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

AND

IN THE MATTER OF
CONRAD M. BLACK, JOHN A. BOULTBEE
AND PETER Y. ATKINSON

REASONS AND DECISION ON A MOTION

Hearing:	April 10 and 11, 2014
Decision:	June 13, 2014
Panel:	Christopher Portner - Commissioner and Chair of the Panel Judith N. Robertson - Commissioner
Counsel:	Johanna Superina - For the Ontario Securities Commission Jed Friedman
	Peter F.C. Howard - For Black Samaneh Hossieni Sinziana R. Hennig

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REASONS AND DECISION ON A MOTION

I. The Motion

[1] By Notice of Motion dated November 26, 2013, relating to the Notice of Hearing (the "Notice of Hearing") and Amended Statement of Allegations (the "Amended Statement of Allegations") against Conrad M. Black ("Black"), John A. Boultbee ("Boultbee") and Peter Y. Atkinson, both dated July 12, 2013 (the "OSC Proceeding"), Black brought a motion for:

(a) An order staying the OSC Proceeding against Black on the condition that the undertaking given to the Ontario Securities Commission (the "Commission") by Black on February 2, 2006, as amended on March 30, 2007 (the "Undertaking"), would remain in effect; or

(b) In the alternative, directions regarding the scope of the issues to be determined at any hearing of the OSC Proceeding and hence the evidence permitted to be presented at the hearing.

II. Historical Background

[2] This matter has had a lengthy procedural history. It was originally commenced by a Notice of Hearing and Statement of Allegations dated March 18, 2005 (the "Initial OSC Proceeding") which sought orders against Hollinger Inc., Black, F. David Radler, Boultbee and Peter Y. Atkinson pursuant to subsection 127(1) and section 127.1 of the *Securities Act*, R.S.O. 1990 c. S.5, as amended (the "Act").

[3] Following the commencement of the Initial OSC Proceeding, a parallel criminal proceeding involving similar allegations was commenced against Black and three others in the United States, the details of which are as follows:

(a) On November 17, 2005, a Grand Jury in the United States District Court for the Northern District of Illinois, Eastern Division (the "U.S. District Court") indicted Black and the others on multiple counts of criminal fraud (*United States v. Black*, 05-cr-727 (N.D. Ill. June 11, 2007) (Docket Entry [738]) [Redacted Superseding Information]);

(b) On July 13, 2007, after extensive pre-trial proceedings, approximately four months of trial and two weeks of jury deliberations, a jury convicted Black on three counts of fraud and one count of obstruction of justice;

(c) Black and the others moved for a judgment of acquittal of the convictions or a new trial. The trial judge, Justice Amy J. St. Eve of the U.S. District Court, reviewed the evidence and denied the motion in a detailed decision issued on November 5, 2007 (*United States v. Black*, 05-cr-727 (N.D. Ill. Nov. 5, 2007));

(d) On December 10, 2007, the U.S. District Court entered judgment and sentence against Black and the others (*United States v. Black*, 05-cr-727 (N.D. Ill. Dec. 10, 2007) (Docket Entry [979]) and *United States v. Black*, 05-cr-727, Transcript of Sentencing Decision (N.D. Ill. Dec. 10, 2007) (the *"2007 Sentencing Decision*"));

(e) Black and the others appealed their convictions to the United States Court of Appeals for the Seventh Circuit (the "U.S Court of Appeal") which denied the appeal in a decision issued on June 25, 2008 (*United States v. Black*, 530 F. 3d 596 (7th Cir. 2008) (the "*2008 Appeal Decision*"));

(f) Following an appeal by Black of the decision of the U.S. Court of Appeal to the Supreme Court of the United States (the "U.S. Supreme Court"), on June 24, 2010, the U.S. Supreme Court vacated the U.S. Court of Appeal Decision and remanded the criminal proceeding back to the U.S. Court of Appeal for reconsideration in light of a parallel decision narrowing the application of the U.S. fraud statute (*Black v. United States*, 561 U.S. 465 (2010));

