

**Enforcement of the Ontario Securities Act:  
A Requiem for Provincial Court Prosecutions under Section 122**

**Brave New World: Securities Litigation & Enforcement  
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Given the recent frenzy of concern over the integrity of the capital markets this is probably not a good time to suggest concern in respect of increasing enforcement powers of the Ontario Securities Commission (OSC) as set forth by Bill 198 (*Keeping the Promise for a Strong Economy Act*), which received royal assent in December 2002.

However, a very real concern is created when the Commission's enforcement powers are drastically increased without a similar or parallel increase in the procedural protections afforded to a respondent caught in the system. It is our view that any willingness to embrace broad and expanding administrative powers ought only to come when adequate procedures for ensuring fairness to respondents have been fully considered and ensconced in the system. Our society's commitment to principles of fundamental justice obliges us to accept nothing less.

Unfortunately, the legislature does not agree: for better or worse, the approval of Bill 198 (*Keeping the Promise for a Strong Economy Act*) will, among other things, augment both the public interest and the s. 122 prosecutorial enforcement mechanisms of the Commission without legislating any corresponding procedural fairness provisions for respondents caught in the system.<sup>1</sup> Bill 198 is significant – both for its practical effect (for example, who will render decisions, Commissioners or Judges, and what will the penalties be?) and for what it represents (if every bump in the market is accompanied by a buttressing of regulatory powers who will be responsible for ensuring appropriate standards of fairness are entrenched as stronger enforcement powers are unbridled?). The purpose of this paper is to explore some of the issues relevant to these

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<sup>1</sup> Bill 198, *The Keeping the Promise for a Strong Economy Act (Budget Measures)*, 2002, received Royal Assent on December 9, 2002. It is not yet in effect. It will come into force on a day to be named by proclamation of the Lieutenant Governor.

questions. In particular, we hope to provide an overview of the primary enforcement mechanisms currently utilized by the Commission in the context of the changes wrought by the new legislation. We believe that s.122 prosecutions before a Provincial Court Judge may well ‘go the way of the dinosaur’. Instead, we consider that, cases will likely proceed before the Commission where the procedural safeguards for respondents are fewer than in court, and, where, under Bill 198, the range of available sanctions is more severe than under the current legislation.

### **The Role of the Ontario Securities Commission**

A thorough review of the role of the OSC is worthy of a paper all its own and thus we cannot hope to provide more than a cursory look within the confines of this paper.

Nevertheless, some understanding of the intended role of the Commission, and its place in the regulatory framework, is clearly required in order to appreciate the scope of its enforcement powers. For our purposes a quick survey should suffice.

First and foremost, the OSC is a regulatory body subject to the confines of administrative law and the statute to which it owes its existence. In respect of regulatory bodies in general, the Supreme Court of Canada has held that the focus of regulatory law should be the protection of societal interests, not the punishment of an individual’s moral fault.<sup>2</sup>

The significance this regulatory focus plays in any analysis of Commission powers and procedures cannot be overemphasized. Further, this focus is particularly critical to a complete understanding of the Commission’s role as an administrative tribunal (via its

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<sup>2</sup> *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154

adjudicative function/s.127 public interest jurisdiction) and the apparent justification for attenuating Charter protections.

While the OSC is undoubtedly the regulatory powerhouse in Ontario's capital markets, it does, in fact, share its market supervision task with several self-regulating organizations (SRO), namely, the Investment Dealers Association (IDA), Market Regulation Services Inc. (RS) and the Mutual Fund Dealers Association (MFDA). In turn, each of these entities enjoys its' own powers of enforcement against those persons and organizations that threaten the integrity of our capital markets. However, the enforcement powers of the Ontario Securities Commission are by far the most significant and, so, it is here that we focus our attention.

The *Ontario Securities Act (OSA)* figures most prominently in Ontario's scheme for market regulation. The framework is rounded out by a variety of other regulatory mechanisms, including, for example, the *OSA* Regulations, National Instruments, Multilateral Instruments, Policy Statements, and the OSC Rules made pursuant to section 143 of the *OSA*. Collectively, these instruments are intended to enable the Commission to fulfil its mandate. Pursuant to the *OSA*, the purposes of the *Act* are twofold: the protection of investors from unfair, improper or fraudulent practices; and, the fostering of fair and efficient capital markets and confidence in capital markets.<sup>3</sup> The key word here is *protect*. As we examine the enforcement powers of the Commission we will find the courts referring, again and again, to this 'purpose'. For now it is enough that we are

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<sup>3</sup> *Securities Act* (Ontario), R.S.O. 1990, c. S.5, s. 1.1.

aware of its overarching significance as we begin to look at the statutory enforcement provisions.

