DISCOVERY-TYPE PROCEDURES IN SECURITY FRAUD PROSECUTIONS

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Securities frauds are frequently of great complexity, presenting considerable difficulties both of investigation and proof. This complexity is largely attributable to two features which distinguish securities from other types of property. First, they represent assets which are ordinarily unavailable for the purchaser s inspection. Secondly, they are traded on an impersonal basis, with the buyer frequently being unable to identify his seller. The same two features and the flexibility they permit have also been largely responsible for the importance of the industry in the national economy. The primary (original issue) market provides financing for government and private industry, while the secondary (trading) market provides liquidity for investors. The complexity of the securities industry combined with its economic importance has resulted in the development of an extensive regulatory pattern applicable not only to the investigation of suspected frauds but also to the day-to-day operations of the industry. The purpose of this article is to describe the manner in which the regulatory structure facilitates procedures which are probably more effective from the Crown's standpoint than pre-trial examinations for discovery would be.

For this purpose the term "securities fraud" is used in a wide sense to denote securities-related offences generally. As securities regulation has expanded in recent years to contribute further to protection of investors,[1] a commensurate expansion has occurred in the number of such offences created by the applicable statutes, both federal and provincial. Both major and minor matters are caught in the net of the provincial legislation. It is an offence to publish a materially misleading statement in a prospectus, and it is also an offence for a corporate insider to fail to make a report concerning minor transactions in his corporation's securities. It is

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[1] For convenience in this article, references are to The Securities Act, 1966 (Ontario), now R.S.O., 1970, c. 426. Each of the provinces west of Ontario has a statute similar to that of Ontario, while the statutes in Quebec and the Maritime Provinces differ in a number of respects.

an offence to trade in securities with the public unless registered, and it is also an offence for a registrant to fail to notify the securities commission within five days after a change of address. The provincial legislation is supplemented by provisions of the Criminal Code[2] which create more serious offences: fraud (section 323); wash trading (section 325); "bucketing" (section 326); and trading in securities held for customers (section 327).[3]

The securities acts are administered by the provincial securities commissions. These commissions share responsibility with the police for the investigation of alleged securities offences and have certain powers designed to assist in the conduct of such investigations, in addition to powers designed to facilitate day-to-day regulatory activities. There is no restriction stating that powers designed for purposes other than investigations may not be used in the conduct of investigations. It is doubtful whether such a provision would be feasible in practice even if desirable in theory. Information obtained by the commissions in the performance of other responsibilities frequently leads to the initiation of an investigation and such information is also frequently used in the course of investigations initiated on the basis of information obtained in other ways. As a result, the commissions are able to conduct extensive inquiries and hearings prior to the initiation of proceedings, and the legislation clearly indicates that these inquiries and hearings may extend to suspected offences against the Criminal Code as well as those against the Securities Acts. For these reasons, police forces have sometimes requested securities commissions to assume primary responsibility for inquiries into specific securities-related offences. The police forces thereby obtain the assistance of investigators with powers greater than would otherwise be available to the forces.

The arsenal of weapons available in the investigation of securities offences is not limited to the powers of the securities commissions. A Royal Commission is sometimes appointed[4] where a major fraud is suspected. The self-regulatory organizations within the

[2] R.S.C., 1970, c. C-34.

[3] A detailed discussion of the offences created by provincial securities legislation and the Criminal Code is not within the scope of this article. For the most complete available analysis, see Williamson, Securities Regulation in Canada (1960), Ch. 6 and Supplement (1966), Ch. VI.

[4] Examples in Ontario include the "Windfall" or "Kelly" Commission (Report of the Royal Commission to Investigate Trading in the Shares of Windfall Oils and Mines Limited, Toronto, September, 1965) and the "Atlantic" or "Hughes" Commission (Report of the Royal Commission on Atlantic Acceptance, Toronto, September, 1969). The investigators for at least one of these Royal Commissions made use of an inquiry order under The Securities Act, 1966 (Ontario) finding that it conferred wider and more flexible authority than The Public Inquiries Act, R.S.O., 1960, c. 323 (replaced by The Public Inquiries Act, 1971, S.O., 1971, c. 49, proclaimed in force effective April 17th, 1972).

securities industry frequently contribute to the inquiry. In Ontario, the Investment Dealers' Association of Canada, The Toronto Stock Exchange, the Canadian Mutual Funds Association and the Broker-Dealers' Association are all subject to the control of the Ontario Securities Commission and all co-operate in investigations. The availability of these sources of information further expands the techniques for "criminal discovery" to which securities commissions may resort. The scope of such techniques can be best explained in the context of a brief review of the powers of securities commissions.

