Court of Appeal File No. C70114

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

ONTARIO SECURITIES COMMISSION

Applicant
(Respondent in Appeal)

– and –

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

Respondents
(Appellants)

APPLICATION UNDER
Sections 126 and 129 of the *Securities Act*, R.S.O. 1990 c. s.5, as amended

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RESPONDENT'S ORAL ARGUMENT COMPENDIUM

April 7, 2022

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Lawyers for the Receiver, KSV Restructuring Inc.

AND TO: Service List in Commercial List File No. CV-21-00673521-00CL

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Respondent's Oral Argument Outline

Context:

- Application pursued to protect investors – fundamental purpose of *Securities Act* (s. 1.1) to protect investors from "unfair, improper or fraudulent practices"
- Receivership affects numerous stakeholders, is ongoing
- Fresh evidence provides context, is admissible
    - Go-To entities in financial jeopardy before receivership
    - Sales Process Order – Furtado consented

#1 – Adjournment Properly Denied

- Misconduct alleged – fraud and misleading Staff – raises integrity concerns
- Appellants had same counsel throughout investigation and at Application, ~3 days' notice of Application, provided no substantive response
- Pattillo J. exercised discretion reasonably, to protect investors
- Fresh evidence: additional self-interested misconduct by Furtado after receipt of Application materials (including freeze directions), notwithstanding his submission to Pattillo J. that no evidence of 'anything precipitous'
    - Contracts for friends and family cancelled
    - Agreement to sell Adelaide properties while decision reserved

#2 – Transcript Objection Without Merit

- Appellants knew their privacy rights, if any, were engaged when they received notice of Application on December 6th – and yet they did nothing
- In Application, Appellants represented by same counsel as in compelled interviews they now say required a s. 17 order
- Application Record was not filed, nor public, when Appellants received it. Had opportunity to address any concern
- Their position is a legal position that is not difficult to articulate, and did not require evidence
- However, Appellants did not:
    - Put Commission on notice, or otherwise assert, that any privacy or confidentiality right of theirs had been infringed
    - Raise any privacy concern before Pattillo J. at December 9th Application hearing

- On the contrary, Appellants took position entirety of the compelled transcripts should have been before Pattillo J.
- Materials were not made public until after Justice Pattillo's decision
- Since that time, Appellants took no steps to seek relief from Court or Commission regarding the information. They raised no statutory or other privacy issue in their Notice of Appeal
- Record is clear that Appellants had no actual privacy concern at the Court below
- Next, addressing *Re Sharpe* – a case not before this Court
    - *Sharpe* interpretation not binding or persuasive because analysis does not consider purposes of Act (e.g. investor protection), fundamental principles in the Act (e.g. efficient enforcement to prevent fraud), and the mandate or powers of Commission (e.g. to apply to Court for receiver)
    - Reads ss. 16-17 in isolation, does not properly identify and consider all interests at stake, including public interest and the purposes of the Act (ss. 1.1, 2.1):
        - Investigations undertaken in pursuit of Commission's regulatory mandate, in accordance with purposes and principles (e.g. prevention of fraud, investor protection, efficient enforcement) and its powers (including seeking receiver from Court)
        - Participation in public markets a privilege, not a right
    - Privacy expectations are very narrow where they directly conflict with fulfilling the purposes of the Act creating the Commission's regulated sphere
- There is no legal principle that would render this relevant and highly probative evidence inadmissible
- Even if Commission should have sought s. 17 Order (it needn't have), does not render transcripts inadmissible
    - No abuse of process
        - Commission proceeded in good faith to fulfill public interest mandate and protect vulnerable investors
        - Evidence properly obtained, and not made public until after Appellants had notice, made submissions, raised no concern
        - Thus, no basis to decline to admit relevant evidence
    - Even *Sharpe* does not stand for proposition that compelled evidence unavailable for receivership applications

CITATION: Ontario Securities Commission v. Go-To Developments Holdings Inc., 2021 ONSC 8133
COURT FILE NO.: CV-21-00673521-00CL
DATE: 20211210

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ONTARIO SECURITIES COMMISSION Applicant	*Erin Hoult and Braden Stapleton*, for the Applicant
– and –	
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 Respondents	*Darryl Mann*, for the Respondents *Steven Graff and Ian Aversa*, for KSV Restructuring Inc., proposed Receiver and Manager **HEARD:** December 9, 2021

L. A. PATTILLO J

[1] On December 6, 2021, the Ontario Securities Commission (the "Commission") issued two freeze directions under s. 126(1) of the Securities Act, R.S.O. 1990 c.s.5 (the "Act") which require the respondent Oscar Furtado ("Furtado") to maintain and refrain from imperiling assets derived from investor funds and require RBC Direct Investing to maintain the assets in Furtado's RBC Direct Account.

[2] The Commission brings this application to continue those directions and for the appointment of KSV Restructuring Inc. as receiver and manager of the respondent Go-To entities.

[3] At the outset of the hearing, Furtado requested a short adjournment to permit him to retain new counsel (Mr. Mann appears on a limited retainer) and file responding material. He submitted, notwithstanding the Commission's Staff's investigation has been ongoing since March 2019, he was only advised of this proceeding on Monday and did not receive the Commission's material until Monday evening. He disagrees with the Commission's allegations, particularly that he misled Staff during the investigation and wants to respond. Nothing in the Commission's material indicates anything precipitous was about to happen.

[4] In support of his request, Furtado has offered terms including continuing the freeze directions (with some access for living expenses and legal fees), production of the investigation transcripts and the appointment of a monitor as opposed to a receiver at the Commission's expense.

[5] The Commission opposed the request. It submitted that a monitor would not be sufficient as it would leave Furtado in charge. Rather, in light of the record, a receiver was necessary to safeguard the interests of the investors. Further, while it could have proceeded *ex parte* under s. 129 of the Act, it gave Furtado notice and sufficient time to file material if required. In that regard, in the absence of material, many of Furtado's submissions were unsubstantiated.

[6] Based on the allegations concerning Furtado's actions in respect of his dealings with the Go-To projects and specifically the Go-To Spadina Adelaide Square Limited Partnership. ("Adelaide LP") as set out in the Commission's material and which I will address shortly, I was satisfied, despite the length of time the Commission's investigation has been ongoing, that it was necessary having regard to the interests of the investors to deal with the application rather than adjourn it to a future date and leave Furtado in charge. I also was of the view that Furtado had sufficient notice to file material.

[7] Accordingly, I dismissed Furtado's adjournment request.

[8] Furtado is the founder and directing mind of the Go-To entities which are limited partnerships. Between 2016 and 2020, Furtado and the respondent Go-To Developments Holdings Inc. (GTDH) raised almost $80 million from Ontario investors for nine Go-To real estate projects by selling limited partnership units. The projects are not complete, and the investors' funds remain outstanding.

[9] One of the projects is Adelaide LP, whose business is described as purchasing, holding an interest in, conducting pre-development planning with respect to development and construction of two properties, 355 Adelaide St. W. and 46 Charlotte Street in downtown Toronto (the

"Properties"). Beginning in February 2019, Furtado began to raise capital for Adelaide LP by selling units.

[10] The Adelaide LP agreement provides that investors would be paid returns pro-rata, after all investors received a return of their capital. It also provides no investor could require return of any capital contributions back until the dissolution, winding up or liquidation of the partnership.

[11] The purchase rights to the Properties were secured by Adelaide Square Developments Inc. (ASD) a company owned, in part, by AKM Holdings Corp. (AKM) which was in turn owned by the wife of Alfredo Malanca (Malanca). Furtado negotiated the Adelaide LP's acquisitions of the Properties with Malanca as a representative of ASD.

[12] In late March, early April 2019, Adelaide LP and ASD entered into agreements whereby ASD assigned the purchase and sale agreements for the properties to Adelaide LP (the purchase price for the Properties was $53.3 million plus a density bonus on one of the properties). They also entered into an Assignment Fee agreement which provided Adelaide LP would pay ASD an assignment fee of $20.95 million. Adelaide LP paid the assignment fee from investors monies.

[13] At the same time, Furtado pledged the assets of two other Go-To LP's to secure Adelaide LP obligations contrary to the LP agreements and without notice to any of the unit holders.

[14] On April 4, 2019, Adelaide LP entered into a demand loan agreement with ASD for $19.8 million. The proceeds were paid by ASD to an investor in Adelaide LP for its redemption of $16.8 million units and a $2.7 million flat fee return and $300,000 to Goldmount Financial Group Corp. (Goldmount), a mortgage brokerage in which Malanca is a director, as a referral fee for introducing the investor.

[15] On April 15, 2019, the respondent Furtado Holdings Inc. and AKM each received from ASD 11 shares of ASD and $388,087.33 paid by ASD out of the assignment fee.

[16] On September 19 to 30, 2019, Furtado raised $13.25 million for Adelaide LP from four investors. On October 1, 2019, Adelaide LP paid ASD $12 million on the demand loan although no payment was due or demand made. On the same day, ASD paid both Furtado Holdings and AKM a "dividend" of $6 million each. Furtado denied that he planned to profit on Adelaide LP's purchase of the Properties and said that ASD decided to give Furtado Holdings "a thank you".

[17] By August 2020, Furtado Holdings had used the bulk of the $6 million dividend to transfer $2.25 million to Furtado's personal bank account and loan or otherwise transfer approximately $3.265 million to every Go-To General Partner (GP), GTDH and Go-To Developments Acquisitions Inc. The Commission states it appears the transfers to the GPs were spent on operating costs and payments due to LP investors.

[18] Further, from Furtado's bank account, approximately $2.026 million was transferred to his RBC Direct Investing account in close proximity to the transfers received from Furtado Holdings.

[19] In addition to the above events involving Adelaide LP, Furtado and ASD, the Commission also submits that Furtado misled Staff during its investigation in respect of some of the answers

he gave. As noted, Furtado denies that allegation and submits that he co-operated with Staff and answered all of their questions.

[20] Section 129(1) and (2) of the Act gives the court the discretion, on application by the Commission, to appoint a receiver and manager of the property of any person or company where: (a) it is in the best interests of the creditors, security holders, or subscribers of such person or company; or (b) it is appropriate for the due administration of securities law.

[21] In *Ontario Securities Commission v. Sextant Strategic Opportunities Hedge Fund L.P.*, 2009 CanLII38503 (ONSC) at para. 54, Morawetz J. (as he then was) emphasized that the analysis of the "best interests" of the creditors and security holders in s. 129 is broader than the solvency test. Instead the court should consider "all the circumstances and whether, in the context of those circumstances, it is in the best interests of creditors that a receiver be appointed. The criteria should also take into account the interests of all stakeholders."

[22] In my view, having regard to all the circumstances, I am satisfied based on the Commission's evidence of Furtado's dealings in respect of Adelaide LP that it is in the best interests of the investors in the Go-To projects that a receiver be appointed to ensure that the Go-To projects are managed in a proper fashion to protect the investors' investments.

[23] The Commission's investigation has revealed evidence of undisclosed payments to Furtado arising from Adelaide LP's purchase of the Properties, resulting in misappropriation and improper use of Adelaide LP funds through his dealings with ASD.

[24] The Commission's evidence establishes Furtado:

a) Arranged to personally profit from Adelaide LP's purchase of the Properties;

b) Misused other Go-To LP assets to secure Adelaide LP's acquisition of the Properties; and

c) Gave false and/or misleading evidence to Staff about his dealings with ASD and Furtado Holdings' receipt of shares and moneys from ASD.

[25] While I acknowledge that Furtado disputes the Commission's allegation that he mislead Staff, in my view his dealings in respect of Adelaide LP and the cross-collateralization are of great concern by themselves.

[26] I agree with the Commission's submission that the gravity of the potential breaches of the Act indicated by the evidence raises significant concerns about Furtado's ability to operate in capital markets in a manner compliant with securities laws.

[27] Accordingly, I am satisfied the Commission has met the requirements of s. 126 of the Act. The appointment of a receiver will ensure that the investors' interests are protected and that the Go-To entities are properly administered.

[28] Furtado submits that the appointment of a receiver will be the "death knell" for the Go-To projects. It will result in defaults under the various Go-To LP loan agreements. The receivership

is not in respect of an insolvency. There is no reason that the various projects can not continue under the control of a receiver. Further, with a stay in place, none of the loan agreements can be placed in default.

[29] Section 126(5.1) of the Act permits the court to continue a freeze direction where it is satisfied that such order would be reasonable and expedient in the circumstances, having due regard to the public interest and either (a) the due administration of Ontario securities law; or (b) the regulation of capital markets in Ontario.

[30] In order to continue a freeze direction, the Commission must establish: (a) there is a serious issue to be tried in respect of the respondents' breaches of the Act; (b) there is a basis to suspect, suggest or prove a connection between the frozen assets and the conduct in issue; and (c) the freeze directions are necessary for the due administration of securities laws or the regulation of capital markets, in Ontario or elsewhere: *OSC v. Future Solar Developments*, 2015 ONSC 2334 at para. 31.

[31] In my view, the evidence establishes all three parts of the above test. There is at least a serious issue to be tried as to potential breaches of the act by Furtado and Furtado Holdings, including fraud; the directions freeze Furtado's RBC Direct Account and any other assets he derived from investor funds. The evidence of Furtado's uses of the $6 million dividend shows at least a basis to "suspect, suggest or prove" a connection between the assets frozen and the conduct in issue. Finally, continuation of the directions is necessary for the due administration of securities laws. They address inappropriate use of investor funds, dissipation of assets and preservation of assets.

[32] The application is allowed. KSV is appointed as receiver and manager without security of the respondent Go-To entities and the directions are continued until withdrawn or altered by the Commission or further order of the court.

[33] The Commission shall redact any personal information concerning any individual (excluding name, title, contact information or designation of business, profession or official capacity) contained in the exhibits to the affidavit filed in support of the application.

L. A. Pattillo J.

Released: December 10, 2021

CITATION: Ontario Securities Commission v. Go-To Developments Holdings Inc., 2021 ONSC 8133
COURT FILE NO.: CV-21-00673521-00CL
DATE: 20211210

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ONTARIO SECURITIES COMMISSION

Applicant

– and –

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

Respondents

REASONS FOR JUDGMENT

Pattillo J.

Released: December 10, 2021

Court File No. CV-21-00673521-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	FRIDAY, THE 10th
	)	
JUSTICE L. PATTILLO	)	DAY OF DECEMBER, 2021

ONTARIO SECURITIES COMMISSION

Applicant

- and -

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

Respondents

APPLICATION UNDER SECTIONS 126 AND 129 OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5, AS AMENDED

ORDER
(appointing Receiver)

THIS APPLICATION, made by the Ontario Securities Commission ("**OSC**") for an Order pursuant to sections 126 and 129 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the

"**Act**"), appointing KSV Restructuring Inc. ("**KSV**") as receiver and manager (in such capacity, the "**Receiver**") without security, of the real property listed on **Schedule "A"** hereto (the "**Real Property**") and all the other assets, undertakings and properties of each of the parties listed on **Schedule "B"** hereto (the "**Receivership Respondents**"), was heard this day by judicial videoconference via Zoom due to the COVID-19 emergency.

ON READING the affidavit of Stephanie Collins sworn December 6, 2021 and the exhibits thereto (the "**Collins Affidavit**"), and on hearing the submissions of counsel for the OSC and counsel for the Respondents, and on reading the consent of KSV to act as the Receiver,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the notice of application and the application record is hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof.

FREEZE DIRECTIONS

2. **THIS COURT ORDERS** that the Freeze Directions issued by the OSC to Oscar Furtado and RBC Direct Investing on December 6, 2021, copies of which are attached at **Schedule "C"** hereto, shall continue until further order of this Court or until the OSC revokes the Freeze Directions or consents to release funds, securities or property from the Freeze Directions.

APPOINTMENT

3. **THIS COURT ORDERS** that pursuant to section 129 of the Act, KSV is hereby appointed Receiver, without security, of the Real Property and all the other assets, undertakings and properties of each of the Receivership Respondents, including all of the assets held in trust or required to be held in trust by or for any of the Receivership Respondents, or by their lawyers, agents and/or any other Person (as defined below), and all proceeds thereof (together with the Real Property, the "**Property**").

RECEIVER'S POWERS

4. **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate and carry on the business of any of the Receivership Respondents, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business or cease to perform any contracts of any of the Receivership Respondents;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of any of the Receivership Respondents or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to any of the Receivership Respondents and to exercise all remedies of any

of the Receivership Respondents in collecting such monies, including, without limitation, to enforce any security held by any of the Receivership Respondents;

(g) to settle, extend or compromise any indebtedness owing to any of the Receivership Respondents;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of any of the Receivership Respondents, for any purpose pursuant to this Order;

(i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to any of the Receivership Respondents, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(k) with the approval of this Court, to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business, and, in each such case, notice under subsection 63(4) of the Ontario *Personal Property Security Act* or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required;

(l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(n) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(o) to apply for any permits, licences, approvals or permissions as may be required by any governmental or regulatory authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of any of the Receivership Respondents;

(p) to enter into agreements with any trustee in bankruptcy appointed in respect of any of the Receivership Respondents, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by any of the Receivership Respondents;

(q) to exercise any shareholder, partnership, joint venture or other rights which any of the Receivership Respondents may have;

(r) to examine under oath any person the Receiver reasonably considers to have knowledge of the affairs of the Receivership Respondents, including, without limitation, any present or former director, officer, employee or any other person registered or previously registered with the OSC or subject to or formerly subject to the jurisdiction of the OSC or any other regulatory body respecting or having jurisdiction over any of the Property and the affairs of any of the Receivership Respondents; and

(s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations,

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Receivership Respondents, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

5. **THIS COURT ORDERS** that (i) each of the Receivership Respondents, (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

6. **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not required, to take possession and control of any monies, funds, deposit instruments, securities, or other Property held by or in the name of any of the Receivership Respondents, or by any third party for the benefit of any of the Receivership Respondents.

7. **THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of any of the Receivership Respondents, or the Property, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 7 or in paragraph 8 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

8. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

9. **THIS COURT ORDERS** that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days' notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

10. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST ANY OF THE RECEIVERSHIP RESPONDENTS OR THE PROPERTY

11. **THIS COURT ORDERS** that no Proceeding against or in respect of any of the Receivership Respondents or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of any of the Receivership Respondents or the Property are hereby stayed and suspended pending further Order of this Court, provided that nothing herein shall prevent the commencement or continuation of any investigation or proceedings in respect of the Receivership Respondents, or any of them, by or before the OSC and its enforcement staff.

NO EXERCISE OF RIGHTS OR REMEDIES

12. **THIS COURT ORDERS** that all rights and remedies against any of the Receivership Respondents, the Receiver or affecting the Property are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), and further provided that nothing in this paragraph shall (i) empower the Receiver or the Receivership Respondents to carry on any business which the Receivership Respondents are not lawfully entitled to carry on, (ii) exempt the Receiver or the Receivership Respondents from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

13. **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by any of the Receivership Respondents, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

14. **THIS COURT ORDERS** that all Persons having oral or written agreements with any of the Receivership Respondents or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data

services, centralized banking services, payroll services, insurance, transportation services, utility or other services to any of the Receivership Respondents are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Receivership Respondents' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Receivership Respondents or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

15. **THIS COURT ORDERS** that all funds, monies, cheques, instruments and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including, without limitation, the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

16. **THIS COURT ORDERS** that all employees of the Receivership Respondents, if any, shall remain the employees of the Receivership Respondents until such time as the Receiver, on the Receivership Respondents' behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA AND ANTI-SPAM LEGISLATION

17. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Receivership Respondents, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

18. **THIS COURT ORDERS** that any and all interested stakeholders in this proceeding and their counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in this proceeding, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to such other interested stakeholders in this proceeding and their counsel and advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

LIMITATION ON ENVIRONMENTAL LIABILITIES

19. **THIS COURT ORDERS** that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste

or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act* or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

20. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

21. **THIS COURT ORDERS** that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. **THIS COURT ORDERS** that the Receiver and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

23. **THIS COURT ORDERS** that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

24. **THIS COURT ORDERS** that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $250,000.00 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

25. **THIS COURT ORDERS** that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

26. **THIS COURT ORDERS** that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as **Schedule "D"** hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

27. **THIS COURT ORDERS** that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

SEALING

28. **THIS COURT ORDERS** that the OSC is authorized to redact any Personal Information (as defined below) contained in the exhibits to the Collins Affidavit (as so redacted, the "**Redacted Exhibits**") and file with the Court the Collins Affidavit with the Redacted Exhibits. "Personal Information" means information about an identifiable individual, including, but not limited to, the following: (i) social insurance number; (ii) driver's license number; (iii) passport number; (iv) license plate number; (v) health plan number; (vi) date of birth; (vii) address (not including city or province); (viii) telephone number; and (ix) bank or trading account number (including a joint account). For greater certainty, "Personal Information" does not include an individual's name or the title, contact information, or designation of an individual in a business, professional, or official capacity.

29. **THIS COURT ORDERS** that the OSC shall file with the Court the Collins Affidavit without exhibits pending filing of the Redacted Exhibits with the Court. The OSC shall file the Redacted Exhibits with the Court as soon as reasonably practicable.

30. **THIS COURT ORDERS** that the OSC is authorized to deliver the Collins Affidavit containing the unredacted exhibits to each of the following parties and its respective lawyers: the Receiver and the Respondents (each such party, a "**Recipient**"). Each Recipient shall keep the unredacted exhibits to the Collins Affidavit confidential and shall not disclose the unredacted exhibits to the Collins Affidavit to any other party without further order of the Court.

31. **THIS COURT ORDERS** that the unredacted exhibits to the Collins Affidavit shall be sealed, kept confidential and shall not form part of the public record pending further Order of the Court.

SERVICE AND NOTICE

32. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/) shall be valid and effective service. Subject to Rule 17.05 of the *Rules of Civil*

Procedure (the "**Rules**") this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules. Subject to Rule 3.01(d) of the Rules and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: https://www.ksvadvisory.com/experience/case/go-to.

33. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding a notice with a link to the Case Website by email, ordinary mail, courier, personal delivery or facsimile transmission to the Receivership Respondents' creditors or other interested parties at their respective addresses as last shown on the records of the Receivership Respondents and that any such service or distribution by email, courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

34. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

35. **THIS COURT ORDERS** that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of any of the Receivership Respondents.

36. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

37. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located,

for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

38. **THIS COURT ORDERS** that the Receiver may engage as its legal counsel Aird & Berlis LLP, notwithstanding that Aird & Berlis LLP has had an advisory role with respect to the OSC in connection with this proceeding.

39. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

40. **THIS COURT ORDERS** that this Order is effective from the date on which it is made, and is enforceable without any need for entry and filing.

Hainey, J.

SCHEDULE "A"
REAL PROPERTY

1. 527 Glendale Avenue
   St. Catharines, ON
   PIN: 46415-0949

2. 185 Major MacKenzie Drive East
   Richmond Hill, ON
   PIN: 03139-0047

3. 197 Major MacKenzie Drive East
   Richmond Hill, ON
   PIN: 03139-0049

4. 209 Major MacKenzie Drive East
   Richmond Hill, ON
   PIN: 03139-0051

5. 191 Major MacKenzie Drive East
   Richmond Hill, ON
   PIN: 03139-0048

6. 203 Major MacKenzie Drive East
   Richmond Hill, ON
   PIN: 03139-0050

7. 215 Major MacKenzie Drive East
   Richmond Hill, ON
   PIN: 03139-0052

8. 4210 Lyons Creek Road
   Niagara Falls, ON
   PIN: 64258-0110

9. 4248 Lyons Creek Road
   Niagara Falls, ON
   PIN: 64258-0713

10. 2334 St. Paul Avenue
    Niagara Falls, ON
    PIN: 64269-0559

11. 355 Adelaide Street West
    Toronto, ON
    PIN: 21412-0150

12. 46 Charlotte Street
Toronto, ON
PIN: 21412-0151

13. Highland Road
Hamilton, ON
PIN: 17376-0025

14. Upper Centennial Parkway
Hamilton, ON
PIN: 17376-0111

15. 19 Beard Place
St. Catharines, ON
PIN: 46265-0022

16. 7386 Islington Avenue
Vaughan, ON
PIN: 03222-0909

17. 4951 Aurora Road
Stouffville, ON
PIN: 03691-0193

SCHEDULE "B"
RECEIVERSHIP RESPONDENTS

1. GO-TO DEVELOPMENTS HOLDINGS INC.
2. FURTADO HOLDINGS INC.
3. GO-TO DEVELOPMENTS ACQUISITIONS INC.
4. GO-TO GLENDALE AVENUE INC.
5. GO-TO GLENDALE AVENUE LP
6. GO-TO MAJOR MACKENZIE SOUTH BLOCK INC.
7. GO-TO MAJOR MACKENZIE SOUTH BLOCK LP
8. GO-TO MAJOR MACKENZIE SOUTH BLOCK II INC.
9. GO-TO MAJOR MACKENZIE SOUTH BLOCK II LP
10. GO-TO NIAGARA FALLS CHIPPAWA INC.
11. GO-TO NIAGARA FALLS CHIPPAWA LP
12. GO-TO NIAGARA FALLS EAGLE VALLEY INC.
13. GO-TO NIAGARA FALLS EAGLE VALLEY LP
14. GO-TO SPADINA ADELAIDE SQUARE INC.
15. GO-TO SPADINA ADELAIDE SQUARE LP
16. GO-TO STONEY CREEK ELFRIDA INC.
17. GO-TO STONEY CREEK ELFRIDA LP
18. GO-TO ST. CATHARINES BEARD INC.
19. GO-TO ST. CATHARINES BEARD LP
20. GO-TO VAUGHAN ISLINGTON AVENUE INC.
21. GO-TO VAUGHAN ISLINGTON AVENUE LP
22. AURORA ROAD LIMITED PARTNERSHIP
23. 2506039 ONTARIO LIMITED

SCHEDULE "C"
FREEZE DIRECTIONS

See attached.

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue queen ouest, Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF GO-TO DEVELOPMENTS HOLDINGS INC., OSCAR FURTADO, and FURTADO HOLDINGS INC.

FREEZE DIRECTION
(Sections 126(1)(b) and 126(1)(c))

TO: Oscar Furtado (DOB: July 15, 1962)
2354 Salcome Drive
Oakville, Ontario
L6H 7N3

RE: Proceeds of sale of units of Go-To limited partnerships

TAKE NOTICE THAT pursuant to paragraph 126(1)(b) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), you are directed to refrain from withdrawing any funds, securities or property: that constitute or are derived from the proceeds of, or are otherwise related to the sale of units in any limited partnership related to Go-To Developments Holdings Inc. ("GTDH"), from another person or company who has them on deposit, under control or for safekeeping; and, without limiting the generality of the foregoing, in RBC Direct Investing account no. 685-92809-2-4 ("**RBC Direct Account**"); and to hold these funds, securities or property until the Ontario Securities Commission in writing revokes or varies this Direction or consents to release a particular fund, securities or property from this Direction or until the Ontario Superior Court of Justice orders otherwise.

AND TAKE FURTHER NOTICE that pursuant to paragraph 126(1)(c) of the Act, you are directed to maintain funds, securities or property: that constitute or are derived from the proceeds of, or are otherwise related to the sale of units in any limited partnership related to GTDH; and, without limiting the generality of the foregoing, in the RBC Direct Account; and you are directed to refrain from disposing of, transferring, dissipating or otherwise dealing with or diminishing the value

of those funds, securities or property until the Ontario Securities Commission in writing revokes or varies this Direction or consents to release a particular fund, security or property from this Direction or until the Ontario Superior Court of Justice orders otherwise, except that you may dispose of securities or derivatives already held in the RBC Direct Account provided that any disposition occurs through the facilities of a recognized exchange and all proceeds of such sales are maintained in the RBC Direct Account.

DATED at Toronto, Ontario this 6th day of December, 2021.

"Timothy Moseley"

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue queen ouest, Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF GO-TO DEVELOPMENTS HOLDINGS INC., OSCAR FURTADO, and FURTADO HOLDINGS INC.

FREEZE DIRECTION
(Section 126(1)(a))

TO: The Manager
RBC Direct Investing Inc.
200 Bay Street
P.O. Box 75
Toronto, ON M5J 2Z5

RE: FURTADO, Oscar
Account No. 685-92809-2-4
(CAD and USD)

TAKE NOTICE that pursuant to paragraph 126(1)(a) of the *Securities Act*, R.S.O. 1990, c. S. 5, as amended (the "**Act**"), RBC Direct Investing Inc. ("**RBC Direct**") is directed to retain any funds, securities or property that it has on deposit or under its control or for safekeeping in the name of or otherwise under the control of Oscar Furtado, including any funds, securities or property on deposit in account no. 685-92809-2-4 (the "**Account**"), and hold the funds, securities or property until the Ontario Securities Commission in writing revokes or varies this Direction or consents to release a particular fund, securities or property from this Direction or until the Ontario Superior Court of Justice orders otherwise, with the exception that securities or derivatives already held in the Account may be sold provided that any disposition occurs through the facilities of a recognized exchange and all proceeds of such sales are maintained in the Account.

AND TAKE FURTHER NOTICE THAT this Direction applies to any and all funds, securities or property in a recognized clearing agency and to any and all securities in the process of transfer by a transfer agent.

AND TAKE FURTHER NOTICE THAT this Direction may be served by e-mail, fax or courier to the above-noted address for and the last known address of the parties named in this Direction in the records of RBC Direct.

DATED at Toronto, Ontario this 6th day of December, 2021.

"Timothy Moseley"

SCHEDULE "D"
RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that KSV Restructuring Inc., the receiver and manager (the "**Receiver**") of the real property listed on Schedule "A" of the Receivership Order (as defined below) (the "**Real Property**") and all the other assets, undertakings and properties of each of the parties listed on Schedule "B" of the Receivership Order (the "**Receivership Respondents**"), including all of the assets held in trust or required to be held in trust by or for any of the Receivership Respondents, or by their lawyers, agents and/or any other Person (as defined in the Receivership Order), and all proceeds thereof (together with the Real Property, the "**Property**"), appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated the 9th day of December, 2021 (the "**Receivership Order**") made in an application having Court file number CV-21-00673521-00CL, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of $_____, being part of the total principal sum of $250,000.00 which the Receiver is authorized to borrow under and pursuant to the Receivership Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Receivership Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Receivership Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Receivership Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Receivership Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Receivership Order.

DATED the _____ day of _____, 20__.

KSV Restructuring Inc., solely in its capacity as Receiver of the Property, and not in its personal capacity

Per: _____

Name:

Title:

ONTARIO SECURITIES COMMISSION

Applicant

GO-TO DEVELOPMENTS HOLDINGS INC., ET AL.

Respondents

Court File No. CV-21-00673521-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

ORDER
(appointing Receiver)

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

Erin Hoult (LSO No. 54002C)
Tel.: (416) 593-8290
Email: ehoult@osc.gov.on.ca

Lawyers for the Ontario Securities Commission

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF GO-TO DEVELOPMENTS HOLDINGS INC., OSCAR FURTADO, and FURTADO HOLDINGS INC.

FREEZE DIRECTION
(Sections 126(1)(b) and 126(1)(c))

TO: Oscar Furtado (DOB: July 15, 1962)
2354 Salcome Drive
Oakville, Ontario
L6H 7N3

RE: Proceeds of sale of units of Go-To limited partnerships

TAKE NOTICE THAT pursuant to paragraph 126(1)(b) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), you are directed to refrain from withdrawing any funds, securities or property: that constitute or are derived from the proceeds of, or are otherwise related to the sale of units in any limited partnership related to Go-To Developments Holdings Inc. ("GTDH"), from another person or company who has them on deposit, under control or for safekeeping; and, without limiting the generality of the foregoing, in RBC Direct Investing account no. 685-92809-2-4 ("**RBC Direct Account**"); and to hold these funds, securities or property until the Ontario Securities Commission in writing revokes or varies this Direction or consents to release a particular fund, securities or property from this Direction or until the Ontario Superior Court of Justice orders otherwise.

AND TAKE FURTHER NOTICE that pursuant to paragraph 126(1)(c) of the Act, you are directed to maintain funds, securities or property: that constitute or are derived from the proceeds of, or are otherwise related to the sale of units in any limited partnership related to GTDH; and, without limiting the generality of the foregoing, in the RBC Direct Account; and you are directed to refrain from disposing of, transferring, dissipating or otherwise dealing with or diminishing the value

of those funds, securities or property until the Ontario Securities Commission in writing revokes or varies this Direction or consents to release a particular fund, security or property from this Direction or until the Ontario Superior Court of Justice orders otherwise, except that you may dispose of securities or derivatives already held in the RBC Direct Account provided that any disposition occurs through the facilities of a recognized exchange and all proceeds of such sales are maintained in the RBC Direct Account.

DATED at Toronto, Ontario this 6th day of December, 2021.

"Timothy Moseley"

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF GO-TO DEVELOPMENTS HOLDINGS INC., OSCAR FURTADO, and FURTADO HOLDINGS INC.

FREEZE DIRECTION
(Section 126(1)(a))

TO: The Manager
RBC Direct Investing Inc.
200 Bay Street
P.O. Box 75
Toronto, ON M5J 2Z5

RE: FURTADO, Oscar
Account No. 685-92809-2-4
(CAD and USD)

TAKE NOTICE that pursuant to paragraph 126(1)(a) of the *Securities Act*, R.S.O. 1990, c. S. 5, as amended (the "**Act**"), RBC Direct Investing Inc. ("**RBC Direct**") is directed to retain any funds, securities or property that it has on deposit or under its control or for safekeeping in the name of or otherwise under the control of Oscar Furtado, including any funds, securities or property on deposit in account no. 685-92809-2-4 (the "**Account**"), and hold the funds, securities or property until the Ontario Securities Commission in writing revokes or varies this Direction or consents to release a particular fund, securities or property from this Direction or until the Ontario Superior Court of Justice orders otherwise, with the exception that securities or derivatives already held in the Account may be sold provided that any disposition occurs through the facilities of a recognized exchange and all proceeds of such sales are maintained in the Account.

AND TAKE FURTHER NOTICE THAT this Direction applies to any and all funds, securities or property in a recognized clearing agency and to any and all securities in the process of transfer by a transfer agent.

AND TAKE FURTHER NOTICE THAT this Direction may be served by e-mail, fax or courier to the above-noted address for and the last known address of the parties named in this Direction in the records of RBC Direct.

DATED at Toronto, Ontario this 6th day of December, 2021.

"Timothy Moseley"

First Report to Court of KSV Restructuring Inc. as Receiver and Manager of Go-To Developments Holdings Inc. and those companies listed on Appendix "B"

December 20, 2021

Contents

Appendices

COURT FILE NO. CV-21-00673521-CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

ONTARIO SECURITIES COMMISSION

APPLICANT

- AND -

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

RESPONDENTS

APPLICATION UNDER
SECTIONS 126 AND 129 OF THE *SECURITIES ACT*, R.S.O. 1990, C. S.5, AS AMENDED

FIRST REPORT OF
KSV RESTRUCTURING INC.
AS RECEIVER AND MANAGER

DECEMBER 20, 2021

1.0 Introduction

1. Pursuant to an application (the "Application") by the Ontario Securities Commission (the "OSC") under sections 126 and 129 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended, the Ontario Superior Court of Justice (Commercial List) (the "Court") made an order on December 10, 2021 (the "Receivership Order") appointing KSV Restructuring Inc. ("KSV") as the receiver and manager (the "Receiver") of the real property listed in Appendix "A" (the "Real Property") and all the other assets, undertakings and properties of the companies (the "Companies") listed in Appendix "B" (together with the Real Property, the "Property"). A copy of the Receivership Order is provided in Appendix "C" and a copy of the Endorsement of Mr. Justice Pattillo is provided in Appendix "D".

3.0 Receiver's Activities

1. The Receivership Order was distributed by email to the service list in this matter by Mr. Justice Pattillo shortly after 10:00 pm on Friday, December 10, 2021. At 6:36 am on Saturday, December 11, 2021, the Receiver sent an email to Mr. Furtado to request a meeting with him at the Companies' head office as soon as possible over the weekend. The Receiver also left a voice mail message for Mr. Furtado at approximately 9:30 am on the same day requesting a meeting as soon as possible.

2. Aird & Berlis LLP ("Aird & Berlis"), the Receiver's counsel, was contacted on December 11, 2021 by Miller Thomson LLP ("Miller Thomson"), which advised that it was in the process of being retained as counsel to the Companies. Aird & Berlis and the Receiver attended a call on December 12, 2021 with Miller Thomson to, *inter alia*, set a time for a meeting between Mr. Furtado and the Receiver. Following the call, Miller Thomson advised that Mr. Furtado was available to meet the Receiver at noon on Monday, December 13, 2021. The Receiver's representatives met with Mr. Furtado and Mr. Ghani during the afternoon of December 13, 2021 and all day on December 14, 2021.

3. A summary of the Receiver's material findings since the date of its appointment is provided below.

3.1 Adelaide LP

1. Go-To Spadina Adelaide Square LP ("Adelaide LP") owns the Real Property located at 355 Adelaide Street West and 46 Charlotte Street in downtown Toronto (the "Adelaide Property"), which is the Companies' most significant Project from a value perspective (the "Adelaide Project").

2. The Application was heard on Thursday, December 9, 2021. On Friday, December 10, 2021, before a decision had been released concerning the Application, Adelaide LP and Go-To Spadina Adelaide Square Inc. executed an agreement of purchase and sale to sell the Adelaide Property (the "Offer"), with a proposed purchaser, whose name is being kept confidential for the purpose of this Report. The Offer is subject to the approval of the Adelaide LP investors, and, if obtained, the proposed purchaser has 120 days to perform due diligence. The Offer includes an insignificant deposit, which the real estate agent for the Adelaide Property (the "Agent") has advised is in the process of being funded.[1]

3. In discussions between the Receiver and the Agent, the Agent advised the Receiver that he presented the Adelaide Property opportunity to a small number of parties. The Agent also advised that he has a business relationship with the proposed purchaser and that he presented the opportunity to acquire the Adelaide Property to the proposed purchaser at a price suggested by Mr. Furtado.

[1] The Receiver has not yet determined if this offer should move forward and if so, the terms on which it should move forward.

4. Adelaide LP's trial balance reflects various non-arm's length payables, including amounts owing to Mr. Furtado ($1.3 million) and Hans Jain[2] ($2.6 million), as well as the balance of a demand loan owing to Adelaide Square Developments Inc. ("ASD") in the amount of $10.4 million, which company and transaction is the subject of extensive discussion in the Collins Affidavit.

5. The Receiver has reviewed Adelaide LP's third quarter interim financial statements dated September 30, 2021 (the "September 30th Statements") (which were provided to at least one investor) and the Companies' audited financial statements for fiscal 2020 (together with the September 30th Statements, the "Financial Statements"). Note 4 of each of the Financial Statements describes the loan from ASD. Each of Mr. Furtado and Anthony Malanca, an individual with several connections to the Companies, is believed to own 11% of ASD. The loan from ASD is not identified as a related party transaction in the Financial Statements.

6. Anthony Marek has invested approximately $13 million in Adelaide LP. He is its largest investor. Through Northridge Maroak Developments Inc. ("Northridge"), Mr. Marek is also a mortgagee of Adelaide LP. The September 30th Statements reflect the principal amount of the loan owing to Northridge as $18,489,000. The loan matures on October 3, 2022.

7. On December 17, 2021, the Receiver and Aird & Berlis spoke with Mr. Marek's legal counsel. Mr. Marek's counsel advised of his client's concerns regarding, *inter alia*, a lack of financial disclosure by Mr. Furtado, the relationship between Mr. Furtado and ASD and various related party transactions. Mr. Marek's counsel expressed his client's view that Adelaide LP should not remain under the control of Mr. Furtado and advised that he believes that the receivership proceedings should continue.

3.2 Liquidity

1. The Companies have bank accounts at Royal Bank of Canada ("RBC"), The Toronto-Dominion Bank ("TD") and Meridian Credit Union ("Meridian"). As reflected in the schedule below, the Companies' cash balances are a small fraction of the Companies' accounts payable[3]. The Companies do not appear to have liquidity to advance their projects or to fund overhead costs.

(unaudited; $)	Cash	Accounts Payable	Difference
Go-To Glendale Avenue Inc.	125,933	539,624	(413,690)
Go-To Major Mackenzie South Block Inc.	4,058	971,666	(967,608)
Go-To Niagara Falls Chippawa Inc.	541	271,776	(271,235)
Go-To Niagara Falls Eagle Valley Inc.	10,374	1,315,111	(1,304,737)
Go-To Spadina Adelaide Square Inc.	12,798	7,657,763	(7,644,965)
Go-To Stoney Creek Elfrida Inc.	19,514	335,885	(316,371)
Go-To St. Catharines Beard Inc.	111	47,018	(46,906)
Go-To Vaughan Islington Avenue Inc.	9,275	497,051	(487,776)
2506039 Ontario Limited	120,869	266,489	(145,620)
Total	303,474	11,902,383	(11,598,909)

[2] Mr. Jain is discussed in the Collins Affidavit and is believed to be a related party.

[3] The accounts payable are as of either September 30 or October 31, 2021. The cash balances are as of December 13, 2021, with the exception of the Meridian account which is as of October 31, 2021. The accounts payable and cash balances were provided to the Receiver by Mr. Ghani.

2. Note 1 to the September 30th Statements addresses Adelaide LP's plans to fund its business. It states, "[T]he project development plans have entered into the second round of the submission being presented to Government authorities to seek approval. The timing of final approval is uncertain. **Management believes that working capital requirements along with ability to meet existing loan obligations can be met through refinancing and issuance of new Partnership units." (Emphasis added.)** This note confirms Adelaide LP's liquidity issue and the proposed solution – refinancing and the issuance of new partnership units.

3.3 Eagle Valley Project

1. On Wednesday December 15, 2021, the Receiver advised the project manager (the "EV Project Manager")[4] of the Eagle Valley Project of the inability of Go-To Niagara Falls Eagle Valley LP (the "Go-To Niagara LP") to fund the construction costs of the Eagle Valley Project due to its illiquidity. On Friday, December 17, 2021, the Receiver sent a letter to the EV Project Manager advising that work on the site should be suspended as there is no ability to pay for services and supplies at this time. The Receiver intends to work with the EV Project Manager to consider how to advance the Eagle Valley Project, including sourcing funding for it, if possible.

2. The Receiver understands that at the commencement date of the receivership, Mr. Furtado and the EV Project Manager were in the process of negotiating financing for the Eagle Valley Project. The Receiver understands that Mr. Furtado was also in the process of negotiating various other loans and/or refinancings for certain of the other Projects. The Receiver does not presently have sufficient information as to whether these transactions can be completed or the stage of each of the financing discussions.

3. A lien in the amount of $431,940 was filed on December 10, 2021 against the Eagle Valley Project by HK United Construction Ltd. ("HK"). Liens have also been filed against the Eagle Valley Project by two other parties.

3.4 Vaughan Project

1. The Receiver spoke with the former project manager (the "Vaughan Project Manager") of the Project (the "Vaughan Islington Project") owned by Go-To Vaughan Islington Avenue LP ("Vaughan Islington LP"). The Vaughan Project Manager advised that it terminated its project management agreement in early 2021 with Vaughan Islington LP and Go-To Developments Holdings Inc. due to concerns regarding the contemplated development for that Project.

[4] The EV Project Manager is also the construction manager of the Eagle Valley Project. The EV Project Manager is also the project and construction manager on three additional Projects, and has various other financial interests in these Projects.

3.5 Glendale Project

1. Torkin Manes LLP ("Torkin Manes") was counsel to Mr. Furtado and to the Companies prior to these proceedings and it continues to have roles for both. On December 15, 2021, the Receiver and Aird & Berlis discussed with Torkin Manes certain matters related to the receivership proceedings. These discussions included:

    a) a potential refinancing of the mortgages on the Real Property of the Go-To Glendale Avenue LP Project (the "Glendale Project") by a loan from a private lender. At this time, it is uncertain if the private lender is prepared to proceed with the refinancing. The Receiver advised Torkin Manes that it requires time to understand the terms of the refinancing and the status of the Glendale Project; and

    b) the Glendale Project has approximately twenty (20) to twenty-five (25) condominium presales. Torkin Manes advised that all presales are to friends and family of Mr. Furtado. On the day prior to the issuance of the Receivership Order, seven (7) of the purchasers of the pre-sold units terminated their agreements of purchase and sale for units in the Glendale Project. The Receiver does not know the reason for the termination of these agreements.

