

Sneaking and Peeking: The Future of Securities Investigation Has Arrived

By Jordan Glick

In the 1983 classic *Scarface*, Tony Montana was recorded laundering millions of dollars by a video camera disguised as a clock. His captors understood one important lesson: capturing sophisticated criminals requires sophisticated tools.

Until recently, it seemed like the Ontario Securities Commission (“**OSC**” or the “**Commission**”) would never learn that lesson.

And then, in May of 2013 (coincidentally just after the movie’s thirty-year rerelease), the OSC launched the “Joint Serious Offences Team” (“**JSOT**”). The JSOT enables OSC investigators, much like the police in *Scarface*, to peek into the boardrooms and offices of suspected corporate criminals and surreptitiously record what they see.

The JSOT was launched with the goals of prosecuting the most serious forms of illegal activity in the securities industry including boiler room operations¹, fraud and market manipulation. What is unique about the JSOT is that for the first time, OSC investigators have been empowered to obtain warrants under the *Criminal Code*² allowing them to intercept e-mails, put hidden cameras and recording devices in offices and secretly enter a place of business.³

The JSOT initiative is the future of enforcement in the securities industry. It reflects a key shift in philosophy for our industry watchdog from passive to active investigation. No longer must investigators build their case by sifting through piles of corporate documents created at some point in the past in the hope of uncovering the smoking gun. Instead, investigators can now approach cases in real time and pursue suspects without waiting for the damage to be done and for the paper trail to reveal itself.

¹A “boiler room” is a slang term used to describe an operation wherein fraudulent security issues are sold. The “boiler room” is the physical office wherein shady or fraudulent stocks are sold, typically using high pressure techniques and false promises to vulnerable investors.

²R.S.C., 1985, c. C-46

³The Ontario Provincial Police appointed investigators of the JSOT team Special Constables pursuant to section 53(2) of the *Police Service Act*, thereby authorizing JSOT investigators to make use of the *Criminal Code* warranting provisions.

This article will first review the traditional way in which the Commission exercises its investigatory search powers and the limitations of those methods. It will then explore some of the new investigatory powers afforded to the JSOT investigators and consider their likely effectiveness in support of quasi-criminal investigations in the securities industry.

The Limitations of Investigations Under the *Ontario Securities Act*

The types of investigation permitted under the *Ontario Securities Act*⁴ (“**OSA**”) appear extensive, but in fact are problematic for pursuing corporate criminals. That is because certain powers afforded to investigators under the OSA cannot be used to further quasi-criminal⁵ investigations.

The OSA permits two different forums for prosecuting individuals for breaches of securities law: (1) in administrative proceedings before a panel of Commissioners; and (2) in quasi-criminal prosecutions in the Ontario Court of Justice (“**OCJ**”). One of the primary differences between Commission and court proceedings is that jail sentences can only be imposed by the OCJ, making it the preferred venue for prosecuting suspected criminal activity. Where quasi-criminal prosecutions are pursued in the OCJ, individuals are afforded protections pursuant to the *Canadian Charter of Rights and Freedoms* (“**Charter**”).

The application of the *Charter* to quasi-criminal proceedings restricts OSC investigators from making use of certain OSA powers. In particular, while the OSA permits investigators to summons and compel testimony from anyone as well as to order production of documents and things⁶, the use of statutorily compelled information has been determined to violate the right against self-incrimination which is a protected interest pursuant to section 7 of the *Charter*.⁷ As a result, OSC investigators cannot make use of the statutory compulsion provisions to further quasi-criminal proceedings.

While OSA compulsion powers are not permitted in furtherance of quasi-criminal prosecutions, OSC investigators have not, until now, been entitled to make use of police investigative techniques that are set out in the *Criminal Code* but not in the OSA. Therein lies the OSC’s dilemma. The Commission cannot effectively prosecute suspected corporate criminals in the courts when its investigators cannot make use of either OSA or police powers of investigation.

The OSA provides very few tools to investigators that can be used to pursue quasi-criminal investigations. While the OSA does permit OSC investigators to apply for search warrants, the scope of those warrants is limited, permitting an OSC investigator to search a specific location for pre-determined items.⁸ For OSC investigators, the OSA search warrant provision is a dull tool.

The New Search Powers Available to the JSOT Investigators Under the *Criminal Code*

The JSOT concept is to put police investigative powers in the hands of OSC investigators to pursue corporate criminals and support proceedings in the OCJ. The *Criminal Code* warranting provisions permit the JSOT investigators to “use any device or investigative technique or procedure or do anything described in the

⁴R.S.O. 1990, c.S.5

⁵The term “quasi-criminal” is used to describe non-criminal conduct that may be penalized in a manner that is similar to criminal conduct. Where the OSC engages in OCJ proceedings, its prosecutions are “quasi-criminal” as the prosecutions are being conducted pursuant to the OSA and not the *Criminal Code*.