### **Section 122: The Commission as Prosecutor**

The prosecutorial role of the OSC is found in section 122 of the *OSA*. Under this provision, the adjudicative function is exercised by a Provincial Court Judge. Proceedings before a Provincial Court Judge allow for the most severe sanctions available under the *OSA*. Leaving aside the specific insider trading provisions, the current provisions allow for a fine of not more than \$1 million or a term of imprisonment not to exceed two years, or both. Bill 198 will increase the specified fine of \$1 million to \$5 million and the jail term from two years to five years less a day. Constitutional and Charter issues arising from these amendments will no doubt be raised in the future. Nevertheless, the repercussions of a prosecution under section 122 are not to be taken lightly. A review of the specifics of this provision highlights some of the relevant considerations.

Section 122 (1) creates two specific disclosure-related securities law offences and a catch-all offence.<sup>4</sup> The language of the section suggests that the disclosure offences apply to both acts and omissions.

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<sup>4</sup> This section is reproduced in full in Appendix 'A'.

That is, the provision captures statements that are made, or should be made, in ‘material, evidence or information submitted to the Commission’ and in ‘any application, release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular or other document required to be filed or furnished under Ontario securities law.’<sup>5</sup> In addition, under s.122(3) there is a secondary offence in respect of directors or officers, who authorize, permit or even acquiesce in the commission of an offence under section 122(1), whether or not a charge has been laid or a finding of guilt has been made under section 122(1).<sup>6</sup>

As mentioned previously, the maximum penalty currently available to the court under s.122 (1) and s.122(3) is a fine of not more than \$1,000,000 or imprisonment for a term of not more than two years, or both. In insider trading cases, a fine can be levied for not less than the profit made or loss avoided and not more than the greater of \$1,000,000 and triple the profit made or loss avoided by the person or company by reason of the contravention of the insider trading provision is section 76.<sup>7</sup> The amendments to the *OSA* in the *Keeping the Promise for a Strong Economy Act*, will increase the maximum fine from \$1,000,000 to \$5,000,000 and the maximum jail term from two years to five years less a day. However, the ‘triple profit’ sanction for insider trading will remain the same.

By all accounts, these are some pretty stiff penalties. However, a respondent facing these potential sanctions may take at least some comfort in the fact that, due to the quasi-criminal nature of section 122 proceedings, many of the procedural practices and

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<sup>5</sup> *OSA*, s.122 (1)(a) & (b).

<sup>6</sup> Section 122 is reproduced in full in Appendix ‘A’.

<sup>7</sup> *Ibid.*, s. 122 (4).

protections established and required in the criminal context are likewise required here. Similarly, the higher burden of proof – beyond a reasonable doubt – is also applicable to section 122 proceedings.

### **Section 127: The Commission as Adjudicator**

The most important distinction between a section 127 enforcement proceeding and a section 122 proceeding is that proceedings commenced under the former are brought before the Commission. Thus, by the time a section 127 hearing is commenced before the Commission, Commission Staff have already performed every other significant function in the development of the case. We will revisit this issue in the context of attenuated Charter protections in OSC investigations.

The orders the OSC may make under section 127 are explicitly enumerated.<sup>8</sup> They include, inter alia, the power to suspend registration, make cease trade orders, order directors and officers to resign their positions, and prohibit persons from becoming directors and officers. In addition, where a party is found to have acted contrary to the public interest, the Commission also has the express authority to order the party to pay the investigation and hearing costs.<sup>9</sup> In our view, the language of section 127.1 suggests that an order to pay costs may be made against a party whether or not the party has been subsequently found in breach of securities law.<sup>10</sup> The only thing that seems to be missing from the Commission's arsenal is the ability to impose fines. Not any longer.

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<sup>8</sup> The provision is reproduced in full in Appendix 'A'.

<sup>9</sup> *OSA*, s. 127.1 (1) & (2).

<sup>10</sup> There is no explicit corresponding provision allowing for payment of any such costs to a successful respondent.

