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 -

IN THE MATTER OF EDA MARIE AGUECI, DENNIS WING, SANTO IACONO, JOSEPHINE RAPONI, KIMBERLEY STEPHANY, HENRY FIORILLO, GIUSEPPE (JOSEPH) FIORINI, JOHN SERPA, IAN TELFER, JACOB GORNITZKI and POLLEN SERVICES LIMITED

REASONS FOR DECISION ON A MOTION

Hearing: September 16, 23 and 27, 2013

Decision: December 13, 2013

Panel:

Edward P. Kerwin	- Commissioner and Chair of the Panel
Deborah Leckman	- Commissioner
Anne Marie Ryan	- Commissioner

Appearances:

Cullen Price Usman Sheikh Albert Pelletier Clare Devlin	- For Staff of the Commission
Nigel Campbell Erin Hoult	- For Jacob Gornitzki
Patricia McLean	- For Dennis Wing
Peter Howard Ellen Snow	- For Henry Fiorillo
Ken Jones	- For Kimberley Stephany

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REASONS FOR DECISION ON A MOTION

I. OVERVIEW

[1] Enforcement Staff of the Ontario Securities Commission (the "**Commission**") brought a motion seeking an order to admit into evidence selected excerpts from transcripts of compelled examinations of respondents conducted pursuant to section 13 of the *Securities Act*, R.S.O. 1990, as amended (the "**Act**") (the "**Motion**").

[2] The Commission issued a Notice of Hearing pursuant to sections 127 and 127.1 of the Act in connection with a Statement of Allegations filed by Enforcement Staff ("**Staff**") on February 7, 2012 against Eda Marie Agueci ("**Agueci**"), Dennis Wing ("**Wing**"), Santo Iacono ("**Iacono**"), Josephine Raponi ("**Raponi**"), Kimberley Stephany ("**Stephany**"), Henry Fiorillo ("**Fiorillo**"), Giuseppe (Joseph) Fiorini ("**Fiorini**"), John Serpa ("**Serpa**"), Ian Telfer ("**Telfer**"), Jacob Gornitzki ("**Gornitzki**") and Pollen Services Limited ("**Pollen**") (collectively, the "**Respondents**").

[3] In the Statement of Allegations, Staff alleges that the Respondents engaged in conduct in breach of the Act and contrary to the public interest, including insider trading and/or tipping contrary to section 76 of the Act. Agueci and Wing are also alleged to have made misleading statements contrary to section 122 of the Act and Agueci is alleged to have disclosed information regarding Staff's investigation contrary to section 16 of the Act. Staff further alleges that Wing authorized, permitted or acquiesced in Pollen's breaches of the Act and is therefore, deemed to have not complied with Ontario securities law.

[4] The Motion was filed by Staff on August 30, 2013. A cross-motion was filed by counsel for Gornitzki on September 6, 2013 requesting that the Motion and cross-motion be heard *in camera*, and seeking orders that the Motion and cross-motion materials and the transcript of the Motion hearing remain confidential following determination of the Motion (the "**Cross-Motion**"). Thereafter, the Panel received written submissions on the Motion from various counsel on behalf of Gornitzki, Telfer, Wing, Stephany and Fiorillo. The Panel also received correspondence from counsel for Agueci adopting the submissions of Telfer.

[5] Oral submissions of the parties on the Motion and Cross-Motion were heard *in camera* before the Commission on September 16, 23 and 27, 2013 (the "**Motion Hearing**").

[6] On September 20, 2013, the Commission approved a settlement between Telfer and Staff (*Re Eda Marie Agueci et al.* (2013), 36 O.S.C.B. 9341). Counsel for Telfer appeared before the Panel on September 23, 2013 to confirm that Telfer was no longer a party and withdrew his submissions in respect of the Motion and a confidentiality cross-motion brought by Telfer. Counsel for Telfer also submitted that he was content to leave his written memorandum of fact and law as part of the record for the Panel's consideration as parties who were not actively participating in the Motion adopted and relied upon legal argument within it. We accept these submissions and have considered them as the written record relied upon by other respondents.

[7] On September 26, 2013, Staff filed an Amended Statement of Allegations against the Respondents, which contained substantially similar allegations as those articulated above.

[8] On October 1, 2013, the Panel delivered its oral ruling with respect to the Motion and the Cross-Motion. The Panel decided that the excerpts from transcripts of compelled examinations of the Respondents are admissible into evidence in the context of regulatory proceedings before the Commission, and their admission is not precluded by Canada's *Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 (the "***Charter***") or the Ontario *Evidence Act,* R.S.O. 1990, c. E.23, as amended (the "***Evidence Act***").

[9] However, the Panel also determined that the oral evidence of those Respondents who chose to testify would provide the Panel with the best evidence of their conduct. Therefore, the Panel determined that at the conclusion of Staff's case, Staff may seek to tender into evidence excerpts from the transcripts of compelled examinations of the Respondents who have not undertaken to testify. The Panel acknowledged, however, that the onus is on Staff to prove the allegations against the Respondents and made an exception to allow Staff to put forward the excerpts from transcripts of compelled examination of Wing and Agueci for the limited purpose of making its case with respect to allegations of breaches of section 122 of the Act by them.

[10] With respect to the Cross-Motion for confidentiality, the Panel agreed that, in the public interest, an appropriate balance would be to order that all materials and transcripts of the Motion and Cross-Motion remain confidential, but that the Panel's decision on the matter shall be public and except for such excerpts of compelled examinations as may be admitted into evidence by the Panel in the course of the hearing on the merits.

II. ISSUES

[11] Addressing the Motion involves considering two main issues:

(a) Are transcripts of compelled examinations of the Respondents admissible against them as part of Staff's case?

(b) If such transcripts are so admissible, what procedure should be followed?

[12] With respect to the Cross-Motion, the Panel must consider whether it is in the public interest to order that any or all of the Motion and Cross-Motion materials, transcripts and decision remain confidential.

III. FACTS

[13] On May 4, 2011 and July 18, 2011, the Commission issued orders under subsection 11(1)(a) of the Act, authorizing members of Staff to investigate the Respondents and others connected to GMP Securities L.P. ("**GMP**") and its employees, in relation to insider trading, tipping or conduct in relation to securities that is in breach of the Act and/or contrary to the public interest (the "**Investigation Order**").

[14] Each of the individual Respondents was summoned to be examined and provided testimony pursuant to section 13 of the Act.

IV. SUBMISSIONS OF THE PARTIES

[15] Staff submits that transcripts of compelled examinations of the individual Respondents, conducted pursuant to section 13 of the Act (the "**compelled testimony**"), are admissible evidence at hearings before the Commission and that Staff should be allowed to read-in excerpts of the compelled testimony at the outset of its case.

[16] Those Respondents who made submissions opposed the Motion on the basis that compelled testimony is not admissible evidence at hearings before the Commission for various reasons. In the alternative, many of the Respondents also took the position that, if the compelled testimony is admissible, the Panel should not admit the compelled testimony of a Respondent who undertakes to testify at the hearing because oral testimony would provide the best evidence and Staff could use transcripts of the compelled testimony for purposes of cross-examination, if necessary.

A. Staff

[17] Staff submits that the compelled testimony must be admitted for three reasons: (i) it is well-established law that transcripts of compelled testimony may be admitted for use by Staff in the same regulatory proceeding in which they were obtained (*Re York Rio Resources Inc.* (2012), 35 O.S.C.B. 99 ("***York Rio***") at para. 67); (ii) the admission of the compelled testimony would cause no prejudice to the Respondents as the admission of transcript evidence is consistent with their reasonable expectations; and (iii) the alternate proposal of admitting compelled testimony only for the purposes of cross-examination is unfair to Staff and the Respondents.

[18] On the first point, Staff relies on subsection 15(1) of the SPPA, which provides for admission of relevant hearsay evidence. Staff submits that compelled transcript evidence is a form of permissible hearsay under section 15 of the SPPA. Staff also submits that the Commission and other Ontario tribunals have regularly admitted compelled testimony into evidence in regulatory proceedings (*Re Al-Tar Energy Corp.* (2010), 33 O.S.C.B. 5535 at para. 40; *Re Sextant Capital Management Inc.* (2011), 34 O.S.C.B. 5829 ("***Sextant***") at para. 8; *York Rio*, *supra* at para. 67; *Re Jain,* [2012] O.C.P.S.D. No. 30 ("***Jain***") at paras. 31-33 (QL)). Staff noted that in *Boock* the Commission stated "a principal purpose of compelled testimony is to permit Staff to obtain relevant documents and evidence for use at a hearing" (*Re Boock* (2010), 33 O.S.C.B. 1589 ("***Boock***") at para. 109).

[19] Staff takes the position that the admission of the compelled testimony is contemplated by the Act, the provisions of which should be construed liberally to achieve its purpose and objectives, and interpreted contextually and harmoniously to allow each of the parts to work together to achieve the goal of the legislation (*Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 ("***Rizzo***") at paras. 21-22; *Interpretation Act*, R.S.O. 1990, c. I.11, as amended, s.10). Therefore, Staff argues, subsection 16(2) of the Act states that compelled testimony is for the "exclusive use of the Commission" and shall not be disclosed "except as permitted under section 17", which should be read together with subsection 17(6) of the Act. Staff submits that subsection 17(6) of

the Act expressly authorizes disclosure of the compelled testimony in connection with "a proceeding commenced or proposed to be commenced by the Commission under … [the] Act". The combined reading of those provisions is supported by the Commission's decision in *Sextant,* in which the panel accepted Staff's submission that the combination of subsections 16(2) and 17(6) contemplate that compelled testimony may be used in a section 127 proceeding before the Commission (*supra* at para. 8).

[20] Furthermore, Staff submits that section 18 of the Act sets out the only prohibited uses of compelled testimony. Section 18 of the Act provides that compelled testimony "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*." Staff submits that the provision requires application of the maxim *expressio unius est exclusio alterius*, or the "implied exclusion" doctrine of statutory interpretation, that the Legislature's silence can be taken as deliberate (Ruth Sullivan, *Sullivan on the Construction of Statutes,* 5th ed. (Markham: LexisNexis Canada, 2008) ("***Sullivan on the Construction of Statutes***") at pp. 243-244). Therefore, Staff states that if the Legislature had intended to prohibit the use of compelled testimony in section 127 proceedings it would have done so expressly (*Sextant, supra* at para. 9).

