

ALBERTA SECURITIES COMMISSION

REASONS FOR RULING

Citation: Arbour Energy Inc., Re, 2010 ABASC 11

Date: 20100108

**Arbour Energy Inc., Dennis Morice, Milowe Brost,
The Institute For Financial Learning, Group of Companies Inc.,
Merendon Mining Corporation Ltd. and Gary Sorenson**

Panel: Glenda A. Campbell, QC
Neil W. Murphy
Karen A. Prentice, QC

Appearing: Deanna Steblyk
for Commission Staff

E. Christopher Archer
for Arbour Energy Inc. and Dennis Morice

Darren J. Reed
for Merendon Mining Corporation Ltd.
and Gary Sorenson

Peter Barber
for the Attorney General of Canada

Date of Hearing: 5 January 2010

Date of Ruling: 5 January 2010

Date of Reasons: 8 January 2010

I. OVERVIEW

[1] These are our reasons for dismissing an application (the "Application") by Arbour Energy Inc. ("Arbour") and Dennis Morice ("Morice") for an order compelling staff ("Staff") of the Alberta Securities Commission (the "Commission") "to obtain and provide all disclosure materials presently in the possession of the Royal Canadian Mounted Police ("RCMP") pertaining to on [sic] Information [(the "Information")] sworn against Milo[we] Brost [("Brost")] and Gary Sorenson [("Sorenson")] on October 16, 2009" relating to allegations of fraud and theft over \$5000.

[2] The Application came before us on 5 January 2010, at which time we heard oral submissions from counsel for Arbour and Morice, for Staff, for Merendon Mining Corporation Ltd. ("Merendon") and Sorenson, and for the Attorney General of Canada (the "AG Canada"). We earlier received written submissions from the same parties. The other respondents neither made any submissions nor appeared on the Application. Although the Application sought a very narrow (and perhaps impossible) relief – to order Staff to *obtain and provide* material – the parties clearly considered and argued a broader sense of it in the positions they took before us. Accordingly, we conducted our analysis and reached our conclusions in that broader context.

[3] After considering all the submissions, we dismissed the Application with reasons to follow in due course. These are those reasons.

II. BACKGROUND

[4] Staff issued a notice of hearing (the "Notice of Hearing"), most recently amended on 27 May 2009. In the Notice of Hearing, Staff make allegations and seek various sanctions, including capital market access bans and administrative penalties under the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act") against Arbour, Morice, Heinz Weis ("Weis"), Arthur Wigmore ("Wigmore"), Brost, The Institute For Financial Learning, Group of Companies Inc., Merendon and Sorenson. Among the allegations in the Notice of Hearing is that these respondents engaged in fraudulent conduct when Arbour securities were sold to investors. Staff recently discontinued their action against Weis, and Wigmore settled with Staff relating to the allegations against him (see *Re Wigmore*, 2009 ABASC 642). Accordingly, we removed the names of Weis and Wigmore from the style of cause for these reasons, and we refer to the remaining respondents as the "Respondents".

[5] In 2005 the RCMP commenced an investigation into alleged activities involving criminal fraud or theft by Brost and other parties as a result of the sale of securities involving Capital Alternatives Inc. ("Capital Alternatives"), Strategic Metals Corp. ("Strategic Metals") and Stone Mountain Resources Ltd. It appears that the RCMP investigation was prompted by a letter from Staff relating to information Staff learned in the course of their own investigation, and which ultimately resulted in a Commission enforcement proceeding against Brost, Edna Forrest, Carol Weeks, Bradley Regier, Capital Alternatives and Strategic Metals. A different Commission panel sanctioned those respondents for fraud and other proven allegations: *Re Capital Alternatives Inc.*, 2007 ABASC 79 and 2007 ABASC 482.

[6] In the case before us, the parties met with a Commission panel several times in a hearing management setting to deal with applications, deadlines and other procedural matters. Hearing

management meetings were scheduled every month from at least March 2009 with the last hearing management meeting set for 9 December 2009, one month before the hearing into the merits of the allegations against the Respondents (the "Hearing") is to recommence on 18 January 2010 with the presentation of Staff's case.

[7] The Hearing began before this panel (the "Panel") on 8 July 2009 for the sole purpose of dealing with a notice to attend (the "Notice to Attend") issued by the Commission at the request of Arbour and Morice to Sergeant Scott Fuller ("Sgt. Fuller") of the RCMP. The Notice to Attend followed an application by Arbour and Morice to the Panel on 16 June 2009 (the "June 2009 Application") for an order to compel Staff "to obtain and provide certain documents and materials presently in the possession of the [RCMP] to" Arbour and Morice. The material requested in the June 2009 Application included transcripts of RCMP interviews of four named individuals and the documents some of them had provided to the RCMP. The Notice to Attend called for Sgt. Fuller to produce the RCMP material sought in the June 2009 Application and, essentially, the entirety of the RCMP investigative file. AG Canada made an application to quash the Notice to Attend. For reasons set out in *Re Arbour Energy Inc.*, 2009 ABASC 366 (the "July 2009 Ruling"), the Panel refused to order production of the majority of documents which Arbour and Morice sought through the Notice to Attend, but did order Sgt. Fuller to provide us with certain statements by 7 August 2009 for our inspection. Ultimately, the Panel ordered production of a few extracts from those inspected statements.

[8] Arbour and Morice appealed the June 2009 Application and the July 2009 Ruling to the Alberta Court of Appeal, which stayed both appeals pending the conclusion of the Hearing: *Arbour Energy Inc. v. Alberta (Securities Commission)*, 2009 ABCA 278.

