OSC PROCEDURAL TRENDS AND FAIRNESS

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On February 18, 2009, the Ontario Securities Commission approved and adopted new *Rules of Procedure*[1] which apply to proceedings commenced on or after April 1, 2009. The new *Rules* replace the old *Rules of Practice*[2], which continue to apply to proceedings commenced before March 31, 2009. The Ontario Securities Commission, in adopting the new *Rules of Procedure*, articulated that the new *Rules* are "designed to ensure the fair and efficient resolution of proceedings before the Commission in the most expeditious and cost-effective manner by providing parties with more complete and easily accessible guidance on the procedures required for the conduct of Commission proceedings".[3] However, they are equally a response to changes in the nature of proceedings before the Commission, which are becoming increasingly litigious. While many cases continue to settle, lengthy contested hearings are increasing in frequency, perhaps because of the Commission's enhanced sanctioning powers under section 127 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "*Act*"). Interlocutory motions on procedural issues such as disclosure are becoming more common, and even Staff are resorting more often to interim orders.

While many aspects of the new rules represent a significant improvement in the procedures followed by the Commission, those rules, the *Act* and Commission practice continue

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[1] *Ontario Securities Commission Rules of Procedure* made under the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, available at http://www.osc.gov.on.ca/Enforcement/RulesPractice/rp_20090306_rules-procedure.jsp

[2] *Ontario Securities Commission Rules of Practice* made under the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, available at http://www.osc.gov.on.ca/Enforcement/RulesPractice/rp_rules-of-practice.jsp

[3] Notice of the Office of the Secretary of the Commission, *Adoption of New Rules of Procedure"* (2009), 32 O.S.C.B. 1935, s. 1.4.4

to fall short in ensuring procedural fairness to respondents in a number of important areas, including pre-hearing disclosure and costs.

1. Pre-Hearing Disclosure

(a) The Applicable Standard

Rule 4 of the new *Rules of Procedure* requires Commission Staff to disclose, or make available for inspection, all documents or things in the possession or control of Staff that are relevant to the allegations against a respondent.

It is now well-settled that the standard of pre-hearing disclosure that informs that obligation is high and similar to that of a criminal trial. In *Deloitte & Touche LLP*[4], the Supreme Court of Canada approved of the Commission's use and application of the relevance standard for disclosure recognized in *Stinchcombe*[5] and confirmed that the choice of that standard by Staff was reasonable. It affirmed the Ontario Court of Appeal's determination that Staff are "obliged to take a generous view of relevance"[6] in making disclosure to a respondent in section 127 proceedings.

What the *Stinchcombe* standard requires of a prosecutor was summarized by the Supreme Court of Canada in *Taillefer*[7] as follows:

> The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly irrelevant. Relevance must be assessed in

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4 *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] 2 S.C.R. 713

5 *R. v. Stinchcombe*, [1991] 3 S.C.R. 326

6 *Ibid.* at para. 16

7 *R. v. Taillefer*, [2003] 3 S.C.R. 307

> relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea (p. 343). Moreover, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses (p. 345). This Court has also defined the concept of "relevance" broadly, in *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 467:
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> > One measure of the relevance of information in the Crown's hands is its usefulness to the defence: it is of some use, it is relevant and should be disclosed – *Stinchcombe* [at page 345]. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defences such as, for example, whether to call evidence.
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> As the courts have defined it, the concept of relevance favours the disclosure of evidence. Little information will be exempt from the duty that is imposed on the prosecution to disclose evidence. As this Court said in [*R. v. Dixon*, [1998] 1 S.C.R. 244], 'the threshold requirement for disclosure is set quite low. … The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence.' (para. 21; see also *R. v. Chaplin*, [1995] 1 S.C.R. 727, at paras. 26-27. 'While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant' (*Stinchcombe* [at page 339]).[8]

In recent Commission decisions, the Commission confirmed the application of the *Stinchcombe* standard in securities enforcement proceedings and considered its requirements in certain situations. For example, in *Re Berry*[9] the Commission decided that the *Stinchcombe* standard required that documents reflecting settlement discussions between other parties, who would be witnesses at the hearing against the respondent, and staff of Market Regulation Services ("RS"), were relevant and should be disclosed to the respondent by RS staff. According to the Commission, withholding those documents from the respondent could "potentially have a significant impact on his ability to prepare his case and make full answer and defence."[10] After balancing the benefits to be gained from the protection of that information from disclosure, with

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[8] *Ibid.* at paras. 59-60

[9] (2008), 31 O.S.C.B. 5441

[10] *Ibid.* at para. 125

the respondent's right to a fair hearing and the opportunity to make full answer and defence, the Commission concluded that setting aside the settlement privilege was warranted.

