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

CONFIDENTIAL REASONS AND DECISION
[Editors Note: Made public on September 8, 2010.]

In Camera Hearing:	April 12, 2007	
Panel:	Lawrence E. Ritchie	- Vice-Chair (Chair of the Panel)
	James E. A. Turner	- Vice-Chair
	Wendell S. Wigle, Q.C.	- Commissioner
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

CONFIDENTIAL REASONS AND DECISION

I. Introduction

[1] On November 16, 2005, the Commission issued a Notice of Hearing 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. The Notice names the following as Respondents: 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"). Staff alleges that the Respondents violated sections 25, 38 and 53 of the Act. An Amended Notice of Hearing was issued by the Commission on February 6, 2007.

[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] According to Staff's Statement of Allegations, the substantive proceeding relates to activities alleged to have taken place from August 2001 through mid-2003.

II. Status of Pending Motions

[4] At this stage of the proceedings, there are a number of motions pending:

(a) a motion filed by Staff, as well as one by the Trustee of Mega-C (the "Trustee"), relating to the use of evidence obtained pursuant to an investigation order in Mega-C's U.S. bankruptcy proceedings (the "Disclosure Motions");

(b) a motion for particulars (the "Particulars Motion") filed by Jared Taylor, Colin Taylor and 1248136 Ontario Limited (collectively, "the Taylor Group"); and

(c) two motions, one brought by Lewis Taylor Sr. and Lewis Taylor Jr. ("Taylor Sr. and Jr."), and one brought by 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] None of these motions have been scheduled. With respect to the Disclosure Motions, we were advised by counsel for both Staff and the Trustee that these motions will not be pursued in advance of the resolution of the Constitutional Motions.

[6] By the Particulars Motion, the Taylor Group seeks particulars of alleged facts and positions asserted in the Statement of Allegations. The Particulars Motion has been adjourned *sine die.*

[7] As described below, the Constitutional Motions challenge both the constitutionality of section 11 of the Act, as well as the manner and basis upon which an investigation order issued pursuant to that section (the "Investigation Order") was obtained and used in the circumstances of this Proceeding. While they are 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*")) as described below.

[8] In response to these Constitutional Motions, Staff filed a "cross-motion" on March 29, 2007, to adjourn the hearing of Taylor Jr. and Sr. and the Taylor Group's 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 ("Staff's Motion"). Staff's Motion is described as a motion to adjourn the Constitutional Motions. However, we agree with counsel for Taylor Sr. and Jr. that Staff's Motion is more in the nature of a motion for directions with respect to the scheduling and hearing of the Constitutional Motions.

[9] It is Staff's Motion that is before us.

III. The Constitutional Motions and the Relief Sought

(a) Motion by Taylor Sr. and Jr.

[10] By Notice of Motion dated December 18, 2006, Taylor Sr. and Jr. brought their Constitutional Motion. A Notice of Constitutional Question was also filed, with proof that it was served on the Attorney General for Ontario.

[11] In their Constitutional Motion, Taylor Sr. and Jr. submit, among other things, that section 11 of the Act is void for vagueness. They seek declaratory relief under section 52 of the *Constitution Act, 1982* that section 11 of the Act is of no force and effect. Taylor Sr. and Jr. also seek a declaration that, in the circumstances of this case, the Investigation Order was issued in a manner that infringed their sections 7 and 8 *Charter* rights on the basis that it was granted:

(1) without sufficient foundation;

(2) without full and frank disclosure; and

(3) was sought and obtained for an oblique and improper purpose.

[12] As well, Taylor Sr. and Jr. take issue with, and seek relief as a result of, the manner in which the Investigation Order was utilized by Staff. They allege, among other things, that:

(a) the Investigation Order and the execution thereof, including the subsequent examinations of them and the other persons compelled to give evidence,

violated their sections 7 and 8 *Charter* rights and the rules of fundamental and/or natural justice;

(b) the efficacy of the Investigation Order was spent prior to the commencement of the examinations by Staff of Taylor Sr. and Jr. and all persons compelled to give evidence; and

(c) the disclosure and dissemination by Staff of certain materials violated their *Charter* and statutory rights.

[13] Taylor Sr. and Jr. also seek a stay of the section 127 proceedings. In the alternative, they seek: (1) an Order for the pre-hearing examination of a member of Staff or other persons by Taylor Sr. and Jr.; and (ii) an Order prohibiting Staff from using evidence obtained pursuant to the Investigation Order or derived therefrom, and an order that such evidence be destroyed.

(b) The Taylor Group's Motion

[14] The Taylor Group's Notice of Motion, dated December 18, 2006, challenges the constitutionality of section 11 of the Act on grounds similar to that relied upon by Taylor Sr. and Jr. The Taylor Group also alleges that there were violations of section 9 (right against arbitrary detention or imprisonment), section 11 (right to a fair trial) and section 13 (right against self-incrimination) of the *Charter*.

[15] In particular, in their Constitutional Motion, the Taylor Group challenges Staff's conduct, the propriety and validity of the Investigation Order, and their compelled examinations under section 13 of the Act, among others, on the following grounds:

(a) Section 11 of the Act violates the *Charter* on the basis or ground that the word 'expedient" is unconstitutionally vague and undefined;

(b) the Commission granted the Investigation Order, without notice to them:

(i) in circumstances that violated the *Charter* and the statutory rights of Jared Taylor and Colin Taylor under the *Charter*; and

(ii) without proper or sufficient information or grounds, and without sufficient foundation and without Staff making proper or sufficient disclosure;

(c) Staff failed to make full, fair and frank disclosure when Staff sought and obtained the Investigation Order;

(d) Staff sought and obtained the Investigation Order for a collateral and/or improper purpose; and

(e) the Investigation Order and its execution, including Staff's compelled evidence examinations of Jared Taylor and Colin Taylor under section

13 of the Act, violated their *Charter* and statutory rights to fundamental and natural justice.

[16] The Taylor Group requests relief similar to that requested by Taylor Sr. and Jr.

