

THIS RULING IS UNDER APPEAL.

ALBERTA SECURITIES COMMISSION

RULING

Citation: Arbour Energy Inc., Re, 2009 ABASC 366

Date: 20090728

**Arbour Energy Inc., Dennis Morice, Heinz Weis, Arthur Wigmore, 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:

Don Young and Deanna Steblyk
for Commission Staff

John James
for Arbour Energy Inc. and Dennis Morice

David de Vlieger and Katrina Edgerton-McGhan
for Heinz Weis

Patrick Sullivan
for Arthur Wigmore

Glenn Solomon and Darren Reed
for Merendon Mining Corporation Ltd.
and Gary Sorenson

Peter Barber and David Lynass
for the Attorney General of Canada

Dates of Hearing:

8, 14 and 15 July 2009

Date of Decision:

28 July 2009

THIS RULING IS UNDER APPEAL.

I. OVERVIEW

[1] This is our ruling on an application by the Attorney General of Canada (the "AG Canada") to quash a 22 June 2009 notice to attend (the "Notice to Attend") issued by the Alberta Securities Commission (the "Commission") to Sgt. Scott Fuller ("Sgt. Fuller") of the Royal Canadian Mounted Police (the "RCMP").

[2] Since the panel has received little in the way of evidence to date, we provide only a thumbnail sketch of the background facts, some of which are merely alleged.

[3] For the reasons set out below, we quash all but clause (c) of the Notice to Attend ("Clause C"), which requested that Sgt. Fuller produce at the hearing, "[a]ll notes, transcriptions and recordings of interviews conducted by the RCMP with Dwayne Martyn on June 25, 2008 and September 17, 2008" (the "Martyn Statements"). In respect of Clause C, we order that Sgt. Fuller provide the Martyn Statements to the panel by 7 August 2009 for the panel's inspection and indicate to us any specific portions thereof for which the RCMP asserts privilege or other privacy claim.

II. BACKGROUND

A. The Respondents and the Allegations

[4] Staff of the Commission ("Staff") issued a notice of hearing (the "Notice of Hearing"), most recently amended on 27 May 2009. Based on allegations, as set out below, the Notice of Hearing seeks 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 Energy Inc. ("Arbour"), Dennis Morice ("Morice"), Heinz Weis ("Weis"), Arthur Wigmore ("Wigmore"), Milowe Brost ("Brost"), The Institute For Financial Learning, Group of Companies Inc. ("IFFL"), Merendon Mining Corporation Ltd. ("Merendon") and Gary Sorenson ("Sorenson") (collectively, the "Respondents").

[5] The Notice of Hearing alleges, among other things: illegal trades and distributions of Arbour securities by Arbour, Morice, Weis, Wigmore, Brost, IFFL and Sorenson; false or misleading statements made in Arbour offering documents by Arbour, Morice, Weis and Wigmore to investors; failure by Arbour, Morice, Weis and Wigmore to file Arbour continuous disclosure documents and to provide timely and reliable continuous disclosure documents to Arbour investors; and a course of conduct in connection with the sale of Arbour securities engaged in by all of the Respondents that they knew or ought to have known perpetrated a fraud on Arbour investors. The Notice of Hearing also sets out particulars of the alleged contraventions of Alberta securities laws and the public interest.

[6] The hearing into the merits of the allegations against the Respondents in the Notice of Hearing (the "Hearing") was scheduled to begin on 1 September 2009.

B. The RCMP Investigation

[7] According to an "Information to Obtain a Production Order" sworn 21 November 2008 by Sgt. Fuller of the RCMP (the "Information"), the RCMP commenced an investigation in October 2005 into the activities of Bradley D. Regier ("Regier"), Edna L. Forrest ("Forrest"), Carol C. Weeks, Brost, Capital Alternatives Incorporated ("Capital Alternatives"), Strategic

THIS RULING IS UNDER APPEAL.

Metals Corporation ("Strategic") and Stone Mountain Resources Limited, directed at the commission of criminal fraud or theft. One of the parties being investigated by the RCMP – Brost – is one of the Respondents. According to a 3 July 2009 affidavit (the "Mattson Affidavit") sworn by Superintendent Eric W. Mattson ("Superintendent Mattson"), the investigation is ongoing.

[8] Transcripts of "Cautioned/KGB Video Recorded Statement[s]" made to Sgt. Fuller and another RCMP officer by Regier on 15 January 2009 (the "Regier Statement") and Forrest on 19 January 2009 (the "Forrest Statement") were provided to Staff under section 42 of the Act and subsequently provided to the Respondents as part of Staff's pre-hearing disclosure in this matter. The Respondents are among the individuals and entities mentioned in the Regier and Forrest Statements. While there are several references to Arbour, the focus of the Regier and Forrest Statements appears to have been those individuals and entities that, according to the Information, are being investigated by the RCMP.

[9] Certain additional documents generated by the RCMP investigation were provided to Staff in compliance with an order of the Court of Queen's Bench and then shared with the Respondents as part of Staff's pre-hearing disclosure in this matter.

C. The 16 June Application

[10] On 16 June 2009 we heard an application by Arbour and Morice (the "16 June Application") to compel Staff "to obtain and provide certain documents and materials presently in the possession of the [RCMP] to" Arbour and Morice. The documents and materials in question (we refer to them collectively as the "Requested Documents") were identified as:

- (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.
- (d) All notes, transcriptions and recordings of interviews conducted by the RCMP with Robert Banfield on September 28, 2008.

[11] After hearing the 16 June Application, we stated:

... we do have concerns as to our jurisdiction to order Staff to obtain the material. However, in the interest of fairness, we do have the power to order the summons of a witness and to compel that witness to appear with documentation during the hearing. And what we are proposing is that if you wish to pursue obtaining that information, we would be prepared to start this hearing on July 8th at 2 p.m. for the sole purpose of, having issued the summons of an RCMP investigator, which we would issue at the request of the applicants, compelling him to attend on July 8th with the requested material.

At which time, if there are any objections to the information being produced, obviously the RCMP and any other parties could object at that time.

...

THIS RULING IS UNDER APPEAL.

You can have a couple of days to think about it.

...

So that we are clear, the hearing, in the interest of efficiency, would commence on July 8th solely for that purpose. Once Sergeant Fuller appears, presumably with the documentation, and we make any necessary decisions at that time, then the hearing would be adjourned to start with Staff's case on the September dates.

[12] Although Arbour and Morice were given time to consider the implications of whether they wished to pursue the panel's suggestion – which presumably would have included consideration of the implications of requesting a ruling on the 16 June Application, requesting a notice to attend or pursuing in the Court of Queen's Bench their "*O'Connor* application" to obtain material from the RCMP (which we were told they had made but adjourned) – Arbour and Morice immediately made the request for a notice to attend. We then advised Arbour and Morice to draft a notice to attend for the panel to sign. Our procedure is to sign a notice to attend when and as presented, with any substantive arguments relating to the notice to attend reserved for the appearance date.

D. Notice to Attend

[13] A few days later the panel was provided with the Notice to Attend. We signed the Notice to Attend that required Sgt. Fuller to attend at the hearing to personally give evidence and to bring with him the material specified in the Notice to Attend. That material included not only the Requested Documents but also a request for additional material that had not been part of the 16 June Application – as itemized in clause (e) of the Notice to Attend ("Clause E"):

- (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).

[14] We understand that the Notice to Attend was served on Sgt. Fuller on 23 June 2009.

E. The 30 June Application

[15] On 30 June 2009 AG Canada filed its application (the "30 June Application") requesting that the panel quash the Notice to Attend. The 30 June Application to quash the Notice to Attend was soon followed by the Mattson Affidavit and AG Canada's written submissions. On 7 July 2009 written submissions were filed by Arbour and Morice.

[16] The Hearing commenced on 8 July 2009 for the sole purpose of dealing with the Notice to Attend. Sgt. Fuller was present on that date, together with counsel for AG Canada. The parties were present or represented, with the exception of Brost and IFFL.

[17] On 8 July 2009 the panel granted Arbour and Morice's request to cross-examine Superintendent Mattson on the Mattson Affidavit, provided any questioning was limited in scope to questions as to whether the RCMP had waived its claim to privilege over material obtained during its ongoing investigation and reasons why the RCMP's investigation would be prejudiced by production of the requested material. At the request of some of the parties, the panel ordered

THIS RULING IS UNDER APPEAL.

that the hearing of the remainder of this application be held in a voir dire – a separate and distinct portion of the Hearing – to ensure that any evidence heard or admitted by the panel in connection with the application would not be considered as evidence in the Hearing, unless admitted as part of the fact-finding process of the Hearing itself.

[18] On 14 July 2009 Superintendent Mattson was cross-examined on the Mattson Affidavit by Arbour and Morice as well as by Merendon and Sorenson. As part of that cross-examination, the Information, the Regier and Forrest Statements and a letter dated 4 March 2008 from May Jensen Shaw Solomon LLP (counsel for Merendon and Sorenson) to a sergeant in the RCMP Integrated Market Enforcement Team ("IMET") in Calgary (the "Sorenson Letter") were entered as exhibits.

[19] We heard oral argument on the application on 8 and 15 July 2009. We heard and considered the written and oral submissions from AG Canada and Arbour and Morice, the oral submissions from Staff, Weis, Wigmore (no substantive submissions), Merendon and Sorenson, the documentary evidence and the testimony of Superintendent Mattson. Arbour and Morice also provided us with a copy of Staff's 12 March 2009 investigative interview of Regier (the "Regier Interview").

III. PARTIES' POSITIONS

A. AG Canada

[20] AG Canada objected to both the appearance of Sgt. Fuller as a witness and the requirement that he bring with him the material identified in the Notice to Attend.

