Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

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

REASONS FOR DECISIONS ON MOTIONS
(Section 127 of the *Securities Act*,
Rule 3 of the Ontario Securities Commission *Rules of Procedure*)

Hearing:	March 28 and April 5, 2011 (Schwartz Motion) May 3, 2011 (York Motion)	
Decisions:	April 5, 2011 (Schwartz Motion) May 5, 2011 (York Motion)	
Reasons:	June 1, 2011	
Panel:	Vern Krishna, Q.C. Edward P. Kerwin	- Commissioner and Chair of the Panel - Commissioner
Appearances:	Hugh Craig Cameron Watson	- For Staff of the Commission
	Victor York	- Self-represented
	George Schwartz	- Self-represented

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REASONS FOR DECISIONS ON MOTIONS

I. INTRODUCTION

A. The Motions

[1] In these motions, respondents George Schwartz ("**Schwartz**") and Victor York ("**York**") question the seizure and admissibility of things and materials relating to York Rio (the "**York Rio Materials**") which were seized during a warranted search. They seek to terminate the hearing on the merits or alternatively to exclude the York Rio Materials from the evidence, because they submit that the seizure of the York Rio Materials was beyond the scope of the search warrant.

[2] We gave oral rulings dismissing the motions. We find that Schwartz lacks standing to bring his motion because he provided no evidence that he had a reasonable expectation of privacy in the premises searched or the York Rio Materials. We find that there is no evidence of any illegality or impropriety in the seizure of the York Rio Materials. Therefore, we conclude that there is no reason to stay the proceeding or to exclude the York Rio Materials from the evidence on the basis of fairness or the public interest. It is in the public interest to continue the Merits Hearing and to admit the York Rio Materials into evidence.

B. The York Rio Proceeding

[3] This proceeding arises out of a Notice of Hearing issued by the Ontario Securities Commission (the "**Commission**"), dated March 2, 2010, in relation to a Statement of Allegations issued by Staff of the Commission ("**Staff**") against York Rio Resources Inc. ("**York Rio**"), Brilliante Brasilcan Resources Corp. ("**Brilliante**"), York, Robert Runic ("**Runic**"), Schwartz, Peter Robinson ("**Robinson**"), Adam Sherman ("**Sherman**"), Ryan Demchuk ("**Demchuk**"), Matthew Oliver ("**Oliver**"), Gordon Valde ("**Valde**") and Scott Bassingdale ("**Bassingdale**"). On November 5, 2010, the Commission approved a settlement agreement between Staff and Robinson (*Re Robinson* (2010), 33 O.S.C.B. 10434). York Rio, Brilliante, York, Runic, Schwartz, Sherman, Demchuk, Oliver, Valde and Bassingdale are referred to collectively in these reasons, as the "**York Rio Respondents**").

[4] Staff alleges that the York Rio Respondents engaged in a fraudulent "boiler room" operation involving the illegal distribution of York Rio securities from May 10, 2004 to October 21, 2008 and Brilliante securities from January 17, 2007 to October 21, 2008 (the "**Material Times**"). Staff alleges that the York Rio Respondents contravened subsections 25(1), 53(1), 38(3) and section 126.1 of the *Securities Act*, R.S.O. 1980, c. S.5, as amended (the "**Act**") contrary to the public interest. Staff also alleges that Schwartz, by trading in York Rio securities, breached the Commission's cease trade order made against him in relation to another matter, *Re Euston Capital Corp. and George Schwartz* (2006), 29 O.S.C.B. 3920, which was extended from time to time and remained in effect during the Material Times, contrary to subsection 122(1)(c) of the Act and contrary to the public interest.

II. THE SCHWARTZ MOTION AND THE YORK MOTION

A. The Schwartz Motion

[5] On March 28, 2011, the fourth day of the hearing on the merits in this matter (the "**Merits Hearing**"), Schwartz brought a motion for an order that the Merits Hearing be terminated or alternatively that the York Rio Materials be excluded from the evidence in

the Merits Hearing (the "**Schwartz Motion**").

[6] The York Rio Materials were seized during a search of offices at 1315 Finch Avenue, West, Suite 501, Toronto ("**1315 Finch**" or the "**Premises**") on October 21, 2008 (the "**Search**") pursuant to a search warrant that was issued under section 158 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 (the "**POA**") on October 16, 2008 (the "**Warrant**").

[7] Schwartz submitted that the seizure of the York Rio Materials was not authorized by the Warrant, which authorized a search of the Premises for things and materials related to CD Capital Ltd. ("**CD Capital**"), operating as Brilliante, York, Brian Aidelman ("**Aidelman**"), Jason Georgiadis ("**Georgiadis**") and Richard Taylor ("**Taylor**") (collectively, the "**Brilliante Respondents**"). The Warrant identified a long list of "things to be searched for" pertaining to the Brilliante Respondents at the Premises, including financial records; corporate records; courier records; treasury orders; prospectus and/or offering documents; lists of shareholders, investors and prospective investors; share certificates; correspondence, including correspondence to or from investors; qualification scripts and sales scripts; investor information; cheques or money orders received from investors; contracts or written agreements with employees, sales staff and others; and computers and computerized records. The Warrant was based on the Information to Obtain a Warrant (the "**ITO**") prepared by Staff Investigator Wayne Vanderlaan ("**Vanderlaan**"). The ITO did not identify things and materials pertaining to York Rio as "things to be searched for" at the Premises.

