

Evidentiary Rules and Trends in Administrative Proceedings – Implications for the Defence
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In Ontario, the *Statutory Powers Procedure Act*² [SPPA] gives tribunals broad jurisdiction to admit evidence that would be presumptively inadmissible in civil proceedings, including hearsay evidence. The two main limits on this jurisdiction concern privilege and procedural fairness rights. Section 15(2) of the SPPA makes privileged evidence inadmissible, while the duty of procedural fairness may operate to exclude hearsay evidence in some contexts. Beyond the SPPA framework that applies to virtually every administrative hearing in Ontario, many tribunals have taken advantage of their ability to control their own process by establishing their own Rules of Practice with associated policies in respect of the evidence that is admissible at their hearings. Parties to administrative hearings are therefore faced with the challenge of navigating a unique and fluid set of evidentiary rules.

Unlike the civil context where parties have reciprocal discovery rights, respondents in the administrative law environment are navigating an uneven playing field. Regulators enjoy extensive powers to compel testimony, documentary production, and detailed lists of respondent witnesses and their anticipated evidence. Respondent's do not have such powers, and rely on the prosecution's disclosure obligations for information about the case.

This paper explores five topics in connection with evidentiary rules that operate differently in the administrative as compared to the civil context: 1) the ability to compel testimony; 2) the limited protection against subsequent use of such testimony in the hearings for which it was gathered; 3) the use of hearsay evidence; 4) the approach taken to admitting expert

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² RSO 1990, c S.22.

evidence; and 5) the defence challenges raised as a result of the expanding requirement on respondents to ‘disclose’ their defence to Staff prosecutors in advance of hearings.

Power to Compel Testimony

The frequent admission of compelled testimony obtained through the exercise of an administrative body’s investigatory powers and reliance on that evidence as part of the prosecution’s case poses strategic and practical questions for respondents. Pursuant to section 33 of the *Public Inquiries Act, 2009*, a broad array of administrative bodies have the authority to compel examinations. These include the College of Teachers,³ the Ontario Architects Association,⁴ and Professional Engineers Ontario.⁵ Section 33 of the *Public Inquiries Act, 2009* states:

33. (1)

[...]

Power to summon witnesses, papers, etc.

(3) The person or body conducting the inquiry may require any person by summons,

(a) to give evidence on oath or affirmation at the inquiry; or

(b) to produce in evidence at the inquiry such documents and things as the person or body conducting the inquiry may specify,

relevant to the subject matter of the inquiry and not inadmissible in evidence under subsection (13). 2009, c. 33, Sched. 6, s. 33 (3).

[...]

Privilege

(13) Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

The Ontario Securities Commission (“OSC”) has analogous powers under sections 11 and 13 of the *Securities Act*⁶, which state:⁷

³ *Ontario College of Teachers Act, 1996*, SO 1996, c 12, s 36(4).

⁴ *Architects Act*, RSO 1990, c A.26, s 38(2.1).

⁵ *Professional Engineers Act*, RSO 1990, c P.28, s 33(2.1).

⁶ RSO 1990, c S.5.

⁷ *Law Society Act*, RSO 1990, c L.8, s 49.3(2).

Investigation order

11. (1) The Commission may, by order, appoint one or more persons to make such investigation with respect to a matter as it considers expedient,

(a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or

(b) to assist in the due administration of the securities or derivatives laws or the regulation of the capital markets in another jurisdiction.

[...]

Right to examine

(4) For the purposes of an investigation under this section, a person appointed to make the investigation may examine any documents or other things, whether they are in the possession or control of the person or company in respect of which the investigation is ordered or of any other person or company. 1994, c. 11, s. 358.

Power of investigator or examiner

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

The extensive powers enjoyed by most regulatory investigators to compel testimony and require the disclosure of documents and information, together with the broad authority to admit such evidence for use against respondents in administrative hearings, poses numerous defence challenges. To put matters in context, these challenges are particularly significant given the high stakes at play in many administrative hearings – which can include large fines of more than \$1 million, virtually unlimited disgorgement orders, one-sided costs, severe reputational damage, and the loss of professional licenses and livelihoods.