[21] AG Canada's application is premised on the argument that, in the circumstances of this case, the significant public interest in effective law enforcement creates a privilege that entitles the RCMP to refuse production of the material sought by Arbour and Morice and prevent the testimony of Sgt. Fuller on the ground that such production and testimony would potentially compromise an ongoing RCMP criminal investigation into an alleged complex fraud.

[22] In support of its contention, AG Canada relied on the information provided by Superintendent Mattson in the Mattson Affidavit:

11. It is essential to the successful completion of our criminal investigation in this case that the public, the parties being investigated, and witnesses not know the extent of RCMP knowledge or the avenues being investigated. It has been my experience that suspects and witnesses having detailed knowledge of ongoing criminal investigations can have an adverse impact on the success of an investigation and subsequent prosecution.

12. Providing the information required in the Notice to Attend will interfere with the RCMP ability to conduct and complete its ongoing criminal investigation. Requiring [Sgt.] Fuller to answer questions by the parties to this hearing about his knowledge of the investigation will also interfere with the RCMP ability to conduct and complete its ongoing criminal investigation.

[23] Superintendent Mattson explained that the "criminal investigation into alleged fraudulent activities by some of the same parties currently subject to this Notice of Hearing" was code-named "Project Netals". Superintendent Mattson emphasized the complexity of the investigation, noting that the RCMP has already gathered "approximately 60 banker's [sic] boxes

THIS RULING IS UNDER APPEAL.

of documents comprising approximately 104,000 pages", all "in the course of our criminal investigation", and that he anticipated charges would be laid under the *Criminal Code* (Canada). He also stated that "the documents and materials listed in the Notice to Attend that Staff Sergeant Fuller is required to bring constitute the entirety of the criminal investigation". Superintendent Mattson acknowledged that Project Netals' investigators shared some information with Staff. On cross-examination, Superintendent Mattson confirmed that the RCMP provided Staff with the Regier and Forrest Statements in response to a notice to produce issued by Staff and served on the RCMP under section 42 of the Act. However, Superintendent Mattson deposed that the RCMP did so "only . . . after analysis has concluded that providing the information will not compromise the ongoing investigation, breach any privilege, or breach any confidentiality arrangements with those from whom the information has been gathered".

[24] AG Canada contended that the evidence of Superintendent Mattson provides the evidentiary foundation on which the panel can conclude that there is an important public interest to protect in this particular case – protection of "an ongoing [police] investigation so that investigation can be brought to a conclusion without jeopardising or compromising that investigation." AG Canada also pointed to the Regier and Forrest Statements in which the deponents spoke to examples of perjury, obstruction of justice, manufacturing of evidence and interference with a prior Commission investigation as demonstrable evidence of the propensity of some individuals under investigation to interfere with an investigation once they are aware they are the target of an investigation, further supporting the RCMP's refusal to disclose its investigation thus far.

[25] AG Canada stressed the separation of and distinction between the RCMP investigation and Staff's investigation in this proceeding. AG Canada noted that the RCMP investigation does not relate to possible breaches of the Act, but to possible *Criminal Code* violations. It noted that the RCMP is a federal organization charged with responsibility to investigate activity that contravenes the *Criminal Code*, whereas the Commission is a provincial regulatory agency charged with responsibility to ensure compliance with the Act. AG Canada emphasized it is clear that Staff and the RCMP are not conducting a joint investigation, and that the RCMP investigation is not under any control or direction by Staff. The RCMP is not obliged to disclose any of its investigation to Staff and, similarly, Staff are not obliged to disclose their investigation to the RCMP or to obtain information from the RCMP. AG Canada noted that the RCMP obtained a search warrant when it sought access to Staff's files and that Staff obtained court orders or issued section 42 orders to obtain material in the hands of the RCMP. In short, the RCMP has not carried out or produced an investigation for the purposes of a Commission enforcement proceeding.

[26] AG Canada stressed that blurring the line between investigations carried out by the Commission and those carried out by the RCMP could conceivably chill or limit investigations undertaken by these bodies as they seek to avoid interfering with or negatively affecting each other's investigations or proceedings. Such a result clearly would not further the administration of justice and is another reason why this case supports a public interest privilege that justifies a refusal to disclose the contents of this ongoing police investigation.

THIS RULING IS UNDER APPEAL.

[27] AG Canada submitted that, in criminal proceedings, the police's disclosure obligation is to the Crown, not the accused, and that neither the police nor the Crown has any disclosure obligation to persons who have not been charged with an offence. AG Canada stated that even those charged or who may be charged in a criminal proceeding do not have unfettered access to the police's investigative file.

[28] Thus, AG Canada argued that the RCMP is not a party to this proceeding and ought to be treated as would any third party to a proceeding faced with a notice to attend and to produce material.

[29] AG Canada argued that, before any materials could be ordered produced, the panel would essentially have to conduct an "*O'Connor* hearing" – referencing the process established by the Supreme Court of Canada in *R. v. O'Connor*, [1995] 4 S.C.R. 411, by which an accused in a criminal trial seeks to gain access to records in the possession of a third party. In an *O'Connor*-type hearing, the Commission would review the contested material and assess whether the balance of all parties' interests – including the RCMP's interest in protecting its ongoing investigation – favours production. However, AG Canada argued that before such a review can occur Arbour and Morice must first satisfy the panel that the material sought is "likely relevant" to the issues to be decided in the Hearing and that they should have met that requirement by providing evidence.

[30] AG Canada noted that no affidavit was provided by either Arbour or Morice and argued that they failed to establish there is material in the RCMP file that is likely to be helpful to them in the conduct of their defence in the Hearing and that they appear to be on a fishing expedition. In support of its contention, AG Canada pointed to Clause E of the Notice to Attend, which it characterized as a "basket-type clause or a catch-all . . . [seeking] what amounts to the entirety of the RCMP investigation that's been done to date". AG Canada argued that the explanation by Arbour and Morice that this broad request was made simply because the Notice of Hearing alleges fraudulent conduct by some of the same parties being investigated by the RCMP is "too broad and ill-defined" to satisfy any threshold test of relevance that would justify an intrusion into a third party's material. In this case the Notice to Attend would require the production of some 104 000 pages of documents for review by the panel. AG Canada noted that Arbour and Morice, having been provided by Staff with disclosure to the standard set out in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, are not operating in the dark, having to speculate or guess at what information might exist. In short, AG Canada contended that Arbour and Morice failed to satisfy the burden on them to establish that the material sought to be produced through Sgt. Fuller is likely to be relevant to the issues they face.

[31] AG Canada then submitted that compelled production by the RCMP of certain of the information and material in the ongoing investigation – namely the information made public in the Information, the Regier and Forrest Statements provided to Staff under the section 42 order, and the material provided to Staff under the Court of Queen's Bench order – did not result in the RCMP expressly or impliedly waiving that privilege over the balance of material in its ongoing investigation. AG Canada contended that the RCMP had no intention to waive privilege over the balance of material in its investigation when it decided not to contest, but to voluntarily comply, with the court order and section 42 order to produce certain specific identified material from its

THIS RULING IS UNDER APPEAL.

investigation. AG Canada also argued that merely because some of the information from the RCMP investigation is now in the public domain does not mean that the RCMP has waived the privilege that attaches to the remaining material in the investigation. In short, AG Canada contended that the only privilege waived is that in respect of the exact information that has been made publicly available by the RCMP.

[32] AG Canada further suggested that, if the panel is not satisfied there is a sufficient basis to support AG Canada's claim that public interest privilege applies to preclude production of the requested material, then the panel would be provided with the material, which we would then review for "true relevance" to the issues in the Hearing. Assuming that higher threshold is met, the panel would then balance the probative value of that information against other competing interests – such as various claims of privilege – in determining whether to order production of the material in question.

[33] AG Canada concluded by noting that the information in the RCMP investigation concerning Sorenson was obtained from Sorenson on condition that the RCMP not provide it to any other law enforcement or regulatory agency. AG Canada argued that the panel – in considering whether a broad or specific public interest privilege ought to apply to the request for that information – must weigh the public interest considerations in disclosing information that the RCMP obtained through an agreement to keep it confidential against disclosing it to Arbour and Morice, who may possibly use that information in their defence of the allegations against them in the Hearing by a "regulatory agency".

B. Arbour and Morice

[34] Arbour and Morice did not dispute that there is a public interest privilege that can be invoked to protect ongoing police investigations and that the information sought, as part of an ongoing RCMP investigation, could be subject to a claim of public interest privilege.

[35] Arbour and Morice argued that the appropriate procedure for the panel to follow in assessing whether the RCMP's claim of public interest privilege attaches to the information sought is not that set out in *O'Connor* but that set out in *R. v. Chan*, 2002 ABQB 287 at para. 145 – the panel should review the documents over which privilege is claimed. This is because Arbour and Morice contended, citing as support *R. v. McNeil*, 2009 SCC 3, that the RCMP has a "first party" disclosure obligation to the Respondents and therefore must provide all relevant information uncovered during its investigation to the "Crown". The Crown in this case, they submitted, is the Commission because section 21 of the Act provides that the Commission is the agent of the Crown and therefore is acting on behalf of the Crown in right of Alberta when conducting enforcement proceedings, such as the proceeding here. Thus, Arbour and Morice argued that the RCMP should have provided the Crown – in this case, Staff – with the fruits of the RCMP investigation which would then, to borrow words from *McNeil* (at para. 53), have formed "part of the first party disclosure package provided to the Crown for its assessment of relevance according to the edicts of *Stinchcombe*".

[36] Arbour and Morice further submitted that, following *McNeil* (at para. 49), Staff are a prosecuting agency or Crown representative "put on notice of the existence of relevant information [and] cannot simply disregard the matter. Unless the notice appears unfounded,

THIS RULING IS UNDER APPEAL.

