Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
P.O. Box 55, 19th Floor, 20 Queen Street West, Toronto ON M5H 3S8
CP 55, 19e étage, 20, rue queen ouest, Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, as amended

- AND -

IN THE MATTER OF
IRWIN BOOCK, STANTON DEFREITAS, JASON WONG, SAUDIA ALLIE, ALENA DUBINSKY, ALEX KHODJIAINTS, SELECT AMERICAN TRANSFER CO., LEASESMART, INC., ADVANCED GROWING SYSTEMS, INC., INTERNATIONAL ENERGY LTD., NUTRIONE CORPORATION, POCKETOP CORPORATION, ASIA TELECOM LTD., PHARM CONTROL LTD., CAMBRIDGE RESOURCES CORPORATION, COMPUSHARE TRANSFER CORPORATION, FEDERATED PURCHASER, INC., TCC INDUSTRIES, INC., FIRST NATIONAL ENTERTAINMENT CORPORATION, WGI HOLDINGS, INC. and ENERBRITE TECHNOLOGIES GROUP

REASONS AND DECISION ON DISCLOSURE

(Section 127 of the *Securities Act*, *Ontario Securities Commission Rules of Practice* (1997), 20 O.S.C.B. 1947)

Hearing:	October 21, 2009 November 2, 2009 November 20, 2009 January 8, 2010	
Decision:	February 9, 2010	
Panel:	James E. A. Turner Mary G. Condon	Vice-Chair and Chair of the Panel Commissioner
Counsel:	Jay Naster	For Irwin Boock
	Kathryn J. Daniels Sean P. Horgan Usman M. Sheikh Amanda Heydon	For Staff of the Ontario Securities Commission

TABLE OF CONTENTS

REASONS AND DECISION

I. INTRODUCTION

[1] The issue in this matter is whether compelled testimony and evidence obtained from a person who is a respondent in an Ontario Securities Commission (the "**Commission**") administrative proceeding, which evidence was obtained for purposes of an investigation by the U.S. Securities and Exchange Commission (the "**SEC**"), should be disclosed to Co-Respondents (as defined below) in the Commission proceeding notwithstanding an undertaking given by Staff of the Commission ("**Staff**") to the respondent.

[2] We have concluded that the compelled testimony and evidence must be disclosed to the Co-Respondents. These are our reasons.

II. BACKGROUND

[3] In response to a request for assistance from the SEC, on June 30, 2006, the Commission issued an order pursuant to subsection 11(1)(b) of the *Securities Act*,[1] R.S.O. 1990, c. S.5, as amended (the "**Act**") authorizing certain Commission Staff and Staff of the SEC ("**SEC Staff**") to investigate possible market manipulation schemes by or involving KSW Industries Inc., a Nevada Corporation ("**KSW**"), and Lease Smart, Inc. ("**LSI**"), the activities of a Toronto-based transfer agent, Select American Transfer Co. ("**SAT**"), and associated entities and persons. Subsequent amendments to the order added and removed Staff and SEC Staff, most recently, on January 27, 2009 (the order as amended is referred to in these reasons as the "**Section 11 SEC Order**"). The Section 11 SEC Order includes the following paragraph:

> IT IS HEREBY FURTHER ORDERED pursuant to section 16(2) of the Act that the information obtained pursuant to this order is for the exclusive use of SEC, forward sharing or disclosure of the information to any third party is expressly prohibited, absent a further Order of the Commission.

[4] The Section 11 SEC Order relates to the investigation of what we will refer to as the "**KSW matter**".

[5] On May 23, 2007, the Commission issued an order pursuant to subsection 11(1)(a) of the Act authorizing Staff to investigate possible breaches of Ontario securities law by SAT, LSI and others. A subsequent amendment on May 30, 2007 added and removed Staff. That order relates to the investigation of what we will refer to as the "**SAT matter**".

[6] The KSW matter and the SAT matter involve the investigation of some of the same persons and some of the same issues.

[7] On October 16, 2008, the Commission issued a Notice of Hearing in this matter (referred to in these reasons as this "**Proceeding**"), and Staff issued a Statement of Allegations, against

[1] See Schedule A for relevant provisions of the Act.

Irwin Boock ("**Boock**"), SAT, LSI and the other persons referred to in the style of cause above, alleging "a complex scheme of securities fraud". This Proceeding resulted from the investigation of the SAT matter.

[8] On November 14, 2008, Staff issued a summons requiring Boock to attend for an examination on December 17, 2008. The summons was issued under the authority of the Section 11 SEC Order.

[9] In a letter dated January 9, 2009, counsel for Boock confirmed that it had been agreed that Boock would appear on January 29, 2009 for examination. The letter includes the following statement:

> Based on our discussions, I have been informed that the OSC has undertaken to erect an ethical wall precluding any access to, or use of, information obtained by the SEC further to the summons, by Staff of the OSC engaged in the prosecution of Mr. Boock pursuant to the Notice of Hearing issued on October 16, 2008. I understand that this will apply to both the testimony and any documents that may be produced by Mr. Boock pursuant to the summons.
>
> During our telephone discussion, I asked for clarification as to why the OSC has erected the ethical wall noted above given what I understand to be the considerable overlap between the OSC allegations and the SEC inquiry. You kindly agreed to get back to me on this issue.
>
> It should also be noted that it is my understanding that the request made by the SEC which resulted in the issuance of the summons, was further to a request made in accordance with the IOSCO MOU to which both the OSC and SEC are signatories. In the circumstances, absent the consent of Mr. Boock, the SEC is precluded from sharing the testimony obtained with any criminal law enforcement agency. Furthermore, disclosure of any documents obtained pursuant to the summons to criminal law enforcement would require that an order be obtained from the OSC pursuant to s. 17 of the Securities Act and that Mr. Boock would be entitled to reasonable notice before any such order were made. In the event that my understanding in this regard is incorrect, please advise.

[10] In a responding letter dated January 16, 2009, Staff confirmed that an ethical wall (the "**Ethical Wall**") had been established:

> With regards to your inquiry relating to the ethical wall, I confirm that Staff has undertaken to erect an ethical wall to screen off access to any documents or material obtained by Staff named in the s. 11(1)(b) order in the matter of KSW Industries Inc. ("KWS") [sic] for the purposes of assisting the U.S. Securities and Exchange Commission Staff. Without responding specifically to your comments on this issue, you are aware that there are times when it is not appropriate for information sharing directly or indirectly to take place amongst teams of investigators. Staff have determined in this case that it is appropriate to establish two separate teams in the Select American and KSW matters. A protocol with

> screening measure has been established to ensure the efficacy of the screen. If you wish to discuss these measures, I am happy to do so.
>
> With respect to your comments relating to the forward sharing of evidence compelled from your client to criminal law authorities, I confirm that Staff share your understanding. Evidence obtained pursuant to s. 11(1)(b) is provided to the SEC on the basis that it cannot be forward shared without first returning to our Commission and obtaining the requisite Order under s. 17 on notice to the individual from whom evidence was compelled.

[11] On January 20, 2009, the Commission re-issued a summons to Boock to attend at the Commission for examination by Staff and SEC Staff. The examination pursuant to that summons is referred to in paragraph 14 of these reasons.

[12] On the same day, Staff signed a "Protocol for the Treatment of Evidence and Testimony Obtained in relation to Select American Transfer Company and KSW Industries Inc." (the "**Protocol**"). The purpose of the Protocol is stated in its preamble to be as follows:

> Staff have obtained a s. 11(1)(a) order and commenced regulatory proceedings in the matter of Select American. Staff have also recommended that criminal proceedings be commenced against certain respondents in the Select American matter. The Securities and Exchange Commission ("SEC") has requested assistance with respect to an investigation they are conducting in the matter of KSW Industries Inc. ("KSW"). Staff have obtained a s. 11(1)(b) order for the purposes of assisting the SEC. The Select American and KSW matters have, in part, similar respondents and issues at hand. In light of the recommendation relating to criminal charges in the Select American matter it is of critical importance that no information compelled on behalf of the SEC for the KSW matter be shared either directly or indirectly with those individuals involved in the Select American matter.

