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
YORK RIO RESOURCES INC., BRILLIANTE BRASILCAN RESOURCES CORP., VICTOR YORK, ROBERT RUNIC, GEORGE SCHWARTZ, PETER ROBINSON, ADAM SHERMAN, RYAN DEMCHUK, MATTHEW OLIVER, GORDON VALDE AND SCOTT BASSINGDALE**

**REASONS FOR DECISION ON A MOTION
(Section 127 of the *Securities Act*,
Rule 3 of the Ontario Securities Commission *Rules of Procedure*)**

Hearing:	August 22, 2011 November 1, 2011	
Reasons:	December 22, 2011	
Panel:	Vern Krishna, Q.C. Edward P. Kerwin	- Commissioner and Chair of the Panel - Commissioner
Appearances:	Hugh Craig Cameron Watson	- For Staff of the Commission
	Victor York	- Self-represented
	George Schwartz	- Self-represented

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REASONS FOR DECISION ON A MOTION

I. INTRODUCTION

[1] George Schwartz ("**Schwartz**"), a respondent in this proceeding, moves for an order for the exclusion and sealing of his compelled evidence, and the compelled evidence of others relating to him, because he claims that it was obtained after the establishment of penal liability under section 122 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") became the predominant purpose of Staff's investigation of him. Schwartz submits that he is entitled to the protection against self-incrimination provided by section 7 of the *Canadian Charter of Rights and Freedoms* (the "**Charter**"), in accordance with the decision of the Supreme Court of Canada in *R. v. Jarvis*, [2002] 3 S.C.R. 757 ("***Jarvis***"), and, therefore, the compelled evidence is inadmissible against him in this proceeding.

A. The York Rio Proceeding

[2] The York Rio Proceeding arises out of a Notice of Hearing issued by the Ontario Securities Commission (the "**Commission**"), dated March 2, 2010, in relation to a Statement of Allegations issued by Staff of the Commission ("**Staff**") against York Rio Resources Inc. ("**York Rio**"), Brilliante Brasilcan Resources Corp. ("**Brilliante**"), Victor York ("**York**"), Robert Runic ("**Runic**"), Schwartz, Peter Robinson ("**Robinson**"), Adam Sherman ("**Sherman**"), Ryan Demchuk ("**Demchuk**"), Matthew Oliver ("**Oliver**"), Gordon Valde ("**Valde**") and Scott Bassingdale ("**Bassingdale**"). On November 5, 2010, the Commission approved a settlement agreement between Staff and Robinson (*Re Robinson* (2010), 33 O.S.C.B. 10434). On June 6, 2011, the Commission approved a settlement agreement between Staff and Sherman (*Re Sherman* (2011), 34 O.S.C.B. 6560). York Rio, Brilliante, York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale are referred to collectively in these reasons as the "**York Rio Respondents**".

[3] Staff alleges that the York Rio Respondents engaged in a fraudulent "boiler room" operation involving the illegal distribution of York Rio securities from May 10, 2004 to October 21, 2008 and Brilliante securities from January 17, 2007 to October 21, 2008 (the "**Material Times**"). Staff alleges that the York Rio Respondents contravened subsections 25(1)(a), 53(1), 38(3) and 126.1(b) of the Act, contrary to the public interest. Staff also alleges that Schwartz, by trading in York Rio securities, breached the Commission's cease trade order made against him in relation to another matter, *Re Euston Capital Corp. and Schwartz* (2006), 29 O.S.C.B. 3920, which was extended from time to time and remained in effect during the Material Times, contrary to subsection 122(1)(c) of the Act and contrary to the public interest.

[4] The hearing on the merits in the York Rio Proceeding (the "**Merits Hearing**") commenced on March 21, 2011 and has continued for 33 days. Staff closed its case on August 11, 2011. Schwartz purportedly closed his case on August 19, 2011. York presented his case by calling two witnesses on September 21 and 28, 2011. On November 1, 2011, Schwartz cross-examined one of the two witnesses, William Farrage ("**Farrage**"), claiming he was a joint witness, which Staff opposed. None of the other York Rio Respondents appeared at the Merits Hearing, although Robinson and Sherman were called as witnesses by Staff. Following the close of evidence, Staff filed and served its written submissions on November 25, 2011. Schwartz and York served and filed their written submissions on December 9, 2011. We heard closing submissions on December 19 and 21, 2011.

B. The Search Warrant Motions

[5] On October 21, 2008, Staff conducted a search of offices located at 1315 Finch Avenue, West, Suite 501, Toronto (the "**Premises**"), pursuant to a search warrant that was issued under section 158 of the *Provincial Offences* Act, R.S.O. 1990, c. P.33 (the "**POA**") on October 16, 2008 (the "**Search Warrant**").

[6] In a previous motion brought on March 28, 2011 (the "**Schwartz Warrant Motion**"), Schwartz argued that the seizure of the materials related to York Rio during the course of execution of the Search Warrant (the "**York Rio Materials**") was not authorized by the Search Warrant, which authorized a search of the Premises for things and materials related to CD Capital Ltd. ("**CD Capital**"), operating as Brilliante, York, Brian Aidelman ("**Aidelman**"), Jason Georgiadis ("**Georgiadis**") and Richard Taylor ("**Taylor**") (collectively, the "**Brilliante Respondents**"). The Search Warrant identified a long list of "things to be searched for" pertaining to the Brilliante Respondents at the Premises. It was based on the Information to Obtain a Warrant ("**ITO**") prepared by Staff Investigator Wayne Vanderlaan ("**Vanderlaan**"). The ITO did not identify things and materials pertaining to York Rio as "things to be searched for" at the Premises. Schwartz submitted that at the time Vanderlaan swore the ITO, he had reason to believe that things and materials relating to York Rio would be found at the Premises but deliberately omitted this from the ITO. Schwartz submitted that the seizure of York Rio Materials was illegal, unfair and contrary to the public interest. He submitted that the Merits Hearing should be terminated, or alternatively, that the York Rio Materials should be excluded from the evidence.

[7] York brought a motion seeking the same remedies as the Schwartz Warrant Motion on very similar grounds, which we heard on May 3, 2011 (the "**York Warrant Motion**") (the Schwartz Warrant Motion and the York Warrant Motion together will be referred to in these Reasons as the "**Search Warrant Motions**").

[8] We gave oral rulings and issued orders dismissing the Search Warrant Motions on April 5, 2011 ((2011), 34 O.S.C.B. 6545) and May 5, 2011 ((2011), 34 O.S.C.B. 5455). Written reasons for our decisions were issued on June 1, 2011 ((2011), 34 O.S.C.B. 6545).

C. The Compelled Evidence and its Admission at the Merits Hearing

[9] On October 14, 2008, the Commission issued an order under subsection 11(1)(a) of the Act, authorizing Vanderlaan and other members of Commission Staff to investigate Schwartz and others in relation to York Rio (the "**Investigation Order**"). On March 18, 2009, Vanderlaan summonsed Schwartz to attend at the Commission for compelled examination on April 28, 2009 pursuant to section 13 of the Act (the "**Summons**").

[10] Pursuant to the Summons, Schwartz attended at the Commission without counsel on May 19, 2009, but stated at the outset of the examination that he believed that the purpose of the examination was to obtain incriminating evidence against him and that he would very likely be charged under section 122 of the Act. He stated that the examination violated his right to silence and to protection against self-incrimination. The examination was put over to June 15, 2009 to allow him to retain counsel.

[11] On June 15, 2009, Schwartz appeared without counsel. He restated his view that the examination was requested in the context of a section 122 proceeding and refused to answer questions without a declaration that Staff would not bring criminal charges

against him. Staff advised that the investigation "to this point" was administrative or regulatory, but that Staff was not willing to rule out quasi-criminal proceedings being taken depending on information obtained during the investigation. Staff also advised Schwartz that section 18 of the Act provides an absolute prohibition on the use of his compelled testimony against him in any quasi-criminal proceedings under section 122 of the Act. The examination was put over to June 29, 2009.

[12] Schwartz did not attend on June 29, 2009.

