

CANADA / JUDGMENT

British Columbia (Securities Commission) v. Brar

2023 BCSC 1122

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2023 BCSC 1122 British Columbia (Securities Commission) v. Brar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

British Columbia (Securities Commission) v. Brar,

2023 BCSC 1122

Date: 20230629

Docket: S216267

Registry: Vancouver

Between:

British Columbia Securities Commission

Petitioner

And

Ranvir Brar

Respondent

- and -

Docket: S216249

Registry: Vancouver

Between:

British Columbia Securities Commission

Petitioner

And

Harjit Gahunia

Respondent

Before: The Honourable Justice Shergill

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

October 12-13, 2022 and

February 21-23, 2023

Place and Date of Judgment:

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June 29, 2023

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I. Overview

- [1] The Petitioner, the British Columbia Securities Commission (the "Commission"), is empowered to investigate and enforce contraventions of the Securities Act, R.S.B.C. 1996, c. 418 [Securities Act]. To effect this purpose, Commission staff are granted enhanced powers of investigation in certain circumstances. This includes the power to compel evidence from witnesses under s. 144 of the Securities Act, similar to the power the Supreme Court has for the trial of civil actions.
- [2] In 2020, the Commission issued summonses under s. 144 of the Securities Act (the "Summons") to Harjit Gahunia and Ranvir Brar (collectively, the "Witnesses" or "Respondents"). The purpose of the Summons was to investigate possible contraventions of the Securities Act by specific individuals and legal entities (not including the Respondents). There are no allegations that the Respondents have contravened the Securities Act.
- [3] The Respondents refused to attend before a Commission investigator in response to the Summons. Consequently, the Petitioner commenced these proceedings (the "Contempt Petitions") seeking the following relief against each of the Respondents: (1) a finding that the Respondents are in contempt under s. 144(2) of the Securities Act; (2) a term of committal, or alternatively, a fine, which is to be suspended for a reasonable period to permit the Respondents to purge their contempt; (3) an order requiring the Respondents to attend before an investigator; and (4) special costs to the Commission.

- [4] This hearing concerns two applications brought by each of the Respondents (collectively, the "Applications"). In the first application (the "Constitutional Challenge"), the Respondents challenge the constitutionality of s. 144(2) of the Securities Act and certain provisions of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR]. In the second application (the "Stinchcombe Application"), the Respondents seek Stinchcombe-like disclosure, or alternatively, a remedy under s. 24 of the Charter of Rights and Freedoms [Charter].
- [5] The Commission opposes all of the relief sought, and seeks special costs of these applications as part of this contempt proceeding.
- [6] For the reasons that follow, both the Constitutional Challenge and Stinchcombe Application, are dismissed.

II. Legal Framework

- [7] Section 142(1) of the Securities Act empowers the Commission to appoint a person to make an investigation the Commission considers expedient: (a) for the administration of the Securities Act; (b) to assist in the administration of the securities or derivatives laws of another jurisdiction; (c) in respect of matters relating to trading in securities or derivatives in B.C.; or (d) in respect of matters in BC relating to trading in securities or derivatives in another jurisdiction. Section 142(2) requires the Commission to specify the matter to be investigated.
- [8] Under s. 143(1) of the Securities Act, an investigator appointed under s. 142 is given broad powers to investigate, inquire into, inspect and examine, the affairs, records, transactions, or property of the person who is the subject of the investigation (the "subject"). Sections 143(1)(e) and (f) also authorize the investigator to explore the relationship between the subject and any other person, arising from a broad range of interactions.
- [9] Sections 144(1) and (2) of the Securities Act provide as follows:
 - 144 (1) An investigator appointed under section 142 has the same power
 - (a) to summon and enforce the attendance of witnesses,
 - (b) to compel witnesses to give evidence on oath or in any other manner,
 - (b.1) to compel witnesses to preserve records and things or classes of records and things, and
 - (c) to compel witnesses to provide information or to produce records and things and classes of records and things
 - as the Supreme Court has for the trial of civil actions.
 - (2) The failure or refusal of a witness
 - (a) to attend,
 - (b) to take an oath,

(c) to answer questions,

(c.1) to preserve records and things or classes of records and things in the custody, possession or control of the witness, or

(d) to provide information or to produce the records and things or classes of records and things in the custody, possession or control of the witness

makes the witness, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

[10] For ease of reference, I have referred to the offending conduct itemized under ss. 144(2)(a) to (d), as the refusal of a witness to comply with the summons.

III. Background

[11] On October 10, 2018, the Commission issued an Investigation Order ("IO") pursuant to s. 142 of the Securities Act, appointing staff of the Enforcement Division of the Commission to investigate various issues between two sets of parties - the "Trading Subjects" and the "Issuer Subjects" (collectively, the "Subjects"). An amended IO was issued on January 22, 2019.

[12] The Subjects (who are not the Witnesses) made various applications before the Commission and the BC Court of Appeal. In 2020, the BCCA issued a sealing order of the appeal file. The was from a decision of the Commission, and the IOs form part of the sealed file.

[13] On October 1, 2020, Alicia Smith, an investigator with the Enforcement Division (the "Investigator"), issued a Summons under s. 144 of the Securities Act, to Ranvir Brar and Harjit Gahunia (the "First Summons").^[1] The First Summons required the Witnesses to attend by video conference on December 2, 2020, and November 30, 2020, respectively, for separate interviews with an investigator (the "Interviews").

[14] Counsel for the Witnesses contacted the Commission days before the Interviews, asking that they be re-scheduled. The Commission agreed, and the Interviews were re-set for the week of December 14, 2020. Shortly before the second set of interview dates, the Witnesses wrote to the Investigator asking that the Interviews be moved into the New Year. The Commission did not accede to this request, and instead obtained a certificate of non-attendance for the Witnesses' failure to attend before the Investigator.

[15] A few days after obtaining the certificates of non-attendance, the Commission issued a second Summons to Mr. Brar and Mr. Gahunia, requiring their attendance for interviews by Zoom in January 2021. The Witnesses also did not attend these Interviews.

- [16] In late January 2021, the Witnesses retained Mr. Magaril to represent them in these matters. In communications exchanged by the parties between February 2021 and April 2021, Mr. Magaril argued that the Summons were void ab initio, and the Commission did not have the power to compel the Witnesses to attend for an interview via Zoom. Counsel for the Commission disagreed.
- [17] The matter remained at an impasse until June 2021, when the Commission filed these Contempt Petitions on June 29.
- [18] In August 2021, the Commission filed an application seeking directions on a sealing order in this file. The Respondents filed their own applications, seeking amongst other things, anonymization of these proceedings, sealing orders, and a ban on publication (the "Contempt Petition Anonymization Applications").
- [19] The parties were unable to have their matters heard in full, due to a lack of judicial resources. Consequently, the parties and counsel for the Subjects consented to an order sealing Affidavit #1 of Alisa Smith, made June 29, 2021 ("Smith Affidavit #1"). The Smith Affidavit #1 was filed in support of these Contempt Petitions, and appended the IO's. It is important to note here that while the Respondents object to the Smith Affidavit #1 being used for the purposes of the underlying Contempt Petitions, they do not object to it being used for the purposes of the Applications.
- [20] The Respondents filed "barebones" petition responses on September 15, 2021, in which they challenged the Summons on constitutional grounds. They plead a blanket denial of all allegations of fact made against them, stating that they would not file a fulsome and complete petition response until the constitutionality of the impugned provisions had been determined by the court.
- [21] The Respondents filed the Constitutional Challenge on September 16, 2021. The matter was set for hearing on October 4, 2021, but this date was adjourned at the request of the Attorney General of BC. The matter was later set to for two days in July 2022.
- [22] The Respondents each filed a revised Constitutional Challenge on June 24, 2022. The parties agreed that there was not enough time at the July 2022 hearing to deal with all of the outstanding applications, and that the hearing would only proceed on some of the issues.
- [23] On July 12, 2022, Mr. Brar, Mr. Gahunia, and Mr. Pawar (the "JR Petitioners"), filed a petition (the "JR Petition") seeking judicial review of the decision of the Commission to issue the Summons under s. 144 of the Securities Act. [2] The JR Petition was brought under the Judicial Review Procedure Act, RSBC 1996, c. 241 [JRPA], and was commenced anonymously under Practice Directive PD-61. In an application filed along with the JR Petition, the JR Petitioners sought anonymization orders, a publication ban, and a sealing order (the "JR Anonymization Application").

[24] The JR Anonymization Application was heard by Justice Veenstra on August 31, 2022. Justice Veenstra dismissed the application on September 2, 2022, on the grounds that the JR Petitioners had not met the standard required to justify an order restricting court openness: *Brar v. British Columbia (Securities Commission)*, 2022 BCSC 1712 ("Brar #1") at para. 30. Following Justice Veenstra's decision, the parties appear to have abandoned the Contempt Petition Anonymization Applications.

[25] Three additional applications were filed in the JR Petition proceeding:

- a) On August 29, 2022, the JR Petitioners filed an application seeking disclosure of the Commission's file material relating to the decision that was being challenged in the JR Petition (the "JR Disclosure Application");
- b) On September 2, 2022, the Commission filed an application to strike the JR Petition in its entirety under Rule 9-5(1) (the "Application to Strike the JR"), on the grounds that the JR Petition proceeding was expressly barred by s. 170 of the Securities Act; and
- c) On the same date (i.e. September 2, 2022), the JR Petitioners filed an application challenging the constitutionality of s. 170 of the Securities Act (the "Section 170 Constitutional Challenge").

(collectively the "JR Applications")

[26] Also on September 2, 2022, the Respondents filed the Stinchcombe Application in the within proceeding.

[27] Justice Murray heard all of the JR Applications. Her Reasons for Judgment were issued on October 4, 2022, and are indexed as 2022 BCSC 1726 ("Brar #2").[3] Justice Murray granted the Commission's Application to Strike the JR. The JR Petition was struck in its entirety, without leave to amend. Justice Murray also dismissed the remaining two applications brought by the JR Petitioners, namely the Section 170 Constitutional Challenge application, and the Disclosure Application.

[28] Justice Murray's decision is currently under appeal (the "JR Appeal").[4] As of the date of this hearing, no hearing date had been set for the JR Appeal.

[29] This hearing relates to the Stinchcombe Application and the Constitutional Challenge.

IV. Preliminary Issue

[30] A preliminary issue arises as to whether this Court should refrain from issuing Reasons for Judgment on the Applications, pending the determination of the JR Appeal.

[31] There is no suggestion that the Court of Appeal's ruling on the JR Appeal will be dispositive of the Applications. However, the factual underpinnings in the Contempt Petitions and the JR Petition are the same, and there is some cross-over in the legal arguments advanced, particularly in relation to the Constitutional Challenge.

