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From: Justice Colin Campbell

Date: April 25, 2006

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COMMENTS:

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COURT FILE NO.: 06-CL-4-6328
DATE: 20060425

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN	)	
	)	
MR. A.	)	*Thomas G. Heintzman, Junior Sirivar* for
Applicant	)	the Applicant
	)	
	)	
-and-	)	
	)	
ONTARIO SECURITIES COMMISSION	)	*Kathryn J. Daniels, Anne Sonnen* for the
Respondent	)	Respondent
	)	
	)	**HEARD**: April 4, 2006
	)	

C. CAMPBELL J.

REASONS FOR DECISION

[1] The Applicant seeks a declaration pursuant to ss. 7 and 24(1) of the *Canadian Charter of Rights and Freedoms*, R.S.C. c. C-12 (the "*Charter*") that the Applicant cannot be compelled to testify under oath pursuant to, and an Order quashing, a Summons to Witness issued by the Ontario Securities Commission ("OSC") dated March 1, 2006 (the "Summons").

[2] The Summons was issued by, and the examination is to occur before, a forensic examiner employed by the OSC. The forensic examiner has been appointed under two Orders issued pursuant to ss. 11 and 13 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "Act") on June 18, 2004 and February 22, 2006 (the "Orders.")

[3] The OSC agrees that charter rights are engaged by the issuance of its summons and there may be some risk to those rights by the legitimate and valid application of the investigative provisions of securities legislation and of international cooperation in that field. The OSC submits that Mr. A. has not met the burden on him in seeking the relief requested and the circumstances to not justify prospective charter relief.

The Investigations

[4] Mr. A.[1] held executive positions with a major company with head office in Ontario until his termination for cause in April 2004. This followed the announcement of an investigation by the company surrounding the need to re-state its financial statements.

[5] In March 2004, Staff of the OSC commenced an investigation into the circumstances surrounding the Company's re-statement. In June 2004, certain OSC Staff were appointed pursuant to s. 11 of the *Securities Act*, R.S.O. 1990 c. S.5 as amended (the "*Securities Act*") to investigate and to enquire into a number of matters related to the Company, including the need for a re-statement and the termination of the Applicant.

[6] On February 22, 2006, the OSC issued two further investigation orders, one authorized certain members of Staff of the OSC to investigate and was made using the authority of s. 11(1)(a) of the *Act*; the second authorized the same members of Staff of the OSC and certain members of Staff of the Securities and Exchange Commission of the United States (the "SEC") to investigate and was made using the authority of sections 11(1)(a) and (b).

[7] Section 11(1) of the *Securities Act* allows the appointment of individuals to investigate matters:

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

(b) to assist in the due administration of the securities laws or the regulation of capital markets in another jurisdiction.

[8] It is the latter subsection and its implications for Mr. A. that are of particular concern on this Application.

[9] Mr. A. alleges that the Order of the OSC was granted for "enforcement" purposes and the role of the OSC and its forensic accountant are, vis-à-vis the Applicant, clearly adversarial, and not merely investigative. At the same time, a criminal investigation is ongoing in Canada in which the Applicant is a suspect. While the Applicant has not yet been formally charged, it is submitted that he is a central figure in the enforcement proceedings and criminal investigation and, in these circumstances, ought not to be forced to give evidence.

[10] In addition, it is urged that there is a danger or risk that the Applicant's testimony may be used against him by American authorities without the protections afforded under the Charter. In the presence of that danger or risk, this Court should not compel the Applicant to testify.

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[1] Prior to issuance of this Application, the Court granted on consent an Order until the hearing, allowing the use of a letter designation of the Applicant. The hearing was held in public and the reference by counsel to the name of the Applicant and of the Company obviated the necessity for any further Order.

Constitutional Protections

[11] The problem for Mr. A. arises from the nature and application of constitutional protection in respect of compelled testimony in both Canada and the United States.

