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Commission  
3S8

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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 X INC.**

**CONFIDENTIAL REASONS AND ORDER**

**(SECTION 17)**

**Hearing:** December 2, 2009

**Reasons and Decision:** March 25, 2010

**Panel:** James E. A. Turner – Vice-Chair  
Carol S. Perry – Commissioner

**Counsel:** Joel Wiesenfeld – For the Bank  
Andrew Gray  
(Torys LLP)

Johanna Superina – For Staff of the Ontario Securities  
Cullen Price Commission

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## CONFIDENTIAL REASONS AND ORDER

### I. BACKGROUND

[1] This is a hearing to determine whether it is in the public interest to grant Staff's request that the Ontario Securities Commission (the "**Commission**") issue an order under subsection 17(1)(b) of the *Securities Act*, R.S.O. 1990, c. S.5., as amended (the "**Act**") permitting the disclosure of documents compelled pursuant to a summons dated November 13, 2008 issued under section 13 of the Act (the "**Summons**"). The Summons was issued pursuant to an investigation order of the Commission dated November 11, 2008 issued pursuant to section 11(1)(a) and (b) of the Act (the "**Section 11 Order**").

[2] Staff seeks an order permitting a foreign securities regulator (the "**Foreign Securities Regulator**") to disclose to a foreign criminal law enforcement agency (the "**Foreign Criminal Law Enforcement Agency**") documents (the "**Documents**") relating to two account holders obtained from a bank (the "**Bank**") pursuant to the Summons.

[3] Staff has given notice to the Bank as required under subsection 17(2)(b) of the Act. Staff seeks to obtain a disclosure order under subsection 17(1)(b) of the Act without giving notice to the two account holders under subsection 17(2)(a) of the Act and without obtaining their consent under subsection 17(3) of the Act.

[4] This matter relates only to documents provided to Staff pursuant to the Summons. It does not relate to compelled testimony. Staff submits that its request is consistent with the purposes and objectives of the Act and that it would be in the public interest for the Commission to authorize the disclosure because it will permit the Commission to assist the Foreign Securities Regulator and Foreign Criminal Law Enforcement Agency in enforcing securities and criminal laws. Providing that assistance is part of the Commission's mandate and consistent with the Commission's policy of international co-operation in securities enforcement matters.

[5] The Bank submits that disclosure under subsection 17(1)(b) of the Act is not permitted without notice being provided to the two account holders as the persons "named by the Commission" in the Summons and as the persons directly affected by the proposed disclosure order.

[6] The hearing of this application was held on December 2, 2009. In light of the confidential nature of the application, Staff requested that the hearing be held in camera pursuant to section 9 of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chap. S. 22, as amended. As a result, these reasons will be treated as confidential until the need to preserve confidentiality becomes unnecessary. We intend, however, to issue a redacted version of these reasons as soon as practicable.

[7] Before we address whether disclosure of the Documents should be ordered pursuant to subsection 17(1) of the Act, we must determine (i) whether the account holders are entitled to reasonable notice and an opportunity to be heard under subsection 17(2)(a) of the Act, and (ii) whether written consent must be obtained from the account holders under subsection 17(3) of the Act.

## **II. THE FACTS**

[8] For purposes of this matter, the relevant facts are as follows:

- (a) The Foreign Securities Regulator obtained the Documents pursuant to the Section 11 Order which was issued under subsection 11(1)(a) and (b) of the Act.
- (b) Pursuant to the Section 11 Order, Staff delivered the Summons to the Bank requiring the production of documents relating to the two account holders.
- (c) The Bank responded to the Summons and delivered the Documents to Staff.
- (d) Staff seeks an order under subsection 17(1) of the Act permitting the Foreign Securities Regulator to disclose the Documents to the Foreign Criminal Law Enforcement Agency, which has general authority to bring criminal proceedings in the foreign jurisdiction.
- (e) Staff gave notice of its application to the Bank pursuant to subsection 17(2)(b) of the Act, as the person from whom the Documents were obtained.
- (f) The two account holders are identified in the Summons but are not identified in the Section 11 Order. The account holders are both corporations.

[9] The Bank objects to the Commission making the proposed order without notice to the two account holders under subsection 17(2)(a) of the Act, as persons “named by the Commission”.