- [32] Both parties submit that the issues raised in the JR Appeal are legally distinct from the matters before me. Consequently, they urge me to issue these Reasons for Judgment without waiting for the JR Appeal to be heard.
- [33] I agree with the parties that the issues raised in the Constitutional Challenge and Stinchcombe Application are discrete from the matters addressed by Justice Murray. They can be determined without the benefit of the Court of Appeal's ruling on the JR Appeal.
- [34] Section 170 of the Securities Act is a privative clause which grants the Commission and others immunity from judicial review for any action done in good faith under the Securities Act. Section 170 is not implicated in the matter before me, except indirectly. The Constitutional Challenge focuses on s. 144(2) of the Securities Act, and certain provisions of the SCCR dealing with petitions and proceedings in chambers.
- [35] Similarly, the Disclosure Application under consideration by Justice Murray was brought under s. 17 of the JRPA. Section 17 of the JRPA is not implicated in the Stinchcombe Application.
- [36] I turn now to the issues before me. As a general comment, the parties should know that is not possible within the scope of these Reasons, to address the myriad of issues raised by their counsel in both the written and oral submissions. Suffice it to say that I have carefully considered all of the submissions made, as well as the materials filed or relied on by counsel, in arriving at my Reasons.

V. Constitutional Challenge

- [37] There are two aspects to the Constitutional Challenge. The first involves s. 144(2) of the Securities Act, and centers on the penal liability for contempt that attaches to the exercise of an investigator's statutory powers, and the mechanism by which such liability is imposed. The second argument relates to the SCCR dealing with petitions and chambers proceedings.
- [38] I begin first with the challenge to s. 144(2) of the Securities Act.

A. Constitutionality of Section 144(2) of the Securities Act

- [39] The Respondents argue that s. 144(2) is unconstitutional because it offends s. 96 of the Constitution Act, 1867 [Constitution], and ss. 7 and 11(d) of the Charter. They also argue that s. 144(2) conflicts with s. 9 of the Criminal Code, R.S.C. c. C-46 [Criminal Code] and to that extent, it is inoperable.
- [40] The Respondents seek the following relief:
- a) A declaration that s. 144(2) of the Securities Act is unconstitutional and of no force and effect; and/or
 - b) A declaration that s. 144(2) is inoperative to the extent that it conflicts with s. 9 of the Criminal Code.

[41] In *T.L. v. British Columbia (Attorney General)*, 2023 BCCA 167, the Court of Appeal noted that the "first step" in assessing the constitutionality of legislation is interpretation: at para. 100, citing *Bracken v. Niagara Parks Police*, 2018 ONCA 261 at para. 18, and *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6 at para. 19.

[42] In *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, Justice Iacobucci discussed the appropriate approach to statutory interpretation. At para. 26, he quoted the following "definitive" formulation from Elmer Driedger's book, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87:

Today there is only one principle or approach, namely, 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.

[43] I have applied these principles when considering the constitutionality of the legislative provisions in question.

1. Does S. 144(2) Violate s. 96 of the Constitution?

[44] The Respondents argue that s. 144(2) runs afoul of the Constitution because it violates the principles of judicial independence and safeguarding the superior courts' core jurisdiction, as required by s. 96 of the Constitution.

[45] Section 96 of the Constitution stipulates that:

The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

[46] Section 96 gives exclusive authority to the federal government to appoint judges to the superior, district and county courts (collectively referred to as the "superior courts"). The provision has been interpreted by the Supreme Court of Canada as protecting judicial independence and guaranteeing the core jurisdiction of the superior courts: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2021 BCSC 348 at para 80 ("Trial Lawyers BCSC"); reversed on other grounds 2022 BCCA 163 ("Trial Lawyers BCCA").

[47] As Chief Justice Hinkson noted, s. 96 has also been used to "delineate the boundaries of jurisdiction between the superior courts and provincially created inferior courts and administrative tribunals": *Trial Lawyers BCSC* at para 80.

[48] Section 92 of the Constitution grants the provincial legislature exclusive power in relation to various enumerated subjects, including the following:

92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

13. Property and Civil Rights in the Province.
 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
 15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
- [49] By virtue of s. 96, the provinces cannot confer the powers of a superior court to a provincial tribunal: Reference Re Residential Tenancies Act 1979, [1981] 1 SCR 714 at 728 ("Residential Tenancies").
- [50] Section 144 of the Securities Act relates to the investigator's power to compel evidence. Section 144(1) specifically grants the investigator the same power that the Supreme Court has for the trial of civil actions, to: (a) summon and enforce the attendance of witnesses; (b) compel witnesses to give evidence on oath or in any other manner; (c) compel witnesses to preserve records and things; and (d) compel witnesses to provide information or to produce records and things.
- [51] Section 144(2) is the enforcement aspect of the provision. It permits the Commission to apply to the Supreme Court and seek liability for contempt, where the witness refuses to comply with a demand made under s. 144(1).
- [52] The Respondents argue that s. 144(2) of the Securities Act offends s. 96 of the Constitution, as it has the effect of constituting a tribunal as a s. 96 court. Their argument is articulated as follows:[5]
5. Subsection 144(1) of the Securities Act confers the "same power as the Supreme Court has for the trial of civil actions" on an investigator to, inter alia, summon and enforce the attendance of witnesses and to compel witnesses to give evidence on oath or in any other manner.
 6. Subsection 144(2) provides that "failure", "makes the witness, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court". Notwithstanding the procedural requirement that there be an application to the Supreme Court, the combined effect of the subsections is to confer both the ex facie and in facie contempt powers of a court on the investigator, in light of the provision's clear language that it is the order of the investigator on which the contempt is founded.
 7. The effective conferral of a court's powers of contempt on the investigator offends s. 96 of the Constitution under the three-part test set out in [the Residential Tenancies case], which holds that a provincial legislature cannot confer the powers of a court of inherent jurisdiction on a court-like entity other than within certain specified bounds.

- [53] It is important to note that in bringing the Constitutional Challenge, the Respondents acknowledge that the constitutionality of s. 144(1) has been considered and settled by various courts, including by the Supreme Court of Canada in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 ("Branch SCC"), and *Beaudette v. Alberta (Securities Commission)*, 2016 ABCA 9.
- [54] Rather than challenging the constitutionality of s. 144(1), they have framed the Constitutional Challenge as an attack "on the liability for contempt that attaches to the exercise of this expressly 'court-like' grant of powers" under s. 144(2).[6] However, as will be seen later, this is largely an exercise in semantics. Though the Respondents frame their application as a challenge to s. 144(2), it is clear from the arguments advanced by the Respondents, that their real concern is with the issuance of the summons under s. 144(1). For example, they take issue with what they say is a lack of judicial oversight in the decision to issue a summons; lack of transparency in the reasons which are given for why the summons was issued; the concern that they are being summoned to determine if they have committed an offence, or for some other collateral purpose; and the absence of published rules to challenge the validity of the issuance of the summons.
- [55] The parties agree that the framework established in the Residential Tenancies case (the "Residential Tenancies test") should be used to determine the constitutionality of s. 144(2). That framework requires the court to address the following questions:
- a) Does the power conferred, "broadly conform" to a power or jurisdiction exercised by a superior, district or county court at the time of Confederation?
 - b) If so, is it a judicial power?
 - c) If so, is the power either subsidiary or ancillary to a predominantly administrative function or necessarily incidental to such a function?
- [56] If the Residential Tenancies test is met, a second "core jurisdiction" test applies: Reference re Code of Civil Procedure (Que.) art. 35, 2021 SCC 27 ("Article 35 Reference").
- [57] In *Trial Lawyers BCCA*, the Court discussed the burden of proof within the context of the Residential Tenancies test:
- [43] The burden throughout is on the plaintiff impugning the grant of jurisdiction. If the plaintiff fails to demonstrate that the jurisdiction was dominated by superior courts at confederation, or that the jurisdiction is exercised in the context of a judicial function, or that the jurisdiction is not subsidiary or ancillary to an administrative function or necessarily incidental to the achievement of a broader policy goal, the challenge will fail. This is so even though second and third steps of the Residential Tenancies test are sometimes referred to as an opportunity to "save" or "validate" the grant.

[citations omitted.]

[58] As such, the burden of proof in this case lies with the Respondents.

a) Step One: Does the Power Broadly Conform to Power Exercised by Superior Court?

[59] The first step requires the court to consider whether the power conferred in s. 144(2) of the Securities Act, broadly conforms to a power or jurisdiction exercised by the superior courts at the time of Confederation. In my view, it does not.

[60] The Respondents argue that s. 144(2) offends step one of the Residential Tenancies test because of what it empowers the investigator to do, and the impact of the summons itself.

[61] I will first consider the impact of the summons.

[62] There is no dispute that the provision in s. 144(2) which "makes the witness, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court", elevates the summons to the level of a Supreme Court order. However, pursuant to s. 92 of the Constitution, it is fully within the purview of the province to enact such a provision.

[63] It is well settled that the provinces have the jurisdiction to enact legislation to regulate securities. This power is derived from s. 92(13) of the Constitution, which gives each province jurisdiction over property and civil rights in that province: Reference re Securities Act, 2011 SCC 66 at paras. 41, 43 ("Securities Act Reference"). Each province and territory (including British Columbia) has established its own securities regime under provincial law. This includes the creation of a regulatory agency that is charged with enforcement of the provincial securities laws.

[64] Section 92(15) of the Constitution expressly grants provincial legislatures the power to impose "Punishment by Fine, Penalty or Imprisonment" to enforce valid provincial statutes. In keeping with that power, provincial and superior courts adjudicating violations of the Securities Act, may impose penalties of imprisonment. See for example, R. v. Nielsen, 2017 BCPC 293, at paras. 34-37.

[65] In *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 SCR 901, 1992 CanLII 99 (S.C.C.) ("*United Nurses*"), the Court heard an appeal of a finding of criminal contempt against a union which was held to have breached directives forbidding the strike. The directives were made by the Labour Relations Board and filed with the Court of Queen's Bench. The Alberta Court of Appeal dismissed the appeal, and the matter was taken to the SCC.

[66] I pause here to note that the contempt alleged by the Commission in this case is civil, rather than criminal contempt, as was the case in *United Nurses*. However, in this case, nothing turns on the distinction between criminal contempt and civil contempt.

- [67] One of the issues before the Court in *United Nurses* was whether a directive of a provincial board filed in court could give rise to criminal contempt. Section 142(7) of the *Alberta Labour Relations Act*, R.S.A. 1980, c. L-1.1, stipulated that if any directive made by the Board "pursuant to subsection (5) or (6) is not complied with, the Board may file a copy of the directive with the clerk of the Court in the judicial district in which the complaint arose and thereupon the directive is enforceable as a judgment or order of the Court".
- [68] Similar to the Respondents in this case, the union in *United Nurses* argued that s. 142(7) violates s. 96 of the Constitution because it constitutes the exercise by a provincial board, of powers which only a s. 96 judge can exercise: *United Nurses* at 934. The SCC held that a statutory provision that provides that an order of an administrative body may be enforced as if it were an order of the court does not offend s. 96 of the Constitution. Rather than conferring s. 96 jurisdiction on a tribunal, such a provision expands the power of the s. 96 court. The SCC provided the following reasoning at 934-936:

This type of sharing arrangement is very common. A plethora of legal decisions in our society are made by inferior tribunals, both provincial and federal. Often the legislation provides that they may be registered with a s. 96 court for purposes of enforcement. Sometimes the legislation gives the court the discretion to decline to enforce the order. Sometimes, as here, it does not.

