**IN THE MATTER OF THE *SECURITIES ACT*,**
**R.S.O. 1990, c.S.5, AS AMENDED (the "Act")**

**AND**

**IN THE MATTER OF**
**A SUMMONS ISSUED PURSUANT TO SECTION 13 OF THE SECURITIES ACT AND SERVED ON THE ROYAL BANK OF CANADA'S ASSISTANT GENERAL COUNSEL, TERESA MONTI**

**HEARING DATE:** **March 13, 2002**

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| **BEFORE:** | **Howard I. Wetston, Q.C.** | **-** | **Vice-Chair** |
| | **H. Lorne Morphy, Q.C.** | **-** | **Commissioner** |
| | **M.T. McLeod** | **-** | **Commissioner** |
| **COUNSEL:** | **K. Manarin** | **-** | **For the Staff of the Ontario Securities Commission** |
| | **B. Morgan** | **-** | **For the Royal Bank of Canada and Teresa Monti** |

## REASONS FOR DECISION

### Facts

This was a motion brought, in camera, by the Royal Bank of Canada ("Royal Bank") which requires the interpretation of section 462 of the *Bank Act,* S.C. 1991, c. 46.

On or about February 13, 2002, a section 13 summons from Staff of the OSC was served on Ms. Teresa Monti, Assistant General Counsel for the Royal Bank, at the Royal Bank's head office in Toronto, Ontario. The summons requested Ms. Monti to provide information and to produce documents with respect to certain named customers of the bank. In particular, it requested documents relating to monthly account statements for a ten-year period for banking accounts, including joint accounts, held by these customers at branches located in British Columbia. In addition to the account statements, a request was made to obtain copies of account opening forms and signatory cards. In their submissions, Staff noted that they have always understood that they might need to serve the branch for the signatory cards and account opening forms. The bank maintains the summons is of no effect as it was not served in accordance with subsection 462(2) of the Bank Act. It further maintains that for joint accounts it is not sufficient to name only one of the joint account holders.

## Issues

The issues to be determined are as follows:

1) Does subsection 462(2) of the *Bank Act* apply to a summons issued by Staff of the OSC under section 13 of the *Securities Act*? In other words, is a summons for bank records regarding a customer's account only effective if it is served at the branch of account where the account is located?

2) Is a summons issued by Staff of the OSC under section 13 of the Securities Act with respect to documents or information regarding a joint account of a bank effective even if it names only one of the joint account holders?

## Submissions

Applicant's Submissions

The Applicant submitted that they are particularly concerned with proper service because they are subject to a common law duty of confidentiality with respect to customers. This duty requires the bank to refrain from disclosing information relating to an account holder unless the account holder consents or unless there is proper legal compulsion for the bank to produce the information.

The Applicant argued that a summons issued pursuant to section 13 of the *Securities Act* is a “notification”, as contemplated by subsection 462(2) of the *Bank Act*, and therefore is effective only if served at the bank branch that is the branch of account for the account or accounts specified in the summons. The Applicant submitted that their position was supported by the plain meaning of the statute, the purpose of the provision and its legislative history, and case authority.

The Applicant drew upon the dictionary definitions of “notification” and “summons” to argue that in plain meaning or ordinary meaning, a summons to a witness is a notification. It gives official notice to an individual to give evidence and provide documents relating to matters in question in the action specified in the summons. On this basis, the Applicant argued that a section 13 summons falls directly within the meaning of subsection 462(2) and therefore should be served on the branch that is the branch of account.

The Applicant argued that subsection 462(1) deals with documents that are binding on property of a customer, or money held on deposit for a customer, only if they served on the branch of account or the branch in possession of the property. Notification, in subsection (2), refers to all other notices which, on their face, do not bind property or money but are still notices with respect to a customer, such as a section 13 summons to a witness. Such documents will constitute notice and fix the bank with knowledge only if they are sent to and received at the branch that is the branch of account. According to the Applicant, this applies

directly to the section 13 summons because it is a notification sent to the bank with respect to certain customers of the bank.