I. *General Regulatory Powers of Securities Commissions.*

The powers and responsibilities of securities commissions may be broadly divided between those concerning the supervision of persons trading in securities and those which establish disclosure requirements designed to ensure that disclosure of relevant facts is provided and properly disseminated. As might be expected in an area of the law which has grown in large part by adaptation to specific problems as they arise, such a neat division does not adequately reflect some of the important powers of the commissions. For example, the prospectus filing requirements enacted primarily for purposes of disclosure also provide the commissions with a considerable degree of substantive authority over public companies which issue securities for public sale.

A. *Registration Requirements.*

In order to provide the commissions with authority to control admission to the securities industry and to supervise persons trading with the public in securities, the legislation provides that all such persons must register with their provincial securities commission and obtain annual re-registration. This requirement extends in most provinces to persons who underwrite securities for public sale, even if they do not deal with the public. The commissions' authority to grant or withhold registration is very wide; while each case must be considered on its merits,[5] the courts do not interfere unless it appears that there is a clear error in law, a failure of the commission to form its opinion in a judicial manner or the opinion of the commission is so clearly wrong as to amount to an injustice.[6] Specifically, registration may be suspended without any showing of a breach of securities legislation or any proof of actual injury

[5] *Re Larrimore Securities Ltd.* (1956), 4 D.L.R. (2d) 727 (Ont. C.A.).

[6] *Re The Securities Commission and Mitchell,* [1957] O.W.N. 595 (Ont. C.A.) per Laidlaw J.A., at p. 599. See also *Re Chromex Nickel Mines Ltd.* (1971), 16 D.L.R. (3d) 273 (B.C.C.A.), per Bull J.A., at p. 287.

to the public.[7] These wide powers even extend to those who are able to fit within the statutory exemptions from the registration requirements, since the commissions may deny such an exemption "where in its opinion such action is in the public interest".[8]

The registration requirements in combination provide the basis for the extensive authority exercised by the commissions over the securities industry. The power to deny the benefit of exemptions brings within the potential scope of their net almost any person who participates at all in securities transactions.[9] These powers, coupled with direct authority over the stock exchanges and a separate power to order the suspension of trading in "such securities for such period as is specified in the order"[10] together enable the commissions to supervise the primary and secondary trading markets as well as individual securities firms. The fact that all of these powers may be exercised in the discretion of the commissions on any reasonable basis and without proof of an offence lends support to the right of the commissions to conduct far-ranging inquiries and investigations, not limited to any specific allegations of wrongdoing.

B. *Disclosure Requirements.*

In the second broad division of the responsibilities and powers of securities commissions, the legislation includes a wide variety of disclosure requirements. The most important are prospectus requirements under which a prospectus must be filed with and accepted by the appropriate commission or commissions prior to the public distribution of securities not previously distributed to the public. While there are some statutory exemptions from these requirements, these exemptions are in some cases dependent upon the making of an order by the appropriate commission for an exemptive order. As with the registration requirements, the commissions may deny the benefit of the prospectus exemptions.

Other disclosure requirements included in securities legislation establish proxy, take-over bid, insider trading and continuing financial disclosure obligations. Unlike prospectuses, documents prepared in satisfaction of these obligations need not be submitted

[7] *Re The Securities Commission and Mitchell, ibid.*

[8] The Securities Act, *supra*, footnote 1, s. 19(5).