[13] The Protocol identifies two teams composed of different members of Staff: the team involved in this Proceeding ("**SAT Staff**") and the team involved in the KSW matter ("**KSW Staff**"). The Protocol provides, amongst other things, that SAT Staff "will not access" KSW Staff files whether filed electronically or in hard copy; that SAT Staff will not discuss this Proceeding with KSW Staff, but for the purposes of responding to SEC requests for assistance; that compelled testimony or documents obtained in the KSW matter will be locked or otherwise secured against access by persons other than KSW Staff; and that no unauthorized person is to attempt to gain access. The acknowledgement signed by members of Staff confirms that "a breach of the Protocol could be in violation of the Securities Act".

[14] On January 29 and 30, 2009, Boock attended for examination in accordance with the Commission's summons. Present were KSW Staff and SEC Staff, but not SAT Staff. Before the examination began, counsel for Boock stated on the record:

> I am advised, and have been given an undertaking by the Ontario Securities Commission and staff of the Commission, that the information that is obtained

> today is for the exclusive use of the Securities and Exchange Commission and will not be used by the Ontario Securities Commission in the context of the ongoing proceeding currently pending before the Ontario Securities Commission. And I understand that that is confirmed as well in the Order that was October, the Investigation Order that has been entered as Exhibit 2. (Transcript of Compelled Examination of Boock, January 29, 2009, 10:11-18).

[15] No comment was made by KSW Staff on the record in response to that statement.

[16] On August 31, 2009, SAT Staff sent an e-mail to counsel for the Respondents in this Proceeding refusing a request to provide a copy of the Protocol to the Respondents and stating that it "was put in place to keep all enforcement options open for Staff of the Commission with respect [to] any and all of the Respondents".

[17] Staff represents that it has complied with the Protocol. In accordance with the Protocol, only SAT Staff are involved in this Proceeding and SAT Staff have not had access to the testimony, documents and information compelled from Boock under the Section 11 SEC Order (the "**Compelled Evidence**").

[18] On October 2, 2009, Stanton DeFreitas, a Respondent in this Proceeding, brought a motion under section 17 of the Act seeking disclosure of "all documentation and information" subject to the Ethical Wall (the "**DeFreitas Motion**").

[19] On October 8, 2009, Boock refused to consent to a request by KSW Staff to permit disclosure to the other Respondents in this matter of the scope and terms of the undertaking given by Staff to Boock (the Respondents in this matter, other than Boock, are collectively referred to as the "**Co-Respondents**").

[20] On October 9, 2009, KSW Staff made disclosure to all the Respondents in this Proceeding of all testimony and evidence obtained in connection with the KSW matter, other than the Compelled Evidence.

[21] On October 14, 2009, KSW Staff brought a motion (the "**Staff Motion**"), on notice to all of the Respondents in this matter, seeking an order authorizing disclosure to the Co-Respondents of the particulars of the undertaking given by Staff to Boock (but not particulars of the Compelled Evidence) in order to permit the Co-Respondents to effectively advance the DeFreitas Motion.

[22] On October 21, 2009, we held a hearing to address the Staff Motion. Given the nature of the issues, the hearing was held *in camera* and involved only KSW Staff and Boock, and not the Co-Respondents.

[23] At the hearing on October 21, 2009, KSW Staff and Boock disagreed as to the terms and scope of the undertaking given by Staff to Boock. Following that hearing, on October 22, 2009, we requested through the Office of the Secretary to the Commission that KSW Staff and Boock make submissions to us on the following six questions:

1. What are the terms of the undertaking given by Staff in favour of Mr. Boock? Does that undertaking restrict the use in an administrative proceeding before the Commission of the information subject to it? Does that restriction apply to any party to the proceeding or specific parties (other than Staff)?

2. What was the reasonable expectation of Mr. Boock with respect to the scope of the undertaking and Staff's compliance with that undertaking?

3. Does the fact that the ethical wall established by Staff has been terminated in respect of all information, other than that subject to the Staff undertaking, affect the undertaking or Staff's obligation to comply with it?

4. To what extent does the section 11 order of the Commission dated January 27, 2009 In the Matter of KSW Industries restrict the "use" in this proceeding of the information obtained by the SEC pursuant to that order?

5. If the Commission concludes that the Staff undertaking remains in effect, should the Commission nonetheless exercise its discretion to require disclosure of the information subject to the undertaking to the other Respondents named In the Matter of Irwin Boock *et al*?

6. Would the disclosure of that information to the other Respondents be unfair to Mr. Boock and, if so, how?

[24] On November 2, 2009, we held an *in camera* hearing at which KSW Staff and Boock made submissions on the scope of the questions referred to in paragraph 23 of these reasons. It was agreed at that time that the issues arising from the questions would be heard and addressed in two stages. Because questions 1 to 4 involve the terms and application of the undertaking, submissions on those questions were to be heard as a first step at an *in camera* hearing involving only KSW Staff and Boock. A second separate hearing would be held, if necessary, on notice to all the Respondents in this matter, to hear submissions on questions 5 and 6, which would be dealt with as part of the DeFreitas Motion.

[25] KSW Staff and Boock filed written submissions with respect to questions 1 to 4 and made oral submissions at an *in camera* hearing held on November 20, 2009. At that time, KSW Staff took the position that the undertaking does not prevent disclosure of the Compelled Evidence to the Co-Respondents. If we agree with that position, it would be unnecessary for us to address the Staff Motion. However, Boock took the position that the undertaking does prevent that disclosure. At the conclusion of that hearing, we reserved our decision and requested KSW Staff and Boock to return and make submissions on questions 5 and 6. In doing so, we acknowledged that the Co-Respondents may have an interest in the answers to those questions and that the Co-Respondents would be given the opportunity to make submissions on them in the future, if that was necessary in the circumstances.

[26] On December 10, 2009, SAT Staff and counsel for Boock, DeFreitas and Wong attended a brief appearance at which the hearing on the merits in this Proceeding was scheduled to commence on February 1, 2010, subject to the outcome of the matters currently before us. (That hearing was subsequently adjourned *sine die* by Commission order.) The resumption of the

hearing to address the matters currently before us, involving only KSW Staff and Boock, was set for January 8, 2010.

[27] KSW Staff and counsel for Boock filed written submissions and, on January 8, 2010, we held an *in camera* hearing to complete submissions by KSW Staff and Boock on the matters currently before us.

[28] KSW Staff and counsel for Boock made submissions on each of the questions referred to in paragraph 23 of these reasons, other than question 5. These reasons focus on questions 1, 2 and 6, although to the extent necessary, we address each of the other questions in the course of our reasons. In our view, KSW Staff and Boock have been given ample opportunity to address the issues currently before us.

[29] For reference, we have set forth in Schedule A to these reasons the relevant provisions of the Act, and we have set forth in Schedule B to these reasons sections 7, 11 and 13 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1992, c. 11 (the "***Charter***").

III. ANALYSIS

A. Positions of the Parties as to the Scope of the Undertaking

(i) Submissions by KSW Staff

[30] KSW Staff acknowledges that an undertaking was given by Staff to Boock and accepts that the undertaking prevents SAT Staff from using the Compelled Evidence in this Proceeding or as a basis for informing its position at the hearing on the merits of this Proceeding. However, KSW Staff submits that the undertaking does not prevent disclosure of the Compelled Evidence to the Co-Respondents and does not prevent the Co-Respondents from using the Compelled Evidence in this Proceeding.

