

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

**GO-TO DEVELOPMENTS HOLDINGS INC., OSCAR FURTADO,
FURTADO HOLDINGS INC., GO-TO DEVELOPMENTS ACQUISITIONS INC.,
GO-TO GLENDALE AVENUE INC., GO-TO GLENDALE AVENUE LP,
GO-TO MAJOR MACKENZIE SOUTH BLOCK INC., GO-TO MAJOR MACKENZIE
SOUTH BLOCK LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK II INC.,
GO-TO MAJOR MACKENZIE SOUTH BLOCK II LP, GO-TO NIAGARA FALLS
CHIPPAWA INC., GO-TO NIAGARA FALLS CHIPPAWA LP,
GO-TO NIAGARA FALLS EAGLE VALLEY INC., GO-TO NIAGARA FALLS EAGLE
VALLEY LP, GO-TO SPADINA ADELAIDE SQUARE INC.,
GO-TO SPADINA ADELAIDE SQUARE LP, GO-TO STONEY CREEK ELFRIDA INC.,
GO-TO STONEY CREEK ELFRIDA LP, GO-TO ST. CATHARINES BEARD INC.,
GO-TO ST. CATHARINES BEARD LP, GO-TO VAUGHAN ISLINGTON AVENUE
INC., GO-TO VAUGHAN ISLINGTON AVENUE LP,
AURORA ROAD LIMITED PARTNERSHIP AND 2506039 ONTARIO LIMITED**

Applicants (Respondents)

- and -

ONTARIO SECURITIES COMMISSION

Respondent (Appellant)

REPLY BOOK OF AUTHORITIES OF THE APPLICANTS

MILLER THOMSON LLP

40 King Street West, Suite 5800
Toronto ON M5H 3S1

Gregory Azeff

Tel: 416.595.2660

Email: gazeff@millerthomson.com

Monica Faheim

Tel: 416.597.6087

Email: mfaheim@millerthomson.com

-and-

CRAWLEY MACKEWN BRUSH LLP

179 John Street, Suite 800
Toronto, ON M5T 1X4

Alistair Crawley

Tel: 416.217.0806

Email: acrawley@cmblaw.com

Melissa MacKewn

Tel: 416.217.0220

Email: mmackewn@cmblaw.ca

Dana Carson

Tel: 416.217.0855

Email: dcarson@cmblaw.ca

Counsel for the Applicants

GOLDBLATT PARTNERS LLP

30 Metcalfe Street, Suite 500
Ottawa, Ontario, K1P 5L4

Colleen Bauman

Tel: 613.482.2463

Fax: 613.235.3041

Email: cbauman@goldblattpartners.com

Ottawa Agent for Counsel for the Applicants

MCCARTHY TETRAULT

66 Wellington Street West, Suite 5300
Toronto, ON M5K 1E6

Paul Steep

Tel: 416.601.7998

Email: psteep@mccarthy.ca

-and-

ONTARIO SECURITIES COMMISSION

20 Queen Street West, 22nd Floor
Toronto, ON M5H 3S8

Erin Hault

Tel: 416.593.8290

Email: ehault@osc.gov.on.ca

Braden Stapleton

Tel: 416.595.8903

Email: bstapleton@osc.gov.on.ca

Counsel for the Respondent**AIRD & BERLIS LLP**

181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

Steven L. Graff

Tel: 416.865.7726

Email: sgraff@airdberlis.com

Ian Aversa

Tel: 416.865.3082

Email: iaversa@airdberlis.com

Jeremy Nemers

Tel: 416.865.7724

Email: jnemers@airdberlis.com

Tamie Dolny

Tel: 647.426.2306

Email: tdolny@airdberlis.com

**Counsel for the Receiver, KSV
Restructuring Inc.**

List of Authorities

1. *A Co. v. Naster* (2001), 143 O.A.C. 356, 2001 CarswellOnt 728

Most Negative Treatment: Distinguished

Most Recent Distinguished: *Insight Venture Associates III LLC v. Rampart Securities Inc. (Trustee of)* | 2008 CarswellOnt 8543 | (Ont. S.C.J., Sep 3, 2008)

2001 CarswellOnt 728
Ontario Superior Court of Justice (Divisional Court)

A Co. v. Naster

2001 CarswellOnt 728, [2001] O.J. No. 4997, 103 A.C.W.S. (3d) 865, 143 O.A.C. 356, 81 C.R.R. (2d) 128

A Co., Applicant and Jay Naster, Respondent

Mr. X, Applicant and Jay Naster, Respondent

Aitken J., Jennings J., O'Leary J.

