

ALBERTA SECURITIES COMMISSION

RULING

Citation: Arbour Energy Inc., Re, 2008 ABASC 143

Date: 20080313

**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:

Stephen R. Murison
Roderick J. McKay, CA

Appearing:

Tony Bell and Deanna Steblyk
for Commission Staff

Glenn Solomon
for Merendon Mining Corporation Ltd.
and Gary Sorenson

Chris Archer
for Arbour Energy Inc. and Dennis
Morice

Paul Johnston
for Heinz Weis

Patrick Sullivan
for Arthur Wigmore

John Blair
for Milowe Brost and The Institute For
Financial Learning, Group of
Companies Inc.

Written Submissions:

15 February 2008

Date of Decision:

13 March 2008

I. INTRODUCTION

[1] This ruling addresses certain issues of pre-hearing disclosure in respect of a proceeding arising from a twice-amended notice of hearing issued on 10 September 2007 (the "Notice of Hearing") by staff ("Staff") of the Alberta Securities Commission (the "Commission"), which set out allegations against Arbour Energy Inc. ("Arbour"); Dennis Morice ("Morice"); Heinz Weis; Arthur Wigmore; Milowe Brost; The Institute For Financial Learning, Group of Companies Inc.; Merendon Mining Corporation Ltd. ("Merendon"); and Gary Sorenson ("Sorenson") (collectively, the "Respondents").

[2] This two-person panel was assigned to set a date for the hearing into the merits of the allegations and to deal with any preliminary matters that might fairly and efficiently be dealt with prior to the hearing. To that end we have heard from counsel for various of the parties in several open sessions. At one such session, on 1 February 2008, counsel for two of the Respondents, Merendon and Sorenson, raised concerns about (among other things) the state of pre-hearing disclosure provided by Staff. Counsel for Merendon and Sorenson suggested that some of the undisclosed material in Staff's possession might be subject to solicitor-client privilege in favour of his clients or, possibly, other Respondents.

[3] On 8 February 2008 we issued a written ruling on the issues raised (the "February Ruling", cited as *Re Arbour Energy Inc.*, 2008 ABASC 85), which should be read together with this ruling. The bulk of the undisclosed material in dispute was identified using a system of numbered "Items" that Staff and some of the parties had used in communication among themselves. We adopted the same Item numbering system in the February Ruling and we use it below.

[4] As noted in the February Ruling, we found ourselves unable to determine, from the information we had been given, whether the reasons given by Staff for their nondisclosure of the disputed material in their possession are sufficient and sustainable. We concluded that such a determination required a review of the material – including the sealed material – and we directed that it be provided to us for that purpose.

II. MATERIAL RECEIVED

[5] In response to our direction, Staff provided to us a considerable volume of material, as follows:

Items 1, 29, 31 and 56

- *Two sets of five binders containing copies of disputed material, not disclosed to the Respondents, identified as belonging to Items 1 (records of public inquiries to the Commission), 29 (unanswered Staff investigation questionnaires), 31 (search results) and 56 (two-volume minute book of Arbour). We also received a further set of two binders and unbound*

documents containing what we understand to be a set of the original material belonging to each of these four Items, marked with stickers to indicate portions disclosed to the Respondents.

Item 30

- *A set of two identical binders containing copies of the original and redacted original material identified as belonging to Item 30 (Staff investigation notes). We also received the original and redacted original material, unbound.*

Item 33

- *Two plastic envelopes containing sealed and unsealed paper envelopes from Staff (unsent or undeliverable) constituting the original undisclosed material identified as belonging to Item 33.*

Items 47 to 53

- *Two sets of 12 document storage boxes containing what we understand to be copies of the material obtained by Staff from the Securities and Exchange Commission in the United States (the "SEC") and not disclosed to the Respondents, together with a third set of 12 boxes containing what we understand to be an almost-complete set of this material, disclosed and undisclosed, with the disclosed material marked by stickers. (We infer, from the manner in which this material was presented to us, that the pages identified in the Schedule to this Ruling have already been disclosed to the Respondents.) All of this material was identified as falling within Items 47 to 53.*

We described some of this material in the February Ruling as the "Adair Material". However, having seen the material in this category and the separate sealed category described immediately below, we believe that our present ruling will be more easily understood if we instead refer to the material, disclosed and undisclosed, in these sets of 12 boxes as the "SEC Material".

Each copied page of the SEC Material bore a notation to the effect that it had been provided by "LLA" or Larry Adair ("Adair") pursuant to a subpoena. We infer that this notation refers to the manner in which the SEC, not Staff, obtained the material. Each such page (there are tens of thousands of pages) was also serially numbered, a numbering system we adopt for convenience in this ruling. (The only exceptions to this numbering within the SEC Material were page dividers, mentioned below, and rare instances of unnumbered pages that appear to have originated with

the copying service.) We checked for missing pages using this serial numbering and found only a few pages unaccounted for within the SEC Material and the sealed box mentioned below.

The pages in these 12 boxes were unstapled. Some clearly went together as part of the same multi-page document; in other cases that was less clear. Some were simply copies (for example, facsimile confirmation reproductions of the first page of a facsimile transmission of other adjacent pages). There did not appear to be any reason, other than space, for the division of the material among document boxes. Pages or groups of pages in the boxes were separated by unnumbered, blank coloured pages. We infer that these dividers signify some sort of grouping or division, or both, of the original source material (for example, pages stapled or clipped together in an original file appearing sequentially in the SEC Material and separated from other adjacent pages by these dividers, and entire files or sections of a filing system being similarly denoted in the SEC Material by these dividers).

It appears that the SEC Material came from files or records maintained in a business and professional office; in context, the office of the source of the material, Adair. It is reasonable to assume that, as in any such office, some or all of the material would have been kept together in file folders or some comparable arrangement, segregated from other material according to some sort of filing system. There were, indeed, among the boxes pages that appeared to be copies of the front of file folders or filing dividers, suggesting that subsequent pages in the SEC Material were kept together in the original source material.

Given this, we infer that some of the adjacent contents of the SEC Material are reasonably viewed as constituting groups of material, even if, when viewed in isolation, an individual component might not demonstrate an obvious connection with the others.

Some pages appeared more than once within the SEC Material. This sort of duplication is, in our experience, not untypical of office filing systems in which copies of the same document are filed in different places for different purposes, and for convenience.

Sealed material

- *One sealed document box – which we opened for the purpose of making this ruling – containing four paper envelopes (three sealed and also opened by us) and many unbound pages, including page dividers. A small portion*

of the unbound material consisted of documentation related to communications between Staff and other securities regulatory authorities ("Regulatory Communication"). All of the other unbound material and all of the contents of the four paper envelopes, apart from the dividers, consisted of serially-numbered pages (corresponding to pages omitted from what we described above as the almost-complete set of Items 47 to 53), each page bearing the reference to its having been provided by Adair pursuant to a subpoena. They clearly had the same origin as the SEC Material in Items 47 to 53.