In short, respondents are compelled to cooperate by providing all of the information sought by investigators, which can be used against them in the ultimate proceeding. Yet, unlike both civil cases governed by provincial Rules of Civil Procedure, and criminal cases governed by both the *Charter* and Criminal Procedure Rules, the evidentiary rules in administrative hearings

are lax and often appear inconsistently applied. Further, while respondents receive disclosure, they have no pre-hearing discovery rights.

Moreover, the protections against subsequent use of incriminating compelled testimony in provincial and federal *Evidence Acts* are largely inapplicable in administrative proceedings. Section 9 of the Ontario *Evidence Act* states:⁸

Witness not excused from answering questions tending to criminate

9. (1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate the witness or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature. R.S.O. 1990, c. E.23, s. 9 (1).

Answer not to be used in evidence against witness

(2) If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection (1) and if, but for this section or any Act of the Parliament of Canada, he or she would therefore be excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him or her in any civil proceeding or in any proceeding under any Act of the Legislature. R.S.O. 1990, c. E.23, s. 9 (2).

Both the College of Physicians and Surgeons and the Ontario Securities Commission have interpreted the provision as allowing the use of the compelled testimony of a respondent against that respondent in the same proceeding in respect of which it was obtained.⁹ As the College of Physicians and Surgeons held:¹⁰

The Committee concluded that the protection contained in s.9(2) is a narrow exception and that it does not apply or result in the exclusion at a discipline hearing of relevant evidence given by a physician responding to questions as required under the physician's duty to co-operate with the College as regulator.

⁸ RSO 1990, c E.23.

⁹ *Ontario (College of Physicians and Surgeons of Ontario) v Jain*, 2012 ONCPSD 30; *Re Boock* (2010), 33 OSCB 1589.

¹⁰ *Ontario (College of Physicians and Surgeons of Ontario) v Jain*, 2012 ONCPSD 30 at 8-9.

The law is not clear about what circumstances must exist for s. 9(2) to apply in an administrative context. In particular, with respect to securities law investigations, the Ontario Securities Commission has the power under ss 17(1) and (2.1) of the *Securities Act* to share compelled testimony with law enforcement, regulatory and other governmental agencies. The interaction between that provision and the protection of the Ontario *Evidence Act* has not been fully tested.

Because the scope of the ability to disclose such compelled testimony is somewhat unclear, as is the potential future use of that testimony, it is critical that respondents (“targets”) and witnesses be well prepared prior to their interview. This can be a challenge given that pre-disclosure is generally not provided in advance of the interview. It is also critically important to invoke s 9(2) on the record at the outset of a compelled interview in order to protect (as much as possible) against the testimony from being admitted in other concurrent criminal, civil or regulatory proceedings.¹¹

Use of Hearsay Evidence

As identified above, the admission of the transcript of the compelled evidence of a respondent in a hearing as evidence against that respondent is a development in the administrative context that has added to the difficulty of defending such cases. Transcripts are, of course, hearsay, but section 15(1) of the *SPPA* makes hearsay presumptively admissible:

Evidence

What is admissible in evidence at a hearing

15.(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

¹¹ Section 13 of the *Charter* and s 5(2) of the Canada *Evidence Act* provide similar protections: *Stryland (Litigation guardian of) v Yazadanfar*, 2011 ONSC 3842 at para 23 (Div Ct).