[12] That difference was summarized in the decision of the Court of Appeal for Ontario in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.* 2005 CanLII 39860 (Ont. C.A.):

> [4] In both Canada and the United States, the right to protection from self- incrimination is an important right that is safeguarded. The difference between how that right is protected in Canada and in the United States lies at the heart of this appeal. In Canada, a person has the right not to have any incriminating evidence that the person was compelled to give in one proceeding used against him or her in another proceeding except in a prosecution for perjury or for the giving of contradictory evidence. Thus, in Canada, a witness cannot refuse to answer a question on the grounds of self-incrimination, but receives full evidentiary immunity in return. In the United States, a witness can claim the protection of the Fifth Amendment and refuse to answer an incriminating question. Once the answer is given, however, there is no protection.

[13] The distinction between the issue in this Application and that which was encountered in *Catalyst, supra*, is that here the investigative Order is that of the OSC, a governmental authority, whereas in *Catalyst*, the investigation was being conducted by a an inspector (a Court-appointed officer) under the provisions of the *Canada Business Corporations Act.*

[14] Mr. Heintzman on behalf of Mr. A. submits that in considering the Applicant's constitutional rights, it must be remembered that the OSC is a government agency. It is not a Court. The Court, it is submitted, cannot grant to the Applicant, nor can it enforce, the constitutional safeguards that would be available if the testimony was taken under the aegis of the Court. It cannot effectively control the use of the testimony by the OSC, or by others to whom the testimony may be given, including American authorities. In those circumstances, it is submitted that this Court should not force the Applicant to give evidence.

[15] At the heart of the Applicant's position is the assertion that the OSC cannot be trusted to conduct an investigation that will acknowledge and protect Mr. A.'s constitutional rights, since, in the words of his counsel, "the Applicant submits that, by constituting itself, in effect, an agent of the SEC, the OSC has disqualified itself as an authority which can be given permission to examine the Applicant, as the potential for the Applicant's Charter rights being violated is linked to the OSC's agreement with the SEC."

[16] According to the Applicant, the initiating event that engaged his constitutional rights in Canada was a subpoena issued by the SEC directed to the Company of which he had been CEO for the production of various financial records, including a number of specific types of documents in the power, possession or control of the Company, relating to Mr. A. who was named in the subpoena.

[17] The subpoena was followed by a letter from the SEC to the Director of Enforcement of the OSC in aid of an investigation to determine whether any individuals or entities violated, among other things, the prohibition against fraud under various U.S. Securities Acts and

regulations. The letter requested access to the OSC's non-public files relating to the OSC's investigation of the Company.

Memoranda of Understanding

[18] There is common ground between the parties that cross-border investigations between the OSC and the SEC operate pursuant to Memoranda of Understanding ("MOUs") between the agencies. Mr. A. asserts that as a result of its obligations to the SEC, the OSC is not in a position to protect his charter rights and in particular his s. 7 right to remain silent.

[19] The nature and operation of the MOUs is summarized in the following paragraphs from the OSC factum, which I accept:

[20] In 1988, the OSC, along with a number of other provincial Securities Commissions, and the SEC executed a Memorandum of Understanding (1988 MOU) committed to increasing cooperation in the enforcement of securities laws. In 2002, the OSC and the SEC, along with a number of other international securities regulators, executed the International Organization of Securities Commissions Multilateral Memorandum of Understanding (IOSCO MMOU) (the 1988 MOU and the IOSCO MMOU, hereinafter collectively referred to as the "MOUS"). Each memorandum sets out in the preamble the purpose of the agreements, which recognize the increasingly international nature of the securities markets and the need for mutual cooperation in the administration and enforcement of securities laws.

[21] Neither the 1988 MOU nor the IOSCO MMOU contain provisions that suggest that these agreements supersede domestic law. The 1988 MOU provides the manner in which assistance is to be requested and is explicit in its description of the applicable law governing an examination. The 1988 MOU sets out the expectations of both the SEC and the OSC and states in article 5 (3):

> The testimony of persons will be taken in the same manner and to the same extent as in investigations or other proceedings in the jurisdiction of the Requested Authority. Notwithstanding any other provision of this Memorandum of Understanding, any person giving testimony as a result of a request made under this Memorandum of Understanding will be entitled to all of the rights and protections of the laws of the jurisdiction of the Requested Authority. Assertions regarding other rights and privileges arising exclusively pursuant to the law of the jurisdiction of the Requesting Authority shall be preserved for consideration by the courts in the jurisdiction of the requesting Authority.

