# 2005 BCSECCOM 80

**Timothy Fernback, Brent Wolverton, Wolverton Securities Ltd. and William Massey**

***Securities Act,* RSBC 1996, c. 418**

**Hearing**

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| **Panel** | Brent W. Aitken | Vice Chair |
| | Joan L. Brockman | Commissioner |
| | John K. Graf | Commissioner |
| **Date of Hearing** | January 27, 2005 | |
| **Date of Ruling** | January 27, 2005 | |
| **Reasons Issued** | February 8, 2005 | |
| **Appearing** | | |
| Mark D. Andrews | For Timothy Fernback | |
| Robert S. Anderson | For Brent Wolverton and Wolverton Securities Ltd. | |
| James Sasha Angus<br>Joyce M. Johner | For the Executive Director | |

**Reasons for Ruling**

¶ 1 This was an application by Timothy Fernback, Brent Wolverton and Wolverton Securities Ltd. for an order directing the Executive Director to "produce all affidavits, materials and a full synopsis of what was represented orally" to Commission Chair Douglas M. Hyndman in connection with his making an investigation order in this matter under section 142 of the *Securities Act*, RSBC 1996, c. 418 on April 4, 2002.

¶ 2 The Executive Director says that the only material falling within the scope of the order sought is an affidavit sworn by a Commission staff investigator.

¶ 3 We dismissed the application and so advised the parties by a letter dated January 27. These are our reasons.

**Background**

¶ 4 We have ruled on a number of applications in this matter on the subject of disclosure. This one is different from the earlier applications, which dealt with the standard of relevance, and the application of that standard, for disclosure of evidence related to the allegations, or the defence of them, in the notice of hearing.

¶ 5 This application is for disclosure to support an application the applicants intend to make based on abuse of process. One of the grounds of that application will be that Commission staff improperly used their powers to compel evidence under the Act because they used those powers not to support an investigation but to obtain evidence for the purposes of the hearing. The applicants seek disclosure of the affidavit in support of the investigation order in connection with this ground of the application.

**Issue**

¶ 6 The applicants say that an investigation order under section 142, and the resulting ability to compel evidence under section 144, are for the sole purpose of determining whether there is sufficient evidence to warrant the commencement of enforcement proceedings. Therefore, they say, once the Executive Director decides to issue a notice of hearing, sections 142 and 144 can no longer be used to obtain evidence for the purpose of that hearing. At that point, the applicants contend, the investigation stage of the process is over, and using sections 142 and 144 for the purpose of gathering evidence for the hearing is an improper use of the powers in those sections.

¶ 7 The Executive Director says that it is proper to use the powers in section 142 and 144 to gather evidence for the hearing. The Executive Director says this is not limited at any point in time and in fact can continue at any time up to the conclusion of the hearing.

¶ 8 The Executive Director says we should dismiss the application because the disclosure will serve no useful purpose, given that the ground being advanced for the future abuse of process application is not valid.

¶ 9 Although the argument before us focused on the investigator's power to compel evidence under section 144, these reasons apply equally to the investigator's powers of search and seizure under section 143.

**Analysis**

¶ 10 Section 142 authorizes the Commission to issue investigation orders:

> **142. Investigation order by commission –** (1) The commission may, by order, appoint a person to make an investigation the commission considers expedient
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> (a) for the administration of this Act,
>
> (b) to assist in the administration of the securities or exchange contracts laws of another jurisdiction,
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> (c) in respect of matters relating to trading in securities or exchange contracts in British Columbia, or
>
> (d) in respect of matters in British Columbia relating to trading in securities or exchange contracts in another jurisdiction.
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> (2) In its order, the commission must specify the scope of an investigation to be carried out under subsection (1).

¶ 11 Section 144 empowers an investigator appointed under section 142 to compel evidence:

> **144. Investigator's power at a hearing –** (1) An investigator appointed under section 142 or 147 has the same power
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> (a) to summon and enforce the attendance of witnesses,
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> (b) to compel witnesses to give evidence on oath or in any other manner, and
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> (c) to compel witnesses to produce records and things and classes of records and things
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> as the Supreme Court has for the trial of civil actions.
>
> . . .
>
> (4) A witness giving evidence at an investigation conducted under section 142 or 147 may be represented by counsel.