Heard: January 24-25, 2001

Judgment: February 27, 2001

Docket: 465-00, 466-00

Counsel: *Bonnie A. Tough, Julia A. Evans*, for Applicant, A Co.

Ian Smith, Kathryn Daniels, for Respondent

Richard Conway, Andrew E. Bernstein, for Applicant, Mr. X

Subject: Constitutional; Corporate and Commercial; Securities; Evidence; Civil Practice and Procedure; Human Rights

Related Abridgment Classifications

Constitutional law

XI Charter of Rights and Freedoms

XI.3 Nature of rights and freedoms

XI.3.g Unreasonable search or seizure

Securities

II Commissions and exchanges

II.3 Investigations

Headnote

Constitutional law --- Charter of rights and freedoms — Nature of rights and freedoms — Unreasonable search or seizure

Securities and commodities --- Commissions and exchanges — Investigations

Table of Authorities

Cases considered by *Jennings J.*:

Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc., (sub nom. *Hunter v. Southam Inc.*) [1984] 2 S.C.R. 145, (sub nom. *Hunter v. Southam Inc.*) 11 D.L.R. (4th) 641, (sub nom. *Hunter v. Southam Inc.*) 55 N.R. 241, 33 Alta. L.R. (2d) 193, (sub nom. *Hunter v. Southam Inc.*) 55 A.R. 291, 27 B.L.R. 297, (sub nom. *Hunter v. Southam Inc.*) 2 C.P.R. (3d) 1, 41 C.R. (3d) 97, (sub nom. *Hunter v. Southam Inc.*) 9 C.R.R. 355, 84 D.T.C. 6467, (sub nom. *Hunter v. Southam Inc.*) 14 C.C.C. (3d) 97, (sub nom. *Director of Investigations & Research Combines Investigation Branch v. Southam Inc.*) [1984] 6 W.W.R. 577 (S.C.C.) — considered

Goodman v. Rossi (1995), 12 C.C.E.L. (2d) 105, 37 C.P.C. (3d) 181, 125 D.L.R. (4th) 613, 24 O.R. (3d) 359, 83 O.A.C. 38 (Ont. C.A.) — referred to

R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627, 68 D.L.R. (4th) 568, 106 N.R. 385, 39 O.A.C. 385, 55 C.C.C. (3d) 530, 76 C.R. (3d) 283, 47 C.R.R. 151, (sub nom. *Canada v. McKinlay Transport Ltd.*) [1990] 2 C.T.C. 103, (sub nom. *McKinlay Transport Ltd. v. R.*) 90 D.T.C. 6243, 72 O.R. (2d) 798 (note) (S.C.C.) — referred to

R. v. Stinchcombe (1991), [1992] 1 W.W.R. 97, [1991] 3 S.C.R. 326, 130 N.R. 277, 83 Alta. L.R. (2d) 193, 120 A.R. 161, 8 C.R. (4th) 277, 18 C.R.R. (2d) 210, 68 C.C.C. (3d) 1, 8 W.A.C. 161 (S.C.C.) — referred to

Rivait v. Gaudry (1993), 19 C.P.C. (3d) 289, 19 C.C.L.I. (2d) 239, 15 O.R. (3d) 159 (Ont. Gen. Div.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 8 — considered

Securities Act, R.S.O. 1990, c. S.5

Generally — considered

s. 11 — referred to

s. 13 — referred to

s. 13(1) — referred to

s. 16 — considered

s. 17 — considered

s. 17(1) — considered

s. 17(2) — considered

s. 17(3) — considered

s. 17(6) — considered

s. 17(7) — considered

APPLICATIONS by subject of investigation and by witness for order prohibiting disclosure of witness's testimony pursuant to Ontario Securities Act.

Jennings J.:

Introduction

1 The applicants seek an order that s. 17(6) of the *Ontario Securities Act*, R.S.O. 1990, c.S.5, as amended (the "*Act*"), does not permit Jay Naster or any other person appointed under the *Act*, to disclose a transcript of the testimony of Mr. X which was obtained by an order compelling testimony as provided in s. 13(1) of the *Act*.

2 Pursuant to an order pronounced by Madam Justice MacFarland, this hearing was held "*in camera*" and the Court file was sealed. I accede to the request of all counsel that the file remain sealed. So that this judgment may be released publicly, the parties will not be identified.

Facts

3 The corporate applicant was the co-lead underwriter in a financing. Mr. X was the officer of the underwriter who signed on the underwriter's behalf, a certificate attesting to the accuracy of the prospectus.

