BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Mountainstar Gold Inc., 2018 BCSECCOM 317 Date: 20181012

Mountainstar Gold Inc. and Brent Hugo Johnson

Panel	Judith Downes	Commissioner
	Audrey T. Ho	Commissioner
	Don Rowlatt	Commissioner
Hearing dates	January 30, 31, February 1, 2, March 26 and July 11, 2018	
Submissions Completed	July 11, 2018	
Decision date	October 12, 2018	

Appearing

Stephen Zolnay Nicholas Isaac	For the executive director
Brent Johnson	For Mountainstar Gold Inc. and himself

Findings

I. Introduction

[1] This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.

[2] In a notice of hearing issued June 28, 2017 (2017 BCSECCOM 218), the executive director alleged that:

a) between December 2012 and December 2015, Mountainstar Gold Inc. made false or misleading statements in its required public filings concerning certain Chilean mining claims and related legal proceedings, or omitted facts that were necessary to make the statements not false or misleading, contrary to section 168.1(1)(b) of the Act, and

b) as an officer and director of Mountainstar, Brent Hugo Johnson authorized, permitted or acquiesced in Mountainstar's contraventions and he therefore contravened that same provision under section 168.2 of the Act.

[3] During the hearing, the executive director called two witnesses: a Commission investigator and O, who the executive director asked to be qualified as an expert witness.

The qualification of this witness is discussed below under "Preliminary Issues – Expert witness". The executive director also tendered documentary evidence and made written and oral submissions.

[4] The respondents called one witness, tendered documentary evidence and made written and oral submissions.

II. Background

A. *The respondents*

[5] Mountainstar, previously Mountain-West Resources Inc., is a reporting issuer under the Act. Its shares were listed on the TSX Venture Exchange (TSXV) until September 2011, and on the Canadian Securities Exchange until September 2016.

[6] Johnson was, at all relevant times, the president, CEO and a director of Mountainstar.

B. *The mining claims*

[7] This case concerns the disclosure made by Mountainstar in required public filings relating to ownership of mining interests in the Pascua Lama deposit and legal proceedings related thereto. These mining interests were subject to competing overlapping claims covering substantially the same area. The various mining interests in issue are:

- the Amarillos 1 to 3000 Mining Claims registered in the name of CMN, a subsidiary of Barrick Gold Corporation,
- the Amarillo North and Amarillo South Mining Claims registered in the name of V, a mining engineer who worked for L, the optionor in the option agreement with Mountainstar described below,
- the Underlying Tesoro Mining Claims registered in the name of UL, an agent and former employee of CMN, and
- the Restituted Amarillo North and Amarillo South Mining Claims, which are the subject of the option agreement between Mountainstar and L and which are also referred to herein as the Optioned Property.

The Pascua Lama deposit straddles the Chile-Argentina border. There are references in our findings to the "Mina Pascua" deposit, which is the Chilean portion of the Pascua Lama deposit.

C. *The option agreement and underlying rights agreement*

[8] On May 20, 2011, Mountainstar entered into an option agreement (the Option Agreement) with L whereby L granted to Mountainstar a right to purchase an option (Option) to acquire a 50% undivided interest in the Restituted Amarillo North and Amarillo South Mining Claims (the Optioned Property).

[9] The purchase price to acquire the Option was 2,000 troy ounces of gold valued on the date of exercise of the right to purchase the Option. If Mountainstar acquired the Option, the option exercise price was 7% of 18 million troy ounces of gold multiplied by the price

of an ounce of gold on the date of exercise of the Option. Assuming a gold price of US$1500 per ounce, the exercise price would be US$1.89 billion.

[10] At the same time as the parties entered into the Option Agreement, they entered into an underlying claims background and history agreement (the Underlying Rights Agreement) which purported to set out the origins and history of the legal dispute between Barrick and L regarding the underlying claims that make up the Optioned Property.

[11] The Underlying Rights Agreement stated that:

a) In 1996, L determined that the Amarillos 1 to 3000 Mining Claims had title defects. L had his mining engineer, V, register in V's name, the Amarillo North and Amarillo South Mining Claims that cover substantially the same area as the Amarillos 1 to 3000 Mining Claims.

b) In 1996, L orally agreed with Barrick to sell the Amarillo North and Amarillo South Mining Claims to CMN. On the instructions of L, V signed a written purchase agreement (the Amarillos written purchase agreement).

c) Just before the Amarillos written purchase agreement was signed, Barrick arranged for its mining engineer, UL, to acquire the Underlying Tesoro Mining Claims. These claims covered substantially the same area as the Amarillo North and Amarillo South Mining Claims and were registered in the name of UL. Barrick then allowed the Amarillo North and Amarillo South Mining Claims to expire.

d) In 2000, L learned that the price set out in the Amarillos written purchase agreement was substantially less than the price Barrick had orally agreed with L. L then instructed V to commence legal proceedings (the Villar Proceedings) against CMN in the 14th Civil Court of Justice in Santiago claiming that the Amarillos written purchase agreement was null and void.

e) In June 2001, the Civil Court issued an injunction prohibiting UL from transferring or encumbering the Underlying Tesoro Mining Claims to Barrick.

f) In June 2006, the Civil Court issued a judgement which found that the Amarillos written purchase agreement was null and void and ordered the Amarillo North and Amarillo South Mining Claims be "restituted" to V.

g) In March 2011, the Government of Chile issued the Restituted Amarillo North and Amarillo South Mining Claims in L's sole name in reliance on the 2006 Civil Court judgment.

[12] The Option Agreement and the Underlying Rights Agreement were Mountainstar's key project and principal assets during the period in issue.

[13] Mountainstar ultimately paid over US$4.6 million to L under the Option Agreement but did not acquire the Option. To pay these amounts, Mountainstar raised funds from investors through private placements and loan agreements.

III. Preliminary Issues

A. *Application to adjourn*

[14] On July 10, 2018, the day prior to the liability submissions hearing, the respondents made an application to adjourn the hearing to give them time to receive funds necessary to engage a securities litigator and a Chilean lawyer. The application stated that the funds would be received within the week.

[15] On July 11, 2018, we heard the application to adjourn and denied it. We gave our ruling and a brief outline of our reasons orally on conclusion of the hearing of the application. Set out below is a more fulsome description of the reasoning underlying our ruling.

