The Osgoode Short Course in
Prosecuting and Defending Professional Discipline Cases

Documentary Requests and Production

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This paper surveys the current state of the law on the powers of professional regulators to demand production from their members and third parties. In particular, it considers the following issues: (1) the need for statutory authorization of a production power and the proper interpretative approach to a production power provision or provisions; (2) judicial review of production orders and the limits of production orders; (3) the extent to which s 8 of the *Charter* applies; and (4) how production demands might affect the disclosure obligations of the regulator later on in the process.

I. Express Statutory Authorization & Interpretive Approach

Powers of inspection and production require express statutory authorization

The common law does not empower professional regulators to enter onto premises to inspect places and things or to demand from members or other persons that they produce documents. These powers are entirely the creature of statute. It is axiomatic in public law that any purported exercise of power by a public authority must be rooted in a statutory or prerogative power. The latter does not apply in the case of self-regulatory agencies. Therefore, any power to inspect or order production must be expressly granted by statute.[2]

Branch v Ontario (Minister of Environment)[3] is instructive in this regard. The Ontario Divisional Court was asked to consider whether s 163.1(2) of the *Environmental Protection Act*[4] ("*EPA*") granted the authority to a justice of the peace, on application by an investigator of the Ministry of the Environment, to make an order to require a person to submit to an interview and to produce documents. If so, then Mr. Branch, who was the target of the order, also challenged the constitutionality of the provision under ss 7 and 8 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). The constitutional issues were not resolved, as the Court held that s 163.1(3) did not create a power for a compelled interview or production order.

Section 163.1(2) of the *EPA* states:

> (2) On application without notice, a justice may issue an order in writing authorizing a provincial officer, subject to this section, to use any device, investigative technique or procedure or to do any thing described in the order if the justice is satisfied by evidence under oath that there are reasonable grounds to believe that an offence against this Act has been or will be committed and that

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2 *Branch v Ontario (Minister of Environment)* (2009), 93 OR (3d) 665 (Div Ct); applied in *R v Maple Leaf Foods*, 2009 ONCJ 594.

3 *Ibid*.

4 RSO 1990, c E.19.

> information concerning the offence will be obtained through the use of the device, technique or procedure or the doing of the thing.[5]

Swinton J, for the Court, concluded that s 163.1(2) of the *EPA* did not support the power to order that a person submit to compelled interviews or the production of documents. She held that such powers require *explicit* statutory language.[6] In our view, the Court's conclusion is equally applicable to the power of inspection.

Not only is the Court's conclusion in *Branch* important, but so too is the manner in which it arrived at its conclusion. In interpreting the provision, the Court applied the "modern" approach to statutory interpretation, that is, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[7]

The Court considered the grammatical and ordinary sense of the provision and concluded that it could not support the interpretation advanced by the government. The Court then compared the language of the impugned provision to a large number of Ontario statutes that compel answers to questioning by governmental authorities. The Court observed that there were generally two ways of conferring the same broad powers in Ontario statutes. The first technique is to give the investigator the powers of a commission of inquiry under the s 33 of the *Public Inquiries Act, 2009*.[8] This technique is employed by s 76(1) of the *Health Professions Procedural Code*[9] (the "*Code*"), which provides:

> 76.(1) An investigator may inquire into and examine the practice of the member to be investigated and section 33 of the *Public Inquiries Act, 2009* applies to that inquiry and examination. 2009, c. 33, Sched. 6, s. 84.

In doing so, the Legislature grants investigators the power to compel a person by summons to give sworn evidence or to produce documents and things,[10] and to refer non-compliant witnesses to the Divisional Court for contempt proceedings.[11] Although s 76(1) was recently amended to reflect the repeal of the former *Public Inquiries Act* and enactment of the *Public Inquiries Act, 2009*, the differences between the former and new versions are minimal. As such, cases that considered the former version are likely still applicable.

Section 33 of the *Public Inquiries Act, 2009* provides for a broad range of investigatory powers and extends certain protections to witnesses. However those protections are limited on

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5 A "device" is "a substance or tracking device that, when placed or installed in or on any place, land or thing, may be used to help ascertain, by electronic or other means, the origin, identity or location of anything." (s 163.1(1) of the *EPA*)

6 *Branch v Ontario* at para 18.

7 *Bell ExpressVu Limited Partnership v Rex*, [2002] 2 SCR 559. This is consistent with the approach taken generally by the courts to interpreting professional discipline statutes: see e.g. *Sazant v College of Physicians and Surgeons of Ontario*, 2012 ONCA 727 at paras 93-94, aff'g 2011 ONSC 323 (Div Ct).

8 SO 2009, c 33, Sched 6.

9 Being Schedule 2 of the *Regulated Health Professions Act, 1991*, SO 1991, c 18 ("*RHPA*").

10 *Public Inquiries Act, 2009*, s 7(1).

11 *Public Inquiries Act, 2009*, s 7(2).

their face to answers to questions and do not extend to the production of documents, except where a document would be inadmissible in court due to privilege.[12]

As well, simply because an investigator has the powers of a commission of inquiry does not mean that it is limited to those powers. The regulatory purpose of the relevant legislation and other provisions may indicate that the legislator implicitly intended the investigator to possess other powers.[13]

The second technique employed by the Legislature is to grant the investigator the powers of a civil court. For example, this is employed in s 13(1) of the Ontario *Securities Act*,[14] which provides:

> 13. (1) A person making an investigation or examination under section 11 or 12 has the same power to summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise, and to summon and compel any person or company to produce documents and other things, as is vested in the Superior Court of Justice for the trial of civil actions, and the refusal of a person to attend or to answer questions or of a person or company to produce such documents or other things as are in his, her or its custody or possession makes the person or company liable to be committed for contempt by the Superior Court of Justice as if in breach of an order of that Court.

However, the *Securities Act* specifically provides in s 13(2) that "[a] person or company giving evidence under subsection (1) may be represented by counsel and may claim any privilege to which the person or company is entitled." This would include solicitor-client privilege, litigation privilege, and the protections of s 9(2) of the Ontario *Evidence Act*[15] and s 5(2) of the *Canada Evidence Act*.[16]

Neither of these two drafting techniques was used in s 163.1(2) of the *EPA*. Hansard confirmed that the purpose of the impugned provision was to expand the investigative tools available, rather than to create a power to compel interviews and make production orders.

Finally, the Court rejected the invitation of the government to construe the provision broadly because of the importance of environmental enforcement. The *EPA*'s regulatory nature and important public purpose were not determinative. Rather, the Court relied on the canon of construction that requires *express* statutory language before a Court interprets a statute in a manner that trenches on an individual's rights.[17] As Swinton J put it, "[w]hile the *Charter* permits a Legislature to include appropriately tailored statutory compulsion powers in regulatory

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12 *Public Inquiries Act, 2009*, ss 33(6), (7), (13).

