

These Reasons and Decision were originally issued on a confidential basis and later published pursuant to the terms of the Order issued in the same application on November 25, 2025



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Citation: *Katanga Mining Limited v Ontario Securities Commission*, 2025 ONCMT 16
Date: 2025-11-20
File No. 2025-12

BETWEEN:

KATANGA MINING LIMITED
(Applicant)

- and -

ONTARIO SECURITIES COMMISSION
(Respondent)

REASONS AND DECISION
(Section 17 of the *Securities Act*, RSO 1990, c S.5)

Adjudicators: Jane Waechter (chair of the panel)
Russell Juriansz
Dale Ponder

Hearing: By videoconference, November 11, 2025

Appearances: Aaron Dantowitz For the Ontario Securities Commission
Emma Seip

Amanda McLachlan For Katanga Mining Limited
Shaan Tolani
Pavan Pasha

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REASONS AND DECISION

1. OVERVIEW

- [1] Katanga Mining Limited applies under section 17 of the *Securities Act*¹ (the **Act**) for permission to disclose certain confidential documents obtained during an Ontario Securities Commission investigation to its parent company, Glencore plc, for use in civil proceedings in the United Kingdom (the **Confidential Documents**).
- [2] For the reasons that follow, we dismiss the application. Katanga did not establish that the order sought was in the public interest. Disclosure of information protected by s. 16 for use in private civil proceedings is generally not in the public interest, and a court order stating that relevant documents must be disclosed cannot alone satisfy the public interest analysis. Despite the investigation being concluded, there still exist privacy concerns and policy considerations that weigh against the disclosure of confidential s. 16 information.

2. BACKGROUND

- [3] Katanga was a reporting issuer with shares listed on the Toronto Stock Exchange. In March 2017, the Commission commenced a confidential investigation of Katanga and several of its officers and directors which resulted in a settlement agreement that was approved by the Tribunal in December 2018.²
- [4] In 2020, Katanga became a wholly-owned subsidiary of Glencore. Glencore is a defendant in a civil claim in the UK High Court of Justice alleging material misleading statements and omissions in its public company disclosure. The UK Court ordered that, among other records, documents provided by the Commission to Katanga during the investigation must be disclosed in the UK proceeding, to the extent they are relevant to the issues in the litigation.
- [5] In March 2025, the Tribunal granted Katanga limited authorization to share some confidential materials with Glencore's UK counsel for the sole purpose of

¹ RSO 1990, c. S.5

² *Katanga Mining Limited (Re)*, 2018 ONSC 59

conducting a relevance review.³ After that review, Glencore's counsel determined that all but one of the documents must be disclosed to comply with a UK court's production order.

- [6] Following that determination, Glencore applied in the UK to vary the production order, relying on expert evidence about Ontario's confidentiality provisions. That UK application has been adjourned pending the outcome of this proceeding.
- [7] Katanga now seeks broader authorization to disclose the Confidential Documents for use in the UK litigation. Katanga provided notice to individuals whose compelled testimony appears in the documents. Two individuals objected, one, while taking no formal position, stated he had an expectation the testimony would remain confidential, and one did not respond. Another individual whose testimony is included has passed away.

3. PRELIMINARY ISSUES

3.1 Confidentiality

- [8] Due to the confidential nature of s. 17 applications, the Tribunal ordered that this hearing take place in the absence of the public and that the materials filed be marked as confidential.⁴ We have drafted these reasons without reference to any confidential information in order to increase the public transparency of this proceeding.

4. ISSUES

- [9] The sole issue to determine on this application is whether it is in the public interest to authorize disclosure of the Confidential Documents for use in the UK proceeding.

5. ANALYSIS

- [10] Ontario's public policy, consistent with other jurisdictions with modern securities regulation, is that confidentiality is essential to the integrity and effectiveness of regulatory investigations.

³ *Katanga Mining Limited v Ontario Securities Commission*, 2025 ONCMT 4 (**Katanga**)

