



REGULATORS AT THE DOOR: Search Warrants and Compulsory Production

Introduction

Businesses and industry in Canada are increasingly subject to regulatory oversight by specialized bureaus, agencies and commissions. A significant aspect of the oversight role played by regulators is necessarily the ability to investigate (for compliance) the businesses and industries they are supposed to be overseeing. In order to assist regulators with their investigative function, parliament and the legislatures (as the case may be) have provided many regulatory bodies with surprisingly broad powers to gather evidence, including the ability to compel under-oath testimony, sworn written statements, and document inspection, as well as the ability to obtain and execute search warrants. Legislation as disparate as the *Securities Act*, the *Competition Act*, the *Electricity Act*, and the *Registered Insurance Brokers Act*, among others, provides such broad powers to investigators appointed there under.

The purpose of this paper is to offer, in general terms, an overview of those powers from the perspective of a party who becomes subject to the investigatory/search powers of a regulator.¹ The investigative tools referred to in this paper have been separated for ease of reference into three categories: (1) requests for voluntary cooperation, (2) compelled testimony or document production, and (3) execution of a search warrant. While each piece of governing legislation and each regulator may have slightly different processes or procedures to follow, these three categories are commonly used investigatory tools. Further, it should be noted that a party who is not actually suspected of any wrongdoing can become involved in a regulatory investigation simply for being in possession of relevant information about the target or for being involved in a market or industry being considered as part of an investigation. In that regard, counsel can become involved in the execution of a search warrant both when a client's premises and the counsel's law firm are subject to a search warrant. As set out below, there are specific guidelines in place for dealing with a law firm search.

Voluntary Cooperation

Any investigator can utilize requests for voluntary cooperation to obtain information. Such requests, also called informal inquiries or informal requests, seek the cooperation of a party without the use of compulsory powers. These types of requests are less likely to be made of the ultimate target of an investigation, but rather of a market player who may have information about the target of the investigation (i.e., a potential witness). Informal requests can take the form of a letter or telephone call and may consist of a request to review documents or to interview an individual. Although (as the name suggests) there is no requirement that a party accede to a request to cooperate and no sanction for failing to do so, there could well be a penalty if, once cooperating, the party provides misleading information in response. As such, if a party is going to cooperate with a regulator and provide information voluntarily, the scope and meaning of the request should be clarified with the regulator and the information provided in response should be reviewed for accuracy and completeness.

¹ To the extent that specific legislative provisions are cited as examples, such citations will be limited to the *Competition Act* R.S.C. 1985, c.C-34, as amended (as an example of Federal legislation) and the *Securities Act* R.S.O. 1990, c.S.5, as amended (as an example of Ontario legislation).

Of course, while there are no sanctions for failing to cooperate voluntarily with a request for information by a regulator, the expectation is that a refusal to cooperate will likely be met with some form of compulsory process to obtain the information. An advantage of dealing with the matter on a “voluntary” basis, then, is that there would appear to be a bit more scope for dialogue and negotiation about the request where it remains voluntary. One disadvantage of dealing with a regulator on a voluntary basis is that the confidentiality (or other) protections typically found in legislation regarding information passed to the regulator in the scope of a formal investigation process may not apply to information transmitted voluntarily – that is, the confidentiality provisions found in the legislation are not triggered by the disclosure in issue because the information is provided “voluntarily” rather than pursuant to the legislation.²

Compelled Testimony and Document Production

Several regulators have broad powers to compel the production of documents and information from parties regardless of whether those parties are the targets of the investigation. Unlike the process for obtaining a search warrant, described below, the compelled testimony and document production powers of several regulators do not require the regulator to show probable cause and in several instances do not even involve the process being vetted by a court. For example, once appointed by the Commission to investigate a matter, an investigator appointed under the *Securities Act* can summons and compel testimony under oath and the production of documents with the same power to do so as is vested in the Ontario Superior Court, and the failure of a party to comply can constitute contempt.³ An investigator under the *Securities Act* also has the power to conduct a warrantless search of the place of business of a person or company that is the target of the investigation.⁴ Similar powers are provided to regulators under other pieces of Ontario legislation.

