IN THE MATTER OF

THE SECURITIES ACT
S.N.B. 2004, c. S-5.5

- and -

IN THE MATTER OF

GEORGE WAYNE MALLETT (a.k.a.: "Wayne Mallett"), VILLABAR REAL ESTATE INC., ST. CLAIR RESEARCH ASSOCIATES INC., RONALD A. MEDOFF and MAYER HOFFER

with respect to GEORGE WAYNE MALLETT
(a.k.a.: "Wayne Mallett")
(Respondent)

REASONS FOR DECISION ON MOTION

Date of Hearing: 9 February 2012

Date of Reasons for Decision: 12 April 2012

Panel:

Denise A. LeBlanc, Q.C., Panel Chair

Tracey DeWare, Panel Member

Ken Savage, Panel Member

Appearances:

Mark McElman	For Staff of the New Brunswick Securities Commission
Jack Blackier & Michel Arseneault Barry Spalding	For Respondent

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GEORGE WAYNE MALLETT (a.k.a.: "Wayne Mallett"), VILLABAR REAL ESTATE INC., ST. CLAIR RESEARCH ASSOCIATES INC., RONALD A. MEDOFF and MAYER HOFFER

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(a.k.a.: "Wayne Mallett")
(Respondent)

REASONS FOR DECISION ON MOTION

1. BACKGROUND

[1] On 16 November 2010, Staff ("Staff") of the New Brunswick Securities Commission ("Commission") filed an Amended Statement of Allegations against the Respondent. Staff allege that the Respondent misled a Commission investigator during a compelled interview on 5 September 2008 (the "Compelled Interview"). The allegedly misleading statements concerned payments made to Mallett under an engagement with St. Clair Research Associates and Villabar Real Estate Inc; Staff claim that these payments constituted illegal commissions pursuant to National Instrument 45-106 *Prospectus Exempt Distributions* ("NI 45-106").

[2] Staff are seeking orders under paragraphs 184(1)(c) and (d) of the *Securities Act* ("*Act*"), permanently cease trading the Respondent and denying him exemptions available under New Brunswick securities law. Staff are also seeking an administrative penalty pursuant to section 186(1) of the *Act*.

[3] The Respondent filed an Amended Response on 1 February 2012 wherein he has denied breaching provisions of the *Act* and of NI 45-106.

[4] The other named respondents in this matter, Villabar Real Estate Inc., St. Clair Research Associates Inc., Ronald A. Medoff and Mayer Hoffer, entered into a Settlement Agreement with the Commission dated 4 July 2011 and approved by the

Commission on 18 August 2011. The Respondent is the subject of a Consent Order issued by the Commission on 19 January 2009, which temporarily denies him exemptions under New Brunswick Securities Law pending final disposition of this matter.

[5] After several adjournments, an Amended and Consolidated Notice of Hearing was issued on 24 November 2011, scheduling a hearing in this matter for the 16 and 17 February 2012.

[6] On 20 January 2012, Staff and counsel for the Respondent requested a pre-hearing conference be held to answer the following two questions:

(a) Is the Respondent a compellable witness by Staff at the hearing?; *and*
(b) Is a copy of the transcript or a CD Audio recording of the Compelled Interview admissible as evidence at the hearing?

[7] The Panel agreed to Staff and the Respondents' request to deal with the above two questions prior to the hearing in this matter. On 30 January 2012 a Notice of Pre-Hearing Conference was issued scheduling the conference for 9 February 2012; on 9 February 2012, with Staff and counsel for the Respondent in attendance and with their consent, the Panel advised that due to the nature of the questions, the matter would proceed as a motion.

[8] Therefore on 9 February 2012, Staff and counsel for the Respondent attended before the Panel and made submissions regarding the above two questions.

2. FACTS

[9] The Panel was not presented with any evidence nor asked to make any determination as to the facts in this matter. The Panel has limited their consideration of the facts at this preliminary stage to those regarding the timeline of the filings to date in this matter and the timing and situation surrounding the Compelled Interview. These facts are not in dispute.

[10] The Respondent is the subject of enforcement proceedings initiated by Staff through the filing of a Statement of Allegations in October of 2010 (as amended in November 2010). Prior to the commencement of the enforcement proceedings, the Commission issued an investigation order in August of 2008 pursuant to section 171(1) of the *Act*, naming the Respondent as one of the subjects of the investigation.

