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Citation: Katanga Mining Limited (Re), 2019 ONSEC 4  
Date: 2019-01-16

**IN THE MATTER OF  
KATANGA MINING LIMITED**

**CONFIDENTIAL REASONS FOR DECISION  
(Section 17 of the *Securities Act*, RSO 1990, c S.5)**

**Hearing:** August 8, 2017

**Decision:** October 18, 2017

**Panel:** D. Grant Vingoe Vice-Chair and Chair of the Panel  
Deborah Leckman Commissioner  
Mark J. Sandler Commissioner

**Appearances:** Carlo Rossi For Staff of the Commission  
Alvin Qian  
  
Alan Gardner For the Applicant,  
Amanda McLachlan Katanga Mining Limited

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## REASONS FOR DECISION

### I. OVERVIEW

- [1] The Applicant, Katanga Mining Limited (“**Katanga**”), filed a confidential application seeking an order from the Ontario Securities Commission to authorize the disclosure of a summons to individuals employed by four separate audit firms. When the Commission considers it to be in the public interest, the requested relief may be granted under subsection 17(1) of the *Securities Act*, RSO 1990, c S.5 (the “**Act**”).
- [2] Staff of the Commission consented to the relief sought with respect to Katanga’s current auditor, but opposed the relief sought for disclosures to the other three audit firms. In relation to the other three audit firms, Staff proposed that Katanga be authorized to disclose only a letter from Staff (the “**Staff Letter**”). The Staff Letter would be addressed to Katanga’s counsel and would indicate that Staff is conducting a confidential investigation into Katanga. But the Staff Letter would not disclose the existence, content or nature of any summons issued in the Katanga investigation.
- [3] On August 8, 2017, the Commission held an *in camera* oral hearing. Katanga’s financial statements were due to be filed the following week. As a result, there was a desire on Katanga’s part for a timely disposition of its application. In the circumstances, the Panel orally advised the parties of its decision shortly after the completion of oral argument. Katanga would be authorized to disclose both the summons and the Staff Letter to its current auditor, but would be authorized to disclose only the Staff Letter to the other three audit firms. The application was otherwise to be dismissed without prejudice to Katanga’s right to re-apply based on new evidence.
- [4] On August 9, 2017, the Commission issued a confidential Order in substantially the form proposed by Staff (the “**August Order**”), attaching the Staff Letter as a Schedule, with Reasons to follow.
- [5] In light of the contested nature of the application, and the potential precedential value of the decision made, the Panel also requested that the parties deliver additional written submissions on the issue of whether the August Order and these subsequent Reasons for Decision should ultimately be published, whether in an anonymized form or otherwise and if so, when.
- [6] In early September 2017, Staff filed written submissions on the publication issue, along with a Book of Authorities. Staff also advised that Katanga did not intend to file written submissions, but was “agreeable to the approach proposed by Staff in Staff’s submissions”.
- [7] These are the Reasons for Decision relating both to Katanga’s application, and to the publication status of our August Order and these Reasons.

### II. ISSUES

- [8] There are two issues to address in these Reasons:
  - a. Is it in the public interest for the Commission to authorize Katanga’s requested disclosure of the summons to individuals employed at each of the four audit firms?

- b. Should the August Order and these Reasons for Decision remain confidential indefinitely or should they be published, in some form, at a later date?