For convenience, we refer below to the material in the sealed box, including the Regulatory Communication, as the "Sealed Nondisclosure".

Other categories

- We directed in the February Ruling that undisclosed information in two further categories be provided to us for our review: "documents concerning a complaint by one Angel Lori; and correspondence between securities regulators apart from that not disclosed under [I]tem 33". We did not receive material in either category identified as such. The name "Angel Lorie" does, however, appear in the SEC Material. The only material we received in the form of communication between securities regulators was the already-mentioned Regulatory Communication.

III. PROCESS FOLLOWED

[6] We reviewed all of the material provided to us.

[7] Our task is not to confirm or reject each particular disclosure by Staff but rather to undertake our own analysis and reach our own conclusions on the disclosability of the disputed material and to make appropriate directions in light of governing law and principles. We therefore do not focus on the particular disclosure decisions Staff made. We have reached some different conclusions from Staff as to the disclosability of certain of the disputed material.

A. Material Other than SEC Material and Sealed Nondisclosure

[8] In respect of all of the disputed material other than the SEC Material and the Sealed Nondisclosure, we endeavoured first to determine whether a particular document (or isolated page) is "relevant" in the sense of there being "a reasonable possibility of the information being useful to [a Respondent] in making full answer and defence" (see the jurisprudence quoted at para. 8 of the February Ruling). The material that we concluded is not relevant is not disclosable on that ground alone.

[9] In the case of material that we considered surmounted the low threshold of relevance and thus prima facie disclosable, we then considered whether it might nonetheless not be disclosable by reason of a privilege or immunity.

B. SEC Material and Sealed Nondisclosure

[10] We took a somewhat different approach to the SEC Material and the Sealed Nondisclosure. Our reasons were, first, the provenance of most of this material – all but the Regulatory Communication having come from the custody of Adair – and, second, in the case of the Sealed Nondisclosure, the fact that Staff themselves had already identified that portion of the material originating from Adair's custody as being potentially subject to solicitor-client privilege (hence its having been sealed). We thus concentrated in the first instance on endeavouring to discern whether such a privilege might indeed attach to any of the SEC Material or the Sealed Nondisclosure and, if so, in favour of whom (that is, which client or clients?) and, in particular, whether the privilege rests with any of the Respondents. Material that we considered to be subject to solicitor-client privilege is to be segregated for separate handling. We have not further assessed its relevance because, given no assertion of or reliance on any exception to solicitor-client privilege, the privilege prevails irrespective of any relevance.

[11] Next, we considered whether any of the SEC Material and Sealed Nondisclosure to which solicitor-client privilege does not apply is relevant. If not, it is not disclosable. If it is relevant, we then considered whether some other privilege or immunity might nonetheless preclude its disclosure.

IV. ANALYSIS, CONCLUSIONS AND DIRECTIONS

[12] Our conclusions and reasons, and further directions, follow.

A. Item 1 – Records of Public Inquiries to the Commission

1. Nature of the Material

[13] The disputed material belonging to Item 1 consists of notes of contacts (by telephone or e-mail) received by Staff. Most of the notes provide an identification of the "caller" (sometimes cursory) and some contact information, and all provide a description of the contact, including the Staff response. Many of the contacts – some apparently prompted by news reports – were inquiries about particular investment products or promotions, issuers or sellers, identified with varying degrees of precision, some quite vague. Others were expressions of concern or complaint about such matters. Staff responses included directing callers to information available on the Commission's website. In some cases matters were referred to other more specialized Staff for follow-up.

2. Positions of the Parties

[14] Some notes of contacts belonging to Item 1 were disclosed by Staff to the Respondents. Staff based their nondisclosure of the remainder on irrelevance or privilege, the latter presumably public interest immunity or section 45 of the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act").

[15] Counsel for Merendon and Sorenson did not find Staff's description of the disputed material and their reasons for nondisclosure useful.

3. Analysis

[16] As discussed in the February Ruling, there is a low threshold of relevance for disclosure purposes, but there is a threshold. For us to conclude that a document is disclosable, there must be a reasonable possibility of its being useful to a Respondent in making full answer and defence to an allegation made in the Notice of Hearing.

[17] Much of the disputed Item 1 material includes mention of the names of one or more of the Respondents. That might (and did) prompt our further attention to the material, but the mere mention of a Respondent's name is not, in our view, dispositive on the issue of relevance – even applying the low threshold of relevance enunciated by the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

[18] Nor, in our view, does a caller having been identified in the disputed Item 1 material constitute that caller a "witness" in this or any other enforcement proceeding, or bring that individual within the class to whom a respondent must conceivably be given access as considered in *Smolensky v. British Columbia (Securities Commission)*, 2004 BCCA 81 (leave to appeal refused [2004] S.C.C.A. No. 274). Were Staff to have followed up with such a caller in the course of their investigation of the Respondents, our view might well be different, but the mere fact of contact having been made by a member of the public and answered by Staff as reflected in the disputed Item 1 material does not in our view render it relevant within the meaning of *Stinchcombe*.

[19] Our review of the disputed Item 1 material led us to conclude that most, and possibly all, would not reasonably be of potential use to a Respondent in making full answer and defence to an allegation made in the Notice of Hearing – in other words, it is irrelevant. Most (and possibly all) of it would therefore not be disclosable on that ground alone.

[20] There is another aspect to this type of material that we consider important. The Commission is charged with regulating the Alberta capital market in the public interest, for purposes including protection of investors and fostering confidence in the fairness of the capital market. Integral to this function is communication with the public. An essential part of such communication is contact initiated by members of the public –

whether seeking information, conveying concerns, or providing information about suspected improper activity in the capital market. This sort of communication (and Staff responses) can assist, inform or reassure the callers. It can also serve the capital market more broadly: it can assist Staff in detecting problems or misconduct in the capital market and in developing responses ranging from targeted communication, through compliance reviews or changes in Alberta securities laws or policies, to formal investigations.

[21] We consider there to be a clear and significant public interest in fostering the type of communication embodied in Item 1 – public-initiated contacts – and candour in such communication. We believe that this requires recognition and protection of the legitimate, reasonable expectation of callers that their communication in this form will be kept private. The very fact that they pose their questions or express their concerns about particular investment products, promotions, persons or companies to Staff implies that they are uncomfortable (or have been unsuccessful) in doing so more directly to the particular persons or companies. Callers should not be concerned that their communication will, without their knowledge and permission, be relayed to the persons or companies who might be the object of their inquiries. More generally, if this expectation of privacy is not honoured, the candour essential to such communication, if not the communication itself, could cease in future. The consequent communication "chill" would, we believe, be injurious to the public interest.

[22] So, to the extent that any of the disputed Item 1 material is relevant – and it would be marginally relevant at best – we believe that the important public interest in fostering such communication through nondisclosure outweighs any impact of nondisclosure on a Respondent's ability to make full answer and defence to an allegation in the Notice of Hearing (see *R. v. Chan*, 2002 ABQB 287 at para. 145). In sum, the disputed Item 1 material is in our view the sort of communication appropriately protected by public interest immunity.