[16] The respondents were not able to provide any evidence that they would receive the funds necessary to engage legal counsel within the time period stated in their application or at all. They advised that funding was being provided by a third party but that there was no signed agreement or even a draft available. They said the terms of the agreement were being negotiated by a "connection" of the respondents and not by the respondents directly.

[17] The respondents could not give any assurance as to the timing of the receipt of the funds or that funding was certain if given more time. Johnson, who was appearing on behalf of the respondents, said: "So what further can I say to that? When anybody is funding someone, it is the person with the gold makes the rules, and so that's –it's not a good excuse, but that is the reality of the marketplace."

[18] This was the second application to adjourn the liability submissions hearing made by the respondents on this basis. An application was made on June 12, 2018 by a securities litigator on the respondents' behalf to adjourn the hearing set for June 19 to allow time for him to be retained by the respondents. The litigator advised that he anticipated being retained by the respondents by the end of June.

[19] The hearing was adjourned to July 11, 2018. The litigator agreed to confirm by June 29, 2018 whether he had been retained. On June 29, he advised he had not yet been retained but anticipated being so by July 3, 2018. No further communication was received from him.

[20] The respondents have had ample notice and time to raise funds to engage counsel. They have been aware of the allegations against them since June 2017 when the notice of hearing was issued and they have known all of the hearing dates well in advance.

[21] The proceedings were substantially completed at the time of the second adjournment application. The evidentiary phase of the hearing concluded on March 26, 2018. Written submissions on liability had been received from all parties. Johnson advised that the

respondents' written submissions, which were lengthy, had been prepared by Mountainstar's corporate counsel.

[22] Prior to the evidentiary hearing, Mountainstar's legal counsel also communicated directly with the executive director to provide his views on alleged defects and deficiencies in what is referred to below as the O Affidavit. See paragraph 141 below.

[23] The only stage of the hearing proceedings that remained at the time of the second adjournment application was the liability submissions hearing. This hearing is optional and is held at the request of a party. The hearing gives the parties an opportunity to present their submissions to the panel in person.

[24] While the right to counsel is a component of administrative fairness, the power to adjourn is discretionary. A competing interest to the right to counsel is the public interest in having matters heard and decided promptly. We need to examine the totality of the circumstances to determine whether to grant an adjournment on the basis requested by the respondents.

[25] Given that:

- the respondents were previously granted an adjournment in order to retain counsel and were unable to obtain the funds necessary to do so within the one month adjournment,
- the respondents could provide no reasonable assurance that the funds would be received within the time period stated in their adjournment application or at all,
- the respondents have had ample opportunity to raise funds to engage legal counsel,
- the respondents have had the benefit of legal advice in the review of key evidence and their detailed written submissions on liability were prepared on their behalf by legal counsel, and
- the proceedings are substantially completed,

we concluded that a refusal to adjourn in these circumstances was not a breach of the duty of fairness to the respondents and that it is in the public interest to complete the hearing in a timely and expeditious manner. We denied the application.

B. *Admission of evidence*

[26] At the liability submissions hearing, the respondents produced documents (the identified documents) which they said they had first brought to the attention of the panel during the evidentiary hearing. They said that they had not tendered these documents as evidence during the evidentiary phase because the executive director had stated they were not relevant. The respondents asserted that these documents were very relevant to their case.

[27] We allowed the respondents considerable latitude with respect to delivery and admission of their documents during the evidentiary phase of the hearing. We believe that our instructions during the course of the hearing process relating to the production and

admission of documents were very clear. However, given the importance that the respondents attributed to the identified documents, we determined, on our own motion, to consider their admission at the liability submissions hearing.

[28] We gave our ruling relating to the admission of the identified documents and a brief outline of our reasons orally at the liability submissions hearing. We did not admit these documents. Set out below is a more fulsome description of the reasoning underlying our ruling.

Background

[29] The issue of the production and admission of documents has been an ongoing source of confusion to the respondents. The respondents did produce a bound package of documents during the evidentiary hearing on February 2, 2018.

[30] The bound package of documents was provided to the executive director at the evidentiary hearing but not to the panel. At that time, the executive director said that there were several issues with the documents: they were not relevant, they were in Spanish and, to the extent that the documents were relevant, they related to issues of foreign law that would require evidence from an expert.

[31] At that time, the panel chair told the respondents that the panel would be prepared to allow these documents to be entered as evidence but that the respondents would have to establish their relevance and provide English translations of any Spanish documents that the respondents wished the panel to consider.

[32] The respondents advised it was likely that not all of these documents were relevant to their case. The panel chair granted a short adjournment of the hearing to allow the respondents an opportunity to review the documents to determine which were relevant. When the panel reconvened, the respondents advised that there were a considerable number of documents requiring translation.

[33] The panel, on their own motion, adjourned the hearing to March 26, 2018. They gave the respondents until February 28 to obtain translations of any of the documents that they wished to tender as evidence and to deliver them to the executive director and the Commission Secretary. This deadline was extended to March 5 at the request of the respondents.

[34] The panel admitted as evidence all documents delivered by the respondents by the March 5 deadline.

[35] At the liability submissions hearing, the respondents advised that none of the identified documents were included in the documents they had delivered by March 5.

Consideration of admission of identified documents

[36] After deciding to consider the admission of the identified documents at the liability submissions hearing, the panel asked the parties to prepare a list of the identified

documents with a brief description of each, to the extent determinable if the documents were in Spanish.

[37] The panel reviewed the list with the parties. There were 15 documents on the list. Thirteen were in Spanish. All of those, with the exception of the complaint described in paragraph 39 below and a December 3, 2015 letter from L's Chilean lawyer, T, to Commission staff, related to legal proceedings commenced by L against various parties including the Commission and the Fisco de Chile. Most of these documents as described postdated the period in issue in this case. Most of the legal proceedings documents appeared to be interlocutory in nature, such as submissions, request to summons, documents relating to service.

[38] The respondents identified one document on the list as being key to their case. As the document included an English translation, the panel was able to review it.

[39] The document was dated December 17, 2015 and was addressed to the Canadian, U.S., English, Argentinian and German embassies in Chile, the Toronto Stock Exchange, the Ontario Securities Commission, the Commission, RCMP and many others. It is what is described as a "formal complaint" by T. It primarily related to what is characterized as "false testimony" given by subsidiaries of Barrick in the Villar Proceedings and what was described as "false testimony, false declarations" by Commission staff regarding statements attributed to T that there were no further rights of appeal or other recourse available to L with respect to the Villar Proceedings.