[9] On 16 October 2009 the RCMP laid charges against Brost and Sorenson as set out in the Information.

[10] At the hearing management meeting held on 10 November 2009, Arbour and Morice advised the Panel that they were considering renewing their application from June 2009 for an order to compel Staff to obtain and provide to Arbour and Morice the documents in the RCMP's possession that were obtained during the RCMP's criminal investigation into alleged fraudulent activities by or of a number of parties, with charges ultimately laid against two of the Respondents named in the Notice of Hearing. The Panel advised Arbour and Morice that any such application should be made as soon as possible.

[11] At the 9 December 2009 hearing management meeting, Arbour and Morice served on the Panel and all other parties a partially completed notice of application seeking an order that would compel Staff "to obtain and provide all disclosure materials" in the possession of the RCMP pertaining to the Information (the "RCMP Information-Related Material"). In light of the imminent recommencement of the Hearing, the Panel specified timelines for filing of written submissions by the parties and set 5 January 2010 as the date for the hearing of the Application. As noted above, we received written and oral submissions on the Application.

[12] It is clear that some of the issues raised in the Application are essentially identical to those decided in the July 2009 Ruling. The RCMP Information-Related Material sought here is similar to that sought in clause (e) of the Notice to Attend, as set out below:

- (a) All notes, transcriptions and recordings of interviews conducted by the RCMP with Owen Hoffman ("Hoffman") on December 20, 2007 and January 2, 2008 together with all documents turned over by Hoffman in relation to Merendon Mining Corp. and Strategic Gold Depository ("SGD");
- (b) All notes, transcriptions and recordings of interview's [sic] conducted by the RCMP with Gary Sorenson on or about April 4, 2008 together with all documents provided by Glenn Solomon [counsel for Merendon and Sorenson] to the RCMP on or about August 7, 2008;
- (c) All notes, transcriptions and recordings of interviews conducted by the RCMP with Dwayne Martyn on June 25, 2008 and September 17, 2008; and
- (d) All notes, transcriptions and recordings of interviews conducted by the RCMP with Robert Banfield on September 28, 2008;
- (e) Any other documents or materials in relation to the RCMP investigation of Gary Sorenson, Milowe Brost, Bradley Regier, Edna Forrest, Owen Hoffman, True North, Merendon Mining Inc., Syndicated Depository (SGD) and The Institute For Financial Learning (IFFL).

[13] The July 2009 Ruling denied all requests for disclosure except for the disclosure requested in clause (c) (which we ordered given to us for review) because: one request was too vague and speculative (clause (e)); another breached a confidentiality agreement that ought to be maintained for public interest reasons (clause (b)); and the "evidence pointed to [was] insufficient to merit our inspection of, or to justify our upholding of the request for, the material specified" in clauses (a) and (d) because the Panel was not satisfied the material sought would contain information potentially relevant in the Hearing. After reviewing the clause (c) documentation, disclosure was made of 36 lines from the 90-page transcripts of interviews with Dwayne Martyn because the Panel found those excerpts were "not clearly irrelevant" but may have been "marginally relevant" to the allegations in the Notice of Hearing.

III. PARTIES' POSITIONS

A. Arbour and Morice

[14] Arbour and Morice argued in the June 2009 Application that lack of jurisdiction was not a barrier to that application. They elaborate here that a Commission hearing panel has the jurisdiction to compel Staff to obtain and produce to a respondent the documentation obtained by the RCMP during the course of an RCMP investigation. In support of their proposition they refer to section 42 of the Act, which gives a person appointed to investigate alleged contraventions of Alberta securities laws the power to compel the production of documents such as the RCMP Information-Related Material. Arbour and Morice state that the Panel here has the same power to grant this Application as a panel used when it issued the "same direction" to Staff to apply to the Court of Queen's Bench of Alberta for an order for commission evidence of Sorenson under section 26 of the Act (see *Re Arbour Energy Inc.*, 2009 ABASC 89).

[15] In their arguments that led to the July 2009 Ruling, Arbour and Morice contended that, in accordance with the principles set out in *R. v. McNeil*, 2009 SCC 3, the RCMP has a "first party" disclosure obligation to the Respondents. They elaborate here that this supposed status makes "all or parts of the disclosure in the hands of the RCMP" relevant information that ought to be disclosed to the "Crown", in this case Staff. That is, according to Arbour and Morice, the fruits of the RCMP investigation are also the fruits of Staff's investigation. Arbour and Morice further

suggest that any public interest privilege that may have protected disclosure of the RCMP Information-Related Material ceased when the RCMP laid charges against Brost and Sorenson.

[16] Arbour and Morice have consistently contended – here and in earlier appearances and submissions – that the information in the RCMP investigative file is relevant to the issues raised by the allegations in the Notice of Hearing. In support of this claim they argue:

Assuming therefore that the RCMP file, which is now part of first party disclosure by virtue of the [I]nformation being sworn, is relevant to Strategic Metals/Capital Alternatives file now closed by [Staff], and further assuming in the broad sense of the word that the Capital Alternative[s] file and the Arbour file are relevant that [sic] it has to follow that the entire RCMP file is relevant to the Arbour file.

[17] Arbour and Morice further contend it is highly significant that "the Information sworn against two of the Respondents covers the same time period of the instant case, the public as a victim and, [sic] fraud".