[23] Further, to the extent that any of the disputed Item 1 material is relevant, we are also of the view that section 45 of the Act protects it from disclosure. The need to balance competing interests – the interest of a respondent in disclosure of a third party's confidences and the interest of the third party in nondisclosure – in applying an Ontario provision approximating section 45 was recognized by the Supreme Court of Canada in *Deloitte & Touche LLP v. Ontario (Securities Commission)*, 2003 SCC 61 at paras. 29-30:

... I believe the OSC [Ontario Securities Commission] properly balanced the interests of disclosure to Philip and the officers [respondents] along with the protection of the confidentiality expectations and interest of Deloitte [a third party]. In this respect, I am of the view that in making a disclosure order in the public interest under s. 17, the OSC has a duty to parties like Deloitte to protect its privacy interests and confidences. That is

to say that OSC is obligated to order disclosure only to the extent necessary to carry out its mandate under the Act. In this case, the OSC properly weighed the necessary disclosure and the interests of Deloitte

The order of the OSC properly balanced the interests of Deloitte and its own obligation to conduct hearings under the Act fairly and properly by restricting the disclosure to that which was necessary to pursue the OSC's mandate.

[24] Clearly, the balancing of competing interests in disclosure and nondisclosure pursuant to section 45 of the Act need not jeopardize a respondent's entitlement to a fair hearing. Nor does fairness demand perfect disclosure (see *Re Workum*, 2005 ABASC 986 at paras. 44-46).

[25] For purposes of section 45 of the Act, we find that the important public interest militating against disclosure of communication in the nature of the disputed Item 1 material, discussed above, outweighs any interest of the Respondents – and of the public generally – in disclosure of such communication, which would be marginally relevant at best.

[26] For the reasons given, the disputed Item 1 material is not disclosable.

4. Conclusion on Item 1

[27] *The disputed material belonging to Item 1 need not be disclosed to the Respondents.* (The panel is returning all of the Item 1 material in its possession to Staff.)

B. Item 29 – Unanswered Staff Investigation Questionnaires

1. Nature of the Material

[28] The disputed material belonging to Item 29 consists almost entirely of preprinted questionnaires for use by Staff to solicit information by telephone from persons whom Staff apparently believed had invested in the Respondent Arbour. The questionnaires have spaces – all filled in – in which the Staff caller could write the name of the interview target and the telephone number used; the date and amount of the supposed investment in Arbour; and the date and time of attempted contact. One exception to this pattern was an e-mailed questionnaire, sent to an interview target apparently in response to that target's request to communicate by that means; in this case the e-mailed questions are essentially a condensed version of those in the preprinted questionnaires.

[29] These disputed questionnaires (the e-mailed questionnaire among them) were not answered: there was no contact made at all; Staff merely left a message on a telephone answering machine or with an individual not the interview target; or (as mentioned) a call recipient directed Staff to e-mail questions.

[30] Also included in the disputed Item 29 material are printed results of a corporate search in the nature of contact information and printed results of what appears to be a search of a computer database producing personal information about interview targets, including physical characteristics and contact information. According to Staff's earlier submissions, the latter search results (described as "demographic search results") were obtained by them from a source unavailable to the public.

2. Positions of the Parties

[31] Staff contended that these unanswered questionnaires and demographic search results are irrelevant or privileged and, further, that the latter are private.

[32] Counsel for certain of the Respondents contended that this information is relevant. They suggested to us that, although Staff did not question these interview targets, the information contained in the disputed Item 29 material might still assist a Respondent in preparing a defence. As counsel for Merendon and Sorenson put it, this information "goes . . . to the soundness of the investigation", "allows us to put things to investigators" and "gives us a head start in terms of contacting witnesses ourselves". Counsel for Arbour and Morice elaborated concerning what he described as "proposed contact with investors": "it's one thing if someone didn't pick up the telephone, but quite another if [Staff have] been told to go away because they don't have anything to say in this regard."

3. Analysis

[33] We began our analysis of the disputed Item 29 material by considering relevance. We were not persuaded that contact information that did not result in questionnaires being answered is relevant within the meaning of *Stinchcombe*. The accuracy of at least some of the contact information is unclear, and none of it is indicative of the interview targets' state of knowledge or willingness to talk. Whether accurate or not, all of the contact information, if disclosed, would be at most of minor convenience to the Respondents. Conveying such information to them might be a courtesy but in our view the information falls short even of the low *Stinchcombe* threshold of relevance. Had the targets actively refused to answer the questionnaires, our view might be different.

[34] We also conclude that the personal information, apart from contact information, about the interview targets in the disputed Item 29 material – that revealed by the demographic searches of a non-public source – is of no reasonable possible use to a Respondent in making full answer and defence. That is, it is irrelevant.

[35] Further, while we consider that information elicited by Staff in a telephone inquiry of a supposed investor might be relevant – both the answers and the questions to which they responded – questions intended to be but never actually posed, obviously without answers, seem to us of no relevance. We were also not persuaded that knowing who Staff had *not* been able to speak to in the course of their investigation is truly relevant to

defending against allegations arising from such investigation. An enforcement hearing is an inquiry into the merits of the allegations concerning conduct of a respondent, and the appropriateness or otherwise of issuing any protective or deterrent orders. A hearing is not an inquiry into the quality of a Staff investigation. (Moreover, weaknesses in an investigation would presumably impair the prospects of the Staff case, not the defence of a respondent.) In any event, the fact that a questionnaire was unanswered tells us nothing about whether subsequent contact was made in some other form. This is an instance of an absence of information. The questions intended to be but never posed to interview targets are not relevant.

[36] We do, however, consider certain of the disputed Item 29 material to be relevant. Given that the allegations in the Notice of Hearing relate, among other things, to securities distributions, we consider that the names of the supposed Arbour investors and the dates and amounts of their respective investments, as recorded by Staff on the unanswered questionnaires, might be of reasonable possible use to a Respondent in making full answer and defence to the allegations. We posit that a Respondent might wish to follow up by contacting the supposed investors directly.

[37] Moving from relevance to potential privilege or immunity, we consider that some of the disputed Item 29 material is not disclosable even if relevant. The contact information recorded on the unanswered questionnaires was obtained by Staff from a source or sources not apparent in the material before us. There is, not infrequently, a reasonable expectation of privacy associated with such personal information (sometimes obtained by Staff from non-public databases). Accordingly, even if this contact information were considered relevant, given its confidential nature and the uncertainty as to its provenance, we consider that the interest of the third-party interview targets in its nondisclosure outweighs the at best slight interest of the Respondents in its disclosure. Thus, section 45 of the Act – or public interest immunity (see *R. v. Trang*, 2002 ABQB 19 at paras. 98-110; and *Chan* at paras. 137-144) – would preclude its disclosure in the public interest.