[40] The allegations relating to Commission staff appeared to be a reference to correspondence from Commission staff to Johnson in late 2015, which set out information regarding the status of the Chilean legal proceedings that are the subject of the disclosure in issue and included a summary of a telephone call between Commission staff and T.

[41] The respondents' assertion that the identified documents are relevant to their defence to the allegations against them highlights a fundamental misunderstanding of the nature of these allegations. This misunderstanding is reflected in many of the respondents' submissions.

[42] The issue before the panel is whether Mountainstar made false or misleading statements regarding its Chilean mining interests and related legal proceedings in required public disclosure made between December 2012 and December 2015. This requires an examination of the facts as they existed at the time and a determination of whether the respondents' disclosure at the time relating to those facts was false or misleading.

[43] Most of the respondents' submissions in this case are directed at attempting to persuade the panel that the Chilean court decisions made with respect to ownership of the Chilean mining interests were flawed and that further recourse is available to L with respect to appeals of those decisions. These submissions are not responsive to the allegations in the notice of hearing. Even if further appeals or other recourse is available to L with respect

to past court decisions and such appeals are successful, it will not change the facts as they existed at the time of the MD&A in issue and whether the disclosure at that time of those facts was false or misleading.

[44] Neither the statements which T may or may not have made to Commission staff nor the legal proceedings commenced by L against the Fisco de Chile, nor interlocutory steps in other legal proceedings commenced by L are relevant to the issues before this panel as they will not affect the facts as they existed at the time of the MD&A in issue, nor whether Mountainstar's disclosure at that time was false or misleading.

[45] Under section 173 of the Act, we must receive all relevant evidence submitted by the parties.

[46] After reviewing the list of the identified documents and the formal complaint document, we determined that these documents were not relevant and that we would not admit them.

C. *Expert witness*

[47] At the evidentiary hearing, the executive director asked that O be qualified as an expert witness.

[48] O testified that he is a Chilean lawyer who specializes in dispute resolution. He obtained a law degree at the Universidad Católica de Chile as well as a master degree in law from Oxford University. He has been a lecturer at various law schools in Chile and abroad on matters of Chilean law, including Harvard University and Georgetown University. He has given expert evidence on matters of Chilean law in several countries, including the U.S., the United Kingdom, Israel and Canada. He has practiced law in Chile for almost 20 years and has acted as counsel before Chilean courts, including the Chilean Appellate Court and the Supreme Court, in more than 100 proceedings. These proceedings have included many cases relating to the Chilean Mining Code and mining law issues.

[49] He confirmed that he had been asked by the executive director to describe the nature and status of certain legal proceedings and mining claims in Chile and that he had prepared an affidavit in that regard (the O Affidavit).

[50] O testified that he did not see himself as an advocate for any party in these proceedings and that he saw his role as providing a fair and objective account of certain legal proceedings and their outcome. He testified that neither he nor his firm had ever represented any of the individuals or entities involved in these proceedings or the Chilean legal proceedings relating to the Optioned Property.

[51] The panel qualified O as an expert in Chilean law, including Chilean mining law.

Respondents' submissions regarding admissibility of O Affidavit

[52] In their liability submissions, the respondents argue that the O Affidavit should not be admitted or, if admitted, should be given no weight. Although this argument was not

raised during the evidentiary phase of the hearing, we will consider the respondents' submissions.

[53] The respondents' principal arguments regarding this issue are as follows.

(a) *O was acting as an advocate for the executive director*

[54] The respondents argue that O was acting as an advocate for the executive director. The respondents say that facts which support this submission include:

(1) O's failure to state in his affidavit that he was aware that he was not to act as an advocate for the executive director.

The respondents say that it was not sufficient that O testified at the hearing that he did not see himself as an advocate for any of the parties to the proceedings. They say that an acknowledgement of his duty not to act as an advocate was not included in the O Affidavit as required under Rule 11-2(2) of the *BC Supreme Court Civil Rules* B.C. Reg 168/2009. They submit the panel can infer from this omission that either O was retained as an advocate for the executive director or he misunderstood his role and acted as advocate.

The *BC Supreme Court Civil Rules* do not apply to hearings before the Commission. Under section 2.7(b) of British Columbia Policy 15-601 – *Hearings*, a party calling expert evidence at a Commission hearing is required to comply with the *Evidence Act*, RSBC 1996, c. 124. There is no requirement under that Act to include an acknowledgement of a duty not to act as an advocate in a written statement of an expert.

Under section 11 of the *Evidence Act*, a person cannot give evidence at a proceeding of his opinion, within the scope of his expertise, unless a written statement of the opinion and the facts on which it is formed has been given to parties adverse in interest at least 30 days before the expert testifies.

The executive director advised that the O Affidavit was delivered to the respondents on June 29, 2017 which is well within the time limitations of section 11 of the *Evidence Act*.

Given the foregoing, the omission of an acknowledgement of the duty not to act as an advocate in the O Affidavit is not a basis on which the inference suggested by the respondents should be made.

(2) O's failure to make reference in the O Affidavit to Barrick, legal proceedings involving Compania Minera Nevada SA or Compania Minera Nevada Limitada or the fact that these companies and CMN were subsidiaries of Barrick.

The respondents say that the panel should infer from this omission that O drafted the O Affidavit, either "intentionally or subconsciously", to avoid statements that

might impugn or irritate Barrick and adversely affect the business of O's firm given that mining is one of the largest business sectors in Chile and Barrick is one of the largest mining companies operating in Chile.

The O Affidavit describes the nature and status of certain legal proceedings. Where relevant, it names CMN as a party to the proceedings. Compania Minera Nevada SA and Compania Minera Nevada Limitada are prior names of CMN. Barrick does not appear to be a party to any of the proceedings.

It is not clear why an intentional or subconscious desire not to impugn or irritate Barrick would be evidence that O acted as an advocate for the executive director. However, in any event, given the subject matter of the O Affidavit, there is no reason to make reference in the O Affidavit to Barrick or the fact that CMN is a subsidiary of Barrick. Where CMN is a party to the proceedings described in the O Affidavit, it is named as such.

Given the foregoing, there is no basis for the inference suggested by the respondents.

(3) There is no discussion in the O Affidavit of the inquisitorial judicial system available in Chile, recent proceedings commenced thereunder by L with respect to the Optioned Property or of other legal relief that might be available to L with respect to past court decisions.