[9] See, for example, *In the Matter of Anlagebank Zurich* (O.S.C. Bulletin, April, 1969, at p. 45) where the Ontario Securities Commission denied to some Swiss institutions the benefit of certain exemptions from the registration requirements, thereby making it impossible for them legally to trade in securities in Ontario. For one limitation on the exercise of the power to deny the availability of exemptions, see *Re Clark and Ontario Securities Commission*, [1966] 2 O.R. 277. In that case an order was overruled which purported to deny certain exemptions to any company of which a named individual was an officer or director.

[10] The Securities Act, *supra*, footnote 1, s. 141b.

for advance review to the securities commissions. However, the commissions have responsibility to enforce the provisions and copies of all documents prepared in compliance with them must be filed with the commissions. The insider trading reports are abstracted and published in a monthly bulletin.

The above discussion supports the prior reference[11] to the wide authority of the provincial securities commissions, particularly over securities firms. So wide is this authority and so important is it to a firm to retain the goodwill of the commission that requests made by commission staff members are often complied with even if not directly supported by the statutory powers of the commission. This often continues to be true even when a firm is, to its knowledge, suspected of an offence.

C. *Regulatory Sanctions.*

It is also noteworthy that the powers of the commissions are sufficiently wide to enable them to discipline many offenders without initiating criminal proceedings. Suspension of registration is a serious penalty for a securities firm, often as much for the notoriety as for the loss of revenue involved. The wide range of grounds upon which a denial or suspension of registration may be based, combined with judicial reluctance to review the merits of such a denial or suspension mean that the effective constraints on the exercise by the commissions of this power are very limited. These considerations, combined with the fact that the commissions are not bound by legal or technical rules of evidence, result in considerable temptation to rely on suspension of registration in cases where there is doubt whether a suspected fraud can be successfully proven in court.

In brief, the securities legislation not only permits but requires securities commissions to invigilate over the securities industry, imposing a code of conduct beyond that imposed by specific provisions which create offences. Both in the administration of disclosure requirements and in the course of investigations into specific complaints, the commissions collect a wide range of information, without the constraint which would be imposed by a requirement that such information be relevant to suspected offences. The commissions may draw on all of this information in the preparation of a case for criminal prosecution.

II. *Investigatory Powers of Securities Commissions.*

A. *Power to Appoint an Investigator.*

When the commissions are engaged in the investigation of a

[11] *Supra,* text at footnote 9.

suspected offence, their authority is expanded even beyond the wide power available in their day-to-day regulatory responsibilities. Under section 21(1) of The Securities Act, 1966 (Ontario), to which there are equivalent provisions in the statutes of most other provinces, the Ontario Securities Commission may appoint any person to make such investigation as it deems expedient for the due administration of the Act. Such an appointment may be made in any case where, upon a statement under oath,[12] it appears probable that an offence has been or is about to be committed against the Act or regulations or against the Criminal Code in connection with a trade in securities. Section 21(2) confers an even wider appointive power on the Ontario Securities Commission, permitting investigations not only for the administration of the Act but also "into any matter relating to trading in securities". This power under section 21(2) may be exercised by the commission on its own authority without a statement under oath.

The anomalous result under sub-sections (1) and (2) of section 21, that the narrower power may be exercised only on the basis of a statement under oath while no such condition limits the exercise of the wider power, may be explained but not justified on historical grounds. Until 1968, the consent of the Attorney General was required for the exercise of the section 21(2) power. In that year, this requirement was deleted so that the Ontario Securities Commission could exercise the power on its own authority. An additional provision was added to the Act permitting the Minister (now the Minister of Consumer and Commercial Relations) to appoint an investigator for either of the purposes contemplated by section 21(2).[13]

B. *Powers of Investigator.*

Complementary provisions accord wide powers to an investigator, whether appointed under sub-section (1) or (2) of section 21. He may compel witnesses, including persons being investigated, to attend and give evidence. He may investigate, inquire into and examine virtually any aspect of the affairs of the person or company being investigated and properties held or formerly held by such person or company or by others acting on behalf of or as agent for such person or company. He may also inquire into the relationships, particularly as to financial affairs, between such person or company and others. To assist in the conduct of the investigation the investigator has power equivalent to that vested in the Supreme Court for the conduct of civil actions, with failure to attend, pro-

[12] The section makes no provision as to by whom the statement must be made but as a matter of practice, it is often made by a member of the commission's staff.