4 On November 1, 1999, the Ontario Securities Commission (the "Commission") issued a Notice of Hearing and Statement of Allegations against 13 respondents, of which A Co. was one, alleging that the prospectus did not contain disclosure of all material facts relating to the securities offered.

5 The respondent, Jay Naster, is counsel for the commission and is responsible for the conduct of the proceeding.

6 In February 2000, Naster obtained an order under s. 11 of the *Act* to examine Mr. X under oath pursuant to the provisions of s. 13 of the *Act*. Mr. X is not a respondent in the proceeding, but he is expected to be called by Naster as a witness in the proceeding.

7 Pursuant to the disclosure obligations contained in the Commission's *Rules of Practice* and mandated by the Supreme Court of Canada in *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.), Naster proposes to give copies of the transcript of Mr. X's testimony, and of documents produced by him on his examination, to the 13 respondents to the proceeding. So far, there have been some 12 orders for disclosure to the respondents granted on consent, under the provisions of s. 17(1) of the *Act*. Since those orders were made, the *Act* has been amended by the passage of s. 17(6). Naster now proposes to make disclosure of the testimony of Mr. X pursuant to the provisions of s. 17(6).

The Legislation

8 It is appropriate to set out the relevant sections of the *Act*:

Sec. 16(1) **Non-disclosure** - Except in accordance with section 17, no person or company shall disclose at any time, except to his, her or its counsel,

(a) the nature or content of an order under section 11 or 12; or

(b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13.

(2) **Confidentiality**. — Any report provided under section 15 and any testimony given or documents or other things obtained under section 13 shall be for the exclusive use of the Commission and shall not be disclosed or produced to any other person or company or in any other proceeding except in accordance with section 17.(1994, c.11, s.358.)

Sec. 17(1) **Disclosure by Commission** - If the Commission considers that it would be in the public interest, it may make an order authorizing the disclosure to any person or company of,

(a) the nature or content of an order under section 11 or 12;

(b) the name of any person examined or sought to be examined under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13; or

(c) all or part of a report provided under section 15.

(2) **Opportunity to object** — No order shall be made under subsection (1) unless the Commission has, where practicable, given reasonable notice and an opportunity to be heard to.

(a) persons and companies named by the Commission; and

(b) in the case of disclosure of testimony given or information obtained under section 13, the person or company that gave the testimony or from which the information was obtained.

(3) **Disclosure to police** — Without the written consent of the person from whom the testimony was obtained, no order shall be made under subsection (1) authorizing the disclosure of testimony given under subsection 13(1) to,

(a) a municipal, provincial, federal or other police force or to a member of a police force; or

(b) a person responsible for the enforcement of the criminal law of Canada or of any conditions imposed by the Commission.

(6) **Disclosure in investigation or proceeding.** — A person appointed to make an investigation or examination under this Act may, for the purpose of conducting an examination or in connection with a proceeding commenced or proposed to be commenced by the Commission under this Act, disclose or produce anything mentioned in subsection (1). (1999, c.9, s. 196)

(7) **Disclosure to police** — Without the written consent of the person from whom the testimony was obtained, no disclosure shall be made under subsection (6) of testimony given under subsection 13(1) to,

(a) a municipal, provincial, federal or other police force or to a member of a police force; or

(b) a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction.

Position Of The Applicants

9 The corporate applicant submits that disclosure under s. 17(6) may only be made in circumstances where obtaining an order under s. 17(1) would be impractical because to do otherwise would breach a duty of procedural fairness owed by the Commission to the corporate respondent.

10 Mr. X submits that disclosure under s. 17(6) is an unreasonable breach of his reasonable expectation of privacy and accordingly, violates [s.8 of the Canadian Charter of Rights and Freedoms \(the "Charter"\)](#).

Analysis

11 It will be convenient to deal first with [the Charter](#) argument.

12 No challenge is made to the Commission's powers of compelling testimony pursuant to [s. 13](#).

13 The securities industry is heavily regulated. In the exercise of its regulatory powers, and in order to protect the interest of the investing public, the Commission oversees most of the day-to-day business activities of the applicants. The applicants are well aware that underwritings are subject to investigation and that a possible outcome of an investigation is the commencement of proceedings under the *Act* which will almost certainly involve the collection and disclosure of information. In the instant case, the information gathered from Mr. X pertains to his participation as an officer of the corporate applicant in the proposed underwriting including the issuing of the prospectus.

14 While Mr. X maintains he had an expectation of privacy in the testimony contained in the transcript, and in the documents produced, I have difficulty in understanding just what gives rise to that expectation. One cannot accept the obligation to provide honestly, fully and accurately information required by the Commission before it grants permission for the public solicitation of funds raised against the assets of a corporation, and then be heard to complain that it is an invasion of privacy to have to disclose whether one abided by that obligation.