Subsequent proceedings that may have been commenced by L with respect to the Optioned Property are not relevant to the allegations in the notice of hearing. As noted above, these proceedings will not change the facts as they existed at the time of the disclosure in issue or whether the disclosure at that time was false or misleading. As a result, O had no reason to address them in the O Affidavit.

Given the foregoing, we do not find this omission to be evidence that O acted as an advocate for the executive director.

[55] The respondents also argued that there were several other key omissions from the O Affidavit. These included a failure to attach a copy of the 2006 decision of the 14th Civil Court of Santiago in L's favour described in paragraph 122 or to describe what Mountainstar characterizes as conflicting testimony given by UL in connection with those court proceedings.

[56] That 2006 court decision was subsequently annulled by the Santiago Court of Appeals as described in paragraph 123. As a result, there was no reason to attach a copy of the decision. As to the purported conflicting testimony, the O Affidavit does not assess the evidence that was before the Chilean courts nor opine on the merits of the various court decisions.

[57] O testified that he was aware of his duty not to act as an advocate. We have not been provided with any evidence that suggests that we cannot rely on this testimony.

(b) *O's conflict of interest*

[58] The respondents submit that O had an apparent, if not actual, conflict of interest. In support of this submission, the respondents state O said, in cross-examination, that his law firm had provided legal services in a dispute between X, a Swiss mining company, and NG, a BC reporting issuer. They allege that this constitutes a conflict of interest as the dispute involved lands that covered the Amarillo North Mining Claims and the ex-president and CEO of Barrick was a director of NG.

[59] The respondents' summary of O's testimony does not accurately reflect what, in fact, was put to or said by O. O testified, in his cross-examination, that his firm had represented X in litigation and arbitrations in Chile. He was then asked if he was aware X had a mining property in Chile in a joint venture with the ex-president of Barrick respecting a mining property that overlaps the Amarillo North Mining Claims. O said that he was not aware of these facts.

[60] It is in their submissions that the respondents assert for the first time that O's law firm provided legal services in a dispute between X and NG, that the dispute involved lands that cover the Amarillo North Mining Claims and that the ex-president and CEO of Barrick was once a director of NG. The respondents have not introduced any evidence to support any of these assertions.

[61] Even if the respondents were able to establish these assertions, it would not amount to a conflict of interest that would lead to a determination that the O Affidavit was inadmissible or did not merit any weight. The respondents have not demonstrated that O has any interest in the outcome of these proceedings or any relationship with the opposing party (in this case, the executive director).

[62] As stated by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbot and Haliburton Co.*, 2015 SCC 23 (at paragraphs 49 and 50):

> [49] The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. ... I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence.
>
> [50] As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection

> with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.
>
> [Emphasis added.]

[63] Even if O's law firm represented X in a dispute with a company which had a former executive and director of Barrick on its board relating to the lands covering the Amarillo North Mining Claims, we cannot see how that would result in O being unable or unwilling to carry out his duty to provide fair, non-partisan and objective assistance in this case.

(c) *O not an expert in Chilean mining law*

[64] The respondents argue that O is not an expert in Chilean mining law and that the statements in the O Affidavit regarding the Amarillo North and Amarillo South mining petitions are wrong.

[65] O testified that many of the cases he is involved in revolve around issues of mining law as many of his firm's most important clients are mining companies. He gave, as an example, his representation of A, a major international mining company in a dispute with the state-owned Chilean mining company regarding the largest copper project in the world. He said he was not a mining solicitor but that he knew Chilean mining law and the Chilean mining code as many of the disputes he was involved in were based on provisions of the mining code.

[66] To support their submission, the respondents quote excerpts from the website of O's law firm which state that O's significant areas of practice include litigation and international trade. They say that the description of his practice on the website does not include the words "mine" or "mining law" or "mining disputes".

[67] The respondents did not provide any evidence of the website disclosure.

[68] The respondents provided various submissions on their interpretation of Chilean mining law as it relates to the Amarillo North and Amarillo South mining petitions that differ in material respects from the O Affidavit and O's testimony. The only evidence provided by the respondents in support of their interpretation was L's testimony of his opinion about the law. L is not a lawyer and was not qualified as an expert in Chilean mining law. In addition, it is his rights to the Amarillo North and Amarillo South mining petitions that are a central issue in this hearing.

[69] Given L's personal interest in advancing the respondents' interpretation and the fact that he was not qualified as an expert in Chilean mining law, we give no weight to L's testimony on his interpretation of Chilean mining law.

[70] We do not find anything in the respondents' submissions that challenges the credibility of the O Affidavit or O's testimony or our ability to rely on the same. We found O to be a very credible witness. We give full weight to O's testimony and the O Affidavit.

IV. Analysis and Findings

A. *Applicable law*

Standard of proof

[71] The standard of proof is proof on the balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court of Canada held (at paragraph 49):

> In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on the balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[72] The Court also held (at paragraph 46) that the evidence must be "sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test.

[73] This is the standard that the Commission applies to allegations: see *David Michael Michaels and 509802 BC Ltd. doing business as Michaels Wealth Management Group*, 2014 BCSECCOM 327, paragraph 35.

Section 168.1(1)(b)

[74] Section 168.1(1)(b) of the Act states that that a person "must not make a statement or provide information in any record required to be filed …under the Act that, in a material respect and at the time and in light of the circumstances under which it is made, is false or misleading, or omits facts from the statement or information necessary to make that statement or information not false or misleading."

[75] In *HRG Healthcare Resource Group Inc., Alexander Downie and Daniel G. Mohan*, 2015 BCSECCOM 326, the Commission found (at paragraph 34) that the materiality threshold in section 168.1(1)(b) measures the degree to which the statement or information departs from the truth.

[76] Section 85(a) of the Act states that "a reporting issuer must, in accordance with the regulations, provide prescribed periodic disclosure about its business and affairs".

[77] The relevant regulation is National Instrument 52-102 *Continuous Disclosure Obligations* which states in section 5.1 that a reporting issuer must file management discussion and analysis (MD&A) relating to its annual financial statements and each interim financial report required under the National Instrument.

[78] Under National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*, a reporting issuer is required to file certificates in the prescribed form signed by its chief executive officer and chief financial officer with its annual MD&A and interim financial reports.

Section 168.1(2)

[79] Section 168.1(2) of the Act states that a person does not contravene subsection 168.1(1) "if the person (a) did not know, and (b) in the exercise of reasonable diligence, could not have known, that the statement or information was false or misleading."