[13] On July 29, 2009, Schwartz appeared, again without counsel. He restated his view that the examination was requested in the context of a section 122 proceeding but agreed, if compelled, to answer the questions of Staff, subject to the protections offered under section 14 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**") and subsection 9(2) of the *Evidence Act*, R.S.O. 1990, c. E.23, as amended (the "**Evidence Act (Ontario)**"). The examination proceeded and was completed that day.

[14] During the Merits Hearing, Vanderlaan read in numerous excerpts from the transcript of Schwartz's compelled examination of July 29, 2009 as part of Staff's case. Vanderlaan also read in numerous excerpts from transcripts of the compelled examinations of York and other York Rio Respondents. Staff counsel stated that Staff would not rely on the compelled testimony of any one of the York Rio Respondents solely to make out the allegations against another York Rio Respondent.

[15] Following the close of Staff's case, Schwartz testified voluntarily at the Merits Hearing and was cross-examined by Staff.

D. The Exclusion of Evidence Motion

[16] On June 16, 2011, the sixteenth day of the Merits Hearing, Schwartz filed and served a request that a time and date be scheduled for the hearing of a motion, pursuant to Rule 3.1 of the Commission's *Rules of Procedure* (2010), 33 O.S.C.B. 8017 (the "**Rules**"), for an order for the exclusion from the evidence admitted at the Merits Hearing of his compelled evidence and any other compelled evidence obtained by Staff in the investigation of him, and an order that the compelled evidence admitted at the Merits Hearing be sealed by the Commission, to ensure it is not disclosed to any police force (the "**Motion**"). York took no part in the Motion.

[17] When the Panel enquired as to the status of the Motion on July 20, 2011, the eighteenth day of the Merits Hearing, Schwartz advised that he could not proceed until he had finished cross-examining Vanderlaan. Vanderlaan's testimony, including cross-examination on whether the investigation was administrative or criminal in nature, was completed on July 27, 2011, the twenty-second day of the Merits Hearing.

[18] On August 10, 2011, after the twenty-fourth day of the Merits Hearing, Schwartz filed and served another request that a time and date be scheduled for the hearing of the Motion.

[19] At the outset of the sitting of the Merits Hearing on August 11, 2011, we scheduled August 22, 2011 for the hearing of the Motion (the "**Motion Hearing**") and directed Schwartz to file his Notice of Motion by Friday, August 12, 2011, in accordance with Rule 3.2 of the Rules. On the morning of August 12, 2011, Schwartz advised that he would not be able to file and serve his Notice of Motion that day, but could do so by Monday, August 15, 2011. As Schwartz and Staff (the "**Parties**") agreed that the requested extension would not require an adjournment of the Motion Hearing, we granted Schwartz's request, in accordance with subrule 1.6(2) of the Rules.

[20] On August 15, 2011, Schwartz filed and served motion materials, including an affidavit of Schwartz and a memorandum of fact and law. Staff filed and served brief written submissions on the Motion on August 18, 2011.

[21] The Motion was heard on August 22, 2011. Staff counsel cross-examined Schwartz on his affidavit, and both Schwartz and Staff presented oral argument. We reserved our decision.

[22] When the Merits Hearing resumed on September 21, 2011, we invited the Parties to provide additional written submissions on *R. v. Wilder* (2001), 53 O.R. (3d) 519, a decision of the Ontario Court of Appeal ("***Wilder***"), by September 28, 2011 (Schwartz) and September 30, 2011 (Staff). Schwartz filed and served his supplementary submissions in respect of the *Wilder* decision (titled "**Amendment to a Motion**") on September 27, 2011. When the Merits Hearing resumed on September 28, 2011, Staff asked whether there would be any time set aside for oral argument in respect of the *Wilder* decision, and suggested that this could be scheduled for November 1, 2011 (the day set aside for the cross-examination of Farrage, a witness called by York). Although the Panel had only invited written submissions on the *Wilder* decision, the Motion having been previously argued in full, we gave York an opportunity to telephone Schwartz from the hearing room to ask whether Schwartz intended to supplement his written submissions on the *Wilder* decision with oral argument. Schwartz stated, through York, that he did not wish to do so. The next day (September 29, 2011), Schwartz sent an email to the Panel through the Office of the Secretary and copied to Staff, stating that he had "by error thought the oral submission [*sic*] were to be made this Friday, which is a religious holiday to me. I did not know until a subsequent discussion with Mr. York that they in fact were scheduled for November 1". He asked for "15 or 20 minutes on November 1" to make his oral submissions. The Panel, having considered the matter, granted the request the next day by email from the Office of the Secretary, allowing Schwartz 15 minutes on November 1, 2011 to offer any additional comments that he wished to make about the *Wilder* decision and giving Staff a brief opportunity to reply. Also on September 30, 2011, Staff filed its written submissions with respect to *Wilder*. On November 1, 2011, following the completion of Farrage's testimony, Schwartz gave oral submissions and Staff made a brief response on the *Wilder* decision in respect of the Motion.

[23] Having considered the evidence and submissions presented by the Parties, including their written and oral submissions with respect to the *Wilder* decision ("**Supplementary Submissions**"), we dismissed the Motion by order issued on November 8, 2011. Our reasons for dismissing the Motion are set forth below.

II. SUBMISSIONS OF THE PARTIES

A. Schwartz

[24] Schwartz submits that Staff could not legally compel him to give evidence against himself in this investigation because the investigation was predominantly penal (criminal or quasi-criminal) in purpose from an early stage, possibly as early as October 14, 2008, when the Investigation Order was issued, and certainly by July 29, 2009, when his compelled examination took place. His submissions rely heavily on the *Jarvis* decision.

[25] *Jarvis* concerned an income tax audit that led to a criminal investigation and ultimately to charges of tax evasion. In February and March 1994, acting upon a tip that the taxpayer had not reported income from the sale of his late wife's artworks on his 1990 and 1991 income tax returns, a Canada Customs and Revenue Agency ("**CCRA**") auditor

obtained certain information and documents from the taxpayer and his accountant as well as certain art galleries that had bought artwork from the taxpayer. On April 11, 1994, the auditor and her supervisor met with the taxpayer (the "**Interview**"). He provided further information and records and signed a bank authorization. On May 4, 1994, based on the additional information and records provided during the Interview, the auditor referred the file to the Special Investigations Section of CCRA, which began an investigation to determine whether a charge of tax evasion should be laid. In June 1994, after a review of the file, including the information and records provided during the Interview, the investigator determined that reasonable and probable grounds existed to seek a search warrant. In November 1994, a search warrant was issued under section 487 of the *Criminal Code*, R.S.C. 1985, c. C-46, as amended (the "**Criminal Code**"). Additional bank records were summonsed in early 1995. The taxpayer was charged under section 239 of the *Income Tax* Act *(Canada)*, R.S.O. 1985, c. 1, as amended (the "**ITA**").

[26] At the Provincial Court of Alberta – Criminal Division, the trial judge held that the audit had become an investigation by March 16, 1994, by which time the auditor had arranged for her supervisor to attend the Interview. Since the auditor did not caution the taxpayer at the Interview on April 11, 1994, the statements and documents he provided at the Interview were obtained in violation of his rights under section 7 of the Charter. The remedy was to remove reference to that information from the ITO. The trial judge concluded that what remained did not provide "reasonable grounds" and as a result, the searches violated the taxpayer's rights under section 8 of the Charter. The evidence was excluded from the trial pursuant to subsection 24(2) of the Charter, as were the bank records that had been obtained pursuant to the audit powers in the ITA after March 16, 1994. The trial judge granted a motion for a directed verdict of acquittal.

[27] On appeal to the Court of Queen's Bench of Alberta, the summary conviction appeal judge ordered a new trial, holding that only the taxpayer's statements during the Interview should have been excluded from the ITO and that the search warrant had been validly issued and there was no violation of the taxpayer's section 8 rights. However, he upheld the exclusion of the bank records obtained by use of the audit powers after March 16, 1994.

[28] The Court of Appeal of Alberta dismissed a further appeal and affirmed the order for a new trial.