3.6 Other Activities

1. In addition to the activities described above, the Receiver's activities have included:

    a) having Aird & Berlis register the Receivership Order on title to the Real Property;

    b) commencing a review of the viability of each of the Projects, including working with certain of the Companies' consultants for this purpose;

    c) reviewing the status of the Companies' refinancing efforts;

    d) sending notices advising of the receivership to mortgagees registered on title, investors, unsecured creditors and Canada Revenue Agency;

    e) speaking and corresponding with various mortgagees on the Real Property;

    f) arranging with RBC, TD Bank and Meridian for the Companies' bank accounts to be restricted to processing deposits only;

    g) arranging for a third-party contractor to attend at each Project location for the purpose of understanding the state of each Project and the Real Property;

    h) making arrangements with the third-party contractor and the EV Project Manager to address safety issues at certain of the Real Property;

    i) reviewing the Companies' insurance policies and confirming that insurance is in place;

    j) arranging with Mr. Ghani to update the Companies' accounting records;

    k) corresponding with the property manager of the Adelaide Property;

Second Report to Court of KSV Restructuring Inc. as Receiver and Manager of Go-To Developments Holdings Inc. and those companies listed on Appendix "B"

February 3, 2022

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Appendices

COURT FILE NO. CV-21-00673521-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

ONTARIO SECURITIES COMMISSION

APPLICANT

- AND -

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

RESPONDENTS

APPLICATION UNDER
SECTIONS 126 AND 129 OF THE *SECURITIES ACT*, R.S.O. 1990, C. S.5, AS AMENDED

SECOND REPORT OF
KSV RESTRUCTURING INC.
AS RECEIVER AND MANAGER

FEBRUARY 3, 2022

1.0 Introduction

1. Pursuant to an application by the Ontario Securities Commission (the "OSC") under sections 126 and 129 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Application"), the Ontario Superior Court of Justice (Commercial List) (the "Court") made an order on December 10, 2021 (the "Receivership Order") appointing KSV Restructuring Inc. ("KSV") as the receiver and manager (the "Receiver") of the real property listed in Appendix "A" (the "Real Property"), and all the other assets, undertakings and properties of the companies (the "Companies") listed in Appendix "B" (together with the Real Property, the "Property"). A copy of the Receivership Order is provided in Appendix "C" and a copy of the Endorsement of Mr. Justice Pattillo is provided in Appendix "D".

1.2 Restrictions

1. In preparing this Report, the Receiver has relied upon: (i) discussions with Oscar Furtado, the directing mind of the Companies ("Furtado"), and Shoaib Ghani, the Companies' Head of Accounting ("Ghani"); (ii) the Companies' unaudited financial information; (iii) discussions with various stakeholders in these proceedings (including their legal representatives); and (iv) the Application materials (collectively, the "Information").

2. The Receiver has not audited or otherwise attempted to verify the accuracy or completeness of the Information in a manner that complies with Canadian Auditing Standards ("CAS") pursuant to the Chartered Professional Accountants of Canada Handbook and, accordingly, the Receiver expresses no opinion or other form of assurance as contemplated under the CAS in respect of the Information. Any party wishing to place reliance on the Information is required to perform its own diligence.

2.0 Background

1. The Companies are developers of nine residential real estate projects in Ontario, each of which is in early stages of development (each a "Project", and collectively the "Projects"). The name and municipal address of each of the Projects is provided below.

Project Name	Address
Go-To Niagara Falls Chippawa	4210 Lyons Creek Road, Niagara Falls, ON 4248 Lyons Creek Road, Niagara Falls, ON
Go-To Niagara Falls Eagle Valley ("Eagle Valley Project")	2334 St. Paul Avenue, Niagara Falls, ON
Go-To Glendale Avenue ("Glendale Project")	75 Oliver Lane Street, St. Catharines, ON
Go-To Major Mackenzie ("Major Mack Project")	185 Major MacKenzie Drive East, Richmond Hill, ON 197 Major MacKenzie Drive East, Richmond Hill, ON 209 Major MacKenzie Drive East, Richmond Hill, ON 191 Major MacKenzie Drive East, Richmond Hill, ON 203 Major MacKenzie Drive East, Richmond Hill, ON 215 Major MacKenzie Drive East, Richmond Hill, ON
Go-To Spadina Adelaide Square ("Adelaide Project")	355 Adelaide Street West, Toronto, ON 46 Charlotte Street, Toronto, ON
Go-To St. Catharines Beard Inc.	19 Beard Place, St. Catharines, ON
Go-To Stoney Creek Elfrida	Highland Road, Hamilton, ON Upper Centennial Parkway, Hamilton, ON
Go-To Vaughan Islington Avenue	7386 Islington Avenue, Vaughan, ON
Go-To Aurora Road	4951 Aurora Road, Stouffville, ON

2. The head office of the Companies is located at 1267 Cornwall Road, #201, Oakville, Ontario.

3. As of the date of the Receivership Order, the Companies employed six individuals.[1] Four out of six of the Companies' employees are relatives of Furtado. Two employees have been terminated since the commencement of these proceedings.

4. The Companies' various limited partnership agreements contemplate payments of interest to the limited partners, notwithstanding that the Projects are in the development stage, do not generate any revenue and the Companies do not have the capital to pay the limited partners. As of the date of the Receivership Order, the combined cash balance of the Companies compared to their accounts payable balances was as follows:[2]

	(unaudited; $)		
	Cash	Accounts Payable	Difference
Go-To Glendale Avenue Inc.	125,933	539,624	(413,690)
Go-To Major Mackenzie South Block Inc.	4,058	971,666	(967,608)
Go-To Niagara Falls Chippawa Inc.	541	271,776	(271,235)
Go-To Niagara Falls Eagle Valley Inc.	10,374	1,315,111	(1,304,737)
Go-To Spadina Adelaide Square Inc.	12,798	7,657,763	(7,644,965)
Go-To Stoney Creek Elfrida Inc.	19,514	335,885	(316,371)
Go-To St. Catharines Beard Inc.	111	47,018	(46,906)
Go-To Vaughan Islington Avenue Inc.	9,275	497,051	(487,776)
2506039 Ontario Limited	120,869	266,489	(145,620)
Total	303,474	11,902,383	(11,598,909)

5. Detailed background information regarding the Companies and the reasons that the OSC sought the appointment of the Receiver are provided in the affidavit of Stephanie Collins, Senior Forensic Accountant in the Enforcement Branch of the OSC, sworn on December 6, 2021 (the "Collins Affidavit"). Additional information regarding these proceedings is also provided in the First Report. A copy of the Collins Affidavit, the First Report and other Court materials filed to-date in these proceedings are available on the Receiver's website at: https://www.ksvadvisory.com/experience/case/go-to.

3.0 Sale Process

1. Since the date of its appointment, the Receiver has been familiarizing itself with each of the Projects with the objective of maximizing recoveries for all stakeholders in these proceedings. In this regard, the Receiver has consulted with:

   - parties who have expressed an interest in developing or acquiring certain of the Projects;
   - project consultants, including planners, architects and project/construction managers;

[1] Mr. Furtado is not an employee or contractor of the Companies. Mr. Furtado was not drawing a salary prior to the date of the Receivership Order and he has not been paid any remuneration during the receivership.

[2] Cash balances are as of the date of the receivership. Accounts payable balances are as of either September 30 or October 31, 2021. The accounts payable and cash balances were provided to the Receiver by Ghani. In due course, a claims process may be required for each of the Companies.

COUNSEL SLIP

COURT FILE NO.: CV-21-00673521-00CL

DATE: 09-FEB-2022

NO. ON LIST 3

TITLE OF PROCEEDING: ONTARIO SECURITIES COMMISSION v. GO-TO DEVELOPMENTS HOLDINGS INC. et al.

COUNSEL FOR:

☐ PLAINTIFF(S)

☐ APPLICANT(S)

PHONE

FAX

Moving Party(ies)

☒
- I. Aversa; T. Dolny; S. Graff, for Court-appointed Receiver (iaversa@airdberlis.com; tdolny@airdberlis.com; sgraff@airdberlis.com)

EMAIL

COUNSEL FOR:

☐ DEFENDANT(S)

PHONE

Responding Party(ies) / Other

- E. Hoult; B. Stapleton, for OSC (ehoult@osc.gov.on.ca; bstapleton@osc.gov.on.ca)
- G. Azeff; M. Faheim, for Appellants (gazeff@millerthomson.com; mfaheim@millerthomson.com)
- K. Kraft; S. Wilson, for 341868 Ontario Limited and Kesbro Inc. (kenneth.kraft@dentons.com; sara.wilson@dentons.com)

☒
- D. Touesnard, for Mortgage Holder (dtouesnard@waterousholden.com)

FAX

- J. Naster, for Anthony Marek and Northridge Maroak Developments (jnaster@btlegal.ca)
- B. Moldaver, for Richmond & Mary Development Inc., Hans Jain, 2768819 Ontario Ltd. And 2434547 Ontario Inc. (brett@moldaverbarristers.com)
- D. Pollack; R. Varcoe, for Kingsett Capital Inc. (dpollack@kingsettcapital.com; rvarcoe@kingsettcapital.com)
- Etc.

EMAIL

JUDICIAL NOTES:

Conway J. Endorsement

The Receiver's motion proceeded before me on an unopposed/consent basis. The Receiver seeks approval of a sale process for the subject properties. Yesterday, offers were presented by Mr. Furtado's counsel for the Glendale and Aurora properties, which he seeks to remove from the sale process. Counsel have negotiated a resolution that will permit the sale process to go forward while having the Receiver evaluate the two offers. They have agreed on the following terms, which I endorse:

The Receiver, the Receivership Respondents and Mr. Oscar Furtado ("**Furtado**", and with the Receivership Respondents, the "**Respondents**") agree that the Order sought by the Receiver at the hearing scheduled on February 9, 2022 shall be issued, on consent, pursuant to the following terms:

1. The Receiver agrees to use its best efforts to evaluate the agreement of purchase and sale for :

    A. 527 Glendale Avenue, St. Catherines, ON, at PIN 46415-0949 (the "**Glendale Property**"), in the form appended as Confidential Exhibit "A" to the Respondents' motion record dated February 8, 2022 (the "**Glendale Offer**"), such that:

if the Receiver determines, after performing due diligence, that:

I. the Glendale Offer is in the best interests of all relevant stakeholders; and
II. the Receiver is advised in writing by all investors in the Glendale Property that the Receiver ought to accept the offer,

the Receiver will take steps to accept the Glendale Offer on the same economic terms as presented within Confidential Exhibit "A", as amended in consultation with the relevant parties, such that the Glendale Property will not form part of the Sale Process on a going forward basis.

The Receiver will communicate its intention to accept or reject the Glendale Offer by 5:00 PM EST on Friday, February 18, 2022 (the "**Acceptance Deadline**").

    B. 4951 Aurora Road, Stouffville, ON at PIN 03491-0193 (the "**Aurora Property**") in the form appended as Confidential Exhibit "D" to the Respondents' motion record dated February 8, 2022 (the "**Aurora Offer**"), such that:

if the Receiver determines, after performing due diligence, that:

I. the Aurora Offer is in the best interests of all relevant stakeholders;
II. the Receiver is advised in writing by the owners of the other parcels subject to the Aurora Offer that the Aurora Offer is acceptable;
III. the Receiver is advised in writing by all investors and stakeholders, as the Receiver deems appropriate, in the Aurora Property that the Receiver ought to accept the offer; and
IV. the Receiver is satisfied that the proceeds from the Aurora Offer as allocated to the Aurora Property will be sufficient to pay, in full, all costs, expenses and stakeholder interests in respect of the Aurora Property,

the Receiver will take steps to accept the Aurora Offer on the same economic terms as presented within Confidential Exhibit "D", as amended in consultation with the relevant parties, such that the Aurora Property will not form part of the Sale Process on a going forward basis.

The Receiver will communicate its intention to accept or reject the Aurora Offer by the Acceptance Deadline.

2. Approval of the Sale Process, as defined in the Order, remains without prejudice to the Respondents' right to return to this Court in the event that the Receiver communicates its intention to reject the

Glendale Offer and/or the Aurora Offer, and seek to have the Glendale Property and/or the Aurora Property excluded from the Sale Process.

3. If the Receiver accepts the Glendale Offer and/or the Aurora Offer by the Acceptance Deadline, an amount of $50,000 in each of the Glendale Offer and the Aurora Offer shall be included as costs for CBRE Limited ("**CBRE**") in consideration for its professional fees and expenses to market the Glendale Property and the Aurora Property in the Sale Process.

4. The Respondents are restrained from engaging in any further sales or marketing efforts of the Real Property, and shall direct any potential purchasers to the Receiver and/or the relevant Realtor.

The remaining relief on the motion is acceptable to me, including approval of the first and second reports.

I am granting a sealing order for Confidential Appendix "1" to the Second Report in light of the ongoing sale process and the commercially sensitive information contained therein. I am satisfied that it meets the *Sierra Club/Sherman Estate* test for sealing. In addition, I am sealing the Confidential Exhibit Brief of the Responding Motion Record, for the same reasons (and it contains private information about the investors).

Order to go as signed by me and attached to this endorsement. This order is effective from today's date and is enforceable without the need for entry and filing.

Mendlowitz & Associates Inc. in its capacity as Trustee in Bankrupcy of Chiang et al. v. Chiang et al.

[Indexed as: Chiang (Trustee of) v. Chiang

93 O.R. (3d) 483

Court of Appeal for Ontario,
Laskin, Simmons and R.P. Armstrong JJ.A.
January 7, 2009

Contempt of court -- Purging contempt -- Appellants given opportunity to purge their contempt by complying with undertakings -- Trial judge subsequently holding inquiry into whether appellants had complied with undertakings and what sanction would be appropriate if they had not complied -- Trial judge correctly finding that onus was on appellants to show on balance of probabilities that they had purged their contempt -- Respondent not required to show fresh contempt.

Contempt of court -- Sentence -- Parole -- Parole board not having jurisdiction to grant parole to offender serving custodial sentence for civil contempt of court if sentence includes requirement that offender be brought back before court upon release from custody -- Trial judge not exceeding her jurisdiction in issuing replacement warrant containing requirement that offender be returned to court where replacement warrant merely gave effect to her original sentence.

Contempt of court -- Sentence -- Quantum -- Judge A making consent order in 2003 finding appellants in breach of six previous court orders and giving them opportunity to purge their contempt by complying with undertakings -- Judge A ordering appellants to be incarcerated for seven days if they

did not comply -- Judge A subsequently finding that appellants had not complied but giving them further 90 days to comply and warning them of more severe consequences if they failed to do so -- Trial judge finding in 2007 that appellants had not purged their contempt by complying with undertakings and imposing custodial sentences of one year on male appellant and eight months on female appellant -- Appellants' appeal from sentence allowed -- Trial judge limited by 2003 order to sentencing appellants to seven days' imprisonment -- Sentences imposed by trial judge appropriate in absence of 2003 order.

In July 2003, Farley J. found the appellants in contempt of six previous orders of the Superior Court relating to an unsatisfied judgment debt. That finding was made on consent. Under the terms of the consent order, the appellants were given an opportunity to purge their contempt by complying with undertakings which required disclosure of financial information. Failing compliance, they were each to be incarcerated for seven days, and faced the prospect of further sanctions for continued non-compliance. In 2005, Farley J. found that the appellants had complied with some of the undertakings but that they still had a long way to go. He gave them a further 90 days to answer their undertakings and warned them of severe consequences if they did not comply. In 2007, the trial judge found that the appellants had not complied with the undertakings which they gave in July 2003. She found that she was not limited by the July 2003 order to sentencing the appellants to seven days' imprisonment, as Farley J. had effectively varied that order in 2005 by balancing the 90-day extension with a potentially more serious period of incarceration, thereby reopening the remedy that the court could grant in a future hearing. She sentenced the male appellant to one year's incarceration [page484] and the female appellant to eight months' incarceration. When Ontario's Parole and Earned Release Board granted the male appellant parole, the trial judge quashed the order of the Board and issued a replacement warrant of committal to ensure that he would serve his entire sentence in custody. The appellants appealed all orders of the trial judge.

Held, the appeal should be allowed in part.

The respondent was not required to establish a new contempt at the hearing before the trial judge, nor was the trial judge hearing a fresh motion for contempt. She was conducting an inquiry into the appropriate sanction. She analogized the proceeding to sentencing in criminal proceedings and treated purging one's contempt by showing compliance with an undertaking as equivalent to providing a mitigating factor on sentence. She correctly found that, as an accused in a sentencing proceeding bears the onus of establishing a mitigating factor on a balance of probabilities, the appellants had to show on a balance of probabilities that they had purged their contempt.

The trial judge did not err in finding that the appellants had not fulfilled their undertakings. Especially in the context of the close relationship between the appellants and their family, the undertakings were not best efforts undertakings; they were undertakings that unequivocally required the appellants to declare the whereabouts of the assets they sent to their family members in California and Taiwan. The appellants' claim that they had done their best and that their family was not cooperating was irrelevant. Failing all else, they were obliged to take court proceedings to compel members of their family to assist them. Moreover, the trial judge's conclusion that the appellants directly controlled the actions of their family was supported by the evidence.

Absent the July 2003 order and the 2005 proceeding before Farley J., the sentences imposed by the trial judge were fit. There were a large number of aggravating factors which, taken together, demonstrated a long record of deliberate disobedience of the court. However, the trial judge was limited by the July 2003 order to imposing sentences of seven days' incarceration on each appellant. Although Farley J. could have varied that term in 2005, he did not do so. His stern warning of severe consequences did not amount to a variation of the consent order. The appellants were not on fair notice in 2007 that for their continued non-compliance they faced a term of imprisonment greater than seven days. The sentences were set aside, and each appellant was sentenced to seven days'

incarceration (which the male appellant had already served).

The trial judge did not err in concluding that the Parole Board did not have jurisdiction to grant parole to the male appellant. A parole board has no jurisdiction to grant parole to a person serving a custodial sentence for civil contempt of court if the sentence includes a requirement that the offender return to court. The original warrant of committal under which the male appellant was sent to custody did not include that requirement. The trial judge did not exceed her jurisdiction in issuing a replacement warrant which included that requirement. The issuance of a warrant is an administrative act. The issuing judge can amend the warrant after it has been issued to ensure that it reflects the judge's original intention. That was what happened here.

Cases referred to

Braun (Re), [2006] A.J. No. 52, 2006 ABCA 23, 262 D.L.R. (4th) 611, [2006] 6 W.W.R. 240, 55 Alta. L.R. (4th) 18, 384 A.R. 80, 17 C.B.R. (5th) 26, 205 C.C.C. (3d) 22, 68 W.C.B. (2d) 246, 147 A.C.W.S. (3d) 799, distd [page485]

Other cases referred to

642947 Ontario Ltd. v. Fleischer (2001), 56 O.R. (3d) 417, [2001] O.J. No. 4771, 209 D.L.R. (4th) 182, 152 O.A.C. 313, 16 C.P.C. (5th) 1, 47 R.P.R. (3d) 191, 110 A.C.W.S. (3d) 568 (C.A.); Country Style Food Services Inc. (Re), 2002 CanLII 41751 (C.A.); Dickie v. Dickie, [2007] 1 S.C.R. 346, [2007] S.C.J. No. 8, 2007 SCC 8, 279 D.L.R. (4th) 625, 357 N.R. 196, J.E. 2007-362, 221 O.A.C. 394, 43 C.P.C. (6th) 1, 39 R.F.L. (6th) 30, 153 A.C.W.S. (3d) 851, 72 W.C.B. (2d) 23, EYB 2007-113671; Ewing v. Mission Institution, [1994] B.C.J. No. 1989, 92 C.C.C. (3d) 484, 24 W.C.B. (2d) 547 (C.A.); Illidge (Trustee of) v. St. James Securities Inc. (2002), 60 O.R. (3d) 155, [2002] O.J. No. 2174, 159 O.A.C. 311, 34 C.B.R. (4th) 227, 114 A.C.W.S. (3d) 657 (C.A.); Kefeli v. Centennial College of Applied Arts and Technology, 2002 CanLII 45008 (C.A.); Korea Data Systems, Co. v. Chiang, [2000] O.J. No. 3784, 20 C.B.R. (4th) 264, 100 A.C.W.S.

[71] We turn now to the Chiangs' fresh evidence motion.

Should leave be granted to admit fresh evidence?

[72] In support of their appeal, the Chiangs sought leave of this court to introduce fresh evidence. The proposed fresh evidence consists of affidavits from their Ontario and California counsel and falls into three categories: the history of Jay Chiang's custody; some of the procedural background of the Ontario and California litigation; and the Chiangs' supposed efforts since the order of the trial judge to purge their contempt by answering their undertakings. The first two categories of proposed evidence, whether "fresh" or not, add nothing to this appeal. Even if admitted, they do not bear on any potentially decisive issue.

[73] The third category of proposed evidence -- the Chiangs' attempts to purge their contempt -- is contentious. Under s. 134(4)(b) of the Courts of Justice Act, R.S.O. 1990, c. C.43, this court "may, in a proper case, receive further evidence". In deciding motions under s. 134(4)(b), this court has used two different tests: either the test in R. v. Palmer, [1980] 1 S.C.R. 759, [1979] S.C.J. No. 126, which is the basic test for the admission of fresh evidence in criminal cases, or the test in Sengmueller v. Sengmueller (1994), 17 O.R. (3d) 208, [1994] O.J. No. 276 (C.A.). The Palmer test has four parts. The party seeking to introduce the fresh evidence must show:

-- the evidence could not, through due diligence, have been adduced at trial;
-- the evidence is relevant in that it bears on a decisive or potentially decisive issue; [page503]
-- the evidence is credible; and
-- the evidence, if believed and taken with the other evidence, could be expected to affect the result.

[74] See the following cases where this court has used the Palmer test: Oakwell Engineering Ltd. v. Enernorth Industries Inc. (2006), 82 O.R. (3d) 500, [2006] O.J. No. 3658 (C.A.); Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equipcap Ltd. Partnership (2008), 90 O.R. (3d) 561, [2008] O.J. No. 2284 (C.A.); Country Style Food Services

Inc. (Re), 2002 CanLII 41751 (C.A.); Zesta Engineering Ltd. v. Cloutier, [2007] O.J. No. 2495, 2007 ONCA 471; Visagie v. TVX Gold Inc. (2000), 49 O.R. (3d) 198, [2000] O.J. No. 1992 (C.A.).

[75] The Sengmueller test has three parts. Under this test, the party seeking to introduce fresh evidence must show:
-- the evidence is credible;
-- the evidence could not have been obtained by the exercise of reasonable diligence before trial; and
-- the evidence, if admitted, will likely be conclusive of an issue in the appeal.

[76] See the following cases where this court used the Sengmueller test: Kefeli v. Centennial College of Applied Arts and Technology, 2002 CanLII 45008 (C.A.); Illidge (Trustee of) v. St. James Securities Inc. (2002), 60 O.R. (3d) 155, [2002] O.J. No. 2174 (C.A.); Shapiro, Cohen, Andrews, Finlayson v. Enterprise Rent-a-Car Co. (1998), 38 O.R. (3d) 257, [1998] O.J. No. 727 (C.A.); Werner v. Warner Auto-Marine Inc., [1996] O.J. No. 3368, 93 O.A.C. 145 (C.A.).

[77] On this appeal, it is unnecessary to decide which is the proper test. The two tests are quite similar, though the last branch of the Sengmueller test may be more stringent than the last branch of the Palmer test: see R. v. Taillefer, [2003] 3 S.C.R. 307, [2003] S.C.J. No. 75. On either test, the Chiangs' motion to introduce fresh evidence must fail.

[78] Although we doubt that the Chiangs can meet the due diligence requirement (which is common to both tests), we need not address it, or the second and third branches of the Palmer test, or the first branch of the Sengmueller test. Even if they are met, the proposed evidence fails to satisfy the last [page504] branch of the Palmer test: it could not be expected to affect the result. And, therefore, equally, the proposed fresh evidence fails the last branch of the Sengmueller test: it will not likely be conclusive of an issue in the appeal.

[79] As we have said, the critical undertakings relate to the

Sengmueller v. Sengmueller

17 O.R. (3d) 208
[1994] O.J. No. 276
Action No. C8706

Court of Appeal for Ontario,
Morden A.C.J.O., McKinlay and Carthy JJ.A.
February 16, 1994

Family law -- Property -- Equalization of net family property -- Deduction from net family property of notional costs of disposition of assets appropriate where there is evidence of likely disposition date -- Deduction not appropriate where it is not clear when, if ever, property will be realized.

The appellant appealed from an order for the payment to her of an equalization payment pursuant to s. 5 of the Family Law Act, R.S.O. 1990, c. F.3, on the ground that the trial judge should not have deducted from the net family property of the respondent an amount on account of notional costs of disposition. The trial judge deducted, as a debt or other liability under s. 4(1) of the Act, amounts estimated as taxes (but not other types of costs of disposition), which would be exigible if the assets involved were realized. The assets of the respondent consisted largely of an RRSP, two parcels of real estate, and the business from which he earned his livelihood.

The appellant also argued that the rate of pre-judgment interest on the equalization payment should have been 15 per cent rather than 11 per cent.

The respondent cross-appealed, asking that there be no order as to pre-judgment or post-judgment interest and no order as to costs of the trial. He also sought to have fresh evidence, which did not exist at the time of the trial, considered on appeal, namely, evidence of the dramatic decrease in value of the real property owned by him, evidence of a dramatic decrease in the work available to his business and evidence of the forced realization of his RRSP to satisfy a portion of the equalization amount assessed at trial. The respondent said that he had been attempting to sell the real property ever since the release of the reasons for judgment but without success.

Held, the appeal and the cross-appeal should be dismissed.

In the circumstances of this case, the admission of the fresh evidence was necessary to deal fairly with the issues on appeal.

As an overriding principle of fairness, costs of disposition as well as benefits should be shared equally. Thus, it is appropriate to take the tax consequences of disposition of assets into account in determining net family property under the Act. There must be satisfactory evidence of a likely disposition date of the assets and that the costs of disposition will be inevitable when the owner disposes of the assets or is deemed to have disposed of them regardless of whether the asset needs to be realized to make an equalization payment. These costs may be considered either in the valuation of the assets themselves or as a liability existing on valuation day. Each case should be dealt with on its own facts, considering the nature of the assets involved, evidence as to the probable timing of their disposition, and the probable tax and other costs of disposition at that time, discounted as of valuation day.

The fresh evidence in this case showed that the RRSP had been seized and that the two pieces of real estate were on the market. This evidence showed the relative imminence of the dispositions. The trial judge's decision should not be disturbed.

There was no basis for interfering with that portion of the disposition as to costs.

Heon v. Heon (1989), 69 O.R. (2d) 758, 22 R.F.L. (3d) 273, 34 E.T.R. 252 (H.C.J.); McPherson v. McPherson (1988), 63 O.R. (2d) 641, 13 R.F.L. (3d) 1, 48 D.L.R. (4th) 577, 27 O.A.C. 167 (C.A.); Starkman v. Starkman (1990), 75 O.R. (2d) 19, 28 R.F.L. (3d) 208, 73 D.L.R. (4th) 746, 43 O.A.C. 85 (C.A.), consd

Other cases referred to

Cook v. Mounce (1979), 26 O.R. (2d) 129, 104 D.L.R. (3d) 635, 12 C.P.C. 5 (S.C.); Mercer v. Sijan (1976), 14 O.R. (2d) 12, 72 D.L.R. (3d) 464, 1 C.P.C. 281 (C.A.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(4)(b)
Family Law Act, R.S.O. 1990, c. F.3, ss. 4(1), (3), 5
Family Law Reform Act, R.S.O. 1990, c. 152

APPEAL and CROSS-APPEAL from a judgment in a matrimonial action.

C.C. Mark, Q.C., for appellant.

Thomas G. Bastedo, Q.C., for respondent.

The judgment of the court was delivered by

MCKINLAY J.A.: -- The appellant, Helga Sengmueller, appeals from that part of the divorce judgment of the Honourable Mr. Justice Fedak which ordered the payment to her of $368,556.06 as an equalization payment pursuant to s. 5 of the Family Law Act, R.S.O. 1990, c. F.3 (the "Act"). She appeals on the bases that the trial judge should not have deducted from the net family property of the respondent, Frederick Sengmueller, the

fresh evidence which was not only unavailable at the time of trial, but which did not exist at that time. The evidence in issue is evidence of the dramatic decrease in value of real property owned by the respondent on valuation date and at the time of trial, evidence of a dramatic decrease in the work available to the corporation of which he was and is sole shareholder, and evidence of the forced realization of an R.R.S.P. owned by him to satisfy a portion of the equalization amount assessed at trial.

Counsel for the appellant submits that since the trial judge, in arriving at the value of matrimonial property, is charged with valuing assets at a precise date before trial, no court should take into consideration facts subsequent to that date. The difficulties arise, he submits, because of the failure of Mr. Sengmueller to sell his real property assets at an appropriate time, when he was aware that the market was on a downswing.

Section 134(4)(b) of the Courts of Justice Act, R.S.O. 1990, c. C.43, gives a court to which an appeal is taken discretion "in a proper case" to "receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs". What concerns the court is not whether it can admit new evidence, but whether the appeal before it is "a proper case" in which to do so.

The normal basis on which an appeal court in this jurisdiction will exercise its discretion in favour of admitting fresh evidence is clear and well-established. It will do so when (1) the tendered evidence is credible, (2) it could not have been obtained, by the exercise of reasonable diligence, prior to trial, and (3) the evidence, if admitted, will likely be conclusive of an issue in the appeal: see Cook v. Mounce (1979), 26 O.R. (2d) 129, 104 D.L.R. (3d) 635 (S.C.).

Most of the cases dealing with the admission of fresh evidence on appeal involve evidence which, though in existence prior to trial, for some reason other than lack of diligence, was not tendered at trial. This case involves evidence which

did not exist prior to trial. One obvious problem with admitting on appeal evidence which did not exist at the time of trial is that such evidence could not possibly have influenced the result at trial. It is argued for the appellant that admitting such evidence on appeal would result in there being no finality to the trial process, that it would tend to turn appeal courts into trial courts, and that it would unacceptably protract legal proceedings. All of these objections are valid and compelling. However, in a case where the evidence is necessary to deal fairly with the issues on appeal, and where to decline to admit the evidence could lead to a substantial injustice in result, it appears to me that the evidence must be admitted. In my view in the particular and unusual circumstances of this case, this is such a case. This court admitted evidence not in existence at the time of trial in Mercer v. Sijan (1976), 14 O.R. (2d) 12 at p. 17, 72 D.L.R. (3d) 464 (C.A.), stating:

> The competing considerations, on the one hand, are the public interest in finality to litigation, and, on the other hand, the affront to common sense involved in a Court shutting its eyes to a fact which falsifies the assessment.

While this case does not involve a reassessment of damages, as Mercer v. Sijan did, the potential for substantial injustice makes it important for the court to exercise its discretion in favour of admitting the fresh evidence, but only for the very limited purposes described below.

Nature of the fresh evidence

At the time of trial Mr. Sengmueller had approximately $26,000 of non-taxable assets with which to satisfy the equalization payment of $368,556.06. The balance of his assets at that time consisted primarily of an R.R.S.P., two parcels of real estate (one of which included the matrimonial home), and Film Sound Services Ltd., the business from which he earned his livelihood. Their value as at valuation date, April 21, 1988, was found to be $85,272, $250,000, $375,000 and $161,854 respectively, less the trial judge's finding as to the tax cost of realization in amounts of $38,789, $36,911, $35,862, and

DATE: 20050223
DOCKET: C43047, C43049 and C43051

COURT OF APPEAL FOR ONTARIO

FELDMAN, SHARPE and ARMSTRONG JJ.A.

B E T W E E N :	)	
	)	
STAMOS KATOKAKIS, 1066821 ONTARIO INC. and 1427936 ONTARIO INC.	)	**Peter Howard and Timothy Banks, for the appellants**
	)	
	)	**Gordon McKee and Robin Linley for**
Applicants (Appellants in Appeal)	)	**BNY Capital Corporation**
	)	
	)	**Norman J. Emblem and Michael D. Schafler for Linedata Services S.A.**
- and -	)	
	)	**Paul Steep and Eric Block for**
	)	**Financial Models Co.**
	)	
WILLIAM R. WATERS LIMITED, 1427937 ONTARIO INC. and BNY CAPITAL CORPORATION	)	**Jeffrey S. Leon for the Special Committee of the Board of Directors of FMC**
	)	
	)	**William J. Burden and Linda I. Knol for 1427937 Ontario Inc. and William R. Waters Limited**
Respondents (Respondents in Appeal)	)	
	)	
	)	**Heard: February 22, 2005**

On appeal from the judgment of Justice John D. Ground of the Superior Court of Justice dated February 8, 2005.

SHARPE J.A.:

[1] This is an expedited appeal from the judgment of Ground J., sitting as a Commercial List judge, interpreting a shareholders' agreement and related documents. Stamos Katotakis ("Katotakis"), William Waters ("Waters"), together with their corporate entities, and BNY Capital Corporation ("BNY") are parties to a shareholders'

agreement that contains rights of first refusal and rights of first offer with respect to shares in Financial Models Company Inc. ("FMC"). We are deciding the appeal on an urgent basis as a crucial offer will expire in a matter of a few days. These reasons, accordingly, will necessarily be brief.

[2] FMC became a publicly traded company in 1998, but the combined holdings of Katotakis, Waters, and BNY, the original shareholders, represent over 80 per cent of the outstanding shares. Waters and BNY delivered selling notices pursuant to the shareholders' agreement offering to sell shares to Katotakis at a price of $12.20. By the terms of the selling notices, Waters and BNY offered to sell Katotakis shares on "terms and conditions … substantially in accordance with the terms and conditions set forth" in a draft acquisition agreement between FMC and Linedata Services S.A. ("Linedata") and in a draft lock-up agreement between Waters, BNY, and Linedata "to the extent applicable" to Katotakis.

[3] Both the acquisition agreement and the lock-up agreement contain "superior proposal" conditions that permit the sellers to sell their shares to another buyer at a better price, provided that the initial buyer is given notice of the superior proposal and the opportunity to match or better it. Katotakis delivered acceptances to the selling notices, including all the terms and conditions contained in them. He also made a takeover bid for the rest of the shares, as required by the shareholders' agreement and securities laws. Linedata subsequently delivered a further proposal to purchase the shares at $14.50. This new offer was set to expire on February 11, 2005. Waters and BNY gave Katotakis notice of Linedata's superior proposal, but Katotakis made no further offer.

[4] The central issue on this appeal is whether the superior proposal conditions apply to Katotakis' acceptance of the offer. Katotakis says that it does not and that he is entitled to specific performance of his acceptance of Waters' and BNY's offer to sell the shares at $12.20. Waters and BNY say that the superior proposal conditions apply to Katotakis and that, as he has failed to match Linedata's $14.50 offer, they are free to tender their shares to that offer.

[5] Katotakis moves to introduce fresh evidence on appeal that a bid from another purchaser at $17.50 is in the offing. While this evidence has little relevance to the precise issues we must decide, I agree with the position taken by all parties except Linedata that it may be admitted to provide us with a full picture of the background and commercial reality of the situation.

[6] The central findings of the application judge were: (1) that Katotakis' acceptance of the offer was void because it did not comply with the Ontario *Securities Act*, R.S.O. 1990, c. S.5, s. 96, and (2) that the selling notices delivered to Katotakis incorporated the superior proposal conditions by way of reference, and so by accepting the offer, Katotakis was bound by those conditions.

Court of Appeal File No. C70114
Court File No.: CV-21-00673521-00CL

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ONTARIO SECURITIES COMMISSION

Applicant
(Respondent in Appeal)

- and-

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

Respondents
(Appellants in Appeal – Moving Party)

APPLICATION UNDER SECTIONS 126 AND 129 OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5, AS AMENDED

APPELLANTS' CERTIFICATE

The Appellants certify that the following evidence is required for the Appeal, in the Appellants' opinion:

1. The Affidavit of Oscar Furtado, sworn December 14, 2021, and the exhibits attached thereto;

Court of Appeal File No. C70114

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

ONTARIO SECURITIES COMMISSION

Applicant
(Respondent in Appeal)

– and –

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

Respondents
(Appellants)

APPLICATION UNDER
Sections 126 and 129 of the *Securities Act,* R.S.O. 1990 c. s.5, as amended

RESPONDENT'S CERTIFICATE

The Respondent confirms the Appellants' certificate except for the following:

DELETIONS

1. The Affidavit of Oscar Furtado sworn December 14, 2021, ought not to be admitted as fresh evidence on the appeal. The Respondent reserves its rights to respond to any motion by the Appellants seeking to introduce that Affidavit as fresh evidence on the appeal, including to file responding evidence and/or cross-examine Furtado, and to amend this certificate as may be necessary thereafter.

Schedule "D" – Annotated Key Persons Chart and Chronology of Key Events

Person	Description	Reference to Collins Affidavit
Katarzyna (Kasia) Pikula (**Pikula**)	Malanca's spouse. The director of AKM and Goldmount Capital Inc., a mortgage brokerage.	Para. 8 and Exs. 2-3
AKM	A holding company. A shareholder of ASD. Pikula is the director.	Para. 48 and Exs. 3 and 50
Goldmount Financial Group Corp. (**Goldmount**)	Malanca is the director.	Para. 8 and Ex. 1
Angelo Pucci (**Pucci**)	The sole registered director, and a shareholder of ASD. Furtado claims to have met him 3 times, with Malanca present. When Staff tried to contact Pucci, his son and former landlord advised that he has dementia (one said his symptoms began in 2019).	Paras. 26-27, 73 and Exs. 27 and 80
Anthony Marek (**Marek**)	A repeat investor in the Adelaide LP. Marek had never dealt with Furtado or Go-To before his first investment in the Adelaide LP.	Paras. 40 and 50

Date	Events	Reference to Collins Affidavit
May 2016-June 2020	Furtado raises ~$80M from investors for 9 Go-To projects, including: - $4.25M for Eagle Valley LP between Apr. 2017-May 2019 - $10.6M for Elfrida LP between Sept. 2017-Feb. 2019 - $42M for Adelaide LP between Feb. 2019-June 2020	Para. 18, App. B and C
February 2018 and following	Malanca is engaged in: - securing purchase rights for 355 Adelaide Street W. and 46 Charlotte Street in downtown Toronto (together, the **Properties**) via agreements with the then-current owners; - due diligence on the Properties, and promotional efforts for the proposed project, called “Adelaide Square”.	Paras. 22-23 and Ex. 25
July 30, 2018	ASD incorporated.	Ex. 27
In or before October 2018	Malanca, as a representative of ASD, asks Furtado if he is interested in acquiring the Properties.	Para. 24 and Ex. 26 (qq. 61-72)
December 2018	Adelaide LP makes an offer to buy the Properties from ASD for $74.25M, which is accepted. This particular agreement does not close; the transaction is restructured in late March 2019.	Ex. 26 (qq. 83-85)
February 15 – April 2, 2019	Furtado raises ~$25M from investors for the Adelaide LP in this period, which includes a $16.8M investment by Marek.	Para. 30 and App. C

March 26, 2019 to April 3, 2019	Adelaide LP and ASD enter into 4 agreements for the acquisition of the Properties (the **Acquisition Agreements**): - assignment of purchase and sale agreement for 355 Adelaide; - assignment of purchase and sale agreement for 46 Charlotte; - **Assignment Fee** agreement, under which the Adelaide LP owes ASD a fee of $20.95M; and - Memo of Understanding (**MOU**) with others, including FAAN Mortgage Administrators Inc. (the Court-appointed trustee re: a mortgage on 46 Charlotte). MOU requires further payments on Charlotte after closing (the **Density Bonus**).	Para. 33 and Exs. 31-34
April 3, 2019	In the MOU, Furtado pledges assets of Elfrida LP to secure Adelaide LP obligations. A charge is registered on the Elfrida LP's properties.[9]	Para. 82, Exs. 34 (p. 870) and 97
	Furtado directs Go-To counsel to pay funds in trust (mortgage and investor funds) for the acquisition of the Properties, including to pay the $20.95M Assignment Fee to ASD.	Para. 35 and Ex. 35
April 4, 2019	Furtado pledges assets of Eagle Valley LP to secure Adelaide LP obligations to one of its mortgage lenders, Scarecrow Capital Inc.[10]	Para. 83 and Exs. 98-99
	Date of a demand loan agreement for a $19.8M loan from ASD to Adelaide LP (the **Demand Loan**). Loan proceeds are paid by ASD to Marek and Goldmount, as below.	Para. 45 and Exs. 45-46
April 5, 2019	Transfer of Properties to Adelaide LP recorded.	Para. 36 and Ex. 108 (pp. 1773, 1790)
	Marek paid $19.5M by ASD from the Assignment Fee (for redemption of $16.8M of Adelaide LP units plus a $2.7M flat fee return).	Paras. 38-39, 40(c), 41-42, and Exs. 40 (p. 978), 41, 42
April 12, 2019	ASD articles amended to change share structure.	Para. 47 and Ex. 48

[9] This charge was removed from title of the Elfrida properties on November 9, 2021.
[10] This charge was removed from title of the Eagle Valley property on April 1, 2021.

April 15, 2019	Furtado Holdings and AKM each receive: - 11 shares of ASD; and - $388,087.33 cheques ($**388K Payment**) of this date, paid out of the Assignment Fee.	Paras. 38, 44, 48 and Exs. 37, 43-44, 49-50
	Goldmount paid $300,000 by ASD from the Assignment Fee. Per Furtado: this payment was a referral fee as Malanca introduced Marek to the Adelaide LP and the LP thus owed the $300,000 to ASD.	Paras. 38, 45 and Ex. 45 (pp. 1001-1003, qq. 272-281)
Summer 2019	Per Furtado: Malanca advised, at a lunch with Pucci, that ASD intended to pay Furtado a $6M dividend "*when they had the funds to pay*".	Para. 73 and Ex. 80 (pp. 1271-1273, qq. 202-210)
By August 2019	Furtado begins seeking further investments for Adelaide LP.	Para. 50 and Exs. 54-55
August/September 2019	Furtado meets with Marek to seek further investment for Adelaide LP	Para. 51 and Exs. 54 (pp 1052-1056, qq. 350-354) and 55 (pp. 1058-1063, qq. 171-173)
September 19-30, 2019	Furtado raises $13.25M for the Adelaide LP from 4 investors, which includes $12M invested by companies belonging to Marek.	App. C
October 1, 2019	Adelaide LP pays ASD $12M on the Demand Loan. No payment had been due or demanded.	Paras. 56-57 and Exs. 46 (p. 1005 at "Interest"), 61-63
	ASD pays a $6M dividend to Furtado Holdings (**$6M Dividend**).	Paras. 58-59 and Exs. 64, 65, 68
	ASD pays a $6M dividend to AKM.	Paras. 58-59 and Exs. 64, 66, 67
July 31, 2020	Adelaide LP enters into a Project Management Agreement with GTDH and AKM as consultants; the 'manager' thereunder remains TBD.	Para. 80 and Ex. 95

September 24, 2020	First examination of Furtado by Staff.	Para. 65
November 5, 2020	Second examination of Furtado by Staff.	Para. 65
November 9 and December 18, 2020	Progress reports sent to Eagle Valley LP and Elfrida LP investors advising them of the pledges of LP assets that occurred in April 2019.	Para. 86 and Exs. 101-102
June 29, 2021	Demand Loan agreement registered on title to the Properties (more than two years after the date of the loan agreement).	Para. 46 and Ex. 47
July 7, 2021	Third examination of Furtado by Staff.	Para. 65

Schedule "C" – Excerpts of Furtado's Evidence re: Payments from and Dealings with ASD

Re: $6M Dividend		
First Examination	**Second Examination**	**Third Examination**
342 Q. So we are looking at the Furtado account holdings. Bank statement. Document 10223-00000911, and on October 1st, 2019, there was a funds transfer from Schneider Ruggiero for $6 million. Mr. Furtado, can you tell me what those funds are for? MR. MANN: Do you remember? THE WITNESS: I don't recall offhand.	391 Q. I see, okay. Thank you. So, we're still on question four and the next point, (c). So, $6 million was transferred or deposited into the account on October 1, 2019 by Schneider Ruggiero, and can you explain to me why Furtado Holdings received those funds? A. It is similar to -- it is related to the Adelaide Square Development project. As I said in my previous answer, the management of Adelaide Square Developments Holdings decided -- approached me, which I was not aware they were going to do so, after the closing and said they wanted to give me some shares in the company in a minority interest. They then decided to declare a dividend of $6 million with Furtado Holdings, but primarily for the significant contributions that kept the deal together in many aspects of negotiations or the deal would have been lost and they wouldn't have made the significant funds they made, so they issued me a dividend for that loss. … 407 Q. So then after they get their money, which would include a gross amount of $20 million that they have to maybe write off certain expenses to, after that happens, they pay you $6 million? A. I don't know their finances, but I know I received a payment for $6 million. 408 Q. And on what basis did you become invested in their company? Like, how did that arise in the context of this transaction? A. Well, they saw the value that I brought to the transaction. The transaction was going to fail in many aspects, including the negotiations of the density clause with that administration. That was my idea that I put forth because they're going to walk away from	207 Q. That is fine. What was discussed at that summer 2019 restaurant meeting with Mr. Pucci and Mr. Malanca? A. There was discussion about -- and Alfredo had the lead in the discussion, discussion about wanting to -- the plan was to give me the 6 million out of their profit share from -- because they did quite well on the deal and they saw the potential of doing future deals with me at the table in the city of Toronto. 208 Q. Okay. So I would like to know everything that you can recall about that discussion. How was it introduced? Who said what? A. Alfredo was the primary guy that did the majority of the talking with -- he referred to Angelo Pucci as "we". And he did the majority of the talking. They wanted to acknowledge the value that I brought to the project to close the deal. And I was surprised with the amount because I knew I had shares in the company and I was a minority holder of one class of shares. So was just surprised that -- I was more thankful than anything else. There was nothing more discussed. … [*Furtado continues on to describe that Malanca/Pucci raised another potential project that went nowhere*]

	14 the deal and say, we want more money from this 15 deal or we're not going to sell it to you, approve 16 the sale to you, so I came up with the whole 17 concept of the density clause and the terms in 18 there. So, everything I came up with, Adelaide 19 Square Developments management did not, I did. I 20 came up with the ideas to save the deal because I 21 wanted to save it and protect my investments and 22 close the deal. 23 409 Q. Okay. So, what you're 24 saying is that they had an offer in place, then 25 the offer was in jeopardy of not closing, and you 1 came up with the density clause that resulted in 2 the deal being able to close. Is that what you're 3 saying? 4 A. That is only one aspect. 5 That's only dealing with 46 Charlotte. And you've 6 received all the paperwork for Adelaide Square, 7 for 355 Adelaide Square also. There were various 8 amendments to the original agreement that they 9 tied up the property with, various amendments 10 including the additional $800,000 deposit that was 11 required to save the deal. So, every time 12 negotiations were required and deals were 13 required, I pretty much came up with everything, 14 the whole strategy, to protect the deals. … 3 412 Q. -- and I'm wondering can 4 you tell me about the conversation where they told 5 you that they were going to give you these shares? [*counsel interjections omitted*] 16 THE WITNESS: The conversation 17 was very straightforward. They called me, I went 18 and met with them, and they said that they wanted 19 to thank me for the value of the deal, they made a 20 lot of money on the deal, and they wanted to give 21 me some shares in the company. And they decided 22 that they were going to give me 11 percent of the 23 shares and we did the paperwork for that. 24 They then said to me, as part 25 of the dividend, they were going to give me a 1 dividend of $6 million, but it was very 2 straightforward. It was more of a thank you than 3 anything else.	