(c) Additional Relief Sought

[17] In their factum and oral submissions, Taylor Sr. and Jr. request that an order be made providing directions with respect to the following matters:

(i) The date upon which Staff would provide its response to the Constitutional Motion;

(ii) The procedure to be adopted for the development of the evidentiary record for their Constitutional Motion; and

(iii) a schedule for the hearing of the Constitutional Motions.

IV. The Issue

[18] The major issue before us is whether the Constitutional Motions brought by the Taylor Group and Taylor Sr. and Jr. ought to be heard at the Hearing, to be dealt with at the discretion of the Hearing Panel, rather than in advance of the Hearing.

V. The Submissions of the Parties

(a) Position of Staff

[19] Staff submits that the Constitutional Motions should not be heard as a pre-hearing matter. Instead it should be heard and determined in the context of the Hearing, by the Hearing Panel. Their argument is summarized as below.

[20] Staff submits that the courts in the criminal, civil and administrative law contexts (including securities regulation) have overwhelmingly held that motions such as the Constitutional Motions ought to be heard in the course of the substantive hearing/trial. The jurisprudence enunciates the following principles:

(i) A complete factual foundation is essential for a proper determination in such circumstances. This requirement is particularly acute in a regulatory setting where the expertise of a specialized tribunal is invaluable in ensuring a complete evidentiary record for any review by the Courts. Staff submits that in this case:

(a) the Commission must hear and weigh all the evidence of Staff, other witnesses and documentary evidence to make findings and fashion remedies in response to allegations of *Charter* breaches, abuse of process, improper or oblique purposes;

(b) The Taylor Group and Taylor Sr. and Jr. "seek to attack and invalidate a core provision of the Act and, in essence, to disable Staff's investigation and enforcement powers." The challenges are made both to the statutory provision itself, as well as to how it was utilized in the circumstances of this case;

(c) The case law states that *Charter* challenges should not be made in a factual vacuum, but rather in the context of a full factual matrix and record; the factual foundation for *Charter* challenges should be complete and not solely based on affidavit evidence where there is likely to be a dispute over the facts;

(d) The general principle that *Charter* challenges require a full factual record is accentuated in the context of an administrative tribunal applying a regulatory scheme. In particular, there is a general duty for administrative tribunals to establish a cogent and complete record. An administrative tribunal does not have the authority to make a general declaration of invalidity under section 52 of the *Constitution Act, 1982*, since only superior courts can make general declarations of invalidity applicable to all Canadians. Accordingly, a decision by a tribunal that a law is unconstitutional is only applicable to the parties over which it has jurisdiction and has no precedential value;

(e) Analogous cases in the securities context support Staff's position; and

(f) *Charter* analysis requires a complex balancing of interests of the individual and society. In assessing a *Charter* challenge, the Commission must decide first, whether there was an infringement of *Charter* rights and second, if there was an infringement, whether it can be justified under section 1 of the *Charter* and, if not, the Commission must consider what is the appropriate *Charter* remedy under section 24. Each step requires the consideration of supporting facts.

(ii) The *Charter* breaches alleged are speculative at this time. A tribunal cannot assess the extent of any prejudice alleged until it crystallizes and the effects are known:

(a) It is unknown whether and to what extent any impugned evidence will be tendered and/or ruled admissible at the Hearing;

(b) It is unknown whether and for what purpose any compelled/ derivative evidence may be used; and

(c) It is unknown how any impugned evidence will fit within the context of Staff's evidence as a whole.

(iii) The remedy sought, being a stay of proceedings, is granted in extremely rare circumstances where an applicant has demonstrated prejudice that will be manifested, perpetuated or aggravated by the continuation of proceedings and no other remedies are capable of removing that prejudice. The Commission must defer the decision to assess the degree and extent of alleged prejudice in the context of the evidence as a whole, particularly where there are significant material facts in dispute.

(b) The Taylor Group

[21] In support of their Constitutional Motion, the Taylor Group filed a 47 page affidavit with 37 exhibits.

[22] The Taylor Group submits that the factual basis for the relief they seek is grounded in the filed affidavit materials and that there are no facts that will be the subject of the section 127 hearing, that are relevant to the issues on their Constitutional Motion. They note that Staff has filed no material responding to the Constitutional Motions (apart from bringing Staff's Motion). The Taylor Group submits therefore that Staff cannot demonstrate that any evidence that may be tendered during the section 127 hearing is necessary for a proper record on their Constitutional Motion.

[23] Further, they submit that the facts and related issues raised in their Constitutional Motion are distinct from the facts and issues that are the subject of the section 127 hearing. The facts and issues underlying the Constitutional Motions relate to Staff's conduct prior to the commencement of this section 127 proceeding, and distinct from the following events that are the subject of the section 127 Hearing.

[24] The Taylor Group submits that Staff's response to the Constitutional Motion and argument on their cross-motion is hypothetical as it is devoid of any facts which address to the Constitutional Motions. They submit that since Staff has not filed any responding material, Staff has not addressed the specific facts nor the specific grounds on which the Constitutional Motion is based.

[25] The Taylor Group further submits that their Constitutional Motion is not speculative as their rights under the *Charter*, and natural justice, have actually been violated.

[26] The Taylor Group argues that adjourning (or deferring) the Constitutional Motion, without a factual foundation to base this decision, would result in a loss of jurisdiction and a further denial of justice, and in particular, a decision that renders substantial aspects of the Constitutional Motion moot.

(c) Taylor Sr. and Jr.

[27] Taylor Sr. and Jr. oppose Staff's Motion on the grounds that they seek to proceed with their Constitutional Motion in a timely and efficient manner that will not interfere with the dates already scheduled for the section 127 hearing.

[28] Further, they submit that the evidence relating to the issues raised in their Constitutional Motion is distinct from the evidence that would be adduced at the Hearing.

