IN THE MATTER OF THE SECURITIES ACT
R.S.O. 1990, C. S. 5, AS AMENDED

AND

IN THE MATTER OF
HOLLINGER INC., CONRAD M. BLACK,
F. DAVID RADLER, JOHN A. BOULTBEE,
AND PETER Y. ATKINSON

Hearing:	October 11, 2005 and November 16, 2005		
Panel:	Susan Wolburgh Jenah	-	Vice-Chair (Chair of the Panel)
	M. Theresa McLeod	-	Commissioner
	Robert W. Davis, FCA	-	Commissioner
Counsel:	Johanna Superina	-	For Staff of the Ontario Securities Commission
	Edward L. Greenspan, Q.C. Todd B. White	-	For Conrad M. Black
	Michael Code David J. Martin	-	For F. David Radler
	Don Jack	-	For John A. Boultbee
	C. Clifford Lax, Q.C.	-	For Peter Y. Atkinson
	Edward J. Babin Matthew P. Gottlieb	-	For Hollinger Inc.

REASONS AND ORDER

BACKGROUND

[1] On March 18, 2005, the Ontario Securities Commission (the Commission) issued a Notice of Hearing pursuant to sections 127 and 127.1 of the *Securities Act,* R.S.O. 1990 c. S.5, as amended (the Act) accompanied by a Statement of Allegations issued by Staff of the Commission (Staff) with respect to Hollinger Inc. (Hollinger), Conrad M. Black (Black), F. David Radler (Radler), John A. Boultbee (Boultbee) and Peter Y. Atkinson (Atkinson) (collectively, the Respondents).

[2] The Statement of Allegations sets out a variety of allegations regarding the conduct of the Respondents which include: diversion of funds from Hollinger International Inc. to Hollinger in connection with sales by the former of certain U.S. community newspapers; 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, Radler, Boultbee and Atkinson to Hollinger and Hollinger International Inc.

[3] Staff alleges that the conduct of the Respondents as outlined in the Statement of Allegations violates securities laws and constitutes conduct contrary to the public interest.

[4] On October 11, 2005, we convened to set a date for a hearing on the merits of this matter to proceed. Staff's proposal was for the hearing to take place over the period of April, May and June, 2006. It was generally acknowledged that further dates might be required to complete the hearing on the merits. Several of the Respondents took issue with the dates proposed by Staff for various reasons and the Panel requested that the parties provide us with their written submissions. We adjourned the scheduling hearing to be continued on November 16, 2005.

[5] Prior to November 16, 2005, we were advised that Hollinger had retained new counsel to represent it in this matter. Hollinger's new counsel indicated that they had a conflict with the April 2006 dates proposed by Staff but otherwise had no difficulty with the dates proposed and were taking no position on the arguments advanced by certain of the Respondents as outlined below.

[6] Counsel for the Respondent Atkinson indicated to the Panel on October 11 that he would not be present on November 16, would not be making any submissions in that regard and would be governed by the Panel's decision with regard to an appropriate hearing date.

[7] Written submissions filed by the remaining Respondents Black, Boultbee and Radler advance arguments for setting a hearing date on the merits to commence June 2007. The main reasons for opposing the dates proposed by Staff relate to the outstanding and parallel criminal proceedings against these Respondents in the United States (the U.S.) and the right of Black to be represented by his counsel of choice in the Commission's administrative proceeding.

[8] Black originally resisted the dates proposed by Staff on the basis that his counsel of choice is unavailable due to his involvement in a criminal trial scheduled for most of calendar year 2006. Accordingly, he submits, setting a hearing date for spring 2006 would be tantamount to a removal by the Commission of his counsel of choice from the record.

[9] Counsel for Radler and Boultbee support Black's submissions regarding his right to counsel of choice. However, Boultbee's arguments focused primarily on the impact of proceeding on the dates proposed by Staff on his right under the *Canadian Charter of Rights and Freedoms,* (the Charter) to be protected against self-incrimination given that testimony he could be compelled to give during the course of the Commission's administrative proceeding may be obtained and used against him in any criminal proceeding that may be launched in the U.S.