13 *Gore v College of Physicians and Surgeons of Ontario*, 2009 ONCA 546, aff'g (2008), 92 OR (3d) 195 (Div Ct).

14 RSO 1990, c S.5.

15 RSO 1990, c E.23.

16 RSC 1985, c C-5.

17 *Morguard Properties Ltd v Winnipeg (City)*, [1983] 2 SCR 493 at 509.

statutes, Courts should be reluctant to read such powers into a statute that does not provide them expressly."[18]

Once granted, a statutory power may receive a broad and purposive interpretation

One should not take from the foregoing that, if there is an express statutory authorization, a court will construe a compulsory power strictly. The better view is that the court will seek to give effect to the provision in accordance with the intention of the legislature. The Ontario Court of Appeal had occasion to consider the inspection power under s 76 of the *Code* in *Gore v College of Physicians and Surgeons.*[19] Specifically, the Court was asked whether the power of an investigator under s 76 included the power to compel observation of surgery conducted by the physician under investigation.

As in *Branch*, the Court in *Gore* applied the "modern" principle of statutory interpretation. The ordinary meaning of the words "inquire into and examine the practice" in s 76 was broad enough to include the power to observe a member in his or her practice.

More importantly, the Court held that self-regulating professional bodies, in order to discharge their duty to protect the public, must have effective means at their disposal to gather all information relevant to their task. Rather than requiring explicit language creating a statutory power of investigation (as in *Branch*), the Court in *Gore* held that explicit language would be required to *deprive* the investigator of those powers necessary to carry out its public mandate of self-regulation.[20] In *Wise v Law Society of Upper Canada*,[21] the Divisional Court relied on the reasoning in *Gore* to find that the *Law Society Act* requires licensees to provide information during interviews conducted by Law Society investigators.[22]

Finally, the Court considered the appellants' argument that reading s 76(1) to include observing surgery would unacceptably infringe patients' privacy. The Court rejected this argument: the regulatory scheme of the *Code* already contemplated significant intrusion into patient privacy in the course of conducting a proper investigation. Investigations could be conducted so as to impact privacy minimally. This passage indicates that the Court saw a self-regulatory scheme as lessening the reasonable expectation of privacy not only of those directly subject to the scheme, but also those who consult them.

II. Challenging Powers of Inspection, Compelled Interviews, and Production Orders

A distinction must be drawn between challenging the exercise of a power to inspect, compel an interview, or make a production order, on the one hand, and challenging the legislation that authorizes the power itself, on the other. The first is potentially open to challenge under administrative law and the *Charter*. The latter is potentially subject to challenge under the *Charter* alone.[23] We will first examine administrative law challenges to the exercise of a power

18. *Branch v Ontario, supra* note 2 at para 28.
19. *Gore, supra* note 13 at paras 18-20.
20. *Ibid* at para 17.
21 2010 ONSC 1937 (Div Ct).
22 *Ibid* at paras 16-22; *Law Society Act*, RSO 1990, c L.8, s 49.3(2)(c). See also *Sazant, supra* note 7 (CA) at paras 83, 94-99.
23. For the purpose of this paper, we do not consider the application of the *Canadian Bill of Rights.*

and secondly examine potential *Charter* challenges against the exercise of the power and the authorizing legislation itself.

A. Venue and jurisdiction

There is a preliminary question of whether, once an investigation has resulted in a Notice of Hearing, the disciplinary body has jurisdiction to entertain challenges to the investigation. If not, then challenges to the investigation must be brought to a court by way of an application for judicial review.

Unfortunately, no clear answer emerges from the case law. In *Krop v College of Physicians and Surgeons of Ontario*,[24] the physician argued before the Discipline Committee that the referral of the matter from the Executive Committee had not been proper. The Divisional Court held that the Discipline Committee lacked jurisdiction to entertain that challenge, holding that the Discipline Committee's jurisdiction flows from the Notice of Hearing and that "[t]he fairness of the investigation and the merits of the referral are matters for judicial review".

On the other hand, in *Sutherland v College of Physicians and Surgeons of Ontario*,[25] the same Court held that challenges to the appointment of an investigator under s 75 of the *Code* should go before the Discipline Committee and that judicial review was premature. The *Sutherland* Court distinguished *Krop* on the basis of its finding that the challenge in *Sutherland* went to the jurisdiction of the Discipline Committee. The two cases are somewhat difficult to reconcile given that the issue in *Krop* (the referral to the Discipline Committee) was a pre-condition to the Discipline Committee's jurisdiction, while the issue in *Sutherland* (appointment of the investigator) does not clearly affect the Discipline Committee's jurisdiction.

In *Sazant*,[26] the Divisional Court set out the holdings from both cases and then said, somewhat cryptically, "whether a Discipline Committee has jurisdiction to address matters relating to the investigatory stage depends on the reason why it is being asked to look at these issues".[27] What the Divisional Court in *Sazant* does make clear is that the Committee has jurisdiction to rule on the admissibility of evidence obtained in breach of *Charter* rights and that it can order a stay on the basis of *Charter* violations during the investigative stage. However, the Court of Appeal's decision in *Sazant* left the Discipline Committee's jurisdiction over disputes at the investigatory stage largely unaddressed. In *Kelly v Ontario and College of Physicians and Surgeons of Ontario*,[28] the Superior Court held that the Discipline Committee's jurisdiction extended to determining questions of *Charter* admissibility.[29] However, the Court refused to dismiss the application on a jurisdictional basis because the applicant sought orders pursuant to s 24(1) of the *Charter* with respect to the destruction of the evidence (a computer hard drive) obtained in breach of his *Charter* rights and a prohibition on the Discipline Committee's use of the evidence. The Court held that the Discipline Committee had no power to order the destruction of evidence held by police and on that basis dismissed the College's objection to the

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24. (2002), 156 OAC 77 (Div Ct).
25. (2007), 162 ACWS (3rd) 685.
26. *Supra* note 7.
27 *Ibid* (Div Ct) at para 190.
28 2014 ONSC 3824 (Sup Ct).
29 *Ibid* at paras 47-8.

Court's jurisdiction and proceeded to decide *both issues*.[30] If the Discipline Committee otherwise had jurisdiction to decide the admissibility issue, one wonders about the correctness of the decision in *Kelly*, which suggests that an applicant need merely add a prayer for relief which the disciplinary body has no power to grant in order to strengthen the case for earlier judicial intervention in the investigative process. However, the Court did confirm the Discipline Committee's jurisdiction to decide admissibility issues under s 24(2) of the *Charter*.