Section 168.2

[80] Section 168.2 of the Act states that if a corporate respondent contravenes a provision of the Act, an individual who is an employee, officer, director or agent of the company also contravenes the same provision of the Act if the individual "authorizes, permits or acquiesces in the contravention".

[81] There have been many decisions which have considered the meaning of the terms "authorizes, permits or acquiesces". In sum, those decisions require that the individual respondent has the requisite knowledge of the corporate contraventions and the ability to influence the actions of the corporate entity (through action or inaction).

B. *Analysis and findings*

Section 168.1(1)(b) allegations

[82] The executive director alleges that Mountainstar made false or misleading disclosure in 13 MD&A filed from December 2012 to December 2015 regarding:

- two competing or underlying mining claims, namely the Amarillos 1 to 3000 Mining Claims and the Underlying Tesoro Mining Claims, the mining claims forming the Optioned Property, and
- the Villar Proceedings.

[83] Set out below is an analysis of each of these allegations outlining the specific disclosure in issue, the executive director's allegations relating thereto, a summary of the relevant provisions of the O Affidavit, the respondents' submissions and our findings regarding the adequacy of the disclosure.

(a) *Mountainstar's statements regarding the Amarillos 1 to 3000 Mining Claims*

[84] All of the MD&A filed by Mountainstar from December 2012 to December 2015 contain the following description of the Amarillos 1 to 3000 Mining Claims:

> 1. LOS AMARILLOS 1 AL 3000, (acquired 1994 from Lac Minerals, owned by Cia Minera Nevada Limitada, **now in the process of cancellation-Chilean Mining Code process)** (emphasis added).

[85] The executive director submits that Mountainstar's repeated statements in its MD&A from December 2012 to December 2015 that the Amarillos 1 to 3000 Mining Claims

were "now in the process of cancellation – Chilean Mining Code process" were false or misleading.

[86] The O Affidavit states that L filed a claim (the L Vallenar proceedings) in July 2012 with the 1st Civil Court of Vallenar seeking cancellation of CMN's Amarillos 1 to 3000 Mining Claims on the basis that CMN had failed to bring an action for annulment of the overlapping Underlying Tesoro Mining Claims held by UL within the required time period.

[87] This claim was dismissed in full by the courts at every level. L's claim was dismissed by the 1st Civil Court of Vallenar on October 11, 2013 and by the Copiapo Court of Appeals on July 25, 2014. On January 30, 2015, L's claim was fully and finally dismissed by the Supreme Court of Chile. O testified that there are no possible appeals from the Supreme Court decision.

[88] The O Affidavit states that L's brother filed a claim (the C Vallenar proceedings) on December 13, 2011 with the 2nd Civil Court of Vallenar seeking the same declaration on essentially the same grounds as the claim in the L Vallenar proceedings. This claim was also dismissed in full by the courts at every level. His claim was dismissed by the 2nd Civil Court of Vallenar on November 18, 2015 and by the Copiapo Court of Appeals on May 19, 2016. On October 20, 2016, the claim was fully and finally dismissed by the Supreme Court of Chile. O testified that there are no possible appeals from the Supreme Court decision.

[89] The Chilean Courts found that CMN owns both the Amarillos 1 to 3000 Mining Claims and the Underlying Tesoro Mining Claims as UL had acquired the Underlying Tesoro Mining Claims as CMN's agent and former employee. Accordingly, as owner, CMN was prevented by provisions of the Chilean Mining Code from filing an annulment action.

[90] The respondents argue that those ongoing legal proceedings were consistent attempts to cancel the Amarillos 1 to 3000 Mining Claims and that such efforts were a "process of cancellation". They submit that each and every word of litigation disclosure in MD&A should not be parsed as that approach is not consistent with the plain language requirements of regulatory policy.

[91] The respondents further argue that a reasonable member of the public would conclude that the series of legal proceedings commenced by L and his brother meant that a process was underway to cancel the mining claims. We do not agree.

[92] We agree with the executive director's submission that the use of the phrase "in the process of cancellation – Chilean Mining Code process" suggests that a process is underway under the Chilean Mining Code where the end result is certain. This is not a question of parsing words. This phrase does not accurately express the fact that all that had been done was the filing of a claim in Civil Court seeking cancellation of the Amarillos 1 to 3000 Mining Claims.

[93] Furthermore, Mountainstar continued to repeat this phrase over a three year period during which L's and his brother's claims were repeatedly dismissed by Chilean courts at every level. Even if we were to accept the respondents' submissions regarding the meaning of the phrase in issue, the disclosure in the MD&A from October 11, 2013 onward materially departed from the truth when it omitted to state that efforts to seek cancellation were consistently failing at every stage of the court proceedings.

[94] We find that Mountainstar's repeated statements in its MD&A from December 2012 to December 2015 that the Amarillos 1 to 3000 Mining Claims were "now in the process of cancellation – Chilean Mining Code process" were false or misleading in a material respect at the time and in light of the circumstances in which they were made or omitted facts necessary to make the statements not false or misleading.

(b) *Mountainstar's statements regarding the Underlying Tesoro Claims*

December 2012 to December 2015 MD&A disclosure

[95] All of the MD&A filed by Mountainstar from December 2012 to December 2015 contain the following disclosure regarding the Underlying Tesoro Mining Claims:

> 2. TESORO Claims (the "Tesoro Claims, filed in 1997 and under Court Injunction since 2001, title in the name of "Hecotor Unda Llanos", Barrick's mining agent, **now in the process of cancellation – Chilean Mining Code process**) (emphasis added).

[96] The executive director submits that Mountainstar's repeated statements in its MD&A from December 2012 to December 2015 that the Underlying Tesoro Mining Claims were "now in the process of cancellation – Chilean Mining Code process" were false or misleading.

[97] As noted above, in the L Vallenar proceedings and the C Vallenar proceedings, L and L's brother sought cancellation of CMN's Amarillos 1 to 3000 Mining Claims on the basis that CMN had failed to bring an action for annulment of the overlapping Underlying Tesoro Mining Claims.

[98] Our analysis in paragraphs 92 and 93 regarding the disclosure related to these proceedings applies equally to Mountainstar's disclosure regarding the process of cancellation of the Underlying Tesoro Mining Claims.

[99] We find that Mountainstar's repeated statements in its MD&A from December 2012 to December 2015 that the Underlying Tesoro Mining Claims were "now in the process of cancellation – Chilean Mining Code process" were false or misleading in a material respect at the time and in light of the circumstances in which they were made or omitted facts necessary to make the statements not false or misleading.

