

TEN YEARS LATER: THE JUSTIFIABLE EXPECTATIONS STANDARD AND THE EVOLUTION OF PUBLIC INTEREST POWERS IN CANADA

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On August 22, 2014, we published *Justifiable Expectations Standard: The Basis for the Exercise of the Public Interest Power of the Ontario Securities Commission* (“**Justifiable Expectations Standard**”), criticizing the approach the Ontario Securities Commission (“**OSC**”) had taken on exercising its public interest jurisdiction under section 127 of the Ontario Securities Act (“**OSA**”). Under this provision, the OSC (or, since April 2022, the Ontario Capital Markets Tribunal (the “**Tribunal**”)) can sanction persons absent a breach of the OSA, regulations thereunder, or policy statements.^[1] The application of section 127 in case law led to two different standards as summarized by OSC staff in 2014:

In the absence of a technical breach of securities law, the principles that have emerged from this line of cases suggest the following: (1) in cases involving novel transactions “the conduct or transaction must clearly be demonstrated to be abusive of shareholders in particular, and of capital markets in general” and (2) in cases “... where market conduct engages the animating principles of the [OSA], the [OSC] does not have to conclude that an abuse has occurred in order to exercise its public interest jurisdiction.”^[2]

However, we found that the “abuse” and “animating principles” standards were not only ill-defined throughout the jurisprudence, but they had been utilized by the OSC in an inconsistent manner. This resulted in a lack of transparency and predictability for securities practitioners and market participants alike.

Given the criticisms and the limitations we found of these two standards, we proposed a single standard: the “justifiable expectations” standard. This standard stems from *Canadian Tire Corp v CTC Dealer Holdings Ltd* and answers the following question: Would a reasonable investor lose confidence in the capital markets and be less willing to invest if the OSC did not take action to deter a repetition of the conduct in question?^[3] Please see [our 2014 paper](#) for further details on these findings.

Ten years have passed since *Justifiable Expectations Standard* was published, and we are now revisiting our conclusions and determining whether public interest decisions in the past ten years have provided greater clarity regarding the exercise of public interest powers.

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Through our review of jurisprudence over the past decade, we found that cases across Ontario, British Columbia, Alberta and Québec have not established a more transparent and predictable standard, and that they continue to grapple with the “abuse” and “animating principles” standards.

Jurisprudence since 2014 has proved to be unhelpful in providing a reliable framework for the public interest jurisdiction. However, more recently, the Tribunal in *Mithaq Canada Inc (Re)* appears to have recognized this and has raised concerns about the “abuse” standard while at the same time noting the need for flexibility. At the very least, this should mean that the Tribunal is open to reconsidering the framework that has been historically adopted in connection with the exercise of the public interest jurisdiction.^[4]

We suggest again that the justifiable expectations standard may provide a single, flexible and unified standard that upholds the purposes of the public interest jurisdiction and the guiding principles enumerated in key decisions, such as the need for restraint. What the justifiable expectations standard focuses on is whether the impact of the transaction would likely harm the Ontario capital markets in such a manner that would run counter to the purposes of the OSA and thereby defeat investors’ reasonable expectations. We believe it is a versatile test that would afford the Tribunal with the necessary flexibility to address various circumstances while balancing caution and restraint to prevent undue interference.

Our hope remains, like in 2014, that our paper will be useful in providing insights into what we believe would clarify the standards used to determine when and how the public interest power will be exercised. With the Tribunal’s newfound open-mindedness to this issue, it is an opportune time to explore a new, more certain framework to guide the public interest jurisdiction.

[1] *Securities Act* (Ontario), RSO 1990, c. S.5, s 127 [OSA].

[2] Tom Atkinson & Cullen Price, “The Ontario Securities Commission’s Public Interest Power: The Primacy of Principles” (2014) 27 Can J Admin L & Prac 205 at 212 [Atkinson & Price], citing *Re Biovail Corp* (2010), 33 OSCB 8914 at para 382.

[3] *Canadian Tire Corp v CTC Dealer Holdings Ltd* (1987), 59 OR (2d) 79.

[4] *Mithaq Canada Inc (Re)*, 2024 ONCMT 9 at para 44.

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A Cautionary Note

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