[31] KSW Staff submits that the terms of the undertaking are as stated by counsel for Boock at the commencement of the examination of Boock on January 29, 2009 (set out in paragraph 14 of these reasons). KSW Staff submits that the letters and e-mails exchanged by Staff and counsel for Boock prior to that date reflect statements of position, but not an agreement or undertaking. KSW Staff submits that the scope of the undertaking is defined by its plain words, which apply only to the use of the Compelled Evidence, not disclosure of it. Further, KSW Staff submits that Boock's reasonable expectations as to the extent of the undertaking would have been informed by his knowledge that Staff is obligated to disclose to all respondents in a Commission proceeding all relevant information. KSW Staff has represented to us that the Compelled Evidence is relevant to this Proceeding.

[32] KSW Staff submits that the undertaking does not restrict disclosure of the Compelled Evidence to the Co-Respondents, or the Co-Respondents' use of that evidence in this Proceeding. KSW Staff submits that respondents in Commission proceedings are entitled to disclosure of all relevant materials and information in the possession of Staff in order to permit the respondents to make full answer and defence. The Commission has held that Staff's

disclosure obligation is a broad duty akin to the "*Stinchcombe* standard" established in criminal law (see paragraph 70 of these reasons).

[33] KSW Staff submits that it has and will continue to comply with the undertaking not to use the Compelled Evidence in this Proceeding. KSW Staff also submits that the undertaking by its terms restricts the use of the Compelled Evidence by Staff, not by the Co-Respondents.

[34] Further, KSW Staff submits that, as a legal matter, the discretion of the Commission is not fettered by an undertaking given by Staff. Accordingly, the Commission is entitled to make any decision it considers to be in the public interest in these circumstances regardless of the terms of the undertaking.

[35] Finally, KSW Staff submits that the public interest requires that the Co-Respondents in this Proceeding be given access to the Compelled Evidence in order to be able to make full answer and defence.

(ii) Submissions by Boock

[36] Boock submits that the Compelled Evidence should not be disclosed to the Co-Respondents because of the undertaking given by Staff to Boock.

[37] Boock submits that the terms of the undertaking are set out, not only in the uncontradicted statement by Boock's counsel on January 29, 2009 at the outset of Boock's testimony, but also in the January 9, 2009 letter from Boock's counsel to Staff, which refers to previous discussions, and Staff's responding letter of January 16, 2009. Accordingly, Boock submits that the terms of the undertaking are that (i) SAT Staff would be prohibited from having access to the Compelled Evidence and that evidence would not be used at, or to inform SAT Staff's strategy in connection with, this Proceeding; (ii) the undertaking prevents disclosure to or use by the Co-Respondents of the Compelled Evidence in this Proceeding; and (iii) Staff undertook to create an ethical wall prohibiting access by SAT Staff to any information on the KSW side of the ethical wall.

[38] Boock submits that where the Commission is considering making a disclosure order under section 17 of the Act, the Commission must, in discerning the public interest, balance the integrity and efficacy of the investigation process and the rights of those investigated to their privacy (*Re X and A Co.* (2007), 30 O.S.C.B. 327 ("***Re X and A Co.***")).

[39] Boock submits that the exercise of the Commission's public interest jurisdiction in the circumstances should be informed by the Commission's decision in *Re Black* (2007), 31 O.S.C.B. 10397 ("***Re Black***") and the decision of the Ontario Court of Appeal in *Deloitte & Touche v. Ontario Securities Commission* (2002), 159 O.A.C. 257 ("***Deloitte (C.A.)***"). In *Re Black*, the Commission concluded that the decision in *Deloitte (C.A.)* "is the leading authority on the test for disclosure under subsection 17(1) of the Act." In *Deloitte (C.A.)*, the Ontario Court of Appeal, in allowing the appeal, stated:

> The Commission recognized that it could order disclosure under s. 17(1) only if Staff established that disclosure to the . . . respondents was "in the public interest". Citing *Coughlan, Re* (2000), 143 O.A.C. 244 (Ont. Div. Ct.) at para. 38,

the Commission observed at p. 5 that in determining whether disclosure was warranted:

> [I]t must consider the purpose for which the evidence is sought and the specific circumstances of the case. … [I]n determining whether to order disclosure it must balance the continued requirement for confidentiality with its assessment of the public interest at stake, including harm to the person whose testimony is sought.

(*Deloitte (C.A.)*, *supra*, at para. 15, cited in *Re Black*, *supra*, at para. 82.)

[40] Boock also refers to the Commission's comments in *Re Black* about the exercise of its public interest jurisdiction in the circumstances before it:

> The Commission recognizes that it must exercise its discretion under subsection 17(1) within the parameters of the Act and the Charter. With respect to the discretionary decisions of administrative agencies, the Supreme Court stated:
>
> > … that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.
>
> …
>
> Staff agrees that the Respondents' reasonable expectations of privacy and the integrity of the Commission's investigative powers are also factors for the Panel to consider.
>
> …
>
> … we conclude that a witness's reasonable expectations of privacy and confidentiality are a significant factor in our public interest jurisdiction.
>
> (*Re Black, supra*, at paras 87, 110 and 123.)

[41] Boock submits that the Commission usually does not authorize, and Staff usually does not conduct, compelled examinations of a respondent after Staff has commenced a Commission administrative proceeding because that would be fundamentally unfair to the respondent and contrary to the principles reflected in the *Charter*. Boock submits that his compelled testimony at the request of the SEC was conducted for the predominant purpose of "incriminating" him, and therefore, the principles set out by the Supreme Court of Canada in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 ("***Branch***") apply. That is to say that it would be fundamentally unfair and inappropriate for the Compelled Evidence to be used against him in this Proceeding.

[42] Boock submits that by giving the undertaking and obtaining the Section 11 SEC Order, the Commission gave effect to its obligation to assist the SEC while at the same time ensuring

that the Compelled Evidence would not prejudice Boock's right to a fair hearing in this Proceeding.

[43] Further, Boock submits that in determining the scope of Staff's undertaking, the Commission is not limited to the bare words of the undertaking but is also entitled to consider the context in which the undertaking was given, Staff's intention in giving it, and Boock's legitimate expectations as a result (*R. v. Mandate Erectors & Welding Ltd* (1999), 221 N.B.R. (2d) 79 (N.B.C.A.) at para. 5). Boock submits that we should determine "the spirit of the undertaking, regardless of what words were used" (*R. v. Wolf*, [1978] O.J. No. 2686 (Ont. Co. Ct.) at paras. 5 to 8).

[44] Boock submits that the position taken by KSW Staff as to the scope of the undertaking effectively renders the undertaking useless and of no effect. He submits that no undertaking was necessary to give Boock use and derivative use immunity in respect of criminal proceedings because those protections are set out in the *Evidence Act*, R.S.O. 1990, c. E. 23, as amended, the *Canada Evidence Act*, R.S.C. 1985, c. C-5, and the *Charter*. Boock submits that Staff's interpretation of the undertaking would allow the Compelled Evidence to be used against him in this Proceeding by the Co-Respondents. From his perspective, it makes no difference whether it is SAT Staff or a Co-Respondent who uses the Compelled Evidence against him. Boock submits that "this is the prejudice that the undertaking was intended to guard against."

[45] Boock submits that pursuant to the undertaking, SAT Staff are to have no knowledge of the Compelled Evidence, and if SAT Staff "cannot access the information, they clearly cannot use or disclose that information." Further, Boock submits that if KSW Staff cannot disclose the Compelled Evidence, the Co-Respondents cannot obtain it, let alone use it.

B. The Terms and Scope of the Undertaking

(i) The Terms of the Undertaking

[46] We must first determine the terms and scope of the undertaking given by Staff to Boock.

