Court of Appeal File No. C70114
Court File No.: CV-21-00673521-00CL

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ONTARIO SECURITIES COMMISSION

Applicant
(Respondent in Appeal)

- and-

GO-TO DEVELOPMENTS HOLDINGS INC., OSCAR FURTADO, FURTADO HOLDINGS INC., GO-TO DEVELOPMENTS ACQUISITIONS INC., GO-TO GLENDALE AVENUE INC., GO-TO GLENDALE AVENUE LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK II INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK II LP, GO-TO NIAGARA FALLS CHIPPAWA INC., GO-TO NIAGARA FALLS CHIPPAWA LP, GO-TO NIAGARA FALLS EAGLE VALLEY INC., GO-TO NIAGARA FALLS EAGLE VALLEY LP, GO-TO SPADINA ADELAIDE SQUARE INC., GO-TO SPADINA ADELAIDE SQUARE LP, GO-TO STONEY CREEK ELFRIDA INC., GO-TO STONEY CREEK ELFRIDA LP, GO-TO ST. CATHARINES BEARD INC., GO-TO ST. CATHARINES BEARD LP, GO-TO VAUGHAN ISLINGTON AVENUE INC., GO-TO VAUGHAN ISLINGTON AVENUE LP, AURORA ROAD LIMITED PARTNERSHIP, and 2506039 ONTARIO LIMITED

Respondents
(Appellants in Appeal)

APPLICATION UNDER SECTIONS 126 AND 129 OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5, AS AMENDED

BOOK OF AUTHORITIES OF THE APPELLANTS

January 13, 2022

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Court of Appeal File No. C70114
Court File No.: CV-21-00673521-00CL

COURT OF APPEAL FOR ONTARIO

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Applicant
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Respondents
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APPLICATION UNDER SECTIONS 126 AND 129 OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5, AS AMENDED

I N D E X

4	*Mega-C Power Corp.*, 2007 LNONOSC 1059 at para. 29, (2010 33 OSCB 8273 (Ont. Sec. Comm) at para. 29	51-59

TAB 1

1988 CarswellOnt 180
Ontario Supreme Court, Toronto Weekly Court

Fisher Investments Ltd. v. Nusbaum

1988 CarswellOnt 180, [1988] O.J. No. 1859, 12 A.C.W.S. (3d) 253, 31 C.P.C. (2d) 158, 71 C.B.R. (N.S.) 185

FISHER INVESTMENTS LTD. et al. v. NUSBAUM et al.

Chadwick J.

Heard: November 15, 1988
Judgment: November 24, 1988
Docket: Toronto No. RE 2293/88

Counsel: *H. Maltz*, for applicants.
S.L. Goldenberg, for respondents.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.A Just and convenient
Headnote
Receivers --- Appointment — Application for appointment — Grounds
Interim receivers — Appointment — Application to appoint interim receiver and manager of nursing home corporation — Applicants and respondents each owning 50 per cent of corporation — Application for winding-up pending — Court to go further than just applying "just and convenient" test — Effect on parties to be considered — Application dismissed.
The applicants sought an order appointing an interim receiver and manager of the assets, property and undertakings of a corporation operating a nursing home. The applicants and the respondents each owned 50 per cent of the enterprise and an application for the winding-up of the corporation was pending and would be heard in about six weeks. The corporation had essentially been owned by the individual respondent N. and his partner, F., and N. had run it. After F.'s death, F.'s children and N. could not co-operate.
Held:
Application dismissed.
The court must go further than just applying the "just and convenient test", and look at the situation in a broader context by examining the effect that the appointment will have upon the parties. There was no evidence of any wrongdoing, nor was there any evidence to suggest that the assets would be dissipated if the respondents continued to manage the business pending the winding-up application. N. had devoted the latter part of his life to establishing, developing and promoting the nursing home operation. An order appointing an interim receiver for a six-week period might have a devastating effect upon N. and the nursing home business itself. By dismissing the application and leaving N. to operate the nursing home, the interests of the parties or the assets of the company would not be jeopardized.
Table of Authorities
Cases considered:
Aetna Fin. Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2, 55 C.B.R. (N.S.) 1, [1985] 2 W.W.R. 97, 29 B.L.R. 5, 15 D.L.R. (4th) 161, 4 C.P.R. (3d) 145, 32 Man. R. (2d) 241, 56 N.R. 241 — *considered*
Statutes considered:

Business Corporations Act, S.O. 1982, c. 4

s. 247

Courts of Justice Act, S.O. 1984, c. 11

s. 114

Application for order appointing interim receiver and manager.

***Chadwick J.*:**

1 The applicants seek an order appointing an interim receiver and manager of the assets, property and undertakings of Christie Park Nursing Homes Limited, 180 Sherbourne Ltd., and Hensol Investments Limited, pursuant to s. 114 of the Courts of Justice Act and s. 247 of the Ontario Business Corporations Act.

2 The applicants' corporations own 50 per cent of the common shares of these enterprises and the respondent Nusbaum Investments Ltd. holds the other 50 per cent interest.

3 David Fisher died on 2nd September 1988 and up until that time he had been a partner with the respondent Solomon Nusbaum for many years. The two gentlemen had started out in the painting business and were successful in acquiring properties and expanding their interests until each owned 50 per cent of the three subject respondent companies. The main concern relates to Christie Park Nursing Homes Limited, which operates a nursing home in the city of Toronto and which has been effectively managed and run by Solomon Nusbaum. Mr. Nusbaum is a gentleman of 78 years of age and, based upon all the affidavit material filed on this motion, it is apparent that the relationship between Mr. Nusbaum and David Fisher's children is not an amicable one. The material sets forth numerous mismanagement allegations relating to documents and ac counting procedures, failure to consult with the Fishers in decision-making, and that Mr. Nusbaum has treated the Christie Park Nursing Home as a business of which he is sole owner. The books and records have been microscopically examined by the applicants to find a hint of any irregularity which may support them in their motion for the appointment of an interim receiver and the winding-up of the company. It is apparent from the affidavit material filed that the two families cannot continue to operate the business, in view of the lack of trust and goodwill which exists between them at the present time. It would certainly appear that a reasonable solution to the problem would be for one party to buy the other party out under a buy-sell agreement or that the parties agree that the business is to be sold and the assets divided, after proper accounting.

4 The motion before me was for the appointment of Touche Ross as an interim receiver until the hearing of the winding-up application. In order to deal with that issue, I of course have been subjected to all of the material relating to the winding-up. The applicants, however, wish to adjourn the hearing of the winding-up application in order that they can conduct cross-examinations, and they anticipate that it would take approximately six weeks before that matter can be brought back on for hearing.

5 I have some concerns about the appointment of an interim receiver to take over the operation of this nursing home for a six-week period. I have no reservation about the business, management and accounting capabilities of the proposed interim receiver, but I do have reservations about their lack of experience with the day-to-day operation of this nursing home.

6 The applicant has urged me to appoint an interim receiver because of the manner in which Mr. Nusbaum has cut the Fishers out of management participation and for other reasons as alleged. There does not appear to be any evidence to suggest that the assets will be dissipated or that Mr. Nusbaum will not effectively carry on the management of the business during this interval. Mr. Nusbaum, in his supplementary material, has filed an up-to-date affidavit outlining what he has done with reference to accounting and management decisions, and from that material the business does not appear to be in any jeopardy. The applicant has urged me to apply the "just and convenient test" referred to in s. 114 of the Courts of Justice Act.

7 In my view one has to go further than just applying the "just and convenient test" and must look at the situation in a broader context, namely, examining the effect that it will have upon the parties. In this particular case, Mr. Nusbaum has devoted the

latter part of his life in establishing, developing and promoting this nursing home operation. If I issue an order appointing an interim receiver for six weeks, it would have a devastating effect upon Mr. Nusbaum and the nursing home business itself. One has to recognize that the appointment of a receiver is tantamount to placing a notice in the window of the business that the proprietors are not capable of managing their own affairs. If the business has to be sold, which is probable, the appointment could have a detrimental effect upon the price received.

8 The grounds for granting extraordinary relief were considered by the Supreme Court of Canada in *Aetna Fin. Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, 55 C.B.R. (N.S.) 1, [1985] 2 W.W.R. 97, 29 B.L.R. 5, 15 D.L.R. (4th) 161, 4 C.P.R. (3d) 145, 32 Man. R. (2d) 241, 56 N.R. 241, where Estey J. stated at p. 166:

> A second and much higher hurdle facing the litigant seeking the exceptional order is the simple proposition that in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be recovered before trial. Execution in this sense includes judicial orders impounding assets or otherwise restricting the rights of the defendant without a trial. This was enunciated by Cotton L.J. in *Lister & Co. v. Stubbs*, [1886-90] All E.R. Rep. 797 at p. 799, as follows:
>
> > I know of no case where, because it is highly probable if the action were brought the plaintiff could establish that there was a debt due to him by the defendant, the defendant has been ordered to give a security till the debt has been established by the judgment or decree.

Likewise, in this case the appointment of an interim receiver is a very strong extraordinary relief prejudging the conduct of the defendant Mr. Nusbaum. I am not satisfied on the evidence before me that the interests of the parties or the assets of the company will be jeopardized in any way by leaving Mr. Nusbaum in the position of operating the nursing home. On the contrary, I would be more concerned with an inexperienced manager stepping in for such a short period of time, and the effect this would have.

9 Therefore, under the circumstances the application is dismissed with costs.

Application dismissed.

TAB 2

1985 CarswellBC 1035
British Columbia Court of Appeal

British Columbia (Superintendent of Brokers) v. Victoria Mortgage Corp.

1985 CarswellBC 1035, [1985] B.C.W.L.D. 2941, [1985] B.C.J. No. 1935, 32 A.C.W.S. (2d) 431, 59 C.B.R. (N.S.) 225

Superintendent of Brokers, Petitioner (Respondent) and Victoria Mortgage Corporation Ltd., Respondent (Appellant)

Hinkson, Macdonald, Esson JJ.A.

Oral reasons: June 27, 1985
Judgment: June 27, 1985
Docket: Vancouver CA004307

Counsel: D.G.S. Rae, Esq., W.S. Martin, Esq., for the Appellant
Ms. J. Maykut, Ms. S. Ross, for the Respondent

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.13 Powers and duties of appellate court
XXIII.13.j Miscellaneous
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.v Practice and procedure
Headnote
Receivers --- Appointment — Setting aside
The respondent brought a short leave application for the appointment of a receiver-manager to manage the affairs of the appellant. This application was opposed by the appellant as well as by a group of persons holding debentures from the appellant, both of whom sought an adjournment on the grounds that they were negotiating a possible restructuring. Upon reading the affidavits that had been filed in support of the petition, the chambers judge refused the appellant's application for an adjournment of one week but granted the petition appointing a receiver-manager. On appeal, *held*, appointment of receiver-manager set aside. The judge erred in concluding that no useful purpose would be served by the adjournment, and entirely overlooked the position of counsel for the debenture holders. Secondly, he erred in deciding the merits of the application without affording counsel for the appellant the opportunity to make submissions in that respect. And finally, the judge prejudged the application when he said that he had made up his mind from reading the material filed on behalf of the respondent.

***Hinkson, J.A.*:**

1 We do not need to hear from you, Mr. Rae.

2 This is an appeal from a decision of a judge in Chambers appointing a receiver-manager. The applicant was the Superintendent of Brokers.

3 Counsel for the Superintendent of Brokers obtained short leave and brought the application on in Supreme Court Chambers on June 21st, 1985.

4 The respondent in the proceedings, Victoria Morgage Corporation, is engaged in the business of raising funds through the issue of debentures to the public and investing those funds in real estate in Alberta and British Columbia. These debentures are offered to the public by prospectus, pursuant to the Securities Act.

5 The Series VI debentures have been issued to approximately 1,200 persons with a principal amount outstanding of approximately $15,000,000.

6 Certain events occurred during the spring of this year which involved and concerned the Superintendent of Brokers office. The company advised the Superintendent of Brokers office that as a result of auditors' advice the company had suspended the sale of the debentures on April 29, 1985.

7 On that same date the Superintendent of Brokers prohibited trading in the debentures of the company by an order pursuant to s.77 of the Securities Act. This order was extended by a further order of May 14, 1985.

8 On May 24, 1985, the company applied to the Superintendent of Brokers for a partial rescission of the cease trading order to issue a $1,000 unsecured debenture under a trust indenture in order for the company to qualify under the Federal Companies Creditors Arrangement Act to enable it to present a financial reorganization plan of arrangement to its creditors. The Superintendent refused the application on May 29, 1985.

9 On May 30, 1985, the company appealed the decision of the Superintendent of Brokers to the Corporate and Financial Services Commission.

10 On June 6, 1985, the company appointed the firm of Coopers and Lybrand to investigate the financial affairs of the company.

11 On June 7, the Superintendent of Brokers appointed the firm of Clarkson Gordon to examine the financial affairs of the company, pursuant to s.34 of the Act.

12 On June 13, 14 and 18, 1985, a hearing was held before the Corporate and Financial Services Commission with regard to the order of the Superintendent of Brokers of May 29, 1985. The hearing did not complete and was adjourned to June 24, 1985.

13 It was during the interim that the Superintendent of Brokers caused a petition to be filed, with supporting affidavits, in the Supreme Court of British Columbia. That petition came on for hearing on June 21st.

14 Before the Corporate and Financial Services Commission Mr. Paine was appointed to represent a group of debenture holders. His instructions from the chairman of the Commission were to represent the interests of the unrepresented debenture holders.

15 As a result of his appointment, Mr. Paine and Mr. Rae, counsel for the company, carried on negotiations which had not yet reached the final agreement on June 21st. When the application came on in Chambers that day Mr. Rae sought an adjournment of the application for one week in order to prepare and file material in answer to the affidavits filed in support of the petition.

16 Mr. Paine appeared and was granted status by the Chambers judge and he supported the application for the adjournment upon the basis that he and Mr. Rae had almost reached agreement with respect to the matters before the Corporate and Financial Services Commission.

17 Counsel for the Superintendent opposed the application, contending that the court should proceed to the merits of the petition and consider the appointment of the receiver-manager.

18 On this appeal we are concerned with three issues of law upon which the appellant contends that the Chambers fell into error.

19 What occurred on the Chambers application was that the Chambers judge heard counsel on the question of the adjournment and also heard from some of the debenture holders who supported the position of counsel for the Superintendent in opposing the requested adjournment.

20 The judge adjourned over the luncheon adjournment and during that time read the affidavits that had been filed in support of the petition. He returned to the bench that afternoon and delivered oral reasons for judgment.

21 The first issue raised by the appellant is that the judge erred in failing to grant the adjournment because of the basis on which he decided that an adjournment ought not to be granted.

22 In support of the application for an adjournment Mr. Rae, for the company, submitted that he would file affidavits within the week that he sought to have the matter adjourned. Further, he contended that on the material before the Chambers judge no urgency was disclosed. And finally, he indicated that he was prepared on behalf of his client to give an undertaking that the status quo would not be altered pending resumption of the application subsequent to the adjournment.

23 The learned Chambers judge gave extended reasons for judgment disposing of the application for an adjournment. He posed the question as to what purpose would be served by granting the adjournment as requested. He said:

> While I do not have to decide, it seems to be in the circumstances a futile exercise in that the necessary financial evidence and material is not available to allow such a restructuring at this time.

24 That really was not the point that Mr. Rae sought to make with respect to filing material. He sought to adjourn the matter in order to file material in answer to the affidavits filed in support of the petition and outlining the alternatives that were open to the Chambers judge with respect to the application of the Superintendent.

25 Then the learned Chambers judge continued:

> In the meantime, Mr. Rae just asked for one week. This court must be satisfied that there would be material forthcoming that would indicate that there is a vastly different state of affairs that exists with this company other than that which is indicated in all of the applicant's material. I, with the greatest respect to submissions of Mr. Rae, do not think that that is possible in the circumstances after having read Mr. Adam's analysis, and looking at the December 31st, 1984 statement of this company, that reality is more likely in line with the material I have before me. I concluded that no useful purpose would be served by extending the time in this instance. Again, if there was some indication before me even without material on deposition, I would grant the adjournment, but I am satisfied looking at figures, the statements, the affidavits, that nothing will have changed.

26 In my opinion, the experience of the Chambers judge ought to have raised a question in his mind as to whether or not that approach was sound.

27 In *John v. Rees* (1970) Ch.345, Megarry, J., (as he then was) said at p.402:

> It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious," they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving the opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.

28 In my respectful view that statement of Mr. Justice Megarry illustrates the experience of the courts in these matters. Therefore, I conclude that the Chambers judge fell into error in the approach he adopted in the passage I have quoted above from his reasons for judgment.

29 But, there is a further ground that leads me to conclude that he did not properly assess the circumstances, and that is that he entirely overlooked the position of Mr. Paine on the submissions he had made as to why the adjournment of one week would be appropriate.

30 In the course of his reasons for judgment no reference was made to that consideration. The trial judge disregarded it or overlooked it. It seems to me that in disposing of the application he ought to have taken Mr. Paine's submissions into consideration, and for that reason as well, in my opinion, he erred in his disposition of the application for the adjournment.

31 The second ground advanced by the appellant was that the Chambers judge had decided the merits of the petition without hearing the submissions of counsel for the company.

32 The submissions made by counsel and by the debenture holders to the Chambers judge dealt with the question of whether or not an adjournment should be granted. Ms. Maykut, for the Superintendent, submits that in the course of those submissions Mr. Rae alluded to the kind of material that he intended to file to meet the petition and in that way she contends that he did have an opportunity to deal with the merits.

33 I am unable to accept that submission because it seems to me that the judge himself recognized that he had not afforded Mr. Rae the opportunity to deal with the merits of the application.

34 After disposing of the application for the adjournment by saying:

> Therefore, to repeat once again, I am not allowing the application for an adjournment.

He continued in the next paragraph:

> Now, I have also decided that in the circumstances there is no other alternative but to make the appointment under s.28, and I do so.
>
> Is there anything else anybody wants to say to me at this point in time? Mr. Rae, anything you want to say?

At that point, Mr. Rae, according to the record, spoke and said this:

> MR. RAE: Well, in light of the fact, My Lord, I haven't filed evidence or haven't had the opportunity to file any evidence.
>
> THE COURT: I've referred to that.
>
> MR. RAE: And the fact that Your Lordship has decided to appoint a receiver manager, I take it that it would be of no use or effect for me to make a submission as to no appointment.
>
> THE COURT: No, that's right. No, I think that's correct, Mr. Rae. I have made up my mind in reading the material that The creditors' interests must be taken Care of, and I think that's the foremost thing. But I thought maybe there was some other housekeeping matters you might have had in mind that I should deal with.

35 In my opinion, that passage clearly demonstrates that Mr. Rae was not afforded the opportunity to make submissions on the merits of the application. What happened was, the trial judge went away, read the material that had been filed in support of the application, and decided on the merits of the application without having heard the submissions of counsel for the company. In doing so, in my opinion, the learned trial judge fell into error.

36 There is a third issue raised by the appellant, and that is that the learned Chambers judge prejudged the application. From the passage that I have just read I conclude that to be the fact. The judge said he had made up his mind from reading the material and that was without the benefit of submissions on the merits from counsel. To adopt that course is, again, error in law.

37 We have heard submissions from Ms. Maykut as to the appropriate course to follow in the event the appeal is to be allowed. She has indicated to us that, as counsel for the Superintendent, in the event that the matter comes on again in the Supreme Court, that she intends to file additional material.

38 This is a matter of great concern to the debenture holders of Victoria Mortgage Corporation Ltd. and it is with reluctance that I have arrived at the conclusion that the order appointing the receiver-manager must be set aside, but that is my conclusion. For the reasons I have given I would allow the appeal and set aside the order appointing the receiver-manager. I would make no further order, but leave it to the parties to follow whatever course they may be advised in the circumstances.