(g) On remand from the U.S. Supreme Court, the U.S. Court of Appeal on October 29, 2010 vacated the fraud findings relating to the APC Payments (as defined in the Amended Statement of Allegations) and affirmed the fraud conviction relating to the Forum and Paxton Payments (as defined in the Amended Statement of Allegations) as well as the obstruction of justice conviction (*United States v. Black,* 625 F. 3d 386 (7th Cir. 2010) (the "*2010 Appeal Decision*"*);*

(h) On June 24, 2011, Black appeared before the U.S. District Court and was resentenced to 42 months of incarceration for his fraud and obstruction of justice convictions (*United States v. Black,* 05-cr-727-1 (N.D. Ill. June 24, 2011)); and

(i) On June 4, 2012, Black filed a further petition with the U.S. District Court to vacate, set aside or correct his sentence, arguing that he had been unable to retain defence lawyers of his choice for the criminal trial and appeals. By decision dated February 19, 2013, Black's petition was rejected, the U.S. District Court finding that Black has been represented by "some of the most talented and well-respected attorneys in their field" (*Black v. United States*, 12-cv-4306, (N.D. Ill. Feb. 19, 2013) at p. 4 (LexisNexis) (the "*Collateral Appeal Judgment"*);

(collectively, the "U.S. Criminal Proceeding")

[4] In addition to the U.S. Criminal Proceedings, on November 15, 2004, the U.S. Securities and Exchange Commission (the "SEC") instituted a separate civil proceeding against Black and the others, the details of which are as follows:

(a) On September 24, 2008, the U.S. District Court held that Black had failed to accurately disclose material facts relating to the APC Payments and the Forum and Paxton Payments in securities filings and found Black liable for securities fraud and other violations of the U.S. *Securities Exchange Act of 1934* (*SEC v. Black,* 04-cv-7377 (N.D. Ill. Sept. 24, 2008) ("the "*Summary Judgment*")). In issuing the *Summary Judgment*, the U.S. District Court relied on, among other things, the findings from the *2008 Appeal Decision*;

(b) On October 22, 2008, the U.S. District Court entered judgment for injunctive relief against Black (*SEC v. Black*, 04-cv-7377 (N.D. Ill. Oct. 22, 2008) (Docket Entry[170]));

(c) Following the *2010 Appeal Decision,* in which the U.S. Court of Appeal vacated the findings relating to the APC Payments made in the *2008 Appeal Decision*, Black moved before the U.S. District Court to set aside the relief ordered in the *Summary Judgment* which relied on that and the other convictions. The District Court found that "no alternation of the prior relief ordered or of the findings made is presently warranted except with respect to some findings relating to the $5.5 million improper non-compete payments" (*SEC v. Black,* 2012 U.S. Dist. Lexis 23192 (N.D. Ill. Feb. 21, 2012) at p. 2 (LexisNexis));

(d) On October 9, 2012, the U.S. District Court entered final judgment against Black and ordered him to pay disgorgement and interest and imposed various forms of injunctive relief, including a permanent ban from serving as a director and officer of a reporting issuer in the United States (*SEC v. Black*, 04-cv-7377 (N.D. Ill. Oct. 9, 2012) (Docket Entry [236]) (the "*October 9, 2012 Decision*")); and

(e) On December 7, 2012, Black filed a notice of appeal of the *October 9, 2012 Decision*, but subsequently terminated the appeal pursuant to a settlement agreement. On the basis of a joint motion filed by Black and the SEC to the U.S. District Court, Black agreed to terminate his appeal in exchange for a reduction in the monetary judgement ordered against him. The U.S. District Court subsequently modified its final judgment on August 13, 2013 to reflect the reduced amount of the monetary penalty (*SEC v. Black*, 04-cv-7377 (N.D. Ill. Aug. 13, 2013) (Docket Entry [270]));

(collectively, the "SEC Proceeding", and together with the U.S. Criminal Proceeding, the "U.S. Proceedings".)

[5] The U.S. Proceedings significantly affected the timing of the hearing relating to the Initial OSC Proceeding before the Commission. As explained in the Commission's reasons issued on January 24, 2006, "common sense and judicial economy argue in favour of allowing the U.S. criminal proceedings to take place in advance of this hearing"

(*Re Black* (2006), 29 O.S.C.B. 847 ("*Re Black 2006*") at para. 53). As a result, the Initial OSC Proceeding was adjourned a number of times and was adjourned *sine die* (*Re* Black (2009), 32 O.S.C.B. 8049) pending the resolution of the U.S. Proceedings.