April 2013 to December 2015 MD&A disclosure

[100] Every MD&A filed by Mountainstar from April 2013 to December 2015 stated that L was the "registered title holder" of the Underlying Tesoro Mining Claims.

[101] The executive director submits that these statements were false or misleading as UL was the registered title holder of these claims throughout this period.

[102] Additionally, every MD&A filed by Mountainstar from April 2013 to March 2014, stated the following:

> On February 19, 2013, the Company announced in its news release that the Company's lawyer had received clean titles to the Mina Pascua, Chile, mining concessions issued by the Mines Registrar of Vallenar. Mr. Jorge Lopehandia is the registered title holder of the titles which cover the following Mina Pascua project areas in Chile:
>
> 1. **Tesoros Uno 1 al 30 through to Tesoros Doce 1 al 5, and**
> 2. **Amarillos Norte and Amarillos Sud.** (emphasis added)

[103] The executive director submits that Mountainstar's statements in the February 19, 2013 news release referenced in its MD&A from April 2013 to March 2014 were false or misleading as they imply that the Mining Registrar "clean titles" showed L was the registered holder of the Underlying Tesoro Mining Claims.

[104] The respondents do not deny that title to the Underlying Tesoro Claims was in the name of UL throughout the period in issue. In fact, they point to their contradictory disclosure on the issue as evidence of an intent to make proper disclosure. Intent is not relevant to allegations under section 168.1(1)(b).

[105] We find that Mountainstar's statements in the February 19, 2013 news release referenced in its MD&A from April 2013 to March 2014 regarding the issuance of "clean titles" by the Mines Registrar in the context of the other statements in the news release implied that the "clean titles" showed L as the registered holder of the Underlying Tesoro Mining Claims.

[106] We find that these statements and the statements that L was the registered title holder of the Underlying Tesoro Mining Claims departed materially from the truth as UL, an employee and agent of B, was the registered holder of these claims throughout the period in issue. We find these statements to be false or misleading in a material respect at the time and in light of the circumstances in which they were made or omitted facts necessary to make the statements not false or misleading.

(c) *Mountainstar's statements regarding the Optioned Property*

[107] Every MD&A filed by Mountainstar from December 2012 to December 2015 identified the Restituted Amarillo North and Amarillo South Mining Claims as the property that was the subject of the Option Agreement and stated that title to those claims was in the name of L:

3. AMARILLO SUR and AMARILLO NORTE, (the "2011 Amarillo Claims, restituted claims filed in 2011, **title in the name of "J.R. Lopehandia", Optioned by MSX, 2011**) (emphasis added).

[108] Additionally, as noted above in paragraph 102, every MD&A filed from April 2013 to March 2014, made reference to a February 19, 2013 press release which stated that Mountainstar's lawyer had received clean titles to the Mina Pascua, Chile, mining concession and that L was the registered holder of titles which cover certain project areas of the Mina Pascua project including the Amarillos Norte and Amarillos Sud. A quote of the relevant wording in the MD&A is set out in paragraph 102.

[109] Applying the same analysis as set out above in paragraphs 104 and 105, we find that the statements in the February 19, 2013 news release regarding the issuance of "clean titles" by the Mines Registrar in the context of the other statements in the news release implied that the "clean titles" showed L as the registered holder of the Restituted Amarillo North and Amarillo South Mining Claims.

[110] The executive director submits that Mountainstar's repeated statements in its MD&A that title to the Restituted Amarillo North and Amarillo South Mining Claims was in the name of L and that he was the registered holder of those claims is false or misleading.

[111] The executive director submits that L never had any meaningful interest in those mining claims. He merely filed applications to obtain mining concessions which were never granted.

[112] O, in his testimony and in the O Affidavit, explained that there was a material difference between a mining petition and a mining concession:

- Under Chilean mining law, any person may apply for a mining concession by filing a manifestacion (or mining petition) with the civil court in the relevant territory. The petition must also be registered with the Conservador de Comercio y Minas (Mining Registry).
- A person may file a mining petition with respect to any land area, including an area where pre-existing mining petitions and even mining concessions already exist. In such cases, the holders of the pre-existing concessions/petitions are entitled to oppose the new petition.
- Under Chilean mining law, a pre-existing concession or petition over the same area has priority over any newly filed petition. An opposition by the holder of a pre-existing concession/petition will succeed unless the applicant can prove there is no overlap.
- A mining petition itself does not confer any exploitation or exploration rights.

[113] The O Affidavit states that O reviewed the court files for the 1st Civil Court of Vallenar which relate to 21 Amarillo North mining petitions and 13 Amarillo South mining

petitions filed by L with respect to the Restituted Amarillo North and Amarillo South Mining Claims and that the court files indicated the following:

- L filed each of the Amarillo North and Amarillo South mining petitions with the 1st Civil Court of Vallenar in March 2011.
- Oppositions were filed in December 2011 by holders of pre-existing mining concessions or petitions with respect to seven of L's petitions. All of the oppositions were upheld between 2012 and January 2014.
- Each of L's remaining 27 mining petitions was cancelled by the Civil Court: six were cancelled in September 2012 and 21 in April 2013.

[114] The O Affidavit states that L's Amarillo North and Amarillo South mining petitions never became concessions and that L, therefore, never acquired any mineral exploration or exploitation rights to the areas subject to the petitions.

[115] The respondents provided various submissions on their interpretation of Chilean mining law as it relates to the Amarillo North and Amarillo South mining petitions which differ in material respects from the O Affidavit and O's testimony. The only evidence provided by the respondents in support of their interpretation was the testimony of L. As noted above in paragraph 69, we do not give any weight to this testimony.

[116] We find that the statements in the MD&A filed by Mountainstar from December 2012 to December 2015, including statements made in MD&A filed between April 2013 to March 2014, that title to the Restituted Amarillo North and Amarillo South Mining Claims was in the name of L and that he was the registered holder of those claims materially departed from the truth as L never acquired any mineral exploration or exploitation rights to the areas in issue. We find these statements to be false or misleading in a material respect at the time and in light of the circumstances in which they were made or omit facts that were necessary to make the statements not false or misleading.