[10] Radler advanced five reasons in support of the June 2007 hearing date. Most of these reasons pertained to the merits of proceeding with related Canadian regulatory proceedings in the face of outstanding or expected U.S. criminal proceedings. At the time these submissions were made, only Radler had been indicted by criminal law authorities in the U.S. and he had entered a plea of guilty to the charges laid against him in the U.S.

[11] Staff rejected Black's arguments on the right to counsel of choice in these circumstances where, due to lengthy and conflicting trial obligations to other clients, the result would be to unduly delay the course of this proceeding. Staff further opposed the position advanced by Radler and Boultbee on the basis that the spectre of proceedings in another jurisdiction should not interfere with the scheduling of a hearing before this Commission and further, as regards Black and Boultbee, there were no outstanding indictments against either of them and no indication as to if or when indictments might be laid.

[12] On November 17, 2005, one day after the scheduling hearing, criminal indictments were laid against Black, Boultbee and Atkinson in the U.S. As a result of this development, the Panel invited all of the parties to make supplementary written submissions as they might consider appropriate in light of these developments. Staff, Black and Boultbee filed supplementary submissions.

[13] At the conclusion of the scheduling hearing on November 16, we reserved our decision. Having considered the original and supplementary written submissions as well as oral arguments advanced by the parties, we have determined that this matter should be set down for a hearing on

the merits commencing June 2007, subject to the individual Respondents agreeing to execute an undertaking to the Commission to abide by interim terms of a protective nature as discussed more fully below. Our reasons follow.

THE ISSUES

[14] The issues that are dealt with in these Reasons are as follows:

(a) The merits of a fractured hearing;

(b) The right to counsel of choice;

(c) What impact should the existence of related criminal proceedings against the individual Respondents in a foreign jurisdiction have on this administrative proceeding; and

(d) What interim terms are appropriate in these circumstances?

Analysis of the Issues

(a) The merits of a fractured hearing.

[15] The Panel raised the possibility of a fractured hearing, or splitting up the proceeding into two blocks, as a means of accommodating scheduling conflicts. Staff and counsel for certain of the Respondents, notably Hollinger and Boultbee, expressed significant concern as to the merit of such an approach on the basis that it would be undesirable and unfair to both the Panel and the parties and would increase costs due to duplicative preparation time.

[16] Staff referred us to the decision of Justice Chapnik in *R. v. Sahota*, which highlights concerns regarding prejudice to the parties and trier of fact resulting from a fractured trial schedule:

> What particularly concerns me is the scheduling of preliminary inquiries and trials in a fashion that allows evidence to be heard intermittently over extensive periods of time. This lends to serious repercussions including the potential of weak memories, forgotten

testimony, faulty reasons and in the end, more and more miscarriages of justice.

R. v. Sahota [2003] O.J. No. 2830 (Ont. S.C.J.) (QL) at para. 25

[17] We note, however, that *Sahota* involved a situation where evidence for a three-day trial had spanned a period of four months. Including sentencing, the three-day trial took seven months to complete. While the specific context within which Justice Chapnik's concerns were expressed should be borne in mind, we are nonetheless persuaded that it would be preferable, from the perspective of fairness and efficiency, to set aside a sufficient period of time for all of the evidence and submissions of the parties to be heard in a single block of time, to the extent possible**.**

(b) The right to counsel of choice

[18] Black's submissions focused on his right to counsel of choice. He resisted the dates proposed by Staff for the hearing on the merits to proceed due to the unavailability of his counsel during 2006. While conceding that section 10(b) of the Charter does not apply to administrative proceedings, counsel for Black argued that section 7 of the Charter is applicable. He cited a number of cases in support of his submissions regarding his client's right to counsel of choice. Staff argued strenuously against Black's position and cited a number of cases in support of Staff's position.