***Macdonald, J.A.*:**

39 I agree with the disposition of the appeal as proposed by Mr. Justice Hinkson and for the reasons he has expressed.

***Esson, J.A.*:**

40 There will be cases where, on hearing an application of this kind, a Chambers judge will be justified in making an order either *ex parte* or, if there has been notice and an appearance by the respondent, in abridging the respondent's right to respond. That will be so where there is sufficient evidence to create a reasonable apprehension of immediate jeopardy to investors or other creditors. This is not that kind of case. As the matter came before the Chambers judge there was obviously a question whether the appointment of a receiver was in the interests of the creditors as a whole. One group supported immediate appointment of a receiver, another group represented by Mr. Paine sought an adjournment in order to pursue the possibility of proceeding with the proposal which would have lead to a restructuring.

41 The judge gave no consideration to the question of jeopardy. Hearing only the one side he came to the conclusion that the idea of restructuring was not feasible and on that basis he made the order he did.

42 In all the circumstances, that was clearly a breach of the most fundamental rule of natural justice. I agree in allowing the appeal for the reasons given by Mr. Justice Hinkson.

***Hinkson, J.A.*:**

43 The appeal is allowed.

TAB 3

2007 CarswellOnt 9553
Ontario Securities Commission

Black, Re

2007 CarswellOnt 9553, 31 O.S.C.B. 10397

In the Matter of the Securities Act, R.S.O. 1990, c. S.5, as amended

In the Matter of Conrad M. Black and John A. Boultbee

C.S. Perry Commr., P.J. LeSage Chair, W.S. Wigle Commr.

Heard: January 10-11, 2007
Judgment: March 5, 2007
Docket: None given.

Counsel: Johanna Superina, Melanie Adams, for Staff of the Ontario Securities Commission
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C. Clifford Lax, Q.C., Paul Michell, for Witness, I

Subject: Corporate and Commercial; Securities; Constitutional
Related Abridgment Classifications
Securities
VI Offences
VI.9 Practice and procedure
VI.9.b Disclosure
Headnote
Securities --- Offences — Practice and procedure — Disclosure
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s. 11(4) — referred to

s. 13 — considered

s. 13(1) — referred to

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Decision of the Board:

I. Overview

A. Background

1 On January 10 and 11, 2007, we heard an application (the "Application") brought by Conrad M. Black and John A. Boultbee (the "Applicants"), for an order pursuant to subsection 17(1) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), authorizing the Applicants to use and disclose testimonial and documentary evidence of persons identified as A, B, C, D, E, F, G, H, I and J (the "Respondents") that was obtained by Staff of the Ontario Securities Commission ("Staff") under an order of the Ontario Securities Commission (the "Commission") made pursuant to section 11 of the Act, in order to provide the Applicants with the ability to make full answer and defence to criminal charges against them in the United States District Court for the Northern District of Illinois, Eastern Division proceeding entitled *United States of America v. Conrad M. Black, John A. Boultbee, Peter Y. Atkinson, Mark S. Kipnis and The Ravelston Corporation Limited*, No. 05 CR 727 (the "U.S. Criminal Proceeding").

2 The Applicants are the subject of a regulatory proceeding in Ontario, entitled In the Matter of *Hollinger Inc., Re* (the "Commission Proceeding"), commenced by a Notice of Hearing issued on March 18, 2005, by the Commission pursuant to sections 127 and 127.1 of the Act, and accompanied by a Statement of Allegations issued by Staff with respect to Hollinger Inc.

("Hollinger"), Conrad M. Black ("Black"), F. David Radier ("Radier"), John A. Boultbee ("Boultbee") and Peter Y. Atkinson ("Atkinson").

3 The Statement of Allegations in the Commission Proceeding sets out a variety of allegations regarding the conduct of Hollinger, Black, Radier, Boultbee and Atkinson, which include: diversion of funds from Hollinger International Inc. to Hollinger in connection with sales of certain U.S. community newspapers by the former; non-compliance by Hollinger with its continuous disclosure obligations; misstatements and omissions in the continuous disclosure filings of Hollinger; failure to disclose the interests of insiders in material transactions; failure to make the required disclosure of executive compensation arrangements; failure to file the required financial statements; failure to implement effective conflict of interest practices; and breach of the fiduciary duties owed by Black, Radier, Boultbee and Atkinson to Hollinger and Hollinger International Inc.

4 The U.S. Criminal Proceeding against the Applicants and the Commission Proceeding involve similar and overlapping allegations arising out of substantially the same transactions. The Applicants seek to use and disclose, in the U.S. Criminal Proceeding, material the Commission disclosed to them in the course of the Commission Proceeding. The specific materials that are the subject of the Application are transcripts of examinations conducted under section 13 of the Act, documents that were the subject of the examinations, and documents produced at these examinations (the "Evidence").

5 The Applicants seek an order that authorizes them and their counsel to use and disclose the Evidence solely for purposes relating to their defence of the charges in the U.S. Criminal Proceeding.

6 In their Application, the Applicants submit that they anticipate the following possible uses of the Evidence: (1) to introduce some of the documents as part of the defence in the criminal trial or to cross-examine witnesses for the prosecution based on the documents and the transcripts; (2) to refer to the Evidence in connection with interviews of proposed prosecution witnesses or attempts by defence counsel to obtain cooperation from persons who were examined in the course of Staff's investigation; and (3) for any other use necessary to make full answer and defence in the U.S. Criminal Proceeding.

7 However, in their written reply submissions and in oral submissions, the Applicants submitted that the Evidence will only be used at the criminal trial in two ways:

> 1) If one of the Respondents testifies as a witness at the criminal trial, his evidence to the Commission may be used in cross-examination to identify contradictions with the respondent's testimony in court.
>
> 2) If a respondent does not testify, his evidence to the Commission may only be used to refresh the memory of another witness.

8 Accordingly, the Applicants seek an order authorizing them to use the Evidence for purposes relating to the trial and any appeals of the trial decision in the U.S. Criminal Proceeding, subject to certain safeguards. In order to obtain such authorization, the Applicants have filed a draft order reflecting proposed conditions that, they submit, should be placed on them and on the use of this information. In particular, they request that the Commission Order, if granted:

> 1. prohibit them from disclosing or using the Evidence for any other purposes;
>
> 2. require them to return all copies of the Evidence to Staff or to destroy them after the completion of the trial and any subsequent appeals; and
>
> 3. require their defence counsel to take all steps reasonably available to obtain protective orders from the United States District Court for the Northern District of Illinois, Eastern Division, that would require all parties to the U.S. Criminal Proceeding and others to comply with the conditions set out in clauses 2 and 3, if it becomes necessary to disclose all or part of the Evidence in the U.S. Criminal Proceeding.

9 At the close of the hearing, we requested that the Applicants file a revised draft order that would alleviate some of the concerns that the Panel had identified at the hearing, in the event that we would authorize the request. We discuss the draft order and the revised draft order in detail below at paragraphs 228 to 237 and 250 to 264 of these Reasons.

10 The question of whether the Commission should authorize the Applicants to use and disclose in the U.S. Criminal Proceeding information obtained pursuant to the Commission processes as part of its investigation in furtherance of the Commission Proceeding is the essence of this hearing. The issues that we have to decide are whether we have jurisdiction to authorize the request, and whether it is in the public interest under subsection 17(1) of the Act to authorize the Applicants to use and disclose the Evidence for the purposes of providing a full answer and defence in the U.S. Criminal Proceeding.

B. The Parties

11 The Applicants are Black and Boultbee, who face potential criminal convictions in the U.S. Criminal Proceeding.

12 The Respondents to this Application are:

- Witness "A";
- Witness "B";
- Witness "C";
- Witness "D";
- Witness "E";
- Witness "F";
- Witness "G";
- Witness "H", The Ravelston Corporation Limited ("Ravelston");
- Witness "I", Atkinson, a director of Hollinger from 1996 to 2004. During the period of 1996 through 2001, Atkinson was also the Vice-President and General Counsel of Hollinger. Atkinson then became the Executive Vice President of Hollinger and remained in that position until January 9, 2004, when he resigned as an officer and director of Hollinger. Atkinson is a co-accused in the U.S. Criminal Proceeding and he is also a respondent in the Commission Proceeding; and
- Witness "J", KPMG LLP (Canada), the Canadian member firm of KPMG, a global network of professional firms providing audit, tax, and advisory services ("KPMG").

13 The Applicants filed an amended Application on December 12, 2006, in which Atkinson was added as a respondent to the Application.

14 KPMG was added as a respondent to the Application at the beginning of the hearing.

15 Counsel for Ravelston did not appear at the hearing, however, by letter dated January 9, 2007, Ravelston, through counsel for RSM Richter Inc. in its capacity as receiver and manager, interim receiver and monitor of Ravelston, stated that it had no objection to the order sought by the Applicants in respect of the documents produced by Ravelston and on behalf of Ravelston provided to Staff in connection with the Commission Proceeding.

16 Staff is also a party to this proceeding. Staff indicated that it did not oppose the relief requested by the Applicants.

C. The Facts

17 The facts that gave rise to this Application can be summarized as follows: on March 15, 2004, the Commission made an order under section 11 of the Act authorizing an investigation into specific conduct relating to Hollinger and its directors and officers. Pursuant to this investigation order, Staff obtained documents and testimony under section 13 of the Act from the Respondents.

18 Between April 2, 2004 and May 6, 2005, Staff examined and obtained documents from witnesses A to G, Ravelston, and Atkinson.

19 Following the investigation by Staff, a Notice of Hearing and a related Statement of Allegations were issued on March 18, 2005, naming Hollinger, Black, Boultbee, Radier and Atkinson as respondents in the Commission Proceeding.

20 Following the issuance of the Notice of Hearing, Staff provided disclosure to the respondents in the Commission Proceeding pursuant to Staff's disclosure obligations and the Commission's Rules of Practice 1997 20 O.S.C.B. 1947 . The compelled documents and transcripts from respondents' examinations were included in this disclosure.

21 On June 29, 2005, Staff sent a letter to counsel for the respondents in the Commission Proceeding to notify them of the delivery of the first part of Staff's disclosure. The letter stated that respondents who receive information further to Staff's disclosure obligations in regulatory proceedings commenced under section 127 of the Act may not, without leave of the Commission, use the information for any purpose collateral or ulterior to the Commission Proceeding.

22 On November 17, 2005, criminal indictments were brought against Black, Boultbee, Atkinson, Mark S. Kipnis and Ravelston in the U.S. Criminal Proceeding. The indictments alleged, *inter alia*, that they engaged in fraudulent schemes relating to non-competition agreements, misappropriated assets of Hollinger International Inc., breached their fiduciary duty by failing to disclose matters to Hollinger International Inc.'s audit committee and board of directors, engaged in misrepresentation, and failed to disclose required information in Hollinger International Inc.'s disclosure documents filed with the United States Securities and Exchange Commission (the "SEC").

23 The Commission's decision *Hollinger Inc., Re* (2006), 29 O.S.C.B. 847 (Ont. Securities Comm.) ("*Hollinger Inc., Re* "), dated January 24, 2006, addressed the setting of dates for the hearing on the merits of the Commission Proceeding, and the Commission described the Commission Proceeding and the U.S. Criminal Proceeding at paragraph 40 as having "[...] similar and overlapping allegations arising out of substantially the same transactions". The panel observed:

> The practical reality is that all of the individual Respondents have been criminally indicted in the U.S. and face the possibility of incarceration if convicted. Additional indictments were recently issued against the Respondent Black which include charges of racketeering and obstruction of justice. There is significant overlap in the nature of the allegations in the two proceedings albeit they are not identical. (Re *Hollinger (2006)*, *supra* at para. 53.)

24 Two of the witnesses, D and G, have voluntarily been interviewed by the SEC and the U.S. Attorney, and have stated their willingness to testify in the U.S. Criminal Proceeding.

25 The trial in the U.S. Criminal Proceeding is scheduled to commence on March 14, 2007.

D. Preliminary Orders

26 Prior to the hearing of this Application, a panel heard and determined an application brought pursuant to subsection 17(1) of the Act to permit counsel for the Applicants and counsel for the Respondents to disclose to all counsel participating in the Application the identity of the witnesses and the Evidence that is relevant to the hearing of the Application.

27 That panel determined that it would be in the public interest to grant the request on certain terms and conditions. An order was issued on December 5, 2006.

II. The Issues

28 The issues that we have to determine are:

1. Does the Commission have jurisdiction pursuant to subsection 17(1) of the Act to grant the Applicants' request for use and disclosure of the Evidence obtained from Staff in the context of the Commission Proceeding so that the Applicants may make full answer and defence in the U.S. Criminal Proceeding?

2. Is the request for use and disclosure of the Evidence in the public interest pursuant to subsection 17(1) of the Act?

a) What is the public interest?

b) What are the factors to consider when making a determination as to whether disclosure is in the public interest?

c) What are the unique and exceptional circumstances of this Application?

d) Should the Commission authorize the use and disclosure of the Evidence when weighing all the relevant factors?

3. If use and disclosure of the Evidence is in the public interest, what should be the appropriate safeguards in a Commission Order to protect the rights of the Respondents?

III. Evidence

A. Staff's Letters to the Applicants and Respondents

29 In the written submissions and at the hearing, references were made to three letters from Staff. As part of its investigation, Staff issued a summons under section 13 of the Act compelling witnesses A to G, Ravelston and Atkinson to attend before a senior investigator and answer questions under oath. In serving the summonses, Staff included a covering letter which advised these respondents that there was a "high degree of confidentiality associated with this matter" and advised them expressly of the confidentiality requirements set out in section 16 of the Act.

30 On July 22, 2004, Staff sent a letter to some of the respondents asking them to consent to the disclosure of the transcripts of their compelled testimony to the SEC. These respondents were advised that any information and documentation in the SEC's file may be made available to criminal law enforcement agencies in the United States and that, consequently, the consent of the witnesses was required pursuant to subsection 17(3) of the Act. These respondents refused to provide their consent.

31 On June 29, 2005, Staff sent a letter to the respondents in the Commission Proceeding, including the Applicants, setting out the disclosure obligations of Staff in accordance with the Commission's *Rules of Practice.* The Applicants were provided with the first tranche of Staff's disclosure. In this letter, Staff advised counsel that in the event that an application is brought before the Commission for disclosure of the compelled evidence, it is not likely that Staff would consent to such an application.

B. Newman's Affidavit

32 The Applicants submit that there can be no question about their need for the Evidence for the purposes of making full answer and defence to the charges against them in the U.S. Criminal Proceeding.

33 The Applicants rely on the affidavit of Gustave H. Newman, Esq. ("Newman"), sworn on January 3, 2007. Newman is a member of the law firm Newman & Greenberg located in New York City, and he is the defence counsel for Boultbee in the U.S. Criminal Proceeding. Newman's affidavit was filed on behalf of Boultbee in support of the Application (copies of the Evidence had already been provided to Boultbee's Canadian counsel).

34 In his affidavit, Newman describes the process and procedures in the U.S. federal criminal practice relating to government disclosure and the use of prior testimony of a trial witness.

35 Witnesses D and G argued during the hearing that the Newman affidavit should be either ignored or struck from the record. First, they claimed that it is so vague as to be useless and could legitimately be ignored. Second, they argued that Newman is not qualified to give an opinion because he is representing one of the Applicants in the U.S. Criminal Proceeding. They argued that

an advocate, either present or former, for one of the parties, is not in a position to give the kind of evidence that tribunals and courts require; that is unbiased opinion evidence, on which the tribunal can rely. They argue that there is a minimum requirement for an expert to be independent.

36 The Applicants argue that the Newman affidavit should be accepted, and that the Panel should give it the weight it believes appropriate. They argue that the Newman affidavit should not be ignored because Newman was not giving an opinion on the issue before the Commission in this Application; all he was doing was describing U.S. criminal procedures with respect to disclosure and the use of prior statements. This evidence was given to respond to the Respondents' submission that there was no evidence as to whether a will-say statement would be provided in the U.S.

37 In our view the Newman affidavit is admissible. The Applicants first referred to the affidavit in their opening submissions, and any objection to its admissibility should have been made at that time. Witnesses D and G did not challenge the admissibility of the affidavit until after all the parties had made their submissions. Further, they did not bring a motion to strike the affidavit. Having found that the affidavit is admissible in evidence, we nevertheless keep in mind the concerns raised by some of the respondents when considering the weight to be attributed to the Newman affidavit.

IV. Analysis

A. Does the Commission Have Jurisdiction Pursuant to Subsection 17(1) of the Act to Grant the Applicants' Request for Use and Disclosure of the Evidence Obtained from Staff in the Context of the Commission Proceeding so that the Applicants may Make Full Answer and Defence in the U.S. Criminal Proceeding?

1. Submissions

a. Applicants' Submissions

38 The Applicants make four arguments to suggest that the Commission has jurisdiction to authorize the use and disclosure of the Evidence:

> 1) Subsection 17(1) is contained in Part VI of the Act. Thus, the public interest jurisdiction referred to in subsection 17(1) must be determined in the context of Part VI;
>
> 2) Subsection 17(1) of the Act is not limited to proceedings commenced under the Act;
>
> 3) The Act is not limited to conduct in Ontario, and the inter-jurisdictional co-operation and the regulation of capital markets is a purpose of the Act; and
>
> 4) Inter-jurisdictional co-operation and the regulation of capital markets are also reflected in Part VI.

39 First, the Applicants submit that subsection 17(1) is contained in Part VI of the Act; thus, the public interest jurisdiction referred to in subsection 17(1) of the Act must be determined in the context of Part VI of the Act. They submit that the Respondents "misconceive" the Commission's public interest jurisdiction under subsection 17(1) by equating it with the Commission's enforcement mandate under the Act. The Applicants acknowledge that the Commission's enforcement jurisdiction is necessarily limited by the purposes of the Act, as the Commission cannot impose discipline for conduct that has no relationship to the integrity of the securities markets and the protection of investors in securities. The mandate under Part VI is different from the enforcement mandate. Accordingly, the Applicants submit that the public interest referred to in subsection 17(1) of the Act must be determined in the context of Part VI of the Act.

40 Second, the Applicants submit that subsection 17(1) of the Act is not limited to proceedings commenced under the Act because a Commission order made under subsection 17(1) is not necessary for disclosure in such proceedings. In regulatory proceedings under the Act (section 127), Staff is entitled to make disclosure to respondents in such proceedings without applying to the Commission under 17(1) of the Act. Further, they point out that in provincial offences proceedings initiated under the Act (section 122), either Staff can make disclosure or the court presiding over the proceeding can order disclosure. The Applicants

argue that in such circumstances, there is no need for an application under subsection 17(1). Accordingly, subsection 17(1) of the Act is necessary for disclosure in proceedings other than those commenced under the Act (e.g. criminal proceedings in a foreign jurisdiction such as the U.S. Criminal Proceeding).

41 Third, the Applicants also argue that the Act is not limited to conduct in Ontario. They submit that inter-jurisdictional cooperation and the regulation of the capital markets is one of the underlying purposes of the Act. They argue that this is demonstrated through: the purposes and principles of the Act, several of the Act's provisions, the fact that the Commission frequently engages in inter-jurisdictional investigations and in proceedings with other Canadian securities commissions and with the SEC.

42 The Applicants refer to the purposes and principles of the Act set out in sections 1.1 and 2.1 which read as follows:

> 1.1 The purposes of this Act are,
>
> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
>
> (b) to foster fair and efficient *capital markets* and confidence in *capital markets.*
>
> 2.1 In pursuing the purposes of this Act, the Commission shall have regard to the following fundamental principles:
>
> 1. Balancing the importance to be given to each of the purposes of this Act may be required in specific cases.
>
> 2. The primary means for achieving the purposes of this Act are,
>
> i. requirements for timely, accurate and efficient disclosure of information,
>
> ii. restrictions on fraudulent and unfair market practices and procedures, and
>
> iii. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.
>
> 3. Effective and responsive securities regulation requires timely, open and efficient administration and enforcement of this Act by the Commission.
>
> 4. The Commission should, subject to an appropriate system of supervision, use the enforcement capability and regulatory expertise of recognized self-regulatory organizations.
>
> 5. The integration of capital markets is supported and promoted by the sound and responsible harmonization and *co-ordination of securities regulation regimes.*
>
> 6. Business and regulatory costs and other restrictions on the business and investment activities of market participants should be proportionate to the significance of the regulatory objectives sought to be realized.
>
> [Emphasis added.]