[8] In his Notice of Motion, Schwartz submitted that Staff had reason to believe that things and materials relating to York Rio would be found at the Premises but deliberately omitted this from the ITO. Therefore, Schwartz submitted that the seizure of York Rio Materials was illegal, unfair and contrary to the public interest. He submitted that the Merits Hearing should be terminated, or alternatively, that the York Rio Materials be excluded from the evidence.

[9] Schwartz sought leave to bring the Schwartz Motion without notice, pursuant to Rule 3.8 of the Ontario Securities Commission *Rules of Procedure* (2010), 33 O.S.C.B. 8017 (the "**Rules**"), and to give oral evidence in support of the Schwartz Motion as permitted under Rule 3.7(3) of the Rules. In support of his Motion, Schwartz provided a binder of materials (the "**Schwartz Motion Materials**"), but he did not provide any affidavit or other evidence.

[10] Staff opposed the Schwartz Motion, submitting, amongst other things, that the Schwartz Motion did not comply with Rule 3 of the Rules in that it was untimely and fatally defective, considering that:

(i) the Notice of Hearing and Statement of Allegations were issued on March 2, 2010;

(ii) the ITO and the Warrant were included in Staff's initial disclosure to the Respondents, which was delivered by way of electronic disclosure (hard drive) on or shortly after March 2, 2010;

(iii) numerous pre-hearings were held;

(iv) the matter was set down for hearing at a pre-hearing conference on October 12, 2010; and

(v) Staff provided hard copies of its hearing briefs 30 days before the start of the hearing, in accordance with Rule 4.3(1) of the Rules.

[11] Staff submitted that Schwartz lacked standing to bring the Schwartz Motion, absent evidence that he had an ownership or privacy interest in the Premises or the York Rio Materials. According to Staff, Georgiadis rented the Premises on behalf of Runic in August 2008, and Schwartz, who had exited York Rio in 2007, had never set foot in the Premises.

[12] Staff submitted that:

(i) there was no legal or evidentiary basis for the Schwartz Motion;

(ii) Staff was prepared to have Vanderlaan testify to rebut any assertions by Schwartz about the preparation of the ITO and the execution of the Warrant;

(iii) the Warrant was obtained based on reasonable grounds to believe that things related to an offence would be found in the place to be searched in accordance with *Hunter v. Southam*, [1984] 2 S.C.R. 145 ("***Hunter v. Southam***") and the cases that followed upon it;

(iv) the "plain view" doctrine in Canadian law allows seizure of items that afford evidence of an offence not itemized in the Warrant but visible during the execution of the Warrant;

(v) on November 18, 2008, Staff filed a Report to a Justice, as required under subsection 159(2) of the POA (the "**Report to a Justice**"), which listed, in an appendix signed by Vanderlaan, the materials seized that referenced Brilliante (the "**Brilliante Materials**"), the materials seized that referenced York Rio, the materials seized that referenced both Brilliante and York Rio, and the materials seized that referenced neither Brilliante nor York Rio (the "**List of Items Seized**");

(vi) the Justice authorized the continued detention of all the materials seized, including the Brilliante Materials and the York Rio Materials (the "**Detention Order**"), and the Detention Order was continued from time to time;

(vii) Schwartz's request for "termination" of the proceeding is inappropriate because a stay of proceedings is available only in the "clearest of cases";

(viii) Schwartz's request for an order excluding the York Rio Materials from the evidence in this proceeding is inappropriate because the Commission's hearings take a less formalistic and rigid approach to the admissibility of evidence; and

(ix) an Order to stay the proceedings or exclude the York Rio Materials from the evidence would be contrary to the public interest and would bring the administration of justice at the Commission into disrepute.

[13] Staff provided a copy of its Motion Record filed with the Ontario Court of Justice on January 14, 2010, seeking an Order to Extend Detention, which included Vanderlaan's

affidavit, sworn January 14, 2010 (the "**Vanderlaan's January 14, 2010 Affidavit**"), to which the Report to a Justice was appended.

[14] In reply, Schwartz submitted that there is no standing requirement because the Schwartz Motion is not brought under section 8 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***") ("Everyone has the right to be secure against unreasonable search or seizure."), but under the Commission's public interest jurisdiction set out in section 127 of the Act. He submitted that it is not in the public interest for the Commission to admit illegally obtained evidence. He acknowledged that he had received electronic disclosure from Staff in March 2010 and Staff's hearing briefs in February 2011, but stated that he was unable to access the electronic disclosure and did not find the ITO or the Warrant in the hearing briefs. He stated that he first saw the ITO and the Warrant when copies were extracted from the electronic disclosure by York's lawyers and provided to him a day or two before the Merits Hearing was to begin.

[15] Because Schwartz was self-represented at the hearing, we waived the time limits set out in Rule 3.8, as permitted by Rule 1.6(2) of the Rules. Rather than refusing to hear the Schwartz Motion, as permitted by Rule 3.9 of the Rules, we adjourned the Merits Hearing to allow Schwartz and Staff to file and serve their respective materials pursuant to the Rules. We invited Staff to file and serve, by 5:00 p.m. on March 30, 2011, a Memorandum of Fact and Law addressing the question: "what is the effect (in terms of admissibility of evidence) of not including reference to York Rio in paragraph 1 of the Warrant, which reference was subsequently included in the related detention orders?" (the "**Question**"). We invited Schwartz to file and serve, by 3:30 p.m. on April 1, 2011, a Memorandum of Fact and Law addressing the Question. We set down April 5, 2011 for oral argument on the Question.

[16] On March 30, 2011, Staff filed and served a Memorandum of Fact and Law and a Brief of Authorities, and Schwartz filed and served a Memorandum of Fact and Law on April 1, 2011.