[19] In view of our analysis of the remaining issues set out below, it is unnecessary for us to deal with this matter in detail. In particular, we need not make a determination as to the application of the Charter and we decline to do so.

[20] Although the Commission is "master of its own house," as recognized by the Supreme Court of Canada, it must comply with rules of fairness and principles of natural justice in the conduct of its proceedings.

Prassad v. Canada (Minister of Employment and Immigration), [1989] 1 S.C.R. 560 (S.C.C.) at para. 16.

[21] Both the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 and the Commission's *Rules of Practice* provide that a party appearing before the Commission has the right to be represented by counsel. However, that right is not absolute.

[22] The cases cited by Staff make it clear that, in an administrative context, limitations have been placed on the right of a party to be represented by counsel of choice, particularly in circumstances where the unavailability of counsel would unduly and unreasonably delay the

course of the proceedings. Parties do not have the right to insist on adjournments or dates of their choice if their counsel are not available.

> *Aseervatham v. Canada (Minister of Citizenship and Immigration)* [2000] F.C.J. No. 804 at para. 16 (F.C.T.D.); leave to appeal to the Supreme Court of Canada dismissed in *Aseervatham v. Canada (Minister of Citizenship and Immigration),* [2000] S.C.C.A. No. 578 (QL)

[23] In *Pierre v. Minister of Manpower and Immigration*, the limitation on the right to counsel of choice was underscored. In that case, where counsel could not be present for a hearing, an adjournment to accommodate counsel's schedule was refused, resulting in counsel's withdrawal from the case. On appeal, the Federal Court deferred to the tribunal's discretion in determining whether an adjournment was reasonable and discussed the right to counsel in the context of administrative proceedings as follows:

> Where the person has a right to choose counsel to represent him, a choice must be from amongst those who are ready and able to appear on his behalf within the reasonable time requirements of the officer or tribunal. Thus, a person cannot select the busiest counsel in the area and insist on being represented by him when that counsel, on account of prior commitments, would not be able to appear . . . without unduly delaying the course of the proceedings.
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> *Pierre v. Minister of Manpower and Immigration,* [1978] 2 F.C. 849 at para. 89 (F.C.A.); leave to appeal to the Supreme Court of Canada dismissed in (1978) 24 N.R. 358n.

[24] Accordingly, while the Commission will strive to accommodate respondents' requests to be represented by counsel of choice in accordance with rules of fairness and principles of natural justice, such requests must be reasonable in the circumstances.

(c) Impact of the U.S. criminal proceedings against the individual Respondents.

[25] Not surprisingly, the submissions of the parties focused heavily on this issue, with the exception of Hollinger and Atkinson who took no position on the matter. The views and submissions of the parties are summarized below.

Mr. Radler's Submissions

[26] Counsel for Radler advanced five reasons in support of a June 2007 hearing as proposed by counsel for Black, three of which are relevant to the subject at issue and are as follows:

(i) There was a pending judgment of the Ontario Court of Appeal in a closely related proceeding which was then on reserve but subsequently released. One of the issues in that appeal was whether related Canadian civil and regulatory proceedings, which will generate a record of evidence from three of the Respondents, ought to proceed in the face of U.S. criminal proceedings. The appeal involved complex Charter issues with respect to the protection against self-incrimination afforded by section 7 of the Charter. Counsel for Radler cautioned us against setting an early hearing date without considering the guidance provided by the Court of Appeal's decision given that similar issues are likely to arise if this hearing proceeds in advance of the related U.S. criminal proceeding;

(ii) The U.S. Attorney with carriage of the related criminal proceeding in Chicago had moved to stay two related U.S. civil and regulatory proceedings with the consent of the U.S. Securities and Exchange Commission (the SEC). Counsel for Radler noted that the Commission's Notice of Hearing substantially duplicates the SEC action and that no principled reason was advanced to justify Staff taking a position different from that of the SEC; and

(iii) Practical common sense and judicial economy favour allowing the U.S. criminal proceeding to take place in advance of the related Commission and SEC proceedings. As counsel for Radler put it: ". . . there is no practical justification for embarking on a lengthy contested hearing in advance of a U.S. criminal proceeding that will likely resolve many of the outstanding factual issues."