## **III. THE ISSUES**

[10] The application made by Staff raises the following issues:

- (a) Are the account holders entitled to reasonable notice and an opportunity to be heard under subsection 17(2)(a) of the Act in connection with the application?
- (b) Is the written consent of the account holders required in these circumstances under subsection 17(3) of the Act?
- (c) Is it in the public interest for the Commission to make an order under subsection 17(1) of the Act authorizing the disclosure of the Documents by the Foreign Securities Regulator to the Foreign Criminal Law Enforcement Agency?

[11] We decided that it was preferable to bifurcate the hearing of the application and to address the first two issues raised by Staff’s application before hearing submissions on the third issue at a separate hearing. As a result, it was unnecessary for us to address many of the submissions of the Bank set forth in paragraph 19 of these reasons.

#### IV. ANALYSIS

##### A. Are the Account Holders Entitled to Reasonable Notice?

###### 1. *Submissions of Staff*

[12] Staff submits that the only persons or companies entitled to notice under subsection 17(2) of the Act are the persons or companies from whom information is obtained (subsection 17(2)(b)) and the persons or companies “named by the Commission” (under subsection 17(2)(a) of the Act). Staff says that no person or company, other than the Bank, was named by the Commission for this purpose. Staff submits that the reference to persons or companies “named by the Commission” is a reference back to “the name of any person examined or sought to be examined” contained in subsection 17(1)(b). In this case, Staff submits that means only the Bank.

[13] Staff submits that there is no ambiguity in subsection 17(2)(a) of the Act and that we should not read words into clause (a). Staff submits that there is no basis to conclude that clause (a) should be interpreted as meaning persons that are “named in a section 11 order”, “subjects of investigation”, “affected parties” or “directly affected” by an order under subsection 17(1). Staff says that other sections of the Act include clear language expressly to that effect when that is intended by the Act.

[14] Staff submits that the Commission is a signatory to the International Organization of Securities Commissions’ Memorandum of Understanding (the “**MoU**”) with respect to co-operating in the international enforcement of securities laws. Staff submits that the public interest in international co-operation pursuant to the MoU clearly outweighs the Bank’s (and, if considered, the account holders’) interest in confidentiality. The disclosure sought by Staff is consistent with the purpose of the Act in facilitating international co-operation for the enforcement of securities laws, including criminal prosecution in respect of such matters.

[15] Staff submits that notice to third parties, such as the account holders, is not required under subsection 17(2) of the Act. Staff relies on the decision in *Re Black* where the Commission stated:

In our view, subsection 17(2) of the Act does not require notice to be given to these third persons. Staff obtained these documents from Ravelston and gave notice to Ravelston. Thus, we are able to authorize the use and disclosure of documents produced by, and on behalf of Ravelston without further notice.

*Re Black* (2008), 31 OSCB 10397 (“**Re Black**”) at para. 249.

[16] Further, Staff refers us to *Re Royal Bank*, where the Commission held that customer account transaction information is a bank’s property, not the customer’s. Accordingly, the account holders have no property interest in the Documents and ought not to be given notice of Staff’s application. Staff relies, in particular, on the following statement from *Re Royal Bank*:

We are of the view that a summons issued pursuant to section 13 of the *Securities Act* is a “writ or process” issued in or pursuant to a legal proceeding.

Consequently, these types of summonses may fall under subsection 462(1)(a) of the *Bank Act*. However, we agree with Staff that the summons at issue in this proceeding does not fall under this subsection. According to a plain language reading of subsection 462(1)(a), it is clear that it applies to property; [*sic*] that a bank has possession of, belonging to a person. Consequently, this section does not apply to account transaction information because such information is not property belonging to a person, rather, it is the bank's property. Thus, subsection 462(1) of the *Bank Act* does not apply to the section 13 summons at issue in this proceeding.

*Re Royal Bank* (2002), 25 OSCB 1855 (“*Re Royal Bank*”) at para. 36.

## 2. *Submissions of the Bank*

[17] The Bank submits that the Documents obtained from the Bank include correspondence from and to the account holders, audiotapes, account documentation (including account opening documents and authorizations), account statements and documents evidencing transfers of funds.