The most controversial amendments in the *Keeping the Promise for a Strong Economy Act* are those relating to the fines the Commission will have the authority to levy pursuant to its public interest jurisdiction. Under Bill 198, the OSC will have the highly coveted authority to impose fines. And big ones at that. Pursuant to the new provisions of Bill 198, the Commission can levy ‘administrative penalties’ of up to \$1 million and, in addition, can order the disgorgement of ‘any amounts obtained as a result of the non-compliance.’<sup>11</sup>

In the grand scheme of things, does it really matter whether a respondent is fined a million dollars by a Provincial Court Judge or a panel of the Commission? Isn’t it really all the same to the recipient or as Lamer C.J. suggested when writing for the minority in *Wholesale Travel*: “Jail is Jail, whatever the reason for it?”<sup>12</sup> We suggest that it does matter. There are, in our estimation, two overriding reasons to distinguish between fines levied by an administrative tribunal as compared to a judicial court of law. The first is the evidentiary and procedural differences inherent in each respective method of proceeding. The second, and arguably the most disconcerting, is the assortment of roles (including investigator and adjudicator) played by the Commission coupled with the apparent willingness of our highest court to attenuate Charter protections in the regulatory investigation process.

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<sup>11</sup> See Appendix ‘A’: Section 127(1) O.S.A., as amended, under Bull 198 to add paragraph 10.

<sup>12</sup> *R. v. Wholesale Travel Group*, [1991] 3 S.C.R. 154.

**Proceedings Under Sections 122 and 127:  
A Selective Review of the Evidentiary and Procedural Differences**

The *Provincial Offences Act (POA)*<sup>13</sup> is the procedural code that governs the enforcement and prosecution of offences created by provincial statutes such as the *OSA*. Other provincial legislative regimes enforced through the *POA* include, for example, the *Highway Traffic Act*, the *Liquor Licence Act* and the *Environmental Protection Act*. In the context of s.122 proceedings under the *OSA*, the full panoply of rights one would expect to find in a criminal proceeding are available to the accused. Most importantly, this includes the right to make full answer and defence.<sup>14</sup>

***Disclosure***

Given that the right to make full answer and defence is constitutionally entrenched in the *Charter of Rights of Freedoms*, specific provision in the *POA* seems somewhat unnecessary. Nevertheless, at the very least, this duplication can be taken to suggest the overriding importance of this fundamental right and the corresponding procedural safeguards, for example, the accused's entitlement to full disclosure. In respect of disclosure, there is a significant distinction between proceedings brought pursuant to section 122 of the *OSA* and those brought under the Commission's section 127 public interest jurisdiction. In quasi-criminal proceedings, the accused is entitled to full and complete disclosure in order to make full answer and defence. There is no corresponding duty on the defence to provide any form of disclosure to the prosecution: *R. v.*

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<sup>13</sup> R.S.O. 1990, c. P.33, as am.

<sup>14</sup> *POA*, s. 46 (2).

*Stinchcombe*.<sup>15</sup> However, this is not the case in administrative proceedings before the Commission. Rule 3.3 of the Commission Rules of Practice requires production by all parties to every other party ‘of all documents that the party intends to produce or enter as evidence at the hearing.’<sup>16</sup> A party that fails to comply with Rule 3.3 may not refer to the document or introduce it in evidence at the hearing without leave of the Commission.<sup>17</sup> Further, pursuant to Rule 3.2, the Commission may order that any disclosure required by Rule 3 be made by a party within such time and on such conditions as may be specified by the Commission.<sup>18</sup> In addition, under Rule 3.2 the Commission may make a ‘disclosure order’ that a party provide to another party and to the Commission such particulars as the Commission considers necessary for a full and satisfactory understanding of the subject proceedings.<sup>19</sup>

### ***Expert Reports***

The disclosure of expert reports provides another clear example of the procedural distinctions between proceedings before the Commission as compared to those before a Provincial Court Judge. Rule 3.6 (2) of the Commission Rules of Practice provides as follows in respect of expert reports:

A party who intends to file a report by an expert at a hearing shall, at least 15 days before the report is filed at the hearing, provide to every other party a copy of the report signed by the expert.

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<sup>15</sup> [1991] 3 S.C.R. 326.