Mr. Boultbee's Submissions

[27] Counsel for Boultbee was principally concerned that the schedule proposed by Staff would place Boultbee in the unfair position of having to choose between preserving his right against self-incrimination in the U.S. and defending himself against the allegations in the Commission proceeding. This difficult position results from the differences in how the same right against self-incrimination is protected in Canada versus in the U.S. Briefly, it is argued, any evidence Boultbee is compelled to give in the Commission's administrative proceeding could be used against him in a subsequent U.S. criminal proceeding.

[28] Counsel for Boultbee, like counsel for Radler, also referred to the Court of Appeal's decision in *Catalyst Fund General Partner Inc. v. Hollinger Inc.* [2005], O.J. No. 4666 (Ont.

C.A.) (*Catalyst*) in which the Court dismissed the appeal. However, counsel invited us to consider that:

(i) the Court of Appeal recognized the seriousness of the constitutional issue raised by Boultbee and others, and left open the question of Charter protection, in the form of a stay, against the risk of self-incrimination in the U.S. once criminal proceedings are commenced;

(ii) Justice Campbell's approach, endorsed by the Court of Appeal, of dealing with Charter protection against the risk of self-incrimination in foreign proceedings on a question-by-question basis is likely to be protracted; and

(iii) in the event that Staff should call Boultbee as a witness, or indeed Boultbee voluntarily chooses to testify, he would be forced to renew objections on a question-by-question basis in order to ensure that his right against self-incrimination in the U.S. remains protected. This process would result in numerous unavoidable interruptions which should be avoided to the extent possible.

[29] In view of the significant overlap between the U.S. criminal indictments and the allegations set out in Staff's Statement of Allegations, the hearing before the Commission should not proceed until 2007.

[30] Given the speedy trial entitlement available in the U.S., counsel for Boultbee indicated his expectation that the U.S. criminal proceedings will have concluded by June 2007, thereby obviating self-incrimination concerns.

Mr. Black's Submissions

[31] Counsel for Black focused principally on the difficulties posed by the conflicting demands of his trial schedule and how they affected his client's right to have the counsel of his choice represent him at this hearing.

[32] Counsel for Black initially took the position in oral argument before us that, despite his unavailability for most of calendar 2006, he would be available for most of mid-July to the end of August, every Friday during 2006 and would be prepared to do "night court" as he put it. In other words, he was prepared to do his best to accommodate the Commission in terms of a reasonable start date for this hearing.

[33] As regards the impact of pending U.S. criminal proceedings against the Respondents, counsel for Black indicated that his views were "slightly different" from those we had heard from counsel for Radler and Boultbee. He did not argue before us that the Commission proceeding ought not to commence prior to the related U.S. criminal proceedings. However, if it did, he indicated that Black would not testify at the Commission proceeding.

[34] Following the indictments laid against Black, Boultbee and Atkinson in the U.S. on November 17, 2005, counsel for Black adopted the supplementary written submissions of Boultbee that the hearing should take place across a single span of time, that it should commence in June 2007 and that, in the event the evidentiary phase of the U.S. criminal trial is not yet complete at that time, he will seek to make further submissions before the Panel. This position differed from the oral submissions made on November 16, 2005 as summarized above.

Staff's Submissions

[35] Staff urged the Commission to exercise caution in making any determination or finding of prejudice in the absence of any direct evidence by Boultbee or the other Respondents in support of such a finding.