[38] We also consider that the demographic search results obtained by Staff from a non-public source are protected from disclosure by public interest immunity inasmuch as they both go to Staff investigative techniques and contain information to which attaches an obvious, overriding privacy interest (see *Trang* at paras. 49-50, 55). The public interest in maintaining the confidentiality of the demographic search results clearly outweighs any impact of its nondisclosure on a Respondent's ability to make full answer and defence to an allegation in the Notice of Hearing (see *Chan* at para. 145).

[39] In short, we conclude that, of the disputed Item 29 material, the only disclosable information consists of the names of the supposed Arbour investors and the dates and

amounts of their respective supposed investments, as recorded by Staff on the unanswered questionnaires.

4. Direction on Item 29

[40] *We direct Staff to disclose to the Respondents, on the terms set out below, the names of the interview targets, together with the dates and amounts of their supposed respective investments in Arbour, as recorded on the unanswered questionnaires belonging to Item 29. The disclosure may be made, at Staff's option, either by providing extracts from or redacted copies of the unanswered questionnaires, or by compiling and providing an appropriately labelled list with this information in it. (To this end, the panel is returning all of the Item 29 material in its possession to Staff.)*

C. Item 30 – Staff Investigation Notes

1. Nature of Material

[41] Item 30 consists of typed notes of Staff's investigation, a redacted copy of which was apparently disclosed. We were given redacted and unredacted copies and originals.

[42] We understand that the dispute relating to Item 30 is limited to the redactions described by Staff as "personal information of third parties". That personal information took the form of two names, some telephone numbers, a street address, an e-mail address and a city reference.

2. Positions of the Parties

[43] Staff claimed that the disputed Item 30 material was protected from disclosure by virtue of section 45 of the Act and, insofar as confidential informants were implicated, public interest immunity.

[44] Counsel for Merendon and Sorenson argued that the disputed Item 30 material is relevant and disclosable.

3. Analysis

[45] We first note that we consider the disputed Item 30 material to be of no reasonable possible use to a Respondent in making full answer and defence to an allegation in the Notice of Hearing. In our view, all of the redacted information, if disclosed, would be at most of minor convenience to the Respondents, which in our view does not render the information relevant within the meaning of *Stinchcombe*. In short, we think that all of the redacted information is nondisclosable on grounds of irrelevance alone.

[46] There are further considerations. The redacted information in our view is also information to which an expectation of privacy reasonably attaches – particularly in the case of confidential informants – and, weighed against the slight possible convenience that the information might offer the Respondents in making full answer and defence, we

consider that this expectation of privacy must be accorded primacy over disclosure. Thus, by operation of section 45 of the Act and (particularly in the case of confidential informants) public interest immunity, the redacted information is not disclosable.

4. Conclusion on Item 30

[47] *The disputed redactions from Item 30 were not inappropriate and we order no further disclosure of this Item.* (The panel is returning all of the Item 30 material in its possession to Staff.)

D. Item 31 – Search Results

1. Nature of the Material

[48] The disputed material belonging to Item 31 consists of 34 documents that appear to have been obtained by Staff as a result of various internet or other electronic searches. Some of the material appears to have come from publicly-available sources. Other of the material consists of personal information (including photographs) of individuals (their identity was not in every case apparent from the material before us) and quite clearly originated from non-public databases.

2. Positions of the Parties

[49] Staff contended that the disputed Item 31 material is irrelevant, which counsel for Merendon and Sorenson disputed.

3. Analysis

[50] We discern in the personal information contained in Item 31 no reasonable possible usefulness to a Respondent in making full answer and defence to an allegation in the Notice of Hearing, even if the identities of all individuals concerned were apparent.

[51] Further, in respect of the personal information obtained from non-public databases, we consider that, irrespective of relevance, it is nondisclosable by virtue of public interest immunity in that it goes to Staff investigative techniques and there is an obvious, overriding privacy interest attached to it (see *Trang* at paras. 49-50, 55). The public interest in maintaining the confidentiality of the personal information clearly outweighs any impact of its nondisclosure on a Respondent's ability to make full answer and defence to an allegation in the Notice of Hearing (see *Chan* at para. 145). Therefore, the material found at tabs 27, 28, 29, 30 and 35 of Item 31 is not disclosable.

[52] However, we consider the remaining disputed Item 31 material to be of reasonable possible use to a Respondent in mounting a defence – hence relevant – and not protected from disclosure.

4. Conclusion on Item 31

[53] *We direct that Staff disclose to the Respondents, on the terms set out below, all of the disputed material belonging to Item 31 with the exception of the material at tabs 27, 28, 29, 30 and 35 thereof.*

E. Item 33 – Unsent or Undeliverable Envelopes from Staff

1. Nature of the Material

[54] The disputed material belonging to Item 33 consists of two plastic envelopes each containing several paper envelopes. One set was marked to indicate that the enclosed envelopes had not been sent to the addressees (all outside Alberta) because the consent of the securities regulatory authorities in the other jurisdictions had not been received. The second set was marked to indicate that the enclosed envelopes had each been sent by post but returned undelivered. (We note that the only material we received in the form of communication between securities regulators was not among this Item 33 material but rather limited to the already-mentioned Regulatory Communication, the disclosability of which we discuss below.)

2. Positions of the Parties

[55] Staff contended that the disputed Item 33 material is irrelevant, which counsel for Merendon and Sorenson disputed.

3. Analysis

[56] We do not discern any relevance in unanswered correspondence from Staff, and (were it possible) even less relevance in correspondence that was not even sent or delivered.

[57] For reasons similar to those discussed above, we do consider that, if and to the extent that the addressees of this correspondence were believed by Staff to have been Arbour investors, the addressees' identities as such are relevant. However, the contact information for those individuals, in the form of mailing addresses – whether never used (the unsent correspondence) or used unsuccessfully (the returned correspondence) – in our view fails the test of relevance, offering at most a minor convenience to the Respondents. Moreover, unless such addresses are publicly available, a reasonable expectation of privacy would be at stake, invoking the protection of section 45 of the Act or public interest immunity.

[58] We conclude that the disputed Item 33 material is not disclosable, with the exception of the names of those of the addressees whom Staff believed to be Arbour investors.

4. Direction on Item 33

[59] *We direct Staff to disclose to the Respondents, on the terms set out below, the names of those of the addressees of the two sets of envelopes (unsent and undeliverable) whom Staff believed, when the envelopes were prepared, to be or to have been Arbour investors. This may be accomplished at Staff's option either by making redacted copies of the envelopes or preparing an appropriately labelled list of the names. (To this end, the panel is returning all of the Item 33 material in its possession to Staff.)*

F. Items 47 to 53 – The SEC Material

1. Nature of the Material

[60] The SEC Material (Items 47 to 53) was described in some detail above. As noted, it consists of thousands of serially-numbered pages of material obtained by Staff from the SEC, which appears in turn to have obtained the material from Adair pursuant to a subpoena. Some of the material – a relatively small portion, identified in the Schedule to this Ruling – Staff have apparently disclosed. Another relatively small portion was segregated and sealed by Staff and forms the bulk of the Sealed Nondisclosure.