[17] On April 5, 2011, Staff and Schwartz and York appeared before the Commission and Staff and Schwartz gave oral submissions in relation to the Schwartz Motion and the Question.

[18] Having considered the submissions of Schwartz and Staff, on April 5, 2011, we gave an oral ruling dismissing the Schwartz Motion, with reasons to follow. An Order was issued the next day.

B. The York Motion

[19] On March 29, 2011, the day after Schwartz brought his Motion, Staff informed the Commission that York wished to join the Schwartz Motion and was seeking leave to bring the Motion without notice, pursuant to Rule 3.8 of the Rules, and to give oral evidence in support of the Motion, as permitted under Rule 3.7(3) of the Rules.

[20] On March 30, 2011, York wrote to the Commission withdrawing his request to join the Schwartz Motion. At the hearing of the Schwartz Motion on April 5, 2011, York attended, confirmed that he was not joining the Schwartz Motion and declined an opportunity to speak to the Schwartz Motion.

[21] However, on April 15, 2011, ten days after we issued our Order dismissing the Schwartz Motion, York filed and served a Notice of Motion seeking the same remedies as the Schwartz Motion and on very similar grounds. York also provided a Memorandum of Fact and Law addressing the Question, and stated that he would rely on

Schwartz's Motion Materials. York did not provide any affidavit or other evidence in support of the York Motion.

[22] Staff, in response, filed and served written submissions stating that the York Motion is "virtually identical" to the Schwartz Motion and should be dismissed for the same reasons, as set out at paragraph 12 above. Staff also submitted that the York Motion is untimely, especially considering that York had expressly stated he was not joining the Schwartz Motion at the hearing on April 5, 2011. Staff submits that York, like Schwartz, has no standing, since he has not provided any evidentiary basis on which to find a privacy interest.

[23] The York Motion is untimely, having been brought without advance notice after we had given York several opportunities to join the Schwartz Motion and after we gave our oral ruling in the Schwartz Motion. However, we decided to consider the York Motion, because York was self-represented at the hearing and in the interests of judicial economy.

[24] When the hearing resumed on May 2, 2011, York stated that he was not prepared to speak to the York Motion, and had only prepared to speak to the adjournment motion he and Schwartz had brought in connection with Staff having recently located and examined Runic. To ensure that York had an opportunity to prepare for and speak to the York Motion, we agreed to adjourn the York Motion until 10:30 a.m. on May 3, 2011.

[25] On May 3, 2011, York gave brief oral submissions to supplement his written submissions. He submitted that he has standing to bring the York Motion because "on the 21st of October of 2008, I in fact was a director of the company. I owned the materials and the things that were seized at the time" (Hearing Transcript, May 3, 2011, p. 5). He also submitted that Staff obtained the Warrant on a pretext of searching for things relating to Brilliante, and used it to seize things and materials relating to York Rio. He disputed Staff's claim that the Brilliante Materials and York Rio Materials were intermingled, and stated that Staff examined and categorized the things seized during the Search. We gave York an opportunity to give evidence in support of the York Motion, but he declined.

[26] Staff stated that it would rely on its written submissions and added that York had not presented any evidence in support of his Motion.

[27] Having considered the submissions of York and Staff on the York Motion, we dismissed the York Motion by Order issued on May 5, 2011.

C. Reasons

[28] Our reasons for dismissing the Schwartz Motion and the York Motion (the "**Motions**") are set forth below.

III. STANDING

A. Submissions of the Parties

(i) Staff

[29] Staff submits that Schwartz and York have no standing to bring the Motions because they have not provided evidence that they had a reasonable expectation of privacy in relation to the Premises or the York Rio Materials.

[30] Staff relies on *R. v. Edwards*, [1996] 1 S.C.R. 128 ("***Edwards***"). In *Edwards*, the accused, who was convicted of drug trafficking, challenged the admissibility of evidence of drugs seized during a warrantless search of his girlfriend's apartment. His argument

that the search contravened section 8 of the *Charter* was dismissed by the trial judge on the basis that he had not discharged the burden of establishing that he had a reasonable expectation of privacy in the apartment. The accused's appeal to the Ontario Court of Appeal was dismissed (McKinlay and Finlayson JJ.A., Abella J.A. dissenting). The Supreme Court of Canada dismissed the accused's appeal, setting out the following legal principles:

> A review of the recent decisions of this Court and those of the U.S. Supreme Court, which I find convincing and properly applicable to the situation presented in the case at bar, indicates that certain principles pertaining to the nature of the s. 8 right to be secure against unreasonable search or seizure can be derived. In my view, they may be summarized in the following manner:
>
> 1. A claim for relief under s. 24(2) can only be made by the person whose *Charter* rights have been infringed. See *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 619.
>
> 2. Like all *Charter* rights, s. 8 is a personal right. It protects people and not places. See *Hunter, supra* [*Hunter v. Southam*].
>
> 3. The right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated. See *Pugliese, supra* [*R. v. Pugliese* (1992), 71 C.C.C. (3d) 295].
>
> 4. As a general rule, two distinct inquiries must be made in relation to s. 8. First, has the accused a reasonable expectation of privacy. Second, if he has such an expectation, was the search by the police conducted reasonably. See *Rawlings, supra* [*Rawlings v. Kentucky*, 448 U.S. 98 (1980)].
>
> 5. A reasonable expectation of privacy is to be determined on the basis of the totality of the circumstances. See *Colarusso, supra* [*R. v. Colarusso,* [1994] 1 S.C.R. 20], at p. 54, and *Wong, supra* [*R. v. Wong*, [1990] 3 S.C.R. 36], at p. 62.
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> 6. The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:
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> (i) presence at the time of the search;
>
> (ii) possession or control of the property or place searched;
>
> (iii) ownership of the property or place;
>
> (iv) historical use of the property or item;

(v) the ability to regulate access, including the right to admit or exclude others from the place;

(vi) the existence of a subjective expectation of privacy; and

(vii) the objective reasonableness of the expectation.