[18] The Bank submits that it is evident from the plain language of the Act that disclosure under subsection 17(2) is not permitted in these circumstances without notice being provided to the account holders as persons “named by the Commission” in the Summons and as persons directly affected by the proposed disclosure order. Counsel for the Bank also stated his personal view that notice should also be given to the persons named in the Section 11 Order as persons “named by the Commission”. In addition, the Bank submits that the account holders must consent under subsection 17(3) of the Act in order for the Commission to provide compelled information to a domestic or international police force or person responsible for the enforcement of criminal law in Canada or elsewhere.

[19] The Bank relies on the decision in *Re Black* which the Bank submits establishes the following principles:

- (a) the power of the Commission to compel a person to provide evidence is a broad and unusual power, providing an investigator with a highly intrusive power to compel by summons the delivery of documentary evidence and the attendance of a witness to provide oral evidence;
- (b) the coercive powers of sections 11 and 13 of the Act are balanced by the confidentiality and non-disclosure protections contained in sections 16 and 17;
- (c) section 17 of the Act provides limited exceptions to the confidentiality regime created by section 16;
- (d) disclosure under subsection 17(1) of the Act will be appropriate only in the “most unusual circumstances”, where the public interest in permitting disclosure clearly outweighs the confidentiality protections provided in the Act;

- (e) the presumption is in favour of protecting confidentiality, not the other way around, and the Commission should order disclosure only to the extent necessary to carry out its mandate under the Act;
- (f) the person seeking a disclosure order has the onus of demonstrating that the disclosure of the evidence is in the public interest;
- (g) the public interest engaged by subsection 17(1) of the Act requires a balancing of the integrity and efficacy of the investigative process, the right of those investigated to privacy and confidences, and the potential harm and prejudice that could be caused by the disclosure;
- (h) in considering whether to order disclosure under subsection 17(1) of the Act, the Commission must consider whether parties may suffer harm as a result of the disclosure and whether the Commission will lose control over the evidence and its use if it is disclosed;
- (i) any disclosure of compelled evidence obtained under the Act for purposes that are outside the scope of the Act and the supervisory role of the Commission will not generally be in the public interest; and
- (j) disclosure of compelled evidence to the Foreign Criminal Law Enforcement Agency is prohibited without the consent of the relevant person or company.

(*Re Black, supra*, at paras. 68, 76, 78, 80, 82, 83, 112, 113, 116, 124, 133, 220, 221, 223, 230, 232, 233 and 236).

[20] The Bank submits that it owes its customers a duty of confidentiality. The Bank's duty of confidentiality includes the requirement to provide notice to a customer when the Bank is compelled by law to disclose the customer's confidential information to third parties (*Robertson v. CIBC*, [1995] 1 All E.R. 824 (P.C.) and *Re Royal Bank, supra*, at para. 4).

[21] While the Bank has no "personal" interest in whether the Commission orders disclosure, it does have an interest in ensuring that any disclosure order in respect of its customers is made in a manner that is consistent with and permitted by the Act. This interest arises, in part, as a result of the duty of confidentiality it owes to its customers.

### **3. *The Legal Framework***

[22] The investigation regime under Part VI of the Act gives the Commission power to compel testimony and documents and imposes strict confidentiality requirements. Sections 11, 13, 16, 17 and 18 of the Act are relevant to Staff's application. We have set out the relevant portions of those sections in Schedule A to these reasons.

[23] Section 11 authorizes the Commission to appoint persons to make such investigation as it considers expedient for the due administration of Ontario securities law and to assist in the due administration of the securities laws in another jurisdiction.

[24] Section 11 of the Act serves an important and legitimate public interest: to facilitate the investigation of violations of the Act. In *British Columbia Securities Commission v. Branch*, Justice L’Heureux-Dube, in her concurring opinion, held that the investigatory powers provided for in the Act are “the primary vehicle for the effective investigation and deterrence of insider trading, stock manipulation, and other trading practices contrary to the public interest...” (*British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 (“**Branch**”) at para. 79).

[25] In *Branch*, the Supreme Court of Canada held that the purposes of the British Columbia Securities Act, namely the protection of investors, capital markets efficiency and ensuring public confidence in the regulatory regime, are of substantial public importance and justify the power of a securities commission to compel testimony and documents.