(d) *Mountainstar's statements regarding the Villar Proceedings*

[117] Twelve MD&A filed by Mountainstar from April 2013 to December 2015, include the following statements:

> Lopehandia **is currently disputing** ownership of the property with Barrick Gold Corporation as the latter claims to own the Pascua Lama deposit and thus, the Mina Pascua deposit.[1] The outcome of the dispute and accordingly the ability of the Optionor to convey property rights to the Company are **not determinable at this time**….
>
> Each of Barrick and Jorge Lopehandia allege to own the Mina Pascua Property and that alleged ownership **is the subject of litigation** which commenced in Santiago, Chile on March 4, 2001 (emphasis added).

[1] This first sentence is worded slightly differently ("Barrick Gold Corporation disputing the validity of Mr. Lopehandia's interest in the property") in the MD&A filed in November and December 31, 2015 but the paragraph retained essentially the same meaning.

[118] The executive director submits that the statements in bold print in the above disclosure are false or misleading.

[119] Additionally, in seven MD&A filed between March 2015 and December 2015, Mountainstar made the following statements:

> On January 7, 2015, the Company and Minera Nevada SpA, the Chile subsidiary for Barrick presented written submissions to the Chile Supreme Court which was hearing an appeal in the main litigation that was commenced in March 2001. The main litigation is concerned with who properly owns the mining claims located in Chile forming the Pascua Lama Project. On January 14, 2015, the Company and Minera Nevada SpA presented final oral submissions to the Chile Supreme Court. A written decision of the Chile Supreme Court has not been issued as of the date of this report.

[120] The executive director submits that the following statements in the above-noted seven MD&A were false or misleading:

- written and oral submissions were presented to the Supreme Court in January 2015, and
- "a written decision of the Chile Supreme Court has not been issued as of the date of this report".

[121] The O Affidavit states that V filed a claim in 2001 with the 14th Civil Court of Santiago for annulment and termination of the Amarillos written purchase agreement. This claim is referred to in this decision as the Villar Proceedings.

[122] On June 19, 2006, the Civil Court issued a decision in V's favour. The decision was issued by the Civil Court's principal secretary, K, who was acting temporarily as a substitute judge.

[123] On October 1, 2007, the Santiago Court of Appeals annulled K's decision based on serious procedural irregularities and remitted the proceedings back to the 14th Civil Court. O testified that the effect of the annulment of K's decision was that the decision had no legal effect and the Civil Court was required to issue a new decision based on the merits of the case.

[124] On August 27, 2010, the 14th Civil Court of Santiago issued a new decision dismissing V's claim in full with costs.

[125] V appealed this decision to the Santiago Court of Appeals. On December 31, 2013, the Court of Appeals upheld the August 27, 2010 Civil Court decision.

[126] V, L and four other interested parties appealed the Court of Appeal's decision by filing annulment actions in the Supreme Court of Chile.

[127] On October 2, 2014, the Supreme Court of Chile dismissed all six annulment actions. V and the other claimants then requested a reconsideration. The Supreme Court of Chile fully dismissed the reconsideration request on October 16, 2014. The O Affidavit states that this Chilean Supreme Court decision is final and fully in force and may not be reviewed by any other authority in Chile or abroad.

[128] The respondents argue that various appeals of court decisions pursued by V, L and others with respect to the Villar Proceedings are evidence that the statements in Mountainstar's MD&A relating to ownership disputes and ongoing litigation were accurate.

[129] The respondents submit that the O Affidavit failed to state that L had a right to appeal an April 4, 2017 decision of the Santiago Court of Appeals and that L had in fact exercised that right.

[130] The April 4, 2017 decision related to the ex parte injunction obtained by V with respect to the Underlying Tesoro Claims which prevented UL and CMN from selling or otherwise dealing with the Underlying Tesoro Claims.

[131] The O Affidavit states that the interim injunction did not confer any ownership or exploration rights or give any form of legal title to V, L or anyone else with respect to any mining concessions.

[132] The respondents also argue that it is relevant to the disclosure in issue that L continues to pursue effort to invalidate the various court decisions issued with respect to the Villar Proceedings.

[133] Even if L is pursuing efforts to invalidate the court decisions, we find that the statement in Mountainstar's MD&A filed after August 27, 2010 that the outcome of the litigation and the ability of the Optionor to convey property rights "was not determinable at this time" materially departed from the truth when it omitted to state that the 14th Civil Court of Santiago had issued a decision on that date dismissing the Villar Proceedings in full. Even though V appealed that court decision, the decision was relevant to L's ability to convey property rights and its disclosure was necessary to make the disclosure in the MD&A not false or misleading.

[134] We find, therefore, that the disclosure described in paragraph 117 was false or misleading in a material respect at the time and in light of the circumstances in which they were made or omitted facts necessary to make the disclosure not false or misleading.

[135] We also find that the statements in Mountainstar's MD&A filed after October 14, 2014 that:

- L's ownership of Pascua Lama "is the subject of litigation"

and the statements in Mountainstar's MD&A from March 2015 to December 2015 that:

- "Written and oral submissions were presented to the Supreme Court in January 2015", and

- "a written decision of the Chile Supreme Court has not been issued as of the date of this report"

materially departed from the truth in that they omitted to state that the Chilean Supreme Court fully and finally dismissed the Villar Proceedings in October 2014. We find such disclosure to be false or misleading in a material respect at the time or in light of the circumstances in which they were made or omitted facts from the statements necessary to make the statements not false or misleading.

Duty to provide minimal assistance to unrepresented respondents

[136] In addition to submissions directed at the specific disclosure in issue, the respondents argued that the panel and the executive director have a duty to provide "minimal assistance" to the respondents. In their written submissions, the respondents say that the panel and the executive director failed in that duty and, as a result, the respondents did not receive a fair hearing and the allegations against the respondents should be dismissed. However, in their oral submissions, Johnson, on behalf of the respondents, said that "the panel has, without a doubt, been helpful to us".

[137] The respondents cite *R. v. Wyatt*, 2018 BCCA 162 (CanLII). In that case it was found the judge erred in not providing adequate assistance to the appellant when he failed to address the appellant's apparent misconceptions and legal error that the victim's evidence needed to be corroborated for there to be a conviction and that the appellant's statements to police were in his file and could be relied on at trial without testifying.

[138] *R. v. Wyatt* is a criminal case. It is not clear whether there is a duty to provide minimal assistance, as contemplated in *R. v. Wyatt*, to respondents in proceedings before this Commission. Even if there is a duty of minimal assistance, as contemplated in *R. v. Wyatt*, in proceedings before the Commission, we find that the respondents have failed to establish that the conduct of the panel or the executive director would amount to a failure of that duty.