In reaching that conclusion, the Commission recognized the importance of adequate disclosure in disciplinary proceedings. "Full, fair and timely disclosure is key to ensuring procedural fairness to respondents in regulatory enforcement proceedings."[11] Accordingly, the "principles of natural justice and fairness require a high standard of disclosure akin to that required at criminal trials."[12]

In *Re Biovail*[13] the Commission also recognized that Staff have a broad duty of disclosure akin to the *Stinchcombe* standard, requiring Staff to disclose all relevant information, whether inculpatory or exculpatory. However, while Staff must err on the side of inclusion, they also have a duty to exclude clearly irrelevant documents and to separate "the wheat from the chaff".[14] That means that Staff cannot simply "document dump" on respondents in order to fulfil their disclosure obligation.

In that case, the five respondents argued that Staff failed to make meaningful disclosure in that Staff simply made bulk disclosure of an enormous number of documents it obtained from the Corporation and the SEC based on "wide sweeps" during a long investigation, without sifting the material for relevance. The disclosure contained documents that were clearly irrelevant, and was in a form that was not electronically searchable. The Commission accepted the respondents'

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[11] *Ibid.* at para. 65

[12] *Ibid.* at paras. 66-67

[13] (2008), 31 O.S.C.B. 7161

[14] *Ibid.* at paras. 15, 32

arguments and concluded that Staff have an obligation to disclose documents it considers relevant to the particular allegation or group of allegations made against each respondent, and that the respondents should not have to search a massive database and guess at which documents Staff considered relevant.

However, the Commission also determined that separating the "wheat from the chaff" does not require Staff to look at each and every document in an electronic database in a manual review to determine relevance. Rather, the Commission suggested that the following procedure was appropriate:

> In our view, it would be reasonable for Staff to begin by identifying all those documents that it knows from its investigation are relevant to the Respondents in this proceeding. Staff must already have identified most of those documents in determining what allegations to bring against the Respondents. In addition, Staff should make relevant searches of the Databases (in the same manner that Staff says the Respondents are able to do) and assess which documents or categories of documents identified in this manner may be relevant to the Respondents. We recognize that this may be an imperfect process that may not identify every relevant document. Both Staff and the Respondents are at risk that some relevant document could be missed. We believe, however, that this process is fair and reasonable and that I can be completed within the time frame set forth in our order.[15]

These decisions are helpful in articulating, with greater specificity, what the *Stinchcombe* standard requires in the context of enforcement proceedings before the Commission and other SROs. However, several important disclosure issues remain to be addressed and may well form the basis for future motions to the Commission. These issues include those described below.

(b) Duty of Staff to provide a "Schedule B"

Currently, the new *Rules of Procedure* do not require Commission Staff to provide a list of documents that Staff have decided to withhold from disclosure on the basis of privilege or

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15 *Ibid.* at para. 47

because they are not relevant. Arguably, without such a list, a respondent is precluded from being able to determine whether in fact all potentially relevant documents have been disclosed, to what extent Staff have withheld relevant documents on the basis of privilege, and whether privilege has been properly claimed by Staff.

Determining what is relevant for the purpose of a Commission proceeding is particularly problematic. That is because, unlike civil proceedings which require a Statement of Defence from the defendant, or IIROC proceedings, which require a respondent to deliver a Reply, a respondent to a Commission proceeding is not required to deliver a pleading in response to Staff's Notice of Hearing and Statement of Allegations. In the circumstances, there may be little to guide Staff's determination of what is relevant, including which documents may be useful to a respondent to rebut Staff's case, to advance any possible defence, or to assist the respondent in making tactical decisions about matters such as whom to call as a witness. Indeed, many respondents' counsel perceive that Staff appear to pay scant attention to defences that may be raised when Staff are investigating, framing the allegations in the Statement of Allegations, making disclosure, and even prosecuting the case before the Commission.

