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

AND

IN THE MATTER OF Y

AND

IN THE MATTER OF
AN APPLICATION BY Y
UNDER SECTION 17 OF THE SECURITIES ACT

REASONS AND DECISION

Hearing:	November 20, 2008	
Decision:	August 31, 2009	
Panel:	Lawrence E. Ritchie Mary G. Condon	- Vice Chair and Chair of the Panel - Commissioner
Counsel:	Karen Manarin Melanie Adams Michelle Spain	- For the Ontario Securities Commission
	Brian H. Greenspan Jill D. Makepeace Aaron Shachter	- For Y
	Andrew Gray	- For N4

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REASONS AND DECISION

I. BACKGROUND

A. Overview

[1] These are the reasons for our orders dated December 18, 2008 and January 9, 2009.

[2] This is an application (the "**Application**") brought by Y pursuant to subsection 17(1) of the *Securities Act*, R.S.O. 1990, c. S.5 (the "**Act**"), seeking orders from the Ontario Securities Commission (the "**Commission**"), authorizing the use and disclosure of certain testimonial and documentary evidence that was obtained by the Commission pursuant to section 13 of the Act (the "**Compelled Evidence**") and certain evidence that was provided to the Commission voluntarily (the "**Voluntary Evidence**").

[3] The Compelled Evidence and the Voluntary Evidence (collectively, the "**Evidence**") was obtained in the course of an investigation relating to matters that became the subject of a Notice of Hearing and Statement of Allegations. Staff alleged that Y, other individual respondents and Z Corporation failed to ensure that Z Corporation filed financial statements in Z Corporation's prospectus that contained full, true and plain disclosure (the "**Commission Proceeding**").

[4] The Commission has approved Settlement Agreements between Staff and Y and the other individual respondents, and Staff withdrew the allegations against Z Corporation. As a result, there are no outstanding matters before the Commission in the Commission Proceeding.

[5] Staff disclosed the Evidence to Y in meeting its disclosure obligations in the course of the Commission Proceeding. With the exception of Volume 42F, which Y is not able to locate, Y returned the Evidence at the conclusion of the Commission Proceeding pursuant to an undertaking given to staff.

[6] Y has been served with a "Wells Notice" by the Securities and Exchange Commission (the "**SEC**"). The SEC alleged that Y "violated and/or aided and abetted and/or caused violations" of United States securities legislation. No proceedings have been instituted against Y by the SEC.

[7] A number of related civil proceedings were instituted against Z Corporation's officers and directors, other affiliated entities and Z Corporation's auditor during the relevant time period. Several of these civil proceedings continue to be outstanding.

[8] Y has been charged with 12 counts of fraud over $5,000 contrary to section 380(1)(a) of the *Criminal Code* relating to Z Corporation. Y seeks access to the Evidence in order to make full answer and defence to the criminal charges in the upcoming trial (the "**Criminal Proceeding**").

[9] Y filed three Notices of Application to Produce Third Party Records, commonly known as *O'Connor* applications (in respect of the decision in *R v. O'Connor*, [1995] 4 S.C.R 411 (SCC)) in the Criminal Proceeding. While Z Corporation, amongst others, was the subject of the *O'Connor* applications, the Commission was not.

[10] The Application was heard on November 20, 2008 (the "**Hearing**"). After considering the written and oral submissions of the parties, we gave an oral ruling, which we confirmed by two written orders issued on December 18, 2008, while reserving in part. We issued two additional orders on January 9, 2009, disposing of the remaining issues in the Application.

[11] After the Hearing, an additional response was filed by Z Corporation, which consented to the Application. Staff did not oppose the disclosure of this evidence. Accordingly, we issued an order with respect to Z Corporation's Compelled Evidence on January 9, 2009.

B. The Application

[12] Y moves for orders authorizing the following:

(a) Disclosure of the Evidence given to the Commission by Z Corporation and by 31 persons identified as C1, C2, C3, C4, C5, C6, C7, C8, C9, C10, C11, C12, C13, C14, C15, N1, N2/05, N3, N4, N5/06, N6, N7, N8, N9, N10, N11, N12, O1, O2, O3 and O4 (collectively the "Respondents"); and

(b) That the Evidence given to the Commission by the Respondents may be used by counsel for Y in the examination of any witness who testifies in the criminal trial.

[13] Except for Respondents N1 and N12, who could not be located (the "**Not Located Respondents**"), all of the Respondents received written notice of the Application, either from Y directly or with the assistance of Staff. The following is a summary of the responses received:

(a) Respondents N9 and Z Corporation (the "**Consenting Respondents**") consented to the Application;

(b) Respondents C1, C3, C5, C6, C10, C11, C13 and N4 (the "**Non-Opposing Respondents**") indicated that they "do not oppose" the Application;

(c) Respondents O1 and C14 (the "**No Objection Respondents**") indicated that they have "no objection" to the Application;

(d) Respondents C4, C9 and C12 (the "**No Position Respondents**") took no position with regard to the Application;

(e) Respondents N3, N6, N7, N8, N10 and N11 (the "**Non-Responding Respondents**") did not respond to the Application;

(f) Respondents N2/05, N5/06, O2, O3, O4 (the "**Opposing Respondents**") oppose the Application; and

(g) Respondents C2, C7, C8 and C15, who provided testimony to the SEC (the "**SEC Respondents**") took no position with regard to the Application.

