Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8
22e 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 –

ERIC INSPEKTOR

REASONS AND DECISION REGARDING A MOTION FOR DISCLOSURE

(Rule 3 of the Commission's *Rules of Procedure* (2014), 37 O.S.C.B. 4168)

Hearing:	October 21, 2014	
Decision:	December 10, 2014	
Panel:	Mary Condon	- Commissioner and Chair of the Panel
Appearances:	Eric Inspektor	- Self-represented
	Swapna Chandra	- For Staff of the Ontario Securities Commission

TABLE OF CONTENTS

REASONS AND DECISION

I. OVERVIEW

[1] On October 21, 2014, the Ontario Securities Commission (the "**Commission**") heard a motion brought by Eric Inspektor (the "**Applicant**") for an order pursuant to section 17 of the of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"), authorizing disclosure of certain investigation notes that the Applicant received from Enforcement Staff of the Commission ("**Staff**") as part of Staff's disclosure obligations in an administrative proceeding against him (the "**Motion**"). Staff opposes the Motion.

[2] The Applicant is the subject of an administrative proceeding before the Commission, commenced by Notice of Hearing issued on March 28, 2014 in relation to a Statement of Allegations filed by Staff on the same day. Staff makes a number of allegations against the Applicant including that he engaged in unregistered trading and the illegal distribution of securities.

[3] On October 6, 2014, the Applicant served and filed a letter requesting disclosure pursuant to section 17 of the Act of certain of Staff's investigation notes and describing reasons for the requests. The Applicant also attached the specific investigation notes for which he seeks disclosure. Staff served and filed a Memorandum of Fact and Law and a Brief of Authorities on October 20, 2014.

[4] On October 21, 2014 the Motion hearing was held *in camera*, pursuant to Rule 8.1 of the Commission's *Rules of Procedure* (2014), 37 O.S.C.B. 4168 (the "**Rules of Procedure**") and subsection 9(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, as amended (the "**Motion Hearing**"). There were 12 exhibits tendered into evidence at the Motion Hearing, including investigation notes documenting discussions between Staff and: (i) Bank A; (ii) a Court-Appointed Receiver; (iii) Witness A, the Applicant's former counsel; (iv) Witness B; and (v) Witness C. Staff also tendered a list of bank accounts related to the Applicant held at Bank A.

[5] At the outset of the Motion Hearing, the Applicant submitted that he did not have an opportunity to respond to Staff's Memorandum of Fact and Law as it was not served and filed in accordance with the Rules of Procedure, but nevertheless he was prepared to make his submissions on the Motion. I reminded the Applicant that he was present at the appearance of September 17, 2014, at which time dates were scheduled for the exchange of submissions on the Motion, he was aware of the tight timelines, he did not object, and a written order was issued to the same effect. I also cited the Rules of Procedure, which provide that it is possible for the Commission to waive timelines set out in the Rules of Procedure (Rule 1.4(3)). Nevertheless, I provided the Applicant with an opportunity to make additional written submissions in response to Staff's Memorandum of Fact and Law, to be filed by October 28, 2014. The Applicant served and filed a Factum on October 28, 2014 in reply to Staff's Memorandum of Fact and Law. In his reply, the Applicant withdrew his request for Staff's investigation notes with respect to the Court-Appointed Receiver. As a result these reasons and decision do not consider that specific request for disclosure.

[6] I requested and received further submissions from the parties with respect to: (a) whether and when an investigation order was made pursuant to section 11 of the Act; (b) whether the contents of the Staff investigation notes, which are sought to be disclosed, were obtained pursuant to section 13 of the Act; and (c) what is the application and scope, if any, of the implied undertaking rule in this matter, as raised in *Re Y* (2009), 32 O.S.C.B. 7188 ("***Re Y***"). Staff filed supplementary submissions on November 18, 2014 and the Applicant filed supplementary submissions on November 25, 2014.

II. SUBMISSIONS

A. The Applicant's Submissions

[7] The Applicant seeks orders for disclosure of Staff's investigation notes for use in a number of parallel civil proceedings. These include: (a) an action commenced by the Applicant against Bank A (the "**Bank Action**"); (b) actions commenced by the Applicant against his former counsel, Witness A (the "**Breach of Fiduciary Duty Action**"); and (c) a derivative action commenced by investors of certain companies (referred to herein as the "**Kaptor Group**") for which the Applicant was a directing mind (the "**Derivative Action**") (collectively, the "**Civil Actions**"). The Applicant submits that the Derivative Action was initiated against the Applicant by an investor, Witness B, who in turn refers to Witness C in an affidavit prepared for the Derivative Action. Therefore, the Applicant is a defendant in the Derivative Action as he was a directing mind of Kaptor Group.