[11] Pursuant to the investigation order, the Respondent was summonsed to attend a compelled interview with Commission Investigator Ed LeBlanc (the "Investigator") on 5 September 2008. The summons, dated 28 August 2008, was issued by the Investigator pursuant to section 173 of the *Act*. The Respondent attended the Compelled Interview on 5 September 2008 accompanied by legal counsel, and was examined under oath by the Investigator.

[12] In pre-hearing discussions between Staff and counsel for the Respondent, Staff advised that they wished to call the Respondent as an adverse witness at the hearing for the purpose of cross-examination. Staff also advised that they will seek to have admitted into evidence at the hearing a transcript of the Compelled Interview or, in the alternative, an audio recording of the Compelled Interview. Counsel for the Respondent advised Staff that they would object to both the Respondent being called as a witness by the Commission and the introduction of the transcript or audio of the Compelled Interview.

[13] So as not to delay the hearing, Staff and counsel for the Respondent requested that the Panel issue a decision on the compellability of the Respondent and the admissibility of the transcript and/or recording of the Compelled Interview.

3. ANALYSIS

(a) Compellability of Respondent

[14] The Respondent relies on the provisions of section 5 of the *Evidence Act*, R.S.N.B. 1973, c. E-11 (the "*Evidence Act*") in his contention that he cannot be compelled to testify at the hearing. Section 5 of the *Evidence Act* reads as follows:

"On the trial of a person in any court for a violation of a statute of this Province, or upon the prosecution of a person for any penalty under a law of this Province, the person charged and his or her spouse are competent witnesses, whether the person so charged is charged solely or jointly with another person; but neither such person nor his or her spouse is compellable to testify."

[15] While Staff originally contested the Respondent's position, in their written submission regarding the pre-hearing conference Staff agreed that the provisions of section 5 of the *Evidence Act* are determinative on this issue. Staff's endorsement of the Respondent's position on this issue was confirmed at the pre-hearing conference before this panel on 9 February 2012.

[16] While Staff and counsel for the Respondent are in agreement that the Respondent is not a compellable witness before a panel of this commission by operation of the provisions of section 5 of the *Evidence Act*, it is important for the Commission to issue a formal ruling on this issue and to set out the basis therefore.

[17] In his pre-hearing conference brief, the Respondent submits that a panel of the Commission is a "court", as defined in the *Evidence Act*. The *Evidence Act* defines a "court" in the following terms:

"court" includes a judge, arbitrator, umpire, commission, tribunal and any other body or person having by law or consent of parties authority to receive evidence;

[18] Section 23 of the *Act* sets out the Commission's powers regarding hearings before the Commission. The provisions of section 23 (6) and 23.1(4) read as follows:

23(6) The Commission may receive in evidence any statement, document, record, information or thing that, in the opinion of the Commission, is relevant to the matter before it, whether or not the statement, document, record, information or thing is given or produced under oath or would be admissible as evidence in a court of law.

.....

23.1(4)A hearing panel of the Commission has, with respect to its duties, the same jurisdiction as that of the Commission and may exercise all the powers of the Commission under this Act or the regulations with respect to a hearing or review that the hearing panel is directed to conduct, and, for that purpose, any

reference in this Act or the regulations to the Commission is deemed to be a reference to a hearing panel of the Commission.

[19] The Respondent argues that as panels of the Commission are authorized, pursuant to section 23(6) and 23.1(4) of the *Act*, to receive evidence, a hearing panel of the Commission meets the definition of a "court" under the *Evidence Act*.

[20] We are of the view that a hearing panel of the Commission, with the power to receive evidence in accordance with the powers set out in section 23 of the *Act*, is a "court" within the definition in the *Evidence Act*. In this particular matter, an administrative penalty against the Respondent is being sought on the basis that the Respondent has contravened New Brunswick securities law. The Respondent would therefore be appearing before a "court" for a violation of a "statute of this Province".

[21] In his brief, the Respondent has submitted that while the provisions of section 23(6) afford the Commission a discretion in receiving in evidence, the Commission should exercise its discretion and refuse to compel the Respondent to testify against his own interest on the ground that compelling the Respondent to testify constitutes a serious erosion of the rule of law and would bring the administration of justice and the legitimacy of this Commission into disrepute.

[22] The power and discretion afforded to the Commission pursuant to section 23(6) relate to receiving "... *in evidence any statement, document, record, information or thing...".* The power and discretion of the Commission found in section 23(6) therefore relate to the admissibility of evidence and not the compellability of individuals to testify.

[23] We find that the Respondent cannot be compelled by Staff to give evidence at the hearing before the Commission.