Requiring Staff to deliver a list of documents identifying those withheld on the basis of privilege is the only way for respondents to be able to determine whether privilege has properly been claimed by Staff. Not every document authored by Commission counsel will be privileged. Similarly, the law is clear that not every report of an investigator is protected by litigation privilege.[16]

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[16] *General Accident Assurance Co. v. Chrusz*, [1999] O.J. No. 3291 (Ont. C.A.), at para. 50

A similar obligation is imposed on civil litigants in Ontario, who are required to list documents withheld on the basis of privilege in a Schedule "B" to the affidavit of documents, and also on Crown prosecutors in criminal cases. In *Laporte*[17], the Saskatchewan Court of Appeal required the Crown to provide a written inventory of all information in its possession which had not been disclosed, and an explanation of the basis upon which the Crown proposed to withhold disclosure. The Crown was required to describe each item "with sufficient detail that counsel will be able to make a reasoned decision as to whether to seek disclosure or not".[18] According to the Court, it was likely that such an inventory would result in the number of items in dispute falling off the table. The inventory would also permit the reviewing judge to ascertain which items in dispute "may be decided by him without production of the document or item of information in question, and those which require production in order to enable him to make a decision" about whether the Crown ought to be required to disclose them or not.[19]

It is desirable that a similar obligation be imposed upon Commission Staff in enforcement proceedings to ensure procedural fairness. There is no reason to require this of Crown prosecutors but not of prosecuting counsel in disciplinary proceedings. It was required in *Hammati v. College of Physicians and Surgeons of British Columbia*.[20] In that case, British Columbia Supreme Court required the B.C. College of Physicians to disclose to a respondent physician a list of documents which it had refused to disclose on the basis of privilege.

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17 *R. v. Laporte*, [1993] S.J. No. 361 (Sask. C.A.)

18 *Ibid.* at para. 18

19 *Ibid.*

20 [1991] 9 W.W.R. 301 (B.C.S.C.)

Requiring the same of Staff in Commission proceedings also would assist the Commission in fulfilling its obligation to review the exercise of Staff's discretion in making disclosure.[21]

(c) **Procedure for obtaining disclosure of third party documents**

Currently, the *Rules of Procedure* and the *Act* do not contain a provision allowing respondents to compel the production of documents from third parties. While Staff have the ability to compel the production of documents during their investigation pursuant to Sections 11 and 13 of the *Act*, respondents have no such ability in advance of the hearing. The new *Rules of Procedure* do not include a provision equivalent to *Rule* 30.10 of the Ontario *Rules of Civil Procedure*:

> Rule 30.10(1) The court may, on motion by a party, order production for inspection of a document that it is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,
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> (a) the document is relevant to a material issue in the action; and
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> (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

If, during the course of Staff's investigation, Staff fail to obtain documents important to the conduct of the respondent's defence, the respondent's only ability to obtain those documents for use at the hearing is to ask the Commission to issue a summons pursuant to section 12 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22 ("SPPA"). Section 12 authorizes a tribunal to require any person, by summons "to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal". However, that wording suggests that the respondent does not get access to the documents until after the commencement of the hearing, which may be highly prejudicial to the respondent's ability to prepare his defence.

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[21] See *Re Ironside*, [2005] A.S.C.D. No. 910 (C.A.), at para. 47

Accordingly, it is desirable that both the *Act* and the *Rules* expressly provide a mechanism to enable respondents to access documents in the hands of third parties prior to the commencement of the hearing on the merits.

(d) **Disclosure for the purpose of responding to the Wells Letter and facilitating potential settlement prior to issuance of the Notice of Hearing**

Currently, the Commission's new *Rules of Procedure* do not require Staff to make disclosure until after service of the Notice of Hearing. This is problematic. Following the commencement of an investigation, Staff will identify the persons or entities against whom proceedings will likely be commenced. Staff provide such persons or entities with a letter stating Staff's intention to commence proceedings (a "Wells letter"). The purpose of the letter is to provide the potential respondent with an opportunity to submit, on a "with prejudice" basis, information and documentation with a view to potentially persuading Staff not to initiate proceedings or to narrow the allegations against that respondent. In many cases, receipt of a Wells letter also prompts the respondent to consider entering into settlement negotiations with Staff.