[18] In oral argument, Arbour and Morice focused almost solely on what they characterized as a breach of a Staff duty to inquire, an issue that they had not raised in the notice of application or their written argument. They submit that this issue, although raised during the June 16 Application, had fallen "by the wayside" as their attention turned to other issues. Arbour and Morice argued that *McNeil* has extended Staff's disclosure obligation under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (discussed further below) to include a duty to inquire when Staff become aware that another Crown entity is investigating or has information about a respondent (such information might be relevant or not) named in a Commission notice of hearing. They argued that Staff have not met their *Stinchcombe* disclosure obligation because Staff failed to make the necessary inquiries of the RCMP.

B. Staff

[19] Staff contend that the Application ought to be dismissed because it is simply an attempt by Arbour and Morice to have the Panel reconsider previous rulings. Staff submit that the RCMP and Staff are not the same "Crown", such that the RCMP would have a first party disclosure obligation to provide material gathered during the course of its investigation to Staff, who in turn would be obliged to disclose any relevant information to Arbour and Morice in accordance with *Stinchcombe* principles. Staff argue that the laying of charges against Brost and Sorenson has not changed anything in respect of this proceeding.

[20] Staff argue that the Commission, as a statutory corporation, derives its power from the Act, and that a Commission hearing panel has been given no statutory authority to conduct, order or review investigations. The power over investigations conducted under the Act rests solely with Staff (see *Re Ironside*, 2002 LNABASC 24). Staff distinguish between the wording, intent and effect of sections 26 and 42 of the Act.

[21] Staff reiterate their position that they are only obliged to produce relevant material in their possession, with relevancy determined by reference to the allegations in a notice of hearing. Staff say they do not have possession of or control over the RCMP Information-Related Material. Staff argue that the Panel has already heard and rejected (in its July 2009 Ruling)

Arbour and Morice's contention that the RCMP's investigative material is also the fruits of Staff's investigation because Staff are an agent of the Crown.

[22] Staff also argue that Arbour and Morice's contention that the entirety of the RCMP investigative file is relevant to Arbour and Morice's defence to the allegations in the Notice of Hearing was, again, heard and rejected by the Panel in its July 2009 Ruling.

[23] In oral argument, Staff responded to the contention that part of their disclosure obligation includes the duty to inquire of the RCMP as to whether it has any relevant information. Staff argued that a plain language reading of *McNeil* does not extend Staff's *Stinchcombe* disclosure obligation to include a duty to inquire of a third party whether there is relevant information. In this regard Staff pointed to paras. 48 and 49 of *McNeil* as standing for the principles that there is no duty to make inquiries of every Crown entity "whether they are in possession of material relevant" and that the duty arises only when "Crown counsel . . . is put on notice of the existence of relevant information". Staff do not agree that they are in the same position as Crown counsel or that, even if they are, they have been put on notice that relevant information exists in the RCMP Information-Related Material. Staff also supported AG Canada's written submissions.

C. Merendon and Sorenson

[24] Merendon and Sorenson contend that the main issue to be determined in the Application – whether the RCMP Information-Related Material in the RCMP's possession can be said to be in Staff's possession and required to be disclosed under the *Stinchcombe* standard – is similar to that raised by the June 2009 Application. Merendon and Sorenson note that Arbour and Morice appear to be trying to have the Panel re-hear and decide matters already addressed in the July 2009 Ruling. Merendon and Sorenson submit that the Information, which may affect any public interest privilege claim that the RCMP had over the RCMP Information-Related Material, does not somehow result in the RCMP now having a "first party" disclosure obligation to Arbour and Morice. They argue that Staff have no obligation to try to obtain the RCMP Information-Related Material and that the RCMP has no obligation to provide it to Staff, if requested. In short, Staff have nothing more to produce or disclose to Arbour and Morice.

[25] Merendon and Sorenson suggest that the proper procedure is for Arbour and Morice to again request the issuance of a Notice to Attend to a witness who has access to the RCMP Information-Related Material. That would provide the proper context for arguments such as public interest privilege and relevance, in the event there is continued opposition to the production of the RCMP Information-Related Material.

[26] Merendon and Sorenson also contend that a Commission hearing panel does not have the jurisdiction to order Staff to obtain the RCMP Information-Related Material. First, they note that the Act does not give Staff the procedural power to obtain material from the RCMP as the RCMP is not a "party" as defined in section 40 and there is no other provision in the Act that would give Staff that power. Second, they agree with Staff that a Commission hearing panel itself has no authority over investigations undertaken by Staff, as the Act gives only Staff investigatory powers. Merendon and Sorenson point to section 42, which gives Staff investigatory powers – powers within Staff's discretion alone to exercise. Merendon and

Sorenson contend that to give a Commission hearing panel such power would place "its impartiality in question".

[27] Finally, Merendon and Sorenson note their increasing concern that the Panel and the Hearing may be tainted by Arbour and Morice's continued attempts to import into this proceeding information about or from the criminal proceeding commenced against Sorenson that is irrelevant to the allegations in the Hearing. Merendon and Sorenson submit that these activities by Arbour and Morice are jeopardizing Merendon's and Sorenson's right to a fair hearing.

[28] In oral argument, Merendon and Sorenson argued that the Application does not deal with Staff's duty to inquire and thus they and the other parties have been "sandbagged" in not having had an opportunity to speak properly to this new issue. Merendon and Sorenson also supported AG Canada's written submissions.

D. AG Canada

[29] AG Canada argues that the Application ought to be dismissed on the grounds of issue estoppel, abuse of process and oppression and as a collateral attack.