Counsel for the Applicant also reviewed the history of section 462. He submitted that the *Bank Act* was originally amended to include what is now subsection 462(1) in response to *McMulkin* v. *Traders Bank of Canada* (1912), 6 D.L.R. 184, O.L.R. 1 (Ont. Div. Ct.). This case held that an attaching order served on one branch of the bank bound the bank in all of its offices, whether it was in this province or another province. It was argued that the Applicant's interpretation of section 462 is supported by *Bank of Nova Scotia* v. *Mitchell* [1981] B.C.J. No. 654 (B.C.C.A.), which indicates that that subsection 462(1) was added to the *Bank Act* to undo the effects of *McMulkin*.

The Applicant maintained that *Re Royal Bank of Canada and Ontario Securities Commission* (1977), 14 O.R. (2d) 783 (H.C.J.) is also an important decision in the legislative history of the section 462. The case was decided at a time when the *Bank Act* did not have subsection 462(2), and Justice Cromarty, in *obiter*, stated that subsection 462(1) did not apply to a summons issued by the OSC. The Bank Act was then amended in 1980 to add what is now subsection 462(2). The Applicant argued that it is a reasonable inference that when the Legislature made this amendment, it was aware of the decision in *Re Royal Bank* and wanted to ensure that a summons issued by the OSC would be binding only if served on the branch of account.

Turning to the authority of existing case decisions, the Applicant submitted that there was one case directly on point on this matter, *Quebec (Sou-ministre du Revenue) c. Banque Toronto-Dominion* [2002] J.Q. no. 5750 (Court du Quebec). This case deals with a formal demand by a government agency under its statutory powers for the production of documents or information concerning a customer's bank account. The court held specifically that the formal demand was a notification covered by subsection 462(2) of the *Bank Act* and that therefore notice had to be given to the branch of account. Mr. Morgan argued that this case deals with a situation that is directly parallel to the situation of a summons since the demand made by the Minister of Revenue of Quebec is the same type of demand as is made in a summons.

The Applicant concluded that since Staff did not serve the appropriate bank branch that is the branch of account for the account or accounts specified in the summons, the summons served on Ms. Monti was ineffective.

With respect to the issue of joint accounts, the Applicant argued that it owes a common law duty of confidentiality to its account holders. Consequently, the bank's policy is to require a summons lawfully issued with the names of both account holders specified thereon in order to produce the documents relating to the account as specified in the summons.

Staff's Submissions

Staff submitted that the summons served on Ms. Monti is a “writ or process”, pursuant to subsection 462(1)(a) of the *Bank Act*, and therefore, not referable to subsection 462(2). Staff also submitted that their position was supported by the plain meaning of the statute, the purpose of the provision and its legislative history, and case authority.

Staff argued that a summons falls within the dictionary definition of “writ or process”, as it is a “written command, precept or formal order… in the name of the sovereign”. They submitted that on a plain language reading of the provision, it is clear that subsection 462(2) pertains to “any notification” “other than a document referred to in subsection (1) or (3)”. Since a “writ or process” is referred to in subsection (1), it follows that it is excluded from the application of subsection (2).

Staff contended that despite the fact that the summons served on Ms. Monti is a “writ or process”, subsection 462(1)(a) of the *Bank Act* is nevertheless not applicable to the summons, as this provision deals only with property of the individual, while the information required by the summons is property of the bank. Staff argued that banks have a legal obligation to maintain account statements under Part VI of the *Bank Act* and that these records include documents such as account transaction information. In addition, banks must maintain the records for a period of at least 6 years, which is consistent with the limitation of time for commencing particular actions in the *Limitation Act*. Staff contended that if these records were the property of the customer, then it could be argued that the customer would

have control over the account statements. However, it is highly unlikely that a bank would comply with a request from a customer attempting to exercise that control, for example, erasing all records regarding an account.

Staff reviewed the legislative history of the section and contended that despite various revisions to the provision, it was always only intended to deal with orders or summons regarding money on deposit or other property that the bank may hold for an individual. It was not intended to deal with the types of documents that Staff was requesting in this case.

Staff distinguished *Quebec (Sou-ministre du Revenue) c. Banque Toronto-Dominion*, for the following reasons:

1) The interpretation of subsection 462 was not at issue. Both parties proceeded on the basis that the Sou-ministre was required to serve the branch and not the head office.

2) The formal demands were sent to the bank for the purpose of ascertaining the existence of monies so that the Sou-ministre could obtain a garnishment order.

3) The formal demands mailed to the bank by the Sou-ministre were not documents referred to in subsection 462(1), whereas this is this case here.