[6] Following the conclusion of the U.S. Proceedings in February 2013, Staff of the Commission ("Staff") issued an Amended Statement of Allegations dated July 12, 2013 in reliance on subsection 127(10) of the Act seeking a reciprocal order against Black in Ontario based on the findings against him and convictions arising from the U.S. Proceedings.

III. Subsection 127(10) of the Act

[7] Subsection 127(10) of the Act plays an important role in facilitating the cross-jurisdictional enforcement of judgments for breaches of securities law and provides the Commission with a mechanism to issue protective and preventive orders to ensure that conduct which took place in other jurisdictions will not be repeated in Ontario's capital markets. As stated by the Supreme Court of Canada in *McLean v. British Columbia (Securities Commission),* [2013] 3 S.C.R. 895 ("*McLean*") at paragraph 51:

> …given the reality of interprovincial, if not international, capital markets, [t]here can be no disputing the indispensable nature of interjurisdictional co-operation among securities regulators today" (*Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21 (CanLII), 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 27). [Emphasis added.]

[8] Subsection 127(10) permits the Commission to bring the OSC Proceeding against Black to an end in an expeditious and minimally costly fashion. It provides a process whereby the Commission may make a final order against Black based on findings made in the United States. As explained in *McLean* at paragraph 54:

> … [the power to issue a reciprocal order] achieves the legislative goal of facilitating interprovincial [and international] cooperation by providing a triggering "event" *other than the underlying misconduct.* The corollary to this point must be the ability to actually rely on that triggering event — that is, the other jurisdiction's settlement agreement (or conviction or judicial finding or order, as the case may be) — in commencing a secondary proceeding. [Emphasis added.]

[9] Relying on findings of other jurisdictions obviates the need for a full hearing on the merits based on similar facts that were litigated in another jurisdiction. This saves time and resources and avoids the need for an inefficient and parallel duplicative proceeding in Ontario. This is consistent with the statement of the Commission in *Re Azeff* (2012), 35 O.S.C.B. 5158 ("*Azeff*") at paragraph 382 that "the interests of administrative efficiency and fairness, and the *Rules of Procedure* themselves, demand

that, if a matter can be disposed of without resort to a lengthy and costly proceeding, it ought to be".

IV. Request for a Stay

[10] In his application, Black is seeking an order staying the OSC Proceeding against him on the condition that the Undertaking would remain in effect. Black contends that the continuation of the OSC Proceeding is entirely unnecessary so as to be unfair and vexatious, and to constitute an abuse of process.

[11] Black also contends that the continuation of the OSC Proceeding is not only completely disproportionate to the seriousness of the remaining allegations against Black, it would serve no proper and useful purpose and that the only remedy for this abuse is a stay of the proceeding.

[12] The Supreme Court of Canada has emphasized that a stay of proceedings "is only one remedy to an abuse of process, but the most drastic one" (*R. v. Regan*, [2002] 1 S.C.R. 297 ("*Regan*") at para. 53) and that a stay will only be appropriate if the following criteria are met:

> (1) The prejudice cause by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome,
> (2) No other remedy is reasonably capable of removing that prejudice, and
> (3) A balancing of interests that would be served by the granting of the stay of proceedings against the interest that society has in having a final decision.
>
> (*Regan, supra* at paras. 54 and 57)

[13] The Supreme Court also set a high threshold for determining whether there is an abuse of process by requiring that it be demonstrated that:

> (1) the proceedings are oppressive or vexatious; and
> (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency.
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> (*Regan, supra* at para. 50 citing *R. v. Scott*, [1990] 3 S.C.R. 979 at p.1007)

[14] The use by the Commission of a subsection 127(10) proceeding is an entirely proper discharge by the Commission of its statutory mandate under section 1.1 of the Act to protect investors and ensure the efficiency of Ontario's capital markets and is not an abuse of process. The OSC Proceeding is neither oppressive (harsh and authoritarian) nor vexatious (brought without sufficient grounds for winning purely to cause annoyance to the defendant). In fact, the exercise by the Commission of its authority to issue a

reciprocal order following the completion of the U.S. Proceedings eliminates the need to re-litigate matters with respect to which another jurisdiction has already made findings, precisely as intended by the legislature. Reciprocal orders are an effective tool to facilitate inter-jurisdictional enforcement and enable the proper administration of justice by eliminating duplicative proceedings based on similar evidence.