Re: $388K Payment		
First Examination	**Second Examination**	**Third Examination**
339 Q. Mr. Baik, can you now go 1 to April 2019. Okay. So I am going to show you a 2 deposit that was made April 16th, 2019, in the 3 amount of $388,087.33. 4 Now, Mr. Baik, can you now 5 pull up document 3099 please. Mr. Baik is going 6 to bring up the supporting documentation for that 7 transaction. As you can see, that is the deposit 8 slip for $388,087.33. 9 Now let's see the cheque, 10 please, Mr. Baik. Here is the cheque. It has 11 come from Concorde Law Professional Corporation. 12 It says at the bottom: 46 Charlotte Street, 13 Toronto. 14 Can you tell me what that 15 cheque represents? 16 MR. MANN: Do you recall? 17 THE WITNESS: I don't recall. 18 I don't recall offhand.	13 371 Q. Okay. On April 16, 2019, 14 the account received $388,087.33 from Concorde Law 15 Professional Corporation. Can you tell me what 16 that was in relation to? 17 A. Right. Furtado Holdings 18 assumed the risk for a non-refundable deposit that 19 was put on during negotiations for the Adelaide 20 Square Development acquisitions. And as a return 21 on the deposit, because of the risk assumed, after 22 the closing of the deal Adelaide Square 23 Developments made that payment to Furtado 24 Holdings. 25 372 Q. Okay. Just so I 1 understand, did you say you got a return of the 2 deposit? 3 A. It's a return on the -- 4 sorry. It's an investment return on deposit. 5 MR. MANN: The $388,000 is a 6 return on the deposit. It is a -- 7 BY MS. VAILLANCOURT: 8 373 Q. Is it like interest on 9 the deposit? Is that what you mean? Was it 10 because it was held in a trust account and there's 11 interest? I'm not following. 12 A. It was interest, yes. … 4 374 Q. And how was it decided 5 that Spadina Adelaide would pay that return to 6 Furtado Holdings? 7 A. At the time the deposit 8 was required, Adelaide Square Developments did not 9 have the money. And as part of the negotiations 10 for the property, additional funds were requested 11 or the deal would be cancelled, so I offered the 12 deposit on the condition and assumed the risk that 13 it would be lost when the deal closed. And I 14 asked management at Adelaide Square Developments 15 to pay me a fee on the deposit if the deal closes 16 because I was assuming the risk. 17 375 Q. Okay. And is there some	7 156 Q. Okay. But your holding 8 company, Furtado Holdings, entered agreements 9 entitling it to be paid a $400,000 fee less legal 10 expenses from Adelaide Square Developments for 11 providing the non-refundable deposit? 12 A. There have been two 13 agreements that have been sent to the Securities 14 Commission. The first one was to assume the risk 15 between Furtado Holdings and the LP. In case the 16 800,000 was lost, Furtado Holdings would have to 17 pay the 800,000 back to the LP. To assume that 18 risk, the LP had to enter into an agreement with 19 Adelaide Square that if that deposit was lost -- 20 sorry, if the deal goes through, the return would 21 be paid to Furtado Holdings for assuming that 22 risk. … 4 161 Q. Were you present when 5 Mr. Pucci signed this document? 6 A. I wasn't. 7 162 Q. Okay. Who did you 8 negotiate this agreement with on behalf of 9 Adelaide Square Developments? 10 A. Alfredo Malanca would 11 have been my primary contact.

	18 kind of a contract or other written document that 19 sets that out? 20 A. No. That's a verbal 21 discussion. 22 376 Q. Okay. And who did you 23 have that discussion with? 24 A. Angelo Pucci.	

Re: ASD Contacts	
Second Examination	**Third Examination**
16 396 Q. Okay. And so do you 17 know, with respect to that dividend that was paid 18 that you received in 2019, do you know if it was 19 something that all common shareholders got? 20 A. I'm not aware of who got 21 dividends of the shareholders. 22 397 Q. Okay. And who was your 23 usual contact at Adelaide Square Developments? Is 24 it Angelo Pucci? 25 A. Correct. … 14 418 Q. That conversation you 15 told us about where they decided to give you 16 shares, who was that conversation with at the 17 Adelaide company, Mr. Furtado? 18 A. I believe I answered that 19 question earlier. All the conversations were with 20 Angelo Pucci.	9 82 Q. Did you have direct 10 dealings with Mr. Pucci? 11 A. As I have mentioned in 12 the previous examinations, I have met him a few 13 times. There was limited exposure. 24 207 Q. That is fine. What was 25 discussed at that summer 2019 restaurant meeting with Mr. Pucci and Mr. Malanca? 2 A. There was discussion 3 about -- and Alfredo had the lead in the 4 discussion, discussion about wanting to -- the 5 plan was to give me the 6 million out of their 6 profit share from -- because they did quite well 7 on the deal and they saw the potential of doing 8 future deals with me at the table in the city of 9 Toronto. 10 208 Q. Okay. So I would like to 11 know everything that you can recall about that 12 discussion. How was it introduced? Who said 13 what? 14 A. Alfredo was the primary 15 guy that did the majority of the talking with -- 16 he referred to Angelo Pucci as "we". And he did 17 the majority of the talking. They wanted to 18 acknowledge the value that I brought to the 19 project to close the deal. And I was surprised 20 with the amount because I knew I had shares in the 21 company and I was a minority holder of one class 22 of shares. So was just surprised that -- I was 23 more thankful than anything else. There was

	24 nothing more discussed. 25 They did -- as I recall, there 1 was -- they did bring up the fact that there was 2 another big property in downtown Toronto that they 3 had considered … 14 209 Q. Okay. So it was in the 15 summer of 2019 that they discussed that they were 16 going to pay you a dividend? 17 A. It was discussed they 18 were going to pay me the 6 million when they had 19 the funds, when they became (inaudible). 20 210 Q. When they became in 21 funds? Is that what you said? 22 A. When they had the funds 23 to pay. 24 211 Q. Okay. Why 6 million? 25 Was there any discussion of that? Where did the 1 number come from? 2 A. You have to ask them. 3 212 Q. Was that the last time 4 you saw Mr. Pucci in person, that summer 2019 5 meeting? 6 A. Correct. 7 213 Q. Okay. So you only recall 8 three times that you met Mr. Pucci in person? 9 That lunch before the deal closed, the meeting at 10 Louis' office in April 2019, and then a summer 11 2019 lunch. Is that correct? Sorry, I didn't 12 hear that. 13 A. Correct.

IN THE MATTER OF GO-TO DEVELOPMENTS HOLDINGS INC.
Summary of the Excerpt from Source and Application of Funds Analysis
for RBC Account 1047257 in the Name of Furtado Holdings Inc.
for the Period October 1, 2019 to August 17, 2020

		CAD
Opening Balance as at October 1, 2019		**1,975.23**
SOURCE OF FUNDS		
Schneider Ruggiero		6,000,000.00
Transfer from Spadina Adelaide LP (Account 1035484)		75,000.00
Unknown		1,839.30
TOTAL SOURCE OF FUNDS		**6,076,839.30**
APPLICATION OF FUNDS		
Oscar Furtado		(2,250,000.00)
Go-To Development Holdings Inc.		(120,000.00)
Go-To LPs:		
Major Mackenzie South Block	(1,005,000.00)	
Niagara Falls Eagle Valley	(535,000.00)	
Stoney Creek Elfrida	(280,000.00)	
Vaughan Islington	(270,000.00)	
GTD Acquisitions	(265,302.31)	
Niagara Falls Chippawa	(240,000.00)	
Aurora Road	(215,000.00)	
Spadina Adelaide Square	(195,000.00)	
St. Catharines Beard	(85,000.00)	
Glendale Avenue	(55,000.00)	(3,145,302.31)
Nanar Law/Royal Lepage (82 Laurier Ave., Milton)		(441,357.36)
Borden Ladner		(100,045.00)
Humberstone Lands Inc. (MF Georgetown Expenses)		(10,000.00)
Service Charges		(248.88)
TOTAL APPLICATION OF FUNDS		**(6,066,953.55)**
Closing Balance as at August 17, 2020		**11,860.98**

IN THE MATTER OF GO-TO DEVELOPMENTS HOLDINGS INC.
Excerpt from Source and Application of Funds Analysis for Royal Bank Account 1047257 in the Name of Furtado Holdings Inc. for the Period October 1, 2019 to August 17, 2020

BANK STATEMENT DETAILS

Date	Description	Debit	Credit	Balance	Sort Code	Comments	Docid
		$	$	$			
1-Oct-19	Opening Balance			1,975.23			
1-Oct-19	Transfer from Schneider Ruggiero		6,000,000.00	6,001,975.23	11	Schneider Ruggiero	
1-Oct-19	Service Charge	(17.00)		6,001,958.23	7	x	
4-Oct-19	Service Charge	(4.50)		6,001,953.73	7	x	
4-Oct-19	Service Charge	(8.50)		6,001,945.23	7	x	
17-Oct-19	Transfer to Account 1046788 - Chippawa	(120,000.00)		5,881,945.23	23	Chippawa	10223-0005512
17-Oct-19	Transfer to Account 1002542 - Elfrida	(230,000.00)		5,651,945.23	23	Elfrida	10223-0003104, 10223-0005511
21-Oct-19	Draft 63689541 - Aurora Road	(165,000.00)		5,486,945.23	23	Loan to Aurora Road	10223-0005513
21-Oct-19	Service Charge	(8.50)		5,486,936.73	7	x	
30-Oct-19	Transfer to Account 1046812 - MMSB	(40,000.00)		5,446,936.73	23	Major Mackenzie South Block	10223-0005514
6-Nov-19	Service Charge	(10.25)		5,446,926.48	7	x	
6-Nov-19	Service Charge	(8.50)		5,446,917.98	7	x	
12-Nov-19	Transfer to Account 1046812 - MMSB	(150,000.00)		5,296,917.98	23	Loan to Major Mackenzie South Block	10223-0003105
14-Nov-19	Transfer to Account 1035484 - Spadina Adelaide	(75,000.00)		5,221,917.98	23	Loan to Spadina Adelaide	10223-0003106
28-Nov-19	Cheque 9	(100,000.00)		5,121,917.98	14	Oscar Furtado	10223-0005602, P3, 10223-0005516
5-Dec-19	Service Charge	(8.25)		5,121,909.73	7	x	
5-Dec-19	Service Charge	(8.50)		5,121,901.23	7	x	
12-Dec-19	Transfer to Account 1046804 - Eagle Valley	(100,000.00)		5,021,901.23	23	Eagle Valley	10223-0005680
12-Dec-19	Transfer to Account 1035484 - Spadina Adelaide	(100,000.00)		4,921,901.23	23	Spadina Adelaide	10223-0005691
16-Dec-19	Transfer to Account 1046804 - Eagle Valley	(150,000.00)		4,771,901.23	23	Eagle Valley	10223-0005702
20-Dec-19	Transfer to Account 1046812 - MMSB	(100,000.00)		4,671,901.23	23	Major Mackenzie South Block	10223-0005713
7-Jan-20	Service Charge	(9.50)		4,671,891.73	7	x	
7-Jan-20	Service Charge	(8.50)		4,671,883.23	7	x	
10-Jan-20	Loan to Major Mackenzie	(100,000.00)		4,571,883.23	23	Major Mackenzie South Block	
21-Jan-20	Draft 63690685 - Remax Gold Realty	(50,000.00)		4,521,883.23	20	Remax Gold Realty Inc. (3046 Turbine Cres., Mississauga)	10223-0005679, 10223-0005717
21-Jan-20	Transfer to Account 1046804 - Eagle Valley	(100,000.00)		4,421,883.23	23	Loan to Eagle Valley	10223-0005719
23-Jan-20	Deposit		50,000.00	4,471,883.23	20	Remax Gold Realty Inc. - Draft Re Deposited	10223-0005679, 10223-0005720
24-Jan-20	Deposit		70,000.00	4,541,883.23	22	Partial Repayment - Spadina Adelaide Loan	10223-0005721
24-Jan-20	Transfer to Account 1046820 - GTDH	(70,000.00)		4,471,883.23	3	Loan - GTDH	10223-0005681
27-Jan-20	Transfer to Account 5020425 - Oscar Furtado	(100,000.00)		4,371,883.23	14	x	10223-0005516, P6
29-Jan-20	Draft 64730033 - Loan to Aurora Road	(50,000.00)		4,321,883.23	23	Aurora Road - TD	10223-0005679, 10223-0005682

IN THE MATTER OF GO-TO DEVELOPMENTS HOLDINGS INC.
Excerpt from Source and Application of Funds Analysis for Royal Bank Account 1047257 in the Name of Furtado Holdings Inc. for the Period October 1, 2019 to August 17, 2020

BANK STATEMENT DETAILS

Date	Description	Debit	Credit	Balance	Sort Code	Comments	Docid
		$	$	$			
29-Jan-20	Service Charge	(8.50)		4,321,874.73	7	x	
31-Jan-20	Transfer to Account 5020425 - Oscar Furtado	(500,000.00)		3,821,874.73	14	x	10223-0005683
5-Feb-20	Draft 64730076 - Royal LePage	(50,000.00)		3,771,874.73	10	Royal LePage Meadowtowne Realty (82 Laurier Ave, Milton)	10223-0005679, 10223-0005684
5-Feb-20	Service Charge	(8.50)		3,771,866.23	7	x	
6-Feb-20	Service Charge	(16.19)		3,771,850.04	7	x	
6-Feb-20	Service Charge	(8.50)		3,771,841.54	7	x	
11-Feb-20	Transfer to Account 1018084 - Beard	(50,000.00)		3,721,841.54	23	Loan to Beard	10223-0005685
11-Feb-20	Transfer to Account 1046267 - Vaughan Islington	(100,000.00)		3,621,841.54	23	Loan to Vaughan Islington	10223-0005686
11-Feb-20	Transfer to Account 1046812 - MMSB	(200,000.00)		3,421,841.54	23	Loan to Major Mackenzie South Block	10223-0005687
25-Feb-20	Loan to Major Mackenzie South Block	(150,000.00)		3,271,841.54	23	Loan to Major Mackenzie South Block	
28-Feb-20	Transfer to Account 5020425 - Oscar Furtado	(400,000.00)		2,871,841.54	14	x	10223-0006052
4-Mar-20	Transfer to Borden Ladner	(100,045.00)		2,771,796.54	16	Borden Ladner	
5-Mar-20	Deposit		5,000.00	2,776,796.54	22	Spadina Adelaide - Repayment of Balance	10223-0006053
5-Mar-20	Service Charge	(12.00)		2,776,784.54	7	x	
5-Mar-20	Service Charge	(8.50)		2,776,776.04	7	x	
11-Mar-20	Transfer to Account 1046804 - Eagle Valley	(50,000.00)		2,726,776.04	23	Loan to Eagle Valley	10223-0005688
12-Mar-20	Transfer to Account 5020425 - Oscar Furtado	(500,000.00)		2,226,776.04	14	x	10223-0005689
18-Mar-20	Transfer to Account 5020425 - Oscar Furtado	(400,000.00)		1,826,776.04	14	x	10223-0005690
24-Mar-20	Transfer to Account 1046812 - MMSB	(50,000.00)		1,776,776.04	23	Major Mackenzie South Block	10223-0005692
24-Mar-20	Transfer to Account 1046804 - Eagle Valley	(50,000.00)		1,726,776.04	23	Eagle Valley	10223-0005692
31-Mar-20	Transfer to Account 5020425 - Oscar Furtado	(250,000.00)		1,476,776.04	14	x	10223-0005693
2-Apr-20	Transfer to Account 1046267 - Vaughan Islington	(25,000.00)		1,451,776.04	23	Vaughan Islington	10223-0005694
6-Apr-20	Transfer to Account 1046788 - Chippawa	(50,000.00)		1,401,776.04	23	Loan to Chippawa	10223-0005695
6-Apr-20	Service Charge	(13.47)		1,401,762.57	7	x	
6-Apr-20	Service Charge	(8.50)		1,401,754.07	7	x	
7-Apr-20	Transfer to Account 1046788 - Chippawa	(50,000.00)		1,351,754.07	23	Chippawa	10223-0005696
23-Apr-20	Transfer to Account 1002542 - Elfrida	(50,000.00)		1,301,754.07	23	Elfrida	10223-0005697
27-Apr-20	Transfer to account 1046242 - Acquisitions	(115,302.31)		1,186,451.76	23	Acquisitions	10223-0005698
27-Apr-20	Transfer to account 1046242 - Acquisitions	(150,000.00)		1,036,451.76	23	Acquisitions	10223-0005699
27-Apr-20	Draft 65128672 - Nanar Law Office	(391,357.36)		645,094.40	16	Nanar Law Office in Trust (Purchase 82 Laurier Ave. Milton)	10223-0005679, 10223-0005700
30-Apr-20	Transfer to Accout 1046812 - South Block	(50,000.00)		595,094.40	23	Major Mackenzie South Block	10223-0005701

IN THE MATTER OF GO-TO DEVELOPMENTS HOLDINGS INC.
Excerpt from Source and Application of Funds Analysis for Royal Bank Account 1047257 in the Name of Furtado Holdings Inc. for the Period October 1, 2019 to August 17, 2020

BANK STATEMENT DETAILS

Date	Description	Debit	Credit	Balance	Sort Code	Comments	Docid
		$	$	$			
6-May-20	Service Charge	(11.50)		595,082.90	7	x	
6-May-20	Service Charge	(8.50)		595,074.40	7	x	
19-May-20	Transfer to Account 1046820 - GTDH	(50,000.00)		545,074.40	3	Loan to GTDH	10223-0006054
25-May-20	Transfer to Account 1046788 - Chippawa	(20,000.00)		525,074.40	23	Chippawa	10223-0005703
25-May-20	Transfer to Account 1018084 - Beard	(35,000.00)		490,074.40	23	Beard	10223-0005704
25-May-20	Transfer to Account 1046267 - Vaughan Islington	(50,000.00)		440,074.40	23	Vaughan Islington	10223-0005705
25-May-20	Transfer to Account 1046796 - Glendale	(55,000.00)		385,074.40	23	Glendale	10223-0005706
26-May-20	Transfer to Account 1046804 - Eagle Valley	(20,000.00)		365,074.40	23	Eagle Valley	10223-0005707
26-May-20	Transfer to Account 1046812 - MMSB	(100,000.00)		265,074.40	23	Major Mackenzie South Block	10223-0005708
29-May-20	Transfer to Account 1035484 - Spadina Adelaide	(20,000.00)		245,074.40	23	Spadina Adelaide	10223-0005709
29-May-20	Transfer to Account 1046267 - Vaughan Islington	(25,000.00)		220,074.40	23	Vaughan Islington	10223-0005710
4-Jun-20	Service Charge	(11.75)		220,062.65	7	x	
4-Jun-20	Service Charge	(8.50)		220,054.15	7	x	
17-Jun-20	Deposit		1,839.30	221,893.45	17	x	
17-Jun-20	Transfer to Account 1046804 - Eagle Valley	(50,000.00)		171,893.45	23	Eagle Valley	10223-0005711
18-Jun-20	Transfer to Account 1046267 - Vaughan Islington	(50,000.00)		121,893.45	23	Vaughan Islington	10223-0005712
22-Jun-20	Cheque 102	(10,000.00)		111,893.45	10	Humberstone Lands Inc. (MF Georgetown Expenses)	10223-0005516, P18
26-Jun-20	Transfer to Account 1046804 - Eagle Valley	(15,000.00)		96,893.45	23	Eagle Valley	10223-0005714
26-Jun-20	Transfer to Account 1046267 - Vaughan Islington	(20,000.00)		76,893.45	23	Vaughan Islington	10223-0005715
26-Jun-20	Wire to Account 1046812 - MMSB	(65,000.00)		11,893.45	23	Major Mackenzie South Block	10223-0005716
7-Jul-20	Service Charge	(10.97)		11,882.48	7	x	
7-Jul-20	Service Charge	(8.50)		11,873.98	7	x	
6-Aug-20	Service Charge	(4.50)		11,869.48	7	x	
6-Aug-20	Service Charge	(8.50)		11,860.98	7	x	

COURT OF APPEAL FOR ONTARIO

CITATION: Bank of Montreal v. Cadogan, 2021 ONCA 405
DATE: 20210608
DOCKET: C68958

Rouleau, Hoy and van Rensburg JJ.A.

BETWEEN

Bank of Montreal

Plaintiff (Respondent)

and

Granville Cadogan, also known as
Granville Nolley Cadogan also known as
Granville N. Cadogan

Defendant (Appellant)

Granville Cadogan, acting in person

Ron Aisenberg, for the respondent

Heard: June 4, 2021 by video conference

On appeal from the judgment of Justice David E. Harris of the Superior Court of Justice, dated November 19, 2020, with reasons reported at 2020 ONSC 7102.

REASONS FOR DECISION

[1] This appeal was dismissed with reasons to follow. These are our reasons.

[2] The respondent bank commenced an action for damages against the appellant, who is a lawyer. The respondent alleged that the appellant made a knowingly false “law statement” under Ontario’s electronic land registration

[7] The motion judge determined that the appellant's request for an adjournment followed a pattern "of obfuscation and attempting to put off his day of reckoning". The summary judgment motion had already been adjourned peremptory to the appellant eight months earlier, when the appellant served an affidavit from his former client the night before the hearing. The endorsement specified that no further adjournments would be permitted. The appellant's lawyer was "exceedingly vague" about when she had been retained, she had not been in touch with the appellant recently, and she had no instructions other than to obtain an adjournment. There was no documentary support for the illness excuse, which would have been simple enough to obtain if it were true.

[8] Whether to grant an adjournment in a civil proceeding is a highly discretionary decision, and the scope for appellate intervention is limited: *Khimji v. Dhanani* (2004), 69 O.R. (3d) 790 (C.A.), at para. 14 (per Laskin J.A., dissenting, but not on this point). The inquiry on appeal must focus on whether the court below took account of relevant considerations in balancing the competing interests and made a decision that was in keeping with the interests of justice: *Toronto-Dominion Bank v. Hylton*, 2010 ONCA 752, 270 O.A.C. 98, at para. 37.

[9] The appellant, although asserting that the adjournment was unreasonably refused, has not pointed to any circumstance that the motion judge failed to consider. Nor does the appellant's reference on appeal to the pandemic provide an excuse for his non-attendance at the virtual hearing. There is no basis to

CITATION: Toronto-Dominion Bank v. Hylton, 2010 ONCA 752
DATE: 20101109
DOCKET: C51522

COURT OF APPEAL FOR ONTARIO

Laskin, Sharpe and Epstein, JJ.A.

BETWEEN

The Toronto-Dominion Bank

Plaintiff (Respondent)

and

Paul Hylton also known as Paul U Hylton

Defendant (Appellant)

Sidney Klotz, for the appellant

Dennis Touesnard, for the respondent

Heard: September 17, 2010

On appeal from the judgment of Justice Robert D. Reilly of the Superior Court of Justice dated December 4, 2009.

Epstein J.A.:

I. Overview

[1] The appellant, Paul Hylton, appeals part of a judgment dated December 4, 2009, in which the motion judge granted summary judgment against him in favour of the respondent, The Toronto-Dominion Bank, in the amount of $81,660.18 plus interest and

of the borrower, including who made the payments, is unclear, as are the Bank's rights upon default. Second, Mr. Hylton has now tendered evidence, at this point unchallenged, that to the knowledge of the Bank and Autopark, it was never intended that he assume personal responsibility for the loans in question.

[33] In these circumstances, I am persuaded that the fresh evidence could reasonably be expected to affect the motion judge's decision concerning whether or not to grant summary judgment in the Bank's favour in relation to the loans in issue.

[34] I would therefore allow the motion to adduce fresh evidence and proceed to consider the appeal in the light of the evidence contained in Mr. Hylton's motion materials.

2. The Appeal

[35] I will now deal with the motion judge's decision to deny the request for an adjournment on December 4, 2009.

[36] The presiding judge has a well-placed and a well-established discretion to decide whether an adjournment request ought to be allowed or denied. In *Khimji v. Dhanani* (2004), 69 O.R. (3d) 790 (C.A.), the majority accepted Laskin J.A.'s statement of the principles applicable to reviewing a denial of an adjournment. Laskin J.A. wrote at para. 14 of his dissent:

> A trial judge enjoys wide latitude in deciding whether to grant or refuse the adjournment of a scheduled civil trial. The

> decision is discretionary and the scope for appellate intervention is correspondingly limited. In exercising this discretion, however, the trial judge should balance the interests of the plaintiff, the interests of the defendant and the interests of the administration of justice in the orderly processing of civil trials on their merits. In any particular case, several considerations may bear on these interests. A trial judge who fails to take account of relevant considerations may exercise his or her discretion unreasonably and if, as a result, the decision is contrary to the interests of justice, an appellate court is justified in intervening.

[37] Laskin J.A.'s passage makes it clear that, in reviewing highly discretionary decisions such as whether to allow a request for an adjournment, the inquiry must focus on whether the court below took account of relevant considerations in balancing the competing interests and made a decision that was in keeping with the interests of justice.

[38] Against the backdrop of the nature of the proceeding and the parties to the proceeding, the court should consider the evidence and strength of the evidence of the reason for the adjournment request, the history of the matter including deliberate delay or misuse of the court process, the prejudice to the party resisting the adjournment and the consequences to the requesting party of refusing the request.

[39] Once again, the fact that a party is self-represented is a relevant factor. That is not to say that a self-represented party is entitled to a "pass". However, as part of the court's obligation to ensure that all litigants have a fair opportunity to advance their positions, the court must assist self-represented parties so they can present their cases to the best of

Sibley & Associates LP v. Ross et al.

[Indexed as: Sibley & Associates LP v. Ross]

106 O.R. (3d) 494

2011 ONSC 2951

Ontario Superior Court of Justice,
Strathy J.
May 16, 2011

Injunctions -- Mareva injunction -- Fraud -- Requirement of risk of removal or dissipation of assets may be established by inference as opposed to direct evidence in cases of fraud -- Inference arising from circumstances of fraud itself taken in context of surrounding circumstances.

The plaintiff brought an action against a former employee and his mother for damages for conversion and fraud. It applied for an interim Mareva injunction.

Held, application granted in part.

The plaintiff had made out a very strong prima facie case of fraud and had met the other requirements for a Mareva injunction, with one exception: there was no direct evidence that there was a serious risk that the defendants were dissipating their assets or proposing to remove them from the jurisdiction. The plaintiff relied on the "fraud exception" to the rule against execution before judgment. It is unnecessary to carve out an "exception" for fraud. In cases of fraud, the Mareva requirement that there be risk of removal or dissipation can be established by inference, as opposed to direct evidence.

> the nature of the harm the plaintiff will suffer as a result of the dissipation.

[61] Other authors have expressed the view that the so-called "Mills injunction" should be available in all cases where fraud is alleged, without the necessity of proof that the alleged fraudster is likely to dissipate assets: see Sarabia et al., above. They argue that the ad hoc use of inferences and exceptions leads to uncertainty in the law and is confusing for lawyers and judges (at 359-60). They make the case, at 372, that

> . . . the courts should embrace Mills Injunctions in this era of heightened concern over fraud and dishonesty as a further tool to deter those willing to engage in fraudulent conduct. Even if the courts do not all agree with the reasoning of Mills, the public's and the legislatures' desire to combat fraud is reason enough to extend Mills Injunctions to all cases where a party alleges fraud. The focus should not be on the question of why a plaintiff should get an advantage in fraud cases. Rather, the focus should be on why alleged perpetrators of fraud should not be subject to an injunction to preserve their assets for innocent plaintiffs.

Conclusions

[62] From Chitel v. Rothbart to the present day, the law has sought to draw a fair balance between leaving the plaintiff with a "paper judgment" and the entitlement of the defendant to deal [page511] with his or her property until judgment has issued after a trial. In my respectful view, a plaintiff with a strong prima facie case of fraud should be in no more favoured position than, say, a plaintiff with a claim for libel, battery or spousal support. On the other hand, there may be circumstances of a particular fraud that give rise to a reasonable inference that the perpetrator will attempt to perfect the deception by making it impossible for the plaintiff to trace or recover the embezzled property. To this extent, it seems to me that cases of fraud may merit the special treatment they have received in the case law.

[63] Rather than carve out an "exception" for fraud, however,

it seems to me that in cases of fraud, as in any case, the Mareva requirement that there be risk of removal or dissipation can be established by inference, as opposed to direct evidence, and that inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances. It is not necessary to show that the defendant has bought an air ticket to Switzerland, has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff.

[64] The risk of removal or alienation can be inferred by evidence suggestive of the defendant's fraudulent criminal activity: Insurance Corp. of British Columbia v. Leland, [1999] B.C.J. No. 2073, 91 A.C.W.S. (3d) 49 (S.C.); Insurance Corp. of British Columbia v. Patko, supra. In referring to these authorities, I have not overlooked the fact that British Columbia applies a somewhat more flexible approach to the grant of a Mareva injunction than the courts of Ontario have applied: see Silver Standard Resources Inc. v. Joint Stock Co. Geolog, [1998] B.C.J. No. 2887, 168 D.L.R. (4th) 309 (C.A.); Mooney v. Orr, [1994] B.C.J. No. 2652, 33 C.P.C. (3d) 31 (S.C.), supp. reasons [1994] B.C.J. No. 3242, 33 C.P.C. (3d) 55 (S.C.); Clark v. Nucare PLC, [2006] M.J. No. 320, 2006 MBCA 101, 274 D.L.R. (4th) 479, at paras. 28-48; Pollard v. Falconer, [2006] B.C.J. No. 424, 2006 BCSC 310. It seems to me, however, that in some cases a pattern of prior fraudulent conduct may support a reasonable inference that there is a real risk that the conduct will continue.

[65] I have concluded that this is one of those cases in which the evidence of fraud is so strong that, coupled with the surrounding circumstances, it gives rise to an inference that there is a real risk that the defendants will attempt to dissipate or hide their assets or remove them from the jurisdiction. [page512]

[66] In coming to this conclusion, I have considered, in particular, the following circumstances:

Marshall v. Watson Wyatt & Co. c.o.b. as Watson Wyatt Worldwide

[Indexed as: Marshall v. Watson Wyatt & Co.]

57 O.R. (3d) 813
[2002] O.J. No. 84
Docket No. C33134

Court of Appeal for Ontario
Carthy, Laskin and Goudge JJ.A.
January 17, 2002

Civil procedure -- Evidence -- Trial judge erring in refusing to permit defendant to lead evidence at trial which was contrary to position it had taken on examination for discovery -- Counsel for plaintiff was aware of defendant's trial position as result of pre-trial conference and delivery of witness statement -- Trial judge's ruling was overly technical and unfair to defendant.

Employment -- Wrongful dismissal -- Damages -- Notice -- Plaintiff employed by defendant for one year as Director of Organizational Communications Practice for Canada -- Jury's award of damages based on nine-month notice period extended by further three months because of defendant's bad faith conduct in manner of dismissal affirmed on appeal.

Employment -- Wrongful dismissal -- Damages -- Punitive damages -- Jury award of punitive damages in amount of $75,000 set aside on appeal -- Trial judge failing to instruct jury of need for independent actionable wrong and need for jury to be satisfied that compensatory award did not adequately express its repugnance at defendant's conduct -- No independent actionable wrong existing and jury's compensatory award more than adequate to express jury's disapproval and to deter

court is entitled to set it aside.

Similarly, in McCannell v. McLean, [1937] S.C.R. 341, [[1937] 2 D.L.R. 639], Duff C.J. stated the reasonableness test as follows at p. 343:

> [T]he verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

In addition, an appellate court that finds there was "no evidence" supporting a particular verdict has "the right and the duty" to set aside that verdict (see Gray Coach Lines Ltd. v. Payne, [1945] S.C.R. 614, at p. 618 [[1945] 4 D.L.R. 145]). Although these two tests are distinct, in neither case may the appellate court set aside a verdict on "mere doubts [it] may entertain" or on its "reaching on the reading of the evidence a conclusion different from that the jury reached" (see Scotland v. Canadian Cartridge Co. (1919), 59 S.C.R. 471, at p. 477, [50 D.L.R. 666], per Davies C.J.).

[13] The second general consideration is that in a civil case s. 134(6) of the Courts of Justice Act, R.S.O. 1990, c. C.43 precludes this court from ordering a new trial "unless some substantial wrong or miscarriage of justice has occurred".

[14] The third general consideration concerns the effect of a party's failure to object to the trial judge's charge to the jury or to some other aspect of the trial proceedings. Although the failure to object at a civil trial is not always fatal to a party's position on appeal, an appellate court is entitled to give it considerable weight, indeed, ordinarily more weight than the failure to object at a criminal trial. In most civil cases where a party's failure to object is in issue, the appellant seeks a new trial because of the alleged error. For this reason, civil cases on the failure to object have typically focused on the question of whether a substantial wrong or miscarriage of justice has occurred.

[15] Even apart from the question whether a new trial should be ordered, however, a party in a civil case generally should not bring an appeal on the basis of some aspect of the trial proceeding to which it did not object. For example, if no objection is made to the admissibility of evidence in a civil trial, an objection on appeal will usually be unsuccessful: see Sopinka, Lederman and Bryant, The Law of Evidence in Canada, 2nd ed. (Toronto: Butterworths, 1999), at p. 47. Similarly, an objection to the charge to the jury in a civil case will generally be unsuccessful if raised for the first time on appeal. Thus, this court has held that where a party on appeal argues non-direction of the jury "in civil cases, failure to object . . . is usually fatal", G.K. v. D.K. (1999), 122 O.A.C. 36 at p. 42. A failure to object at trial to an incomplete jury instruction weighs heavily against a litigant bringing an appeal because "it is an indication that trial counsel did not regard as importa nt or necessary the additional direction now asserted", Tsalamatas v. Wawanesa Mutual Insurance Co. et al. (No. 2) (1982), 141 D.L.R. (3d) 322 at p. 326, 31 C.P.C. 257 (Ont. C.A.). This court will relieve against the failure to object only if the interests of justice require it.

[16] In this case, both parties approved the trial judge's charge before it was given and counsel for Watson Wyatt did not object to the charge after it was given. Yet on three of its grounds of appeal -- the reasonable notice period, the "Wallace" extension and punitive damages -- Watson Wyatt complains about non-direction in the trial judge's instructions to the jury. In each case, Watson Wyatt complains not about what was contained in the jury charge but instead about what was omitted. On a fourth ground of appeal -- the jury's finding of an annual base salary of $225,000 beginning on July 1, 1996 -- Watson Wyatt questions the admissibility of Ms. Marshall's oral evidence though it did not object to her giving that evidence at trial. I will now address Watson Wyatt's six grounds of appeal.

1. Was the jury's award of nine months' notice unreasonable?

[17] Ms. Marshall was entitled to reasonable notice of her

Interpretation, other general matters
Definitions

1 (1) In this Act,

...

"Commission" means the Ontario Securities Commission; ("Commission")

Note: On a day to be named by proclamation of the Lieutenant Governor, the definition of "Commission" in subsection 1 (1) of the Act is amended by adding "continued under the *Securities Commission Act, 2021*" at the end. (See: 2021, c. 8, Sched. 9, s. 40 (2))

Purposes of Act

1.1 The purposes of this Act are,

(a) to provide protection to investors from unfair, improper or fraudulent practices;

(b) to foster fair, efficient and competitive capital markets and confidence in capital markets;

(b.1) to foster capital formation; and

(c) to contribute to the stability of the financial system and the reduction of systemic risk. 1994, c. 33, s. 2; 2017, c. 34, Sched. 37, s. 2; 2021, c. 8, Sched. 9, s. 40 (7).

Principles to consider

2.1 In pursuing the purposes of this Act, the Commission shall have regard to the following fundamental principles:

1. Balancing the importance to be given to each of the purposes of this Act may be required in specific cases.
2. The primary means for achieving the purposes of this Act are,

    i. requirements for timely, accurate and efficient disclosure of information,

    ii. restrictions on fraudulent and unfair market practices and procedures, and

iii. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

3. Effective and responsive securities regulation requires timely, open and efficient administration and enforcement of this Act by the Commission.

4. The Commission should, subject to an appropriate system of supervision, use the enforcement capability and regulatory expertise of recognized self-regulatory organizations.

5. The integration of capital markets is supported and promoted by the sound and responsible harmonization and co-ordination of securities regulation regimes.

6. Business and regulatory costs and other restrictions on the business and investment activities of market participants should be proportionate to the significance of the regulatory objectives sought to be realized.

7. Innovation in Ontario's capital markets should be facilitated. 1994, c. 33, s. 2; 2019, c. 7, Sched. 55, s. 2.

Commission staff

3.6 (1) The Commission may employ such persons as it considers necessary to enable it effectively to perform its duties and exercise its powers under this or any other Act. 1997, c. 10, s. 37.

Officers

(2) The Commission shall appoint from among its employees an Executive Director and a Secretary as officers of the Commission, and may appoint from among its employees such other officers as it considers necessary. 1997, c. 10, s. 37.

Status of members

(3) The members of the Commission are not its employees, and the Chair and Vice-Chairs shall not hold any other office in the Commission or be employed by it in any other capacity. 1997, c. 10, s. 37.

Conflict of interest, indemnification

(4) Sections 132 (conflict of interest) and 136 (indemnification) of the *Business Corporations Act* apply with necessary modifications with respect to the Commission as if the Minister were its sole shareholder. 1997, c. 10, s. 37.

(5) REPEALED: 2006, c. 35, Sched. C, s. 121.

Public Service Pension Plan not to apply

(6) The Public Service Pension Plan established under the *Public Service Pension Act* does not apply to the members and employees of the Commission, except as authorized by order of the Lieutenant Governor in Council. 1997, c. 10, s. 37.

Agreement for services

(7) The Commission and a ministry of the Crown may enter into agreements for the provision by employees of the Crown of any service required by the Commission to carry out its duties and powers. The Commission shall pay the agreed amount for services provided to it. 1997, c. 10, s. 37.

Note: On a day to be named by proclamation of the Lieutenant Governor, section 3.6 of the Act is repealed. (See: 2021, c. 8, Sched. 9, s. 40 (9))

PART VI
INVESTIGATIONS AND EXAMINATIONS

Investigation order

11 (1) The Commission may, by order, appoint one or more persons to make such investigation with respect to a matter as it considers expedient,

(a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or

(b) to assist in the due administration of the securities or derivatives laws or the regulation of the capital markets in another jurisdiction. 1994, c. 11, s. 358; 2010, c. 26, Sched. 18, s. 4 (1).

Contents of order

(2) An order under this section shall describe the matter to be investigated. 1994, c. 11, s. 358.

Scope of investigation

(3) For the purposes of an investigation under this section, a person appointed to make the investigation may investigate and inquire into,

(a) the affairs of the person or company in respect of which the investigation is being made, including any trades, communications, negotiations, transactions, investigations, loans, borrowings or payments to, by, on behalf of, or in relation to or connected with the person or company and any property, assets or things owned, acquired or alienated in whole or in part by the person or company or by any other person or company acting on behalf of or as agent for the person or company; and

(b) the assets at any time held, the liabilities, debts, undertakings and obligations at any time existing, the financial or other conditions at any time prevailing in or in relation to or in connection with the person or company, and any relationship that may at any time exist or have existed between the person or company and any other person or company by reason of investments, commissions promised, secured or paid, interests held or acquired, the loaning or borrowing of money, stock or other property, the transfer, negotiation or holding of stock, interlocking directorates, common control, undue influence or control or any other relationship. 1994, c. 11, s. 358.

Right to examine

(4) For the purposes of an investigation under this section, a person appointed to make the investigation may examine any documents or other things, whether they are in the possession or control of the person or company in respect of which the investigation is ordered or of any other person or company. 1994, c. 11, s. 358.

Minister may order investigation

(5) Despite subsection (1), the Minister may, by order, appoint one or more persons to make such investigation as the Minister considers expedient,

(a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or

(b) to assist in the due administration of the securities or derivatives laws or the regulation of the capital markets in another jurisdiction. 1994, c. 11, s. 358; 2010, c. 26, Sched. 18, s. 4 (2).

Same

(6) A person appointed under subsection (5) has, for the purpose of the investigation, the same authority, powers, rights and privileges as a person appointed under subsection (1). 1994, c. 11, s. 358.

Power of investigator or examiner

13 (1) A person making an investigation or examination under section 11 or 12 has the same power to summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise, and to summon and compel any person or company to produce documents and other things, as is vested in the Superior Court of Justice for the trial of civil actions, and the refusal of a person to attend or to answer questions or of a person or company to produce such documents or other things as are in his, her or its custody or possession makes the person or company liable to be committed for contempt by the Superior Court of Justice as if in breach of an order of that court. 1994, c. 11, s. 358; 2006, c. 19, Sched. C, s. 1 (1).

Rights of witness

(2) A person or company giving evidence under subsection (1) may be represented by counsel and may claim any privilege to which the person or company is entitled. 1994, c. 11, s. 358.

Inspection

(3) A person making an investigation or examination under section 11 or 12 may, on production of the order appointing him or her, enter the business premises of any person or company named in the order during business hours and inspect any documents or other things that are used in the business of that person or company and that relate to the matters specified in the order, except those maintained by a lawyer in respect of his or her client's affairs. 1994, c. 11, s. 358.

Authorization to search

(4) A person making an investigation or examination under section 11 or 12 may apply to a judge of the Ontario Court of Justice in the absence of the public and without notice for an order authorizing the person or persons named in the order to enter and search any building, receptacle or place specified and to seize anything described in the authorization that is found in the building, receptacle or place and to bring it before the judge granting the authorization or another judge to be dealt with by him or her according to law. 1994, c. 11, s. 358; 2006, c. 19, Sched. C, s. 1 (2).

Grounds

(5) No authorization shall be granted under subsection (4) unless the judge to whom the application is made is satisfied on information under oath that there are reasonable and probable grounds to believe that there may be in the building, receptacle or place to be searched anything that may reasonably relate to the order made under section 11 or 12. 1994, c. 11, s. 358.

Power to enter, search and seize

(6) A person named in an order under subsection (4) may, on production of the order, enter any building, receptacle or place specified in the order between 6 a.m. and 9 p.m., search for and seize anything specified in the order, and use as much force as is reasonably necessary for that purpose. 1994, c. 11, s. 358.

Expiration

(7) Every order under subsection (4) shall name the date that it expires, and the date shall be not later than fifteen days after the order is granted. 1994, c. 11, s. 358.

Application

(8) Sections 159 and 160 of the *Provincial Offences Act* apply to searches and seizures under this section with such modifications as the circumstances require. 1994, c. 11, s. 358.

Private residences

(9) For the purpose of subsections (4), (5) and (6),

"building, receptacle or place" does not include a private residence. 1994, c. 11, s. 358.

Non-disclosure

16 (1) Except in accordance with subsection (1.1) or section 17, no person or company shall disclose at any time,

(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. 1994, c. 11, s. 358; 2019, c. 15, Sched. 34, s. 1 (1).

Exceptions

(1.1) A disclosure by a person or company is permitted if,

(a) the disclosure is to the person's or company's counsel; or

(b) the disclosure is to the person's or company's insurer or insurance broker, and the person or company, or his, her or its counsel,

(i) gives written notice of the intended disclosure to a person appointed by the order under section 11 at least 10 days before the date of the intended disclosure,

(ii) includes in that written notice the name and head office address of the insurer or insurance broker and the name of the individual acting on behalf of the insurer or insurance broker to whom the disclosure is intended to be made, as applicable, and

(iii) on making the disclosure, advises the insurer or insurance broker that the insurer or insurance broker is bound by the confidentiality requirements in subsection (2) and obtains a written acknowledgement from the insurer or insurance broker of this advice. 2019, c. 15, Sched. 34, s. 1 (2).