[14] All of the individual Respondents are on the Crown's witness list in the Criminal Proceeding (the "**Crown Witness List**"), except for the following ten individuals:

(a) N9 (a Consenting Respondent);

(b) C1, C3, C5, C6 and C10 (Non-Opposing Respondents);

(c) N7 and N11 (Non-Responding Respondents);

(d) N2/O5 (an Opposing Respondent); and

(e) N12 (a Not Located Respondent).

[15] On November 14, 2008, Staff contacted all the Respondents who could be located, other than the SEC Respondents. Y contacted the SEC Respondents directly and notified them that "counsel for [Y] will be bringing a motion to seek disclosure of the testimony that you gave to the Staff of the Ontario Securities Commission. The hearing in this matter will take place on Thursday November 20, 2008 at 11:15 a.m. in the Large Hearing Room …".

[16] Staff does not oppose the disclosure of the Evidence provided by the Consenting Respondents, Non-Opposing Respondents, and No Objection Respondents (collectively, the "**Non-Objecting Respondents**") but does oppose the disclosure of the Evidence provided by the No Position Respondents, Non-Responding Respondents and Opposing Respondents. In

addition, Staff brought a motion for directions with regard to the Respondents who provided Voluntary Evidence.

II. THE LAW

[17] Subsection 17(1)(b) of the Act provides:

> 17(1) If the Commission considers that it would be in the public interest, it may make an order authorizing the disclosure to any person or company of,
>
> (b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13;

[18] Pursuant to subsection 17(4) of the Act, an order under subsection 17(1) "may be subject to terms and conditions imposed by the Commission."

III. THE ISSUES

[19] The Commission must determine whether it is in the public interest to authorize the disclosure of the Evidence to Y pursuant to subsection 17(1) of the Act.

IV. POSITIONS OF THE PARTIES

A. Y

1. Jurisdiction of the Commission

[20] Y submits that subsection 17(1) of the Act grants the Commission power to order that testimonial and documentary evidence that was compelled pursuant to section 13 of the Act be disclosed and used for purposes outside of a Commission proceeding. In Y's submission, the sole limitation on the broad discretion granted to the Commission by subsection 17(1) is that it must be exercised in the public interest. Further, subsection 17(2) of the Act states: "No order shall be made under subsection 17(1) unless the commission has, where practicable, given reasonable notice" of the Application and an opportunity to respond. Y submits that he provided reasonable notice by corresponding with the Respondents on several occasions to provide notice of his intention to seek section 17(1) orders and ascertain their positions. In his view, the Non-Responding Respondents should be deemed not to oppose the Application.

2. Public Interest Considerations

a) Overview

[21] Y submits that the Commission has broad discretion to determine what is in the public interest and in exercising that discretion must balance the interests of the party seeking disclosure against the expectation of privacy and confidentiality of witnesses who gave Compelled Evidence. Y also submits that the Supreme Court of Canada ("**SCC**") has held that subsection 17(1) disclosure orders should be confined to the extent necessary for the Commission to carry out its mandate under the Act. In support of this proposition, Y cites *Deloitte & Touche LLP v. Ontario Securities Commission*, [2003] 2 S.C.R. 713 at paras. 21, 29-30 ("***Deloitte SCC***"). Y also relies on the Commission's decision in *Re X and A Co.* (2007), 30 O.S.C.B. 327 ("***Re X and A Co.***") at para. 28.

[22] In *Deloitte SCC*, Deloitte was compelled to provide documents to the Commission concerning a corporate respondent in a Commission proceeding, and certain of Deloitte's officers were compelled to provide testimony to the Commission. In order to satisfy its disclosure obligation, Staff sought an order under subsection 17(1) of the Act to permit the disclosure of the compelled evidence to the respondents in the Commission proceeding. The order was granted, despite Deloitte's objection. The Divisional Court allowed Deloitte's appeal of the Commission's order. The Ontario Court of Appeal overturned that decision and restored the Commission's order ("***Deloitte CA***"). On further appeal, the SCC upheld the Court of Appeal decision. The SCC found that the Commission's decision was reasonable and stated that the Commission "is obligated to order disclosure only to the extent necessary to carry out its mandate under the Act" (*Deloitte SCC*, *supra* at para. 29).

[23] Y submits that the balancing exercise involved in determining an application under subsection 17(1) is altered where a respondent does not oppose the application. Y cites *Re Black* (2008), 31 O.S.C.B. 10397 at para. 243 ("***Re Black***") for this proposition.