Crown counsel will not be able to fully assess the merits of the case and fulfill its duty as an officer of the court without inquiring further and obtaining the information if it is reasonably feasible to do so", including making "reasonable inquiries of other Crown agencies or departments that could reasonably be considered to be in possession of evidence" (citing *R. v. Arsenault* (1994), 153 N.B.R. (2d) 81 (C.A.) at para. 16). Arbour and Morice contended that Staff in this case had actual notice of the existence of information in the hands of the RCMP that is relevant to the issues in the Hearing. Arbour and Morice said this is so because the RCMP investigation covers allegedly fraudulent activities by some of the same parties that form the basis for the allegations of fraud on Arbour investors in the Notice of Hearing, including activities surrounding the raising and distributing of Arbour funds, and because the RCMP provided Staff with some of the information from its investigation to assist Staff in their case against the Respondents.

[37] Therefore, Arbour and Morice argued that the panel ought to follow the procedure set out in *Chan* and review the material over which public interest privilege is claimed because the "Crown" – in this case, Staff – is asserting a claim of public interest privilege to prevent untimely disclosure of material obtained in the investigation by the RCMP. Arbour and Morice submitted that the issue for the panel to decide is whether the public interest privilege claimed by the RCMP outweighs the right of Arbour and Morice to make full answer and defence. Further, as this is a qualified privilege, the weighing of interests must be assessed on a case-by-case basis.

[38] Arbour and Morice, in arguing that the material sought to be produced by Sgt. Fuller is relevant to the issues in the Hearing, relied on the contents of the Information, the Regier and Forrest Statements and the Regier Interview. Arbour and Morice contended that the information provided in the Regier and Forrest Statements suggests that the raising of funds for Arbour was part of an ongoing enterprise to raise funds for other interests and that all of the investors who purchased Arbour preferred shares knew that, despite the disclosure in the offering memoranda as to use of proceeds, they were really investing in accounts of Syndicated Gold Depository ("SGD"), which was to generate returns from between 30 to 40 percent per year. Arbour and Morice also said that this same fraud is the subject matter of the RCMP investigation.

[39] Arbour and Morice submitted that the interviews being requested contain relevant information in terms of either Staff's theory or Arbour and Morice's theory of what happened at Arbour. For example, Arbour and Morice suggested that the 20 December 2007 and 2 January 2008 RCMP interviews (the "Hoffman Statements") of Owen Hoffman ("Hoffman") will speak to Hoffman's involvement with SGD, the mechanism used and the individuals involved, albeit not during the period covered by the Notice of Hearing. Further, as Staff propose to call Hoffman as a witness, Arbour and Morice submitted that he obviously has relevant evidence to give in the Hearing and thus Arbour and Morice ought to be entitled to review his statements given to the RCMP. With respect to Clause E, Arbour and Morice submitted that they could narrow the request to the material involving Arbour investors, IFFL structurists and banking documents relating to money received by Arbour and spent. However, they suggested there is no need to do so because "everything that the RCMP are looking into was relevant to what our interests in making full answer and defence are", arising from what was said in the Regier and Forrest Statements.

THIS RULING IS UNDER APPEAL.

[40] In short, Arbour and Morice argued that it is insufficient to say that they have enough information for their defence when more information exists in the hands of the RCMP. They argued that the Information, the Regier and Forrest Statements and the Regier Interview clearly show that the material being sought is relevant in proving the mechanism of fraud used in the case of Arbour, as well as whether investors who purchased Arbour preferred shares relied on the Arbour offering memoranda as to the use of investor funds when they made their investment decisions.

[41] Arbour and Morice argued that the RCMP explicitly waived any claim it may have had to public interest privilege over its investigation in this case because of the disclosures it made in the Information. They noted that the Information names the individuals from whom statements were obtained and provides a detailed summary of the content of those statements. Thus, the RCMP, in disclosing not only the existence but the substance of what it has, waived any privilege that might have attached to that material. Arbour and Morice emphasized that the RCMP took no steps – such as obtaining an order to seal the Information – to safeguard the confidentiality of the information that it now says is so important to its ongoing investigation as to warrant a claim of public interest privilege. Arbour and Morice referred us to *R. v. Kim*, 2003 ABQB 1025, as support for their contention.

[42] Arbour and Morice argued that AG Canada's assertion that the RCMP provided a portion of its investigation to Staff because it was compelled by statute is wrong. Arbour and Morice argued that a section 42 order issued by Staff is no different than the issuance by a panel of a notice to attend under section 29 of the Act and that the use by Staff of a section 42 order does not preclude an assertion of confidentiality, privilege or other similar claims. Rather, Arbour and Morice submitted that, as admitted by Superintendent Mattson in his cross-examination, the RCMP was aware of its rights and chose to waive any claim it may have had to public interest privilege over the material requested by Staff for the purpose of providing it to Staff. Arbour and Morice submitted that the RCMP impliedly waived its claim to privilege over its entire investigation by so providing, yet, when faced with a similar request by Arbour and Morice, the RCMP invoked a claim of public interest privilege over the undisclosed portions of its investigation. Indeed, Arbour and Morice submitted that, as noted by the Court of Queen's Bench in *O'Scolai v. Antrajenda*, 2008 ABQB 77, if fairness and consistency require disclosure, then the privilege will be impliedly and effectively waived. Thus, while disclosure may well impede the RCMP in its ongoing investigation, it took that risk when it decided to disclose portions of its investigation to Staff. In terms of fairness or consistency, the RCMP cannot "cherry pick" to disclose part of its investigation without disclosing the entirety of it and, thus, contended Arbour and Morice, the RCMP has impliedly waived any public interest privilege that may have attached to this ongoing investigation.

[43] Arbour and Morice concluded that they have established sufficient relevance – under either the *O'Connor* or *Chan* process – for the panel to review the material sought, preferably using the *Chan* procedure, in order to determine whether the RCMP's claim of public interest privilege outweighs Arbour and Morice's right to make full answer and defence. However, it was Arbour and Morice's submission that, if the panel were to determine that the RCMP had waived that claim to privilege, then there would be no need for the panel to review any of the

THIS RULING IS UNDER APPEAL.

documentation under either the *O'Connor* or *Chan* process because all the material sought would then be required to be produced by Sgt. Fuller under the Notice to Attend.

C. Staff

[44] Staff stated that the panel could consider whether it is appropriate for the Commission to follow the modifications to the *Stinchcombe* standard as set out in *McNeil*, as not all *Stinchcombe* modifications "are necessarily appropriate for an administrative tribunal", but that regardless, the RCMP does not have a first party disclosure obligation. Staff highlighted some passages from *McNeil*, arguing that the RCMP was neither conducting nor involved with the Commission investigation.

[45] Staff also commented on relevancy. Staff stated that they understood the theory of Arbour and Morice to be that Arbour was "part of an ongoing plan" and that Staff's allegations do not reflect the actual fraud mechanism. Staff continued that, if Arbour and Morice could support that theory from the Regier and Forrest Statements, "then there is simply no need to go delving into the RCMP investigation for further information. Presumably, at that point, his defence is supported." In other words, if Arbour and Morice already have enough to support their theory of defence, no more is needed; if they do not have enough, then any further material they seek is merely fishing. Further, Arbour and Morice can cross-examine Staff's investor witnesses; if Arbour and Morice are unwilling to do that because they are unsure of the answers, then that again shows they are "simply fishing".

[46] Staff distinguished between the requested production of the Hoffman Statements and the RCMP's production to Staff of the Regier and Forrest Statements because the latter two were prior statements under oath and would, therefore, be relevant to the credibility of Regier and Forrest in the Hearing because they had lied to the Commission in the past. Since, Staff said, Hoffman's credibility would not be in issue in the same sense – because there was no indication of Hoffman lying to the Commission – the Hoffman Statements would not be required in the same way. Staff submitted that just because Staff intend to call Hoffman as a witness does not make the Hoffman Statements relevant. Further, Staff contended that what Hoffman may or may not have said to the RCMP during its investigation of Strategic and Capital Alternatives is not relevant to the Hearing. Staff confirmed that they are unaware of the scope of the RCMP investigation, other than as detailed in the Information.

D. Weis

[47] Weis referred to *O'Neill v. Canada (Attorney General)*, [2006] O.J. No. 106 (S.C.J.), stating that AG Canada bears the burden of proving that a public interest privilege applies here to protect the RCMP's investigation. Weis also stressed that a public interest privilege is a "qualified" privilege and thus very different from solicitor-client privilege. Because of its qualified nature, Weis submitted, the panel must balance the right to make full answer and defence with the right to protect the ongoing police investigation. He continued that "selective disclosure" of the Regier and Forrest Statements should be considered as a matter of fairness in that balancing process. Weis suggested that "selective disclosure" was evident from the fact that the RCMP waived privilege over the Regier and Forrest Statements requested by Staff, but "simply issued a blanket denial" instead of making "a considered or rational decision" when Arbour and Morice made their request for material in the Notice to Attend.

THIS RULING IS UNDER APPEAL.

[48] Weis also contended that the Information is so detailed as to constitute waiver of at least those portions of the RCMP material described in the Information. He noted that if, on review, there were any portions of the remaining RCMP file that needed to be redacted to avoid alerting certain individuals or the public about non-waived parts of the material, that could be done. Finally, Weis submitted that the statement obtained by the RCMP from Sorenson on 4 April 2008 (the "Sorenson Statement") may be distinguishable from the rest of the materials because of the confidentiality arrangement which, he stated, could be weighed in assessing the public interest privilege.

E. Merendon and Sorenson

[49] Merendon and Sorenson began by urging the panel to choose a procedure that works for the panel and not to feel bound by *O'Connor*, which in the civil courts means that the court will review a document for relevance. They suggested a three-stage process: (1) determine if there is privilege associated with the non-disclosed parts of the investigation – if so, that ends the inquiry; (2) if there is no privilege, then the panel would review the material to determine if it is relevant; and (3) balance the competing interests, if any.