The Court of Appeal's decision in *Volochay v College of Massage Therapists of Ontario*[31] further clarified the question of when a matter is ripe for judicial review in the health professions context. In *Volochay*, the Complaints Committee ordered a full investigation into the respondent massage therapist's practice without disclosing the nature of the allegations or allowing the respondent an opportunity to make written submissions. Although the Court found that this conduct was a clear breach of the procedural safeguards mandated by the *Code*, it nonetheless held that the respondent massage therapist should have challenged the Complaints Committee's order before the Health Professions Appeal Review Board instead of proceeding directly to a judicial review application. The Court further noted that the violation of procedural fairness would have been *less* serious if the order had been for a referral to the Discipline Committee instead of for a full investigation into the respondent's practice.[32] Consequently, it is still unclear whether a Discipline Committee's jurisdiction to hear a matter should first be challenged before the Committee or on judicial review.

Although the application of the *Sutherland* dictum is questionable, it is likely correct in principle. Challenges to a tribunal's jurisdiction should be heard first by the tribunal itself, and a tribunal should have jurisdiction to consider the soundness of other investigative steps when it has consequences for proceedings before the tribunal (e.g. the admissibility of evidence obtained in the investigation). However, there seems no reason why the tribunal should have free-standing jurisdiction to review the investigation; such challenges should proceed straight to a court by way of judicial review.

B. Administrative Law Challenges

1. Challenging the appointment of the investigator

Generally, an investigator must be formally appointed before he or she may exercise powers to inspect, to order production or to compel an interview.[33] For example, for the colleges governed by the *Regulated Health Professions Act*, the Registrar may only initiate a formal appointment where: the Registrar has reasonable and probable grounds to believe that the member has committed an act of professional misconduct or is incompetent, and the appointment

30 *Ibid* at para 24.
31 2012 ONCA 541.
32 *Ibid* at para 79.
33 However, the regulator need not appoint an investigator to carry out a less formal investigation where the formal statutory powers of the investigator are not needed: *Rassouli-Rashti v College of Physicians and Surgeons of Ontario* (2009), 256 OAC 186 (Div Ct) at para 14.

of the investigator is approved by the Executive Committee.[34] The approval of the Executive Committee is intended to act as a check on the intrusiveness of a formal investigation.[35]

However, it is difficult to challenge the appointment of an investigator. Absent exceptional circumstances, such as bad faith or abuse on the part of the investigator or the appointing body, courts are reluctant to interfere at the investigatory stage. Judicial review is a discretionary remedy, and courts will usually decide that it is premature to decide whether the statutory preconditions for appointing an investigator were met until there is a full record and the regulatory proceedings have come to an end.[36]

2. Challenging an investigative act as beyond the scope of the authorized investigation

The terms of a formal appointment will limit the scope of the investigator's powers. Where the appointment relates only to a discrete allegation of misconduct, then the investigator will generally only have a mandate to investigate that allegation. If the investigator uncovers evidence of other unrelated misconduct in the course of the investigation, then it can make a report to the authorizing body (a Complaints Committee, for example), which will decide whether further investigation is warranted. However, where the allegation raises a broader issue of fitness or competence, the appointment will implicitly authorize the investigator to investigate other allegations that pertain to the same concern.[37]

For example, in *Stolen v British Columbia College of Teachers*, the majority of the British Columbia Court of Appeal held that the allegations that had sparked the investigation had "raised the issue of whether the respondent was a man given to violence against women." This, in the majority's view, had implicitly authorized an investigation into allegations of the same nature other than those forming part of the initial complaint.[38]

Similarly, if a regulator receives complaints about a number of acts of a member, it is reasonable for the regulator to direct an investigation into the member's practice rather than itemizing each alleged act in its order appointing an investigator. As the Divisional Court held in *Krop v College of Physicians and Surgeons of Ontario*:[39]

> Where there are a number of acts, it is neither unfair nor unreasonable to direct an investigation of the member's practice as opposed to itemizing each act. It is an administrative, not a criminal, process. While the ultimate consequences of the discipline process may be serious, this stage is only the initiation of an investigation, not a prosecution. The order is addressed to the investigator, not [the member] and focuses on the gathering of information. The Notice of Hearing particularized the charges against [the member] and constituted the commencement of the

34 *Code*, s 75(1).
35 *Sazant, supra* note 7 (CA) at para 125.
36 See e.g. *Gore*, *supra* note 13 at paras 66-68; and *Sutherland*, *supra* note 25 at paras 3-5.
37 *Stolen v British Columbia College of Teachers* (1995), 128 DLR (4th) 453 (BCCA) at paras 54-60 per Southin JA, Wood JA concurring. Prowse JA wrote separate concurring reasons.
38 *Ibid.*
39 *Supra* note 24 at para 17.

> prosecution. [The member] suffered no prejudice because of the failure to itemize each act in the Order appointing inspectors.

Likewise, a complaint or report leading to an investigation need not necessarily identify the member or members under suspicion. The Supreme Court of Canada considered this issue with respect to the syndic (agent of the regulatory body) responsible for investigating and referring a matter to discipline for the Ordre des pharmaciens du Québec in *Pharmascience Inc. v Binet*.[40] In that case, there had been allegations made in the media that a number of pharmacists had received financial benefits from generic drug manufacturers in exchange for orders for drugs, a practice that was prohibited by the *Code of ethics of pharmacists*. Based on information obtained from proceedings instituted by the Régie de l'assurance maladie du Québec against the manufacturers, the syndic began an investigation and sought relevant documents from a generic drug manufacturer. The manufacturer refused to provide them.

LeBel J (for the majority) held that the syndic need not be in a position to identify exactly which professionals were under suspicion before being able to request the production of documents. Individualized allegations are only required when the syndic refers the complaint to the Discipline Committee. The syndic's investigation precedes this process and is aimed at determining whether a complaint should be referred to discipline.

While individual suspects were not identified, the investigation in *Binet* was not random. The syndic began her investigation based on reliable information that established a reasonable basis for her inquiry. Identifying offenders, rather than determining the specific circumstances of the offence, was a proper object for an investigation.

The result in *Binet* was driven largely by the need for professional regulators - who bear an "onerous obligation" to regulate the profession in a manner that protects the public interest - to have the necessary tools to properly discharge this obligation.[41] The policy considerations raised and the broad reading of the regulator's power to investigate suggest that courts will be reluctant to unduly limit the scope of investigations in the professional discipline context.