43 The Applicants point out that paragraph (b) of section 1.1 of the Act refers to "capital markets", not only Ontario capital markets. They also note that subsection 2.1(5) of the Act refers to jurisdictions outside of Ontario.

44 The Applicants also refer to several provisions in the Act that contemplate inter-jurisdictional co-operation and the regulation of the capital markets. In particular, they refer to: (i) section 143.10 of the Act, which permits the Commission to enter into a Memorandum of Understanding with foreign authorities; (ii) section 153 of the Act, which permits information sharing with foreign authorities, including law enforcement authorities; and (iii) subsection 126(1) of the Act, which permits the Commission to make an order to preserve property even if there is no misconduct or harm to investors in Ontario.

45 Further, they assert that the Commission frequently engages in inter-jurisdictional investigations and proceedings with other Canadian securities commissions and with the SEC.

46 Fourth, they submit that provisions in Part VI of the Act reflect that inter-jurisdictional co-operation and the regulation of capital markets are purposes of the Act.

47 The Applicants refer to subsection 11(1) of the Act which authorizes the Commission to make investigation orders "for the due administration of Ontario securities law or the regulation of the capital markets in Ontario", or "to assist in the due administration of securities laws or the regulation of the capital markets *in another jurisdiction*". [Emphasis added.]

48 The Applicants also refer to subsection 17(3) of the Act which states that the Commission cannot order disclosure under subsection 17(1) of the Act where it would involve disclosure to a law enforcement authority, including a person responsible for the enforcement of criminal law in Canada or in any other country or jurisdiction. This contemplates the possibility that subsection 17(1) of the Act could permit disclosure for the purposes of conduct in another country; otherwise subsection 17(3) would be unnecessary. The Applicants argue that these provisions demonstrate that Part VI of the Act contemplates inter-jurisdictional cooperation and the regulation of capital markets.

b. Respondents' Submissions

49 Witness A submits that the Commission does not have the jurisdiction to order the requested disclosure to the Applicants under subsection 17(1) of the Act. Witness A argues that the relief request by the Applicants is beyond the Commission's jurisdiction, and that although the Commission has a broad jurisdiction, it does not have unlimited jurisdiction. Witness A submits that the Commission has no powers other than those granted by the Act.

50 Witness A asserts that the Legislature attempted to define and assist the Commission in exercising its powers by setting out the purposes of the Act in section 1.1. Witness A argues that the Applicants provide no evidence as to how the requested disclosure falls within the purposes of the Act. Further, section 2.1 also provides assistance in the form of principles to consider when pursuing the purposes of the Act. Witness A argues that subsection 2.1(3) of the Act makes no reference to the law of any other jurisdiction, and that subsection 2.1(5) of the Act makes no reference to anything other than securities regulation regimes. Neither refers to the enforcement of criminal law in a foreign jurisdiction.

51 Witness A argues that the Applicants' requested disclosure attempts to bring U.S. criminal law into the Commission's jurisdiction. He agrees with the Applicants that the Commission's jurisdiction is not limited to conduct in Ontario. The Commission has jurisdiction where Ontario residents are acting in capital markets outside of Ontario and the Commission has jurisdiction where non-residents are acting in Ontario capital markets. Thus, Witness A accepts that the Commission has jurisdiction over the activity of capital market players and the regulation of securities law in Ontario and outside of Ontario. However, he argues this jurisdiction does not extend to other areas of law such as criminal law and environmental law. Accordingly, the Commission does not have jurisdiction to authorize the use and disclosure of the Evidence in the U.S. Criminal Proceeding.

52 Witness A agrees that the jurisdiction under section 17 of the Act is to be determined in the context of Part VI of the Act. However, Witness A argues that the Commission's jurisdiction under Part VI must be informed by the purposes of Act, and that there is nothing in Part VI to suggest that the purposes of the Act relate to criminal proceedings in the U.S. For example, section 11 investigation orders under Part VI of the Act are only available for the due administration of Ontario securities law or the regulation of the capital markets in Ontario, or to assist in the due administration of securities law or regulation of the capital markets in another jurisdiction. This is consistent with the Commission's jurisdiction being limited to capital market players and the regulation of securities law in and outside of Ontario. The Commission's jurisdiction under section 11 does not extend to the investigation, prosecution or defence of criminal law, and it never will because section 11 would violate the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "Charter") if it was used for investigating or prosecuting criminal law. (*British Columbia (Securities Commission) v. Branch*, [1995] 2 S.C.R. 3 (S.C.C.).)

53 Witness A also refers to subsection 16(2) of the Act, which states that compelled evidence is for the exclusive use of the Commission or such other regulator as the Commission may specify under section 11, such as the SEC. This is again consistent with the purposes of the Act.

54 Finally, Witness A refers to subsection 17(3) of the Act, which prohibits disclosure of a witness's compelled evidence to criminal law authorities without the witness's consent. He argues this demonstrates a limit to the Commission's jurisdiction and that the legislature intended that limit to be determined by the Commission's mandate set out in the Act.

55 Witnesses B, C, E and F assert that the Applicants' requested disclosure is not necessary for the Commission to carry out its mandate as this Application relates to actions affecting a different jurisdiction from the Ontario jurisdiction to which the Act relates. They argue that using the Evidence in the U.S. Criminal Proceeding, though it may be similar in nature to that of the Commission Proceeding, is completely unrelated to the Commission's mandate under the Act. They argue that there is nothing in the Commission's mandate that requires it to ensure that defendants in a foreign criminal proceeding are fully able to exercise their right to make full answer and defence in the foreign proceeding.

2. Discussion

56 This Application requires us to consider whether the Commission has jurisdiction under subsection 17(1) of the Act to make an order authorizing the Applicants' request for use and disclosure of the Evidence obtained by Staff and disclosed to the Applicants in connection with the Commission Proceeding, so that the Applicants may make full answer and defence in the U.S. Criminal Proceeding.

57 As subsection 17(1) is contained within Part VI of the Act, the Commission's public interest jurisdiction under that provision must be read in the context of Part VI:

> Section 17, unlike s. 127, is part of Part VI of the Act which has a narrow purpose relating to investigations and compelled testimony. Accordingly, *the term "public interest" in s. 17 of the Act should be interpreted in the context of Part VI of the Act* to enable the Commission to conduct fair and effective investigations and to give those investigated assurance that investigations will be conducted with due safeguards to those investigated, thus encouraging their cooperation in the process. (*X, Re* (2007), 30 O.S.C.B. 327 (Ont. Securities Comm.) at para. 28.)
>
> [Emphasis added.]

58 Accordingly, to understand the context of Part VI, it is necessary to review the provisions of Part VI of the Act. "Part VI of the Act sets out the statutory scheme for investigations and examinations by [Staff]". (*X, Re* , *supra* at para. 18.) The relevant provisions are sections 11 through 18 of the Act.

59 Under section 11, the Commission may appoint persons to investigate any matter so long as it relates to either:

> (a) the due administration of Ontario securities law or the regulation of the capital markets in Ontario, or
>
> (b) the due administration of the securities laws or the regulation of the capital markets in another jurisdiction.

60 Once the Commission makes an order under section 11, the investigators have broad powers to "examine any documents or other things, whether they are in the possession or control of the person or company in respect of which the investigation is ordered or of any other person or company" (subsection 11(4) of the Act). Furthermore, these investigators may summon and enforce the attendance of any person, and compel him or her to testify under oath and to produce documents and other things (subsection 13(1) of the Act).

61 Section 16 of the Act provides confidentiality protections in relation to compelled testimony and documents collected under an investigation order:

> Section 16 of the Act provides that, except in accordance with s. 17, no person shall disclose at any time, except to his or her counsel, the nature or content of an order under s. 11 or any testimony given under s. 13. Section 16 also provides that all testimony given under s. 13 and all documents and other things obtained under that section relating to an investigation or examination are for the exclusive use of the Commission and shall not be disclosed or produced to any other person or in any other proceeding except as permitted under s. 17. (*Re X and A Co.*, *supra* at para. 22.)

62 However, despite section 16, section 17 of the Act sets out circumstances where disclosure of compelled testimony and documents is permissible.

63 Subsection 17(1) of the Act permits the Commission to authorize disclosure of compelled testimony or documents to any person or company where it would be in the public interest. However, the Commission may not authorize disclosure unless it has, where practicable, given reasonable notice and an opportunity to be heard to the person or company that gave the testimony (subsection 17(2) of the Act). The Commission is also prohibited from authorizing disclosure of testimony to a municipal, provincial, federal or other police force or to a member of a police force or a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction without the consent of the person from whom the testimony was obtained (subsection 17(3) of the Act).

64 Subsection 17(5) of the Act provides that a court having jurisdiction over a prosecution under the *Provincial Offences Act*, R.S.O. 1990, c. P.33, initiated by the Commission may compel production to the court of any compelled testimony or documents. After inspecting the testimony, document or thing and providing all interested parties with an opportunity to be heard, the court may order the release of the testimony, document or thing to the defendant if the court determines that it is: (a) relevant to the prosecution; (b) not protected by privilege; and (c) necessary to enable the defendant to make full answer and defence.

65 Subsection 17(6) of the Act permits investigators appointed under section 11 to disclose or produce compelled testimony or documents, but only in connection with a proceeding commenced or proposed to be commenced by the Commission under the Act or an examination of a witness under section 13 of the Act. Investigators are prohibited from disclosing compelled testimony to a municipal, provincial, federal or other police force, member of a police force or a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction without the consent of the person from whom the testimony was obtained (subsection 17(7) of the Act).

66 Finally, section 18 of the Act states that compelled testimony shall not be admitted in evidence against the person from whom the testimony was obtained in a prosecution for an offence under section 122 or in any other prosecution governed by the *Provincial Offences Act*.

3. Conclusion

67 We agree with the Applicants that the purposes of the Act include inter-jurisdictional co-operation and the regulation of capital markets and that Part VI reflects this purpose.

68 However, the issue in this Application is not whether the Applicants can disclose the Evidence to the U.S. Attorney; that would be prohibited by subsection 17(3) of the Act. The issue is whether the Applicants can use and disclose the Evidence in the U.S. Criminal Proceeding for the purposes of making full answer and defence.

69 The Commission has jurisdiction over evidence it obtains, but no jurisdiction over any other evidence not in its control. The Evidence that the Applicants seek to use and disclose in the U.S. Criminal Proceeding was obtained under Part VI of the Act pursuant to a section 11 investigation order and section 13 of the Act. These sections provide the Commission jurisdiction over the Evidence.

70 Subsection 17(1) of the Act provides the Commission with discretion to "make an order authorizing the disclosure to any person or company". The Commission has the discretion to authorize disclosure of the Evidence to anyone. Indeed, subsection 17(1) contains no restrictions with respect to either whom disclosure can be made or the purposes and jurisdiction where the

information can be used and disclosed. The Commission is only limited by how it exercises that discretion, that is, it must do so in the public interest.

71 Accordingly, the Commission has jurisdiction pursuant to subsection 17(1) of the Act to grant the Applicants' request for use and disclosure of the Evidence obtained by Staff in the context of the Commission Proceeding so that the Applicants may make full answer and defence in the U.S. Criminal Proceeding. We must now determine whether the request for use and disclosure of the Evidence is in the public interest.

B. Is the Request for Use and Disclosure of the Evidence in the Public Interest Pursuant to Subsection 17(1) of the Act?

72 The Applicants submit that a consideration of the public interest includes their right to make full answer and defence in the U.S. Criminal Proceeding. Before we can consider this issue, it is necessary to establish what is the public interest under subsection 17(1) of the Act.

1. What is the Public Interest Under Subsection 17(1) of the Act?

a. The Meaning of Public Interest

73 The Commission recently considered the meaning of the public interest in subsection 17(1) of the Act in *X, Re*, *supra* at paras. 27-31. In this decision, the Commission relied on paragraph 41 of *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 (S.C.C.) ("*Asbestos*"), which states:

> [...] the public interest jurisdiction of the OSC is not unlimited. Its precise nature and scope should be assessed by considering s. 127 in context. Two aspects of the public interest jurisdiction are of particular importance in this regard. First, it is important to keep in mind that the OSC's public interest jurisdiction is animated in part by both of the purposes of the Act described in s. 1.1, namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets." Therefore, in considering an order in the public interest, it is an error to focus only on the fair treatment of investors. The effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets should also be considered.

74 In *X, Re*, *supra* at paragraph 28, the Commission made the following comments regarding *Asbestos*:

> Justice Iacobucci was speaking of the Commission's jurisdiction under s. 127 of the Act, which is a broad jurisdiction. Section 17, unlike s. 127, is part of Part VI of the Act which has a narrow purpose relating to investigations and compelled testimony. Accordingly, the term "public interest" in s. 17 of the Act should be interpreted in the context of Part VI of the Act: to enable the Commission to conduct fair and effective investigations and to give those investigated assurance that investigations will be conducted with due safeguards to those investigated, thus encouraging their cooperation in the process.

75 The Commission also referred to *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] 2 S.C.R. 713 (S.C.C.) ("*Deloitte & Touche* ") where at paragraph 29, Iacobucci, J., made the following observation:

> I believe the OSC properly balanced the interests of disclosure to Philip and the officers, along with the protection of confidentiality expectations and interest of Deloitte. In this respect I am of the view that in making a disclosure order in the public interest under s. 17, the OSC has a duty to parties like Deloitte to protect its privacy interests and confidences. That is to say that the OSC is obligated to order disclosure only to the extent necessary to carry out its mandate under the Act.

76 Also, in *X, Re*, *supra* at paragraph 31, the Commission described the functions and the limitations of section 13 of the Act:

> The power of compulsion in s. 13 of the Act is extraordinary. It gives the Commission meaningful and powerful tools to use in its investigation of matters. Part VI, however, has limitations and protections with respect to confidentiality, and the possible use of compelled testimony. From this, we discern that the public interest referred to in s. 17 relates to a balancing

> of the integrity and efficacy of the investigative process and the right of those investigated to their privacy and confidences, all in the context of certain proceedings taken or to be taken by the Commission under the Act.

77 In summary, the Commission's public interest requires balancing the rights of individuals and companies that have been investigated against the Commission's mandate under the Act.

78 The Applicants accept that they have the onus of demonstrating that the requested use and disclosure of the Evidence is in the public interest under subsection 17(1) of the Act. There is a high expectation of privacy with respect to all testimony under section 13 of the Act which renders satisfying this onus a heavy burden:

> The OSC held that confidentiality was the expressed intent of the Act and that the onus was on the applicant to justify disclosure as being in the public interest. That is clearly consistent with the scheme and intent of the legislation as well as with existing jurisprudence [...]. (*Coughlan, Re* (2000), 143 O.A.C. 244 (Ont. Div. Ct.) at para. 38 (Div. Ct.) (*"Coughlan"*) .)

79 In addition, the Commission must be satisfied on the basis of the evidence filed by the Applicants that the proposed use and disclosure of the transcripts of section 13 testimony will not result in a contravention of subsection 17(3) of the Act. Under subsection 17(3) of the Act, no order can be made by the Commission authorizing disclosure of section 13 testimony to persons responsible for the enforcement of criminal law of Canada or any other jurisdiction absent the written consent of the person who gave the section 13 testimony.

b. The Test Under Subsection 17(1) of the Act

80 Historically, the Commission did not consent to disclosure of compelled evidence for any purposes. This was based on the predecessor provision to section 16 of the Act (section 14) and former *OSC Policy Statement No. 2.8: Applications for Ontario Securities Commission Consent to Obtain Transcripts of Evidence Taken During Investigations of Hearings*, (July-December 1982) Volume 4 Part 3 O.S.C.B. 394E. This Policy Statement stated at paragraph A.3 that:

> [...] the Commission does not view it as being in the public interest and the conduct of effective investigations, to consent to the release of information or evidence obtained through an investigation order issued under sections 11 or 13 of the Act.

81 However, *OSC Policy Statement No. 2.8* was rescinded in 1997 (*Notice re Rules of Practice*, 20 O.S.C.B. 1825). As a result, the Court of Appeal found that the rescission of *OSC Policy Statement No. 2.8* "significantly affected the public interest calculus required by s. 17(1)". It also found that the Commission had recalibrated its approach regarding disclosure. (*Deloitte & Touche LLP v. Ontario (Securities Commission)* (2002), 159 O.A.C. 257 (Ont. C.A.) at paras. 37-38 (C.A.) ("*Deloitte & Touche LLP* ").)

82 The Court of Appeal's decision in *Deloitte & Touche LLP* is the leading authority on the test for disclosure under subsection 17(1) of the Act, and it refers to the test set out in *Coughlan, Re*, *supra* at paragraph 38. Pursuant to this test the Commission must consider:

> [...] the purpose for which the evidence is sought and the specific circumstances of the case [...] in determining Whether to order disclosure [the Commission] must balance the continued requirement for confidentiality with its assessment of the public interest at stake, including harm to the person whose testimony is sought. (*Deloitte & Touche (C.A.)*, *supra* at para. 15.)

83 In *Deloitte & Touche LLP*, Staff sought to disclose compelled testimony and documents from Deloitte to respondents in a Commission proceeding in accordance with Rule 3.3(2) of the Commission *Rules of Practice.* Deloitte opposed this disclosure, but the Commission disagreed and found that disclosure was in the public interest. The Court of Appeal reviewed the Commission's findings and found that it was reasonable for it to interpret subsection 17(1) of the Act using the test set out above from *Coughlan.* The Court stated that the Commission correctly recognized that it must "[...] evaluate the extent to which the policies of the Act were served by the purpose for which disclosure was sought and the harm done by disclosure to confidentiality interests or other individual interests". (*Deloitte & Touche LLP*, *supra* at para. 31.) It stated the Commission

must weigh and balance competing interests to determine whether it is in the public interest to permit disclosure under section 17. The Supreme Court agreed with these findings, but added that:

> [...] the OSC has a duty to [a compelled witness] to protect its privacy interests and confidences. [...] the OSC is obligated to order disclosure [to a respondent] only to the extent necessary to carry out its mandate under the Act. (*Deloitte & Touche (SCC)*, *supra* at para. 29.)

c. Relevance of the Evidence

84 The Commission must also consider the relevance of disclosure sought in the public interest under subsection 17(1) of the Act:

> Obviously, the tribunal cannot rule on the ultimate admissibility of the evidence at trial. That is a matter for the trial judge. However, that does not mean that relevancy is not a matter for the tribunal to consider in determining whether disclosure is warranted in the public interest. It is not sufficient to say that disclosure of the material "may" be the best way to resolve disputes. That is nothing more than speculation. Such a standard is not even sufficient to meet a minimum threshold to warrant reviewing the material itself to determine if there may be some relevance. It certainly is not sufficient to warrant disclosure. To do so is to sanction what is nothing more than a fishing expedition in material statutorily deemed to be confidential. (*Coughlan*, *supra* at para. 52.)

85 Accordingly, we must consider the relevance of the Evidence to the U.S. Criminal Proceeding in our consideration of the public interest.

86 None of the parties disputed that the Evidence would be relevant to the U.S. Criminal Proceeding. In light of the similar and overlapping allegations between the U.S. Criminal Proceeding and the Commission Proceeding, we accept that the Evidence would be relevant.

d. Commission's Discretion Under 17(1) of the Act is Limited by the Charter

87 Both the Applicants and Respondents make reference to the Charter to advance their arguments. The Commission recognizes that it must exercise its discretion under subsection 17(1) within the parameters of the Act and the Charter. With respect to the discretionary decisions of administrative agencies, the Supreme Court stated:

> Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. [...] However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter. (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at para. 56 ("*Baker* ") cited in *Deloitte & Touche (C.A.)*, *supra* at para. 29 .)
>
> [Emphasis added.]