(a) any oral testimony; and
 (b) any document or other thing,
 relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

The admission of hearsay evidence has been approved of, and even encouraged, by the Divisional Court. In *Rex Diamond Mining Corp. v Ontario (Securities Commission)*, the Commission admitted letters related to demands for payment in respect of mining leases from Sierra Leonean government officials for the truth of their contents without requiring the authors to testify as to their content or, conversely, allowing the respondents to cross-examine the authors. The content of the letters was central to the Commission's ultimate decision. In dismissing the appeal on that ground, the Divisional Court stated: "the Commission is expressly entitled by statute to consider hearsay evidence...Hearsay evidence is not, in law, necessarily less reliable than direct evidence".¹²

The Federal Court of Appeal, while interpreting a federal provision in the *Public Service Modernization Act* that is the equivalent of s 15(1) of the *SPPA*, has held that it is an error of law for administrative decision-makers to refuse to admit evidence simply on the basis that it is hearsay.¹³

In characterizing the use of hearsay evidence to establish a material fact as an adjudicative error, the adjudicator was articulating a principle which is at odds with paragraph 226(1)(d) of the PSLRA which provides that an adjudicator may accept any evidence, whether admissible in a court of law or not. The adjudicator is not bound to accept hearsay evidence but he cannot reject it out of hand simply because it is hearsay. The issue is whether it is reliable. In this respect, we note that there are elements of information contained in the letter from Crown counsel's office which are not contradicted and do not appear to be controversial. It was unreasonable, and an error of law, for the adjudicator to conclude that evidence was not to be considered simply because it was hearsay. [emphasis added]

¹² [2010] O.J. No. 3422 at para 4.

¹³ *Canada (Attorney General) v Basra*, 2010 FCA 24 at para 21.

Concerns about the reliability of hearsay evidence instead go to weight and, in the administrative law context, these concerns are primarily addressed under the rubric of procedural fairness and by reference to the concept of corroboration.

By way of example on the issue of the admissibility of the transcripts of a respondent's compelled testimony, the practice of the OSC used to be that the interview transcripts of third-party witnesses would be admitted only if that witness was not testifying. The Commission would refuse to admit the transcript of a respondent who was choosing not to testify, for reasons of procedural fairness (see, for example, *Xanthoudakis v Ontario (Securities Commission)*, 2011 ONSC 4685 (Div Ct).)

However, the recent trend before the OSC (though there are numerous contradictory decisions on the point), has been to relax the limitations on the use of compelled evidence. The OSC now tends to refuse to allow Staff counsel to read into evidence the transcript of a respondent who agrees to testify and be cross-examined at the hearing. In this circumstance, the witness will of course be subject to impeachment if his or her testimony is inconsistent with the transcript evidence. The Commission will admit transcripts of compelled testimony if a respondent declines to testify at the hearing.¹⁴ The result is that, in effect, the transcript can always be used by the prosecution.

This was the approach followed in *Re Agueci*,¹⁵ a case involving accusations of insider trading against several respondents. The Commission admitted transcripts of compelled examinations only for the respondents who chose to not testify.¹⁶ In *Re Donald*, the Commission held:¹⁷

¹⁴ *Re Morgan Dragon Development Corp.* (2014), 37 OSCB 4141 at paras 35-37.

¹⁵ (2015), 38 OSCB 1573.

¹⁶ *Ibid* at paras 34-35.

¹⁷ (2012), 35 OSCB 7383 at para 34.

Staff requested that they be permitted to read excerpts of the transcript of their compelled examination of Donald into the record of the hearing. We determined that as Donald intended to testify on his own behalf, his direct testimony would provide us with the best evidence. We therefore decided that Staff would not be permitted to read in excerpts of their compelled examination of Donald, with the exception that Donald's prior evidence given under oath could be used in cross-examination to impeach his testimony. We also decided that, in the event that Donald chose not to testify, it would be open to Staff to read-in excerpts of the transcript of his compelled examination. Donald did testify as a witness on his own behalf, and Staff did not read in excerpts from his examination transcript, other than during their cross-examination of Donald.