[50] Merendon and Sorenson stated that the Sorenson Letter would properly be considered at both stages one and three of their suggested process. They contended that the deal the RCMP agreed to (including that the information would not be shared with any "regulatory agency" – here, the Commission) should not be circumvented without Merendon and Sorenson's approval, which they were not giving. For the first stage, Sorenson was "akin to an informant" and should get the benefit of that privilege, which could not be waived by the RCMP because of the Sorenson Letter and because Sorenson had not waived anything. For the third stage, they submitted the panel should balance the:

. . . fundamental public policy consideration in ensuring that when investigative authorities, and in particular authorities investigating criminal offences, find someone who is prepared to talk to them on terms, that those terms are honoured, because if they're not, that impacts law enforcement generally.

[51] Merendon and Sorenson also raised several points relating to waiver and to privilege in general. First, they argued that waiver is limited to that which was intentionally waived and that the evidence was weak regarding any intention to waive the rest of the investigation. Second, they noted the difference between positively waiving privilege (which they stated did not occur here) and a failure to assert privilege (which they stated is what the RCMP did and which does not express an intention to waive). They also noted that the evidence does not suggest that Sorenson himself is being investigated by the RCMP. Third, they pointed out that the "innocence at stake" and "full answer and defence" concepts from the criminal context do not apply here because there is no evidential foundation of such serious harm.

[52] Merendon and Sorenson submitted that it is increasingly important for the panel to determine what is and is not relevant in the Hearing. For example, they bluntly characterized Arbour and Morice's theory as "a theory without a foundation" and "potentially a massive waste of time". They also noted that, despite Staff's extensive disclosure regarding Hoffman, it is still unclear to them what Hoffman would testify to that would be relevant to the issues in the

THIS RULING IS UNDER APPEAL.

Hearing. Merendon and Sorenson also objected to the fact that Arbour and Morice – who are in the best position to provide support for their theory of defence – did not provide any evidence, such as some evidence about Morice's knowledge regarding investors apparently intending to invest in SGD or some evidence from even one investor who could describe this supposed intention to invest in SGD.

IV. ANALYSIS

A. Context

1. Nature of Commission Enforcement Proceedings

[53] 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.

[54] 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.

[55] 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.

[56] 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:

THIS RULING IS UNDER APPEAL.

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.

[57] 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.

2. Scope of the Hearing

[58] A Commission hearing panel is charged with the responsibility to determine whether the allegations made by Staff in a notice of hearing are proved, and, if so, whether any orders ought to be made as a result. The scope of a Commission enforcement hearing is defined by the notice of hearing, which limits the facts and issues that will ultimately be contested by the parties during the hearing and limits the findings that can be made by a Commission hearing panel. Thus, in this case, the scope of the Hearing is limited to the allegations of facts and contraventions set out in the Notice of Hearing and defences relevant to those allegations. We reproduce here the excerpts from the Notice of Hearing that are germane to this application:

Allegations

Summary of Breaches

- 1 Staff of the Commission (Staff) alleges that Arbour Energy Inc. (Arbour), Dennis Morice (Morice), Heinz Weis (Weis), Arthur Wigmore (Wigmore), Milowe Brost (Brost), The Institute For Financial Learning, Group of Companies Inc. (IFFL), Merendon Mining Corporation Ltd. (Merendon), and Gary Sorenson (Sorenson) (collectively, the Respondents), engaged in a course of conduct relating to the securities of Arbour that perpetrated a fraud on Alberta investors.
...
- 3 Staff alleges that Arbour, Morice, Weis, Wigmore, Brost, and IFFL engaged in an illegal distribution of Arbour securities.
...
- 5 Staff alleges that Arbour, Morice, Weis, and Wigmore made false or misleading statements to investors in offering documents.
- 6 Staff alleges that Arbour, Morice, Weis, and Wigmore failed to file continuous disclosure documents as required by the Alberta securities laws, and failed to provide timely and reliable continuous disclosure to existing and prospective investors.
- 7 Staff alleges that the Respondents acted contrary to the public interest.
...

THIS RULING IS UNDER APPEAL.

Fraudulent Course of Conduct

- 31 Staff alleges that the Respondents directly or indirectly participated in a course of conduct relating to the securities of Arbour that they knew or ought reasonably to have known perpetrated a fraud on the Arbour investors. The Respondents [sic] conduct placed the pecuniary interests of the Arbour investors at risk and caused them to invest in Arbour without any or any sufficient disclosure of the use to be made of their invested funds.
- 32 Staff further alleges that it was the intention of the IFFL, Brost, and Sorenson, with the input and assistance of some or all of the remaining Respondents, to raise funds through the sale of Arbour securities to IFFL members, and then to move those funds offshore to Merendon, or to other entities owned, controlled or directed, beneficially or otherwise, by some or all of the Respondents.
- 33 Particulars of the fraudulent conduct includes [sic] the allegations elsewhere in this Notice and the following:
- 33.1 Arbour raised in excess of \$46,000,000 in approximately 16 months, despite doing no advertising or promotion of the Arbour preferred share offerings;
- 33.2 No one at Arbour, Morice included, solicited investors for Arbour's preferred share offering. Instead, investors contacted Arbour expressing interest in the shares;
- 33.3 Expedia Logistics, a company whose sole shareholder and director is Brost's stepson, James Verbeem, received a \$257,000 "fee" for performing office administration services and ensuring that Arbour met the terms of the offering memorandum exemption;
- 33.4 Arbour made a purported short term "loan" of \$10,000,000 to Merendon, on a "handshake" deal with Sorenson, without any or any commercially reasonable security;
- 33.5 A written loan agreement with Merendon was only prepared by Arbour, months later, following a request by Arbour's auditors;
- 33.6 Throughout 2005, Arbour advanced to Merendon \$28,000,000 of a \$45,000,000 loan commitment, again on a "handshake" arrangement with Sorenson;
- 33.7 Late 2005, after the majority of the \$28,000,000 was advanced, the \$45,000,000 loan commitment was documented, with security for the debt in the form of alleged interests in mining concessions owned by an offshore subsidiary of Merendon. Arbour did little or no due diligence to assess the security, and was aware, in any event, that the value of the security did not support the loan;
- 33.8 The money was loaned to Merendon on the understanding that Sorenson would use his "influence" and "clout" to arrange for and close international oil and gas transactions;
- 33.9 Merendon used a portion of the funds for operations, despite allegedly having, according to Sorenson, cash to repay the funds loaned plus gold on deposit in excess of that amount;
- 33.10 One or both of True North Productions L.L.C. (**True North**), a company managed by Brost, and Brost, directed Merendon to transfer, and it so did, some of the funds raised from Arbour investors to True North [original emphasis];
- 33.11 In 2004, Merendon had revenue of \$0, and in 2005 Merendon had revenue of \$9,286 and an accumulated deficit of \$23,072,103;

THIS RULING IS UNDER APPEAL.

- 33.12 In total, \$38,000,000 was loaned by Arbour to Merendon on a handshake basis with little or no due diligence by Arbour or its directors, Morice, Wigmore, and Weis, and despite the knowledge of Wigmore, a shareholder and former director and President of Merendon, that all of Merendon's assets were secured at the time of the Arbour loans by a charge relating to a \$20M loan made to Merendon in 2002 by Syndicated Gold Depository;
- 33.13 In approximately January 2005, Arbour agreed to purchase Canadian Oilsands Recovery Enterprises Ltd. (COREL) from four parties, two of whom were Merendon and Monkman Consulting Medicine Hat Ltd., for approximately \$10,300,000, of which \$4,800,000 was paid in cash;
- 33.14 Jack Monkman, the beneficial owner of Monkman Consulting Medicine Hat Ltd., is a former director of Merendon;
- 33.15 Merendon paid \$52 when it acquired its approximate 40% interest in COREL in November 2003;
- 33.16 Arbour intentionally did not disclose the arrangements with Merendon in the OM's [sic], purportedly due to Morice's belief that Merendon was a very private company and would not want to be named in the documents;
- 33.17 Merendon, Sorenson, and Jack Monkman were sanctioned by the Commission on October 24, 2000, for making misrepresentations to investors with the intention of effecting trades in the securities of Merendon, for trading in securities without registration, and for trading in securities without a prospectus or appropriate exemption;
- 33.18 Arbour distributed approximately \$1,900,000 to Arbour Energy USA, a wholly owned subsidiary of Arbour that was never disclosed to investors in any of the OM's [sic];
- 33.19 Arbour distributed approximately \$70,000 to Arbour Energy Caribbean Ltd., a wholly owned subsidiary of Arbour that was never disclosed to investors in any of the OM's [sic]; and
- 33.20 Approximately \$43,000,000 of the \$46,000,000 was either loaned or paid to Merendon by Arbour, with little or no security and no or wholly inadequate disclosure to investors.

[59] The Notice of Hearing alleges that Arbour is an Alberta company and that at "all material times" Morice was its president as well as one of its directors (Weis and Wigmore being two other directors). The Notice of Hearing alleges that Arbour traded and distributed securities using offering memoranda dated 14 July 2004, 19 January 2005 and 26 September 2005 (the "OMs") as the selling documents and that the OMs "all contained false or misleading statements or failed to contain information necessary to make a statement not misleading." The Notice of Hearing alleges that Morice was responsible for preparing the OMs, certified that the OMs did not contain misrepresentations and filed the OMs with the Commission. The Notice of Hearing also alleges that all of the Respondents engaged in a course of conduct involving the manner in which Arbour funds were raised (the use of the OMs that contained false or misleading statements) and the subsequent uses to which investor funds were used (alleged payments to Expedia Logistics, Merendon, Arbour Energy USA, Arbour Energy Caribbean Ltd. and the purchase of an interest in Canadian Oilsands Recovery Enterprises Ltd.), which amounted to a fraud on Arbour securityholders.