Issues have occasionally arisen where the regulator refuses to show the order or appointment authorizing the investigation to the person from whom evidence is sought. In that circumstance, the person may be unable to determine whether the evidence being sought is relevant to the investigation. However, lawyers must be careful in their approach in such a situation. In *Autorité des marchés financiers c Fournier*,[42] the Quebec Court of Appeal reversed two lower court decisions that had acquitted Mr. Fournier of refusing to answer questions at a compelled interview after his lawyer had objected to answering the questions on the basis of relevance. The investigator had refused to provide a copy of the order authorizing the investigation. The lawyer had proposed that a ruling be sought from a Superior Court judge. The Court of Appeal held that in the absence of a proceeding before the Court, a question could not be referred to a judge for a ruling. In contrast, the Court stated that "if the person examined believes that the investigator exceeded his or her mandate or jurisdiction, or that the rules of natural justice or procedural fairness were violated, that person may bring proceedings before the Superior Court and ask a judge of that court to suspend the examination during the proceedings.

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40. 2006 SCC 48.
41. *Ibid* at para 36.
42. 2012 QCCA 1179, rev'g 2010 QCCS 4830.

But this was not the path taken here."[43] In rejecting the respondent's argument that refusing to answer questions on the basis of legal advice established a due-diligence defence, the Court of Appeal held that it was not sufficient for the respondent merely to argue that he followed the advice of his lawyer but that he had to establish that his refusal was justified by a valid reason or excuse, or in other words, on the basis of due diligence, not an error in law, even if confirmed by counsel. Although the Court acknowledged that investigators must ask relevant questions, the Court was clearly motivated by a concern that it would make the investigatory process unduly cumbersome if investigators were called on to provide a "reasoned decision on [every] objection." The Court held:

> If the person examined does not succeed in convincing the investigator not to insist on an answer or to be satisfied with the answer already given, the person must answer. If the person refuses to answer, he or she must assess the consequences of the refusal and consider any paths open to him or her.[44]

3. Challenging for irrelevance and overbreadth

A production order or subpoena may be challenged by way of judicial review on the ground of overbreadth. Such a demand is overbroad if it seeks documents or things that are not "relevant" to the inquiry. It is important to note that such a challenge, if successful, will not overturn the whole order: the court will likely only invalidate those portions of the order that seek irrelevant material.[45]

"Relevance" will take a broad meaning in the regulatory context, especially at the investigative stage. In the context of a production order under the *Competition Act*,[46] the Federal Court has cautioned that "the order relates to the production of information and documents for the purpose of an inquiry, not for the purpose of the prosecution of a criminal offence."[47] At the investigative stage, "relevance" must be judged by a more relaxed standard than it would were one considering the admissibility of evidence at trial or even the standard applied at the discovery stage of civil proceedings.

In our view, material is "relevant" if it reasonably *could* afford information, taken by itself or in relation to other material, concerning the subject matter of the inquiry. This proposed standard draws on the test for search warrants under s 487 of the *Criminal Code*,[48] and should be modified as required by the statutory language and purpose of the authorizing legislation.

This broad approach to relevance was taken in *Hooper v College of Nurses of Ontario*,[49] wherein the Divisional Court held that relevance encompassed any information relevant to the

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43 *Ibid* (emphasis added).
44 *Ibid* at paras 54-55.
45 See e.g. *Canada (Commissioner of Competition) v Air Canada*, [2001] 1 FC 219 at para 13.
46 RSC 1985, c C-34.
47 *Air Canada*, *supra* note 45 at para 19.
48 *R v Canadian Broadcasting Corporation* (1992), 77 CCC (3d) 341 (Ont Gen Div) per Moldaver J (as he then was).
49 (2006), 81 OR (3d) 296 (Div Ct).

matter under investigation and not only a particular act of professional misconduct. Swinton J for the Court held:

> Similarly, in this case, the investigator has broad powers of inquiry. She was not restricted to a particular act of misconduct. Pursuant to s. 76(2), she may enter the business premises of the member at any reasonable time and "may examine anything found there that is relevant to the investigation". The investigator must have reasonable grounds for believing that information requested is relevant. However, the threshold of relevance is low, given that he or she is at an early stage in the proceedings, gathering documents and information about possible misconduct.[50]

A similar approach was recently taken by the Court of Appeal in *Sazant*.[51] Given that the wide range of conduct encompassed by the legislation "includes conduct that in other contexts - including in other professional regulation contexts - might otherwise be considered private"[52], the Court held that the College's investigatory and examination powers must be construed broadly. It rejected the narrow interpretation of the power urged by the physician, who had sought to restrict it to "the assessment, diagnosis, prevention and treatment of disease". As the Court noted, "[w]here conduct would be regarded as professional misconduct by other members of the profession, it can hardly be surprising to a member that he or she would be subject to investigation by the regulator where the regulator has reasonable grounds to believe that the member has engaged in such conduct."[53] This approach to relevance at the investigative stage is both analytically and practically sound.

The Ontario Securities Commission recently expansively interpreted the Commission's investigatory powers under s 11 of the Ontario *Securities Act*[54] to include an investigation into respondents' financial affairs following the rendering of an order imposing monetary sanctions. This approach is of some concern given the Commission's apparent acknowledgment (in its reasons on the respondents' motion to revoke the investigation order) that the purpose of the inquiry was essentially to gather information for potential use in the Court, not Commission proceedings.[55]

3. Challenging on the basis of the burden of compliance

A production order will not be suspect merely because it imposes a significant burden on the party against whom the order is directed. Individuals have both a moral and a legal duty to assist in the enforcement of Canadian laws, and sometimes this will include incurring trouble or expense in order to comply with regulatory demands.

However, the burden of compliance is generally a relevant factor in determining whether a production order should be granted, and, once granted, in deciding whether it should be

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50 *Ibid* at para 34.
51 *Sazant*, *supra* (CA) note 7 at paras 95-98, and 175-178.
52 *Ibid* at para 176.
53 *Ibid* at para 179.
54 RSO 1990, c S.5.
55 *Re Crown Hill Capital Corp.* (2014), 37 OSCB 8294 at para 24.

overturned or varied.[56] If a statutory provision provides for residual discretion in the granting of judicial pre-authorization – for example by providing that a justice "may" issue a production order – then arguably the application may be denied where the order would be so burdensome as to be unreasonable. As a corollary, if the authorizing person fails to consider the burden of compliance, arguably the resulting order is liable to be quashed because the authorizing person did not exercise the discretion judicially.

In *Tele-Mobile Co v Ontario*,[57] the Supreme Court had occasion to consider the meaning of "reasonableness" in the context of burdensome compliance with production orders:[58]

> What is reasonable will be informed by a variety of factors, including the breadth of the order being sought, the size and economic viability of the object of the order, and the extent of the order's financial impact on the party from whom production is sought. Where the party is a repeated target of production orders, the cumulative impact of multiple orders may also be relevant.[59]

In principle, if the person acting judicially has a residual discretion whether or not to grant the order sought, these criteria will be relevant considerations. Proving that a production order is overly burdensome ought to be a difficult threshold to meet in order not to unduly hamper the regulator's duty to protect the public.