2. Analysis

(a) Scope of Solicitor-Client Privilege

[61] The SEC Material seems to have originated from the office of Adair. Counsel for Merendon and Sorenson indicated in his submissions that Adair was a lawyer, and this was apparent from some of the SEC Material.

[62] On its face, this might be taken as an indication that all of the SEC Material had to do with a law practice and so falls within the scope of the privilege that protects from disclosure material pertaining to the relationship between solicitor and client. Such a conclusion would be incorrect.

[63] Solicitor-client privilege protects a citizen's confidential access to legal advice and the frank interchange between lawyer and client essential to that end. As such, communications made in confidence between lawyer and client in connection with a request for legal advice and the provision of that advice are protected from disclosure. The privilege is accorded primacy over competing interests favouring disclosure, apart from narrow exceptions or waiver of the protection by the affected client. Neither exceptions nor waiver were argued here.

[64] However, the scope of the privilege is far from unlimited. Not everything passing between lawyer and client pertains to legal advice, and not everything pertaining to the lawyer-client relationship qualifies for the privilege. Conversely, when the privilege exists, it can embrace material beyond obvious communications of a request for or provision of legal advice.

[65] We consider here some of the principles of the evolving law on solicitor-client privilege, and then apply it to the task before us.

Communication in Professional Capacity

[66] For solicitor-client privilege to apply to a communication, it must be between client and lawyer in the latter's professional capacity (see *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 872-73). Communications involving a lawyer outside that professional capacity do not attract the privilege: the Supreme Court of Canada stated in *Maranda v. Richer*, 2003 SCC 67 at para. 30:

. . . not everything that happens in the solicitor-client relationship falls within the ambit of privileged communication, as has been held in cases where it was found that counsel was acting not in that capacity but simply as a conduit for transfers of funds (*Re Ontario Securities Commission and Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 (Div. Ct.)

[67] The same Court said the following in *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 50:

Advice given by lawyers on matters outside the solicitor-client relationship is not protected. . . . In private practice some lawyers are valued as much (or more) for raw business sense as for legal acumen. No solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer. . . .

Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

[68] Similar conclusions have been reached by the Federal Court of Canada: see *Canada (Minister of National Revenue) v. Singh Lyn Ragonetti Bindal LLP*, 2005 FC 1538, where the Court discerned, at para. 10, "a straight commercial relationship using the law firm's trust accounts to receive and transfer funds" and held, at para. 19, that "*Greymac* remains good law"; and *Canada (Minister of National Revenue) v. Reddy*, 2006 FC 277 at para. 14. More recently, in *Royal Bank of Canada v. Welton*, [2008] O.J. No. 678 at para. 25, the Ontario Superior Court of Justice, citing *Greymac* and *Maranda*, described the acts of a lawyer "as a conduit of funds, rather than communications".

Distinction Between Fact and Communication; Continuum of Communication

[69] Documents clearly severable from legal advice have been found not to be privileged. Thus, in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at para. 43, a majority of the Supreme Court of Canada stated that the privilege did not extend to documents not "brought into existence for [the] purpose" of obtaining legal advice. This was consistent with the distinction between communications made for the

purpose of giving or receiving legal advice (privileged) and facts or acts having an independent existence (not privileged).

[70] That said, too great a focus on the distinction between "fact" and "communication" can obscure the true nature of the interchange between lawyer and client and undermine the solicitor-client privilege. The very process of trying to make the distinction can be problematic, as the Court of Queen's Bench of Alberta noted in *R. v. Polo*, 2005 ABQB 250 at para. 35:

... it must surely be accepted that the solicitor-client relationship is a dynamic one. Therefore it is reasonable to expect that the confidential communication common to that relationship will permeate all aspects of the [solicitor's] file whether pigeon[-]holed as work product or as pure communication. It seems to me that a process which seeks to differentiate is bound to lead to arbitrariness and inconsistency.

[71] The English Court of Appeal in *Balabel v. Air India*, [1988] 2 All E.R. 246 at 254 took what might be termed a purposive approach in assessing which of a variety of documents passing between solicitor and client in connection with a real estate transaction were privileged:

In my judgment, therefore, the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do". But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

[72] The Supreme Court of Canada in *Maranda* looked to whether a third party might be able to discern, even from something not itself containing legal advice, protected information about legal advice sought or provided. While recognizing, at para. 30, that "not everything that happens in the solicitor-client relationship falls within the ambit of privileged communication", the Court held that in the circumstances before it the privilege extended to certain billing or payment information relating to a legal retainer. The reasoning was captured succinctly by a Master of the Ontario Superior Court of

Justice in *Currie v. Symcor Inc.*, [2007] O.J. No. 3225 at para. 80 (aff'd [2008] O.J. No. 812 (S.C.J.)): "[F]acts are discoverable and are not privileged. The exception to this general proposition is if the disclosure of the facts may reveal the nature of the legal advice thereby destroying the privilege." (See also *Gaetz v. Nova Scotia (Attorney General)*, 2005 NSSC 215, in which the Nova Scotia Supreme Court noted, at para. 19, that seemingly peripheral records could contain identifying information capable of undermining the privilege.)

[73] Although courts since *Maranda* have not wholly ignored the distinction between fact and communication, they apply it carefully with attention to the purpose of the privilege, to avoid protected legal advice being revealed, directly or indirectly. Thus, in *Cinar Corp. v. Groia*, [2006] O.J. No. 4753 the Ontario Superior Court of Justice held that certain information relating to legal bills was protected. The Court, at para. 24, saw *Maranda* not so much as a departure from prior law but rather (on the issue before the Court) as instructive on the need for "a careful consideration of whether disclosure of the facts of a solicitor's trust ledger constitutes disclosure of communications subject to solicitor-client privilege".

Application to Administrative Proceeding

[74] *Maranda* dealt with a seizure of material from a law office in connection with a criminal investigation. It was in that context that the Court commented, at para. 37: "It is important that lawyers . . . not have their offices turned into archives for the use of the prosecution." The British Columbia Supreme Court appeared to have a similar concern about police access to material in *Re Krhanek*, 2006 BCSC 956. These cases are thus distinguishable from the matter before us both as to facts and legal context.

[75] Solicitor-client privilege, however, is not confined to one field of law. We therefore conclude that, even in an administrative proceeding such as this (and absent waiver or an applicable exception), the privilege protects from disclosure, direct or indirect, a client's request for and receipt of legal advice.