[26] Section 13 of the Act permits the persons making an investigation under an order issued pursuant to section 11 or 12 of the Act, to compel a person by summons to provide oral testimony under oath and to provide documentary evidence.

[27] The Commission commented on the importance of that power in *Re Black*:

The power of the Commission to compel a person to come forward and give statements under oath is a 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. The Court of Appeal has recognized that the right to compel a witness to make a statement under oath is “perhaps the most important tool which Staff has in conducting investigations”. (*Biscotti v. Ontario Securities Commission* (1991), 1 O.R. (3d) 409 at para. 10 (C.A.).)

*Re Black, supra*, at para. 112.

[28] Subsection 16(1) of the Act provides that, except in accordance with section 17, no person summoned may disclose, except to their legal counsel, the nature or content of an investigation order, the name of a person examined, any testimony given, the nature and content of the questions asked or documents requested or the fact that any document was produced.

[29] Subsection 16(2) of the Act provides that any information compelled under section 13 is for the exclusive use of the Commission, or of any other regulators specified in the investigation order, and may not be disclosed or produced except as permitted under section 17.

[30] Section 17 of the Act contemplates circumstances in which testimony, information and documents compelled under section 13 of the Act may be disclosed or produced. Subsection 17(1) provides that compelled evidence may be disclosed where the Commission considers that it would be in the public interest to make an order authorizing disclosure.

[31] No order under subsection 17(1) may be made unless notice and an opportunity to be heard is given to “persons and companies named by the Commission” (subsection 17(2)(a)) and to “the person or company that gave the testimony or from which the information was obtained” (subsection 17(2)(b)).

#### 4. Analysis of *Re Black*

[32] Staff has given notice of this application to the Bank, which is the person from whom Staff obtained the Documents under the Summons. Staff submits that the Commission has held that third parties are not entitled to notice under subsection 17(2).

[33] In *Re Black*, the documents obtained under a section 13 summons included documents that the company named in the summons had obtained from third parties. The Commission concluded as follows:

As discussed above, we have determined that it would only be in the public interest under subsection 17(1) of the Act to authorize the use and disclosure of documents produced by, and on behalf of Ravelston. Accordingly, we must ensure the Commission has given the required notice in subsection 17(2) of the Act with respect to these documents before we authorize their use and disclosure.

Ravelston was given notice of this Application and an opportunity to be heard; in fact it made written submissions. However, the documents produced by, or on behalf of Ravelston may include documents Ravelston obtained from third persons who have not received notice of this Application. If we determine that these third persons are entitled to notice, subsection 17(2) of the Act would prevent us from authorizing the use and disclosure of the documents.

In our view, subsection 17(2) of the Act does not require notice to be given to these third persons. Staff obtained these documents from Ravelston and gave notice to Ravelston. Thus, we are able to authorize the use and disclosure of documents produced by, and on behalf of Ravelston without further notice. ...

*Re Black, supra*, at paras. 247 to 249

[34] While the Commission concluded in *Re Black* that there was no obligation to give notice to the relevant third parties pursuant to subsection 17(2) of the Act, the reasons of the Commission do not indicate whether the third parties were named by the Commission in the summons pursuant to which the documents were obtained. We do not know whether only Ravelston was named in that summons; it seems unlikely, however, that the relevant third parties would have been named. Accordingly, in *Re Black*, the obligation to provide notice pursuant to subsections 17(2)(a) and (b) may have been fulfilled by the notice to Ravelston. Further, it is not clear from the reasons in *Re Black* whether it was practicable for the Commission to provide notice to the third parties. We note that, in *Re Black*, the application was made on an urgent basis to permit the use of the compelled evidence by the respondents in making full answer and defence in an approaching U.S. criminal proceeding. As a result, giving notice to the third parties may not have been practicable in the circumstances.

[35] We also note that the Commission, in *Re Black*, in authorizing disclosure of the documents, (i) had the consent to that disclosure of Ravelston, the company named in the summons and a respondent in the Commission proceeding, (ii) received no objections from other

respondents to the disclosure, and (iii) imposed a series of conditions to limit the use of the documents and to provide legal protections in connection with their use.