(b) Admissibility of Compelled Interview

[24] While there is agreement amongst Staff and the Respondent that the Respondent is not a compellable witness, there is no agreement on the issue of the admissibility of the transcript of the Compelled Interview at the hearing.

[25] The Respondent's interview with the Investigator was compelled pursuant to the provisions of Part 13 of the *Act* which deals with investigations, and more particularly the provisions section 173 of the *Act*, which at the time of the Compelled Interview read as follows:

> ***Power to compel evidence***
>
> *173(1) An investigator making an investigation under this Part has the same power to summon and enforce the attendance of witnesses, to compel witnesses to give evidence under oath or in any other manner and to compel witnesses to produce books, records, documents and things or classes of books, records, documents and things as the Court of Queen's Bench has for the trial of civil actions.*
>
> *173(2) On the application of an investigator to the Court of Queen's Bench, the failure or refusal of a person to attend, to take an oath, to answer questions or to produce books, records, documents and things of classes of books, records, documents and things in the custody, possession or control of the person makes the person liable to be committed for contempt as if in breach of an order or judgment of the Court of Queen's Bench.*
>
> *173(3) A person giving evidence at an investigation conducted under this section may be represented by legal counsel.*
>
> *173(4) Testimony given under this section shall not be admitted in evidence against the person from whom the testimony was obtained in any prosecution.*

[26] Section 173(4) of the *Act* was recently amended and now provides as follows:

> *"Testimony given under this section shall not be admitted in evidence against the person from whom the testimony was <u>obtained in any prosecution</u> other than for perjury in the giving of that testimony or the <u>giving of evidence contradictory to that testimony</u>"* [emphasis added]

[27] The Respondent's main submission is that that the term "prosecution" contained in section 173(4) is not limited to a criminal prosecution and that enforcement proceedings before the Commission, and in particular the hearing, constitutes a "prosecution" as contemplated in section 173(4) of the *Act*. The Respondent argues that had the legislature intended to limit the scope of the provisions of section 173(4) of the *Act* to criminal prosecution, it would have done so by using the words: "*.... in any <u>criminal</u> prosecution*".

[28] It warrants noting that the Respondent's position is not that proceedings before the Commission are criminal or penal in nature. The Respondent's argument is that the use of the word "prosecution" in section 173(4), without the qualifier of the word "criminal" renders the Respondent's testimony during the Compelled Interview inadmissible in any proceeding, be it civil, regulatory or criminal, other than for perjury in the giving of that testimony or the giving of evidence contradictory to that testimony.

[29] The Respondent has used as a starting point, the definition of "prosecution" found in Black's Law Dictionary:

> *1. The commencement and carrying out of any action or scheme [...]. 2. A criminal proceeding in which an accused person is tried.*

The Respondent has also submitted definitions of the term "prosecution" in support of his contention that "prosecution" has a broader meaning than and is not limited to a criminal proceeding.

[30] In our interpretation of the provision at issue, we must be guided by the principles set out by the Supreme Court of Canada in ***Sarvanis v. Canada*** [2002] 1 S.C.R. 921, and ***Rizzo & Rizzo Shoes Ltd. (Re)*** [1998] 1 S.C.R. 27, :

> "....*we must not interpret words that are of a broad import taken by themselves without looking to the context in which the words are found.... Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament*."

[31] A detailed discussion on the judicial consideration of the term "prosecution" can be found in a 2007 decision of the Newfoundland and Labrador Office of the Information and Privacy Commissioner, 2007 CanLII 28205 (NL IPC) . Although the context of the situation which the Information and Privacy Commissioner (the "Commissioner") dealt with in that particular matter is different from the current matter before this panel, the Commissioner's thorough review of case law in which the term "prosecution" has been considered, found in paragraphs 61 through 67 of the decision, is most relevant to this matter:

> *[61] Notwithstanding the overall intent of the legislation, I believe it is important to more thoroughly explore the definition of "*prosecution*." As such, I have analyzed a number of dictionary definitions. Since both the*

Applicant and Memorial have referred to Black's Law Dictionary I will begin there.

[62] Black's Law Dictionary*, Eighth Edition, defines prosecution as:*

> 1. The commencement and carrying out of any action or scheme <the prosecution of a long, bloody war>. 2. A criminal proceeding in which an accused person is tried <the conspiracy trial involved the prosecution of seven defendants>. – Also termed criminal prosecution…3. The government attorneys who initiate and maintain a criminal action against an accused defendant <the prosecution rests>…

I note that Memorial has referred to the Seventh Edition. However, both editions include the definition as quoted above. Specifically, Memorial is relying on the first part of the definition, which is quite general in nature; "the commencement or carrying out of any action or scheme." The Applicant, on the other hand, has placed emphasis on the express reference to "a criminal proceeding in which an accused person is tried."

