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Commission des valeurs mobilières de l'Ontario
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IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c.S.5, AS AMENDED

- AND -

IN THE MATTER OF
SEXTANT CAPITAL MANAGEMENT INC.,
SEXTANT CAPITAL GP INC., OTTO SPORK, KONSTANTINOS EKONOMIDIS, ROBERT LEVACK AND NATALIE SPORK

MID-HEARING RULING
(ADMISSIBILITY OF COMPELLED TESTIMONY)

Decision:	October 18, 2010	
Panel:	James D. Carnwath	- Chair of the Panel
	Carol S. Perry	- Commissioner
Counsel:	Tamara Center Brendan Van Niejenhuis Ray Daubney Pavel Malysheuski	- for Staff of the Ontario Securities Commission
	Joseph Groia Kevin Richard	- Counsel for Otto Spork, Natalie Spork and Konstantinos Ekonomidis

[1] Staff seeks to file excerpts from the respective transcripts of compelled examinations of Natalie Spork and Konstantinos Ekonomidis, (the "Respondents"). The transcripts record the compelled testimony authorized by s. 13 of the *Securities Act* R.S.O. 1990, c.S.5, as amended (the "*Act*"), which allows persons appointed to investigate matters pursuant to an order under s. 11 of the *Act* to compel persons or companies to provide testimony, documents, and/or other things.

[2] The Respondents both took and rely upon the protections provided under s. 9 of the *Evidence Act (Ontario),* which provides that compelled testimony shall not be used or receivable in evidence against that person in any civil proceeding or any proceeding under any act of the legislature.

ISSUES TO BE DECIDED

[3] The Respondents make several submissions in opposing the use of the compelled testimony. The issues to be decided are as follows:

(A) Are the investigation stage and the adjudicative stage one proceeding, or two separate proceedings, in a regulatory context?

(B) Regardless of the answer to (A), does s. 9(2) of the *Evidence Act (Ontario)* prohibit the use of compelled testimony in the circumstances of this matter?

(C) Does the use of the compelled testimony contravene the Respondents' *Charter* rights?

(A) Are the investigation stage and the adjudicative stage one proceeding, or two separate proceedings, in a regulatory context?

[4] In support of their submission that the investigative stage and the adjudicative stage are two separate proceedings, the Respondents submit:

- Rule 2.5 of the OSC's *Rules of Procedure* states that "a proceeding commences upon the issuance of a Notice of Hearing by the Secretary".

- Section 3 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ("SPPA") applies "to a proceeding by a tribunal in the exercise of a statutory power of decision", while s. 3(2) of the SPPA provides that the SPPA does not apply to investigations. Therefore, say the Respondents, a proceeding cannot be both subject to and not subject to the SPPA.

- The decision in *Alberta (Securities Commission) v. Brost* [2008] A.W.L.D. 4625 cited by Staff is of no assistance to the Panel because of the different regimes in Ontario and Alberta.

[5] We take the view that r. 2.5 of the OSC's *Rules of Procedure* is not determinative of the issue. There can be stages in a regulatory proceeding, including an investigation stage and an adjudicative stage. Rule 2.5 simply identifies the commencement of the adjudicative stage.

[6] As regards the SPPA, the Respondents cite no authority for the proposition that a regulatory proceeding cannot be both subject to, and not subject to, the SPPA. We know of no impediment to one stage of a proceeding being subject to the SPPA and another not. The investigative stage, by definition, precedes the adjudicative stage which is subject to SPPA supervision.

[7] The Alberta Court of Appeal decision in *Brost*, above, is persuasive and worthy of respect. The issue before the court was a simple one – the use of compelled testimony. That issue transcends any differences in the regimes of Ontario and Alberta. At para. 37, the Court found 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 proceeding in which they were obtained.

We take the same view in this matter – the compelled testimony would be used in the same regulatory proceeding in which it was obtained.

[8] Section 16(2) of the *Act* provides that all testimony given under s. 13 is for the "exclusive use of the Commission and shall not be disclosed" except as permitted under s. 17. Section 17(6) specifically permits disclosure of that testimony in connection with "a proceeding commenced by the Commission under this Act." We agree with Staff's submission that the combination of these two sections contemplate that testimony given under s. 13 may be used in a s. 127 proceeding before the Commission.