[47] In our view, the undertaking agreed to by Staff is principally reflected in the statement made by Boock's counsel at the commencement of Boock's compelled examination on January 29, 2009 (set out in paragraph 14 of these reasons). That statement is supplemented by the letter from Boock's counsel to Staff dated January 9, 2009 (relevant excerpts of which are set forth in paragraph 9 of these reasons) and the responding letter from Staff to counsel for Boock dated January 16, 2009 (relevant excerpts of which are set out in paragraph 10 of these reasons). The key terms of the undertaking are that the Compelled Evidence would not be used by the Commission or Staff in this Proceeding. We are not certain whether Staff intended by its January 16, 2009 letter to undertake *to Boock* that an ethical wall would be established. In all the circumstances, however, we have concluded that it was reasonable for Boock to believe that Staff had undertaken to him in that letter that Staff would establish an ethical wall between the KSW matter and the SAT matter.

[48] From Staff's perspective, the primary purpose of the Ethical Wall was to protect the integrity of Staff's investigation related to the SAT matter, because Staff had recommended criminal proceedings against certain respondents in connection with that matter. It would have

been improper for Staff to have compelled testimony from Boock for the predominant purpose of obtaining evidence for use against him in a criminal proceeding.[2]

[49] Accordingly, the Ethical Wall was established for the protection of Staff and the integrity of the SAT investigation in order to keep "all enforcement options open" to Staff. We note that Boock was not aware of the specific arrangements put in place to establish the Ethical Wall and he was not a party to or aware of the specific terms of the Protocol. That suggests that the purpose of the Ethical Wall was not for Boock's benefit. It is also clear, based on the letter from Boock's counsel to KSW Staff dated January 9, 2009, that at least one of Boock's concerns at the time was to ensure that the Compelled Evidence was not used in connection with a U.S. criminal proceeding.

[50] We would add that it is not completely clear to us why Staff gave the undertaking to Boock. The Ethical Wall was to protect the integrity of Staff's investigation in the SAT matter at a time when possible criminal proceedings were contemplated. It appears to us that KSW Staff was legally entitled to compel Boock's testimony in connection with the KSW matter, subject to the concerns addressed by establishing the Ethical Wall. However, we recognize Boock's submission that the undertaking was given to induce him to provide his testimony without objection (see paragraph 65 of these reasons).

(ii) Is the Undertaking Binding on the Commission?

[51] An undertaking given by Staff is not legally binding on the Commission, but we recognise the importance to the integrity of our investigatory and adjudicative processes that the Commission honour reasonable undertakings given by Staff. We agree that "public confidence in the integrity of the [Commission] and its Staff would not be enhanced if assurances given by counsel are simply dismissed out of hand as "not binding"" (*Coughlan v. WMC International Inc.* (2000), 143 O.A.C. 244 (Ont. Div. Ct.) ("***Coughlan***"), at para. 58).

[52] We also note that Rule 4.01(7) of the Law Society of Upper Canada's *Rules of Professional Conduct* states that "[a] lawyer shall strictly and scrupulously carry out an undertaking given to the tribunal or to another legal practitioner in the course of litigation". The Commentary to Rule 4.01(7) states that "[u]nless clearly qualified, the lawyer's undertaking is a personal promise and responsibility".

[53] Accordingly, we believe that the Commission should honour an undertaking given by Staff to a respondent unless there is a good reason not to do so.

(iii) Interpretation of the Undertaking

[54] We believe that we should give a fair and reasonable interpretation to the terms of the undertaking given by Staff to Boock. That interpretation must be made, however, within the regulatory context in which the undertaking was given. Our difficulty here is in determining exactly what the terms of the undertaking are and what is meant by them. There is certainly some ambiguity in the words used.

[2] See the discussion commencing at paragraph 83 of these reasons with respect of the application of sections 7, 11 and 13 of the *Charter* to Boock's Compelled Evidence.

[55] We would encourage Staff to be more precise in the future in articulating and establishing the terms of an undertaking given to a respondent. We note that KSW Staff did not respond on the record to the statement made by Boock's counsel in articulating the terms of the undertaking and that there is no other statement by Staff of the terms of the undertaking (although KSW Staff says that the undertaking is as set forth in the statement by Boock's counsel set out in paragraph 14 of these reasons). It would be preferable if matters such as those referred to in paragraph 71 of these reasons were expressly addressed in writing by Staff and a respondent in agreeing to an undertaking.

(iv) Conclusion

[56] Counsel for Boock has submitted that the undertaking means that the Compelled Evidence cannot be used in any way, manner or form whatsoever in this Proceeding by Staff, the Co-Respondents or anyone else.

[57] We do not agree with that interpretation.

[58] In our view, the undertaking applies by its express terms to the *use* of the Compelled Evidence by the Commission and Staff. It does not by its terms apply to the disclosure of the Compelled Evidence to the Co-Respondents or the use by the Co-Respondents of the Compelled Evidence in this Proceeding. As noted above, we believe that the terms of the undertaking must be interpreted and understood within the regulatory context in which the undertaking was given. We will address that context below in considering Boock's reasonable expectations in the circumstances.

C. Boock's Reasonable Expectations

[59] Boock submits that his reasonable expectations were that the undertaking applied to any use of the Compelled Evidence in this Proceeding, whether by Staff or the Co-Respondents.

(i) Submissions of KSW Staff on Reasonable Expectations

[60] KSW Staff submits that in determining whether it is in the public interest to order disclosure to the Co-Respondents, the Commission must consider the reasonable expectations of a person who is compelled to give evidence, but the Commission has discretion to order disclosure if it is satisfied that it is in the public interest to do so (*Re Black*, *supra*, at para. 20; *Re Berry*, *supra*, at paras. 124 and 125).

[61] KSW Staff submits that determining the public interest requires balancing the privacy interests and expectations of a person who is compelled to give evidence and the Commission's obligation to provide relevant disclosure in order to allow respondents in Commission proceedings to make full answer and defence (*Re Black*, supra, at paras. 77 and 83; *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] 2 S.C.R. 713 ("***Deloitte (SCC)***"), at para. 29; and *Re Suman and Rahman* (2009), 32 O.S.C.B. 592 ("***Re Suman and Rahman***") at para. 38).

[62] KSW Staff submits that Boock's reasonable expectations with respect to the undertaking would have been informed, not only by the specific terms of the undertaking, but by his

awareness of Staff's obligation to provide all relevant disclosure in Staff's possession to respondents in a Commission administrative proceeding.

[63] Further, KSW Staff submits that Boock's reasonable expectations would have been informed by his knowledge that the Commission has discretion to order disclosure of compelled evidence pursuant to section 17 of the Act, if the Commission "considers that it would be in the public interest" to do so (see *Coughlan, supra*, at para. 58; *Mason v. British Columbia (Securities Commission)*, 2003 BCCA 359, at para. 6; and *Deloitte & Touche LLP v. Ontario (Securities Commission)* (2005), 198 O.A.C. 333 (Ont. Div. Ct.)), at paras. 25 and 59).

[64] Finally, KSW Staff submits that Boock's reasonable expectations would have been informed by the terms of the Section 11 SEC Order itself, which expressly provided that it was subject to "further Order of the Commission" (see paragraph 3 of these reasons).

(ii) Boock's Submissions on Reasonable Expectations

[65] Boock submits that he had a reasonable expectation that the undertaking would ensure that his interests as a Respondent in this Proceeding would not be prejudiced in any way as a result of giving testimony under oath for the exclusive use of the SEC pursuant to the Section 11 SEC Order. Boock submits that although KSW Staff was expressly advised by counsel for Boock of his reasonable expectations and were invited to clarify any misunderstanding, KSW Staff did not do so at any time prior to or during Boock's compelled testimony. Boock says that he relied on the undertaking in agreeing to provide his testimony and in not challenging the right of KSW Staff to compel that testimony.