See *United States v. Gomez*, 16 F.3d 254 (8th Cir. 1994), at p. 256.

7. If an accused person establishes a reasonable expectation of privacy, the inquiry must proceed to the second stage to determine whether the search was conducted in a reasonable manner.

(*Edwards*, *supra*, at para. 45)

[31] With respect to Schwartz, Staff submits that on October 21, 2008, when the Warrant was executed, Schwartz was not present at the Premises and had no connection to the Premises, which were leased by Georgiadis on behalf of Runic.

[32] With respect to York, Staff submits that if York, who is no longer a director of York Rio, wants to assert a privacy interest in the Premises or the York Rio Materials, Staff would like to see an affidavit to that effect.

(ii) Schwartz and York

[33] Schwartz submits that the law on standing to challenge a search and seizure under section 8 of the *Charter* does not apply because he does not rely on section 8 of the *Charter* and is not seeking a *Charter* remedy. His position is that the Commission's public interest jurisdiction gives us authority to exclude illegally obtained evidence and that fairness requires us to do so.

[34] As stated at paragraph 25 above, York submits that he has standing to bring the York Motion on the basis that he was a director of York Rio at the time of the Search and owned the York Rio Materials that were seized.

B. Analysis

[35] Although Schwartz and York purport not to rely on the *Charter*, the only case they relied on in support of their challenge to the seizure of the York Rio Materials was *R. v. Morelli*, [2010] 1 S.C.R. 253 ("***Morelli***"), a case that concerned a challenge to a search warrant under section 8 of the *Charter*. In essence, the Motions ask us to stay the proceedings or exclude the York Rio Materials from the evidence on the basis that the York Rio Materials were illegally or improperly obtained in contravention of the guarantee against unreasonable search and seizure and contrary to the public interest. Even if the Motions are framed in terms of abuse of process or conduct contrary to the public interest, Schwartz and York must establish standing to bring the Motions.

[36] Schwartz provided no evidence that he had a privacy interest in the Premises or the York Rio Materials, despite being given an opportunity to do so. We find that Schwartz has not established a reasonable expectation of privacy in respect of the Premises or the York Rio Materials that were seized in the course of the execution of the Warrant, according to the factors sets out by the Supreme Court of Canada in *Edwards*.

Although that is sufficient to dispose of the Schwartz Motion, we also find the motion to be of little merit for the reasons set forth below.

[37] Although York, in his submissions, asserted a privacy interest in the Premises and the York Rio Materials, he did not provide any evidence to support that assertion. However, we do not find it necessary to determine whether York had a reasonable expectation of privacy in relation to the Premises or the York Rio Materials because we find the motion to be of little merit for the reasons set forth below.

IV. CHALLENGE TO THE SEIZURE OF THE YORK RIO MATERIALS

A. Submissions of the Parties

(i) Schwartz and York

[38] Schwartz and York submit that the seizure of the York Rio Materials was beyond the scope of the Warrant. They say that Vanderlaan had reason to believe that things relating to York Rio would be found at the Premises and should have disclosed that fact in the ITO. They submit that Staff obtained the Warrant on the pretext of being interested only in Brilliante, and that by withholding information about the York Rio investigation from the issuing Justice of the Peace, Staff removed the process from the judicial arena. Accordingly, Schwartz and York submit that the Warrant did not provide legal authority to seize things relating to York Rio. They argue that Staff should have secured the premises and obtained a warrant specifically with respect to York Rio.

[39] Schwartz and York rely on *Morelli*, in which the Supreme Court of Canada allowed the accused's appeal from conviction on the basis that the police officer who drafted the ITO did not have reasonable grounds to believe that evidence of possession of child pornography would be found in the place to be searched. The Court held that although there was no reason to disturb the trial judge's finding that there had been no deliberate attempt to mislead, "the police officer's selective presentation of the facts painted a less objective and more villainous picture than the picture that would have emerged had he disclosed all the material information available to him at the time" (*Morelli*, *supra*, at para. 59). The Court found, therefore, that the search and seizure of the accused's computer infringed his right under section 8 of the *Charter* and this evidence should be excluded under subsection 24(2) of the *Charter*.

[40] Schwartz and York also submit that the Commission's public interest function is to be interpreted to enable the Commission to conduct truthful, fair and effective investigations and to give those investigated assurance that investigations will be conducted with due safeguards.

[41] Schwartz and York also make the following submission:

> As a regulator of Ontario's capital markets, trust and respect are the cornerstone of the relationship between the Commission and investors, market participants, other regulators, the government and the general public. The Commission states that it is committed to the highest standards of ethical conduct in all its activities, in accordance with all applicable laws and regulations, and it also means commitment to the *spirit of the law*. It is the Respondents' position that these high standards of ethical conduct were materially breached at least in spirit and substance, if not in pure technical form. The acts surrounding the search and seizure were a contravention of the public interest and the Commission's own standard of ethics. These acts speak to the integrity of the Commission. It would

therefore be advisable to secure the just and expeditious determination of the search and seizure in issue. [Emphasis in original]

(ii) Staff

[42] Staff submits that Schwartz and York have not provided any evidence of offending conduct on the part of Staff, and have "not taken the trouble to identify which of the approximately 10,000 documents . . . seized from the Premises tread upon [their] rights to a fair hearing."