[15] In the criminal law context, the Supreme Court of Canada has recognized that a stay of proceedings for abuse of process will only be granted in the clearest of cases and that:

> [T]o conclude that the situation "is tainted to such a degree" and that it amounts to one of the "clearest of cases", as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice.
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> (*R. v. Power,* [1994] 1 S.C.R. 601 at paras. 10 and 12) [Emphasis added.]

[16] In an administrative law context, the Supreme Court of Canada has held that, in order to find an abuse of process, we must be satisfied that "the damage to the public interest in the fairness of the administrative process should the proceedings go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted". (*Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para. 120). In our view, quite the opposite would be true in the Black matter.

[17] As noted in paragraph 10 above, Black alleges in his Notice of Motion, an allegation which is repeated at paragraph 34 of his Factum, that, as the Undertaking would remain in effect under his proposal, "the continuation of the Proceeding against Black is entirely unnecessary so as to be unfair and vexatious, and to constitute an abuse of process." The foregoing allegation quite clearly does not satisfy the requirements for a determination that there has been an abuse of process articulated in *Reagan* and *Power.* Moreover, there would, in our view, be a public expectation that the Commission will finally address and make a determination with respect to the allegations against Black in Ontario that have been outstanding for more than nine years (since the Initial OSC Proceeding commenced) and the Commission's failure to make such a determination would bring its regulatory role into disrepute and would likely be viewed as a means by which Black would avoid any finding against him in Ontario.

[18] The Undertaking was always understood to be of an interim nature and that it would remain in place to ensure the protection of Ontario's capital markets pending the Commission's final decision in this matter. As the Commission made clear when agreeing to the delay in 2006**:**

> In view of the protective and preventive role of the Commission in safeguarding the capital markets, [Black's] agreement to provide an undertaking to the Commission that [he] will abide by appropriate

> terms and conditions restricting [his] participation in the capital markets is critical to a lengthy adjournment of this proceeding.
>
> (*Re Black 2006, supra* at para. 57)

[19] Allowing the Undertaking to remain outstanding in the absence of a final decision and reasons issued by the Commission would also raise a number of legal concerns relating to its future enforceability. Similar concerns would arise in the event that Black were to make to an application in the future to vary the terms of the Undertaking which would likely obligate the Commission to proceed with a hearing relating to the OSC Proceeding, potentially years after the events took place. Such an outcome would be untenable.

[20] Black's proposal that the Undertaking simply remain outstanding in lieu of a hearing of the OSC Proceeding would have the effect of delaying indefinitely, or avoiding entirely, the final adjudication of the allegations against Black in Ontario.

[21] Black has merely asserted but not established that the OSC Proceeding is oppressive and vexatious and an abuse of process and, by failing to do so, he has not satisfied the criteria for the granting of a stay. As a result, and for the reasons set out above, the public interest clearly compels us to reject Black's application for a stay of the OSC Proceeding and to proceed with the hearing under subsection 127(10) of the Act.

V. Scope of the Hearing

[22] As an alternative submission, Black is seeking direction from the Panel on the scope of evidence that will be permitted at the hearing relating to the OSC Proceeding. The categories of evidence proposed by Black in his Notice of Motion are couched in such broad terms that it is clear that, if we were to permit all of such evidence, we would effectively be permitting the re-litigation of the U.S. Proceedings which Black categorically states is not his objective.

[23] We agree that it is appropriate for us to deal with Black's scope of evidence request now to avoid uncertainty regarding the type of evidence that will be permitted at the hearing and to more efficiently allocate the resources of the Commission. Determining in advance the evidence that will be considered appropriate will also permit for a more efficient hearing and limit the need to deal with numerous objections relating to evidence during the hearing.

[24] As noted above, subsection 127(10) proceedings are not a forum for re-litigating findings made in other jurisdictions. The purpose of such proceedings is to hear evidence and submissions with respect to the terms of an appropriate reciprocal order to protect Ontario's capital markets by ensuring that similar conduct does not occur in Ontario in the future.

