Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e 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
URANIUM308 RESOURCES INC., MICHAEL FRIEDMAN, GEORGE SCHWARTZ, PETER ROBINSON, and SHAFI KHAN

- AND -

IN THE MATTER OF
YORK RIO RESOURCES INC., BRILLIANTE BRASILCAN RESOURCES CORP., VICTOR YORK, ROBERT RUNIC, GEORGE SCHWARTZ, PETER ROBINSON, ADAM SHERMAN, RYAN DEMCHUK, MATTHEW OLIVER, GORDON VALDE AND SCOTT BASSINGDALE

ENDORSEMENT
(Section 127 of the *Act*)

Hearing:	December 13, 2010	
Decision:	December 15, 2010	
Panel:	James D. Carnwath	- Commissioner
Appearances:	Matthew Boswell Carlo Rossi	- for Staff of the Ontario Securities Commission
	George Schwartz	- Self-represented
	Victor York	- Self-represented

ENDORSEMENT

[1] Mr. Schwartz and Mr. York (the "Applicants") make a motion for dismissal or adjournment of the proceedings against them on the following grounds:

1. they claim that there is a reasonable apprehension of bias due to (a) the Commission's multifunctional structure and (b) a separate panel of the Commission's approval of settlement agreements with other respondents in these matters, which contain agreed facts; and

2. they claim that the Commission does not have jurisdiction to make an order against the respondents pursuant to s. 127 of the *Securities Act*, R.S.O. 1990 c. S.5 (the "*Act*") against the respondents because they are not participants in Ontario's capital markets.

[2] The Applicants request an order:

(a) staying these proceedings; or, in the alternative,

(b) adjourning these matters to be heard before the Canadian Securities Tribunal, once it is in a position to adjudicate these proceedings; or, in the further alternative,

(c) appointing interim non-members to adjudicate these proceedings.

[3] With respect to the first ground, Mr. Schwartz submits that by its very nature, the tripartite structure of the Commission gives rise to a reasonable apprehension of bias. In support of this allegation, Mr. Schwartz refers to statements made by representatives of the Commission and the federal and provincial Ministers of Finance. He submits that their statements in support of a national securities regulatory structure which would include an independent tribunal provide evidence of institutional bias. Mr. Schwartz also submits that a reasonable apprehension of bias arises in these proceedings because a separate panel of the Commission approved settlement agreements with other respondents in these matters, which contained "agreed facts". The Applicants submit that the panel hearing the merits will be highly unlikely to make findings that are inconsistent with these "agreed facts".

[4] In *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301 ("*Brosseau")* the Supreme Court of Canada found that the integrated agency model of the Alberta Securities Commission did not give rise to a reasonable apprehension of bias. The Commission applied the Court's finding in *Brosseau* in its decision in *Re Norshield Asset Management (Canada) Ltd.* (2009), 32 O.S.C.B. 1249, in which it stated at paragraph 104:

> In light of [*Brosseau*] the combination of the enforcement and adjudicative functions, to the extent that it is authorized by the Act, cannot form the grounds of a challenge of a reasonable apprehension of bias or a lack of independence.

[5] In response to the Applicants' allegation of institutional bias, Staff provides authority for the principle that statements by employees and officials without decision-making responsibility will not generally rebut the presumption that a decision-maker is impartial. This principle has been upheld by the courts, including in decisions cited by Staff in their Written Submissions (See

E.A. Manning Ltd. v. Ontario Securities Commission 23 O.R. (3d) 257 at paras. 47 and 49; *Zündel v. Citron*, [2000] F.C.J. No. 679 at paras. 49-50; *Telus Communications Inc. v. Telecommunications Workers Union*, [2005] F.C.J. No. 1253; and *Hamilton Street Railway Co. v. (Ontario) Human Rights Commission*, [2006] O.J. No. 4662).

[6] Notwithstanding the support individuals or the Commission may give to the proposition of a national securities regulator, Parliament has not yet enacted any statute giving jurisdiction over securities regulation to a national body. Presently, the powers to regulate the Ontario capital markets and adjudicate enforcement actions brought pursuant to the *Act* lie with this Commission, and not with a federal authority.

[7] In their Written Submissions, Staff responds to the Applicants' allegation that approving a settlement agreement that contains "agreed facts" with respect to one respondent leads to a reasonable apprehension of bias in the context of a merits hearing with respect to the remaining respondents. In particular, Staff refers to *Re Osler Inc.* (1991), 14 O.S.C.B. 1980 in which the Commission stated that they "do not consider settlements, on an uncontested statement of facts made by a respondent, as suggesting a determination of factual issues by the Commission in any way whatsoever". In a merits hearing, the panel is to objectively asses the merits of the allegations against respondents based on the evidence, as stated in *Gaudet v. Ontario (Securities Commission)* (1990), 13 O.S.C.B. 1405 at 1410-1411, appeal dismissed, [1990] O.J. No. 3652 (Ont. Div. Ct.):

> … commissioners of the Ontario Securities Commission who through reading the financial press and in other ways will often be aware of allegations and of other proceedings but, like judges, should be able to approach a hearing in an objective manner. Moreover, commissioners should be fully aware that they are to hear an determine a matter based on the evidence placed before them.

[8] The Applicants failed to provide sufficient evidence of institutional bias. The case law has established that the Commission's multifunctional structure does not give rise to a reasonable apprehension of bias.

[9] With respect to the second ground for the Applicants' motion, I agree with Staff's submission that it is premature. The nature of the respondents' involvement in the capital markets and the Commission's public interest jurisdiction to make orders against them pursuant to s. 127 are issues to be addressed by the panel conducting the hearing on the merits.

[10] Accordingly, the Applicants' motion for dismissal or adjournment of these proceedings is denied.

Dated at Toronto this 15th day of December, 2010.

"James D. Carnwath"

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James D. Carnwath