[43] Staff submits that the plain view doctrine in Canadian law allows seizure of items that afford evidence of an offence not itemized in the Warrant but visible during the execution of the Warrant. Staff submits that section 489 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 (the "**Criminal Code**"), can be used by the Commission to answer the Question. Section 489 is as follows:

Seizure of things not specified

489(1) Every person who executes a warrant may seize, in addition to the things mentioned in the warrant, any thing that the person believes on reasonable grounds

(a) has been obtained by the commission of an offence against this or any other Act of Parliament;

(b) has been used in the commission of an offence against this or any other Act of Parliament; or

(c) will afford evidence in respect of an offence against this or any other Act of Parliament.

Seizure without warrant

(2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds

(a) has been obtained by the commission of an offence against this or any other Act of Parliament;

(b) has been used in the commission of an offence against this or any other Act of Parliament; or

(c) will afford evidence in respect of an offence against this or any other Act of Parliament.

[44] Staff submits that the York Rio Materials were legally obtained.

[45] Staff also submits that the remedy described by Schwartz and York as a "termination of the proceedings" is essentially a stay of proceedings, which should only be granted in the "clearest of cases" (*R. v. O'Connor,* [1995] 4 S.C.R. 411 ("***O'Connor***"), *R. v. Regan*, [2002] 1 S.C.R. 297 ("***Regan***")). In *Regan*, the Supreme Court of Canada (LeBel J., speaking for McLachlin C.J. and L'Heureux-Dube, Gonthier and Bastarache JJ.) stated:

In the *Charter* era, the seminal discussion of abuse of process is found in *R. v. O'Connor*, [1995] 4 S.C.R. 411. The doctrine of abuse of process had been traditionally concerned with protecting society's interest in a fair process. However, in *O'Connor*, L'Heureux-Dubé J., writing for a unanimous Court on this issue (Lamer C.J. and Sopinka and Major JJ. dissenting on the application of law to the facts), subsumed the common law doctrine abuse of process into the principles of the *Charter* in the following terms, at para. 63:

> [I]t seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused.
>
> (*Regan*, *supra*, at para. 49)

[46] In *Regan*, the Supreme Court of Canada also reiterated its statement in *O'Connor* that under the *Charter* as under the common law doctrine of abuse of process, a stay of proceedings is available only in the "clearest of cases" (*Regan*, *supra*, at para. 53; *O'Connor*, *supra*, at para. 68).

[47] With respect to the alternative relief sought in the Motions (exclusion of the York Rio Materials from the evidence), Staff submits that subsection 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "**SPPA**"), authorizes broad inclusion of evidence that would not be admissible in court. The relevant provisions of section 15 of the SPPA are as follows:

> 15.(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.
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> (2) Nothing is admissible in evidence at a hearing,
>
> (a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or
>
> (b) that is inadmissible by the statute under which the proceeding arises or any other statute.
>
> (3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

[48] Staff submits that the Commission's mandate, set out in section 1.1 of the Act, is to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets. Staff submits that the Commission's mandate is achieved in part through quick and efficient

administrative enforcement hearings under section 127 of the Act, including a less formalistic and rigid approach to the admissibility of evidence than applies in the criminal context.

[49] Staff submits that the SPPA and the Act weigh heavily in favour of admission, not exclusion, of the York Rio Materials as evidence in the public interest.

[50] Staff submits that an order staying the proceeding or excluding the York Rio Materials from the evidence would not be in the public interest, but would bring the administration of justice and the reputation of the Commission into disrepute.

B. The Evidence

[51] As neither Schwartz nor York presented any evidence in support of the Motions, the evidence before us comes entirely from Staff.

[52] In the ITO, Vanderlaan described: the Brilliante investigation; the York Rio investigation; the connections between Brilliante and York Rio; the connection of Brilliante to the Premises; investor funds connected to Brilliante, York Rio, Aidelman, York and Georgiadis; and ongoing conduct. Based on the investigation, Vanderlaan swore, in the ITO, that he believed that Brilliante, Aidelman, York, Georgiadis and Taylor and others "are presently soliciting the public to purchase shares in Brilliante" and that they are operating a "boiler room", and engaging in conduct that is contrary to sections 25, 38, 53, 126.1 and 122(1)(c) of the Act in relation to the sale of Brilliante shares.

[53] Vanderlaan also described the investigation leading up to the execution of the Warrant when he testified before us on March 22, 2011, the second day of the Merits Hearing ("**Vanderlaan's Testimony**").

[54] According to Vanderlaan, the main steps in the investigation that culminated in obtaining the Warrant were as follows:

- Staff had been investigating York Rio since early 2008.

- On August 26, 2008, Vanderlaan received an email from a person who had been an investor in another matter Vanderlaan had investigated ("**Investor A**"). Investor A told Vanderlaan he had been cold-called by a representative of Brilliante ("**Brilliante Representative A**"), who proceeded to solicit him to buy Brilliante shares at $1 per share. Brilliante Representative A told Investor A that he had previously offered Investor A shares of another company at $0.75 per share, which Investor A had declined, that those shares had gone up to $60 per share, and that Brilliante was now poised to do the same thing. Brilliante Representative A followed up with an email that linked to the Brilliante website, which Investor A forwarded to Vanderlaan.