Confidentiality

(2) If the Commission issues an order under section 11 or 12, all reports provided under section 15, all testimony given under section 13 and all documents and other things obtained under section 13 relating to the investigation or examination that is the subject of the order are for the exclusive use of the Commission or of such other regulator as the Commission may specify in the order, and shall not be disclosed or produced to any other person or company or in any other proceeding except in accordance with subsection (1.1) or section 17. 2002, c. 18, Sched. H, s. 7; 2019, c. 15, Sched. 34, s. 1 (3).

Disclosure by Commission

17 (1) 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, 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; or

(c) all or part of a report provided under section 15. 1994, c. 11, s. 358.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 17 (1) of the Act is amended by striking out "the Commission" and substituting "the Tribunal". (See: 2021, c. 8, Sched. 9, s. 40 (17))

Opportunity to object

(2) 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. 1994, c. 11, s. 358.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 17 (2) of the Act is amended by striking out "the Commission" wherever it appears and substituting in each case "the Tribunal". (See: 2021, c. 8, Sched. 9, s. 40 (17))

Order without notice

(2.1) Despite subsection (2), if the Commission considers that it would be in the public interest, it may make an order without notice and without giving an opportunity to be heard authorizing the disclosure of the things described in clauses (1) (a) to (c) to any entity referred to in paragraph 1, 3, 4 or 5 of section 153. 2013, c. 2, Sched. 13, s. 1 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 17 (2.1) of the Act is amended by striking out "the Commission" and substituting "the Tribunal". (See: 2021, c. 8, Sched. 9, s. 40 (17))

Disclosure to police

(3) Without the written consent of the person from whom the testimony was obtained, no order shall be made under subsection (1) or (2.1) 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

Note: On a day to be named by proclamation of the Lieutenant Governor, clause 17 (3) (a) of the Act is repealed and the following substituted: (See: 2019, c. 1, Sched. 4, s. 56 (1))

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

(b) a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction. 1994, c. 11, s. 358; 2013, c. 2, Sched. 13, s. 1 (2).

Terms and conditions

(4) An order under subsection (1) or (2.1) may be subject to terms and conditions imposed by the Commission. 1994, c. 11, s. 358; 2013, c. 2, Sched. 13, s. 1 (3).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 17 (4) of the Act is amended by striking out "the Commission" and substituting "the Tribunal". (See: 2021, c. 8, Sched. 9, s. 40 (17))

Disclosure by court

(5) A court having jurisdiction over a prosecution under the *Provincial Offences Act* initiated by the Commission may compel production to the court of any testimony given or any document or other thing obtained under section 13, and after inspecting the testimony, document or thing and providing all interested parties with an opportunity to be heard, the court may order the release of the testimony, document or thing to the defendant if the court determines that it is relevant to the prosecution, is not protected by privilege and is necessary to enable the defendant to make full answer and defence, but the making of an order under this subsection does not determine whether the testimony, document or thing is admissible in the prosecution. 1994, c. 11, s. 358.

Disclosure in investigation or proceeding

(6) A person appointed to make an investigation or examination under this Act may disclose or produce anything mentioned in subsection (1), but may do so only in connection with,

(a) a proceeding commenced or proposed to be commenced before the Commission or the Director under this Act; or

Note: On a day to be named by proclamation of the Lieutenant Governor, clause 17 (6) (a) of the Act is amended by striking out "before the Commission or the Director". (See: 2021, c. 8, Sched. 9, s. 40 (18))

(b) an examination of a witness, including an examination of a witness under section 13. 2001, c. 23, s. 210; 2016, c. 5, Sched. 26, s. 1.

Disclosure to police

(7) 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

Note: On a day to be named by proclamation of the Lieutenant Governor, clause 17 (7) (a) of the Act is repealed and the following substituted: (See: 2019, c. 1, Sched. 4, s. 56 (2))

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

(b) a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction. 1999, c. 9, s. 196.

Prohibition on use of compelled testimony

18 Testimony given under section 13 shall not be admitted in evidence against the person from whom the testimony was obtained in a prosecution for an offence under section 122 or in any other prosecution governed by the *Provincial Offences Act*. 1994, c. 11, s. 358.

Freeze direction

126 (1) If the Commission considers it expedient for the due administration of Ontario securities law or the regulation of the capital markets in Ontario or expedient to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction, the Commission may,

(a) direct a person or company having on deposit or under its control or for safekeeping any funds, securities or property of any person or company to retain those funds, securities or property;

(b) direct a person or company to refrain from withdrawing any funds, securities or property from another person or company who has them on deposit, under control or for safekeeping; or

(c) direct a person or company to maintain funds, securities or property, and to refrain from disposing of, transferring, dissipating or otherwise dealing with or diminishing the value of those funds, securities or property. 2014, c. 7, Sched. 28, s. 13 (1).

Duration

(1.1) A direction under subsection (1) applies until the Commission in writing revokes the direction or consents to release funds, securities or property from the direction, or until the Superior Court of Justice orders otherwise. 2014, c. 7, Sched. 28, s. 13 (1).

Application

(2) A direction under subsection (1) that names a bank or other financial institution shall apply only to the branches of the bank or other financial institution identified in the direction. 1994, c. 11, s. 375.

Exclusions

(3) A direction under subsection (1) shall not apply to funds, securities or property in a recognized clearing agency or to securities in process of transfer by a transfer agent unless the direction so states. 1994, c. 11, s. 375.

Certificate of pending litigation

(4) The Commission may order that a direction under subsection (1) be certified to a land registrar or mining recorder and that it be registered or recorded against the lands or claims identified in the direction, and on registration or recording of the certificate it shall have the same effect as a certificate of pending litigation. 1994, c. 11, s. 375.

Review by court

(5) As soon as practicable, but not later than 10 days after a direction is issued under subsection (1), the Commission shall serve and file a notice of application in the Superior Court of Justice to continue the direction or for such other order as the court considers appropriate. 2010, c. 26, Sched. 18, s. 32.

Grounds for continuance or other order

(5.1) An order may be made under subsection (5) if the court is satisfied that the order would be reasonable and expedient in the circumstances, having due regard to the public interest and,

(a) the due administration of Ontario securities law or the securities laws of another jurisdiction; or

(b) the regulation of capital markets in Ontario or another jurisdiction. 2014, c. 7, Sched. 28, s. 13 (2).

Notice

(6) A direction under subsection (1) may be made without notice but, in that event, copies of the direction shall be sent forthwith by such means as the Commission may determine to all persons and companies named in the direction. 1994, c. 11, s. 375.

Clarification or revocation

(7) A person or company directly affected by a direction may apply to the Commission for clarification or to have the direction varied or revoked. 1994, c. 11, s. 375.

Appointment of receiver, etc.

129 (1) The Commission may apply to the Superior Court of Justice for an order appointing a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company. 1994, c. 11, s. 375; 2006, c. 19, Sched. C, s. 1 (1).

Grounds

(2) No order shall be made under subsection (1) unless the court is satisfied that,

(a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of or subscribers to the person or company; or

(b) it is appropriate for the due administration of Ontario securities law. 1994, c. 11, s. 375.

Application without notice

(3) The court may make an order under subsection (1) on an application without notice, but the period of appointment shall not exceed fifteen days. 1994, c. 11, s. 375.

Motion to continue order

(4) If an order is made without notice under subsection (3), the Commission may make a motion to the court within fifteen days after the date of the order to continue the order or for the issuance of such other order as the court considers appropriate. 1994, c. 11, s. 375.

Powers of receiver, etc.

(5) A receiver, receiver and manager, trustee or liquidator of the property of a person or company appointed under this section shall be the receiver, receiver and manager, trustee or liquidator of all or any part of the property belonging to the person or company or held by the person or company on behalf of or in trust for any other person or company, and, if so directed by the court, the receiver, receiver and manager, trustee or liquidator has the authority to wind up or manage the business and affairs of the person

or company and has all powers necessary or incidental to that authority. 1994, c. 11, s. 375.

Directors' powers cease

(6) If an order is made appointing a receiver, receiver and manager, trustee or liquidator of the property of a person or company under this section, the powers of the directors of the company that the receiver, receiver and manager, trustee or liquidator is authorized to exercise may not be exercised by the directors until the receiver, receiver and manager, trustee or liquidator is discharged by the court. 1994, c. 11, s. 375.

Fees and expenses

(7) The fees charged and expenses incurred by a receiver, receiver and manager, trustee or liquidator appointed under this section in relation to the exercise of powers pursuant to the appointment shall be in the discretion of the court. 1994, c. 11, s. 375.

Variation or discharge of order

(8) An order made under this section may be varied or discharged by the court on motion. 1994, c. 11, s. 375.

Bruce Douglas Branch and Pal Arthur Levitt *Appellants*

v.

British Columbia Securities Commission *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General for Saskatchewan and the Attorney General for Alberta *Interveners*

INDEXED AS: BRITISH COLUMBIA SECURITIES COMMISSION *v.* BRANCH

File No.: 22978.

1994: February 28 and March 1; 1995: April 13.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Fundamental justice — Self-incrimination — Right to silence — Securities commission investigation — Company's officers ordered to testify under oath and to produce documents pursuant to s. 128(1) of Securities Act — Whether s. 128(1) infringes s. 7 of Canadian Charter of Rights and Freedoms — Securities Act, S.B.C. 1985, c. 83, s. 128(1).

Constitutional law — Charter of Rights — Unreasonable search and seizure — Securities commission investigation — Company's officers ordered to produce documents pursuant to s. 128(1) of Securities Act — Whether s. 128(1) infringes s. 8 of Canadian Charter of Rights and Freedoms — Securities Act, S.B.C. 1985, c. 83, s. 128(1).

Bruce Douglas Branch et Pal Arthur Levitt *Appelants*

c.

British Columbia Securities Commission *Intimée*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, le procureur général de la Nouvelle-Écosse, le procureur général du Manitoba, le procureur général de la Colombie-Britannique, le procureur général de la Saskatchewan et le procureur général de l'Alberta *Intervenants*

RÉPERTORIÉ: BRITISH COLUMBIA SECURITIES COMMISSION *c.* BRANCH

N° du greffe: 22978.

1994: 28 février et 1er mars; 1995: 13 avril.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Justice fondamentale — Auto-incrimination — Droit de garder le silence — Enquête par une commission des valeurs mobilières — Dirigeants d'une société enjoints de témoigner sous serment et de produire des documents conformément à l'art. 128(1) de la Securities Act — L'article 128(1) porte-t-il atteinte à l'art. 7 de la Charte canadienne des droits et libertés? — Securities Act, S.B.C. 1985, ch. 83, art. 128(1).

Droit constitutionnel — Charte des droits — Fouilles, perquisitions et saisies abusives — Enquête par une commission des valeurs mobilières — Dirigeants d'une société enjoints de produire des documents conformément à l'art. 128(1) de la Securities Act — L'article 128(1) porte-t-il atteinte à l'art. 8 de la Charte canadienne des droits et libertés? — Securities Act, S.B.C. 1985, ch. 83, art. 128(1).

The British Columbia Securities Commission commenced an investigation into a company following a report by the company's auditors disclosing questionable expenditures. The appellants, two of the officers of the company, were served with summonses compelling their attendance for examination under oath and requiring them to produce all information and records in their possession relating to the company. The summonses were issued pursuant to s. 128(1) of the province's *Securities Act*. When the appellants failed to appear, the Commission petitioned the British Columbia Supreme Court for an order committing the appellants in contempt. In response, they applied for a declaration to the effect that s. 128(1) violates ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*. The application was dismissed. The superior court judge rejected the appellants' claims in respect of privilege against self-incrimination and of a right to remain silent under s. 7. He also concluded that the seizure authorized by s. 128(1)(c) of the *Securities Act* is not "unreasonable" within the meaning of s. 8. The appellants were ordered to comply with the summonses, or, in default, to show cause or be held in contempt. An appeal to the British Columbia Court of Appeal was dismissed.

Held: The appeal should be dismissed.

(1) *Section 7*

Per Lamer C.J. and La Forest, Sopinka, Cory, McLachlin, Iacobucci and Major JJ.: In *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, it was decided that the principle against self-incrimination, one of the principles of fundamental justice protected by s. 7 of the *Charter*, requires that persons compelled to testify be provided with subsequent "derivative use immunity" in addition to the "use immunity" guaranteed by s. 13 of the *Charter*. The accused has the evidentiary burden of showing a plausible connection between the compelled testimony and the evidence sought to be adduced. Once this is established, in order to have the evidence admitted the Crown will have to satisfy the court on a balance of probabilities that the authorities would have discovered the impugned derivative evidence absent the compelled testimony. In order to trigger the derivative use immunity, the witness may only claim such protection in a subsequent proceeding where he is an accused subject to penal sanctions or in any proceeding which engages s. 7.

La British Columbia Securities Commission a ouvert une enquête sur une société à la suite d'un rapport des vérificateurs de cette dernière faisant état de dépenses discutables. Les appelants, deux dirigeants de la société, se sont vu signifier des assignations les enjoignant de comparaître pour subir un interrogatoire sous serment, et de produire tous les renseignements et dossiers qui étaient en leur possession et qui concernaient la société en cause. Ces assignations ont été délivrées conformément au par. 128(1) de la *Securities Act* de la province. À la suite de l'omission des appelants de comparaître, la Commission a, par voie de requête, demandé à la Cour suprême de la Colombie-Britannique de rendre une ordonnance condamnant les appelants pour outrage. Ces derniers ont réagi en demandant un jugement déclarant que le par. 128(1) violait les art. 7 et 8 de la *Charte canadienne des droits et libertés*. Cette demande a été rejetée. Le juge de cour supérieure a rejeté les revendications des appelants relatives au privilège de ne pas s'incriminer et à un droit de garder le silence en vertu de l'art. 7. Il a aussi conclu que la saisie autorisée par l'al. 128(1)c) de la *Securities Act* n'est pas «abusive» au sens de l'art. 8. Les appelants se sont vu ordonner de se conformer aux assignations ou, à défaut, d'exposer les raisons de leur refus, sinon ils seraient déclarés coupables d'outrage. Un appel interjeté devant la Cour d'appel de la Colombie-Britannique a été rejeté.

Arrêt: Le pourvoi est rejeté.

(1) *L'article 7*

Le juge en chef Lamer et les juges La Forest, Sopinka, Cory, McLachlin, Iacobucci et Major: Dans l'arrêt *R. c. S. (R.J.)*, [1995] 1 R.C.S. 451, on a statué que le principe interdisant l'auto-incrimination, l'un des principes de justice fondamentale garanti par l'art. 7 de la *Charte*, exige que les personnes contraintes à témoigner bénéficient d'une «immunité contre l'utilisation de la preuve dérivée», qui vient s'ajouter à «l'immunité contre l'utilisation de la preuve» reconnue à l'art. 13 de la *Charte*. L'accusé a la charge de démontrer l'existence plausible d'un lien entre le témoignage forcé et les éléments de preuve que l'on cherche à présenter. Une fois cela établi, le ministère public devra, pour que ces éléments de preuve soient admis, convaincre le tribunal, selon la prépondérance des probabilités, que les autorités auraient, en l'absence du témoignage forcé, découvert la preuve dérivée que l'on conteste. Pour que l'immunité contre l'utilisation de la preuve dérivée s'applique, le témoin ne peut revendiquer cette protection que dans des procédures ultérieures où il est un accusé passible de sanctions pénales ou dans toutes procédures qui déclenchent l'application de l'art. 7.

In *S. (R.J.)*, it was also decided that courts could, in certain circumstances, grant exemptions from compulsion to testify. The crucial question is whether the predominant purpose for seeking the evidence is to obtain incriminating evidence against the person compelled to testify or rather some legitimate public purpose. To qualify as a valid public purpose, compelled testimony in a criminal prosecution or prosecution under a provincial statute must be for the purpose of obtaining evidence in furtherance of that prosecution. It would be rare indeed that the evidence sought cannot be shown to have some relevance other than to incriminate the witness. If it is established that the predominant purpose is not to obtain the relevant evidence for the purpose of the proceeding, but rather to incriminate the witness, the party seeking to compel the witness must justify the potential prejudice to the right of the witness against self-incrimination. If it is shown that the only potential prejudice is the possible subsequent derivative use of the testimony, then the compulsion to testify will occasion no prejudice for that witness since he will be protected against such use. If the witness can show any other significant prejudice that may arise from the testimony such that his right to a fair trial will be jeopardized, then the witness should not be compellable. The purpose of calling a particular witness will not be readily apparent and such purpose must be inferred in many cases from the overall effect of the evidence proposed to be called. If the overall effect is that it is of slight importance to the proceeding in which it is compelled but of great importance in a subsequent proceeding against the witness in which the witness is incriminated, then an inference may be drawn as to the real purpose of the compelled evidence. The issue of compellability may arise at the time when the witness is called to testify (subpoena stage) and at a subsequent penal proceeding against the witness (trial stage). The burden of proof with respect to the predominant purpose of the compelled testimony will be on the witness who asserts that it is not sought for a legitimate purpose. If this is established, the witness should not be compelled unless the party seeking to compel the witness justifies the compulsion.

The liberty interest under s. 7 of the *Charter* is engaged at the point of testimonial compulsion. Once it is engaged, the question is whether there has been a deprivation of this interest in accordance with the principles

Dans l'arrêt *S. (R.J.)*, on a également statué que les tribunaux pouvaient, dans certaines circonstances, exempter une personne de l'obligation de témoigner. La question cruciale est de savoir si la demande de témoignage a pour objet prédominant d'obtenir des éléments de preuve incriminants contre la personne contrainte à témoigner, ou si elle vise plutôt la réalisation d'une fin publique légitime. Pour répondre à une fin publique valide, le témoignage forcé, au cours de poursuites criminelles ou de poursuites intentées en vertu d'une loi provinciale, doit viser à obtenir une preuve utile à ces poursuites. Il est vraiment rare qu'il soit impossible d'établir que le témoignage recherché est pertinent à d'autres fins que d'incriminer le témoin. S'il est établi que l'objet prédominant est non pas l'obtention d'éléments de preuve pertinents aux fins des poursuites en cause, mais plutôt l'incrimination du témoin, la partie qui cherche à contraindre la personne à témoigner doit justifier le préjudice qui risque d'être causé au droit du témoin de ne pas s'incriminer. S'il est établi que le seul préjudice qui risque d'être causé est la possibilité que les éléments de preuve dérivée, obtenus grâce au témoignage, soient utilisés ultérieurement, alors la contrainte à témoigner ne causera aucun préjudice au témoin en question étant donné qu'il sera protégé contre une telle utilisation. Le témoin qui peut établir que son témoignage risque de causer un autre préjudice important susceptible de compromettre son droit à un procès équitable ne devrait pas être contraignable. Le but poursuivi en assignant une personne particulière à témoigner ne sera pas si évident et, dans bien des cas, il doit s'inférer de l'effet global du témoignage que l'on se propose de recueillir. Si, de par son effet global, le témoignage a peu d'importance aux fins des poursuites au cours desquelles la personne est contrainte à témoigner, mais revêt une grande importance dans des procédures ultérieures engagées contre le témoin qui est alors incriminé, une déduction peut alors être faite quant à l'objet réel du témoignage forcé. La question de la contraignabilité peut se présenter au moment où la personne est assignée à témoigner (l'étape de l'assignation) et au cours de poursuites pénales ultérieures intentées contre le témoin (l'étape du procès). C'est le témoin qui soutient que le témoignage forcé ne vise pas une fin légitime qui doit faire la preuve de l'objet prédominant de ce témoignage forcé. S'il fait cette preuve, le témoin ne devrait pas être contraint, sauf si la partie qui veut le contraindre justifie cette contrainte.

Le droit à la liberté garanti par l'art. 7 de la *Charte* s'applique au moment où est exercée la contrainte à témoigner. Dès qu'il s'applique, il s'agit alors de déterminer s'il y a eu privation de ce droit qui soit conforme

of fundamental justice. Here, s. 128(1) of the *Securities Act* does not violate s. 7. The purpose of the Act, which is to protect our economy and the public from unscrupulous trading practices, justifies inquiries of limited scope. An inquiry such as the one at hand legitimately compels testimony as the Act is concerned with the furtherance of a goal which is of substantial public importance — namely, obtaining evidence to regulate the securities industry. The inquiry is of the type permitted by our law as it serves an obvious social utility. The predominant purpose of the Commission's inquiry in this case is to obtain the relevant evidence for the purpose of the instant proceedings, and not to incriminate the appellants, and there is nothing in the record at this stage to suggest otherwise. The proposed testimony thus falls to be governed by the general rule applicable under the *Charter*, pursuant to which a witness is compelled to testify, yet receives evidentiary immunity in return. The appellants are also entitled to claim the protection of subsequent derivative use immunity. This is a protection that is afforded to witnesses notwithstanding that the source of their evidence may derive from corporate activity.

Documentary compulsion may also entail jeopardy in so far as it engages the appellants' liberty interest under s. 7. The appellants, as representatives of the corporation, may receive the benefit of that protection in so far as they are personally implicated by their own evidence. At the stage of compellability, like the oral testimony, the documents are compellable subject to a possible claim against their subsequent use under the "but for" test. That test is not applicable to determining their compellability. The documents are properly compellable unless they are excluded on the basis of the principles applicable to testimonial compulsion. The rationale both at common law and under s. 7 for these principles is that in certain circumstances compellability would impinge on the right to silence. This right, however, attaches to communications that are brought into existence by the exercise of compulsion by the state and not to documents that contain communications made before such compulsion and independently thereof. If, as in this case, the person subpoenaed is compelled to testify, then all communications including those arising from the production of documents will be compelled. If not compelled, the communications arising from production of documents would also not be admissible. The communicative aspects of the production of documents may, however, be of significance at the derivative evidence

aux principes de justice fondamentale. En l'espèce, le par. 128(1) de la *Securities Act* ne viole pas l'art. 7. L'objet de la Loi, qui est de protéger notre économie et le public contre les pratiques commerciales malhonnêtes, justifie la tenue d'enquêtes d'une portée restreinte. Une enquête du genre de celle dont il est question en l'espèce contraint légitimement une personne à témoigner puisque la Loi vise la réalisation d'un objectif d'une grande importance pour le public, à savoir, recueillir des témoignages pour réglementer le secteur des valeurs mobilières. L'enquête est du genre autorisé par notre droit puisqu'elle a une utilité sociale évidente. En l'espèce, l'enquête de la Commission a pour objet prédominant de recueillir le témoignage pertinent aux fins des présentes procédures et non dans le but d'incriminer les appelants, et à ce stade, il n'y a rien dans le dossier qui porte à croire autre chose. En conséquence, le témoignage proposé se trouve régi par la règle générale applicable en vertu de la *Charte*, selon laquelle un témoin est contraint à témoigner et bénéficie en retour d'une immunité relative à la preuve. Les appelants ont également le droit de réclamer l'immunité contre l'utilisation de la preuve dérivée. Il s'agit là d'une protection accordée aux témoins même s'il se peut que leur témoignage tire sa source des activités d'une personne morale.

La contrainte à produire des documents peut aussi comporter un danger dans la mesure où elle met en cause le droit à la liberté garanti aux appelants par l'art. 7. Les appelants, en tant que représentants de la société en cause, peuvent bénéficier de cette protection dans la mesure où ils sont personnellement compromis par leur propre témoignage. Lorsqu'il y a contraignabilité, la production des documents, à l'instar du témoignage oral, peut être forcée sous réserve d'un recours possible contre leur utilisation ultérieure en vertu du critère du «n'eût été». Ce critère ne saurait s'appliquer pour déterminer si on peut en contraindre la production. On peut contraindre régulièrement la production des documents, sauf s'ils sont écartés en application des principes applicables à la contrainte à témoigner. La raison d'être de ces principes, tant en common law qu'en vertu de l'art. 7, est que, dans certains cas, la contraignabilité empiéterait sur le droit de garder le silence. Cependant, ce droit se rattache aux communications faites par suite de la contrainte exercée par l'État, mais non aux documents qui renferment des communications faites avant cette contrainte et de façon indépendante de celle-ci. Si, comme en l'espèce, la personne assignée est contrainte à témoigner, alors elle sera contrainte relativement à toutes les communications, y compris celles liées à la production de documents. Si elle ne l'est pas, les com-

stage at which the witness seeks to exclude all evidence which would not have been obtained but for the compelled testimony.

Per Gonthier J.: The reasons of Sopinka and Iacobucci JJ., and the additional comments of L'Heureux-Dubé J. relating to evidence in a regulatory context, were agreed with.

Per L'Heureux-Dubé J.: As expressed in the concurring reasons given in *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, the possibility of imprisonment flowing from a failure to testify is sufficient to trigger s. 7 protection at the subpoena stage. Where the witness can demonstrate at that stage that, under the circumstances, it would be fundamentally unfair to require that he testify, then the principles of fundamental justice under s. 7 of the *Charter* require that he not be compellable. Where, however, there is no possibility that the individual may be deprived of liberty at the subsequent proceeding, he cannot claim that it would be fundamentally unfair to compel his testimony. As a corollary, the less proximate the possibility of a deprivation of liberty in the subsequent proceeding, the less likely it is that the fact of testimonial compulsion will, itself, be fundamentally unfair. A subpoena will only be quashed at the subpoena stage in the clearest of cases.

It is generally a satisfactory proxy for the existence of fundamentally unfair conduct on the part of the Crown, in violation of s. 7, to inquire into whether the predominant purpose for seeking the evidence is to obtain incriminating evidence against the witness, rather than to further some legitimate public purpose. The regulatory context of the present appeal, however, requires that this test be applied with somewhat greater deference than might otherwise be the case. Conduct which may be fundamentally unfair in a traditional criminal context may not be so in the context of administrative proceedings in a highly complex and tightly regulated field, such as the securities industry. Activity in that industry is of immense economic value to society generally and, in order to safeguard the public welfare and trust, securities market participants, who are engaged in this licensed activity of their own volition, must conform with the extensive requirements set out by the provincial securities commissions and should expect to be questioned occasionally by regulators as to their market activities. Further, in view of the complex nature of the

munications liées à la production de documents ne seront pas admissibles non plus. Les aspects de communication que comporte la production de documents peuvent cependant être importants à l'étape de l'examen de la preuve dérivée au cours de laquelle le témoin cherche à faire écarter tous les éléments de preuve qui n'auraient pas été obtenus n'eût été le témoignage forcé.

Le juge Gonthier: Les motifs des juges Sopinka et Iacobucci ainsi que les commentaires additionnels du juge L'Heureux-Dubé, concernant la preuve dans un contexte de réglementation, sont acceptés.

Le juge L'Heureux-Dubé: Tel qu'exprimé dans les motifs concordants rédigés dans l'arrêt *R. c. S. (R.J.)*, [1995] 1 R.C.S. 451, le risque d'emprisonnement découlant de l'omission de témoigner suffit à déclencher l'application de la garantie de l'art. 7 de la *Charte* à l'étape du subpoena. Si le témoin peut, à cette étape, démontrer qu'il serait, en l'occurrence, fondamentalement inéquitable de l'obliger à témoigner, alors, selon les principes de justice fondamentale visés à l'art. 7, il ne doit pas être contraint de le faire. S'il n'y a aucun risque que la personne subisse une atteinte à sa liberté au cours des procédures subséquentes, elle ne peut soutenir qu'il serait fondamentalement inéquitable de la contraindre à témoigner. Comme corollaire, moins le risque d'atteinte à la liberté dans les procédures subséquentes est immédiat, moins il est probable que la contrainte à témoigner sera fondamentalement inéquitable en soi. Ce n'est que dans les cas les plus manifestes qu'il y aura annulation du subpoena à l'étape du subpoena.

Un moyen satisfaisant d'établir que le ministère public s'est conduit d'une façon fondamentalement inéquitable, en violation de l'art. 7, consiste habituellement à vérifier si la demande de témoignage a pour objet prédominant d'obtenir des éléments de preuve incriminants contre le témoin, ou si elle vise plutôt la réalisation d'une fin publique légitime. Cependant, le contexte de réglementation du présent pourvoi exige que ce critère soit appliqué avec davantage de retenue qu'il le serait dans un autre contexte. Il se peut qu'une conduite qui peut être fondamentalement inéquitable dans le contexte criminel traditionnel ne le soit pas dans le contexte de procédures administratives dans un domaine fort complexe et réglementé comme le secteur des valeurs mobilières. L'activité dans ce secteur a une valeur économique considérable pour l'ensemble de la société et, dans le but d'assurer le bien-être et la confiance du public, les participants au marché des valeurs mobilières, qui s'adonnent de leur propre gré à cette activité requérant un permis, doivent respecter le vaste ensemble de règlements et d'exigences établis par les commis-

securities industry, the investigatory powers in s. 128(1) are the primary vehicle, and often the only tool, for the effective investigation and deterrence of trading practices contrary to the public interest. Finally, consideration must be given to the other *Charter* rights at stake. It would be ironic to conclude that a proceeding involving testimonial compulsion is contrary to the principles of fundamental justice if the only equally effective alternative, reasonably available to the state to pursue a pressing and substantial objective, would constitute a far more dramatic intrusion into individual rights. Here, notwithstanding that one of the primary purposes of an investigation under s. 128(1) is to engage in a form of civil discovery of the witness as well as of the company to illuminate or investigate irregularities, the appellants have not demonstrated that, in the present context and under the circumstances, it would violate their s. 7 rights to be compelled to testify at the Commission's inquiry. Courts must differentiate between unlicensed fishing expeditions that are intended to unearth and prosecute criminal conduct, and actions undertaken by a regulatory agency, legitimately within its powers and jurisdiction and in furtherance of important public purposes that cannot realistically be achieved in a less intrusive manner. Whereas the former may run afoul of s. 7, the latter do not.

A person compelled to testify in a s. 128 inquiry shall enjoy, under s. 13 of the *Charter*, full testimonial immunity in any subsequent proceedings undertaken by the state. Even if the "but for" standard is an appropriate level of s. 7 protection in a purely criminal context, it may not be equally suited for use in predominantly regulatory contexts. Many of the interests underlying the principle against self-incrimination are simply not engaged as dramatically in situations in which an individual voluntarily participates, for his own profit, in a licensed activity, the effective regulation of which is essential to pressing and substantial societal interests. The existence of derivative evidence immunity could significantly undermine the Commission's ability to administer and enforce securities regulations effectively. Without the benefit of a closer examination of the specific contexts in which imprisonment may arise as a

sions provinciales des valeurs mobilières et devraient s'attendre à être interrogés à l'occasion par un organisme de réglementation relativement à leurs activités sur le marché. En outre, compte tenu de la nature complexe du secteur des valeurs mobilières, les pouvoirs d'enquête visés au par. 128(1) constituent le principal moyen efficace, et souvent le seul, d'enquêter et d'avoir un effet de dissuasion sur les opérations sur valeurs mobilières contraires à l'intérêt public. Enfin, il faut tenir compte des autres droits garantis par la *Charte* qui sont en jeu. Il serait ironique de conclure qu'une procédure touchant la contrainte à témoigner est contraire aux principes de justice fondamentale si la seule autre solution tout aussi efficace, à laquelle l'État pourrait raisonnablement recourir dans la poursuite d'un objectif réel et urgent, constituerait une atteinte beaucoup plus spectaculaire aux droits de particuliers. En l'espèce, nonobstant le fait que l'un des principaux objectifs d'une enquête fondée sur le par. 128(1) soit de procéder à une forme d'interrogatoire civil préalable du témoin et de la société dans le but d'obtenir des éclaircissements ou d'enquêter sur des irrégularités, les appelants n'ont pas démontré que, dans le présent contexte et les présentes circonstances, il serait contraire aux droits qui leur sont garantis par l'art. 7 de les contraindre à témoigner à l'enquête de la Commission. Les tribunaux doivent différencier les expéditions de pêche non autorisées, qui visent à découvrir une conduite criminelle et à intenter des poursuites y reliées, des mesures que prend un organisme de réglementation, à l'intérieur de sa sphère de compétence légitime, dans le but de réaliser d'importants objectifs d'intérêt public qui ne peuvent, de façon réaliste, l'être d'une manière moins envahissante. Alors que, dans le premier cas, il risque d'y avoir violation de l'art. 7, dans le second, ce risque n'existe pas.

Une personne contrainte à témoigner à une enquête fondée sur l'art. 128 doit, en vertu de l'art. 13 de la *Charte*, jouir d'une immunité testimoniale complète dans toutes procédures subséquentes engagées par l'État. Même si le critère du «n'eût été» offre une protection appropriée, en vertu de l'art. 7, dans un contexte purement criminel, il se peut qu'il ne convienne pas également aux contextes surtout de nature réglementaire. Nombre d'intérêts sous-jacents au principe interdisant l'auto-incrimination n'entrent tout simplement pas en jeu de façon aussi spectaculaire dans les cas où une personne participe de son propre gré et pour son propre profit, à une activité assujettie à l'obtention de permis, dont la réglementation efficace est essentielle aux intérêts réels et urgents de la société. L'existence d'une immunité contre l'utilisation de la preuve dérivée pourrait miner sensiblement la capacité de la Commission

possible eventual consequence under the *Securities Act*, it is inappropriate for this Court, at the subpoena stage, to define the exact parameters of appropriate derivative evidence immunity to come into effect at the trial stage. Although Sopinka and Iacobucci JJ. recognize some derivative evidence immunity at the trial stage, their reasons are taken to leave open the possibility that this protection may vary according to context.

As a practical matter, particularly in the regulatory context, authorities often seek a substantial fine rather than imprisonment upon conviction, notwithstanding that the legislation provides for the possibility of imprisonment. In such cases, agreement between all parties and the trial judge at the outset of the trial proceedings that imprisonment will not be sought as a sanction upon conviction will negate the need for a s. 7-based derivative evidence immunity, since the individual accused will not face the possibility of a deprivation of liberty.

The compulsion to produce pre-existing documents in s. 128(1)(c) does not violate s. 7 if it is found that the person subpoenaed is compellable to testify. The compelled production of pre-existing documents does not engage self-incriminatory concerns since they have not been generated subject to state compulsion. There is thus nothing fundamentally unfair in requiring the production of such documents and in the possibility that they may subsequently be relied upon by the state in a proceeding against the individual who has been compelled to produce them. The "but for" standard does not apply at the trial stage to pre-existing documents.

(2) *Section 8*

Section 128(1) of the *Securities Act* does not violate s. 8 of the *Charter*. The Act is essentially regulatory legislation designed to protect the public, including the investors, and discourage detrimental forms of commercial behaviour. Persons involved in the securities market, a highly regulated industry, do not have a high expectation of privacy with respect to regulatory needs that have been generally expressed in securities legislation. They know or are deemed to know the rules of the game. The effective implementation of securities legislation, which has obvious implications for the nation's

d'administrer efficacement la réglementation sur les valeurs mobilières et de la faire respecter. Sans avoir eu le bénéfice d'une étude plus poussée des contextes spécifiques dans lesquels l'emprisonnement peut représenter une conséquence éventuelle en vertu de la *Securities Act*, il ne convient pas que notre Cour définisse, à l'étape du subpoena, les paramètres exacts de l'immunité contre l'utilisation de la preuve dérivée applicable à l'étape du procès. Bien que les juges Sopinka et Iacobucci reconnaissent une certaine immunité contre l'utilisation de la preuve dérivée à l'étape du procès, leurs motifs sont interprétés comme laissant ouverte la possibilité que cette protection varie dépendant du contexte.

En pratique, particulièrement dans le contexte de la réglementation, les autorités réclament souvent, en cas de déclaration de culpabilité, l'imposition d'une amende considérable plutôt que l'emprisonnement, même si la loi en cause prévoit la possibilité d'un emprisonnement. En pareils cas, si toutes les parties et le juge du procès conviennent, au début du procès, qu'on ne réclamera pas une peine d'emprisonnement en cas de déclaration de culpabilité, il ne sera plus nécessaire d'offrir l'immunité contre l'utilisation de la preuve dérivée en vertu de l'art. 7, puisqu'il n'y aura plus aucun risque de privation de liberté pour l'accusé.

La contrainte à produire des documents préexistants, prévue à l'al. 128(1)c), ne contrevient pas à l'art. 7 si on décide que le témoin assigné est contraignable. La production forcée de documents préexistants ne soulève aucune crainte d'auto-incrimination étant donné qu'ils n'ont pas été constitués sous la contrainte de l'État. Il n'y a donc rien de fondamentalement inéquitable dans le fait d'exiger la production de ces dossiers et dans le risque que ceux-ci soient subséquemment invoqués par l'État dans des procédures engagées contre la personne qui a été contrainte à les produire. Le critère du «n'eût été» ne s'applique pas, à l'étape du procès, aux documents préexistants.

(2) *L'article 8*

Le paragraphe 128(1) de la *Securities Act* ne porte pas atteinte à l'art. 8 de la *Charte*. La Loi est essentiellement un régime de réglementation destiné à protéger le public, y compris les investisseurs, et à décourager les formes préjudiciables de comportement commercial. Les participants au marché des valeurs mobilières, qui est un secteur fortement réglementé, n'ont pas des attentes élevées en matière de vie privée relativement au besoin de réglementation généralement exprimé dans les lois sur les valeurs mobilières. Ils connaissent ou sont réputés connaître les règles du jeu. L'efficacité de la

material prosperity, depends on the willingness of those who choose to engage in the securities trade to comply with the defined standards of conduct. The provisions of the Act are pragmatic sanctions designed to induce such compliance. The Act thus serves an important social purpose and the social utility of such legislation justifies the minimal intrusion that the appellants may face. The demand for the production of documents contained in the summonses is one of the least intrusive of the possible methods which might be employed to obtain documentary evidence. Moreover, documents produced in the course of a business which is regulated have a lesser privacy right attaching to them than do documents that are, strictly speaking, personal. Those who are ordered under s. 128(1) "to produce records and things" can claim only a limited expectation of privacy in respect of business records. Section 128(1) does not unreasonably infringe on this limited expectation of privacy. The *Hunter* criteria were not appropriate in the present context to determine the applicable standard of reasonableness.

Cases Cited

By Sopinka and Iacobucci JJ.

Applied: *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; **distinguished:** *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; **considered:** *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627; **referred to:** *R. v. Hebert*, [1990] 2 S.C.R. 151; *Re Robinson and The Queen* (1986), 28 C.C.C. (3d) 489; *Re Transpacific Tours Ltd. and Director of Investigation & Research* (1985), 25 D.L.R. (4th) 202; *Haywood Securities Inc. v. Inter-Tech Resource Group Inc.* (1985), 24 D.L.R. (4th) 724; *Bishop v. College of Physicians & Surgeons of British Columbia* (1985), 22 D.L.R. (4th) 185; *College of Physicians & Surgeons of British Columbia v. Bishop* (1989), 56 D.L.R. (4th) 164; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *R. v. Amway Corp.*, [1989] 1 S.C.R. 21; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Collins*, [1987] 1 S.C.R. 265; *Gregory & Co. v. Quebec Securities Commission*, [1961] S.C.R. 584; *R. v. Borden*, [1994] 3 S.C.R. 145; *R. v. Kokesch*, [1990] 3 S.C.R. 3; *R. v. Wiley*, [1993] 3 S.C.R. 263; *R. v. Primeau*, [1995] 2 S.C.R. 60; *R. v. Jobin*, [1995] 2

mise en œuvre des lois en matière de valeurs mobilières, qui a des répercussions évidentes sur la prospérité matérielle de la nation, dépend de la volonté qu'ont les gens qui choisissent d'effectuer des opérations sur ce marché de respecter les normes de conduite établies. Les dispositions de la Loi sont des sanctions pragmatiques destinées à encourager ce respect. La Loi sert donc une fin sociale importante et l'utilité sociale d'une telle mesure législative justifie l'atteinte minimale dont peuvent être victimes les appelants. La demande de production de documents contenue dans les assignations est l'une des méthodes les moins envahissantes auxquelles on puisse recourir pour obtenir une preuve documentaire. De plus, les documents constitués dans le cadre d'une entreprise réglementée sont assortis d'un droit à la vie privée moindre que les documents qui sont strictement personnels. Les personnes qui se voient ordonner, en vertu du par. 128(1), de «produire des dossiers et des objets» ne peuvent faire valoir que des attentes restreintes en matière de vie privée relativement aux dossiers d'entreprise. Le paragraphe 128(1) n'empiète pas de façon abusive sur ces attentes limitées en matière de vie privée. Les critères formulés dans l'arrêt *Hunter* ne sont pas appropriés, dans le présent contexte, pour déterminer la norme du caractère raisonnable applicable.

Jurisprudence

Citée par les juges Sopinka et Iacobucci

Arrêt appliqué: *R. c. S. (R.J.)*, [1995] 1 R.C.S. 451; **distinction d'avec l'arrêt:** *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; **arrêts examinés:** *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425; *R. c. McKinlay Transport Ltd.*, [1990] 1 R.C.S. 627; **arrêts mentionnés:** *R. c. Hebert*, [1990] 2 R.C.S. 151; *Re Robinson and The Queen* (1986), 28 C.C.C. (3d) 489; *Re Transpacific Tours Ltd. and Director of Investigation & Research* (1985), 25 D.L.R. (4th) 202; *Haywood Securities Inc. c. Inter-Tech Resource Group Inc.* (1985), 24 D.L.R. (4th) 724; *Bishop c. College of Physicians & Surgeons of British Columbia* (1985), 22 D.L.R. (4th) 185; *College of Physicians & Surgeons of British Columbia c. Bishop* (1989), 56 D.L.R. (4th) 164; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *R. c. Amway Corp.*, [1989] 1 R.C.S. 21; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *R. c. Collins*, [1987] 1 R.C.S. 265; *Gregory & Co. c. Quebec Securities Commission*, [1961] R.C.S. 584; *R. c. Borden*, [1994] 3 R.C.S. 145; *R. c. Kokesch*, [1990] 3 R.C.S. 3; *R. c. Wiley*, [1993] 3 R.C.S. 263; *R. c. Pri-*

mons issued under s. 128 of the British Columbia *Securities Act*. Appeal dismissed.

Alastair Rees-Thomas, for the appellants.

Mark L. Skwarok, for the respondent.

Michael R. Dambrot, Q.C., and *John S. Tyhurst*, for the intervener the Attorney General of Canada.

Leah Price and *Michel Hélie*, for the intervener the Attorney General for Ontario.

Jacques Gauvin and *Gilles Laporte*, for the intervener the Attorney General of Quebec.

Louise Walsh Poirier, for the intervener the Attorney General of Nova Scotia.

Marva J. Smith, for the intervener the Attorney General of Manitoba.

George H. Copley, for the intervener the Attorney General of British Columbia.

Graeme G. Mitchell, for the intervener the Attorney General for Saskatchewan.

Richard F. Taylor, for the intervener the Attorney General for Alberta.

The judgment of Lamer C.J. and La Forest, Sopinka, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

1 SOPINKA AND IACOBUCCI JJ. — This appeal raises issues also dealt with in three other appeals heard at the same time: *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, *R. v. Primeau*, [1995] 2 S.C.R. 60, and *R. v. Jobin*, [1995] 2 S.C.R. 78. In particular, it asks whether individuals who might subsequently be charged with a criminal or *quasi*-criminal offence can be compelled to give evidence and produce documents. However, unlike those other appeals, this appeal asks questions about compellability outside of the criminal justice system. In that respect, the importance of this context and consequential issues regarding search and seizure are the focus of this appeal. Before turning to the

ties Act de la Colombie-Britannique. Pourvoi rejeté.

Alastair Rees-Thomas, pour les appelants.

Mark L. Skwarok, pour l'intimée.

Michael R. Dambrot, c.r., et *John S. Tyhurst*, pour l'intervenant le procureur général du Canada.

Leah Price et *Michel Hélie*, pour l'intervenant le procureur général de l'Ontario.

Jacques Gauvin et *Gilles Laporte*, pour l'intervenant le procureur général du Québec.

Louise Walsh Poirier, pour l'intervenant le procureur général de la Nouvelle-Écosse.

Marva J. Smith, pour l'intervenant le procureur général du Manitoba.

George H. Copley, pour l'intervenant le procureur général de la Colombie-Britannique.

Graeme G. Mitchell, pour l'intervenant le procureur général de la Saskatchewan.

Richard F. Taylor, pour l'intervenant le procureur général de l'Alberta.

Version française du jugement du juge en chef Lamer et des juges La Forest, Sopinka, Cory, McLachlin, Iacobucci et Major rendu par

LES JUGES SOPINKA ET IACOBUCCI — La présente affaire soulève des questions également examinées dans trois autres pourvois entendus en même temps: *R. c. S. (R.J.)*, [1995] 1 R.C.S. 451, *R. c. Primeau*, [1995] 2 R.C.S. 60, et *R. c. Jobin*, [1995] 2 R.C.S. 78. Il s'agit plus particulièrement de déterminer si une personne susceptible d'être ultérieurement accusée d'avoir commis une infraction criminelle ou quasi criminelle peut être contrainte à témoigner et à produire des documents. Cependant, à la différence de ces autres pourvois, on s'interroge ici sur la contraignabilité d'une personne en dehors du système de justice criminelle. À cet égard, le présent pourvoi est axé sur l'impor-

facts of this appeal, however, we wish to consider the Court's decision in *S. (R.J.)*.