[8] The Applicant submits that there is a discrepancy between Kaptor Group account information provided by Bank A to the Commission and Kaptor Group account information provided by Bank A to the Applicant in his capacity as a defendant to the Derivative Action referred to above. The Applicant argues that there is no way of making a request to examine for discovery the person from Bank A named in Staff's investigation note, unless there is disclosure pursuant to section 17 of the Act.

[9] With respect to Staff's investigation note relating to Witness A, the Applicant submits that he commenced an action against his former counsel for breach of fiduciary duty and breach of duty of loyalty. As a result, the Applicant seeks disclosure for the purpose of determining what, if anything, Witness A told Staff.

[10] The Applicant also submits that Witness B circulated an email to other investors of the Kaptor Group, which insinuates misconduct by the Applicant, and that Witness C has been vocal in the community and in meetings about the Applicant's alleged misconduct. The Applicant takes the position that Staff's investigation notes are the only documents that refer to such accusations in a blatant manner and he seeks their disclosure for use in one or more of the Civil Actions. The Applicant admits that Witness B will be examined in discovery for the Derivative Action.

[11] The Applicant argues that the Motion does not seek disclosure of compelled testimony and a witness cannot expect his or her voluntary statements to be protected. Further, he submits that witnesses cannot expect that statements relevant to civil litigation would not be disclosed, there is no potential harm to witnesses as a result of disclosure,

and the requested disclosure does not undermine the integrity of the ongoing investigation because it assists the investigation.

[12] The Applicant does not object to notifying parties who could be affected by the order. In other words, he is not seeking an order without notice pursuant to subsection 17(2.1) of the Act.

[13] With respect to voluntary evidence, the Applicant agrees that the Implied Undertaking Rule ("**IU Rule**") encourages individuals to provide candid information to Staff, as long as the information is factual, truthful and not misleading. The Applicant submits that he seeks disclosure for use in the Civil Actions to challenge the validity and accuracy of the information being provided to Staff.

[14] Lastly, the Applicant submits that the purpose of the IU Rule is to protect the privacy of witnesses. However, where the accuracy of information being provided by a witness is questioned, where the information being provided breaches the witness' fiduciary obligations, or where a witness makes unfounded allegations, the witness should not be afforded the protection of the IU Rule.

B. Staff's Submissions

[15] Staff submits that the Applicant has failed to demonstrate that the public interest in disclosure outweighs the public interest in maintaining the integrity and confidentiality of Staff's ongoing investigation. Staff also submits that the use of the disclosure material in a collateral civil proceeding would not further the Commission's mandate under the Act.

[16] Staff submits that the investigation of this matter is ongoing and many of the parties that would be affected by the disclosure that is sought by the Applicant are cooperating with Staff in that investigation. Staff takes the position that the integrity and confidentiality of its investigation would be compromised as would the ability to secure the co-operation of potential witnesses if their initial contact with the Commission found its way into existing or proposed civil actions.

[17] Staff also submits that the Applicant has not clearly demonstrated that the disclosure he seeks is relevant or critical to the Civil Actions or could not be obtained through the civil discovery process.

[18] Staff submits that the investigation notes relating to Bank A were obtained pursuant to section 13 of the Act following the issuance of summonses dated December 5 and 11, 2012 and, therefore, section 16 of the Act prohibits the Applicant from disclosing them.

[19] Staff submits that the investigation notes relating to Witness A, Witness B and Witness C were obtained voluntarily (the "**Voluntary Evidence**") and are subject to the IU Rule. Staff submits that the IU Rule restricts the use of disclosed materials for any purpose other than making full answer and defence in the Commission proceeding. Staff submits that the privacy of the individuals who offered voluntary evidence to the Commission should be protected.

[20] Lastly, Staff submits that the Applicant has not provided notice to the relevant parties of this request and has not given them an opportunity to object.

III. THE LAW

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

> If the Commission considers that it would be in the public interest, it may make an order authorizing the disclosure to any person or company of,
>
> (a) the nature or content of an order under section 11 or 12;
>
> (b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13; or
>
> (c) all or part of a report provided under section 15.

[22] Subsection 17(2) of the Act prohibits the Commission from making an order under subsection 17(1) unless the Commission has, where practicable, given notice and an opportunity to object to the parties that would be affected by an order. Nevertheless, the statutory framework gives authority to the Commission to make an order without notice pursuant to subsection 17(2.1) of the Act where it would be in the public interest.