[29] On further appeal, the Supreme Court of Canada considered whether CCRA's audit functions (including powers of inspection and examination) could be distinguished from its investigation functions, and summarized its conclusions at the outset of its reasons, as follows:

> Ultimately, we conclude that compliance audits and tax evasion investigations must be treated differently. While taxpayers are statutorily bound to co-operate with CCRA auditors for tax assessment purposes (which may result in the application of regulatory penalties), there is an adversarial relationship that crystallizes between the taxpayer and the tax officials when the predominant purpose of an official's inquiry is the determination of penal liability. When the officials exercise this authority, constitutional protections against self-incrimination prohibit CCRA officials who are investigating ITA offences from having recourse to the powerful inspection and requirement tools in ss. 231.1(1) and 231.2(1). Rather, CCRA officials who exercise the authority to conduct such

investigations must seek search warrants in furtherance of their investigation.

(*Jarvis*, *supra*, at para. 2)

[30] The Court elaborated on the distinction by stating:

> In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1). In essence, officials "cross the Rubicon" when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry.
>
> (*Jarvis*, *supra*, at para. 88)

[31] The Court set out a non-exhaustive list of factors to be considered in determining whether a compliance audit has turned into an investigation of possible criminal offences:

> In this connection, the trial judge will look at all factors, including but not limited to such questions as:
>
> (a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?
>
> (b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
>
> (c) Had the auditor transferred his or her files and materials to the investigators?
>
> (d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
>
> (e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
>
> (f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?
>
> (g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?
>
> It should also be noted that in this case we are dealing with the CCRA. However, there may well be other provincial or federal governmental departments or agencies that have different organizational settings which

> in turn may mean that the above factors, as well as others, will have to be applied in those particular contexts. [Emphasis in the original]
>
> (*Jarvis*, *supra*, at para. 94)

[32] Applying these factors to the facts before it, the Court found that there was no investigation into penal liability before May 4, 1994, when the auditor made the referral to the Special Investigations Section. The Interview was not an investigation into Jarvis's penal liability (in fact it revealed little that was new), and therefore the inclusion in the ITO of the information obtained as a result of the Interview did not violate the taxpayer's section 7 rights; the search warrant was validly obtained and the evidence would be admissible in any new trial. However, the Court upheld the lower court rulings with respect to the bank records, which were obtained by use of the audit powers at a time when the investigation was well underway. The appeal was dismissed and the order for a new trial upheld.

[33] Schwartz and Staff have strongly differing views on the interpretation of *Jarvis* and its application to the Motion.

[34] Schwartz submits that application of the *Jarvis* factors to this case suggests the following considerations:

> *(a) an objective assessment whether reasonable and probable grounds exist:*
>
> In York Rio, Vanderlaan's ITO lays out in great detail his belief that various offences occurred based on multiple grounds, and this was accepted as meeting the standard of reasonable belief in the commission of offences by the issuing Justice of the Peace. Schwartz notes that the ITO did not ask to seize any items for the purpose of affording evidence in support of administrative orders under section 127 of the Act. He submits that Staff was only authorized to seize evidence of section 122 offences under the Search Warrant, and therefore Staff's decision to seek a warrant under the POA shows that Staff needed more time to investigate quasi-criminal charges under section 122 of the Act.
>
> *(b) the conduct of Staff investigators – whether they were engaged in a focused, targeted investigation into specific conduct:*
>
> In York Rio, the Commission clearly targeted specific alleged illegal acts by named entities and individuals, including Schwartz.
>
> *(c) the nature of the evidence obtained by the Commission and its relevance to later proceedings:*
>
> Clearly the evidence obtained was relevant, material and compelling, requiring Vanderlaan to obtain multiple extensions on the seized items' detention.
>
> *(d) information or materials passing between the 'audit' or inspection branch and the branch that investigates offences for penal purposes:*
>
> This is inapplicable here, as [quasi-]criminal section 122 and administrative section 127 proceedings are combined in one branch and one individual. Vanderlaan, straddling the Rubicon, thus runs the risk of being subject to the full panoply of Charter standards at an *earlier stage* in

his investigation than otherwise.

[35] In cross-examination on his affidavit, Schwartz conceded that no charges giving rise to penal liability have been laid in relation to York Rio and he has not been approached by any police force in relation to criminal charges possibly being laid in the future. However, he relies on the principle that the liberty interest protected by section 7 of the Charter is engaged at the point of testimonial compulsion. He also notes that in *Jarvis,* the Supreme Court of Canada stated:

> It would be a fiction to say that the adversarial relationship only comes into being when charges are laid….we believe that allowing CCRA officials to employ ss. 231.1(1) and 231.2(1) until the point where charges are laid, might promote bad faith on the part of the prosecutors. Quite conceivably, situations may arise in which charges are delayed in order to compel the taxpayer to provide evidence against himself or herself for the purposes of a s. 239 prosecution. Although the respondent [CCRA] argued that such situations could be remedied by the courts, we view it as preferable that such situations be avoided rather than remedied.
>
> (*Jarvis*, *supra*, at para. 91)

[36] Schwartz submits that when Staff investigates a possible contravention of sections 25, 38 or 53 of the Act, for example, "it is engaged in a *de facto*, *ab initio* criminal investigation". He says all contraventions in the Act are offences subject to section 122 penal liability. Although most investigations do not result in criminal charges, and Staff may later seek an order in the public interest under section 127 of the Act, Schwartz submits that all investigations begin as criminal investigations.

[37] It follows, in Schwartz's submission, that Staff may have "crossed the Rubicon" as early as October 14, 2008, when the Investigation Order was issued on the basis that Schwartz and others "may have" contravened sections 25, 53 and 126.1(b) of the Act; October 16, 2008, when the Search Warrant was issued; October 21, 2008, when it was executed; or the various dates in 2008 and 2009 when the Detention Orders were extended. Schwartz also relies on the following evidence:

> (i) Vanderlaan, a Staff investigator, is a Provincial Offences Officer empowered to conduct Commission investigations into suspected offences under the Act.
>
> (ii) Two officers of the Joint Securities Intelligence Unit ("**JSIU**"), one of whom is an RCMP officer, and one of whom is a member of Staff, attended the Search on October 21, 2008. Schwartz included in his motion materials the business cards of the two officers, pages from the notebook of one of the officers, and a page from the RCMP website explaining the role of the JSIUs and Integrated Market Enforcement Teams ("**IMETs**").
>
> (iii) On June 24, 2009, Vanderlaan made a note that an Alberta investor had called him asking what was happening with the file and he advised the investor "that the investigation was progressing and that charges would likely be laid".
>
> (iv) On July 10/14, 2009, Vanderlaan submitted an affidavit to the Court to seek a further extension of the Detention Order which stated that Staff was investigating potential breaches of the Act.

(v) On September 8, 2009, Vanderlaan advised an investor by email that "charges will be filed".

(vi) On September 29, 2009, in an email to a group of York Rio investors, Vanderlaan stated:

> I have spoken to an investigator from York Regional Police and they are aware that it is entirely up to them whether or not they start an investigation. The problem from our end, however, is that we cannot share compelled information with the police until it becomes public. I am prohibited by the Securities Act from giving information that I have received by way of summons but I can share information that I received on a voluntary basis. Most of the good stuff is compelled and this may be why [YRP] might be hesitant to start an investigation at this point.
>
> Once our information becomes public, i.e. after a hearing, I imagine that I will again be speaking with the police.
>
> At no time did I inform any police agency that I did not want or require their assistance, again, it is up to them to decide if they want to start an investigation and I would not advise them one way or the other.

(vii) On December 24, 2009, Vanderlaan made a note that he had completed an Investigation Recommendation Report and submitted it for approval.

(viii) On January 5, 2010, in an email to an investor, Vanderlaan wrote: "Things are moving along. My report has been submitted to legal and we should be proceeding with charges shortly".