- Vanderlaan reviewed the Brilliante website, and found that much of its content was copied from Wikipedia and from a government of Brazil website. He found out that the Brilliante website was registered to Denise McDonald ("**McDonald**"), with an address of 965 Bay Street, Toronto ("**965 Bay**"). He found out that the geologist named on the Brilliante website, Daniel Pasin ("**Pasin**"), was also named as the geologist for York Rio on the York Rio website, and that the York Rio website was also registered to 965 Bay, gave 965 Bay as the company address and named

McDonald as its vice-president. Vanderlaan determined that the Corporation Profile Report for York Rio listed York as its sole director and 965 Bay as its corporate mailing address, and the Corporation Profile Report for Brilliante listed Aidelman, with an address in Concord, Ontario, as its sole director.

- On September 8, 2008, Vanderlaan obtained an Order under section 11 of the Act appointing him to investigate and inquire into Brilliante and Aidelman. Under the authority of section 13 of the Act, Vanderlaan was able to summons information to further the investigation.

- The Brilliante website listed an address of 20 Bay Street, 11th Floor, Toronto ("**20 Bay**"), which is a virtual office operated by Rostie Group Business Centres ("**Rostie**"). Vanderlaan attended at 20 Bay with a summons and learned that the account was in the name of Brilliante and Aidelman; that McDonald had opened it by email; and that Aidelman was listed as having an email address in York's name. On September 19, 2008, Vanderlaan learned that it was York who had initially opened the file, but the name on the file was later changed to Aidelman. Vanderlaan also found out that York's former name was Victor Georgiadis and that his home address was at 44 Charles Street West, Toronto ("**44 Charles**"), which was also the billing address Rostie had for Brilliante.

- Investor A forwarded to Vanderlaan all the emails he received from Brilliante. From Bell Canada, Vanderlaan was able to trace the emails to 1315 Finch, which was listed to CD Capital. CD Capital is not registered as a corporation in Ontario.

- On September 24, 2008, Vanderlaan attended at 1315 Finch and spoke to the building manager, who told him that CD Capital occupied the Premises and had moved in at the end of June 2008, that the rent was paid out of a Royal Bank of Canada ("**RBC**") account, that the lease was signed by Georgiadis, who listed Taylor as his partner, and that Georgiadis had made subsequent rent payments in cash.

- On September 25, 2008, Vanderlaan obtained information from Purolator Courier ("**Purolator**") identifying an Alberta investor in Brilliante ("**Investor B**"). Investor B told Vanderlaan he invested $50,000 after being contacted by a representative of Brilliante ("**Brilliante Representative B**"). Brilliante Representative B had previously tried to sell York Rio shares to Investor B but Investor B had declined. Brilliante Representative B told Investor B that Brilliante was a uranium company and was operating a mine in Brazil, and that its share price was expected to go to at least $1.25 once the company went public. Investor B forwarded a Brilliante email to Vanderlaan that linked to a website with the URL www.brillianteresources.com, which actually linked to the York Rio website. Investor B also sent Vanderlaan a copy of a cheque he had sent to Brilliante which was deposited into a TD Canada Trust ("**TD**") account.

- Another Alberta investor ("**Investor C**") told Vanderlaan he was contacted by a representative of Brilliante ("**Brilliante Representative C")** who told him that Brilliante was a uranium company that had a mine

in Brazil, that the share price was $1 per share and that the price would be going up considerably once the company went public. Investor C invested $10,000, paying by cheque.

- On September 29, 2008, with information from Bell Canada, Vanderlaan was able to trace the Brilliante emails received by Investor B and Investor C back to 1315 Finch. He testified, referring to Brilliante, that as a result of the information received from Bell Canada, he was "very, very certain" where this activity was taking place.

- Another Alberta investor ("**Investor D**"), told Vanderlaan he was called by a Brilliante Representative ("**Brilliante Representative D**") who told him that Brilliante was about to begin production on a uranium mine in Brazil and that the price of the shares was $1 per share now, but would increase significantly, possibly to $30 per share, like the shares in the last company that Brilliante Representative D had sold. Brilliante Representative D also advised that the company was going public as soon as they had sold enough shares. After receiving about 15 calls from various Brilliante representatives, Investor D sent a cheque for $12,500.

- Investor B and Investor D sent their cheques by Purolator, as they were advised to do by the Brilliante salespersons, to 1881 Steeles Avenue West, Suite 109, Toronto ("**1881 Steeles**"), which is a UPS courier franchise location. There is no mention of this address as a Brilliante address in any of the Brilliante materials. Vanderlaan found out that UPS had not received a package on behalf of Brilliante since October 8, 2008.

- Vanderlaan also found out that the TD account was in the name of Brilliante (the "**Brilliante Account**") and that Aidelman had sole signing authority. Further, he determined that the account had been opened in January 2007, with an initial deposit of $1,000 paid by cheque drawn on the account of York Rio. There was little or no activity in the Brilliante Account until March 2008, when a York Rio cheque for $2,500 was deposited. Significant deposits that appeared to come from investors started to come in during September 2008, including the cheques from Investor B and Investor D, and there was one withdrawal of $37,500 in September. The balance in the Brilliante Account as of September 24, 2008 was $58,650.58.

- On October 3, 2008, Vanderlaan found out that the bank draft that was used to rent the office at 1315 Finch was paid for by Runic, who controlled an RBC account that was in the name of a company called Superior Home Building Systems Incorporated (the "**Runic Account**" or the "**RBC Account**").

- On October 8, 2008, Vanderlaan learned that the $37,500 withdrawal from the Brilliante Account in September 2008 went to a TD account in the name of Munket Capital Holdings ("**Munket**"), a company that was registered to York (the "**Munket Account**"), and that money from the Munket Account went to an account at the Meridian Credit Union ("**Meridian**") in the name of 2180353 Ontario Inc. ("**2180353**"), a company that was registered to Georgiadis (the "**2180353 Account**").