⁴ (2025), 48 OSCB 7636

- [11] Disclosure of the existence or nature of an investigation risks impairing market integrity by signalling that regulatory action may be imminent, prompting premature market reactions.
- [12] Confidentiality also protects the investigative process in a number of other ways. It does so by reducing the risk of witness coordination, and the tailoring, concealing and destruction of evidence. It encourages candid cooperation by assuring witnesses that compelled testimony and produced documents will not be disclosed except as expressly permitted by statute. It safeguards the Commission's investigative and market-surveillance methods.
- [13] Importantly, confidentiality protects commercial and personal privacy interests and avoids unwarranted reputational harm where no wrongdoing is ultimately found.
- [14] Part VI of the *Act*, which deals with Investigations and Examinations, implements the public policy of maintaining the confidentiality of securities investigations.
- [15] Section 13 of the *Act* grants investigators the power to force persons to attend and testify under oath and produce documents and other things. Compelled interviews are a central investigative tool. At such interviews witnesses cannot refuse to answer on self-incrimination grounds but may invoke the protection of s. 9 of the *Evidence Act*⁵ which precludes the subsequent use of their compelled answers against them in any civil proceeding or prosecution under any Act of the Legislature.
- [16] Section 16 of the *Act* codifies Ontario's strong policy of non-disclosure. It prohibits disclosure of the existence or content of an investigation order, the identity of persons examined, the content of compelled testimony, production demands, and materials produced.
- [17] Section 16 contains limited exceptions, including disclosure to counsel or insurers and certain uses by the Commission itself. Outside these exceptions, the information "shall not be disclosed or produced...in any other proceeding." The

⁵ RSO 1990, c E.23

exception engaged here is s. 17, which authorizes the Tribunal to permit disclosure where it “considers that it would be in the public interest.”

5.1 Public Interest Test under s. 17

[18] In determining whether it is in the public interest to order disclosure, the Tribunal must:

- a. consider the purpose for which the evidence is sought and the specific circumstances of the case; and
- b. balance the continued requirements for confidentiality with its assessment of the public interests at stake, including harm to the person whose testimony is sought.⁶

[19] In applying this test we keep in mind the statement of the Supreme Court of Canada in *Deloitte and Touche LLP v Ontario (Securities Commission)* that the Tribunal “is obligated to order disclosure only to the extent necessary to carry out its mandate under the Act.”⁷ The Tribunal has observed 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.”⁸

5.2 Disclosure for Private Civil Litigation Is Generally Not in the Public Interest

[20] It is well-established, as acknowledged by the applicant, that disclosure of information protected by s. 16 for use in private civil proceedings is generally not in the public interest.⁹ The applicant seeking an order under s. 17 authorizing disclosure bears the onus of demonstrating disclosure for use in private civil litigation would nonetheless advance the public interest under the *Act*.¹⁰

⁶ *Deloitte & Touche LLP v. Ontario (Securities Commission)*, 2002 CanLII 44980 (Ont CA) at para 15, aff’d by *Deloitte & Touche LLP v Ontario (Securities Commission)*, 2003 SCC 61 (**Deloitte SCC**) at para 13; *Coughlan, Re*, [2000] OJ No 5109, 102 ACWS (3d) 241 (Div Ct) (**Coughlan**) at para 38; *Katanga* at para 12

⁷ *Deloitte SCC* at para 29

⁸ *Black (Re)* (2008), 31 OSCB 10397 (**Black**) at para 220

⁹ *X and A Co (Re)*, 2007 ONSC 1 (**X and A Co**) at para 32; *Coughlan* at paras 5, 40-41

¹⁰ *Black* at para 78

- [21] This principle reflects the scheme of the *Act*. It is not a purpose of the *Act*'s investigation and enforcement provisions to assist private litigants in recovering losses arising from alleged breaches of securities law. The Tribunal lacks jurisdiction to order restitution to private investors, and even disgorgement orders are protective and preventative, not compensatory.¹¹ The Tribunal in *X and Co (Re)* stated, "Whatever public interest concerns may be relevant under s. 17, we are satisfied that they do not include disclosure to facilitate investors in pursuing civil causes of action against those investigated under s.11."¹²
- [22] The general purposes of the *Act* are expressly stated in s. 1.1 as follows:
- (i) protect investors from unfair, improper, or fraudulent practices;
 - (ii) foster fair, efficient, and competitive capital markets and confidence in those markets;
 - (iii) foster capital formation; and
 - (iv) contribute to financial-system stability and the reduction of systemic risk.
- [23] The Tribunal's decision in *X and A Co (Re)*, illustrates the application of the principle.
- [24] In that case, a court-appointed receiver sought authorization to use compelled interview transcripts in a civil action and in a class proceeding. The receiver argued that its appointment at the Commission's request gave it a special public-interest status and that its civil action was a natural extension of the Commission's enforcement efforts. It submitted several grounds for disclosure, including relevance to the civil claims, alleged inconsistency between the defendant's court pleadings and its settlement with the Commission, and the absence of prejudice to the examined witness.¹³
- [25] The Tribunal rejected the receiver's application, holding that the receiver was not acting as an agent or instrumentality of the Commission in pursuing civil litigation, and that the providers of the compelled evidence reasonably expected