88 The Court of Appeal in *Deloitte & Touche (C.A.)* relied on this passage from *Baker to* explain the limits on the exercise of the Commission's discretion in making orders under subsection 17(1) of the Act. The Charter imposes "boundaries" on the Commission's discretion to make orders in the public interest.

2. What are the Factors to Consider When Making a Determination as to Whether Disclosure is in the Public Interest?

a. Submissions

i. Applicants' Submissions

89 The Applicants submit that they have a real and compelling need to use the Evidence for their defence in the U.S. Criminal Proceeding because there is no equivalent in the U.S. to the disclosure principles established in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.) ("*Stinchcombe* ").

90 The Applicants accept that the Respondents are entitled to have reasonable expectations with regards to their compelled testimony. However, they submit that the Respondents can have no reasonable expectation under the Act that their evidence will not be used for purposes of cross-examination to make full answer and defence in criminal or regulatory proceedings.

91 The Applicants, as defendants to criminal charges, submit that they are entitled to use the evidence disclosed to them as part of the Commission's disclosure obligations for any purpose relating to making a full answer and defence. This includes using the Evidence for the purpose of cross-examining witnesses in the U.S. Criminal Proceeding.

92 The Applicants submit that the Charter values that protect the Applicants' right to make full answer and defence to the criminal charges against them prevail over the Respondents' confidentiality interest in preventing such use.

93 Further, the Applicants argue witnesses A, B, C, E and F will suffer little harm if the Commission authorizes the requested use and disclosure of the Evidence. They point out that there has been an investigation by the SEC, the Commission, and the U.S. Attorney and that witnesses A, B, C, E and F have not been charged with an offence in Canada or in the U.S. None of them is subject to a regulatory proceeding in Canada or elsewhere, and none of them is a defendant in any of the civil proceedings in Canada or in the U.S. relating to Hollinger and Hollinger International Inc.

94 The Applicants also argue that witnesses D and G will suffer little harm if the Commission authorizes the requested use and disclosure of the Evidence. They point out that witnesses D and G have been interviewed by the SEC, the U.S. Attorney, and the Special Committee of Hollinger International Inc. Witnesses D and G have also agreed to testify at the trial in the U.S. Criminal Proceeding. Thus, they argue that the SEC and likely the U.S. Attorney both have a copy of witnesses D and G's evidence. However, despite this, neither Witness D nor G is subject to criminal or regulatory proceedings, and neither is a defendant in any civil proceeding relating to the allegations against the Applicants. Accordingly, they argue that there is no likelihood that either Witness D or G will be the subject of an indictment or other charge as a result of the Commission authorizing the use and disclosure of the Evidence.

95 With respect to harm to KPMG, the Applicants argue that there are only 17 material documents at issue in this Application. The Applicants assert that KPMG provided these documents to Staff and to the SEC. The Applicants argue that in view of the fact that KPMG already shared these 17 documents with the SEC, there can be no harm involved in allowing the Applicants to use the copies Staff disclosed to the Applicants. In these circumstances, the possibility of harm to KPMG is no different than if the Evidence had already been disclosed during regulatory proceedings.

96 Finally, with respect to all of the Respondents including Atkinson, the Applicants argue that the limitations in their draft order concerning the use of the Evidence will be effective in ensuring that there will be little harm, if any, to the Respondents. They argue that the likelihood that the transcripts will be filed in court or introduced in evidence is low or nonexistent. They argue that the Evidence can only be admitted into evidence in the U.S. Criminal Proceeding in one very limited and uncommon circumstance, namely, if a respondent testifies and directly contradicts his prior evidence before the Commission, and refuses to acknowledge this contradiction when confronted with it. Accordingly, they argue that there is little risk to the Respondents since there is no likelihood that the Evidence will fall into the hands of the U.S. Attorney.

ii. Respondents' Submissions

97 The Respondents focus on their reasonable expectations of privacy in relation to their examinations. These expectations arise from the provisions in the Act governing the use and disclosure of compelled evidence, namely section 16 of the Act. They submit that the Act's confidentiality provisions should prevail in these circumstances since it was not within their reasonable expectations that disclosure be made in the absence of adequate safeguards for their constitutional, statutory and common law rights.

98 Witnesses B, C, E and F submit that they have the following reasonable expectations:

(a) their evidence would be kept confidential;

(b) there would be strict limitations on the use of their compelled testimony, as provided in Part VI of the Act;

(c) their rights against self-incrimination would be protected under the Charter, section 5 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 and section 9 of the *Evidence Act* (Ontario), R.S.O. 1990, c. E.23; and

(d) their evidence would not be disclosed to persons responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction.

99 The Respondents were aware that their transcript would be disclosed to the Applicants for the purpose of responding to any regulatory proceedings commenced by the Commission. However, they submit that they could not have had any reasonable expectation that the testimony they provided during their section 13 examinations would be made available for purposes outside the scope of the regulatory proceedings commenced under the Act. Witnesses B, C, E and F submit that the Commission has never authorized the type of use and disclosure requested by the Applicants.

100 The Respondents argue that the Applicants' request is contrary to their privacy expectations. When individuals are summoned under section 13, they are typically reminded of the high degree of confidentiality associated with the investigative process. The Respondents in this case were advised by letter from Staff, prior to giving their compelled testimony that the process was confidential, and relied upon this advisement in providing statements under oath to the Commission. The Respondents were asked by Staff to consent to the disclosure of their compelled testimony to the SEC and criminal enforcement agencies in the U.S. However, the Respondents refused to provide their consent.

101 The Respondents submit it is inconceivable that they could have reasonably expected their compelled testimony would be used in connection with a criminal proceeding in a foreign jurisdiction, and disclosed to persons other than the Applicants who might be adverse to their interest. There are no statutory provisions, policies or rules requiring or recommending disclosure of compelled evidence in foreign proceedings. This suggests, according to the Respondents, that the presumption in favour of confidentiality must govern and reflect the public interest.

102 In addition to the reasonable expectations of the Respondents, witnesses B, C, E and F argue that there is a serious risk of harm to them if the Commission authorizes the use and disclosure of the Evidence in the U.S. Criminal Proceeding. They argue that they will suffer harm because their rights against self-incrimination will be eviscerated. They note that there is a difference between Canadian and U.S. self-incrimination protections. Accordingly, they argue that if the Commission authorizes disclosure they will not enjoy U.S. or Canadian protections against self-incrimination. They would not enjoy the protections against self-incrimination provided in the Charter, the *Canada Evidence Act* and the Ontario *Evidence Act*.

103 Witnesses B, C, E and F also argue that they face the risk of prosecution or civil liability even though it may be a small risk at this point in time. They point out that they have received no immunity from the Commission or from any U.S. authorities. They argue that it would not be in the public interest to increase this risk of prosecution or civil liability by authorizing the use and disclosure of the Evidence. To do so would be to deny them the protection they received in return for assisting the Commission by providing compelled evidence.

104 KPMG argues that it is in a different position than the other respondents with respect to harm because it is currently a defendant in civil class proceedings in Ontario, Saskatchewan and Quebec. KPMG also argues that it is a defendant to various claims for contribution and indemnity made by the Applicants and others arising from the various class proceedings. Moreover, KPMG argues that statements made on behalf of the Applicants suggest that their defence counsel in the U.S. Criminal Proceeding will attempt to lay blame on their professional advisors, which include KPMG.

105 With respect to the proposed limits in the draft order, the respondents argue that the Commission cannot constrain the U.S. Attorney or others who may come to possess the Evidence. Once the Evidence is filed in the U.S. Criminal Proceeding, all Canadian protections against self-incrimination, use and derivative use will cease to exist.

106 Accordingly, the respondents argue that it would not be in the public interest to order disclosure of their compelled testimony in these circumstances since they would not enjoy the protections against self-incrimination provided in the Charter, the *Canada Evidence Act* and the Ontario *Evidence Act*.

iii. Atkinson's Submissions

107 Atkinson argues that the Act provides a detailed mechanism for the conduct of examinations of witnesses under oath. He submits that the non-disclosure provisions of the Act are central to the efficacy of the investigative process and that the Commission's investigations must be kept confidential in order to be effective.

108 Atkinson also submits that since he is a defendant in the U.S. Criminal Proceeding, facing potentially serious sanctions, he has a direct interest in having the Commission protect his right against self-incrimination.

109 Further, Atkinson does not accept that the use of his evidence would be as limited as the Applicants suggest. He argues that there are no assurances that the jury in the U.S. Criminal Proceeding will not draw negative inferences about Atkinson's guilt or innocence from the use of the Evidence to either cross-examine him or refresh a witness's memory, even if it is never admitted into evidence.

iv. Staff's Submissions

110 Staff submits that the Commission may consider all factors that are relevant in making a disclosure order in the public interest-under subsection 17(1) of the Act. In doing so, Staff submits that the Commission must in each case consider the purpose for which the evidence is sought and balance the continued requirement for confidentiality against the public interest at stake, including harm to the witness whose evidence is sought. Staff agrees that the Respondents' reasonable expectations of privacy and the integrity of the Commission's investigative powers are also factors for the Panel to consider.

111 Staff submits that they do not oppose the relief requested by the Applicants, and that there would be little likelihood of harm to the Respondents if the Commission grants the requested order.

b. Discussion of Relevant Legal Principles

i. Compelled Evidence Under the Act

112 The power of the Commission to compel a person to come forward and give statements under oath is a broad and unusual power afforded by the Legislature to the Commission to enable it to carry out its responsibilities to the public under the Act. The Court of Appeal has recognized that the right to compel a witness to make a statement under oath is "perhaps the most important tool which Staff has in conducting investigations". (*Biscotti v. Ontario (Securities Commission)* (1991), 1 O.R. (3d) 409 (Ont. C.A.) at para. 10.)

(1) High Degree of Confidentiality

113 As explained above at paragraphs 56 to 66 of these Reasons, the broad coercive powers available to an investigator under section 13 of the Act are balanced by the non-disclosure and confidentiality protections set out in section 16 of the Act. Section 16 provides, except in accordance with section 17, that no person shall disclose at any time, except to his or her counsel, the nature or content of an order under section 11 or any testimony given under section 13. Section 16 also provides that all testimony given under section 13 and all documents and other things obtained under that section relating to an investigation or examination are for the exclusive use of the Commission and shall not be disclosed or produced to any other person or in any other proceeding except as permitted under section 17.

114 The confidentiality provisions in section 16 of the Act assist Staff in both conducting effective investigations and protecting the privacy interests of persons compelled to produce documents and give testimony. In *Coughlan, Re*, the Court approved the Commission's description of the competing interests that must be balanced:

> Commission investigations, whether conducted under sections 11 or 13 of the Act [...] are performed by Commission Staff on a confidential basis. Confidentiality is essential in order to facilitate the investigation and in order to avoid, either prejudicing a person's right to fair process in the event that the findings of the investigation justify proceedings, or damaging a person's reputation when the results of the investigation do not support further proceedings. The effective functioning of the Commission depends upon the reliance which parties affected by its operations can place upon the confidentiality of the Commission's administrative proceedings. (*Coughlan*, *supra* at para. 57 citing *Norcen Energy Resources* (April 29, 1983) O.S.C.B. 759 at page 2 of the attached letter.)

(2) Strict Limitations on the Use of the Evidence

115 Section 17 of the Act creates limited exceptions to the non-disclosure and confidentiality regime established in section 16 of the Act. For example, subsection 17(1) of the Act permits the Commission to authorize disclosure of the confidential materials obtained under Part VI of the Act where it would be in the public interest.

116 However, there are limits to these exceptions. Subsections 17(3) and (7) of the Act provide that compelled evidence cannot be disclosed to a person responsible for the enforcement of the criminal law of Canada or another country or jurisdiction without the written consent of the witness.

117 Section 18 of the Act provides that testimony given under section 13 shall not be admitted into evidence against the person from whom the testimony was obtained in a prosecution for an offence under section 122 or in any other prosecution governed by the *Provincial Offences Act*.

118 In summary, Part VI of the Act provides the power to compel persons to testify and produce documents or other things, however Part VI also protects against misuse of compelled testimony and documents, and it imposes controls on the use of compelled testimony under section 13. Part VI of the Act also provides the Commission with the ability to depart from the protection and controls, where in the Commission's opinion it would be in the public interest to authorize such departure. (*X, Re*, *supra* at paras. 18-26.)

ii. Reasonable Expectations of Witnesses

119 A witness is entitled to expect that the confidentiality provisions set out in section 16 of the Act will be respected and that compelled evidence will only be released where disclosure is in the public interest or for the purposes of a regulatory proceeding under the Act.

120 In determining whether it is in the public interest to order disclosure under subsection 17(1), the Commission is not bound by the doctrine of reasonable expectations, but instead is required to consider a witness's expectations as one of the factors to be weighed in the balance. (*Coughlan, Re*, *supra* at para. 61.)

121 In addition to the confidentiality provisions included in the Act, the Respondents submit that they also relied on the existence and application of the implied undertaking rule. The Respondents assert that there is an implied undertaking to the Commission that a party will not use in collateral proceedings materials disclosed for regulatory proceedings pursuant to subrule 3.3(2) of the Commission's *Rules of Practice*.

122 The implied undertaking rule is a recognized principle of law in Ontario and it applies to Commission proceedings. The primary rationale for the imposition of the implied undertaking rule is the protection of privacy. The implied undertaking rule prohibits the use of information obtained in a proceeding's discovery process for "any purpose collateral or ulterior to the resolution of the issues in that proceeding". (*A Co. v. Naster* (2001), 143 O.A.C. 356 (Ont. Div. Ct.) at paras. 22-23 and *Melnyk, Re* (2006), 29 O.S.C.B. 7875 (Ont. Securities Comm.) at para. 37.)

123 As the Divisional Court held in *A Co. v. Naster*, this means that "while under *Stinchcombe* principles, the respondents in the proceedings can demand to inspect the words of and the documents produced by [a witness], they are bound under pain of sanction by the Commission not to use the information for any purpose outside the matter of the investigation." (*A Co. v. Naster*, *supra* at para. 24 and Re *Melnyk, Re*, *supra* at para. 37.) Therefore, we conclude that a witness's reasonable expectations of privacy and confidentiality are a significant factor in our public interest jurisdiction.

iii. Potential Harm From Disclosure

124 The Commission must also consider the harm and prejudice to the witnesses if their testimony is disclosed. In *Coughlan, Re*, the Divisional Court observed that:

> [...] the existence of specific harm is clearly a relevant factor to take into account in deciding whether the public interest warrants disclosure. However, the absence of any evidence of specific harm cannot be taken as proof, or even as inference, that no such harm exists. To require the affected individual to provide evidence of harm, failing which disclosure will be made, is to put him in an untenable position. In order to avoid the harm of disclosure he will have to disclose the existence of the harmful material. Care must be taken not to place an onus on the individual to prove harm. It is clear from the statutory scheme that the presumption is in favour of protecting confidentiality, not the other way around. (*Coughlan*, *supra* at para. 63.)

This too is a significant factor in our consideration.

iv. Protection Against Self-incrimination

125 The Supreme Court has established that two types of protection are afforded under the Charter to an individual compelled to give evidence:

> [...] the principle against self-incrimination, one of the principles of fundamental justice protected by s. 7 of the Canadian Charter of Rights and Freedoms, requires that persons compelled to testify be provided with subsequent "derivative use immunity" in addition to "use immunity" guaranteed by s. 13 of the Charter. (*British Columbia Securities Commission v. Branch*, *supra* at para. 2.)

126 In both Canada and the U.S., the right to protection from self-incrimination is an important right that is safeguarded. However, the Canadian approach differs from the American approach. The differences between Canadian and American protections against self-incrimination was recently canvassed by the Court of Appeal in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.* (2005), 79 O.R. (3d) 70 (Ont. C.A.) ("*Catalyst (C.A)*") in the following terms:

> In Canada, a person has the right not to have any incriminating evidence that the person was compelled to give in one proceeding used against him or her in another proceeding except in a prosecution for perjury or for the giving of contradictory evidence. Thus, in Canada, a witness cannot refuse to answer a question on the grounds of self-incrimination, but receives full evidentiary immunity in return. In the United States, a witness can claim the protection of the Fifth Amendment and refuse to answer an incriminating question. Once the answer is given, however, there is no protection. (*Catalyst (C.A.)*, *supra* at para. 4.)

127 As such, witnesses compelled to testify in Canada cannot refuse to answer questions on the basis that the answer may incriminate them, but they are afforded evidentiary protections under the Charter, as well as under the provisions of the *Canada Evidence Act* and the Ontario *Evidence Act*, which prevent their testimony from being used against them.

128 This arrangement has been described as a *quid pro quo* — the state (the Commission in this case) provides protection against the subsequent use of compelled evidence against the witness in exchange for his or her full and frank testimony. The Supreme Court in *R. c. Noël* recognized that there is a societal benefit in encouraging witnesses to come forward and provide evidence to the state in return for the *quid pro quo* of statutory protection. This interest is not served where witnesses in testifying in other proceedings expose themselves to the danger of self-incrimination because of such testimony. (*R. c. Noël*, [2002] 3

S.C.R. 433 (S.C.C.) ("*R. c. Noël* ") at paras. 21-25.) Thus, we accept that protection against self-incrimination is an important factor in our determination.

v. Integrity of the Commission's Investigative Powers

129 The Applicants and Staff argue that this Application would not bring any negative impact to the integrity of Staff's investigations, given the unique and exceptional circumstances of this case that would warrant disclosure and the limited uses of the Evidence proposed by the Applicants.

130 The Respondents submit that the confidentiality protections set out in section 16 of the Act are not only essential for the protection of the rights of persons compelled to give evidence; they are also central to the efficacy of the investigative process. The Commission's investigations must be subject to the highest degree of confidentiality in order to be effective.

131 The Respondents further submit that it is in the public interest to encourage witnesses to comply with summonses issued under section 13 of the Act and to give evidence under oath. Suggesting otherwise, according to the Respondents, would dissuade a witness from volunteering compelled testimony to an investigator and this would undermine the integrity of the Commission's investigative powers.

132 In *X, Re*, the panel commented that public interest concerns under Part VI of the Act involve various considerations including whether disclosure would undermine the integrity of Staff's investigations and the ability of Staff investigators to secure co-operation from witnesses. (*X, Re*, *supra* at para. 28.)

133 As a general principle, we concur that the Commission is required to consider whether disclosure would undermine the integrity of the investigations conducted under Part VI of the Act. This consideration is particularly relevant in circumstances where parties may suffer harm and where the Commission will no longer have control over the evidence. The Commission's mandate includes fostering confidence in the integrity of the investigation procedures undertaken pursuant to the Act.

134 Accordingly, we need to consider the extent to which witnesses who may be summoned in the future to give evidence in the context of an investigation by the Commission could be dissuaded from cooperating if they believed their testimony would be disclosed in U.S. criminal proceedings without their consent.

c. Conclusion

135 We must consider the following factors in weighing the public interest under subsection 17(1) of the Act in this Application:

1) The high degree of confidentiality associated with compelled evidence and the strict limitations on its use imposed by sections 16, 17 and 18 of the Act;

2) The reasonable expectations of witnesses compelled to provide evidence;

3) The potential harm to witnesses as a result of the Commission authorizing use and disclosure of their compelled evidence;

4) The protections against self-incrimination provided by the Charter, the *Canada Evidence Act*, and the Ontario *Evidence Act*, and

5) The integrity of Commission investigations.

136 This is not meant to be an exhaustive list of factors to consider in determining the public interest under subsection 17(1):

> In appropriate cases, there may be other interests that will have to be balanced against the safeguards in Part VI for those investigated, in making a determination of the public interest under s. 17 [...]. (*Re X and A Co., supra* at para. 34.)