<sup>16</sup> In its capacity as an administrative body the OSC is subject to the *Statutory Powers Procedure Act* (*SPPA*). Pursuant to section 25.1 of the *SPPA*, a tribunal may make rules governing the practice and procedure before it. The OSC has done this, as referenced in the text of this paper. Further, the *SPPA*, under section 5.4, authorizes a tribunal to make various disclosure orders including, for example, the exchange of documents, oral and written examinations, and the exchange of witness statements and expert reports.

<sup>17</sup> OSC Rules of Practice, Rule 3.3(3).

<sup>18</sup> *Ibid.*, Rule 3.2 (b).

<sup>19</sup> *Ibid.*, Rule 3.2 (a).

In addition, pursuant to Rule 3.6 (1), a respondent is required to advise Staff of the intention to file an expert report 30 days prior to the commencement of the hearing. These provisions are in stark contrast to the *POA* which is surprisingly silent on this point. Such silence, in our view, suggests that, at the very least, there is no obligation to provide any information in respect of expert evidence prior to opening one's case.

### ***Admissibility of Evidence***

The rules governing the admissibility of evidence provides another critical and useful example of the significant difference between Commission and Provincial Court proceedings. The fundamental difference here lies in the relaxation of the rules of admissibility of evidence when appearing before the Commission. Section 15 of the *SPPA* provides as follows:

15. (1) ... a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
- (a) any oral testimony; and
  - (b) any document or other thing,
- relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

This is a very low threshold for admissibility. It clearly gives the Commission the opportunity to admit evidence that would never be admissible inside a courtroom. Again, the justification for this appears to be the intended protective/proactive role administrative tribunals.

In its own words the Commission has explained its adjudicative role under the public interest provisions as purely protective, reiterating that it is “not here to punish past

conduct; that is the role of the courts”.<sup>20</sup> We would suggest that in light of Bill 198 this position will become increasingly hard to justify, particularly in light of the impending ability of the Commission to levy substantial administrative penalties. Surely some consideration must be given to the effect of fining a market participant into financial ruin.

### **Charter Protections: Application in the Regulatory Context**

The Supreme Court of Canada has held that bodies created by statute, which derive their power from legislative authority are subject to the Charter.<sup>21</sup> However, a public purposes exception has been created and espoused by the Supreme Court in respect of the investigatory powers exercised by the Commission. The leading case on point here is *British Columbia Securities Commission v. Branch*.<sup>22</sup> Here the Supreme Court articulated the ‘predominant purpose’ test whereby the powers of investigation exercised by a regulatory body will not be subject to Charter scrutiny so long as they are used to attain a proper public purpose. In this case, the Supreme Court found the requisite proper purpose was the regulation of the securities market.

The powers of investigation granted to the Commission under the *OSA* are extensive.<sup>23</sup>

The Commission may order an investigation<sup>24</sup> into the affairs of persons and companies including their trades, communications, negotiations, transactions, and their assets and the control thereof.<sup>25</sup>

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<sup>20</sup> *Re Mithras Management Ltd.*, (1990) 13 O.S.C.B. 1600.

<sup>21</sup> *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43.

<sup>22</sup> [1995] 2 S.C.R. 3.

<sup>23</sup> The relevant sections are reproduced in Appendix ‘B’.

<sup>24</sup> *OSA*, s. 11 (1).

<sup>25</sup> *OSA*, s. 11 (3)(a) & (b).

In addition, Staff of the Commission may examine any documents and/or things in the possession of a person or company in respect of which the investigation is ordered, or of any other person or company. Further, Commission Staff may summon and enforce the attendance of any person and compel that person to testify under oath.<sup>26</sup>

Naturally, investigatory powers as broad as these have not been without their own controversy. Suggested Charter infringements run the gamut from s.7 (the right to life, liberty and security of the person); s.8 (the right to be secure against unreasonable search and seizure); and s. 11 (various protections extended to persons charged with an offence, including the presumption of innocence).

Nevertheless, time and time again the courts have declined to find regulatory and disciplinary bodies subject to the Charter. In *Pezim* the Supreme Court suggested the reason for this is the protective nature of the Commission's activities which "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".<sup>27</sup> Alternatively, in *Thomson Newspapers* the Supreme Court relied on the expectancy factor as another justification, i.e. "the degree of privacy the citizen can reasonably expect may vary significantly depending on the activity that brings him into contact with the state".<sup>28</sup>

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<sup>26</sup> *OSA*, s. 11 (4) and s.13 (1).