THIS RULING IS UNDER APPEAL.

[60] In short, the Notice of Hearing focuses on Arbour, alleging capital market misconduct by several individuals and companies with Arbour securities as the focus. While the Hearing will address a variety of alleged contraventions of Alberta securities laws, it is only the allegation of fraudulent conduct that is relevant for the purposes of this application. Arbour and Morice have not suggested that any of the material sought in the Notice to Attend would be relevant to defending against any of the other allegations in the Notice of Hearing.

3. Scope of Arbour and Morice's Theory of Defence

[61] Arbour and Morice's theory of defence appears to us to be two-pronged. First, Arbour and Morice stressed that the Arbour investors intended all along to invest in SGD (not Arbour) to achieve promised extraordinarily high returns; consequently, those investors were not misled by information in the Arbour OMs regarding the use of proceeds from the sale of the Arbour securities, and there was no fraud. Second, Arbour and Morice repeatedly referred to the events allegedly occurring with Arbour as part of a "larger fraudulent scheme" – that is, Arbour and Morice wish to present a defence based on Arbour being only one component in a larger scheme.

[62] In our view, the first prong of Arbour and Morice's theory of defence could have merit when considered in the context of the allegations of fraudulent conduct in the Notice of Hearing, which are premised on investor reliance on the OMs. However, we do not accept that the second – and much broader – prong could have any success as a defence to the allegations of fraudulent conduct in the Notice of Hearing. Even if Arbour and Morice were to prove a "larger fraudulent scheme" or that Arbour was "part and parcel of an ongoing enterprise for the raising of money to provide to particular interests", that simply would not address the specific allegations in the Notice of Hearing: that Arbour and Morice certified and filed false and misleading OMs; that there were investors who relied on those false and misleading OMs in purchasing Arbour securities; that investor funds were used for purposes not disclosed in the OMs or for commercially unreasonable purposes; and that this conduct contravened the Act, including perpetrating a fraud on Arbour investors. What is in issue and will be decided in the Hearing is whether there was fraudulent conduct by Arbour and Morice and the other Respondents in the selling of Arbour securities. The Hearing is not an inquiry into other, or broader, fraudulent conduct.

[63] For the foregoing reasons, we consider in our analysis only the first – the narrower – prong of Arbour and Morice's theory of defence.

B. Nature of RCMP's Obligation under the Notice to Attend

1. First Party or Third Party Disclosure?

[64] Arbour and Morice, relying on *McNeil*, contended that the RCMP has no typical third party status in these proceedings but rather has a first party disclosure obligation to the Respondents. They said this is so because the "Commission and its Staff are, for the purpose of these proceedings, standing in the footsteps of the Crown, in the shoes of the Crown" and that, in the result, the RCMP is obliged to disclose the entirety of its investigation to the Commission as the prosecuting "Crown" agent. The Commission, once in possession of that material, would disclose from that material all relevant information to Arbour and Morice in accordance with the *Stinchcombe* standard. AG Canada and Staff strenuously argued that the RCMP, in the

THIS RULING IS UNDER APPEAL.

circumstances of this case, clearly is a third party to the investigation undertaken by Staff that resulted in the allegations made in the Notice of Hearing.

[65] Assuming that the obligation in question here is a disclosure obligation (although, as we discuss below, it, in our opinion, is not), we disagree with Arbour and Morice's assertion of a first party disclosure obligation on the RCMP. We are not persuaded that the RCMP has a first party disclosure obligation in administrative enforcement proceedings before the Commission. 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.

[66] 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* regime for third party production.

[67] 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:

THIS RULING IS UNDER APPEAL.

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".

[68] 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.

2. Production by a Third Party Witness

[69] The material requested from the RCMP is third party material. Much of the parties' written and oral submissions concerning the procedure to be followed for ordering production of the requested material focused on what we would refer to as "disclosure" cases, such as *Stinchcombe*; *McNeil*; *R. v. Trang*, 2002 ABQB 19; and *Chan*. We note that the parties' use of the concept of "disclosure" in their submissions was sometimes meant in the sense of "production".

[70] However, it is important to recognize that Arbour and Morice seek production of this third party material under the Notice to Attend in the context of an enforcement hearing. Our authority to issue a notice to attend comes from section 29(c) of the Act:

29 For the purpose of a hearing before the Commission . . . , the following applies: . . .

- (c) the Commission . . . has the same power as is vested in the Court of Queen's Bench for the trial of civil actions
 - (i) to summon and enforce the attendance of witnesses,
 - (ii) to compel witnesses to give evidence on oath or otherwise, and
 - (iii) to compel witnesses to produce documents, records, securities, exchange contracts, contracts and things; . . .

[71] The Notice to Attend here is akin to a subpoena *duces tecum* used in civil or criminal proceedings to compel a third party (who is not a party to a proceeding) to attend as a witness and to produce material in that party's possession for which there is no lawful reason to withhold

THIS RULING IS UNDER APPEAL.

(which we consider to include matters of privilege and privacy) – see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1990), 78 Alta. L.R. (2d) 207 (Q.B.) at para. 2. As is the case in other forums, a witness who is not a party to a Commission proceeding and is served with a notice to attend a Commission enforcement hearing has the right to apply to have the notice to attend quashed on the ground that the testimony or material sought is irrelevant, oppressive or an abuse of process (*Ed Miller* at para. 5).

[72] As discussed in *Ed Miller* (at para. 13), the purpose of a subpoena *duces tecum* – like the Notice to Attend – is to require that material be produced for the purpose of proving relevant facts at issue in the proceeding, and not for the purpose of discovery of material from third parties. Thus, it is clear that the material sought by Arbour and Morice under the Notice to Attend is to be for the sole purpose of proving, on their behalf, facts relevant to the allegations in the Notice of Hearing and defences thereto.

[73] At times in argument, the parties appeared to blur the distinction between use of the material sought from the RCMP as pre-hearing disclosure (or discovery) and its use as evidence in the Hearing. However, the clear distinction between "discovery" and "proof" is recognized in law, as discussed in *Ed Miller* (at para. 14), quoting from Devlin J. in *Radio Corp. of Amer. v. Rauland Corp.*, [1956] 1 All E.R. 260, varied [1956] 1 All E.R. 549 (Div. Ct.) at 551-52:

... the distinction is made plain between what I have called discovery or indirect material on the one hand, and proof or direct material on the other hand. That is, I think, the true distinction with which one must approach the word "testimony" in this Act. Testimony which is in the nature of proof for the purpose of the trial is permissible. Testimony, if it can be called "testimony", which is mere answers to questions on the discovery proceeding designed to lead to a train of inquiry, is not permissible. Into which category does the present fall? It might perhaps be enough to say that it is plain enough from what I have said of the nature of proceedings in the court in Illinois that they fall into the category of pre-trial proceedings, proceedings by way of discovery.

The distinction is not whether what is to be obtained is documentary material or oral material. This distinction is whether it is a process by way of discovery and testimony for that purpose or whether it is testimony for the trial itself.

[74] Thus, discovery encompasses a search for relevant material as opposed to seeking to prove relevant facts in a hearing.

[75] Because the courts do not allow the discovery of third party material by way of a subpoena *duces tecum*, any such discovery must be accomplished through other means, if available. As Bayda J. reasoned in *Dalgleish v. Basu*, [1975] 2 W.W.R. 326 (Sask. Q.B.) at para. 18:

But should this court permit a subpoena *duces tecum* to be used as a substitute for the normal discovery-of-documents procedure? I believe it should not. The subpoena should be used for only that purpose for which it was intended and no other. If justice requires a discovery of documents then appropriate statutory provisions should be made if no procedural rules now exist for such a discovery. In short, resort should not be had to a side door if the legislators have not seen fit to open the front door.

[76] The Act does not expressly, nor has it been found to impliedly, give respondents a right by which they can initiate discovery of material of a third party. Respondents do receive pre-

THIS RULING IS UNDER APPEAL.

hearing disclosure of material in Staff's possession, both inculpatory and exculpatory, provided it has some relevance to the allegations in the notice of hearing and the defences thereto. The courts may have the power to order discovery of third party material by a respondent in a Commission enforcement proceeding, by, for example, applying the procedure set out in *O'Connor*. As noted, we understand that Arbour and Morice had applied to the Court of Queen's Bench using the procedure set out in *O'Connor* to obtain disclosure of the RCMP investigation but, for a reason unknown to us, adjourned the application so that a determination in that forum has yet to be made.

[77] Crucial to the 30 June Application is the relevance of the materials sought in the Notice to Attend. The parties differed on when, how and in precisely what context we should assess relevance, and they differed on what would be considered relevant or not. However, as we noted during the course of oral argument, we are now in a hearing and thus are governed by section 29(e) of the Act – "the Commission . . . shall receive that evidence that is relevant to the matter being heard" – which sets out a relevance standard for the admission of evidence in the hearing (modified, as necessary, to the extent set out by Wittmann A.C.J. in *Lavallee v. Alberta (Securities Commission)*, 2009 ABQB 17). The issues in a Commission enforcement hearing are defined by the allegations in the notice of hearing and the evidence sought to be introduced must be relevant to one of those issues, with the weight being tied to considerations of reliability, probative value, prejudicial effect, remoteness and so on.

[78] Material sought to be produced by a notice to attend must be relevant to the issues in the hearing and admissible. Relevant material would either directly prove a fact in issue, or go to proving facts from which a hearing panel could draw an inference in respect of a fact in issue. As discussed above, a notice to attend cannot be used as a means of discovery of material, and the material sought cannot relate to an issue that is too collateral or remote to the issues.

C. Process for Review of Notice to Attend

[79] In the circumstances before us, we are not persuaded that the Notice to Attend in its entirety can be quashed at the outset on the basis of a blanket privilege. Further, although we take some guidance from the procedures and comments set out in the disclosure cases cited to us, our task is to review the Notice to Attend to determine whether the material sought to be produced in the Hearing as evidence for Arbour and Morice is relevant and not oppressive, an abuse of process or subject to privilege or other privacy right.