[23] The Commission has established that an applicant bears a heavy burden of demonstrating that disclosure is in the public interest. The Commission has held that:

> The Applicants accept that they have the onus of demonstrating that the requested use and disclosure of the Evidence is in the public interest under subsection 17(1) of the Act. There is a high expectation of privacy with respect to all testimony under section 13 of the Act which renders satisfying this onus a heavy burden.
>
> (*Re Black* (2008), 31 O.S.C.B. 10397 ("***Black***") at para. 78)

[24] The test for disclosure under subsection 17(1) of the Act is found in the Court of Appeal's decision in *Deloitte & Touche v. Ontario Securities Commission* (2002), 159 O.A.C. 257 ("***Deloitte & Touche* (CA)**") affirmed by the Supreme Court of Canada in *Deloitte & Touche LLP v Ontario (Securities Commission)*, [2003] 2 S.C.R. 713 ("***Deloitte & Touche* (SCC)**"). The decision in *Deloitte & Touche* (CA) in turn refers to the test articulated by the Divisional Court in *Coughlan v WMC International Ltd.,* [2000] O.J. No. 5109 ("***Coughlan***"). In determining whether it is in the public interest to order disclosure, the Commission must:

(i) consider the purpose for which the evidence is sought and the specific circumstances of the case, and

(ii) balance the continued requirements for confidentiality with its assessment of the public interest at stake, including harm to the person whose testimony is sought.

(*Deloitte & Touche* (CA)*, supra* at para. 15, citing *Coughlan, supra* at para. 38; *Black, supra* at para. 82)

[25] The Supreme Court of Canada has also held that the Commission is obligated to order disclosure only to the extent necessary to carry out its mandate under the Act (*Deloitte & Touche* (SCC), *supra* at para. 29).

[26] In applying the test under subsection 17(1) of the Act, the Commission must consider the following non-exhaustive list of factors:

(i) The high degree of confidentiality associated with compelled evidence and the strict limitations on its use imposed by sections 16, 17 and 18 of the Act;

(ii) The reasonable expectations of witnesses compelled to provide evidence;

(iii) The potential harm to witnesses as a result of the Commission authorizing use and disclosure of their compelled evidence;

(iv) The protections against self-incrimination provided by the Charter, the *Canada Evidence Act,* and the Ontario *Evidence Act;* and

(v) The integrity of Commission investigations.

(*Black, supra* at para. 135)

[27] The production of confidential materials obtained by the Commission under Part VI of the Act for use by a party in a civil action is not in and of itself in the public interest (*Re X and A Co.* (2007), 30 O.S.C.B. 327 ("***X and A Co.***") at para. 32).

[28] With respect to evidence collected on a voluntary basis, the Commission has held that the IU Rule is a recognized principle of law in Ontario, which applies to Commission proceedings (*Re Melnyk* (2006), 29 O.S.C.B. 7875 ("***Melnyk***") at para. 36, citing *A Co. v Naster* (2001), 143 O.A.C. 356 (Div. Ct.) ("***Naster***") at para. 23).

[29] In the civil context, the Supreme Court of Canada stated that, where the IU Rule applies, the onus is on the applicant to demonstrate a "superior public interest in disclosure" that outweighs the values that the implied undertaking is designed to protect and noted that such undertaking "should only be set aside in exceptional circumstances" *(Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems,* [2008] 1 S.C.R. 157 (*sub nom. Juman v. Doucette*) ("***Doucette***") at paras. 32 and 38).

[30] In *Doucette*, the Supreme Court of Canada expressed the view that an implied undertaking is designed in part to encourage complete and candid discovery by assuring parties that "the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded" (*Doucette, supra* at paras. 26 and 38). In addition, the Supreme Court also stated that the IU Rule is designed to protect privacy, the right against self-incrimination and the efficient conduct of litigation (*Doucette, supra* at paras. 32-33).

[31] In *Melynk,* the Commission held that:

> The implied undertaking rule prohibits the use of information obtained in a proceeding's discovery process for "any purpose collateral or ulterior to the resolution of the issues in that [proceeding]." (*Naster*, at para. 22). "[T]he respondents in the proceedings can demand to inspect the words of any documents produced by ... [although] they are bound under pain of sanction by the Commission not to use the information for any purpose outside the matter of the investigation." (*Naster*, at para. 24).
>
> (*Melnyk, supra* at para. 37, citing *Naster, supra* at paras. 22 and 24).

[32] I find that the factors discussed in *Doucette* and *Melnyk* are relevant and applicable to a determination of whether relief from the IU Rule should be granted in the present matter.

IV. ANALYSIS

[33] The Applicant seeks disclosure of Staff's investigation notes relating to four different parties. I find that Staff's investigation notes relating to Bank A were collected pursuant to section 13 of the Act and are, therefore, compelled evidence. I also find that the Voluntary Evidence collected is subject to the IU Rule. I will apply the relevant legal considerations to each request below to determine whether the Commission should order disclosure.