Generally, the subject of a burdensome production order will not be able to argue that the regulator should bear the financial cost of compliance. In its recent decision on production orders under s 487.012 of the *Criminal Code*, the Supreme Court of Canada specifically held that an issuing court has no jurisdiction to order reimbursement of the costs of complying with a production order absent express statutory authorization.[60]

4. Challenging a court order because of disclosure deficiencies in an ex parte application

Some investigative tools require the regulator to apply for an *ex parte* order from a Court or justice of the peace – for example, a production order or search warrant. An order obtained *ex parte* may be overturned on the basis that the regulator failed to make full, fair and frank disclosure in the application. A recent case in the competition context illustrates the risks faced by regulators in making *ex parte* applications.

In *Commissioner of Competition v Labatt Brewing Company Limited*,[61] Labatt Brewing Company Ltd. and Lakeport Brewing Income Fund asked the Federal Court to set aside a demand for documents under s 11 of the *Competition Act*. The Court did so in part because the Commissioner, in its *ex parte* application to obtain the order, had not mentioned that it had already obtained some of the material sought pursuant to an earlier order. The Court held:

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56 *Commissioner of Competition v Labatt Brewing Company Limited*, 2008 FC 59 [*Labatt*] at paras 95-98.
57 *Tele-Mobile Co v Ontario*, 2008 SCC 12, [2008] 1 SCR 305.
58 *Labatt, supra* note 56 at paras 95-98.
59 *Ibid* at para 67.
60 *Tele-Mobile Co, supra* note 57 at para 59.
61 *Supra* note 56.

> [T]he Commissioner cannot come before this Court, on an *ex parte* basis, seeking onerous production orders … and represent that extraordinarily extensive information and documentation sought has not previously been requested, when that is clearly not the case.[62]

As a result, the disclosure made by the Commission on the *ex parte* application for the s 11 order had been "misleading, inaccurate and incomplete". The Court further held that, had Labatt provided complete disclosure, the Court would not have granted the order that it did. As a result, the Court set aside the order. The Commission was permitted to bring a fresh application for a s 11 order, but only on notice to both companies.

An *ex parte* application is a departure from the fundamental principle of procedural fairness that the Court should hear both sides. Because the party against whom an order is sought *ex parte* has no opportunity to try to persuade the Court that it should decline to grant the order, the law imposes on the applicant a duty to be scrupulously fair to the absent party by disclosing all material facts in a fair manner.[63] The rationale is explained in the leading authority in Ontario, *United States of America v Friedland*, by Sharpe J (as he then was):

> The judge hearing an ex parte motion and the absent party are literally at the mercy of the party seeking injunctive relief. The ordinary checks and balances of the adversary system are 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.[64]

Sharpe J then set out the onerous standard on the party moving for an *ex parte* order:

> For that reason, the law imposes an exceptional duty on the party who seeks ex parte relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.[65]

If the moving party has not made full, fair and frank disclosure in its application, the respondent is entitled to have the order set aside. As illustrated in *Labatt*, these onerous obligations can present significant pitfalls for regulators who seek *ex parte* orders.

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62 *Ibid* at para 94.

63 *United States of America v Friedland*, [1996] OJ No 4399 (Gen Div). Adopted by Mactavish J in *Labatt*, *supra* note 56 at para 23.

64 *Ibid* at para 26.

65 *Ibid* at para 27.

In *Labatt*, the Court held that had it known of the Commission's representation to the Court that the extensive information sought in the first round of s 11 orders "would likely be sufficient" for the purposes of the inquiry, it would not have made the later order without an explanation from the Commission as to why additional information was required. It was, according to the Court, a material omission that justified setting aside the later order.[66] The Court further held that the Commission was required to advise the Court of any representations that may have been made to the Court as to whether the information previously sought would suffice for the purposes of the inquiry.[67]

5. Challenges based on the rights of third parties

To what extent will the rights of third parties be considered in making or reviewing production orders? In *Sazant*, the Court of Appeal noted that the summons power under s 76(1) of the *Code* is not limited to documents created during the course of regulated activity. Patients' medical, telephone and other personal records may be summonsed. There is no provision for notifying third parties whose privacy rights might be affected by the summons.[68]

In *Gore*, the physicians argued that s 76 of the *Code* should not be interpreted to include a power to compel observed surgery because of the impact on the privacy rights of patients undergoing the surgery. The Court of Appeal rejected this argument: other provisions of the *Code* already contemplated significant intrusion into patient privacy as necessary costs of conducting an effective investigation. However, the Court noted that the patients' interests – including privacy – must be taken into account by the investigator. Further, the patient, unlike the physician, has no obligation to cooperate with the investigation. Finally, the College must keep confidential all information that comes to their knowledge in the course of their duties.[69]

The last observation suggests that where information obtained pursuant to a summons is to be disclosed outside the regulatory context, the privacy rights of third parties may demand more attention. Although there is no absolute bar on such disclosure, the third parties may receive participatory rights such as notice and an opportunity to be heard so that they may argue that disclosure should not occur.

This point is illustrated in *Re X Inc.*, a recent decision of the Ontario Securities Commission.[70] There, Staff of the Commission had obtained the bank records of named customers pursuant to a *Securities Act* s 13 summons. The Staff wished to supply the records to a foreign law enforcement agency, because the investigation had begun in part at the behest of a foreign securities regulator. Staff applied to the Commission for authorization to disclose the records, and provided notice of its application to the bank under s 17 of the *Act*.

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66 *Labatt*, *supra* note 56 at para 46.

67 *Ibid* at paras 49-50.

68 *Sazant*, *supra* note 7 (CA) at paras 139-141. This distinguishes the *Code* summons power from certain other regulatory regimes. For example, the interview power in s 49.3(2) of the *Law Society Act*, RSO 1990, c L.8 is limited to "the licensee and people who work with the licensee".

69 *Gore*, *supra* note 13 at paras 23-24.

70 Decision March 25, 2010, released December 7, 2010

The bank took the position that its customers were entitled to receive notice and an opportunity to be heard. Staff disagreed. In light of the confidentiality requirements imposed by s 16, the bank was required to litigate the issue *in camera*.

The Commission agreed with the bank that the statute required notice to be given to the customers. The customers met the statutory definition of "persons named by the Commission" in s 17(2)(a) because they had been named in the summons. The Commission noted that there was no evidence as to why it would be impractical to give notice to the customers and specifically referred to the purpose of the order, which was to provide the documents to a law enforcement agency. Fairness and the statute required notice to be given to the Bank's customers.