[24] In *Re Black*, two of the respondents in a Commission proceeding applied under subsection 17(1) of the Act for disclosure of compelled evidence to allow them to make full answer and defence to criminal charges brought against them in the United States. In a two to one decision of the Commission, the majority (Commissioners Wigle and Perry) refused (with one exception) to authorize the requested disclosure on the basis that neither an order of the Commission nor an undertaking by applicants' counsel could control the use and dissemination of the compelled evidence once it was used in the U.S. criminal proceeding, and the respondents would no longer have protection against self-incrimination under section 18 of the Act, section 9 of the *Evidence Act (Ontario)*, R.S.O. 1990, c. E.23, as amended (the "**Evidence Act (Ontario)**"), section 14 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**"), section 5 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5., as amended (the "**Canada Evidence Act**") or sections 7 and 13 of the *Charter of Rights and Freedoms* (the "**Charter**"). Therefore, the Commission ordered disclosure only with respect to a respondent who did not object to the application on the basis that by not objecting, the respondent had waived its right to confidentiality and protection against self-incrimination for the purposes of the application, and the integrity of Commission investigations would be maintained because Staff could continue to assure future witnesses that their evidence will remain confidential unless they consent to disclosure (*Re Black*, *supra* at para. 243).

[25] In his dissenting reasons, Commissioner LeSage indicated that he would have granted the disclosure under section 17(1) as he believed that an order could be drafted that would allow the Commission to maintain control over the permitted use of the evidence sought.

[26] The majority made the following comment about the importance of protection against self-incrimination in their decision:

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

[27] Y submits that the orders he seeks in this Application satisfy the criteria set out in *Re Black* and other authorities.

b) Relevance

[28] Y submits that the relevance of the testimonial and documentary evidence to the proceeding in which its use is sought is an important consideration.

[29] Y refers to *Re Black*, where the Commission ruled that "we must consider the relevance of the evidence to the U.S. Criminal Proceeding in our consideration of the public interest" (*Re Black, supra*, at paras. 84-86). Y also refers to *Coughlan v. WMC International Ltd*, [2000] O.J. No. 5109 at para. 52 (Div. Ct.) ("***Coughlan***") and *Re X and Y* (2004), 27 O.S.C.B. 49 ("***Re X and Y*** ") at para. 28.

[30] Y submits that Staff's allegations in the Commission Proceeding and the charges in the Criminal Proceeding arise out of the same factual foundation and the Evidence in the Commission Proceeding covers the same subject matter as the Criminal Proceeding. He submits that because of the similarity and overlapping nature of the Commission Proceeding and the Criminal Proceeding, the Application satisfies the relevance threshold.

[31] Y submits that the Evidence sought in this Application is relevant to:

(a) the credibility of the Crown witnesses formerly employed by Z Corporation;

(b) the propriety of all business conducted by Z Corporation;

(c) the reliability of Z Corporation documentation to be used in the Criminal Proceeding; and

(d) the reliability of the conclusions reached by the Crown's forensic accounting expert in the forensic accounting report ("**Forensic Accounting Report**").

[32] With respect to credibility, Y submits that the Evidence will enable him to test the consistency between the testimony of a Crown witness at the Criminal Proceeding and the testimony the witness gave the Commission. In support of this position, Y cites *R v. Foster*, [1994] O.J. No. 4190 ("***Foster***"). Y submits that in *Foster* the court held that the most valuable means of assessing credibility was to examine the consistency between evidence at trial and what was said on prior occasions.

[33] Further, Y submits that the majority of the Respondents are expected to testify at the criminal trial.

[34] With respect to the propriety of the business conducted by Z Corporation, Y submits that the Evidence will allow him to challenge the reliability of the Crown's documentation. He submits that many of the expected Crown witnesses were either directly responsible for, or had knowledge of, the alleged widespread practice of altering and manipulating documents at Z Corporation, and that his ability to cross-examine on this issue, and thus to make full answer and defence, will be severely impaired if he does not have disclosure of the Evidence.

[35] Finally, Y submits that the Evidence is relevant to the Forensic Accounting Report, which, in essence, outlines the Crown theory of the case, and will enable him to cross-examine the Crown's forensic accounting expert, who is expected to testify in the Criminal Proceeding.

c) Right to Make Full Answer and Defence

[36] Y submits that the right of an accused to make full answer and defence is constitutionally guaranteed as a principle of fundamental justice in section 7 of the Charter as established in *R v. Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.) ("***Seaboyer***") and *Regina v. Stinchcombe* (1991), 68 C.C.C. (3d) ("***Stinchcombe***").

[37] Y distinguishes the facts of this case from those in *Re Black*, where the Commission could not guarantee that the use of any disclosed material would be consistent with Charter protection against self-incrimination.

[38] Therefore, Y submits that his right to make full answer and defence is the only constitutionally protected right at stake in the Application and that the Commission is obliged to weigh it heavily in its assessment of public interest.

d) Purported Use – Serious Criminal Charges

[39] Y submits that there could exist no more compelling purpose for granting a subsection 17(1) order than to enable the Applicant to defend himself against serious criminal charges in a Criminal Proceeding in which his liberty is at stake. Y notes that criminal courts have ordered production of evidence obtained by the Commission in the absence of the Commission's consent, and in cases in which the Commission was not a party to the proceedings. As examples of this, Y cites *R. v. Awde*, [1998] O.J. No 2959 (Ont. Prov. Ct.) at para. 8, and *Re Ontario Securities Commission and Crownbridge Industries Inc. et al*, [1989] O.J. No. 1811 (Ont. C.A.) at para. 13.

e) No Harm or Prejudice

[40] Y submits that specific harm to the person whose testimony is sought is a relevant factor for the Commission to consider.