¶ 12 These powers have been upheld by the Supreme Court of Canada. In so doing, that Court has emphasized the importance of considering them in the context of the broad securities regulatory regime. (The Court has consistently stressed the importance of the overall context in considering matters of procedural fairness – see *Knight v. Indian Head School Division No. 19 of Saskatchewan*, [1990] 1 SCR 653; *R. v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.)

¶ 13 In *British Columbia Securities Commission v. Branch*, [1995] 2 SCR 3, the Court considered the power of an investigator to compel testimony under section 144 of the Act (then section 128). In the portion of the judgment delivered by Sopinka and Iacobucci JJ., after quoting the relevant portions of the section, the Court said:

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

> It is important to note from the outset that the [*Securities Act*] is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system . . . .

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

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

. . .

35 Clearly, this purpose of the Act justifies inquiries of limited scope. The Act aims to protect the public from unscrupulous trading practices which may result in investors being defrauded. It is designed to ensure that the public may rely on honest traders of good repute able to carry out their business in a manner that does not harm the market or society generally. *An inquiry of this kind legitimately compels testimony as the Act is concerned with the furtherance of a goal which is of substantial public importance, namely, obtaining evidence to regulate the securities industry. Often such inquiries result in proceedings which are essentially of a civil nature. The inquiry is of the type permitted by our law as it serves an obvious social utility. Hence the predominant purpose of the*

> *inquiry is to obtain the relevant evidence for the purpose of the instant proceedings, and not to incriminate Branch and Levitt*. . . . [our emphasis]

¶ 14 Later in the judgment, L'Heureux-Dubé J. went on to consider the fundamental fairness of the powers in the Act to compel evidence:

> 80 Finally, the fundamental fairness of the powers of testimonial compulsion and document production in s. 128(1) of the Act must be evaluated in light of all other rights equally guaranteed under the *Charter*. Where a company officer is summoned to attend a hearing before investigators, he knows what the subject of the inquiry is. He can prepare himself for the questions. He will generally be accompanied by his lawyers. At the hearing itself, he will be treated with courtesy and will be given every opportunity to consult his lawyers and consider his answers. He will produce those documents requested by the investigators. It would be ironic to conclude that such a proceeding is, itself, contrary to the principles of fundamental justice if the only equally effective alternative reasonable available to the state to pursue a pressing and substantial objective would constitute a far more dramatic intrusion into individual rights. Given the profound asymmetries of information between market players and market regulators in the securities industry, such a reasonable alternative might very well require conferring upon securities regulators broad, intrusive and sweeping search and seizure powers. . . .
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> 81 To recapitulate, although the distinction may be difficult to draw, courts must try to differentiate between unlicensed fishing expeditions that are intended to unearth and prosecute criminal conduct, and actions undertaken by a regulatory agency, legitimately within its powers and jurisdiction and in furtherance of important public purposes that cannot realistically be achieved in a less intrusive manner. Whereas the former may run afoul of s. 7 of the *Charter*, the latter do not.
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> 82 As such, notwithstanding *that one of the primary purposes of an investigation under s. 128(1) of the* Securities Act *is to engage in a form of civil discovery of the witness as well as of the company to illuminate or investigate irregularities or suspicious conduct* [our emphasis], I agree with Sopinka and Iacobucci JJ. that it has not been demonstrated that testimonial compulsion at these proceedings would be fundamentally unfair to the witnesses. As I recognized in [*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425], at p. 578, "[c]ompelling the attendance of witnesses is an established investigatory tool in this age of governmental regulation of the economy". Although such powers of

> investigation may not always be necessary in regulatory contexts, I conclude that they are indeed necessary in the present instance, given the profound asymmetry of information facing securities regulators, the close relationship between such investigatory powers and the obligations voluntarily undertaken by those participating in this regulated activity, and the lack of a less intrusive alternative means to investigate and deter market irregularities and improper conduct by market players.