[13] S.O., 1968, c. 123, s. 9.

duce documents or answer questions being punishable as contempt of court. He may seize any documents, records, securities or other property of the person or company whose affairs are under investigation.

The authority of the securities commission in connection with an investigation is further buttressed by a provision which appears in section 26 of the Ontario Act, with equivalent provisions in other provincial statutes. This section enables the commission to "freeze" the assets of any person or company being or about to be investigated under section 21, or of any registrant whose registration has been or is about to be cancelled or suspended, or of any person or company against whom criminal proceedings for a securities-related offence have been or are about to be initiated. The commission may direct all persons or companies, including bank branches, named in its order which have on deposit or under control or for safekeeping any assets of the person or company concerned to hold such assets until further direction from the commission. A similar order may be issued to registrars of deeds and equivalent officers with respect to real property owned by the person or company concerned. With the exception of certain provisions recently added to other Ontario statutes,[14] I am aware of no provisions in other Canadian legislation which are as wide as these "freezing" provisions.

C. *Secrecy Requirement.*

Orders under the various sections discussed above are frequently, perhaps usually, made without attendant publicity. The resultant secrecy is supported by a provision which prohibits disclosure of any information or evidence obtained or the name of any witness examined unless the consent of the commission is first obtained, and the commission's usual policy is to refuse such consent to the accused.[15] The section contains an exception, added

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[14] The Mortgage Brokers Registration Act, R.S.O., 1970, c. 278; The Collection Agencies Act, R.S.O., 1970, c. 71; The Real Estate and Business Brokers Act, R.S.O., 1970, c. 401; and The Used Car Dealers Act, R.S.O., 1970, c. 401, were amended by, *inter alia*, the addition of provisions similar to those described in the text, by The Civil Rights Statute Law Amendment Act, 1971, S.O., 1971, c. 50, proclaimed in force effective April 17th, 1972.

[15] In the trial which resulted in the judgment reported as *Re Williams and Williams and Mid-Erie Acceptance Corp. Ltd., et al.*, [1961] O.R. 657, counsel for the accused requested such consent as to the transcripts of testimony given before securities commission investigators by persons who also testified at the trial. Crown counsel stated in connection with this application: "I do not have written instructions from the Commission in this regard. I am acting on behalf of the Crown in this matter. The Securities Commission is an independent body which can make its own decision. My own understanding though is that the Commission will not make available copies of the evidence of other witnesses who have been called, other than in relation to his client, as is, I understand, their policy."

in 1966, which permits persons to disclose information to their own counsel. In one case,[16] the Ontario Court of Appeal referred to this provision in concluding that the trial judge had properly exercised his discretion in refusing to order the production, at the request of the accused, of statements previously made before the Ontario Securities Commission in an investigation of the same incident under section 21. The decision of the court implies that the result would have been different had the statements been taken in the course of proceedings conducted by the Crown. While this decision leaves it unclear whether the trial judge must reject such a request or has discretion to accept or reject the request, the result has far-reaching implications. Particularly in view of the fact that transcripts of relevant hearings before the Ontario Securities Commission are regularly made available to Crown counsel in prosecutions for securities frauds, the decision is more likely to lead to the exclusion of exculpatory than of inculpatory evidence.

D. *Judicial Review of Investigation Orders.*

The courts, traditionally restrictive in their approach to administrative tribunals, have been kind in their interpretation of the sections discussed above in spite of the fact that orders made under the investigatory sections have frequently been very wide in their description of the matters to be investigated. Attacks on such orders have been founded on two main contentions: that the relevant statutory provisions are *ultra vires* the provinces at least in their application to certain situations, and that the making of an order under the sections is a quasi-judicial act so that the exercise of discretion involved is reviewable on appeal to the courts.