⁶*Ontario Securities Act*, s. 11, 12 and 13(1)-(3)

⁷In *R. v. Jarvis*, [2002] S.C.J. No. 76, at para. 59-99, the Supreme Court of Canada considered the use of statutory compulsion powers under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and concluded that where the “predominant purpose of a particular inquiry is the determination of penal liability”, a regulator (in that case the Canada Customs and Revenue Agency) must “relinquish the authority to use the inspection and requirement powers”.

⁸*Ontario Securities Act*, s. 13(4)-(8)

warrant that would, if not authorized, constitute an unreasonable search or search.”⁹ In theory, an investigator may make use of a broad array of novel and flexible investigative techniques so long as the pre-conditions for these special search warrants are met and a judicial officer authorizes the search prior to its execution.¹⁰

The *Criminal Code* warranting provisions were drafted broadly in order to enhance flexibility and permit investigators to readily integrate new technologies to their arsenal of investigative tools. Given the breadth of the provisions, their application to the securities industry could involve the use of:

- **Electronic Surveillance:** Electronic devices such as cameras, microphones and tape recorders, typically in a secretive or unobtrusive manner, to gather and accumulate evidence of suspected quasi-criminal activity.
- **Interception of Communications (e.g. wiretapping)**¹¹: Devices to intercept otherwise private communications such as e-mail, text, telephone and other electronic communications.
- **Electronic Tracking Devices**¹²: Devices to monitor or ascertain the whereabouts of an individual through electronic means.
- **“Sneak and Peek” Warrants:** Warrants that permit covert entry into a premises in order to make surreptitious recordings of evidence and/or to seize and remove documents, records or things without alerting the target of the ongoing investigation.

The JSOT in Context

This is not the first time that the OSC has supported an initiative to enhance investigation of those who commit serious capital markets offences. In 2003, the OSC supported the RCMP’s creation of the Integrated Market Enforcement Team (“**IMET**”), a specialized police unit devised to tackle white collar criminals. Backed by federal financing of more than \$30 million per year, the team charged only nine individuals between 2004 and 2008. While IMET is still operational, it has been widely viewed as a failure.

The problem with IMET is the disconnect between the RCMP and the day-to-day regulation of the capital markets. The IMET is ultimately a reactive policing entity that is not positioned to engage in active enforcement.

By comparison, the JSOT investigators are specialists who are therefore integrated into the OSC’s regulatory environment. Vesting them with police powers should provide the necessary tools to effectively investigate the most serious of securities crime. The challenge for investigators will be to embrace their

⁹*Criminal Code*, s. 487.01

¹⁰In general, the preconditions for such warrants require evidence that:

1. an offence has or will be committed;
2. information concerning the offence will be obtained through the use of the technique, procedure or device;
3. it is in the best interests of the administration of justice to issue the warrant; and
4. there is no provision in the *Criminal Code* or in any other Parliamentary Act that would similarly provide for a warrant, authorization or order permitting the technique, procedure or device to be used.

¹¹*Criminal Code*, s. 184-186. Given heightened concerns regarding the invasion of privacy in the case of the interception of private communications, a judge must also consider whether “other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative techniques” before issuing this type of warrant.

¹²*Criminal Code*, s. 492.1

new powers and shift the internal OSC culture from one of passive, reactive investigation to a more proactive approach.

Early signs are promising for the JSOT. Since October 2013, the JSOT has already charged individuals and groups on five separate occasions for allegations including fraud, unregistered trading and forging documents.

Challenging the JSOT in Court, A Look to the Future

While the JSOT has to date laid several charges, its future will hinge on the success of its prosecutions in the OCJ. The key battle zone in many of these cases will be a challenge to the admissibility of evidence that was obtained using the *Criminal Code* warranting provisions, a process which requires a deep knowledge of search and seizure law from both the criminal and regulatory perspective and of the securities industry in general.

Understanding the scope and limitations of the JSOT's powers is a first step to dealing with investigations and defending prosecutions. It recognizes that, thirty years after we witnessed Tony Montana caught with a hidden camera, the future of securities investigation has arrived.

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*WeirFoulds' lawyers provide real time advice to individuals and companies who are being investigated by the OSC, other financial regulators and the police, and who have been charged with securities offences and business crimes. For more information, please contact **Jordan Glick**.*

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