The evil suggested is that s. 142(7) of the *Labour Relations Act* takes away some of the power of federally appointed judges by permitting an inferior tribunal to determine an important element of the offence. The tribunal makes an order prohibiting certain conduct (in this case strike action). That order is then registered in the court. A motion for contempt of court is brought on the ground the order has been violated. The s. 96 judge, barring proceedings for judicial review, must accept the tribunal's order as valid. It remains for the judge to determine whether the Crown has established beyond a reasonable doubt that the accused has breached the directive in a way that amounts to public defiance of the authority of the court and if so, to determine the sentence.

Viewed thus, the question is whether the inability of the judge to inquire into the validity of the order on the contempt proceeding deprives the judge of a responsibility which should rest with a s. 96 court. One way of approaching the problem is to ask whether a judge entertaining a motion for contempt of an order made by a judge of the court, as opposed to an inferior tribunal, would have the power to go behind the order. It would seem not. The validity of the order is not an issue on the contempt hearing. Unless the order has been set aside for want of jurisdiction, the judge hearing the motion on criminal contempt must accept it as valid. While the defence in such case could move to have the order set aside on jurisdictional grounds, the defence on a trial involving an order of an inferior tribunal could make the equivalent motion for judicial review of the order of an administrative tribunal. This suggests that s. 142 takes nothing away from the superior court judge.

The union's suggestion that s. 142(7) might insulate the decision of the inferior tribunal from review does not withstand scrutiny. It is true that a directive made without jurisdiction could be registered in the court and a motion for contempt made on the basis of the unrectified order. But this would not insulate the board which made the order from review. In *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, this Court held that a legislature could not insulate the decisions of a provincial tribunal from judicial review, with the result that an affected party can always challenge the directive of the board directly on jurisdictional grounds. I note that the judge hearing the motion for contempt can decline to deal with the matter until the review proceedings are completed, thereby avoiding the danger of a finding of criminal contempt based on an invalid order. In this case, the judge refused the motion to adjourn pending judicial review of the Board's order, but nothing was made of this on appeal.

Another way of looking at the matter is to ask whether s. 142(7) offends because it permits a superior court to enforce orders other than its own. In a sense, the superior court is not merely enforcing the order of the tribunal; it is also finding a criminal offence to have been made out. But accepting that it is merely enforcing the tribunal order, this amounts not to a diminution of the superior court's powers, but rather a grant to it of additional powers. Nor is anything taken from the inferior tribunal which does not have the power of enforcement by contempt.

- [69] The above reasoning has direct application to the facts of this case, and in my view, *United Nurses* is a complete answer to this aspect of the Respondents' argument. In coming to this conclusion, I have considered the Respondents' argument that they are left without the redress contemplated by the SCC, because Justice Murray held that the privative clause contained at s. 170 of the Securities Act, is a "complete bar to the petition".
- [70] While the privative clause may narrow the available grounds upon which a judicial review of the Commission's decision can be brought, it does not prevent a party from seeking judicial review of the decision to issue a summons. As noted by Justice Murray, the privative clause permits judicial review on the grounds of bad faith. In this case, the Respondents had failed to establish any grounds on which a finding of bad faith could be made out: *Brar #2* at paras. 15-17.
- [71] Further, while the court cannot go behind the summons at the hearing of contempt, it is always open to a party being summoned to apply to have the summons set aside. Indeed, Rule 12-5(39) of the SCCR, entitles a person who is served with a subpoena, to apply to the court to have it set aside "on the grounds that compliance with it is unnecessary or that it would work a hardship on the person".
- [72] For example, in *British Columbia (Securities Commission) v. Imbeault*, 1998 CanLII 1716 (B.C.S.C.) the Court dealt with a refusal by the witnesses to attend pursuant to a summons issued under s. 144(1), on the grounds that the summons was invalid. The Court held that the petition should be considered similar to a situation where a party has failed to comply with a subpoena issued by the court. In such a case, the party that issued the subpoena is entitled to apply for a warrant under Rule 40(41), or the witness is entitled to apply to have it

set aside under Rule 40(42):[7] Imbeault at para. 12.

- [73] The policy argument raised by the Respondents is also without merit. They argue that the legislature should not enact that the breach of a tribunal order and court order are subject to the same consequences. In considering that very argument, the SCC in *United Nurses* noted that the power of the legislature to enact the provision "cannot be questioned; legislatures routinely make changes in the law which empower or require federally appointed judges to impose certain remedies": at 939.
- [74] The Respondents' reliance on the minority opinion in *United Nurses* is also misguided. While the reasons of the minority may be useful in understanding an issue, I am bound to follow the decision of the majority.
- [75] I turn now to the scope of the powers of the investigator under s. 144(2).
- [76] It is important to note that s. 144(2) expressly reserves the finding of contempt, and any punishment for contempt, to the Supreme Court. Section 144(2) entitles the investigator to seek a finding of contempt on the failure of the witness to comply with the summons. It does not grant the investigator the power to make a finding of contempt. Nor does s. 144(2) mandate that the court make a finding of contempt. Rather, it remains fully within the discretion of the Supreme Court to determine if the contempt has been made out, even in the face of non-compliance with the summons.
- [77] Indeed, in *British Columbia (Securities Commission) v. Branch* (1990), 43 BCLR (2d) 286, 1990 CanLII 996 (B.C.S.C.) ("*Branch BCSC*"), Justice Wood declined to make a finding of contempt, and instead ordered the respondents to attend for interviews and produce documents and other things required of them: *Branch BCSC* at 44.
- [78] *Branch SCC* "involved a constitutional challenge to the same testimonial and documentary compulsion provided in s. 144(1) of the Securities Act": *Tak v. British Columbia (Securities Commission)*, 2023 BCCA 76 at para. 19.
- [79] The statute under consideration in *Branch* was the Securities Act, S.B.C. 1985, c. 83 [Old Securities Act].
- [80] Section 128(1) of the Old Securities Act provided as follows:
128. (1) An investigator appointed under section 126 or 131 has the same power
- (a) to summon and enforce the attendance of witnesses,
 - (b) to compel witnesses to give evidence on oath or in any other manner, and
 - (c) to compel witnesses to produce records and things
- as the Supreme Court has for the trial of civil actions, and the failure or refusal of a witness
- (d) to attend;

- (e) to take an oath;
- (f) to answer questions, or
- (g) to produce the records and things or classes of records and things in the custody, possession or control of the witness

makes the witness, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

- [81] The combined wording of ss. 144(1) and (2) of the Securities Act, is substantively similar to the wording of s. 128(1) of the Old Securities Act. The key difference in the provisions is this: whereas s. 128(1) included both the power to compel evidence and the power to seek a finding of contempt on application to the Supreme Court, these two processes have been divided into separate subsections in s. 144 of the Securities Act.
- [82] The facts in Branch BCSC are remarkably similar to the facts of this case. As in this case, the Commission in Branch BCSC petitioned the BC Supreme Court for an order committing the witnesses in contempt. The witnesses were the directors of a company listed on the Vancouver Stock Exchange, which was being investigated by the Commission. The Commission issued summonses requiring the witnesses to attend for examination, and to produce information and records in relation to the company. The witnesses refused to comply with the summons, on the grounds that the summonses were preliminary steps to criminal or quasi-criminal charges being brought against them.
- [83] At the petition hearing, the witnesses asked the Court for a declaration that s. 128(1) of the Old Securities Act was unconstitutional, as it violated ss. 7, 8, 9, and 15(1) of the Charter. Justice Wood dismissed the application for a declaration, and ordered the witnesses to comply with the summons, or in default, to show cause or be held in contempt. The matter was appealed to the BC Court of Appeal, which upheld Justice Wood's decision: *British Columbia (Securities Commission) v. Branch* (1992), 63 BCLR (2d) 331, 1992 CanLII 380 (B.C.C.A.). A further appeal was dismissed by the Supreme Court of Canada.
- [84] Branch SCC was heard at the same time as three other appeals which involved proceedings commenced under the Criminal Code: *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, 1995 CanLII 121 (S.C.C.); *R. v. Primeau*, [1995] 2 S.C.R. 60, 1995 CanLII 143 (S.C.C.); and *R. v. Jobin*, [1995] 2 S.C.R. 78, 1995 CanLII 144 (S.C.C.). Unlike those other appeals, Branch SCC dealt with witness compellability outside of the criminal justice system. Specifically, Branch SCC raised the question of "whether individuals who might subsequently be charged with a criminal or quasi-criminal offence can be compelled to give evidence and produce documents": Branch SCC at para. 1.
- [85] The Court noted in Branch SCC that an investigator acting under s. 128(1) by issuing a summons, is carrying out a valid investigative power that is intra vires the province: at paras. 34-35.

- [86] Branch SCC was applied by the BC Court of Appeal in *British Columbia (Securities Commission) v. Wiebe*, 2000 BCCA 89 ("Wiebe"). Justice Southin, writing for the Court, noted that the contempt provisions at issue in s. 144(2) were not common law contempt, but rather "statutory contempt which is within the jurisdiction of the legislature of British Columbia to enact": *Wiebe* at para. 6. In allowing the appeal and setting aside the order of the chambers judge, the BCCA noted that the case was "wholly governed" by the Branch SCC decision: *Wiebe* at para. 10.
- [87] I come to the same conclusion in this case.
- [88] In my view, the legislators have clearly delineated in s. 144(2), between the powers of the investigator to seek a finding of contempt, and the powers of the BC Supreme Court to make a finding of contempt. Thus, it cannot be said that the power of the investigator as contained in s. 144(2), "broadly conforms" to a power or jurisdiction exercised by the superior courts.
- [89] The applicants have failed to meet the first part of the Residential Tenancies test. Consequently, the application seeking a finding that s. 144(2) violates s. 96 of the Constitution, must fail.
- b) Step Two: Is it a Judicial Power?
- [90] Though the Witnesses have not met the first step of the Residential Tenancies test, for the sake of completeness I will consider the second and third steps.
- [91] Step two requires the Court to consider the "nature of the question" that the tribunal has been asked to decide, in order to determine whether the power that is exercised by the tribunal, is "judicial". For the reasons that follow, I conclude that this application also fails to meet the second step of the Residential Tenancies test.
- [92] In *Residential Tenancies* at 735, the SCC explained what is meant by the exercise of "judicial" power:

Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a 'judicial capacity'.

- [93] In the case of s. 144(2), the investigator is not adjudicating a dispute between private parties. The authority granted by this provision to the Commission investigator, is restricted to bringing an application in Supreme Court seeking a finding of contempt. Section 144(2) recognizes and relies on the exclusive inherent jurisdiction of the superior court to make an order in contempt "on application" by the Commission. There is no judicial function being exercised by the investigator when bringing or deciding to bring, an application under s. 144(2).

[94] As noted elsewhere, s. 144(2) does not confer any power on the Commission to make a finding of contempt. Rather, that power is left exclusively to a s. 96 court (the BC Supreme Court).

c) Step Three: Is the Power Subsidiary, Ancillary, or Necessarily Incidental?