Conclusions as to the Scope of the Privilege

[76] Applying the evolving law on the subject, as we understand it, a decision to require or deny disclosure in the context of an administrative proceeding must be made with a view to protecting the process of obtaining confidential legal advice. However, this is not a licence to block disclosure that would not undermine the privilege, for disclosure serves other important public interests. Finding the correct balance requires an assessment of the nature of the lawyer's involvement with the client, and the nature and circumstances of the particular communication or other information in question. If the item in question appears in the context of a professional legal relationship, this assessment may involve a determination of whether the item – however it might be

characterized if viewed in isolation – falls within the continuum of legal communication the disclosure of which would undermine this important privilege.

[77] Approaching the issue this way does not produce simple answers. Not everything found in the files of a lawyer falls within the privileged category. Documents must be considered in their context, not only in isolation. A document can include both privileged and unprivileged content. However, diligent attention to the objectives of the process – neither revealing (directly or indirectly) confidential legal advice nor concealing information outside the legal advice continuum – is more likely to produce correct outcomes than a narrower, but arbitrary, focus on technical distinctions or classifications.

(b) Dealing With the SEC Material as Presented

[78] Before applying our understanding of the importance and scope of solicitor-client privilege to the material before us, we had first to formulate an approach to identifying the constituents of the essentially undifferentiated mass of several thousand pages that make up the SEC Material, and then placing those constituents in context.

Obviously Connected Material

[79] As mentioned, although all of the SEC Material was presented to us unstapled and serially numbered, separated at intervals only by unmarked dividing pages, some of it obviously consisted of multi-page documents, and some other pages or documents clearly went together (for example, facsimile transmissions together with an adjacent copy of the first transmittal page confirming the transmission). We naturally considered such obviously-connected material as a unit.

Other Indicia of Connection Considered

[80] Where a page or document appeared to us to indicate that confidential legal advice had been sought or given (indicating that solicitor-client privilege attached), we then considered whether other material less obviously privileged might nonetheless be subject to such privilege because of its connection to the legal advice (that is, falling within the privileged continuum, or capable indirectly of revealing protected information).

[81] In applying this approach we looked for context, from the more obvious (indications that a sequence of pages or documents originated in the same portion of Adair's files or filing system and related to the same topic) to the less (unsigned draft documents or pages with notations that appeared to pertain to other material itself apparently privileged).

[82] Given the primacy accorded solicitor-client privilege, we proceeded with what might be described as a reasonable abundance of caution. In ambiguous cases we leaned toward concluding that the privilege applies. For example, we regarded extracts of law as sharing privilege with related analysis and advice. Even quite sparse information about

payments to a lawyer, where it appeared that the source document was kept with clearly privileged material, we have treated as sharing the privilege. In some cases we considered this type of information (payments to lawyers) as attracting the privilege in its own right (following *Maranda*) when we thought it capable of revealing an identifiable client's retention of a lawyer for a broadly discernable, legal purpose.

Redaction

[83] As noted, a document can contain both privileged and unprivileged portions. Recognizing that there are important interests favouring disclosure, we considered whether the two categories of information could usefully be severed and the unprivileged portion disclosed without producing a result either meaningless or destructive of the solicitor-client privilege.

[84] In the instances where we thought this achievable, we concluded that the correct approach is to make a copy of the document from which the privileged information can be redacted, to produce a disclosable version of the document in which the fact of the redactions, but not their content, would be apparent. Where this was not the case, we concluded that the document in its entirety is not disclosable.

Multiple Appearances of Material

[85] As mentioned, some material appeared more than once within the SEC Material. Given the importance of context in assessing the application of solicitor-client privilege to a document that does not on its face disclose legal advice, and the surviving distinction (to be made where feasible with a view to the ultimate objective of preserving the confidentiality of legal advice) between "fact" and "communication", the same document might fall within the scope of the privilege when it appears in one context (linked to or capable of revealing more obviously privileged information) but fall outside the privilege when it appears in a different context (without such a linkage or revealing capacity).

[86] Accordingly, we have not endeavoured to identify every instance in which every page of a group of privileged material appeared elsewhere in the SEC Material. Rather, we considered each appearance of a duplicated page to assess it in its respective, and sometimes different, contexts. As a result, some pages we treated as privileged (hence not disclosable) in association with other privileged material, but disclosable as they appeared elsewhere in the SEC Material.

Approach Generally

[87] We consider that our approach to the SEC Material, as described, respects the importance of solicitor-client privilege, recognizes the necessary but at times difficult weighing of competing interests favouring disclosure and nondisclosure, and corresponds to the extent reasonably practicable to how the task might more easily have been

undertaken were the panel physically present in the Adair office and able to view the source files and filing system in situ.

(c) SEC Material Includes Both Legal and Business Records

[88] Adair, as mentioned, was a lawyer. He held himself out as such (if only through his choice of letterhead) throughout the period covered by the SEC Material. The SEC Material discloses that he apparently gave up the private practice of law for a time but (at least occasionally) described himself as "general counsel" to certain corporate entities. However, it is readily apparent from the SEC Material that Adair was also a businessman. For example, in some of this material he is identified as president of Syndicated Gold Depository S.A., a name that appears frequently throughout the 12 boxes of SEC Material. He handled a large number of financial transactions for, or involving, entities or persons who might or might not have been also, or formerly, legal clients – some of whom appear to have sought or been given legal advice in addition to business service, varying with the occasion. However, in many instances the frequency, regularity and nature of the communications included in the SEC Material bear the hallmarks not of the lawyer-client relationship but rather those of business or financial dealings.

[89] Our observations on this point involve no assessment of propriety nor any finding of impropriety. The point, simply, is that Adair was both a lawyer and a businessman, he communicated through his law office for both purposes, and he sometimes communicated for both purposes with the same persons and companies.

[90] It follows, and we find, that much of what Adair did, he did as a businessman, and much of what is contained in the SEC Material constituted records of a business or businesses, not material relating to professional service and legal advice to which solicitor-client privilege can apply.

[91] The SEC Material includes a great deal of transactional data, and with it the names and contact information for many individuals and entities. This, we found, was business data relating to business transactions – even when the data related to, or the transactions passed through, bank accounts operated or maintained by Adair or over which he had apparent direction. Because it is business data, we do not consider that any expectation of confidentiality was invoked that would outweigh the Respondents' interest in disclosure (if relevant). It certainly did not (for reasons discussed) attract solicitor-client privilege merely by reason of a connection to Adair's trust or other bank accounts.

[92] It was necessary for us to review the SEC Material carefully in an effort to determine context and any connection to protected legal advice. Where we considered that a communication, or a set of material, contained protected information and thus attracted solicitor-client privilege, we then considered whether redaction would be appropriate.

[93] Finally, where we found solicitor-client privilege to apply, we endeavoured to identify the client or clients in whose favour the privilege lies. In some cases (not all) we concluded that the client is, or includes, one or more of the Respondents.

[94] We concluded that a minority of the SEC Material is subject to solicitor-client privilege and is therefore either (i) in its entirety not disclosable because of such privilege, or (ii) disclosable, but in redacted form. (There was no indication that any such privilege was waived.)