[66] Boock notes that the Section 11 SEC Order was issued pursuant to subsection 11(1)(b) of the Act, not subsection 11(1)(a) or subsection 11(1)(a) and subsection 11(1)(b), and that a recital to the order states that Staff "intend to use the information obtained in respect of an investigation for the regulation of the capital markets in another jurisdiction, being the United States". By giving the undertaking, Boock says that Staff was agreeing not to rely on subsection 17(6) of the Act in order to use the Compelled Evidence in this Proceeding.

[67] Further, Boock submits that at the time Staff obtained the Section 11 SEC Order, Staff was aware of its pre-hearing disclosure obligations to Boock and the Co-Respondents in this Proceeding. Nonetheless, the order states that the information obtained is "for the exclusive use of the SEC". Moreover, Boock contrasts the terms of the Section 11 SEC Order with the terms of a preceding order that stated simply that the information obtained was "for the use of SEC Staff", not the "exclusive use", and without the restriction on forward sharing the information. Boock submits the words "exclusive use" in the Section 11 SEC Order were deliberately chosen and reflect the Commission's intent that the Compelled Evidence not be used in any manner in this Proceeding.

[68] Boock also submits that the "further order" clause in the Section 11 SEC Order was not intended to allow Staff to disclose the evidence obtained pursuant to the Section 11 SEC Order for purposes of a Commission proceeding. Boock submits that no order is required to allow Staff to disclose information obtained pursuant to a section 11 order for the purpose of a "proceeding commenced or proposed to be commenced by the Commission" (subsection 17(6) of the Act).

Boock submits that the "further order" clause of the Section 11 SEC Order, rather than contemplating the disclosure sought by Staff, is intended to allow the SEC to seek the consent of the Commission to use the evidence obtained pursuant to the Section 11 SEC Order for another purpose (in accordance with the IOSCO Multilateral Memorandum of Understanding to which both the SEC and the Commission are signatories).

(iii) Discussion

[69] As noted above, we believe that the scope and terms of the undertaking must be interpreted and understood within the regulatory context in which the undertaking was given. In our view, it was not reasonable for Boock to have expected in these circumstances that the undertaking given by Staff was as broad as submitted to us by his counsel.

[70] The Commission has held that "Staff has a broad duty of disclosure akin to the *Stinchcombe* standard" established in criminal law (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326 ("***Stinchcombe***")). That standard "requires the Crown to disclose all relevant information, whether inculpatory or exculpatory, subject to the discretion of the Crown, which discretion is reviewable by the Court" (*Re Biovail Corp.* (2008), 31 O.S.C.B. 7161 at para. 15, cited in *Re Suman and Rahman* at para. 38; see also *Stinchcombe, supra,* at para. 29, *Re Market Regulation Services Inc.* (2008), 31 O.S.C.B. 5441 ("***Re Berry***"), and *Deloitte (SCC)*. That disclosure obligation is a matter of fundamental fairness to respondents in Commission proceedings in order to permit them to make full answer and defence. Further, "[a]ny order for disclosure under s. 17 implies use by the person to whom it is disclosed. . . ." (*Re X and A Co., supra,* at para. 40).

[71] In our view, Boock must be taken to have known in receiving the undertaking that (i) as noted above, the Commission has an obligation to ensure that Staff meets a very high standard of disclosure to all respondents in any Commission proceeding; (ii) testimony and evidence compelled under section 13 of the Act can be used in a Commission proceeding in accordance with subsection 17(6) of the Act without the need for a Commission order; (iii) the undertaking was not legally binding on the Commission; and (iv) the Commission has the discretion to amend or modify any Commission order if doing so is in the public interest. In this latter respect, we note that the express terms of the Section 11 SEC Order at least contemplate the possibility of such a subsequent amendment or modification.

[72] *Re Black* and *Deloitte (SCC)* are the leading decisions that consider the principles applicable to the exercise by the Commission of its discretion to issue a disclosure order under subsection 17(1) of the Act. It is important to note, however, that in *Re Black* the Commission was addressing whether to permit the use of testimony compelled under the Act in a U.S. *criminal proceeding*, not in a Commission administrative proceeding. That is a fundamentally different question than the one we are addressing here. That distinction was made by the Alberta Court of Appeal in *Alberta (Executive Director of Securities Commission) v. Brost*, [2008] A.J. No. 1071 (C.A.) ("***Brost (C.A.)***"), where the Court stated that:

> The use of the appellants' hearsay statements was not a situation like that in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, 123 D.L.R. (4th) 462 [*Branch*], where the question was whether the information and evidence acquired by investigators could be used on a *derivative* basis for a

> criminal, or quasi-criminal, law purpose. The use made of the content of the investigative interviews conducted in this case was not outside the scope of the very regulatory proceedings for which the authority to investigate was enacted. As noted in *Branch*, at para. 64, "[a]ll those who enter into [the securities] market know or are deemed to know the rules of the game." *Accordingly, they do not have a reasonable expectation that the content of their investigative interviews will not be used for the purposes of the Act.* [emphasis added]
>
> (*Brost (C.A.)* at para. 38.)

[73] In addition, in *Re Black*, of the 10 witnesses that gave compelled testimony, only one of those witnesses was a respondent in the Commission proceeding.

[74] In our view, a respondent in an administrative proceeding before the Commission should have a very low expectation of privacy with respect to the use in a *Commission administrative proceeding* of that respondent's own compelled testimony and evidence. Subsection 17(6) of the Act expressly contemplates that compelled evidence can be disclosed or produced in connection with a proceeding commenced or proposed to be commenced by the Commission under the Act, without the necessity for a Commission order under subsection 17(1). It is a much more difficult question if compelled testimony and evidence is proposed to be (i) provided to a foreign securities regulator, which is not subject to the provisions of the *Charter*, or (ii) used in any criminal proceeding.

[75] Both *Re Black* and *Deloitte (SCC)* were addressing whether it was in the public interest for the Commission to issue an order in the public interest under subsection 17(1) of the Act permitting disclosure of the compelled testimony and evidence. It is important to note that we are not required in this matter to issue an order under subsection 17(1) of the Act to authorize disclosure of the Compelled Evidence. The Commission is entitled to rely on subsection 17(6) of the Act to permit the use of the Compelled Evidence in this Proceeding. In this respect, subsection 17(6) of the Act does not distinguish between an investigation order issued under subsection 11(1)(a) or (b) of the Act. That means that we are not required to determine in this matter whether or not disclosure of the Compelled Evidence may be in the public interest under subsection 17(1) of the Act. In our view, that question does not arise because of subsection 17(6) of the Act.

[76] We note in this respect that subsection 17(6) was added to the Act subsequent to the compelled testimony that was the subject matter of the decision in *Deloitte (SCC)*.

[77] We would also note that in *Deloitte (SCC)* the Court was addressing whether compelled testimony of a third party, *who was not a respondent*, should be disclosed in connection with a Commission administrative proceeding. As noted above, we believe that a respondent to a Commission administrative proceeding has a much lower expectation of privacy than a third party who is not a respondent.

[78] We acknowledge that the terms of the Section 11 SEC Order contemplate the Compelled Evidence being "for the exclusive use of the SEC". The terms of that order must, however, be understood in context. The Commission would want to make absolutely clear to the SEC in

issuing the Section 11 SEC Order that the testimony and evidence compelled was only for the SEC's own use. The SEC has administrative and not criminal authority. Accordingly, the terms of the Section 11 SEC Order are primarily intended to convey to the SEC that the testimony and evidence compelled cannot be passed on by the SEC to third parties including U.S. criminal authorities. As a result, we do not believe that the specific wording of the Section 11 SEC Order, as it relates to the use of the Compelled Evidence, assists in resolving this matter. We also note that KSW Staff was appointed under the Section 11 SEC Order, together with SEC Staff, to carry out the examinations under that order. KSW Staff is in possession of the Compelled Evidence as a result.