[63] In its submission, Memorial refers to the Ontario Court of Appeal and its reference to the definition of prosecution in Black's Law Dictionary. In S. (M.A.) (Litigation Guardian of) v. Ludwig (2004), 2004 CarswellOnt 3853 (Ont. C.A.), Armstrong J.A. noted that the definition includes civil litigation. I note, however, that the Court in S. (M.A.) (Litigation Guardian of) was relying on the Sixth Edition of Black's Law Dictionary, which includes the following:

> A criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime…The term is also used respecting civil litigation, and includes every step in action, from its commencement to its final determination…

The express reference to "civil litigation" in this earlier definition clearly establishes that the editors at the time intended civil matters to be included in the term "prosecution." Notwithstanding this reference to civil action, however, Armstrong J.A. stated that "[i]t appears clear to me that the editors of Black's [Law Dictionary, Sixth Edition] regard the primary meaning of 'prosecution' as referring to a criminal proceeding."

[64] It is also important to note that the express reference to civil litigation in the Sixth Edition of Black's Law Dictionary was removed from the Seventh Edition and the current Eighth Edition, upon which I am relying. I believe this to be significant. If the editors made a conscious decision to remove any reference to civil matters from the definition of

prosecution, I suggest they intended the term to be used in the context of criminal matters.

[65] For these reasons I do not find Memorial's reliance on the Black's Law Dictionary *definition to be convincing. In further support of this, however, I will look to some other definitions.*

[66] The Canadian Law Dictionary, *Third Edition, compiled by John A. Yogis, Q.C., defines prosecution as:*

> *The act of pursuing a criminal trial by the Crown. Where the Crown fails to move the case towards final resolution or trial as required by the court schedule, the matter may be dismissed for "want of prosecution".*

The Merriam-Webster Online Dictionary (available at http://www.m-w.com/) defines the term as:

> Function: noun
> 1: the act or process of prosecuting; specifically: the institution and continuance of a criminal suit involving the process of pursuing formal charges against an offender to final judgment 2: the party by whom criminal proceedings are instituted or conducted 3: obsolete: Pursuit

[67] I note that the Alberta Trial Division has used the Oxford English Dictionary *to interpret the word prosecution. In* U.A., Local 488 v. Alberta (Industrial Relations Board) *(1975), 75 C.L.L.C. 14, 60 D.L.R. (3d) 690 (Alta. T.D.), Miller D.C.J. stated as follows:0*

> ...While it might therefore follow that all "prosecutions" could be called "actions" it does not follow that all "actions" can be called "prosecutions"....
>
> The Oxford English Dictionary, 1961 reprint, vol. 8, at p. 1490, gives several different meanings for the word "prosecution" but specifically refers to one meaning under the sub-heading "law" and goes on to define the word as follows:
>
> (a) In strict technical language: a proceeding either by way of indictment or information in the criminal courts, in order to put an offender upon his trial; the exhibition of a criminal charge against a person before a court of justice.
>
> (b) In general language; the institution and carrying on of legal proceedings against a person.

(c) Loosely; the party by whom criminal proceedings are instituted and carried on.

...When the word "*prosecution*" is used in a statute and particularly one such as the Alberta Evidence Act, which attempts to delineate certain rights and obligations with precision, it is my view that the term was intended to be used in its strict legal or technical content rather than in general language usage or broad dictionary references.

I note as well that this quotation from the Alberta Trial Division is cited, in part, in Carswell Words and Phrases Judicially Defined in Canadian Courts and Tribunals *as its definition of* "prosecution."

[32] The Respondent argues that as i) section 173(1) of the *Act* confers upon an investigator the authority akin to that of a Court of Queen's Bench Justice relative to the power to compel evidence; ii) pursuant to section 174, an investigator is deemed to be "*employed for the preservation and maintenance of the public peace*..." and is a peace officer as defined in the Criminal Code (Canada); and iii) pursuant to section 189(1), the decision of the Commission has "*the same force and effect as if it were a judgment of the Court of Queen's Bench*" , the effect of these statutory provisions cloak the hearing with a flavour akin to that of a judicial proceeding, that the "hearing" before the Commission is a "legal proceeding" and on the basis of section 173(4) of the *Act*, the transcript is not admissible into evidence.