[95] I turn now to the third step in the Residential Tenancies test. Under this part, the court is required to consider whether the power that is being exercised is either subsidiary or ancillary to a predominantly administrative function, or necessarily incidental to such a function. This is done by reviewing "the tribunal's function as a whole in order to appraise the impugned function in its entire institutional context": Residential Tenancies at 735.

[96] The goal of the securities legislation was considered by the Supreme Court of Canada in Branch SCC. The SCC noted at para. 34 that the purpose of the Securities Act was to protect our economy, which is a goal "of paramount importance". The Court held that there was a social utility for "protect[ing] the public from unscrupulous trading practices", and noted the importance of the power to conduct an investigation and to compel testimony, in furtherance of that goal: Branch SCC at para. 35.

[97] In Tak, the Court of Appeal recently relied on Branch SCC, when it affirmed the importance of receiving compelled testimony in the securities context:

[49] Here, the interests of the Commission in receiving compelled testimony are significant. Obtaining evidence to regulate the securities industry is a goal of substantial public importance. The securities market has long been recognized as an international one and effective regulation requires cooperation and reciprocal assistance between securities regulators in different jurisdictions: see Branch at para. 35; Global Securities Corp. v. British Columbia (Securities Commission), 2000 SCC 21 at paras. 27-28.

[98] In finding s. 144(1) constitutional, the Court in Branch SCC determined that the Commission's investigative powers under the Securities Act function to "legitimately" compel testimony from witnesses, and further a goal of substantial public importance, "namely, obtaining evidence to regulate the securities industry": Branch SCC at para. 35.

[99] The Court in Branch SCC went on to discuss the predominant purpose of the inquiry made through a summons:

35 Hence, the predominant purpose of the inquiry is to obtain the relevant evidence for the purpose of the instant proceedings, and not to incriminate Branch and Levitt. More specifically, there is nothing in the record at this stage to suggest that the purpose of the summonses in this case is to obtain incriminating evidence against Branch and Levitt. Both orders of the Commission and the summonses are in furtherance of the predominant purpose of the inquiry to which we refer above. The proposed testimony thus falls to be governed by the general rule applicable under the Charter, pursuant to which a witness is compelled to testify, yet receives evidentiary immunity in return: S. (R.J.), supra.

[100] The onus lies on the Respondents to show that the predominant purpose of the investigation is to find incriminating evidence against them. They have failed to do that. There is nothing in the evidence that supports a conclusion that there is an improper purpose or abuse of office on the part of the Commission either in commencing the investigation, issuing the summons, or seeking a finding of contempt for failure to comply with the summons.

[101] It is settled law that s. 144(1) is constitutional. Branch SCC has established that the dominant purpose of s. 144(1) is to ensure the effective operation of securities regulation - not to punish criminal behaviour. Section 144(2) is intimately connected to s.144(1), and must be considered together with that provision, in order to understand its purpose. Section 144(1) of the Securities Act empowers the investigator to compel evidence from a witness. The power to compel testimony is meaningless unless there is an ability to seek enforcement for failure to comply.

[102] Even if the effect of s. 144(2) was to duplicate a criminal offence enacted by Parliament (which it is not), s. 144(2) is still intra vires the province because its dominant purpose is to enforce securities regulation: *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21 at paras. 3-5 ("Global").

[103] In *Global*, the Court dealt with the same Securities Act before me, but focused on s. 141(1)(b). The issue before the Court was summarized as follows:

2 The provision challenged in this appeal, s. 141(1)(b) of the British Columbia Securities Act, R.S.B.C. 1996, c. 418, allows the Commission to require registered brokers in the province ("registrants") to produce records in their control "to assist in the administration of the securities laws of another jurisdiction". The respondent claims that this provision does not fall within the powers granted to the provinces by the Constitution Act, 1867.

[104] The Court summarized its conclusion:

3 The fundamental error in the respondent's position is that it fails to recognize that the dominant purpose, or "pith and substance", of the provision in question is the enforcement of British Columbia's securities law. This purpose clearly falls within provincial authority under s. 92(13) of the Constitution Act, 1867, over "Property and Civil Rights in the Province". The law furthers this goal in two ways. First, to regulate effectively the domestic (a term which, in these reasons, I use as a synonym for "intraprovincial") securities market, the Commission will often require access to records located outside the province, access that can most effectively be given by the securities regulator in that jurisdiction. If the Commission is to expect this co-operation from bodies like the SEC it must reciprocate, as s. 141(1)(b) enables it to do.

4 Second, s. 141(1)(b) will likely help uncover misconduct abroad by domestic registrants. The Commission is concerned with the honesty and good repute of domestic registrants. If a British Columbia registrant is violating the securities laws of another jurisdiction, this is undoubtedly relevant to the fitness of that registrant to continue trading in the province. Giving relevant information to the SEC thus helps the Commission determine the fitness of domestic registrants to trade in the province.

5 Given these two dominant purposes, the fact that the provision assists the enforcement of foreign laws is not determinative, and cannot impugn the law's validity under the Constitution Act, 1867.

[105] Furthermore, the Court in Wiebe noted that even if there was sharing of information between the statutory body and the criminal authorities, that "ancillary result" is not improper: Wiebe at para. 9.

[106] Thus, I conclude that the power granted to the Commission in s. 144(2) is ancillary to the power contained in s. 144(1). The application fails under step three of the Residential Tenancies test.

d) Step Four: Does the Grant of Power Meet the Core Jurisdiction Test?

[107] Given my conclusion that none of the elements in the Residential Tenancies test have been met, it is not necessary for me to consider the core jurisdiction test. Nevertheless, as with my discussion regarding steps two and three of Residential Tenancies, I will briefly address the issues raised on this point.

[108] The core jurisdiction test articulated in the Article 35 Reference applies where the court has found the grant of jurisdiction to be valid under the Residential Tenancies test. It requires the court to consider if the grant of decision-making jurisdiction to a Commission investigator, or the Commission generally, would constitute a transfer of essential powers or exclusive jurisdiction away from the Supreme Court: Article 35 Reference at paras. 63-68.

[109] The importance of the core jurisdiction test was explained by the SCC at para. 66 of the Article 35 Reference as follows:

. The core jurisdiction test prevents the legislature from transferring to other courts the features that are essential to the role of the superior courts as the centrepiece of the unitary justice system and the primary guardians of the rule of law, for such transfers could transform those other courts into mirrors of the superior courts.

[110] At para. 7 of the Article 35 Reference, the Court set out six non-exhaustive factors that may be considered to address the question of whether the provision offends the core jurisdiction test. These are:

- a) The scope of the jurisdiction being granted;
- b) Whether the grant is exclusive or concurrent;

- c) The monetary limits to which it is subject;
- d) Whether there are mechanisms for appealing decisions rendered in the exercise of the jurisdiction;
- e) The impact on the caseload of the Superior Court of general jurisdiction; and
- f) Whether there is an important societal objective.

- [111] In relation to the first factor (scope of the jurisdiction being granted), the Respondents specifically take issue with the power of the investigator to "determine by themselves, without a record, without a discernable legal test, and with no rights of appearance, review, or appeal, persons that should be compelled to attend an interview and be examined".[8] This is the power contained in s. 144(1) - not s. 144(2) - and has already been addressed in Branch SCC. The scope of the jurisdiction granted under s. 144(2) is limited to the right to apply to the court to seek an order for contempt.
- [112] The Respondents' argument that the court is deprived through s. 144(2) of its jurisdiction to decide whether to come to the aid of the investigator and compel the witness to attend, is also an attack on settled authority. That issue was dealt with by the SCC in *United Nurses* when it upheld the constitutionality of a statutory provision enabling the enforcement of an order of an administrative body as if it were an order of the court.
- [113] In relation to whether the grant is exclusive or concurrent, the concern raised is that only the Commission investigator can determine which witnesses to compel. Once again, this is a power which is captured by s. 144(1) and not 144(2).
- [114] The monetary limits issue (third factor) arose in the Article 35 Referendum within the context of a tribunal that could award damages; this factor is not directly relevant in this case. The Respondents ask the Court to consider as part of this factor, the financial or penal consequences that arise by virtue of s. 144(2). In that regard, the Respondents say that they could become the subject of a significant administrative penalty of up to one million dollars per contravention under s. 162(1), if they disclose any information that the investigator believes may be a violation of the Securities Act. This argument assumes that the Respondents are the subjects of the investigation. They are not. They are being summoned as witnesses. As noted in the following discussion regarding the Charter, where witnesses are compelled to testify, protections under ss. 7 and 13 of the Charter are afforded regarding the use and derivative use of their testimony: *Tak* at para. 15.
- [115] The fourth factor is the mechanism for appealing decisions. The Respondents take issue with the lack of mechanism to review the investigator's decision to issue a summons. Once again, this is a power captured in s. 144(1) and not 144(2). In relation to s. 144(2), as noted elsewhere, a witness is not left without recourse. They can challenge the issuance of the summons through judicial review on the grounds of bad faith, and on application under Rule 12-5(39) of the SCCR.

- [116] The fifth factor deals with the impact on the caseload of the superior court. In that regard, the number of reported cases dealing with statutory contempt are sparse.
- [117] The sixth and final factor relates to the societal objective achieved in the grant of jurisdiction. Bearing in mind that I have not found that a grant of jurisdiction has occurred by operation of s. 144(2), I find that there is an important societal objective to the power encapsulated in that provision. Effective regulation of the securities market is an important objective, which can be achieved through receiving compelled testimony: Tak at para. 49.
- [118] After having regard to the applicable authorities and the facts of this case, I conclude that s. 144(2) does not have the impact of creating a parallel court, and thus does not offend s. 96 of the Constitution.

2. Does S. 144(2) Violate Ss. 7 and 11(d) of the Charter?

- [119] The Respondents argue that s. 144(2) violates ss. 7 and 11(d) of the Charter, which provide:

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11 Any person charged with an offence has the right

- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

- [120] It is submitted that when s. 144(2) is considered within the context of s. 144(1), it violates ss. 7 and 11(d) of the Charter. In particular, the Respondents argue that s. 144(2) is unconstitutional because: it offends the principles of fundamental justice and judicial independence; it is vague and overbroad; and it cannot be saved under s. 1. They have articulated their position as follows:

132. Turning to the applicant's Charter argument, it bears repeating that the issue on the present application is not the general constitutional validity of the power conferred on the investigator to summon and compel witnesses, as was considered and upheld by the Supreme Court in *Branch* and the Alberta Court of Appeal in *Beaudette*. The applicants in these proceedings do not dispute the constitutionality of the powers conferred on the investigator in light of the abovementioned authorities, nor the latter's ability to, for example, seek an order for compliance under s. 157 of the Securities Act in relation to the exercise of such powers. Nor, again, is the applicant's claim founded on the broadly overlapping adjudicative and investigative roles of the Securities Commission as a body.
133. Rather, what is at issue on the present application is the constitutionality of the Act's imposition of criminal liability for contempt, upon application to a court, flowing directly from the "failure or refusal of a witness" to attend for questioning, take an oath, or answer questions by an investigator armed with the "powers of a court".