[41] Y submits that the Respondents will not be prejudiced by the requested order because they are protected from self-incrimination under section 18 of the Act, section 5 of the Canada Evidence Act and section 13 of the Charter.

f) Commission Proceedings have Concluded

[42] Y submits that the absence of an ongoing investigation that might be compromised by the disclosure is a relevant factor to be considered. In *Coughlan, supra* at para. 57, the court agreed that "[t]he fact that there is no ongoing investigation that might be compromised by disclosure is a relevant factor to be taken into account in determining the public interest in disclosure."

[43] Y submits that there is no outstanding investigation in the instant case as all matters have been resolved pursuant to settlement agreements. Y distinguishes the present case from *Re Black,* which was decided in the context of an ongoing Commission proceeding.

g) Respondent's Co-operation with the Police and the Crown

[44] Y submits that a respondent's co-operation with the police and the Crown effectively diminishes the expectation of privacy the respondent has with regard to the evidence. Y cites *Foster* for support of this proposition. In *Foster*, the witness whose testimony was being sought had testified before the Commission and in the criminal proceeding in question. The court ruled that these facts lessened the "the … concern about violating a person's right to privacy and the requirement of a heightened sensitivity." (*Foster, supra,* at para. 9. See also: *Hill v. Gordon-Daly Grenadier Securities*, [2001] O.J. No. 4181 (Ont. Div. Ct.)

[45] Y submits that the Respondents who are opposed to this Application have fully co-operated with police and are expected to be Crown witnesses in the Criminal Proceeding.

B. Staff

[46] Staff does not oppose disclosure of the Evidence provided by the Non-Objecting Respondents, but does oppose disclosure of the Evidence provided by the No Position Respondents, Non-Responding Respondents and Opposing Respondents.

1. Voluntary Evidence

[47] Staff submits that while Voluntary Evidence is not subject to section 17 of the Act, its disclosure to Y during the Commission Proceeding was subject to the implied undertaking rule against its use for any purpose other than making full answer and defence in the Commission Proceeding, and the Applicant's former counsel signed express acknowledgements that this material could not be used for any purpose other than making full answer and defence in the Commission Proceeding.

[48] Accordingly, Staff brought a motion for directions with regard to the Respondents who provided Voluntary Evidence.

2. The SEC Respondents

[49] Staff submits that the SEC advised that they have no process similar to the Commission's section 17 process through which Y can get a copy of the SEC transcripts. Staff therefore arranged a process between itself, the SEC and Y whereby the SEC will consent to Staff giving a copy of the transcript of the testimony of the SEC Respondents to the Crown. The Crown will then include this material in its disclosure to Y in the Criminal Proceeding.

[50] Accordingly, no Order is required and there is no need for us to consider the SEC Respondents any further in these reasons.

3. The Non-Objecting Respondents

[51] Relying on *Re Black*, Staff submits that it is in the public interest to authorize the use and disclosure of documents and testimony produced by the Non-Objecting Respondents for the purpose of Y's full answer and defence in the Criminal Proceeding.

[52] Staff's submissions focused on the Application with respect to the Opposing, Non-Responding, No Position and Not Located Respondents.

4. Opposing, Non-Responding, No Position and Not Located Respondents

a) The Commission's Discretion to make Orders under section 17

[53] Staff submits that when considering the term "public interest" in section 17 of the Act, the Commission must "evaluate the extent to which the policies of the Act [are] served by the purpose for which disclosure [is] sought and the harm done by disclosure to confidentiality interests or other individual interests." The Commission "must weigh and balance these competing interests in determining whether the public interest favour[s] disclosure" (*Deloitte CA*, *supra*, at para. 31).

[54] Staff also submits that "the OSC is obligated to order disclosure only to the extent necessary to carry out its mandate under the Act" (*Deloitte SCC*, *supra*, at para. 29, quoted in *Re Black*, *supra*, at para. 75).

b) The Public Interest Jurisdiction of the Commission

[55] Staff submits that the Commission should look to its discretion in public interest proceedings under section 127 of the Act to guide its decision with regard to the public interest under section 17.

[56] Staff submits that the Commission has a "very wide discretion" to determine the meaning of the public interest with regard to the making of an order under section 127 of the Act. Staff submits that in so doing, the Commission should consider both of the purposes of the Act described in section 1.1, namely providing protection to investors from unfair, improper or fraudulent practices and fostering fair and efficient capital markets and confidence in capital

markets (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 (S.C.C.) ("***Asbestos***") at para. 41).

[57] Staff submits that the principles set out in *Asbestos* in the context of a section 127 proceeding apply with equal force to the commission's exercise of its public interest jurisdiction under section 17 of the Act, and therefore the Commission has the same broad latitude to determine "whether and how" to exercise its public interest discretion under section 17 of the Act.

c) Application of the General Principles

[58] Staff submits that it is not in the public interest to authorize the use and disclosure of the Evidence produced by the Not Located Respondents or the No Position, Non-Responding, or Opposing Respondents. Staff submits that its position is consistent with *Re Black*, where the Commission ordered disclosure only with respect to the individuals who consented.