[33] There can be no doubt that a hearing before a panel of the Commission has a flavour akin to a judicial proceeding as do hearings before other regulatory bodies but it does not follow that such hearings are "prosecutions" or prosecutorial in nature. We agree with the assertion of Miller, D.C.J. in the case of **U.A. Local 488 v. Alberta (Industrial Relations Board)** (1975), 60 D.L.R. (3d) 690, to the effect that

"*while it might therefore follow that all "prosecutions" could be called "actions" it does not follow that all "actions" can be called "prosecutions"*...".

[34] It warrants noting as well that other provisions in the *Act* use terms such as "action, proceeding or prosecution" (see section 164) , and "the prosecution of an action" (see section 158). Clearly, the legislators must have meant something different by a "proceeding" and an "action" as opposed to a "prosecution".

[35] Section 17 of the *Interpretation Act,* R.S.N.B. 1973, Chap I-13, sets out how legislation is to be interpreted. Section 17 states as follows:

> *"Every Act and regulation and every provision thereof shall be deemed remedial, and shall receive such fair, large and liberal construction and interpretation as best ensures the attainment of the object of the Act, regulation or provision."*

[36] The provisions of section 173(4) must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of the legislator. Accordingly, we find that the word "prosecution", in the context of section 173(4) of the *Act*, is limited to the criminal or quasi-criminal context.

[37] In this matter, although Staff have alleged violations of section s 179, the Respondent is not being prosecuted under section 179 nor are Staff seeking a remedy under this section.

[38] The provisions of section 179(2) read, in part, as follows:

> "*179(2) A person who does any of the following commits an offence and is liable on conviction to a fine of not more than $1,000,000 or to imprisonment for a term of not more than 5 years less a day, or to both:*
>
> *(a) Makes a statement in any information or material submitted, provided, produced, delivered or given to or filed with the Commission, the Executive Director, a compliance officer, an investigator or any person acting under the authority of the Commission or the Executive Director that is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading.*
> *.....*"

[39] Offences under 179 and 180 of the *Act* which would be punishable by a fine or term of imprisonment subsequent to a conviction would be prosecuted by a Crown Prosecutor in Provincial Court and not by Staff.

[40] in this matter, Staff are seeking public interest remedies under sections 184 and 186 of the *Act*. The remedies being sought are administrative remedies.

[41] The Respondent has argued that admission of the Compelled Interview evidence at the hearing will result in a direct affront to the Respondent's statutory right against self-incrimination afforded by the *Evidence Act*.

[42] In **Re York Rio Resources Inc**., 2011 CarswellOnt 14396, the Ontario Securities Commission (the "OSC") wrote at paragraph 67 of the decision:

> "*It is now well established that a respondent's compelled evidence is admissible against him in an administrative proceeding before the Commission*."

[43] The OSC, in its decision, refers to the Supreme Court of Canada decision in **Pezim v. British Columbia (Superintendent of Brokers),** [1994] 2.S.C.R. 557, in which the Supreme Court of Canada discussed the regulatory and protective role of the securities commissions, in the following terms:

> "*This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized in the way in which their functions are carried out under their Acts*." (page 593 of the decision)

[44] The OSC, in the York Rio matter, supra, also refers to the Supreme Court of Canada decision in **British Columbia Securities Commission v. Branch** [1995], 2 S.C.R. 3 wherein the Supreme Court of Canada opined as follows at paragraph 35 of the decision:

> "*Clearly, this purpose of the Act justifies inquiries of limited scope. The Act aims to protect the public from unscrupulous trading practices which may result in investors being defrauded. It is designed to ensure that the public may rely on honest traders of good repute able to carry out their business in a manner that does not harm the market or society generally. An inquiry of this kind legitimately compels testimony as the Act is concerned with the furtherance of a goal which is of substantial public importance, namely, obtaining evidence to regulate the securities industry. Often such inquiries result in proceedings which are essentially of a civil nature. The inquiry is of the type permitted by our law as it serves an obvious social utility*. ..."