The fact that the respondent's own compelled hearsay evidence may be admitted even if the respondent chooses not to testify can have a significant effect on defence strategy. It is generally accepted that the prosecution cannot compel a respondent to testify at the hearing – the respondent must make a tactical decision whether it is advantageous to testify in his or her own defence and be subject to cross-examination on that testimony. Notably, the respondent to an administrative hearing is already at a substantive disadvantage, as the prosecution is already in possession of a transcript of compelled testimony that can be used for the purposes of cross-examination, an advantage that does not exist in the criminal context.¹⁸

However, where the transcript of a compelled examination under oath will be admitted into evidence anyway, that choice has been effectively removed. The prosecution will have the benefit of testimony given under oath, in the nature of cross-examination, whether or not the respondent chooses to testify. The prosecution will potentially be able to pick and choose the most damaging evidence for use at the hearing. Faced with an already damaging record, a respondent must testify to clarify and explain the compelled testimony and to limit its use at the hearing. In doing so, the respondent loses any meaningful right to silence and opens the floodgates of further cross-examination.

¹⁸ The respondent faces a further disadvantage in that the compelled testimony is given in somewhat of a vacuum. The prosecution has not clearly articulated its case, so the testimony can often be given and taken out of context.

Expert Evidence in Administrative Hearings

The issue of whether expert evidence can or should be called before “specialized” tribunals is a difficult one that does not appear to have been approached with a great deal of consistency by many tribunals.

The *Mohan* test for the admissibility of expert evidence features four elements: relevance, necessity, absence of an exclusionary rule, and a properly qualified expert. The *Mohan* test is widely cited by Ontario tribunals, but the specialized and expert nature of administrative tribunals means that parties seeking to admit expert evidence often fail to pass the necessity criterion in *Mohan*. For example, the OSC has consistently taken a narrow approach to the admission of expert evidence on the issue of ‘materiality’ (as defined in Ontario securities laws). Conversely, in civil cases, the recognized complexity of determining materiality has resulted in extensive reliance on expert evidence.¹⁹

The rationale for the excluding expert evidence on materiality is that the OSC has sufficient expertise so that the third *Mohan* criterion, necessity, is not met.²⁰

The Commission held in *Coventree* that determining questions such as whether a fact is a “material fact” or whether a “material change” has occurred within the meaning of section 75 of the Act “are matters squarely within our expertise as a specialized tribunal” (*Coventree, supra*, at para. 157). On appeal, the Ontario Divisional Court held that it is “beyond question that the interpretation of material change under the *Securities Act* and the Commission’s discretionary application of its public interest jurisdiction under s. 127 of the *Securities Act* are issues falling within the specialized expertise of the Commission (*Cornish v. Ontario Securities Commission*, 2013 ONSC 1310 (“*Cornish*”) at para. 34). The Court noted that “[t]he Commission has repeatedly held that, as an expert tribunal, it does not require evidence from experts or investors in order to determine questions of disclosure and materiality” (*Cornish, supra*, at para. 58).

¹⁹ *Sharbern Holding Inc. v Vancouver Airport Centre Ltd.*, 2011 SCC 23 at para 87; *Harris v Leikin Group Inc.*, 2013 ONSC 1525 at para 404 (Sup Ct).

²⁰ *Re Crown Hill Capital Corp.* (2013), 36 OSCB 8721 at para 124.

However, by way of example, the OSC will admit expert evidence in limited circumstances, although the use it makes of that evidence will vary. Recently, in the *Biovail* case, the OSC accepted expert evidence in respect of its materiality assessment. Ultimately, though, the OSC found that while the evidence was useful for the purpose of identifying the relevant issues that it ought to consider in making its own assessment, the conclusions given by the experts on the issue of materiality were not helpful.²¹

The current state of affairs appears to be that there is some scope for a respondent to bring expert testimony on narrow issues, either ones of considerable complexity (such as trading analysis), or for the purpose of “identifying issues” for the Commission. However, the OSC is not always going to be willing to accept that evidence. Because of the expert status of administrative tribunals, there will be almost no scope for a respondent to argue that the prosecution has failed to prove its case by its failure to call expert evidence on issues central to the tribunal’s mandate.