C. Charter Challenges

Although the law regarding the application of the *Charter* to regulatory inspection and production orders is complex and deserves careful attention, the following principles can be distilled from the authorities:

1. a regulatory inspection constitutes a "search" within the meaning of s 8 of the *Charter*;

2. a regulatory production demand or order constitutes a "seizure" within the meaning of s 8 of the *Charter*;

3. generally, a regulated member has little expectation of privacy vis-à-vis the regulator in respect of information and documents prepared in the course of his or her regulated profession;

4. the requirements applicable to criminal search and seizure, in particular to search warrants, do not apply with equal vigour to production demands and orders. Indeed, the material sought need only satisfy the requirement that they be "relevant" to the investigation; and

5. compelled interviews and production demands do not infringe s 7 of the *Charter* where the predominant purpose is not to incriminate the respondent but to obtain relevant evidence in furtherance of an important regulatory purpose. However, subsequent use immunity and derivative use immunity in respect of evidence gathered in this manner may arise in subsequent penal proceedings.

We will explore these points in further detail below.

1. Section 8 of the *Charter*

In the seminal case under s 8 of the *Charter*, *Hunter v Southam*,[71] and since,[72] the Supreme Court of Canada emphasized that judicial pre-authorization based on information upon oath that the police officer has a reasonable belief that there is evidence of an offence in the place to be searched is, as Scott Hutchison puts it, "the central measure against which the

71 *Hunter v Southam*, [1984] 2 SCR 145.
72 See e.g. *Schreiber v Canada*, [1998] 1 SCR 841.

reasonableness of any form of legal authority to search or seize will be considered in the criminal law context."[73]

After some debate and disagreement in the lower Courts,[74] the Supreme Court of Canada considered in a quartet of cases whether regulatory production demands were "searches" or "seizures" within the meaning of s 8 of the *Charter* and, if so, whether the prerequisites applicable to search warrants were also applicable to production orders.

The Supreme Court of Canada first considered the issue in the context of a regulatory production demand in *Thomson Newspapers Ltd. v Canada*.[75] Specifically, the Court considered the provision (then s 17(1) of the *Combines Investigation Act*) authorizing the Restrictive Trade Practices Commission to seek subpoenas *duces tecum*.

The Court was badly split. All five judges on the panel felt compelled to write reasons. Four of five held that production demands were a "seizure" within the meaning of s 8 of the *Charter*. Sopinka J disagreed and held that a production order did not constitute a seizure. He was concerned not to dilute the *Hunter* standards by modifying them to the regulatory context. His solution was to exclude regulatory production demands altogether from the ambit of s 8 of the *Charter*.

The remaining justices disagreed over the characterization of the statute as criminal or regulatory, which impacted on whether the strict *Hunter* standards applied or whether a different balance should be struck. Lamer and Wilson JJ held that a production order was a "seizure" within the meaning of s 8 of the *Charter* and that the *Combines Investigation Act* was a criminal or quasi-criminal statute. Thus, they concluded that the *Hunter* requirements applied and s 17(1) violated s 8 of the *Charter*. Wilson J defined seizure as the "taking hold by a public authority of a thing belonging to a person against that person's will."[76] Wilson J held that compelling a person to hand over private information carries the same consequences as when someone else seizes it. Indeed, she noted that the consequences may even be harsher because it may produce evidence the authorities did not have reasonable ground to believe existed.[77]

La Forest and L'Heureux-Dube JJ also held that a production order was a "seizure", but they characterized the *Combines Investigation Act* as regulatory. As a result, the *Hunter* standards did not apply with full vigour. In this regard, La Forest's judgement is most instructive and his approach ultimately wins the support of the majority of the Court in *British Columbia Securities Commission v Branch*.[78] The essential points of La Forest's judgment in *Thomson Newspapers* were:

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73 S. C. Hutchison, *Hutchison's Canadian Search Warrant Manual 2005* (Toronto: Carswell, 2005) at 3.

74 *Alberta (Human Rights Commission v Alberta Blue Cross Plan* (1983), 1 DLR (4th) 301 (Alta CA); *Gershman Produce Co. v Motor Transport Board* (1984), 14 DLR (4th) 722 (Man QB); *Reich v College of Physicians and Surgeons of Alberta* (1984), 8 DLR (4th) 696 (Alta QB).

75 *Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425.

76 *Ibid* at 493.

77 *Ibid* at para 90 (QL).

78 [1995] 2 SCR 3.

- a production order under s 17, though supported by penal sanctions, is essentially regulatory and not criminal;

- violations of the *Combines Investigation Act* are difficult to detect and their discovery will often require access to information as to the internal affairs of businesses. Section 17 is important to the overall effectiveness of the regulatory regime;

- business records and documents will normally be the only documents that can lawfully be obtained under that section. There is a relatively low expectation of privacy in business records, which are produced in the course of regulated activity; and

- section 17 does not infringe the limited expectation of privacy in these records.

Importantly, however, La Forest concluded that s 8 of the *Charter* imposed a relevance requirement. He wrote, "[t]he material sought must be relevant to the inquiry in progress. The question of relevancy, however, must be related to the nature and purpose of the power accorded under s 17."[79] Moreover, he cited with approval from the leading American authority on production orders, *Oklahoma Press Publishing Co. v Walling*.[80] In the context of the Fourth Amendment to the U.S. Constitution, the U.S. Supreme Court had articulated the following three criteria:

1. the investigation must be for a lawfully authorized purpose. However, it is not necessary to require a specific charge or violation of law for the production order to be made;

2. the production demand must be sufficiently clear and specific to inform the respondent of precisely what documents are being demanded; and

3. the production demand must only be as broad as is necessary for the purposes of the inquiry in progress. An unduly broad production demand will be struck down for burdensomeness.[81]

In La Forest J's opinion, the last two requirements both flowed from the relevance requirement, which must be judged based on the "nature, purposes and scope"[82] of the investigation. Finally, he held that judicial pre-authorization of production demands was not required because there was no requirement for the investigator to establish a reasonable belief that there is evidence of an offence in the place to be searched.

In the companion case of *R v McKinlay Transport Ltd.*,[83] the same five judges considered production demands for the purpose of an income tax audit under the *Income Tax Act*. Wilson J wrote reasons with which Lamer, La Forest, and L'Heureux-Dube JJ agreed, subject to their

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79 *Thomson, supra* note 75 at para 160 (QL).
80 327 US 186 (1946).
81 *Ibid* at 209; *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924) at 305-6.
82 *Oklahoma Press Publishing Co, supra* note 80 at 209.
83 [1990] 1 SCR 627 [*McKinlay Transport*].

reasons in *Thomson*. Wilson J held that the demand constituted a "seizure" within the meaning of s 8 of the *Charter*. The documents that could be demanded extended beyond those which were required by the filing and maintenance requirements of the *Act* and therefore beyond those in which an individual had no reasonable expectation of privacy vis-à-vis the state.[84]

Wilson J held that the purpose of the scheme was regulatory and not criminal, and thus subject to less stringent standards than those applied to criminal search warrants. Finally, Wilson J held that the production demand was "the least intrusive means by which effective monitoring of compliance with the *Income Tax Act* can be effected."[85] Importantly, it did not lead to the invasion of a person's home; the taxpayer had a "relatively low" privacy interest vis-à-vis the Minister; and the *Act* protected the taxpayer's privacy by shielding his records and information therein from disclosure to other persons or agencies.