[36] We do not read the reasons in *Re Black* as having concluded that notice is never required to be given under subsection 17(2)(a) to a third party other than the person who gave the testimony or from whom the information was obtained. We would distinguish the circumstances before us from those in *Re Black* on the basis that, in this case (i) the two account holders were specifically identified in the Summons, (ii) we are not aware of any reason why it would not be practicable to give notice to them, and (iii) the application is for an order permitting disclosure to the Foreign Criminal Law Enforcement Agency, rather than for disclosure to permit the use of compelled evidence by a defendant in a U.S. criminal proceeding for the purposes of making full answer and defence.

#### **5. Interpretation of Subsection 17(2)(a)**

[37] In order to resolve Staff's application, we must interpret the language of subsection 17(2)(a) of the Act. In doing that, we will apply the principle of statutory interpretation set out by the Supreme Court of Canada in *BellExpressVu Limited Partnership v. Rex* [2002] S.C.J. No. 43 as follows:

In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2<sup>nd</sup> ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings [citations omitted] ...

Other principles of interpretation – such as the strict construction of penal statutes and the “Charter values” presumption – only receive application where there is ambiguity as to the meaning of a provision.

In interpreting subsection 17(2)(a), we must recognise the regulatory context of that section within the scheme of the Act and the objective of the Commission in ensuring compliance with that regulatory scheme.

[38] We certainly agree with Staff that one of the important purposes of the Act includes international co-operation in the enforcement of securities laws and that the Commission should, to the extent it reasonably can, comply with the principles reflected in the MOU. That does not mean, however, that such interest necessarily outweighs the interests of the Bank and the account holders in these circumstances.

[39] There is no question that the Commission's investigatory power under section 11 of the Act provides a powerful means by which the Commission carries out its mandate to protect investors and regulate capital markets. In interpreting section 17 of the Act, it is important that we recognize the potentially intrusive nature of the Commission's investigatory power under section 11 and the need to balance that power by the protections and confidentiality obligations contained in sections 16 and 17. The use of the power to compel testimony and evidence is critical to achieving the Commission's regulatory mandate, but that power must be exercised in a manner that takes account of the legitimate rights and expectations as to privacy of the parties compelled.

[40] Subsection 17(2)(a) of the Act requires reasonable notice of an application under subsection 17(1) to be given to "persons or companies named by the Commission". In our view, those words are ambiguous in the circumstances. While we agree with Staff that we should not read broad words into the section, we must give some reasonable interpretation to the words used. Staff's interpretation of them did not assist us. In interpreting the words of subsection 17(2)(a), it is clear that they refer to persons or companies other than the person or company that gave the testimony or from whom the documents or information were obtained. Those latter persons are expressly specified in subsection 17(2)(b) of the Act as persons to whom notice must be given. It is equally clear that clauses (a) and (b) are conjunctive, joined by the word "and", suggesting two separate categories of persons.

[41] In this case, the two account holders are named by the Commission in the Summons. Moreover, they are the persons who have the real interest in whether the Documents are disclosed to the Foreign Criminal Law Enforcement Agency notwithstanding their privacy interests. As noted above, the Bank has an obligation of confidentiality with respect to its customers' account information but, apart from that obligation, it has no particular interest in whether or not the Commission orders that the Documents be disclosed to the Foreign Criminal Law Enforcement Agency under subsection 17(1) of the Act.

## **6. *Conclusion as to Required Notice***

[42] In our view, the phrase "persons or companies named by the Commission" should be interpreted in these circumstances in a manner that recognises the parties with the real interest in whether the Documents are disclosed. That is the two account holders. In our view, the "persons or companies named by the Commission" constitute at least the persons or companies who are identified in a summons issued under section 13 of the Act. If we had been in any doubt as to that conclusion, we believe that we have discretion, in any event, to have required that notice of the application be given to the two account holders.

[43] We are not aware of any impracticality in this case in giving reasonable notice to the account holders and providing them an opportunity to be heard on this application.

[44] We are not expressing any view on whether subsection 17(2)(a) of the Act would also apply to persons or companies named in a section 11 order.

[45] In our view, this matter does not turn on the question of who legally owns the Documents. The Bank may be the legal owner. Clearly, however, the Documents reflect

information about the customer accounts. It is the customers that have the principal privacy interest with respect to the information in the Documents and it is those customers who could be prejudiced by the disclosure of the Documents to the Foreign Criminal Law Enforcement Agency.