One further issue to be considered is the use of ‘quasi-experts’ by the prosecution. For example, in the OSC context, Staff often relies on its internal investigator, ostensibly a fact witness, to give, for example, accounting evidence, calculations of losses to investors or gains by the respondent. Staff has used court-appointed receivers who are viewed as possessing inherent credibility and independence for similar and even more extensive purposes. In such circumstances, the respondent might not have the opportunity to call a responding expert on the basis that the investigator has not been presented as an expert *per se*, and will be limited to cross examination of Staff’s witnesses on those issues.

²¹ *Re Biovail Corp.*, 2010 LNONOSC 729 at paras 211-214.

Disclosure of the Defence Case

In an apparent effort to increase efficiency, the OSC has instituted various pre-hearing procedural requirements which differentiate administrative hearings in that context from many other proceedings. In particular, respondents are required to provide witness lists, “will say” statements and lists of all of the documents they will rely on in their defence of the matter, in advance of the hearing.²² In essence, respondents are now required to provide a ‘roadmap’ to the defence of their case before the hearing has commenced.

The potential unfairness that can flow from the ‘efficiency initiatives’ discussed above is shown by the recent effort by OSC Staff to use their powers of compulsion to examine defence witnesses after the delivery of witness lists. By doing so, OSC Staff obtains “discovery” of those witnesses, not for the purpose of investigating a potential breach of the Securities Act, but for specific use at the hearing. In the case of *Re Waheed*,²³ the OSC quashed a summonses compelling two witnesses named on the respondent’s list of witnesses who Staff only sought to interview shortly before the commencement of the hearing on the merits, despite their lengthy investigation into the matter. The two respondent witnesses in *Re Waheed* were lawyers that were being called by the respondent to establish reliance on legal advice. The OSC rejected Staff counsel’s reliance on previous decisions that characterized the power to compel testimony as investigatory in nature and held that, in *Re Waheed*, the proceeding had moved past the investigative stage and Staff counsel were, in fact, inappropriately relying on their investigatory powers to prepare for the merits hearing. However, the OSC fell short of establishing a clear rule

²² Ontario Securities Commission Rules of Procedure (Amendment and Consolidation as of April 8, 2014), Rules 4.3 (Disclosure of Documents or Things) and 4.5 (Witness Lists and Summaries). Rule 4.3 disclosure is required a minimum of 20 days before the merits hearing and Rule 4.5 disclosure is required a minimum of 10 days before the merits hearing.

²³ (2013), 36 OSCB 1071.

prohibiting Staff counsel from relying on their power to compel testimony from witnesses in advance of hearings.²⁴

I accept that Staff's investigation in this matter may be ongoing and that there is no legal barrier to the investigation continuing. However, for Staff to be permitted to proceed with a compelled examination at this late stage in the proceeding, it is not sufficient for Staff to merely assert that the examinations are for the purpose of an ongoing investigation.

In my view, Staff is attempting to exercise its investigative authority on the eve of the Merits Hearing in order to examine witnesses who will be testifying on behalf of the Respondents and I find that such an exercise of its investigative authority is inappropriate.

It may also be relevant that the summonses at issue in *Re Waheed* would have compelled testimony from former legal counsel for the respondents, which may have heightened concerns about the appropriateness of such a practice. It should also be noted that, given that Staff's investigations are subject to strict confidentiality requirements, the respondents are usually unaware that further summonses have been served. As a result, respondents generally do not have the opportunity of launching a challenge to those summonses as being a breach of procedural fairness.

Conclusion

Defending respondents in administrative proceedings has always been difficult and does not appear to be getting any easier as tribunals and courts progressively loosen the evidentiary rules that limited the use of certain evidence by the prosecution. Tribunals are meant to function efficiently as compared to courts, given, among other things, their expertise and less-stringent evidentiary rules. The power to admit all manner of hearsay evidence and the requirement for

²⁴ *Ibid* at paras 27-28.

pre-hearing disclosure by respondents clearly adds to such efficiencies by, among other things, encouraging a narrowing of issues and evidence prior to the hearing itself. The question however, is whether the pendulum has swung too far in favour of efficiency and away from the principles of procedural fairness, natural justice and the ability to make full answer and defence.