[30] AG Canada contends that issue estoppel prevents Arbour and Morice from relitigating the same issue – disclosure of the entirety of the RCMP's investigative materials – on which a final binding decision has been issued by the same decision-maker. AG Canada suggests that Arbour and Morice recognized the finality of the Panel's decision when they filed their appeals of the June 2009 Application and the July 2009 Ruling. AG Canada notes that Arbour and Morice had the opportunity to present evidence, cross-examine and make written and oral submissions before the Panel decided in the July 2009 Ruling:

- to reject Arbour and Morice's request for the RCMP's investigative material because the request was so vague and broad that it was a speculative, oppressive request that ought to be quashed;
- to reject Arbour and Morice's argument that Staff and the RCMP are indivisible and therefore information in the possession of the RCMP is constructively in the possession of Staff; and
- to reject Arbour and Morice's argument that their status as "pawns in a larger fraudulent scheme" lays the foundation for their claim that the RCMP's investigative material is relevant in their defence to the allegations that will be considered during the Hearing.

[31] AG Canada submits that there are no special circumstances – fraud or changes in public policy, legislation or jurisprudence – that would justify the Panel reconsidering its decisions. AG Canada contends that the only changed circumstance is the swearing of the Information, and it has no bearing on the issue of the relationship between Staff and the RCMP or the validity of the "larger fraudulent scheme" defence. In short, AG Canada submits that the laying of charges against Brost and Sorenson provides no basis for the Panel to reconsider its decision that Arbour and Morice failed to satisfy the Panel that their request for the RCMP's investigative material

was relevant to the points in issue in the Hearing and was other than "discovery in disguise or a fishing expedition".

[32] AG Canada argues that the Application, which in effect is seeking an appeal of the Commission's own decision, is an abuse of the Commission's process because relitigation by the same parties, making the same arguments on the same issues, offends the integrity of the Commission's adjudicative process (see *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 51).

[33] AG Canada also contends that the Application is a collateral attack on the Court of Appeal's decision to stay Arbour and Morice's appeals of the June 2009 Application and the July 2009 Ruling.

[34] Finally, AG Canada submits that the request for the RCMP Information-Related Material is oppressive and contrary to the public interest because ordering "parallel disclosure" would cause the Hearing to be further delayed and would encroach on the necessary separation between criminal and regulatory investigations and proceedings.

[35] AG Canada concludes that the RCMP laying charges against Brost and Sorenson has not resulted in any material change that would justify the Panel reconsidering the June 2009 Application or the July 2009 Ruling.

[36] In oral argument, AG Canada agreed with the oral submissions made by Staff and by Merendon and Sorenson. AG Canada also argued that obliging Staff to ask whether the RCMP has relevant material (because Staff and the RCMP have not provided evidence that the RCMP Information-Related Material is irrelevant) reverses the onus that Arbour and Morice have to satisfy the Panel that there is relevant information in existence.

IV. ANALYSIS

[37] Arbour and Morice essentially pursue two alternative lines of argument.

[38] First, they contend that Staff have or should have the RCMP Information-Related Material in their possession or control, such that the RCMP Information-Related Material falls within Staff's *Stinchcombe* disclosure obligation. Arbour and Morice's submissions on this point in part effectively duplicate their arguments from the earlier proceeding that resulted in the July 2009 Ruling, arguments that were not successful at that time. The sole difference in this Application appears to be the fact that the Information has now been sworn and charges laid and the RCMP's previously-claimed public interest privilege during the investigation may no longer apply.

[39] Second, Arbour and Morice submit that this Panel has the jurisdiction to order Staff "to obtain and provide" the RCMP Information-Related Material. We indicated during the June 2009 Application that we had doubts as to our jurisdiction in such a case, but we did not rule on that issue.

[40] We deal with each alternative in turn, but first reiterate some important underlying considerations.

A. Commission Enforcement Proceedings

[41] An enforcement proceeding before a Commission panel is a regulatory hearing for the purpose of determining whether it would be in the public interest to make protective and deterrent orders against a respondent under sections 198 and 199 of the Act based on findings of capital market misconduct. It is not a criminal trial in which a finding of guilt may have punitive consequences.

[42] This Panel commented extensively on the role of Staff, the role of a Commission panel and the purpose and nature of enforcement proceedings in the July 2009 Ruling at paras. 53-57:

The Alberta capital market is a regulated market, and participation in it is a privilege not a right. Staff have been given the responsibility for investigating conduct in the capital market that may contravene Alberta securities laws and for seeking protective and preventive orders on the basis of allegations of capital market misconduct in proceedings brought before a Commission hearing panel. A Commission panel struck to hear and decide an enforcement proceeding under sections 198 and 199 of the Act is carrying out that role as an administrative tribunal, with quasi-judicial powers limited to making the protective and preventive orders prescribed in sections 198 and 199 of the Act. Commission enforcement proceedings are public interest hearings characterized as regulatory, protective or deterrent, not quasi-criminal or punitive in nature.

A Commission enforcement proceeding is not subject to the same evidentiary and other restrictions that can apply in a proceeding before the courts; however, respondents in a Commission enforcement proceeding are entitled to natural justice and procedural fairness. To that end, Commission hearing panels, although not bound to do so, sometimes consider, and in many cases adopt, court-like approaches and practices. This is in recognition of the serious consequences faced by a respondent in many of the enforcement proceedings brought before a Commission panel. An example of this is that Staff, who are not Crown prosecutors, have a disclosure obligation akin to that required in a criminal trial to ensure that respondents receive disclosure of all relevant material in Staff's possession and have a fair hearing. This Commission has repeatedly endorsed that *Stinchcombe* standard of disclosure in stating that level of disclosure by Staff provides the appropriate degree of procedural fairness in our proceedings.