¹¹ *Cartaway Resources Corp. (Re)*, 2004 SCC 26 at para 58; *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 41

¹² *X and A Co* at para 33

¹³ *X and A Co* at para 12

confidentiality. Disclosure for collateral civil proceedings was not justified in the public interest.¹⁴

- [26] However, there is no blanket rule against disclosure for use in private litigation. In *Biscotti v Ontario Securities Commission*,¹⁵ the Court of Appeal confirmed that the Commission cannot maintain a blanket policy against disclosure and must assess each request on its own merits by reference to the purposes of the *Act*. The Tribunal must consider the specific circumstances of each case.¹⁶

5.3 Application of Principles to This Case

- [27] The applicant seeks disclosure in this case to fulfil Glencore's duty of production in civil proceedings. Glencore's lawyers have determined that the Confidential Documents are relevant and subject to Glencore's disclosure obligations in those civil proceedings.
- [28] These facts are not unusual. Materials obtained by a Commission investigator would always be relevant to private civil litigation arising from the same or related subject matter. Such material, without s. 16, would be subject to civil procedure rules governing production and discovery whether in domestic or foreign litigation.
- [29] The special circumstance in this case, the crux of the case according to counsel for the applicant, is that Glencore is subject to a case management order issued by the United Kingdom Court requiring Glencore to produce the Confidential Documents to the claimants in the UK litigation.
- [30] We see several reasons why a case management order of a foreign court, without more, cannot determine the outcome under s. 17.
- [31] First, Ontario's confidentiality regime is statutory. Section 16 creates a broad prohibition on disclosure, and the Tribunal may depart from it only where s. 17 expressly authorizes it. The Tribunal's jurisdiction is therefore limited to determining whether disclosure would advance the purposes of the *Act*. A foreign

¹⁴ *X and A Co* at paras 27-42

¹⁵ 1991 CanLII 7216 (Ont CA) (*Biscotti*)

¹⁶ *Biscotti* at p 9

court order, grounded in foreign procedural rules and directed to the conduct of foreign civil litigation, does not fulfil those purposes.

- [32] Second, principles of comity cannot displace the statutory framework. Ontario's courts and tribunals respect foreign judicial processes, but comity does not permit this Tribunal to disregard the Legislature's express confidentiality requirements. A foreign order cannot expand the statutory exceptions in s. 16, nor can it shift the focus of the s. 17 inquiry from Ontario's regulatory purposes to the procedural needs of foreign private litigants.
- [33] Third, if the existence of a foreign production order were sufficient to justify disclosure under s. 17, the provision would be transformed from a narrow exception designed to preserve the integrity of Ontario's investigative processes into a mechanism for accommodating foreign civil-procedure rules. That outcome is inconsistent with both the language of the *Act* and the jurisprudence holding that disclosure for private civil litigation is generally not in the public interest.
- [34] We do not accept the applicant's submission that in *Hamlin (Re)*¹⁷ the Tribunal "recognized the importance of allowing parties to comply with foreign court obligations". The facts in *Hamlin* were unusual and complicated.
- [35] The Commission issued its s. 11 investigation order at the request of the US Commodity Futures Trading Commission Division of Enforcement (**CFTC**). The s. 11 order authorized both CFTC staff and Commission staff to investigate the possible violations of the *US Commodity Exchange Act* and regulations. The compelled examination of *Hamlin* under s. 13 of the *Act* was conducted by both Commission staff and CFTC staff. The CFTC commenced an action in the United States District Court for the Southern District of New York (**SDNY**). *Hamlin* was not a party to the proceeding but a party sought to examine him. The SDNY Court issued a Letter of Request to the Ontario court to compel *Hamlin*'s attendance at an examination, which was recognized and enforced by the Ontario Superior Court of Justice. When *Hamlin* attended the examination in the US proceeding, he refused to answer questions about his compelled examination because he was subject to s. 16 of the *Act*. *Hamlin* applied under s. 17 for

¹⁷ 2023 ONCMT 5 (*Hamlin*)

authority to disclose his compelled examination before he attended for a scheduled re-examination in the US proceeding.¹⁸ The Tribunal granted his application.¹⁹