[80] That review may or may not require inspection of the material sought. In some instances, we may be able to reach a conclusion on the sole basis of the request itself, in others on the basis of the request and evidence supporting that request, in still others only after an inspection of the material sought. Evidence provided in support of requiring production by a witness of material must satisfy the panel that the material sought is relevant to the issues in the notice of hearing to the standard set out in section 29(e) of the Act (modified as noted above) or satisfy the panel that there is a good reason to inspect the material to determine if that relevance standard is met.

[81] Where the request on its face is so broadly, generally or vaguely worded that it can be viewed as nothing other than a speculative, oppressive request – discovery in disguise or a

THIS RULING IS UNDER APPEAL.

fishing expedition – then the request can be quashed without any need to inspect the material sought.

[82] It may also be the case that a request, although framed with some specificity, is on its face clearly irrelevant to the issues to be determined as delineated in the applicable notice of hearing. Such a request, too, can be quashed without resort to inspection of the requested material. The same holds true where there is a request for production of specific material accompanied by no or insufficient evidence supporting such request.

[83] There may also be circumstances where a specific request, irrespective of the evidence supporting such request, can be quashed on the basis of an overriding public interest without the need for any inspection.

[84] So, too, there may be situations where the request is for well-defined material that is clearly relevant to the issues to be determined in the applicable notice of hearing. Such a request is upheld without resort to inspection of the requested material unless a claim of privilege or other privacy right is made in respect thereto.

[85] Where a panel has before it a request for specific material accompanied by supporting evidence that is not strong enough to consider the material relevant without more, but does satisfy the panel that there is good reason to inspect the material to determine if the relevance standard set out in section 29(e) of the Act is met, inspection of the material for that purpose will be ordered.

[86] In the event inspection of material is found to be necessary, the panel would order the prospective witness to produce the material for inspection by the panel to determine relevance of the material in question. On inspection, if the panel finds the material or portions thereof relevant to the issues in the proceeding, the panel will then assess the issues of privilege (such as, in this case, public interest privilege), other privacy rights and waiver.

[87] In our view, this approach is consistent with the panel's provision of procedural and substantive fairness to a respondent in an enforcement hearing, the panel's search for truth in that hearing and the efficient and timely resolution of enforcement proceedings – all part of the Commission's public interest mandate.

[88] We next consider the specific requests for material.

D. Applying Process to Specific Requests

[89] As noted, the Notice to Attend issued at the behest of Arbour and Morice seeks to have Sgt. Fuller attend at the Hearing with five separate and distinct sets of material. Before we apply the process discussed above to each of these five sets separately to determine whether to quash all or part of the Notice to Attend or to order production or inspection of any of the sought-after material, we consider the evidence relied on, and associated arguments, by Arbour and Morice in support of their contention that the material ought to be produced.

THIS RULING IS UNDER APPEAL.

1. Supporting Evidence and Arguments

[90] Arbour and Morice argued that the relevance of the entire file is indicated by the fact that the material requested in the Notice to Attend would, according to Superintendent Mattson, encompass that entire RCMP file. We reject this argument because it fails to recognize that any material requested must be relevant to the allegations in the Notice of Hearing and defences thereto. All this indicates to us – as discussed below – is that the Notice to Attend was drafted far too broadly.

[91] We give no weight to Arbour and Morice's contention that had there been nothing "relevant" in the RCMP file, Superintendent Mattson would have said so in the Mattson Affidavit or during his cross-examination. As noted above, the RCMP is running an investigation separate from Staff's investigation. The RCMP is not intimately familiar with the details of Staff's allegations in the Notice of Hearing or with Arbour and Morice's proposed narrower theory of defence. In any event, it is for the panel, not Superintendent Mattson, to make an assessment of relevance in this case.

[92] We also are not persuaded by Arbour and Morice's apparent contention that the RCMP is currently investigating Arbour. Arbour and Morice pointed to specific passages in the Regier and Forrest Statements and the Regier Interview that they claimed specifically established that the RCMP investigation is on the way to establishing the first prong of Arbour and Morice's defence – the mechanism of fraud and non-reliance of Arbour investors on the OMs. As Arbour and Morice contended:

... we have the two statements of Regier and Forrest from – conducted by the RCMP, which, by looking at them very clearly, tell us what is involved in the RCMP investigation insofar as the converging interest between this notice of hearing or this hearing and their investigation . . .

[93] However, nothing in the Information, the Regier and Forrest Statements or the Regier Interview states or implies that the RCMP investigation is "converging" with Staff's allegations before us. References in the Information and the Regier and Forrest Statements to Arbour and those connected with Arbour are quite limited. One of the references in the Regier Statement actually contradicts the contention made by Arbour and Morice – at the start of Regier's interview, one of the RCMP officers stated: "OK – and you understand that we are currently conducting ah [sic] an investigation into Strategic Metals, Capital Alternatives and that we've asked you to come here and be a witness here today for us?" On reviewing both the Regier and Forrest Statements, we did not get a sense that the interviewing RCMP officers were particularly concerned with or interested in Arbour. This is further emphasized by contrasting those two statements with the Regier Interview, which is heavily focused on Arbour and the allegations in the Notice of Hearing. We found even fewer references to Arbour in the Information – and note that para. 3 of the Information, which listed the individuals and entities that were the subject of the investigation, did not list Arbour or Morice. Nothing in the evidence before us convinced us that the focus of the RCMP investigation was on Arbour before the Information was issued or has since shifted to Arbour.

2. Clause E

[94] We deal with Clause E first because it can be distinguished from the other requests on the basis of its breadth and lack of specificity.

THIS RULING IS UNDER APPEAL.

[95] As noted, Clause E states that Sgt. Fuller is to bring with him and produce at the hearing:

- (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).

[96] In our view the material requested in Clause E is so vague in nature and broad in scope that this aspect of the Notice to Attend should be quashed on the ground that it is nothing other than a speculative, oppressive request – discovery in disguise or a fishing expedition.

[97] Clause E does not describe particular material but rather provides a general description of what could be a large volume of material. Indeed, we learned from Superintendent Mattson that the documents that would be produced in response to this request are contained in approximately 60 bankers' boxes, comprising approximately 104 000 pages. Apparently Arbour and Morice do not know what this material might be. Notably, Clause E seeks material "in relation to the RCMP investigation of" several individuals and entities, but the evidence before us indicates that only three of those are actually under investigation by the RCMP. Further, only four of those named in Clause E are Respondents (assuming Arbour and Morice misnamed Merendon as "Merendon Mining Inc.") and apparently only one of those is under investigation by the RCMP. Moreover, there is no evidence before us that the RCMP is investigating either Arbour or Morice. Clearly, the request for material under Clause E was one made by Arbour and Morice in speculation that something new and useful might surface that would assist them in answering the allegations made against them. This is, in our view, nothing other than an impermissible attempt at discovery of a third party or a general fishing expedition.

[98] A notice to attend that requires a third party to search for records and then bring them to a hearing must be sufficiently focused to ensure that this burden placed on the third party, a stranger to the proceeding, is not an oppressive one. However, the scope of the request for material under Clause E is so very broad and is so lacking in specificity that it is an oppressive request.

[99] For these reasons, we quash Clause E.

3. Clause B

[100] Clause (b) of the Notice to Attend ("Clause B") is a request that Sgt. Fuller produce at the Hearing:

- (b) All notes, transcriptions and recordings of interviews 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.

[101] Merendon and Sorenson contended that the Sorenson Letter limited the purpose for which documents from and an interview with Gary Sorenson obtained or conducted by the RCMP could be used. That letter states, in part:

. . . we confirm that the attendance in Honduras [Sorenson's location] will be for the following:

THIS RULING IS UNDER APPEAL.

...

2. access to the records of Merendon Mining Corporation Ltd. and its related entities, to the extent that these are related to your investigation; and
3. an interview with Gary Sorenson in Honduras.

...

... the foregoing is subject to restrictions and conditions as follows:

...

4. any information obtained by the IMET Unit of the RCMP pursuant to the above will not be provided to any other law enforcement or regulatory agency without the approval of Gary Sorenson and Merendon Mining Corporation Ltd.

[102] The Information indicated that the RCMP obtained the Sorenson Statement in Honduras and that on 7 August 2008 the RCMP received a package of documents from Solomon on behalf of Merendon and Sorenson (the "Sorenson Documents").

[103] Arbour and Morice pointed to Superintendent Mattson's unfamiliarity with all of the terms on which the Sorenson Statement was obtained in arguing that there was no evidence of anything other than "a simple letter saying here is what we would like, and there's no evidence before you that that was in fact accepted."

[104] AG Canada submitted that the panel would have to balance the information obtained by the RCMP from Sorenson with the confidentiality relationship between Sorenson and the RCMP and the interests of "encouraging or permitting the police to conduct their investigations and soliciting ... cooperation".

[105] Not surprisingly, Merendon and Sorenson argued that the RCMP made the confidentiality agreement with Sorenson to obtain certain information and "that ought not to be circumvented without the approval of [Merendon and Sorenson]. They're not approving that."

[106] In our view, the Sorenson Letter is clear evidence that the Sorenson Statement and the Sorenson Documents were intended to be kept confidential. It appears, given Sorenson's location and the argument made on his behalf, that the Sorenson Statement and the Sorenson Documents would not have been provided but for the terms of the Sorenson Letter. We do not accept the contention made by Arbour and Morice that the restrictions and conditions set out in the Sorenson Letter may not have been followed and that it is "a simple letter" rather than evidence of an agreement. We do accept the representations made to us by counsel for Merendon and Sorenson that the Sorenson Statement and Sorenson Documents were provided on terms, which included the term that the information not be given to the Commission. Given the 2008 date of the Sorenson Letter, the confidentiality arrangement was clearly made in contemplation of the Hearing (the initial Notice of Hearing was issued on 18 November 2005). We conclude that, if the terms of the Sorenson Letter had not been honoured, Merendon and Sorenson would have halted the interview and production process.