[59] Further, Staff submits that Y bears the onus of demonstrating that disclosing the Evidence is in the public interest, and has failed to meet that onus. Staff submits that Y is engaged in a "fishing expedition" and has not provided sufficient particulars to demonstrate that the Evidence sought is relevant. Staff contrasts *Foster*, where the court ruled that the defendants who requested disclosure were not going on a "fishing expedition" as they knew that the items being requested contained "statements by the complainants relating to the very charges their clients are facing" (*Foster*, *supra* at para. 32).

[60] Staff submits that an *O'Connor* application in the Criminal Proceeding may be the more appropriate forum for the application with regard to the Not Located Respondents and the No Position, Non-Responding and Opposing Respondents because the Evidence Y seeks is relevant to the Criminal Proceeding, there being no ongoing Commission Proceeding.

V. ANALYSIS

A. Jurisdiction and Forum

[61] We do not accept Staff's submission that Y's motion should be brought in the Criminal Proceeding in the form of an *O'Connor* application. We find that the Act gives the Commission authority to determine the issues raised in this application for the following reasons:

(a) The Evidence was obtained in an investigation conducted by Staff.

(b) Part VI of the Act is intended to facilitate and protect the Commission's investigations. It would therefore be inappropriate for the Commission to abdicate its responsibility to protect its investigations.

(c) Part VI of the Act contemplates disclosure and use of compelled evidence outside a Commission proceeding. Subsection 17(1) grants the Commission a broad discretion to authorize disclosure and use of compelled evidence where it would be in the public interest, and does not restrict to whom disclosure may be made or the purposes for which the compelled evidence may be used, subject to subsection 17(3), subsection 17(7) and section 18. (*Re Black*, *supra*, at para. 70).

(d) Finally, the Commission has the expertise necessary to determine the issues that arise in a subsection 17(1) application.

B. General Principles

[62] Staff submits that the Commission has the same broad latitude in exercising its public interest discretion under section 17 of the Act as it does when exercising its public interest discretion under section 127. However as this Commission stated in *Re X and A Co.*:

> Section 17, unlike s. 127, is part of Part VI of the Act which has a narrow purpose relating to investigations and compelled testimony. Accordingly, the term "public interest" in s. 17 of the Act should be interpreted in the context of Part VI of the Act: to enable the Commission to conduct fair and effective investigations and to give those investigated assurance that investigations will be conducted with due safeguards to those investigated, thus encouraging their co-operation in the process.
>
> (*Re X and A Co., supra*, at para. 28, quoted in *Re Black, supra* at para 74)

[63] We find that "the public interest referred to in section 17 relates to a balancing of the integrity and efficacy of the investigative process and the right of those investigated to their privacy and confidences, all in the context of certain proceedings taken or to be taken by the Commission under the Act" (*Re X and A Co., supra*, at para. 31).

[64] In *Deloitte SCC*, the Supreme Court of Canada considered the balancing exercise required under section 17. Justice Iacobucci stated, on behalf of the Court:

> I believe the OSC properly balanced the interests of disclosure of Philip and the officers, along with the protection of confidentiality expectations and interest of Deloitte. In this respect I am of the view that in making a disclosure order in the public interest under s. 17, the OSC has a duty to parties like Deloitte to protect its privacy interests and confidences. That is to say that [the] OSC is obligated to order disclosure only to the extent necessary to carry out its mandate under the Act.
>
> (*Deloitte SCC, supra* at para 29, followed in *Re X and A Co., supra*, at para. 29)

[65] In *Re Black*, after considering *Re X and A Co.* and *Deloitte SCC*, the Commission reaffirmed that "the Commission's public interest requires balancing the rights of individuals and companies that have been investigated against the Commission's mandate under the Act." (*Re Black, supra* at para 77)

[66] We accept that in determining the public interest under subsection 17(1), we must balance Y's right to make full answer and defence against the Respondents' reasonable expectations that their privacy interests will be protected.

[67] The Commission has established that a section 17(1) applicant bears a heavy burden of showing that disclosure is in the public interest:

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

[68] In *Re Black*, the Commission stated that the factors to be considered in weighing the public interest under subsection 17(1) of the Act include:

1. The high degree of confidentiality associated with compelled evidence and the strict limitations on its disclosure and use imposed by sections 16, 17 and 18 of the Act;
2. The reasonable expectations of witnesses compelled to provide evidence;
3. The potential harm to witnesses as a result of the Commission authorizing use and disclosure of their compelled evidence;

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

5. The integrity of Commission investigations.

(*Re Black, supra* at para. 135)

[69] The Commission in *Re Black* added that this was not meant to be an exhaustive list:

> . . . the challenge faced by the Commission in applications under Part VI of the Act involves striking a balance between the continued requirement for confidentiality and our assessment of the public interest at stake.
>
> In exercising the Commission's public interest discretion under subsection 17(1) of the Act, we must also consider the specific purpose for which the evidence is sought and the unusual or exceptional circumstances of the case and determine whether the disclosure of the evidence would serve a useful public purpose.
>
> (*Re Black, supra* at paras. 137-138)

[70] These are the general principles we have applied in determining the public interest in this Application.