[21] Staff also submits that the admission of transcripts of the compelled testimony as part of Staff's case in chief does not conflict with the *Evidence Act* or the *Charter* because neither apply. Section 9 of the *Evidence Act*, Staff submits, does not serve as a basis to exclude compelled transcript evidence for use within the same regulatory proceeding for which it was obtained. Staff relies on the Commission's decision in *Sextant*, which found that the word "subsequent" must be read into subsection 9(2) of the *Evidence Act* "so that it provides that "the answer so given shall not be used or receivable in evidence against him or her in any civil proceeding or in **any subsequent proceeding** under any Act of the Legislature" [emphasis added] (*supra* at para.15; see also *York Rio*, *supra* at paras. 78-79). Staff also directs us to consider the statement in *Sextant* that to deny the use of compelled evidence "would hamper effective enforcement for many boards and commissions throughout Ontario that have the power to compel testimony" (*supra* at para. 14).

[22] Staff also relies on *Jain*, a decision of the College of Physicians and Surgeons of Ontario (the "**CPSO**") which determined that section 9 of the *Evidence Act* offers a protection to witnesses in a proceeding from having "their answers used against them in a subsequent criminal proceeding or a civil proceeding that by its nature is penal or involves forfeiture" (*supra* at para. 32). As a result, the CPSO concluded that section 9 of the *Evidence Act* did not provide a basis to exclude Dr. Jain's evidence, given at her interview, in her discipline hearing (*Jain, supra* at para. 33).

[23] Staff further relies on the Alberta Court of Appeal decision in *Brost*, which determined that section 6 of the *Alberta Evidence Act*, R.S.A. 2000, c. A-18 (the "***Alberta Evidence Act***"), which Staff submits is similar in substance to section 9 of the *Evidence Act* in Ontario, has no application to Alberta Securities Commission (the "**ASC**") proceedings and prohibits the use of a witness' testimony to incriminate the witness in other proceedings (*Alberta (Securities Commission) v. Brost*, 2008 A.B.C.A. 326 (CanLII) ("***Brost***") at para. 37). The Court of Appeal

went on to state that the "interviews were not used to incriminate these appellants in the sense that criminal proceedings were involved nor were they used in other proceedings. Rather, the interviews were used in the same regulatory proceedings in which they were obtained." (*ibid*).

[24] Staff submits that in Ontario civil actions, which are also subject to the *Evidence Act*, Rule 31.11(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("***Rules of Civil Procedure***") expressly allows for transcript evidence of an examination for discovery to be read into evidence in the same civil proceeding for which the evidence was obtained. In any event, Staff argues that the protection of section 9 of the *Evidence Act* was not asserted by four of the respondents, including Gornitzki, Fiorini, Serpa and Wing.

[25] The *Charter* does not apply, Staff submits, because the predominant purpose of securities commission regulatory investigations and enforcement proceedings arising out of them is not to incriminate a respondent and therefore they do not engage the *Charter* (*British Columbia Securities Commission v. Branch,* [1995] 2 S.C.R. 3, 1995 CanLII 142 ("***Branch***") at paras. 34-35; *Boock*, *supra* at paras. 94-99; *Sextant, supra* at paras. 17-24).

[26] With respect to its second point, Staff submits that as market participants in a highly regulated securities industry, the admission of the compelled testimony is consistent with the Respondents' reasonable expectations. Staff relies on *Branch*, in which the Supreme Court of Canada (the "**SCC**") noted that market participants are well-aware that the securities industry is highly regulated and are deemed to know the rules of the game (*Branch, supra* at paras. 57-58 and 64). Furthermore, Staff takes the position that the Respondents must have known or are deemed to have known that they would or could be questioned by regulators from time to time to ensure their compliance with the rules (*Branch, supra* at para. 78). Staff relies on *Brost* and *Boock* in support of its submission that Respondents must have known that the contents of their interviews conducted during Staff's investigation would be used for the purposes of the Act (*Boock, supra* at para. 74; *Brost, supra* at para. 38). Staff takes the position that save for Serpa and Gornitzki, the Respondents were represented at the time of their compelled examinations by experienced counsel who were aware of the Commission's practice of admitting compelled transcript evidence in a Commission proceeding.

[27] Staff's third point is that if the Panel were to admit compelled testimony only for purposes of cross-examination, it would be unfair to Staff and the Respondents. Staff argues that this alternative would severely impede Staff's ability to properly present Staff's case. Staff directed the Panel to the SCC's decision in *Branch*, which states:

> Compelling the testimony of certain individuals may be the only reasonable means by which regulators can obtain evidence or gain a full appreciation of important information. The alternative, which I believe to be far less palatable, is for investigators to resort to highly intrusive search and seizure powers. This Court has previously recognized and taken into consideration the difficulties involved in regulating activities in a licensed sphere, where important information is generally only in the possession of the private individuals whose activity is the focus of the regulation […]

(*Branch, supra* at para. 91)

[28] Staff submits that reading-in the compelled testimony is critical to Staff's case because: (a) the compelled testimony is required to establish elements of certain offences, including allegations of misleading or untrue statements made by some of the Respondents in the course of their compelled examination and contents of an examination which Staff alleges were divulged; (b) the compelled testimony is required to explain code words; (c) the compelled testimony is required to understand relationships between the Respondents, as context and motivation for many of the impugned trades as well as conduct alleged to be contrary to the public interest; (d) the compelled testimony is required to understand Staff's forensic accountant's analysis; (e) the compelled testimony is required to explain trades and other transactions; and (f) the compelled testimony is required to assess credibility of the Respondents. Specifically with respect to submission (a), Staff submits that it intends to rely upon the compelled testimony of Iacono and Fiorillo to prove Staff's allegation of Agueci's breach of section 16 of the Act with respect to confidentiality.

[29] Staff also asserts that the proposal to admit compelled testimony only for purposes of cross-examination of the Respondents who do testify and otherwise to admit the compelled testimony after the Respondents have presented their evidence, only for the Respondents who do not testify, would prejudice all the Respondents who have not consented to such a method, because it would require Staff to split its case. Staff submits that there is a fundamental rule which prohibits the Crown from splitting its case and that all relevant evidence should be advanced by the Crown as part of its case as it would be unfair to wait and permit the accused to trap himself or herself (Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis Canada, 2009) ("***Law of Evidence***") at para. 8.168). Staff submits that this rule is intended to prevent surprise, prejudice and confusion on the part of a Respondent and to avoid infringing on a Respondent's right to know the case he or she has to meet (*R. v. Krause*, [1986] 2 S.C.R. 466 at 473-74, 33 DLR (4th) 267).

[30] Lastly, Staff submits that the Commission's decision in *Donald* was a significant departure from the Commission's well-established practice of admitting a respondent's compelled transcript into evidence as part of Staff's case in chief. In *Donald*, the panel determined that because the only respondent in that matter had undertaken to testify on his own behalf, Staff would not be permitted to read into the record excerpts from his compelled testimony, with the exception that his transcript could be used to impeach his testimony in cross-examination (*Re Donald* (2012), 35 O.S.C.B. 7383 ("***Donald***") at para. 34). Staff submits that in the past two years at least five panels of the Commission have allowed Staff to tender a respondent's transcript evidence, even where the respondent also later testified as part of his/her defense (*Re MRS Sciences Inc.* (2011), 34 O.S.C.B. 1547 at paras. 90-96 (transcript ruling on June 22, 2009 at 8-9); *York Rio, supra* at paras. 55-56, 63, 67, 74-76, 78; *Re MP Global Financial Ltd.* (2011), 34 O.S.C.B. 8897 ("***MP Global***") at paras. 4, 6 and 34; *Re McErlean* (2012), 35 O.S.C.B. 7474 ("***McErlean***") at paras. 59,118 and 175-178; *Re New Found Freedom Financial* (2012), 35 O.S.C.B. 11522 ("***New Found Freedom***") at paras. 22-24, 119 and 134; *Re Goldbridge Financial Inc.* (2011), 34 O.S.C.B. 1064 ("***Goldbridge***") at paras. 6, 87, 89 and 111). In any event, Staff submits, *Donald* is distinguishable as there are significant differences in the

nature and types of allegations (ex. misleading Staff in this matter) and unlike in *Donald,* not all the Respondents have undertaken to testify.

B. Gornitzki

1. Response to the Motion

[31] Gornitzki opposes the Motion on the following grounds: (i) the Act prohibits public disclosure of compelled testimony; (ii) alternatively, while Staff may avail itself of compelled testimony transcripts for purposes of impeaching Gornitzki during cross-examination, the transcripts of compelled testimony should not be admissible evidence at a section 127 hearing (except in exceptional circumstances which are not present here) because such examinations are bereft of reliability safeguards; and (iii) in the further alternative, principles of natural justice and procedural fairness dictate that the compelled testimony cannot be admitted in this particular case as Gornitzki was not afforded procedural fairness during Staff's investigation.

[32] Gornitzki submits that the starting point in the Act is that testimony and information obtained as a result of the exercise of section 13 powers of investigation are confidential pursuant to section 16 of the Act and shall not be disclosed or produced except as permitted under section 17 of the Act. Gornitzki takes the position that subsections 17(1) and (6) of the Act set out very limited exceptions to the general rule of confidentiality and they are expressly limited by subsections 17(3) and (7) of the Act, which state that compelled testimony cannot be disclosed to police or law enforcement officials without written consent of the party from whom the testimony was obtained. Gornitzki notes that subsection 17(1) of the Act permits the Commission, if it is in the public interest, to make an order authorizing disclosure of compelled testimony once the Commission has given reasonable notice and an opportunity to be heard to person who gave the testimony, pursuant to subsection 17(2) of the Act.

