

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

Concurrent Regulatory and Criminal Investigations

Ever since the Supreme Court of Canada decision in *R. v Colarusso*, [1994] 1 SCR 20, joint criminal and regulatory investigations have been rare. In that case the Court held that a lawful search or seizure (in that case a Coroner's obtaining of blood samples after an accident) could become unlawful if the police use the evidence in criminal proceedings.

This separation of regulatory and police investigations have simplified the lives of regulators who do not have to worry about whether the evidence they obtain jointly with the police will be excluded because of an alleged breach of the *Canadian Charter of Rights and Freedoms* ("Charter"). It is often easier for the regulatory body to simply obtain the information from the police afterwards.

Importantly, this decision tended to discourage police from obtaining evidence obtained by regulators because the evidence was likely not admissible in the criminal proceedings. The routine police seizure of regulatory evidence causes administrative problems (would the evidence be retrievable by the time the discipline hearing rolled

around?). In addition, if members (and their lawyers) became aware that a regulatory investigation could result in evidence being made available for criminal charges, cooperation would dry up quickly.

A recent decision has reopened the possibility of police coming to regulatory bodies to conduct joint investigations or even to use the regulator's own evidence. In *R. v Sandhu*, the Ontario Court of Appeal held that the existence of a concurrent criminal law investigation does not in itself make a regulatory search or investigation that is otherwise authorized by law unreasonable under the *Charter*.

In *Sandhu*, a truck driver was arrested after police and a Ministry of Transportation enforcement officer searched, without a warrant, the trailer of his transport truck and found 205 kg of cocaine concealed in nine plastic wrapped bales. The Judge acquitted the truck driver at trial, finding that the discovery of the cocaine represented unconstitutionally obtained evidence under s. 24(2) of the *Charter* "which would bring the administration of justice into disrepute". According to the judge, the truck driver's rights had been violated under s. 8 of the *Charter* which guarantees that "everyone has

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the right to be secure against unreasonable search and seizure”.

The Court of Appeal allowed an appeal of that decision on the following two grounds:

#1 - The existence of a criminal law purpose for conducting a search does not in itself preclude the existence of valid regulatory purpose.

The enforcement officer of the Ministry of Transportation can under s. 216.1 of the *Highway Traffic Act* examine at any time a commercial vehicle and its contents as well as documents relating to ownership and operation of the vehicle to ensure compliance with the law.

The Court of Appeal held that the enforcement officer was entitled to conduct an inspection to confirm regulatory compliance. According to the Court, as long as there was a continuing regulatory purpose on which to ground the exercise of the regulatory power, the issue then became whether the search by the police officers infringed on the reasonable expectation of privacy of the truck driver. Citing the Supreme Court in *R. v. Nolet*, the Court held that “the expectation that the search might also uncover drugs did not convert a *Charter*-compliant regulatory search into a *Charter* violation”.

#2 - The trial judge failed to correctly apply the legal test for the admission of evidence obtained by a *Charter* breach:

- (i) the seriousness of the *Charter*-breach;
- (ii) the impact of the breach on the *Charter*-protected interests of the accused; and

- (iii) society’s interest in adjudication of the case on its merits.

In this case, the truck driver’s right to privacy (protected under s. 8 of the *Charter*) was rather minimal. Why? Because commercial trucking is a highly regulated industry and the truck driver was not the owner of the tractor-trailer which minimized his privacy interests in the trailer.

The trial judge failed to appropriately weigh and balance these different concerns against the further fact that the exclusion of the evidence would put an end to the prosecution of a very serious charge.

In summary, a regulatory search or investigation does not become a breach of the *Charter* because it has a concurrent criminal aspect to it. A regulatory investigation can continue even though the investigator is uncovering evidence of criminal conduct. This would seem to indicate that joint regulatory and police investigations, while legally complex, are not always out of the question.

This case is of assistance, however, to regulators who fear that they may need to halt a regulatory investigation if it uncovers criminal conduct. *Sandhu* is a strong authority for the proposition that so long as the regulator is gathering evidence for regulatory proceedings, it does not need to stop the investigation simply because it also discloses the commission of a crime.

The *Sandhu* case can be found at: www.canlii.org.