C. Application of the General Principles to this Case

[71] We find it appropriate to consider the three categories of Respondents separately – the Not Located Respondents, the Non-Objecting Respondents, and the Opposing Respondents.

1. The Not Located Respondents

[72] Subsection 17(2)(b) of the Act states: "No order shall be made under subsection (1) unless the Commission has, where practicable, given reasonable notice and an opportunity to be heard" to "the person or company that gave the testimony or from which the information was obtained."

[73] Though attempts were made to serve all of the Respondents, N1 and N12 could not be located. In the circumstances, we were not prepared to order the disclosure of their Evidence. Accordingly, the Application with respect to N1 and N12 was adjourned *sine die*, until such time as those Respondents receive Notice of the Application. We made an oral ruling to that effect at the Hearing, and confirmed it by written order issued on December 18, 2008.

2. The Non-Objecting Respondents

[74] As stated in *Re Black*, we find that "the balance of factors in the public interest is very different" with respect to Non-Objecting Respondents (*Re Black, supra* at para. 243). We find that in these circumstances, the public interest requires us to give less weight to the potential harm or prejudice to Non-Objecting Respondents, and further that disclosure of their Evidence does not affect Staff's ability to give confidentiality assurances to future witnesses, thus maintaining the integrity of Commission investigations. Therefore, we find that it is in the public interest to authorize disclosure with respect to the Non-Objecting Respondents.

[75] Accordingly, we gave the following oral rulings with respect to the Non-Objecting Respondents at the conclusion of the Hearing and confirmed them by Confidential Orders dated December 18, 2008:

(a) a Confidential Order on a Motion for Directions, allowing disclosure and use of Voluntary Evidence, on terms, in respect of Respondent C13 (a Non-Objecting Respondent); and

(b) a Confidential Order, pursuant to subsection 17(1) of the Act, allowing disclosure and use of Compelled Evidence, on terms, in respect of Respondents C1, C3, C5, C6, C10, C11, C14, N4, N9 and O1 (Non-Objecting Respondents).

[76] After the Hearing, we received an application for disclosure and use of Compelled Evidence provided to the Commission by Z Corporation, along with Z Corporation's consent to the order sought, with respect to privileged documents obtained by Staff during the investigation in the Commission Proceeding which were never disclosed to Y. On January 9, 2009, we issued a Confidential Order, pursuant to subsection 17(1) of the Act, allowing disclosure and use, on terms, of the Compelled Evidence provided by Z Corporation.

3. The No Position, Non-Responding and Opposing Respondents

[77] At the conclusion of the Hearing, we reserved our decision with regard to the No Position Respondents (C4, C9 and C12), the Non-Responding Respondents (N3, N6, N7, N8, N10 and N11) and the Opposing Respondents (N2/O5, N5/O6, O2, O3 and O4).

[78] By Confidential Orders issued on January 9, 2009, we authorized disclosure and use, on terms, with regard to No Position, Non-Responding and Opposing Respondents who are on the Crown Witness List, and dismissed the Application with regard to No Position, Non-Responding and Opposing Respondents who are not on the Crown Witness List.

[79] In making these rulings, we considered the following factors:.

a) Relevance

[80] Staff submits that whereas its allegations against Y in the Commission Proceeding related to failure to make full, true and plain disclosure in Z Corporation's prospectus, the Criminal Proceeding concerns charges of fraud. Staff submits that Y is engaging in a "fishing expedition" in this Application and has not satisfied his onus of demonstrating that the Evidence is relevant to the Criminal Proceeding.

[81] We do not agree. We find that the subject matter and factual foundation of the charges in the Criminal Proceeding overlaps with the subject matter and factual foundation of Staff's allegations in the Commission Proceeding. Further, many of the Respondents have been identified by the Crown as possible witnesses in the Criminal Proceeding, suggesting that the Crown believes that the Evidence they provided to the Commission is also relevant to the Criminal Proceeding.

[82] We find that the Evidence given to the Commission in the Commission Proceeding is likely to be relevant in testing the credibility of the Crown witnesses and the reliability of the documentary evidence concerning the conduct of business at Z Corporation in the Criminal Proceeding.

b) Right to make Full Answer and Defence

[83] Y submits that if the Application is not granted, his counsel in the Criminal Proceeding may be unable to assess the consistency of the evidence given by Crown witnesses who also gave Evidence to Staff, and further that Y, who did receive disclosure of the Evidence during the Commission Proceeding, will not be able to inform his counsel of any inconsistency of which he is aware.

[84] In *Stinchcombe*, the SCC stated:

> [The] Common law right [to make full answer and defence] has acquired new vigour by virtue of its inclusion in s. 7 of the [Charter] as one of the principles of fundamental justice…. The right to make full answer and defence is one of the

pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted.