[33] Gornitzki submits that implicit in Staff's argument, in reliance on subsections 16(2) and 17(6) of the Act, is the notion that a public interest inquiry by the Panel pursuant to subsection 17(1) of the Act is not necessary. That is a position that Gornitzki submits should be rejected. Gornitzki's counsel relies on *Naster*, for its submission that subsection 17(6) of the Act permits disclosure and production of section 13 materials by Staff for two reasons only: (1) to meet Staff's disclosure obligations; or (2) to continue its investigation (*A. Co. v. Naster,* [2001] O.J. No. 4997 (Div. Ct.) (QL) ("***Naster***") at paras. 25-30). Therefore, Gornitzki submits, Staff cannot be permitted to read-in the compelled testimony at the hearing on the basis of subsection 17(6) of the Act. Gornitzki takes the position that the *Naster* interpretation is consistent with the well-established principle that it is for the Panel to determine the admissibility of evidence a party proposes to introduce at a hearing and it accords with principles of purposive statutory interpretation considering a provision in its entire context and its grammatical and ordinary sense, harmoniously with the scheme of the Act (*Rizzo, supra* at para. 21; *Sullivan on the Construction of Statutes, supra* at pp. 1 and 257).

[34] Gornitzki submits that, if it had been the intention of the Legislature to permit the compelled testimony to be read-in, the Legislature would have done so expressly as it did in the context of transcripts of an examination for discovery in civil proceedings (*Rules of Civil Procedure*, r. 31.11). Gornitzki's counsel argues that a section 13 examination under the Act is

nothing like an examination for discovery, in that before an examination for discovery in a civil proceeding the parties have exchanged pleadings and affidavits so that a deponent: (a) knows the allegations; (b) has had a chance to review his own documents; (c) has had a chance to review the other party's documents; and (d) has had a chance to speak to others who may have relevant information, all before giving an answer under oath.

[35] Gornitzki directs the Panel to the Commission's decision in *Black,* which acknowledges that confidentiality is essential both to facilitate the investigation and to avoid prejudice to a person's right to fair process if he or she becomes the subject of the proceedings (*Re Black* (2007), 31 O.S.C.B. 10397 at paras. 112-114, citing *Re Coughlan* (2000), 143 O.A.C. 244 (Ont. Div. Ct.) at para. 57). Gornitzki submits that Staff's investigative powers are extraordinary, intrusive, do not include the safeguards afforded to parties in civil proceedings in examinations for discovery and are unlike the powers of law enforcement officials, who cannot compel people to answer questions.

[36] Further, Gornitzki submits that Staff has not requested that the Panel consider an order under subsection 17(1) of the Act and, if such a request were made, Gornitzki reserves his right to object and make submissions in that respect. Gornitzki asserts that if the Act prohibits admission of compelled testimony, section 15 of the SPPA cannot override that prohibition.

[37] With respect to his second ground for opposing the Motion, Gornitzki submits that if the Act does not prohibit the admission of compelled transcripts into evidence, such transcripts should nonetheless be inadmissible at a hearing in all but exceptional circumstances as they were obtained in the absence of reliability safeguards (e.g. notice of allegations, availability of documents, and time for preparation). Exceptional circumstances, Gornitzki argues, include when a witness has died, is infirm or otherwise fails to testify. Gornitzki submits that he is available and will testify. Gornitzki also agreed that where appropriate, Staff may be permitted to use compelled transcripts for purposes of impeachment (*Donald, supra* at para. 34).

[38] The further alternative submission made by Gornitzki is that principles of fairness and natural justice prohibit the reading-in of the compelled testimony in this case. Gornitzki argues that principles of natural justice must inform admissibility decisions. Gornitzki submits that the Respondents are owed a duty of procedural fairness which requires a fair opportunity to participate in the decision-making process. In the context of a hearing pursuant to section 127 of the Act, Gornitzki relies on *Baker* and *Judicial Review of Administrative Action in Canada* for his submission that procedural fairness requires: adequate notice, reasonable expectations to be adhered to, adequate disclosure, the opportunity to fully and fairly present their respective cases, including being able to present evidence and to cross-examine adverse evidence and that all parties be treated equally (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 ("***Baker***") at para. 24; Donald Brown and The Honourable John Evans, *Judicial Review of Administrative Action in Canada,* loose-leaf (Toronto: Canvasback, 2009) vol. 2 ("***Judicial Review of Administrative Action in Canada***") at pp. 7-20, 7-72, 9-1, 10-1). Gornitzki takes the position that he was not afforded the foregoing procedural protections in Staff's compelled examination of him and therefore, to permit Staff to read-in the compelled testimony would taint the fairness of the hearing.

[39] Gornitzki submits that if Staff intends to attempt to use compelled testimony of a respondent at a hearing, then Staff should be expected to adhere to the principles of procedural fairness applicable at a hearing in obtaining the information. Further, Gornitzki argues that there is a duty of fairness owed in investigations to provide witnesses with some details of the nature of the investigation and Staff fell short in this obligation in respect of their examination of Gornitzki (Sara Blake, *Administrative Law in Canada,* 5th ed. (Markham: LexisNexis Canada Inc., 2011) at pp. 15-16; *Ontario (Securities Commission) v. Biscotti*, [1988] O.J. No. 1115 (H.C.J.) (QL) ("***Biscotti***") at p. 11; *R. v. Landen*, 2007 ONCJ 531 at paras. 58, 68). Gornitzki's counsel relies on the Commission's decision in *Norshield* in support of his position that "[n]atural justice and fairness issues must still be considered by the Panel when ruling on admissibility" (*Re Norshield Asset Management (Canada) Ltd.* (2010), 33 O.S.C.B. 2139 ("***Norshield***") at para. 87, aff'd 2011 O.N.S.C. 4685 (Div. Ct.)). In that case the panel declined to admit a transcript of evidence given by a respondent before a receiver in circumstances where Staff had not conducted its own examination under section 13 of the Act (*Norshield, supra* at para. 90).

[40] Gornitzki submits that reading-in his compelled testimony would offend the principles of natural justice and procedural fairness because:

(a) There was not adequate notice that his evidence could be used against him and that he was the target of the investigation, nor had he received a copy of the Investigation Order prior to his examination;

(b) It would be inconsistent with reasonable expectations of fair procedure, given his entitlement to a fair hearing, Staff's emphasis on confidentiality in the investigation, Staff's failure to caution Gornitzki that his answers could be used against him later and the automatic protections granted to witnesses against derivative use of their testimony at any hearing governed by the SPPA (Act, s.127(4); SPPA, s. 14);

(c) Gornitzki had not received any disclosure at the time of his compelled examination and was not permitted to keep copies of documents put to him; and

(d) Gornitzki was treated differently than other respondents in the investigation to whom Staff provided more and different information, for example advising Agueci, Serpa, Fiorillo, Raponi, Stephany, Iacono, Fiorini and others of the relevant timeframe that the investigation concerned.

[41] Gornitzki submits that the information he was given led him to believe he was not a target of the investigation and that his inability to prepare for his examination combined with personal matters he was facing at the time of his examination raise doubts about the reliability of the evidence obtained at the investigation stage. Therefore, Gornitzki submits, the Panel should prefer his *viva voce* evidence over excerpts from a written transcript obtained in the particular circumstances of this case.

[42] Gornitzki also submits that admitting the compelled testimony of other respondents as part of Staff's case against him would be contrary to the principles of natural justice and procedural fairness because of the denial of ability to cross-examine on the evidence (SPPA, s.10.1).

2. The Cross-Motion

[43] With respect to the Cross-Motion, Gornitzki submits that all materials filed in respect of the Motion and Cross-Motion should be ordered to be kept confidential and that both be heard in the absence of the public. In the alternative, Gornitzki requests that the public only have access to redacted copies of the materials and transcripts and that personal information of Gornitzki and the compelled testimony proposed by Staff to be admitted be removed from the public record. Gornitzki cites the Commission's authority pursuant to subsection 9(1) of the SPPA and rules 5.2 and 8.1 of the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 ("***Rules of Procedure***") to consider whether intimate financial or personal matters may be disclosed which, according to Gornitzki, having regard to the circumstances, the desirability of avoiding disclosure thereof, in the interest of any person affected or in the public interest, outweighs the desirability of adhering to the principle that hearings be open to the public.

[44] Gornitzki submits that his objection to the Motion can only be fully and fairly considered by the Panel if the Motion is heard *in camera* and public access to the Motion documents is restricted prior to the Panel's determination. Further, Gornitzki submits that following the determination of the Motion, the transcripts should remain confidential, regardless of the outcome, because Gornitzki's responding materials contain personal information and Staff has, by way of reply filed the entirety of Gornitzki's investigation transcript. Such complete public disclosure, Gornitzki submits, offends the Act's presumption of confidentiality for the reasons discussed above.

C. Telfer

[45] In his submissions, which have been adopted by Wing, Stephany and Agueci, Telfer submits that it would not be in the interests of justice or the public interest to allow Staff to read-in the compelled testimony of any of the Respondents and it would be in breach of Ontario law. Telfer requests that the Motion be dismissed because: (i) the compelled testimony is not admissible in this proceeding, commenced on February 7, 2012; (ii) the admission of the compelled testimony is not consistent with Telfer's reasonable expectations; and (iii) Telfer has undertaken to testify in the proceeding and therefore, the compelled testimony should only be used for the purposes of impeachment during cross-examination, should that ever be necessary.

[46] On the first point, Telfer relies on three arguments. First, Telfer submits it is not well-established that the compelled testimony is admissible in administrative proceedings. Second, the admission of the compelled testimony is not permissible under the Act. Third, the admission of the compelled testimony is in contravention of the *Evidence Act*.

[47] Telfer submits that the *York Rio* panel, which stated that it is well-established law that transcripts of compelled testimony may be admitted for use by Staff, placed significant reliance on *Branch* (*York Rio, supra* at para. 68)**.** However, Telfer submits, the SCC in *Branch* was faced

with the issue of whether to quash an investigative summons issued to compel an individual to give evidence and produce documents, not whether that evidence can be properly admitted in subsequent proceedings. Telfer takes the position that the SCC concluded that unless the predominant purpose of the summons was to obtain incriminating evidence, the witness was compelled to testify, but fell short of making a ruling on what use could be made of that testimony (*Branch, supra* at paras. 1, 36-37).

