

PUBLICATION

Alberta Court Upholds Investigation and Disclosure Powers of ASC

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The ASC is investigating possible breaches of the Alberta Securities Act (ASC). The company in question is also trading on the OTC Bulletin Board in the United States. The ASC issues a Summons to an Alberta resident compelling him to appear at a certain date and time to be examined under oath, and to bring with him certain described categories of documents. There is a likelihood the evidence obtained by the ASC in the course of its investigation may be shared by the ASC with the SEC. Criminal prosecutions could possibly ensue.

Does the compulsion of the Summons violate a citizen's Charter right to be protected from selfincrimination? Will the possible sharing of the information so obtained with U.S. law enforcement agencies, including the SEC and the U.S. Department of Justice, violate the Canadian citizen's rights? Can the witness require the ASC to provide a written assurance that any evidence so obtained would be kept confidential and not shared with such other enforcement authorities?

The answer to all of these questions, according to a recent Alberta Court of Queen's Bench decision, is a resounding "no": *Beaudette v ASC*, released January 22, 2015.

In understanding these results, it is important to note the differences between Canadian and U.S. law on these points. In the U.S., the "Fifth Amendment" right against self-incrimination enjoys high constitutional status and is deeply entrenched in U.S. law and culture. In Canada, the approach has been far less absolutist. In fact, the rights granted by the Canadian Charter of Rights and Freedoms are expressly made subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Traditionally, Canadian courts have sought to "balance" the competing interests of the individual's right to remain silent against the state's interest in compelling the production of evidence for valid public purposes, such as law enforcement. When faced with these competing principles, Canadian courts have usually asked: "Is the predominant purpose for seeking the evidence to obtain incriminating evidence against the person compelled to testify, or is it for some legitimate public purpose?" In the context of securities regulation, the valid public purposes are to safeguard the integrity of public markets in securities, protect investors, and to foster public confidence in the system. In *Beaudette*, the Alberta court was inclined to put significant weight on the public purposes of effective securities regulation. Securities regulation aims to protect the public from "unscrupulous trading practices", to prevent "investors from being defrauded"... which are goals of "substantial public importance" serving an "obvious social utility". Accordingly, "the reasonable expectation of privacy in the heavily regulated securities industry is low".

On the further point of the sharing of evidence obtained under compulsion with foreign regulatory authorities, where the evidence might be used in criminal charges against the person from whom it was obtained, the court was again inclined to put great weight on the value of information sharing. It noted that, in today's global economy, securities activity has international scope. Multi-jurisdictional co-operation is a necessity in the modern age. The Alberta court further observed that to effectively enforce activities within its own jurisdiction, the ASC might frequently require evidence from other jurisdictions, together with the assistance of regulators elsewhere. The point being....."you must give to receive". Finally, the Alberta court was prepared to leave to the determination of U.S. law how evidence gathered in Alberta might be used in a U.S. proceeding.

But note that this decision is based on the law of Alberta. In particular, in Alberta the law provides that the decision whether or not to disclose to third parties information gathered under compulsion is to be made exclusively by the Executive Director. Elsewhere in Canada, lawmakers have made different policy choices. In Ontario, Nova Scotia and Newfoundland, all information gathered during an investigation is held in strict confidence. Disclosure to a third party requires a Hearing to determine whether such sharing is in the public interest. The compelled party is given notice of the Hearing and the right to participate in it. There is also provision for a review of that determination by the Courts. Both Canada and British Columbia have released drafts of proposed amended securities legislation containing similar safeguards. Will Alberta follow, I wonder.

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