137 As we stated above, the challenge faced by the Commission in applications under Part VI of the Act involves striking a balance between the continued requirement for confidentiality and our assessment of the public interest at stake.

138 In exercising the Commission's public interest discretion under subsection 17(1) of the Act, we must also consider the specific purpose for which the evidence is sought and the unusual or exceptional circumstances of the case and determine whether the disclosure of the evidence would serve a useful public purpose.

139 It is therefore useful at this stage to set out the other interests proposed by the Applicants, and summarize the alleged unique and exceptional circumstances of this Application.

3. What are the Unique and Exceptional Circumstances of this Application?

140 In addition to the factors identified above, the Applicants submit there are unique and exceptional circumstances that should be considered when making our determination under section 17(1) of the Act. They submit that the Panel should also consider the following as other considerations relevant to this Application:

1) There is no likelihood that the Evidence will be filed in the U.S. Criminal Proceeding or introduced in evidence. The U.S. Attorney will not get access to the Evidence;

2) The Commission must consider Charter values — specifically the right to make full answer and defence — in its determination of the public interest under subsection 17(1) of the Act;

3) This Application is only necessary because — as a matter of mere timing — the U.S. Criminal Proceeding will take place before the Commission Proceeding; and

4) The Applicants could have used the Evidence for their defence in a Canadian criminal proceeding had they been charged with similar crimes in Canada.

141 We review each of these considerations below.

a. Limited use of the Evidence

i. Submissions

(1) Applicants' Submissions

142 The Applicants argue that the Evidence will not come into the hands of the U.S. Attorney. They argue that there is no likelihood that the Evidence will be filed in court or introduced in evidence. They claim that the Evidence will be used at the trial in the U.S. Criminal Proceeding only in two ways:

1) If one of the Respondents testifies as a witness in the U.S. Criminal Proceeding, his evidence to the Commission may be used in cross-examination to identify contradictions with the respondent's testimony in court.

2) If a respondent does not testify, his evidence to the Commission may only be used to refresh the memory of another witness.

143 The Applicants further argue that the Evidence could only be admitted into evidence in the U.S. Criminal Proceeding in one very limited and uncommon circumstance which is, if a respondent testifies and directly contradicts his prior evidence before the Commission, and refuses to acknowledge the contradiction when confronted with it. They argue that in no event would the entire transcript of any of the Respondents' evidence be introduced or received in evidence. With respect to the use to refresh a witness's memory, they argue that they could put a respondent's evidence to a witness without identifying the respondent.

(2) Witness A's Submissions

144 The Applicants provided a draft order that purports to limit the use and disclosure of the Evidence to allow the Applicants to make full answer and defence in the U.S. Criminal Proceeding. Draft undertakings have also been made by the Applicants' counsel to provide an assurance that the terms of an order by the Commission will be adhered to.

145 Witness A submits that the difficulty with the draft order and draft undertakings is that neither the Commission nor the Applicants' counsel will have any control over the use made of the Evidence once it is disclosed to the U.S. Attorney, or otherwise made public upon filing it in the U.S. criminal court. Further, the Applicants have provided no evidence that they attempted to secure a commitment from the U.S. Attorney that the Evidence will not be used for any purpose other than the prosecution of the Applicants or that use or derivative use of the Evidence would be otherwise constrained by the U.S. court.

(3) Atkinson's Submissions

146 Atkinson is a co-accused in the U.S. Criminal Proceeding, and thus, argues he is in a unique position as compared to the other individual Respondents.

147 Atkinson argues that it would be rather naïve to accept that the use of his evidence would be limited in a manner suggested by the Applicants and Boultbee's U.S. counsel, Newman.

148 With respect to cross-examination, Atkinson argues that a witness does not have to completely contradict prior testimony in order to be impeached with it and that he should not have to justify minor deviations from his prior testimony when his liberty is at risk. He also notes that the U.S. Criminal Proceeding will have a jury and argues there are no assurances that the jury will not draw negative inferences about his guilt or innocence from an attack on his credibility. Further, Atkinson argues that it is necessary to establish an evidentiary basis in order to impeach a witness's credibility, and thus, a portion of his evidence will necessarily be entered into evidence in the U.S. Criminal Proceeding. He argues that this portion of his evidence will not be as narrow as the Applicants suggest because it will be necessary to give context to it. Atkinson argues that there is a very fine distinction between impeachment and incrimination. Thus, he argues the Commission should not accept that Atkinson's evidence would only be used to impeach him — an impeachment of his credibility may result in his ultimate conviction.

149 With respect to refreshing the memory of other witnesses, Atkinson argues that it is "surreal to believe" that the Applicants' U.S. defence counsel could put Atkinson's evidence to a witness to refresh his or her memory without identifying to the court what counsel would be to showing the witness or the identity of the person who gave the evidence.

150 Finally, Atkinson refers to section 18 of the Act, which he suggests prohibits the use of his testimony in Ontario. He questions why it would be permissible to use the transcripts in the U.S. Criminal Proceeding for a purpose that an accused could not use in Ontario.

ii. Discussion and Conclusion

151 The Applicants rely on the Newman affidavit to support the argument that there would be limited use of the Evidence in the U.S. Criminal Proceeding, and thus, disclosure would be in the public interest.

152 Although we have determined that the Newman affidavit is admissible in evidence, we find that it has little value. His affidavit is vague and inconsistent at times.

153 We agree with Witness A, that the draft order and draft undertakings do not provide any assurances that the Commission or the Applicants' defence counsel would maintain control over the use made of the Evidence once it is disclosed to the U.S. court.

154 Further, we agree with Atkinson that there is a fine distinction between impeaching credibility and incrimination. "Even for those trained in the law, the use in cross-examination of evidence obtained from the accused as a witness in other proceedings involves a firm grasp of a subtle distinction in theory that is often difficult to apply in practice." (*R. c. Noël*, *supra* at para. 19, citing Fish J.A.'s dissenting opinion in *R. c. Noël* (2001), 156 C.C.C. (3d) 17 (Que. C.A.) at para. 169.)

155 The Supreme Court in *R. c. Noël* considered this distinction where the Crown sought to cross-examine the accused on the testimony he gave in his brother's trial. In that case, the accused had invoked the protections of section 5 of the *Canada Evidence Act* before giving evidence in his brother's trial. The Court found that the use of prior testimony containing an element of self-incrimination is totally prohibited, even for the purposes of impeaching credibility, unless there is no realistic danger of incrimination. (*R. c. Noël*, *supra* at paras. 30 and 54.) The Supreme Court explained that:

> [...] a cross-examination on a prior admission of guilt is such that it is asking too much of a jury to ignore the content of the prior admission, particularly when the admission was made under oath in a prior judicial proceeding [...] even in the face of the most legally cogent instructions, it is most likely that the jury would not ignore the content of the prior incriminating testimony. (*R. c. Noël*, *supra* at para. 55.)

and,

> While this Court has insisted over the years that jurors be made privy to as much evidence as possible, we have also recognized the necessity to exclude evidence in appropriate cases where the prejudicial effect of its use would overshadow its probative value. [...] [There is] an overriding concern not to put to the jury evidence that presents an intolerable likelihood of misuse. [...] there is also a legitimate societal interest in not eviscerating constitutional protections such as the one provided for in s. 13 of the Charter. (*R. c. Noël*, *supra* at para. 57.)

156 While *R. c. Noël* discussed the Crown's ability to cross-examine an accused, the Supreme Court's comments with respect to confusion in the minds of jurors are useful.

b. Application of Charter Rights and Values

i. Submissions

(1) Applicants' Submissions

157 The Applicants submit that the Commission must consider Charter values in its determination of the public interest under subsection 17(1) of the Act. They argue that the Charter value engaged in this Application is their right to make full answer and defence in criminal proceedings under section 7 of the Charter. The Applicants argue that this Application is not an attempt to impose Charter limitations on a foreign proceeding. Rather, they submit that it is a question of the Applicants' need to use information necessary for them to make full answer and defence. This invokes Charter values that must be considered by the Commission.

158 The Applicants make four arguments:

> 1) The right to make full answer and defence has been recognized as a Charter value by the Supreme Court and has been adopted by the Commission;
>
> 2) The Commission may consider Charter values to protect Canadians outside of Canada;
>
> 3) The Applicants' right to make full answer and defence includes the right to cross-examine a witness or co-accused on prior statements and outweighs witness protections; and
>
> 4) The Applicants' right to make full answer and defense in the U.S. Criminal Proceeding is also relevant to the Applicant's right to make full answer and defence in the Commission Proceeding because a conviction in the U.S. Criminal Proceeding would substantially determine the result in the Commission Proceeding.

159 First, the Applicants refer to the Supreme Court's decision in *Stinchcombe*, where Sopinka J. held that the ability of the accused to make full answer and defence is not only included as one of the principles of fundamental justice under section 7 of the Charter, but is also "one of the pillars of the criminal justice system on which we heavily depend on to ensure that

the innocent are not convicted". (*Stinchcombe*, *supra* at para. 17.) The Applicants remind us that the Commission adopted the *Stinchcombe* disclosure principles in *Glendale Securities Inc., Re* (1995), 18 O.S.C.B. 5975 (Ont. Securities Comm.), and in the Commission's *Rules of Practice* which requires Staff to make disclosure in Commission proceedings, (Rule 3.3)

160 The Applicants also argue that *Stinchcombe* was the underpinning of the Commission's decision in *Deloitte & Touche LLP*, and the enactment of subsection 17(6) of the Act which gives Staff discretion to provide disclosure in regulatory and provincial offences proceedings initiated by the Commission under the Act without a public interest disclosure order under subsection 17(1).

161 Second, the Applicants argue that the Commission may consider Charter values to protect Canadians outside of Canada. They argue that the Supreme Court has held that a government agency should not make a decision that could expose someone to consequences that are unacceptable to fundamental Canadian values.

162 Third, with respect to the use for cross-examination purposes, the Applicants argue that their right to make full answer and defence outweighs witness protections. They argue that their right to make full answer and defence includes a right to cross-examine any witness on prior statements. They argue that this includes a right to cross-examine a co-accused, such as Atkinson. They argue that once an accused goes into a witness box, he is there in the capacity of a witness, and his co-accused may cross-examine him using any prior statements — voluntary or otherwise. The Applicants argue Atkinson should not be able to get on the stand in the U.S. Criminal Proceeding and give a statement that is completely contradictory to his testimony to the Commission.

163 Fourth, the Applicants submit that their right to make full answer and defense in the U.S. Criminal Proceeding is also relevant to their right to make full answer and defence in the Commission Proceeding because a conviction in the U.S. Criminal Proceeding would substantially determine the result in the Commission Proceeding.

164 To this end, the Applicants submit that Staff and the SEC have been co-operating in their investigations into the affairs of Hollinger and Hollinger International Inc. and have been sharing documents. They assert that the Commission has previously characterized the U.S. Criminal Proceeding as a related proceeding, with similar and overlapping allegations arising out of substantially the same transactions. The Applicants submit that a criminal conviction outside of Ontario may form the basis of disciplinary sanctions in regulatory proceedings. A conviction in the U.S. Criminal Proceeding, according to the Applicants, would become indisputable evidence which could substantially determine the result of the Commission Proceeding.

(2) Respondents' Submissions

165 The respondents collectively argue that their Charter rights will be affected if the Commission orders disclosure. They assert that the Charter provides two protections to compelled witnesses: use immunity under section 13 of the Charter and derivative use immunity under section 7 of the Charter. As such, witnesses compelled to testify cannot refuse to answer questions on the basis that the answer may incriminate them; in return they are afforded evidentiary protections under the Charter, as well as pursuant to section 5 of the *Canada Evidence Act* and section 9 of the Ontario *Evidence Act*, which prevent their testimony from being used against them. They note this constitutional arrangement has been described as a *quid pro quo* — the witness provides evidence and in return it is not used against him. The Respondents argue the Commission obtained the benefit of the compelled evidence and should, in accordance with the *quid pro quo* underlying the Charter protections against self-incrimination, not authorize disclosure of the Respondents' compelled evidence.

166 Witness A argues that it is manifestly in the public interest to ensure that a witness compelled to give evidence in a Commission investigation receives the protections contained in the Charter, as well as those embodied in the Act prohibiting disclosure outside the context of Commission proceedings. He argues that because the Respondents were compelled to give testimony and provide other evidence pursuant to a section 13 summons, both their Charter liberty interest and their right against self-incrimination are engaged.

167 With respect to the similarities between the Commission Proceeding and the U.S. Criminal Proceeding, Witness A argues that the fact that a U.S. criminal proceeding may arise out of the same facts does not bring it within the public interest

jurisdiction of the Commission. This merely shows the same facts can give rise to a Commission proceeding in Canada and to a criminal indictment in the U.S. He argues these same facts could possibly give rise to a criminal indictment anywhere in the world or to charges under other legislation, but that doesn't bring any of that within the Commission's mandate.

168 Witnesses B, C, E and F submit that there is nothing in the Commission's mandate that requires it to ensure that defendants in foreign criminal proceedings are fully able to exercise their right to make full answer and defence in those foreign proceedings.

169 Witnesses D and G argue that the Commission should respect U.S. criminal procedures even though they differ from those in Canada. They argue that it is inappropriate for the Commission or any Canadian court or regulatory body to pass judgment on the adequacy of U.S. judicial procedures.

170 Witnesses D and G also argue that the interest in privacy and confidentiality is not automatically superseded by the public interest in disclosure. Rather, both interests are public interests worthy of protection. They argue that the Commission must find a balance that respects the importance of both interests.

171 Atkinson argues that the Applicants put forward no authority to support their claim that authorizing disclosure for the purpose of making full answer and defence in the U.S. Criminal Proceeding falls within the scope of public interest in subsection 17(1). He submits that the Commission has never held that it is in the public interest to assist persons to defend themselves in foreign criminal proceedings. Atkinson asserts the Commission has recognized the public interest mandate of the Commission is distinct from the mandate of the U.S. Attorney.

172 Atkinson also argues that the Applicants have no Charter right to make full answer and defence in the U.S. Criminal Proceeding. The Applicants' submissions conflate their right to make full answer and defence in Canadian proceedings with an abstract right to make full answer and defence generally — presumably extending to U.S. criminal proceedings.

173 Finally, Atkinson submits that the approach to protection against self-incrimination differs in Canada and the U.S. In the U.S., one may decline to answer incriminating questions; whereas in Canada one must answer any question, but enjoys use immunity in return. He argues that the Canadian approach to protection against self-incrimination ensure that investigating authorities benefit from obtaining answers to questions, but requires strict control over what use may be made of these answers. He argues this approach generates a social benefit; it makes compelled evidence available to Canadian investigating authorities where it would be denied to their U.S. counterparts by operation of the Fifth Amendment to the U.S. Constitution. Atkinson claims the Applicants are seeking to exploit this difference in protection against self-incrimination.

ii. Discussion

174 The Applicants rely on section 7 of the Charter to argue that their right to full answer and defence is engaged because their liberty is at stake in a foreign jurisdiction. Indeed, convictions may result in significant penalties, such as imprisonment and fines.

175 Some of the respondents rely on sections 7 and 13 of the Charter to argue that their right against self-incrimination is engaged because disclosure would eviscerate their rights against self-incrimination in the U.S.

176 Sections 7 and 13 of the Charter provide:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

177 There is no doubt that the Applicants' liberty is at stake as they face the possibility on conviction of 50 years of incarceration. However, the Applicants' liberty is at stake in the U.S., not Canada. This requires us to examine how Charter values apply in this context.

178 The Applicants refer us to *United States v. Burns*, [2001] 1 S.C.R. 283 (S.C.C.) ("*Burns* ") to argue that the Commission should not make a decision that could expose someone to an unconstitutional result outside of Canada or any result that is unacceptable to Canadian values.

179 Witnesses D and G on the other hand cite *R. v. Schmidt*, [1987] 1 S.C.R. 500 (S.C.C.) ("*Schmidt* ") to support their arguments that the Commission should respect U.S. criminal procedures even though they differ from those in Canada.

180 In *Burns*, Burns and Rafay were facing murder charges in the U.S. and potentially faced the death penalty. The Minister of Justice ordered their surrender to U.S. authorities unconditionally — without assurances with respect to the death penalty. Burns and Rafay argued that the failure to seek such assurances violated the Charter. The Supreme Court found that the Minister is constitutionally obligated to seek such assurances except in exceptional cases, and found that extraditing Burns and Rafay to face the death penalty would violate their rights under section 7 of the Charter.

181 The Supreme Court stated that the principles of fundamental justice are found in the basic tenants of our legal system and that these basic tenants include the following:

> 1) "[I]ndividuals who choose to leave Canada leave behind Canadian law and procedures and must generally accept the local law, procedure and punishments which the foreign state applies to its own residents [...]." (*Burns*, *supra* at para. 72.)
>
> 2) "Extradition is based on the principles of comity and fairness to other cooperating states in rendering mutual assistance in bringing fugitives to justice [...] subject to the principle that the fugitive must be able to receive a fair trial in the requesting state [...]." (*Burns*, *supra* at para. 72.)
>
> 3) Capital punishment is unjust and should be stopped; it is not within the appropriate limits of the criminal justice system (*Burns*, *supra* at paras. 77 and 84.)
>
> 4) Canadian principles of fundamental justice are influenced by international law and opinion and Canada's international human rights obligations. There is a significant movement towards international acceptance that capital punishment should be abolished. (*Burns*, *supra* at paras. 79-80 and 91.)

182 In *Schmidt*, Schmidt was facing extradition to the U.S. to face a charge of child-stealing contrary to Ohio state law. Schmidt argued that extradition would violate section 7 of the Charter because she was already acquitted of a kidnapping charge under U.S. federal law and a trial in Ohio would mean double jeopardy.

183 The Supreme Court accepted that her right to life, liberty and security of the person under section 7 of the Charter was violated and that there were circumstances where a foreign state's treatment of an accused may be contrary to the principles of fundamental justice. However, the Court found Schmidt's extradition would not violate the principles of fundamental justice:

> [...] I see nothing unjust in surrendering to a foreign country a person accused of having committed a crime there for trial in the ordinary way in accordance with the system for the administration of justice prevailing in that country simply because that system is substantially different from ours, with different checks and balances. *The judicial process in a foreign country must not be subjected to finicky evaluations against the rules governing the legal process in this country.* A judicial system is not, for example, fundamentally unjust — indeed, it may in its practical workings be as just as ours — because it functions on the basis of an investigatory system without a presumption of innocence or, generally, because its procedural or evidentiary safeguards have none of the rigours of our system. (*Schmidt*, *supra* at para. 48.)
>
> [Emphasis added.]

184 In our consideration of the public interest, we must also balance the Applicants' right to make full answer and defence embodied in section 7 of the Charter against both the Respondents' Charter rights under sections 7 and 13 of the Charter to have protection against self-incrimination (*British Columbia (Securities Commission) v. Branch*, *supra* at paras. 2 and 7.), and against Atkinson's right to make full answer and defence. If we consider the Charter values at stake for the Applicants, then we must also consider the Charter values at stake for the Respondents.

185 The Respondents' rights against self-incrimination are at stake because of the differences between the U.S. and Canadian approach to such protections. In Canada, a witness cannot refuse to answer questions because Canadian evidence statutes and the Charter provide protections by preventing any subsequent use of the testimony in civil and criminal proceedings. In the United States, a witness may refuse to answer any incriminating questions, but there is no use immunity if the witness chooses to testify. (*Catalyst (C.A.)*, *supra* at para. 4.) Accordingly, the risk that the Evidence will fall into the hands of the U.S. Attorney and could potentially be used to prosecute the Respondents — especially in the case of Atkinson, requires us to consider how an order authorizing disclosure affects the Respondents' Charter rights.