[36] Staff referred to *R. v. Eurocopter Canada Ltd.* (2004), 185 C.C.C. (3d) (Ont. S.C.J.) (QL) 233 at 254, where Justice Morin pointed out that the applicant would be prejudiced only if a number of contingencies occur: he testifies, his testimony is incriminatory, evidence of such testimony is obtained, the evidence is declared admissible in the foreign court and the evidence contributes to his conviction.

[37] In this case, Staff submits, none of the Respondents have been summonsed to testify, there is no evidence that the testimony, if sought, would be incriminatory, that it would be admitted in the U.S. court or that the evidence would contribute to a conviction. There is therefore no direct evidence or factual basis to support the Respondents' position that their right to be protected against self-incrimination is in jeopardy. The alleged prejudice is merely anticipated and, as yet, uncertain.

[38] Staff points out that it is uncertain whether the U.S. criminal proceeding will have concluded by June 2007 and there is no assurance that Black, Boultbee and Radler will be willing to proceed in 2007 in the event it has not concluded. To the contrary, these Respondents have indicated that they will likely resist a hearing should the U.S. criminal process not be completed.

[39] Finally, Staff submits that in balancing the interests of the Respondents and greater societal interests, the Commission may reasonably conclude that there are no extraordinary

circumstances in this case that warrant a significant delay of the Commission's proceeding. Indeed, the public interest would be better served by completing the hearing on the merits on a timely basis given the distinct mandate of the U.S. Attorney for the Northern District of Illinois (the U.S. Attorney) as compared to that of the Commission and despite the apparent overlap in the allegations in the two proceedings.

Our Analysis

[40] The parties indicated that they were not aware of any precedent involving parallel U.S. criminal and Canadian administrative proceedings against the same respondents, with similar and overlapping allegations arising out of substantially the same transactions.

[41] Although the Respondents submit that the Commission hearing ought to await the outcome of the U.S. criminal proceeding, or at least the evidentiary phase thereof, they strenuously maintain that they are not seeking a stay of the Commission proceeding. Indeed, as is clear from the reasons of the Commission in *Re Robinson et al.* (1993), 16 O.S.C.B. 5667 (*Robinson*), the Respondents face a major hurdle when seeking a stay or a significant adjournment of Commission proceedings.

[42] In *Robinson*, the Commission declined to order a stay of proceedings in circumstances where the Robinsons faced related charges under the *Criminal Code*, R.S. 1985, c. C-46 (*Criminal Code*), stating as follows:

> . . . the interests of society include the interest in protecting the investing public and the capital market against market participants who have allegedly engaged in conduct that is abusive of the capital markets and contrary to the public interest. This protection should be given now and not at some indeterminate date in the future if these allegations are proved to be true.
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> *Re Robinson et al.* (1993), 16 O.S.C.B. 5667

[43] Counsel for Radler asks us to consider that the SEC has consented to a stay of U.S. civil and regulatory proceedings at the request of the U.S. Attorney with carriage of the related criminal proceeding in Chicago. He argues that no principled reason has been advanced by Staff that would justify the Commission taking a different position from the SEC.

[44] Our position is different from that of the SEC. In particular, there are no related Canadian criminal proceedings pending in connection with this matter and the U.S. Attorney General has not sought a stay of this proceeding. More importantly, we must consider the appropriate course of action having regard to our own statutory mandate.

[45] Counsel for Radler referred us to other cases involving complex multi-party and parallel related proceedings in support of his position that the hearing date proposed by the Respondents in this case is not unusual. One of the cases cited was *Re Livent Inc*. (2002), 25 O.S.C.B. 7805 (*Livent*), a Canadian case involving parallel criminal and Commission proceedings against various respondents. In *Livent*, the Commission proceeding was adjourned *sine die* by Order dated November 15, 2002, pending the conclusion of the trial relating to the *Criminal Code* charges. The criminal trial in that case remains pending. The resulting delay to the Commission proceeding was not likely foreseeable at the time.