(ix) In the Statement of Allegations, issued on March 2, 2010, Staff alleged that the York Rio Respondents contravened subsections 25(1), 38(3), 53(1) and 126.1(b) of the Act, and that "Schwartz violated Ontario securities laws by trading in securities while he was prohibited from doing so by order of the Commission, contrary to section 122(1)(c) of the Act and contrary to the public interest".

[38] Schwartz submits that the evidence discussed at paragraphs 34 and 37 above shows that Staff was engaged in an ongoing criminal investigation, seeking judicial authority under the POA, at the time it obtained his compelled evidence, and may still be pursuing a criminal investigation.

[39] Schwartz requests that his compelled evidence and the compelled evidence of third parties against him be sealed. In his affidavit, Schwartz stated that he believes, based especially on the email described at subparagraph (vi) of paragraph 37 above, that once the York Rio Proceedings under section 127 of the Act are completed and a decision issued, Vanderlaan will notify the police that the compelled evidence admitted at the Merits Hearing is now a matter of public record and can be used against him by the police in a prosecution.

[40] Schwartz submits that although section 18 of the Act makes his compelled testimony inadmissible against him in any quasi-criminal prosecution under the POA, it

does not apply to prosecutions in any other jurisdiction, and it does not prohibit Staff from using the compelled evidence of third parties against him. Schwartz submits that *Jarvis* stands for the proposition that no compelled evidence can be obtained once the predominant purpose of an investigation is incriminatory. Schwartz also submits that subsection 9(2) of the Evidence Act (Ontario) and subsection 5(2) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, as amended (the "**Canada Evidence Act**") do not prohibit the use of the compelled evidence of third parties against him. He also submits, relying on *Re Sextant* (2011), 34 O.S.C.B. 5829 ("***Sextant***"), that "[c]ompelled testimony may be used in subsequent proceedings except in the limited sense when the witness objects to answer a question in the current Hearing upon the ground that the answer may tend to criminate him in a subsequent prosecution under any Canadian law". Further, he submits that section 13 of the Charter likely does not prevent his compelled evidence from being used against him if it is argued that it was obtained in a civil proceeding. It is his position that these consequences are contrary to the ruling in *Jarvis*.

[41] In his Supplementary Submissions, Schwartz submits that the *Wilder* decision pre-dated the legislative amendments that increased the penalties available under subsection 122(1) of the Act, which took effect on April 7, 2003. As a result of those amendments, a person or company is liable, upon conviction, "to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both"; prior to the legislative amendment, the maximum fine was $1 million and the maximum prison term two years less a day. Schwartz submits that the increased penalties call for heightened procedural protection under the Charter, in particular the separation of the Commission's criminal investigation and administrative investigation functions. Schwartz submits that, in this case, Staff's investigation began as a criminal investigation, as evidenced by Staff's obtaining a search warrant under the POA (Schwartz submits that it would be improper for Staff to obtain a search warrant under the POA for an administrative purpose), and only later became an administrative investigation. Schwartz submits that the compelled evidence was illegally obtained and should be stricken from the record.

B. Staff

[42] Staff seeks an order dismissing the Motion.

[43] Staff submits that *Jarvis* can be relied upon to exclude compelled evidence in a quasi-criminal hearing under section 122 of the Act (or in a criminal trial) but not in an administrative hearing under section 127 of the Act. As this is an administrative hearing, where Schwartz's liberty is not at stake, *Jarvis* does not apply.

[44] In response to Schwartz's submission that Staff's decision to obtain a search warrant under the POA, rather than make use of Staff's administrative investigation powers under section 13 of the Act, demonstrates the quasi-criminal purpose of the investigation, Staff submits that obtaining a search warrant under the POA does not convert an administrative proceeding into a quasi-criminal proceeding but merely ensures that the persons identified in the search warrant are provided with the full protection required by *Hunter v. Southam*, [1984] 2 S.C.R. 145 ("***Hunter v. Southam***"). There is nothing in the law that prevents Staff from obtaining a search warrant under the POA while keeping its options to proceed by quasi-criminal or administrative proceedings and while continuing to make use of its powers of compulsion under the Act.

[45] In response to Schwartz's submission that Staff's allegation against him under subsection 122(1)(c) of the Act (breach of a cease trade order) demonstrates the quasi-

criminal purpose of the investigation, Staff submits that subsection 122(1)(c) describes a specific charge that can be dealt with by way of quasi-criminal or administrative proceeding, at the option of Staff, just as with any other contravention of Ontario securities law. Staff submits it has three options when an investigation results in evidence of a contravention of Ontario securities law: (i) proceed administratively under section 127 of the Act; (ii) proceed quasi-criminally in the Ontario Court of Justice under section 122 of the Act; (iii) or continue to investigate. Further, the Commission held in *Re Boock* (2010), 33 O.S.C.B. 1589 ("***Boock***"), that Staff may, absent bad faith, continue to obtain compelled evidence after issuing a Statement of Allegations.

[46] Staff states that when Staff determines that there has been an "offence" under the Act, Staff must obtain the consent of the Commission, pursuant to subsection 122(7) of the Act, to lay quasi-criminal charges under section 122 of the Act by swearing an information. Pursuant to subsection 122(8) of the Act, the matter then proceeds to trial before a judge of the Ontario Court of Justice or a justice of the peace. Staff submits that a proceeding is deemed to be an administrative proceeding under section 127 of the Act unless quasi-criminal charges are laid under section 122 of the Act. Staff cannot breach *Jarvis* by continuing to compel evidence once Staff has it in their mind to proceed possibly quasi-criminally. If Staff were to compel a respondent to testify and then proceed to lay quasi-criminal charges, that respondent's compelled evidence would not be admissible against him in the quasi-criminal proceeding, and the admissibility of the fruits of the compelled evidence would be open to challenge. However, Staff may decide to proceed administratively, in which case *Jarvis* does not apply, and any compelled evidence obtained would be admissible.

[47] Staff states that no quasi-criminal charges have been laid under section 122 of the Act in relation to the York Rio Proceeding, and that Schwartz has presented no evidence that Staff intends to lay quasi-criminal charges or intends to disclose the compelled evidence to any police force. When pressed on this point in cross-examination, Schwartz was able to provide no evidence, but only his belief that charges were pending. When Staff counsel suggested to Schwartz that Vanderlaan's comments about "charges" in his notes and investor emails in mid-to-late 2009 and early 2010 related to the Statement of Allegations issued on March 2, 2010, Schwartz described this suggestion as "totally absurd". He insisted that "charges" refers only to quasi-criminal charges, and that Vanderlaan would have referred to "allegations" if he were talking about administrative proceedings.

[48] Staff states that no criminal or quasi-criminal charges have been laid against Schwartz. However, if Schwartz ever faced charges under the Criminal Code which relied on the evidence filed in this hearing, including his compelled evidence, he could avail himself of the protections set out in sections 7 and 13 of the Charter, subsection 5(2) of the Canada Evidence Act, and the common law, including *R. v. White*, [1999] 2 S.C.R. 417 ("***White***") and *R. v. Noël*, [2002] 3 S.C.R. 433 ("***Noël***").

[49] In *White*, the Supreme Court of Canada held that three statements made by the accused under the compulsion of subsection 61(1) of the British Columbia *Motor Vehicle Act*, R.S.B.C. 1979, c. 288 (the "**Motor Vehicle Act**"), which imposes a statutory duty to report any accident that has caused death or personal injury, were inadmissible against her at her trial on a charge of failure to stop at the scene of an accident under subsection 252(1)(a) of the Criminal Code. Although subsection 61(7) of the Motor Vehicle Act states that, with two exceptions, "neither the report nor any statement contained in it is admissible in evidence…in a trial or proceeding arising out of the accident referred to in

the report", the parties agreed that this use immunity applied only in provincial proceedings and not in Criminal Code proceedings (*White*, *supra*, at para. 35). Iacobucci J., speaking for the Court, said: "Statements made under compulsion of s. 61 of the Motor Vehicle Act are inadmissible in criminal proceedings against the declarant because their admission would violate the principle against self-incrimination" (*White*, *supra*, at para. 30).