[22] Of similar effect is Article 6(a) of the IOSCO MMOU which provides that the MMOU are not intended to create legally binding obligations on the signatories nor to supersede domestic law. Article 6(e) explicitly states:

> ...A request for assistance may be denied by the Requested Authority:
>
> Where the request would require the Requested Authority to act in a manner that would violate domestic law; ...

[23] The OSC takes the position that U.S. authorities would not be able to obtain the testimonial evidence of the Applicant given in an OSC examination without the applicant having notice of a request for disclosure (pursuant to s.17 of the *Securities Act*) and an opportunity to be heard before the Commission.

[24] Subject to the further comments below, I accept the concern raised by the Applicant as genuine, that information following from an investigation that obtains information under oath from Mr. A. be protected from release to U.S. authorities without notice to him and an opportunity to be heard before the Commission and if necessary the Court.

[25] At the same time, I accept that the *Securities Act* contains a regime that is designed to afford protection to a person in the position of Mr. A. that information obtained not be disclosed to others without the person having an opportunity to be heard.

[26] Mr. Heintzman urges that the SEC subpoena seeks information directly from or about his client and the OSC Order under s. 11(1)(b) of the *Securities Act* is designed pursuant to the MOU to have the OSC obtain that same information for the use of the SEC, and that any testimony of his client under oath will be used for that purpose and then used in proceedings in the U.S. where his client would be prevented from objecting to its use to incriminate, since the right to silence under the Fifth Amendment to the United States Constitution would no longer apply.

[27] The power of an investigator appointed under s. 11 and the limitation on disclosure of information obtained is set out in s. 13 and in ss. 16 to 18 of the *Securities Act* attached hereto as Appendix A. The sections codify the basis for taking oral testimony and the limitations on its use.

[28] The position of the Applicant is that the investigation by the OSC, in addition to aiding the SEC, has by virtue of its Orders made a determination to pursue a criminal or quasi-criminal process as against him, thereby invoking his entitlement to protection under s. 7 of the *Charter*, which provides:

> 7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[29] Section 13 of the *Charter* reads:

> 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence

Law and Analysis

[30] Both the Applicant and the OSC rely on the decision of the Supreme Court of Canada in *B.C. Securities Commission v. Branch*, [1995] 2 S.C.R. 3. That case dealt with the constitutionality of the investigative powers of the B.C. Securities Commission in statutory language, which is very similar to that in the Ontario Statute.

[31] The *Branch* decision was issued contemporaneously with two other decisions of the Supreme Court of Canada. *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, which involved a criminally accused young offender, and *Phillips v. N.S. (Westray Mine Inquiry)*, [1995] 2 S.C.R. 140, which involved summons to witnesses at a public inquiry who were or could face criminal prosecution.

[32] In *Branch* the Court concluded that the compulsion to produce documents under a *Securities Act* inquiry does not violate s. 7 of the *Charter*. Sopinka J. for himself and Iacobucci J.

for the majority distinguished the protection necessary for the criminal context from the more flexible approach that is reasonable in a regulated industry such as the securities market, where participants are aware and accept justified state intrusions with respect to business dealings and records.

[33] Sopinka J. summarized the *S. (R.J.)* decision in *Branch* at paragraph 2, as follows:

> [2] 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.

[34] The decision in *Branch* by the Supreme Court of Canada recognized that development of the principles of testimonial immunity would require a case-by-case analysis, but enunciated several tests of common application in the following paragraphs:

> [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 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.
>
> [8] 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 CanLII 112 (S.C.C.), [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.
>
> [9] 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 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.