[48] It is Telfer's submission that the panel on a hearing is the one to determine what use can be made of compelled examination transcripts (*Boock, supra* at para. 115). Telfer invites the Panel to distinguish *Brost* on the basis that Alberta securities and evidence legislation are significantly different. Subsection 215(2) of the Alberta *Securities Act*, R.S.A. 2000, c. S-4 (the "**ASA**"), provides that where a person is compelled to testify, that testimony shall not be admitted in evidence against that person in a prosecution of an offence under section 194 of the ASA or any other prosecution of an offence under an enactment of Alberta. Subsection 6(2) of the *Alberta Evidence Act* provides that a "witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any **other** proceedings, except in a prosecution for perjury or for the giving of contradictory evidence" [emphasis added]. Telfer suggests that subsection 215(2) of the ASA, which was found in *Brost* to be a specific provision that overrides the general provision at section 6 of the *Alberta Evidence Act,* does not exist in the Act.

[49] Telfer also submits that sections 44, 45 and 46 of the ASA are significantly different from sections 16 and 17 of the Act, including that there is no prohibition of disclosure of compelled evidence to the police in the ASA. Finally, Telfer submits that subsection 29(e) of the ASA states that the ASC "shall receive the evidence that is relevant", whereas section 15 of the SPPA states that the Commission "may" admit evidence.

[50] Similar to Gornitzki's submission, Telfer argues that the admission of transcript evidence is not permissible under the Act. Telfer submits that neither section 16 nor section 17 of the Act speak to admissibility of the compelled testimony transcripts in a subsequent proceeding. Telfer submits that subsection 17(1) of the Act provides that no disclosure of information obtained pursuant to section 13 of the Act shall be disclosed without an order and subsection 17(6) of the Act permits disclosure only in connection with a proceeding. Telfer takes the position that the purpose of subsection 17(6) of the Act is not to allow Staff to read-in previously compelled testimony in a subsequent proceeding, but rather to allow Staff to carry out disclosure obligations they owe to respondents. Telfer submits that this position is consistent with the Commission's commentary at the time when subsection 17(6) was introduced in 1999, including that "[s]ection 17 of the Act has been amended to allow disclosure by an investigator of information obtained pursuant to powers of compulsion, for the purpose of conducting an examination or in connection with a proceeding... without the requirement to obtain further Commission orders" (*Notice of Amendments to the Securities Act and the Commodity Futures Act* (1999), 22 O.S.C.B. 8395 at 8396).

[51] Telfer also submits that subsection 17(7) of the Act provides that there can be no disclosure to police, but that if a party is permitted to file the transcript of compelled testimony in a public hearing before the Commission, this is the equivalent of disclosure to the public and the

police. Therefore, Staff's use of the compelled testimony in the manner proposed would be in breach of the Act.

[52] Further, Telfer argues that section 18 of the Act is, in effect, a reflection of *Charter* rights that would apply to any defendant in a subsequent quasi-criminal proceeding. Telfer notes that although section 18 does not refer to section 128 proceedings, Staff has failed to provide any support or explanation that would suggest that the failure to mention section 128 of the Act creates an inherent right on the part of Staff to file and rely upon compelled transcripts in a section 128 proceeding.

[53] Telfer also takes the position that admission of compelled transcript evidence is in contravention of section 9 of the *Evidence Act,* which provides that compelled testimony may not be used against a respondent in any civil proceeding or any proceeding under an act of Legislature. Telfer submits that *Sextant,* in which the Commission determined that the word "subsequent" should be read into subsection 9(2) of the *Evidence Act*, should not be followed (*Sextant, supra* at para. 15).

[54] In the event that *Sextant* is followed, Telfer submits, a proceeding commenced under section 127 of the Act is a subsequent and distinct proceeding from an investigation commenced under section 11 of the Act. Telfer submits that in *Sextant* there was no case law or reasonable legal support for the conclusion that a subsequent section 127 proceeding is part of the same proceeding as a section 11 investigation. Telfer notes that Rule 2.5 of the Commission's *Rules of Procedure* states that "a proceeding commences upon the issuance of a Notice of Hearing by the Secretary." Telfer submits that it would be misleading to disclose these rules to the public, creating reasonable expectations, and then for Staff to rely on a completely different and contradictory definition of when a proceeding commences. Telfer takes the position that his compelled examination of July 15, 2011 is a prior proceeding to the proceedings commenced by Staff on February 7, 2012. In support of his submission, Telfer notes that subsection 17(6) of the Act distinguishes between a proceeding and a section 13 examination conducted in an investigation. Therefore, a section 13 examination and a proceeding, Telfer submits, are different and separate – not the same proceeding.

[55] In addition, Telfer submits that the application of the *Evidence Act* protections to Commission hearings should be analogous to how they are applied in civil cases involving discoveries, but that reading-in the transcripts of an examination for discovery into civil proceedings is not analogous to the present case. Telfer suggests that the cases cited by Staff in which examinations for discovery were allowed to be read into evidence in the same civil proceeding for which the evidence was obtained are distinguishable because they do not appear to deal with situations where individuals availed themselves of the protection under the *Evidence Act*. Furthermore, Rule 31.11 of the *Rules of Civil Procedure* only allows read-ins of discovery transcripts "if the evidence is otherwise admissible" and there is no debate that the discoveries occur within the same proceeding. Additionally, Telfer submits, parties examined for discovery are afforded several measures of fairness: relevant issues are defined by pleadings, there is a mutual exchange of documents and an opportunity for mutual discovery of the parties.

[56] With respect to his second ground for opposing the Motion, Telfer submits that he did not reasonably expect that his compelled testimony would be admitted in this proceeding in violation of the Act and his section 9 of the *Evidence Act* protections. Telfer submits that *Branch* is not applicable to the present case as it focused on reasonable expectations that the securities industry is heavily regulated and that individuals in the industry can reasonably expect to be questioned by regulators, but not the use of that evidence. Further, Telfer submits that he did not expect to face allegations unless and until a subsequent proceeding was commenced against him.

[57] It is Telfer's position that in situations where a witness testifies at the proceeding, limiting the use of compelled examinations for the purpose of impeachment in cross-examinations is fair. Telfer relies on the Commission's decision in *Donald,* which concluded that direct testimony of the Respondent, where the respondent chooses to testify, is the best evidence (*Donald, supra* at para. 34). Since Telfer has undertaken to testify, he submits that Staff should not be permitted to read-in excerpts of his compelled testimony. Further, to the extent that Staff is relying upon the compelled testimony of one respondent against other, Telfer submits this is not permissible. Telfer argues that out-of-court admissions are binding only against the party who made them and are not evidence against another and to allow such use would be unfair to the other respondents as they would not have the opportunity to cross-examine the declarant (*Chote v. Rowan*, 1943 CarswellOnt 294, [1943] O.W.N. 646 at para. 5). Telfer further submits that the admission of one party will be evidence against another as to the truth of its contents only if that other person was present and assented, but the only people present at the section 13 examination were Staff, the witness and in some cases the witness' lawyer (*Law of Evidence, supra* at para. 6.482).

D. Wing

[58] Wing submits that pursuant to section 13 of the *Charter*, the excerpts from transcripts of his compelled examination cannot be admitted into evidence in this proceeding because: (i) Wing's examinations were compelled; (ii) Wing's examinations were in a different proceeding; and (iii) Staff confirmed that they are using Wing's compelled testimony in another proceeding to incriminate him, in particular, with respect to the allegations of misleading Staff. In addition, Wing agrees with arguments submitted by Gornitzki and Telfer with respect to the Motion and to avoid duplication did not repeat those legal arguments in his submissions.

[59] Wing attended an examination at the Commission pursuant to a summons issued under section 13 of the Act on August 17, 2011, November 17, 2011 and December 14, 2011 ("**Wing's Compelled Examination**"). The style of cause on the cover pages of Wing's Compelled Examination for those three dates reads "*In the Matter of GMP Securities L.P.*". Counsel submits that Wing was not given the opportunity to review the Investigation Order, that Wing's counsel requested copies of the exhibits to Wing's examination August 17, 2011 and was advised that it was not standard practice of Staff to release exhibits to a section 13 examination and that it would not do so. As a result, Wing submits that substantial unfairness and prejudice would result if Wing's Compelled Examination, or of any other individuals examined in the proceeding "*In the Matter of GMP Securities L.P.*", was simply read-in by Staff at the hearing in this proceeding. Further, Wing submits that he intends to testify at the hearing on the merits.

[60] Wing submits that section 13 of the *Charter* confers a right against self-incrimination by use of evidence in one proceeding in any other proceeding, including an administrative proceeding (*Branch, supra* at para. 87). Wing also takes the position that the right conferred by this section is not dependent on any objection made by a witness giving evidence at the time it is given and therefore, Wing was not required to assert any protections under it (*Dubois v. Queen*, [1985] 2 S.C.R. 350 at pp. 360 and 362).

[61] Wing relies on *Nedelcu* in support of his submission that the historical rationale underlying section 13 of the *Charter* is the *quid pro quo*. The "*quid",* Wing submits, refers to the incriminating evidence the witness has given and the "*quo*" is the state's side of the bargain that in return for compelling the witness to testify, to the extent that the witness provided incriminating evidence, the state will not use that evidence to incriminate the witness in any other proceeding, except in a prosecution for perjury or for giving of contradictory evidence (*R. v. Nedelcu*, 2012 S.C.C. 59 ("***Nedelcu***") at paras. 1, 3, 6 and 7). Wing submits that the meaning of "incriminating evidence" in the context of section 13 of the *Charter* can only mean evidence given by a witness at a prior proceeding that the Crown could use at the subsequent proceeding (*Nedelcu*, *supra* at para. 9). As Staff takes the position that it needs excerpts of Wing's Compelled Examination to make out elements of the allegations against him, Wing submits that the excerpts of compelled testimony are incriminating. Further, Wing takes that the position that because it meets the test for incriminating evidence, Staff cannot use it for any purpose at the hearing, including to impeach Wing, aside from uses for prosecution for perjury or for giving contradictory evidence (*Nedelcu*, *supra* at para. 15).