[50] In *Noël*, the Supreme Court of Canada held, pursuant to section 13 of the Charter and subsection 5(2) of the Canada Evidence Act, that an accused who testifies at trial cannot be cross-examined on the basis of prior testimony, even if it is tendered for the apparent limited purpose of testing credibility, unless there is no realistic danger that the prior testimony could be used for incrimination (*Noël, supra*, at paras. 4 and 30).

[51] Staff submits that sections 16 and 17 of the Act limit Staff's ability to disclose compelled evidence to third parties, including the police, and section 18 of the Act provides an absolute bar on admitting a person's compelled testimony against him in a prosecution under the POA. Staff submits that there is no evidence that any police force or other entity has requested or obtained any compelled evidence admitted in the Merits Hearing, and accordingly, Schwartz's Motion is premature. However, Staff noted that Schwartz testified voluntarily at the Merits Hearing, which is a public hearing. On cross-examination by Staff counsel at the Motion Hearing, Schwartz affirmed that his request for a sealing order applied not only to his compelled evidence given to Staff during the investigation but also to Staff counsel's cross-examination of him with respect to his compelled evidence at the Merits Hearing.

[52] In response to Schwartz's request that his compelled evidence and the compelled evidence about him be sealed, Staff relies on Rule 8 of the Commission's Rules and subsection 9(1) of the SPPA, pursuant to which the Commission has authority to order that a hearing or part of a hearing be held *in camera* (in the absence of the public). Staff submits that if Schwartz wanted to request an *in camera* hearing, he should have made that request at the start of the hearing and before the compelled evidence was admitted into evidence. Instead, Schwartz raised the matter after Staff had read excerpts from his compelled evidence into the evidence at the Merits Hearing, after Schwartz had voluntarily taken the stand and after Staff had cross-examined him in relation to, amongst other things, his compelled evidence. The evidence admitted at the Merits Hearing is now part of the public record, which includes transcripts of the oral evidence as well as the documentary evidence that was admitted.

[53] In its Supplementary Submissions, Staff submits that *Wilder* provides an absolute answer to the Motion because it stands for the proposition that the Act allows Staff three means of enforcement where the conduct at issue amounts to a contravention of Ontario securities law: a quasi-criminal proceeding in the Ontario Court of Justice pursuant to subsection 122(1) of the Act, seeking, upon conviction, a fine and/or imprisonment; an administrative proceeding before the Commission pursuant to section 127 of the Act, seeking an order in the public interest; or an application in the Ontario Superior Court of Justice, pursuant to section 128 of the Act, for a declaration that a person has not complied with or is not complying with Ontario securities law and a remedial order from that court. *Wilder* also stands for the proposition that an overly narrow interpretation of the Act would ignore the fundamental aspects of the statutory scheme and would frustrate rather than promote the objectives of the Act, that remedial variety and flexibility is preferable to a rigidly narrow and literal interpretation of the Act, and that the broader purpose of the enforcement provisions of the Act is to regulate the capital markets in a

supervisory role and in order to adequately do so, the broader legislative purpose of the Act must be considered when giving meaning to its constituent provisions of the Act. Staff submits that Schwartz's Supplementary Submissions add nothing to his written and oral submissions made previously in the Motion, and are of no assistance to the Panel.

III. ANALYSIS

[54] The Motion is dismissed for the following reasons.

A. This is an administrative proceeding

[55] This Motion raises issues about the relationship between section 122 and section 127 of the Act. Section 122 creates provincial offences that may be prosecuted in the Ontario Court of Justice and punishable by a fine of not more than $5 million or imprisonment of not more than 5 years less a day or both. In this case, Staff alleges that Schwartz contravened subsection 122(1)(c) of the Act – contravening Ontario securities law – by trading in securities while he was prohibited from doing so by order of the Commission. Staff also alleges that Schwartz contravened subsection 25(1)(a) of the Act (unregistered trading of York Rio securities), subsection 53(1) (illegal distribution of York Rio securities), subsection 126.1(b) (fraud), and section 129.2 (deemed non-compliance by a director or officer who authorized, permitted or acquiesced in York Rio's contraventions of subsections 25(1)(a), 38(3) (making prohibited representations that York Rio securities were to be listed on a stock exchange), 53(1) and 126.1(b) of the Act), all of which allegations describe contraventions of Ontario securities law.

[56] However, and critically, Staff has not commenced a quasi-criminal proceeding pursuant to section 122 of the Act in the Ontario Court of Justice in relation to York Rio, Schwartz or any of the other York Rio Respondents. The Commission's Notice of Hearing that commenced the York Rio Proceeding gave the York Rio Respondents notice of a hearing to consider, "by reason of the allegations as set out in the Statement of Allegations…", "whether, in the opinion of the Commission, it is in the public interest, pursuant to sections 127 and 127.1 of the Act" to order that:

> (i) trading in any securities by the respondents cease permanently or for such period as is specified by the Commission (pursuant to paragraph 2 of subsection 127(1) of the Act);
>
> (ii) the acquisition of any securities by the respondents is prohibited permanently or for such other period as is specified by the Commission (pursuant to paragraph 2.1 of subsection 127(1) of the Act);
>
> (iii) any exemptions contained in Ontario securities law do not apply to the respondents permanently or for such period as is specified by the Commission (pursuant to paragraph 3 of subsection 127(1) of the Act);
>
> (iv) each of the respondents disgorge to the Commission any amounts obtained as a result of non-compliance by that respondent with Ontario securities law (pursuant to paragraph 10 of subsection 127(1) of the Act);
>
> (v) the respondents be reprimanded (pursuant to paragraph 6 of subsection 127(1) of the Act);
>
> (vi) the individual respondents, including Schwartz, resign one or more positions that they hold as a director or officer of any issuer, registrant or investment fund manager (pursuant to paragraphs 7, 8.1 and 8.3 of subsection 127(1) of the Act);

(vii) the individual respondents, including Schwartz, be prohibited from becoming or acting as a director or officer of any issuer, registrant and investment fund manager (pursuant to paragraphs 8, 8.2 and 8.4 of subsection 127(1) of the Act);

(viii) the respondents be prohibited from becoming or acting as a registrant, as an investment fund manager and as a promoter (pursuant to paragraph 8.5 of subsection 127(1) of the Act);

(ix) the respondents each pay an administrative penalty of not more than $1 million for each failure by that respondent to comply with Ontario securities law (pursuant to paragraph 9 of subsection 127(1) of the Act); and,

(x) the respondents be ordered to pay the costs of the Commission investigation and the hearing (pursuant to section 127.1 of the Act).

[57] In addition, the Notice of Hearing gave notice that the hearing would consider whether, in the opinion of the Commission, an order should be made pursuant to section 37 of the Act that the respondents cease permanently to telephone from within Ontario to any residence within or outside Ontario for the purpose of trading in any security or any class of securities, or "whether to make such further orders as the Commission considers appropriate".

[58] Staff has not requested imprisonment, which is a remedy available to the Ontario Court of Justice but not to the Commission. Legislative amendments which took effect on April 7, 2003 not only increased the penalties available under subsection 122(1) of the Act to "to a fine of not more than $5 million", but also gave the Commission powers to order administrative penalty and disgorgement under paragraphs 9 and 10 of subsection 127(1) of the Act, respectively. Rather than requesting a "fine" of up to $5 million, Staff has requested an "administrative penalty" under paragraph 9 of subsection 127(1) of the Act, which is an administrative remedy, not a penal sanction (*Re Rowan* (2010), 33 O.S.C.B. 91). In sum, the remedies described at paragraphs 56 and 57 above are administrative remedies that are within the public interest jurisdiction of the Commission.

[59] That the Commission has jurisdiction, in an administrative proceeding, to hear and determine allegations under section 122 of the Act was conclusively established in *Wilder*. In that case, Staff alleged that Wilder, who was counsel to YBM Magnex International Inc., made statements in a letter to Staff "that in a material respect, and at the time and in the light of the circumstances under which the statements were made, were misleading or untrue or did not state a fact that was required to be stated or that was necessary to make the statements not misleading; specifically, statements concerning the result of due diligence conducted in respect of YBM. In doing so, Wilder acted in a manner contrary to the public interest".