[55] Vanderlaan testified that on October 15, 2008, the day before he swore the ITO, he attended at the Premises, and as a result, he concluded that Brilliante continued to operate a boiler room there.

[56] Vanderlaan also testified about the execution of the Warrant on October 21, 2008. He testified that Staff seized about ten boxes of materials as a result of the search, including a computer and emails taken off the computer.

[57] On November 18, 2008, pursuant to subsection 159(1) of the POA, Vanderlaan filed a Report to a Justice, with the List of Items Seized appended, in order to continue detaining those items. The List of Items Seized identifies each item seized, and indicates, amongst other things, whether the item referenced Brilliante, York Rio, both or neither. Thirty items are identified as referencing Brilliante, 25 items are identified as referencing York Rio, 7 items are identified as referencing both, and the remaining items are identified as referencing neither. The items seized included call lists, scripts, the corporate profile, company information, client information, sales order logs, investor lists, accreditation information and emails. In his Detention Order, Justice of the Peace Wilson ordered the continued detention of all items seized until January 21, 2009 and the Detention Order was continued from time to time.

[58] In his affidavit sworn January 12, 2009 ("**Vanderlaan's January 12, 2009 Affidavit**"), which was an exhibit attached to Vanderlaan's January 14, 2010 Affidavit, Vanderlaan stated:

> I was the informant for the Information to Obtain the search warrant for the Premises (the "Search Warrant"). At the time I swore the Information to Obtain, I did not have reasonable grounds to believe that the sale of York Rio securities was occurring at the Premises, I only had reasonable grounds to believe that the sale of Brilliante securities was occurring at the Premises.
>
> On October 21, 2008 and during Staff's continuing investigation, I have made the following observations regarding the Premises, individuals present and evidence seized during the execution of the Search Warrant.
>
> > (a) The Premises contained approximately 18 workstations, each equipped with a telephone. Some workstations were cubicles, some were enclosed offices with either one desk or several desks within the same office.
> >
> > (b) There were approximately 15 individuals identified at the Premises during the execution of the Search Warrant. All individuals who were dealing with investors or potential investors were using false names. Each individual working at the Premises had a designated workstation.
> >
> > (c) There were call lists, lead lists, scripts and other information used to solicit potential investors located at workstations throughout the Premises, indicating that shares in Brilliante and shares in York Rio were being sold from the Premises.

(d) The lists, scripts and other information referred to in sub-paragraph (c) above were found at workstations throughout the Premises as follows:

(i) 10 workstations had material only in relation to sale of Brilliante shares;

(ii) 6 workstations had material in relation to sale of both Brilliante shares and York Rio shares; and

(iii) 2 workstations had material only in relation to sale of York Rio shares.

(e) With respect to the 6 workstations referred to in subparagraph (d)(ii), the Brilliante and York Rio Materials were closely intermingled making it difficult to distinguish and/or separate the materials at the Premises.

(f) I have reviewed some of the sales order forms that were seized from the Premises and identified several false names that were used to solicit investors in either Brilliante or York Rio. Several individuals working at the Premises were selling both Brilliante shares and York Rio shares.

(g) Some of the scripts used to sell Brilliante shares and to sell York Rio shares are virtually identical in wording except for the specifics relating to each company.

[59] The List of Items Seized was one of the exhibits attached to Vanderlaan's January 12, 2009 Affidavit, which was submitted in support of a continuation of the Detention Order, and on January 19, 2009, Justice Cavion continued the Detention Order to July 21, 2009. On July 17, 2009, Justice Hryn continued the Detention Order to August 14, 2009, and on August 13, 2009, Justice Fairgrieve extended it to January 21, 2010. In summary, a Justice of the Peace and three Judges of the Provincial Court, having been informed of the circumstances, ordered the continued detention of the items seized, including the York Rio Materials.

C. Analysis

[60] Schwartz and York submit that Vanderlaan, when he swore the ITO, had reason to believe that York Rio Materials would be found at the Premises. They submit that Staff obtained the Warrant targeting Brilliante, on a pretext, and therefore, the seizure of the York Rio Materials was not authorized by the Warrant.

[61] We reject this.

(i) No Evidence the Warrant was Obtained on a Pretext

[62] In *Morelli*, the case Schwartz and York rely on, the Supreme Court of Canada held that the ITO contained false statements and gave an incomplete and misleading account of the facts, in contravention of the informant's duty to make full and frank disclosure of all material information, and that the ITO, even when corrected and

amplified on review at a *voir dire*, was insufficient to permit any justice of the peace, acting reasonably, to find adequate grounds for the search.

[63] This case is very different from *Morelli*. Schwartz and York do not suggest that Vanderlaan lacked reasonable grounds for believing that things and materials relating to Brilliante would be found at the Premises. Nor do they say that Vanderlaan could not have obtained a warrant to search for things and materials relating to York Rio; on the contrary, they submit that Vanderlaan had reason to believe that York Rio was contravening the Act and that things or materials relating to York Rio would be found at the Premises. Schwartz and York submit that Vanderlaan "should have disclosed that he was looking for items or things belonging to York Rio" when he requested the Warrant, but they presented no evidence to support their assertion that Vanderlaan expected to find York Rio Materials at the Premises. Nor have they demonstrated that the ITO contained false or misleading statements or that it was materially incomplete. We note, for example, that Vanderlaan's disclosure in the ITO included four paragraphs on the York Rio investigation and another six paragraphs on the connections between York Rio and Brilliante. We also note that Vanderlaan stated, in his affidavit sworn January 12, 2009, discussed at paragraph 58 above, that at the time he swore the ITO, he "did not have reasonable grounds to believe that the sale of York Rio securities was occurring at the Premises" and "only had reasonable grounds to believe that the sale of Brilliante securities was occurring at the Premises."