They submit that, unlike some of the cases referred to by Staff, they are not raising constitutional issues in relation to the very provisions at issue in the main proceeding (which, in this case, include sections 25, 38 and 53 of the Act). They acknowledge that if they were challenging the constitutionality of sections 25, 38 and/or 53 of the Act, there could, be substantial overlap between the evidence relating to the constitutional issues and the allegations at the hearing proper, depending upon the nature of the challenge. They submit that while it could be of assistance to the Panel to hear the evidence regarding the allegations in order to consider the constitutional issues in that circumstance, and in some other cases, such as where the evidence on the motion is interrelated with that anticipated to be heard at the hearing on its merits; this is not such a case.

[29] Taylor Sr. and Jr. argue that the violations of their rights are neither speculative nor prospective. Rather, they are based upon events that have already occurred in the course of the investigation. They seek remedies for these past violations of their rights to avoid the compounding of the violations during the course of the proceeding.

[30] They also submit that Staff's approach would create a real risk that the Hearing would not be completed during the scheduled dates. These Hearing dates were set almost a year in advance and had to accommodate the schedule of the Commission and counsel involved.

VI. Analysis

(a) Preliminary Motions in Commission Hearings

(1) General Observations

[31] At the outset, we find it helpful to make some general observations about the nature and propriety of preliminary, pre-hearing motions made in the context of section 127 proceedings. While proceedings before a specialized administrative tribunal are intended to be more streamlined and less formal than those in the court system, Commission proceedings must be conducted with caution to ensure fairness to the parties before it, and efficiency in the conduct of such proceedings. It is not uncommon for parties to bring pre-hearing motions to a Commission panel in the context of a section 127 proceeding. In our view, some of these motions should be heard and determined as pre-hearing motions, in advance of the hearing on the merits, so as to promote and advance the goals of fairness and efficiency. On the other hand, often such motions do not sufficiently advance those goals to warrant being heard in advance of the substantive hearing, and are best addressed by the panel hearing the merits of the case, at the time of the substantive hearing.

[32] In reviewing prior Commission decisions, decisions of other administrative regulatory tribunals, as well as subsequent appeals and judicial reviews of such decisions, we note the following:

(1) There is a wide variety in the nature, scope and breadth of Commission proceedings, and a great diversity in the outcomes sought and the impacts on the parties. When proceedings are brought to a Commission Hearing Panel, Staff could be seeking a range of protective orders and relief that can affect the ability of the parties to participate in the capital markets. The relatively recent legislative amendments which gave the Commission the power to impose monetary sanctions and cost orders have increased the severity of possible outcomes to persons named as respondents in section 127 proceedings.

(2) The Commission must ensure its proceedings are fair and that all procedural rights to which respondents are entitled are properly and effectively provided. The manner in which that goal is achieved may depend on the context of each individual proceeding, including the sanctions and outcomes sought, and what is ultimately at stake for the respondents before the Commission.

(3) The Commission is responsible for administering the Act, which has an over-arching mandate and obligation:

    (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.

(4) Commission proceedings ought to be transparent, fair, effective and efficient, in furtherance of and in light of fulfilling its statutory mandate and obligations.

(5) As an administrative tribunal, the Commission, and each hearing panel in particular, are "masters of their own procedure". (See *Prassad v. Canada (Minister of Employment & Immigration)*, [1989] 1 S.C.R. 560 at para. 16; and Robert W. Macaulay, Q. C., & James L. H. Sprague, *Hearings Before Administrative Tribunals*, 2nd ed. (Scarborough: Carswell, 2002) at § 9.1. See also section 25.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, which enables administrative tribunals in Ontario, such as the Commission, to adopt their own procedures.) The Commission has broad discretion in such matters, which must be exercised with due regard to all of the circumstances, interests and rights of the parties. All such elements need to be carefully balanced.

(2) The Exercise of Discretion

[33] The essence of Staff's argument is that it is premature, for a number of reasons, to have the Constitutional Motions heard and determined as a preliminary matter, in advance of the Hearing.

[34] In our view, in exercising its discretion as "master of its procedure", the Commission ought to have due regard for all of the circumstances described above, as well as concern for not unduly "judicializing" its processes. While fairness and the procedural rights of the Respondents and affected persons must be ensured, as stated above, administrative proceedings are intended to be less formal and more procedurally flexible than those of the courts. In considering the stage at which motions such as these should be heard and determined by a Commission panel, we believe that it is useful to ask the following questions:

(a) Can the issues raised in the motions be fairly, properly or completely resolved without regard to contested facts and the anticipated evidence that will be presented at the hearing on the merits? In other words, will the evidence relied upon on the motions likely be distinct from, and unique of, the evidence to be tendered at the hearing on the merits?

(b) Is it necessary for a fair hearing that the relief sought in the motions be granted prior to the proceeding on its merits?

(c) Will the resolution of the issues raised in the motions materially advance the resolution of the matter, or materially narrow the issues to be resolved at the hearing on the merits such that it will be efficient and effective to have them resolved in advance of the commencement of the hearing on the merits?

[35] If the answer to any of these questions is "yes", in our view, the Commission should hear the Constitutional Motions as pre-hearing motions, in advance of the Hearing, absent strong reasons to the contrary.

[36] In contrast, if the answer to all of these questions is "no", the Commission should be reluctant to address the motions as pre-hearing motions, absent strong reasons to the contrary.

[37] To take an example, motions relating to Staff's disclosure obligations and motions for particulars, are the types of motions that should be brought and heard well in advance of the substantive hearing on the merits: they raise issues which can be fairly, properly and completely resolved without regard to contested facts and anticipated evidence that will be the subject matter of the hearing. Further, if the relief sought is to be granted at all, it is necessary for fairness to the affected Respondents that the relief be granted prior to the commencement of the hearing on its merits. There may be other motions that, if heard in advance, could materially advance the matter or narrow the issues to be resolved on the hearing on the merits.

[38] Of course, we recognize that there can be no "hard and fast" rules that govern the exercise of a Commission panel's discretion. Each case is unique, and a Commission panel's discretion should not be encumbered by generalities. We do, however, suggest this framework may assist the task of balancing the interests of fairness and administrative efficiencies in the face of pre-hearing motions.

(b) *Charter* and Similar Challenges as Preliminary Motions

(1) A Complete Factual Foundation is Generally Desirable

[39] The case law referred to us by Staff supports the view that in a civil law context there is a strong trend in favour of hearing constitutional motions at the trial itself, rather than in advance, because a proper factual foundation is required for the assessment of the constitutionality of a statutory provision.