THIS RULING IS UNDER APPEAL.

[107] The RCMP obviously made the decision to obtain the Sorenson Statement and the Sorenson Documents in accordance with the restrictions and conditions in the Sorenson Letter. The RCMP agreed to these terms, and we are not prepared to order the RCMP to breach the confidentiality obligations that it owes to Merendon and Sorenson. We do not need to address whether the RCMP's discussion of the Sorenson Statement and the Sorenson Documents in the Information goes beyond the scope of the confidentiality provisions in the Sorenson Letter. Even if it did, Merendon and Sorenson were clear that they were still asserting and had not waived the confidentiality provisions in the Sorenson Letter.

[108] The public has a strong, in our view overriding, interest in upholding that confidentiality to preserve the effectiveness of the particular investigative technique in question. Disregarding the confidentiality promised by the Sorenson Letter could potentially hamper the RCMP's ability to gather evidence in a similar way in this or in other investigations. If we were to effectively hold meaningless the terms, spirit and intent of the Sorenson Letter, there would be no reason for any parties to enter into any such confidentiality agreements in the future. The RCMP could thus lose a potentially valuable investigative tool.

[109] In our view, this is one of those situations where a specific request for production of material from a prospective third party witness, irrespective of the evidence supporting such request, can be quashed on the basis of an overriding public interest without the need for any inspection. For these reasons, we quash Clause B.

4. Clause A

[110] Clause (a) of the Notice to Attend ("Clause A") is a request that Sgt. Fuller produce at the Hearing:

- (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").

[111] The Information sets out what appears to be a somewhat detailed summary of the Hoffman Statements, along with a general description of the related documents provided by Hoffman to the RCMP and sought by Arbour and Morice in the Notice to Attend. We reproduce the relevant sections of the Information in their entirety:

52. On December 20, 2007, IMET investigators Sgt. Chodyka and Sgt. Ryan spoke with Owen Hoffman ("Hoffman"), a former director of Merendon Mining Corp. and the former president of Syndicated Gold Depository ("SGD"). During the meeting Hoffman stated the following:

- a. He was the creator of SGD and designed it as an offshore company.
- b. That present during SGD's creation was [sic] Brost, Stephen Kendall ("Kendall"), and Christopher Houston ("Houston").
- c. That he, Brost, Kendall and Houston discussed how they could make money from investment opportunities. Brost and Kendall created the shell companies.
- d. During the development of the business, he met Sorenson, Larry Adair ("Adair") and Wigmore who were involved with Merendon Mining Corp.
- e. Adair was a lawyer in Florida.
- f. Adair later took over the role of President of SGD.

THIS RULING IS UNDER APPEAL.

- g. He was in possession of several years of privately recorded conversations between himself [sic], Brost, Sorenson and several other individuals involved in this investigation and that he was willing to provide a copy of these conversations to the RCMP.
- h. That Brost was known to use two aliases, M.B. Gonne and Phillip K. Collins.

53. On January 2, 2008 Hoffman met with Sgt. Chodyka and Sgt. Randall Neely, ("Sgt. Neely") also with IMET. At that time, he provided Calgary IMET an audio/video taped statement under oath. Hoffman was informed as to the consequences for Public Mischief contrary to section 140 of the *Criminal Code* and Obstructing Justice contrary to section 139 of the *Criminal Code* in providing such a statement. In the course of his statement, Hoffman advised that:

- a. He originally met Brost and Kendall in 1999 when they approached him to solicit funds for a company called Bellringer Resources and Bio-Ag Foods.
- b. He was having coffee with Brost, Kendall and Houston in Calgary when they came up with the business venture idea of an offshore finance company.
- c. They based the business concept on a Costa Rican company called Anderson Arc that was in the business of moving investment funds for companies offshore.
- d. He met Sorenson sometime later in 1999.
- e. Capital Alternatives was one of the first companies used by Brost to solicit funds from investors.
- f. He (Hoffman) was the former President of SGD.
- g. SGD was a Bahamian company but only had an office in Tegucigalpa, Honduras.
- h. He was involved in discussions with Sorenson, Brost, Kendall and Houston in creating a contract for SGD to provide capital to Merendon Mining Corp. to finance the purchase of raw gold.
- i. He moved to Honduras in January of 2000 where he was responsible for the accounting of both SGD and Merendon Mining.
- j. He looked after the funds solicited by Brost and the others for SGD and Merendon Mining.
- k. He recalled seeing approximately 3,000 to 4,000 ounces of refined gold in Merendon Mining's vault, however Merendon Mining's loan with SGD by this time was approximately \$50,000,000.
- l. Based on what he saw while employed in Honduras, specifically the lack of gold contracts, 95% of what he witnessed Sorenson tell investors and other employees were lies.
- m. He expressed his concerns to Wigmore who at the time was the president of Merendon Mining but nothing was done.
- n. He was fired from his position as president of SGD in December of 2001 and left Honduras in March of 2002.
- o. Adair who was Sorenson's lawyer in Florida became the President of SGD and was eventually replaced by Graham Blakie ("Blakie"). Blakie was Sorenson's cook in Honduras at one time.
- p. He had previously met Forrest who worked as an executive secretary for Brost.

54. During the January 2, 2008 statement, Hoffman also turned over a box of documents relating to SGD, Merendon Mining and Strategic Metals, along with an electronic copy of the recorded conversations mentioned in paragraph 52(g) of this [Information].

[112] As discussed earlier, the allegations of fraudulent conduct in the Notice of Hearing relate to a fraud "on the Arbour investors". The Notice of Hearing also alleges that the plan was to raise funds through the sale of Arbour securities, then move the funds offshore to Merendon or

THIS RULING IS UNDER APPEAL.

certain other entities. According to the Notice of Hearing, Morice became president of Arbour in 2004 and Arbour sold securities between July 2004 and November 2005 under three OMs.

[113] As noted, the narrower prong of Arbour and Morice's theory of defence is that the Arbour investors knew they were actually investing in SGD, so were not relying on the Arbour OMs in making their investment decisions. Arbour and Morice contended that the Hoffman Statements would show his involvement with SGD, although not during the time period covered by the Notice of Hearing, and that, in any event, Hoffman must have relevant evidence because Staff plan to call him. We note that the only SGD involvement alleged in the Notice of Hearing is as a creditor of Merendon:

33.12 In total, \$38,000,000 was loaned by Arbour to Merendon on a handshake basis with little or no due diligence by Arbour or its directors, Morice, Wigmore, and Weis, and despite the knowledge of Wigmore, a shareholder and former director and President of Merendon, that all of Merendon's assets were secured at the time of the Arbour loans by a charge relating to a \$20M loan made to Merendon in 2002 by [SGD];

[114] From the description in the Information, the Hoffman Statements related to his role with SGD, which was, as acknowledged by Arbour and Morice, clearly outside the time period during which the impugned activity involving Arbour allegedly took place. We understand that Staff provided the Respondents with "will says" for all of Staff's witnesses. Accordingly, the Respondents – including Arbour and Morice – are well aware of the evidence Staff are planning to adduce from Hoffman. However, none of the parties enlightened us as to how any of the evidence Staff plan to so adduce from Hoffman would be connected to the Hoffman Statements and related documents.

[115] While the Arbour investors' intentions and understanding of what they were investing in are clearly important to Arbour and Morice's defence, we are unable to find any suggestion of anything relevant to that defence in the Hoffman Statements, nor, we surmise, would we be able to draw any useful inferences therefrom. We also examined the Regier and Forrest Statements and the Regier Interview. None of those has any information supporting Arbour and Morice's speculation that Hoffman would have any knowledge relating to the intentions and knowledge of the Arbour investors.

[116] As mentioned, the evidence before us indicates that Hoffman left SGD years before Arbour began raising funds. Even if the Arbour funds did go through SGD, Hoffman would not have anything relevant to add to the Hearing as he was no longer with SGD. Hoffman and his role with SGD are too far removed from the matters before us. Although Hoffman might have some interesting information on the establishment of SGD, whether or how other funds were funnelled through SGD, and if, in fact, there was an overarching fraud, we have already rejected Arbour and Morice's claim that the purported larger fraudulent scheme forms a viable defence against the allegations in the Notice of Hearing. Accordingly, we are not satisfied that the Hoffman Statements contain any information that would be potentially relevant in the Hearing.

[117] We conclude that the evidence pointed to is insufficient to merit our inspection of, or to justify our upholding of the request for, the material specified in Clause A.

THIS RULING IS UNDER APPEAL.

[118] For these reasons, we quash Clause A.

5. Clause C

[119] Clause C is a request that Sgt. Fuller produce at the Hearing:

- (c) All notes, transcriptions and recordings of interviews conducted by the RCMP with Dwayne Martyn on June 25, 2008 and September 17, 2008.