[25] As stated by the Commission in *Re Graham* (2009), 32 O.S.C.B. 7202 at paragraph 31, "relying on the Final Judgment in a s. 127(10) application represents a

timely, open and efficient administration and enforcement of the Act by the Commission." Further, as stated by the Alberta Securities Commission in *Re Anderson*, 2007 ABASC 912 at paragraph 16:

> This is not an appeal or a review of the BCSC Decision, nor a rehearing into the events giving rise to that decision (see *Re Alexander*, 2007 ABASC 146 at paras. 37, 46; and *Re Kuipers*, 2007 ABASC 293 at paras. 23, 25). To the contrary, section 198(1.1) (like its counterparts in the securities laws of other provinces) establishes a mechanism by which this Commission can issue protective and deterrent orders on the basis of determinations made by other decision-making bodies *without* the necessity of duplicating the process by which the original determinations were reached. The effects – and, it may be inferred, the legislative purposes – are to enhance the efficiency and effectiveness of regulatory oversight of the capital markets, and the protection of participants in those markets, while diminishing the ability of wrongdoers to avoid the consequences of misconduct merely by moving their activities from one jurisdiction to another. [Emphasis added.]

[26] Although there is a low threshold for determining whether it is in the public interest to reciprocate an order from another regulatory authority, the Commission must make its own determination of what is in the public interest in Ontario "rather than make an order automatically, based on the order of the foreign jurisdiction" (*Lines v. British Columbia (Securities Commission)* (2012) BCCA 316, at para. 31). The Commission has also recognized that:

> The decision of a foreign jurisdiction stands as a determination of fact for the purpose of the Commission's considerations under subsection 127(10) of the Act. The Commission's task is then to determine whether, based on those findings of fact, the sanctions proposed by Staff would be in the public interest in Ontario. An important factor to consider is, if the facts had occurred in Ontario, whether the respondent's conduct would have constituted a breach of the Act and been considered to be contrary to the public interest, such that it would attract the same or similar sanctions.
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> (*Re JV Raleigh Superior Holdings Inc.* (2013), 36 O.S.C.B. 4639 at para. 16)

[27] The Commission has also considered the threshold when reciprocal orders are based on decisions of courts and regulators outside Canada. In *Re New Futures Trading International Corp* (2013), 36 O.S.C.B. 5713 ("*New Futures*"), when considering judgments from the United States, the Commission commented at paragraph 27 that:

> Although the application of subsection 127(10) of the Act does not involve the direct enforcement of a foreign judgment, the principles of comity and reciprocity espoused in *Morguard* and in *Beals*, underlying the enforcement of interprovincial and foreign judgments should equally apply to securities regulators. I acknowledge that the Commission's orders in the public interest involve more than monetary judgment enforcement. The Commission has the authority to impose a number of market prohibitions on the Respondents, only when it is in the public interest to do so. Comity requires that there not be barriers to recognizing and reciprocating the orders of other regulatory authorities when the findings of the foreign jurisdiction qualify under subsection 127(10) of the Act as a judgment that invokes the public interest. For comity to be effective and the public interest to be protected, the threshold for reciprocity must be low. The onus will rest with the Respondents to show that there was no substantial connection between the Respondent and the originating jurisdiction, that the order of the foreign regulatory authority was procured by fraud or that there was a denial of natural justice in the foreign jurisdiction. [Emphasis added.]

[28] In *Beals v. Saldanha*, [2003] 3 S.C.R. 416 ("*Beals*"), the Supreme Court of Canada stated as follows:

> If the foreign state's principles of justice, court procedures and judicial protections are not similar to ours, the domestic enforcing court will need to ensure that the minimum Canadian standards of fairness were applied. If fair process was not provided to the defendant, recognition and enforcement of the judgment may be denied.
>
> (at para. 63)
>
> …
>
> The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment. However, if that procedure, while valid there, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected. The defendant carries the burden of proof and, in this case, failed to raise reasonable apprehensions of unfairness.
>
> (at para. 64) [Emphasis added.]