Staff's current practice is not to enter into settlement discussions with a potential respondent until its investigation is complete. The rationale for that is that Staff are not prepared to entertain settlement discussions on the basis of incomplete information. However, Staff refuse to provide respondents with disclosure at the time of delivery of the Wells letter, and indeed at any time prior to issuance of the Notice of Hearing.

This creates an uneven playing field for the purpose of settlement discussions. Staff have the fruits of their investigation into the merits of the allegations against the respondents. The respondents do not. This discourages respondents from entering into early settlement

discussions. It also can make it extremely difficult for respondents to deliver a meaningful response to the Wells letter. The potential respondent is left to respond without knowing what Staff's investigation has revealed, including what exculpatory information may be in the possession of Staff. This is highly unfair to respondents.

Surely it is not too onerous to require Staff to deliver, along with the Wells letter, a short summary of the evidence obtained by Staff against the potential respondent, and identification of potentially exculpatory information in its possession. This may avoid the situation that occurred in *Re AIT Advanced Information Technology Inc.* In that case, one of the named respondents settled only 2 ½ weeks after the Notice of Hearing was issued.[22] It is likely, and indeed almost a certainty, that that respondent did not have full disclosure from Staff at the time that settlement negotiations were entered into. In the settlement agreement, the respondent acknowledged that Section 75 of the *Act* had been violated.

At a subsequent contested hearing against the other respondents, the Commission found, after a full hearing on the merits, that Section 75 of the *Act* had not in fact been breached.[23] Ultimately, Staff and the respondent who settled made an application to the Commission pursuant to Section 144 of the *Act* to revoke the order made against the respondent approving the settlement agreement that he had made with Staff. The Commission agreed to vacate its prior order and expressed regret to the respondent for having suffered personal and financial consequences as a result of the settlement based upon the false premise that a breach of the *Act*

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[22] *Re AIT Advanced Information Technology Inc.* (2007), 30 OSCB 1859

[23] *Re AIT Advanced Information Technology Inc.* (2008), 31 O.S.C.B. 712

had occurred. The Chair of the Panel hearing the Section 144 application stated "[i]t is one of those things that happens and to the extent it can be righted, corrected, that is now being done".[24]

Unfortunately, that decision has not "righted" or "corrected" the situation for other respondents. In the absence of disclosure to the respondents of a summary of evidence, including exculpatory information, relating to Staff's proposed allegations, it is entirely likely that similar injustices will result in other cases. To impose such an obligation on Staff is entirely consistent with the duty on a Crown prosecutor in a criminal case to make disclosure of all relevant evidence before election or plea.[25]

(e) ***Ex Parte*** **Orders and Disclosure**

The Commission makes investigation orders pursuant to Section 11, interim cease trade orders pursuant to Section 127, and directions to freeze brokerage and bank accounts pursuant to Section 126 on an *ex parte* basis.

There is no dispute that interim orders are an important tool available to securities regulators in their quest to protect the public interest. As stated by the Ontario Securities Commission in *Shallow Oil*:

> The authority of the Commission to issue and extend temporary cease trade orders is directly related to its goal of protecting investors. It is essential that the Commission be able to act quickly, at an early stage of an investigation, to protect investors from ongoing harm. In doing so, the Commission must consider the public interest in the particular circumstances.[26]

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[24] *Re AIT Advanced Information Technology Inc.* (2008), 31 O.S.C.B. 10027, at para. 5

[25] *R. v. Taillefer*, supra note 7, at p. 339

[26] *Re Shallow Oil & Gas Inc.* (2008), 31 O.S.C.B. 2007, at para. 33

However, such *ex parte* interim orders also are incredibly intrusive. This is why courts and securities commissions have recognized that such interim orders are not routine and should be made with caution.[27]

In a myriad of other circumstances, the courts have recognized that a party applying for an order without notice to the other party has a heavy burden to make "full and frank disclosure" and a "balanced presentation" of the facts relevant to the application. This includes *ex parte* applications for orders to compel the production of documents under the *Competition Act*, R.S. 1985, c. C-34[28] and applications by police officers seeking judicial authorization to wiretap[29] and to obtain a search warrant.[30]

The reason for this is obvious: both the judge hearing such a motion and the absent party against whom the order is sought are "literally at the mercy" of the party seeking the relief in issue. As stated by the Court in *United States of America v. Friedland*[31]:

> The ordinary checks and balances of the adversary system or not operative. The opposite party is deprived of the opportunity to challenge the factual and legal contentions advanced by the moving party in support of the injunction. The situation is rife with the danger that an injustice will be done to the absent party. As a British Columbia Judge noted recently:
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> > There is no situation more fraught with potential injustice and abuse of the Court's powers than an application for an ex part injunction.