(*Stinchcombe*, *supra* at 9)

[85] Further, in *Seaboyer*, the SCC stated:

> The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution. As one writer has put it (*Doherty*, *ibid*., at p. 67):
>
> > If the evidentiary bricks needed to build a defence are denied the accused, then for that accused the defence has been abrogated as surely as it would be if the defence itself was held to be unavailable to him.
>
> In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled. The defence which the law gives with one hand, may be taken away with the other. Procedural limitations make possible the conviction of persons who the criminal law says are innocent.
>
> (*Seaboyer*, *supra* at 389)

[86] The Commission has held that disclosure should not be authorized just because a party to an action seeks production of compelled evidence for use in civil litigation (*Coughlan, supra* at para. 38, *Re X and A Co.*, *supra*, at para. 32, *Re Black*, *supra* at para. 82). That is not the situation in this case. Y has been charged with 12 counts of fraud over $5,000, contrary to section 380(1)(a) of the *Criminal Code*. Conviction on these charges may result in a sentence of incarceration. Accordingly, Y's right to make full answer and defence is a significant factor in our considerations.

c) The Commission's Power to Compel Testimony

[87] Balanced against Y's right to make full answer and defence, we must consider the reasons for the confidentiality provisions in Part VI of the Act. As the Commission noted in *Re Black*:

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

[88] The extraordinary nature of the Commission's power to compel testimony requires that we consider the reasonable expectations of a witness who provides compelled testimony, any potential harm and prejudice to the witness as a result of disclosure, and whether disclosure impinges on the witness's right to protection against self-incrimination or the integrity of the Commission's investigative powers.

[89] In *Re Black*, the Commission considered the harm and prejudice that could befall respondents if their compelled evidence was ordered disclosed for use in criminal proceedings in

the U.S., because of differences between the Canadian and American protections against self-incrimination. The majority of the Panel concluded:

> The difficulty with the draft order and draft undertakings [that the Applicants' defence counsel will comply with the draft order] is that neither the Commission nor the Applicant's counsel will have any control over the use made of the Evidence once it is used in the U.S. Criminal proceeding. Any order made by the Commission will not and cannot have extra-territorial effect and, as such, will not constrain the U.S. Attorney or others who may come into possession of the Evidence.
>
> (*Re Black*, *supra*, at para. 230)

[90] However, the majority stated that disclosure "would be appropriate where the Commission or an Ontario court could exercise control over the use and derivative use in order to ensure that the witnesses' rights against self-incrimination would be protected" (*Re Black*, *supra*, at para. 232).

[91] In this case, disclosure is sought for use in a criminal proceeding in Canada. Therefore, we find that the protections against self incrimination offered by section 18 of the Act, sections 7 and 13 of the Charter and section 5 of the Canada Evidence Act provide sufficient protection for the Respondents such that disclosure will not result in harm, prejudice or self-incrimination. Further, because the Commission Proceeding has concluded, we find that ordering disclosure in this case will not negatively impact the Commission's investigative powers in this case.

[92] We note that the orders sought by the Applicant include terms restricting the use of the Evidence. This is consistent with the principle that Compelled Evidence should be disclosed for limited purposes only where and to the extent that the Commission is satisfied that disclosure is in the public interest.

d) The Crown Witness List

[93] For the reasons given above, we find that for the No Position, Non-Responding and Opposing Respondents who received notice of the Application, a demarcation can be made between those who are on the Crown Witness List and those who are not.

[94] We are satisfied that where the Crown has named a Respondent as a potential witness, that Respondent's Evidence is relevant to the Criminal Proceeding, and further, that Y's right to make full and answer and defence strongly favours that disclosure should be made where a Respondent is on the Crown Witness List. In these circumstances, we believe that disclosure will generally not adversely impact the Respondent's reasonable expectations of confidentiality and protection against self-incrimination, absent evidence to the contrary. We are of the view that the Commission's power to craft appropriate safeguards around the use of disclosed evidence, its power to enforce compliance with its orders and the statutory and constitutional protections against self-incrimination discussed above, vitiate any potential harm or prejudice to a witness in these circumstances.

[95] We are not prepared to order disclosure of the Evidence of No Position, Non-Responding or Opposing Respondents who are not on the Crown Witness List because we are not satisfied that Y needs their Evidence to make full answer and defence in the Criminal Proceeding. In these circumstances, we find that these Respondents' reasonable expectations of privacy and confidentiality must prevail and disclosure should not be ordered.

[96] Accordingly, we issued the following written orders on January 9, 2009:

(a) a Confidential Order on a Motion for Directions, allowing disclosure and use, on terms, of the Voluntary Evidence provided by Respondents C12 (a No Position Respondent) and N8 (a Non-Responding Respondent), who received notice of the Application and are on the Crown Witness List, and dismissing it with respect to Respondents N7 and N11 (Non-Responding Respondents), who received notice of the Application but are not on the Crown Witness List, without prejudice to the Applicant renewing his Motion if circumstances change, including N7 and N11 being added to the Crown Witness List; and

(b) a Confidential Order, pursuant to section 17 of the Act, allowing disclosure and use, on terms, of the Compelled Evidence provided by Respondents C4, C9, N3, N6, N5/O6, N10, O2, O3 and O4 (No Position, Non-Responding and Opposing Respondents), who received notice of the Application and are on the Crown Witness List, and dismissing it with respect to Respondent N2/O5 (an Opposing Respondent), who received notice of the Application but is not on the Crown Witness List, without prejudice to the Applicant renewing his Application if circumstances change, including N2/O5 being added to the Crown Witness List.