[60] Before the Ontario Court of Appeal, Wilder argued that this allegation fell squarely and exclusively within the terms of the offence created by subsection 122(1)(a), and that the legislature gave the Ontario Court of Justice exclusive jurisdiction to deal with offences under subsection 122(1)(a). Amongst other things, he argued that the Act should not be interpreted so as to limit the rights he would have in a quasi-criminal proceeding:

> If Wilder were charged with the offence created by s. 122(1)(a), he would enjoy significant advantages and procedural protections not available

under the administrative procedure of s. 127. On the quasi-criminal charge before the Ontario Court of Justice, the OSC would be required to prove guilt under the strict rules of criminal evidence and on the criminal standard of beyond a reasonable doubt. Wilder could assert ss. 7 and 11 Charter rights and the statutory due diligence defence specified in s. 122(2).

(*Wilder*, *supra*, at para. 17).

[61] The Court described the issue in the following way:

> The specific allegation against Wilder precisely tracks the wording of the prohibition contained in s. 122(1)(a). There can be no doubt that on this allegation the OSC could have proceeded by way of a quasi-criminal prosecution against Wilder in the Ontario Court of Justice. Nor, in my view, can there be any doubt that the Ontario Court of Justice has exclusive jurisdiction to try any charges that are laid under s. 122(1)(a). The question is whether the OSC is limited to that enforcement route in dealing with conduct that could form the subject of a charge pursuant to s. 122(1)(a).
>
> (*Wilder*, *supra*, at para. 15)

[62] In an often-cited passage, the Court rejected Wilder's argument and affirmed Staff's remedial flexibility:

> The remedial and enforcement provisions of the Act must be read in light of the fundamental purpose and aim of the legislation. In the light of the overall purpose of the Act, I cannot accept the proposition that the wording of the provision creating the offences prescribed by s. 122 indicates a legislative intention to confer exclusive jurisdiction on the Ontario Court of Justice where it is alleged that a party has been guilty of misrepresentation. The legislature has quite clearly manifested its intention to provide the OSC with a range of remedial options to assist the OSC in carrying out its statutory mandate. The Act provides the OSC with three different enforcement tools: prosecution before the Ontario Court of Justice pursuant to s. 122; administrative sanctions before the OSC itself pursuant to s. 127; and declaratory, injunctive, and other orders from the Superior Court of Justice pursuant to s. 128. These enforcement tools provide the OSC with a range of remedial options to be deployed in the OSC's discretion to meet the wide variety of problems and issues that it must confront. In some cases, the OSC may determine that *quasi*-criminal prosecution leading to fine or imprisonment is the most effective and appropriate means to ensure compliance with the Act and to ensure public confidence in the capital markets. In other cases, the OSC may prefer the more flexible and less drastic administrative sanctions available pursuant to s. 127 as the best way to achieve the objectives of the legislation. To the extent one can discern a legislative intention from this scheme, it seems to me that the overwhelming message is one of remedial variety and flexibility, rather than one that creates hived-off areas of remedial exclusivity. A court should be loath to prefer a rigidly narrow and literal interpretation over one that recognizes and reflects the purposes of the Act.

> It is true that if Wilder were prosecuted under s. 122, he would enjoy procedural protections and other advantages not available in proceedings brought under s. 127. I fail to see, however, how that leads to the conclusion that he can *only* be prosecuted under s. 122. Different procedural rights are accorded because different consequences follow. The Act provides for various remedial routes which themselves entail varying procedural consequences. The reduction in procedural rights under s. 127 from those available in a prosecution under s. 122 results from the simple fact that there is no criminal sanction attached to a s. 127 order. **The essence of the statutory scheme is remedial flexibility, not remedial exclusivity, and differing procedural consequences are an inevitable result of such a scheme.** [Emphasis added]
>
> (*Wilder*, *supra*, at paras. 23-24)

[63] In our view, *Wilder* provides a complete answer to Schwartz's submissions. In summary, the fact that Staff *could have* charged the York Rio Respondents with offences under sections 25, 38, 53, 122 and 126.1(b) of the Act in the Ontario Court of Justice, which proceedings would have been governed by the POA, does not convert *this* proceeding into a quasi-criminal proceeding. We are here today because on March 2, 2010, Staff issued a Statement of Allegations and the Commission issued a Notice of Hearing, giving notice that a hearing would be held before the Commission to consider various remedies requested by Staff pursuant to sections 37, 127 and 127.1 of the Act. The Commission is an administrative tribunal whose powers and procedure are governed by the Act, the SPPA, and the Commission's Rules, and the York Rio Proceeding is an administrative proceeding.

[64] It does not matter that Vanderlaan may have used the word "charges" loosely to embrace administrative or regulatory allegations. As Staff counsel pointed out to Schwartz in his cross-examination, Vanderlaan made these comments shortly before Staff issued the Statement of Allegations on March 2, 2010. At the time of writing, some 18 months later, no quasi-criminal charges have been laid and we heard no evidence that they will be.

[65] Nor does it follow from Staff's decision to seek a search warrant under the POA, rather than making use of the Commission's inspection and search powers under section 13 of the Act, that penal liability was the predominant purpose of the investigation at the time the Search Warrant was issued and executed in October 2008. As Staff counsel noted in his submissions, use of the POA warrant process ensures that the persons named in the warrant receive the highest level of procedural protection, as set out in *Hunter v. Southam*. We were presented with no authority for the proposition that Staff can only apply for a warrant under the POA if administrative proceedings have been ruled out. In any event, the validity of the warrant is a matter for the issuing and reviewing Justice, and not for this Commission. For our purposes, Staff's decision to use the POA warrant process shows, at most, that Staff was keeping its options open at that time. It does not establish that Staff had "crossed the Rubicon" and embarked an a quasi-criminal investigation.

[66] We are satisfied that this proceeding is an administrative proceeding that does not involve penal liability.

B. A respondent's compelled evidence is admissible against him in an administrative proceeding

[67] It is now well-established that a respondent's compelled evidence is admissible against him in a an administrative proceeding before the Commission.

[68] The leading decision on point is the decision of the Supreme Court of Canada in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 ("***Branch***"). In *Branch*, the British Columbia Securities Commission served summonses on Branch and Levitt, who were officers of a company that was under investigation, compelling them to attend for examination under oath and to produce all information and records in their possession concerning the company. The two officers challenged the summonses, arguing that the statutory provision under which they were issued (subsection 128(1) of the British Columbia *Securities Act*, S.B.C. 1985, c. 83, as amended which is similar to subsection 13(1) of the Act), violated sections 7 and 8 of the Charter. The Supreme Court of Canada rejected this position. The Court began its discussion of the issue of testimonial compulsion by stating:

> The liberty interest is engaged at the point of testimonial compulsion. Once it is engaged, the investigation then becomes whether or not there has been a deprivation of this interest in accordance with the principles of fundamental justice.
>
> (*Branch*, *supra*, at para. 33)

[69] The Court then stated that the issue before it was to determine "the predominant purpose of such an inquiry at which a witness is compelled to attend" (*Branch*, *supra*, at para. 34). To determine that issue, the Court looked to *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 ("***Pezim***"), in which the Supreme Court of Canada discussed the regulatory and protective role of the securities commissions, and stated:

> This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.
>
> (*Pezim*, *supra*, p. 593, quoted at *Branch*, *supra*, at para. 34)

[70] The Court in *Branch* continued:

> Clearly, this purpose of the Act justifies inquiries of limited scope. The Act aims to protect the public from unscrupulous trading practices which may result in investors being defrauded. It is designed to ensure that the public may rely on honest traders of good repute able to carry out their business in a manner that does not harm the market or society generally. An inquiry of this kind legitimately compels testimony as the Act is concerned with the furtherance of a goal which is of substantial public importance, namely, obtaining evidence to regulate the securities industry. Often such inquiries result in proceedings which are essentially of a civil nature. The inquiry is of the type permitted by our law as it serves an obvious social utility. Hence, the predominant purpose of the inquiry is to obtain the relevant evidence for the purpose of the instant proceedings, and not to incriminate Branch and Levitt. More specifically, there is nothing in the record at this stage to suggest that the purpose of the summonses in this case is to obtain incriminating evidence against Branch