### III. ANALYSIS

#### A. Is it in the Public Interest to Authorize Katanga's Requested Disclosures of the Summons?

##### 1. Background

- [9] Katanga is the holding company of a group of companies that produce copper and cobalt metal at mining assets located in the Democratic Republic of Congo. Katanga's sole customer is Glencore International AG ("**Glencore**"), which, along with Glencore's subsidiaries, owns the majority of Katanga's issued and outstanding shares.
- [10] On March 22, 2017, the Commission issued an Order pursuant to paragraph 11(1)(a) of the Act authorizing a confidential investigation relating to Katanga. On April 19, 2017, in connection with that investigation, the Commission issued a summons to Katanga pursuant to section 13 of the Act (the "**Katanga Summons**"). The Katanga Summons requires that Katanga produce certain documents and information to Staff. On April 19, 2017 and May 18, 2017, the Commission also issued summonses to a Katanga director and to Katanga's Chief Executive Officer (collectively, with the Katanga Summons, the "**Summonses**").
- [11] There have been two previous section 17 applications related to the Katanga investigation and the Summonses. In both cases, Staff consented to the relief sought and the proceedings were heard in writing. Two confidential Orders resulted:
  - a. The Commission's May 24, 2017 Order permitted Katanga to disclose the contents of the Katanga Summons to the General Counsel of Glencore, the Chief Executive Officer of Glencore and the Chief Financial Officer of Glencore for the purpose of facilitating Katanga's ability to respond to the requests for information and documentation contained in the Katanga Summons; and
  - b. The Commission's June 14, 2017 Order permitted Katanga to disclose the contents of the Summonses to representatives of Glencore's insurers, Glencore's insurance broker, and executives of Glencore (UK) Ltd. with responsibility for liaising with Glencore's insurers.
- [12] In July 2017, Katanga issued a press release announcing that the independent directors of Katanga's Board of Directors were conducting a review of certain of Katanga's past accounting practices (the "**Past Accounting Review**"). The independent directors had concluded that certain of Katanga's historical financial statements and related management's discussion and analysis would likely require restatement. The press release stated that Katanga's independent directors were working with, among others, "Katanga's external auditors, Deloitte & Touche".
- [13] On August 4, 2017, Katanga filed the application that is the subject of these Reasons for Decision. Specifically, Katanga sought authorization to disclose the

existence and contents of the Katanga Summons to the auditors responsible for auditing Katanga's financial statements, reviewing Katanga's unaudited interim financial statements and for overseeing aspects of the Past Accounting Review. Disclosures were sought for specific individuals employed by four separate audit firms: Deloitte South Africa ("**Deloitte SA**"), Deloitte AG, Deloitte LLP and Deloitte Canada.

## 2. Test for Authorizing Disclosures

- [14] Confidentiality is central to preserving the integrity of investigations conducted by Staff of the Commission. The Act creates a regime in which the Commission controls the flow of information in connection with its investigations, which are presumptively confidential. This regime protects Staff's investigations, as well as the privacy interests of the individuals compelled to provide testimony under the Act and of the market participants being investigated. The disclosure of the existence, nature or content of a summons is prohibited unless specifically authorized by the Commission pursuant to section 17 of the Act.
- [15] Subsection 17(1) of the Act provides that the Commission may make an order authorizing the disclosure of certain confidential information, provided that the Commission considers that it would be in the public interest to do so:
- 17 (1) If the Commission considers that it would be in the public interest, it may make an order authorizing the disclosure to any person or company of,
- (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.
- [16] When considering whether disclosure is warranted under subsection 17(1), the Commission must:
- a. consider the purpose for which the disclosure is sought and the specific circumstances of the case; and
  - b. balance the continued requirement for confidentiality with the Commission's assessment of the public interest at stake.<sup>1</sup>
- [17] Applicants bear the heavy burden of demonstrating that a requested disclosure is in the public interest.<sup>2</sup> Moreover, even when disclosure is warranted, the

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<sup>1</sup> *Re Coughlan*, [2000] OJ No 5109 (Div Ct) at para 38; *Deloitte & Touche LLP v Ontario (Securities Commission)*, [2002] OJ No 2350 (CA) at para 15; *Re Black* (2007), 31 OSCB 10397 at para 82.

<sup>2</sup> *Re Black* (2007), 31 OSCB 10397 at para 78.

Commission is only to order disclosure to the extent necessary in the public interest.<sup>3</sup>

### **3. Application of the Test**

#### **(a) Deloitte SA**

- [18] Katanga's current external auditor is Deloitte SA, which is responsible for reviewing Katanga's unaudited interim financial statements. Deloitte SA was also Katanga's auditor for the year 2016. The Past Accounting Review includes a possible restatement of Katanga's 2016 financial statements.
- [19] Staff consented to Katanga's request for authorization to disclose the Katanga Summons to Deloitte SA. Though Staff did not necessarily agree that it is necessary for Deloitte SA to review the Katanga Summons, it is Staff's view that there is minimal potential prejudice to Staff's investigation if the Katanga Summons is disclosed to Deloitte SA.
- [20] We found that it was in the public interest to grant this request. Accordingly, we authorized Katanga to disclose the existence and contents of the Katanga Summons and the Staff Letter to four identified individuals employed at Deloitte SA. Disclosure may facilitate their participation in the Past Accounting Review without any appreciable risk of interfering with Staff's investigation. In this regard, we understand that Deloitte SA, and these individuals were uninvolved in the 2014 financial statements, which are presently the focus of the investigation.