[64] Vanderlaan testified that Staff has been investigating York Rio since early 2008, and he realized "very early in the investigation" that there were "some pretty serious connections between Brilliante and York Rio". He explained his theory of the case at the time he swore the ITO:

> The theory that I formed at the time and when I eventually wrote my search warrant, this was a theory of the warrant, was that York Rio had been going for quite sometime. Indications were that it had been running since 2004. That's very, very, very long for a boiler room. My experience is a year to 18 months maximum before they'll move on to something else.
>
> So the theory was, the theory I believed and still believe, was that Brilliante was created as a natural progression, if you like, of the York Rio activities. In other words, they were going to take what they were doing in York Rio and they were going to flip their efforts now onto this Brilliante thing because uranium at the time in 2008, if you'll recall, was quite hot. I think it was up to $145 a pound, and an investment in uranium seemed like a good thing at the time.
>
> So I believed then and I believe now that they created this other entity to then further the business of York Rio and they were going to shut down York Rio. As a matter of fact, I was told by a number of the salesmen, if I can use another boiler room term, that they were, quote/unquote, slopping York Rio, and slopping is basically the final sort of approach to investors before you shut the whole thing down.
>
> So that was my understanding and that's what I believed and that's what I believe now.
>
> (Hearing Transcript, March 22, 2011, pp. 188-189)

[65] We find Vanderlaan's explanation to be consistent with the entirety of the

evidence, and heard no evidence to the contrary. We find that there is no evidence to support the assertion that the Warrant was obtained on a pretext.

(ii) Plain View Doctrine

[66] Apart from Staff's comment that section 489 of the Criminal Code "can be used by the Commission to answer the Question", we received no submissions as to the scope of that section or its applicability to a Warrant obtained pursuant to the POA.

[67] Staff's submissions on the plain view doctrine were also very summary and no authorities were provided. Based on the limited submissions we heard, we are satisfied that the plain view doctrine applies to the seizure of the York Rio Materials in that:

(i) Schwartz and York do not challenge the legality of the execution of the Warrant as it applies to Brilliante – there is no suggestion the officers conducting the Search were not lawfully present in the Premises under a valid warrant;

(ii) Schwartz and York presented no evidence that Staff obtained and executed the Warrant on a pretext, and we accept Staff's evidence that Vanderlaan believed that the sale of Brilliante securities was occurring at the Premises and did not believe that the sale of York Rio securities was occurring at the Premises when he swore the ITO; and

(iii) the York Rio Materials that were seized were the same kinds of documents as the Brilliante Materials that were seized, including lead lists, call scripts, client information, sales logs and other documents that are characteristic of a "boiler room" operation contrary to the Act and contrary to the public interest.

[68] In summary, Vanderlaan obtained a warrant to search what he had reasonable grounds to believe were the premises of a new boiler room (Brilliante) and found, during the search, that an older and related boiler room (York Rio), which was also under investigation, was also operating out of the same premises. Documents, including lead lists, call scripts and sales logs, provided evidence that York Rio shares, as well as Brilliante shares, were being sold out of the Premises, contrary to the Act and contrary to the public interest. These circumstances were described in Staff's Report to a Justice, filed in November 2008, and the continued detention of all the materials seized, including the Brilliante Materials and the York Rio Materials, was continued from time to time by judicial orders.

(iii) No Reason to Stay the Proceeding or Exclude the York Rio Materials

[69] We are not persuaded that Staff's seizure of the York Rio Materials from the Premises was illegal or improper, or that Schwartz and York have been prejudiced or their rights have been infringed as a result of the seizure of the York Rio Materials. There is no reason, therefore, to stay the proceeding or exclude the York Rio Materials from the evidence on the basis of fairness or the public interest. On the contrary, we find that it is in the public interest to continue the Merits Hearing and to admit the York Rio Materials into evidence.

V. CONCLUSION

[70] For the reasons stated, the Motions are dismissed. We find that:

1. Schwartz's rights were not engaged by the seizure of the York Rio Materials from the Premises and accordingly he lacks standing to bring the Schwartz Motion.

2. There is no evidence to support the assertions by Schwartz and York that Staff's seizure of the York Rio Materials from the Premises was illegal or improper, or that Schwartz and York have been prejudiced or their rights have been infringed as a result of the seizure of the York Rio Materials.

3. There is no reason to stay the proceeding or exclude the York Rio Materials from the evidence on the basis of fairness or the public interest. It is in the public interest to continue the Merits Hearing and to admit the York Rio Materials into evidence.

[71] As ordered on May 5, 2011, the Merits Hearing shall resume on June 6, 2011 at 11:00 a.m., and continue on June 8, 9 and 10, 2011 at 10:00 a.m., June 13, 2011 at 11:00 a.m., June 14, 15, 16 and 17 at 10:00 a.m., June 20, 2011 at 11:00 a.m., June 22 and 23, 2011 at 10:00 a.m., and such further and other dates and times as are agreed by the parties and fixed by the Office of the Secretary.

Dated at Toronto this 1st day of June, 2011.

"Vern Krishna"

Vern Krishna, Q.C.

"Edward P. Kerwin"

Edward P. Kerwin