> and Levitt. Both orders of the Commission and the summonses are in furtherance of the predominant purpose of the inquiry to which we refer above. The proposed testimony thus falls to be governed by the general rule applicable under the Charter, pursuant to which a witness is compelled to testify, yet receives evidentiary immunity in return: [*R. v. S.(R.J.)*, [1995] 1 S.C.R. 451].
>
> (*Branch*, *supra*, at para. 35)

[71] The principles set out in *Branch* are now well-established (See *Johnson v. British Columbia (Securities Commission)* (1999), 128 B.C.A.C. 207; *Alberta (Securities Commission) v. Brost* (2008), 440 A.R. 7; *Gore v. College of Physicians and Surgeons of Ontario* (2008), 92 O.R. (3d) 195 (Ont. Div. Ct.); *Boock*, *supra*, at para. 72; and *Sextant*, *supra*, at paras. 4 and 7. Earlier Commission decisions to the same effect include *Ontario (Securities Commission) v. Biscotti*, [1988] O.J. No. 1115 (Ont. H.C.J.); and *A. v. Ontario Securities Commission*, [2006] O.J. No. 1768 (Ont. Div. Ct.), at paras. 43-44, 53, 58 and 59).

[72] The leading Commission decision is *Boock*. In that case, the issue was whether Boock's compelled evidence which was obtained by Staff for the purposes of an investigation into KSW Industries Inc. ("**KSW**") by the U.S. Securities and Exchange Commission, should be disclosed to Boock's co-respondents in the related Commission proceeding involving Select American Transfer Co. ("**SAT**") and others. Before obtaining the compelled evidence from Boock, Staff gave an undertaking that Staff would not "use" it against him in the Commission proceeding. Boock's co-respondents in the Commission proceeding sought production of Boock's compelled evidence pursuant to Staff's obligation to disclose to respondents all relevant materials, whether inculpatory or exculpatory, in advance of a hearing on the merits before the Commission. As Boock would not consent to the disclosure, Staff brought a motion before the Commission for a disclosure order. The Commission concluded that the undertaking did not prevent Staff from disclosing the compelled evidence to Boock's co-respondents, partly on the basis that Boock's reasonable expectations with respect to the scope of the undertaking should be based on the terms of the undertaking within the regulatory context in which it was given, including Staff's disclosure obligations and the admissibility of compelled evidence against him in Commission proceedings:

> 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. [Emphasis in the original]
>
> (*Boock*, *supra*, at para. 74)

[73] Boock also argued that disclosing and permitting co-respondents to use his compelled evidence against him in the Commission proceeding would be unfair and

contrary to the protection against self-incrimination provided by sections 7, 11 and 13 of the Charter. The Commission rejected these submissions on the principles set out in *Branch* and the cases that followed it:

> 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.
>
> 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.)
>
> While SAT Staff [the Staff team involved in the section 127 proceeding] 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.
>
> 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).
>
> 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.

> 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.
>
> (*Boock*, *supra*, at paras. 94-99)

[74] The Commission added, in *Boock*, that "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" (*Boock*, *supra*, at para. 109).

[75] In *Sextant*, the Commission again concluded that a respondent's compelled testimony is admissible against him in a Commission proceeding:

> Section 16(2) of the Act provides that all testimony given under s. 13 is for the "exclusive use of the Commission and shall not be disclosed" except as permitted under s. 17. Section 17(6) specifically permits disclosure of that testimony in connection with "a proceeding commenced by the Commission under this Act." We agree with Staff's submission that the combination of these two sections contemplate that testimony given under s. 13 may be used in a s. 127 proceeding before the Commission.
>
> Section 18 of the Act sets out prohibited uses of compelled testimony pursuant to s. 13. Section 18 provides that compelled testimony is not to be used in s. 122 proceedings or any other proceedings under the *Provincial Offences* Act. Nowhere in s. 18 of the Act is there a prohibition against the use of compelled testimony in s. 127 proceedings brought before the Commission. Had the legislature intended to prohibit the use of compelled testimony in s. 127 proceedings, it would have been a simple matter for the inclusion of s. 127 proceedings as one of the prohibited uses of compelled testimony in s. 18. We conclude that the reverse is the case, that is, the legislative intention was that compelled testimony could be used in s. 127 proceedings.
>
> (*Re Sextant*, supra, at paras. 8-9)

[76] In this case, we have been given no reason to conclude that Schwartz's compelled evidence is unreliable hearsay, that its admission would be unfair to Schwartz or that Staff has acted in bad faith. For the reasons given in *Branch, Boock* and *Sextant*, we find that Schwartz's compelled evidence is admissible against him in this proceeding, which is administrative and not criminal or penal in nature.

C. A respondent's compelled evidence is not admissible against him in a quasi-criminal or criminal proceeding

[77] Although our analysis at paragraphs 55 to 76 above is sufficient to dispose of the Motion, we find it appropriate to add the following comments.

[78] Schwartz submits that if his compelled evidence is admitted against him in this proceeding, he will be deprived of protection against self-incrimination in any subsequent criminal or quasi-criminal proceedings. This submission reflects a misunderstanding of the protection provided by the law. The protection against self-incrimination provided by the Act, the SPPA, the Evidence Act (Ontario), the Canada Evidence Act, and the Charter does not make Schwartz's compelled testimony inadmissible against him in this Commission proceeding brought under section 127 of the Act. Schwartz is, however, protected, pursuant to section 18 of the Act, subsection 14(1) of the SPPA, subsection

9(2) of the Evidence Act (Ontario), and section 13 of the Charter, against use of his compelled evidence in any quasi-criminal prosecution under section 122 of the Act (or in any civil proceeding). In addition, subsection 5(2) of the Canada Evidence Act and section 13 of the Charter prevent the use of Schwartz' compelled evidence in any criminal proceeding against him. Section 7 of the Charter provides derivative use immunity in criminal or quasi-criminal proceedings.

[79] As Staff noted, these provisions do not apply to the testimony Schwartz gave voluntarily at the Merits Hearing.

[80] Finally, Schwartz appears to be concerned about the compelled evidence of others being admitted against him in this or any other proceeding. By definition, Schwartz can have no self-incrimination concern in relation to statements made by anyone other than Schwartz. Nothing prevents Staff from using the compelled evidence of others against Schwartz, subject to evidence law considerations relating to hearsay, particularly relating to co-respondents.

D. There is no basis for holding an *in camera h*earing or sealing any compelled evidence

[81] Schwartz submits, in the alternative, that if his compelled evidence is found to be admissible against him in this Proceeding, it should be sealed to ensure it is not provided to any police force or used against him in a criminal or quasi-criminal proceeding, and parts of the hearing where compelled evidence was read into the record should be ruled *in camera*.

[82] We find there is no basis for such a ruling. We have procedural and substantive reasons for our ruling.

[83] First, with respect to procedure, Schwartz gave notice of motion on June 16, 2011, on the sixteenth day of the Merits Hearing after some three weeks of evidence, and made his request for the hearing of a motion after the twenty-fourth day of the Merits Hearing, well beyond the time contemplated by Rule 8.2 of the Commission's Rules, the relevant part of which states: "If a party wishes to have a hearing held *in camera*, the party shall make a request *at the commencement of the hearing* before the Panel pursuant to section 9 of the SPPA". Where a party wishes to have only part of a hearing held *in camera*, for example, the testimony of a witness whose evidence concerns "intimate personal or financial matters", the request must be made *before* that part of the hearing commences. This is not merely a matter of courtesy and orderliness. The Commission's hearings are transcribed, and a transcript cannot be redacted. In this case, the compelled evidence that Schwartz is concerned about is already a matter of public record to the extent it has been read into the evidence at the Merits Hearing, prior to the making of the Motion.