Four years later, the Supreme Court of Canada returned to this question in *Comite paritaire de l'industrie de la chemise v Potash*.[86] They did so in the context of a challenge to s 22(e) of the *Act respecting Collective Agreement Decrees* ("*ACAD*") which provided that inspectors:

> may, as of right and at any reasonable time, examine the registration system, the compulsory register and the pay-list of any employer, take copies or extracts therefrom, verify as regards any employer and any employee the rate of wage, duration of work, apprenticeship system and observance of the other provisions of the decree [and] require . . . all information deemed necessary.[87]

The Court (in two sets of concurring reasons, both joined by a majority) held that the power to make documents was analogous to that of requiring documents to be produced and was a "seizure" within the meaning of s 8 of the *Charter*. Moreover, the power of inspection, which included a right of access to work premises, constituted a "search" within the meaning of s 8. However, these powers were reasonable and did not infringe s 8 of the *Charter*. The majority concluded that the *ACAD* is a regulatory statute, the purpose of which is to ensure decent working conditions for vulnerable employees. The majority concluded that the privacy interest of employers was not very high.

Finally, in *British Columbia Securities Commission v Branch*,[88] the Supreme Court of Canada considered whether the power granted to an investigator by the British Columbia *Securities Act*[89] to compel, by summons, a witness to give evidence and to produce records and things violated ss 7 and 8 of the *Charter*. The Court was unanimous in holding that the impugned provision did not violate s 8 of the *Charter* for the reasons of La Forest J in *Thomson* and those of Wilson J in *McKinlay Transport*. Although the compelled production of records constituted a "seizure" under s 8 of the *Charter*, it was not unreasonable. The statute was regulatory and not criminal. Moreover, businesses operating in the highly regulated securities sector do not have a

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84 See *R v Hufsky*, [1988] 1 SCR 621 at 638.

85 *McKinlay Transport, supra* note 83 at para 35 (QL).

86 [1994] 2 SCR 406.

87 *Act respecting Collective Agreement Decrees*, RSQ, c D-2.

88 *Supra* note 78.

89 RSBC 1996, c 418.

high expectation of privacy vis-à-vis the Securities Commission with respect to business records. In this light, the production demand was minimally intrusive of privacy rights.

The Ontario Court of Appeal has recently upheld the constitutionality of s 76(1) of the *Code* in the face of a s 8 challenge.[90] Section 76(1), it will be recalled, was subsequently amended to reflect the enactment of the *Public Inquiries Act, 2009*, but both the former and current versions grant a College investigator the ability to summons witnesses and compel the production of documents.

Dr. Sazant, the appellant, had been charged criminally with sexual offences involving young boys, one of whom had been a patient. The charges were withdrawn or stayed without a conviction. However, an investigator appointed by the College attempted to use his s 76(1) powers to compel the Crown and police to hand over their prosecutorial and investigative files. Dr. Sazant brought an application to exclude the evidence obtained thereby, arguing that s 76(1) violated s 8 of the *Charter*.

Dr. Sazant observed that, while the use of s 76(1) was restricted to those documents and witnesses that were relevant to the inquiry, it could be used to compel material that was not created in the course of the regulated activity (i.e. practising medicine). He further observed that College investigations can have serious consequences for the investigated member, and that the underlying conduct alleged is often also against the criminal law. He essentially argued that pre-authorization of some kind was required, in the context, for such a broad summons power to survive s 8 scrutiny.

The Court of Appeal rejected these arguments. First, although the alleged conduct could have been (and indeed had been) the subject of criminal charges, the College proceedings are not criminal or quasi-criminal so as to attract the full force of the *Hunter v Southam* standard. The power in question exists not to collect evidence with a view to laying a criminal charge, but rather for the purpose of proceedings that could result, at most, in removing or restricting a license to practice medicine.[91]

Second, the Court of Appeal held that summons powers are less intrusive than a search warrant (which Dr. Sazant had sought to use for comparison in order to argue that the strictures of *Hunter v Southam* should apply). Search warrants are obtained *ex parte* and the subject has no opportunity to challenge one before it is executed in what is often a highly intrusive search. The subject of a summons, on the other hand, learns of it when it is served and may seek to set it aside before giving evidence.[92]

Third, although the s 76(1) power is broad, it is not unchecked. It only comes into existence when the Registrar has appointed an investigator under s 75. The Registrar may only do so when he or she believes on reasonable grounds that the member has committed an act of professional misconduct, and obtains the Executive Committee's approval. It only applies to material that is relevant to the inquiry. These conditions, the Court held, act as a check on the power.[93] The Court further explained that the Registrar should provide "a brief description of the

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90 *Sazant v College of Physicians and Surgeons*, 2012 ONCA 727, aff'g 2011 ONSC 323 (Div Ct).
91 *Ibid* at paras 182-185.
92 *Ibid* at para 122.
93 *Ibid* at para 156.

act(s) of professional misconduct he or she believes on reasonable and probable grounds were committed."[94] This would both ensure that the reasonable and probable grounds threshold has been met and assist in defining the scope of the s 76(1) summons power.[95]

Fourth, a member of a regulated profession – especially one with a duty to self-regulate in the public interest – has a low expectation of privacy in respect of a professional regulatory investigation and in respect of material that may be relevant to such an investigation.[96]

Unlike the Court of Appeal, the Divisional Court also dealt with the issue of the Discipline Committee's jurisdiction to determine *Charter* breaches and grant *Charter* remedies. In *R v Conway*,[97] the Supreme Court held that tribunals with the power to decide questions of law and from which constitutional jurisdiction has not been withdrawn by statute are able to decide *Charter* questions and grant *Charter* remedies in relation to questions arising in the course of carrying out their mandate. Consistent with this, the Divisional Court in *Sazant* held that the Discipline Committee had the power to grant the s 24(1) remedy sought, which was an order excluding evidence, a power explicitly granted to the Committee by statute.[98] Because the Divisional Court also upheld the Discipline Committee's finding that Dr. Sazant had no reasonable expectation of privacy in the Crown and police materials and therefore lacked the standing to seek a personal s 24 *Charter* remedy, the Court of Appeal declined to address the Discipline Committee's *Charter* jurisdiction.[99]

2. Section 7 of the *Charter*

A regulator may not use a power to compel evidence from a respondent if the predominant purpose is to establish criminal liability.[100] Otherwise the use of the power would violate the right to silence under s 7 of the *Charter*.