[35] The *Phillips* decision continued the analysis from *Branch* and *S. (R.J.)*, refined to a two-stage analysis, the first of which involves a consideration of the nature and public importance of the proceedings, the purpose for which the compelled testimony is sought, and the likely importance of that testimony.

[36] Mr. Justice Cory for the Court wrote the following:

> [85] If, at this stage, the court is of the opinion that the proceedings are undertaken or functioning primarily in such a way as to obtain evidence for the prosecution of the witness, then s. 7 requires that the accused person be exempted from testifying. To allow the authorities to utilize separate proceedings as a substitute for a criminal investigation amounts to a breach of the fundamental requirement that the state must build its case without the unwilling assistance of the accused, and is incompatible with s. 7. In those situations, there is no need to proceed further with the analysis. The accused person will not be a compellable witness. I wish to point out, however, that the situations in which an improper purpose for compelling evidence arises may be infrequent: see, for example, *Haywood Securities Inc. v. Inter-Tech Resource Group Inc.* (1985), 24 D.L.R. (4th) 724 (B.C.C.A.), and *Buffalo v. Canada (Minister of Indian Affairs and Northern Development)* (1994), 86 F.T.R. 1. Where, on the other hand, the court finds that the proceedings in question were created to achieve goals of substantial public importance and not to further a criminal prosecution, it must continue to the second stage of the analysis.
>
> [86] The second stage of the analysis requires the court to balance the rights of the individual accused against the interests of the state in receiving the compelled testimony in a way which ensures that all the requirements of the *Charter* are upheld. The result of the balancing will depend upon the circumstances of each case. The reasons in *Branch*, at p. 16, provided some guidelines to this end:
>
>> 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.

[37] More recently, the Supreme Court of Canada again revisited this issue in *R. v. Jarvis*, [2002] 3 S.C.R. 757. *Jarvis* involved initially an audit, which was then followed by referral to a special investigations unit to determine whether prosecution for income tax evasion were warranted. The specific facts concerned the introduction into evidence under a s. 239 prosecution under the *Income Tax Act* of documents and utterances compelled under other sections of the Statute.

[38] The Court observed the context of the dispute in paragraph 84 of the decision:

> [84] Although the taxpayer and the CCRA are in opposing positions during an audit, when the CCRA exercises its investigative function they are in a more traditional adversarial relationship because of the liberty interest that is at stake. In these reasons, we refer to the latter as the adversarial relationship. It follows that there must be some measure of separation between the audit and investigative functions within the CCRA. Of course, having determined this, it remains for us to determine the bounds between the ITA audit and investigation and then to discuss the legal consequences. To this, we now turn.

[39] The balancing line is elaborated in the following passages from paragraphs 88 and 91:

> [88] In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1). In essence, officials "cross the Rubicon" when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry.
>
> [91] The other pole of the continuum is no more attractive. It would be a fiction to say that the adversarial relationship only comes into being when charges are laid. Logically, this will only happen once the investigators believe that they have obtained evidence that indicates wrongdoing. Because the s. 239 offences contain an element of mental culpability, the state will, one must presume, usually have some evidence that the accused satisfied the *mens rea* requirements before laying an information or preferring an indictment. The active collection of such evidence indicates that the adversarial relationship has been engaged, since it is irrelevant to the determination of tax liability. Moreover, although there are judicial controls on the unauthorized exercise of power (*Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Babcock v. Canada (Attorney General)*, 2002 SCC 57 (CanLII), [2002] 3 S.C.R. 3, 2002 SCC 57, at para. 25), we believe that allowing CCRA officials to employ ss. 231.1(1) and 231.2(1) until the point where charges are laid, might promote bad faith on the part of the prosecutors. Quite conceivably, situations may arise in which charges are delayed in order to compel the taxpayer to provide evidence against himself or herself for the purposes of a s. 239 prosecution. Although the respondent argued that such situations could be remedied by the courts, we view it as preferable that such situations be avoided rather than remedied. It is for this reason that the test is as set out above.