- [121] Despite the Respondents' protestations to the contrary, their arguments supporting the Charter challenge bear a striking similarity to the challenge to s. 144(1) of the Securities Act which was settled in Branch SCC.
- [122] It is beyond dispute that s. 7 is engaged in contempt proceedings, regardless of whether the contempt is civil or criminal: Branch SCC at paras. 71-72.
- [123] In Branch SCC, the Court addressed the issue of the infringement of a witness' s. 7 rights through the enactment of s. 128(1). The Court concluded that s. 128(1) did not violate the appellants' s. 7 rights, despite their liberty interests being engaged. In coming to this conclusion, the SCC noted: the predominant purpose of the investigation; the distinction between subjects of an investigation and witnesses to an investigation; and the protections afforded to witnesses through derivative use immunity: Branch SCC at paras. 35, 42 and 72.
- [124] Although the Respondents insist that Branch SCC only addresses the constitutionality of s. 144(1), I see the decision having much broader implications, particularly in relation to the constitutionality of s. 144(2). While the Court's focus was on the powers of the Commission to compel evidence under s. 128(1) of the Old Securities Act (which are captured in what is now s. 144(1)), it is clear that the SCC was alive to the contempt provision that is now set out in s. 144(2). In coming to this conclusion, I note first that the matter only came before the Court after the Commission petitioned the BC Supreme Court for an order committing the appellants in contempt: Branch SCC at para. 18. Further, the appellants argued before the SCC that there was a violation of their s. 7 rights at the "subpoena" stage because of the penal consequences that could flow from a refusal to testify.
- [125] The appellants' position was summarized by Justice L'Heureux-Dubé in her concurring reasons, as follows:
- [73] The appellants in this case argue that any proceeding under any statute which exposes a person to penal consequences and which denies that person the right to silence and the privilege against self-incrimination violates s. 7 of the Charter. They further submit that if a proceeding is designed or can be used to conscript a person against him or herself and true penal consequences can result, then the proceedings are in violation of s. 7
- [126] Justice L'Heureux-Dubé agreed that the penal liability that flowed from a failure to comply with the summons raised s. 7 rights:
- [71] In my reasons in S. (R.J.), I identified two stages at which s. 7 concerns might be addressed. The first stage is the subpoena stage (the time the witness is compelled). At this stage, the possibility of imprisonment flowing from a failure to testify is sufficient to trigger s. 7 protection.

- [127] Thus, the s. 7 rights of the witnesses are only engaged because of the penal liability that could flow from non-compliance with a summons issued under s. 144(1). This would suggest that the Court's finding in Branch SCC that s. 128(1) was constitutional and did not breach s. 7 rights, applied to the entire provision, including what is now s. 144(2). This provides a full answer to the s. 7 Charter challenge brought by the Respondents in relation to s. 144(2).
- [128] Even if the Court's ruling in Branch SCC is restricted only to what is now s. 144(1), in light of the inter-relationship between the compellability provision and the contempt provision, the same reasoning used by the Court in Branch SCC, applies to defeat a Charter challenge to s. 144(2).
- [129] Branch SCC remains good law, and was recently applied by the BCCA in *Tak*. In *Tak*, the Court heard an appeal of an order made by a chambers judge that required Mr. Tak to comply with a summons to give evidence under oath. The summons was issued under s. 144 of the Securities Act. The appellant sought an exemption from testifying, and relied on the protections afforded under ss. 7 and 13 of the Charter against self-incrimination. He argued that he was at risk of criminal prosecution in the United States, because he did not enjoy the same protections regarding the subsequent use and derivative use of his testimony (collectively referred to as the "use immunity protections"). The Court of Appeal did not agree. It noted that the United States was a rule of law democracy which had constitutional protections that were similar to our own: *Tak* at para. 53. The Court concluded that Mr. Tak had not established on a balance of probabilities, a real and substantial risk that he would be subject to criminal prosecution in the United States: *Tak* at para. 74.
- [130] In dismissing the appeal, the Court of Appeal applied the "predominant purpose" test set out in Branch SCC, which it described at para. 21 as "a more precise test requiring a determination of the predominant purpose for which the testimony is sought".
- [131] The predominant purpose test was explained in Branch SCC as follows:
- [9] . In such cases, if it is established that the predominant purpose is not to obtain the relevant evidence for the purpose of the instant proceeding, but rather to incriminate the witness, the party seeking to compel the witness must justify the potential prejudice to the right of the witness against self-incrimination. If it is shown that the only prejudice is the possible subsequent derivative use of the testimony then the compulsion to testify will occasion no prejudice for that witness. The witness will be protected against such use. Further, if the witness can show any other significant prejudice that may arise from the testimony such that his right to a fair trial will be jeopardized, then the witness should not be compellable.
- [132] The predominant purpose test was further clarified by Justice Cory in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, 1995 CanLII 86 (S.C.C.) as follows:

- [82] In *S. (R.J.) and Branch*, this Court recognized the need to strike an appropriate balance between the state's interest in obtaining the evidence for a valid public purpose and the individual's right to remain silent and to have a fair trial. To that end, a two-stage analysis has been developed to ascertain whether a witness is compellable in particular proceedings. First, the court must consider the importance to the state of obtaining compelled testimony from the witness. As noted in *Branch*, at p. 15, "the crucial question is whether the predominant purpose for seeking the evidence is to obtain incriminating evidence against the person compelled to testify or rather some legitimate public purpose." Second, even where the purpose of compelling testimony is valid, it is necessary to assess the prejudicial effect of such compulsion upon the witness.
- [133] The Court of Appeal in *Tak* referred to the above comments in *Phillips* and then went on to summarize the manner in which the predominant purpose test is to be applied:
- [29] The commentary in *Phillips* confirms an analysis that starts with a consideration of the predominant purpose and moves to the second stage only where the purpose is legitimate. It is at this second stage that the court is required to balance the prejudicial effect of compulsion on the witness against the interests of the state in receiving the compelled testimony. In my view, the prejudicial effect could include the potential absence of use and derivative use immunity in a future foreign criminal proceeding.
- [134] I turn then to the matter before me. It has already been held in *Branch SCC*, and affirmed in *Tak*, that "the Securities Act legitimately compels testimony because the legislation is concerned with the furtherance of a goal of substantial public importance - to obtain evidence to regulate the securities industry": *Tak* at para. 32. There are no facts in this case that would cause me to conclude otherwise.
- [135] I find that the predominant purpose of the summons issued to the Respondents, is to obtain relevant evidence in furtherance of the Commission's investigation of the Subjects, and not to incriminate the Respondents. Further, I find that the interests of the state in receiving the compelled testimony of the Respondents far outweighs any prejudicial effect of the compulsion on the Respondents. In coming to this conclusion, I find that the Respondents are protected by use immunity, and there are no less intrusive means available to obtain the information sought: *Branch SCC* at para. 84.
- [136] The use immunity protections that exist under Canadian law were explained in *Tak*, as follows:
- [15] Canadian law does not permit witnesses to be excused from answering questions on the ground that the answer may tend to criminate them: *Canada Evidence Act*, R.S.C., 1985, c. C-5, s. 5(1). However, where witnesses are compelled to testify, they have protections regarding the use of their testimony under ss. 7 and 13 of the Charter:

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

13 A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[16] Protection against self-incrimination is one of the principles of fundamental justice protected by s. 7 of the Charter. In addition to the "use immunity" guaranteed by s. 13 of the Charter, persons compelled to testify must also be provided with subsequent "derivative use immunity" under s. 7: *R. v. S. (R.J.)*, 1995 CanLII 121 (SCC), [1995] 1 S.C.R. 451.

[137] The Court went on to note at para. 50 that the "residual protection" against self-incrimination provided for under s. 7 of the Charter, is "context-dependent". A witness is not provided with absolute protection from all uses of information that is compelled. For example, regulators may use compelled testimony in the course of their investigation, such as under ss. 169.1(2)(b), 141(1)(b), and 142(1)(b) of the Securities Act. These provisions authorize the Commission to gather information, investigate for the purposes of assisting the administration of securities laws in other jurisdictions, and to share information with foreign regulators: *Tak* at paras. 50-51.

[138] Pursuant to *Tak*, the Respondents are protected from self-incrimination under s. 13 of the Charter (subsequent use immunity), as well as from the use of evidence derived from their compelled testimony under s. 7 of the Charter (derivative use immunity). Taken together, these provisions address the concerns raised by the Respondents about the potential impact of s. 144(2) on their Charter rights.

[139] I conclude that the Respondents have failed to show that they will suffer significant prejudice that outweighs the legitimate interest of the Commission to compel their testimony.

[140] I also dismiss the notion that s. 144(2) violates the Respondents' s. 11(d) Charter rights. Those rights are invoked when faced with criminal prosecution. In this case, any potential criminal prosecution based on their compelled testimony is speculative. There is nothing in the record which suggests that there is a real and substantial risk that this will occur: see *Tak* at para. 64.

[141] Insofar as the Respondents rely on s. 11(d) of the Charter within the context of penal liability for contempt, I dismiss the notion that judicial independence and impartiality are compromised by the contempt petition brought under s. 144(2). There is simply no basis to find that the court hearing the contempt petition acts only as a "rubber stamp", or that there is an appearance of lack of judicial independence because the court is enforcing the summons issued by an administrative tribunal as if it were an order of the Court. The SCC in *United Nurses* addresses this very issue at 934- 936 (excerpted above at para. 68).

[142] I turn now to the question of vagueness and overbreadth. Justice McLachlin (as she then was) writing for the majority in *United Nurses*, rejected the argument that the offence of criminal contempt violates s. 7 of the Charter because it is vague. She wrote as follows at 933-934:

Criminal contempt, thus defined, does not violate the Charter. It is neither vague nor arbitrary. A person can predict in advance whether his or her conduct will constitute a crime. The trial judges below had no trouble applying the right test, suggesting that the concept is capable of application without difficulty. Thus the case that the crime of contempt violates the principles of fundamental justice has not been made out. For the same reasons, violation of s. 11(a) and (g) of the Charter is not established, assuming *arguendo* that these provisions are applicable in the circumstances of the case.

[143] Applying similar reasoning, s. 144(2) clearly sets out the consequences that flow from a failure to comply with a summons issued under s. 144(1), such that the witness can "predict in advance" whether their conduct could attract penal consequences.

[144] I also reject the notion that s. 144(2) offends the "principle against overbreadth and disproportionality" because a Commission investigator is not obliged to seek a compliance order before seeking an order in contempt. This concern is raised within the context of s. 157 of the Securities Act.