#### **(b) Deloitte AG**

- [21] Employees at Deloitte AG served as the signing audit partners for Katanga from 2012 to 2015. Deloitte AG is based in Switzerland. It is also Glencore's auditor, along with Deloitte LLP. In 2016, Katanga apparently moved its headquarters from Switzerland to South Africa, at which time Deloitte SA took over the auditor role from Deloitte AG. Katanga identified two fundamental purposes for the requested disclosure of the Katanga Summons to Deloitte AG: 1) to enable Katanga to comply with its disclosure obligations to its auditors, and 2) to help facilitate or focus Deloitte AG's participation in the ongoing Past Accounting Review, which includes a possible restatement of Katanga's 2015 financial statements. Deloitte AG employed the audit partners responsible for Katanga's 2015 financial statements.
- [22] Katanga's only evidence in support of its application was an affidavit sworn by an associate at the law firm representing Katanga. In her affidavit, the associate swore that the National Professional Practice Director at Deloitte Canada advised her that "Deloitte & Touche, Katanga's external auditors, require Katanga to disclose the contents of the [Katanga] Summons" to, among others, two individuals at Deloitte AG "in the event that a restatement of Katanga's 2015 and 2016 Consolidated Financial Statements is required".
- [23] Apart from this bald assertion that disclosure was required, no evidence was provided, either directly by the affiant or indirectly by the source of her information, the Deloitte Canada Practice Director, to explain specifically why the Katanga Summons was necessary for Deloitte AG's purposes or how the Katanga Summons would be used by Deloitte AG for the possible restatement. Nor was

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<sup>3</sup> *Deloitte and Touche LLP v Ontario (Securities Commission)*, 2003 SCC 61 at para 29.

there evidence to indicate that, without the Katanga Summons, the Past Accounting Review could not be conducted. Rather, at the hearing, Katanga's counsel suggested that the disclosure might be required to complete the restatement "in a reasonable amount of time", rather than being required to complete the restatement at all. Again, there was no evidence that receiving the Katanga Summons would abbreviate Deloitte AG's work and no evidence about the potential time differential. In fairness, Katanga's counsel candidly acknowledged certain shortcomings in the evidence presented, which arose from the short time frame in which the application had been brought.

- [24] Katanga submitted that disclosure to Deloitte AG posed no threat to Staff's investigation. It relied heavily on Staff's consent to disclosure to Katanga's current auditor, contending that, if it was in the public interest to allow the disclosure to Deloitte SA, then it must also be in the public interest to allow the disclosure to Deloitte AG, since there was no qualitative distinction between the two companies. Finally, Katanga submitted that the Staff Letter did not meet its needs since it disclosed no more than what Katanga was already permitted to disclose to Deloitte AG – namely, the existence of the investigation.
- [25] In opposing disclosure of the Katanga Summons to Deloitte AG, Staff submitted that individuals from Deloitte AG have relevant evidence that may form part of Staff's investigation into Katanga. As earlier indicated, Staff's investigation of Katanga is presently focused primarily on the 2014 fiscal year. Deloitte AG was Katanga's auditor at that time, and would itself have a hypothetical exposure in the investigation. Deloitte SA was uninvolved during that time frame. Its employees would be much less likely to have relevant evidence about the circumstances leading to the historical disclosure that is presently the subject matter of Staff's investigation. Accordingly, there is a qualitative difference between the positions of Deloitte AG and Deloitte SA.
- [26] Staff also objected to the use of the Katanga Summons as a tool for Deloitte AG to set the scope for the Past Accounting Review. Whether or not Deloitte AG has access to the Katanga Summons, Deloitte AG will have its own obligations and will have to comply with relevant auditing standards as part of the Past Accounting Review. In particular, the auditors will have to satisfy themselves that they have full and frank information from their client, Katanga. Staff argued that the present scope of Staff's investigation should be irrelevant for that work and, in any event, the scope of its investigation cannot be defined by a single summons.
- [27] Staff also contended that it is possible that Deloitte AG may not be satisfied with the disclosure of the Katanga Summons and may seek additional and ongoing disclosure of Staff's investigation, since the investigation is continuing and may go in new directions, further engaging Staff's and the Commission's resources. We need not place reliance on this contention at this point since it does invite speculation. However, it does highlight the need to remain mindful of the ongoing and changing nature of a typical investigation as the Commission contemplates how the integrity of the investigation is best protected.
- [28] Finally, Staff submitted that the proposed Staff Letter is designed to resolve any potential concern on the auditors' part that Katanga's management is being uncooperative in Staff's investigation. The Staff Letter also signals to the

auditors that they ought not to be inhibited in asking questions that they are expected to ask as auditors, simply because of Staff's investigation.