¶ 15 *British Columbia Securities Commission v. Stallwood*, [1995] BCJ No. 1321, was a petition by the Commission to the British Columbia Supreme Court for an order compelling witnesses to testify under oath in an investigation. In considering the validity of sections 142 and 144 (then sections 126 and 127), the court, after quoting paragraphs 80 and 81 of *Branch* (reproduced in part above) said:

> 32 The Commission has a duty to specify the scope of an investigation pursuant to s. 126(2) of the *Securities Act*. The very purpose of the investigation is to provide facts to the Commission for it to decide if there is sufficient information to proceed with a Hearing. The effect of the Investigating Order setting out the scope of the investigation is, in effect, defining what is relevant. It would be unrealistic to restrict the area of investigation further when many of the facts are solely with the witness and not known to the Commission. To this extent the procedure differs from that involving the state in a manner involving criminal law offences against an individual. In a regulatory proceeding what has taken place is the predominant issue at the investigation stage. In criminal law proceedings the state must produce evidence, without the individual's assistance, that an offence has been committed by that individual.

¶ 16 The applicants emphasize, unduly we think, the Court's statement that the "very purpose of the investigation is to provide facts to the Commission for it to decide if there is sufficient information to proceed with a hearing". This, they say, supports their argument that once the Executive Director decides to issue a notice of hearing, there is no longer any purpose for the investigation order, and that therefore any further use of the compulsion powers under section 144 is improper.

¶ 17 The problem with this interpretation is that it takes the language out of the broader context of the *Stallwood* decision. Read as a whole, paragraph 32 of the decision shows that the Court was considering the Commission's right to compel potential respondents to testify against their own interest in an investigation under section 142, in contrast to what is permissible in criminal law. The Court was not considering whether the Executive Director, having decided to issue a notice of hearing, can continue to exercise the powers under section 144.

¶ 18 The applicant's interpretation of *Stallwood* is also inconsistent with several statements of the Supreme Court of Canada on the use of these powers. In *Pezim*, the Court noted the "special character" of securities commissions that "must be recognized when assessing the way their functions are carried out". It commented on the broad powers given the Commission by the legislature for investigations, audits, hearings and orders, and concluded that "it was the legislature's intention to give the Commission a very broad discretion to determine what is in the public interest".

¶ 19 Considering sections 142 and 144 specifically, the Court in *Branch* expressed the purpose of investigations under the Act in broad terms. It said that these investigations were for "obtaining evidence to regulate the securities industry". Noting that investigations often resulted in "proceedings . . . essentially of a civil nature", the Court said the "predominant purpose of the inquiry is to obtain relevant evidence" for those proceedings. L'Heureux-Dubé J., having remarked on "the profound asymmetries of information between market players and market regulators in the securities industry" said that "one of the primary purposes of an investigation order . . . is to engage in a form of civil discovery".

¶ 20 In contrast to *Stallwood, Johnson v. British Columbia (Securities Commission)*, [1999] BCJ No. 552 (BC Supreme Court in Chambers) is directly on point.

¶ 21 In *Johnson*, Commission staff used their powers under a section 142 (then section 126) order to examine Johnson under oath in February and September of 1997. In July 1998 the Executive Director issued a notice of hearing seeking sanctions against Johnson and others. In August 1998 Commission staff issued a further summons seeking Johnson's appearance at another investigation. Johnson declined to attend on the basis that the sole or primary purpose of an examination after the issuance of a notice of hearing was to obtain evidence to incriminate him at the hearing.

¶ 22 Allan J., in chambers, upheld the summons. After quoting paragraph 35 of *Branch* (reproduced above), the court said:

> 120 The Court held that persons may be compelled to give evidence for a legitimate public purpose, such as proceedings under the Act, but they cannot be compelled if the predominant purpose of the summons is to incriminate them in a subsequent criminal or quasi-criminal proceeding. Although Mr. Justice Wood, the trial judge in [*Branch*] distinguished between the "investigative" stage and the "adjudicative" stage of the Commission's proceedings, the Supreme Court of Canada did not.

> 121 *Branch* establishes that a summons issued for the purpose of an administrative hearing under the Act is not contrary to fundamental justice because of the limited scope of the inquiry. The Act is regulatory and its purpose is to serve legitimate social goals; thus the requirement that the infringement of the liberty interest be in accordance with fundamental justice is satisfied. In a particular case, however, it is necessary to determine whether the investigators' purpose in compelling the testimony is for a legitimate purpose connected with the instant proceedings or for an incriminatory purpose related to future criminal or quasi-criminal proceedings.
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> 122 . . . The Notice of Hearing, with its detailed allegations, was issued after 18 months of investigation. Indeed, one of the allegations against Johnson is that he made false statements to the investigators in the course of his first two interviews. . . . *The probable purpose of a further interview is to obtain information which may be used against Johnson at the Hearing itself. However, this would appear to be a permissible purpose under the reasoning in* Branch. *S. 144 imbues the investigators with broad powers analogous to those of the Supreme Court in a civil action.* [our emphasis]