[62] Wing also submits that the time for determining whether the evidence given at the prior proceeding may be properly characterized as "incriminating" is the time when the Crown seeks to use it at the subsequent proceeding. Therefore, Wing submits that evidence given at the prior proceeding, although seemingly innocuous or exculpatory at that time, may become "incriminating evidence" at the subsequent proceeding (*Nedelcu*, *supra* at para. 17).

[63] Wing submits that the exception to section 13 of the *Charter* does not apply in this administrative proceeding because it is not a prosecution for perjury or for giving contradictory evidence in this proceeding. Counsel for Wing argues that, by definition, a prosecution refers to a criminal proceeding, whereas this matter is commenced pursuant to section 127 and 127.1 of the Act (*Black's Law Dictionary*, 5th ed., *sub verbo* "prosecution"; *Boock*, *supra* at para. 99).

[64] Wing requests an order that Staff may not read in excerpts of Wing's Compelled Examination, or of compelled examinations of any of the Respondents, from the proceeding "*In the Matter of GMP Securities L.P.*" in this proceeding, "*In the Matter of Eda Marie Agueci".* In the alternative, Wing requests an order that if Wing testifies at the hearing in this proceeding, Staff may only use transcripts of Wing's Compelled Examination to cross-examine Wing.

[65] In correspondence dated September 10, 2013, counsel for Wing expressed his agreement with the Cross-Motion. Specifically, counsel states that the Motion materials and the Motion Hearing should proceed in the absence of the public until such time as the Motion is heard and determined by the Panel.

E. Stephany

[66] Stephany adopts and relies upon the submissions of Gornitzki, Telfer and Wing. In addition, Stephany submits that at her compelled examination, she relied upon protections of the *Evidence Act* and the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (the "***Canada Evidence Act***"). Further, Stephany submits that during the course of her examination, several objections were made that it was being conducted unfairly, based upon selective and incomplete production of documents and emails in a context where her trading activities had occurred several years prior and were minimal in volume and value.

[67] In opposing the Motion, Stephany made the following specific submissions: (i) admission of transcript evidence violates the *Evidence Act*; (ii) subsection 17(6) confines disclosure to other respondents or persons being interviewed in an effort to obtain information; and (iii) administrative agencies are bound by a duty of fairness.

[68] Stephany submits that subsection 17(6) does not govern admissibility of compelled testimony, but rather allows compelled testimony to be produced or disclosed in connection with Commission proceedings. Stephany argues that section 15 of the SPPA governs the admissibility of compelled testimony and that subsections 15(2) and (3) of the SPPA support her submission that regardless of subsection 17(6) of the Act, the compelled testimony is inadmissible if it violates any other statute.

[69] It is Stephany's position that Staff's intention to admit the compelled testimony violates section 9 of the *Evidence Act*. Specifically, Stephany relies on subsection 9(2) of the *Evidence Act,* which states that if a witness objects upon certain grounds and if, but for this section or any Act of the Parliament of Canada, he or she would therefore be excused from answering, then although the witness is compelled to answer, the answer given shall not be used or receivable in evidence against him or her in any civil proceeding or in any proceeding under any Act of the Legislature. Stephany submits that Staff has provided no court authority to support the position that the word "subsequently" must be read into the provision. Stephany relies on the findings of the panel in *Liberman* where the prohibition in section 9(2) of the *Evidence Act* was applied (*Liberman v. College of Physicians and Surgeons of Ontario*, 2010 O.N.S.C. 337 ("***Liberman***")). Further, Stephany submits that the Panel should interpret the provision in accordance with the express language used by the legislature, which is the better interpretation.

[70] Stephany distinguishes *Brost* on the basis that section 6 of the *Alberta Evidence Act* expressly states that the evidence will not be used to incriminate the witness "in any **other** proceeding" [emphasis added]. Rather, Stephany suggests, the conclusion to be drawn is the opposite from that proposed by Staff. If the qualification suggested by Staff could properly be read-in, there would be no need for the word "other" in the Alberta legislation.

[71] Stephany also relies on the *Naster* decision in which the court found that subsection 17(6) of the Act appears to confine disclosure "to other respondents, or persons being interviewed in an effort to obtain information" (*Naster, supra* at para. 25).

[72] Furthermore, Stephany submits that administrative agencies are bound by a duty of fairness even though traditional rules of proof and evidence do not apply (*Mooring v. Canada*

(National Parole Board), [1996] 1 S.C.R. 75 ("***Mooring***") at paras. 25 and 37). In *Mooring*, the SCC determined that "where incriminating statements are obtained from the offender, the law of confessions based on an admixture of reliability and fairness will be pertinent although not binding" and stated that the Board may, in appropriate circumstances, "conclude that reliance on a coerced confession is unfair" (*Mooring, supra* at para. 37). Stephany directs the Panel to consider the Saskatchewan's Queen Bench decision in *Murray,* which held that the tribunal had breached its duty of fairness by failing to give sufficient reasons for its decision to admit a sworn videotaped statement in the absence of the actual witness appearing (*Murray v. Saskatchewan Veterinary Medical Assn.*, 2008 S.K.Q.B. 424, aff'd 2011 S.K.C.A. 1 ("***Murray Appeal Decision***")). The Court of Appeal disagreed with the trial judge's reasoning, but held that the respondent's right to examine, cross-examine and re-examine all witnesses does not preclude the tribunal from considering hearsay when admission of that hearsay is necessary (*ibid* at para. 28). The Court of Appeal went on to state that before it can admit evidence that would not be subject to cross-examination, the tribunal must determine it is necessary to admit it, whereas the decision-maker "will ultimately decide on the probative value, including the reliability, of the hearsay evidence after it has been admitted" (*ibid*).

[73] In email correspondence dated September 27, 2013, counsel for Stephany advised that it was inappropriate for Staff to be permitted to read-in compelled testimony of a respondent who availed themselves of the protections applicable to such testimony and that a determination to that effect should not depend on the willingness of a respondent to give the undertaking to testify. Notwithstanding that position, counsel for Stephany confirmed that Stephany is prepared to undertake to be a witness at the merits hearing at the appropriate time following completion of Staff's case.

F. Fiorillo

[74] Fiorillo requests that the Motion be dismissed. Fiorillo submits that it would be inherently unfair to Fiorillo to allow Staff to require him to submit to an examination process, in connection with an investigation of a different corporate entity, which lacked even the most basic procedural safeguards to ensure that any evidence elicited from Fiorillo met the thresholds of fairness and reliability, and then use the transcript of that compelled testimony to attempt to incriminate Fiorillo in this proceeding. Further, while Fiorillo supports the other Respondents' submissions as being right in law and fairness, he submits that there is absolutely nothing in his transcript that is an admission by him in the sense of supporting a conclusion that he did anything improper. Regardless of how the issues are decided in the Motion, Fiorillo submits that he has concerns that the particular proposed passages are out of context, misleading or otherwise irrelevant to the issues to be determined at the hearing and therefore, reserves his right to object to particular excerpts of compelled testimony being read-in at the merits hearing.

[75] Fiorillo takes the position that the compelled testimony is inadmissible in evidence in this proceeding because: (i) the Act prohibits admission of the compelled testimony into evidence; (ii) the compelled testimony is inadmissible in accordance with the *Evidence Act*; and (iii) admission of the compelled testimony is inconsistent with the principles of fairness and the requirements of justice.

[76] Fiorillo adopts the submissions of Gornitzki as to the correct interpretation of sections 16 and 17 of the Act and submits that they are consistent with the majority reasons of *Branch*. Similar to Telfer, Fiorillo submits that the SCC in *Branch* does not expressly deal with the issue of whether compelled testimony is admissible in a regulatory proceeding, but rather whether compelling individuals to provide testimony during an investigation could be justified under the provisions of the *Charter*.

[77] Fiorillo argues that to the extent that the SCC in *Branch* did address admissibility of the compelled testimony, the majority reasons suggest that such evidence is not admissible. Specifically, Fiorillo relies on findings of the SCC that, if it is shown that the only prejudice is the possible subsequent derivative use of the testimony, the compulsion will occasion no prejudice because the witness will be protected against such use (*Branch*, *supra* at para. 9). Further, Fiorillo relies on the SCC determination that the proposed compelled testimony in furtherance of the predominant purpose of the inquiry is governed by the general rule applicable under the *Charter*, pursuant to which a witness receives evidentiary immunity (*Branch*, *supra* at para. 35).

[78] Similar to other respondents, Fiorillo also relies upon the protection of subsection 9(2) of the *Evidence Act*. Like Telfer and Wing, Fiorillo submits that he was compelled to testify in the matter "*Re GMP Securities L.P.*" at which time he invoked protections of the *Evidence Act* and *Canada Evidence Act*, but now Staff seeks to use the compelled testimony in the matter "*Re Eda Marie Agueci*", which, Fiorillo submits, is a separate and distinct proceeding from the investigation conducted under section 11 of the Act with respect to GMP.

[79] Fiorillo disputes that the *Sextant* decision, which determined that compelled transcripts can be admitted in the same proceeding, should be followed, but submits that Staff should nevertheless be barred from attempting to adduce the compelled testimony of Fiorillo in this, subsequent, proceeding. Fiorillo also distinguishes the present case from *Sextant* and submits that this matter requires a finding that the section 11 investigation and the proceeding commenced in February 2012 are separate proceedings since: (i) one investigation order was issued on July 18, 2011; (ii) that investigation order did not name Fiorillo as a target of the investigation; (iii) at the time he was examined, Fiorillo was not notified he was a subject of investigation; (iv) Fiorillo was not apprised of the issues under investigation; (v) the Notice of Hearing in the *Re Eda Marie Agueci* matter was not issued until February 7, 2012; and (vi) Staff's investigation morphed considerably into a separate proceeding as GMP is not included as a respondent.