[84] In any event, turning to substance, we are not persuaded there is any reason to seal any evidence or rule any part of the hearing *in camera* in this case. Subsection 9(1) of the SPPA codifies the foundational principle of open courts, and Rules 8 and 5 of the Rules, which deal with public hearings and public access to documents, respectively, are based on and make reference to the principle of open courts in subsection 9(1) of the SPPA. Accordingly, in considering whether to rule any part of the hearing *in camera* or to declare and seal any evidence under Rule 8.1 and subrule 5.2(1) of the Rules, respectively, we must consider whether "intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any

person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public". Further, in considering whether public access to a document should be restricted, a Commission panel has the power, pursuant to subrule 5.2(3) of the Rules, to declare a document confidential "if it is of the opinion that there are valid reasons for restricting access to [that] document".

[85] Schwartz's compelled evidence did not include any intimate financial or personal matters or other matters of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of Schwartz or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public, as set out in subsection 9(1) of the SPPA and Rule 8.1 and subrule 5.2(1) of the Rules; nor are we satisfied that there are valid reasons under subrule 5.2(3) of the Rules for restricting access to the compelled evidence or declaring and sealing it as confidential. We note that pursuant to subsection 17(7) of the Act, Schwartz's compelled evidence cannot be disclosed, without his written consent, to "a municipal, provincial, federal or other police force or to a member of a police force" or "a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction". Moreover, for the reasons discussed at paragraphs 55 to 80 above, we find that although Schwartz's compelled evidence is admissible against him in this proceeding, he is not thereby deprived of the protection against self-incrimination provided at law. Given these protections, we are not persuaded it is in the public interest to seal Schwartz's compelled evidence or hold an *in camera* hearing, even if it were possible to do so retrospectively.

IV. CONCLUSION

[86] For the reasons stated, the Motion is dismissed.

Dated at Toronto this 22nd day of December, 2011.

"*Vern Krishna*"	"*Edward P. Kerwin*"
Vern Krishna, Q.C.	Edward P. Kerwin

SCHEDULE A

***Securities Act*, R.S.O. 1990, c. S. 5 (as amended)**

"Ontario securities law" means,

(a) this Act,

(b) the regulations, and

(c) in respect of a person or company, a decision of the Commission or a Director to which the person or company is subject; ("droit ontarien des valeurs mobilières")

Investigation order

11. (1) 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;

…

Power of investigator or examiner

13. (1) 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.

Disclosure to police

17. (7) Without the written consent of the person from whom the testimony was obtained, no disclosure shall be made under subsection (6) of testimony given under subsection 13 (1) to,

(a) a municipal, provincial, federal or other police force or to a member of a police force; or

(b) a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction.

Prohibition on use of compelled testimony

18. Testimony given under section 13 shall not be admitted in evidence against the person from whom the testimony was obtained in a prosecution for an offence under section 122 or in any other prosecution governed by the *Provincial Offences Act*.

Order prohibiting calls to residences

37. (1) The Commission may by order suspend, cancel, restrict or impose terms and conditions on the right of any person or company named or described in the order to

call at a residence or telephone from a location in Ontario to a residence located in or out of Ontario for the purpose of trading in any security or derivative or in any class of securities or derivatives.

…

Offences, general

122. (1) Every person or company that,

(a) makes a statement in any material, evidence or information submitted to the Commission, a Director, any person acting under the authority of the Commission or the Executive Director or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;

(b) makes a statement in any application, release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular or other document required to be filed or furnished under Ontario securities law that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; or

(c) contravenes Ontario securities law,

is guilty of an offence and on conviction is liable to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both.

…

Consent of Commission

(7) No proceeding under this section shall be commenced except with the consent of the Commission.

Trial by provincial judge

(8) The Commission or an agent for the Commission may by notice to the clerk of the court having jurisdiction in respect of an offence under this Act require that a provincial judge preside over the proceeding.

Orders in the public interest

127. (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:

1. An order that the registration or recognition granted to a person or company under Ontario securities law be suspended or restricted for such period as is specified in the order or be terminated, or that terms and conditions be imposed on the registration or recognition.

2. An order that trading in any securities by or of a person or company or that trading in any derivatives by a person or company cease permanently or for such period as is specified in the order.

2.1 An order that the acquisition of any securities by a particular person or company is prohibited permanently or for the period specified in the order.

3. An order that any exemptions contained in Ontario securities law do not apply to a person or company permanently or for such period as is specified in the order.

4. An order that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Commission.

5. If the Commission is satisfied that Ontario securities law has not been complied with, an order that a release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular, offering memorandum, proxy solicitation or any other document described in the order,

i. be provided by a market participant to a person or company,

ii. not be provided by a market participant to a person or company, or

iii. be amended by a market participant to the extent that amendment is practicable.

6. An order that a person or company be reprimanded.

7. An order that a person resign one or more positions that the person holds as a director or officer of an issuer.

8. An order that a person is prohibited from becoming or acting as a director or officer of any issuer.

8.1 An order that a person resign one or more positions that the persons holds as a director or officer of a registrant.

8.2 An order that a person is prohibited from becoming or acting as a director or officer of a registrant.

8.3 An order that a person resign one or more positions that the person holds as a director or officer of an investment fund manager.

8.4 An order that a person is prohibited from becoming or acting as a director or officer of an investment fund manager.

8.5 An order that a person or company is prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter.

9. If a person or company has not complied with Ontario securities law, an order requiring the person or company to pay an administrative penalty of not more than $1 million for each failure to comply.

10. If a person or company has not complied with Ontario securities law, an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance.

Ontario Securities Commission Rules of Procedure (2010), 33 O.S.C.B. 8017

Rule 5 – Public Access to Documents

5.1 Public Documents – Subject to Rule 5.2 and subrule 10.9(3), documents required to be filed or received in evidence in proceedings shall be available to the public.

5.2. Request Regarding Confidentiality – (1) At the request of a party or person, the Panel may order that any document filed with the Secretary or any document received in evidence or transcript of the proceeding be kept confidential pursuant to section 9 of the SPPA.

(2) A party or person who makes a request pursuant to subrule 5.2(1) shall advise the Panel of the reasons for the request.

(3) The Panel may, if it is of the opinion that there are valid reasons for restricting access to a document, declare the document confidential and make such other orders as it deems appropriate.

Rule 8 – Public Access to Hearings

8.1 Open to the Public Except under Certain Conditions – Subject to Rule 8.2, a hearing shall be open to the public, except when having regard to the circumstances, the Panel is of the opinion that intimate financial, personal or other matters may be disclosed at the hearing and that the desirability of avoiding that disclosure in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public pursuant to section 9 of the SPPA.

8.2 In Camera Hearing – If a party wishes to have a hearing held in camera, the party shall make a request at the commencement of the hearing before the Panel pursuant to section 9 of the SPPA. The Panel will make a decision on whether or not to hold the hearing or a portion of the hearing in camera, based on the facts and circumstances of each case.

***Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22**

Hearings to be public, exceptions

9.(1)An oral hearing shall be open to the public except where the tribunal is of the opinion that,

(a) matters involving public security may be disclosed; or

(b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,

in which case the tribunal may hold the hearing in the absence of the public.

Protection for witnesses

14.(1)A witness at an oral or electronic hearing shall be deemed to have objected to answer any question asked him or her upon the ground that the answer may tend to criminate him or her or may tend to establish his or her liability to civil proceedings at the instance of the Crown, or of any person, and no answer given by a witness at a hearing shall be used or be receivable in evidence against the witness in any trial or other proceeding against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence.

***Evidence Act*, R.S.O. 1990, c. E.23**

Witness not excused from answering questions tending to criminate

9. (1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate the witness or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature.

Answer not to be used in evidence against witness

(2) If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection (1) and if, but for this section or any Act of the Parliament of Canada, he or she would therefore be excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him or her in any civil proceeding or in any proceeding under any Act of the Legislature.

***Canada Evidence Act*, R.S.C. 1985, c. C-5**

Incriminating questions

5. (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

Answer not admissible against witness

(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

Canadian Charter of Rights and Freedoms

Life, liberty and security of person

7. 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.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

…

Self-crimination

13. 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.