VI. CONCLUSION

[97] After the Hearing, we invited the parties' written submissions on whether the Orders and these Reasons should be released to the public, and if so, on what basis, including the timing of publication and whether monikers should be retained, rather than identifying the Respondents. In written submissions, Y and Staff agreed that Respondents should not be identified by name but only by moniker. While Staff submitted that the Orders and Reasons should be published immediately, while retaining the use of monikers, Y submitted that publication should be deferred pending the completion of the Criminal Proceeding.

[98] After considering the parties' submissions, we concluded that publishing the Orders and Reasons, while retaining the use of monikers rather than names, is consistent with the open courts principle and also with the confidentiality and disclosure provisions of Part VI of the Act. However, we have concluded that, in keeping with the open courts principle, the Orders and Reasons should be published in anonymized form without further delay without awaiting the completion of the Criminal Proceeding.

[99] For the reasons discussed above, we issued the following Confidential Orders, which are to be made public concurrently with the publication of these Reasons:

(a) a Confidential Order, dated December 18, 2008, on a Motion for Directions, allowing disclosure and use, on terms, of the Voluntary Evidence provided by Respondent C13 (a Non-Objecting Respondent);

(b) a Confidential Order, dated December 18, 2008, pursuant to section 17 of the Act, allowing disclosure and use, on terms, of the Compelled Evidence provided by Respondents C1, C3, C5, C6, C10, C11, C14, N4, N9 and O1 (Non-Objecting Respondents), and adjourning the Application *sine die* with respect to N1 and N12 (Not Located Respondents);

(c) a Confidential Order, dated January 9, 2009, on a Motion for Directions, allowing disclosure and use, on terms, of the Voluntary Evidence provided by Respondents C12 (a No Position Respondent) and N8 (a Non-Responding Respondent), who received notice of the Application and are on the Crown Witness List, and dismissing it with respect to Respondents N7 and N11 (Non-Responding Respondents), who received notice of the Application but are not on the Crown

Witness List, without prejudice to the Applicant renewing his Motion if circumstances change, including N7 and N11 being added to the Crown Witness List;

(d) a Confidential Order, dated January 9, 2009, pursuant to section 17 of the Act, allowing disclosure and use, on terms, of the Compelled Evidence provided by Respondents C4, C9, N3, N6, N5/O6, N10, O2, O3 and O4 (No Position, Non-Responding and Opposing Respondents), who received notice of the Application and are on the Crown Witness List, and dismissing it with respect to Respondent N2/O5 (an Opposing Respondent), who received notice of the Application but is not on the Crown Witness List, without prejudice to the Applicant renewing his Application if circumstances change, including N2/O5 being added to the Crown Witness List; and

(e) a Confidential Order, dated January 9, 2009, pursuant to subsection 17(1) of the Act, allowing disclosure and use, on terms, of the Compelled Evidence provided by Respondent Z Corporation.

[100] Where disclosure and use of Voluntary Evidence has been ordered, we have imposed the following terms:

1. The Applicant's counsel may make disclosure of and use the Evidence solely for the purpose of the examination of any witness who testifies in the Criminal Proceeding, in order to allow the Applicant to make full answer and defence to the charges made against him in the Criminal Proceeding.

2. Disclosure and use of the Evidence will be on the basis that:

   a. The Applicant and his counsel will not use the Evidence other than as expressly permitted by this Order;

   b. Except as expressly permitted by this Order, the Evidence shall be kept confidential;

   c. Any use of the Evidence other than as expressly permitted by this Order will constitute a violation of this Order;

   d. The Applicant and his counsel shall maintain custody and control over the Evidence so that copies of the Evidence and any other information in their possession which was obtained pursuant to or as a result of this Order are not disclosed or disseminated for any purpose other than the use expressly permitted by this Order;

   e. The Applicant's counsel will not file any part of the Evidence on the public record in the Criminal Proceeding unless it is necessary for the Applicant to make full answer and defence in the Criminal Proceeding;

   f. The Evidence shall not be used for any collateral or ulterior purpose;

   g. The Applicant and his counsel shall, promptly after the completion of the trial and any appeals in the Criminal Proceeding, return all copies of the Evidence to Staff or confirm in writing that they have been destroyed; and

   h. This Order does not affect any rights the Respondent has to protection against self-incrimination granted by the *Canadian Charter of Rights and Freedoms* and the *Evidence Act of Ontario*.

[101] The following additional safeguard was added to the disclosure orders made pursuant to subsection 17(1) in respect of Compelled Evidence:

i. This Order does not affect the prohibition on use of compelled testimony contained in section 18 of the Act.

DATED in Toronto, Ontario this 31st day of August, 2009.

"Lawrence E. Ritchie" *"Mary G. Condon"*

Lawrence E. Ritchie Mary G. Condon