186 This creates a situation where the Applicants' right to full answer and defence conflicts with the Respondents' rights against self-incrimination. If we authorize disclosure, then the Respondents are put at risk. If we do not authorize disclosure, then the Applicants are put at risk.

187 The Supreme Court has previously considered the issue raised by conflicting Charter values. It stated:

> When the protected rights of two individuals come into conflict [...] Charter principles require a balance to be achieved that fully respects the importance of both sets of rights. (*R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.) at para. 61 citing *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.) at para. 72 .)

188 The Applicants also argue that their right to make full answer and defence includes the right to cross-examine a witness or a co-accused on any prior statement, voluntary or otherwise. They argue that their right to full answer and defence outweighs witness protections when they choose to testify.

189 We agree with the Applicants that the right to make full answer and defence includes the right to cross-examine any of the Respondents, including Atkinson, to impeach credibility. (*R. v. Pelletier* (1986), 29 C.C.C. (3d) 533 (B.C. C.A.) at para. 13; *R. v. Logan* (1988), 67 O.R. (2d) 87 (Ont. C.A.) at paras. 116-18; *R. v. Creighton*, [1995] 1 S.C.R. 858 (S.C.C.) at para. 27 and John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Markham: Butterworths, 1999) at §§ 8.9, 8.105, and 16.115.):

> [...] when an accused goes into the witness box he is there in the capacity of a witness. His co-accused may cross-examine him. The only restriction is that the cross-examination should be confined to matters relevant to the issue and to credibility. The co-accused is not under the same restraint as the Crown in that the co-accused need not establish that the statement was voluntary before being permitted to cross-examine upon it. (*R. v. Pelletier*, *supra* at para. 10.)

190 However, a witness's right against self-incrimination and full answer and defence does not evaporate in these circumstances. "[T]he respective rights of each accused must be balanced [...] so as to preserve the overall fairness of the trial." (*R. v. Suzack* (2000), 141 C.C.C. (3d) 449 (Ont. C.A.) at para. 111; and *The Law of Evidence in Canada*, *supra* at § 8.105.)

191 Accordingly, we must find a balance between the Applicants' right to full answer and defence and the Respondents rights against self-incrimination that respects both Charter values.

192 With respect to the relevance of a conviction in the U.S. Criminal Proceeding, we will reiterate the comments made by the panel in *Hollinger Inc., Re* that:

> [...] the U.S. criminal proceedings in this matter ought not to be viewed as a proxy for the regulatory proceeding before the Commission. (*Hollinger Inc., Re* , *supra* at para. 56.)

iii. Conclusion

193 The Charter values at stake in this Application require us to consider the Applicants' right to make full answer and defence, the Respondents' right against self-incrimination, the principles of comity, and the principle that an individual entering a foreign state must generally accept the local laws, procedures, and punishments of that foreign state.

c. Timing of the U.S. Criminal Proceeding

i. Submissions

(1) Applicants' Submissions

194 The Applicants also point out that if the Respondents had already testified in a hearing before the Commission, then each of them could have been fully cross-examined on their previously compelled evidence. If the Respondents had already testified before the Commission, then not only could the Applicants have used this evidence for cross-examination, but this evidence would also have been accessible to the general public.

ii. Discussion and Conclusion

195 We disagree with the Applicants' submissions because, if accepted, it would weaken the purpose of subsection 17(1) of the Act. Where regulatory proceedings under the Act have not yet been settled, it is understood that compelled evidence obtained under Part VI of the Act could be introduced and weighed in hearings before the Commission.

196 If we were to accept the Applicants' submissions, the Commission would be forced to order disclosure of compelled evidence obtained under Part VI for collateral proceedings whenever regulatory proceedings under the Act have not yet been resolved. We do not believe this practice follows the Commission's mandate in the manner that was intended by the Legislature.

d. Use of Evidence in Canadian Criminal Proceedings

i. Submissions

(1) Applicants' Submissions

197 The Applicants argue that subsection 17(5) of the Act and the decision in *R. v. Awde* (1988), 13 O.S.C.B. 2839 (Ont. Dist. Ct.) ("*Awde* "), would have permitted them to use the Evidence for their defence in Canadian criminal proceedings had they been charged with similar crimes in Canada. They also argue that subsection 17(5) of the Act was enacted in recognition of a defendant's right to make full answer and defence, and thus, section 16 of the Act not only permits, but contemplates production and the use of compelled evidence in criminal or regulatory proceedings. Therefore, the Applicants argue that it is unreasonable to prohibit them from using the Evidence in the U.S. Criminal Proceeding simply because the criminal charges were brought in the U.S. and not in Canada.

(2) Respondents' Submissions

198 Witness A points out that all of the cases cited by the Applicants deal with criminal proceedings in Canada in the context of the protections of sections 7 and 13 of the Charter. Witness A argues that this Application is very different because the Applicants seek to use the Evidence in the U.S. Criminal Proceeding.

ii. Discussion and Conclusion

199 When the entire context of Part VI of the Act is considered, and the words used in subsection 17(5) are read in their grammatical and ordinary sense, disclosure is permitted by "a *court having jurisdiction over a prosecution under the Provincial Offences Act initiated by the Commission".* [Emphasis added.] No other jurisdictions are mentioned in this provision.

200 As such, subsection 17(5) of the Act only permits a court having jurisdiction over a prosecution under the *Provincial Offences Act*, namely the Ontario Court of Justice to compel production. Any disclosure request from another jurisdiction would have to be considered in the public interest under subsection 17(1).

201 The Applicants argue it is unreasonable to prohibit them from using the Evidence in the U.S. Criminal Proceeding because they would have been able to use the Evidence had they been similarly charged in Canada. The Applicants rely on subsection 17(5) of the Act and refer to three decisions in support of their argument: *Awde*, *supra; Ontario (Securities Commission) v. Crownbridge Industries Inc.* (1988), 66 O.R. (2d) 242 (Ont. H.C.) aff'd (1989), 70 O.R. (2d) 506 (Ont. C.A.) ("*Crownbridge*"); and *R. v. Foster* (1994), 18 O.S.C.B. 683 (Ont. Prov. Div.) ("*Foster* ").

202 Subsection 17(5) of the Act and these decisions relate to ordering production of compelled testimony in Canadian criminal proceedings where the witness who gave that testimony was protected against the subsequent use of that testimony. They do not relate to foreign criminal proceedings:

- subsection 17(5) of the Act permits a court in Ontario to order the production of compelled testimony. It does not permit a court to order production in a foreign criminal proceeding.

- these decisions related to production of compelled testimony in a Canadian criminal proceeding. None of them considered the production in a foreign criminal proceeding.

203 The Applicants seek to use and disclose the Evidence in a foreign criminal proceeding, the U.S. Criminal Proceeding. However, witness protections in Canadian and U.S. criminal proceedings differ substantially. As discussed before, Canadian witnesses may be compelled to testify, but enjoy use immunity in return, whereas U.S. witnesses may refuse to testify, but enjoy no use immunity if they choose to testify.

204 Accordingly, it may be reasonable to permit the Applicants to use the Evidence in Canadian criminal proceedings because Canadian law provides protections against the subsequent use of compelled testimony. (See section 18 of the Act, section 13 of the Charter, section 14 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, section 5 of the *Canada Evidence Act*, and section 9 of the *Evidence Act* (Ontario).) However in the U.S., where these protections do not exist in the same manner, it may not be so reasonable. The difference between use of the Evidence in Canadian criminal proceedings and U.S. criminal proceedings is that the Respondents are at risk of self-incrimination in the U.S., whereas they are not at risk in Canada.

4. Should the Commission Authorize Disclosure of the Evidence in this Case When Weighing All the Relevant Factors?

a. Submissions

i. Applicants' Submissions

205 The Applicants submit that they have met the burden to establish that disclosure is in the public interest, and that their right to make full answer and defence outweighs the privacy interests of the Respondents.

206 The Applicants submit that the draft order meets this threshold and properly balances their interests regarding disclosure and the right to make full answer and defence, against the Respondents' confidentiality interests.

207 The Applicants submit that the relief requested is quite limited. They maintain that the draft order would not authorize the release of the Respondents' compelled testimony to the U.S. Attorney or other persons responsible for the enforcement of U.S. criminal law. The draft order would merely authorize the Applicants' defence counsel in the U.S. Criminal Proceeding to use the information disclosed to them to assist in the Applicants' defence. Disclosure would only be made to defence counsel.

208 Although the Applicants argued on several occasions that there was no likelihood that the Evidence will fall into the hands of the U.S. Attorney, the Applicants submit that potential disclosure to the U.S. Attorney will be limited, since only the part of a transcript that is used to contradict the testimony of a witness will be introduced into evidence in the U.S. Criminal

Proceeding. They claim a witness's entire transcript would not be filed in court, and it would not come into the hands of the U.S. Attorney as a result of the Commission's order.

209 The Applicants relied on the Newman affidavit, which states that a witness's transcript will be used at trial and put into evidence only in limited circumstances.

210 The Newman affidavit contemplates that the transcript would be used to put the contradiction to the witness, and then only if the witness denies the contradiction, will any material be introduced into evidence. Newman swore that only the part of the transcript that shows the contradiction and any related part would be introduced and filed as evidence.

211 With respect to Atkinson, the Applicants submit that they have a recognized right, as co-accused, to cross-examine Atkinson on the basis of his Commission evidence with respect to the accuracy of his recollection and his credibility, but not to incriminate him.

ii. Witnesses A, B, C, E & F

212 Witnesses A, B, C, E and F submit that there is a presumption against permitting disclosure under the Act, and that the Applicants have not met their onus. According to witnesses A, B, C, E and F, the Applicants have not shown that their interest in using the Evidence for a collateral purpose outweighs the Respondents' confidentiality expectations and right against self-incrimination.

213 Witnesses A, B, C, E and F also submit that the Commission does not have the ability to impose conditions to safeguard the use of their compelled testimony. Any order made by the Commission will not have extra-territorial effect, and the Commission would not be able to constrain the U.S. Attorney or others who may come into possession of the Evidence. As a result, all protections against self-incrimination that the Respondents are entitled to under the laws of Canada would be eviscerated once the Evidence is filed in the U.S. Criminal Proceeding.

iii. Witnesses D, G & KPMG

214 Witnesses D, G and KPMG submit that the Applicants have failed to demonstrate that the Evidence sought is necessary to make full answer and defence. Counsel states that their clients have collaborated and have been active witnesses with respect to the U.S. Criminal Proceeding. They have been interviewed by the SEC in relation to this matter and they have provided a written undertaking to the U.S. court to appear and give evidence in the U.S. Criminal Proceeding if required to do so. In other words, if testimony and documents from witnesses D and G are needed to make full answer and defence, witnesses D and G will participate as witnesses.

215 Witnesses D, G and KPMG submit that the Applicants request for disclosure is unnecessary because much of the evidence and testimony given to the SEC and the U.S. Attorney has been, or will be, disclosed to the Applicants in the U.S. Criminal Proceeding. Counsel advised the Commission that all KPMG materials were provided to the U.S. Attorney and, in turn, have been disclosed to the Applicants. Once the Applicants receive disclosure, its adequacy is not a matter that should be reviewed by the Commission. Any complaint about the adequacy of the U.S. disclosure process is a matter for the criminal courts in Chicago.

iv. Atkinson's Submissions

216 Atkinson's submissions focused on the public interest in encouraging persons who have been summoned by Staff of the Commission to appear and make statements under oath. Atkinson submits that unlike him, neither Black nor Boultbee have given a statement under oath to the Commission. He mentions that Atkinson was a cooperative citizen and provided compelled testimony with the expectation that his evidence would be kept confidential and his rights against self-incrimination would be protected.

217 Atkinson also argues that it would be contrary to the public interest to provide the Applicants with the benefit of the sworn evidence of witnesses who complied with the process on the reasonable expectation that the confidentiality of their evidence would be maintained.

v. Staff's Submissions

218 Staff advises that the Commission must balance the principles of fairness and Charter values favouring the Applicant's right to make full answer and defence to the criminal charges in the U.S. against the confidentiality interests of the Respondents, and any harm that may result from the use or disclosure of their section 13 testimony.

219 Staff did not object to the Application and took the view that the relief requested by the Applicants should be permitted in light of the special circumstances in this matter, the limited proposed uses of the compelled testimony, the proposed conditions to use the testimony by the Applicants' defence counsel, and the minimal potential harm to the Respondents.

b. Discussion

i. Disclosure of the Evidence of the Respondents (With the Exception of Ravelston and Atkinson)

220 Having considered the parties' submissions and the relevant factors to consider in this Application, we are satisfied that an order under subsection 17(1) of the Act will be appropriate only in the "most unusual circumstances" where the public interest in disclosure clearly outweighs the confidentiality protections provided in the Act.

221 It is clear from the statutory scheme of Part VI of the Act that the presumption is in favour of protecting confidentiality, not the other way around. (*Coughlan, Re*, *supra* at para. 63.) The protections afforded under section 16 of the Act are not only essential for the protection of the rights of persons compelled to give evidence: they are also central to the efficacy of the investigative process. In our view, Staff's investigations and the materials produced under section 13 must be kept confidential to enable the Commission to carry out its responsibilities to the public under the Act.

222 Part VI of the Act, however, has limitations and protections with respect to confidentiality, and the possible use of compelled testimony. In circumstances where the balance tilts in favour of disclosure, it is in the public interest for the Commission to order disclosure "to the extent necessary to carry our mandate under the Act". (*Deloitte & Touche (SCC)*, *supra* at para. 29.)

223 The Applicants, therefore, bear the onus to demonstrate that the use of the compelled testimony in the U.S. Criminal Proceeding is in the public interest. The Respondents' interest in confidentiality pursuant to section 16 of the Act is not automatically superseded by the public interest in disclosure; rather both interests are public interests worthy of protection. The Commission must find a balance that respects the importance of both rights, (*R. v. Mills*], *supra* at para. 61.)

224 In *Deloitte & Touche (C.A.)*, the Court held that the Commission is entitled to substantial leeway in deciding what meaning should be given to the "public interest" in subsection 17(1) of the Act, and in deciding whether the public interest warrants disclosure in the circumstances of the case. (*Deloitte & Touche (C.A.)*, *supra* at para. 30.)

225 The balancing and the interpretation of rights raised in this Application must be carried out in a contextual manner in light of the particular circumstances. We recognize that the Applicants have submitted that there is a real and compelling need to use the transcripts for the purposes of making full answer and defence in the U.S. Criminal Proceeding.

226 Our public interest jurisdiction to authorize disclosure under subsection 17(1) was recently addressed by the Supreme Court. In *Deloitte & Touche (SCC)*, Iacobucci J. held that the Commission had properly balanced the interests of disclosure and the protection of confidentiality expectations. The Supreme Court also approved the order granted by the Commission, which contained several conditions including: "The Respondents and their counsel will not use the Evidence for any purposes other than for making full answer and defence to the allegations made against the Respondents in these Proceedings." (*Deloitte & Touche (SCC)*, *supra* at para. 29.)

227 in that case, the mandate referred to was the holding of a fair hearing under section 127 of the Act. We should reiterate that the general policy and practice of the Commission is that production of confidential materials obtained by the Commission under Part VI of the Act for use by a party for private purposes is not usually considered to be in and of itself in the

public interest. (*Biscotti v. Ontario (Securities Commission)*, *supra*; *Coughlan, Re*, *supra*; *Weram Investments Ltd. v. Ontario (Securities Commission)* (1990), 13 O.S.C.B. 2287 (Ont. Div. Ct.); *Mr. X, Re* (2003), 27 O.S.C.B. 49 (Ont. Securities Comm.); and *X, Re*, *supra* at para. 32.)

(1) Draft Order Proposed by the Applicants

228 The Applicants recognize the high threshold that they have to meet in an application under subsection 17(1) of the Act, and have provided a draft order to the Commission which outlines conditions for the use of the Evidence in order to minimize the harm to the Respondents.

229 The Respondents argue that they provided their evidence to the Commission with the understanding and comfort that their evidence was, and would remain, confidential. The Applicants recognize this concern and have provided a draft order which purports to limit use and disclosure of the Evidence, while still allowing the Applicants to make full answer and defence in the U.S. Criminal Proceeding. The draft order also requires undertakings to be made by the Applicants' defence counsel to provide an assurance that the terms of the Commission's order will be adhered to during the trial in the U.S. Criminal Proceeding.

230 The difficulty with the draft order and draft undertakings is that neither the Commission nor the Applicants' counsel will have any control over the use made of the Evidence once it is used in the U.S. Criminal Proceeding. Any order made by the Commission will not and cannot have extra-territorial effect and, as such, will not constrain the U.S. Attorney or others who may come into possession of the Evidence. The circumstances faced by the Commission in this Application are different from those in *Catalyst*

231 In *Catalyst*, an Inspector of Hollinger appointed under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, sought an order to examine under oath Messrs. Black, Radier and Boultbee. They resisted on the grounds that compelling them to submit to an examination would violate their right against self-incrimination because their testimony could be used against them in a criminal investigation in the U.S. The Court granted an order permitting the Inspector to examine the respondents concluding that the respondents' right against self-incrimination was adequately protected by the provisions of the *Canada Business Corporations Act*, prohibiting use of evidence gathered by the Inspector for collateral purposes. In particular, Campbell J. stated:

> Consistent with a process that is at all times subject to Court supervision, I would envisage that any objection made by the respondents to answering any specific question of the Inspector on the basis of its potential for self-incrimination would be subject to review by this Court before the answer was required.
>
> Such process would in my view more than balance the competing principles of compulsion and disclosure in favour of the respondents with respect to both "use" and "derivative use" immunity. (*Catalyst Fund General Partner I Inc. v. Hollinger Inc.* (2005), 255 D.L.R. (4th) 233 (Ont. S.C.J.)at paras. 58 and 59 (Ont. Sup. Ct.).)

232 In our view, any disclosure of evidence obtained under Part VI of the Act would be appropriate where the Commission or an Ontario court could exercise control over the use and derivative use in order to ensure that the witnesses' rights against self-incrimination would be protected. The Applicants' requested order does not meet this requirement.

233 As we stated above, section 13 of the Act confers upon an investigator appointed under section 11 a highly intrusive authority to compel by summons the delivery of documents and other things, and the attendance of any person to give evidence under oath. The broad scope of this power is evidenced by the potential penalty for refusal to comply with a summons for this purpose, i.e. committal for contempt by the Superior Court of Justice.

234 It is an integral part of the Act's investigation and examination scheme that these broad powers are balanced with detailed protections for persons compelled to give materials and evidence under oath. The Commission is responsible for maintaining all evidence obtained under Part VI of the Act in the highest degree of confidence. This responsibility is the *quid pro quo* in return for the broad and unusual power afforded by the Legislature to the Commission to enable it to carry out its responsibilities to the public under the Act.

235 As Campbell J. held recently in *A. v. Ontario (Securities Commission)* , "[...] there is an important public interest in the oversight by the [Commission] of its own process, which includes protection of *Charter* rights of those being investigated under the Securities Act". (*A. v. Ontario (Securities Commission)* (2006), 141 C.R.R. (2d) 79 (Ont. S.C.J.) at para. 57.)

236 We are not convinced that the Applicants' request falls within the public interest purpose of the Act, namely the protection of investors and the regulation of the capital markets. Any use of compelled evidence, obtained under section 13 of the Act, for purposes that are outside the scope of the Act and the supervisory role of the Commission, will not generally be considered to be in the public interest. Accordingly, we are not satisfied that the Application is in the public interest and we decline to grant the Applicants' requested order with respect to the Respondents other than Ravelston.