<sup>27</sup> *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

<sup>28</sup> *Thomson Newspapers Ltd. V. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425.

This ‘expectancy factor’ is reminiscent of the licensing rationale for attenuating Charter standards – that is, that persons in the regulated activity choose to enter that activity thereby voluntarily accepting the degree of necessary regulation. The Supreme Court has relied on this rationale, in our view rather unconvincingly, on several occasions.<sup>29</sup>

However, the Supreme Court’s reliance on this rationale has been of little consequence due to the implicit understanding that the real reason for protecting regulatory bodies from Charter scrutiny has always been the modest range of sanctions at their disposal.

Those in the securities industry will undoubtedly watch carefully to see how the Supreme Court reviews these previously articulated principles in the context of the newly devised Bill 198.

### **Judicial Review of Commission Decisions**

While there are more than a few good reasons to favour enforcement by prosecution under section 122 over enforcement through the public interest jurisdiction of the Commission,<sup>30</sup> one of the most important is certainly the high threshold to get over before Canadian courts will interfere with a decision of the Commission. In *Ainsley Financial Corporation*,<sup>31</sup> the Honourable Justice Blair articulated the well known principle of judicial deference as follows:

The exercise of [OSC] discretionary authority will not be interfered with unless it has been wielded in a fashion which fetters the application of the discretion, and provided it has been exercised in good faith, with an

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<sup>29</sup> *Thomson Newspapers*, supra note 28 *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *BCSC v. Branch*, [1995] 2 S.C.R. 3.

<sup>30</sup> Not the least of which is the need for certainty. As James E. A. Turner expressed in his article “Comments on ‘Gatekeeping and the Commission: The Role of Professionals in the Regulatory System,’” in *Securities Regulation: Issues and Perspectives – Papers Presented at the Queen’s Annual Business Law Symposium 1994* (Toronto: Carswell, 1995) ‘lawyers should not be giving advice based on what they *think* a regulator *thinks* the law should be.’

<sup>31</sup> *Ainsley Financial Corporation v. Ontario Securities Commission*, (1993) 14 O.R. (2d) 280 at 289-290.

obvious and honest concern for the public interest and with evidence to support its opinion.<sup>32</sup>

Shortly after the decision in *Ainsley Financial Corporation*, the Supreme Court of Canada had an opportunity to address the standard of judicial review in respect of the British Columbia Securities Commission. In *Pezim*,<sup>33</sup> the Honourable Justice Iacobucci reasoned that the Supreme Court's refusal to interfere with the Commission's decision arose, at least in part, from the fact that it was "dealing with an appeal from a highly specialized tribunal on an issue which arguably goes to the core of its regulatory mandate and expertise".<sup>34</sup>

One cannot argue with the Supreme Court's portrayal of the Commission as a specialized tribunal. However, this portrayal cannot, in our view, be taken to courts should be loathe to intervene in Commission decisions that reach outside its narrow scope of expertise. In our view, judicial deference based on administrative expertise may only be justified if the tribunal's jurisdiction is clearly confined to its regulatory authority, that is, to protect the integrity of the markets.

### **The Demise of Section 122 Prosecutions?**

The option to commence proceedings under section 122 belongs to the Staff of the Commission.<sup>35</sup> Having had an opportunity to review a few of the fundamental differences between proceeding via section 122 or section 127 it goes without saying that every decision to proceed by way of one option as opposed to another must be viewed with these types of differences in mind. In *Wilder v. OSC*, the Honourable Justice Sharpe

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<sup>32</sup> Ibid.

<sup>33</sup> *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

<sup>34</sup> Ibid.

<sup>35</sup> *OSA*, s.122 (7).

had the following to say about Commission Staff's discretion as to the choice of how to proceed:

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.<sup>36</sup>

It is open to question whether such a decision would have been rendered if Bill 198 had been in force at the time. In any event, Justice Sharpe's assessment of the options which are available to Commission Staff emphasizes that the Commission can choose the method of proceeding. However, it does not address the possibility that Commission Staff may choose to select the manner of proceeding that it considers appropriate based on factors which are arguably nothing to do with the merits of the case and the objective needs of the market. Will the Commission have any motivation to proceed in the Courts (where they have a higher burden of proof to meet and where their actions may be subject to Charter scrutiny) when they can proceed by panel hearing and still get million dollar fines 'for each failure to comply' with the *OSA*?