[46] We have carefully considered the recent decision of the Ontario Court of Appeal in *Catalyst*. In that case, the Court of Appeal dismissed the Respondents' (Black, Boultbee and Radler) appeal from an order compelling them to testify under oath as part of an inspection process under the *Canada Business Corporations Act*, R.S. 1985, c. C-44. The Respondents had argued on appeal that testifying under oath would violate their protection against self-incrimination rights afforded by the U.S. Constitution and the Charter. In dismissing the appeal, the Court of Appeal stated as follows:

> 4. In both Canada and the United States, the right to protection from self-incrimination is an important right that is safeguarded. The difference between how that right is protected in Canada and in the United States lies at the heart of this appeal. 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.
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> . . .
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> 7. The next issue is whether the appellants are entitled to a constitutional exemption from answering any questions. They are not. They are only entitled to a constitutional exemption if their evidence would be used against them in a criminal prosecution here. A constitutional exemption is not appropriate in the circumstances of this case as the purpose of the inquiry being conducted under the *Canada Business Corporations Act* is fact-finding only and not prosecutorial.
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> . . .

> 9. . . . The appellants seek protection in a factual vacuum and boldly assert that no measures imposed by any judge or taken by the Minister of Justice could protect them once they have been compelled to answer questions in Canada.
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> 10. Campbell J. set up a procedure specifically to deal with the anticipated conflict in how Canada and the United States approach protection from self-incrimination, however. That procedure is designed to enable the parties to make submissions as a result of which the Court will craft a protective mechanism tailored to the situation. The parties have yet to engage this process. As a result, no one knows yet what protective mechanism will be crafted. We cannot decide that *Charter* rights will be infringed in a vacuum or engage in speculation. The particular Order that is before us under appeal does not as yet lead us to conclude that the appellants' *Charter* rights will be violated.
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> *Catalyst Fund General Partner Inc. v. Hollinger Inc.*, [2005] O.J. No. 4666 (Ont. C.A.) (Q.L.)

[47] The Court of Appeal noted in *Catalyst* that protection under the Charter is witness-specific and fact-specific and that the balancing of potential prejudice to a particular individual against the necessity of obtaining their evidence must be undertaken in context. As the Court of Appeal stated at paragraph 12, ". . . by his plea of guilty in the United States, Mr. Radler may be in a different position in some respects than the other two appellants and may not need protection from the use that can be made of his answers at least in respect of the matters to which he has already pled guilty." The Court was careful to avoid any determination that Charter rights would be infringed in a vacuum or engage in speculation. The Court of Appeal's reasons do not lead to the conclusion that we ought not to proceed with this hearing.

[48] There are a number of cases in which the Courts have considered applications to stay Canadian civil proceedings in the face of pending U.S. criminal proceedings. In all but one of the cases noted below (i.e., *Gillis v. Eagleson*) the Courts refused the stay application on the basis that the extraordinary and exceptional circumstances necessary to justify a stay had not been established:

> *Royal Trust Corporation of Canada v. Fisherman* (2000), 49 O.R. (3d) 187 (Ont. S.C.J.) (Q.L.)
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> *Gillis v. Eagleson* (1995), 23 O.R. (3d) 164 (Gen. Div.)
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> *National Financial Services Corporation v. Wolverton Securities Ltd.* (1998), 46 B.C.L.R. (3d) 275 (B.C. S.C.)

> *United States (Securities & Exchange Commission) v. Shull*, 1999 CarswellBC 1772 (B.C. S.C.)