[40] The Supreme Court has held that *Charter* challenges should be decided within the context of a full factual matrix and record: "*Charter* challenges should not and must not be made in a factual vacuum" (*MacKay v. Manitoba*, [1989] 2 S.C.R. 357, ("*MacKay*") at para. 9).

[41] In *MacKay*, the Supreme Court listed a number of reasons to support hearing a *Charter* challenge in the context of a full factual record. First, *Charter* challenges will frequently involve concepts and principles that are of fundamental importance to Canadian society (*MacKay*, *supra* at para. 8). Since a *Charter* challenge can raise important issues that have an impact on Canadian society as a whole, the Supreme Court emphasized that, "courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases" (*MacKay*, *supra* at para. 8).

[42] These observations have been followed and applied by the Ontario Court of Appeal, which stated in *Danson v. Ontario* (1987), 41 D.L.R. (4th) 129 (Ont. C.A.) ("*Danson CA*") that if a constitutional challenge:

> […] should fail for lack of a factual underpinning, the loss may not be his alone, but could well prejudice the rights of those who follow […] the court might on this sketchy record, feel constrained to make some sweeping generality which would later appear unwise. (*Danson CA*, *supra* at 138)

[43] Due to the potential impact of the resolution of a constitutional issue, courts have found it to be desirable to hear a constitutional challenge in the context of all relevant facts and circumstances.

[44] When a *Charter* challenge relates to the effect of a statutory provision, courts have observed that it is necessary to consider all the facts that give rise to an alleged violation of the *Charter* before rendering a decision. The Supreme Court has stated:

> A factual foundation is of fundamental importance on this appeal. It is not the purpose of the legislation which is said to infringe the *Charter* but its effects. *If the deleterious effects are not established there can be no Charter violation and no case has been made out.* Thus the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position [Emphasis added] (*MacKay*, *supra* at para. 20).

[45] The importance of a factual basis is, in our view, self-evident from the analysis required by the *Charter* itself. A *Charter* analysis involves following multiple steps and each step requires proof with the appropriate factual underpinning. As indicated in *R. v. Oakes*, [1986] 1 S.C.R. 103 ("*Oakes*"), a *Charter* analysis starts with a determination whether a right guaranteed by the *Charter* has been violated. Then, if it is found that a *Charter* right has indeed been infringed, a section 1 *Charter* analysis is carried out to determine whether the *Charter* violation is justified.

[46] Section 1 of the *Charter* has two functions: (1) it promotes and reiterates the constitutional guarantees of the rights and freedoms listed in the *Charter*'s provisions; and (2) it may be relied on to justify limitations to *Charter* rights and freedoms (*Oakes*, *supra* at para. 66). In determining whether a breach of the *Charter* is justified, decision makers must be "guided by the values and principles essential to a free and democratic society" (*Oakes*, *supra* at para. 67). This requires balancing competing interests. In this balancing process, evidence is required to demonstrate whether a *Charter* violation can be justified in a free and democratic society. Specifically, the Supreme Court has said that:

> […] *evidence* is required in order to prove the constituent elements of a s. 1 inquiry and […] it should be *cogent and persuasive* and make clear to the court the consequences of imposing or not imposing a limit [to *Charter* rights] [Emphasis added] (*Oakes*, *supra* at para. 72).

[47] A complete record of evidence is needed in the context of a section 1 *Charter* analysis. Moreover, in order to properly assess a *Charter* challenge and balance competing interests, the *Charter* analysis must be considered within the context in which the claim arises. Accordingly, the challenged provisions of the Act must be considered within the Act's regulatory scheme, and the specific facts of the case in which the challenge has arisen. The Supreme Court has emphasized that:

> It is now clear that the *Charter* is to be interpreted in light of the context in which the claim arises. Context is relevant both with respect to the delineation of the meaning and scope of *Charter* rights, as well as to the determination of the balance to be struck between individual rights and the interests of society.
>
> A contextual approach is particularly appropriate in the present case to take account of the regulatory nature of the offence and its place within a larger scheme of public welfare legislation. This approach requires that the

> rights asserted by the appellant be considered in light of the regulatory context in which the claim is situated, acknowledging that a *Charter* right may have different scope and implications in a regulatory context than in a truly criminal one (*R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at paras. 149 and 150).

[48] Further, in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 ("*Cuddy Chicks*"), the Supreme Court affirmed that "in the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical" (*Cuddy Chicks*, *supra* at para. 16). A well informed assessment of *Charter* rights in a particular regulatory context is best accomplished based on a complete factual record. Therefore, *Charter* rights need to be evaluated in light of the factual circumstances and this can be most effectively done during the hearing on the merits.

[49] In *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 ("*Metropolitan Stores*"), the Supreme Court has also recognized that there are disadvantages to hearing a constitutional challenge during the interlocutory stage of a proceeding. In particular, the Supreme Court emphasized that:

> Most of the difficulties encountered by a trial judge at the interlocutory stage, which are raised above, apply not only in *Charter* cases but also in other constitutional challenges of a law. I therefore fully agree with what Professor R. J. Sharpe wrote in Injunctions and Specific Performance, at p. 177, *in particular with respect to constitutional cases that "the courts have sensibly paid heed to the fact that at the interlocutory stage they cannot fully explore the merits of the plaintiff's case". At this stage, even in cases where the plaintiff has a serious question to be tried or even a prima facie case, the court is generally much too uncertain as to the facts and the law to be in a position to decide the merits* [Emphasis added] (*Metropolitan Stores*, *supra* at para. 50).

[50] We agree with Staff that the case law supports the recognition of a "[…] general rule that *Charter* issues should be decided only after a proper record is put before the decision maker" (*DeVries v. British Columbia (Attorney General)*, [2006] B.C.J. No. 3226 (B.C.C.A.) (QL) ("*DeVries*") at para. 7).