[40] Finally, paragraph 96 deals with the exemption to testify:

> [96] On the other hand, with respect to s. 7 of the *Charter*, when the predominant purpose of a question or inquiry is the determination of penal liability, the "full panoply" of *Charter* rights are engaged for the taxpayer's protection. There are a number of consequences that flow from this. First, no further statements may be compelled from the taxpayer by way of s. 231.1(1)(*d*) for the purpose of advancing the criminal investigation. Likewise, no written documents may be inspected or examined, except by way of judicial warrant under s. 231.3 of the ITA or s. 487 of the *Criminal Code*, and no documents may be required, from the taxpayer or any third party for the purpose of advancing the criminal investigation. CCRA officials conducting inquiries, the predominant purpose of which is the determination of penal liability, do not have the benefit of the ss. 231.1(1) and 231.2(1) requirement powers.

[41] The Applicant urges that the context of the s. 11(a) investigation of him and the s. 11(b) Order that would expose him to U.S. authorities is sufficient to engage the "pull panoply" of *Charter* rights, such that he should be relieved from testifying at all.

[42] There are two distinct matters involved in the two OSC Orders that are in issue on this Application. The first involves assistance through the MOU to the SEC. The second involves the OSC's own investigation for the purpose of regulation of securities markets in Canada.

[43] It is in this latter aspect that the testimony of Mr. A. under oath is sought. I am not satisfied at this point that the proceeding is undertaken "to obtain evidence for the prosecution of the witness" or that "the predominant purpose of the inquiry is for the determination of penal liability of the witness." As the Supreme Court of Canada noted in *Jarvis, supra*, at paragraph 39, "there is no clear formula that can answer whether or not this is the case."

[44] I am comforted by the fact that my conclusion at this stage of the investigation is not determinative for all time. Mr. A. has the entitlement to notice and a hearing under s. 17 of the *Securities Act* should the OSC seek to disclose information from Mr. A. to any other person or body. In addition, should Mr. A. be prosecuted, he would have a further opportunity to raise the issue of whether evidence obtained from him could be used at all.

[45] As mentioned earlier in these Reasons, counsel for the OSC accepts that there is some risk to Mr. A.'s *Charter* rights, but is of the view that the regime of the protections provided to him under the *Securities Act* and, if necessary, review by this Court, are sufficient to ensure that the investigative process will not result in a violation of *Charter* rights.

[46] Counsel has offered to permit review of any Commission determination and Orders affecting Mr. A. by a judge of the Commercial List in this Court in a supervisory capacity to avoid the more lengthy Divisional Court appeal process that would be the normal route process that offers further protection to Mr. A. and without the need for the more detailed involvement of the Court envisaged in the *Hollinger* case, *supra*.

Conclusion

[47] I have concluded that the regime proposed by the OSC is appropriate for protection of Mr. A.'s *Charter* rights.

[48] I do not accept either the OSC cannot be trusted or that the investigative regime following on the s. 11(a) Orders directed to Mr. A. will necessarily result in his testimony under oath being "given" to U.S. authorities in circumstances where he would lose Fifth Amendment protection.

[49] Each side in this dispute submitted an affidavit from an American "expert," one an academic, the other a reputable practitioner. Without in any way wishing to be seen as critical of either individual, I do not find either opinion particularly helpful.

[50] The fact that two individuals with respected legal training and experience have opposing views on how U.S. Courts might hypothetically deal with the issue of "derivative use" of testimony shows the nature of the problem.

[51] The issue raised before me has not been dealt with squarely in any U.S. decision to which I was referred. Any such determination before a U.S. Court would require a factual context of when, how and by what legal or other means such testimony would find its way to be tendered before a U.S. Court.

[52] Much of that factual context is at issue in the material before me. I am far from satisfied that the OSC could simply turn over material or testimony to U.S. authorities without an Order of the Commission on notice to Mr. A. or alternatively an Order of this Court. To speculate how otherwise this might happen without legal redress I do not find helpful.

[53] The OSC, like other Securities Commissions in this country and indeed in other jurisdictions, occupies a particularly important public purpose: the regulation of the public securities industry in Ontario and Canada. It would be surprising indeed, given the need for cross-border securities enforcement, if a U.S. Court did not pay attention to, let alone honour, a Canadian process designed to preserve derivative use immunity of validly taken testimony in Canada.