A. Compelled Evidence Relating to Bank A

[34] The Applicant submits that disclosure of the investigation notes relating to Bank A, for the purpose of one or more of the Civil Actions, is in the public interest because the public has been told that $38 million has been lost and the public is entitled to know the truth. The Applicant submits that the Commission must grant these orders in order to determine the actual amounts lost by investors and who should be held accountable for the losses.

[35] Staff submits that the relevance of the investigation notes relating to Bank A to the Civil Actions is unclear because the state of accounts reflected in the notes was obtained in the initial phases of the investigation and may pertain to any one of 43 accounts for which the Applicant was on record. Staff argues that the probative value, if any, of the evidence sought with respect to Bank A is far outweighed by the public interest in maintaining the confidentiality of Staff's investigation. Further, Staff submits that the

Applicant has not provided any evidence that he attempted to procure the evidence sought to be disclosed in any other way.

[36] Recognizing that subsection 16(2) of the Act states that all things obtained under section 13 of the Act are for the exclusive use of the Commission and that the use of that confidential material in a civil action is not in and of itself in the public interest (*X and A Co., supra* at paras. 32 and 38), my determination is that the Applicant has not met the burden of demonstrating that the requested use and disclosure of this evidence is in the public interest under subsection 17(1) of the Act.

[37] In making this determination, I am guided by the Supreme Court of Canada's decision that the Commission is obligated to order disclosure only to the extent necessary to carry out its mandate under the Act and owes a duty to protect the privacy interests of affected parties (*Deloitte & Touche* (SCC), *supra* at para. 29).

[38] This matter is distinguishable from matters in which respondents to Commission proceedings have sought orders for purposes relating to their defence in criminal proceedings (*Black, supra* at para. 5; *Re Y, supra* at para 86). The Commission has acknowledged that:

> It is an integral part of the Act's investigation and examination scheme that these broad powers are balanced with detailed protections for persons compelled to give materials and evidence under oath. The Commission is responsible for maintaining all evidence obtained under Part VI of the Act in the highest degree of confidence. This responsibility is the *quid pro quo* in return for the broad and unusual power afforded by the Legislature to the Commission to enable it to carry out its responsibilities to the public under the Act.
>
> (*Black, supra* at para. 234)

[39] Contrary to the Applicant's submissions, the Applicant will have an opportunity to fully respond to Staff's allegations, and make use of the disclosure materials in that context if he so chooses. In so doing, the public interest is served through the Commission hearing to determine whether the Applicant should be held accountable for the losses to investors. The Applicant has not persuaded me that the broad powers provided to the Commission to engage in evidence gathering should be used for the purpose of a parallel civil proceeding.

[40] Furthermore, I am not persuaded that disclosing this investigation note is the only way that the Applicant can access relevant account records of Bank A. In particular, the Applicant has not demonstrated that he is unable to obtain information about accounts in Bank A through other means, including the civil discovery process.

[41] Having considered the purpose for which the evidence is sought, the specific circumstances of the case, and the need to balance the requirements for confidentiality with the public interest at stake, I am not satisfied that disclosure of this material is in the public interest.

B. Voluntary Evidence Relating to Witness A

[42] The Applicant submits that the public should be aware of Witness A's breach of his obligations as counsel, if any, and that disclosure would have no impact on Staff's ongoing investigation.

[43] Staff submits that the Applicant has not provided any particulars of the Civil Actions to demonstrate the relevance or necessity of the information contained within the investigation note relating to Witness A. Staff takes the position that any value that the investigation note has is outweighed by protecting the confidentiality of an ongoing investigation.

[44] Although the Commission granted partial relief from the IU Rule in respect of certain of the voluntary evidence in *Re Y,* Staff submits that the Commission considered extraordinary circumstances, which are not present in this case. In particular, Staff submits that Y's proposed use of the voluntary evidence was to defend serious criminal charges, in which Y's liberty was at stake and the issues engaged Y's right to make full answer and defence. Staff also submits that in *Re Y* the panel considered the reasonable expectations of individuals that their privacy would be protected, the absence of potential harm to the witnesses and the absence of an ongoing investigation.

[45] While framed as a request for disclosure, the Applicant's submission at the Motion Hearing made it apparent that his interest was in inquiring about whether or not Witness A spoke to Staff and, if so, the particulars of such conversation. His submission included: "Point three, […Witness A]. This is a little bit -- and maybe I'm not really requesting a section 17, but maybe I'm really requesting some clarity." (Confidential Motion Hearing Transcript of October 21, 2014 at p. 39).