[79] Finally, we would note that, because KSW Staff has access to the Compelled Evidence, it is able to make disclosure of that evidence to the Co-Respondents without disclosing the evidence to SAT Staff.

(iv) Conclusion

[80] In conclusion, we believe that Boock's reasonable expectations in this matter should be based on the specific terms of the undertaking interpreted within the regulatory context in which the undertaking was given. His interpretation of the undertaking should have been informed, in particular, by his knowledge that Staff has an obligation to make a high level of disclosure to other respondents in connection with a Commission proceeding and that, as a matter of principle, any compelled testimony and evidence can be used in a Commission administrative proceeding without the need for an authorizing Commission order. We have concluded above that we do not believe that the express words of the undertaking are as broad as submitted by counsel for Boock.

[81] We note, in any event, that Boock's reasonable expectations would not determine the outcome of this matter. Those reasonable expectations are simply one factor the Commission should weigh in deciding whether disclosure of the Compelled Evidence should be made to the Co-Respondents.

D. Fairness to Boock

[82] The other question we should address is whether disclosure of the Compelled Evidence to the Co-Respondents in these circumstances would be fundamentally unfair to Boock.

(i) Boock's Charter Arguments

[83] Counsel for Boock has argued that, in considering the question of fundamental fairness to his client, we should be informed by and should consider the protections available to Boock under sections 7, 11 and 13 of the *Charter*.[3] In essence, Boock argues that by compelling his testimony and evidence, and permitting the use of that testimony and evidence in this Proceeding, Staff is forcing him to incriminate himself contrary to the principles enshrined in the *Charter*. Boock submits that is fundamentally unfair.

[3] See Schedule B for the relevant provisions of the *Charter*.

[84] Boock also submits that Staff compelled his testimony after the issue of the Notice of Hearing and Statement of Allegations in this Proceeding. He submits that, at that point, the investigation was over and Staff and Boock were engaged in an adversarial adjudicative proceeding. Boock submits that it would be unfair and inappropriate for Staff to compel testimony from a respondent once an adjudicative proceeding such as this has been commenced against that respondent.

(ii) Staff Submissions

[85] Staff submits that the Supreme Court of Canada in *Branch* expressly approved the admissibility and use of compelled testimony and evidence in an administrative proceeding before a securities commission (in that case, the administrative proceeding was brought by the British Columbia Securities Commission ("**BCSC**")). The Court confirmed that compelling testimony for use in an administrative proceeding serves an important public purpose and does not infringe section 7 of the *Charter*. Accordingly, Staff submits that compelling testimony under the Act is not fundamentally unfair to a compelled witness even if that witness is a respondent.

[86] Staff also submits that there is currently only one proceeding outstanding in the SAT matter and that is this Proceeding. As a result, there is currently no other proceeding to which section 13 of the *Charter* can apply. Further, Staff submits that its ability to continue to investigate under a section 11 order is not affected by the issue of a notice of hearing or statement of allegations. In Staff's view, the commencement of an administrative proceeding does not affect Staff's ability to continue to investigate the matter and to compel testimony under a section 11 order.

(iii) Analysis and Conclusions

The Charter Arguments

[87] In our view, the case law is relatively clear as to the principles that we should apply in the circumstances.

[88] First, we note that subsection 12(1) of the *Statutory Powers Procedures Act*, R.S.O. 1990, c. S. 22, as amended, provides that a tribunal such as the Commission can require a person, including a party to a proceeding, to give evidence at an oral or electronic hearing. While that section does not fully answer the question whether compelling testimony and evidence in any particular circumstances may be fundamentally unfair, it does recognise as a matter of principle that administrative tribunals have the power to compel testimony and evidence from a party to a proceeding and that doing so is not inherently unfair.

[89] The Supreme Court of Canada stated in *Pezim* that "it is important to note from the outset that the [Securities Act] is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor, but other goals include capital market efficiency and ensuring public confidence in the system …" (*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557).

[90] This Proceeding is an administrative proceeding under section 127 of the Act, not a criminal proceeding, or a quasi-criminal proceeding under section 122 of the Act, in which penal sanctions may be imposed.

[91] In *Branch*, the Supreme Court of Canada considered whether two officers of a company could be compelled by the BCSC to give testimony. The officers argued that doing so violated their privilege against self-incrimination under section 7 of the *Charter*. In rejecting that argument, the Court emphasized the distinction between the regulatory role of the BCSC and the objective of criminal prosecution. L'Heureux-Dubé J., in her concurring reasons, stated:

> To recapitulate, although the distinction may often be difficult to draw, courts must try to differentiate between unlicensed fishing expeditions that are intended to unearth and prosecute criminal conduct, and actions undertaken by a regulatory agency, legitimately within its powers and jurisdiction and in furtherance of important public purposes that cannot realistically be achieved in a less intrusive manner. Whereas the former may run afoul of s. 7 of the Charter, the latter do not.
>
> (*Branch, supra,* at para. 81.)

The Commission recognised this distinction in *Glendale Securities Inc. (Re)* (1996), 19 O.S.C.B. 6273 ("***Glendale***") where it stated that:

> It is clear, however, that an administrative proceeding, such as this one, under the Act is not a criminal, or even quasi-criminal proceeding. Its purpose is not to punish anyone. Rather, it is to take such administrative action, if any, under section 127 of the Act as, on the basis of the evidence presented and the findings made, is required for the protection of investors and of the capital markets.
>
> (*Glendale* at 6274.)

[92] The Commission recently adopted a similar analysis in *Re Roger D. Rowan et al* (2010), 33 O.S.C.B. 91 ("***Rowan***") in concluding that section 11 of the *Charter* does not apply to an administrative proceeding before the Commission. In that case, the Attorney General of Ontario intervened and submitted that:

> [t]he criminal and quasi-criminal rights of section 11 of the Charter only apply to persons "charged with an offence." The Respondents are not persons "charged with an offence" within the meaning of section 11 of the Charter and cannot therefore rely on that section. Section 11 of the Charter does not apply to administrative proceedings such as these.
>
> (*Rowan* at para. 31.)

[93] The Commission in *Rowan* held that a hearing under section 127 of the *Act*, including a hearing in which an administrative penalty is sought, is fundamentally regulatory. The Commission cited *R. v. Wigglesworth*, [1987] S.C.J. No. 71 as distinguishing between state action

to promote public order and state action to regulate conduct within a private sphere of activity. The Commission concluded that its mandate relates to the latter and that section 11 of the *Charter* does not apply to an administrative proceeding under section 127 of the Act.

[94] In determining whether testimony and evidence can be compelled from a person "the crucial question is whether the predominant purpose for seeking the evidence is to obtain incriminating evidence against the person compelled to testify or rather some legitimate public purpose" (*Branch, supra,* at para. 7). In *Branch,* the Court concluded that the BCSC compelled the relevant testimony for a legitimate public purpose in regulating capital markets. Similarly in *Brost (C.A.)* and *Johnson v. British Columbia (Securities Commission)* [1999] B.C.J. No. 1885 ("***Johnson (C.A.)***"), the Alberta and British Columbia Courts of Appeal affirmed, respectively, the admissibility of compelled evidence in administrative hearings. The Commission has the same public purpose to protect investors and regulate capital markets in this Province. Staff is bringing this Proceeding in furtherance of those objectives.