[54] In carrying out that mandate, the OSC has an administrative and regulatory role and function apart from its investigative and prosecutorial roles.

[55] I am satisfied that with the supervisory role of the Commission itself and the protective mechanisms of ss. 16 to 19 of the *Securities Act*, the staff of the Commission are aware of their varying roles and duties.

[56] The independence of the Commission and their role in supervising staff functions provides the first layer of *Charter* protection. To the extent that further protection may be appropriate, the Court may be engaged by either the appeal route or the Commercial List supervisory process acceded to by counsel for the OSC.

[57] In my view, there is an important public interest in the oversight by the OSC of its own process, which includes protection of *Charter* rights of those being investigated under the *Securities Act.*

[58] If that public purpose is to succeed, the OSC must be able to and be seen to carry out its legislative mandate in the manner that was intended by the Legislature of the Province. The financial state of a major Canadian corporation that allegedly misrepresented its financial statements in various years does have a broad purpose involving shareholders, financial markets, employees and regulators.

[59] It is against this background that I have concluded that the investigative subpoena to Mr. A. is not solely for a prosecutorial purpose as referred to in *Branch, supra* and refined in the *Jarvis* decision.

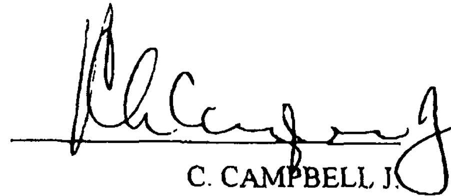
[60] Given the supervisory and adjudicative role of the OSC, it is not necessary to consider the elaborate supervision that was envisaged in the *Catalyst v. Hollinger* case referred to above.

[61] The OSC may wish to consider that it would appear more transparent to have separate investigation teams to deal with testimony from Mr. A. and the material being reviewed under the s. 11(1)(b) Order with SEC officials. Obviously the SEC officials will not be part of the 11(1)(a) Order involving Mr. A.

[62] If counsel are unable to work out a regime and process by which any Order or direction of the OSC is carried into effect to provide for protection of the transcript of testimony or other information provided under the subpoena to Mr. A., the parties are at liberty to seek assistance from a judge of the Commercial List.

[63] The staff of the OSC and the Commission itself should determine its own process and make any necessary orders before involvement by the Court, either on a consensual basis of review by a Commercial List judge or by appeal to the Divisional Court under the statute.

[64] An Order will issue granting the relief sought only to the extent provided for in this decision. If it is necessary to deal with the issue of costs, counsel should file submissions in writing within two weeks.



C. CAMPBELL J.

Released: April 25, 2006

COURT FILE NO.: 06-CL-4-6328
DATE: 20060425

Appendix A
to the Reasons dated April 25, 2006 of Mr. Justice C. Campbell
In Mr. A. v. Ontario Securities Commission

Section 13 of the *Securities Act*

Power of investigator or examiner
(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 Ontario Court (General Division) 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 Ontario Court (General Division) as if in breach of an order of that court. 1994, c. 11, s. 358.

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 (Provincial Division) 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.

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.

Sections 16 to 18 of the *Securities Act*

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

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

(b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13. 1994, c. 11, s. 358.

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 as permitted under section 17. 2002, c. 18, Sched. H, s. 7.

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.

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.

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) authorizing the disclosure of testimony given under subsection 13 (1) to,

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

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

Terms and conditions

(4) An order under subsection (1) may be subject to terms and conditions imposed by the Commission. 1994, c. 11, s. 358.

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 by the Commission under this Act; or

(b) an examination of a witness, including an examination of a witness under section 13. 2001, c. 23, s. 210.

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

(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.

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DATE: 20060425

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MR. A.

Applicant

and

ONTARIO SECURITIES COMMISSION

Respondent

REASONS FOR DECISION

C. CAMPBELL J.

Released: April 25, 2006