[46] Having reviewed Staff's investigation note relating to Witness A, provided to me on a confidential basis, I conclude that the Applicant's argument with respect to its relevance to the Breach of Fiduciary Duty Action is speculative at best. The investigation note consists of two sentences and no substantive particulars. I note that Staff is obliged to make full disclosure to the Respondent and, if Staff had had further discussions with the Applicant's counsel, I would expect that Staff would disclose it to the Applicant.

[47] I am not satisfied that, with respect to the investigation note involving Witness A, the Applicant has demonstrated a public interest in disclosure such that the implied undertaking should be set aside.

C. Voluntary Evidence Relating to Witness B and Witness C

[48] The Applicant submits that he wishes to challenge the validity and accuracy of the information being provided to Staff by Witness B and Witness C by using it in the Derivative Action. The Applicant argues that the public should be aware of the truth and that disclosure would have no impact on Staff's ongoing investigation as there is no reason for Witness B or Witness C to stop cooperating with Staff.

[49] Staff again submits that there is an ongoing investigation in this matter and disclosure would undermine the cooperation of these witnesses, who may be called to

testify in the hearing on the merits before the Commission. Witness B, Staff submits, was already the subject of a compelled interview by Staff and specifically raised concerns about the confidentiality of the information he was providing and its potential use in civil litigation. Staff takes the position that any value that the investigation notes have to the Applicant is outweighed by protecting the confidentiality of an ongoing investigation. Staff submits that the investigation notes are not certified transcripts of interviews, but rather notes of telephone conversations. Accordingly, Staff submits that their purported use for purposes of impeaching witnesses is without foundation.

[50] Staff submits that the distinguishing factors referred to in paragraph [44] above, with respect to *Re Y,* apply equally to the Applicant's requests relating to Witness B and Witness C.

[51] The Applicant admits that Witness B is a party to one of the Civil Actions who will be examined in the civil discovery process and that Witness C made statements in meetings related to one of the Civil Actions. The Applicant also admits that Witness B and Witness C have made allegations to Staff which they have repeated in public. Therefore, I am not persuaded that use of Staff's investigation notes relating to Witness B and Witness C are the only method by which the Applicant can examine them in the context of the Civil Actions. Nor did the Applicant provide sufficient particulars concerning the scope and content of the Civil Actions, which would have assisted me in assessing the relevance of the evidence sought to be disclosed for the Applicant's collateral use.

[52] I find that the Applicant's proposed use of the investigation notes relating to Witness B and Witness C for the Civil Actions is distinguishable from *Re Y*, which dealt with disclosure in a criminal proceeding engaging the right to make full answer and defence. In addition, in *Re Y,* the investigation had been completed, whereas in this case the investigation is ongoing. I accept Staff's submission that disclosure of the investigation notes relating to Witness B and Witness C could undermine Staff's ongoing investigation and the cooperation of these witnesses.

[53] It is in the public interest for individuals to cooperate with Staff's investigations and the case law acknowledges that potential witnesses should have the benefit of some assurance that their privacy is being protected. There are a number of reasons why, in pursuing the purposes of the Act, Staff would seek information on a voluntary basis. Such evidence can be tested by respondents in defending themselves against the allegations made by Staff. The Applicant will have an opportunity to challenge statements made by Witness B and Witness C, call them as witnesses or be afforded an opportunity to cross-examine them during the Commission hearing to determine the merits of Staff's allegations.

[54] It is less clear that a respondent should be able to use disclosed materials in a collateral civil proceeding, where doing so could jeopardize Staff's ongoing investigation and the potential cooperation of witnesses who provide voluntary evidence. I am not satisfied that, with respect to the investigation notes involving Witness B and Witness C,

the Applicant has demonstrated a public interest in disclosure such that the implied undertaking should be set aside.

V. CONCLUSION

[55] The Applicant has not met the burden of demonstrating that the requested use and disclosure of evidence relating to Bank A is in the public interest under subsection 17(1) of the Act. With respect to the Voluntary Evidence, the Applicant has also failed to demonstrate a public interest in disclosure such that the implied undertaking should be set aside.

[56] The Applicant had no objection to providing notice to the parties affected by an order pursuant to section 17 of the Act. Had I taken the view that the Applicant could meet the burden of demonstrating that disclosure for a collateral purpose in a civil proceeding should be ordered, I would have requested submissions, if any, by the affected parties, before making any disclosure orders.

[57] For these reasons, the Motion is dismissed.

DATED at Toronto this 10th day of December 2014.

"Mary Condon"

_____

Mary G. Condon