[145] Section 157 gives the Commission the option to seek various orders to ensure compliance. The provision is as follows:

Order for Compliance

157 (1) In addition to any other powers it may have, if the commission considers that a person has contravened or is contravening a provision of this Act or of the regulations, or has failed to comply or is not complying with a decision, and the commission considers it in the public interest to do so, the commission may apply to the Supreme Court for one or more of the following:

- (a) an order that
 - (i) the person comply with or cease contravening the provision or decision, and
 - (ii) the directors and officers of the person cause the person to comply with or to cease contravening the provision or decision;
- (b) an order that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention;
- (c) an order setting aside a transaction relating to trading in securities or derivatives;
- (d) an order that a security or derivative be issued or cancelled;

- (e) an order that a security or derivative be purchased, disposed of or exchanged;
 - (f) an order prohibiting the voting of a security or the exercise of a right attaching to a security or derivative;
 - (g) an order appointing a director of the person that is the subject of the application;
 - (h) an order that the person repay a holder of a security or a derivative money paid by the holder for the security or derivative;
 - (i) an order that the person compensate or make restitution to any other person;
 - (j) an order that the person pay general or punitive damages to any other person;
 - (k) an order that the person correct a record;
 - (l) an order that the person rectify any contravention of this Act, or the regulations, to the extent that rectification is possible.
- (2) On an application under subsection (1), the Supreme Court may make the order applied for and any other order the court considers appropriate.
- (3) An order may be made under this section even though a penalty has already been imposed on that person in respect of the same non-compliance or contravention.

[146] Thus, s. 157 empowers the Commission to apply for a compliance order from the BC Supreme Court if it considers that a person has contravened a "provision" of the Securities Act, or has failed to comply with a "decision". In my view, s. 157 does not apply to circumstances where a witness has refused to comply with a summons. I come to this conclusion for the following reasons.

[147] First, I note that the refusal to comply with the summons is not the same as a contravention of a "provision". Having regard to the purpose of the Securities Act, and the wording and placement of s. 157, I interpret the word "provision" to mean those portions of the Securities Act which create duties and obligations aimed at regulation of the securities industry, such as s. 143.2 or s. 155.

[148] Second, I find that an investigator is not making a "decision" under s. 144(2), but rather they are exercising a power. This interpretation is supported by the Court of Appeal's decision in *Morabito v. British Columbia (Securities Commission)*, 2022 BCCA 279 at paras. 7-8, leave to appeal to SCC ref'd, 47836 (13 April, 2023).

[149] Third, I note that the compliance order that the Respondents argue should be sought prior to seeking incarceration on a finding of contempt, is already a part of the relief sought by the Commission in the Petition:

5. Such further and other relief as the court may order, including an order that the respondent attend at a date, time and location of the Commission's choosing (including on any remote platform the Commission may employ for this purpose) to give evidence under oath before an Investigator appointed by the Commission in response to the Investigation Order made October 10, 2018, and amended January 22, 2019;

[150] Fourth, the common law, which guides the court's exercise of its power to punish for contempt, has placed stringent conditions for its use. The power to punish for contempt is discretionary, and to be exercised "cautiously and with great restraint": *TG Industries Ltd. v. Williams*, 2001 NSCA 105 at para. 32. The court retains its inherent jurisdiction to impose relief aimed at compliance, such that "where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt": *Carey v. Laiken*, 2015 SCC 17 at para. 37. See for example, *Branch BCSC*; and *British Columbia Securities Commission v. Palm*, [1991] B.C.J. No. 2517, 1991 CanLII 217 (B.C.S.C.) where the Court declined to make a finding of contempt, and instead, gave the contemnor an opportunity to purge the contempt.

[151] The end result is that the "lesser" remedy that the Respondents seek via s. 157, has already been sought by the Commission in this proceeding, and is available to the court in any event.

[152] Ironically, even though the Witnesses argue that an order to comply with the summons would be an appropriate remedy (instead of a finding of contempt), they have refused to agree to an order that they attend before an investigator to give evidence.

[153] In conclusion, the Respondents have failed to establish that their s. 7 or s. 11(d) Charter rights are violated by s. 144(2) of the Securities Act.

3. Does S. 144(2) Conflict with S. 9 of the Criminal Code?

[154] Section 9 of the Criminal Code provides that:

9 Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730

- (a) of an offence at common law,
- (b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or
- (c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.

[155] Section 133 of the Offence Act, R.S.B.C. 1996, c. 338, adopts s. 9 of the Criminal Code by reference.

133 If, in any proceeding, matter or thing to which this Act applies, express provision has not been made in this Act or only partial provision has been made, the provisions of the Criminal Code relating to offences punishable on summary conviction apply, with the necessary changes and so far as applicable, as if its provisions were enacted in and formed part of this Act.

[156] Section 5 of the Offence Act is a "general offence" provision. It stipulates that:

5 A person who contravenes an enactment by doing an act that it forbids, or omitting to do an act that it requires to be done, commits an offence against the enactment.

[157] Section 158 of the Securities Act exempts the Securities Act from the application of s. 5 of the Offence Act, as follows:

158 Section 5 of the Offence Act does not apply to this Act or the regulations.

[158] Section 127 of the Criminal Code makes it an offence to disobey a lawful order made by a court of justice "or by a person or body of persons authorized by any Act to make or give the order". The provision has been interpreted to include the breach of an order of an administrative tribunal: *United Nurses* at 938.

[159] In *Quebec (Attorney General) v. Publications Photo-Police Inc.*, [1990] 1 S.C.R. 851, 1990 CanLII 94 (S.C.C.) the Court rejected the argument that s. 127(1) of the Criminal Code ousted the court's inherent power to punish for contempt of court.

[160] Contempt of court is the only remaining common law criminal offence in Canada: see *R. v. D.L.W.*, 2016 SCC 22.

[161] The power to find contempt is derived from the court's inherent jurisdiction to control its own process: see *United Nurses*; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 at paras. 15, 33, 1995 CanLII 57 (S.C.C.); and *R. v. Vermette*, [1987] 1 S.C.R. 577 at 581, 1988 CanLII 87 (S.C.C.).

[162] Superior courts may punish for contempt of court, whether it occurs in the court, or elsewhere within the court's jurisdiction: *Canadian Broadcasting Corp. v. Quebec (Police Commission)*, [1979] 2 S.C.R. 618 at 631-638, 1979 CanLII 24 (S.C.C.).

[163] Contempt of court is a legal mechanism to protect the authority of the court and the administration of justice from improper interference. It "rest[s] on the power of the court to uphold its dignity and process": *Carey* at para. 30, citing *United Nurses* at 931.

[164] The contempt power is an integral part of the rule of law and serves two objectives:

- a) to ensure that court orders are obeyed, and
- b) to promote and preserve respect for the courts in the administration of justice.

- [165] Contempt of court may be civil or criminal. The distinction lies on whether there is public defiance that accompanies the contempt: *United Nurses* at 931. The offence of criminal contempt occurs when there is an element of public defiance of the court's process in a way that is calculated to lessen societal respect for the courts. Civil contempt, on the other hand, is the non-public defiance of a court order such as the refusal to appear as required by a summons or subpoena.
- [166] Irrespective of whether contempt proceedings are brought as civil or criminal contempt, the principles of fundamental justice and Charter protections apply: *Hayes Forest Services Ltd. v. Krawczyk*, 2006 BCCA 156 at paras. 43-50.
- [167] The Respondents argue that s. 144 creates an offence through the operation of the common law of contempt. However, pursuant to s. 9 of the Criminal Code, only the common law of contempt as it existed prior to 1955 may be prosecuted. Hence, it is argued that imposition of liability for contempt flowing from the failure to obey the directive of an investigator is inoperative. In support of their argument, the Respondents once again rely on Justice Sopinka's dissenting reasons in *United Nurses*, wherein he states the following at 947:

The effect of the position contended for by the respondent and maintained by the Court of Appeal is that provincial legislation can provide that an order which remains an order of the Board can be the subject of criminal contempt proceedings. A province could thus provide that disobedience of an order of an administrative tribunal *ex facie* the tribunal is a criminal offence. Since no such offence existed nor exists at common law, this interpretation would enable the province to enact criminal law, a matter reserved to Parliament. Such an interpretation should not be adopted unless the language is incapable of a meaning that conforms to the powers of a province.

[emphasis added]

- [168] However, the majority in *United Nurses* viewed the actions of the legislature as engaging the criminal law, not creating it. The majority stated thus at 937-938:

It is also suggested that the effect of the position contended for by the respondent is to enable the province to enact criminal law, a matter reserved to Parliament. I cannot agree. The provision engages the criminal law, just as it may engage the civil contempt power, but it creates neither. It is trite to say that failure to obey an order made by a superior court pursuant to provincial law may give rise, in appropriate circumstances, to a citation for criminal contempt. In such a case we would not say that the provincial law on which the order was based is in any way criminal law even though the criminal contempt power may eventually be engaged. In the present instance, s. 142(7) of the Labour Relations Act provides a special mechanism for engaging the court process when the provincial law is administered primarily by an inferior tribunal, rather than by the courts. But the provision does not itself create the criminal (or civil) contempt power, any more than does a provincial law which is administered primarily by the courts. It simply engages the jurisdiction of the superior court (as modified by any provincial law respecting civil contempt and by any federal law regarding criminal contempt) to control the administration of justice

through civil and criminal contempt proceedings, as may be required, as well as the court's jurisdiction to lend its authority to support that of inferior courts and other bodies subject to its supervision and control.

The distinction between creating the criminal law and engaging it is illustrated by consideration of s. 127 of the Code, R.S.C., 1985, c. C-46, which makes it an offence to disobey a lawful order made by a court of justice "or by a person or body of persons authorized by any Act to make or give the order". "Act" is defined (in s. 2 of the Code) to include "an Act of the legislature of a province". This means it is always a criminal offence to breach an order of a provincial tribunal, even if that tribunal is not authorized by provincial law to file the order as an order of the court. It is clear that the province is not enacting criminal law every time it empowers a tribunal to make orders which may not be filed with the court, even though it is a criminal offence to breach such an order; rather, the province has enacted non-criminal law, which is within its sphere of competence, and Parliament, acting within its sphere, has decided to make it a criminal offence to breach this provincial law. Similarly, the province is not enacting a new criminal law each time it provides that orders of a particular tribunal are to be enforced as a court order. Such a provision is non-criminal law; it is the common law which provides that breach of such an order may, in certain circumstances, be a criminal offence.

[emphasis added]

[169] In *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065 at para. 1, 1992 CanLII 29 (S.C.C.) the Court confirmed that an offence of contempt may be created by the provincial legislature stating that an individual may be cited for contempt, even where no statutory offence exists.

[170] Having regard to the reasoning of the Court in *United Nurses* and other authorities, I am satisfied that s. 144(2) does not conflict with s. 9 of the Criminal Code. The provision recognizes the inherent jurisdiction of the Supreme Court to impose punishment for contempt, and engages the court's power to ensure that protection and promotion of the administration of justice.

B. Constitutionality of Petition and Chambers Rules

[171] The Respondents say that Rule 16-1(4)-(7) and (19), and Rule 22-1(4), are unconstitutional as they relate to contempt proceedings. It is submitted that these provisions violate, amongst other things, ss. 7 and 11(d) of the Charter in relation to trial fairness, the right to make full answer and defence, and the right to silence.

[172] Consequently, they ask that the offending provisions be declared to be of no force and effect to the extent that they violate the Respondents' Charter rights; or that they be read down to address the Charter concerns.