[80] Similar to Stephany, Fiorillo relies on *Liberman* to support his submission that compelled testimony from an investigation of Liberman's colleague should not be allowed in a subsequent proceeding directed against Liberman himself on the basis that subsection 9(2) of the *Evidence Act* prohibited it (*Liberman, supra* at paras. 39-42). Fiorillo acknowledges that there is little doubt the section 11 investigation and the proceeding in *Re Eda Marie Agueci* are related as the latter flowed from the former. The current matter, Fiorillo submits, should be equated to the prosecution of Liberman, which was related to and evolved out of the prosecution of his colleague. Fiorillo takes the position that since the targets of the investigation and the targets of the proceeding are markedly different, it cannot be said that they are the same proceeding, thereby falling directly within the prohibition contained in section 9(2) of the *Evidence Act.*

[81] Even in the absence of a breach of the Act or the *Evidence Act,* it is submitted that the Motion should be dismissed because admitting the compelled testimony is inconsistent with principles of fairness owed to Fiorillo and requirements of natural justice. Fiorillo submits that at the bare minimum he should have been permitted to attend the examination with counsel and provided with details as to the subjects upon which he would be questioned (*Biscotti, supra* at pp. 3 and 11). Fiorillo acknowledged he was afforded the right to attend with counsel, but not the other entitlements enumerated in *Biscotti* such as advising Fiorillo that he was a target or person of interest, giving him particulars of the matters under investigation, other than a vague reference to insider trading, and identifying the transactions or conduct in issue to allow Fiorillo to refresh his recollection of events (*ibid*). Fiorillo also notes that he had no right to object to questions or challenge their relevance.

[82] In response to Staff's reliance on *Branch* with respect to reasonable expectations, Fiorillo submits that it is nonsensical to maintain that a respondent ought to have reasonably expected that he or she be forced to submit to an examination, without notice or context of the matters to be examined and without the right to challenge the questions being asked, to then have that evidence used as part of the case to be made against him or her in the proceeding. Further, in addressing Rule 31.11 of the *Rules of Civil Procedure*, which permits the reading-in of discovery transcripts of an adverse party, Fiorillo submits that the overall context and safeguards of examinations for discovery must be considered. Like Gornitzki, Fiorillo lists safeguards in the discovery context, which he submits would ensure reading-in the compelled testimony do not result in unfairness to the examined parties.

G. Agueci

[83] In correspondence dated September 13, 2013, counsel for Agueci confirmed that Agueci opposes the Motion for a number of reasons discussed below. Agueci also adopts the arguments advanced by Telfer, as she too availed herself of the protections of the *Evidence Act*.

[84] Agueci submits that Part VI of the Act contains extraordinarily invasive investigative powers that are not and were not intended to be equivalent to a civil examination for discovery. Further, Agueci takes the position that Staff's proposed use of powers under Part IV of the Act is both wrong in principle and in law.

[85] Agueci takes the position that section 16 of the Act provides a general prohibition on disclosure of the compelled testimony including "in any other proceeding except as permitted under section 17". Agueci submits that a proceeding commenced pursuant to section 127 of the Act is an "other proceeding" and therefore, use of compelled testimony obtained pursuant to section 13 of the Act may only be used in the context of a section 127 proceeding as permitted by section 17.

[86] Agueci submits that subsection 17(1) of the Act does not permit the Commission to order disclosure for the purposes of a section 127 proceeding. On the other hand, Agueci submits, subsection 17(6) of the Act permits a person appointed under section 11 of the Act to "disclose or produce" the compelled testimony in connection with a proceeding commenced by the Commission under the Act (which would include a section 127 proceeding) or in connection with the "examination of a witness". Agueci submits that nothing in the Act permits the

Commission or a person appointed under section 11 of the Act to read the compelled testimony into evidence, file or tender compelled testimony to establish liability of a respondent. Agueci states that any recent jurisprudence that suggests the contrary is simply wrong.

[87] Agueci submits that no documents were provided to her in advance of the examination, nor was she afforded a meaningful opportunity to review materials at the examination prior to being questioned. Further, Agueci submits that over the course of five days she corrected many, if not all misstatements she may have made as a result of memory lapses.

[88] With respect to Staff's submissions on the necessity of using compelled examinations to prove allegations of misleading statements, Agueci submits that section 122 has no application in the circumstances. Agueci submits that it would be fatuous to suggest that, as a compelled witness on an examination, she "submitted" her evidence to the persons appointed under section 11 of the Act. Agueci submits that the Concise Oxford English Dictionary defines "submit" as "to present for consideration or judgment" which connotes an element of voluntariness which was absent in Agueci's examination.

H. Staff's Reply

1. Reply to the Motion Submissions of the Respondents

[89] Staff submits that the Respondents were treated fairly during the investigation. In the case of Wing, Staff submits that he was reminded of and exercised his right to counsel, he did not ask for a copy of the Investigation Order prior to his examination, and he did review the Investigation Order at the examination. In the case of Gornitzki, Staff submits that he was reminded three times of his right to retain counsel and he was advised on at least two occasions of the nature of Staff's investigation. Further, Staff suggests that Gornitzki's position with respect to personal matters that may have affected his testimony has no merit since there was no evidence that he was affected at the time of his interview, the examination was held on a date of Gornitzki's choosing to accommodate him and Gornitzki was able to answer all questions.

[90] Staff further submits that Agueci was provided with a copy of the Investigation Order as well as other information in advance of her examination with Staff. Finally, in the case of Fiorillo, Staff submits he and his counsel were aware of the nature of Staff's investigation, and his factum notes the scope of the investigation as set out in the Investigation Order. Also, Staff submits that Fiorillo and his counsel were provided with an opportunity to review the Investigation Order at the commencement of his examination and that they did have the opportunity to object to questions including on the basis of relevance and actively did so.

[91] Staff submits that *Naster* has no application to this matter as the Divisional Court was considering Staff's ability to disclose information, prior to the hearing, to respondents as part of Staff's *Stinchcombe* obligations, and did not consider the ability of Staff to use subsection 17(6) of the Act to admit transcript evidence at a Commission hearing. In any event, Staff submits, the Commission, as an expert tribunal interpreting its own enabling statute, has considered the limits of subsection 17(6) of the Act to admit compelled evidence since *Naster*. Staff takes the position that if Gornitzki's submissions relating to subsections 17(6) and 17(7) of the Act were true, the Commission would not even be permitted to admit into evidence any of the documents obtained

under section 13 summonses, which would be an absurd result. Furthermore, it would render section 122 of the Act meaningless, Staff submits, if the very statements alleged to be misleading were inadmissible to prove the allegation.

[92] Staff takes the position that the compelled transcripts are highly reliable as they were taken under oath and transcribed by a court reporter who certified the transcript as true and accurate. Further, Staff submits that the Respondents do not claim inaccuracies in the statements, which have been in their possession for a year and a half, and that any deficiencies as to circumstances surrounding the taking of the statements are not a matter of admissibility, but rather weight. With respect to the "reliability safeguards" derived from the civil context, Staff submits that they make sense for a civil discovery, but not in the context of a confidential investigation pursued by a regulator in furtherance of its mandate to protect investors and foster confidence in Ontario's capital markets.

[93] Staff directs the Panel's attention to the purpose of the confidentiality provision in section 16 of the Act as being two-fold: to control information passed on regarding the investigation, including that the investigation is being conducted to, among other things, avoid collusion among witnesses who may discuss their evidence and provide statutory protections to a witness (Ministry of Finance, *Five Year Review Committee Final Report – Reviewing the Securities Act (Ontario)* (Toronto: Queen's Printer for Ontario, 2003) at 241 ("***Five Year Review***")). Staff submits the concern is legitimate and particularly relevant in this case where Staff alleges that Agueci breached section 16 of the Act by divulging information to others, including some of the Respondents, which provided them with an opportunity to tailor their evidence to hers. Staff submits concerns for preserving the integrity of investigations is heightened when insider trading allegations are at issue because they are often based on the content of private discussions between respondents.

[94] Staff further submits that Gornitzki, Agueci, Fiorillo and Stephany's submissions with respect to notice of particulars of an investigation are inconsistent with the Act itself. Section 11 of the Act requires that the order set out the matters to be investigated. Staff submits that the Investigation Order in this case describes that employees of GMP and others connected to GMP employees may have engaged in insider tipping and trading or conduct related to those securities that was contrary to the public interest. Consequently, Staff submits, the Respondents knew the subject matter of the investigation. Staff argues that subsection 13(2) of the Act sets out the rights of witnesses, which include the right to counsel and to claim privilege to which the person is entitled.

[95] Staff directs the Panel to consider the *Azeff* decision, in which the Commission noted that the rights to procedural fairness owing to a witness during an investigation conducted by Staff are minimal (*Re Azeff* (2012), 35 O.S.C.B. 5159 ("***Azeff***") at paras. 223-227 and 258-260). Further, Staff relies on the Divisional Court's decision in *Biscotti* for the proposition that at the investigation stage, the witness is entitled to have counsel present and that any evidence not be used in subsequent criminal proceedings (*Biscotti, supra* at p. 11).

[96] Staff also takes the position that there are not two distinct and separate proceedings, as the investigation order in "*GMP Securities L.P.*" led to, and is the genesis of, the current

proceeding. Staff relies on the Commission's decision in *Sextant*, which finds that the investigation and adjudicative stage of a matter are simply stages of one and the same proceeding (*Sextant, supra* at paras. 5 and 10).

[97] With respect to use of the compelled testimony, Staff submits that it may, and in this case must, be admitted against the Respondent who made the statement and in limited circumstances, also against other Respondents. Specifically, Staff relies on statements made by Iacono and Fiorillo, who admit to Staff that Agueci divulged information from her compelled examinations with Staff. Staff submits that there is not unfairness to the Respondents by admitting such evidence as it is being used for the very purpose for which it was obtained. Staff submits that in a regulatory proceeding the Respondents are all compellable witnesses, including by and against each other pursuant to section 12 of the SPPA. Staff submits that in *Brost* the Alberta Court of Appeal stated that the regulatory proceedings do not deny an opportunity to test the impugned hearsay evidence as the respondents could apply to the Commission for a subpoena to have other respondents testify (*Brost, supra* at paras. 35-36). Similarly, Staff relies upon *York Rio* for the proposition that nothing prevents Staff from using compelled evidence of others against the respondent, Schwartz, subject to evidence law considerations relating to hearsay, particularly relating to co-respondents (*York Rio, supra* at para. 80).