237 Further, we are of the view that KPMG requires special consideration, because KPMG is currently a defendant in civil class proceedings in Ontario, Saskatchewan and Quebec. Unlike the other Respondents, KPMG's exposure to civil liability is not hypothetical; it is very real. While the order proposed by the Applicants limits the use of the Evidence, an order from the Commission cannot prevent third parties who are adverse in interest from using the Evidence for collateral purposes once it is disclosed in the U.S. Criminal Proceeding. Accordingly, an order authorizing the use and disclosure of the Evidence related to KPMG poses a real risk of harm and weighs against the public interest.

ii. Disclosure of Atkinson's Evidence

238 This brings us to the Respondent Atkinson. The Applicants acknowledge that Atkinson is not in the same category as the other Respondents because he is a co-accused in the U.S. Criminal Proceeding. As a co-accused in the U.S. Criminal Proceeding, Atkinson's reasonable expectations are stronger than those of the other Respondents. His interest in having the Commission protect his right against self-incrimination is direct.

239 The principles of fairness and Charter values relied upon by the Applicants also apply to the interests of Atkinson. In keeping with the *quid pro quo*, in our view, the Applicants should not be permitted to introduce, in cross-examination, Atkinson's compelled testimony for the purpose of impeaching his credibility. Atkinson cooperated with the Commission by requesting a summons from Staff to appear and make statements under oath. In exchange for his compelled testimony, Atkinson invoked all of the rights against self-incrimination that were available to him in Canada.

240 The Applicants argue that they require protection against the possibility that a co-accused may give inconsistent testimony without them being able to cross-examine him on a prior statement. The Applicants submit that they won't be able to cross-examine Atkinson during the trial if his testimony is inconsistent with his prior statements, unless they are authorized to use and disclose the Evidence. We understand this concern. On the other hand, we are mindful that attempts to impeach a witness' credibility by use of prior transcripts can often involve non-direct contradictions, but rather relatively minor differences in phrasing or expression. Accordingly, we are of the view that Atkinson should not run the risk of having to explain and justify his use of language in previous examinations, which in turn could undermine his credibility in proceedings in which his own freedom is at stake. The distinction between incriminating and impeaching a co-accused in criminal proceedings before a jury may well be a question of degree in these circumstances.

241 For the reasons set out above, we do not authorize the Applicants to use and disclose the evidence of Atkinson, collected in connection with the Commission Proceeding, for the purposes of making full answer and defence in the U.S. Criminal Proceeding.

iii. Disclosure of Ravelston's Evidence

242 Unlike the other respondents, RSM Richter Inc., the receiver and manager of Ravelston, does not object to the order sought by the Applicants in respect of the documents produced by, and on behalf of Ravelston. However, although Ravelston did not object, the Applicants may not use or disclose its evidence without a Commission order under subsection 17(1) of the Act. Accordingly, we must consider the public interest in authorizing disclosure of documents produced by Ravelston.

243 Given that Ravelston has not objected, the balance of factors in the public interest is very different from the other Respondents: (1) there is no concern for Ravelston's confidentiality and self-incrimination because, by not objecting to disclosure, it impliedly waived its right to confidentiality and self-incrimination for the purposes of this Application; and (2) the integrity of Commission investigations is maintained because Staff can continue to assure future witnesses that their evidence will remain confidential unless they consent.

244 Accordingly, it would be in the public interest to authorize the use and disclosure of documents produced by, and on behalf of Ravelston, for the purposes of the Applicants' full answer and defence in the U.S. Criminal Proceeding.

iv. Notice of this Application to Persons or Companies who Provided the Evidence

245 Before we make a decision as to whether we authorize the use and disclosure of any transcripts or documents forming part of the Evidence, we must ensure that notice of this Application has been given to all persons and companies entitled to notice pursuant to subsection 17(2) of the Act.

246 Subsection 17(2) of the Act provides that no order shall be made authorizing disclosure under subsection 17(1) of the Act unless the Commission has, where practicable, given reasonable notice and an opportunity to be heard to,

> (a) persons and companies named by the Commission; and
>
> (b) in the case of disclosure of testimony given or information obtained under section 13, the person or company that gave the testimony or from which the information was obtained.

247 As discussed above, we have determined that it would only be in the public interest under subsection 17(1) of the Act to authorize the use and disclosure of documents produced by, and on behalf of Ravelston. Accordingly, we must ensure the Commission has given the required notice in subsection 17(2) of the Act with respect to these documents before we authorize their use and disclosure.

248 Ravelston was given notice of this Application and an opportunity to be heard; in fact it made written submissions. However, the documents produced by, or on behalf of Ravelston may include documents Ravelston obtained from third persons who have not received notice of this Application. If we determine that these third persons are entitled to notice, subsection 17(2) of the Act would prevent us from authorizing the use and disclosure of the documents.

249 In our view, subsection 17(2) of the Act does not require notice to be given to these third persons. Staff obtained these documents from Ravelston and gave notice to Ravelston. Thus, we are able to authorize the use and disclosure of documents produced by, and on behalf of Ravelston without further notice. We differentiate these circumstances from those where documents obtained by Staff from third parties are used in an examination of a witness and form part of the witness's testimony. We would then expect notice to be given to those third parties prior to authorizing disclosure of their documents.

C. If Disclosure is in the Public Interest, What Should be the Appropriate Safeguards in an Order of the Commission to Protect the Rights of the Respondents?

1. Submissions

a. Applicants' Submissions

250 The Applicants submit that they seek to use the Evidence for the purpose of making full answer and defence in the U.S. Criminal Proceeding and for no other purpose. They submit that the order requested would impose limitations on the use defence counsel could make of the Evidence.

251 The order requested would require the Applicants to return all copies of the Evidence to Staff of the Commission or to destroy the Evidence after the completion of the trial or any subsequent appeals in the U.S. Criminal Proceeding. The order

would also require defence counsel to seek a protective order from the U.S. District Court sealing the disclosure at the trial of the criminal matter of any portion of the compelled testimony and prohibiting its use in any other forum or for any other purpose other than the full answer and defence of the Applicants in the U.S. Criminal Proceeding. The Applicants assert that the protective order in the United States will be sought prior to the Respondents taking the stand to be cross-examined.

252 Finally, defence counsel for the Applicants have agreed to provide an undertaking to the Commission that they will comply with the terms and conditions specified in the Order.

i. The Applicants' Revised Draft Order

253 At the request of the Panel, the Applicants provided a revised draft order to the Commission following the hearing of this Application. The revised draft order was intended to address the concerns expressed by the Panel during the hearing of this Application and the concerns raised by the Respondents. The Applicants proposed further limitations in the revised draft order and they submit that:

a. The Applicants and their counsel would maintain custody and control over the Evidence.

b. The Applicants and their counsel would not take the transcripts, related documents or copies of any part of the Evidence outside of Canada.

c. The transcripts would be used only for purposes of cross-examination in circumstances where a witness testifies in the U.S. Criminal Proceeding and gives evidence at trial which contradicts the earlier testimony given to Staff. The Applicants' counsel would accept the witness's answer to any such question without further reference to the transcripts.

d. The Applicants' counsel would be precluded from disclosing the identity of any respondent and from showing any of the Evidence, other than a witness's own evidence, used for seeking the testimony of a witness on behalf of the defence.

254 With respect to the possible cross-examination of Atkinson, the Applicants have agreed to provide additional safeguards. In the event that Atkinson testifies in the U.S. Criminal Proceeding and contradicts the compelled testimony given under section 13 of the Act, the Applicants would be permitted to return to the Commission, on an emergency basis, to request an order under subsection 17(1) in light of the contradictory testimony at the trial.

255 The proposed conditions in the revised draft order with respect to an "emergency hearing" would require the Applicants to give two hours notice to the Secretary, Atkinson's counsel and Staff. The parties would agree to waive the requirements in the Commission's *Rules of Practice* with respect to the convening and holding of a hearing. The hearing would be conducted by telephone conference-call in accordance with Rule 4 of the Commission's *Rules of Practice*, at a time determined by the Secretary, and the Applicants submit that they would pay the costs for the hearing.

b. Respondents' Submissions

i. Submissions During the Hearing

256 Witness "A" argues that the Applicants have put the "substantive cart before the procedural horse" and submits that the Applicants have not attempted to secure a commitment from the U.S. Attorney that use or derivative use of the Evidence will be constrained by the U.S. District Court. Witness A submits that his Charter rights should not be subject to the vagaries of "I will try" to obtain a protective order. The Applicants should have secured a protective order from the U.S. District Court before asking the Commission for a public interest disclosure order.

257 In the event that this Commission determines that disclosure would be in the public interest, Witness A requests that we grant a limited section 17 order permitting the Applicants to disclose that various witnesses have been examined by Staff in order to persuade the U.S. District Court to issue a protective order that will ensure use and derivative use protection for the witnesses examined under oath in Canada.

258 Witnesses B, C, E and F assert that an order will not and cannot have extra-territorial effect. They argue that the Commission cannot constrain the U.S. Attorney or others who may come to possess the Evidence. They argue that once the Evidence is filed in the a U.S. court, all Canadian protections against self-incrimination, use and derivative use will cease to exist.

ii. Submissions in Response to the Applicants' Revised Draft Order

259 The Respondents unanimously refused to provide their consent to the Applicants' revised draft order.

260 Witnesses A, B, C, E and F submit that the revised draft order does not alleviate their concerns regarding the disclosure of their compelled evidence or change their opposition to the relief requested. In addition, they submit that the revised draft order is unworkable.

261 Witnesses D, G and KPMG submit that the revised draft order does not provide a workable solution and does not address the substantive submissions made during the hearing.

262 Atkinson submits that the revised draft order is significantly different than the order originally sought in the Application and does not address the substantive issues during the hearing.

2. Discussion and Conclusion

263 The Applicants provided a draft order, which included an undertaking that the Applicants and their defence counsel would take all steps reasonably available to obtain a protective order from the U.S. District Court requiring all parties to the U.S. Criminal Proceeding to comply with the conditions in the draft order. At the hearing, the Applicants provided no evidence to assure the Panel that such protective orders would be granted by the U.S. District Court and the extent to which they would protect the Respondents. The Applicants' revised draft order does not make any reference to obtaining a protective order, but provides an undertaking to the Commission that the Applicants' defence counsel will comply with the terms and conditions specified in the revised draft order. We acknowledge that the Applicants have attempted to address our concerns by including additional restrictive conditions in their revised draft order. However, we are still not convinced that any of these best efforts undertakings would ultimately protect the Respondents from having their testimony potentially used in criminal or civil proceedings in the U.S.

264 We agree with the Respondents that the draft order and the conditions included in the revised draft order do not address the substantive issues and our concerns discussed in our reasons above. Accordingly, we decline to grant the Applicants' request set out in their original draft order as well as the revised draft order.

V. Conclusions

265 Our analysis of this request was conducted in light of the alleged unique and exceptional circumstances of this case.

266 We affirm that the statutory scheme of Part VI of the Act provides a presumption in favour of protecting confidentiality of compelled evidence from witnesses under section 13 of the Act. An order under subsection 17(1) of the Act will be appropriate only in the "most unusual circumstances" where the public interest in disclosure clearly outweighs the confidentiality rights provided in the statute. We are not convinced that granting this Application would be in the public interest, and accordingly, we decline to grant the Applicants' requested order, except for Ravelston.

267 An order under subsection 17(1) of the Act will be issued shortly with respect to Ravelston.

***P.J. LeSage Chair*:**

VI. Reasons and Decision of Patrick J. LeSage (in dissent)

268 I have read and considered the very thorough and complete Reasons of the majority. I agree with their decision with respect to Ravelston and Atkinson. I am, respectfully, not able to agree with the majority's dismissal of the Applicants' request regarding the evidence of witnesses A, B, C, D, E, F, G and KPMG.

269 At the outset, it is important to note that pursuant to Canadian disclosure laws and practices, the Applicants are already in possession of the testimony and documentary evidence that forms the subject matter of this Application. This Application therefore relates not to whether they may possess the testimony and related exhibits, but rather whether they may, if circumstances require, use that evidence in a "parallel" proceeding in the U.S., namely, the U.S. Criminal Proceeding, in which the Applicants are the accused.

270 I am satisfied that the Applicants' request falls squarely within the supervisory role of this tribunal over the operation of the Act, specifically section 17. The question therefore is whether the Applicants' request is... "in the public interest" having regard to all the circumstances? This is not, as some have characterized it, an Application for a purely private purpose, nor a request made so that the Applicants can personally gain. Rather, the request is for use of the evidence in a very public action in which the State is seeking to convict and incarcerate the Applicants. That is not a private purpose.

271 If the identical or similar criminal prosecution occurred anywhere in Canada, I am sure we would authorize the requested use of the sought after Evidence, so as to enable the Applicants to make full answer and defence. However, in such a case, I am mindful that Canadian laws would apply protecting the witnesses against self-incrimination.

272 This Application is not to be determined on the basis of the adequacy of the disclosure rules in U.S. criminal courts, and in particular, this specific U.S. Criminal Proceeding, rather, on the basis of the Application of Canadian law to determine whether an Order authorizing the use and disclosure of the Evidence should be made having regard to all the relevant factors.

273 At paragraph 232 the majority write in part as follows:

> [...] any disclosure of evidence obtained under Part VI of the Act would be appropriate *where the Commission or an Ontario court could exercise control over the use* and derivative use in order to ensure that the witnesses' rights against self-incrimination would be protected. The Applicants' requested Order does not meet this requirement.
>
> [Emphasis is my own.]

274 I do not accept, as will be seen in these Reasons, that the Respondents' right to privacy and right against self-incrimination trumps all other rights, including the right of the Applicants to make full answer and defence. I also believe, with an appropriate Order, that the Commission can exercise a significant degree of control over the permitted use of the Evidence.

275 The Applicants have been criminally indicted in the U.S. and face the possibility of long term incarceration if convicted. There have been numerous investigations concerning the conduct of the affairs of Hollinger and Hollinger International Inc. The Special Committee of Hollinger International Inc. conducted an investigation; Staff of the Commission conducted an investigation; and the S.E.C. conducted an investigation. The U.S. Attorney conducted an investigation and invoked a Grand Jury. None of witnesses A, B, C, E and F has been charged as a result of these investigations. In addition, none of these witnesses has been named in a regulatory proceeding, nor is any of them named as a defendant in any of the civil actions that have arisen out of the Hollinger investigations.

276 Witnesses D and G, and their employer, KPMG, have been interviewed by the Special Committee of Hollinger International Inc., and the S.E.C. None of them is the subject of a criminal or regulatory proceeding and neither D nor G is a defendant in any of the civil proceedings relating to the allegations against the Applicants, although KPMG is a defendant in Canadian class proceedings.

277 Witnesses D, G and KPMG representatives have been interviewed by the U.S. authorities and have agreed to cooperate as witnesses in the U.S. Criminal Proceeding.

278 Given the stage and the number of investigations completed over a lengthy period, there is not now, in my view, a realistic likelihood of criminal, civil or regulatory risk to these respondents (other than KPMG in the Class proceedings) if their evidence before the Commission is used for the purpose of cross-examination on the limited terms that I would allow.

279 The right to make full answer and defence has been referred to by the Supreme Court of Canada in *Stinchcombe* as "one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted". (*Stinchcombe*, *supra* at para. 17.) It would seem, therefore, to be not only reasonable, but eminently fair, to permit counsel for the Applicants at the U.S. Criminal Proceeding to cross-examine witnesses D and G and any KPMG witnesses on testimony they provided in Canada that is contradictory to the evidence they have willingly agreed to provide for the U.S. prosecution. Certainly, any expectation of privacy or confidentiality or freedom from self-incrimination that they may have reasonably anticipated when they provided their evidence in Canada has been diluted, if not negated, by their cooperation and willingness to provide statements to, and to attend as witnesses for (it appears), the prosecution against the Applicants.

280 in light of the remoteness of any risk to witnesses D, G or KPMG, and having regard to their willingness to cooperate and provide statements to the U.S. prosecutorial authorities, I believe it would be both unfair and unreasonable not to grant the Applicants' request, subject to the terms I will set out.

281 If the Applicants' request regarding witnesses D, G and KPMG is not granted, and D, G or a KPMG representative provides evidence in the U.S. trial that contradicts evidence they provided the Commission, counsel for the accused Applicants would be prohibited from cross-examining them on the contradictory evidence. If, of course, as one would reasonably expect, they did not give contradictory evidence, then the sought after Evidence would not be relied on and no possible harm could befall anyone as a result of the Order I would make. Therefore, if an Order is made permitting the Applicants the right to use the Evidence, it would be utilized only in the, hopefully unlikely situation, that the evidence of witnesses D, G and KPMG at the trial in the United States is contradictory to the evidence they provided the Commission. The balance of the rights of D, G and KPMG, against self-incrimination, as compared to the accused Applicants' rights to make full answer and defence is overwhelmingly in favour of the Applicants.

282 Witnesses A, B, C, E and F are in a somewhat different position, however, the likelihood of them being adversely affected in a civil, criminal or regulatory sense is slight, if not remote, having regard to the late stage of the proceedings, both in the U.S. and here in Canada. Accepting as I do, that section 17 of the Act creates a public interest exception to the non-disclosure and confidentiality regime established in section 16 of the Act, I am satisfied that a balance must be achieved between the respective rights of the Applicants and the respective rights of A, B, C, E and F. When one weights the slight, if not remote, risk of harm that could befall A, B, C, E or F if the restricted use requested by the Applicants was permitted, against the very significant harm that could befall the Applicants if they are curtailed in their right to make full answer and defence, I conclude the balance- is tilted significantly in favour of the Applicants.

283 In so finding I am not, of course, ordering or directing that their evidence be used, but rather permitting it to be used in very limited circumstances. The Applicants are bound by the restrictions that this Commission will impose.

284 Atkinson, however, is in a totally different position than the other Respondents. He is an accused facing the same serious criminal charges with the same significant penal consequences. In balancing the respective rights of the Applicants and Atkinson, it is necessary to take into consideration that he is facing not a perceived, but a real, risk with significant consequences. In that circumstance, his right to be free against self-incrimination is at least equal to the Applicants' right to full answer and defence. The Applicants therefore have not met their onus. As a result, I agree with the majority, the Applicants may not use the testimony of Atkinson for any purpose.

285 In determining that it is appropriate to authorize restricted use of the testimony of witnesses A, B, C, D, E, F and G and KPMG, I am influenced by the firm belief that this will not impede the Commission's ability to conduct future investigations. This Application raises unique and exceptional circumstances that call for a unique and exceptional discrete disclosure Order. I am mindful of criminal cases in the past where wrongful convictions have occurred because the State failed to disclose relevant

evidence. In arriving at my conclusion, I am also mindful that Canadian values espouse the right of an accused to make full answer and defence.

286 I therefore conclude that the Applicants' rights in this circumstance outweigh the witnesses A, B, C, D, E, F, G and KPMG's reasonable expectations of privacy in the compelled evidence. I am satisfied, given the terms, I would impose, that the risk of harm and the nature of self incrimination is minimal and that it is in the public interest to authorize the restricted use of the Evidence on terms as follows:

1. The Applicants or their counsel may make disclosure and use of the evidence and the documents of witnesses A, B, C, D, E, F, G and KPMG solely for the purpose relating to their defence of the outstanding charges in the U.S. Criminal Proceeding and for no other purpose.

2. Disclosure and use of the evidence of witnesses A, B, C, D, E, F, G and KPMG will be on condition that:

(a) the Applicants and their counsel will not use the evidence or the documents other than in connection with their making full answer and defence to the charge against them in the U.S. Criminal Proceeding;

(b) the Applicants and their counsel shall maintain custody and control over the evidence in the documents so that the copies of the evidence are not disseminated to other persons in their employ or for any purpose other than in connection with their making full answer and defence to the charges in the outstanding U.S. Criminal Proceeding;

(c) the Applicants and their counsel shall not take the evidence or copies of any part of the evidence outside of Canada;

(d) the Applicants and their counsel may use the evidence only for the purposes of cross-examination of a witness at the trial in the U.S. Criminal Proceeding by asking questions based on the evidence, but shall accept the witness's answer to any such question without further reference to the evidence in respect of that question;

(e) if any of the evidence is used as a basis for seeking the testimony of an individual on behalf of the defence, other than a witness with respect to his or her own evidence, the identity of the witnesses shall not be disclosed and no part of the evidence shall be shown to any such individual, except, of course, unless ordered to do so by the presiding judge in the U.S. court. If so compelled, counsel must take every step available to them to ensure the spirit of this order is adhered to. This includes ensuring, to the extent possible, in the United States courts, the compelled statements, if utilized, not be used in an incriminating manner against the witnesses or their employer;

(f) the evidence and the documents shall not be used for any collateral or ulterior purpose;

(g) defence counsel for the Applicants in the U.S. Criminal Proceeding shall undertake that they will comply with the terms and conditions specified in this Order.