1. Petition Rule

[173] The impugned portions of Rule 16-1 (the "Petition Rule") are set out below:

Response to petition

- (4) A person who has been served with a copy of a filed petition under subrule (3) of this rule must, if the person wishes to receive notice of the time and date of the hearing of the petition, do the following:
 - (a) file a response to petition in accordance with subrule (5);
 - (b) file, with the response to petition, all affidavits that have not already been filed and on which the person intends to rely at the hearing of the petition;

Contents of response to petition

- (5) A response to petition must be in Form 67 and must
 - (a) indicate, for each order sought, whether the petition respondent consents to, opposes or takes no position on the order, and
 - (b) if the petition respondent wishes to oppose any of the relief sought in the petition,
 - (i) briefly summarize the factual and legal bases on which the orders sought should not be granted,
 - (ii) list the affidavits and other documents on which the petition respondent intends to rely at the hearing of the petition, and
 - (iii) set out the petition respondent's estimate of the time the petition will take for hearing.

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Petitioner may respond

- (6) A petitioner may file affidavits in response to any document served on the petitioner under subrule (4) (c) and, in that event, must serve copies of those filed responding affidavits on each petition respondent no later than the date on which the notice of hearing is served on that petition respondent under subrule (8) (b).

No additional affidavits

- (7) Unless all parties of record consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (3), (4) and (6).

Amendment of petition or response to petition

- (19) A party may amend a petition or response to petition filed by the party
 - (a) at any time with leave of the court, and

- (b) subject to Rules 6-2 (7) and (10) and 7-7 (5),
 - (i) once without leave of the court, at any time before service of the notice of hearing, and
 - (ii) at any time with the written consent of all the parties,
- and for that purpose Rule 6-1 (2) to (7) applies.

[174] The Respondents argue that the Petition Rule gives the Commission a carte blanche right to amend the petition materials and to cure defects prior to issuance of the Notice of Hearing. This means that the petitioner has the right to see the defence prior to opening of the case, and they can fix defects in their case without it resulting in a dismissal. It is alleged that the Petition Rule violates trial fairness, right to full answer and defence, and s.11(d) Charter rights.

[175] Consequently, the Respondents seek the following relief in relation to the Petition Rule:

- a) A declaration that in respect of contempt proceedings, SCCR 16-1(4)-(7) and 16-1(19), are unconstitutional, to wit:
 - i. Rules 16-1(4) and (5) are of no force and effect to the extent they require the petition respondent to file a substantive response to the petition, or otherwise file affidavit evidence that they anticipate adducing;
 - ii. Rules 16-1(6) and 16-1(19) are of no force and effect to the extent that they allow the Petitioner to have an automatic right to adduce responding evidence or to amend the Petition; and
 - iii. Rule 16-1 (7) is of no force and effect to the extent that it prohibits the Petition Respondent from serving further affidavit material after a Notice of Hearing is filed, without consent of the other parties, or leave of the court.

[176] I find the concerns advanced by the Respondents are wholly speculative. There is no evidence that the Petitioner in this case had in fact amended their materials prior to issuance of the Notice of Hearing in a manner that violated the Respondents' Charter rights. Nor was Counsel for the Respondent able to provide any case in which the concern raised had actually transpired.

[177] Further, Rule 16-1(19) specifically entitles both a petitioner and a respondent to amend their pleading in the same manner. Even if a petitioner was to amend their petition immediately prior to the service of the notice of hearing, a respondent could seek leave of the court to file an amended response in order to address issues of trial fairness and the right to full answer and defence.

[178] There are adequate safeguards in the SCCR to ensure that the concerns of trial fairness and right to full answer and defence are respected.

[179] Rule 1-3 of the SCCR discusses the purpose of the Rules and the need for proportionality:

Rule 1-3 -- Object of Rules

Object

- (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

Proportionality

- (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
- (a) the amount involved in the proceeding,
 - (b) the importance of the issues in dispute, and
 - (c) the complexity of the proceeding.

[180] Building on these principles, Rule 16-1(18) permits the court in a petition proceeding, to, on its own motion, import any other Rules that will assist in doing justice between the parties and properly control the process. The provision is worded as follows:

Powers of court

- (18) Without limiting the court's right under Rule 22-1 (7) (d) to transfer the proceeding referred to in this rule to the trial list, the court may, whether or not on the application of a party, apply any other of these Supreme Court Civil Rules to a proceeding referred to in this rule.

[181] The flexibility and wide latitude for the exercise of judicial discretion, which is built into the SCCR, is further reinforced through the jurisprudence. It is a well-established principle of common law that the court has "inherent jurisdiction to do all that is necessary to do justice between the parties": *British Columbia (Director of Civil Forfeiture) v. Doe*, 2010 BCSC 940 at para. 21.

[182] In *Wong v. Wong*, 2006 BCCA 540, Chief Justice Finch articulated it thus:

[23] It is trite law that the Rules of Court are made to promote justice, and that they should be interpreted in a manner most likely to do justice between the parties. The rules are the servants, and not the masters of the court

[emphasis added]

[183] Given the object of the Rules, the need for proportionality, the wide discretion granted to the court and its inherent jurisdiction, I see no merit in the Respondents' argument that the Petition Rules act in a manner to offend the Respondents' rights. In my view, there are sufficient safeguards in the Rules to address the concerns raised by the Respondents, and to ensure that there is no violation of their Charter rights, or trial fairness, the right to make full answer and defence, and the right to silence.

[184] The challenge to the constitutionality of Rule 16-1(4)-(7) and (19), is dismissed.

2. Chambers Rule

[185] I now turn to the challenge to the Rule 22-1(4) ("Chambers Rule"), which provides:

Evidence on an application

- (4) On a chambers proceeding, evidence must be given by affidavit, but the court may
 - (a) order the attendance for cross-examination of the person who swore or affirmed the affidavit, either before the court or before another person as the court directs,
 - (b) order the examination of a party or witness, either before the court or before another person as the court directs,
 - (c) give directions required for the discovery, inspection or production of a document or copy of that document,
 - (d) order an inquiry, assessment or accounting under Rule 18-1, and
 - (e) receive other forms of evidence.

[186] The Respondents argue that the Chambers Rule prevents them from: having the right to cross-examine any affiants adduced as part of the prosecuting party's case; adducing evidence from an uncooperative witness; and require the respondent to share some of their defence.

[187] The Respondents seek the following relief in relation to the Chambers Rule:

- a) A declaration that in respect of the contempt proceedings, SCCR 22-1(4) is unconstitutional, to wit:
 - i. Rule 22-1(4)(a) is to be read down so that the word "may" is replaced with "must, upon the request of the Respondent" so that the Respondent is entitled as of right to compel the attendance of any person who deposes an affidavit that the Petitioner relies upon for the purposes of cross-examination before the presider hearing the application for contempt;
 - ii. Rule 22-1(4)(b) is to be read down so that the Respondent is entitled to compel the attendance of witnesses using a subpoena and apply Rules 12-5(31) through 12-5(39) *mutatis mutandis* to this proceeding; and

iii. Rule 22-1(4)(e) is to be read down so that the Respondent is entitled to adduce evidence in non-affidavit format, and in particular through viva voce evidence.

[188] It is uncontroverted that Rule 22-1 applies to a petition proceeding. However, I disagree with the Respondents that the court is required to stay within the narrow parameters set out in Rule 22-1(4), in the case of a contempt proceeding. If that were the case then the court would indeed be a servant to the Rules rather than the master.

[189] As noted earlier, Rule 16-1(18) permits the court to "apply any other of these Supreme Court Civil Rules to a [petition] proceeding". This includes transferring the matter to the trial list, where viva voce evidence is given with the right to cross-examination of the prosecuting party's witnesses. Even where the matter is not transferred to the trial list, there is nothing preventing the Respondents from applying to court to have a broader right to cross-examine than what is provided for in Rule 22-1(4).

[190] Numerous authorities have confirmed that the court has the power to shape the process in the interests of justice and to ensure that the Charter rights of the alleged contemnor are protected.

[191] In *Hayes Forest Ltd. v. Forest Action Network*, 2006 BCCA 156 ("Hayes"), leave to appeal to SCC refused, 39341 (23 November, 2006), the Court heard an appeal of Justice Harvey's order finding criminal contempt. The appellant argued that her s. 7 rights were violated as she "was not afforded all of the procedural safeguards and protections to which an accused is ordinarily entitled after being charged with a criminal offence": Hayes at para. 4. The Court noted that:

[5] In the main, the arguments the appellant has advanced in relation to the contempt proceedings brought against her have been considered and rejected in other cases, and cannot succeed.

[192] In dismissing the appeal, the Court agreed with Justice Harvey that "criminal contempt is governed by a summary process, fixed by the court to meet the exigencies of the situation": Hayes at para. 55.

[193] The Court of Appeal commented on the use of affidavits as part of the summary process, concluding that this did not create unfairness:

[57] One of the matters about which the appellant complains is the Crown's use of affidavits in the proceedings. The Crown filed affidavits but also made the deponents available for cross-examination. For the Crown to proceed in that manner complied with the specific summary procedure which had been authorized by the court and the use of that procedure created no unfairness to the appellant in this case.

[194] The Court went on to state:

[56] In his reasons for judgment Harvey J. noted that the court has a discretion to determine how to proceed and is not bound by time limits or other procedural rules with the exception that the proceedings must adhere to the principle of fairness. Harvey J. acknowledged that an alleged contemnor must be treated fairly and afforded his or her equivalent of Charter rights and protections, some of which have been commented upon in *R. v. Cohn*, supra. While the trial judge said that the authority of a Superior Court Judge to deal effectively with criminal contempt was not compromised by the Charter, he clearly decided that the contemnor has the right to know specifically what is charged, the right to cross-examine witnesses, the right to give evidence or call evidence on his or her behalf, the right to make submissions in relation to both guilt and punishment, and the right to be presumed innocent and to require proof beyond a reasonable doubt of the allegations of contempt.

[195] In *Denman Island v. 4064 Investments*, 2000 BCSC 1645, the Court heard a challenge to Rule 56(7), which was the previous iteration of Rule 22-8(11).

[196] Rule 22-8 (the "Contempt Rule") specifically addresses contempt proceedings. The relevant provisions are:

Proceeding for contempt

(11) A party applying for an order for contempt must serve the alleged contemnor with a copy of the filed notice of application and all filed affidavits in support of it at least 7 days before the hearing of the application.

Affidavit

(12) An application under subrule (11) must be supported by affidavit setting out the conduct alleged to be contempt of court.

Hearing

(13) The court may give directions as to the mode of hearing the application, including an order that the matter be transferred to the trial list under Rule 22-1 (7) (d).

[197] In *Denman Island*, Justice Sinclair Prowse held that: (1) the requirement in the Rules to make an election to call evidence prior to the hearing does not contravene the respondent's right to know the case it has to meet before making that election; and (2) while s. 11(c) of the Charter applies, the requirement to make an election to call evidence prior to a hearing does not compel the respondent to testify against itself and does not infringe Charter rights. *Denman Island* has been followed in British Columbia in *M.P.R. v. J.B.R.*, 2020 BCSC 1046 and *Potratz v. Potratz*, 2015 BCSC 1608.