[45] In **Re Boock** (2010), 33 O.S.C.B 1589, an OSC decision which is referred to in the York Rio matter, supra, Boock argued that disclosing and permitting co-respondents to use his compelled evidence against him in the Commission proceeding would be unfair and contrary to the protection against self-incrimination provided by sections 7, 11, and 13 of the Charter. The Commission rejected these submissions on the principles set out

by the Supreme Court of Canada in Branch, supra, and the cases that followed it. At paragraphs 94 to 99 of the decision, the OSC writes:

> *"In determining whether the testimony and evidence can be compelled from a person "the crucial question is whether the predominant purpose for seeking the evidence is to obtain incriminating evidence against the person compelled to testify or rather some legitimate public purpose" (Branch, supra, at para 7.) In Branch, the Court concluded that the BCSC compelled the relevant testimony for a legitimate public purpose in regulating capital markets. Similarly in Brost (C.A.) and Johnson v. British Columbia (Securities Commission), [1999] B.C.J. No. 1885 ("Johnson (C.A.)", the Alberta and British Columbia Courts of Appeal affirmed, respectively, the admissibility of compelled evidence in administrative hearings. The Commission has the same public purpose to protect investors and regulate capital markets in this Province. Staff is bringing this Proceeding in furtherance of those objectives.*
>
> *The onus is on Boock to show that the purpose of the Compelled evidence was to "incrimate" him. The British Columbia Court of Appeal addressed this issue in Johnson (C.A.):*
>
> > *Merely because a person is compelled to give information that may be used against him at an administrative hearing does not mean that he is "incriminating" himself, as Branch makes clear... The onus is on the applicant to show that the purpose of the hearing is to incriminate him or gather evidence that will be used to incriminate him, in a criminal or quasi-criminal proceeding.*
> > *(Johnson (C.A.), supra at para. 9)*
> > .....
>
> *While we recognise that the sanctions that may be imposed by the Commission in an administrative proceeding can have significant regulatory and economic consequences to a respondent, those sanctions are not penal in nature and no respondent can be incarcerated by the Commission in the exercise of its jurisdiction under section 127 of the Act. The Commission has concluded that a "hearing under section 127 of the Act, including a hearing in which an administrative penalty is sought, is fundamentally regulatory. It does not meet the "criminal by nature" characterization of the offence" (Rowan, supra, at para. 40; see also R. v. White, [1999] 2 S.C.R. 417.*
>
> *In our view, the fact that a financial penalty may be imposed on a respondent does not make a Commission administrative proceeding under section 127 of the Act criminal or penal in nature.*
>
> *Accordingly, in our view, sections 7 and 11 of the Charter do not apply to restrict the testimony and evidence that may be compelled in connection with this Proceeding.*"

[46] The Respondent has argued in his brief that the OSC, in the York Rio matter, supra, in allowing the admission of the compelled testimony did so on the basis of wording in the Ontario statute which is much narrower than the provision of section 173(4) of the New Brunswick legislation.

[47] The relevant provision of the Ontario *Securities Act* prohibited:

> "*..the use of compelled testimony obtained under section 13....in a prosecution for an offence under section 122 or in any other prosecution governed by the Provincial Offences Act*."

While the Respondent is correct in stating that the wording in the Ontario and New Brunswick statutes are different, once we've determined that the term "prosecution" is limited to the criminal or quasi-criminal context, all principles set out in the York Rio matter, supra, are applicable herein. While the statutory provisions may be worded differently, in the end, we are dealing with the admissibility of compelled evidence in administrative proceedings.

[48] The Respondent's argument that admission of the Compelled Interview evidence at the hearing will result in a direct affront to the Respondent's statutory right against self-incrimination afforded by the *Evidence Act* fails on two fronts: i) the mere fact that a person is compelled to give information which may be used against that individual at an administrative hearing does not equate to that individual "incriminating" himself or herself and ii) having determined that in section 173(4) of the *Act*, the term "prosecution" is limited to the criminal or quasi-criminal context, any testimony compelled from an individual pursuant to the powers set out in section 173 of the *Act* would not be admissible against that individual in a criminal or quasi-criminal context other than for the purposes set out in section 173(4).

[49] Accordingly, we find that Respondent's compelled evidence is admissible against him in this proceeding, which is administrative and not criminal or penal in nature.

4. DECISION

[50] We find that the Respondent cannot be compelled by Staff to give evidence at the hearing before the Commission.

[51] We find that the Respondent's compelled evidence is admissible against him in this proceeding, which is administrative and not criminal or penal in nature.

[52] The above constitute the Commission's Reasons for Decision on the Motion heard on 9 February 2012.

Dated this 12th day of April 2012.

"original signed by"
Denise A. LeBlanc, Q.C., Panel Chair

"original signed by"
Tracey DeWare, Panel Member

"original signed by"
Ken Savage, Panel Member

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