4) The formal demands that were sent to the bank were invalid on their face as the Sou-ministre did not have the power to request the information.

Staff submitted that the summons served by Staff on Ms. Monti had been effectively served even though it was served at the head office and not on the branch of account since the summons complied with the requirements of Rule 53.04(1) of the *Rules of Civil Procedure*.

With respect to the issue of joint accounts, Staff argued that the account transaction information requested is the property of the bank and that therefore it is not necessary to name both account holders on a summons. The bank's policy to require that the summons include the names of both account holders cannot invalidate a summons that is validly issued.

**Analysis**

Under section 13 of the *Securities Act*, a person making an investigation or examination under section 11 or 12 has the same power to summons 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.

The Superior Court of Justice is governed by the *Rules of Civil Procedure* (R.R.O. 1990, Reg. 194) in this regard. Rule 53.04(1) states:

> By Summons to Witness
>
> 53.04 (1) A party who requires the attendance of a person in Ontario as a witness at a trial may serve the person with a summons to witness (Form

> 53A) requiring him or her to attend the trial at the time and place stated in the summons, and the summons may also require the person to produce at the trial the documents or other things in his or her possession, control or power relating to the matters in question in the action that are specified in the summons.

Thus, persons conducting an investigation or examination under section 11 of the *Securities Act* have the power to summons persons in accordance with Rule 53.04(1).

Subsections 462(1) and (2) of the *Bank Act* are statutory provisions that set forth the place at which a bank is to receive various documents relating to the customer, the customer's bank account or property of the customer held by the bank, if such documents and their contents are to be effective notice to the bank.

The most recent version of section 462, which is applicable to the instant case, was proclaimed into force on October 24, 2001 and states as follows:

> (1) **Effect of Writ, etc.** – Subject to subssections (3) and (4), the following documents are binding on property belonging to a person and in the possession of a bank, or on money owing to a person by reason of a deposit account in a bank, only if the document or a notice of it is served at the branch of the bank that has possession of the property or that is the branch of account in respect of the deposit account, as the case may be:
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> (a) a writ or process originating a legal proceeding or issued in or pursuant to a legal proceeding;
>
> (b) an order or injunction made by a court;
>
> (c) an instrument purporting to assign, perfect or otherwise dispose of an interest in the property or the deposit account;
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> (d) an enforcement notice in respect of a support order or support provision.

> (2) **Notices** – Any notification sent to a bank with respect to a customer of the bank, other than a document referred to in subsection (1) or (3), constitutes notice to the bank and fixes the bank with knowledge of its contents only if sent to an received at the branch of the bank that is the branch of account of an account held in the name of that customer.
>
> […]

Both counsel argued that, in essence, the question before the Commission was the statutory interpretation of section 462 of the *Bank Act*. There was little difference in the approach taken by counsel to the interpretation of the provision, with the exception of whether it was reasonable to infer that the Legislature was aware of a particular decision when the *Bank Act* was amended. However, the parties disagreed on the meaning of section 462.

Driedger on the Construction of Statutes (Toronto, Ontario: Butterworths Canada Ltd., 1994 at 131) states,

> "There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids."

The words are to be read in their entire context in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. As Driedger notes:

> (1) It is presumed that the ordinary meaning of a legislative text is the intended or most appropriate meaning. In the absence of a reason to reject it, the ordinary meaning prevails.
>
> (2) Even where the ordinary meaning of a legislative text appears to be clear, the courts must consider the purpose and scheme of the legislation, and the

> consequences of adopting this meaning. They must take into account all relevant indicators of legislative meaning.
>
> (3) In light of these additional considerations, the court may adopt an interpretation in which the ordinary meaning is modified or rejected. That interpretation, however, must be plausible; that is, it must be one the words are reasonably capable of bearing. (*Driedger on the Construction of Statutes, supra* at 6-7.)

In the matter before us, the references to the legislative history of section 462 were useful, but not terribly instructive. If the words read are clear and of plain reading and no ambiguity arises contextually then we should apply them as such, recognising that this is the most appropriate indicator of Parliament's intention.