In *S. (R.J.)*, a majority of this Court held that the principle against self-incrimination, one of the principles of fundamental justice protected by s. 7 of the *Canadian Charter of Rights and Freedoms*, requires that persons compelled to testify be provided with subsequent "derivative use immunity" in addition to the "use immunity" guaranteed by s. 13 of the *Charter*. In addition, a majority of the members of the Court (albeit a different majority) were of the view that courts could, in certain circumstances, grant exemptions from compulsion to testify.

This appeal presents the opportunity to build on the consensus reflected in *S. (R.J.)*, and achieve greater clarity and guidance on the rules to be applied in this area. Specifically, we offer additional comments on derivative use immunity and the circumstances relating to exemptions from compulsion to testify.

With respect to derivative use immunity, it should be remembered that what was discussed by Iacobucci J. on the subject was intended to be comments of general application only and that further refinement will have to await development that can only take place through the consideration of cases as they arise.

At pages 565-66 of *S. (R.J.)*, Iacobucci J. discussed the burden of proof on the accused regarding derivative use immunity. He stated that the general *Charter* rule would operate, namely, the party claiming a *Charter* breach must establish it on a balance of probabilities. Iacobucci J. went on to state that as a practical matter the Crown will likely bear the burden of responding because it is the Crown which can be expected to know how evidence was, or would have been, obtained. This

tance de ce contexte et de questions qui s'ensuivent en matière de fouilles, de perquisitions et de saisies. Avant de passer aux faits de la présente affaire, nous tenons, cependant, à examiner l'arrêt *S. (R.J.)* de notre Cour.

2 Dans l'arrêt *S. (R.J.)*, notre Cour, à la majorité, a statué que le principe interdisant l'auto-incrimination, l'un des principes de justice fondamentale garanti par l'art. 7 de la *Charte canadienne des droits et libertés*, exige que les personnes contraintes à témoigner bénéficient d'une «immunité contre l'utilisation de la preuve dérivée», qui vient s'ajouter à l'«immunité contre l'utilisation de la preuve» reconnue à l'art. 13 de la *Charte*. En outre, notre Cour à la majorité (quoique la composition de cette majorité fut différente) était d'avis que les tribunaux pouvaient, dans certaines circonstances, exempter une personne de l'obligation de témoigner.

3 Le présent pourvoi offre l'occasion de faire fond sur le consensus reflété dans l'arrêt *S. (R.J.)*, et de clarifier davantage les règles applicables en cette matière. Nous ferons, plus particulièrement, des commentaires additionnels sur l'immunité contre l'utilisation de la preuve dérivée et les circonstances relatives à l'exemption de l'obligation de témoigner.

4 En ce qui concerne l'immunité contre l'utilisation de la preuve dérivée, il y a lieu de se rappeler que les commentaires du juge Iacobucci à ce sujet se voulaient d'application générale uniquement, et que toute précision additionnelle devra attendre la suite des événements qui ne pourra survenir que lors de l'examen de cas au fur et à mesure qu'ils se présenteront.

5 Aux pages 565 et 566 de l'arrêt *S. (R.J.)*, le juge Iacobucci a examiné le fardeau de la preuve imposé à l'accusé en matière d'immunité contre l'utilisation de la preuve dérivée. Il a affirmé qu'il y aurait alors application de la règle générale de la *Charte* selon laquelle la partie qui allègue une violation de la *Charte* doit en prouver l'existence selon la prépondérance des probabilités. Le juge Iacobucci a ensuite affirmé qu'en pratique ce fardeau risquera d'être assumé par le ministère public

means that the accused has the evidentiary burden of showing a plausible connection between the compelled testimony and the evidence sought to be adduced. Once this is established, in order to have the evidence admitted, the Crown will have to satisfy the court on a balance of probabilities that the authorities would have discovered the impugned derivative evidence absent the compelled testimony. This is explained in more detail in the reasons of Iacobucci J. in *S. (R.J.)* (at p. 562). Finally, it goes without saying that in order to trigger the derivative use immunity, the former witness may only claim such protection in a subsequent proceeding where he or she is an accused subject to penal sanctions or in any proceeding which engages s. 7 of the *Charter*. We also refer to our further discussion on this matter below.

6 Regarding exemptions from compulsion, Iacobucci J., writing for the majority on "derivative use immunity", recognized that a colourable attempt to compel the evidence of a witness could in certain circumstances be objectionable. In *S. (R.J.)* it was not necessary to determine conclusively when such exemptions were available and there was no agreement on the precise test to be applied. There was, however, sufficient consensus to form the basis for a more precise and acceptable test which can be applied to resolve this appeal and the companion appeals of *Primeau* and *Jobin*.

7 In view of the conclusions reached in *S. (R.J.)*, any test to determine compellability must take into account that if the witness is compelled, he or she will be entitled to claim effective subsequent derivative use immunity with respect to the compelled testimony or other appropriate protection. The common feature of the respective compellability tests proposed in the reasons in *S. (R.J.)* is that the

puisqu'on peut s'attendre à ce que ce soit lui qui sache comment les éléments de preuve ont été ou auraient pu être obtenus. Cela signifie que l'accusé a la charge de démontrer l'existence plausible d'un lien entre le témoignage forcé et les éléments de preuve que l'on cherche à présenter. Une fois cela établi, le ministère public devra, pour que ces éléments de preuve soient admis, convaincre le tribunal, selon la prépondérance des probabilités, que les autorités auraient, en l'absence du témoignage forcé, découvert la preuve dérivée que l'on conteste. Ce point est expliqué plus en détail dans les motifs du juge Iacobucci dans l'arrêt *S. (R.J.)* (à la p. 562). Enfin, il va sans dire que, pour que l'immunité contre l'utilisation de la preuve dérivée s'applique, le premier témoin ne peut revendiquer cette protection que dans des procédures ultérieures où il est un accusé passible de sanctions pénales ou dans toutes procédures qui déclenchent l'application de l'art. 7 de la *Charte*. Nous renvoyons également à l'analyse supplémentaire de cette question que nous faisons plus loin.

En ce qui concerne les exemptions de la contrainte à témoigner, le juge Iacobucci, s'exprimant au nom de la majorité relativement à la question de l'«immunité contre l'utilisation de la preuve dérivée», a reconnu qu'une tentative déguisée de contraindre une personne à témoigner pourrait, dans certaines circonstances, être répréhensible. Dans l'arrêt *S. (R.J.)*, il n'était pas nécessaire de déterminer de façon concluante dans quels cas ces exemptions pouvaient être invoquées et l'on ne s'est pas entendu sur le critère précis à appliquer. Cependant, il y avait un consensus suffisant pour constituer le fondement d'un critère plus précis et acceptable qui peut être appliqué pour résoudre le présent pourvoi et les pourvois connexes *Primeau* et *Jobin*.

Vu les conclusions de l'arrêt *S. (R.J.)*, tout critère visant à déterminer la contraignabilité doit tenir compte du fait que, si la personne est contrainte à témoigner, elle pourra invoquer efficacement l'immunité contre l'utilisation subséquente de la preuve dérivée relativement à ce témoignage forcé, ou une autre garantie appropriée. Dans l'arrêt *S. (R.J.)*, les divers critères proposés en matière

crucial question is whether the predominant purpose for seeking the evidence is to obtain incriminating evidence against the person compelled to testify or rather some legitimate public purpose. This test strikes the appropriate balance between the interests of the state in obtaining the evidence for a valid public purpose on the one hand, and the right to silence of the person compelled to testify on the other.

In applying this test, the Court must first determine the predominant purpose for which the evidence is sought. To qualify as a valid public purpose, compelled testimony in a criminal prosecution or prosecution under a provincial statute must be for the purpose of obtaining evidence in furtherance of that prosecution. In *S. (R.J.)*, Sopinka J. suggested some guidelines for determining whether this is the predominant purpose. In other proceedings, discerning the purpose is more complex. Where evidence is sought for the purpose of an inquiry, we must first look to the statute under which the inquiry is authorized. The fact that the purpose of inquiries under the statute may be for legitimate public purposes is not determinative. The terms of reference may reveal an inadmissible purpose notwithstanding that the statute did not so intend: see *Starr v. Houlden*, [1990] 1 S.C.R. 1366. Indeed, even if the terms of reference authorize an inquiry for a legitimate purpose in some circumstances, the object of compelling a particular witness may still be for the purpose of obtaining incriminating evidence.

It would be rare indeed that the evidence sought cannot be shown to have some relevance other than to incriminate the witness. In a prosecution, such evidence would simply be irrelevant. There may, however, be inquiries of this type and it would be difficult to justify compellability in such a case. In the vast majority of cases, including this case, the evidence has other relevance. In such cases, if it is established that the predominant purpose is not to obtain the relevant evidence for the purpose of the instant proceeding, but rather to

de contraignabilité ont ceci de commun que la question cruciale y est de savoir si la demande de témoignage a pour objet prédominant d'obtenir des éléments de preuve incriminants contre la personne contrainte à témoigner, ou si elle vise une autre fin publique légitime. Ce critère établit l'équilibre approprié, d'une part, entre l'intérêt qu'a l'État à obtenir des éléments de preuve pour une fin publique valide et, d'autre part, le droit de garder le silence que possède la personne contrainte à témoigner.

8 En appliquant ce critère, la Cour doit d'abord déterminer l'objet prédominant pour lequel le témoignage est demandé. Pour répondre à une fin publique valide, le témoignage forcé, au cours de poursuites criminelles ou de poursuites intentées en vertu d'une loi provinciale, doit viser à obtenir une preuve utile à ces poursuites. Dans l'arrêt *S. (R.J.)*, le juge Sopinka a proposé certaines lignes directrices applicables pour déterminer si c'est là l'objet prédominant. Dans d'autres poursuites, discerner l'objet visé s'avère plus complexe. Lorsque le témoignage est demandé aux fins d'une enquête, nous devons d'abord examiner la loi qui autorise la tenue de cette enquête. Le fait que les enquêtes tenues en vertu de la loi puissent viser des fins publiques légitimes n'est pas déterminant. Le mandat peut révéler un objet inacceptable, même si cela n'était pas voulu dans la loi: voir *Starr c. Houlden*, [1990] 1 R.C.S. 1366. En fait, même si le mandat prévoit la tenue d'une enquête à une fin légitime dans certaines circonstances, la contrainte à témoigner exercée contre une personne donnée peut quand même viser à obtenir des éléments de preuve incriminants.

9 Il est vraiment rare qu'il soit impossible d'établir que le témoignage recherché est pertinent à d'autres fins que d'incriminer le témoin. Dans des poursuites, pareil témoignage ne serait tout simplement pas pertinent. Cependant, il peut y avoir des enquêtes de ce genre et il serait difficile de justifier la contraignabilité dans un tel cas. Dans la grande majorité des cas, y compris la présente affaire, le témoignage est pertinent à une autre fin. Dans de tels cas, s'il est établi que l'objet prédominant est non pas l'obtention d'éléments de preuve perti-

incriminate the witness, the party seeking to compel the witness must justify the potential prejudice to the right of the witness against self-incrimination. If it is shown that the only prejudice is the possible subsequent derivative use of the testimony then the compulsion to testify will occasion no prejudice for that witness. The witness will be protected against such use. Further, if the witness can show any other significant prejudice that may arise from the testimony such that his right to a fair trial will be jeopardized, then the witness should not be compellable.

10 We recognize that the purpose of calling a particular witness will not be readily apparent and that such purpose must be inferred in many cases from the overall effect of the evidence proposed to be called. If the overall effect is that it is of slight importance to the proceeding in which it is compelled but of great importance in a subsequent proceeding against the witness in which the witness is incriminated, then an inference may be drawn as to the real purpose of the compelled evidence. If that relationship is reversed then no such inference may be drawn. As stated in *S. (R.J.)*, the issue of compellability may arise at the time when the witness is called to testify (the subpoena stage) and at a subsequent penal proceeding against the witness (the trial stage). By reason of the foregoing, the true purpose of the evidence will often not be apparent until the latter stage.

11 As in the case of any breach of *Charter* rights, the burden of establishing a breach is on the party alleging it. In this context, the burden of proof with respect to the predominant purpose of the compelled testimony will be on the witness who asserts that it is not sought for a legitimate purpose. If this is established, the witness should not be compelled unless the party seeking to compel the witness justifies the compulsion as referred to above.

nents aux fins des poursuites en cause, mais plutôt l'incrimination du témoin, la partie qui cherche à contraindre la personne à témoigner doit justifier le préjudice qui risque d'être causé au droit du témoin de ne pas s'incriminer. S'il est établi que le seul préjudice est la possibilité que les éléments de preuve dérivée, obtenus grâce au témoignage, soient utilisés ultérieurement, alors la contrainte à témoigner ne causera aucun préjudice au témoin en question. Celui-ci sera protégé contre une telle utilisation. De plus, le témoin qui peut établir que son témoignage risque de causer un autre préjudice important susceptible de compromettre son droit à un procès équitable ne devrait pas être contraignable.

Nous reconnaissons que le but poursuivi en assignant une personne particulière à témoigner ne sera pas si évident et que, dans bien des cas, il doit s'inférer de l'effet global du témoignage que l'on se propose de recueillir. Si, de par son effet global, le témoignage a peu d'importance aux fins des poursuites au cours desquelles la personne est contrainte à témoigner, mais revêt une grande importance dans des procédures ultérieures engagées contre le témoin qui est alors incriminé, une déduction peut alors être faite quant à l'objet réel du témoignage forcé. Dans la situation inverse, on ne peut pas faire une telle déduction. Tel que mentionné dans l'arrêt *S. (R.J.)*, la question de la contraignabilité peut se présenter au moment où la personne est assignée à témoigner (l'étape de l'assignation) et au cours de poursuites pénales ultérieures intentées contre le témoin (l'étape du procès). Compte tenu de ce qui précède, l'objet véritable du témoignage ne deviendra souvent évident qu'à l'étape ultérieure.

Comme dans le cas d'une violation de droits garantis par la *Charte*, c'est la partie qui allègue la violation qui a le fardeau d'en établir l'existence. Dans ce contexte, c'est le témoin qui soutient que le témoignage forcé ne vise pas une fin légitime qui doit faire la preuve de l'objet prédominant de ce témoignage forcé. S'il fait cette preuve, le témoin ne devrait pas être contraint, sauf si la partie qui veut le contraindre justifie cette contrainte, tel que mentionné plus haut.

V. Analysis

1. *Section 7 of the Charter*

31 This case is unlike *S. (R.J.)* in two respects. First, it is outside the criminal realm, and is within a regulatory regime. Secondly, since Bruce Branch and Pal Arthur Levitt are directors of Terra Nova, it must be discerned whether corporate officers may raise *Charter* violations.

32 The s. 7 *Charter* challenge against s. 128(1) of the *Securities Act* involves two issues:

(a) testimonial compulsion; and

(b) documentary compulsion.

(a) Testimonial Compulsion

33 In light of the four sets of reasons of this Court in *S. (R.J.)*, *supra*, the trial judge erred as to when the liberty interest is engaged. The liberty interest is engaged at the point of testimonial compulsion. Once it is engaged, the investigation then becomes whether or not there has been a deprivation of this interest in accordance with the principles of fundamental justice.

34 The portion of s. 128(1) of the *Securities Act* which is relevant to testimonial compulsion reads as follows:

128. (1) An investigator appointed under section 126 or 131 has the same power

. . .

(b) to compel witnesses to give evidence on oath or in any other manner. . . .

We must determine the predominant purpose of such an inquiry at which a witness is compelled to attend. In *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, Iacobucci J., writing for the Court referred to the regulatory nature of the *Securities Act* (at p. 589):

It is important to note from the outset that the [*Securities Act*] is regulatory in nature. In fact, it is part of a

V. Analyse

1. *L'article 7 de la Charte*

La présente affaire diffère, à deux égards, du pourvoi *S. (R.J.)*. Premièrement, elle ne relève pas du domaine criminel et se situe à l'intérieur d'un régime de réglementation. Deuxièmement, puisque Bruce Branch et Pal Arthur Levitt sont des administrateurs de Terra Nova, il faut déterminer si les dirigeants d'une société sont habilités à soulever des violations de la *Charte*.

La contestation du par. 128(1) de la *Securities Act*, fondée sur l'art. 7 de la *Charte*, soulève deux questions:

a) la contrainte à témoigner et

b) la contrainte à produire des documents.

a) La contrainte à témoigner

Compte tenu des quatre ensembles de motifs dans l'arrêt de notre Cour *S. (R.J.)*, précité, le juge du procès a commis une erreur quant au moment où le droit à la liberté s'applique. Ce droit s'applique au moment où est exercée la contrainte à témoigner. Dès qu'il s'applique, il s'agit alors de déterminer s'il y a eu privation de ce droit qui soit conforme aux principes de justice fondamentale.

Voici la partie du par. 128(1) de la *Securities Act* qui est pertinente en matière de contrainte à témoigner:

[TRADUCTION] **128.** (1) Un enquêteur nommé en vertu des articles 126 ou 131 est investi du même pouvoir

. . .

b) d'obliger des personnes à témoigner sous serment ou autrement. . .

Il nous faut déterminer l'objet prédominant d'une telle enquête à laquelle un témoin est forcé de comparaître. Dans l'arrêt *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, le juge Iacobucci parle, au nom de notre Cour, de la nature réglementaire de la *Securities Act* (à la p. 589):

Il importe tout d'abord de faire remarquer que la [*Securities Act*] est une loi de nature réglementaire. En

much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system: David L. Johnston, *Canadian Securities Regulation* (1977), at p. 1. [Emphasis added.]

The goal of protecting our economy is a goal of paramount importance. In *Pezim*, the preeminence of securities regulation in our economic system was emphasized (at pp. 593 and 595):

> This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.
>
> . . .
>
> The breadth of the [British Columbia Securities] Commission's expertise and specialisation is reflected in the provisions of the [*Securities Act*]. Section 4 of the Act identifies the Commission as being responsible for the administration of the Act. The Commission also has broad powers with respect to investigations, audits, hearings and orders.
>
> . . .
>
> In reading these powerful provisions, it is clear that it was the legislature's intention to give the Commission a very broad discretion to determine what is in the public's interest. . . .

It must also be noted that the definitions in the [*Securities Act*] exist in a factual or regulatory context. They are part of the larger regulatory framework discussed above. They are not to be analyzed in isolation but rather in their regulatory context.

Clearly, this purpose of the Act justifies inquiries of limited scope. The Act aims to protect the public from unscrupulous trading practices which may result in investors being defrauded. It is designed to ensure that the public may rely on honest traders of good repute able to carry out their business in a manner that does not harm the market or society generally. An inquiry of this kind legitimately compels testimony as the Act is con-

fait, elle s'inscrit dans le cadre d'un régime de réglementation beaucoup plus vaste de l'industrie des valeurs mobilières au Canada. Elle vise avant tout à protéger l'investisseur, mais aussi à assurer le rendement du marché des capitaux et la confiance du public dans le système: David L. Johnston, *Canadian Securities Regulation* (1977), à la p. 1. [Nous soulignons.]

La protection de notre économie constitue un objectif de première importance. Dans l'arrêt *Pezim*, on souligne la prééminence de la réglementation des valeurs mobilières dans notre système économique (aux pp. 593 et 595):

> Ce rôle protecteur, qui est commun à toutes les commissions des valeurs mobilières, donne à ces organismes un caractère particulier qui doit être reconnu lorsqu'on examine la manière dont leurs fonctions sont exercées aux termes des lois qui leur sont applicables.
>
> . . .
>
> La [*Securities Act*] fait bien ressortir l'étendue de l'expertise et de la spécialisation de la [British Columbia Securities Commission]. Son article 4 précise que la Commission est responsable de son application. La Commission possède également de vastes pouvoirs en matière d'enquêtes, de vérifications, d'audiences et d'ordonnances.
>
> . . .
>
> En lisant ces dispositions éloquentes, on se rend compte que la législature avait l'intention de conférer à la Commission un très vaste pouvoir discrétionnaire dans la détermination de ce qui constitue l'intérêt public. . .

On doit aussi se rappeler que les définitions dans la [*Securities Act*] sont présentées dans un contexte de nature factuelle ou réglementaire. Elles font partie de l'ensemble du régime de réglementation qui a déjà été examiné. Elles ne doivent pas être analysées séparément, mais plutôt dans leur contexte de réglementation.

De toute évidence, cet objet de la Loi justifie la 35
tenue d'enquêtes d'une portée restreinte. La Loi vise à protéger le public contre les pratiques commerciales malhonnêtes susceptibles de frauder les investisseurs. Elle vise à assurer que le public puisse se fier à des négociateurs honnêtes de bonne réputation qui sont en mesure d'exploiter leur entreprise d'une façon non préjudiciable au marché ou à l'ensemble de la société. Une enquête de ce

cerned with the furtherance of a goal which is of substantial public importance, namely, obtaining evidence to regulate the securities industry. Often such inquiries result in proceedings which are essentially of a civil nature. The inquiry is of the type permitted by our law as it serves an obvious social utility. Hence, the predominant purpose of the inquiry is to obtain the relevant evidence for the purpose of the instant proceedings, and not to incriminate Branch and Levitt. More specifically, there is nothing in the record at this stage to suggest that the purpose of the summonses in this case is to obtain incriminating evidence against Branch and Levitt. Both orders of the Commission and the summonses are in furtherance of the predominant purpose of the inquiry to which we refer above. The proposed testimony thus falls to be governed by the general rule applicable under the *Charter*, pursuant to which a witness is compelled to testify, yet receives evidentiary immunity in return: *S. (R.J.)*, *supra*.

36 An issue may arise in subsequent proceedings as to who can claim the benefit of derivative use immunity, the individuals or the corporation or both. While this issue might be left to be determined when it arises in such proceedings, in view of the fact that the test for compellability is premised on the availability of subsequent derivative use immunity on the basis of the "but for" concept, we believe it should be addressed.

37 Clearly, the individuals Branch and Levitt are entitled to claim the protection of subsequent derivative use. This is a protection that is afforded to witnesses notwithstanding that the source of their evidence may derive from corporate activity. See *R. v. Amway Corp.*, [1989] 1 S.C.R. 21. On the other hand, the protection depends on the applicability of s. 7 of the *Charter*. This Court has held that s. 7 does not apply to a corporation. See *Thomson Newspapers*, *supra*. It should be remembered that it will be up to the judge hearing

genre contraint légitimement une personne à témoigner puisque la Loi vise la réalisation d'un objectif d'une grande importance pour le public, à savoir, recueillir des témoignages pour réglementer le secteur des valeurs mobilières. Pareilles enquêtes aboutissent souvent à des procédures de nature essentiellement civile. L'enquête est du genre autorisé par notre droit puisqu'elle a une utilité sociale évidente. L'enquête a ainsi pour objet prédominant de recueillir le témoignage pertinent aux fins des présentes procédures et non dans le but d'incriminer Branch et Levitt. Plus précisément, il n'y a rien, à ce stade, dans le dossier qui porte à croire que les assignations en l'espèce ont pour objet d'obtenir des éléments de preuve incriminants contre Branch et Levitt. Les ordonnances de la Commission et les assignations visent la réalisation de l'objet prédominant de l'enquête mentionné plus haut. En conséquence, le témoignage proposé se trouve régi par la règle générale applicable en vertu de la *Charte*, selon laquelle un témoin est contraint à témoigner et bénéficie en retour d'une immunité relative à la preuve: *S. (R.J.)*, précité.

Dans des procédures ultérieures, il peut se poser une question quant à savoir qui peut réclamer l'immunité contre l'utilisation de la preuve dérivée: les particuliers, la personne morale, ou les deux à la fois. Même si on pourrait attendre de trancher cette question seulement lorsqu'elle se présentera dans de telles procédures, nous croyons qu'il y a lieu de l'aborder compte tenu du fait que le critère de contraignabilité repose sur la possibilité de bénéficier de l'immunité contre l'utilisation de la preuve dérivée en fonction du concept du «n'eût été».

De toute évidence, Branch et Levitt ont le droit, en leur qualité personnelle, de réclamer l'immunité contre l'utilisation de la preuve dérivée. Il s'agit là d'une protection accordée aux témoins même s'il se peut que leur témoignage tire sa source des activités d'une personne morale. Voir *R. c. Amway Corp.*, [1989] 1 R.C.S. 21. Par contre, la protection dépend de l'applicabilité de l'art. 7 de la *Charte*. Notre Cour a conclu que l'art. 7 ne s'applique pas à une personne morale. Voir *Thomson Newspapers*, précité. Il y a lieu de se rappeler qu'il appartiendra

the scope of s. 7 protection against self-incrimination in a case where the documents do not pre-exist the statutory compulsion to produce, but rather have been created by statutory compulsion.

2. *Section 8 of the Charter*

49 To reiterate, the issue raised by this portion of the appeal is whether s. 128(1) of the *Securities Act* infringes s. 8 of the *Charter*. The foundation for a s. 8 analysis was laid by Dickson J. (as he then was) in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145. As Dickson J. stated, at pp. 159-60, one of the clear purposes of the *Charter* is the protection of the individual's reasonable expectation of privacy:

> The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement. [Emphasis in original.]

50 Dickson J. set forth several criteria which had to be met in order that a search be reasonable. These criteria were summarized by Wilson J. at p. 499 of *Thomson Newspapers*:

(a) a system of prior authorization, by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the State against those of the individual;

(b) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds, established under oath, to believe that an offence has been committed;

(c) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has

soulevé. Nous remettons également à plus tard l'examen de la pertinence du contexte réglementaire pour déterminer la portée de la garantie de l'art. 7 contre l'auto-incrimination dans un cas où les documents n'existent pas avant la contrainte légale à les produire, mais sont plutôt le fruit de cette contrainte.

2. *L'article 8 de la Charte*

De nouveau, nous précisons que la question soulevée dans cette partie du pourvoi est de savoir si le par. 128(1) de la *Securities Act* porte atteinte à l'art. 8 de la *Charte*. Dans l'arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, le juge Dickson (plus tard Juge en chef) a jeté les bases d'une analyse fondée sur l'art. 8. Comme il l'affirme aux pp. 159 et 160, l'un des objectifs clairs de la *Charte* est la protection des attentes raisonnables que le particulier a en matière de vie privée:

> La garantie de protection contre les fouilles, les perquisitions et les saisies abusives ne vise qu'une attente raisonnable. Cette limitation du droit garanti par l'art. 8, qu'elle soit exprimée sous la forme négative, c'est-à-dire comme une protection contre les fouilles, les perquisitions et les saisies «abusives», ou sous la forme positive comme le droit de s'attendre «raisonnablement» à la protection de la vie privée, indique qu'il faut apprécier si, dans une situation donnée, le droit du public de ne pas être importuné par le gouvernement doit céder le pas au droit du gouvernement de s'immiscer dans la vie privée des particuliers afin de réaliser ses fins et, notamment, d'assurer l'application de la loi. [Souligné dans l'original.]

Le juge Dickson énonce plusieurs critères qu'il faut respecter pour qu'une perquisition soit raisonnable et non abusive. Le juge Wilson les résume, à la p. 499 de l'arrêt *Thomson Newspapers*:

a) une procédure d'autorisation préalable par un arbitre tout à fait neutre et impartial qui est en mesure d'agir de façon judiciaire en conciliant les intérêts de l'État et ceux de l'individu;

b) une exigence que l'arbitre impartial s'assure que la personne qui demande l'autorisation a des motifs raisonnables, établis sous serment, de croire qu'une infraction a été commise;

c) une exigence que l'arbitre impartial s'assure que la personne qui demande l'autorisation a des motifs rai-

reasonable grounds to believe that something which will afford evidence of the particular offence under investigation will be recovered; and

(d) a requirement that the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation.

It is important to note, however, that these criteria were articulated in the context of an appeal concerning the validity of a section which was, in essence, criminal or *quasi*-criminal. It is clear that the context within which the alleged violation takes place must be considered, for it is the context which determines the expectation of privacy that is legitimately expected. The following comments of Wilson J. in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at p. 645, are instructive:

Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful.

Therefore, it is clear that the standard of reasonableness which prevails in the case of a search and seizure made in the course of enforcement in the criminal context will not usually be the appropriate standard for a determination made in an administrative or regulatory context: *per* La Forest J. in *Thomson Newspapers*. The greater the departure from the realm of criminal law, the more flexible will be the approach to the standard of reasonableness. The application of a less strenuous approach to regulatory or administrative searches and seizures is consistent with a purposive approach to the elaboration of s. 8: *Thomson Newspapers*.

While the expectation of privacy with respect to criminal matters seems certain, the standard of reasonableness to be applied in the regulatory and administrative realm is less well defined. Wilson J. found in *McKinlay Transport*, at pp. 645-46, that the point was aptly made by A. D. Reid and A. H. Young in "Administrative Search and Seizure

sonnables de croire que l'on découvrira quelque chose qui fournira une preuve que l'infraction précise faisant l'objet de l'enquête a été commise; et

d) une exigence que les seuls documents dont la saisie est autorisée soient ceux se rapportant strictement à l'infraction faisant l'objet de l'enquête.

51 Cependant, il importe de signaler que ces critères ont été formulés dans le contexte d'un pourvoi concernant la validité d'une disposition essentiellement de nature criminelle ou quasi criminelle. Il est clair qu'il faut examiner le contexte dans lequel aurait eu lieu la violation reprochée, car c'est lui qui détermine les attentes légitimes en matière de vie privée. Les commentaires suivants que le juge Wilson fait, dans l'arrêt *R. c. McKinlay Transport Ltd.*, [1990] 1 R.C.S. 627, à la p. 645, sont intéressants:

Puisque les attentes des gens en matière de protection de leur vie privée varient selon les circonstances et les différents genres de renseignements et de documents exigés, il s'ensuit que la norme d'examen de ce qui est «raisonnable» dans un contexte donné doit être souple si on veut qu'elle soit réaliste et ait du sens.

52 En conséquence, il est clair que la norme du caractère raisonnable applicable dans le cas des fouilles, perquisitions et saisies effectuées dans le cadre de la mise en application du droit criminel ne sera généralement pas appropriée pour déterminer le caractère raisonnable dans un contexte administratif ou réglementaire: le juge La Forest dans l'arrêt *Thomson Newspapers*. Plus l'on s'éloignera du domaine du droit criminel, plus la façon d'aborder la norme du caractère raisonnable sera souple. Le recours à une façon moins rigide d'aborder les fouilles, perquisitions et saisies dans le contexte administratif ou réglementaire est conforme à une interprétation fondée sur l'objet de l'art. 8: *Thomson Newspapers*.

53 Bien que les attentes en matière de vie privée dans le cas d'affaires criminelles semblent certaines, la norme du caractère raisonnable à appliquer dans le contexte administratif ou réglementaire est moins bien définie. Dans l'arrêt *McKinlay Transport*, le juge Wilson conclut, aux pp. 645 et 646, que A. D. Reid et A. H. Young ont bien

Under the Charter" (1985), 10 *Queen's L.J.* 392, at pp. 398-99:

> There are facets of state authority, generically associated with search or seizure, that are so intertwined with the regulated activity as to raise virtually no expectation of privacy whatsoever. . . . Other activities are regulated so routinely that there is virtually no expectation of privacy from state intrusion. Annual filing requirements for banks, corporations, trust companies, loan companies, and the like are inextricably associated with carrying on business under state licence.
>
> There are other situations in which government intrusion cannot be as confidently predicted, yet the range of discretion extended to state officials is so wide as to create in the regulatee an expectation that he may be inspected or requested to provide information at some point in the future. This may arise in the form of an inspection carried out either on a "spot check" basis, or on the strength of suspected non-compliance. The search may be in the form of a request for information that is not prescribed as an annual filing requirement, but is required to be produced on a demand basis. For the most part, there is no requirement that these powers be exercised on belief or suspicion of non-compliance. Rather, they are based on the common sense assumption that the threat of unannounced inspection may be the most effective way to induce compliance. They are based on a view that inspection may be the only means of detecting non-compliance, and that its detection serves an important public purpose.

54 Thus, it is incumbent that an examination of the nature of the securities context be undertaken. As mentioned above, the primary goal of securities legislation is the protection of the investor, but other goals include capital market efficiency and ensuring public confidence in the system. In *Pezim*, *supra*, the Court noted that the British Columbia *Securities Act* is regulatory in nature and stated at p. 589 that it forms part of a much larger

exposé ce point de vue dans leur article intitulé «Administrative Search and Seizure Under the Charter» (1985), 10 *Queen's L.J.* 392, aux pp. 398 et 399:

> [TRADUCTION] Il y a des aspects de l'autorité de l'État, communément associée aux fouilles, aux perquisitions et aux saisies, qui sont si étroitement liés à l'activité réglementée que ceux qui en font l'objet ne s'attendent pratiquement pas au respect de leur vie privée. [. . .] D'autres activités sont réglementées de façon si courante qu'on ne s'attend pratiquement pas à ce qu'elles soient protégées contre l'immixtion de l'État. L'obligation faite aux banques, aux sociétés, aux compagnies de fiducie et aux compagnies de prêt et autres organismes semblables de produire des déclarations annuelles fait inextricablement partie de l'exploitation de l'entreprise en vertu d'un permis de l'État.
>
> Il existe d'autres situations où il n'est pas possible de prédire avec autant d'assurance l'immixtion de l'État et pourtant le pouvoir discrétionnaire accordé aux fonctionnaires est si étendu que ceux qui sont visés par un règlement s'attendent à faire l'objet d'une inspection ou à ce qu'on leur demande de fournir des renseignements à un moment donné. Il peut s'agir d'une inspection qui prend la forme d'un contrôle ponctuel ou qui a lieu parce qu'on soupçonne l'existence d'une violation. La fouille ou perquisition peut revêtir la forme d'une demande de renseignements qui n'ont pas à être fournis annuellement mais qui doivent être produits sur demande. Dans la plupart des cas, rien n'exige que ces pouvoirs soient exercés sur la foi d'une croyance ou d'un soupçon qu'il y a eu violation. Ils se fondent plutôt sur l'hypothèse logique que la menace d'une inspection imprévue peut constituer l'incitation la plus efficace au respect de la loi. Ces pouvoirs se fondent sur l'opinion que l'inspection peut être le seul moyen de découvrir les violations et que cette découverte répond à un objectif public important.

Ainsi, il faut procéder à un examen de la nature du contexte des valeurs mobilières. Comme nous l'avons déjà mentionné, la législation sur les valeurs mobilières vise avant tout à protéger l'investisseur, mais aussi, notamment, à assurer le rendement du marché des capitaux et la confiance du public dans le système. Dans l'arrêt *Pezim*, précité, notre Cour souligne, à la p. 589, que la *Securities Act* de la Colombie-Britannique est une loi de

framework which regulates the securities industry throughout Canada:

> Within this large framework of securities regulation, there are various government administrative agencies which are responsible for the securities legislation within their respective jurisdictions. The [British Columbia Securities] Commission is one such agency. Also within this large framework are self-regulatory organizations which possess the power to admit and discipline members and issuers. The [Vancouver Stock Exchange] falls under this head. Having regard to this rather elaborate framework, it is not surprising that securities regulation is a highly specialized activity which requires specific knowledge and expertise in what have become complex and essential capital and financial markets.

With this in mind, the obvious question becomes what degree of privacy can those subject to investigation under the British Columbia *Securities Act* reasonably expect in respect of activities and matters with which such investigations may be concerned. The relevant provisions of the Act are reproduced below for ease of analysis.

128. (1) An investigator appointed under section 126 or 131 has the same power

(a) to summon and enforce the attendance of witnesses,

(b) to compel witnesses to give evidence on oath or in any other manner, and

(c) to compel witnesses to produce records and things

as the Supreme Court has for the trial of civil actions, and the failure or refusal of a witness

(d) to attend,

(e) to take an oath,

(f) to answer questions, or

(g) to produce the records and things in his custody or possession

makes the witness, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

nature réglementaire et qu'elle s'inscrit dans un régime beaucoup plus général de réglementation du secteur des valeurs mobilières au Canada:

> À l'intérieur de ce grand régime de réglementation des valeurs mobilières, il existe divers organismes gouvernementaux responsables de l'application des lois sur les valeurs mobilières dans leur ressort respectif. C'est la fonction de la [British Columbia Securities] Commission. Il y a également des organismes autonomes qui possèdent le pouvoir d'inscrire des membres et des émetteurs et d'assurer la discipline. C'est le rôle de la [Bourse de Vancouver]. Compte tenu de cette toile de fond plutôt compliquée, il n'est pas étonnant que la réglementation des valeurs mobilières soit une activité fort spécialisée qui exige des connaissances et une expertise particulières du domaine complexe et essentiel des marchés financiers.

Ceci dit, la question évidente est de savoir quel est le degré de vie privée auquel les personnes qui font l'objet d'une enquête en vertu de la *Securities Act* de la Colombie-Britannique peuvent raisonnablement s'attendre relativement aux activités et aux questions sur lesquelles peuvent porter ces enquêtes. Pour faciliter l'analyse, nous reproduisons ci-après les dispositions pertinentes de la Loi: 55

[TRADUCTION] **128.** (1) Un enquêteur nommé en vertu des articles 126 ou 131 est investi du même pouvoir

a) d'assigner des témoins et de les obliger à comparaître,

b) d'obliger des personnes à témoigner sous serment ou autrement, et

c) d'obliger des témoins à produire des dossiers et des objets

que celui qui est conféré à la Cour suprême en matière d'actions civiles, et toute personne qui omet ou refuse

d) de comparaître,

e) de prêter serment,

f) de répondre à des questions, ou

g) de produire les dossiers et objets dont elle a la garde ou la possession

peut, sur requête à la Cour suprême, être condamnée pour outrage au même titre que si elle avait omis de se conformer à une ordonnance ou à un jugement de cette cour.

56 It is clear that in numerous instances a regulatory regime will be needed in order to act as a check on an individual's self-interest. There are surely times when one's own motivations and objective are not of benefit to society on a wider scale. As we have already mentioned, the primary goal of securities regulation is the protection of the investing public. The importance of this goal, as against the reasonable expectation of privacy of securities traders, is what we are considering here. At this intersection, the words of our colleague, La Forest J., in *Thomson Newspapers*, *supra*, at pp. 506-7, ring particularly true:

But the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state. In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restaurateur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or homeowner's compliance with building codes or zoning regulations, can only be tested by inspection, and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often only be assessed by inspection of the employer's files and records.

Il est évident que dans de nombreux cas, un régime de réglementation sera nécessaire pour réprimer les intérêts des particuliers. Il arrive sûrement que la motivation et l'objectif de quelqu'un ne bénéficient pas à l'ensemble de la société. Comme nous l'avons déjà mentionné, la réglementation des valeurs mobilières vise avant tout la protection du public investisseur. Ce qui nous intéresse en l'espèce c'est l'importance de cet objectif par rapport aux attentes raisonnables que les négociateurs de valeurs mobilières ont en matière de vie privée. À ce stade, les propos que notre collègue le juge La Forest tient, aux pp. 506 et 507 de l'arrêt *Thomson Newspapers*, précité, sonnent particulièrement juste:

Mais ce degré de vie privée auquel le citoyen peut raisonnablement s'attendre peut varier considérablement selon les activités qui le mettent en contact avec l'État. Dans une société industrielle moderne, on reconnaît généralement que de nombreuses activités auxquelles peuvent se livrer des particuliers doivent malgré tout être plus ou moins réglementées par l'État pour veiller à ce que la poursuite des intérêts des particuliers soit compatible avec les intérêts de la collectivité dans la réalisation des buts et des aspirations collectifs. Dans de nombreux cas, cette réglementation doit nécessairement comporter l'inspection de lieux ou de documents de nature privée par des fonctionnaires de l'État. Pour vérifier si le restaurateur se conforme à la réglementation sur la santé publique, si l'employeur se conforme à la législation sur les normes et la sécurité du travail et si le promoteur ou le propriétaire se conforme au code du bâtiment ou aux règlements de zonage, il n'existe que l'inspection des lieux, et encore celle qui est faite à l'improviste. De même, il arrive fréquemment que le respect des lois sur le salaire minimum, sur l'équité en matière d'emploi et sur les droits de la personne ne puisse être vérifié que par inspection des dossiers et archives de l'employeur.

57 There are areas of business, for example, that are subject to regulation as a matter of course. Persons who carry on the business of trading in securities realize that the industry is heavily regulated and for good reason. It is a crucial part of our economy that is at stake. In *Pezim*, *supra*, at pp. 592-93, this Court relied on the following position articulated by Fauteux J. in *Gregory & Co. v. Que-*

Par exemple, il y a des secteurs d'activités qui sont bien entendu réglementés. Les personnes qui effectuent des opérations sur valeurs mobilières comprennent que ce secteur est fortement réglementé, et ce, pour de bonnes raisons. C'est un secteur crucial de notre économie qui est en jeu. Aux pages 592 et 593 de l'arrêt *Pezim*, précité, notre Cour se fonde sur le point de vue formulé par le

bec Securities Commission, [1961] S.C.R. 584, at p. 588:

The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.

In our opinion, persons involved in the business of trading securities do not have a high expectation of privacy with respect to regulatory needs that have been generally expressed in securities legislation. It is widely known and accepted that the industry is well regulated. Similarly, it is well known why the industry is so regulated. The appellants in this case were well aware of the dictates of the *Securities Act*. Once again, we rely on the words of La Forest J. at p. 507 of *Thomson Newspapers*:

It follows that there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course. In a society in which the need for effective regulation of certain spheres of private activity is recognized and acted upon, state inspection of premises and documents is a routine and expected feature of participation in such activity. As A. D. Reid and A. H. Young point out in their article "Administrative Search and Seizure Under the Charter" (1985), 10 *Queen's L.J.* 392, at p. 399, there is a "large circle of social and business activity in which there is a very low expectation of privacy", and in which the "issue is not *whether*, but rather when, how much, and under what conditions information must be disclosed to satisfy the state's legitimate requirements".

Hence, the *Securities Act* is essentially a scheme of economic regulation which is designed to discourage detrimental forms of commercial behaviour. The provisions provided by the legislature are pragmatic sanctions designed to induce compli-

juge Fauteux dans l'arrêt *Gregory & Co. c. Quebec Securities Commission*, [1961] R.C.S. 584, à la p. 588:

[TRADUCTION] L'objet prépondérant de la loi est d'assurer que les personnes qui, dans la province, exercent le commerce des valeurs mobilières ou qui agissent comme conseillers en placement, sont honnêtes et de bonne réputation et, ainsi, de protéger le public, dans la province ou ailleurs, contre toute fraude consécutive à certaines activités amorcées dans la province par des personnes qui y exercent ce commerce.

58 À notre avis, les personnes qui effectuent des opérations sur valeurs mobilières n'ont pas des attentes élevées en matière de vie privée relativement au besoin de réglementation généralement exprimé dans les lois sur les valeurs mobilières. Il est généralement reconnu que ce secteur est bien réglementé. De même, on sait bien pourquoi il est ainsi réglementé. Les appelants en l'espèce sont bien au courant des préceptes de la *Securities Act*. De nouveau, nous nous fondons sur les propos tenus par le juge La Forest, à la p. 507 de l'arrêt *Thomson Newspapers*:

Il s'ensuit que les attentes des particuliers ne peuvent être très élevées quant au respect de leur droit à la vie privée dans le cas de lieux ou de documents utilisés ou produits dans l'exercice d'activités qui, bien que légales, sont normalement réglementées par l'État. Dans une société où l'on reconnaît le besoin de réglementer efficacement certains domaines d'activités privées et où l'on y donne suite, l'inspection de lieux et de documents par l'État est un aspect routinier auquel les particuliers s'attendent en exerçant cette activité. Comme A. D. Reid et A. H. Young le soulignent dans leur article «Administrative Search and Seizure Under the Charter» (1985), 10 *Queen's L.J.* 392, à la p. 399, il existe un [TRADUCTION] «large éventail d'activités sociales et commerciales dans lesquelles on s'attend très peu au respect de la vie privée», et où la [TRADUCTION] «question n'est pas de savoir *si* les renseignements doivent être divulgués pour satisfaire aux exigences légitimes de l'État, mais plutôt de déterminer le moment, l'étendue et les conditions de la divulgation».

59 En conséquence, la *Securities Act* est essentiellement un régime de réglementation économique destiné à décourager les formes préjudiciables de comportement commercial. Les dispositions adoptées par la législature sont des sanctions pragma-

ance with the Act. After all, the Act is really aimed at regulating certain facets of the economy and business. This has obvious implications for the nation's material prosperity: *Thomson Newspapers*. As such, the effective implementation of securities legislation depends on the willingness of those who choose to engage in the securities trade to comply with the defined standards of conduct. In this respect, we fully agree with Wilson J.'s comments that "[a]t some point the individual's interest in privacy must give way to the broader state interest in having the information or document disclosed": *Thomson Newspapers*, at p. 495.