[95] The panel will remove from all three sets of boxes containing the SEC Material both the pages that we consider wholly nondisclosable on the ground of solicitor-client privilege, and the unredacted pages that we consider disclosable in redacted form. We discuss below the further handling of this segregated material.

(d) Relevance of Remaining SEC Material

[96] The remaining contents of the SEC Material we assessed for relevance. In doing so, we were mindful of the low threshold of relevance that applies, and the fact that we are not in a position to know every Respondent's understanding of the facts and possible lines of defence. For most of this material, therefore, we could not rule out a reasonable possibility of its proving useful to a Respondent in answering and defending against Staff's allegations, and thus it surmounts the applicable threshold.

[97] That portion of the SEC Material that we concluded is not relevant is, on that ground, not disclosable. We discuss its further handling, below.

(e) Other Privileges or Immunities

[98] No other privilege or disclosure immunity appeared to us clearly applicable to any of the remainder of the SEC Material we have found to be relevant. We therefore regard this remaining SEC Material as disclosable, but only provisionally.

[99] We note that all of this material was obtained by Staff from the SEC. We are aware that cooperation arrangements among securities regulatory authorities may provide for information and material to be shared on conditions. We consider there to be an obvious public interest in such sharing of information, and therefore also in adherence to the terms and conditions of such arrangements.

[100] Without certain knowledge of such terms and conditions as may have attached to the SEC's cooperation in respect of the SEC Material, or an understanding of the extent to which Staff have already addressed any such terms or conditions, we are unable to conclude with certainty that wholesale disclosure of this material would not undermine a potential public interest immunity or be counter to section 46 of the Act.

[101] We note that Staff have already disclosed portions of this material, which suggests that Staff have already reached the conclusion that public interest immunity and section 46 of the Act do not prevent disclosure. Nonetheless, given the limitations on our knowledge as just mentioned, we consider it advisable to proceed with some caution on this point. We deal with this issue below.

3. Conclusion on Items 47 to 53

[102] In summary, we find that some of the material included in Items 47 to 53 (and not previously moved by Staff to form the bulk of the Sealed Nondisclosure) is not disclosable by reason of solicitor-client privilege or irrelevance. The remaining contents of Items 47 to 53 appear to be disclosable on the terms set out below. However, we first require assurance that this material is not nondisclosable by reason of section 46 of the Act or a public interest immunity arising from the manner in which, or the source from which, Staff obtained it.

[103] *We therefore direct Staff to advise this panel and the Respondents, by 16:00 on Wednesday 19 March 2008, as to whether any terms or conditions on which they obtained the SEC Material from the SEC would preclude its disclosure to the Respondents on the terms set out below. This advice may be succinct and need not disclose the terms of any arrangement or understanding with the SEC.*

G. Item 56 – Arbour Minute Book

[104] Arbour is a Respondent. The allegations in the Notice of Hearing relate to alleged trades and distributions of Arbour securities. The Notice of Hearing does not speak only of events during the period 2004 to 2005.

[105] While we cannot be certain that anything in the Arbour minute book *would* assist a Respondent in defending against the allegations made in the Notice of Hearing, and some of what is found therein seems highly unlikely (viewed in isolation) to be useful for that purpose, we nonetheless consider that the minute book as a whole is so intrinsically linked to a key party to Staff's allegations that we cannot rule out the potential utility of any of its contents. We consider that the entire minute book surmounts the low *Stinchcombe* threshold of relevance. We discern nothing in it that would be nondisclosable on some other ground.

[106] *We therefore direct that Staff disclose Item 56 in its entirety to the Respondents, on the terms set out below.*

H. The Sealed Nondisclosure

[107] The Sealed Nondisclosure was described above. As noted, with but one exception it all originated with the SEC Material in Items 47 to 53.

[108] We deal first with the exception. This was the Regulatory Communication. It relates to information-sharing between Staff and other securities regulatory authorities. We consider that this correspondence is not disclosable by reason of either or both section 46 of the Act and public interest immunity.

[109] As to the balance of the Sealed Nondisclosure, our initial review was for the purpose of determining whether it did indeed appear to be of a nature to which solicitor-client privilege might apply. We concluded that most of it does appear to relate to the provision of legal advice and, as such, that it was correctly identified as being subject to solicitor-client privilege. Nothing before us indicated that any client had waived such privilege. We endeavoured to determine who the client or clients were, and thus by whom that privilege might be claimed.

[110] We have determined that in some cases, as counsel for Merendon and Sorenson suggested, the clients appear to be (or to include) Respondents in this proceeding. In other cases, the probable client was either not clearly identifiable or, if identified, not among the Respondents.

[111] We concur with the contention of counsel for Merendon and Sorenson that material subject to solicitor-client privilege in their favour should be delivered to them and not disclosed to any non-client. The same, of course, applies to material subject to solicitor-client privilege in respect of any other Respondent. While, as indicated, in some instances we conclude that material is subject to such privilege in respect both of one or more Respondents and others (identified or not) who are not Respondents, our task here is not to redeliver such privileged material to each and every client who might have a claim on it, but rather (and more narrowly) to avoid its being disclosed improperly as part of this proceeding.

[112] Accordingly, we conclude that the material to which solicitor-client privilege may be claimed by one or more Respondents should be delivered to their counsel in this proceeding for further handling as determined by their respective client or clients – whether or not others not party to this proceeding appear also to have a similar claim of privilege.

[113] We consider that the other material to which we found solicitor-client privilege attaches – but not for the benefit of a Respondent – should not be disclosed to any party in this proceeding. The panel will reseal this other material.

[114] There remain portions of the Sealed Nondisclosure that we consider not subject to solicitor-client privilege or obvious public interest immunity. On review, we considered these portions relevant in the *Stinchcombe* sense. Subject to the concern already

mentioned above in connection with the potential application of public interest immunity or section 46 of the Act (or both) to the SEC Material by reason of its provenance from another securities regulatory authority – which Staff are to address in accordance with the direction given above – we discern no other applicable privilege or immunity attaching to these portions of the Sealed Nondisclosure. We thus consider this material in the Sealed Nondisclosure provisionally disclosable.

[115] The pages currently included in the Sealed Nondisclosure which we have found to be provisionally disclosable we will return to the SEC Material, there to be dealt with in the same fashion as the rest of the provisionally disclosable SEC Material as discussed above and on the terms set out below.

[116] Finally, we concluded above that some of the material that Staff had not transferred from Items 47 to 53 to the Sealed Nondisclosure is in fact subject to solicitor-client privilege. We reached the same conclusions as to how it should be dealt with as we did with the similarly-privileged material among the Sealed Nondisclosure: some to be sealed, and some to be returned (all copies in the panel's custody) to counsel for certain of the Respondents for the benefit of those Respondents.

[117] *The panel will arrange for the delivery of the Regulatory Correspondence to counsel for Staff, and of material subject to solicitor-client privilege in favour of Respondents to their respective counsel.*

I. Angel Lorie Material

[118] We found nothing in any of the disputed material that we could identify as relating to any complaint involving Angel Lorie other than isolated appearances of that name within the provisionally disclosable SEC Material.