- [36] On our reading, the Tribunal in *Hamlin* applied the purpose driven public interest analysis under s. 17. The Tribunal permitted disclosure not because the foreign court required it, but because the requested use aligned with the Ontario investigation that produced the compelled evidence and disclosure posed no risk to the Commission's investigation integrity or to any person's privacy interests.²⁰
- [37] It is noteworthy that even though the Ontario court had recognized and enforced a foreign letter of request, the Tribunal held that it had to independently apply the statutory public interest test and did so.²¹ While Hamlin's proposed disclosure advanced the foreign proceeding, that proceeding was a product of the cooperative cross-border regulatory investigation in which he gave his compelled testimony. As he was seeking the order himself, there was no threat to his privacy interests. The Commission confirmed the privacy of other persons was not a consideration and there was no concern about impairment of the integrity of an ongoing commission investigation.²²
- [38] On our reading, *Hamlin* indicates a foreign disclosure order is a contextual fact but not a substitute for the statutory analysis that s. 17 requires. We see a distinction between foreign assistance tied to the Commission's s. 11 investigation and foreign private litigation unconnected to the *Act's* purposes.
- [39] The foreign proceeding in this case lacks any special features. On the information we have, the foreign proceeding in this case is private civil litigation in which the Confidential Documents are relevant. As we noted above, the products of a Commission investigation are always relevant in private civil litigation involving related subject matter. This is not a case, like *Hamlin*, where disclosure in the foreign proceedings aligns with the public interest under s. 11 of the *Act*.

¹⁸ *Hamlin* at paras 7-13

¹⁹ *Hamlin* at para 33

²⁰ *Hamlin* at para 24

²¹ *Hamlin* at paras 28-29

²² *Hamlin* at paras 23-24

[40] Accordingly, the existence of a UK court order directing production in foreign civil proceedings does not, without more, satisfy the applicant's onus to demonstrate that disclosure is in Ontario's public interest under s. 17. The applicant's proposal to create a "ring of confidentiality" within the UK litigation falls outside this Tribunal's authority and, in any event, does not alter the statutory analysis.

5.4 Other Considerations

[41] As the applicant points out the investigation in this matter was completed almost seven years ago. The investigation culminated in a settlement that the Tribunal approved on December 18, 2018.²³ The settlement agreement is available to the public on the Commission's website. That substantial information is publicly available through the approved settlement does not diminish the statutory confidentiality attaching to the Confidential Documents.

[42] The Tribunal and supervising courts have recognized that confidentiality under s. 16 does not lapse when an investigation concludes. The Ontario Court of Appeal said in *Biscotti*:

Section 14 [now s. 16] of the *Act* requires that it be and remain confidential and that the prohibition against disclosure continues unless the Commission consents to its disclosure. Further, the need for confidentiality does not diminish once the investigation is complete. There is no reason why the legislation should be construed that way. If that had been the legislature's intention, the section would have expressly so provided.²⁴

[43] The Divisional Court in *Coughlan* said that while some of the legislative provisions had changed, this was still binding authority. The Divisional Court said:

The fact that there is no ongoing investigation that might be compromised by disclosure is a relevant factor to be taken into account in determining

²³ *Katanga Mining Limited (Re)*, 2018 ONSC 59

²⁴ *Biscotti* at p 8

the public interest in disclosure. However, it is by no means the only factor supporting a public interest in maintaining confidentiality.²⁵

- [44] Persons who are compelled to provide testimony or documents do so on the understanding that the use of that information will be tightly confined. Maintaining confidentiality after an investigation ends preserves that expectation and protects the privacy of individuals who have been compelled to provide sensitive personal, financial or proprietary information.
- [45] Two of the individuals whose testimony is included in Confidential Documents advised that the request to disclose the transcripts was contrary to their expectations that the information provided in the interviews would be kept confidential. Another simply advised that they objected to the release of their testimony.
- [46] These responses highlight that maintaining confidentiality after an investigation preserves the expectations of persons subjected to compelled interviews and is necessary to maintain trust in the Commission's processes. This has long been recognized. In 1983, the then Commission chairman said in *Norcen Energy Resources*, "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."²⁶
- [47] It is in the public interest to safeguard the integrity and perceived fairness of the Commission's investigative processes. It is not in the public interest that compelled information be transformed into a litigation resource serving the procedural needs of external proceedings.

6. CONCLUSION

- [48] Our reasoning makes a review of the comprehensive material filed by the parties unnecessary. We conclude the applicant has not established that it is in the public interest tied to the purposes of the *Act* to authorize disclosure of the Confidential Documents in this case. Consequently, this application is dismissed. Any unauthorized disclosure would constitute a breach of Ontario securities law.

²⁵ *Coughlan* at para 57

²⁶ Quoted in *Coughlan* at para 57

Dated at Toronto this 20th day of November, 2025.

"Jane Waechter"

Jane Waechter

"Russell Juriansz"

Russell Juriansz

"Dale Ponder"

Dale Ponder