2. Response to the Cross-Motion

[98] Staff objects to the proceeding being held *in camera* and the request that materials be sealed, but does not oppose a temporary order for confidentiality. Staff submits that it is the basic principle of law that hearings be open to the public and the Respondents have the burden of proving exceptional circumstances and they have not done so (*Re Vancouver Sun*, 2004 S.C.C. 43, [2004] 2 S.C.R. 332; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 S.C.C. 41, [2005] 2 S.C.R. 188). Staff relies on subsection 9(1) of the SPPA for its submission that exceptions to the public hearing rule, including intimate financial or personal matters, may be disclosed and that the desirability of adhering to principles that hearings be open to the public outweighs the desirability of avoiding disclosure. Staff submits that the test for confidentiality orders is that: (1) such an order is necessary to prevent a serious risk to an important interest, and (2) the salutary effects of the confidentiality order outweigh its deleterious effects on the right to free expression (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 S.C.C. 41, [2002] 2 S.C.R. 522 at para. 45). Staff submits that the risk must be real and substantial, well grounded in evidence, and pose serious threats to the interest. Staff also submits that the Panel must consider whether reasonable alternatives are available and restrict the order as much as reasonably possible.

[99] Staff submits that the public interest in having access to tribunal records greatly outweighs the interests expressed by the Respondents. Staff submits that the Respondents' financial information is necessary for Staff's case on the merits and that Gornitzki's personal information has become relevant because he is using it to attempt to retreat from the compelled evidence he gave. Further, Staff submits that the Respondents have not proven any real and substantial risk to their interests.

3. Response to Wing's Constitutional Question on the Motion

[100] Staff takes the position that Wing's motion to challenge the constitutionality of Staff's request is without merit and out of time. Staff submits that section 13 of the *Charter* does not apply to this hearing because it is not a criminal prosecution and the provision applies to prevent "incriminating" evidence from being used by the Crown in a prosecution to prove guilt (*Nedelcu, supra* at para. 9).

[101] Further, Staff submits that the request is time-barred pursuant to the 15-day service requirements of Rule 2.7 of the *Rules of Procedure* and subsection 109(2.2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "***Courts of Justice Act***").

V. LAW AND ANALYSIS

A. Admissibility of Compelled Testimony

1. The Scheme of the Act

[102] Pursuant to section 11 of the Act, the Commission may issue an order to appoint one or more persons to investigate with respect to a matter as it considers expedient, for the due administration of Ontario securities law or the regulation of the capital markets in Ontario and such order shall describe the matter to be investigated.

[103] Once an order is issued pursuant to section 11 of the Act, the investigator has the power to summon any person and to compel him or her to testify under oath and to produce documents pursuant to subsection 13(1) of the Act. Subsection 13(2) of the Act provides a person or company giving evidence under subsection (1) the right to be represented by counsel and to claim any privilege to which the person or company is entitled.

[104] As expressed in the *Five Year Review, supra,* section 16 of the Act serves to maintain the integrity of Commission investigations, among other things. Except in accordance with section 17 of the Act, section 16 of the Act expressly prohibits disclosure, except to counsel, of the nature or content of an order issued under section 11 of the Act or of:

> 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.
>
> (Subsection 16(1)(b) of the Act)

[105] Furthermore, testimony given under section 13 of the Act and all documents and other things obtained under that section relating to the investigation or examination that is the subject of the order are for the exclusive use of the Commission pursuant to subsection 16(2) of the Act.

[106] Section 17 of the Act permits disclosure or production of testimony given under section 13 of the Act in certain instances, as discussed in detail below, and prohibits disclosure in others.

Section 18 of the Act specifically indicates that testimony given under section 13 of the Act 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,* R.S.O. 1990, c. P.33, as amended (the "***Provincial Offences Act***").

[107] Subsection 17(6) of the Act provides:

> **Disclosure in investigation or proceeding**
> **[17] (6)** A person appointed to make an investigation or examination under this Act may disclose or produce anything mentioned in subsection (1)[including compelled testimony], 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.

[108] We find that subsection 17(6) of the Act, construed liberally and purposively, in the context of surrounding provisions and to achieve the purposes of the Act, permits Staff to produce compelled testimony at a hearing commenced pursuant to section 127 of the Act (*Rizzo*, *supra* at paras. 21-22). We agree that if the Legislature had intended to prohibit the use of compelled testimony in section 127 proceedings it would have done so expressly as it did in section 18 of the Act for prosecutions under the *Provincial Offences Act* (*Sextant, supra* at para. 9) and that the Legislature's silence can be taken as deliberate (*Sullivan on the Construction of Statutes*, *supra* at 243-44). To find otherwise would also prohibit the use of documentary evidence compelled by Staff pursuant to section 13 of the Act, which cannot have been the legislative intention given the context of the scheme of the Act in respect of investigations and enforcement.

[109] For clarity, Staff does not need to rely upon subsection 17(1) of the Act in order to satisfy the Panel that it is permissible to admit compelled testimony in a section 127 proceeding (*Boock, supra* at paras. 71 and 74).

[110] This administrative proceeding was commenced by a Notice of Hearing issued pursuant to sections 127 and 127.1 of the Act in connection with a Statement of Allegations filed by Staff. The hearing process, including admissibility of evidence, is governed by the SPPA and the Commission's *Rules of Procedure*, where applicable. While subsection 17(6) of the Act permits the production of compelled evidence, including testimony and documentary evidence, at an administrative proceeding commenced under the Act, it remains at the discretion of the panel hearing the matter to determine the admissibility of such evidence in accordance with section 15 of the SPPA and such considerations as the Panel deems appropriate for a fair and efficient hearing (*Boock, supra* at para. 115).

2. Hearsay is Admissible

[111] With respect to the admissibility of evidence, subsection 15(1) of the SPPA provides:

> **What is admissible in evidence at a hearing**
> **15 (1)** Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious. [emphasis added]

[112] Subsections 15(2) and (3) of the SPPA create certain exceptions to the broad authority of a tribunal to admit relevant hearsay evidence:

> **What is inadmissible in evidence at a hearing**
> **(2)** Nothing is admissible in evidence at a hearing,
>
> (a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or
>
> (b) that is inadmissible by the statute under which the proceeding arises or any other statute.
>
> **Conflicts**
> **(3)** Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding. [emphasis added]

[113] We find that transcripts of the compelled testimony are relevant hearsay and are therefore admissible pursuant to subsection 15(1) of the SPPA. For the reasons discussed herein, we are not satisfied that the compelled testimony is otherwise inadmissible pursuant to subsections (2) or (3) of the SPPA. The Act does not make the compelled testimony inadmissible in an administrative hearing and the Act does not expressly limit the extent to or purposes for which the compelled testimony may admitted or used in evidence at an administrative hearing under the Act. Further, we were not satisfied that the other statutes cited by the Respondents make the compelled testimony inadmissible in an administrative hearing under the Act or expressly limit the extent to or purposes for which the compelled testimony may be admitted or used in evidence at an administrative hearing under the Act.

[114] Once tendered at an administrative hearing under the Act, the compelled testimony is protected by section 14 of the SPPA, which provides that "no answer given by a witness at a hearing shall be used or be receivable in evidence against the witness in any trial or other proceeding against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence".

[115] We are mindful of the dangers of hearsay evidence and note that the weight to be afforded to such evidence is a determination for the Panel. In making such a determination, we

will consider whether there are sufficient indicia of reliability, corroboration of the hearsay evidence and the extent to which such evidence was tested by cross-examination.

3. Protections for Compelled Testimony

a. The Charter

[116] We recognize that Wing has not complied with the 15-day service requirements of Rule 2.7 of the *Rules of Procedure* and subsection 109(2.2) of the *Courts of Justice Act*. We have nevertheless considered the submissions of the parties in this respect given the nature of this question and its importance to fully determine the Motion.

[117] Section 13 of the *Charter* provides:

> **Self-crimination**
> **13.** A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[118] In our view, section 13 of the *Charter* does not apply to restrict the use of compelled evidence in the context of administrative proceedings, which are not penal. The public interest purpose of the Commission's securities regulatory investigations and administrative enforcement proceedings does not engage the *Charter* because the predominant purpose of the inquiries or proceedings is not to incriminate the witness (*Branch*, *supra* at paras. 34-35; *Boock*, *supra* at paras. 94-99; *Sextant, supra* at paras. 17-24).

[119] The Commission's public interest mandate is to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets (section 1.1 of the Act). The purpose of Commission investigations is not criminal or penal in nature, but rather it serves a public purpose for the regulation of capital markets.

[120] We do not agree with Wing's submission that because Staff is relying on the transcripts to prove allegations of misleading statements made during Wing's Compelled Examination, the evidence somehow becomes "incriminating" within the meaning of section 13 of the *Charter*. Such use of the compelled evidence does not alter the regulatory nature of these proceedings. Allegations, which may lead to orders in the public interest pursuant to section 127 of the Act, deal with matters that may require protective and preventative action by the Commission and are not criminal.

b. The SPPA

[121] A witness who testifies at a hearing is protected pursuant to section 14 of the SPPA. Subsection 14(1) of the SPPA provides:

> A witness at an oral or electronic hearing shall be deemed to have objected to answer any question asked him or her upon the ground that the answer may tend

to criminate him or her or may tend to establish his or her liability to civil proceedings at the instance of the Crown, or of any person, and no answer given by a witness at a hearing shall be used or be receivable in evidence against the witness in any trial or other proceeding against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence.

c. The Evidence Act

[122] Section 9 of the *Evidence Act* provides:

> **Witness not excused from answering questions tending to criminate**
> **9. (1)** A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate the witness or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature.
>
> **Answer not to be used in evidence against witness**
> **(2)** If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection (1) and if, but for this section or any Act of the Parliament of Canada, he or she would therefore be excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him or her in any civil proceeding or in any proceeding under any Act of the Legislature.