[29] Based on the principles articulated in *New Futures* and *Beals*, we need to consider whether the U.S. Proceedings lacked due process or otherwise subjected Black to a denial of natural justice in the United States.

[30] Black was represented in the U.S. Proceedings by extremely capable counsel. As noted by Justice St. Eve, "… the Court noted that [Black's] trial and appellate counsel were some of the most talented and well-respected attorneys in their field" and then listed in detail the accomplishments of his U.S. trial counsel (*Collateral Appeal Judgment, supra* at p. 4). Black's counsel before the Supreme Court of the United States and on remand before the U.S. Court of Appeal was Miguel Estrada, and in his book, *A Matter of Principle*, which formed part of Black's submissions to us, Black acknowledges at page 478 that Mr. Estrada was "very able and motivated" and "proved a magnificently thorough counsel".

[31] With respect to the conduct of Justice St. Eve, who presided over the trial, the motion for a judgment of acquittal of the convictions and the sentencing before the U.S. District Court, Black stated at the first sentencing hearing "…it only remains for me to thank your Honor for the unfailing courtesy and efficiency with which you conducted this trial" (*2007 Sentencing Decision, supra* at page 111 lines 12-14).

[32] As reflected in the numerous decisions resulting from the U.S. Proceedings, Black was provided with an exhaustive opportunity to repeatedly contest the criminal and administrative allegations against him before some of the most consequential courts in the United States, including the Supreme Court. Although the principles of natural justice, court procedures and judicial protections in the United States are not identical in all respects to those that exist in Ontario, Black has not raised with us any alleged deficiencies in or procedural failures of the U.S. Proceedings that would amount to a denial of natural justice. Clearly, Black's assertion through his counsel that he "doesn't believe that he did something wrong" (Hearing Transcript, April 10, 2014 at p. 69, lines 22-24), is not evidence of a denial of natural justice.

[33] By any measure, the U.S. Proceedings met Canadian standards of fairness and Canada's concept of natural justice. As stated in *Beals*, Black carried the burden of proof, and, in our view, has "failed to raise reasonable apprehensions of unfairness" in the conduct of the U.S. Proceedings. In addition, the U.S. Proceedings resulted in convictions in the United States relating to offenses arising from transactions businesses or courses of conduct related to securities within the meaning of paragraph 1 of subsection 127(10) of the Act), and Black agreed with a securities regulatory authority in the United States to be made subject to sanctions and restrictions within the meaning of paragraph 5 of subsection 127(10) of the Act.

[34] Having concluded that the convictions and orders resulting from the U.S. Proceedings are a reliable basis for an enforcement proceeding against Black under subsection 127(10) of the Act, the questions that remain are (i) what protective and preventive order would be in the public interest in Ontario; and (ii) what evidence relating to such an order would be appropriate at the subsection 127(10) hearing. The

case law previously referred to establishes that the purpose of the hearing is not to re-litigate the U.S. Proceedings. The conduct at issue has already been the subject of adjudication in the United States and it is not the Commission's role to go behind foreign judgments and overturn prior court findings.

[35] Our role under subsection 127(10) of the Act is to craft a reciprocal order that is protective and preventive to ensure that conduct similar to the conduct which was the subject matter of the U.S. Proceedings cannot occur in Ontario's capital markets. To be admissible, any evidence presented at the subsection 127(10) hearing must be relevant to crafting such an order. As summarized in *Administrative Law in Canada*:

> The basic criterion for the admissibility of evidence is relevance. Relevant evidence is admissible, irrelevant evidence is inadmissible. Relevance is determined by the purpose and subject matter of the proceeding described in the notice of hearing or written allegations. Evidence relevant to those matters is admissible.
>
> (Sara Blake, *Administrative Law in Canada,* 5th ed (Markham: Lexis Nexis Canada 2011) at 60)

[36] A tribunal's ability to exclude irrelevant evidence is well established. For example, in *Wright v. College and Assn. of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267 at paragraph 33, the Alberta Court of Appeal affirmed a tribunal's decision to exclude evidence as follows:

> Deciding what issues are raised by the hearing, and what evidence is relevant to those issues is an integral part of the decision making process. Likewise, deciding what evidence will be persuasive or helpful (i.e. material) on those issues is well within the mandate of the Hearing Tribunal. … A tribunal is entitled to decide that some evidence is not sufficiently persuasive to warrant the time and expense required for its consideration.