However, we must be mindful of the fact that the Commission is not a court of law and Commission enforcement proceedings are neither civil actions nor criminal proceedings. Rather, the Commission is a statutorily-created administrative agency responsible for administering Alberta securities laws, with the mandate to protect investors and foster a fair and efficient capital market in the province and public confidence in that market. An important aspect of securities regulation is its flexibility, providing regulators with a number of procedural choices resulting in different consequences, all designed to ensure that securities regulators are able to respond efficiently and effectively in dealing with non-compliance in a dynamic capital market. It is essential that our enforcement proceedings provide respondents with an appropriate level – which might not be the highest possible standard – of procedural fairness, balanced against the need to ensure that administrative efficiency of our system is not compromised.

As the Supreme Court of Canada said in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at para. 53:

It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of

natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (Judicial Review of Administrative Action, 4th ed. (1980), at p. 240), the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome.

Thus, in determining the procedures to be followed in an enforcement proceeding, the Commission seeks to balance the right of a respondent to a fair hearing, including the right to make full answer and defence, against public interest factors such as the flexibility and expediency expected by the public in achieving protection of the investing public and a timely resolution of alleged capital market misconduct matters.

[43] There is a public interest in maintaining a system of securities regulatory enforcement that effectively and efficiently deals with allegations of capital market misconduct to protect the public. Many procedures and principles relevant to criminal and quasi-criminal proceedings may therefore not be appropriate in a Commission enforcement proceeding. There is a degree of flexibility in Commission enforcement proceedings, stemming partly from the need to balance sometimes competing interests, including those of respondents and third parties, the public interest in obtaining evidence that could assist in deciding the allegations in a notice of hearing, and the need for fair, just and expeditious resolutions of Commission enforcement proceedings.

B. Staff Disclosure Obligations

1. Material in Staff's Possession or Control

[44] Section 29 of the Act governs the conduct of a Commission enforcement hearing. Section 29(e) provides that a Commission hearing panel is to "receive that evidence that is relevant to the matter being heard". Coupled with the rules of natural justice and procedural fairness that govern Commission enforcement hearings, this section gives a Commission hearing panel the authority to direct Staff to provide all relevant material in their possession or control to a respondent and to comply with the principles of disclosure articulated in *Stinchcombe* (see *Re Ironside*, 2005 ABASC 683 at paras. 28-30).

[45] The Commission requires Staff to disclose to respondents all information, whether inculpatory or exculpatory, gathered in Staff's investigation and in their possession or control, if that information is relevant to the issues raised by a notice of hearing. This obligation accords with *Stinchcombe*, which sets the standard of relevance for mandatory disclosure of material to an accused. We understand this also to be the practice of other securities regulatory authorities.

[46] Here, there appears to be no dispute that Staff disclosed all relevant material in their possession or control to the Respondents. Staff represent that they properly disclosed relevant information under the *Stinchcombe* standard, and that such disclosure obligation does not extend to the RCMP Information-Related Material because Staff do not have that material in their possession or control.

[47] Arbour and Morice disagree, arguing that Staff have not met their disclosure obligation to them because Staff failed to ask the RCMP whether the RCMP Information-Related Material contains relevant information. Arbour and Morice contend that Staff bore such an obligation, and that it was triggered when Staff became aware that the RCMP was investigating Brost, who

is also a Respondent named in the Notice of Hearing. Arbour and Morice further claim that Staff's purported obligation became increasingly important once the Information was sworn and charges laid and at least some aspects of public interest privilege could no longer be a complete answer from the RCMP to such an inquiry. However, Arbour and Morice have not identified any particular document that they assert is both relevant and within the RCMP Information-Related Material. Further, there is no suggestion that the RCMP Information-Related Material was garnered in connection with Staff's investigation and, as we ruled earlier, it was not obtained in a joint Staff/RCMP investigation.

2. Material Not in Staff's Possession or Control

[48] The courts have upheld decisions of securities regulatory authorities limiting the disclosure obligation in the securities context to the information that is in the possession or control of securities regulatory authorities' staff (see *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2002] O.J. No. 2350 at para. 41 (C.A.)). This Commission ruled that Staff are not required "to produce material not in [their] possession, nor [is there] any requirement that [they] hunt down material from third parties at the behest" of a respondent (see *Re Hennig*, 2005 ABASC 745 at para. 134). Thus, a respondent seeking to obtain "information in the possession of a third party must look to some other procedural mechanism" (see *Re Workum*, 2005 ABASC 986 at para. 49). In this case, Arbour and Morice availed themselves of such mechanisms, apparently having filed an application in the Court of Queen's Bench seeking an order to obtain access to the RCMP investigative material and also having obtained the Notice to Attend for Sgt. Fuller of the RCMP.

[49] However, Arbour and Morice suggest that the *Stinchcombe* standard as it applies to securities regulatory proceedings now imposes on Staff the duty to inquire of other government entities about the existence of relevant evidence as discussed in *McNeil*.

[50] This suggestion would require a marked departure from the Commission's application in its enforcement proceedings of the *Stinchcombe* standard – as a standard of relevance for the disclosure of material in the possession or control of Staff. In that regard, we note that in *Deloitte & Touche LLP v. Ontario (Securities Commission)*, 2003 SCC 61 at para. 26 the Supreme Court of Canada found that the use by the Ontario Securities Commission (the "OSC") of the *Stinchcombe* standard of relevance was reasonable as an appropriate standard for disclosure of material in the possession or control of OSC staff.