### **Judicial Review Reconsidered**

As we see it, the odds of Commission Staff continuing to utilize section 122 prosecutions depends on the willingness of the Courts to subject Commission activity to Charter scrutiny *and* to judicially review administrative penalties. To this end, the seminal Supreme Court decision in *Wigglesworth*<sup>37</sup> appears to offer some hope. In this case, the Honourable Justice Wilson states that while section 11 of the Charter clearly applies to

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<sup>36</sup> *Wilder v. Ontario Securities Commission* (2001) 53 O.R. 519 at 530.

<sup>37</sup> *R. v. Wigglesworth*, [1987] 2 S.C.R. 541.

criminal and quasi-criminal proceedings it could also apply to those offences which result in true penal consequences. She went on to define such consequences as “imprisonment or fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline”.<sup>38</sup>

The *Wigglesworth* decision suggests that the primary means of determining the applicability of the Charter is the nature of the consequences which, in turn, is determined by the quantum of the fine. Unfortunately, the Courts have, thus far, declined to make a determination of how much is enough. But surely, by anyone’s standards, a million bucks for each failure to comply is enough.

Two recent decisions of the British Columbia Court of Appeal provide some insight into the willingness of the Courts to review Commission penalties. The first of these is *Biller v. British Columbia (Securities Commission)*.<sup>39</sup> In this instance the issue on appeal was the ability of the Commission to levy multiple penalties. The Court of Appeal ruled that the Commission could only impose one penalty per hearing and reduced the penalty accordingly. In the more recent decision of *Re Cartaway Resources*,<sup>40</sup> the Court of Appeal reduced a Commission fine from \$100,000 to \$10,000 for each of the respondents on the basis that the Commission can only administer fines in respect of clear and explicit breaches of the Act.

Admittedly, neither of these recent appellate decisions is directly on point. Yet, the simple fact that the Courts review and overturn the Commission sanctions surely must

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<sup>38</sup> Ibid.

<sup>39</sup> (2001) 199 D.L.R. (4<sup>th</sup>) 124.

<sup>40</sup> (2002) B.C.C.A. 461.

stand for something. Given the seemingly pro-regulatory decisions of the Supreme Court to date, rendered in respect of traditional regulatory bodies, we can only hope that these decisions represent a fresh approach in the new age of pumped-up regulatory bodies.

## Appendix 'A'

**PART XXII, Ontario Securities Act  
ENFORCEMENT****Offences, general**

**122. (1)** Every person or company that,

(a) makes a statement in any material, evidence or information submitted to the Commission, a Director, any person acting under the authority of the Commission or the Executive Director or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;

(b) makes a statement in any application, release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular or other document required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; or

(c) contravenes Ontario securities law,

is guilty of an offence and on conviction is liable to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than two years, or to both. 1994, c. 11, s. 373.

**Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (1) is amended by the Statutes of Ontario, 2002, chapter 22, subsection 181 (1) by striking out the portion after clause (c) and substituting the following:**

is guilty of an offence and on conviction is liable to a fine of not more than \$5 million or to imprisonment for a term of not more than five years less a day, or to both.

**See: 2002, c. 22, ss. 181 (1), 189 (2).**

**Exemption**

**(1.1)** Clauses (1) (a) and (b) do not apply to a statement made or given to the Commission in a submission in respect of a proposed rule or policy. 1994, c. 33, s. 7.

**Defence**

**(2)** Without limiting the availability of other defences, no person or company is guilty of an offence under clause (1) (a) or (b) if the person or company did not know and in the exercise of reasonable diligence could not have known that the statement was misleading or untrue or that it omitted to state a fact that was required to be stated or that was necessary to make the statement not misleading in light of the circumstances in which it was made. 1994, c. 11, s. 373.

**Directors and officers**

**(3)** Every director or officer of a company or of a person other than an individual who authorizes, permits or acquiesces in the commission of an offence under subsection (1) by the company or person, whether or not a charge has been laid or a finding of guilt has been made against the company or person in respect of the offence under subsection (1), is guilty of an offence and is

liable on conviction to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than two years, or to both. 1994, c. 11, s. 373.

**Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (3) is amended by the Statutes of Ontario, 2002, chapter 22, subsection 181 (2) by striking out "to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than two years, or to both" at the end and substituting "to a fine of not more than \$5 million or to imprisonment for a term of not more than five years less a day, or to both". See: 2002, c. 22, ss. 181 (2), 189 (2).**

#### **Fine for contravention of s. 76**

(4) Despite subsection (1) and in addition to any imprisonment imposed under subsection (1), a person or company who is convicted of contravening subsection 76 (1), (2) or (3) is liable to a minimum fine equal to the profit made or the loss avoided by the person or company by reason of the contravention and a maximum fine equal to the greater of,

(a) \$1 million; and

**Note: On a day to be named by proclamation of the Lieutenant Governor, clause (a) is repealed by the Statutes of Ontario, 2002, chapter 22, subsection 181 (3) and the following substituted:**

(a) \$5 million; and

**See: 2002, c. 22, ss. 181 (3), 189 (2).**

**Note: On the day the Statutes of Ontario, 2002, chapter 22, subsection 181 (3) comes into force, clause (a) is repealed and the following substituted:**

(a) \$5 million; and

**See: 2002, c. 22, ss. 188 (3), 189 (2).**

(b) the amount equal to triple the amount of the profit made or the loss avoided by the person or company by reason of the contravention. 2002, c. 18, Sched. H, s. 11.

#### **Same**

(5) If it is not possible to determine the profit made or loss avoided by the person or company by reason of the contravention, subsection (4) does not apply but subsection (1) continues to apply. 1994, c. 11, s. 373.

#### **Definitions: "loss avoided", "profit made"**

(6) In subsections (4) and (5),

"loss avoided" means the amount by which the amount received for the security sold in contravention of subsection 76 (1) exceeds the average trading price of the security in the twenty trading days following general disclosure of the material fact or the material change; ("perte évitée")

"profit made" means,

(a) the amount by which the average trading price of the security in the twenty trading days following general disclosure of the material fact or the material change exceeds the amount paid for the security purchased in contravention of subsection 76 (1),

(b) in respect of a short sale, the amount by which the amount received for the security sold in contravention of subsection 76 (1) exceeds the average trading price of the security in the twenty trading days following general disclosure of the material fact or the material change, or

(c) the value of any consideration received for informing another person or company of a material fact or material change with respect to the reporting issuer in contravention of subsection 76 (2) or (3). ("profit réalisé") 1994, c. 11, s. 373.

### **Consent of Commission**

(7) No proceeding under this section shall be commenced except with the consent of the Commission. 1994, c. 11, s. 373.

### **Trial by provincial judge**

(8) The Commission or an agent for the Commission may by notice to the clerk of the court having jurisdiction in respect of an offence under this Act require that a provincial judge preside over the proceeding. 1994, c. 11, s. 373.

### **Orders in the public interest**

127. (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:

1. An order that the registration or recognition granted to a person or company under Ontario securities law be suspended or restricted for such period as is specified in the order or be terminated, or that terms and conditions be imposed on the registration or recognition.
2. An order that trading in any securities by or of a person or company cease permanently or for such period as is specified in the order.
3. An order that any exemptions contained in Ontario securities law do not apply to a person or company permanently or for such period as is specified in the order.
4. An order that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Commission.
5. If the Commission is satisfied that Ontario securities law has not been complied with, an order that a release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular, offering memorandum, proxy solicitation or any other document described in the order,
  - i. be provided by a market participant to a person or company,
  - ii. not be provided by a market participant to a person or company, or
  - iii. be amended by a market participant to the extent that amendment is practicable.
6. An order that a person or company be reprimanded.

7. An order that a person resign one or more positions that the person holds as a director or officer of an issuer.

8. An order that a person is prohibited from becoming or acting as a director or officer of any issuer. 1994, c. 11, s. 375; 1999, c. 9, s. 215.

**Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (1) is amended by the Statutes of Ontario, 2002, chapter 22, subsection 183 (1) by adding the following paragraphs:**

9. If a person or company has not complied with Ontario securities law, an order requiring the person or company to pay an administrative penalty of not more than \$1 million for each failure to comply.

10. If a person or company has not complied with Ontario securities law, an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance.

**See: 2002, c. 22, ss. 183 (1), 189 (2).**

### **Terms and conditions**

[\(2\)](#) An order under this section may be subject to such terms and conditions as the Commission may impose. 1994, c. 11, s. 375.