APPENDIX

Note

On January 10 and 11, 2007, the Commission heard an *in camera* application brought by Conrad M. Black and John A. Boultbee, for an order pursuant to subsection 17(1) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended, authorizing the Applicants to use and disclose testimonial and documentary evidence of persons identified as A, B, C, D, E, F, G, H, I and J that was obtained by Staff of the Commission under an order of the Commission made pursuant to section 11 of the Act, in order to provide the Applicants with the ability to make full answer and defence to criminal charges against them in the United States District Court for the Northern District of Illinois, Eastern Division proceeding entitled *United States of America v. Conrad M. Black, John A. Boultbee, Peter Y. Atkinson, Mark S. Kipnis and The Ravelston Corporation Limited*, No. 05 CR 727.

On February 7, 2007, the Commission issued its Reasons and Decision on a confidential basis and denied the application, with the exception of granting limited relief to permit use of certain documents in the U.S. criminal proceeding, subject to terms and conditions.

Subsequently, the Confidential Reasons and Decision issued on February 7, 2007 was amended after receiving submissions from counsel. On March 5, 2007, the Commission issued its Amended Confidential Reasons and Decision in this matter along with an Amended Confidential Order dated March 5, 2007.

On April 3, 2007 the Commission held an *in camera* hearing to consider written and oral submissions in relation to the publication of the Amended Confidential Reasons and Decision.

On April 10, 2007, the Commission issued an order stating that the Commission will issue a summary of the Reasons and Decision for immediate publication, subject to the following terms:

> (i) the full Reasons will be published at the completion of the U.S. Criminal Proceeding (i.e., the completion of the U.S. criminal trial, and for greater clarity, all matters up to the sentencing process, if any); and
>
> (ii) further application to the Commission may be made at any time, including prior to the completion of the U.S. Criminal Proceeding, on notice to counsel for the Applicants and Respondent I, for an order for publication of the full Reasons or a redacted version of the Reasons.

The Order dated April 10, 2007 including the summary of the Reasons and Decision was published in the Ontario Securities Commission Bulletin as *In the Matter of X and Y* (2007), 30 O.S.C.B. 3513.

On October 16, 2008, the Commission published the Amended Confidential Reasons and Decision issued on March 5, 2007 and the Amended Confidential Order issued on March 5, 2007, in accordance with the Commission's Order dated April 10, 2007.

End of Document

TAB 4

Mega-C Power Corp. (Re)

Ontario Securities Commission Decisions

Ontario Securities Commission

Panel: Lawrence E. Ritchie, Vice-Chair (Chair of the Panel); James E.A. Turner, Vice-Chair; Wendell S. Wigle, Q.C., Commissioner

Heard: May 18, 2007.

Decision: July 26, 2007, by written submissions.

Released: September 8, 2010.

2007 LNONOSC 1059 | (2010), 33 OSCB 8273

IN THE MATTER OF the Securities Act, R.S.O. 1990, c. S.5, as amended, and IN THE MATTER OF Mega-C Power Corporation, Rene Pardo, Gary Usling, Lewis Taylor Sr., Lewis Taylor Jr., Jared Taylor, Colin Taylor and 1248136 Ontario Limited

(40 paras.)

Counsel

Anne C. Sonnen, Sean Horgan, For Staff of the Ontario Securities Commission.

Peter Copeland, For Lewis Taylor, Sr. and Lewis Taylor Jr.

Fred Platt, For Jared Taylor, Colin Taylor and 1248136 Ontario Limited.

Steven Sofer, James Camp, For Gary Usling.

David Hausman, For the Liquidation Trustee of Mega-C Power Corporation.

REASONS AND DECISION

REGARDING THE REQUEST

FOR REDACTION OF THE CONFIDENTIAL

I. Introduction

1 On November 16, 2005, the Commission issued a Notice of Hearing against Mega-C Power Corporation ("Mega-C"), Rene Pardo, Gary Usling, Lewis Taylor Sr., Lewis Taylor Jr., Jared Taylor, Colin Taylor and 1248136 Ontario Limited (collectively, "the Respondents") pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") in connection with a Statement of Allegations delivered by Staff of the Commission ("Staff") on that day. Staff alleges that the Respondents violated sections 25, 38 and 53 of the Act. The allegations relate to activities alleged to have taken place from August 2001 through mid-2003.

2 By Order dated December 5, 2006, on consent of all parties, the Commission ordered the hearing on the merits to commence on October 29, 2007, to proceed over the following six weeks.

3 An Amended Notice of Hearing was issued by the Commission on February 6, 2007. On June 4, 2007, a Notice of Withdrawal was issued by Staff withdrawing the allegations against the respondent, Mega-C.

4 As of April 12, 2007, there were a number of motions pending, including: two motions, one brought by Lewis Taylor Sr. and Lewis Taylor Jr. ("Taylor Sr. and Jr."), and one brought by Jared Taylor, Colin Taylor and 1248136 Ontario Limited (the "Taylor Group"), relating to the propriety and legality of certain statutory investigation provisions contained in the Act, and their use in this case (collectively, the "Constitutional Motions").

5 As we noted in our Confidential Reasons and Decision dated May 18, 2007 (the "Confidential Reasons and Decision"), while these motions were described as the "Constitutional Motions", the Taylor Group and Taylor Sr. and Jr. also rely on principles of "fundamental and/or natural justice", in addition to *Charter* protections (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Charter*")).

6 In response to these two Constitutional Motions challenging both the constitutionality of section 11 of the Act, as well as the manner and basis upon which an investigation order (the "Investigation Order") was obtained and used in the circumstances of this Proceeding, Staff filed a "cross-motion" on March 29, 2007 ("Staff's Motion"), to adjourn the hearing of the Constitutional Motions until the commencement of the hearing in this matter on October 29, 2007 (the "Hearing"), so that the Constitutional Motions would be dealt with at the discretion of the Hearing Panel.

II. Taylor Sr. and Jr. and the Taylor Group's Request for Redaction of the Confidential Reasons and Decision dated May 18, 2007

7 At the hearing of Staff's Motion, some of the respondents pointed out that certain matters that would be addressed by the Panel in its reasons and decision may raise confidentiality issues. As a result, we agreed at the time to release our reasons and decision on a confidential basis until we could consider counsel's submissions

regarding the need to preserve confidentiality of parts of the reasons and decision until the commencement of the Hearing.

8 On May 18, 2007, we issued the Confidential Reasons and Decision. At the request of the Respondents, we issued our reasons on a confidential basis to allow them the opportunity to review the Confidential Reasons and Decision and to make submissions as to which parts, in their view, should be kept confidential until the commencement of the Hearing.

9 We understand that discussion amongst the parties failed to result in agreement as to the public release of the Confidential Reasons and Decision. Accordingly, by way of letter dated June 14, 2007, sent to the parties by the Secretary to the Commission, on behalf of the Panel, we requested that the parties file written submissions regarding their position on the confidentiality issue raised during the hearing of Staff's motion, before we publicly release our Confidential Reasons and Decision.

10 The parties filed written submissions by letter on June 21st and June 22nd, 2007. Each party filed a letter setting out its position on the issue of confidentiality. Three of the parties respectively filed suggested redacted versions of the Confidential Reasons and Decision to be considered by the Panel.

11 We have reviewed the letters submitted by the parties and the suggested redacted versions of the Confidential Reasons and Decision proposed by the respective parties. These are our confidential Reasons and Decision regarding the request for redaction of the Confidential Reasons and Decision.

III. Parties' Position

Taylor Sr. and Jr.

12 Counsel for Taylor Sr. and Jr. submits that paragraph 16(1)(b) of the Act prohibits the public disclosure of information which would help identify the names of persons, including his clients, "examined or sought to be examined under section 13" of the Act.

13 In counsel's letter dated June 21, 2007, counsel proposed redactions of the Confidential Reasons and Decision with respect to two types of information:

(i) the names of persons who were the subject of examinations pursuant to section 13 of the Act; and

(ii) information that would tend to identify the names of persons who were the subject of examinations pursuant to section 13, including:

a. the name of the proceeding;

b. the identity of all the respondents and their counsel:

c. the history of the proceedings (paragraphs 1 and 2);

d. the time frame of the alleged conduct in the Statement of Allegations (paragraph 3);

e. the specific sections of the Act that are the subject of the allegations (paragraphs 1 and 28); and

f. the scheduled date of the section 127 Hearing (paragraphs 2, 8, 87, 88, 89, 99, 100).

14 Counsel for Taylor Sr. and Jr. further submits that section 17(6) has no application in these circumstances, as the exceptions allow only for disclosure by "[a] person appointed to make an investigation or examination under the Act". He acknowledges, however, that the scope of the two exceptions to confidentiality in subsection 17(6) of the Act have not been clearly established by the jurisprudence. Moreover, according to counsel, when Staff discloses materials to respondents pursuant to subsection 17(6) of the Act, the protections of section 16 are not displaced. In support of his argument, counsel relies on the decision of *A Co. v. Naster*, *[2001] O.J. No 4997* at para. 25 (Div. Ct.) ("*A Co. v. Naster*"):

> Second, there are the provisions of s. 16 of the Act. It is submitted that s. 17(6) does not confine disclosure to the other respondents. That is so, but I observe that the disclosure can only be made "for the purpose of conducting an examination or in connection with a proceeding commenced or proposed to be commenced by the Commission." That appears to me to confine disclosure under s. 17(6) to other respondents, or persons being interviewed in an effort to obtain information. Section 16 extends the protection of confidentiality to any person or company, whether or not a respondent.

15 Counsel for Taylor Sr. and Jr. filed a proposed redacted version of the Confidential Reasons and Decision for our consideration.

The Taylor Group

16 In his letter dated June 21, 2007, counsel for the Taylor Group and 1248136 Ontario Limited submits that the following portions of the Confidential Reasons and Decision should be redacted:

a. the name of his clients or portions that refer to his clients; and

b. the names of the members of the Panel and counsel who appeared before the Panel.

17 Counsel submits that the names of his clients ought to be redacted because the Act requires that the existence of a compelled examination be kept confidential. According to counsel, the information referred to above could be used to identify the proceeding and thereafter the identity of his clients. Counsel submits that the redacted names (other than the names of the members of the Panel and counsel), i.e. those in the body of the Confidential Reasons and Decision, can be given pseudonyms and the dates can be deleted without doing any injustice to the Confidential Reasons and Decision.

18 Counsel also filed a suggested version of the redacted Confidential Reasons and Decision for our consideration, which follows this proposed approach.

Gary Usling

19 In his letter dated June 22, 2007, counsel for Gary Usling indicated that Gary Usling has no objection to the Confidential Reasons and Decision being published in full, without redaction.

Staff

20 In their letter dated June 21, 2007, Staff submit that the confidentiality provisions in section 16 of the Act do not support a *de facto* sealing order of the scope urged upon us by counsel for Taylor Sr. and Jr. and the Taylor Group.

21 Staff submit that the redactions proposed by counsel for Taylor Sr. and Jr. and by counsel for the Taylor Group are overly broad and contrary to the presumption in favour of open proceedings, which fosters public confidence in the integrity of the administration of justice.

22 Staff argue that the expedient release of the reasons in an unredacted form is necessary to provide guidance to the public on pre-hearing motions of this nature and to help inform those involved in subsequent proceedings.

23 Staff point out that the Confidential Reasons and Decision falls within the application of paragraph 17(6)(a) of the Act and that accordingly, no disclosure order is required.

24 In the alternative, Staff submit that, in the event that the Panel were to conclude that subsection 17(6) of the Act was of no assistance in resolving this legal issue, Staff would be prepared to proceed by way of an application for an order under subsection 17(1) of the Act. Staff submit that it would bring such application on the basis that the moving respondents' rights to confidentiality under section 16 of the Act is not absolute, but rather, any prejudice to the moving respondents from the disclosure of the fact that a section 11 order was issued and the fact that section 13 evidence was obtained is outweighed by the public interest in having a full copy of the Confidential Reasons and Decision available for public review.

25 Although Staff are of the view that it is not necessary to redact the Confidential Reasons and Decision, Staff do not oppose an amendment such that references to the Respondents are made generically to ensure that the Confidential Reasons and Decision do not disclose to whom the section 11 order was applied or from whom section 13 evidence was obtained. Staff filed a suggested version of the redacted Confidential Reasons and Decision for our consideration.

IV. Analysis

26 Sections 16 and 17 of the Act are the relevant provisions to determine the matter in issue. Section 16 of the Act provides confidentiality relating to the nature and content of section 11 orders and evidence obtained under section 13 of the Act. Section 16 provides:

> **16.**(1) Except in accordance with section 17, no person or company shall disclose at any time, except to his, her or its counsel,
>
> (a) the nature or content of an order under section 11 or 12; or
>
> (b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13. 1994, c. 11, s. 358.
>
> (2) If the Commission issues an order under section 11 or 12, all reports provided under section 15, all testimony given under section 13 and all documents and other things obtained under section 13 relating to the investigation or examination that is the subject of the order are for the exclusive use of the Commission or of such other regulator as the Commission may specify in the order, and shall not be disclosed or produced to any other person or company or in any other proceeding except as permitted under section 17.

27 Subsection 17(6) of the Act reads as follows:

> (6) A person appointed to make an investigation or examination under this Act may disclose or produce anything mentioned in subsection (1), but may do so only *in connection with*,
>
> (a) a proceeding commenced or proposed to be commenced by the Commission under this Act; or
>
> (b) an examination of a witness, including an examination of a witness under section 13. [Emphasis added]

28 In our view, subsection 16(2) makes it clear that information and material obtained pursuant to an Investigation Order are for the exclusive use of the Commission (or such other regulator identified in the Order). Further, the words used in subsection 16(2), set out above, presume that information obtained pursuant to sections 11, 12 and 13 can be produced or disclosed in the course of a Commission proceeding, since there is a prohibition from disclosure of such information and material "in any other proceeding" "except as permitted by section 17". The reference to "any other proceeding" must be a reference to a proceeding other than the relevant Commission proceeding and/or a proceeding of any other regulator named in the relevant order.

29 Section 17 of the Act establishes a legal framework for disclosure. We note that subsection 17(6) makes reference to disclosure by the person appointed to make the investigation, but not the Commission. However, we must read all of the relevant provisions as a whole to make them meaningful. In our view, sections 16 and 17 are meant, among other things, to provide some comfort to persons who are examined or who provide information to Staff in the course of an investigation pursuant to an investigation order, that the identities of those individuals, the information they provide and the fact that they have been involved at all, will remain confidential, subject to the terms of the Act. However, the fact that disclosure can be made by a person appointed to make an investigation, "in connection with a proceeding" commenced or proposed to be commenced, qualifies the reasonable expectation of confidentiality of an affected person.

30 In circumstances such as these, where a proceeding has been commenced and a preliminary motion has been brought, the Act contemplates that information obtained pursuant to the statutory investigation powers can be disclosed in the course of the relevant Commission proceeding.

31 As the Confidential Reasons and Decision relate to a pre-hearing motion brought in the context of a proceeding that is scheduled for a hearing, we are of the view that disclosure regarding the section 11 Order and the section 13 evidence provided in the Confidential Reasons and Decision falls within the ambit of subsection 16(2) and subparagraph 17(6)(a) of the Act and no separate order is required. Subsection 17(6) does not say: "at the outset of a proceeding", or "in the course of a proceeding". Rather, it states that disclosure is permitted "in connection with" a proceeding. The use of that phrase indicates that once a Notice of Hearing is issued, disclosure of information made confidential pursuant to section 16, may be made if the disclosure is in connection with the proceeding. For example, it is expected that disclosure of such confidential information would be made in satisfaction of Staff's production obligations to respondents, and once that disclosure is made, the information can be used by any party to the proceeding, in the course of that proceeding. We recognize that there could be special circumstances that would warrant the preservation and protection of confidentiality. However, absent any such special circumstances, we are of the view that disclosure in connection with a proceeding ordinarily would include disclosure of preliminary or interlocutory motions made in the connection with the proceeding.

32 In any event, we agree with Staff that the Confidential Reasons and Decision does not refer to the section 17 application, does not refer to the nature and content of the section 11 order, nor to the contents of the information obtained under section 13 of the Act.

33 Counsel for Taylor Sr. and Jr. referred us to the decision of *A. Co. v. Naster*, cited above, which is relied upon to support the proposition that subsection 17(6) of the Act is not applicable in these circumstances. First, we note that the portion cited by counsel refers to the application of paragraph 17(6)(a) to the disclosure of the actual compelled evidence in that proceeding. While the released reasons in that matter referred to the applicant as "A. Co.", but for that redaction, the reasons were released in an unredacted form.

34 Further, when reviewing the reasons in *A. Co. v. Naster*, we note that this decision did not redact: the nature of the proceeding, the underlying facts of the proceeding, the name of counsel, the names of the Panel members or dates of events in the proceeding. These are all elements of the decision that Respondents' counsel in this case wish to have redacted.

35 We also note that in other Commission decisions relating to section 11 and or section 13 of the Act, the reasons were published in an unredacted form (see for instance: *Biscotti v. Ontario (Securities Commission) (1990), 76 D.L.R. (4th), 762* and *OSC v. Gatti* (unreported: March 27, 2001), and *Universal Settlements International Inc. v. Ontario* (2003) 26 O.S.C.B. 7611).

36 The Commission is a public body, exercising its statutory powers in the public interest. It is important, in our view, that it fulfill its mandate as transparently as practically possible. This means that matters coming before the Commission, including the details about those matters, be made public, to the broadest extent possible, absent special circumstances that would warrant some degree of confidentiality. Where such circumstances exist, the Commission should exercise its discretion narrowly, so as to provide the public with as much information about the proceedings before the Commission as possible in the circumstances.

37 In the circumstances before us, although we are of the view that the Commission has the authority to release the Confidential Reasons and Decision publicly in an unredacted form pursuant to subsection 16(2) and as contemplated by 17(6) of the Act, we are prepared to release our Confidential Reasons and Decision in a redacted form at this time until the commencement of the Hearing.

38 In coming to this conclusion, we have considered the fact that Staff do not oppose Taylor Sr. and Jr. and the Taylor Group's request to publish the Confidential Reasons and Decision in a redacted form which removes the names of the parties. We also note that the substantive Hearing on the merits is scheduled to commence shortly, and that the nature of the redactions are largely limited to concealing the names of the parties to that proceeding.

IV. Decision

39 Accordingly, the Confidential Reasons and Decision dated May 18, 2007 shall be released publicly in a redacted form which removes reference to the parties affected.

40 These Confidential Reasons and Decision Regarding the Request for Redaction of the Confidential Reasons and Decision dated May 18, 2007, and the Confidential Reasons and Decision, shall be made available to the public in an unredacted form on the first day of the Hearing on the merits.

DATED at Toronto this 26th day of July, 2007.

Lawrence E. Ritchie

Wendell S. Wigle

James E.A. Turner

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ONTARIO SECURITIES COMMISSION	and	**GO-TO DEVELOPMENTS HOLDINGS INC. *et al***
Applicant (Respondent in Appeal)		Respondents (Appellants in Appeal)

Court of Appeal File No.: C70114
Court File No: CV-21-00673521-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at
TORONTO

BOOK OF AUTHORITIES OF THE APPELLANTS

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RCP-F 4C (September 1, 2020)