[95] The onus is on Boock to show that the purpose of the Compelled Evidence was to "incriminate" him. The British Columbia Court of Appeal addressed this issue in *Johnson (C.A.)*:

> Merely because a person is compelled to give information that may be used against him at an administrative hearing does not mean that he is "incriminating" himself, as Branch makes clear ... The onus is on the applicant to show that the purpose of the hearing is to incriminate him or gather evidence that will be used to incriminate him, in a criminal or quasi-criminal proceeding.
>
> (*Johnson (C.A.), supra,* at para. 9.)

[96] While SAT Staff contemplated at one time the possibility of bringing criminal proceedings against certain respondents in the SAT matter, SAT Staff have represented to us that they no longer anticipate such a proceeding. As a result, the Ethical Wall has been terminated except as it relates to the Compelled Evidence.

[97] While we recognise that the sanctions that may be imposed by the Commission in an administrative proceeding can have significant regulatory and economic consequences to a respondent, those sanctions are not penal in nature and no respondent can be incarcerated by the Commission in the exercise of its jurisdiction under section 127 of the Act. The Commission has concluded that "a hearing under section 127 of the Act, including a hearing in which an administrative penalty is sought, is fundamentally regulatory. It does not meet the 'criminal by nature' characterization of the offence" (*Rowan, supra,* at para. 40; see also *R. v. White*, [1999] 2 S.C.R. 417).

[98] In our view, the fact that a financial penalty may be imposed on a respondent does not make a Commission administrative proceeding under section 127 of the Act criminal or penal in nature.

[99] Accordingly, in our view, sections 7 and 11 of the *Charter* do not apply to restrict the testimony and evidence that may be compelled in connection with this Proceeding. We recognise that Boock should not have been compelled to give evidence under the Section 11 SEC Order if the predominant purpose of compelling that evidence was to incriminate him for purposes of a

criminal prosecution or where other significant prejudice to a fair trial may arise from the testimony (see *Branch* at para. 9). The Ethical Wall was put in place by Staff to ensure that the Compelled Evidence was not used in the SAT matter at a time when a criminal proceeding was a possibility. The objective was to ensure that the Compelled Evidence would not be used or available to SAT Staff in connection with any possible criminal proceeding against any respondent in the SAT matter. That objective is consistent with the principles reflected in sections 11 and 13 of the *Charter*.

[100] It is clear that the predominant purpose for obtaining the Compelled Evidence was to assist the SEC in an administrative and not a criminal investigation. That purpose is apparent from the terms of the Section 11 SEC Order. Similarly, the question we are addressing is whether the Compelled Evidence should be disclosed to the Co-Respondents for potential use in this Proceeding. We should add that, in our view, disclosure of the Compelled Evidence to the Co-Respondents carries with it the ability of the Co-Respondents to use that evidence in this Proceeding, subject to the overriding discretion of the Panel hearing this matter on the merits to determine on what basis such evidence may be used. That use, however, would clearly be in connection with a regulatory proceeding and not a criminal or quasi-criminal proceeding.

[101] Section 13 of the *Charter* provides that a witness in any proceeding has the right not to have any incriminating evidence so given used to incriminate the witness in any other proceedings, except a prosecution for perjury or for giving contradictory evidence. If the Compelled Evidence is used in this Proceeding, Boock will have the benefit of use and derivative use immunity in respect of any use of the Compelled Evidence in any subsequent criminal prosecution, if one were to occur. The Commission recognised this protection in *Glendale* where it stated:

> No criminal or quasi-criminal proceedings are currently pending against Parr, and we were advised by Ms. Blake, counsel for Staff, that none are contemplated. Even if such proceedings are hereafter commenced, section 13 of the Charter will prevent evidence given by Parr in these proceedings from being used to incriminate him in the subsequent proceedings, and he will be entitled, under section 7 of the Charter, to claim derivative use immunity.
>
> (*Glendale, supra*, at 6287.)

[102] Accordingly, our analysis of the appropriate application of sections 7, 11 and 13 of the *Charter* does not lead us to conclude that it would be fundamentally unfair to Boock or inappropriate for us to order disclosure of the Compelled Evidence to the Co-Respondents.

Compulsion After the Notice of Hearing

[103] Boock also argued that the Compelled Evidence should not be used in this Proceeding because it was compelled after the issue of the Notice of Hearing and Staff's Statement of Allegations. The essence of this argument is that, once a notice of hearing is issued, the matter becomes an adversarial adjudicative proceeding and Staff's power to compel testimony and evidence from a respondent for purposes of investigation comes to an end. Accordingly, it is

submitted that it would be unfair thereafter to permit Staff to continue to compel testimony from a respondent, particularly as the date of the hearing on the merits approaches.

[104] There is no question that the Commission's authority under section 11 of the Act is a power of investigation. It is an extraordinary power and one that should be exercised by Staff with some restraint. We agree with the Commission's statement in *Re X and A Co.* that:

> Section 17, unlike s. 127, is part of Part VI of the Act which has a narrow purpose relating to investigations and compelled testimony. Accordingly, the term "public interest" in s. 17 of the Act should be interpreted in the context of Part VI of the Act: to enable the Commission to conduct fair and effective investigations and *to give those investigated assurance that investigations will be conducted with due safeguards to those investigated,* thus encouraging their cooperation in the process.
>
> …
>
> *The power of compulsion in s. 13 of the Act is extraordinary.* It gives the Commission meaningful and powerful tools to use in its investigation of matters. Part VI, however, has limitations and protections with respect to confidentiality, and the possible use of compelled testimony. From this, we discern that *the public interest referred to in s. 17 relates to a balancing of the integrity and efficacy of the investigative process and the right of those investigated to their privacy and confidences,* all in the context of certain proceedings taken or to be taken by the Commission under the Act.
>
> …
>
> With respect to the interplay between s. 17 as to disclosure and s. 16(2) as to use, in our view, they work hand in hand. Any order for disclosure under s. 17 implies use by the person to whom it is disclosed and would likely deal expressly with the question of use and the implied undertaking to the Commission (cf. the order of the Commission …) [emphasis added].
>
> (*Re X and A Co., supra*, at paras. 28, 31 and 40.)

As discussed above, the Commission's power to compel testimony and evidence should not be exercised where the predominant purpose is to incriminate a person. This principle was reflected in *Branch* and reiterated by the Supreme Court of Canada in *R. v. Jarvis*, [2002] 3 S.C.R. 757.

[105] In our view, the authority of Staff to investigate under a section 11 order does not end when an adjudicative proceeding is commenced. There are many legitimate reasons why an active investigation may continue after the issue of a notice of hearing or a statement of allegations. The Commission stated in *Re X and A Co.* that "there is no indication in the Act that a notice of hearing in any way changes Staff's ability to exercise its power under an order made pursuant to section 11 of the Act". Similarly, the Court stated in *Johnson v. British Columbia (Securities Commission),* [1999] B.C.J. No. 552 ("***Johnson S.C.***") that "the probable purpose of the further interviews is to obtain further information which may be used against Johnson at the

Hearing itself. However, this would appear to be a permissible purpose under the reasoning in *Branch*" (*Johnson S.C., supra,* at para. 122). The Court in *Alberta (Executive Director of Securities Commission) v. Brost,* [2008] A.J. No. 250 ("***Brost Q.B.**")* made a similar point:

> I am not persuaded that Brost should not attend the interview because a hearing has been scheduled. *Branch* demonstrates that securities regulators are subject to much less stringent procedural safeguards than criminal laws and that compelling personal attendance for investigation purposes is not constitutionally objectionable.
>
> (*Brost Q.B.* at para. 30.)

[106] In our view, Staff may continue to compel testimony and evidence from a respondent after the issue of a notice of hearing or statement of allegations so long as that testimony and evidence is compelled *bona fide* for the purpose of further investigation and not for an improper purpose. It appears to us that the Compelled Evidence was obtained as part of a *bona fide* investigation being conducted by KSW Staff and SEC Staff and was not compelled for any improper purpose.