We disagree with the Bank's submission that a summons to a witness is a "notification" within the meaning of subsection 462(2) of the *Bank Act*. On a plain reading of this provision, it is clear that the types of documents referred to in this subsection deal with notifications that give the bank information with respect to customers of the bank. These types of documents are "sent and received" by a bank. They provide the bank with knowledge or information with respect to its customers and fix the bank with such knowledge or information. As such they relate to matters between the customer and the bank and the property of the customer held by the bank.

The fact that subsection 462(2) expressly refers to notifications other than documents referred to in subsection 462(1) or (3) is support for the interpretation that notifications made under subsection 462(2) pertain to matters between the bank and its customers.

In its submissions, the Applicant relied upon the decision of Mr. Justice Jean-Pierre Lortie, *Quebec (Sou-ministre du Revenue) c. Banque Toronto-Dominion*. In that case, the Minister of Revenue of Quebec was attempting to collect a tax assessment in the amount of $55,000. In connection with the collection, the Quebec Minister of Revenue sent two formal demands on a bank, requiring it to file certain documents or information with respect to the taxpayer. Section 39 of *An Act Respecting the Ministere du Revenue*, R.S.Q., c. M-31 states the following*:*

> 39. The Minister may, by a formal demand delivered by registered mail or personal service require from any person, whether or not he is subject to the payment of a duty, that he file by registered mail or personal service, within a reasonable delay fixed in the demand:
>
> (a) information or additional information, including a return, report or supplementary return or report exigible under a fiscal law, or
>
> (b) books, letters, accounts, invoices, financial statements or other documents.
>
> […]

The Bank took the position that this notice was a "notification" within section 462 of the *Bank Act* and as such had to be given at the branch where the account of the taxpayer was located. The court agreed with the bank's position. Since the notice was not sent to the

appropriate branch, it did not constitute notice to the bank and did not fix the bank with its contents.

We have found it useful to consider this decision. However, we are of the opinion that the facts and the provisions under consideration are distinguishable from this proceeding. Tax collection and a formal demand made under section 39 of *An Act Respecting the Ministere du Revenue* are different in purpose and effect from a section 13 summons in the context of an investigation under the *Securities Act*. Moreover, the interpretation of section 462 of the *Bank Act* was not at issue in that case.

The Applicant also argued that when the *Bank Act* was amended in 1980, it is a reasonable inference that the Legislature was aware of the decision in *Re Royal Bank of Canada.* According to the Applicant, the addition of subsection 462(2) was in part to ensure that a summons issued by the OSC would be binding only if served on the branch of account. It is unnecessary to make this inference in order to decide this matter.

With respect to the issue of joint accounts, we agree with Staff that the account transaction information requested is the property of the bank and that therefore it is not necessary to name both account holders on a summons. We recognise the confidentiality issues raised by the Applicant. However, we are satisfied that the Commission and Staff have a continuing requirement for confidentiality under Part VI of the Act. Section 13 of the Act provides Staff

with wide powers to compel the production of documents and compel testimony. Section 16 prohibits the disclosure of material and testimony so obtained. However, section 16 disclosure is subject to section 17, which states that only if the Commission considers that it would be in the public interest, it may order disclosure of material and testimony obtained pursuant to section 13.

**Conclusion**

We are of the view that a summons issued pursuant to section 13 of the *Securities Act* is a "writ or process" issued in or pursuant to a legal proceeding. Consequently, these types of summonses may fall under subsection 462(1)(a) of the *Bank Act*. However, we agree with Staff that the summons at issue in this proceeding does not fall under this subsection. According to a plain language reading of subsection 462(1)(a), it is clear that it applies to property, that a bank has possession of, belonging to a person. Consequently, this section does not apply to account transaction information because such information is not property belonging to a person, rather, it is the bank's property. Thus, subsection 462(1) of the *Bank Act* does not apply to the section 13 summons at issue in this proceeding.

For the reasons given, we further find that a summons is not a notification within the meaning of subsection 462(2). Accordingly, we find that the summons was properly served on Ms. Monti according to Rule 53.04(1) of the *Rules of Civil Procedure* and we shall issue an order to this effect.

We find that a summons issued by Staff pursuant to section 13 of the *Securities Act* is effective even if it names only one of the joint account holders. For the reasons given, we are satisfied the Part VI of the Act enables the Commission to balance the need to obtain the joint account statement(s) as part of its investigation with the confidentiality requirements of the joint account holder(s).

DATED at Toronto this _____ day of April, 2002.

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