60 Of equal importance is the nature of the seizure authorized by the *Securities Act*. The demand for the production of documents contained in the summonses is one of the least intrusive of the possible methods which might be employed to obtain documentary evidence. The importance of this distinction was stressed in *Baron v. Canada*, [1993] 1 S.C.R. 416. At page 443, the Court adopted the following statement from the reasons of Wilson J. *McKinlay Transport*, *supra*, at pp. 649-50:

> In my opinion, s. 231(3) provides the least intrusive means by which effective monitoring of compliance with the *Income Tax Act* can be effected. It involves no invasion of a taxpayer's home or business premises. It simply calls for the production of records which may be relevant to the filing of an income tax return.

61 In *R. v. Borden*, [1994] 3 S.C.R. 145, it was stated that, "[t]he question of whether the seizure was unreasonable can be disposed of simply. In the absence of prior judicial authorization, a search or seizure will be unreasonable unless it is authorized by law, the law itself is reasonable and the manner in which the search was carried out is reasonable" (p. 165). In this case, the outstanding issue is whether the law is reasonable: *R. v. Kokesch*, [1990] 3 S.C.R. 3, *R. v. Collins*, *supra*, and *R. v. Wiley*, [1993] 3 S.C.R. 263. As we have indicated above, the *Securities Act* serves an important social

tiques destinées à inciter au respect de la Loi. Après tout, la Loi vise vraiment à réglementer certaines facettes de l'économie et des affaires. Cela a des répercussions évidentes sur la prospérité matérielle de la nation: *Thomson Newspapers*. Alors, l'efficacité de la mise en œuvre des lois en matière de valeurs mobilières dépend de la volonté qu'ont les gens qui choisissent d'effectuer des opérations sur ce marché de respecter les normes de conduite établies. À cet égard, nous sommes tout à fait d'accord avec le commentaire du juge Wilson, selon lequel «[i]l vient en effet un moment où le droit de l'individu au respect de sa vie privée doit céder le pas à l'intérêt plus grand qu'a l'État à ce que soient communiqués des renseignements ou un document»: *Thomson Newspapers*, à la p. 495.

Tout aussi importante est la nature de la saisie autorisée par la *Securities Act*. La demande de production de documents contenue dans les assignations est l'une des méthodes les moins envahissantes auxquelles on puisse recourir pour obtenir une preuve documentaire. L'importance de cette distinction a été soulignée dans *Baron c. Canada*, [1993] 1 R.C.S. 416. À la page 443, la Cour adopte l'énoncé suivant tiré des motifs du juge Wilson dans *McKinlay Transport*, précité, aux pp. 649 et 650:

> À mon sens, le par. 231(3) prescrit la méthode la moins envahissante pour contrôler efficacement le respect de la *Loi de l'impôt sur le revenu*. Elle n'entraîne pas la visite du domicile ni des locaux commerciaux du contribuable, elle exige simplement la production de documents qui peuvent être utiles au dépôt des déclarations d'impôt sur le revenu.

Dans l'arrêt *R. c. Borden*, [1994] 3 R.C.S. 145, on affirme que «[l]a réponse à la question de savoir si la saisie était abusive est simple. En l'absence d'une autorisation judiciaire préalable, une fouille, perquisition ou saisie sera abusive sauf si elle est permise par la loi, si la loi est elle-même raisonnable et si la façon dont la fouille ou la perquisition a été effectuée est raisonnable» (p. 165). En l'espèce, la question à trancher est de savoir si la loi est raisonnable: *R. c. Kokesch*, [1990] 3 R.C.S. 3, *R. c. Collins*, précité, et *R. c. Wiley*, [1993] 3 R.C.S. 263. Comme nous l'avons déjà

purpose and the social utility of such legislation justifies the minimal intrusion that the appellants may face. The law in question, is therefore, reasonable.

As our final point, we note the distinction between business records and personal papers. We are of the view that in order to determine the relative privacy rights that attach, the type of document at issue is important. Documents produced in the course of a business which is regulated have a lesser privacy right attaching to them than do documents that are, strictly speaking, personal. Again, the words of La Forest J. in *Thomson Newspapers*, at pp. 517-18, are helpful:

> While such records are not devoid of any privacy interest, it is fair to say that they raise much weaker privacy concerns than personal papers. The ultimate justification for a constitutional guarantee of the right to privacy is our belief, consistent with so many of our legal and political traditions, that it is for the individual to determine the manner in which he or she will order his or her private life. . . . But where the possibility of such intervention is confined to business records and documents, the situation is entirely different. These records and documents do not normally contain information about one's lifestyle, intimate relations or political or religious opinions. They do not, in short, deal with those aspects of individual identity which the right of privacy is intended to protect from the overbearing influence of the state. On the contrary, as already mentioned, it is imperative that the state have power to regulate business and the market both for economic reasons and for the protection of the individual against private power. Given this, state demands concerning the activities and internal operations of business have become a regular and predictable part of doing business. Under these circumstances, I cannot see how there would be a very high expectation of privacy in respect of records and documents in which this information is contained.

Therefore, we conclude that those who are ordered under s. 128(1) of the *Securities Act* "to produce records and things" can claim only a limited expectation of privacy in respect of these

indiqué, la *Securities Act* sert une fin sociale importante et l'utilité sociale d'une telle loi justifie l'atteinte minimale dont peuvent être victimes les appelants. La loi en question est donc raisonnable.

62 Enfin, nous soulignons la distinction qui existe entre les dossiers d'entreprise et les documents personnels. Nous sommes d'avis que le genre de document en cause est important pour déterminer les droits relatifs en matière de vie privée qui s'y rattachent. Les documents constitués dans le cadre d'une entreprise réglementée sont assortis d'un droit à la vie privée moindre que les documents qui sont strictement personnels. Encore une fois, les propos que le juge La Forest tient, aux pp. 517 et 518 de l'arrêt *Thomson Newspapers*, sont utiles:

> Bien que ces dossiers ne soient pas dépourvus d'intérêt de nature privée, il est raisonnable de dire qu'ils soulèvent des préoccupations beaucoup moins importantes que les documents personnels. L'argument suprême à l'appui d'une garantie constitutionnelle du droit au respect de la vie privée repose sur notre conviction, conforme à tant de nos traditions juridiques et politiques, qu'il appartient à l'individu de déterminer la façon dont il mènera sa vie privée. [. . .] Mais lorsque la possibilité d'une telle intervention est restreinte aux dossiers et documents de l'entreprise, la situation est tout à fait différente. Ces dossiers et documents ne contiennent habituellement pas de renseignements relatifs au mode de vie d'une personne, à ses relations intimes ou à ses convictions politiques ou religieuses. Bref, ils ne traitent pas de ces aspects de l'identité personnelle que le droit à la vie privée vise à protéger de l'influence envahissante de l'État. Au contraire, comme je l'ai déjà souligné, il est impératif que l'État ait le pouvoir de réglementer le commerce et le marché tant pour des raisons économiques que pour protéger l'individu d'un pouvoir de nature privée. Cela étant dit, les demandes de l'État relatives aux activités et aux opérations internes des entreprises sont maintenant choses courantes et prévisibles en matière commerciale. Compte tenu de ces circonstances, je ne crois pas qu'il puisse y avoir de très grandes attentes en matière de vie privée à l'égard des dossiers et des documents qui contiennent des renseignements de cette nature.

63 En conséquence, nous concluons que les personnes qui se voient ordonner, en vertu du par. 128(1) de la *Securities Act*, de [TRADUCTION] «produire des dossiers et des objets» ne peuvent faire

materials. The operative question becomes whether s. 128(1) unreasonably infringes on this limited expectation of privacy.

64 In our view it does not. We have already mentioned that in a highly regulated industry, such as the securities market, the individual is aware, and accepts, justifiable state intrusions. All those who enter into this market know or are deemed to know the rules of the game. As such, an individual engaging in such activity has a low expectation of privacy in business records. In fact, "there will be instances in which an individual will have no privacy interest or expectation in a particular document or article required by the state to be disclosed": *McKinlay Transport*, *supra*, at pp. 641-42. Under such circumstances, the state authorized inspection of documents under s. 128(1) of the *Securities Act* does not violate s. 8 of the *Charter*.

VI. Disposition

65 We thus answer the constitutional questions as follows:

1. [Does] s. 128(1) of the *Securities Act*, S.B.C. 1985, c. 83, infringe[] ss. 7 or 8 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If the answer is yes, is the limitation one which is reasonable, prescribed by law, and demonstrably justified pursuant to s. 1 of the *Charter*?

Answer: It is not necessary to answer this question.

66 We would dismiss the appeal with costs.

The following are the reasons delivered by

67 L'HEUREUX-DUBÉ J. — I agree with Sopinka and Iacobucci JJ. that this appeal should be dismissed and I would answer the constitutional questions as they have done.

valoir que des attentes restreintes en matière de vie privée relativement à ceux-ci. La question utile est alors de savoir si le par. 128(1) empiète de façon abusive sur ces attentes limitées en matière de vie privée.

Nous sommes d'avis que non. Nous avons déjà mentionné que, dans un secteur fortement réglementé comme le marché des valeurs mobilières, le particulier est conscient qu'une certaine ingérence de l'État est justifiable et accepte cet état de choses. Toutes les personnes qui gagnent ce marché connaissent ou sont réputées connaître les règles du jeu. Alors, une personne qui se livre à une telle activité a peu d'attentes en matière de vie privée pour ce qui est de ses dossiers d'entreprise. En fait, «[i]l arrive sans aucun doute qu'un particulier n'a aucun intérêt ni aucune attente à ce que soit protégé un document ou un article particulier dont l'État réclame la production»: *McKinlay Transport*, précité, à la p. 642. Dans ces circonstances, l'inspection de documents, autorisée par l'État en vertu du par. 128(1) de la *Securities Act*, ne porte pas atteinte à l'art. 8 de la *Charte*.

VI. Dispositif

En conséquence, nous répondons ainsi aux questions constitutionnelles:

1. Le paragraphe 128(1) de la *Securities Act*, S.B.C. 1985, ch. 83, porte-t-il atteinte aux art. 7 ou 8 de la *Charte canadienne des droits et libertés*?

Réponse: Non.

2. Dans l'affirmative, cette atteinte constitue-t-elle une limite raisonnable prescrite par une règle de droit, dont la justification peut se démontrer conformément à l'article premier de la *Charte*?

Réponse: Il n'est pas nécessaire de répondre à cette question.

Nous sommes d'avis de rejeter le pourvoi avec dépens.

Les motifs suivants ont été rendus par

LE JUGE L'HEUREUX-DUBÉ — Je suis d'accord avec les juges Sopinka et Iacobucci pour dire qu'il y a lieu de rejeter le présent pourvoi, et je répon-

The Superintendent of Brokers *Appellant*

v.

Murray Pezim, Lawrence Page and John Ivany *Respondents*

and

The Attorney General of British Columbia, the Ontario Securities Commission, the Alberta Securities Commission and the Securities Dealers Society of Ontario *Interveners*

and between

The British Columbia Securities Commission *Appellant*

v.

Murray Pezim, Lawrence Page and John Ivany *Respondents*

and

The Attorney General of British Columbia, the Ontario Securities Commission, the Alberta Securities Commission and the Securities Dealers Society of Ontario *Interveners*

INDEXED AS: PEZIM *v.* BRITISH COLUMBIA (SUPERINTENDENT OF BROKERS)

File Nos.: 23107, 23113.

1994: February 24; 1994: June 23.

Present: Lamer C.J. and La Forest, Sopinka, Gonthier, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Administrative law — Judicial review — Securities Commission — Commission part of larger regulatory framework — No privative clause and right of appeal —

Superintendent of Brokers *Appelant*

c.

Murray Pezim, Lawrence Page et John Ivany *Intimés*

et

Procureur général de la Colombie-Britannique, Commission des valeurs mobilières de l'Ontario, Alberta Securities Commission et Securities Dealers Society of Ontario *Intervenants*

et entre

British Columbia Securities Commission *Appelante*

c.

Murray Pezim, Lawrence Page et John Ivany *Intimés*

et

Procureur général de la Colombie-Britannique, Commission des valeurs mobilières de l'Ontario, Alberta Securities Commission et Securities Dealers Society of Ontario *Intervenants*

RÉPERTORIÉ: PEZIM *c.* COLOMBIE-BRITANNIQUE (SUPERINTENDENT OF BROKERS)

N^os^ du greffe: 23107, 23113.

1994: 24 février; 1994: 23 juin.

Présents: Le juge en chef Lamer et les juges La Forest, Sopinka, Gonthier, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit administratif — Contrôle judiciaire — Commission des valeurs mobilières — Commission intégrée dans un régime de réglementation — Absence de clause

Appropriate standard of review of Commission's decisions — Whether standard properly applied — Securities Act, S.B.C. 1985, c. 83, ss. 1(1) "material change", "material fact", 14(1), (2), 44(1), 45(2), 49(1), 50(1), 67, 68, 144(1)(a), (b), (c), (d), 149(a), (b), (c), 154.2.

Securities — Securities Commission — Statutory duty on issuers of stock to disclose nature and substance of material change — Prohibition against insider trading — Series of transactions allegedly breaching duty to disclose — Whether transactions breaching duty to disclose and/or prohibition against insider trading.

Respondents were, respectively, the chair of the board, the vice president responsible for internal administration and the president of Prime, a company holding several wholly owned subsidiaries and controlling or managing about 50 public junior resource companies. Respondents were also directors of Calpine, a company controlled and managed by Prime. Both companies were reporting issuers listed on the Vancouver Stock Exchange and subject to the VSE's rules and policies concerning public disclosure of information and pricing of options. Both were subject to the continuing and timely disclosure requirements under s. 67 of the *Securities Act* and to the insider trading provisions under s. 68. The British Columbia Securities Commission administers the Act and ensures compliance with its requirements. It also regulates the VSE.

In the spring of 1990, the Superintendent of Brokers (the Commission's chief administrative officer) instituted proceedings against the respondents in connection with various types of transactions which occurred between July and October, 1989. The Superintendent alleged that the respondents had violated the timely disclosure provisions and insider trading provisions in three categories of impugned transactions: the drilling results and share options transactions, the private placement, and the ALC withdrawal. Respondents were prevented from having information relative to assay results by a "Chinese Wall".

In the first category, Prime or Calpine allegedly failed to disclose all material changes in four transactions in that assay results were publicly disclosed after the company had granted or repriced options. The fifth option transaction, although made after a detailed news release

privative et de droit d'appel — Norme de contrôle appropriée des décisions de la Commission — La norme appropriée a-t-elle été appliquée? — Securities Act, S.B.C. 1985, ch. 83, art. 1(1) «changement important», «fait important», 14(1), (2), 44(1), 45(2), 49(1), 50(1), 67, 68, 144(1)a), b), c), d), 149a), b), c), 154.2.

Valeurs mobilières — Commission des valeurs mobilières — Loi imposant aux émetteurs d'actions de divulguer la nature et la substance d'un changement important — Interdiction des opérations d'initiés — Série d'opérations qui auraient été effectuées en contravention de l'obligation de divulgation — Les opérations violent-elles l'obligation de divulgation ou l'interdiction des opérations d'initiés.

Les intimés étaient respectivement président du conseil d'administration, vice-président responsable de l'administration interne et président de Prime, société détenant plusieurs filiales en propriété exclusive et contrôlant ou gérant quelque 50 petites sociétés minières. Les intimés étaient aussi administrateurs de Calpine, société contrôlée et gérée par Prime. Les deux sociétés étaient des émetteurs assujettis cotés à la Bourse de Vancouver et étaient régies par les règles et politiques de la Bourse en matière de divulgation publique de renseignements et de fixation du prix des options. Elles devaient se conformer aux exigences d'information continue et occasionnelle énoncées à l'art. 67 de la *Securities Act* et aux dispositions sur les opérations d'initiés prévues à l'art. 68. La British Columbia Securities Commission applique la Loi et assure le respect de ses exigences. Elle réglemente aussi la Bourse.

Au printemps 1990, le Superintendent of Brokers (l'administrateur en chef de la Commission) a intenté des poursuites contre les intimés relativement à diverses opérations conclues entre les mois de juillet et d'octobre 1989. Le surintendant soutenait que les intimés avaient contrevenu aux exigences en matière d'information occasionnelle et aux dispositions relatives aux opérations d'initiés en ce qui concerne trois catégories d'opérations attaquées: les résultats de forage et les options d'achat d'actions, le placement privé, et le retrait d'ALC. La mise en place d'une «muraille de Chine» a empêché les intimés de connaître les résultats de forage.

Dans la première catégorie, Prime ou Calpine aurait omis de divulguer tous les changements importants dans quatre opérations en ce sens que les résultats de forage ont été divulgués après que la société eut accordé de nouvelles options d'achat d'actions ou fixé un nouveau prix d'exercice d'options antérieures. Dans le cas de la

of assay results, allegedly violated a pricing formula under the VSE options policy.

The second series of impugned transactions involved the private placement of Calpine units. Calpine allegedly failed to disclose, contrary to s. 67, that Prime was the purchaser and that the sale significantly increased Prime's interest in Calpine. It was also alleged that Calpine had misled the VSE as to the firm brokering the private placement.

The third impugned transaction occurred when a broker disputed its contractual obligation either to find a purchaser or to buy a set number of Prime units on offer following the withdrawal of a firm (ALC) from a deal to purchase them. Prime was alleged to have violated s. 67 by not making timely and adequate disclosure of the dispute following ALC's withdrawal.

The Commission concluded that the respondents contravened s. 67 of the Act by failing to disclose material changes in their affairs. No insider trading contrary to s. 68 of the Act was found, however. The respondents were found responsible for these breaches as senior managers of the companies, were suspended from trading in shares for one year and were required to pay part of the costs incurred by the Commission and Superintendent. Respondents' appeal was limited to whether the Commission had erred as a matter of law in its conclusions on s. 67 (disclosure of material change), s. 144 (power of Commission to make orders) and s. 154.2 (power of Commission to make orders regarding costs) of the Act. The Court of Appeal allowed the appeal and set aside the Commission's orders. The Superintendent and the Commission now appeal from that decision.

These appeals dealt mainly with the appropriate standard of review for an appellate court reviewing a decision of a securities commission which is not protected by a privative clause when there exists a statutory right of appeal and where the case turns on a question of statutory interpretation. The appeals also raised issues of

cinquième opération concernant les options, quoique réalisée après un communiqué détaillé des résultats de titrage, il y aurait eu mauvaise utilisation de la formule de calcul du prix en vertu de la politique de la Bourse relative aux options.

La deuxième série d'opérations attaquées a trait au placement privé des unités de Calpine. Celle-ci aurait omis de divulguer, en contravention de l'art. 67, que Prime était l'acheteur et que la vente allait sensiblement accroître la participation de Prime dans Calpine. On a aussi soutenu que Calpine avait induit la Bourse en erreur relativement à la firme de courtage chargée d'effectuer le placement privé.

La troisième opération attaquée s'est produite lorsqu'un courtier a contesté qu'il était contractuellement tenu de trouver un acheteur ou d'acheter un certain nombre d'unités de Prime sur le marché à la suite du retrait d'une firme (ALC) qui s'était engagée à les acheter. On a soutenu que Prime aurait contrevenu à l'art. 67 en omettant de divulguer en temps opportun et de façon appropriée l'existence d'un différend à la suite du retrait d'ALC.

La Commission a conclu que les intimés avaient enfreint l'art. 67 de la Loi en omettant de divulguer des changements importants survenus dans leurs affaires. Cependant, à son avis, ils n'avaient pas enfreint l'art. 68 de la Loi, qui vise les opérations d'initiés. En tant que cadres supérieurs des sociétés, les intimés ont été jugés responsables de ces contraventions; la Commission leur a interdit de faire des opérations sur des actions pendant une période d'un an et elle leur a ordonné de payer une part des dépens de la Commission et du surintendant. L'appel des intimés devait seulement viser à déterminer si la Commission avait commis une erreur de droit dans ses conclusions relatives à l'art. 67 (divulgation d'un changement important), à l'art. 144 (pouvoir de la Commission de rendre des ordonnances) et à l'art. 154.2 (pouvoir de la Commission de rendre des ordonnances quant aux dépens) de la Loi. La Cour d'appel a accueilli l'appel et annulé les ordonnances de la Commission. Le surintendant et la Commission se pourvoient maintenant contre cette décision.

Les présents pourvois portent principalement sur la norme de contrôle applicable à une cour d'appel siégeant en révision d'une décision d'une commission des valeurs mobilières qui n'est pas protégée par une clause privative, lorsque la loi prévoit un droit d'appel et que le litige vise une question d'interprétation des lois. Les pourvois soulèvent aussi des questions de respect des

compliance with the timely disclosure requirements under applicable securities legislation.

Held: The appeals should be allowed.

The *Securities Act* is part of a much larger framework which regulates the securities industry throughout Canada primarily for the protection of the investor but also for capital market efficiency and ensuring public confidence in the system.

The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. The analysis must consider the tribunal's role or function, whether the agency's decisions are protected by a privative clause, and whether the question goes to the tribunal's jurisdiction. The courts have developed a spectrum that ranges from the standard of patent unreasonableness (where deference is at its highest, for example, where a tribunal is protected by a privative clause in deciding a matter within its jurisdiction) to that of correctness (where deference is at its lowest, for example, where there is a statutory right of appeal or where the issue concerns the interpretation of a provision limiting the tribunal's jurisdiction). The case at bar falls between these two extremes. On one hand lies a statutory right of appeal pursuant to s. 149 of the *Securities Act*. On the other lies an appeal from a highly specialized tribunal on an issue which arguably goes to the core of its regulatory mandate and expertise. Even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise.

The breadth of the Commission's expertise and specialisation is reflected in the provisions of the *Securities Act*. The Commission is responsible for the administration of the Act, has broad powers with respect to investigations, audits, hearings and orders, and any decision, when filed in the Supreme Court of British Columbia Registry, has the force and effect of a decision of that court. The Commission has the power to revoke or vary any of its decisions. It also has a very broad discretion to determine what is in the public's interest. The definitions in the Act exist in a factual or regulatory context and must be analysed in context, not in isola-

exigences en matière d'information occasionnelle en vertu des dispositions législatives applicables aux valeurs mobilières.

Arrêt: Les pourvois sont accueillis.

La *Securities Act* s'inscrit dans le cadre d'un régime de réglementation beaucoup plus vaste de l'industrie des valeurs mobilières au Canada, visant avant tout à protéger l'investisseur, mais aussi à assurer le rendement du marché des capitaux et la confiance du public dans le système.

Dans l'examen de la norme de contrôle applicable, il faut avant tout déterminer quelle était l'intention du législateur lorsqu'il a conféré compétence au tribunal administratif. Cette analyse doit porter sur le rôle ou la fonction du tribunal, viser à savoir si les décisions de l'organisme sont protégées par une clause privative et si la question touche la compétence du tribunal concerné. Les tribunaux ont élaboré toute une gamme de normes allant de celle de la décision manifestement déraisonnable (qui appelle la plus grande retenue, par exemple, dans les cas où un tribunal protégé par une clause privative rend une décision relevant de sa compétence), à celle de la décision correcte (où l'on est tenu à une moins grande retenue, par exemple, dans les cas où la question en litige porte sur l'interprétation d'une disposition limitant la compétence du tribunal). Le présent pourvoi se situe entre ces deux extrêmes. D'une part, il existe un droit d'appel conformément à l'art. 149 de la *Securities Act*. D'autre part, il s'agit d'un appel contre la décision d'un tribunal très spécialisé sur une question qui, peut-on soutenir, touche directement le mandat et l'expertise que lui confère le texte réglementaire. Même lorsqu'il n'existe pas de clause privative et que la loi prévoit un droit d'appel, le concept de la spécialisation des fonctions exige des cours de justice qu'elles fassent preuve de retenue envers l'opinion du tribunal spécialisé sur des questions qui relèvent directement de son champ d'expertise.

La *Securities Act* fait bien ressortir l'étendue de l'expertise et de la spécialisation de la Commission. Celle-ci est responsable de l'application de la Loi et possède de vastes pouvoirs en matière d'enquêtes, de vérifications, d'audiences et d'ordonnances; en outre, toute décision de la Commission déposée au greffe de la Cour suprême de la Colombie-Britannique est exécutoire comme décision de cette cour. La Commission a le pouvoir de révoquer ou de modifier ses décisions. Elle possède également un très vaste pouvoir discrétionnaire dans la détermination de ce qui constitue l'intérêt public. Les définitions dans la Loi sont présentées dans un contexte

tion. This is yet another basis for curial deference. A higher degree of judicial deference is also warranted with respect to a tribunal's interpretation of the law where it plays a role in policy development. Here, the Commission's primary role is to administer and apply the Act. It also plays a policy development role but its policies are not to be treated as legal pronouncements absent statutory authority mandating such treatment. Thus, on precedent, principle and policy, those decisions of the Commission falling within its expertise generally warrant judicial deference.

Sections 67, 144 and 154.2 of Act were specifically considered with an eye to the tribunal's expertise and its need for deference. The decision to make an order and the precise nature of that order, under s. 144, as well as any decision obliging a person to pay the costs of a hearing necessitated by his or her conduct, pursuant to s. 154.2, are clearly within the jurisdiction and expertise of the Commission. The other provision at issue was s. 67 which involves an interpretation of the words "material change" and "as soon as practicable".

Both "material change" and "material fact" are defined in s. 1 of the Act. They are defined in terms of the significance of their impact on the market price or value of the securities of an issuer. The definition of "material fact" is broader than that of "material change"; it encompasses any fact that can "reasonably be expected to significantly affect" the market price or value of the securities of an issuer, and not only changes "in the business, operations, assets or ownership of the issuer" that would reasonably be expected to have such an effect.

This case turned partly on the definition of "material change". Three elements emerge from that definition: the change must be (a) "in relation to the affairs of an issuer", (b) "in the business, operations, assets or ownership of the issuer" and (c) material, i.e., would reasonably be expected to have a significant effect on the market price or value of the securities of the issuer. Not all changes are material changes; the latter are set in the context of making sure that issuers keep investors up to date. The determination of what information should be

de nature factuelle ou réglementaire et doivent être analysées en contexte et non pas séparément. C'est là un autre motif de faire preuve de retenue judiciaire. Lorsqu'un tribunal participe à l'établissement de politiques, il faut également faire preuve d'une plus grande retenue à l'égard de son interprétation de la loi. En l'espèce, la Commission a pour rôle principal d'appliquer la Loi. Elle participe aussi à l'établissement de politiques, mais ses politiques ne peuvent être considérées comme ayant le statut de loi, en l'absence d'un pouvoir à cet effet prévu dans la loi. Par conséquent, compte tenu des précédents, des principes et des politiques, il faut généralement faire preuve de retenue judiciaire à l'égard des décisions que la Commission rend à l'intérieur de sa sphère de compétence.

Les articles 67, 144 et 154.2 de la Loi ont été spécifiquement examinés en fonction de la compétence du tribunal et de la nécessité de faire preuve de retenue à l'égard de ses décisions. La Commission possède clairement toute la compétence et l'expertise nécessaires lorsqu'il s'agit de rendre une ordonnance et d'en préciser la nature, conformément à l'art. 144, et d'obliger une personne à payer, conformément à l'art. 154.2, les dépens d'une audience à laquelle sa conduite a donné lieu. L'autre disposition en cause est l'art. 67, qui soulève la question de l'interprétation des expressions «changement important» et «dès que possible».

L'article premier de la Loi définit les expressions «changement important» et «fait important». Ces expressions sont définies en fonction de l'importance de l'effet du changement ou du fait sur le cours ou la valeur des valeurs mobilières d'un émetteur. La définition de l'expression «fait important» est plus large que celle de «changement important»; un «fait important» s'entend de tout fait «dont il est raisonnable de s'attendre» qu'il aura «un effet appréciable» sur le cours ou la valeur des valeurs mobilières d'un émetteur, et non seulement des changements dans «[l]es activités commerciales, [l']exploitation, [l]es éléments d'actif ou [l]a propriété» de l'émetteur, dans les cas où il est raisonnable de s'attendre à ce que ce changement ait un tel effet.

Le présent pourvoi porte en partie sur la définition de l'expression «changement important». Trois éléments se dégagent de cette définition: le changement, a) «[d]ans le contexte des affaires d'un émetteur», b) «s'entend d'un changement dans ses activités commerciales, son exploitation, ses éléments d'actif ou sa propriété» et c) doit être important, c'est-à-dire qu'il doit être raisonnable de s'attendre à ce qu'il ait un effet appréciable sur le cours ou la valeur des valeurs mobilières de l'émetteur. Ce ne sont pas tous les changements qui sont des chan-

disclosed is an issue which goes to the heart of the regulatory expertise and mandate of the Commission, i.e., regulating the securities markets in the public's interest.

This case also turns on the meaning of the words "as soon as practicable", in s. 67 of the Act, as to when a material change should be disclosed to the public. The timeliness of disclosure also falls within the Commission's regulatory jurisdiction.

Given the nature of the securities industry, the Commission's specialization of duties and policy development role, and the nature of the problem before the court, considerable deference was warranted in the present case notwithstanding the facts that there was a statutory right of appeal and that there was no privative clause.

The determination of what constitutes a material change for the purposes of general disclosure under s. 67 of the Act falls squarely within the regulatory mandate and expertise of the Commission. New information relating to a mining property (which is an asset) bears significantly on the question of that property's value. A change in assay and drilling results can amount to a material change as was the case here.

The obligation to disclose "as soon as practicable" takes on a different meaning when an issuer is about to engage in a securities transaction. Although a duty to inquire is not expressly stated in s. 67, such an interpretation contextualizes the general obligation to disclose material changes and guarantees the fairness of the market, which is the underlying goal of the Act. The Commission had jurisdiction to interpret s. 67 in this manner and was entitled to the court's deference.

A duty to inquire under s. 67 is not incompatible with the Act's insider trading provision (s. 68). If an issuer wishes to engage in a securities transaction, its directors must inquire about all material changes in the issuer's affairs. Consequently, the directors will have, at one point in time, knowledge of undisclosed material facts and material changes which constitute inside information. As long as the material facts and material changes are adequately disclosed prior to the transaction, there

gements importants; la divulgation des changements importants a pour but de veiller à ce que les émetteurs tiennent les investisseurs au courant. La détermination des renseignements à divulguer est une question qui touche directement l'expertise et le mandat de la Commission, soit la réglementation du marché des valeurs mobilières dans l'intérêt public.

Le présent pourvoi porte aussi sur l'interprétation de l'expression «dès que possible» à l'art. 67 de la Loi, c'est-à-dire le moment où un changement important doit être divulgué au public. La détermination de cette question relève également de la compétence de la Commission en matière de réglementation.

Compte tenu de la nature de l'industrie des valeurs mobilières, des fonctions spécialisées de la Commission, de son rôle en matière d'établissement de politiques et de la nature du problème en cause, il y avait lieu de faire preuve en l'espèce d'une grande retenue malgré le droit d'appel prévu par la loi et l'absence d'une clause privative.

La détermination de ce qui constitue un changement important pour les fins de divulgation générale en vertu de l'art. 67 de la Loi est une question qui relève directement du mandat et de l'expertise de la Commission en matière de réglementation. Tout nouveau renseignement sur les propriétés minières (un élément d'actif) a une incidence importante sur la question de leur valeur. Un changement dans les résultats de titrage et de forage peut constituer un changement important, comme c'était le cas en l'espèce.

L'obligation de divulguer «dès que possible» prend un sens tout à fait différent si un émetteur est sur le point de conclure une opération sur valeurs mobilières. Bien que l'art. 67 ne précise pas explicitement une obligation de s'enquérir, une telle interprétation permet de placer dans son contexte l'obligation générale de divulgation de tout changement important et de garantir l'équité du marché, objet sous-jacent de la Loi. Il relevait de la compétence de la Commission d'interpréter l'art. 67 de cette façon et elle était en droit de s'attendre à une certaine retenue à cet égard.

L'obligation de s'enquérir en vertu de l'art. 67 n'est pas incompatible avec la disposition de la Loi sur les opérations d'initiés (art. 68). Si un émetteur souhaite participer à une opération sur valeurs mobilières, ses administrateurs doivent s'enquérir de tout changement important dans ses affaires. Par conséquent, les administrateurs seront, à un moment donné, au courant de faits importants non divulgués et de changements importants qui constituent des renseignements d'initiés. Dans la

will be no possibility of insider trading. The directors' duty to inquire about material changes is not erased by the erection of a Chinese Wall because the disclosure requirements under s. 67 are on the issuer.

Each of the Commission's findings were supported by overwhelming evidence and should not be disturbed. The Commission concluded that information contained in drilling results can constitute a material change in a reporting issuer's affairs and that s. 67 imposes a duty on senior management to inquire as to the existence of material changes before causing a reporting issuer to engage in a securities transaction. It found that the respondents breached s. 67 by failing to disclose various material changes in the affairs of Prime and Calpine before causing these two companies to engage in securities transactions. The Commission also concluded that the non-disclosure of information concerning the private placement issue and the withdrawal of ALC constituted a failure to disclose a material change. Although the material change arising from the controversy surrounding the withdrawal of ALC was self-evident, not all material changes are self-evident.

Section 144 of the Act gives the Commission a broad discretion to make orders that it considers to be in the public interest. Thus, a reviewing court should not disturb an order of the Commission unless the Commission has made some error in principle in exercising its discretion or has exercised its discretion in a capricious or vexatious manner.

The Commission exercised its discretion in a judicial manner. Further, it could make the orders it did with respect to the respondents even though the duty to make timely disclosure under s. 67 of the Act applies to a "reporting issuer". Although responsibility for timely disclosure is vested in the reporting issuer, effective responsibility rests with the senior officers and the directors of the reporting issuer. In addition, s. 144 of the Act not only gives the Commission a broad power to make orders it considers to be in the public interest but also confers upon the Commission the authority to make orders with respect to "a person". The Commission's

mesure où les faits importants et les changements importants sont divulgués comme il se doit avant l'opération, il n'y a pas de risque d'opérations d'initiés. L'établissement d'une muraille de Chine n'élimine pas l'obligation qu'ont les administrateurs de s'enquérir des changements importants, puisque c'est l'émetteur qui, en vertu de l'art. 67, doit respecter les exigences en matière de divulgation.

Il existe de nombreux éléments de preuve à l'appui de chacune des conclusions de la Commission et il n'y a pas lieu de les modifier. La Commission a conclu que les renseignements contenus dans les résultats de forage peuvent constituer un changement important dans les affaires d'un émetteur assujetti et que l'art. 67 impose aux cadres supérieurs une obligation de s'enquérir de l'existence de changements importants avant qu'un émetteur assujetti puisse participer à une opération sur valeurs mobilières. Elle a conclu que les intimés avaient contrevenu à l'art. 67 en omettant de divulguer divers changements importants dans les affaires de Prime et de Calpine avant que celles-ci prennent part à des opérations sur valeurs mobilières. La Commission a aussi conclu que la non-divulgation de renseignements sur la question du placement privé et le retrait d'ALC constituaient une omission de divulguer un changement important. Bien que le changement important découlant de la controverse relative au retrait d'ALC ait été tout à fait évident, ce n'est pas le cas de tous les changements importants.

L'article 144 de la Loi donne à la Commission un vaste pouvoir discrétionnaire de rendre les ordonnances qu'elle estime dans l'intérêt public. En conséquence, un tribunal qui siège en révision ne devrait pas modifier une ordonnance rendue par la Commission, sauf si celle-ci a commis une erreur de principe dans l'exercice de son pouvoir discrétionnaire ou si elle l'a exercé d'une façon arbitraire ou vexatoire.

La Commission a exercé son pouvoir discrétionnaire d'une manière judiciaire. En outre, elle pouvait rendre les ordonnances en question contre les intimés même si l'obligation d'information occasionnelle prévue à l'art. 67 de la Loi est imposée à un «émetteur assujetti». Bien que l'obligation d'information occasionnelle soit imposée à l'émetteur assujetti, ce sont les cadres supérieurs et les administrateurs qui ont en fait cette responsabilité. Par ailleurs, l'art. 144 de la Loi confère à la Commission non seulement un vaste pouvoir de rendre les ordonnances qu'elle estime dans l'intérêt public mais aussi le pouvoir de rendre des ordonnances relativement à «une personne». La Commission avait toute la compétence

order with respect to costs was well within its jurisdiction; considerable deference was in order.

Cases Cited

Referred to: *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756; *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Pacific Coast Coin Exchange v. Ontario Securities Commission*, [1978] 2 S.C.R. 112; *Four Star Mgmt. Ltd. v. B.C. Securities Comm.* (1990), 46 B.C.L.R. (2d) 195, leave to appeal refused *sub nom. Williams (Byron Leslie) v. British Columbia Securities Comm.*, [1991] 1 S.C.R. xv; *Gordon Capital Corp. v. Ontario Securities Commission* (1991), 14 O.S.C.B. 2713; *Re the Securities Commission and Mitchell*, [1957] O.W.N. 595; *Bay Street West Securities (1983) Inc. v. Alberta Securities Commission* (1984), 56 A.R. 19.

Statutes and Regulations Cited

Company Act, R.S.B.C. 1979, c. 59, ss. 1, 255, 267, 272.

Securities Act, S.B.C. 1985, c. 83, ss. 1(1) "material change", "material fact", 14(1), (2), 44(1) [am. 1989, c. 78, s. 16], 45(2) [am. 1989, c. 78, s. 16], 47(1), (2), 48(1) [am. 1989, c. 58, s. 12], 49(1) [am. 1989, c. 78, s. 20], 50(1), 67, 68 [rep. & sub. 1989, c. 78, s. 25], 144(1)(a) [rep. & sub. 1989, c. 78, s. 39], (b) [rep. & sub. 1989, c. 78, s. 39], (c) [rep. & sub. 1989, c. 78, s. 39, am. 1990, c. 25, s. 49], (d) [rep. & sub. 1989, c. 78, s. 39], 149(a) [rep. & sub. 1989, c. 78, s. 43, am. 1992, c. 52, s. 27], (b) [rep. & sub. 1989, c. 78, s. 43], (c) [ad. 1992, c. 52, s. 27], 154.2 [ad. 1988, c. 58, s. 25].

requise pour rendre l'ordonnance quant aux dépens. C'est pourquoi il y avait lieu de faire preuve d'une grande retenue.

Jurisprudence

Arrêts mentionnés: *Le Syndicat canadien de la Fonction publique, section locale 963 c. La Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227; *U.E.S., local 298 c. Bibeault*, [1988] 2 R.C.S. 1048; *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 R.C.S. 756; *Zurich Insurance Co. c. Ontario (Commission des droits de la personne)*, [1992] 2 R.C.S. 321; *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554; *Université de la Colombie-Britannique c. Berg*, [1993] 2 R.C.S. 353; *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722; *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316; *Brosseau c. Alberta Securities Commission*, [1989] 1 R.C.S. 301; *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324; *Pacific Coast Coin Exchange c. Commission des valeurs mobilières de l'Ontario*, [1978] 2 R.C.S. 112; *Four Star Mgmt. Ltd. c. B.C. Securities Comm.* (1990), 46 B.C.L.R. (2d) 195, autorisation de pourvoi refusée *sub nom. Williams (Byron Leslie) c. British Columbia Securities Comm.*, [1991] 1 R.C.S. xv; *Gordon Capital Corp. c. Ontario Securities Commission* (1991), 14 O.S.C.B. 2713; *Re the Securities Commission and Mitchell*, [1957] O.W.N. 595; *Bay Street West Securities (1983) Inc. c. Alberta Securities Commission* (1984), 56 A.R. 19.

Lois et règlements cités

Company Act, R.S.B.C. 1979, ch. 59, art. 1, 255, 267, 272.

Securities Act, S.B.C. 1985, ch. 83, art. 1(1) «changement important», «fait important», 14(1), (2), 44(1) [mod. 1989, ch. 78, art. 16], 45(2) [mod. 1989, ch. 78, art. 16], 47(1), (2), 48(1) [mod. 1989, ch. 58, art. 12], 49(1) [mod. 1989, ch. 78, art. 20], 50(1), 67, 68 [abr. & rempl. 1989, ch. 78, art. 25], 144(1)a) [abr. & rempl. 1989, ch. 78, art. 39], b) [abr. & rempl. 1989, ch. 78, art. 39], c) [abr. & rempl. 1989, ch. 78, art. 39, mod. 1990, ch. 25, art. 49], d) [abr. & rempl. 1989, ch. 78, art. 39], 149a) [abr. & rempl. 1989, ch. 78, art. 43, mod. 1992, ch. 52, art. 27], b) [abr. & rempl. 1989, ch. 78, art. 43], c) [aj. 1992, ch. 52, art. 27], 154.2 [aj. 1988, ch. 58, art. 25].

V. Analysis

1. What is the appropriate standard of review for an appellate court reviewing a decision of a securities commission not protected by a privative clause when there exists a statutory right of appeal and where the case turns on a question of interpretation?

In order to answer this first question, I should like to discuss a number of factors and principles which come into play.

A. *The Nature of the Statute*

It is important to note from the outset that the Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system: David L. Johnston, *Canadian Securities Regulation* (1977), at p. 1.

Within this large framework of securities regulation, there are various government administrative agencies which are responsible for the securities legislation within their respective jurisdictions. The Commission is one such agency. Also within this large framework are self-regulatory organizations which possess the power to admit and discipline members and issuers. The VSE falls under this head. Having regard to this rather elaborate framework, it is not surprising that securities regulation is a highly specialized activity which requires specific knowledge and expertise in what have become complex and essential capital and financial markets.

B. *Principles of Judicial Review*

From the outset, it is important to set forth certain principles of judicial review. There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tri-

V. Analyse

1. Quelle est la norme de contrôle applicable à une cour d'appel siégeant en révision d'une décision d'une commission des valeurs mobilières qui n'est pas protégée par une clause privative, lorsque la loi prévoit un droit d'appel et que le litige vise une question d'interprétation?

Pour répondre à la première question, j'examinerai certains facteurs et principes pertinents.

A. *Nature de la loi*

Il importe tout d'abord de faire remarquer que la Loi est une loi de nature réglementaire. En fait, elle s'inscrit dans le cadre d'un régime de réglementation beaucoup plus vaste de l'industrie des valeurs mobilières au Canada. Elle vise avant tout à protéger l'investisseur, mais aussi à assurer le rendement du marché des capitaux et la confiance du public dans le système: David L. Johnston, *Canadian Securities Regulation* (1977), à la p. 1.

À l'intérieur de ce grand régime de réglementation des valeurs mobilières, il existe divers organismes gouvernementaux responsables de l'application des lois sur les valeurs mobilières dans leur ressort respectif. C'est la fonction de la Commission. Il y a également des organismes autonomes qui possèdent le pouvoir d'inscrire des membres et des émetteurs et d'assurer la discipline. C'est le rôle de la Bourse. Compte tenu de cette toile de fond plutôt compliquée, il n'est pas étonnant que la réglementation des valeurs mobilières soit une activité fort spécialisée qui exige des connaissances et une expertise particulières du domaine complexe et essentiel des marchés financiers.

B. *Principes de contrôle judiciaire*

Il importe tout d'abord de formuler certains principes en matière de contrôle judiciaire. Il existe diverses normes de contrôle applicables à la myriade d'organismes administratifs qui existent au Canada. Dans l'examen de la norme de contrôle applicable, il faut avant tout déterminer quelle était l'intention du législateur lorsqu'il a conféré com-

. . . the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause. Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada, supra,* it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.

On the other side of the coin, a lack of relative expertise on the part of the tribunal *vis-à-vis* the particular issue before it as compared with the reviewing court is a ground for a refusal of deference.

In my view, the pragmatic or functional approach articulated in *Bibeault* is also helpful in determining the standard of review applicable in this case. At page 1088 of that decision, Beetz J., writing for the Court, stated the following:

. . . the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

As already mentioned, the primary goal of securities legislation is the protection of the investing public. The importance of that goal in assessing the decisions of securities commissions has been recognized by this Court in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301 (*Brosseau*), where L'Heureux-Dubé J., writing for the Court, stated the following at p. 314:

Securities acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this Court in *Gregory & Co. v. Quebec Securities Commission*, [1961] S.C.R. 584, where Fauteux J. observed at p. 588:

The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to

. . . son expertise [du tribunal] est de la plus haute importance pour ce qui est de déterminer l'intention du législateur quant au degré de retenue dont il faut faire preuve à l'égard de la décision d'un tribunal en l'absence d'une clause privative intégrale. Même lorsque la loi habilitante du tribunal prévoit expressément l'examen par voie d'appel, comme c'était le cas dans l'affaire *Bell Canada,* précitée, on a souligné qu'il y avait lieu pour le tribunal d'appel de faire preuve de retenue envers les opinions que le tribunal spécialisé de juridiction inférieure avait exprimées sur des questions relevant directement de sa compétence.

Par contre, lorsque, comparativement au tribunal d'examen, le tribunal administratif manque d'expertise relative en ce qui concerne la question dont il a été saisi, cela justifie de ne pas faire preuve de retenue.

À mon avis, l'analyse pragmatique ou fonctionnelle formulée dans l'arrêt *Bibeault* est également utile à la détermination de la norme de contrôle applicable en l'espèce. À la page 1088 de cet arrêt, le juge Beetz, s'exprimant au nom de la Cour, affirme:

. . . la Cour examine non seulement le libellé de la disposition législative qui confère la compétence au tribunal administratif, mais également l'objet de la loi qui crée le tribunal, la raison d'être de ce tribunal, le domaine d'expertise de ses membres, et la nature du problème soumis au tribunal.