- [29] We agreed with Staff's submissions that, based on the existing record, Deloitte AG is differently situated than Deloitte SA, and that the potential risk to Staff's investigation significantly outweighs any purported need for disclosure. The bald assertion contained in the affidavit relied upon by Katanga was insufficient to discharge its heavy burden of demonstrating that the disclosure was required for Deloitte AG to fulfill its obligations. Indeed, the available evidence suggests that such disclosure was not required.
- [30] We accept that, generally, "the nature of the audit process is such that sharing of information between auditor and client is essential to the performance of the auditor's task."<sup>4</sup> However, for the reasons already given, we were unconvinced, based on the existing record, that disclosure of the Katanga Summons would advance Deloitte AG's audit responsibilities in a significant manner, particularly when weighed against the public interest in protecting the integrity of Staff's investigation. Accordingly, Katanga's application to disclose the contents of the Katanga Summons to Deloitte AG was dismissed. Katanga was authorized to disclose only the Staff Letter to two identified individuals employed at Deloitte AG.

**(c) Deloitte LLP**

- [31] Katanga submitted that coordination between Deloitte AG and Deloitte LLP is necessary in the event of a restatement of Katanga's 2015 and 2016 financial statements. Several employees of Deloitte LLP are members of a committee responsible for oversight of the work performed by Deloitte AG. Deloitte LLP is also Glencore's auditor, along with Deloitte AG. Though they are separate legal entities, Deloitte LLP and Deloitte AG operate as a combined firm, with Deloitte LLP performing quality and risk functions and oversight in support of Deloitte AG. In the ordinary course, Deloitte LLP provides oversight in cases involving the restatement of financial statements.
- [32] Katanga argued that disclosure of the Katanga Summons was required for the performance of Deloitte LLP's oversight role in support of Deloitte AG. It also argued that there was no principled difference between Deloitte AG and Deloitte LLP.
- [33] Given our conclusion that the Katanga Summons should not be disclosed to Deloitte AG, it should not be disclosed to Deloitte LLP either. Simply put, since the evidence did not demonstrate that the Katanga Summons was required for Deloitte AG to perform its work, the evidence did not demonstrate that such disclosure was required to oversee Deloitte AG's work. Accordingly, Katanga's application to disclose the Katanga Summons to Deloitte LLP was dismissed. Katanga was authorized to disclose only the Staff Letter to three identified individuals employed at Deloitte LLP.

**(d) Deloitte Canada**

- [34] Katanga's application materials indicate that Deloitte Canada's National Professional Practice Director is supporting the work conducted by the employees of the other audit firms and is supporting the Past Accounting Review.

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<sup>4</sup> *Deloitte & Touche LLP v Ontario (Securities Commission)*, [2005] OJ No 1510 (Div Ct) at para 60.



Therefore, Katanga contended that disclosure of the Katanga Summons to Deloitte Canada was arguably required.

- [35] At the hearing, Katanga conceded that the requested disclosure to Deloitte Canada was more for convenience than for necessity. The main focus of Katanga's application was to obtain disclosures for Deloitte SA and Deloitte AG. Nonetheless, Katanga argued that disclosure to Deloitte Canada was in the public interest and would cause no harm to the integrity of Staff's investigation.
- [36] Counsel for Katanga was candid and fair in his presentation. He was unable to support, on the evidentiary record before us, the need for Deloitte Canada to be apprised of the Katanga Summons. Katanga's application to disclose the contents of the Katanga Summons to Deloitte Canada was dismissed. Katanga was authorized to disclose only the Staff Letter to Deloitte Canada's National Professional Practice Director.