In a 1951 Ontario case[17] the order under attack was issued by the Attorney General and was couched in wide terms, directing an investigation into "any matter relating to trading in securities by or on behalf of" a named person or company. The order was made prior to the statutory change discussed above[18] which permits the Ontario Securities Commission to make an order for an investigation under section 21(2) instead of restricting that power to the appropriate Minister. In concluding that the issuance of the order was not a quasi-judicial but an administrative act, Spence J. relied at least to some extent on the fact that the order could be made only by the Minister. Noting the wide scope of the investigator's appointment, he said:[19]

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[16] *R.* v. *Smith*, [1963] 1 O.R. 249, at p. 270; leave to appeal to the Supreme Court of Canada was refused, *ibid.*, at p. 249.

[17] *Torny Financial Corporation Ltd.* v. *Marcus et al.*, [1951] 4 D.L.R. 762 (Ont. H. C.)

[18] *Supra*, footnote 13.

[19] *Supra*, footnote 17, at p. 767.

> Counsel for the defendant submits that it is quite possible that the Attorney-General [the Minister then responsible for the administration of The Securities Act] could not grant a more specific appointment and that in fact, he does not know what "matter" he is interested in until he receives the report of the investigating officer. This certainly bears out the plaintiff's allegation of an "endless fishing expedition", but as I have suggested it is the fault of the statute and not of the appointment. There is much merit in the observation of counsel for the defendants that the person granted such fiduciary power is a senior Cabinet Minister in charge of the administration of justice and responsible to the Legislature for the discharge of his ministerial duties. It might well be of the essence of effective administration of regulations governing the trading in securities in the modern and very complicated financial structure that there should be left to one responsible person the broadest discretion in determining what matters shall be investigated and considered, even if the exercise of this discretion might result in very confusing, embarrassing and harassing interference with the affairs of those engaged in such trade.

In view of this language, it is of interest to speculate what the decision of Spence J. would have been had the provisions before him been those in the Act as currently constituted.

The British Columbia Court of Appeal[20] construed the extent of the investigatory power more narrowly, disagreeing with Spence J. as to the permissible scope of the investigation. The court was not prepared to accept that the legislature could be assumed to have contemplated an unrestricted power of investigation under the British Columbia provisions equivalent to section 21(2) of the Ontario Act, merely because power to make an order under that section was restricted to a Cabinet Minister. Indeed, the absence of a safeguard in the form of the sworn statement required as a condition to the authority of the Commission to make an order under section 21(1) led one judge on the three-man court to assume that some restriction on the Minister's power must have been intended: "The absence of any safeguard points to a restricted power."[21] Another judge was "greatly influenced in arriving at this conclusion by the very drastic nature of some of the powers vested in the appointee—powers the exercise of which is not traditionally available to investigators of crimes".[22] While the decisions do not state with precision what restrictions the court would impose on section 21(2) orders, a wide-ranging inquiry to determine whether an offence has occurred under the Criminal Code would clearly not be permitted under the reasoning expressed.

The constitutionality of the provisions was tested in the British Columbia case discussed above and in a decision of the Ontario

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[20] *In re International Claim Brokers Ltd.* v. *Kinsey* (1966), 57 D.L.R. (2d) 357.

[21] *Ibid.*, at p. 359.

[22] *Ibid.*, at p. 365.

Court of Appeal.[23] In both instances the provisions were held to be valid enactments of provincial legislatures; the Ontario decision specifically stated as a corollary that the Canadian Bill of Rights is of no application.

While the decision of the British Columbia court may limit to some extent the scope of investigation orders, as a practical matter this is not a serious impediment since supplementary orders can readily be issued. The availability of these wide powers, which may be exercised in almost complete secrecy because of the prohibition against publicity other than to one's own counsel,[24] provides provincial securities commissions with potent weapons in their quest for the perpetrators of securities frauds. When coupled with the powers and sanctions available to the commissions in the exercise of their normal regulatory responsibilities, the resultant array of authority is awesome and far exceeds the power available to other law enforcement agencies. In the next section certain constraints on the exercise of this authority are considered.