### **Cease trading order**

[\(3\)](#) The Commission may make an order under paragraph 2 of subsection (1) despite the delivery of a report to it under subsection 75 (3). 1994, c. 11, s. 375.

**Note: On a day to be named by proclamation of the Lieutenant Governor, section 127 is amended by the Statutes of Ontario, 2002, chapter 22, subsection 183 (2) by adding the following subsection:**

### **Disgorgement order**

[\(3.1\)](#) A person or company is not entitled to participate in a proceeding in which an order may be made under paragraph 10 of subsection (1) solely on the basis that the person or company has a right of action against the respondent to the proceeding or the person or company may be entitled to receive any amount disgorged under the order.

**See: 2002, c. 22, ss. 183 (2), 189 (2).**

### **Hearing requirement**

[\(4\)](#) No order shall be made under this section without a hearing, subject to section 4 of the *Statutory Powers Procedure Act*. 1994, c. 11, s. 375.

### **Temporary orders**

[\(5\)](#) Despite subsection (4), if in the opinion of the Commission the length of time required to conclude a hearing could be prejudicial to the public interest, the Commission may make a temporary order under paragraph 1, 2 or 3 of subsection (1) or subparagraph ii of paragraph 5 of subsection (1). 1994, c. 11, s. 375.

**Period of temporary order**

(6) The temporary order shall take effect immediately and shall expire on the fifteenth day after its making unless extended by the Commission. 1994, c. 11, s. 375.

**Extension of temporary order**

(7) The Commission may extend a temporary order until the hearing is concluded if a hearing is commenced within the fifteen-day period. 1994, c. 11, s. 375.

**Same**

(8) Despite subsection (7), the Commission may extend a temporary order under paragraph 2 of subsection (1) for such period as it considers necessary if satisfactory information is not provided to the Commission within the fifteen-day period. 1994, c. 11, s. 375.

**Notice of temporary order**

(9) The Commission shall give written notice of every temporary order made under subsection (5), together with a notice of hearing, to any person or company directly affected by the temporary order. 1994, c. 11, s. 375.

**Payment of investigation costs**

**127.1 (1)** If, in respect of a person or company whose affairs were the subject of an investigation, the Commission,

(a) is satisfied that the person or company has not complied with, or is not complying with, Ontario securities law; or

(b) considers that the person or company has not acted in the public interest,

the Commission may, after conducting a hearing, order the person or company to pay the costs of the investigation. 1999, c. 9, s. 216.

**Payment of hearing costs**

(2) If, in respect of a person or company whose affairs were the subject of a hearing, the Commission, after conducting the hearing,

(a) is satisfied that the person or company has not complied with, or is not complying with, Ontario securities law; or

(b) considers that the person or company has not acted in the public interest,

the Commission may order the person or company to pay the costs of or related to the hearing that are incurred by or on behalf of the Commission. 1999, c. 9, s. 216.

**Payment of costs where offence**

(3) Where a person or company is guilty of an offence under this Act or the regulations, the Commission may, after conducting a hearing, order the person or company to pay the costs of any investigation carried out in respect of that offence. 1999, c. 9, s. 216.

**Costs**

[\(4\)](#) For the purposes of subsections (1), (2) and (3), the costs that the Commission may order the person or company to pay include, but are not limited to, all or any of the following:

1. Costs incurred in respect of services provided by persons appointed or engaged under section 5, 11 or 12.
2. Costs of matters preliminary to the hearing.
3. Costs for time spent by the Commission or the staff of the Commission.
4. Any fee paid to a witness.
5. Costs of legal services provided to the Commission. 1999, c. 9, s. 216.

## Appendix 'B'

### **PART VI, Ontario Securities Act 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 laws or the regulation of the capital markets in another jurisdiction. 1994, c. 11, s. 358.

#### **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 laws or the regulation of the capital markets in another jurisdiction. 1994, c. 11, s. 358.

### **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.

### **Financial examination order**

**12.** (1) The Commission may, by order, appoint one or more persons to make such examination of the financial affairs of a market participant 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 laws or the regulation of the capital markets in another jurisdiction. 1994, c. 11, s. 358.

### **Contents of order**

(2) An order under subsection (1) shall describe the matter to be examined. 1994, c. 11, s. 358.

### **Right to examine**

(3) For the purposes of an examination under this section, a person appointed to conduct the examination may examine any documents or other things, whether they are in the possession or control of the market participant or any other person or company. 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 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.