[51] Is there good reason to extend Staff's disclosure obligation to include a duty to inquire as discussed in *McNeil*?

[52] Based on the arguments before us and a review of pertinent jurisprudence, we conclude there is not, particularly in the circumstances of this case.

[53] As noted above, many procedures and principles applicable in criminal and quasi-criminal proceedings may not apply in administrative regulatory proceedings that are designed to protect the public by regulating activities, such as capital market conduct. As the British Columbia Securities Commission (the "BCSC") noted in *Re Cox*, 2001 BCSECCOM 204 at paras. 49-50:

Proceedings before . . . the [BCSC] are administrative. The Legislature has chosen an administrative agency to regulate securities markets because the flexibility and responsiveness of the administrative structure is well suited to the demands of the fast moving commercial sector. (The case before us is perhaps not the best example of that.) It is consistent with this intent that securities regulatory agencies afford a high level of procedural protection yet not be burdened with the highest standards possible. [There followed the quote from *Knight* reproduced earlier in this ruling]

It is clear from these decisions, and . . . the other decisions of the Supreme Court of Canada cited earlier that refer specifically to securities regulation, that the court considers factors such as flexibility, expediency, pragmatism and the economic regulation function of the securities regulatory system to be significant is assessing the procedures to be followed by securities regulatory agencies.

[54] We are satisfied that the Commission's application of the *Stinchcombe* standard in its enforcement proceedings provides a high degree – and, in the circumstances, an appropriate degree – of procedural fairness in our proceedings. Staff are obliged to provide respondents with all relevant material in Staff's possession or control. Recognizing practicalities, the level of disclosure given to any respondent in a particular case necessarily "will reflect a combination of sufficiency and feasibility" (see *Workum* at para. 47). Thus, Staff's disclosure need not be perfect or absolute, but it must be – and, we find in the present case, it has been – adequate to ensure that respondents know the case they have to meet (see *Hennig* at para. 135).

[55] We conclude that a refusal to extend this disclosure obligation in the manner argued by Arbour and Morice will not jeopardize the fairness of our proceedings, including the right of a respondent to make full answer and defence. In this case, Staff's disclosure obligation has produced all relevant material in their possession – what Arbour and Morice acknowledge is a voluminous amount of documents. It appears that Arbour and Morice have been provided with sufficient disclosure to enable them to understand Staff's case against them and meet the allegations in the Notice of Hearing.

[56] We also are profoundly concerned that an extension of the disclosure obligation as suggested would greatly impair the Commission's ability to deal effectively and efficiently with alleged capital market misconduct. We are unconvinced that a more extensive disclosure obligation is needed to provide procedural fairness to a respondent. We consider that it would not serve the administration of justice and the public interest in this regulatory context. When we weigh the relevant competing interests – including those of respondents and third parties (in this case the RCMP and perhaps now the provincial Crown who may be in possession of the RCMP Information-Related Material), the public interest in obtaining evidence that could assist in deciding the allegations in a notice of hearing, and the need for fair, just and expeditious resolution of Commission enforcement proceedings – we are compelled to conclude that no extension of Staff's disclosure obligation is warranted.

[57] Consistent with our conclusion, we note that in *Deloitte* the Supreme Court of Canada determined that application of the *Stinchcombe* standard of relevance was reasonable – not required – in securities regulatory enforcement proceedings. The Supreme Court made no suggestion that any extension of that disclosure obligation was needed. Finally, we were not

pointed by the parties to any jurisprudence that explicitly requires all principles augmenting or stemming from *Stinchcombe* to be extended to administrative proceedings.

3. RCMP Material

[58] Consistent with their argument in relation to the June 2009 Application and the July 2009 Ruling, Arbour and Morice contend that the Commission (in this context meaning Staff of the Commission) "is the agent of the Crown and . . . entitled to receive the fruits of the investigations conducted by the RCMP that are now in possession of the Crown by virtue of the laying of [the Information] dealing with matters that are relevant to" this Hearing.

(a) Indivisibility

[59] In the July 2009 Ruling (at paras. 65-68), the Panel stated the following in relation to the same argument – and Arbour and Morice in this Application provided no new authority or evidence on this point:

. . . The RCMP is a stranger to Staff's investigation and to this proceeding; it is not the investigating police agency for the Commission. There is no evidence before us that the RCMP has been or is conducting or otherwise involved in the investigation undertaken by Staff in this matter. Indeed, the evidence suggests that the investigation undertaken by the RCMP, while involving or mentioning some of the names that appear in the Notice of Hearing, is focused on entities and individuals other than Arbour and Morice.

Our view is consistent with the following principles set out in *McNeil*. First, the first party disclosure obligation recognized in *McNeil* attaches to the police who are investigating for the "prosecuting" state authority, not to policing agencies generally, even if they are also investigating some of the same parties for another state authority. The key is who is doing the investigation and for which state authority. That is made clear in *McNeil* at paras. 14-15:

. . . The Crown's obligation to disclose all relevant information in its possession to an accused is well established at common law and is now constitutionally entrenched in the right to full answer and defence under s. 7 of the *Canadian Charter of Rights and Freedoms*. The necessary corollary to the Crown's disclosure duty under *Stinchcombe* is the obligation of police (or other investigating state authority) to disclose to the Crown all material pertaining to its investigation of the accused. For the purposes of fulfilling this corollary obligation, the investigating police force, although distinct and independent from the Crown at law, is not a third party. Rather, it acts on the same first party footing as the Crown.