[123] The Commission's mandate, as articulated under section 1.1 of the Act, is to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets. As noted above, the statutory scheme under which the Commission operates grants an investigator power to summon any person and to compel him or her to testify under oath and to produce documents pursuant to subsection 13(1) of the Act. We agree that to accept the submissions of the Respondents that the compelled testimony cannot be admitted into evidence would hamper effective enforcement of the Act by the Commission, which has the legislative power to compel testimony and use it in accordance with the Act (*Sextant, supra* at para. 14). One of the purposes of compelled testimony is to obtain relevant documents and evidence for use in an administrative hearing (*Boock, supra* at para. 109).

[124] In determining the scope of section 9 of the *Evidence Act*, the Panel has considered the apparent purpose of the legislation and the ordinary meaning of its language. In order to give subsection 9(2) of the *Evidence Act* a liberal and purposive interpretation in the context of this administrative hearing, the word "other" should be read into the provision, such that it would read "the answer so given shall not be used or receivable in evidence against him or her in any **other** civil proceeding or in any **other** proceeding under any Act of the Legislature" (*Rizzo*, *supra* at paras. 21-22). We would not read in the word "subsequent" as the *Sextant* panel did because it is possible that another proceeding could proceed concurrently with an administrative hearing. It is our view that use of compelled testimony in this administrative hearing would prevent concurrent as well as subsequent use of the compelled testimony of the witness who asserts the protection under section 9 of the *Evidence Act*.

[125] We find that the style of cause on a transcript of compelled evidence is not determinative of whether the compelled testimony was obtained in the same or another proceeding. We agree with Fiorillo that there is little doubt that the current matter, entitled "*Re Eda Marie Agueci"* flowed from the Investigation Order, entitled "*Re GMP Securities L.P.*". We do not agree that the nature of the investigation changed such that the current matter becomes another proceeding. We agree with the determination in *Sextant* that an investigation is a stage of a proceeding, as is the adjudicative stage (*Sextant, supra* at paras. 5 and 10).

d. Procedural Fairness and Reasonable Expectations

[126] We agree with the Commission's analysis of the *Baker* factors in *Azeff*, which determined that the duty of fairness during an investigation is minimal (*Azeff, supra* at paras. 208-258; *Baker*, *supra* at paras. 21-28). The duty of fairness owed to a respondent during the investigation of a matter is clearly distinguishable from the procedural fairness requirements at the hearing (*Azeff, supra* at para. 258).

[127] We are not satisfied that the Respondents were treated unfairly during the investigation with respect to the circumstances under which the compelled testimony was obtained. Each of the individual Respondents was provided with a summons and the opportunity to review the Investigation Order at the outset of the compelled examinations. The Investigation Order, as discussed above, authorized members of Staff to investigate the Respondents, although not by name, and others connected to GMP and its employees in relation to insider trading, tipping or conduct in relation to securities that is in breach of the Act and/or contrary to the public interest. Most of the Respondents exercised their right to be represented by counsel at their compelled examinations and those who did not were reminded of their right to do so. We are satisfied that it would not result in unfairness to the Respondents to permit the compelled testimony to be admitted in this case in the manner directed by the Panel below, at the end of Staff's case and once the election is made by the Respondents as to whether they undertake to testify in this hearing.

[128] Further, we do not find the use of the compelled evidence in an administrative proceeding to be beyond the reasonable expectations of the Respondents. We note that in *Branch* the SCC acknowledged that securities market participants are deemed to know the "rules of the game" (*Branch, supra* at para. 64). We concur with the findings of the Commission in *Boock* that:

> a respondent in an administrative proceeding before the Commission should have a very low expectation of privacy with respect to the use in a *Commission administrative proceeding* of that respondent's own compelled testimony and evidence. Subsection 17(6) of the Act expressly contemplates that compelled evidence can be disclosed or produced in connection with a proceeding commenced or proposed to be commenced by the Commission under the Act, without the necessity for a Commission order under subsection 17(1).
>
> (*Boock*, *supra* at para. 74)

[129] We also consider the Alberta Court of Appeal's decision in *Brost* to be consistent with our view that respondents do not have a reasonable expectation that the content of their compelled examinations will not be used for the purposes of the Act (*Brost, supra* at para. 38).

B. Procedural Direction

[130] Compelled testimony is admissible at an administrative proceeding commenced under the Act. Nevertheless, it remains at the discretion of the panel hearing the matter to determine whether to admit such evidence in accordance with section 15 of the SPPA and such considerations the Panel deems appropriate for a fair and efficient hearing (*Boock, supra* at para. 115). The Panel's discretion to control the process of the hearing includes the ability to determine the process by which evidence should be tendered.

[131] We acknowledge Staff's submission that in the past, panels of the Commission have, on occasion, allowed Staff to tender a respondent's transcript evidence, even where the respondent also later testified as part of his or her defense (*York Rio*, *MP Global, McErlean, New Found Freedom* and *Goldbridge).* In this case, however, the Panel is of the view that it is more appropriate to follow the process in *Donald* since the oral evidence of the Respondents who testify would provide us with the best evidence because it would afford the Panel an opportunity to observe the witness during examination-in-chief and cross-examination, including with respect to prior admissions and prior inconsistent statements, if any (*Donald*, *supra* at para. 34). We agree with submissions of the Respondents that Staff should not propose to tender excerpts of the Respondents' compelled testimony into evidence until the conclusion of its case. At that time, Staff may seek to tender into evidence selected excerpts from transcripts of compelled testimony of those respondents who have not undertaken and do not undertake to testify. This provides the Respondents with an opportunity to consider the evidence tendered by Staff before determining whether they will undertake to testify at the merits hearing while also attempting to avoid any unfairness that could result from Staff splitting its case.

[132] In addition, we agree with the submissions of Gornitzki and Telfer that where a respondent chooses to give oral testimony, Staff may use the compelled testimony for the purpose of cross-examination of the Respondents in relation to statements made during their compelled examinations. However, we also acknowledge that the onus is on Staff to prove the allegations against the Respondents and that, out of necessity, there may be limited circumstances which require the panel to be seized of the contents of a compelled examination to have an opportunity to fully and fairly assess the allegations against the Respondents. In this case, by virtue of the allegations of misleading statements made by certain of the Respondents in the course of their compelled examinations, we find that the misleading statements are by necessity required to be put before the Panel. As with *Goldbridge*, in which the panel heard the compelled evidence of a respondent to prove that he misled the Commission, we shall also permit the use of the compelled testimony for that purpose (*Goldbridge*, *supra* at paras. 87 and 89).

[133] On the other hand, we do not agree with Staff that allegations of breaching confidentiality of the investigation brought pursuant to section 16 of the Act require, by necessity, that the compelled testimony be put before the Panel by way of read-in at the outset of Staff's presentation of its evidence. In this case, the Panel is of the view that Staff should bring, through

its investigator, relevant evidence gathered by the investigator of the breach of section 16 of the Act. In addition, at the conclusion of its case, Staff may seek to tender into evidence selected excerpts from transcripts of compelled examinations of those respondents who have not undertaken and do not undertake to testify, which will be subject to evidence law considerations relating to hearsay and the use of one respondent's statements against another.

C. Confidentiality Cross-Motion

[134] We recognize and agree with the well-established principle that hearings should be open to the public, pursuant to section 9 of the SPPA and rules 5.1 and 8.1 of the *Rules of Procedure*. In this case, we were persuaded that, for the Respondents to have a meaningful opportunity to respond to the Motion it should be heard *in camera*. We found that the matters to be disclosed at the hearing were of such a nature that the desirability of avoiding disclosure thereof, in the interests of the Respondents affected and in the public interest of fairness, outweighed the desirability of adhering to the principle that the hearing be open to the public.

[135] We note that Staff included substantial portions, if not all of the excerpts, of the compelled testimony at issue in its motion record. We were mindful that those excerpts may or may not be tendered at the public hearing on the merits. Further, we were persuaded that some of the materials contain personal information as contemplated in section 9 of the SPPA, for which avoiding disclosure outweighed the desirability of public access.

[136] Pursuant to subsection 9(1)(b) of the SPPA and rules 5.2 and 8.1 of the Commission's *Rules of Procedure,* we find that, in the public interest, an appropriate balance is to order that all materials and transcripts of the Motion and Cross-Motion remain confidential, but that the Panel's decision on the matter shall be public and except for such excerpts of compelled examinations as may be admitted into evidence by the Panel in the course of the hearing on the merits.

[137] In order to balance the interests of fairness to the Respondents and the public interest in having opening hearings, we have endeavored to provide a fulsome decision, which acknowledges and discloses the submissions of the parties and the reasoning of this Panel.

VI. CONCLUSION

[138] Upon considering the submissions of the parties, the Panel concludes that the excerpts from transcripts of compelled examinations of the Respondents are admissible into evidence in the context of regulatory proceedings before the Commission, and their admission is not precluded by the *Charter* or the *Evidence Act*. The Panel may admit relevant hearsay evidence, and the weight to be afforded to such evidence is to be determined by the Panel.

[139] However, the Panel is of the opinion that the oral evidence of the Respondents who testify would provide us with the best evidence. We agree with submissions of the Respondents that Staff should not propose to tender excerpts of the Respondents' compelled examinations into evidence until the conclusion of its case. At that time, Staff may seek to tender into evidence selected excerpts from transcripts of compelled examinations of those respondents who have not undertaken and do not undertake to testify. In addition, where a Respondent chooses to give oral

testimony, Staff may cross-examine the Respondent in relation to statements made during their compelled examination.

[140] The Panel also acknowledges that the onus is on Staff to prove the allegations against the Respondents. Therefore, the Panel is prepared to make an exception to allow Staff to put forward the excerpts from transcripts of compelled examination of Mr. Wing and Ms. Agueci for the limited purpose of making its case with respect to allegations of breaches of section 122 of the Act by them.

[141] With respect to the Cross-Motion for confidentiality, the Panel agrees that, in the public interest, an appropriate balance is to order that all materials and transcripts of the Motion and Cross-Motion remain confidential, but that the Panel's decision on the matter shall be public and except for such excerpts of compelled examinations as may be admitted into evidence by the Panel in the course of the hearing on the merits.

Dated at Toronto this 13th day of December, 2013.

"Edward P. Kerwin"

Edward P. Kerwin

"AnneMarie Ryan"

AnneMarie Ryan

"Deborah Leckman"

Deborah Leckman