### **(e) Renewal of the Application**

- [37] In our August Order, we dismissed Katanga's application for authorization to disclose the Katanga Summons to Deloitte AG, Deloitte LLP, Deloitte Canada and the named individuals at those firms, without prejudice to a renewed application based on new evidence. While we questioned whether Katanga could ever discharge its heavy burden in relation to Deloitte LLP or Deloitte Canada, we recognized that there was a possibility that additional evidence could be placed before us to invite reconsideration. Ordinarily, an application stands or falls on the adequacy of the evidentiary record placed before the Commission when the application is heard. However, we did appreciate that time constraints prevented Katanga from providing a more robust evidentiary record -- hence, we decided to dismiss the application, in part, without prejudice to its renewal.
- [38] Katanga has not sought to revisit the Commission's decision.

### **B. Should the August Order and these Reasons for Decision Remain Confidential?**

- [39] We ordered that the hearing of Katanga's application would be held *in camera* and that any transcript of the hearing would be confidential. To have decided otherwise would, of course, have undermined the entire rationale for these types of applications. However, we also recognized that there is an important public interest in the transparency of our processes and decision-making, and precedential value in how the Commission addresses these applications. That is why we invited written submissions on whether our August Order and these Reasons for Decision must remain confidential for all time.
- [40] Having read Staff's written submissions on point, we are satisfied that our August Order and these Reasons for Decision should remain confidential at this time. In our view, this is necessary to maintain the integrity of Staff's investigation. However, we are also satisfied that there is scope for the future publication of our Order and Reasons for Decision. The balance of these Reasons for Decision addresses this issue.

### **1. Law on Confidentiality**

- [41] There is a presumption that Commission hearings will be open to the public. It is well established that "covertness is the exception and openness the rule", which

fosters the necessary public confidence in the integrity of the Commission's processes and an understanding of the administration of justice.<sup>5</sup> Openness is particularly important for the Commission because it is charged with the responsibility of helping to ensure the integrity of the capital markets in Ontario. Disclosure and openness are hallmarks of Ontario securities regulation and are demanded by the Commission of those it regulates. It follows that the Commission's own disclosure practices set an important example.

- [42] Investors, those being regulated, and the general public all have a strong interest in knowing what decisions the Commission makes and why. This promotes our accountability, as well as confidence in our processes.
- [43] However, under section 9 of the *Statutory Powers Procedure Act*, RSO 1990 c S.22 (the "**SPPA**"), the openness presumption may be overridden in limited circumstances. Hearings may be conducted in the absence of the public where the Commission is of the opinion that the desirability of avoiding disclosure in the public interest outweighs the desirability of adhering to the principle of open proceedings.
- [44] Subsection 9(1) of the SPPA provides:
- 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.
- [45] In addition, Rule 5.2 of the *Ontario Securities Commission Rules of Procedure* (2014), 37 OSCB 4168, permits application records to be ordered confidential if a Panel is of the opinion that there are valid reasons for restricting public access. Rule 17.2(2) adds that a Panel's decision shall be published, unless a Panel orders that it shall remain confidential.
- [46] The Commission does not publish Orders made under section 17 of the Act in circumstances that will unfairly prejudice Staff's investigation or the subjects of Staff's investigation. Such confidential Orders, often issued on consent of all parties, are consistent with the scheme set out under sections 16 and 17 of the Act. However, the Commission has permitted the publication of Orders and Reasons in section 17 applications in a variety of circumstances: for example, where the Commission has resolved conflicting submissions on the scope of appropriate confidentiality after a hearing, where relief from the confidentiality

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<sup>5</sup> *Re Standard Trustco* (1992), 15 OSCB 143, quoting *MacIntyre v Nova Scotia (Attorney General)*, [1982] 1 SCR 175 at para 59.

requirements was denied or where it has decided matters that may provide guidance to others. The nature and scope of publication in these cases have been dictated by a number of factors, including the continued need, if any, of confidentiality in the public interest.