As I will explain, records relating to findings of serious misconduct by police officers involved in the investigation against the accused properly fall within the scope of the "first party" disclosure package due to the Crown, where the police misconduct is either related to the investigation, or the finding of misconduct could reasonably impact on the case against the accused. The Crown, in turn, must provide disclosure to the accused in accordance with its obligations under *Stinchcombe*. Production of disciplinary records and criminal investigation files in the possession of the police that do not fall within the scope of this first party disclosure package is governed by the *O'Connor* [from *R. v. O'Connor*, [1995] 4 S.C.R. 411] regime for third party production.

Second, as noted, Arbour and Morice argued that, because the Commission is an agent of the Alberta Crown, administrative enforcement actions undertaken by the Commission must be regarded as having been done ultimately on behalf of the Crown. Therefore, they contended, any

investigation of crime by the RCMP which touches on matters concerning the same parties or similar misconduct that is the subject of a Commission enforcement proceeding would effectively become part of Staff's investigation and subject to disclosure. We note that Arbour and Morice provided no authority for their proposition that the Crown is indivisible, and their proposition runs contrary to *McNeil*. *McNeil* reaffirms that there is no support in law for the proposition that the Crown is indivisible for the purposes of disclosure in criminal prosecutions – presumably (and we conclude) the same holds true for enforcement proceedings undertaken by securities regulatory authorities. As explained by the Supreme Court in *McNeil* at para. 22:

The *Stinchcombe* regime of disclosure extends only to material in the possession or control of the Crown. The law cannot impose an obligation on the Crown to disclose material which it does not have or cannot obtain: *R. v. Stinchcombe*, [1995] 1 S.C.R. 754. A question then arises as to whether "the Crown", for disclosure purposes, encompasses other state authorities. The notion that all state authorities amount to a single "Crown" entity for the purposes of disclosure and production must be quickly rejected. It finds no support in law and, given our multi-tiered system of governance and the realities of Canada's geography, is unworkable in practice. As aptly explained in *R. v. Gingras* (1992), 120 A.R. 300 (C.A.), at para. 14:

If that line of reasoning were correct, then in order to meet the tests in *Stinchcombe*, some months before trial every Crown prosecutor would have to inquire of every department of the Provincial Government and every department of the Federal Government. He would have to ask each whether they had in their possession any records touching each prosecution upcoming. It would be impossible to carry out 1% of that task. It would take many years to bring every case to trial if that were required.

Accordingly, the *Stinchcombe* disclosure regime only extends to material relating to the accused's case in the possession or control of the prosecuting Crown entity. This material is commonly referred to as the "fruits of the investigation".

For the reasons given, we find that the RCMP investigation does not fall within the scope of first party disclosure and thus the RCMP had no obligation to provide any of its investigation to Staff. It follows, and we so find, that the RCMP's investigation does not form part of Staff's pre-hearing disclosure package that they are obliged to disclose to the Respondents in accordance with the standard set by *Stinchcombe*. In short, we view the RCMP investigative material as material in the hands of a third party.

[60] Further, in an earlier ruling (*Re Arbour Energy Inc.*, 2009 ABASC 89 at paras. 12-13), a panel rejected another request by Arbour and Morice for the RCMP's investigative material. Arbour and Morice had argued that the panel should consider Staff "inferentially" in possession of documents and records possessed by the RCMP. The panel saw no basis for such an inference and specifically found that the documents "are not the 'fruits of Staff's investigation'".

[61] We conclude that the issuance of the Information and the laying of criminal charges against Brost and Sorenson arising from the RCMP investigation do nothing to alter the conclusions we reached in our July 2009 Ruling that: the RCMP and Staff are divisible; information in the possession of the RCMP is not in the constructive possession of Staff; and such information does not engage Staff's disclosure obligation to the Respondents. The fact that

the provincial Crown may now or will have possession of the RCMP Information-Related Material does not alter our conclusions on these issues. In short, nothing has occurred that would warrant our reconsideration of these issues.

(b) Relevance

[62] We also reject Arbour and Morice's contention that issuance of the Information and the laying of criminal charges could somehow clothe the entire RCMP investigative file with "relevance" to the issues raised in the Notice of Hearing. As they did in the earlier proceeding culminating in the 2009 July Ruling, Arbour and Morice contend that a broad category of documents has not been, but ought to be, disclosed on the basis that their relevance has been established by Arbour and Morice's bald assertion that "all or parts of the disclosure in the hands of the RCMP are relevant and should be disclosed in the current proceedings".

[63] This is not a sufficient or proper foundation for an assertion of relevance and a demand for disclosure. We reach the same conclusion now as we did in the July 2009 Ruling – Arbour and Morice's request remains too broad and amounts to "a speculative, oppressive request – discovery in disguise or a fishing expedition" (at para. 96). Even assuming in the present circumstances that the RCMP or the provincial Crown, on the one hand, and Staff on the other, are indivisible – which we strongly reject – allowing so broad and unspecified a request would require the disclosure of all documents, whether relevant or not, and therefore would impose on Staff a disclosure obligation far beyond that set out in *Stinchcombe*.

[64] In sum, there is no new evidence or change in circumstances, nor new issues presented in the Application (and no evidence that there has been or will be a change in the issues that will be before the Panel in the Hearing), nor change to Arbour and Morice's theory of defence, nor change in public policy, legislation or jurisprudence of which we have been made aware that would warrant our making any different decision from that set out in the July 2009 Ruling.