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27 See for example *Re Lost River Mining Corporation*, Oct. 1979 O.S.C.B. 290, at para. 292; *Re Momentas Corporation et al* (2005) 28 O.S.C.B. 6493, at para. 43; *Biller v. British Columbia (Securities Commission)*, [1988] B.C.J. No. 451 (B.C.C.A.) (QL), at para. 11

28 *Canada Commissioner of Competition v. Labatt Brewing Co.*, [2008] F.C.J. No. 127 (F.C.T.D.)

29 *R. v. Rogers*, [2000] O.J. No. 3010 (Ont. S.C.J.)

30 *R. v. Branton*, [2001] O.J. No. 1445 (Ont. C.A.)

31 [1996] O.J. No. 4399 (Gen. Div.), at paras. 26-27

> (*Watson v. Slavik*, [1996 B.C.J. No. 1885, August 32rd [sic], 1996, paragraph 10]

> Accordingly, the law imposes a duty on the party seeking *ex parte* relief both to present its own case fairly, and to inform the Court of any material points of facts or law known to is [sic] which favour the other side. The test of materiality is an objective one. All matters relevant to the exercise of weighing the evidence and determining whether or not to grant the relief requested must be disclosed. The obligation to make full and frank disclosure of all relevant facts has been held to apply to regulators and other government officials and police officers.

The same obligation should apply to Commission Staff when seeking an *ex parte* order under Section 11, 126 or 127. In the absence of such an obligation upon Staff to make full and frank disclosure to the Commission, and to provide the respondent with the information Staff provided to the Commission when obtaining the order, the Commission is vulnerable to being used as a "rubber stamp" by Staff. This is particularly so in relation to section 11 investigation orders.

Section 11 orders impose significant restrictions on the Commission's ability to use compelled evidence, including a prohibition on sharing such information with the police, and on using compelled testimony in prosecutions under the *Securities Act*. In addition, testimony obtained pursuant to Section 11 cannot be provided to other regulators, such as the U.S. Securities and Exchange Commission, automatically. Rather, the witness must be provided with notice of an intention to disclose in advance, and an opportunity to object. Accordingly, whenever a request for Section 11 order is made to the Commission, it should be incumbent on the Commission to consider, in the context of deciding whether it is "expedient" for the due administration of securities law, whether an investigation order is truly necessary, or whether Staff already have or likely can obtain, sufficient evidence without the order.

In the context of an application for a Section 11 investigation order, or an amendment to an existing section 11 order, Staff's disclosure duty to the Commission should encompass

identification of what other investigatory steps have been taken by Staff to date; an accurate summary of what information those other inquiries have yielded, including evidence of an exculpatory nature; whether potential targets and witnesses have indicated a willingness to provide information to Staff on a voluntary basis, without the need for Staff to resort to section 11; and the status of any proceedings that have been initiated. In urgent situations, the standard of required disclosure may be lessened to fit the circumstances prevailing.

This information is necessary in order for the Commission to be fully and fairly apprised of all circumstances relevant to whether the making of a section 11 order is “expedient” for the due administration of Ontario securities law or the regulation of the capital markets in Ontario.

A proper record of that information should be maintained so that there is no question about what was or was not disclosed to the Commission. Ideally, a transcript of any oral submissions made by Staff to the Commission and responses to any questions asked of Staff should be prepared. The information that is provided to the Commission to obtain the Section 11 order should be disclosed to a respondent once proceedings are initiated, so as to permit the respondent to seek to exclude evidence obtained pursuant to an investigation order that was granted on the basis of misleading, inaccurate or incomplete information.

A similar obligation to make full and accurate disclosure to the Commission when seeking a cease trade order or freeze direction also should be imposed upon Staff, as well as a corresponding duty to disclose that information to those affected by the order so that they may decide whether to seek to terminate the order on the basis that it was not properly obtained in the first instance.