¶ 23 Johnson sought leave to appeal this decision. In refusing leave (see 1999 BCCA 465), Newbury J.A. quoted from Allan J.'s decision (including the passages above) and said:

> 11 In my view, the reasoning in *Branch*, together with the protection available to Mr. Johnson in the form of use or derivative-use immunity should criminal or quasi-criminal proceedings be taken against him, lead to the conclusion that there is no reasonable likelihood that he would succeed on appeal . . . . The case is simply covered by *Branch.* As in that case, there is no indication in the evidence of an intention by the Securities Commission or Crown to misuse the information to be obtained at the hearing, and of course, the use of immunity rule ensures that that could not occur.
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> 12 Nor do I think any distinction in principle can be made on the basis that the investigation phase of this proceeding has closed or has nearly closed. As Madam Justice Allan pointed out in her Reasons, the distinction made between the investigative and adjudicative phases made by Wood J. (as he then was) at the trial level in *Branch*, was not taken up by the Supreme Court of Canada in *Branch* or any other case.

¶ 24 It is clear that once the jurisprudence established criminal immunity from evidence obtained under the Commission's powers under sections 142 and 144, the courts supported a broad application of those powers by the Commission in discharging its regulatory mandate. The language used by the courts in *Johnson* could not be more clear on this point.

¶ 25 The applicants cited *British Columbia Securities Commission v. La Pointe*, (1992) 923955 Victoria Registry *affd.* (1994) VI01810 Victoria Registry, in support of their position. In *La Pointe*, the B.C. Supreme Court (in Chambers) decided that the Act did not authorize the Court to issue a letter of request to a foreign jurisdiction under section 175(1) (then section 154.3(1)) to allow the Executive Director to gather evidence for a hearing. The Court so decided because section 154.3(1) (since amended) authorized the court to grant the letter only "if a person outside of the Province may have evidence *that may be relevant to an investigation ordered by the Commission under section 126*" [our emphasis]. The decision of the chambers judge was affirmed by the Court of Appeal.

¶ 26 *La Pointe* has no application here. The decision dealt only with the interpretation of section 154.3(1). Whether the Executive Director, having decided to issue a notice of hearing, can continue to exercise the powers under section 144 was not before the Court.

¶ 27 Furthermore, the decision turned on the words quoted above, words which do not appear in section 144 (or section 143, the section authorizing an investigator to search premises and seize property).

¶ 28 The applicants acknowledged that we are not bound to follow criminal law precedents, but invited us to do so, and cited a number of cases from the criminal law environment in support of their arguments.

¶ 29 Although it is useful to be aware of the procedures followed in criminal courts, in our opinion, it would be a mistake to apply criminal law standards to the conduct of investigations under the Act. That approach would be at odds with the care the Supreme Court of Canada has taken to preserve the public interest aims of the Act, and the scheme of securities regulation as a whole, by distinguishing the procedures that are appropriate for investigations under the Act from those that are appropriate under the criminal law.

¶ 30 Section 173 of the Act states that a person presiding at a hearing "must receive all relevant evidence submitted by a person to whom notice has been given and may receive relevant evidence submitted by any person". Despite this distinction, the Commission generally admits all relevant evidence. It is entirely proper and consistent with the public policy aims of the Act that Commission staff be entitled

to use the powers under sections 142, 143 and 144 to gather relevant evidence for the purposes of the hearing. This includes the right to gather evidence after the hearing has started, a practice that the Commission has consistently ruled as acceptable, recognizing that, when appropriate, an adjournment can generally address any prejudice arising.

**Decision**

¶ 31 The applicant's argument for a limited application of the powers under sections 142 and 144 is not supported in law, and is therefore not a valid ground for a claim of abuse of process. Since the disclosure sought was to support that ground, ordering the disclosure would serve no useful purpose. We therefore dismissed the application.

¶ 32 February 8, 2005

¶ 33 **For the Commission**

Brent W. Aitken
Vice Chair

Joan L. Brockman
Commissioner

John K. Graf
Commissioner