(2) *Charter* Challenges in Administrative Law Proceedings

(i) General Observations

[51] Staff also referred us to relevant case law that describes the appropriate process for a *Charter* challenge in an administrative law context. In particular, Staff asserts that administrative tribunals have a general duty to establish a cogent and complete record of proceedings, which is of invaluable assistance to an appeal court in *Charter* disputes.

[52] Indeed, there are a number of reasons to support this submission. In an administrative law context, the informed view of a specialized tribunal possessing

knowledge of relevant facts and an ability to compile a cogent record is extremely helpful in *Charter* disputes. For example:

> In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical. […] The informed view of the [administrative tribunal], as manifested in a sensitivity to relevant facts and *an ability to compile a cogent record, is also of invaluable assistance* [Emphasis added] (*Cuddy Chicks*, *supra* at para. 16).

[53] Furthermore, in the context of an appeal of a *Charter* challenge heard before an administrative tribunal, it is important to have a complete record including all the relevant facts, in case the decision is appealed. As explained by the Supreme Court in *Nova Scotia (Worker's Compensation Board) v. Martin*, [2003] 2 S.C.R. 504:

> […] the factual findings and record compiled by an administrative tribunal, as well as its informed and expert view of the various issues raised by a constitutional challenge, will often be *invaluable to a reviewing court* [Emphasis added] (*Nova Scotia (Worker's Compensation Board) v. Martin*, *supra* at para. 30).

(ii) Specific Cases in a Securities Law Context

[54] Staff also referred us to decisions in a securities law context, supporting the proposition that *Charter* challenges are best heard during the hearing on the merits in order to ensure that a complete factual record is available. This was the case in *Smolensky v. British Columbia Securities Commission* (2004), 236 D.L.R. (4th) 262 (B.C.C.A.) ("*Smolensky BCCA*"); leave to appeal to the S.C.C. refused: [2004] S.C.C.A. No. 274.

[55] In *Smolensky BCCA,* the respondent challenged the constitutionality of section 148 of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418 (the "BCSA"). In particular, the respondent alleged that section 148 of the BCSA violated sections 2(b), 7, 8 and 11(d) of the *Charter*. The British Columbia Court of Appeal held that it was too premature to assess whether section 148 of the BCSA violated the *Charter* (*Smolensky BCCA*, *supra* at para. 26). According to the British Columbia Court of Appeal:

> Before this Court states a definitive opinion on *Charter* issues, *the Commission should have the opportunity to address those issues on the facts of this case*, including any specific restrictions of access to information and disclosure asserted by the appellant. I have concluded that the other grounds of relief raised by the appellant are issues that also should be dismissed as not timely. They are *not appropriate for judicial review in the absence of a complete record of facts* and deliberation before the Commission […] [Emphasis added] (*Smolensky BCCA*, *supra* at para. 6).

[56] Thus, the British Columbia Court of Appeal declined to consider the constitutional question until the British Columbia Securities Commission had the opportunity to address the question and have the opportunity to create a full record for an appeal, if one was taken (*Smolensky BCCA*, *supra* at para. 26). The British Columbia Court of Appeal took the position that without a full record of the relevant facts, the effect of section 148 of the BCSA was unknown and the constitutional question was premature (*Smolensky BCCA*, *supra* at para. 24). As a result, the British Columbia Securities Commission had initial jurisdiction over the constitutional issue and was best suited to create a full and cogent record to deal with that issue.

[57] After the decision was rendered in *Smolensky BCCA*, the matter came before the British Columbia Securities Commission in *Re Smolensky* (2006), BCSECCOM 45 ("*Smolensky BCSC*"). Smolensky brought an application before the British Columbia Securities Commission to challenge the constitutionality of subsection 148(1) of the BCSA before the hearing on the merits of the matter. The British Columbia Securities Commission panel cited *MacKay* as authority to require a full factual record for the determination of a constitutional challenge, and the panel found that they were in the same position as the British Columbia Court of Appeal in *Smolensky BCCA* because no factual context was presented (*Smolensky BCSC*, *supra* at para. 72). The panel of the British Columbia Securities Commission explained that:

> Until a hearing is held on the merits, the Commission will have no factual background upon which to assess the *Charter* issues. For example, at this point we do not know:
>
> - the disclosure that the Executive Director has made to Smolensky
> - the evidence, including witnesses, that the Executive Director intends to use to try to prove the allegations in the notice of hearing
> - the evidence, including witnesses, that Smolensky might reasonably require to try to refute the evidence of the Executive Director
> - Smolensky's actual access to witnesses
>
> Only with this information, and doubtless other information as well, will the Hearing Panel be in a position to determine whether, on the facts of this case (as required by *MacKay*) Smolensky's *Charter* rights have been violated.
>
> In our opinion it is premature to make a ruling on the *Charter*-based grounds of Smolensky's application, and we therefore dismiss them (*Smolensky BCSC*, *supra* at paras. 73 to 75).

(c) The Application of These Principles to the Constitutional Motions

[58] The Taylor Group and Taylor Sr. and Jr. contend that the Constitutional Motions can be heard prior to the hearing on the merits and that the evidence contained in the affidavit materials filed is sufficient to enable the Commission to resolve their motions.

[59] As stated by the Supreme Court of Canada:

> [there] may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge (*Metropolitan Stores*, *supra* at para. 49).

[60] In this case, we are not convinced that the Constitutional Motions are based on a simple question of law alone. Here, as discussed above, the Taylor Group and Taylor Sr. and Jr. challenge not only the constitutionality of the relevant provision, but the actions of Staff acting pursuant to it, and their effects.

[61] We find that the Taylor Group and Taylor Sr. and Jr. need to demonstrate if and how the Investigation Order actually violated their *Charter* rights. We doubt that this can be accomplished in a factual vacuum, and therefore, the Constitutional Motions should be assessed and determined in the whole context of this matter.

[62] As established in *Danson v. Ontario (Attroney Genrera)*, [1990] 2 S.C.R. 1086 ("*Danson SCC*"):

> […] any *Charter* challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged facts. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred (*Danson SCC*, *supra* at para. 31).