J. Communication Between Securities Regulatory Authorities

[119] We discussed above the Regulatory Communication. We found no other communication between Staff and other securities regulatory authorities.

K. Manner of Disclosure

[120] There is a large volume of undisclosed documentation that we consider should be disclosed to the Respondents or, in the case of Items 47 to 53 (and the portions of the Sealed Nondisclosure being returned to the SEC Material), disclosed subject to our first receiving the assurance from Staff mentioned above.

[121] We doubt that each and every Respondent will in fact consider all of this disclosable material useful. We therefore do not consider it appropriate, or necessary in the interests of fairness, to require that all of this material be recopied and physically delivered to every Respondent. For the most voluminous of the material, it would in our

view be more prudent and more appropriate to first allow each of the Respondents to determine for themselves how much, if any, of this material they want.

[122] In addition, we note that much of this material, even if not protected from disclosure by privilege or immunity, would not in the ordinary course fall into the public domain, and we consider that it should not be used for purposes other than the hearing of this matter.

[123] We therefore make the following further directions.

1. Physical Distribution of Certain Material

[124] The disclosure we have directed of material or information from Items 29 and 33 is limited in volume.

[125] *We direct that Staff make disclosure of the specified material for these two categories directly to the Respondents, as soon as practicable.*

2. Availability for Inspection and Copying

[126] *All of the disclosure we have directed from Items 31 and 56 and, if the panel receives from Staff the assurance mentioned above, Items 47 to 53 (which, as discussed, will include the material being returned to Items 47 to 53 from the Sealed Nondisclosure and pages from the SEC Material redacted by the panel, but exclude the SEC Material that we have found to be irrelevant and therefore nondisclosable and which the panel will remove and return to Staff), will be made available to the Respondents and their respective counsel for their review **during the hours of 09:00 to 16:00** at the premises of the Commission (300 - 5th Avenue SW, Calgary, Alberta; directions to the inspection room will be given by the receptionist on the 4th floor) commencing on **Thursday 20 March 2008** and continuing for such of that and the succeeding nine business days as may be required.*

[127] *The Respondents are entitled, at their expense, to copies of such of this disclosed material as they desire. To that end, the Respondents should list the material they wish copied and provide that list to the Executive Assistant to the Chair of the Commission, who will arrange for the copying and delivery of the material so listed at the respective Respondent's expense. The disclosable material will also be available to Staff during this process, and returned to them from the inspection room at the conclusion of this process.*

SCHEDULE
SEC Material Assumed to Have Been Disclosed
(by serial page number)

62	3801-02	6286	8263
98	3926-4013	6318-19	8524-27
202	4644-45	6330-62	8611-20
315	4857	6370-87	8796-800
367	4860	6389-403	8946-51
403	4870	6646	8966-67
519	4896	6715-20	9002-05
788	4926	6748	9055-58
1634	4941	6751	9062
1979	5049	6913	9077
2067	5061-64	6915	9079
2427	5066-68	6927	9098-101
2486	5110	6929	9114-15
2653	5124-37	6933	9253
2655-59	5147-55	6938	9321
2720	5177-79	6942	9336
2909	5292	7188	9349
2940	5329	7329	9553
2947	5358	7494	9556
2951	5368	7513	9623
2969	5378	7534-36	9677
2988	5440	8018	9708-09
3007	5551	8020-27	9769
3010	5886	8081	9777
3047	5905	8098	9860
3087	5961-62	8100	10050
3094-95	5968	8104	10058
3103	5971	8106	10060-76
3124-27	5988	8132	10108-10
3131	6012-14	8134	10127-30
3236-37	6032-39	8148	11199
3240-45	6044	8162	11213
3464-68	6050	8171	11231
3473-512	6076	8176	11878
3730-31	6078	8197	11933-34
3734-36	6094	8211	12542
3764-65	6098	8242-56	12966

13029	19770-71	21146-54	24427
13922	19773	21230-38	24515-18
14053-54	19798-99	21241-49	24563-68
14110-13	19808-23	21284	24579-89
14165	19825-26	21301	24634-45
14175-76	19837	21315-20	24676
14207	19839	21322-27	24750-61
14219-22	19844-47	21381-82	24777-81
14225-28	19856-64	21429	24867-78
14261-65	19879-82	21430-32	24942-51
14270-76	19904-07	21457-59	25001
14287	19909-13	21466-67	25367-69
14290	19916-19	21496-98	25391
14407-09	19922	21901	25395
14441-43	19943-46	22270	25498-99
14694	19951-76	22525	25505
15083	19978	22600	25508
15330-33	20000	22725	25511-13
15525-40	20034	22752	25537
15541-46	20097-99	22923	25556
15550-57	20103-05	22926	25565
15563-75	20111-21	22936	25571-73
16303-05	20151-56	22956-57	25614-22
16580	20260-77	22961-62	25758-61
16691	20289-92	22965	25765-78
17167-71	20342-45	23108	25791-807
17703	20394-96	23197	25828-30
17848	20417-18	23317	25860
18123-26	20494-508	23430	25878-83
18232	20529-33	23461-63	25890
18337-44	20552-57	23508-25	25925-28
18416	20714-23	23538-44	25985-6139
18505-06	20746-58	23552	26216-37
18537	20800	23636	26249
18609-11	20901	23670	26253
18832-35	21001-07	23722	26268
18907	21038	23743	26272-82
19335-36	21055-59	23777	26287-92
19468-69	21122-24	23852	26301-11
19472-73	21127-28	23896	26317-18
19589-92	21133	24133-38	26345-60
19733	21135-38	24186-237	26374-76

26384-405	29193	30629-32
26424-29	29345-49	30638-40
26475-76	29452-53	30645-51
26891	29567-654	30696-98
27460	29678	30705-10
27993-94	29693-96	30729-32
28190-91	29701	30739-42
28225	29715-18	30763-66
28264	29731-32	30878-84
28267-70	29736-37	30886-913
28272	29769-86	30943
28277	29803-16	30987-88
28282	29829-34	31006-18
28289	29836-39	31025
28299-301	29847-49	31036
28304-07	29861-63	31044
28328-29	29867-68	31079
28340-45	29872-74	31081-84
28348	29879-82	
28358	29896	
28421-23	29899-901	
28445	29904-06	
28449-51	29908-13	
28492	29915-28	
28540-69	29930-37	
28593-607	29939	
28609-12	29943-50	
28621-23	29953-54	
28668	29956-58	
28681	29960-68	
28770-82	30008-09	
28788-862	30038	
28882	30473-514	
28891	30517-36	
28894-95	30541-44	
28901-02	30551	
28924	30561-63	
28926	30569-73	
28926	30576-79	
28928-32	30582-89	
29001-03	30603-06	
29012	30621-24	