[9] Section 18 of the *Act* sets out prohibited uses of compelled testimony pursuant to s. 13. Section 18 provides that compelled testimony is not to be used in s. 122 proceedings or any other proceedings under the *Provincial Offences Act*. Nowhere in s. 18 of the *Act* is there a prohibition against the use of compelled testimony in s. 127 proceedings brought before the Commission. Had the legislature intended to prohibit the use of compelled testimony in s. 127 proceedings, it would have been a simple matter for the inclusion of s. 127 proceedings as one of the prohibited uses of compelled testimony in s. 18. We conclude that the reverse is the case, that is, the legislative intention was that compelled testimony could be used in s. 127 proceedings.

[10] We conclude that the investigative stage and the adjudicative stage are not separate proceedings, but rather stages in one proceeding, in the circumstances of this matter.

(B) Regardless of the answer to (A), does s. 9(2) of the *Evidence Act (Ontario)* prohibit the use of compelled testimony in the circumstances of this matter?

[11] The Respondents submit that s. 9(2) of the *Evidence Act (Ontario)* prohibits the use of the compelled testimony because Staff proposes that it be used "in any proceeding under any Act of the Legislature" which includes the *Securities Act*.

[12] Section 9 of the *Evidence Act*, states:

> 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 persons or to a prosecution under any Act of the Legislature.
>
> (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.
>
> ***Evidence Act* (Ontario), s. 9**

[13] In support of their submission, the Respondents cite *Liberman v. College of Physicians & Surgeons (Ontario)* (2010) S.C.J. 337 in support of their submissions. Dr. Liberman testified in a hearing involving the conduct of one Dr. Yazdanfar. In a subsequent hearing involving his own conduct, the College proposed to confront Dr. Liberman with the compelled testimony he gave in Dr. Yazdanfar's hearing. Not surprisingly, Jennings J. found that the prohibition in s. 9(2) of the *Evidence Act* prohibited the introduction of compelled testimony given by Dr. Liberman in Dr. Yazdanfar's hearing. We find on the facts of *Liberman*, that the hearing involving Dr. Liberman's conduct was a subsequent proceeding to that in which he gave evidence involving the conduct of Dr. Yazdanfar. The case does not assist the Respondents as its facts fall squarely within the prohibition in s. 9(2) of the *Evidence Act (Ontario)*.

[14] To accept the Respondent's submission that compelled evidence cannot be used "in any proceeding under any Act of the Legislature" would hamper effective enforcement for many boards and commissions throughout Ontario that have the power to compel testimony.

[15] We agree with Staff's submission that for s. 9(2) of the *Evidence Act (Ontario)* to make sense in a tribunal setting, the words "subsequent" must be read in to s. 9(2) 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.

[16] We conclude that s. 9(2) of the *Evidence Act (Ontario)* does not prohibit the use of the compelled testimony in this matter.

> (C) Does the use of the compelled testimony contravene the Respondents' Charter rights?

[17] Section 11(c) of the *Charter* gives any person charged with an offence the right "not to be compelled to be a witness in proceedings against that person in respect of the offence".

[18] As long ago as 1987, the Supreme Court of Canada held that the *Charter* applies only in circumstances where the proceedings are criminal or penal in nature and does not apply in proceedings that are regulatory in nature:

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and profession standards or to regulate conduct within a limited private sphere of activity…
>
> ***R. v. Wigglesworth,* [1987] 2 S.C.R. 541 at para. 32**

[19] We must conclude that s. 11(c) of the *Charter* does not apply to the Respondents in the circumstances of this matter.

[20] Section 13 of the *Charter* provides that a witness who testifies in any proceeding has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceeding, except in a prosecution for perjury or for the giving of contradictory evidence.

[21] We have determined previously in these reasons that the investigative stage and the adjudicative stage are one proceeding, in a regulatory context.

[22] In *British Columbia (Securities Commission) v. Branch*, [1995] 2 S.C.R. 3, the Supreme Court of Canada found that compelled evidence is admissible in the context of proceedings before provincial securities commissions. The court went on to say that it must be established that the predominant purpose of an investigation was to obtain relevant evidence to be led in an administrative proceeding, rather than to incriminate those persons from whom the evidence was obtained. If the intention was to incriminate, derivative use of that compelled evidence in other proceedings would be prohibited.

[23] There is no evidence to suggest that Staff intended to incriminate the Respondents. Everything we have heard and read in these proceedings confirms that Staff is carrying out the regulatory mandate of the *Act*.

[24] We must conclude that s. 13 of the *Charter* does not apply to the Respondents in the circumstances of this case.

[25] Staff may file excerpts from the respective transcripts of compelled examinations of the Respondents, Natalie Spork and Konstantinos Ekonomidis.

DATED at Toronto this 18th day of October, 2010.

"James D. Carnwath"
James D. Carnwath

"Carol S. Perry"
Carol S. Perry