[120] The Information sets out what appears to be a somewhat detailed summary of the Martyn Statements sought by Arbour and Morice in the Notice to Attend. We reproduce the relevant sections of the Information in their entirety:

58. On June 25, 2008, Sgt. Chodyka obtained a taped statement from Dwyane [sic] Edward Martyn ("Martyn") the former President and Director of Capital Alternatives. From July 18 to 21, 2008, I reviewed the audio recording of Martyn's statement and noted the following:

- a. He (Martyn) originally played hockey with Brost's brother Leslie Brost known as LJ. At the time he was out of work resulting from a recent battle with throat cancer.
- b. Through Leslie Brost, he was introduced to Milowe Brost (Brost) who hired him in what he terms a "mercy hiring" (hired with no specific qualifications) to put furniture together for the Capital Alternatives office in 2004.
- c. While working there he was in a position to observe Leslie Brost and Roger Holm working on the advertising campaign. Not happy with the quality of the campaign he spoke up and advised them that there was a better [sic] of doing things. He then showed them a more effective way of marketing.
- d. Brost had discussions with Martyn about putting a company together to raise money for Strategic Metals and Stone Mountain Resources.
- e. In November of 2004, Brost named Martyn as the president of Capital Alternatives and wanted the computer entry regarding Martyn's new position backdated on CORES. CORES stands for Corporate Registry System, which is a database maintained by the Province of Alberta. This database contains information on the shareholders and directors of all corporations registered in the Province of Alberta.
- f. Brost was experiencing regulatory problems with the Saskatchewan Securities Commission and as a result Brost asked Martyn to use Martyn's name as a shareholder, Director etc. [sic] as Brost wished to be able to continue using Capital Alternatives to raise funds [sic]
- g. All information used for the advertising of Stone Mountain Resources was provided by Brost, the entire thing was Brost driven.
- h. Martyn was aware that MB Gonne was one of Brost's alias' [sic] and learned of this while he worked at Capital Alternatives.
- i. In Martyn's opinion, Forrest took all of her direction from Brost and that she was Brost's former personal assistant.

59. On September 17, 2008, Martyn provided Sgt. Chodyka with a second statement, this time, in the presence of his legal counsel. The purpose of the second interview was to clarify some of the details provided in his first interview detailed in paragraph 58. The following are the pertinent details provided by Martyn:

- a. He witnessed Brost work with Richard Skeith who was counsel for Strategic Metals and Carol Weeks, a director for Strategic Metals, in the creation of the Strategic Metals OM's [sic].
- b. Brost provided all of the direction for the creation of the OM's [sic].

THIS RULING IS UNDER APPEAL.

- c. Brost was in control of Strategic Metals, he was the director of the whole program.
- d. Brad Mitchell Brost is Brost's son. Brad Mitchell-Brost was the recipient of \$242,000 loan [sic] using Strategic Metals investment funds for the purposes of a home purchase in Chestermere as detailed in paragraph 21 (a). I believe this shows the level on [sic] control Brost had over Strategic Metals investment fund by having the company lend his son \$242,000 for a home purchase. The loan was paid back within one week with no interest or service fee charged which I believe illustrates that this was not a business transaction but the improper use of investment funds.

[121] There are no references to Arbour in the RCMP's summary in the Information of the Martyn Statements. Unlike with Hoffman, however, there are some potentially significant references to Martyn in the Regier and Forrest Statements and the Regier Interview, respectively:

I didn't have any concern about Arbour [referring to why he did not want to get too involved in Arbour], I just didn't want I, I got a Bachelor of Commerce not an accountant, don't have a, [sic] I knew enough about publicly traded companies and the reporting requirements that said [sic] listen that's over and above my level of expertise. Um, lets [sic] not, you know, lets [sic] hold up at that point in time. Um ah, Dwayne [Martyn] um, shows himself with some skills with dealing with RSP providers and a few things like this, shows himself as some some [sic] knowledge of oil and gas, don't know how much, begins also assisting Arbour Energy in giving and working with the RSP providers and this that and the other thing. With Arbour Energy. Sigh. [Regier Statement]

Q: How do you know Dwayne MARTIN [sic]?

A: He was working in Arbor [sic] Energy's Office in [2004].

...

A: . . . I don't know exactly when [Martyn] came on the scene but he was working in Arbor's [sic] office answering calls for Arbor [sic] Energy for any potential investor. Helping them with their subscription, their OM. I'd walk into the office cause Strategic also had an office there so I could walk in and out freely. Ah and he was dealing with the banks as to who, who, [sic] which banks would hold Arbor's [sic] shares cause some banks didn't wanna hold shares on pink sheets cause it was all registered product. [Forrest Statement]

Q: Do you know who was involved with Arbour Energy?

A: Involved in what sense?

Q: Did work for them . . .

A: Sure. . . . I know Dwayne Martyn did some work for them, but I don't think he had any specific relationship there. [Regier Interview]

[122] There are also references in those documents to the role Martyn played with Capital Alternatives; however, those are not relevant to the allegations in the Notice of Hearing or defences thereto.

THIS RULING IS UNDER APPEAL.

[123] Although the references to Martyn's role with Arbour are brief and fairly vague, there is indication in the Regier and Forrest Statements that Martyn did perform some work for Arbour. While there is nothing in the Information's summary of the Martyn Statements about Arbour, the fact that we have other evidence indicating Martyn was somewhat involved with Arbour – and apparently with the Arbour OMs – distinguishes the Martyn Statements from the Hoffman Statements.

[124] In this case, therefore, we believe there is good reason for us to inspect the Martyn Statements to determine if there is relevant information therein relating to the issues in the Hearing. The summary of the Martyn Statements in the Information may have inadvertently omitted a reference to Arbour, may have consciously omitted a reference to Arbour as not relevant to the desired production order, or there may, in fact, be no references to Arbour in the Martyn Statements.

[125] We therefore order Sgt. Fuller to provide the Martyn Statements to the panel by 7 August 2009 for the panel's inspection and indicate to us any specific portions thereof for which the RCMP asserts privilege or other privacy claim.

[126] If we find that the Martyn Statements are irrelevant, that is determinative of the matter and Clause C will be quashed. If, however, we determine that there is information in the Martyn Statements relevant to the allegations in the Notice of Hearing or to Arbour and Morice's theory of defence (again within the narrower scope set out above, not the broader scope argued by Arbour and Morice), we must then determine the issues of public interest privilege and waiver argued by the parties on the basis of that complete information. In that event, the parties can advise whether further submissions are necessary.

6. Clause D

[127] Clause (d) of the Notice to Attend ("Clause D") is a request that Sgt. Fuller produce at the Hearing:

- (d) All notes, transcriptions and recordings of interviews conducted by the RCMP with Robert Banfield on September 28, 2008

[128] The Information sets out what appears to be a somewhat detailed summary of the evidence given by Robert Banfield (also referred to in some material before us as "Bandfield"; we will refer to him as "Banfield") during his 28 September 2008 RCMP interview (the "Banfield Statement"), sought by Arbour and Morice in the Notice to Attend. We reproduce the relevant sections of the Information in their entirety:

64. On September 28, 2008 Sgt. Neely obtained a statement from Robert Bandfield ("Bandfield") of IPC Corporate Services. Below is a summary of events as stated by Bandfield:

- a. His company, IPC Corporate Services is a web based company run out of Belize which facilitates the setting up of offshore companies and bank accounts.
- b. He first met Christopher Thompson (Thompson) when he was living in Portland Oregon and traveled to Vancouver to meet with investors.
- c. These investors required offshore companies as a term of their contract of investing with SGD.

THIS RULING IS UNDER APPEAL.

- d. He was responsible for setting up approximately 1000 companies for Syndicated Gold Depository (SGD) investors associated with Thompson and Parklane International.
- e. SGD was a company formed by Owen Hoffman (Hoffman), Milowe Brost (Brost) and Gary Sorenson (Sorenson) whose purpose was to raise money for Merendon Mining.
- f. These companies were set up as "S.A." which stands for Society Anonymous, a requirement from Brost.
- g. Later, under the direction of Brost, these companies were set up as "M.A." which is an abbreviation of Managed Accounts.
- h. According to Bandfield, in an M.A. account, all the money is pooled into one account as opposed to each investor having their [sic] own account.
- i. His understanding of the investment opportunity with SGD was that investors invested with SGD and that SGD had a security agreement with Merendon Mining whereby SGD loaned Merendon money for it [sic] mining operation. The restrictions placed on Merendon required the SGD investment money to be in the form of cash, raw gold or refined gold.
- j. The name M.B. Gonne was an alias used by Brost. That Brost had listed M.B. Gonne on one of his companies. When asked about M.B. Gonne, he said in his own words "it's Milowe Brost is gone, it doesn't take a lot to figure that out."
- k. He attended a meeting at Brost's residence in Honduras along with Sorenson, Hoffman and Larry Adair where it was discussed that SGD was now being run and split 50/50 between Brost and Sorenson [sic]
- l. He had a discussion with Casey Brost, Milowe Brost's son, approximately two years ago and Casey Brost advised that SGD had raised approximately \$400,000,000 and that their shareholder debt was \$1.25 Billion.

[129] As with the Hoffman Statements and the Martyn Statements, the RCMP's summary of the Banfield Statement in the Information does not mention Arbour, Arbour investors or the Arbour OMs. Although no time period is specified in the summary, there is nothing in any of the evidence or submissions indicating that the Banfield Statement contains anything relevant to the allegations in the Notice of Hearing or to Arbour and Morice's narrower theory of defence to those allegations. Mere speculation is insufficient. The Banfield Statement is therefore similar to the Hoffman Statements – we are simply not convinced there is a possibility of anything relating to issues in the Hearing being in the Banfield Statement.

[130] We conclude that the evidence pointed to is insufficient to merit our inspection of, or to justify our upholding of the request for, the material specified in Clause D.

[131] For these reasons, we quash Clause D.

V. SUMMARY OF RULING

[132] AG Canada's application to quash the Notice to Attend is successful in part.

[133] We have quashed all but Clause C. In respect of Clause C, Sgt. Fuller is ordered to provide the Martyn Statements to the panel by 7 August 2009 for the panel's inspection and indicate to us any specific portions thereof for which the RCMP asserts privilege or other privacy claim.

THIS RULING IS UNDER APPEAL.

[134] Our ruling on the issue of the relevance of the Martyn Statements will follow in due course.

28 July 2009

For the Commission:

"original signed by"
Glenda A. Campbell, QC

"original signed by"
Neil W. Murphy

"original signed by"
Karen A. Prentice, QC