15 Given the nature of the industry, and the nature of the information gathered, Mr. X can have had virtually no expectation of privacy in what he divulged upon his examination.

16 If there is no, or very little, expectation of privacy, the authorized compulsory production of testimony and documents will not amount to a search or seizure within the meaning of [s.8 of the Charter](#). Further, the Supreme Court of Canada has

drawn a distinction between seizures in criminal or quasi-criminal matters which will attract the criteria set out by the Supreme Court of Canada in *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.), and seizures in the regulatory context to which a lesser standard applies. (See *R. v. McKinlay Transport Ltd.* (1990), 55 C.C.C. (3d) 530 (S.C.C.) per Wilson J. at 544).

17 Given the, at best, minimal expectation of privacy that Mr. X may have had in what he disclosed to the Commission, I can find no infringement of rights granted under s.8 of the *Charter*.

Restricted Use of Section 17(6)

18 The corporate applicant disputes neither the propriety nor the need for the disclosure that Naster wishes to make. It concedes the obligation of the Commission to disclose what was obtained from Mr. X upon his examination.

19 The applicants' submission is that it is unfair to deny A Co. the protections afforded by a hearing that will result in an application for order under s. 17(1) at which the corporation and Mr. X can make submissions as to terms and conditions that should attach to the order. They fear disclosure without attached conditions will permit further disclosure to the whole world.

20 The corporate applicant further submits that s. 17(6) should be given a narrow interpretation and, in effect, be "read down" to pertain only to situations arising in the course of examinations under s. 13, where Commission counsel wishes to put to the witness statements made or documents produced by a previous witness, so as to avoid the interruption of the examination that would be necessary to obtain an order under s. 17(1).

21 In my opinion, a plain reading of s. 17(6) does not permit the interpretation suggested.

22 In my view, that applicants' fear of further disclosure is unfounded for two reasons. First, the Courts of Ontario have declared it to be the law of Ontario that "the use of information obtained through the discovery process in an action for any purpose collateral or ulterior to the resolution of the issues in that action, without leave of the court, is a contempt of the court". (See Brockenshire J. in *Rivait v. Gaudry* (1993), 15 O.R. (3d) 159 (Ont. Gen. Div.) at p. 164. See also Morden ACJO in *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (Ont. C.A.) at p.366.)

23 The implied undertaking rule is a principle of law recognized in Ontario. As such, it applies as well to proceedings before administrative tribunals as to the courts.

24 This means that while under *Stinchcombe* principles, the respondents in the proceeding can demand to inspect the words of and the documents produced by Mr. X, they are bound under pain of sanction by the Commission not to use the information for any purpose outside the matter of the investigation. They cannot share it with, for example, parent corporations in Canada or elsewhere.

25 Second, there are the provisions of s. 16 of the *Act*. It is submitted that s. 17(6) does not confine disclosure to the other respondents. That is so, but I observe that the disclosure can only be made "for the purpose of conducting an examination or in connection with a proceeding commenced or proposed to be commenced by the Commission." That appears to me to confine disclosure under s. 17(6) to other respondents, or persons being interviewed in an effort to obtain information. Section 16 extends the protection of confidentiality to any person or company, whether or not a respondent.

26 The contemplated disclosure is for the restricted purpose of making mandated disclosure to respondents to the proceeding. This is not disclosure at large. Accordingly, it does not appear to me that the absence of terms and conditions attaching to such disclosure made under s. 17(6) amounts to a denial of procedural fairness.

Conclusion

27 In my opinion, s. 17 of the *Act* now provides for two methods of disclosure:

1- by the Commission, where it considers it to be in the public interest, to any person, pursuant to [sub-section \(1\)](#) provided the procedure in subsection (2) is adhered to;

2- by a person appointed, in two situations only, pursuant to subsection (6).

28 On the facts before us, the disclosure contemplated is protected by the provisions of s. 16 of the *Act*, and the application of the implied undertaking rule.

29 I have observed, however, that there is no limitation in s. 17(6) with respect to those persons to whom disclosure can be made.

30 Nothing in these reasons is intended to determine the propriety of a person appointed seeking to make under s. 17(6) the disclosure at large permitted under s. 17(1). That disclosure, if in the public interest, would appear to me to be reserved to the Commission under s. 17(1); however, on the facts giving rise to this application, that issue is not before the Court.

31 The applications are dismissed, with costs payable to the Commission fixed at \$6,000.

O'Leary J.:

I agree.

Aitken J.:

I agree.

Application dismissed.