[63] We are of the view that, in order to determine the allegations made in the Constitutional Motions, there must be a full factual record in order to assess whether and how rights have been violated. This reasoning was also followed by the British Columbia Court of Appeal in *DeVries*. In that case, it was argued that section 2(b) of the *Charter* was violated by the nature of the allegations in the Notice of Hearing of the British Columbia Securities Commission. The British Columbia Court of Appeal held that there is a "[…] general rule that *Charter* issues should be decided only after a proper record is put before the decision-maker" (*DeVries*, *supra* at para. 7). The British Columbia Court of Appeal also reiterated that a factual basis was required to conduct the requisite *Charter* analysis, and as a result, adjourned the application so that the constitutional issues could be heard at the hearing in the presence of relevant facts (*DeVries*, *supra* at para. 12). The Taylor Group has failed to demonstrate a strong case justifying departure from this general rule.

[64] Staff asserts that the constitutional violations alleged by the Taylor Group and Taylor Sr. and Jr. in this case are not novel, and thus, we are not in an exceptional situation which justifies that a *Charter* challenge should be heard outside of a full factual basis. We agree with this submission and we note that *Charter* violations concerning the investigatory provisions of the Act have previously been considered and the constitutionality of such provisions have been upheld by the Courts (In particular, see *British Columbia (Securities Commission) v. Stallwood et al.*, (1995), 126 D.L.R. (4th) 89 (B.C.S.C.); *BCSC v. Branch*, (1990), 68 D.L.R. (4th) 347 (B.C.S.C.); *Barry v. Alberta Securities Commission*, (1986), 25 D.L.R. (4th) 730 (Alta. C.A.); *Re Malartic Hygrade Gold Mines and Ontario Securities Commission*, (1986), 27 D.L.R. (4th) 112 (Ont. Div.

Ct.), leave to appeal refused (1986), 27 D.L.R. (4th) 112; and *Gatti v. Ontario Securities Commission*, (March 27, 2001: unreported) Ontario Securities Commission).

[65] Further, the answer to the question of the appropriate remedy in the event that a *Charter* violation is found, also requires a proper factual context which, in our view, can only be grounded in the specific facts of this case.

[66] In their written and oral submissions, the Taylor Group and Taylor Sr. and Jr. seek remedies under section 24 of the *Charter*. Section 24 of the *Charter* provides:

> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[67] Apart from the question of whether this section is applicable to the Commission, it is clear from the language of subsection 24(1) of the *Charter* that in order for a remedy under section 24 to be available, a *Charter* breach must be found. In other words, section 24 of the *Charter* cannot apply in the absence of a *Charter* violation. Remedies under section 24 of the *Charter* are not available where the deprivation of the *Charter* right is merely speculative.

[68] While courts have held that it is possible to get relief for a prospective *Charter* violation in circumstances where the claimant can establish that there is a "sufficiently serious risk" or a "high degree of probability" that an alleged *Charter* violation will occur, these types of situations are rare. In such a case, the onus of proving a prospective *Charter* breach is a high one; the decision maker must be satisfied that if relief under section 24 of the *Charter* is not granted, an individual's *Charter* rights will be prejudiced (*Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mines Tragedy)*, [1995] 2 S.C.R. 97 ("*Phillips*") at para. 110).

[69] The question of whether an individual's *Charter* rights have been, or will be violated cannot be made in the abstract. This must be demonstrated by the factual circumstances. In particular, all the surrounding circumstances need to be taken into account "including, for example, the nature of the right said to be threatened and the extent to which the anticipated harm is susceptible of proof" (*Phillips*, *supra* at para. 110). Again, this demonstrates that *Charter* issues are best dealt with in the presence of all the relevant facts in the context of a hearing on the merits.

[70] At this time, we view the Constitutional Motions as premature, since we have no evidence before us as to what use has been made by Staff of the impugned evidence.

[71] Further, at this point, based on the materials before us, it is unclear whether the impugned evidence will be sought to be used during the Hearing, and it is also unclear exactly how this evidence will be used. Since the use and relevance of the impugned evidence will only be known at a later stage, during the Hearing, it is premature to assess whether the *Charter* rights have been or will be engaged. We find that we are in a similar situation as in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 ("*Branch SCC*"), where the "true purpose of the evidence will […] not be apparent until the latter stage" (*Branch SCC*, *supra* at para. 10). Therefore, in our view, the *Charter* violations alleged by the Taylor Group and Taylor Sr. and Jr. have not yet have crystallized.

(d) Other Good Reasons to Defer the Motions to the Hearing

[72] A further factor which points toward deferring the motions until the Hearing, is the type of remedy sought by the Taylor Group and Taylor Sr. and Jr. In this case, both parties seek a stay of proceedings as primary relief.

[73] Staff contends that a stay is only granted in extremely rare circumstances and a stay is not appropriate in this case. In support of their position, Staff referred us to the case law dealing with the criteria for granting a stay.

[74] According to the case law:

> […] a stay of proceedings will only be appropriate when two criteria are met:
>
> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice. (*R. v. Regan*, [2002] 1 S.C.R. 297 at para. 54)

[75] In the case before us, we cannot determine whether this test is satisfied at this time, in the absence of a full record. We agree with Staff that the extent of any prejudice arising from the use of the compelled evidence can only be assessed within the context of the evidence as a whole as it relates to each respondent. Secondly, the Taylor Group and Taylor Sr. and Jr. have not convinced us that there are no other appropriate remedies available. The Hearing Panel will need to assess Staff's submission that there exist other remedies less drastic than a stay which are capable of removing any prejudice, for example, the exclusion of evidence.

[76] In addition, before a stay can be granted, it is necessary to balance the interests of granting a stay against the interest that society has in holding a hearing to have a final decision on the merits (*R. v. Regan*, *supra* at para. 57; and *Regina v. E.D.* (1990) 57 C.C.C. (3d) 151 at para. 23). As previously discussed, balancing interests requires a complete factual record and this can be best accomplished in the context of a hearing on the merits. This is also relevant when balancing interests in the context of an application for a stay. The Ontario Court of Appeal emphasized that a motion for a stay should

normally be decided after the trial is completed once all the relevant evidence has been adduced (*R. v. Dikah*, (1994) 18 O.R. (3d) 302 (C.A.) at para. 34. See also *Regina v. François*, (1993), 15 O.R. (3d) 627 (C.A.) at 629).