[107] We would add that a number of the decisions referred to us by counsel for Boock address the question of *procedural fairness* to a respondent. In the matter before us, we believe that it is clear that, as a procedural matter, Boock has been treated fairly and has had ample opportunity to make his case to us on the issues we must decide.

[108] In our view, but for the undertaking, there is no legal reason why the Compelled Evidence cannot be disclosed to the Co-Respondents and used by them in this Proceeding (subject to the overriding discretion of the Panel hearing the matter on the merits to determine on what basis they will permit the use of the Compelled Evidence as evidence at that hearing). Further, in our view, requiring disclosure of the Compelled Evidence to the Co-Respondents would not be fundamentally unfair to Boock even though the Compelled Evidence was obtained after the issue of the Notice of Hearing and Statement of Allegations in this Proceeding.

[109] Staff submitted to us that the only purpose for compelling testimony and evidence from a respondent under a section 11 order is to be able to obtain testimony and documents to be introduced as evidence at the hearing on the merits. A principal purpose of compelled testimony is to permit Staff to obtain relevant documents and evidence for use at a hearing. On the other hand, in our view, compelled testimony is a form of hearsay and the Panel hearing a matter on the merits has discretion to determine on what basis such evidence may be used at that hearing.

E. Compliance with the Undertaking

[110] In our view, our conclusion that the undertaking does not prevent disclosure of the Compelled Evidence to the Co-Respondents does not eliminate the benefit to Boock of receiving the undertaking. We intend to order Staff to continue to comply with the undertaking and the Protocol as it relates to the Compelled Evidence. Accordingly, SAT Staff will continue to be excluded from obtaining or reviewing the Compelled Evidence or using it in this Proceeding. The Compelled Evidence will therefore not inform SAT Staff's approach to or strategy at the hearing on the merits in this Proceeding. The Co-Respondents will determine what use, if any,

they propose to make of the Compelled Evidence at the hearing on the merits. If necessary, the Panel hearing this matter on the merits will determine on what basis they will permit use of the Compelled Evidence as evidence at that hearing.

[111] We would note that, in considering the matters before us, we have not seen or reviewed any of the Compelled Evidence. We have simply relied on the representation made by KSW Staff that the Compelled Evidence is relevant to this Proceeding. In addition, in reaching our decision, we have recognised that Boock and the Co-Respondents may be adverse in interest and adversaries at the hearing on the merits.

[112] As noted above, we have concluded that the undertaking given by Staff to Boock does not prevent disclosure of the Compelled Evidence to the Co-Respondents or the use by the Co-Respondents of that evidence in this Proceeding. Had we come to the conclusion that the undertaking prevented disclosure of the Compelled Evidence to the Co-Respondents, we would have had to determine whether it was nonetheless in the public interest for Staff to disclose the Compelled Evidence to the Co-Respondents. We have considered that question in the circumstances before us. We have considered the interest Boock would have in enforcing the undertaking, and the competing right of the Co-Respondents to obtain all relevant disclosure in connection with this Proceeding. The Commission has accepted in the past that Staff has a high duty of disclosure to respondents akin to the standard articulated in *Stinchcombe*. That is an overarching principle that ensures fundamental fairness to respondents by permitting them to make full answer and defence to proceedings brought by the Commission against them.

[113] Based on those considerations, we have concluded that the obligation of Staff to make full disclosure of all relevant information to the Co-Respondents would have to take precedence over the interests of Boock in enforcing the undertaking. The Co-Respondents must be in a position to make full answer and defence in this Proceeding based on all relevant information. Accordingly, we would have ordered disclosure to the Co-Respondents of the Compelled Evidence notwithstanding the undertaking, had we concluded that the undertaking prevented that disclosure.

IV. CONCLUSIONS AND DECISION

[114] Accordingly, we have concluded that:

1. The undertaking given by Staff to Boock does not prevent disclosure by KSW Staff of the Compelled Evidence to the Co-Respondents.

2. Accordingly, KSW Staff shall disclose the Compelled Evidence to the Co-Respondents.

3. Staff shall maintain the Ethical Wall in place with respect to the Compelled Evidence. Staff shall continue to comply with the Protocol as it relates to the Compelled Evidence and SAT Staff may not have access to or review the Compelled Evidence and may not use that evidence in connection with the hearing on the merits in this Proceeding.

4. The Co-Respondents are entitled to make such use of the Compelled Evidence in the hearing on the merits as they may propose, subject to the overriding discretion of the Panel hearing the matter on the merits to decide on what basis they will permit the use of the Compelled Evidence as evidence at that hearing.

[115] If any of the Compelled Evidence is admitted as evidence at the hearing on the merits, the Panel hearing that matter will also determine on what basis SAT Staff may be permitted to respond to that evidence. Our conclusions shall not restrict the Panel hearing this matter on the merits from conducting that hearing on such terms as it considers appropriate.

[116] In our view, these decisions dispose of the DeFreitas Motion without the need for us to hear from the Co-Respondents.

[117] We are prepared to address any questions counsel may have with respect to the effect of our decision in this matter. While these reasons are being issued initially on a confidential basis, in our view, there is no reason for that confidentiality to continue. Accordingly, subject to any submissions counsel may wish to make in writing on that question, we propose to publicly release these reasons on February 16, 2010.

[118] Counsel for Boock has requested that our decision in this matter not take immediate effect. Accordingly, we direct Staff not to comply with paragraph 2 of our decision (set forth in paragraph 114 above) until February 16, 2010, unless Boock otherwise consents.

DATED at Toronto this 9th day of February, 2010.

"James E. A. Turner"	*"Mary G. Condon"*
James E. A. Turner	Mary G. Condon

Schedule A
Relevant Provisions of the *Securities Act* (Ontario)

Subsection 11(1) of the Act provides as follows:

> **11. (1) Investigation order** – The Commission may, by order, appoint one or more persons to make such investigation with respect to a matter as it considers expedient,
>
> (a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or
>
> (b) to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction.

Subsection 13(1) of the Act provides as follows:

> **13. (1) Power of investigator or examiner** – A person making an investigation or examination under section 11 or 12 has the same power to summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise, and to summon and compel any person or company to produce documents and other things, as is vested in the Superior Court of Justice for the trial of civil actions, and the refusal of a person to attend or to answer questions or of a person or company to produce such documents or other things as are in his, her or its custody or possession makes the person or company liable to be committed for contempt by the Superior Court of Justice as if in breach of an order of that court.

Subsection 16(2) of the Act provides as follows:

> **16. (2) Confidentiality** – If the Commission issues an order under section 11 or 12, all reports provided under section 15, all testimony given under section 13 and all documents and other things obtained under section 13 relating to the investigation or examination that is the subject of the order are for the exclusive use of the Commission or of such other regulator as the Commission may specify in the order, and shall not be disclosed or produced to any other person or company or in any other proceeding except as permitted under section 17.

Subsections 17(1) and (6) of the Act provide as follows:

> **17. (1) Disclosure by Commission** – 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,
>
> (a) the nature or content of an order under section 11 or 12;

(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; or

(c) all or part of a report provided under section 15.

…

(6) Disclosure in investigation or proceeding – A person appointed to make an investigation or examination under this Act may disclose or produce anything mentioned in subsection (1), but may do so only in connection with,

(a) a proceeding commenced or proposed to be commenced by the Commission under this Act; or

(b) an examination of a witness, including an examination of a witness under section 13.

Schedule B
Sections 7, 11 and 13 of the *Charter of Rights and Freedoms*

Section 7 of the *Charter* provides as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 11 of the *Charter* provides as follows:

> Any person charged with an offence has the right
>
> …
>
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> …

Section 13 of the *Charter* provides as follows:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.