- [47] There are several examples of anonymized published section 17 decisions, issued by the Commission both before and after enforcement proceedings are commenced. For instance:
- a. In *Re Mr. X* (2003), 27 OSCB 49, the Commission dismissed an application to amend a section 17 Order to authorize disclosure of prohibited information in a civil action. The hearing was held *in camera* and anonymized Reasons were published.
  - b. In *Re X* (2007), 30 OSCB 327, the Commission dismissed an application for a section 17 Order. The hearing was held *in camera* and anonymized Reasons were published.
  - c. In *Re X and Y* (2007), 30 OSCB 3513, after granting an application for a section 17 Order to permit the applicant to defend criminal charges in the United States, the Commission published an Order granting the publication of a synopsis of the Panel's Reasons in the form appended to the Order. The Panel ordered: 1) immediate publication of a summary of the anonymized Reasons using monikers and 2) publication of the full Reasons after the completion of the criminal proceedings (subject to further submissions regarding publication in the interim). A year and a half later, the full Reasons were published without the use of monikers.<sup>6</sup>
  - d. In *Re Y* (2009), 32 OSCB 7182 and 32 OSCB 7188, both Staff and the applicants consented to publication of several Orders and Reasons with the use of monikers. The Panel concluded that publication, while retaining the use of monikers rather than names, was consistent with the open courts principle and with the confidentiality and disclosure provisions of the Act. The Orders<sup>7</sup> and Reasons were published in anonymized form, without awaiting the completion of related criminal proceedings.
- [48] In cases where enforcement proceedings are already commenced before the Commission, and are either ongoing or have been completed, Panels have published unredacted Reasons in section 17 applications, without anonymizing the parties. See, for instance, *Re Coughlan* (2000), 23 OSCB 3687, *Re Boock* (2010), 33 OSCB 1589, *Re Inspektor* (2014), 37 OSCB 11271, *Re Amato* (2015), 38 OSCB 5111 and *Re Welcome Place Inc.* (2016), 39 OSCB 10501.
- [49] In all cases, given the importance of the openness principle, confidentiality should not be granted for longer than is absolutely necessary.

## 2. Positions of the Parties

- [50] In this case, Staff's confidential investigation into Katanga is ongoing and no Statement of Allegations has been filed. Staff submitted that the Commission should only publish the August Order and these Reasons when the need to

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<sup>6</sup> See *Re Black* (2008), 31 OSCB 10397.

<sup>7</sup> The Orders are published at: *Re Y* (2009), 32 OSCB 7151, *Re Y* (2009), 32 OSCB 7153, *Re Y* (2009), 32 OSCB 7159, *Re Y* (2006), 32 OSCB 7161 and *Re Y* (2009), 32 OSCB 7163.

preserve the confidentiality of the investigation is no longer present. Therefore, Staff submitted that the Commission should maintain the confidentiality of the August Order and these Reasons until the earlier of:

- a. one year from the date of the August Order; or
- b. Staff bringing enforcement proceedings against Katanga, subject to the right of the parties to object to the publication of the August Order and these Reasons on the grounds that the publication would cause a party significant prejudice or otherwise not be in the public interest.

[51] Staff also requested that our further Order incorporate a number of other provisions regarding potential redactions and party objections closer to the publication date.

[52] In the alternative, if we were to order immediate publication, Staff submitted that publication of the August Order and these Reasons should include substantial redactions, to eliminate any reasonable possibility that such publication could expose Staff's investigation to the public. However, Staff argued that publishing a redacted August Order and an anonymized version of these Reasons would be "essentially hollow", given the many redactions that would be necessary to prevent exposure of Staff's confidential investigation. Specifically, Staff submitted that the following facts would have to be redacted from any immediately published version of the August Order and these Reasons:

- a. the identity of the applicant;
- b. the purpose for which the application was sought;
- c. the stated grounds for the application;
- d. the parties' arguments in support of their positions on the application;
- e. the identity of the intended recipients of the disclosure;
- f. the fact that the intended recipients of the disclosure are external auditors of the applicant;
- g. the nature of the confidential information that formed the subject of the section 17 application, including the dates of the Summons, the company named in the Summonses and the documents identified in the Summonses; and
- h. the Commission's assessment of the parties' arguments and the evidence led as part of the application.

[53] Katanga did not deliver submissions on this issue, but Staff advised us that Katanga is "agreeable to the approach proposed by Staff in Staff's submissions".

### **3. Application of the Law**

[54] Upon balancing the desirability of openness on the one hand and the possible prejudice to Katanga and to Staff's investigation on the other, we find that the August Order and these Reasons should remain confidential for a limited period following issuance, but should be published in full, subject to further submissions, at a later date.