Under the federal *Competition Act*, the Commissioner of Competition has similarly broad investigative tools to obtain the delivery of documents and sworn written evidence, and to take oral testimony under oath.⁵ Unlike the provisions of the Ontario *Securities Act* adverted to above, however, the Commissioner of Competition is not empowered on her own to do these things. Rather, the Commissioner is required to make an *ex parte* application to a court seeking an order for such orders to be made. While this does provide a gatekeeper between the regulator and the information being sought, the threshold for the order to be made under the *Competition Act* is a low one: the court must be satisfied that the Commissioner is conducting an inquiry under the Act and that the person from whom information/documentation/testimony is being sought has or is likely to have information relevant to the inquiry.

The constitutionality of certain of these types of provisions has been challenged and the provisions have been upheld by the courts.⁶

Upon receipt of an order or requirement to provide documents, information or testimony, counsel should be involved and the scope and timing of the requirement should be ascertained. If there are any ambiguities (for instance, in the meaning of a question posed in a request for a written response), the regulator should be contacted immediately for clarification. It may also be possible to negotiate the scope of the information being sought, particularly if the request as framed is particularly onerous and the respondent is not the target of the investigation. Even if the scope of the request can be narrowed through cooperation and negotiation, however, no documents or records covered by the request should be destroyed.

Production of documents or information can be refused on the basis of privilege. Any claim of privilege should be made at the first opportunity, either in respect of the answer to a specific question or a general request for documents that would include privileged records. If a privilege issue cannot be resolved between the regulator and the party asserting the privilege, the matter can be addressed before a judge.

Search Warrants

Certainly the most invasive, though not necessarily the most probing, tool available to many regulators in the course of an investigation is a search warrant. A warrant issued by a court allows the investigators to enter premises in order to search for documentary and electronic evidence. Warrants are typically made on an *ex parte*

² See *Competition Act* section 29 and *Securities Act* section 16(2) which each provide that confidentiality provisions attach to information provided pursuant to processes under the applicable legislation. This suggests that such provisions would not apply to information voluntarily provided, but each regulator may have its own approach to attempt to extend confidentiality in those circumstances.

³ *Securities Act* section 13(1).

⁴ *Securities Act* section 13(3).

⁵ *Competition Act* section 11.

⁶ See, for example, *Thomson Newspapers v. Canada*, [1990] 1 S.C.R. 425.

application to a court and supported by a sworn statement by an investigator. The sworn statement would outline the nature of the investigation and would have to establish that there were reasonable and probable grounds to believe that material relevant to the investigation was at the location to be searched.⁷ The warrant itself, once issued, would not describe the evidence that was filed to obtain it. However, it should identify the offence (including the suspected time period of its commission) in respect of which the search is taking place, the types of documents and records that can be searched, the search location, the identities of the authorized searchers, and the time limits on the search.

When the regulators arrive at the door brandishing their warrant, they may be willing to wait a reasonable amount of time for counsel to be contacted before they begin their search. In the intervening time, and in fact throughout the course of the execution of the warrant, the searchers should be treated courteously but they should not be afforded the opportunity to have substantive discussions with business people.⁸ Search warrants allow the investigators only to look at documents already in existence and do not entitle the searchers to interview people or to cause reports or other documents to be prepared to address their questions. Even if the searchers agree to wait a reasonable time for counsel to arrive before they begin their search, all employees should be advised immediately not to remove, destroy or alter any documents, records or computer files (including e-mails) as doing so could constitute an offence (and has the appearance of a tacit admission of guilt).