2. Costs – A Tool for Deterrence

In administrative proceedings, the general power to award costs is found in section 17.1(3) of the SPPA which grants authority to a tribunal to make rules with respect to (1) the ordering of costs, (2) the circumstances in which costs may be ordered, and (3) the amount of costs or the manner in which the amount of costs is to be determined. The Supreme Court of Canada has held that the statutory authority of a tribunal to order a disciplined party to pay costs to the tribunal does not violate section 7 of the *Charter*, nor give rise to a reasonable apprehension of bias.[32] A person, against whom allegations of misconduct are not proven, may be awarded costs, but only if there is express statutory authority to do so.

The statutory authority for the Ontario Securities Commission to make costs awards is found in section 127.1 of the *Act.* That power is broad and permits the Panel to make an order for costs following a hearing "in respect of a person or company whose affairs were the subject of a hearing if the person or company did not comply with Ontario securities law or did not act in the public interest". The Panel may order the respondent to pay costs not only of the hearing, but also the investigation. These costs may include:

(a) costs incurred in respect of services provided by persons appointed or engaged under section 5, 11 or 12 of the *Act;*

(b) costs of matters preliminary to the hearing;

(c) costs for time spent by the Commission or Staff;

(d) any fee paid to a witness;

(e) costs of legal services provided to the Commission.[33]

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[32] *Pearlman v. Manitoba Law Society Judicial Committee,* [1991] S.C.J. No. 66 (S.C.C.)

[33] Section 127.1(4) of the *Securities Act,* R.S.O. 1990 ch. S.5

Significantly, the Commission does not have statutory authority for awarding costs to a respondent against whom allegations of misconduct and breach of securities law have not been proven. This is unlike several other administrative tribunals which make provision for such discretion:

Administrative Body	**Statutory Authority**	**Language of Statutory Authority**	**Rule of Procedure**
Law Society of Upper Canada	Section 49.28 of the *Law Society Act*, R.S.O. 1990, c. L.8	49.28 Subject to the rules of practice and procedure, the costs of and incidental to a proceeding or a step in a proceeding before the Hearing Panel are in the discretion of the Panel, and the Panel may determine by whom and to what extent the costs shall be paid.	Costs against the Society 14.03 In licensing, conduct, capacity, professional competence or non-compliance proceedings, where it appears that the proceedings were unwarranted, the tribunal may order that such costs as it considers just be paid to the person subject to the proceeding by the Society and any other party to the proceeding.
College of Opticians of Ontario	Section 53 of the *Health Professions Procedure Code*, being Schedule 2 of the *Regulated Health Professions Act*, S.O. 1991, c. 18	53. If a panel is of the opinion that the commencement of proceedings was unwarranted, it may make an order requiring the College to pay all or part of the member's legal costs.	Costs against the College 13.02 Where the member seeks costs against the College pursuant to section 53 of the *Code*, the Discipline Committee may direct that the issue be dealt with by a motion conducted separately from the hearing under Rule 5 with any necessary modifications.
College of Physician and Surgeons of Ontario	Section 53 of the *Health Professions Procedure Code*, being Schedule 2 of the *Regulated Health Professions Act*, S.O. 1991, c. 18	53. If a panel is of the opinion that the commencement of proceedings was unwarranted, it may make an order requiring the College to pay all or part of the member's legal costs.	Costs against the College 13.02 Where the member seeks costs against the College pursuant to section 53 of the *Code*, the Discipline Committee may direct that the issue be dealt with by a motion conducted separately from the hearing under Rule 5 with any necessary modifications.
Ontario College of Teachers	Section 30(9) of the *Ontario College of Teachers Act*, S.O. 1996, c. 12	30(9) Where the Discipline Committee is of the opinion that the commencement of the proceeding was unwarranted, the Committee may order that the College reimburse his or her costs or such portion of them as the Discipline Committee fixes.	Costs against the College 13.02 Where the member seeks costs against the College pursuant to section 30(9) of the *Act*, the Discipline Committee may direct that the issue be dealt with by a motion conducted separately from the hearing under Rule 5 with any necessary modifications.

In the courts, one of the most effective deterrents against improper or abusive behaviour or the commencement of frivolous or unwarranted proceedings is the court's power to award costs against any party, to which both sides are entitled in the event of success or improper conduct by the opposing party.