[49] Justice Cumming's comments in *Fisherman* are instructive:

> 38. Mr. Bogatin suggests, in effect, that the Canadian court should adopt a higher standard for the admission of evidence in an American criminal trial than the American court itself adopts. He submits, in effect, that this Court should ensure that the possible gap in the United States law of the Fifth Amendment (through its presumed non-application to evidence gained through extraterritorial civil proceedings) is rectified by giving a stay in the Canadian civil proceedings.
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> 39. In my view, this Court should not give a stay for the purpose of denying the American authorities access to incriminating evidence where the American court would admit such evidence because its admission would not shock the judicial conscience or violate baseline due process requirements. This is a matter of standards for the American court to determine when applying American law. The principles at stake arise from American constitutional requirements and not Canadian constitutional requirements: see *National Financial Services Corp.* at page 289. **The principle of comity and respect for the sovereignty of another nation applies, particularly when that other country is a recognized democracy governed by the rule of law**. (Emphasis added.)
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> . . .
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> 41. To accept Mr. Bogatin's position would also, in effect, have the paradoxical result that the laws of the United States would shape the conduct of Ontario civil proceedings.
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> *Royal Trust Corporation of Canada v. Fisherman* (2000), 49 O.R. (3d) 187 (Ont. S.C.J.) (Q.L.)

[50] In Canada and in the U.S., the right to protection against self-incrimination is an important right which is safeguarded but in different ways. In Canada, a person generally has the right not to have incriminating evidence that he or she was compelled to give in one proceeding used against him or her in another proceeding. By contrast, in the U.S., a witness can refuse to answer an incriminating question but, once the answer is given, the protection is waived and the answer can be used against him or her. It is this difference which lies at the heart of the concerns raised about proceeding with this Commission hearing in advance of the evidentiary phase of the U.S. criminal proceeding.

[51] Staff submits that the public interest would be better served by completing this hearing on a timely basis. This is a laudatory objective. The Commission has previously stated that in fulfilling its public interest mandate to regulate capital markets effectively, it must be clear to market participants that the Commission can and will deal with enforcement matters in an expeditious fashion. Indeed, this principle was perhaps best expressed by the Commission in *Robinson*, a case involving parallel *Criminal Code* proceedings where the Respondents sought to stay the Commission proceeding but declined to be subject to interim terms:

> It is in the public interest for this Commission to hear this matter as soon as possible to determine whether we ought to make an order removing the respondents from participation in the public markets and thereby protect those public markets.
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> . . .
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> Furthermore, in order to be able to regulate the capital markets effectively, it must be clear to market participants that the Commission can and will deal with matters such as these in a reasonably expeditious way. We are troubled by the trend that is developing in hearings before the Commission towards a proliferation of pre-hearing proceedings resulting in lengthy delays . . .
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> *Re Robinson et al*, at paras. 13 and 14

[52] In determining the appropriateness of adjournments in individual cases, whether they involve parallel Canadian or foreign criminal proceedings, the Commission must balance a variety of considerations: legal, equitable, circumstantial and practical. These considerations will include, among others, the extent of the delay to the Commission proceedings that would be occasioned and the resulting impact on the Commission's ability to discharge its mandate effectively and efficiently as against practical and fairness considerations including the extent to which interim terms and conditions may adequately protect the public interest in the event of an adjournment.

[53] 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. In these circumstances, we find compelling the submission that common sense and judicial economy argue in favour of allowing the U.S. criminal proceedings to take place in advance of this hearing provided, however, that the latter proceeds in a reasonably expeditious fashion as currently contemplated. In balancing the Commission's public interest mandate, considerations of practical and judicial economy in view of the pending U.S. criminal proceedings and the significant overlap in the allegations against

the individual Respondents in the two proceedings, we have concluded that a June 2007 hearing date is not unreasonable subject to the comments below.

[54] We emphasize that the public interest mandate of the Commission is distinct from the mandate of the U.S. Attorney. As Justice Iacobucci observed in the Supreme Court of Canada decision in *Asbestos*, quoting Laskin J.A., "the purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets."

> *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* (2001), 199 D.L.R. (4th) 577 (S.C.C.) at para. 42.

[55] By contrast, the mandate of the U.S. Attorney includes seeking punishment for those found guilty of unlawful behaviour through the prosecution of alleged criminal activity.