[46] For these reasons, we have concluded that notice is required to be given pursuant to subsection 17(2)(a) of the Act to the account holders named by the Commission in the Summons. Accordingly, the account holders are entitled to notice of Staff's application.

## **B. Are the Written Consents of the Account Holders Required in These Circumstances?**

### **1. Submissions of Staff**

[47] Staff submits that the application does not relate to testimony given by the account holders, but only to documents provided to Staff. Staff argues that the compulsion of documents does not attract the same protections against self-incrimination as testimony. Further, Staff submits that the Documents, as business records, have a very low expectation of privacy attached to them.

[48] Staff submits that the Supreme Court of Canada held in *Branch* that there are no self-incrimination concerns in respect of compelled documents that are pre-existing. Moreover, Staff submits that the constitutional right against self-incrimination does not apply to corporations. The account holders in this case are both corporations.

### **2. Submissions of the Bank**

[49] The Bank submits that the Commission's decision and reasoning in *Re Black* is directly applicable to this issue. In *Re Black*, the Commission dismissed the motion for disclosure, other than in respect of one corporate respondent that consented to the disclosure. The Commission stresses in its reasons that it would lose control over the use of the compelled evidence once it was disclosed, and that it could be used to incriminate persons in U.S. criminal proceedings where the protection against self-incrimination is not available on the same basis as in Canada.

[50] The Bank points out that in *Re Black* disclosure was ordered by the Commission with respect to one corporate respondent because that party consented to the disclosure order. In view of the corporation's consent, the Commission was not required to consider that party's privacy interest or the question of self-incrimination.

[51] The Bank submits that, in a subsequent decision, the Commission placed significant weight on the consent of the party affected in determining whether to order disclosure under subsection 17(1) of the Act (*Re Y* (2009) 32 OSCB 7188).

### **3. The Legal Framework**

[52] Subsection 17(3) of the Act prohibits disclosure of "testimony" to a person responsible for law enforcement in Canada or another jurisdiction without the consent of the person from whom the testimony was obtained.

[53] Section 18 of the Act provides that “testimony” given under section 13 cannot be admitted as evidence in a quasi-criminal prosecution under section 122 of the Act or in any other prosecution governed by the *Provincial Offences Act*. A similar restriction is imposed under subsection 17(7) with respect to disclosure of testimony under subsection 17(6).

#### 4. *Analysis*

[54] The Bank’s submissions as to why disclosure of the Documents should not be made rest primarily on concerns as to self-incrimination with respect to compelled testimony. Staff’s request, however, does not seek authority to disclose compelled testimony. Rather, the request relates to disclosure of the Documents obtained from the Bank under the Summons. It appears to us that the Act treats these two categories of compelled evidence differently. While compelled testimony invokes the protection that is reflected in sections 17(8) and 18 of the Act, the compulsion of documents generally does not. It seems to us that there is a legitimate rationale for the Act making that distinction.

[55] It is clear that subsection 17(1) by its language distinguishes between testimony and other types of compelled documents and information. In contrast, subsection 17(3) refers specifically to “testimony”, and not documents or information, and requires consent to “disclosure of testimony”. To reiterate, we are not being asked to make an order permitting disclosure of testimony; we are being asked to order disclosure of the Documents produced by the Bank.

[56] The Bank submits that the Commission concluded in *Re Black* that the prohibition in subsection 17(3) of the Act applies to both testimony and documentary evidence. That conclusion is based on the following passage:

However, the issue in this Application is not whether the Applicants can disclose the Evidence to the U.S. Attorney; that would be prohibited by subsection 17(3) of the Act. The issue is whether the Applicants can use and disclose the Evidence in the U.S. Criminal Proceeding for the purposes of making full answer and defence.

*Re Black, supra*, at para. 68.

For purposes of the reasons in *Re Black*, the term “Evidence” was defined to include both testimony and documents.