[198] The Commission argues that the *Denman Island* line of authorities settle the issue regarding the Charter challenge to the SCCR, and there is no basis upon which to conclude that *Denman Island* was wrongly decided.

- [199] However, in my view, there is no need to resort to Denman Island in this case. Denman Island is superseded by Hayes. Insofar as any conflict between Denman Island and Hayes, Hayes is binding on this Court. Hayes establishes that in criminal contempt proceedings, the court must ensure that fundamental procedural safeguards are respected. This includes the right to: be heard; know the specifics of the charge; cross-examine witnesses; adduce evidence; make submissions as to guilt and punishment; the presumption of innocent; and require proof beyond a reasonable doubt: Denman Island, at paras. 10 and 56.
- [200] In *British Columbia (Workers Compensation Board) v. Skylite Building Maintenance Ltd.*, 2013 BCSC 1666 at para. 42, the Court held that the procedural safeguards articulated in Hayes, are equally applicable in civil contempt proceedings.
- [201] Thus, for the same reasons set out in the analysis regarding the Petition Rule, I find that the Respondents have failed to establish that their Charter rights are infringed by application of the Chambers Rule.
- [202] Consequently, the challenge to the constitutionality of Rule 22-1(4) is dismissed.

VI. Stinchcombe Application

- [203] The Respondents seek the following order:

A disclosure order, pursuant to Stinchcombe, or 24(1) of the Charter requiring that the Petitioner disclose to the Witnesses all documents and materials in its possession that were created, or reviewed, or relied upon by investigator Alisa Smith acting under the investigative order made October 10, 2018 and amended January 22, 2019 prior to issuing the underlying summonses, except materials that are clearly irrelevant.

- [204] Section 24(1) of the Charter provides:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

- [205] For the reasons that follow, I find that there has been no violation of the Charter rights of the Respondents entitling them to relief under s. 24(1) of the Charter. Nor have the Respondents established that an order for Stinchcombe like disclosure should be made in this case.

- [206] In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 1991 CanLII 45 the Court held that in a criminal proceeding, "there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it": Stinchcombe at 338, citing *R. v. C. (M.H.)*, [1998] B.C.J. No. 2620, 1998 CanLII 3283 (B.C.C.A.). However, the Crown has the discretion to withhold the provision of information that is privileged or "clearly irrelevant": Stinchcombe at 339.

- [207] The Respondent does not dispute that the Stinchcombe standard of disclosure is typically available only in criminal proceedings. However, the Respondent submits that because he faces incarceration as a result of the allegation of statutory contempt made by the Commission (an agent of the government), his ss. 7 and 11(d) Charter rights are engaged. Consequently, he is entitled to Stinchcombe-like disclosure in the contempt proceedings initiated under s. 144(2) of the Securities Act.
- [208] The Commission submits that Stinchcombe disclosure does not flow from the challenge to s. 144(2) of the Securities Act. In my view, this argument is misconceived. It is not the nature of the challenge advanced by the Respondents that engages Stinchcombe, but the impact of the proceedings on the rights of the Respondents.
- [209] The Commission acknowledges that procedural fairness obligates it to provide Stinchcombe-like disclosure in enforcement hearings held under the Securities Act: *Morabito v. British Columbia (Securities Commission)*, 2022 BCCA 279 at para. 10, citing *Fernback (Re)*, 2004 BCSECCOM 378 at paras. 33-36. The Court *Morabito* explains the duty of disclosure of the Commission as follows:
- [10] The executive director must disclose "all relevant information that is not privileged" as well as a 'reliance list' that identifies the records on which he or she intends to rely at the hearing. As a matter of general practice, the Commission requires the director to disclose 'will-say' statements and reliance lists approximately 30 days before the hearing, and respondents to disclose the same approximately 15 days before.
- [210] In this case, the Executive Director has not commenced enforcement proceedings against the Respondents, nor are they subjects of the investigation. However, the Commission is seeking committal on a finding of contempt.
- [211] I am satisfied that by virtue of the fact that the Respondents face incarceration on a finding of contempt, their Charter rights are engaged. Those Charter rights entitle them to Stinchcombe-like disclosure in order to ensure procedural fairness. However, as noted above, the Executive Director's duty to disclose is limited to information that is not privileged, and which is relevant to the accused.
- [212] In *Stinchcombe* at para. 17, the Court held that the trial judge can review the discretion exercised by the Crown in the provision of disclosure:

The discretion of Crown counsel is, however, reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule.

- [213] In this case, the Commission does not deny that the material sought by the Respondents exists. However, it argues that this material is clearly irrelevant, as it relates to the underlying investigation commenced under s. 142, or the decision to issue the Summons under s. 144(1).
- [214] I agree with the Commission that the only documentation relevant to the Contempt Petitions, is that which grounds the petition. To that end, the uncontroverted evidence is that the Respondents have received all of the documents which are relevant to the orders sought in the contempt proceedings. Specifically, they have received a copy of the Summons, the investigation orders authorizing the Summons, and the correspondence with the Respondents.
- [215] In Wiebe, the Court of Appeal dismissed an application for disclosure in similar circumstances.
- [216] The underlying issue in Wiebe was the witness' refusal to comply with the summons issued under s. 144(1) to provide oral and documentary evidence. The witness took the position that ss. 142, 143, and 144 of Securities Act are unconstitutional, and that the witness will not be protected by the derivative use protections in the United States: Wiebe at para. 2.
- [217] The issue before the chambers judge in Wiebe was whether to make an order compelling the Commission to produce investigative files. The chambers judge held that the predominant purpose of the investigation proceedings undertaken by the Commission was criminal. Consequently, the witness was entitled to Charter protections, and more particularly, to the principles of disclosure outlined in Stinchcombe. The chambers judge ordered the Commission to provide full and complete disclosure of all of its files regarding its investigation of Mr. Wiebe and his alleged involvement with the Subjects: Wiebe at para. 1.
- [218] The Commission appealed. In allowing the appeal and dismissing the application for disclosure, the Court of Appeal noted as follows:
- [8] It is clear that what the respondent wants is an order which will enable him to try to find something in the files of the Commission which might give him some basis for asserting that the Securities Commission in summoning him to give evidence is not carrying out its statutory mandate but, in some kind of sham or subterfuge, is using its power simply to provide evidence upon which the criminal law power, that is the R.C.M.P. and the Attorney General, can lay charges under the Criminal Code or other federal statute against Mr. Wiebe.
- [9] The issue as argued before us has been as to the words to be found in British Columbia Securities Commission v. Branch, 1995 CanLII 142 (SCC), [1995] 2 S.C.R. 3 at pp. 14 and 15, "predominant purpose". Now those are not statutory words and the question is what is within the scope of those words in the context of the whole discussion in Branch, supra. In my view Branch does not stand for the proposition that the Securities Commission may not give assistance to the police in the criminal law side so long as the Securities Commission

carries out its powers for its own use in a proper way. The ancillary result, if one might call it that, that some help is given to the police for federal law enforcement is not improper. Law enforcement does not exist in watertight compartments, and nothing in Branch suggests that it should.

- [10] In my view, this case is wholly governed by the judgments in the Supreme Court of Canada in Branch. There is nothing in the evidence to warrant any finding of an improper inadmissible purpose or any abuse of office on the part of the Securities Commission. Without coming to any conclusion on the point, I consider that there is something to be said for the proposition that if the respondent had such evidence his remedy could be to seek by judicial review to set aside the investigation order.
- [219] To the extent that the Respondents' argument is grounded in the idea that the predominant purpose of the Summons is to investigate the Respondents, there is simply no evidentiary or legal basis upon which I can come to that conclusion.
- [220] Similar to Wiebe, I find that the Respondents are seeking disclosure in order to try to find some evidence to ground an application to challenge the validity of the Summons issued under s. 144(1).
- [221] I also agree with the Commission that the information being sought is protected by privilege, and thus is not producible.
- [222] Section 11 of the Securities Act requires any person acting under the authority of the Act, to keep confidential, all information, facts and records obtained or provided under the Act, except in discrete circumstances, as follows:

Obligation to keep information confidential

11 (1) Every person acting under the authority of this Act must keep confidential all facts, information and records obtained or provided under this Act, or under a former enactment, except so far as the person's public duty requires or this Act permits the person to disclose them or to report or take official action on them.

- (2) Subject to subsections (3) and (4), the facts, information and records referred to in subsection (1) must be released to the Ombudsperson at the request of the Ombudsperson.
- (3) All facts, information and records that are obtained
- (a) from a law enforcement agency, or
- (b) pursuant to an investigation under this Act,
- must only be released to the Ombudsperson if the Ombudsperson first produces the written consent of
- (c) the law enforcement agency, or

- (d) the person from whom the facts, information or records were obtained pursuant to the investigation,

to release the facts, information or records.

- (4) All facts, information and records that could lead to the identification of an informant under this Act must only be released to the Ombudsperson if the person to whom the Ombudsperson makes the request first obtains the written consent of the informant to release the facts, information or records.

[223] There is no evidence that any of these circumstances apply in this case.

[224] After having regard to all of the evidence in this case, and the submissions of counsel, the Stinchcombe Application is dismissed.

VII. Conclusion

[225] The Respondents' Constitutional Challenge and Stinchcombe Application are dismissed.

[226] The Petitioner is at liberty to set down the Contempt Petitions for hearing in accordance with the SCCR.

[227] The parties have asked to address the Court on the question of costs. In the event they are unable to agree on costs, they have leave to provide written submission with respect to costs, as follows:

- a) The party seeking a variation from the general rule that costs follow the event, may prepare written submissions up to a maximum of 5 pages in length for my consideration. These should be submitted through Supreme Court Scheduling within 30 days of this Order.
- b) Responding submissions are to be provided 14 days thereafter and are not to exceed 5 pages.
- c) Any Reply submissions are to be provided within 7 days following receipt of Response submissions, and are limited to 3 pages.

[228] The parties should ensure that all communications with the Court are copied to the opposing party.

"Shergill J."

[1] The Commission also issued a Summons to a third person, Michael Pawar. Mr. Pawar shared the same counsel as the Respondents and responded to these proceedings in concert with them. Due to sadly, Mr. Pawar died on September 10, 2022. The contempt proceeding commenced by the Commission against Mr. Pawar (SCBC Docket No. S216248, Vancouver Registry) was adjourned due to Mr. Pawar's untimely death, and is not the subject of this hearing.

[2] SCBC Docket No. S225653, Vancouver Registry.

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- [3] Justice Murray issued a correction to her Reasons on March 9, 2023. The corrections are captured in the summary of her Reasons provided herein.
- [4] BCCA Court Docket no. 48595, Court of Appeal.
- [5] Respondents' Written Submissions.
- [6] Respondents' Written Submissions, at para. 12.
- [7] Rule 12-5(39) of the current SCCR.
- [8] Respondents' Submissions at para. 124.
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