III. *Constraints on Exercise of Commissions' Authority.*

A. *Application of the Rules of Natural Justice.*

Prior to 1966 the securities Acts contained no rules of procedure to be followed in hearings or investigations. This omission was reflected in practice, with the procedures followed ranging the gamut from full hearings to cases where registrants were suspended without previous notice (something still permissible, but only where the commission first concludes that the delay necessary for a hearing would be prejudicial to the public interest and then only for a fifteen-day period). Only in 1966 was a case decided which established that the principles of natural justice were applicable to disciplinary proceedings before the Ontario Securities Commission.[25] In that case the director of the Commission had denied to an individual the availability of certain exemptions under the Act, without first giving him an opportunity to be heard and acting in reliance on a report which was mistaken on at least one fact.

[23] *Re Williams and Williams and Mid-Erie Acceptance Corp. Ltd. et al., supra,* footnote 15.

[24] The extent of the desire for secrecy on the part of the Ontario Securities Commission in the conduct of its investigations is well illustrated by *Hawkins* v. *The Ontario Securities Commission,* decided by Moorhouse J. of the Ontario High Court on June 22nd, 1971 and not reported at the time of writing. In that case an investigation order had been issued as to trading by Mr. Hawkins. His solicitor was summoned for examination. Mr. Hawkins retained separate counsel to represent him at the examination but the commission refused to permit the counsel to attend. The court declared that counsel for Mr. Hawkins was entitled to be present on the examination.

[25] *Re Clark and Ontario Securities Commission, supra,* footnote 9.

The Commission, in a full hearing, affirmed the director's decision. On appeal to the court, it was held that the principles of natural justice applied and that the director's decision had contravened these principles, but that the full hearing before the Commission had cured the defect. In a remarkably similar set of facts, the British Columbia Court of Appeal recently arrived at a similar result.[26]

The principles of natural justice, while a significant constraint, are not alone sufficient to ensure respect for the rights of persons affected by proceedings of the securities commissions. Apart from their imprecision, a topic not within the scope of this article, reliance on them in this context involves two principal difficulties. First, while the decisions referred to above are based on the conclusion that in making the order appealed against the commissions concerned were acting quasi-judicially, it is not clear whether the securities commissions always act quasi-judicially in their decisions. Indeed, a recent Ontario case[27] clearly indicates that they do not always so act. It was there held that the denial of an application for prospectus filing was an administrative rather than a quasi-judicial act. This somewhat surprising[28] conclusion would indicate that the rules of natural justice do not apply to the rejection of a prospectus filing application, although this corollary is not specifically stated in the decision.

The second difficulty with reliance on the rules of natural justice as a constraint to ensure respect for the rights of persons affected by the work of securities commissions is that, even on the assumption that these rules apply to every formal decision or order made by a securities commission, their application to an investigation under sub-section (1) or (2) of section 21 is far from clear. The investigator has no power to make an order or to exercise authority other than that necessary to compile information. On balance, it seems unlikely that the rules of natural justice are applicable to such investigations.[29] Certainly they are not considered to be applicable by securities commissions: a high degree of secrecy is customarily maintained in the conduct of investigations, even those which may have a direct impact on a particular person

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[26] *Re Chromex Nickel Mines Ltd., supra,* footnote 6.

[27] *Voyager Explorations Ltd.* v. *Ontario Securities Commission et al.,* [1970] 1 O.R. 237 (H.C.).

[28] The *Voyager* decision seems inconsistent with assumptions as to the position of the Securities Commission made in other decisions cited in this article. In *Re Electrical and Industrial Development Trust,* [1956] 1 All E.R. 162 (Ch. D.), the court assumed that the English Board of Trade was acting in a quasi-judicial capacity in the performance of similar responsibilities.

[29] For a discussion of the application of rules of natural justice to investigators who have no power to make a binding decision, see S. A. De Smith, Judicial Review of Administrative Action (2nd ed., 1968), pp. 217-221.

or persons.[30] The suspected person is permitted to have counsel in attendance when being interviewed by the investigator, but is not advised of interviews of other persons and may not be represented at such interviews.