[56] Accordingly, the U.S. criminal proceedings in this matter ought not to be viewed as a proxy for the regulatory proceeding before the Commission.

[57] In view of the protective and preventive role of the Commission in safeguarding the capital markets, the Respondents' agreement to provide an undertaking to the Commission that they will abide by appropriate terms and conditions restricting their participation in the capital markets is critical to a lengthy adjournment of this proceeding. Our discussion of the importance of interim terms follows.

(d) What interim terms are appropriate in these circumstances?

[58] The Panel requested that the parties address interim terms as against the individual Respondents in the event the hearing is scheduled to commence June 2007. Staff have proposed that the individual Respondents execute an undertaking in accordance with the following terms:

(a) the individual Respondents agree to refrain from:

(i) acting or becoming an officer or director of a "reporting issuer" or "affiliated company" of a reporting issuer, as these terms are defined in the Act, and in particular, subsections 1(1) and 1(1.1) of the Act, respectively;

(ii) applying to become a "registrant" of, from being an employee, director or officer of a registrant or an affiliated company of a registrant, as that term is defined in the Act; and

(iii) engaging directly or indirectly in the solicitation of investment funds from the general public;

(b) Black will notify forthwith, in writing, the Secretary's Office, OSC counsel and counsel for the Respondents in the event that there is any change in Mr. Greenspan's schedule in relation to the trials referred to in Mr. White's affidavit sworn October 28, 2005; and

(c) the undertakings remain in effect until the Commission's final decision on liability and sanctions in this proceeding, or an Order of the Commission releasing the Respondents from the undertakings or aspects of the undertakings.

[59] Staff has not proposed, nor do we consider it necessary or appropriate, that the individual Respondents refrain from acting as officers or directors of private companies.

[60] The interim terms proposed by Staff in this case are substantially the same as those which were sought in the *Livent* matter as reflected in the Order of the Commission dated November 18, 2002. As the Commission does not have the authority to make a temporary order pursuant to subsection 127(5) of the Act prohibiting a person from becoming or acting as a director or officer of an issuer, the interim terms would take the form of an undertaking from the individual Respondents.

[61] The Respondents Black, Atkinson and Radler have indicated that the interim terms proposed by Staff are acceptable to them. Black has requested, and Staff has indicated that she would not oppose, a minor exemption for Conrad Black Capital Corporation (CBCC) for the sole purpose of permitting Black to continue as a director or officer of CBCC which is an affiliated company of the reporting issuers Argus Corp. Limited, Hollinger, and Hollinger International. Having regard to the receivership of Argus and other companies, the Panel does not object provided that there is no change in the receivership status of the companies.

[62] Boultbee is also prepared to agree to the interim terms proposed by Staff but seeks an exemption so as to permit him to continue acting as a director of Iamgold Corporation, a reporting issuer in all jurisdictions across Canada. Staff objects to this exemption sought by Boultbee.

[63] We are of the view that the interim terms proposed by Staff are appropriate on a principled basis. In the event that Staff and the Respondents, including Boultbee, are unable to settle the terms of the undertaking to the Commission within 30 days of this Decision, the Panel will reconvene to hear any submissions and to resolve the form of the Undertaking to be provided to the Commission by the Respondents in connection with this matter.

ORDER

[64] For these Reasons, this matter is set down for a hearing on the merits commencing June 2007, subject to the individual Respondents agreeing to execute an undertaking to the Commission to abide by interim terms within 30 days of this Decision.

[65] In the event that Staff and the Respondents, including Boultbee, are unable to settle the terms of the undertaking to the Commission, the Panel will reconvene to hear any submissions and to resolve the form of the Undertaking to be provided to the Commission by the Respondents in connection with this matter.

Dated at Toronto this 24th day of January, 2006

"Susan Wolburgh Jenah"	"M. Theresa McLeod"
Susan Wolburgh Jenah	M. Theresa McLeod

"Robert W. Davis"
Robert W. Davis