Comme je l'ai déjà mentionné, les lois sur les valeurs mobilières visent avant tout à protéger le public investisseur. Dans l'arrêt *Brosseau c. Alberta Securities Commission*, [1989] 1 R.C.S. 301 (*Brosseau*), notre Cour a reconnu l'importance de cet objectif lorsqu'il faut procéder à l'examen de décisions prises par des commissions des valeurs mobilières; le juge L'Heureux-Dubé, s'exprimant au nom de notre Cour, dit, à la p. 314:

D'une manière générale, on peut dire que les lois sur les valeurs mobilières visent à réglementer le marché et à protéger le public. Cette Cour a reconnu ce rôle dans l'arrêt *Gregory & Co. v. Quebec Securities Commission*, [1961] R.C.S. 584, dans lequel le juge Fauteux a fait remarquer à la p. 588:

[TRADUCTION] L'objet prépondérant de la loi est d'assurer que les personnes qui, dans la province, exercent le commerce des valeurs mobilières ou qui agissent comme conseillers en placement, sont hon-

protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.

This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.

In *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, Wilson J., in a concurring judgment, referred at p. 1336 to financial markets as a field where specialized tribunals have an important role to play:

Canadian courts have struggled over time to move away from the picture that Dicey painted toward a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state. Part of this process has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise.

Courts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work. [Emphasis added.]

The breadth of the Commission's expertise and specialisation is reflected in the provisions of the Act. Section 4 of the Act identifies the Commission as being responsible for the administration of the Act. The Commission also has broad powers with respect to investigations, audits, hearings and orders. Section 144.2 provides that any decision of the Commission filed in the Registry of the

nêtes et de bonne réputation et, ainsi, de protéger le public, dans la province ou ailleurs, contre toute fraude consécutive à certaines activités amorcées dans la province par des personnes qui y exercent ce commerce.

Ce rôle protecteur, qui est commun à toutes les commissions des valeurs mobilières, donne à ces organismes un caractère particulier qui doit être reconnu lorsqu'on examine la manière dont leurs fonctions sont exercées aux termes des lois qui leur sont applicables.

Dans l'arrêt *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324, le juge Wilson, dans des motifs concordants, affirme, à la p. 1336, que les marchés financiers constituent un domaine où les tribunaux spécialisés ont un rôle important à jouer:

Les tribunaux judiciaires canadiens se sont efforcés au fil des ans de se détacher du point de vue de Dicey pour en arriver à une compréhension plus subtile du rôle des tribunaux administratifs dans l'État canadien moderne. C'est là un processus qui s'est traduit notamment par une reconnaissance accrue de la part des cours de justice qu'il se peut qu'elles soient simplement moins en mesure que les tribunaux ou organismes administratifs de statuer dans des domaines que le Parlement a choisi de réglementer par l'intermédiaire d'organismes exerçant un pouvoir délégué, comme, par exemple, les relations de travail, les télécommunications, les marchés financiers et les relations économiques internationales. Une gestion prudente de ces secteurs nécessite souvent le recours à des experts ayant à leur actif des années d'expérience et une connaissance spécialisée des activités qu'ils sont chargés de surveiller.

Les cours de justice ont également fini par se faire à l'idée qu'elles ne sont peut-être pas aussi bien qualifiées qu'un organisme administratif déterminé pour donner à la loi constitutive de cet organisme des interprétations qui ont du sens compte tenu du contexte des politiques générales dans lequel doit fonctionner cet organisme. [Je souligne.]

La Loi fait bien ressortir l'étendue de l'expertise et de la spécialisation de la Commission. Son article 4 précise que la Commission est responsable de son application. La Commission possède également de vastes pouvoirs en matière d'enquêtes, de vérifications, d'audiences et d'ordonnances. En vertu de l'art. 144.2, toute décision de la Commission déposée au greffe de la Cour suprême de la

Wilder et al. v. Ontario Securities Commission

[Indexed as: Wilder v. Ontario Securities Commission]

53 O.R. (3d) 519
[2001] O.J. No. 1017
Docket No. C34363

Court of Appeal for Ontario
Abella, Goudge and Sharpe JJ.A.
March 22, 2001

Administrative law--Boards and tribunals--Jurisdiction --Ontario Securities Commission--Ontario Securities Commission having jurisdiction to reprimand lawyer acting in professional capacity--Securities Act, R.S.O. 1990, c. S.5, s. 127.

Professions--Barristers and solicitors--Discipline--Ontario Securities Commission having jurisdiction to reprimand lawyer acting in professional capacity--Securities Act, R.S.O. 1990, c. S.5, s. 127.

The Ontario Securities Commission ("OSC") commenced proceedings to reprimand LDW, who was a solicitor, for alleged misconduct in his representation of YBM Magnex International Inc., in connection with the filing of a preliminary prospectus. The notice of hearing stated that the OSC would consider whether it was in the public interest to make an order pursuant to s. 127(1), para. 6 of the Securities Act to reprimand LDW and whether, if it was determined that he had not complied with Ontario securities law, application should be made to the Superior Court of Justice for a declaration pursuant to s. 128(1) or a remedial order pursuant to s. 128(3) of the Act. LDW and his law firm, Cassels Brock and Blackwell ("Cassels"), supported by the intervenor, the Law Society of

Upper Canada, applied for judicial review and called into question the OSC's authority to reprimand LDW. The Divisional Court dismissed their application. Leave having been granted, they appealed to the Court of Appeal.

Held, the appeal should be dismissed with costs.

The Securities Act, Part XXII provides the OSC with three methods of enforcement. The first, pursuant to s. 122(1), is a quasi-criminal proceeding in the Ontario Court of Justice leading to conviction and fine or imprisonment. The second, pursuant to s. 127, is an administrative proceeding for an order in the public interest, including a reprimand. The third, pursuant to s. 128, is an application to the Superior Court of Justice for a declaration that a person or company has not complied, or is not complying with Ontario securities law.

In the immediate case, the specific allegation against LDW could have proceeded by way of a quasi-criminal prosecution under para. 122(1)(a), but this did not preclude an administrative proceeding pursuant to s. 127. The appellants submitted that s. 122(1)(a) conferred exclusive jurisdiction to the Superior Court because of the principle of statutory interpretation in that where a statute provides for a specific remedy, other remedies may be excluded by inference and the presumption that the legislature should not be taken to have limited the rights of the individual -- in this case, Charter rights and the stricter rules of evidence and proof in criminal proceedings -- unless it does so expressly. However, another well-known principle of statutory interpretation is that the courts must consider the broader legislative purpose of an Act when giving meaning to its constituent provisions. The appellant's interpretation was an excessively narrow and literal approach that ignored fundamental aspects of the statutory scheme and frustrated the attainment of the objects of the Act. The legislature clearly manifested its intention to provide the OSC with a range of remedial options to assist it in carrying out its statutory mandate. The reduction in procedural rights under s. 127 from those available under s. 122 resulted from the simple fact that there is no criminal sanction attached to a s. 127 order. The essence of the

statutory scheme is remedial flexibility, not remedial exclusivity and differing procedural consequences are an inevitable result in such a scheme.

Further, it was not the case, as submitted by the appellants, that the reprimand power of s. 127(1) para. 6 is limited to situations falling within paras. 1-5. And, contrary to the submissions of the appellants, it was not the case that a reprimand is a punitive sanction beyond the powers conferred by s. 127(1).

Finally, with the caveat that solicitor-client privilege must be maintained and protected, for the reasons given by the Divisional Court, the OSC has jurisdiction to reprimand lawyers for their conduct as solicitors before the OSC. The need to respect solicitor-client privilege did not require a blanket preclusion preventing the OSC from reprimanding lawyers in all cases. The Law Society's Rules of Professional Conduct define the terms upon which a lawyer's promise of confidentiality is made. They contain a general provision allowing for disclosure of confidential information where necessary to defend the lawyer's legal interests, and there is no reason why that provision should not apply to an allegation of misconduct by the OSC. This exemption does not allow the OSC to ignore the importance of solicitor-client privilege, and it must, on a case-by-case basis, ensure that the substantive legal right to solicitor-client privilege is respected.

Cases referred to

Anderson v. Bank of British Columbia (1876), 2 Ch. D. 644, [1874-80] All E.R. Rep. 396, 45 L.J. Ch. 449, 35 L.T. 76, 24 W.R. 624, 724, 3 Char. Pr. Cas. 212 (C.A.); Brosseau v. Alberta (Securities Commission), [1989] 1 S.C.R. 301, 65 Alta. L.R. (2d) 97, 57 D.L.R. (4th) 458, 93 N.R. 1, [1989] 3 W.W.R. 456, 47 C.R.R. 394n (sub nom. Barry and Alberta Securities Commission, Re); Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn., [1993] 3 S.C.R. 724, 108 D.L.R. (4th) 1, 160 N.R. 321, 93 C.L.L.C. 14,062 (sub nom. Canadian Pacific Airlines Ltd. v. CALPA); Committee for the Equal Treatment of

[18] Despite the very forceful and able argument presented by Mr. Morphy, I cannot accept the contention that allegations of misrepresentation of the kind made against Wilder must be dealt with exclusively as a quasi-criminal offence under s. 122(1)(a). It seems to me that to accept the appellants' submission would be to adopt an excessively narrow and literal approach that would ignore fundamental aspects of the statutory scheme and that would frustrate rather than foster the attainment of the purposes and objects of the Act.

[19] Another well-known principle of statutory interpretation is that courts must consider the broader legislative purpose of an Act when giving meaning to its constituent provisions. The purposive approach to interpretation best ensures the attainment of the true object sought by the legislators: Covert v. Nova Scotia (Minister of Finance), [1980] 2 S.C.R. 774 at p. 807, 41 N.S.R. (2d) 181; Pointe-Claire (City) v. S.E.P.B., Local 57, [1997] 1 S.C.R. 1015 at pp. 1063-64, 146 D.L.R. (4th) 1; R. Sullivan, ed., Driedger on the Construction of Statutes, 3d ed. (Toronto: Butterworths, 1994) at pp. 38-41, 131.

[20] With respect to the Securities Act, the legislature directed its mind to specifying the purposes of the Act. They are explicitly stated in s. 1.1:

> 1.1 The purposes of this Act are,
>
> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
>
> (b) to foster fair and efficient capital markets and confidence in capital markets.

[21] As this statement of statutory purpose indicates, and as the Divisional Court and other decisions have confirmed, the Act confers an important public mandate on the OSC to regulate capital markets. At the very core of that supervisory role is the need to ensure that the public is given fair and accurate information regarding securities. In Pacific Coast Coin Exchange of Canada v. Ontario (Securities Commission), [1978] 2

S.C.R. 112 at p. 126, 2 B.L.R. 212, de Grandpr J. described the policy of the Securities Act as being "the protection of the public" and adopted the following description of the basic aim or purpose of the Act: ". . . [T]he protection of the investing public through full, true and plain disclosure of all material facts relating to securities being issued". Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557 at pp. 592-93, 92 B.C.L.R. (2d) 145, and Brosseau v. Alberta (Securities Commission), [1989] 1 S.C.R. 301 at p. 314, 65 Alta. L.R. (2d) 97, both adopt Fauteux J.'s statement of the role of securities commissions in Gregory & Co. v. Qubec (Commission des valeurs mobilires), [1961] S.C.R. 584 at p. 588, 28 D.L.R. (2d) 721:

> The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.

[22] The OSC is charged with the statutory obligation to do its best to ensure that those involved in the securities industry provide fair and accurate information so that public confidence in the integrity of capital markets is maintained. It is difficult to imagine anything that could be more important to protecting the integrity of capital markets than ensuring that those involved in those markets, whether as direct participants or as advisers, provide full and accurate information to the OSC.

[23] The remedial and enforcement provisions of the Act must be read in light of the fundamental purpose and aim of the legislation. In the light of the overall purpose of the Act, I cannot accept the proposition that the wording of the provision creating the offences prescribed by s. 122 indicates a legislative intention to confer exclusive jurisdiction on the Ontario Court of Justice where it is alleged that a party has been guilty of misrepresentation. The legislature has quite clearly manifested its intention to provide the OSC with a

> range of remedial options to assist the OSC in carrying out its statutory mandate. The Act provides the OSC with three different enforcement tools: prosecution before the Ontario Court of Justice pursuant to s. 122; administrative sanctions before the OSC itself pursuant to s. 127; and declaratory, injunctive, and other orders from the Superior Court of Justice pursuant to s. 128. These enforcement tools provide the OSC with a range of remedial options to be deployed in the OSC's discretion to meet the wide variety of problems and issues that it must confront. In some cases, the OSC may determine that quasi-criminal prosecution leading to fine or imprisonment is the most effective and appropriate means to ensure compliance with the Act and to ensure public confidence in the capital markets. In other cases, the OSC may prefer the more flexible and less drastic administrative sanctions available pursuant to s. 127 as the best way to achieve the objectives of the legislation. To the extent one can discern a legislative intention from this scheme, it seems to me that the overwhelming message is one of remedial variety and flexibility, rather than one that creates hived-off areas of remedial exclusivity. A court should be loath to prefer a rigidly narrow and literal interpretation over one that recognizes and reflects the purposes of the Act.

[24] It is true that if Wilder were prosecuted under s. 122, he would enjoy procedural protections and other advantages not available in proceedings brought under s. 127. I fail to see, however, how that leads to the conclusion that he can only be prosecuted under s. 122. Different procedural rights are accorded because different consequences follow. The Act provides for various remedial routes which themselves entail varying procedural consequences. The reduction in procedural rights under s. 127 from those available in a prosecution under s. 122 results from the simple fact that there is no criminal sanction attached to a s. 127 order. The essence of the statutory scheme is remedial flexibility, not remedial exclusivity, and differing procedural consequences are an inevitable result of such a scheme.

(ii) Is the reprimand power of s. 127(1) para. 6 limited to situations falling within s. 127(1) paras. 1-5?

Rooney et al. v. ArcelorMittal S.A. et al.
[Indexed as: Rooney v. ArcelorMittal S.A.]

Ontario Reports

Court of Appeal for Ontario,

Simmons, Gillese and Hourigan JJ.A.

August 17, 2016

133 O.R. (3d) 287 | 2016 ONCA 630

Case Summary

Securities regulation — Misrepresentation — Takeover bid — Section 131(1) of Securities Act not requiring security holders of offeree issuer to choose between suing offeror for damages for misrepresentation in takeover bid circular and suing offeror's directors and signatories — Security holders who sold shares in secondary market not able to rely on s. 131(1) to assert claim based on misrepresentation in takeover bid circular — Securities Act, R.S.O. 1990, c. S.5, s. 131(1).

Relying on s. 131 of the *Securities Act*, the appellants commenced a proposed class action for damages for misrepresentations in a takeover bid circular. On motions by the respondents to strike the statement of claim, the motion judge ruled that a plaintiff who wants to bring an action under s. 131(1) and who elects to sue for damages rather than rescission must elect whether to sue the offeror or sue the offeror's directors and other individuals who signed or approved the takeover bid circular. She also ruled that security holders who sold their shares in the secondary market cannot rely on s. 131(1) to assert a claim based on a misrepresentation in a takeover bid circular. The appellants appealed. [page288]

Held, the appeal should be allowed in part.

In interpreting s. 131(1) of the *Securities Act* as requiring a plaintiff to choose between suing the offeror and suing the offeror's directors and other signatories, the motion judge focused too narrowly on the plain meaning of s. 131(1). When read in its entire context, with regard to its ordinary and grammatical meaning, and in harmony with the scheme and object of the Act and the intention of the legislature, s. 131(1) allows a plaintiff who elects to sue for damages rather than rescission to sue both the offeror and the offeror's directors and signatories.

The motion judge did not err in holding that security holders who sold their securities in the secondary market during the currency of, and in connection with, the takeover bid could not assert a claim under s. 131(1). A right of action under Part XXIII.1 of the Act was available to those security holders. The appellants' attempted reliance on s. 131(1) for secondary market participants was an impermissible attempt to avoid the restrictions placed on the operation of the statutory cause of action found in Part XXIII.1.

[10] The starting point in a review of the modern principle of statutory interpretation is *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2. That case provides both general guidance on the proper approach to statutory interpretation and specific guidance on how to apply that approach where the plain meaning of a provision appears to conflict with its underlying statutory purpose.

[11] *Rizzo Shoes* is the best known authority for how to approach the task of statutory interpretation and has been cited more than 3,000 times by courts at all levels. Iacobucci J., writing for the court, endorsed Driedger's "modern principle" of statutory interpretation, at para. 21, quoting the following passage from Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

With these words, the Supreme Court fully embraced Elmer Driedger's "modern principle" of statutory interpretation. But to fully appreciate the significance of this statement, we have to ask: "modern" compared to what?

[12] Ruth Sullivan explains that, in the 19th, and for much of the 20th centuries, statutory interpretation was dominated by the plain meaning rule. That rule held that where the words of a statute were clear and unambiguous, the courts applied them as they were written -- even if legislative intention or practical considerations pointed in another direction. At times, courts relied instead on the so-called golden rule, which allowed courts [page292] to depart from the plain meaning of a statute but only when that meaning lead to absurd results: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014), at 2.13-2.17.

[13] The modern principle takes a more holistic view. As Iacobucci J. explained in *Rizzo Shoes*, at para. 21, the modern principle "recognizes that statutory interpretation cannot be founded on the wording of the legislation alone". Sullivan expands on this idea, at 2.18: "Today, as the modern principle indicates, legislative intent, textual meaning and legal norms are all legitimate concerns of interpreters and each has a role to play in *every* interpretive effort" (emphasis added).

[14] That is the general guidance that *Rizzo Shoes* provides in all cases involving statutory interpretation. Equally important for present purposes is the guidance the case provides in circumstances where the plain meaning of a provision appears to conflict with its underlying statutory purpose. The issue in *Rizzo Shoes* was whether employees who lost their jobs when their employer went bankrupt were entitled to termination and severance pay under the *Employment Standards Act*, R.S.O. 1980, c. 137 (the "*ESA*"). That statute provided that such benefits were payable when a claimant's employment was "terminated by an employer": see ss. 40 and 40*a*. The question was whether bankruptcy acted as a "termination" for purposes of the Act.

[15] The judge at first instance held that it did. He reasoned that the object and intent of the *Employment Standards Act* was to provide minimum employment standards and to benefit and

protect employees' interests. As remedial legislation, the Act should be given a fair, large and liberal interpretation to advance its goals.

[16] The Court of Appeal for Ontario disagreed. It focused on the plain meaning of the impugned provisions and concluded that the rights to termination and severance pay were limited to situations where the employer actively terminates the employee -- not when the termination results by operation of law, as in a bankruptcy.

[17] Iacobucci J. identified the fundamental tension as follows, at para. 20:

> At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. [page293]

[18] It was in this context that Iacobucci J. repudiated the view that statutory interpretation could be [at para. 21] "founded on the wording of the legislation alone". Instead, the words of the statute had to be read in their entire context, having regard not just to their ordinary and grammatical meaning but also to the scheme and object of the Act and to the legislature's intention.

[19] Iacobucci J. examined the Court of Appeal's reasoning in light of this standard and found it "incomplete". He explained his conclusion, at para. 23:

> Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized.

[20] Applying the modern principle to the case before him, Iacobucci J. concluded that the impugned provisions of the *Employment Standards Act* should be interpreted to include the employees whose jobs were terminated as a result of their employer's bankruptcy. He held the following with respect to the Court of Appeal's restrictive interpretation of the word "termination":

- it was incompatible with the object of the Act, which was to protect employees;
-
- it was incompatible with the object of the termination and severance pay provisions themselves, which was
- to provide employees with a cushion against the adverse economic effects of termination without notice; and
- it would lead to absurd results because it would distinguish between employees' entitlement to benefits
- based on whether they were dismissed the day before or the day after their employer's bankruptcy became final.

[21] In considering the arguments advanced on this appeal, this court must take the modern approach described by Iacobucci J. It is not permissible or helpful to look at the words of s. 131(1) in isolation and without regard to the scheme and object of the Act and to the legislature's intention.

(2) *Election of potential defendants*

(a) *Nature of the issue*

[22] The parties agree that s. 131(1) requires a security holder to choose between suing the offeror for rescission and suing the [page294] offeror for damages, since the Act treats these as mutually exclusive causes of action. The controversy lies in determining whether the provision also requires a security holder to choose between suing the offeror and suing the offeror's directors and the other individuals listed in clauses (*a*) to (*c*).

[23] The appellants were able to point to one previous case where the Superior Court certified a class action under s. 131(1) against both offerors and their directors and signatories, but the question whether the security holders in that case should instead have been put to an election does not appear to have been raised: see *Allen v. Aspen Group Resources Corp*., [2009] O.J. No. 5213, 81 C.P.C. (6th) 298 (S.C.J.).

[24] That said, in *Allen*, Strathy J. (as he then was) described s. 131(1) in *obiter* as giving an offeree's security holders a right of action against an offeror *and* its directors and signatories, at para. 8:

> The teeth of the take-over bid provisions are found in s. 131, which give the shareholders of the target company a civil remedy in damages, as well as a claim against the offeror for rescission, in the event of misrepresentation or non-disclosure in the take-over bid circular. *The remedy can be exercised not only against the offeror corporation, but also against the directors or officers of the offeror who signed the circular, experts whose reports appeared (with their consent) in the circular, and those -- such as auditors -- who signed a certificate in the circular.*

(Emphasis added)

[25] While Strathy J.'s comments are not determinative of the issue, they lend weight to the appellants' preferred interpretation of s. 131(1).

[26] The motion judge acknowledged, at para. 132, that s. 131(1) "is not as clearly expressed as it could be". She also found it "unlikely", at para. 131, that the very experienced counsel and judge in *Allen* would have overlooked the election issue.

[27] Despite these reservations, the motion judge accepted the respondents' interpretation. She gave four reasons, at para. 132:

- The "plain and grammatical meaning" of the operative words in the section "appear to require an election" as
- between a right of action against the offeror and a right of action against its directors.

that the legislature made a conscious decision to require plaintiffs to elect to sue either the offeror or the offeror's directors and signatories.

[37] The main point that the respondents make is that, if the legislature intended to permit a plaintiff to sue both the offeror and its directors and signatories for damages, it could have easily done so by using clear language. However, when pressed in oral argument, they could not offer an explanation for how their interpretation advances the purposes of the *Securities Act* or the scheme for statutory liability for misrepresentation in takeover bid circulars.

(c) *Application of the modern principle*

[38] A proper interpretive approach to s. 131(1) requires the court to consider this provision in its entire context, with regard to its ordinary and grammatical meaning, and in harmony with the scheme of the Act, the object of the Act and the intention of the legislature.

[39] The first part of the analysis is a consideration of s. 131(1) in its entire context. Subsection 131(1) is found in [page298] Part XXIII of the *Securities Act*, titled "Civil Liability". Part XXIII creates civil liability for misrepresentation in a prospectus (s. 130), an offering memorandum (s. 130.1) and a takeover bid circular (s. 131). A contextual approach means that the language of each of these provisions informs the interpretation of the others. The distinguishing feature of ss. 130 and 130.1 for purposes of this appeal is that those sections explicitly create mutually exclusive causes of action: a plaintiff can sue for rescission or for damages, but not both.

[40] Subsection 130(1) provides as follows:

130(1) Where a prospectus, together with any amendment to the prospectus, contains a misrepresentation, a purchaser who purchases a security offered by the prospectus during the period of distribution or during distribution to the public has, without regard to whether the purchaser relied on the misrepresentation, a right of action for damages against,

(a) the issuer or a selling security holder on whose behalf the distribution is made;

(b) each underwriter of the securities who is required to sign the certificate required by section 59;

(c) every director of the issuer at the time the prospectus or the amendment to the prospectus was filed;

(d) every person or company whose consent to disclosure of information in the prospectus has been filed pursuant to a requirement of the regulations but only with respect to reports, opinions or statements that have been made by them; and

(e) every person or company who signed the prospectus or the amendment to the prospectus other than the persons or companies included in clauses (*a*) to (*d*),

or, where the purchaser purchased the security from a person or company referred to in clause (a) or (b) or from another underwriter of the securities, the purchaser may elect to exercise a right of rescission against such person, company or underwriter, in which case the purchaser shall have no right of action for damages against such person, company or underwriter.

understood by everyone and universally accommodated by the simple *or.*" Garner advises that, if a writer intends to use the exclusive "or", he or she should make this intention explicit.

[48] In my view, the first "or" in s. 131(1) ("elect to exercise a right of action for rescission or damages against the offeror") should be read exclusively, since rescission and damages are [page300] treated as alternative causes of action in Part XXIII of the Act. The second "or" ("or a right of action for damages against . . .") should be read inclusively -- a plaintiff electing to sue for damages can sue the offeror, the offeror's directors and signatories, or both.

[49] In her reasons, the motion judge held as follows, at para. 134: "it seems very unlikely that the word aeor' be [read] both exclusively and inclusively within the span of a few words". I disagree. As I have just explained, the plain meaning of "or" can be either inclusive or exclusive. "Or" is not a term of art that must be given a consistent interpretation throughout a legislative text.

[50] Next, s. 131(1) must be read harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature. As noted above, the legislative purposes of the *Securities Act* are outlined in s. 1.1: to protect investors from "unfair, improper or fraudulent practices" and to foster "fair and efficient capital markets" and confidence in those markets.

[51] There is nothing in the public record that explains why the wording of the subsection was changed between first and second reading. As noted above, both the appellants and the respondents argue that the change favours their interpretation. I am not able to discern the legislature's intention from this change and thus it is of limited assistance in conducting this part of the statutory interpretation analysis.

[52] The appellants point to the following features of the statutory scheme for misrepresentation in a takeover bid circular, which they say demonstrate that the motion judge's interpretation is incorrect:

- OSC Form 62-504F1, which prescribes the contents of a takeover bid circular, states that offerors must
- disclose "any material facts concerning the securities of the offeree issuer" and "any other matter . . . known to the offeror . . . that would reasonably be expected to affect the decision of the security holders of the offeree issuer to accept or reject the offer".

- A takeover bid circular must be accompanied by a certificate stating: "The foregoing contains no untrue
- statement of a material fact and does not omit to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made." [page301]

- Section 99 of the Act, repealed in 2015, provided that a takeover bid circular "shall contain a certificate of the
- offeror" and must be signed, if the offeror is a person or company other than an individual, by each of the following: the CEO, the CFO and two directors.

[53] I agree. If the motion judge's interpretation is correct, this scheme falls apart. What point is there in requiring the offeror's directors and officers to sign a certificate affirming the integrity of the takeover bid circular if s. 131(1) forces a plaintiff into an election that could let those

Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue queen ouest, Toronto ON M5H 3S8

Citation: Sharpe (Re), 2022 ONSEC 3
Date: 2022-03-30
File Nos. 2021-26 and 2021-15

IN THE MATTER OF
DAVID SHARPE

and

IN THE MATTER OF
BRIDGING FINANCE INC., DAVID SHARPE, BRIDGING INCOME FUND LP, BRIDGING MID-MARKET DEBT FUND LP, BRIDGING INCOME RSP FUND, BRIDGING MID-MARKET DEBT RSP FUND, BRIDGING PRIVATE DEBT INSTITUTIONAL LP, BRIDGING REAL ESTATE LENDING FUND LP, BRIDGING SMA 1 LP, BRIDGING INFRASTRUCTURE FUND LP, and BRIDGING INDIGENOUS IMPACT FUND

REASONS FOR DECISION
(Section 144 of the *Securities Act*, RSO 1990, c S.5)

Hearing:	December 16, 2021; further written submissions received January 7 and 14, 2022	
Decision:	March 30, 2022	
Panel:	Timothy Moseley	Vice Chair, and Chair of the Panel
	Lawrence P. Haber	Commissioner
	M. Cecilia Williams	Commissioner
Appearances:	Alistair Crawley Melissa MacKewn Alexandra Grishanova	For David Sharpe
	Linda Rothstein Robert Gain Jacob Millar	For Staff of the Commission
	John L. Finnigan Erin Pleet	For the receiver of Bridging Finance Inc. et al.

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REASONS FOR DECISION

I. OVERVIEW

[1] This case arises because in April and May of 2021, the Ontario Securities Commission indirectly publicly disclosed compelled testimony of David Sharpe that Commission Staff had obtained during an investigation conducted pursuant to an order issued under s. 11 of the *Securities Act*[1] (the **Act**). The Commission made that disclosure:

a. on April 30, 2021, by filing the compelled testimony in the public court record in connection with the Commission's application for the appointment of a receiver over Bridging Finance Inc. (**Bridging**) and related entities; and

b. on May 1, 2021, by publishing a news release on the Commission's website, announcing the appointment of the receiver, and including a link to the receiver's website, on which could be found the compelled testimony.

[2] Mr. Sharpe submits that the Commission's public disclosure was improper, and that Staff of the Commission ought first to have obtained an order from this tribunal under s. 17 of the Act, authorizing disclosure. As a remedy, Mr. Sharpe asks that we revoke the s. 11 investigation order. He makes that request in two different proceedings: (i) by way of a motion in the proceeding commenced by Staff for a temporary order; and (ii) in a separate application that he commenced.

[3] The Commission directed that the motion and the application be heard together, and that before a full merits hearing, there would be a hearing at which two preliminary questions were to be addressed. The questions, the form of which was agreed upon by the parties before the hearing, are:

a. Can the Commission publicly disclose compelled evidence obtained under a s. 11 order when it brings an application for the appointment of a receiver under s. 129 of the Act, without first obtaining a s. 17 order?

b. If the answer to Question 1 is no, is the revocation or variation of the s. 11 order an available remedy?

[4] At the joint request of the parties, these two questions were supplemented by a statement of agreed facts, to give context to the questions. The parties agreed that if we were to conclude that the Commission cannot make the kind of public disclosure contemplated in the first question, and that revocation of the s. 11 order is an available remedy, then the question of whether we should revoke the s. 11 order in this case would be determined at a subsequent hearing at which evidence could be called to establish additional facts.

[5] On March 25, 2022, we issued an order dismissing Mr. Sharpe's request for a revocation or variation of the s. 11 order. We set out below the reasons for that decision. The order also calls for further steps to resolve Mr. Sharpe's request that part or all of the adjudicative record (except for written submissions) be kept confidential. We describe those steps at the end of these reasons. With

[1] RSO 1990, c S.5

respect to the primary request, for revocation or variation of the s. 11 order, we conclude for the reasons below that:

a. the Commission cannot publicly disclose compelled evidence (or any similarly protected material) in the context of an application to the Court to appoint a receiver, without first obtaining a s. 17 order;

b. however, the revocation or variation of a s. 11 order is not an available remedy in the circumstances set out in the statement of agreed facts.

[6] Accordingly, no further hearing is required with respect to the merits of Mr. Sharpe's request for revocation or variation of the s. 11 order in this case. We dismiss that request.

[7] That would dispose of the application and motion, except that Mr. Sharpe also asked that the adjudicative records in the two proceedings be kept confidential. He later clarified that his request did not extend to the written submissions filed by the parties, which are part of the adjudicative record. At the hearing before us, we ordered that the adjudicative records (excluding the written submissions) would continue to remain confidential and not accessible to the public, pending the issuance of this decision.

[8] We also advised that upon issuing this decision, if we contemplated that the confidentiality order might be terminated, we would afford the parties an opportunity to make submissions on that question. At the conclusion of these reasons we set out a mechanism for the parties to do so.

II. BACKGROUND

A. Context and terminology

[9] The Commission is an integrated regulatory agency. The powers it exercises in furtherance of its mandate fall into three categories that align with the three branches of government, and to which we will return in our analysis below, using these labels:

a. the Commission exercises a **quasi-legislative function** when it makes rules and policies;

b. the Commission exercises a **quasi-judicial function** when its tribunal adjudicates proceedings that come before it; and

c. the Commission carries out an **executive function** when, among other things, it applies and enforces legislation, rules and policies.

[10] The Commission acts in different capacities depending on the context and the nature of the power being exercised. Because this case touches upon those different capacities, it is important for our analysis and for clarity of our reasons to be precise in the use of terminology.

[11] We use the word **Commission** to refer to the agency as a whole, including its appointed Members and staff. The Commission carries out its regulatory mandate through, among other things, the making of policies and rules (*i.e.*, its quasi-legislative function), and the exercise of oversight over those who participate in the capital markets (part of its executive function).

[12] We use the word **Tribunal** to refer to the agency's quasi-judicial (or adjudicative) function. The Tribunal comprises all appointed Members of the

Commission, except the individual who is both the Chair and Chief Executive Officer, who does not adjudicate because they oversee the enforcement function and the staff who appear before the Tribunal.

[13] We use the word **Staff** to refer to the unitary entity that is a party before the Tribunal (see Rule 5(g) of the *Ontario Securities Commission Rules of Procedure and Forms*[2]). This entity is essentially made up of all Commission employees, although where appropriate it includes outside counsel acting for Staff. It excludes the Vice Chair, who is a Commission employee but who is separate from Staff in the context of Tribunal proceedings. It also excludes those employees in the Office of the Secretary who support the Tribunal.

[14] We elaborate on these terms as necessary in the analysis that follows.

[15] We use one other term for convenience. The concern that Mr. Sharpe raises in his motion and application relates to **compelled evidence**, which includes testimony that he gave in response to a summons issued by a person appointed under the s. 11 investigation order. As a result, his testimony is "compelled testimony", a sub-category of compelled evidence that is protected by confidentiality provisions in the Act. Those statutory provisions protect more than just compelled evidence (*e.g.*, they also protect the fact that an investigation order was issued), but because compelled evidence is the focus of this hearing, we use that term in these reasons.

B. Facts

[16] The following brief factual background is drawn from the parties' statement of agreed facts and from the history of these two proceedings.

[17] On September 11, 2020, the Commission performing its executive function issued an order under s. 11 of the Act, authorizing the persons named in that order to conduct an investigation into Bridging. At the time, Bridging was a registered restricted portfolio manager, exempt market dealer and investment fund manager.

[18] As part of that investigation, a summons was issued to Mr. Sharpe under s. 13 of the Act, compelling his attendance to answer investigators' questions. At the time of these examinations, Mr. Sharpe was the chief executive officer and ultimate designated person of Bridging. Mr. Sharpe attended to be examined on October 23 and 27, 2020, and again on April 29, 2021.

[19] At the examinations, Mr. Sharpe took the use and derivative use protections of the *Evidence Act*[3] and the *Canadian Charter of Rights and Freedoms*[4] (the ***Charter***) in respect of all questions asked and answers given.

[20] On April 30, 2021, the day after Mr. Sharpe's last examination, Staff asked the Commission (acting in its executive capacity, *i.e.*, not the Tribunal) to issue a temporary order without notice to any party, cease trading the securities of certain Bridging-controlled investment vehicles. The Commission issued the temporary order, which has been extended and varied by the Tribunal since then. The current order expires on June 30, 2022.

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[2] (2019) 42 OSCB 9714
[3] RSO 1990, c E.23
[4] Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

[21] Later on April 30, 2021, the Commission applied to the Superior Court of Justice under s. 129 of the Act, for the appointment of PricewaterhouseCoopers Inc. as receiver and manager of all the assets, undertakings and properties of Bridging and associated entities. The application was made without notice to Mr. Sharpe or to any other party. The material that the Commission filed with the Court in support of the application included compelled evidence, including the entire rough draft of the transcript of Mr. Sharpe's April 29, 2021, examination.

[22] Staff did not seek a s. 17 order from the Tribunal before filing the compelled evidence with the Court on April 30.

[23] The Court granted the Commission's application on the day of the hearing. The Court's order provided that the receiver would create a website on which Court materials could be found. The receiver did so, and posted some compelled evidence, including the draft transcript of Mr. Sharpe's April 29 examination, on its website.

[24] On May 1, 2021, the day after the Court issued the order appointing the receiver, the Commission published on its website a news release announcing the appointment of the receiver. The news release included a link to the receiver's website, on which some of the compelled evidence was posted.

III. ANALYSIS

A. Submissions invoking the *Charter*

[25] Before we turn to our analysis of the questions before the Panel, a preliminary comment is in order.

[26] In their submissions, both Mr. Sharpe and Staff make arguments about the *Charter* and the effect it might have on the issues before us. We decline to address those arguments. At a preliminary attendance before the hearing that gives rise to this decision, the Tribunal canvassed with the parties whether any issues would arise that might require notice to the Attorneys General of Canada and Ontario of a constitutional question. Mr. Sharpe confirmed that there would be none at this stage of the proceeding.

[27] The parties gave no such notice. Any finding we make with respect to the *Charter*, including its effect in this case, might fall within the scope of matters for which the Attorneys General of Canada and Ontario require notice. Accordingly, we will not address those issues.

[28] We turn now to address the two questions before us.

B. The Commission cannot publicly disclose compelled evidence without first obtaining a s. 17 order

1. Introduction

[29] The first question is whether the Commission can publicly disclose compelled evidence without first obtaining a s. 17 order when the Commission uses that evidence in support of a Court application for a receiver. We conclude that it cannot.

[30] Staff makes a preliminary objection to our considering this question at all. Staff submits that if the Commission engaged in any impermissible conduct, that

conduct was purely in connection with the Court application, a proceeding over which the Tribunal has no jurisdiction, control or influence.

[31] With respect to the Court proceeding, we agree with Staff's characterization of the Tribunal's role, or more precisely the lack of a role. However, we disagree with the suggestion that as a consequence, we cannot answer the first question. Mr. Sharpe's primary request for relief is that we revoke the s. 11 order. Even though we ultimately dismiss that request, in order to reach it we must begin by considering his allegations about the Commission's conduct.

[32] That brings us to our analysis of the first question. We start with the relevant statutory provisions, being ss. 16 and 17 of the Act. We then consider applicable statutory interpretation principles and the interests at stake, and we apply those principles and interests to assess whether the Commission acted improperly in the circumstances of this case as specified in the statement of agreed facts.

2. Relevant statutory provisions

[33] Section 16 of the Act sets out the confidentiality and non-disclosure obligations with respect to compelled evidence. We consider s. 16's provisions in detail below, but by way of introduction, they serve two main purposes:

a. they protect the integrity of an ongoing investigation; and

b. they protect the privacy interests of persons or companies who provide evidence under compulsion.[5]

[34] The first of those two purposes is not at issue here. In general, Staff is the principal steward of the confidentiality of an ongoing investigation. Staff asserted no such interest in this case; indeed, the Commission's actions in publicly disclosing some compelled evidence clearly demonstrate that the Commission was not concerned about protecting confidentiality of that material. We therefore conduct our analysis with regard to the interests protected by the second purpose. In this case, those are the privacy interests of Mr. Sharpe, who was compelled to testify.

[35] With that focus in mind, we begin with s. 16(1), which prohibits any person or company from disclosing compelled evidence. Staff submits that this prohibition does not apply to the Commission itself, a position we consider and reject below.

[36] Whenever s. 16(1) does apply, though, two exceptions appear. Only one of those two is relevant here, and applies if the disclosure is made in accordance with s. 17 of the Act. The other, in s. 16(1.1), permits disclosure to counsel or for insurance purposes.

[37] Subsection 16(2) of the Act is similar in substance to s. 16(1). Unlike s. 16(1), though, which speaks in the active voice and focuses on what a person or company may or may not do, s. 16(2) speaks in the passive voice and focuses on the compelled evidence itself. It provides that compelled evidence "is 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…". The prohibition does not

[5] *Black (Re),* (2007) 31 OSCB 10397 (***Black***) at para 135; *Potter v Nova Scotia (Securities Commission),* 2006 NSCA 45 at para 48

depend on the identity of the person or company that would otherwise make disclosure.

[38] Staff relies heavily on the words "for the exclusive use of the Commission" in s. 16(2) when justifying the Commission's choice to disclose compelled evidence in this case. We return to consider those words below.

[39] Assuming s. 16(2) does apply to protect the confidentiality of compelled evidence, the same two exceptions are provided in that subsection as in s. 16(1), *i.e.*, s. 16(1.1) and s. 17. Once again, the only relevant exception here is if disclosure is made in accordance with s. 17.

[40] Section 17 provides three mechanisms by which disclosure may be made:

a. pursuant to an order of the Tribunal under s. 17(1);

b. pursuant to an order of a court having jurisdiction over a prosecution under the *Provincial Offences Act*[6] initiated by the Commission (s. 17(5)); and

c. a person appointed under s. 11 as an investigator may disclose in connection with an existing or contemplated proceeding before the Tribunal or before certain designated Commission staff members (s. 17(6)).

[41] The third of those mechanisms (disclosure by an appointed investigator) allows Staff, in the enforcement context, to discuss evidence with a contemplated respondent before a proceeding is commenced, to satisfy its disclosure obligations to respondents, and to prepare its case, including by briefing witnesses.

[42] Neither that mechanism nor the second of the three listed above is directly relevant to the proceedings before us. However, Mr. Sharpe cites them in support of his submission that the overall legislative scheme is one of significant protection of compelled evidence, and that disclosure may be made only as explicitly permitted. He notes that neither mechanism results in disclosure that is public and unlimited; rather, the disclosure is targeted to specified recipients and is limited to the specified purpose.[7]

[43] Mr. Sharpe submits that Staff was required to pursue the first of the above three mechanisms (a s. 17(1) order from the Tribunal) before the Commission filed the compelled evidence with the Court and then further disclosed it by issuing a news release that linked to the receiver's website.

[44] When a party employs the first mechanism and applies for an order under s. 17(1), the Tribunal's authority to issue such an order is subject to two limitations:

a. where applicable and where practicable, reasonable notice must be given to, among others, persons who provided the compelled evidence pursuant to a s. 13 summons (s. 17(2)); and

b. the Tribunal must determine that it is in the public interest to make the order, and this determination must be made in the context of this part of

[6] *Provincial Offences Act*, RSO 1990, c P.33
[7] *A Co v Naster,* [2001] OJ No 4997 (Div Ct) (***Naster***) at para 26

the Act that governs investigations and compelled evidence,[8] taking into account the public interest in maintaining the confidentiality of compelled evidence generally.[9]

[45] We are aware of no case in which the Tribunal has ordered unlimited public disclosure of compelled evidence under s. 17(1). Similarly, we are aware of no decision that refers to broad public disclosure of compelled evidence in the absence of a s. 17 order. Staff counsel advised that in other cases, the Commission has filed compelled evidence in court in support of a receivership application without first obtaining a s. 17 order. The fact that the Commission may have previously done so unchallenged neither supports nor undermines the legitimacy of that approach.

3. Applicable principles of statutory interpretation

[46] There are two principles of statutory interpretation that guide us and that we highlight before proceeding with our analysis.

[47] The first requires that statutory language be interpreted purposively, in context, and in its grammatical and ordinary sense, harmoniously with the scheme of the legislation, the object of the legislation and the intention of the legislature.[10] We should be skeptical about a proposed interpretation that does not meet this standard, because when a legislature intends to provide an exception or otherwise depart from the general scheme of the legislation, it can say so expressly.

[48] Secondly, legislation that interferes with citizens' rights is to be strictly construed. Any ambiguity found upon the application of proper principles of statutory interpretation should be resolved in favour of the person whose rights are being truncated.[11]

4. The balancing of competing interests

[49] We turn now to consider the competing interests at play. This contextual analysis will assist us in applying the above two principles and in interpreting the relevant statutory provisions.

[50] The Commission's powers of compulsion are not unique but are extraordinary.[12] Failure to attend an examination or to answer an investigator's questions makes the compelled person liable to be committed for contempt by the Superior Court of Justice.[13]

[51] In *Black,* the Commission held that "these broad powers are balanced with detailed protections for persons compelled to give materials and evidence under oath." The Commission's obligation to maintain all compelled evidence "in the highest degree of confidence" is "the *quid pro quo* in return for" the powers of compulsion.[14]

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[8] *X (Re)*, 2007 ONSEC 1, (2007) 30 OSCB 327 (***Re X***) at para 28
[9] *Coughlan (Re),* [2000] OJ No 5109 (Div Ct) (***Coughlan***) at para 66
[10] *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26
[11] *Morguard Properties Ltd v City of Winnipeg,* [1983] 2 SCR 493 at para 26
[12] *Re X* at para 31
[13] Act, s 13(1)
[14] *Black* at para 234

[52] In its written submissions, Staff asserts that the Commission (performing its executive function as applicant in Court) was entitled to determine the appropriate use and disclosure of compelled evidence "in furthering its public interest mandate". While the Tribunal often exercises statutory powers with reference to "the public interest" (as is explicitly called for by the relevant provisions in the Act), "public interest" is not a paramount principle that allows the Commission, when performing its executive function, to override protections that would otherwise operate. The Commission is a creature of statute and has only the authority granted to it, subject to prescribed limitations on that authority. We must examine the Commission's actions in this case against the applicable statutory provisions and legal principles.

[53] As we undertake that examination, it is important to address Staff's submission that the Commission and its Staff are distinct, and Mr. Sharpe's categorical rejection of that submission. In our view, the correct answer lies somewhere in between. Crucially, context matters. It is true that the Act contains many references to the Commission, and separate references to its staff or employees. It is also true that in some contexts, the Commission acts only through its staff. Our analysis below will consider the proper context-specific meaning of these terms.