B. *Procedural Requirements in Securities Legislation.*

The first of the two difficulties with reliance on the rules of natural justice as a constraint on hearings and investigations was partially resolved in 1966 by the inclusion in The Securities Act, 1966 (Ontario) of a provision setting out procedural rules to be followed in any hearing "required or permitted under this Act to be held before the Commission or the director". These rules include the right to notice, the right to representation by counsel and the right of adversely affected parties to require that reasons for judgment be given. Relevant evidence may be received although it does not comply with the "legal or tehnical rules of evidence". While this provision is of considerable importance in formal hearings under the securities legislation where a regulatory sanction may be imposed, it does not appear to extend to investigations and therefore does not resolve the second problem discussed above. The latter problem is, of course, the one of more direct relevance to the topic of this article. It would appear that neither the rules of natural justice nor the procedural requirements of securities legislation are applicable to investigations under that legislation.

C. *Other Constraints.*

Other constraints apply to the exercise by a securities commission of its authority. The most notable is the right of appeal to the commission from decisions made by the director and to the courts from decisions made by the commission. This right is not ordinarily relevant to an investigation, for investigations result only in reports rather than in appealable orders. It is probable that the court would confine investigators to questions that are relevant to the scope of the investigation order, but this is not a significant constraint both because the orders are usually very wide in their scope and because an additional order can be quickly issued if necessary to cure a deficiency in the scope of the investigator's authority. No doctrine has evolved which limits the right of the commissions to investigate a matter as to which other proceedings are concurrently in progress: for example, private hearings under a section 21 order were held concurrently with the public

[30] For an instance in which the impact was very direct since the suspected person was convicted of commiting perjury in answers given during the course of an examination by an investigator, see *Farris* v. *The Queen*, [1965] 2 O.R. 396 (C.A.). As to the high degree of secrecy observed, see *supra*, footnote 24.

hearings of The Royal Commission on Windfall Oils & Mines Limited conducted pursuant to The Public Inquiries Act.[31] It would therefore appear that there are no substantial constraints on investigations under securities legislation.

IV. *Use of Investigation Results in Subsequent Proceedings.*

It is apparent from the above discussions that the securities commissions are able through the combined exercise of their various powers, both regulatory and investigative, to compile a very complete file on a suspected securities fraud prior to the initiation of formal proceedings. It is therefore of importance to determine the use which may be made of this file in subsequent formal proceedings, whether before the director or the commission with a view to suspension of registration or some other regulatory penalty, or before the courts as part of criminal proceedings. It is necessary for this purpose to distinguish between information obtained in the exercise of the regulatory authority and that obtained by an investigator through the exercise of his special powers. This distinction is of importance since information of the former type is ordinarily obtained without the examination of a "witness" as that word is used in section 5 of the Canada Evidence Act[32] and section 9 of the Ontario Evidence Act.[33] The opportunity to make the objection contemplated by these sections therefore never arises with respect to such information and, where relevant, it is freely admissible in subsequent proceedings subject to the ordinary rules of evidence in the case of judicial proceedings.

A. *Evidence Act Protection.*

The availability to witnesses of the right to object under the Evidence Acts and thereby to render answers given in the course of examination inadmissible in subsequent proceedings against them is significant, but sometimes proves illusory. Often a witness is reluctant to attract attention by making the necessary objection to obtain the protection of the Evidence Acts.[34] Even where the objection is made and the protection accorded, the result is only that the answers may not be used against that witness in subsequent criminal proceedings (by virtue of the Canada Evidence Act) or civil proceedings under an Ontario statute (by virtue of the Ontario Evidence Act). The information obtained may be used by the

[31] *Supra,* footnote 4.
[32] R.S.C., 1970, c. E-10.
[33] R.S.O., 1970, c. 151.
[34] The force of this concern is tacitly acknowledged by The Public Inquiries Act, 1971, *supra,* footnote 4. Section 9 provides in effect, that the protection of the Ontario Evidence Act is available to all witnesses under The Public Inquiries Act without necessity for a preliminary objection.

investigator and the police in the course of their work and may also be used in evidence against associates of the witness who gave the evidence.