[57] Based on our reading of *Re Black*, the Commission did not expressly turn its mind to the distinction between testimony and documents when it referred to subsection 17(3) of the Act. In the passage set forth in paragraph 56 of these reasons, the Commission was primarily contrasting the circumstances that it was addressing, which did not involve direct disclosure to the U.S. Attorney. In our view, the Commission did not come to a substantive conclusion that subsection 17(3) of the Act applies to both testimony and documents. Accordingly, in our view, the passage referred to above does not resolve the issue before us.

[58] We agree with Staff that the compulsion of documents does not generally attract the same concerns as to self-incrimination as the compulsion of testimony. In any event, there is a very low expectation of privacy related to documents that constitute pre-existing business records. We

note in this respect, however, that not all of the Documents may be properly characterized as business records. We did not receive full submissions on that question.

**5. Conclusion as to Required Consent**

[59] While we have set forth our preliminary analysis above, because of our conclusion that notice of Staff's application should be given to the account holders, we will not come to a final conclusion on the question of whether the account holders' consents are required under subsection 17(3) in this matter. It may be that the account holders will wish to make submissions to us on that issue.

**C. Conclusion**

[60] For the reasons discussed above, we have concluded that reasonable notice of Staff's application and an opportunity to be heard shall be given pursuant to subsection 17(2)(a) of the Act to the account holders named by the Commission in the Summons.

[61] If Staff wishes to proceed with the application, it should contact the Secretary's Office to schedule a hearing, upon notice to the Bank and the account holders, to address the remaining issues, including whether in the circumstances it is in the public interest for us to order under subsection 17(1) of the Act that the Documents be disclosed to the Foreign Criminal Law Enforcement Agency.

Dated the 25<sup>th</sup> day of March, 2010.

*"James E. A. Turner"*

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James E. A. Turner

*"Carol S. Perry"*

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Carol S. Perry

## Schedule A

### Relevant Provisions of the *Securities Act* (Ontario)

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

**11. (1) Investigation order** – The Commission may, by order, appoint one or more persons to make such investigation with respect to a matter as it considers expedient,

(a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or

(b) to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction.

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

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

Section 16 of the Act provides as follows:

**16. (1) Non-disclosure** – Except in accordance with section 17, no person or company shall disclose at any time, except to his, her or its counsel,

(a) the nature or content of an order under section 11 or 12; or

(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.

(2) **Confidentiality** – If the Commission issues an order under section 11 or 12, all reports provided under section 15, all testimony given under section 13 and all documents and other things obtained under section 13 relating to

the investigation or examination that is the subject of the order are for the exclusive use of the Commission or of such other regulator as the Commission may specify in the order, and shall not be disclosed or produced to any other person or company or in any other proceeding except as permitted under section 17.

Section 17 of the Act provides as follows:

**17. (1) Disclosure by Commission** – If the Commission considers that it would be in the public interest, it may make an order authorizing the disclosure to any person or company of,

(a) the nature or content of an order under section 11 or 12;

(b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13; or

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

(2) **Opportunity to object** – No order shall be made under subsection (1) unless the Commission has, where practicable, given reasonable notice and an opportunity to be heard to,

(a) persons and companies named by the Commission; and

(b) in the case of disclosure of testimony given or information obtained under section 13, the person or company that gave the testimony or from which the information was obtained.

(3) **Disclosure to police** – Without the written consent of the person from whom the testimony was obtained, no order shall be made under subsection (1) authorizing the disclosure of testimony given under subsection 13 (1) to,

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

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

(4) **Terms and conditions** – An order under subsection (1) may be subject to terms and conditions imposed by the Commission.

(5) **Disclosure by court** – A court having jurisdiction over a prosecution under the *Provincial Offences Act* initiated by the Commission may compel

production to the court of any testimony given or any document or other thing obtained under section 13, and after inspecting the testimony, document or thing and providing all interested parties with an opportunity to be heard, the court may order the release of the testimony, document or thing to the defendant if the court determines that it is relevant to the prosecution, is not protected by privilege and is necessary to enable the defendant to make full answer and defence, but the making of an order under this subsection does not determine whether the testimony, document or thing is admissible in the prosecution.

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

- (a) a proceeding commenced or proposed to be commenced by the Commission under this Act; or
- (b) an examination of a witness, including an examination of a witness under section 13.

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

- (a) a municipal, provincial, federal or other police force or to a member of a police force; or
- (b) a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction.

Section 18 of the Act provides as follows:

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