- [55] In order to maintain confidentiality for no longer than is absolutely necessary, we find that publication should be on the earlier of the following two dates:
- a. August 10, 2018, being one year from the date of the August Order; and
  - b. if Staff files a Statement of Allegations naming Katanga as a Respondent, and/or other Respondents in a proceeding involving Katanga's financial statements, 30 days after the Notice of Hearing is issued to commence that enforcement proceeding.
- [56] If a Statement of Allegations is filed, all parties to that proceeding will have an opportunity to make submissions regarding the need for continuing confidentiality and its scope based upon prejudice to Staff's investigation or to those persons. If no Statement of Allegations is filed within the year, Staff and Katanga will still have the opportunity to make submissions regarding the need for continuing confidentiality and its scope.
- [57] These Reasons will be issued along with an Order that adopts many of Staff's proposed terms in essence, but with two modifications of particular note: first, removing the Panel's obligation to identify, at first instance, specific redactions to the Reasons and Order and, second, advancing the timing of the vetting process before publication.
- [58] In relation to the first point, Staff suggested that, in the event of publication at the one-year mark, the Office of the Secretary or the Panel would first redact the Order and Reasons to anonymize the applicant (*i.e.*, Katanga) as well as the recipients and intended recipients of the disclosure sought by Katanga (*i.e.*, the various Deloitte entities and the identified individuals at those entities). In that scenario, the parties would have advance notice of the intended publication and an opportunity to bring a motion objecting to the publication. However, this proposal would leave the burden of identifying the necessary redactions for either the Office of the Secretary or a Panel, without the benefit of additional party input.
- [59] The parties are better situated to identify, at first instance, the redactions they believe are necessary to preserve any continuing need for confidentiality. A Panel can then evaluate, with the assistance of the parties, whether those redactions are appropriate, near the time of publication. Therefore, under our Order, Staff will be required, and Katanga will be permitted, to make written submissions shortly before publication, which submissions must include the specific details of any proposed redactions.
- [60] In light of this change in the redaction process, it follows that Staff's proposed timing also requires modification. Staff proposed that the Commission should provide the parties with at least 15 days' notice of the intended date of publication and that any party could file a motion objecting to the publication at least 10 days prior to the intended publication date. Under our Order, the timing of objections will depend on the triggering event for publication. If a Statement of Allegations is filed before July 10, 2018, Staff will be required to deliver submissions on the issues of publication and redaction by no later than 10 days after the related Notice of Hearing is issued. If no Statement of Allegations is filed by July 10, 2018, Staff will be required to deliver submissions on the issues of publication and redaction by no later than July 20, 2018. In either case, if Katanga wishes to deliver responding submissions, it will have 7 days to do so

after Staff's submissions. This will leave a Panel some time to consider the submissions and proposed redactions before the scheduled publication.

- [61] The modified approach outlined above is preferable to deciding at this point in Staff's investigation what information can be revealed and what must remain confidential. If such decisions are made at present, there may be a tendency to be overly protective of Staff's investigation, such that the published decisions would be of limited utility to the public. Awaiting a reasonable period of time and further submissions will allow a Panel to more precisely consider the need for, and scope of, any continuing confidentiality or anonymization.

#### **IV. CONCLUSION**

- [62] For all the above reasons, the Commission's August Order authorized disclosure of the Katanga Summons to identified individuals at Deloitte SA and disclosure of the Staff Letter to identified individuals at Deloitte SA, Deloitte AG, Deloitte LLP and Deloitte Canada. The following conditions were also included in the August Order:

- a. before any disclosure of the Katanga Summons or of the Staff Letter, Katanga shall obtain a written confirmation that the individual receiving the disclosure agrees to be bound by the confidentiality provisions of subsection 16(2) of the Act; and
- b. the Staff Letter is confidential and may not be disclosed to any person or company, except to the individuals identified in the August Order.

- [63] A further confidential Order will be issued along with these Reasons to address the timing of the future publication of the August Order and these Reasons. The publication date will vary, depending on whether enforcement proceedings are commenced against Katanga or others arising from the same subject matter, but in any event the parties will have a further opportunity to make submissions regarding the publication closer to the intended date of release.

Dated at Toronto this 18th day of October, 2017.

*"D. Grant Vingoe"*

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D. Grant Vingoe

*"Deborah Leckman"*

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Deborah Leckman

*"Mark J. Sandler"*

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Mark J. Sandler