The Supreme Court considered this issue in *R v Jarvis*,[101] in the context of the broad powers of the Minister of National Revenue for the administration and enforcement of the *Income Tax Act*.[102]

The Court concluded that these powers were available for the *audit* function of the Minister, but not the *investigation* function. In other words, where the predominant purpose was to monitor compliance with the *Income Tax Act*, these powers were available. This is the case even though non-compliance carried with it civil penalties and summary offences. However, if

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94 *Ibid* at para 160 [citations omitted].

95 *Ibid* at paras 161-162.

96 *Ibid* at para 174-175. The Divisional Court also held at paras 169-176 that the search warrant power in s 77 of the *Code* did not render the summons power redundant (and hence unnecessary and unreasonable). This point was not addressed by the Court of Appeal.

97 2010 SCC 22, [2010] 1 SCR 765

98 *Sazant*, *supra* note 7 at paras 180-185

99 *Sazant*, *supra* note 7 (CA) at paras 166-169.

100 *R v Jarvis*, [2002] 3 SCR 757.

101 *Ibid*.

102 Under ss 231.1 and 231.2, a person authorized by the Minister has the powers to: enter a taxpayer's place of business or place of record keeping; require the taxpayer and third parties to answer questions put to them; and require the taxpayer and third parties to furnish information and documents upon request.

the predominant purpose of a use of the powers is to investigate an offence such as tax evasion, and the subject of the powers is thereby exposed to true penal consequences, then the residual principle against self-incrimination under s 7 of the *Charter* would apply and the powers would be unavailable to the Minister.

It is notable that the Court nevertheless permitted the use of evidence compelled through use of the audit powers, because of the low expectation of privacy in these materials. However, the Court did not permit investigators to *continue* to use the audit powers to obtain evidence for a criminal investigation – only criminal investigative techniques were left open.

The appropriate use of powers of compulsion has also been addressed in the context of proceedings commenced by the Ontario Securities Commission. For example, in *R v Landen*, the Ontario Court of Justice found that Staff of the Ontario Securities Commission had relied on powers of compulsion to seize documents after the predominant purpose of the Commission's inquiry had become the quasi-criminal prosecution of the respondents.[103] As such, the Court found that the respondents' s 8 *Charter* rights had been violated (although the Court held that the evidence was nonetheless admissible under s 24(2) of the Charter).[104] Further, in *Re Waheed*,[105] respondents in an insider trading prosecution successfully brought a motion to quash s 13 summonses issued to the respondents' former legal counsel. The summons were issued only after the respondents had indicated that they intended to call their former legal counsel as witnesses in the merits hearing and not in the context of Staff's lengthy prior investigation of the matter. As the Commission held:

> The Applicants [Respondents in the merits hearing] have made a compelling case that the purpose for issuing the Summonses to [the lawyers] is to provide Staff the tactical advantage of discovering the evidence of [the lawyers] prior to their testimony at the Merits Hearing. This, in my opinion, is not an appropriate use of Staff's broad investigative powers.[106]

If, on the other hand, the regulator's predominant purpose is not to establish criminal liability but rather to further a regulatory purpose, then the demand will not violate s 7 even if it would tend to compel the respondent to give self-incriminatory evidence. However, such evidence will be inadmissible in subsequent criminal proceedings against the respondent ("use immunity") and evidence discovered as a result of that evidence will also be inadmissible ("derivative use immunity").[107] Such immunities arise as a result either of s 13 of the *Charter* or of the residual right against self-incrimination in s 7.

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103 2007 ONCJ 531 at para 69.

104 *Ibid* at paras 90 and 97.

105 (2013), 36 OSCB 1071.

106 *Ibid* at para 36.

107 Although beyond the scope of this paper, for further authority on subsequent use immunity of regulatory reports and statements see *R v Fitzpatrick*, [1995] 4 SCR 154 and *R v White*, [1999] 2 SCR 417.

IV. Production demands and disclosure obligations

As a matter of procedural fairness at common law, professional regulators have broad disclosure obligations when they commence proceedings against a regulated person. Generally, regulators are held to a standard of disclosure akin to that in *R v Stinchcombe*,[108] which applies in the context of criminal proceedings. *Stinchcombe* requires that the Crown disclose all relevant information, whether exculpatory or inculpatory, subject to the discretion of the Crown and to privilege. The discretion of the Crown is reviewable by the Court. The Crown has the initial obligation to separate the relevant from the irrelevant and should err on the side of inclusion by only excluding clearly irrelevant information.

The disclosure decision of the Ontario Securities Commission in *Biovail Corp. et al*[109] aptly illustrates the breadth of the disclosure obligation. In that case, Staff made disclosure to the respondents in electronic form of a computer hard drive of over 230 gigabytes of data. If printed, the documents would have numbered over 4.3 million pages and filled more than 1,700 bankers' boxes.[110] The respondents brought a motion seeking "meaningful disclosure" regarding the allegations. The Commission concluded that Staff had not satisfied its disclosure obligations.

Because Staff had engaged in a wide-ranging investigation of the respondents, it assembled a vast amount of material. The Commission held that the respondents should not have to sift through such a massive amount of information. Although Staff do not generally have to attribute every document to an allegation, where there are multiple respondents facing different allegations, Staff is under a duty to make disclosure of the documents that are relevant to each respondent. That said, where there are multiple allegations against a particular respondent, it is not necessary to attribute a document to a specific allegation.

Moreover, the Commission directed Staff to (i) identify all the documents that it knows from its investigation are relevant to the respondents and (ii) make relevant searches of the electronic database of documents and assess which documents or categories of documents were relevant to the respondents.

Biovail demonstrates the need for regulators to keep in mind their eventual disclosure obligations when forming their production orders. While the regulator may not have to hone its request with absolute surgical precision, the lesson of the *Biovail* decision for regulators is not to overreach in their production orders because they will be required to sort it out at the disclosure stage, perhaps at enormous expense in terms of time and resources. By the same token, this gives the target of a production order, especially corporate and institutional targets, a basis for negotiating away overbroad production request. While the public interest mandate of the regulator must be respected, skilful counsel may be able to persuade staff of the regulator that they are really biting off more than they wish to chew with a 'kitchen sink' production request.

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108 [1991] 3 SCR 326.

109 (2008), 31 OSCB 7161, 2008 LNONOSC 536 (Sec Comm)

110 *Ibid* at para 5. See also *In the Matter of Eda Marie Agueci, Dennis Wing, Santo Iacono, Josephine Raponi, Kimberley Stephany, Henry Fiorillo, Guiseppe (Joseph) Fiorini, John Serpa, Ian Telfer, Jacob Gornitzki and Pollen Services Ltd* (Ontario Securities Commission, December 12, 2014).