Before the search begins, the warrant should be copied and should be reviewed to confirm (1) the location to be searched is accurately described in the warrant, (2) the searchers at the premises are identified by name in the warrant and are authorized to conduct the search, and (3) which documents and computer files are the subject of the warrant. Any inaccuracies or irregularities should be brought to the attention of the searchers and discussed with counsel, but it will only be in the clearest of cases that the search should not be permitted to proceed. Case law on the scope and interpretation of search warrants generally provides that a warrant needs to have sufficient particularity in terms of offence and time period so that it does not give the searchers “carte blanche to rummage through the premises of the target”, yet relevance at an investigatory stage will be broadly interpreted.⁹

Although a search should not be impeded, it is appropriate for the target of the search to discuss and clarify protocols with the searchers. This can include a procedure to review the documents being seized by the searchers and to allow for the taking of copies (note that the taking of copies may be necessary to allow the business to continue to function smoothly after the searchers have left with certain records, and also provides the benefit of permitting the company’s counsel to review the evidence taken by the searchers). If privileged documents are located in the target area of the search, those documents should be identified and the searchers should be precluded from seeing them. Any potentially relevant documents over which privilege is claimed will typically be secured and deposited with an authority to prevent examination by the searchers until a judge can review the privilege claim (or until the claim of privilege can be resolved between the parties).

The procedures put in place to deal with documents during a search will be put to the test with respect to computer records. A search warrant will typically identify computer records as being subject to the search, but because of the vast number of computer files and documents, including e-mails, on an average computer, it may not be possible for the searchers to complete a computer review while they are physically in the premises being searched, although there is an expectation that some effort will be made to do so.¹⁰ As such, the computer searchers may therefore be justified in simply taking computers or copies of the hard drives or network folders of people or subjects which could contain relevant material, with the actual detailed review to be carried out by the searchers subsequently. While solving the problems of time and volume, the obvious concern about such an approach is that it almost necessarily allows the computer searcher to leave the search premises with electronic documents which will be outside the scope of the warrant and which could contain privileged information. There may be no perfect way to address this problem, but there are solutions which can be negotiated with the searchers – including allowing the target of the search to review its own computer records for privileged documents or having the searchers discuss with the target the files which are intended to be seized.

7 For example, see *Securities Act* section 13(4).

8 It is appropriate for searchers to ask questions about the locations of certain types of documents, and to ask for and be provided with keys for offices, passwords for computers, etc. to facilitate their search.

9 *R v. Church of Scientology of Toronto* (1987), 31 C.C.C. (3d) 449 (Ont.C.A.).

10 *R v. Khan*, [2005] O.J. No. 3486, at para 76 (QL) (Sup.Ct.).

The Law Society has very recently approved Guidelines for Law Office Searches to be followed by lawyers in the event of a search warrant naming a law firm. There are five key steps set out in the Guidelines that lawyers should follow in the event of such a search:

- 1. Determine the validity of the warrant** – Consistent with search warrants of a client’s premises, the lawyer should confirm (1) the law office is properly identified on the face of the warrant; (b) the searchers have attended on the date authorized; (c) the documents sought are identified or described; (d) the offence is identified, and (e) the search warrant was issued by or endorsed by an Ontario Court of Federal Court of Canada.
- 2. Assert solicitor-client privilege** – The lawyer should assume that privilege attaches to documents being searched and assert that privilege. It is not up to either the lawyer or the searcher to determine whether the documents are privileged, as that determination must be made by a Court.
- 3. Address potential conflicts of interest** – If a lawyer has a potential conflict of interest in respect of the search, such as in circumstances where the lawyer or law firm may be one of the targets of an investigation, the appointment of a referee is required.
- 4. Determine whether independent computer forensic expert required** – The Court may have appointed an independent computer forensic expert, or if the lawyer has a conflict of interest such an independent expert may be required to search for and preserve electronic documents.
- 5. Steps after execution of the warrant** – After the execution of the warrant, and subject to any court order requiring otherwise, the lawyer should inform any client(s) implicated in the search. A court may order a more comprehensive electronic search be conducted. Any non-conflicted lawyer or referee will then be involved in any court applications associated with the search, such as those dealing with concerns about the scope of the search, privilege, client notification and subsequent searches.

Conclusion

Many regulators have far-reaching investigatory powers that allow them to obtain search warrants or to compel the provision of documents and information. Understanding the scope of those powers and the best way of responding to them puts a party who becomes subject to an investigation in the best position to deal with an investigation, including ensuring that privilege is maintained and that the regulators are not permitted to expand through conduct the already broad powers they have been given.

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