[54] Examination of the statutory scheme reveals a balancing between the Commission's legitimate interests in obtaining and preserving evidence to further its investigations, and the interests of compelled witnesses. The Tribunal has previously emphasized the "high degree of confidentiality associated with compelled evidence and the strict limitations on its use".[15]

[55] When reviewing an application under s. 17 for authorization to disclose compelled evidence, and when considering how the public interest should influence the outcome of such an application, the Commission also takes into account the reasonable expectations of compelled witnesses. As the Divisional Court has noted, the "effective functioning of the Commission depends upon the reliance which parties affected by its operations can place upon the confidentiality of [an investigation]."[16]

[56] There is a high expectation of privacy with respect to all compelled testimony,[17] and ss. 16 and 17 of the Act are meant, among other things, to give some comfort to compelled witnesses that the information they provide will remain confidential, subject to the terms of the Act.[18]

[57] This reasonable expectation of privacy combines with the reality of potential harm to witnesses as a result of the Tribunal authorizing the use and disclosure of compelled evidence.[19] These factors explain why the Tribunal is required by s. 17(2) to ensure that where practicable, a compelled witness is notified before the Tribunal authorizes disclosure of compelled evidence received from that witness.

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[15] *Black* at para 135
[16] *Coughlan* at para 57 citing with approval *Norcen Energy Resources* (April 29, 1983) OSCB 759
[17] *Black* at para 78
[18] *Mega-C Power Corporation et al,* 2007 ONSEC 11, (2007) 33 OSCB 8273 (***Mega-C***) at para 29
[19] *Black* at para 135

[58] That requirement to give notice to a compelled witness reflects the interest that such a person has in having an opportunity to:

a. oppose the making of the order;

b. argue that the scope of the disclosure ought to be limited, including by "edit[ing] out irrelevant or privileged material";[20] or

c. argue that other possibilities ought to be considered that would minimize the impact of disclosure.[21]

[59] In *Deloitte & Touche LLP v. Ontario (Securities Commission)*,[22] the Supreme Court of Canada articulated an important guiding principle for the making of disclosure orders:

> …in making a disclosure order in the public interest under s. 17, the OSC has a duty to [compelled witnesses] to protect [their] privacy interests and confidences. That is to say that OSC is obligated to order disclosure only to the extent necessary to carry out its mandate under the Act. [emphasis added]

[60] In that decision, the Court calls for an approach that minimally impairs the compelled witness's privacy interests. To assist with the necessary determination, the Act provides a mechanism by which Staff and the compelled witness can present to the Tribunal competing views of the minimum impairment that would be required to allow the Commission to carry out its mandate. The Tribunal cannot fully consider the privacy rights of a compelled witness, and balance those rights against competing interests, without hearing from the compelled witness, where practicable.[23]

[61] Terms and conditions are a tool that can be used to limit the disclosure so that it is only to the extent necessary. Sharpe speculates that had Staff applied under s. 17, disclosure would not have been ordered on the expansive basis that the Commission unilaterally undertook. We will not opine on a hypothetical application, but what is clear is that the route that the Commission chose did not afford Mr. Sharpe an opportunity to make submissions either before the Tribunal or before the Court.

[62] In contrast to the balancing envisioned by the Act and by the Supreme Court of Canada, in this case the Commission in performing its executive (not adjudicative) function chose to make its own determination about how much disclosure was appropriate. At first blush at least, this action failed to take account of what the Superior Court of Ontario has described as the "important public interest" served by the Tribunal's oversight of the Commission's desire to disclose compelled evidence.[24]

[63] On this point, Staff's submissions misapprehend the role of the Tribunal within the agency. This misunderstanding is repeated throughout Staff's written submissions, in which Staff suggests that it would be illogical to conclude that

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[20] *Coughlan* at para 66
[21] *Coughlan* at para 41(vii)
[22] 2003 SCC 61 (***Deloitte***) at para 29
[23] *XX (Re),* 2018 ONSEC 45, (2018) 41 OSCB 7519 (***XX***) at para 45
[24] *A v Ontario (Securities Commission*), 2006 CanLII 14414 (ON SC) at paras 44, 57

the Commission would be required to obtain authorization from itself under s. 17(1) when the Commission wishes to disclose compelled evidence. Staff explicitly disagrees with what it describes as Mr. Sharpe's attempts to bifurcate the Commission.

[64] We reject this submission, which conflates the Tribunal (the adjudicative function) and the Commission performing its executive function as applicant before the Superior Court of Justice. It also ignores the fact that from time to time, Staff applies to the Tribunal for an order under s. 17(1), contrary to Staff's assertion before us that to its knowledge, no such case exists.[25]

[65] Staff's assertion that under s. 17(1), "the Commission is charged with determining whether it is in the public interest for compelled information to be disclosed",[26] appears correct if no distinction is made among the agency's various functions. However, it is the Tribunal that makes that determination, not the Commission performing its executive function.

[66] The same goes for orders of "the Commission" under s. 127 of the Act at the conclusion of an enforcement proceeding. If the Commission were conceptually a unitary entity with no distinction between its executive function and its adjudicative function, there would be no need at all for Staff to appear before the Tribunal in an enforcement proceeding. By its logical extension, Staff's submission about s. 17(1) suggests that the Commission performing its executive function could, by itself, simply issue a sanctions order under s. 127. That is clearly not the case.

[67] Returning to the facts of this case, the Commission did what applicants in court typically do, when it applied for the appointment of a receiver. The Commission filed affidavits containing evidence on which the Commission intended to rely. Initially at least (*i.e.*, at the time of filing), such affidavits are not subjected to scrutiny by anyone at the court to determine admissibility of the evidence. Where no notice is given to any respondent to the application (as was the case here), only the applicant is in a position to review the evidence, before it appears in the public court file, to determine whether all of it is properly admissible in court. Further, only the applicant is in a position to raise admissibility issues before the court.

[68] There was no suggestion before us that before filing its material, the Commission undertook a review to determine admissibility or whether public disclosure of any of the material might impermissibly violate Mr. Sharpe's interests. Even if the Commission undertook such a review, it did so without input from Mr. Sharpe, because Mr. Sharpe was afforded no opportunity to give that input. The Commission's bypassing of the mechanisms in s. 17 deprived the Tribunal of the opportunity to exercise control over the extent of disclosure and to ensure that such disclosure was minimized, as required by the Supreme Court of Canada in *Deloitte*.

[25] See, *e.g.*, *XX*, and *Mega-C* at para 24

[26] Memorandum of Fact and Law of Staff of the Ontario Securities Commission, December 3, 2021 (**Staff's Written Submissions**) at para 55

5. Principles of statutory interpretation applied

[69] With that background and the principles of statutory interpretation in mind, we turn to the arguments advanced by Staff to justify the Commission's choice to disclose publicly the compelled evidence without first obtaining a s. 17 order.

(a) The Commission, as a corporation, is bound by the prohibition in s. 16(1)

[70] Staff submits that s. 16(1) prohibits disclosure by a "person or company", but not by the Commission. Staff acknowledges that the Commission is a corporation and therefore a "company" as defined in s. 1(1) of the Act. However, Staff argues that because the Commission became a corporation in 1997, after the 1994 enactment of s. 16(1) in its current form, the restriction could not have been intended to apply to the Commission.[27]

[71] We reject this position. As Mr. Sharpe correctly points out, before the Commission was a corporation it was a person, as that term is defined in s. 1(1) of the Act. A plain reading of s. 16(1) makes it applicable to the Commission, and there is no principle of statutory interpretation that would displace that conclusion.

[72] In particular, we disagree with Staff that because other occurrences of "person or company" in the Act may not lend themselves to applying to the Commission (*e.g.* the right of an investigator to compel the attendance of a person or company), we should exclude the Commission from "company" in s. 16(1). Ideally, a statutory term has a consistent meaning throughout the statute, but that general rule does not apply where the context "clearly indicates otherwise".[28] The word "company" in s. 16(1) includes the Commission by definition.

[73] We should adopt that definition and apply it, since the context does not clearly indicate otherwise, and there is no explicit carve-out for the Commission in s. 16(1). If the legislature intended to depart from the general statutory scheme of protecting confidentiality and create an exception for the Commission, it could easily have explicitly said so. It did not. Because of the absence of explicit exclusionary language, the Commission is bound by s. 16(1).

(b) The words "for the exclusive use of the Commission" in s. 16(2) do not allow the Commission to bypass s. 17

[74] Staff acknowledges the confidentiality regime imposed by ss. 16 and 17 of the Act, but maintains that even if s. 16(1) applies to the Commission as a "company", the Commission need not resort to any of the three s. 17 mechanisms when it chooses to apply to court for the appointment of a receiver. Staff submits that the words "for the exclusive use of the Commission" grant blanket authority to the Commission to make such use of compelled evidence as it sees fit, without the limitations and protections set out in those sections. Staff argues that this is so even if the Commission's use of the compelled evidence will

[27] Act, s 3(1)
[28] *R v Ali*, 2019 ONCA 1006 at para 68

result in public disclosure of that material, without notice to a compelled witness whose evidence is included.

[75] We disagree. The plain meaning of the words "for the exclusive use of the Commission" limits rather than expands the overall use that can be made of compelled evidence. The obligation to construe strictly any ambiguity supports this interpretation.

[76] Against the backdrop of a statutory scheme that prescribes a high degree of confidentiality of compelled evidence, with a limited number of specifically enumerated exceptions that balance competing interests, clear legislative intent would be required to support the interpretation advanced by Staff. We see no such legislative intent, and we find Staff's general "public interest" and "Commission mandate" arguments unpersuasive.

[77] The words "exclusive use of the Commission", read in the context of the legislative scheme, strongly suggest emphasis on the word "exclusive". The rest of s. 16 consistently establishes the confidentiality of compelled evidence, except for the counsel/insurer exception in s. 16(1.1) and references to s. 17. It would be inconsistent for the words "exclusive use of the Commission" to expand the use that can be made, as opposed to excluding use by others.

[78] Had the legislature intended that the Commission have unfettered discretion to publicly disclose compelled evidence, it could easily have said so, *e.g.*, by using words such as "exclusive and unrestricted use", or "exclusive use of the Commission in its discretion".

[79] Staff also refers to the following words in s. 16(2) in support of its submissions: "…and [compelled evidence] shall not be disclosed or produced to any other person or company or in any other proceeding except in accordance with subsection (1.1) or section 17 [emphasis added]."

[80] We have difficulty with these words of the statute, especially "other proceeding". Until that occurrence of the word "proceeding", s. 16 does not refer to any proceeding, so it is unclear what "other" refers to.

[81] Section 16's focus is a formal investigation and the information derived from one, but an investigation is not a proceeding. Where Staff wishes to obtain a s. 11 order and the powers that result from that order to assist in an investigation, Staff does not commence a proceeding. Instead, that request is made to the Commission performing its executive function.

[82] In contrast, a proceeding is commenced by the issuance of a Notice of Hearing by the Secretary, following the filing with the Tribunal of an Application or a Statement of Allegations. Staff takes no such steps when seeking a s. 11 order.

[83] As a result, because an investigation is not a proceeding we are unable to make sense of the word "other" before "proceeding" in s. 16(2).

[84] We do not agree with Staff that the words should be read as referring to a proceeding other than one that arises out of the investigation order through which the compelled evidence was obtained. That proposed interpretation does not conform to the plain meaning of the words, and in any event, it may be impossible in some cases to determine whether a proceeding "arises" out of a particular investigation order.

[85] As it turns out, we do not need to resolve this quandary. The words of s. 16(2) prohibit disclosure "to any other person or company or in any other proceeding". The "or" following "person or company" means that disclosure to any other person or company is prohibited. That prohibition does not depend on the meaning of "any other proceeding"; nor does it relate to any particular investigation or proceeding.

[86] By filing the compelled evidence in Court without seeking a sealing order, and by issuing a news release linking to that material, the Commission disclosed it to the public (and therefore to persons and companies).

[87] For these reasons, we cannot accept the proposition that the words of s. 16(2) permit the Commission to bypass the mechanisms set out in s. 17. For the same reasons, we cannot accept Staff's repeated but unsubstantiated submission that the interpretation proposed by Mr. Sharpe would "stymie" the Commission's ability to carry out its public interest mandate and undermine the Commission's ability to "uncover the truth".[29]

(c) The words "in connection with a proceeding…" in s. 17(6) do not assist the Commission in this case

[88] We now return to s. 17(6), one of the three mechanisms in s. 17 that permits disclosure of compelled evidence. Under certain specified circumstances, s. 17(6) allows that disclosure without an order from the Tribunal.

[89] In relevant part, s. 17(6) provides that a person appointed under a s. 11 investigation order may disclose compelled evidence "only in connection with a proceeding commenced or proposed to be commenced before the Commission or the Director" [emphasis added].

[90] Staff submits that the Commission's receivership application falls within this language, and that the Commission's public disclosure was therefore permitted by s. 17(6). Staff says that the Court application was "in connection with" a proceeding commenced before the Tribunal, *i.e.*, Staff's application under s. 127 for an extension of a cease trade order (one of the two proceedings in which this hearing was held, and the only one of the two proceedings that existed at the time).

[91] We disagree. We do not construe "in connection with" as Staff proposes. Staff relies on *Mega-C* in support of its submission that the words "in connection with" are to be interpreted broadly.[30] However, that case involved disclosure of compelled evidence entirely within one Tribunal proceeding, with no mention of any other proceeding, and we see nothing in the cited paragraph that supports a broad reading of "in connection with".

[92] There are words elsewhere in the *Mega-C* decision that if read out of context could suggest support for Staff's position here:

> The Commission is a public body, exercising its statutory powers in the public interest. It is important, in our view,

[29] Staff's Written Submissions at para 89
[30] *Mega-C* at para 31

> that it fulfill its mandate as transparently as practically possible.[31]

[93] Read in the context of the entire decision and the rest of the paragraph, however, the words "the Commission" in the passage above clearly speak about the Tribunal. The paragraph continues:

> This means that matters coming before the Commission, including the details about those matters, be made public, to the broadest extent possible, absent special circumstances that would warrant some degree of confidentiality. Where such circumstances exist, the Commission should exercise its discretion narrowly, so as to provide the public with as much information about the proceedings before the Commission as possible in the circumstances. [emphasis added]"

[94] There is nothing in this paragraph, either, that supports Staff's position in this case. This is so because there is no discussion of what the Commission, performing its executive function, might do as applicant in a court proceeding. Nor is there a collision between the language in *Mega-C* and the Supreme Court of Canada's exhortation in *Deloitte* that an order authorizing disclosure permit only such disclosure as is necessary.[32] In the above-quoted words from *Mega-C*, the panel expressly acknowledged that the Tribunal's general interest in being transparent was limited by what is "practically possible" and subject to "special circumstances that would warrant some degree of confidentiality".[33]

[95] Staff also relies on *Crown Hill Capital Corporation et al*,[34] where the Tribunal said that there were "a number of [unspecified] decisions" in which it was found that the words "in connection with", among others, were to be interpreted broadly and given significant latitude. However, this analysis concerned the language in s. 11(3) of the Act, which describes the permissible scope of an investigation:

> For the purposes of an investigation under this section, a person appointed to make the investigation may investigate and inquire into,
>
> (a) the affairs of the person or company in respect of which the investigation is being made, including any trades [etc.] to, by, on behalf of, or in relation to or connected with the person or company…; and
>
> (b) the assets [etc.], the financial or other conditions at any time prevailing in or in relation to or in connection with the person or company… [emphasis added]

[96] The context for the use of the words is very different between a s. 11 investigation order (the fruits of which are protected by the confidentiality restrictions in s. 16) on the one hand, and a mechanism that would intrude on

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[31] *Mega-C* at para 36
[32] *Deloitte* at para 29
[33] *Mega-C* at para 36
[34] 2014 ONSEC 25, (2014) 37 OSCB 8294 (***Crown Hill***) at para 21

those protections on the other. We are not prepared to attribute the general and unsubstantiated proposition in *Crown Hill* to the present case.

[97] The words "in connection with" an existing or proposed Tribunal proceeding do not clearly extend to a different proceeding in a different venue. Had the legislature intended the result Staff seeks, it could have used words such as "arising out of the same facts as" or "involving the same events". To us, the words "in connection with" do not convey that meaning.

6. The Commission's actions defeated Mr. Sharpe's reasonable expectations and did not limit impairment of his privacy interests to the extent necessary in these circumstances

[98] We turn now to consider whether the Commission's choice to disclose publicly the compelled evidence aligned with Mr. Sharpe's reasonable expectations, and whether that choice minimized impairment of his privacy interests. We conclude that the answer is no in both cases.

(a) The Commission's actions were not consistent with Mr. Sharpe's reasonable expectations; rather, they defeated those expectations

[99] We begin by considering Mr. Sharpe's reasonable expectations. We conclude that the Commission's actions defeated rather than met those expectations.

[100] As the Tribunal has previously stated, a witness's reasonable expectations of privacy and confidentiality are a significant factor for the purposes of the Tribunal's s. 17(1) public interest jurisdiction.[35] Staff asserts that the Commission's disclosure of compelled evidence in this case was in accordance with the reasonable expectations of Mr. Sharpe. We disagree.

[101] This issue requires us to consider objectively the reasonable expectations of a compelled witness, as opposed to the actual expectations of Mr. Sharpe, about which we had no evidence, and nor should we have.

[102] Staff cites *Black* in submitting that Mr. Sharpe should reasonably have expected that his compelled evidence could be disclosed "for the purposes of a regulatory proceeding under the Act".[36] This submission misunderstands the Tribunal's words in that case, and in particular the words "a regulatory proceeding". The excerpted words must be read in the context of the decision and of the entire paragraph from which they are drawn:

> A witness is entitled to expect that the confidentiality provisions set out in section 16 of the Act will be respected and that compelled evidence will only be released where disclosure is in the public interest or for the purposes of a regulatory proceeding under the Act.

[103] Those words do two things. First, they reinforce the reasonable expectation of a witness that s. 16 will apply. Second, they contemplate two scenarios in which compelled evidence will be released:

a. where disclosure is in the public interest; or

[35] *Black* at para 123
[36] *Black* at para 119

b. for the purposes of a regulatory proceeding under the Act.

[104] This short list of two scenarios aligns structurally with s. 17, which provides only two ways in which compelled evidence will be released, *i.e.*, made available in some way (as opposed to being provided under compulsion as contemplated by s. 17(5), by which a court may order production under certain circumstances). The two methods of release in s. 17 are:

a. by an order under s. 17(1), which requires the Tribunal to consider "the public interest" (and thereby to consider limitations that might be placed on the disclosure); and

b. that permitted by s. 17(6), which in relevant part permits disclosure "only in connection with… a proceeding commenced or proposed to be commenced before the Commission or the Director [emphasis added]".

[105] In *Black*, the Tribunal assessed a witness's reasonable expectations in light of these prescribed exceptions. Nothing in s. 17 or in *Black* suggests that a witness should reasonably expect unrestricted disclosure in connection with a receivership application.

[106] We note the finding by the Divisional Court in *A Co. v Naster* (***Naster***) that the compelled witness "can have had virtually no expectation of privacy in what he divulged upon his examination."[37] It is difficult to reconcile this statement with the Supreme Court of Canada's holding in *Deloitte* that "the OSC has a duty to [compelled witnesses] to protect [their] privacy interests and confidences" and to limit disclosure as much as possible.[38] Given that *Naster* was decided in 2001, and *Deloitte* was decided in 2003 without reference to *Naster*, we are bound to follow *Deloitte*, as this Tribunal previously has.[39]

[107] The importance of protecting privacy interests having been established, we turn to Staff's assertion that the Commission's actions were justified because, in part, compelled evidence is "routinely disclosed without s. 17(1) authorization in connection with regulatory proceedings under the Act". Staff cites five examples.

[108] First, Staff notes that it discloses compelled evidence in Statements of Allegations, which are public documents. We do not find that argument to be persuasive. An allegation is not evidence. Explicit references in Statements of Allegations to evidence having been compelled are rare, and when they appear they typically relate to an allegation that a respondent misled Staff in a compelled examination. Such disclosure is authorized by s. 17(6). No s. 17(1) order is required.

[109] Second, Staff notes that it discloses compelled evidence to respondents in accordance with Staff's disclosure obligations. Again, this disclosure is authorized by s. 17(6).

[110] Third, Staff notes that respondents sometimes tender compelled evidence in Tribunal proceedings. That is true. However, when they do, they do so under authority of s. 17(6), because the disclosure is "in connection with" (*i.e.*, in) the

[37] *Naster* at para 15
[38] *Deloitte* at para 29
[39] For example, see *Katanga Mining Limited (Re),* 2019 ONSEC 4, (2019) 42 OSCB 803 at para 17

very proceeding in which the disclosure was made to the respondents in the first place.[40]

[111] Fourth, Staff submits that parties openly refer to compelled information in their submissions before the Tribunal and that compelled witnesses are not entitled to notice in those circumstances. We do not accept this broad and unsubstantiated description. A closer examination would be required in order to understand the context, to distinguish different types of situations, and to understand whether parties were referring to information that had already been made public in the course of the hearing or otherwise.

[112] Fifth, Staff submits that there are numerous statutory provisions that contemplate the Commission being a party to court proceedings in which, according to Staff, the Commission would be expected to disclose compelled information. However, none of the provisions cited by Staff refers to compelled information, and there is nothing about any of the provisions that would necessarily mean that information called for would have been obtained by compulsion. More importantly, there is nothing about any of those provisions that would prevent the Commission from seeking proper authorization from the Tribunal to disclose compelled evidence if it were necessary.

[113] Staff also identifies three previous Tribunal decisions that it says resulted in public disclosure of some compelled evidence:

a. *Dunn* – There are no reasons for decision in this case; simply the order that resulted. Three individuals applied under s. 17(1) for an order permitting disclosure of compelled evidence at their criminal trial. Notice was given to the two compelled witnesses whose transcripts formed part of the compelled evidence. Neither witness appeared to contest the application. We see nothing in this order that assists Staff.[41]

b. *Amato* – The Tribunal authorized disclosure of two compelled examination transcripts to alleged victims of a Ponzi scheme who were seeking the use of those transcripts in a court proceeding against their lawyer. There was no longer a need to protect the integrity of the investigation, and there were no persisting privacy interests, since the transcripts had previously been disclosed to the receiver. Disclosure to the receiver had occurred because one of the compelled witnesses was deceased, and the other did not object. Again, nothing in this decision assists Staff.[42]

c. *Y* – The Tribunal authorized the use of certain compelled evidence, to assist parties in defending criminal proceedings. The Tribunal imposed a long list of terms to limit use of the compelled evidence as much as possible. This approach is consistent with the obligation to protect privacy interests as much as possible, and is of no assistance to Staff in this case.[43]

[114] Is there any other basis for how Staff describes a witness's reasonable expectations? Staff rightly concedes that this case is novel. While the Commission's actions here may not have been unprecedented, in that (according

[40] *Mega-C* at para 31
[41] *Frank Dunn et al (Re),* (2012) 35 OSCB 441
[42] *Amato v Welsh,* 2015 ONSEC 16, (2015) 38 OSCB 5111 at paras 1-2, 11 and 27-28
[43] *Y (Re)*, 2009 ONSEC 29, (2009) 37 OSCB 11271 at paras 94 and 100

to Staff) the Commission has publicly disclosed compelled evidence before in connection with a receivership application, we have no reason to believe that those prior situations have ever come to anyone's attention outside the proceedings in which they arose.

[115] In the absence of any jurisprudential basis for the reasonable expectations that Staff describes, how then could the Commission's actions be said to be in accordance with Mr. Sharpe's reasonable expectations? We see no basis for that argument. Mr. Sharpe attended three examinations as required, was accompanied by experienced counsel, and demonstrated caution by expressly asserting his rights under relevant statutes. The only reasonable expectation that a compelled witness in Mr. Sharpe's position could have would be that the Commission and its Staff would act as they were required to, limiting the extent of disclosure only to that necessary to carry out the Commission's mandate and as they had in the past, to the extent there was public knowledge of the Commission's conduct in other cases.[44]

[116] These factors, taken together, would create the expectation in any reasonable person that if the Commission intended to put compelled evidence before the Court, it would do so in a manner that properly respected the high degree of confidentiality associated with that material.

(b) The Commission did not proceed in a way that impaired Mr. Sharpe's privacy interests only to the extent necessary

[117] Mr. Sharpe's reasonable expectations aside, Staff makes a number of submissions to suggest that the Commission proceeded in the only reasonable way available to it. As we address each of these submissions in turn, we will assess the Commission's action in this case against the governing principle – was the Commission's action one that minimally impairs a compelled witness's privacy interests while at the same time fulfilling the Commission's mandate?

i. Obligation of full and fair disclosure to the Court

[118] Staff correctly notes that in the receivership application, which the Commission brought without notice to any other party, the Commission had to make full and frank disclosure to the Court. Staff suggests that this obligation required Staff to present a comprehensive record, the obvious implication being that there was no room for Staff or the Court to limit the material filed in the public record.

[119] We disagree. The obligation to make full and frank disclosure, while real, would not preclude an alternative route that would meet that obligation while at the same time giving Mr. Sharpe an opportunity to make submissions about the appropriate extent of material that would be publicly disclosed. We address that alternative route in the following paragraphs.

[120] At the hearing, we asked Staff whether it would have been practicable, and consistent with the Commission's legitimate interest in seeking the appointment of a receiver, for a cloak of confidentiality to be placed over the compelled evidence until after the receiver had been appointed, at which time Mr. Sharpe

[44] *Deloitte* at para 29

could have been given an opportunity to make submissions about the extent to which that cloak of confidentiality should be maintained.

[121] We asked in particular about the Tribunal's recent decision in *B (Re)*[45]. That case did not involve a receivership, and arose because of a private party's (B's) application, not Staff's. However, the mechanism employed in that case is instructive.

[122] As part of an investigation authorized by a s. 11 order, a summons was issued to B to attend and answer questions at an examination. B wished to cooperate but was concerned that doing so would violate a confidentiality provision in B's employment contract. B sought a declaration from the Tribunal that complying with the summons would not violate that contract.[46] The Tribunal held that it was not empowered to give B the requested declaration. Instead, the Tribunal issued a confidential order under s. 17(1), permitting B to disclose, on a confidential basis, such information as was necessary to commence a court application.[47] Proceeding confidentially was essential, since the alternative would have destroyed the very confidentiality that was at issue.

[123] In the hearing before us, Staff responded to our questions about whether a similar method could or should have been employed in this case. However, following the conclusion of oral submissions, Staff asked for, and we granted, an opportunity for the parties to exchange further brief written submissions "about the potential application to this case of the process that was followed in the *B* decision".

[124] In those supplementary submissions, Staff argued that it would not be appropriate to follow that process, principally because it would defeat the Commission's ability, set out in s. 129(3) and used in this case, to apply for the receiver without notice to any party. We disagree. The following process, similar to that used in *B*, could have been employed here (and there may be others):

a. Staff applies to the Tribunal for a confidential order under s. 17(1) authorizing the Commission to disclose, on a confidential basis, all the compelled evidence (or such portion of it as the Commission sees fit to request) to the Court;

b. the Tribunal grants the order if appropriate, on terms (as permitted by s. 17(4)) that the Commission's *ex parte* (without notice) application to the Court for a receiver include a request that the Court consider whether, in light of s. 16, the confidentiality restrictions applicable to the compelled evidence should continue; and

c. if the Court determines that it is appropriate to grant the order for a receiver, it does so, but having been alerted to the s. 16 issue, it can also consider whether it is appropriate to maintain the confidentiality of certain of the material in the court file, pending an opportunity (after the receiver has been appointed) for a compelled witness to make submissions to the Court about the extent of any confidentiality protection.

[45] 2020 ONSEC 21, (2020) 43 OSCB 6719 (***B***)
[46] *B* at paras 2-3
[47] *B* at para 47

[125] Contrary to the receiver's submissions, the first step above would neither limit the evidence that could be put before the Court nor would it fetter the Court's discretion. We reject the receiver's contention that the Tribunal would be improperly interjecting itself in the Court's process.

[126] The point of the above process or one like it is that it engages rather than ignores the privacy interests of a compelled witness, and it respects the admonition of the Supreme Court of Canada in *Deloitte*.[48] Further, while it is for a court, not this Tribunal, to assess compliance with an *ex parte* applicant's compliance with the obligation of full and frank disclosure to a court, Staff has put this issue before us. We cannot ignore it. We question whether the Commission's decision not to mention s. 16 to the Court, and not to raise the question of whether a temporary sealing order would be appropriate, meets an *ex parte* applicant's obligation.

[127] We derive little comfort from Staff's suggestion that the Court was able to issue a sealing order if one were warranted, even though the Commission chose not to raise the issue with the Court. In our respectful view, that approach reflects an unrealistic view of a court's capacity to receive voluminous material on short notice and to anticipate on its own, unassisted by counsel, any issue that might arise. We are concerned that the Commission's actions did not align well with its obligation to balance the competing interests at play in a case such as this one.

[128] In its submissions, Staff spent considerable time discussing the test for a sealing order at the Court, and the extent to which that test is similar to or dissimilar from the test under s. 17(1). That discussion is irrelevant to the question we asked of counsel and to the topic about which Staff sought to make additional submissions. The process suggested above, similar to the one employed in *B*, respects s. 16 (as the Tribunal must) but defers completely to the Court making whatever determination it sees fit, according to whatever test it thinks appropriate. Nothing about the process involves the Tribunal purporting to prescribe or even suggest what the Court's decision ought to be.

[129] In summary, Staff offers no persuasive reason why such a process would interfere in any meaningful way with the appointment of a receiver, even if (and we do not assume this to be true in this case, absent evidence) there was urgency and/or a risk of dissipation of assets. We reject Staff's suggestion that the process above, even if there were multiple compelled witnesses, would be "complex". A single s. 17(1) order obtainable on short notice would have sufficed, and would have been no more complex than the temporary cease trade order that was issued in this case.

ii. Obligation to fulfill the Commission's mandate transparently

[130] Staff cites the Tribunal's comment in *Mega-C* that the Commission should fulfill its mandate as transparently as practically possible.[49] We agree, but this proposition does not assist in resolving the question in this case, which is: What is "possible", given the statutory scheme?

[48] *Deloitte* at para 29
[49] *Mega-C* at para 36

iii. A need to obtain s. 17(1) orders would unnecessarily impede the Commission's work and would serve no meaningful purpose

[131] Staff submits that in the circumstances of this case and other similar cases, a requirement that the Commission obtain a s. 17(1) order from the Tribunal would be a "roadblock" that furthers no meaningful or public interest purpose and that would "undermine the effective enforcement of Ontario securities law".[50] We emphatically reject these unsubstantiated submissions.

[132] Subsection 17(1) orders can be and routinely are applied for in writing and promptly obtained in circumstances where either: (i) no notice to any third party is required; or (ii) where no third party to whom notice was given objects. Where notice to a third party is required, the request engages that third party's privacy interests, which we discussed above. We must emphasize in this context that those privacy interests are not to be lightly dismissed.

7. Conclusion about the Commission's use of the compelled evidence without first obtaining a s. 17(1) order

[133] We summarize our discussion about the Commission's use of the compelled evidence by noting the following conclusions:

a. s. 16(1) of the Act, which prohibits any person or company from disclosing compelled evidence, other than in accordance with prescribed exceptions, applies to the Commission;

b. neither the words "for the exclusive use of the Commission" in s. 16(2) nor the words "shall not be disclosed… to any other person or company or in any other proceeding" in that same subsection assist the Commission in these circumstances;

c. the legislative scheme seeks to ensure minimum impairment of privacy interests, while permitting the Commission to perform its mandate within those constraints, and any exception to the general protection must be strictly construed, consistent with the high degree of confidentiality associated with compelled evidence and the need for strict limitations on its use;

d. the only exception to s. 16(1) that is relevant in this case is that set out in s. 17(1), which empowers the Tribunal to make an order authorizing disclosure, after: (i) where practicable, giving notice to persons who provided the compelled evidence, and (ii) determining that it is in the public interest to make the order;

e. the obligation to give notice to persons affected by the proposed disclosure gives them the opportunity to make submissions about the proposed disclosure, including the appropriate extent of disclosure and any terms that should be imposed;

f. the Commission's actions defeated Mr. Sharpe's reasonable privacy expectations;

[50] Staff's Written Submissions at paras 30 and 50

g. any similar and unchallenged disclosure by the Commission in previous instances is of no assistance to the Commission;

h. there is no Tribunal or Court decision that addresses circumstances similar to those in this case, and that supports the Commission's actions; and

i. Staff was unable to explain persuasively why the Commission could not have obtained a s. 17(1) order before publicly disclosing the compelled evidence.

[134] For all these reasons, we conclude that the answer to the first question is no. The Commission cannot, in the circumstances set out in the statement of agreed facts, publicly disclose compelled evidence without first obtaining a s. 17 order.

[135] Because of our answer to the first question, we turn now to the second question, *i.e.*, whether under the circumstances revocation of the s. 11 order is an available remedy.

C. Even where the Commission publicly discloses compelled evidence when it applies for the appointment of a receiver, without complying with s. 17 of the Act, revocation of the s. 11 investigation order is not an available remedy

1. Introduction

[136] Mr. Sharpe applies under subsection 144(1) of the Act, which empowers "the Commission" to revoke or vary a "decision of the Commission", if "the Commission" determines that doing so would not be prejudicial to the public interest. The word "decision" is defined in s. 1(1) of the Act to include an order. There is no dispute that the s. 11 investigation order falls within this definition, and that the Tribunal is empowered to revoke the s. 11 order if doing so would not be prejudicial to the public interest.

[137] Accordingly, revocation of the s. 11 order is "available" in a technical sense. While the parties before us first formulated the preliminary question to ask whether the remedy is "available", they agreed after submitting the statement of agreed facts that we should treat the question as if it asks whether that remedy could ever be available (*i.e.*, appropriate) given the circumstances set out in the statement of agreed facts.

[138] Mr. Sharpe submits that revocation would be appropriate because the public disclosure by the Commission is a new material fact that would likely have affected the Commission's original decision to issue the s. 11 order. We conclude that revocation would not be appropriate, for two reasons that we will address in turn:

a. the Commission's public disclosure of compelled evidence, made after the issuance of the relevant s. 11 order, is not a newly discovered fact that would likely have changed the decision to issue the s. 11 order; and

b. by its nature, revocation of a s. 11 order in the circumstances set out in the statement of agreed facts would be insufficiently connected to a court application later commenced by the Commission, even where that application relies on some of the compelled evidence.

2. Public disclosure after the issuance of a s. 11 order is not a newly discovered fact that would likely have changed the decision to issue the s. 11 order

[139] The Tribunal has held that it will issue an order under s. 144 only "in the rarest of circumstances".[51] Tribunal decisions have enumerated a number of grounds upon which the Tribunal may exercise its s. 144 authority. We need not review all the grounds, since Mr. Sharpe relies on only one – where "new facts come to light that were not discoverable at the time of the original hearing", and those new facts are "'compelling', *i.e.*, likely to have affected the original decision."[52]

[140] In considering whether revocation of the s. 11 order could be an appropriate remedy, we must first focus on when the "new facts" on which Mr. Sharpe relies occurred or came into existence.

[141] Mr. Sharpe does not contend that at the time the s. 11 order was issued, there were any material facts, then in existence, of which the Commission was unaware. Rather, Mr. Sharpe asks us to take an event that happened well after the issuance of the original order (*i.e.* the Commission's public disclosure of the compelled evidence) and then to ask first whether the Commission's September 2020 decision to issue the s. 11 order would likely have been different had it (the Commission itself) known that it (again, the Commission) would in April 2021, more than seven months later, publicly disclose some of the compelled evidence that would be obtained pursuant to that order.

[142] We cannot accept Mr. Sharpe's written submission that it "goes without saying that when issuing the Section 11 Order, the Commission presumed that the evidence collected pursuant to the powers granted by it would be treated in a manner that complied with the law and respected the rights of those compelled to provide evidence".[53] It was the same Commission, performing its executive function, that issued the s. 11 order and that publicly disclosed the compelled evidence in its Court application. At most, the Commission could only have intended to disclose publicly, at a then-unknown later date, certain fruits of the investigation that it had just ordered.

[143] However, we have no evidence before us about the Commission's intention at the time that it issued the s. 11 order. We cannot and will not speculate. In any event, in identifying the "new fact", Mr. Sharpe chooses the act of disclosure rather than any supposed future intention, even though the act of disclosure came later.

[144] We conclude that there was no fact at the time of the making of the s. 11 order that would likely have changed the decision to issue the order.

[145] However, a previous Tribunal decision considering an application to revoke a s. 11 order (discussed below) does leave the door open to consideration of events that arise after the order is made. The elapsed time between the order and the event complained of, and the logical connection (or lack of it) between the impugned event and the investigation authorized by the order, are both

[51] *X Inc (Re),* 2010 ONSEC 26, (2010) 33 OSCB 11380 at para 35
[52] *Pro-Financial Asset Management Inc (Re),* 2017 ONSEC 39, (2017) 40 OSCB 9159 at paras 16-17
[53] Submissions of David Sharpe, November 22, 2021 at para 90

relevant in determining whether we should exercise the authority under s. 144 in this case.

[146] We turn now to consider those two factors.

3. Revocation of a s. 11 order is insufficiently connected to a court application later commenced by the Commission, even where that application relies on some of the compelled evidence

[147] While it is open to us to consider facts that arise after the making of the s. 11 order, we conclude that revocation of the s. 11 order in this case could not be an appropriate remedy in response to the Commission publicly disclosing compelled evidence without adhering to s. 17. That remedy is insufficiently connected to the conduct complained of.

[148] Before we analyze the question before us, we must address Staff's request that we consider the fact that Mr. Sharpe has suffered no prejudice. We decline this invitation. This hearing is confined to the two agreed-upon questions, as directed by the Tribunal before the hearing. Neither question contemplates that the parties could tender evidence about any alleged harm or prejudice.

[149] Had our ultimate conclusion been that revocation of a s. 11 order could be an appropriate remedy on the limited facts before us, this proceeding would have moved to a subsequent hearing, at which issues regarding the actual effect on Mr. Sharpe would have been canvassed. Accordingly, at this stage we disregard any submission by Staff about a lack of harm or prejudice to Mr. Sharpe.

[150] Turning to consider whether revocation of this s. 11 order could ever be an appropriate remedy in these circumstances, we agree with Staff that revocation in response to the public disclosure could only be properly described as punitive. Revocation would not in any way reverse the public disclosure of the compelled evidence; nor would revocation offer any other relief to Mr. Sharpe, other than perhaps greater vindication or similar satisfaction. That is an insufficient reason to invoke the Tribunal's rarely-used authority under s. 144, and s. 144 does not exist to punish.

[151] We distinguish the Court of Appeal of Alberta decision cited to us by Mr. Sharpe, in which the Court upheld a decision to terminate a discipline proceeding on the basis that the investigator had improperly disclosed confidential information. However, a detailed review of that decision is warranted.

[152] *Clark v Complaints Inquiry Committee*[54] arose out of a complaint received by the Institute of Chartered Accountants of Alberta about Mr. Clark. The Institute's prosecutorial branch, the Complaints Inquiry Committee, determined that an investigation was warranted. An Institute employee was assigned to investigate.[55]

[153] At the direction of the Institute's employee, Mr. Clark and others provided relevant information by sending it to the e-mail address of the Institute employee's wife.[56]

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[54] 2012 ABCA 152 (***Clark***) at para 18
[55] *Clark* at para 2
[56] *Clark* at para 3

[154] At the beginning of the discipline hearing against him, Mr. Clark asked that it be dismissed because the employee, by using his wife's e-mail address, had contravened the relevant statutory provision prohibiting disclosure of confidential information obtained during an investigation.[57]

[155] The Discipline Tribunal dismissed Mr. Clark's application to terminate the proceedings. Mr. Clark was successful in his appeal to the Appeal Tribunal, which found that the investigation was an abuse of process; in particular, it held that disclosure of confidential information in the course of the investigation was prohibited and unacceptable.[58]

[156] The Court of Appeal of Alberta found that the Appeal Tribunal's decision to stay the proceeding was a discretionary one and that the Court should review that decision using a reasonableness standard. Significantly, the Court concluded that the Appeal Tribunal panel was concerned about abuse in the investigative process itself.[59]

[157] The *Clark* case differs from the one before us in three material ways:

a. Mr. Clark's complaint was about conduct that was part of the investigation, whereas there is no such complaint before us;

b. Mr. Clark did not seek a revocation of whatever instrument (if any) was employed to commence the investigation – indeed, there is no reference in the Court decision to such an instrument, and contrary to Mr. Sharpe's written submission, Mr. Clark sought a stay of the proceeding, not a stay of the investigation; and

c. Mr. Clark's requested stay was of a proceeding governed by the same body that governed the investigation, whereas here, to the extent that Mr. Sharpe's complaint is in connection with a proceeding, it is about a proceeding before the Superior Court of Justice, over which this Tribunal has no jurisdiction.

[158] We therefore conclude that the *Clark* case is of no assistance to Mr. Sharpe. It is neutral on the questions before us.

[159] For similar reasons, we distinguish the Tribunal's 2004 decision in *X Corp*[60]. In that case, a corporation named in a s. 11 investigation order asked the Tribunal to revoke the order. The applicant maintained that it was suffering prejudice during the investigation, and that the investigation was going on too long.[61] The Tribunal dismissed the application, but did say that it could consider "all relevant facts, past or present".[62]

[160] The panel in *X Corp.* concluded that the matters being investigated were serious and that it remained in the public interest for the investigation to continue. The panel was "unable to conclude… that the new facts which have arisen since [the

[57] *Clark* at para 6
[58] *Clark* at para 9
[59] *Clark* at paras 14 and 16
[60] 2004 ONSEC 19 (***X Corp***)
[61] *X Corp* at para 28
[62] *X Corp* at para 31

s. 11 order's] issuance permit us to form an opinion that a revocation or variation of the s. 11 order would not be prejudicial to the public interest."[63]

[161] The complaint in *X Corp.* was that the conduct of the investigation itself was abusive. Had the Tribunal been sympathetic to X Corp.'s substantive arguments, a revocation of the order authorizing the investigation would have brought an end to the conduct complained of. The connection would have been immediate and direct. No such connection exists here.

[162] The remedy Mr. Sharpe seeks is unprecedented. That does not mean that it is never available, but Mr. Sharpe has not met the burden of showing why we should exercise our discretion to depart from established precedent, including from the established principle that revocation of an earlier order should result only in the rarest of cases, and for sound reasons, which reasons do not exist in this case.

[163] Before leaving this issue, we note the agreed fact, emphasized in Staff's written and oral submissions, that Mr. Sharpe has not taken any action in the Superior Court of Justice related to the materials filed in support of the receivership order. In our view, that fact is not relevant to the issue before us and we accord it no weight.

IV. CONCLUSION

[164] We agree with Staff's submission that the alleged unlawful act by the Commission does not affect the legality or appropriateness of the s. 11 order. No matter what evidence Mr. Sharpe might adduce about specific harm or prejudice, if this proceeding were to advance to a full hearing on the merits we would be unable to conclude that it would not be prejudicial to the public interest to revoke the s. 11 order.

[165] We answer the two questions before us as follows:

a. the Commission is bound by s. 16 and was not entitled to bypass s. 17 of the Act in publicly disclosing Mr. Sharpe's compelled evidence; and

b. on the agreed facts, revocation or variation of the s. 11 investigation order cannot be an appropriate remedy.

[166] Accordingly, we dismiss Mr. Sharpe's request for a revocation or variation of the s. 11 order in this case.

[167] As noted above, that leaves Mr. Sharpe's request that the adjudicative records in these two proceedings (except for the written submissions) be kept confidential, without access by the public. If Mr. Sharpe wishes to maintain this request, then by 4:30pm on April 14, 2022, he shall serve and file:

a. a notice that, without grounds or submissions, specifies briefly but precisely the extent of his request, including identification of the documents that are the subject of the request, and for each document, whether he seeks redactions (which redactions, if any, shall be specified in the notice) or confidentiality protection of the entire document; and

b. written submissions of not more than five pages.

[63] *X Corp* at paras 36-37

[168] If Mr. Sharpe does not file the notice and submissions by the prescribed deadline, we will dismiss the request for confidentiality.

[169] If Mr. Sharpe files the notice and submissions, then Staff and the receiver shall serve and file any responding submissions, of no more than five pages each, by 4:30pm on April 28, 2022.

[170] The parties may request a different schedule for the above steps, by submitting to the Registrar by 4:30pm on April 14, 2022, either an agreed-upon schedule or competing submissions of no more than one page each.

Dated at Toronto this 30th day of March, 2022.

"*Timothy Moseley*"

Timothy Moseley

"*M. Cecilia Williams*"

M. Cecilia Williams

"*Lawrence Haber*"

Lawrence Haber

Court of Appeal File No. C70114

ONTARIO SECURITIES COMMISSION Applicant (Respondent in Appeal)	- AND -	GO-TO DEVELOPMENTS HOLDINGS INC., *et al.* Respondents (Appellants)

COURT OF APPEAL FOR ONTARIO
Proceeding Commenced at Toronto

RESPONDENT'S ORAL ARGUMENT COMPENDIUM

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