[77] Staff submits that the decision to rule on a stay application or to reserve until the end of a case is discretionary and should be exercised having regard to two policy considerations:

> (1) Proceedings on the merits should not be fragmented by interlocutory proceedings; and
>
> (2) Adjudication of constitutional challenges without a factual foundation should be discouraged (*R. v. DeSousa*, [1992] 2 S.C.R. 944 at para. 17).

[78] The appropriateness of a stay of proceedings depends on the effect of the conduct amounting to abuse of process or other prejudice on the fairness of the trial. We accept Staff's submission that this is best assessed in the context of a hearing and as a result, it is preferable to reserve a decision regarding a stay until the hearing on the merits. This is because the measurement of the extent of the prejudice often cannot be done without considering all the relevant evidence. As explained by the Supreme Court of Canada in *R. v. La*, [1997] 2 S.C.R. 680:

> The appropriateness of a stay of proceedings depends upon the effect of the conduct amounting to an abuse of process or other prejudice on the fairness of the trial. This is often best assessed in the context of the trial as it unfolds. Accordingly, the trial judge has a discretion as to whether to rule on the application for a stay immediately or after hearing some or all of the evidence. Unless it is clear that no other course of action will cure the prejudice that is occasioned by the conduct giving rise to the abuse, it will usually be preferable to reserve on the application. This will enable the judge to assess the degree of prejudice and as well to determine whether measures to minimize the prejudice have borne fruit (*R. v. La*, *supra* at para. 27).

[79] Counsel for the Taylor Sr. and Jr. argue that in some cases, it is not desirable to put off a decision regarding a stay until the trial stage of a proceeding. In support of their position, they rely on a passage from *R. v. DeSousa* which states:

> In some cases the interests of justice necessitate an immediate decision. Examples of such necessitous circumstances include cases in which the trial court itself is implicated in a constitutional violation as in R. v. Rahey, [1987] 1 S.C.R. 588, or where substantial on-going constitutional violations require immediate attention [page 955] as in R. v. Gamble, [1988] 2 S.C.R. 595. Moreover, in some cases it will save time to decide constitutional questions before proceeding to trial on the evidence. An apparently meritorious *Charter* challenge of the law under which the accused is charged which is not dependent on facts to be elicited during

> the trial may come within this exception to the general rule. (See Manitoba (Attorney General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110, at p. 133.) This applies with added force when the trial is expected to be of considerable duration. See, for example, R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606 (*R. v. DeSousa*, *supra* at para. 17).

[80] We accept that exceptions exist to the rule that it is preferable to reserve a decision regarding a stay until the hearing stage; however, we find that the Taylor Group and Taylor Sr. and Jr. have failed to demonstrate that this exception applies in this case. First, we are not dealing with a situation in which the Commission itself or any member of the Hearing Panel is implicated in a constitutional violation. At this point in time, the *Charter* violations, or at least the effects of the impugned actions, are speculative. Secondly, in our opinion, deciding the Constitutional Motions in advance of the hearing on the merits in this matter will not save time. Deciding the constitutional issues in advance of the hearing on the merits can exacerbate the time it will take to complete a proceeding. As observed in *Re Belteco Holdings Inc.* (1997), 20 O.S.C.B. 2921, at paragraph 1.10: often "preliminary motions can take on a life of their own", especially when the parties seek to challenge these motion decisions in the courts, the hearing on the merits cannot continue until the interlocutory matters run their course. The result can be a substantial delay in having a Commission matter heard on the merits. In our view, that result is inconsistent with the ability of the Commission to satisfy its public interest mandate in a timely manner. For these reasons, we do not accept the submissions of Taylor Sr. and Jr. The Commission has generally taken the position in the past that stays are an extraordinary remedy and a Panel should wait until the end of the hearing to make a determination regarding a stay (See *Re Belteco Holdings Inc., supra* and in *Re Glendale Securities Inc.* (1996), 19 O.S.C.B. 3874).

[81] In conclusion, we find that the Constitutional Motions should be dealt with in the course of the hearing on the merits because a determination of the constitutional challenges in advance of the Hearing would deprive the Commission of the complete factual basis that is necessary for a proper consideration of the alleged *Charter* violations.

(e) Other Issues

(1) Staff's Recommendations of a "Voir Dire"

[82] Staff takes the position that it is inappropriate to rely on affidavit evidence on the Constitutional Motions, and submits that only *viva voce* evidence be used. We do not necessarily agree. While we agree that affidavit evidence filed in advance of and in isolation from the evidence tendered at the substantive hearing is unduly limiting, the Hearing Panel has discretion to address how best to deal with the Constitutional Motions within the context of the substantive hearing; these reasons should in no way be seen as limiting or influencing the exercise of that discretion.

(2) The Request for Disclosure of Staff's Position

[83] The Taylor Group and Taylor Sr. and Jr., both in their written submissions and in their oral presentations, express concerns that they have not received a response from Staff to the Constitutional Motions. In light of Staff's Motion, by which Staff requested that the Constitutional Motions be deferred until the Hearing, a lack of response is not surprising. Further, Staff asserts that Staff is not obliged to provide the Respondents with a "road map" of their case on the merits. They suggest that this includes their argument in response to the Constitutional Motions, which they see as a defence to the substantive allegations and therefore as premature.

[84] We agree that Staff is not required to provide a "road map" of their argument on the merits (*Re Belteco Holdings Inc.* 20 O.S.C.B. 1333 at paras. 26 to 28). However, we note that the Respondents have the right to know the case that they have to meet and that Staff has an obligation to disclose all information and materials which are relevant to the matters at issue in this proceeding. We are of the view that the articulation and communication of Staff's position in response to the Constitutional Motions is certainly consistent with these general obligations and furthers the overarching principle that Commission proceedings be fair and efficient. While we are not, at this time, prepared to determine and direct the appropriate form or extent of that disclosure, we do request and expect that Staff consider and determine its position on the Constitutional Motions, what facts and evidence, if any, they intend to rely upon to support that position and what evidence compelled pursuant to section 11 it intends to rely upon at the Hearing. Staff should advise counsel for the Respondents accordingly.