The concept of costs originated in England with a 1605 statute pursuant to which the legislature and the courts attempted to regulate the conduct of legal practitioners. The 1605 statute (entitled 3 James I, c. 7) dealt with out-of-pocket expenses and the rendering of accounts to clients. It had become clear that the regulation of lawyers required more stringent rules to deter improper conduct.[34] More recently, as expressed by Orkin in his work The Law of Costs, "costs are an appropriate deterrent to advancing questionable claims, or for dealing with the unreasonable conduct of a case."[35] This purpose has been echoed by the Ontario Court of Appeal, which has stated:

> Traditionally the purpose of an award of costs within our "loser pay" system was to partially or, in some limited circumstances, wholly indemnify the winning party for the legal costs it incurred. However, costs have more recently come to be recognized as an important tool in the hands of the court to influence the way the parties conduct themselves and to prevent abuse of the court's process. Specifically, the three recognized purposes of costs awards are to encourage settlement, to deter frivolous actions and defences, and to discourage unnecessary steps that unduly prolong litigation.[36]

Recent cases illustrate that the underlying principles expressed by Orkin and the Court of Appeal for awarding costs are equally applicable to proceedings before the Ontario Securities Commission.

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[34] W.S. Holdsworth, *A History of English Law,* vol XII (London: Methuen & Co. Ltd., 1924)

[35] Mark M. Orkin, *The Law of Costs, 2nd Ed.* (Ontario: Canada Law Book, Looseleaf), at s. 2-7

[36] *1465778 Ontario Inc. v 1122077 Ontario Ltd.* (2006), 275 D.L.R. (4th) 321 (Ont. C.A.), at para. 26. See also *LeVan v. LeVan* (2006) 82 O.R. (3d) 1 (S.C.J.), at para. 28, aff'd at 2008 ONCA 388.

For example, in *Re ATI Technologies Inc.,*[37] after 19 costly days of hearing, the Panel dismissed allegations against two respondents alleged to have engaged in insider trading. The Commission Panel was critical of Staff's attempt to prove serious allegations of insider trading relying almost exclusively upon hearsay evidence in the form of e-mails which could not be tested by cross-examination. The Panel also was critical of Staff's attempt to level new allegations "significantly at variance" with those in the Statement of Allegations during closing submissions. However, notwithstanding the Commission's comments about Staff's handling of the case, and its recognition of the "significant adverse repercussions" to the respondents by virtue of the mere fact of the allegations that had been made by Staff, costs could not be awarded to compensate them because the *Act* and the Commission's rules did not permit it.

The Ontario Securities Commission, in adopting the new *Rules of Procedure*, considered public comment urging it to seek authority to award costs against Staff. However, it declined to do so on the basis that section 127.1 of the *Act* only gives the Commission power to award costs to Staff. Notwithstanding this, and presumably in an attempt to recognize Staff's duty to act fairly during investigations and the proceedings, the Ontario Securities Commission included an additional item to the list of factors found for consideration in Rule 18.2 of the new *Rules of Procedure:* the conduct of Staff during the investigation and during the proceeding, and how Staff's conduct contributed to the costs of the investigation and the proceeding.

While this is a positive step towards levelling the playing field between Staff and respondents, only the authority to award costs against Staff will effectively deter Staff from

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[37] (2005), 28 O.S.C.B. 8558

rushing to make ill-founded allegations against respondents based upon evidence of dubious substance, or conducting the investigation and prosecution in an unfair manner.

3. Conclusion

Ensuring that securities enforcement is both fair and perceived to be fair is of great importance. As stated by the Hon. Peter de C. Cory, C.C. and Marilyn L. Pilkington: "[c]oncerns regarding the fairness, wisdom and integrity of [securities] enforcement processes generate apprehension, undermine the confidence of market actors, and may, in turn, undermine compliance with securities laws."[38] The Commission itself has recognized that one of the most important ways that it seeks to "build trust" is "by providing fair, vigorous and timely enforcement".[39] Levelling the playing field with respect to disclosure and costs is one way to achieve that goal.

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[38] The Hon. Peter d C. Cory, C.C. and Marilyn Pilkington, "Critical Issues in Enforcement," *Canada Steps Up – Strengthening Market Credibility and Integrity* (volume 6) (Toronto: Task Force to Modernize Securities Legislation, October 2006) at p. 195

[39] Ontario Securities Commission Annual Report 2006 at pp. 2-3