[37] For the purposes of subsection 127(10) hearings, the Act provides that the Commission may make orders on the basis of: convictions by courts and/or the orders and decisions of, or settlement agreements with, regulators in other jurisdictions. However, the Commission has accepted that other evidence might also be relevant to assist the Commission in crafting an appropriate reciprocal order. For example, in *Re Euston Capital Corp.* (2009), 32 O.S.C.B. 6313, in addition to the decisions of other Canadian securities regulators, evidence was led "…indicat[ing] that the Respondents may have been engaged in serious misconduct in Ontario, and their conduct may have harmed a number of Ontario investors"(at para. 78). This evidence could be relevant to the sanctions that should be imposed on respondents.

[38] In our view, in addition to convictions, orders or agreements emanating from the United States, in the circumstances of this matter, other evidence of the parties that may

be relevant to the determination of an appropriate and proportionate order by the Commission would be evidence relating to Black's conduct as contemplated by paragraphs 39(e) and (g) below.

[39] We have reviewed the summary of the evidence that Black seeks to adduce set out in paragraphs (aa) and (bb) of his Notice of Motion, and have assessed its relevance. We find that:

(a) The value that the Black-led management team built and the Black-led management team's expertise, described in paragraphs (aa)(i) and (ii) are not relevant. The growth of the Hollinger Inc. ("Hollinger") enterprise is not at issue in the OSC Proceeding.

(b) The allegations by certain groups regarding Black and the Black-led management team's improprieties described in paragraph (aa)(iii) are not relevant. The management of the Hollinger enterprise is not at issue in the OSC Proceeding.

(c) The alleged destruction of the Hollinger enterprise described in paragraph (aa)(iv) is not relevant. The decline in the value of the Hollinger enterprise is not at issue in the OSC Proceeding.

(d) The efforts of the Black-led management team to increase Hollinger's market capitalization described in paragraph (bb)(i) are not relevant and are not at issue in the OSC Proceeding.

(e) The Hollinger corporate governance procedures described in paragraph (bb)(ii) may be relevant to the issue of sanctions but only to the extent of Black's conduct relating to the APC Payments and the Forum and Paxton Payments.

(f) The circumstances that lead to the departure of the Black-led management team described in paragraph (bb)(iii) are not relevant and are not at issue in the OSC Proceeding.

(g) Black's conduct relating to the removal of 13 boxes of documents from Hollinger's Toronto offices described in paragraph (bb)(iv) may be relevant to the issue of sanctions.

VI. Conclusion

[40] For the reasons set out above, the application by Black for a stay of the OSC Proceeding is dismissed. The evidence permitted to be adduced at the subsection 127(10) hearing is set out in paragraphs 39(e) and (g) of these reasons provided that, at the subsection 127(10) hearing, the Panel may make further rulings relating to the

admissibility of specific evidence sought to be adduced and may determine the weight to be ascribed to such evidence.

[41] In coming to the foregoing conclusions, we have taken a practical approach to ensure we do not waste valuable Commission resources re-litigating the U.S. Proceedings, while at the same time ensuring that we have all relevant information to craft a reciprocal order in this matter. As these reasons narrow the scope of the evidence that will be permitted, the subsection 127(10) hearing will be much shorter than originally contemplated. As a result, we have also issued a separate order rescheduling certain future appearances and scheduling a pre-hearing conference to ensure the efficient case management of this hearing and that there are no further delays.

[42] During the hearing of Black's application for a stay of proceedings, both parties alluded to the subsection 127(10) hearing taking place in two phases, namely, an evidentiary phase and a sanctions phase. We do not agree with such an approach, which has never been followed in any other subsection 127(10) proceeding before the Commission, and see no compelling reason to alter the Commission's current practice. For clarity, the hearing scheduled to commence on October 3, 2014 is for the purposes of making a reciprocal order under subsection 127(10) of the Act, and will deal with evidence and submissions relating to such an order.

Dated at Toronto this 13th day of June, 2014.

"Christopher Portner"	*"Judith N. Robertson"*
Christopher Portner	Judith N. Robertson