(c) Bars to Application

[65] We also agree with AG Canada that the doctrines of issue estoppel, abuse of process and oppression may well apply to bar Arbour and Morice from relitigating the issues of indivisibility and relevance as decided in the July 2009 Ruling. Further, we agree with AG Canada that the Application in part could be construed as an impermissible collateral attack on the stays ordered by the Court of Appeal. However, we need not reach a definitive conclusion on that basis.

C. Jurisdiction of a Commission Hearing Panel

[66] Arbour and Morice assert that a Commission panel struck to hear and decide an enforcement proceeding has the jurisdiction to order Staff, as part of Staff's disclosure obligation, to ask for and obtain the RCMP Information-Related Material. As noted, Arbour and Morice claim our jurisdiction arises from the power given under section 42 of the Act to compel the production of documents. Arbour and Morice contend that we can exercise jurisdiction under section 42 in the same way that a panel exercised the power given to the Commission and the Executive Director under section 26 of the Act to apply for an order from the Court of Queen's Bench for the taking of evidence of a witness outside Alberta.

[67] Arbour and Morice's assertion is incorrect and misapprehends the statutory powers given to the Commission and the powers given to Staff.

[68] The Commission is a statutory corporation that derives its powers from the Act. Unlike a court, the Commission has no inherent powers to compel the attendance of witnesses or the production of documents: it must have an express statutory power to so act.

[69] The Commission is comprised of: (1) its members who are responsible for "the administration of Alberta securities laws" (section 11 of the Act) and who are designated by the Chair of the Commission to conduct any hearings under the Act (section 23); and (2) those who carry out most of the day-to-day operations of the Commission – we commonly refer to all or any within this group as "Staff" (with the Executive Director at their head). The Commission undertakes many functions – policy-making, regulation of various capital market activities and participants, oversight of other securities regulatory bodies, and enforcement. To carry out these roles, the Act expressly allocates certain areas of responsibility to the Commission, to the Executive Director, or to both. An area where the Act clearly separates responsibilities is the enforcement of Alberta securities laws.

[70] The Executive Director and his Staff are ultimately responsible for initiating enforcement action against a respondent on the basis of allegations of capital market misconduct. Staff assess complaints to determine whether further action is warranted, including what investigative steps to take, whether to commence a proceeding and whether that proceeding ought to be brought as a prosecution in provincial court or as an administrative hearing before a Commission panel. In *Re Ironside*, 2002 LNBASC 24 (at paras. 41-46) the Commission discussed the legislative history of the Commission's investigative and enforcement functions and concluded that the legislature did not intend the Commission members (who comprise hearing panels) to be involved in the investigative process (at para. 46):

To summarize the relevant changes between 1981 and 1995, the Commission lost all its previous power to conduct, order or review investigations. Now only the Executive Director can order an investigation under s. 41(1) or (2). . . .

[71] Consistent with the Act's assignment of responsibilities, the Commission is structured so that Commission hearing panels are not empowered to "launch or conduct investigations" (see *Re Albinati*, 2009 ABASC 279 at para. 47). The Commission's adjudication of alleged capital market misconduct is carried out by Commission members who are designated as the hearing panel. Such a panel, as the adjudicator in the enforcement proceeding, is responsible for the conduct of a fair and impartial hearing. The panel's role begins once Staff commence a proceeding with a notice of hearing that sets out Staff's allegations against a respondent and the sanctions they are seeking.

[72] Part 2 of the Act, entitled "Investigations", sets out the investigative and compulsion powers, which are assigned to the Executive Director. None of these powers are granted to the Commission. For example, under section 40 of the Act the Executive Director may order a "party" to provide to him specified "information, documents or records". In the present case, the RCMP is not a "party" as defined in section 40(1). Under section 42 only "those appointed to

make an investigation under section 41" by the Executive Director can "compel witnesses to produce documents" and other records for the purpose of an investigation.

[73] Thus, the section 42 wording is different – and crucially so – from that in section 26 of the Act that empowers either the Commission or the Executive Director to apply to the Court of Queen's Bench for an order "appointing a person to take the evidence of a witness outside Alberta". Presumably the legislature gave the same power to both the Commission and the Executive Director because Commission members could appropriately make use of it for the purpose of a hearing, while the Executive Director could use the power for the purpose of either an investigation or a hearing. It is, in any event, clear from the wording of section 26 and Part 2 of the Act that the legislature made a deliberate, intentional marked delineation of powers – only the Executive Director, not the Commission, has been given the power to appoint persons to conduct an investigation and to compel the production of documents for the purpose of such an investigation.

[74] For these reasons, we find that the Panel has no statutory authority to direct Staff's investigation nor to compel them to obtain the RCMP Information-Related Material. Further, even were we to have the statutory authority to compel Staff to obtain material in the possession of a third party, we would be loath to exercise that authority because that third party may well have a legal basis for refusing to provide that material to Staff, thus putting Staff in the untenable position of being in breach of a Commission order.

V. RULING

[75] In summary, we are not persuaded that the issuance of the Information or the laying of criminal charges against Brost and Sorenson provides a reason for reconsidering or altering our earlier conclusions on indivisibility and relevance. We do not have the jurisdiction to order that Staff obtain and provide the RCMP Information-Related Material. We also conclude that Arbour and Morice have not established that Staff failed to comply with their disclosure obligation to Arbour and Morice as Respondents in this Commission enforcement proceeding.

[76] The Application is therefore dismissed.

8 January 2010

For the Commission:

"original signed by"
Glenda A. Campbell, QC

"original signed by"
Neil W. Murphy

"original signed by"
Karen A. Prentice, QC