[85] This information need not be formally presented – we think it could be sufficient that it be conveyed through informal correspondence, such as a letter, or even orally in a face-to-face meeting. But we expect Staff to take steps to advise counsel for the Respondents of these matters. Further, we ask Staff to advise counsel for the Respondents which Staff members they intend to call as witnesses at the Hearing.

[86] We are of the view that if this information is received by the Respondents' counsel well in advance of the Hearing, they will be able to assess what further evidence they feel is required in furtherance of the Constitutional Motions. We anticipate that, with the disclosure of this information, some of the issues raised in the Constitutional Motions will be less "hypothetical" and all parties can be better prepared for the Hearing.

[87] In the circumstances of this case, since the Hearing date is set to commence on October 29, 2007, we feel that 90 days prior to that date (i.e. by July 27, 2007) is a reasonable time by which Staff should make such disclosure to the Respondents. We ask that Staff communicate its position on these matters to the parties by that date.

[88] We note that the Particulars Motion remains outstanding. We would expect, and request, that if the issues raised by the Particulars Motion, and the information described above, are not resolved amongst counsel, the Particulars Motion be scheduled and heard well in advice of the October hearing dates, and any matters arising from these reasons be addressed at that time.

(3) Scheduling Concerns

[89] Counsel for Taylor Sr. and Jr. emphasized the concern that a deferral of the Constitutional Motions would risk a loss in valuable hearing days, set so far in advance. We agree that when the Commission sets hearing dates for a hearing, (in this case six weeks), all parties are expected to make every effort to maintain those dates. To accommodate this concern, we offer to add three days in October to the outset of the Hearing, in order to proceed with any motions, or at least, for the Hearing Panel to receive submissions and consider the most effective means through which to deal with the Constitutional Motions and any other outstanding or contentious matter. We ask that this be coordinated through the Office of the Secretary, who will contact counsel.

(4) Confidentiality Issues

[90] The parties point out that some of the matters addressed in these reasons may raise confidentiality issues. As a result, these reasons are released at this stage on a confidential basis. This Commission Panel undertook to seek submissions from the parties prior to the public release of these Reasons, and we shall do so. We ask the parties to make arrangements with the Office of the Secretary of the Commission to address this issue.

VII. Conclusion

[91] For the reasons set out above, we are not satisfied that the Constitutional Motions should or can properly be resolved by this Panel, or any other Panel, in the absence of a complete and cogent factual record. We note the seriousness of the allegations made in the Constitutional Motions and the nature of the remedies sought.

[92] At the same time, we are sensitive to the rights of the Respondents to "have their day in court" and to assert whatever response to Staff's allegations that are available to them. Respondents should have the right to determine how best to pursue those defences, so long as they do not unduly interfere with the ability of the Commission to accomplish its mandate as set out in the Act.

[93] We believe that the Constitutional Motions are premature because:

(i) It is unknown at this stage whether and to what extent any impugned evidence will be sought to be tendered and/or ruled admissible at the hearing; and

(ii) It is unclear whether and for what purpose any impugned evidence will fit within the context of Staff's evidence as a whole.

[94] This is not an exceptional case justifying the hearing of the Constitutional Motions in advance of the Hearing. Similar constitutional challenges of analogous provisions of securities legislation have been denied by the courts. Indeed, the courts in criminal, civil and administrative law contexts (including securities regulation) have overwhelmingly held that such motions are to be heard within the context of the hearing/trial on the merits.

[95] We are also mindful that proceeding on the basis of affidavit evidence alone as proposed by the Taylor Group and Taylor Sr. and Jr., without a complete factual record, may lead to disputes and further interlocutory motions. To be clear, we do not say that it would be inappropriate to rely on affidavit evidence to determine the Constitutional Motions. However, we are neither prepared nor able, at this time, to find that it is sufficient as a sole basis of evidence, and we leave the ultimate determination of this issue to the Hearing Panel.

[96] For all of these reasons when we ask ourselves the three questions described at paragraph 34 above, we answer "no" to each of them. In our view:

> (a) the issues raised in the Constitutional Motions cannot be fairly, properly or completely resolved without regard to contested facts and anticipated evidence that will be the subject of the hearing on the merits;
>
> (b) it is not necessary for fairness to the Respondents that the relief sought in the Constitutional Motions be granted prior to the commencement of the hearing on the merits; and
>
> (c) the resolution of the issues raised by the Constitutional Motions will not materially advance the resolution of this matter, or narrow the issues to be resolved at the hearing on the merits.

[97] We conclude that a determination of the Constitutional Motions in advance of the hearing on the merits would be inappropriate in these circumstances.

[98] Accordingly, we order that the Constitutional Motions shall be heard as part of the hearing on the merits, to be dealt with at the discretion of the Hearing Panel.

[99] In light of the particular circumstances of this motion, we request that no later than 90 days prior to the proposed commencement of the Hearing (i.e. no later than July 27, 2007), Staff counsel advise the Respondents' counsel of its position on the Constitutional Motions, as well as what evidence it intends to rely upon to support that position, the evidence compelled pursuant to section 11 that it intends to rely upon at the Hearing, and a list of Staff members that it intends to call as witnesses. Further we ask Staff to advise the Respondents within that time frame.

[100] We also request that the Taylor Group (or any other Respondent) take steps to schedule the Particulars Motions, if unresolved, and any other motion deemed necessary to address issues remaining unresolved from these reasons, no later than 60 days prior to the commencement of the Hearing (i.e. no later than August 29, 2007).

DATED at Toronto this 18th day of May, 2007.

"Lawrence E. Ritchie"

Lawrence E. Ritchie

"Wendell S. Wigle"

Wendell S. Wigle

"James E. A. Turner"

James E. A. Turner