B. *Production of Information to Accused.*

Another distinction between information generated through the exercise of routine regulatory functions and that generated by investigations is that the former is not subject to the statutory prohibition discussed above[35] against disclosure without consent of the commission. This means that the accused may be able to require the production of such information although unable, as noted above, to require production of information obtained in the course of a formal investigation. This is not, however, a significant advantage and the accused person in an alleged securities fraud sometimes has difficulty in knowing the nature of the case he must meet because he lacks access to information available to the Crown.

V. *The Statutory Powers Procedures Act, 1971.*

On July 13th, 1971 the Ontario Legislature enacted a new statute with the short title "The Statutory Powers Procedures Act, 1971".[36] This statute applies a relatively complete code of procedure for hearings subject to it. However, as the long title[37] of the statute indicates, it does not apply to investigations which will not result in binding decisions. This is confirmed by a specific provision that the code of procedure will not apply to the proceedings of persons required to investigate and report if "the report is for the information and advice of the person to whom it is made and does not in any way legally bind or limit that person in any decision he may have power to make".[38]

Summary and Conclusion

In keeping with the complicated and important nature of the securities industry, securities frauds are frequently complex and extensive. They therefore require unusual investigatory techniques. In view of this, provincial securities commissions are entrusted with extensive special investigatory powers to supplement their already wide powers for the regulation of the securities industry.

[35] *Supra,* footnote 15 and accompanying text.

[36] S.O., 1971, c. 47, proclaimed in force effective April 17th, 1972. By Order-in-Council 703/72 pursuant to s. 36 of this Act, proceedings under the Securities Act are exempt from its requirements for a period of one year from April 17th, 1972.

[37] An Act to provide Procedures governing the Exercise of Statutory Power granted to Tribunals by the Legislature wherein the Rights, Duties or Privileges of Persons are to be decided at or following a Hearing.

[38] *Ibid.,* clause 3(2)(g).

The latter powers include authority to apply significant sanctions for misconduct not amounting to judicially provable fraud. Under the investigatory powers either the commission or the appropriate Minister may appoint an investigator with wide powers to summon witnesses (who may include the person under investigation) and to require the production of documents. The work of the investigator may be conducted in secrecy, shielded by a statutory prohibition against divulging information concerning the investigation, except to one's own counsel, without consent of the commission. These provisions are supplemented by one which enables the commission to order the "freezing" of bank accounts and other assets held for the suspected person.

The constitutional validity of the investigation sections has been upheld, with suggestions that there must be reasonable limits on the scope of the matter assigned for investigation. It has also been held that the appointment of an investigator is an administrative act, not subject to judicial review. This holding indicates that the rules of natural justice are inapplicable to investigations conducted by the commissions, although they are applicable to at least some formal hearings. Provisions in the Securities Acts specifying rules of procedure do not apply to investigations and the procedural provisions contained in Ontario's recently-enacted new statute. The Statutory Powers Procedures Act, 1971, are similarly restricted in their effect so that they would not apply to investigations.

It would appear that information collected through the exercise of the general regulatory responsibilities of the commissions is admissible and may be compellable as evidence in subsequent proceedings, subject in the case of judicial proceedings to compliance with the rules of evidence; in proceedings before the commissions, the rules of evidence other than that as to relevance are inapplicable. Information collected in investigations is inadmissible in a proceeding against the witness who provided the information, if he made timely objection under and obtained the protection of, the federal and provincial Evidence Acts. Subject to this restriction (and to any limits imposed by the laws of evidence) the information may be freely used by the Crown although it is unavailable to the accused without consent of the commission—which consent is frequently or usually withheld.

It is clear that securities frauds frequently present unusual difficulties and that correspondingly unusual investigatory techniques are therefore required to deal with them. However, it is fair to question whether the panoply of authority which the securities commission may bring to bear in investigations is fully consistent with the fair treatment of suspected or accused persons. This question becomes of increasing relevance and significance as the scope

of securities legislation, and therefore of securities offences, expands. Existing requirements ensure adherence to relatively high standards of fairness in the prosecution of accused persons. It should be feasible to design provisions which will prevent unfair treatment of persons under investigation but not yet accused, while not placing an undue constraint on the flexibility available to securities commissions.