[139] The Commission, as an administrative tribunal, has a duty of procedural fairness to parties to proceedings before it. We do not agree with the respondents' submissions that they did not receive a fair hearing. We find that the Commission satisfied its duty of procedural fairness to the respondents.

[140] The respondents' submissions on this issue fall generally into three categories: those relating to communications between Mountainstar's corporate counsel and the executive director prior to the hearing regarding the O Affidavit, those relating to the admission of documents and those relating to Johnson's cross-examination of O.

(a) *Communications between Mountainstar's legal counsel and the executive director*

[141] Mountainstar says that one month before the commencement of the hearing, its corporate counsel brought to the attention of the executive director various allegations regarding deficiencies and defects in the O Affidavit, including the allegations regarding O's

conflict of interest and acting as an advocate for the executive director discussed under "Preliminary Issues – Expert witness".

[142] The respondents submit that the executive director failed in his duty to provide minimal assistance when he did not bring to the attention of the panel the position of Mountainstar's counsel on these issues.

[143] The respondents say that the executive director should have known that the reason that Johnson did not advance these issues at the evidentiary hearing was the "complete and utter inability" of Johnson to understand the litigation process. We do not accept this submission.

[144] The litigation process was explained to Johnson several times. The hearing purpose and process were explained to Johnson first, at the hearing management meeting held on November 6, 2017 and then, in more detail, at the commencement of the hearing on January 30, 2018. The explanation was repeated before commencement of the respondents' case on March 26, 2018.

[145] The respondents received O's Affidavit well in advance of the hearing and had the opportunity to consult corporate counsel about its content. They had the opportunity to cross-examine O on the affidavit at the hearing and did so. A review of the transcript shows Johnson asked many questions of O, including questions about conflicts of interest. Counsel for the executive director raised the issue of whether O was acting as an advocate for the executive director in the direct examination of O, which Johnson had the opportunity to ask O about in his cross-examination.

[146] In addition, the position of Mountainstar's counsel regarding alleged deficiencies in the O Affidavit were clearly brought to the attention of the panel in the detailed submissions on this issue provided in the respondents' liability submissions.

[147] For the reasons stated above, we find that the failure of the executive director to bring to the attention of the panel the comments that Mountainstar's counsel raised prior to the hearing did not result in an unfair hearing for the respondents. There was no breach of the duty of procedural fairness. Even if the executive director has a duty to provide minimal assistance to the respondents, as contemplated in *R. v. Wyatt*, we find that this conduct would not have amounted to a failure of this duty.

(b) *Cross-examination of O by Johnson*

[148] The respondents also allege that the panel and the executive director failed to provide required minimal assistance to the respondents when they did not assist Johnson in his cross-examination of O. They say certain key issues were lost because of Johnson's inability to formulate or articulate questions that raised such issues.

[149] The respondents say that it should have been obvious that one of their key issues was:

> How did the beneficial interest in the Tesoro mining concessions end up in the

> hands of Barrick if UL was independent of Barrick in light of the existence of the Interim Injunction (abbreviation added).

[150] This was not a question on which O could have given evidence, as it was outside the matters covered in his affidavit. Even if it were something he could have testified to, it is not clear how the panel or the executive director could have known that the respondents wished to raise this issue as it is not relevant to the allegations in the notice of hearing. Additionally, it is not the role of the executive director or the panel to conduct the respondents' cross-examination on their behalf.

[151] The respondents also say that the executive director and the panel chair hampered Johnson in his cross-examination.

[152] A review of the transcript shows that the panel chair and the executive director interceded a number of times during Johnson's cross-examination of O primarily to: seek clarification of the nature of the questions put by Johnson to O and point out when his questions were outside the scope of the O Affidavit and O's testimony. The respondents have not explained how such intercessions hampered Johnson's cross-examination.

[153] For the reasons above, we do not accept the respondents' submissions that the circumstances surrounding the cross-examination of O resulted in them not receiving a fair hearing. There was no breach of the duty of procedural fairness. Even if the panel and the executive director have a duty to provide minimal assistance to the respondents, as contemplated in *R. v. Wyatt*, we find that they would not have failed in this duty with respect to Johnson's cross-examination of O.

(c) *Strict adherence to evidentiary rules*

[154] The respondents say that the panel and the executive director failed in their duty to provide minimal assistance by strictly adhering to evidentiary rules which "ensured the hearing was unjust [and] left valuable evidence unheard".

[155] During the respondents' direct examination of L, L made reference to a Supreme Court of Chile decision that L said he had emailed to the executive director. The respondents say they thought that this was a proper means of providing notice of documents that they intended to rely on as evidence. They say that the panel refused to admit this document and that this was an inappropriate adherence to evidentiary rules.

[156] Throughout the hearing, the respondents and L, in his testimony, made repeated references to this document as being key to the respondents' case. The executive director referred to this document as the "mysterious 2017 Supreme Court decision". He said Commission staff have never been provided with a copy of this document and he does not believe it exists. Despite many opportunities to deliver this document, the respondents failed to do so.

[157] The panel afforded the respondents many opportunities to deliver the documents they wished to admit as evidence and extended considerable latitude to the respondents on this issue throughout the hearing process. Examples include the lengthy adjournment granted

to allow the respondents additional time to prepare and deliver evidentiary documents as described in paragraph 33 and the consideration of the admission of the identified documents at the liability submissions hearing as described in paragraphs 36 to 46. Both of these matters were initiated on the panel's own motions.

[158] We do not accept the respondents' submissions that there was a strict adherence to evidentiary rules or that the panel's conduct with respect to the admission of the respondents' documents resulted in the respondents not receiving a fair hearing. There was no breach of the duty of procedural fairness. Even if the panel and the executive director have a duty to provide minimal assistance to the respondents, as contemplated in *R. v. Wyatt*, we find that their conduct with respect to admission of the respondents' documents would not amount to a failure of such a duty.

Section 168.1(2) due diligence defence

[159] The respondents seek to rely on the due diligence defence available under section 168.1(2). The respondents say that Mountainstar took reasonable steps to determine the status of the mining claims and the legal proceedings that were the subject of the disclosure by relying on T, whom they say is a Spanish speaking lawyer licenced to practice law in Chile and familiar with the claims and proceedings.

[160] As noted above, the respondents did not provide any evidence as to the legal advice received nor was any other evidence introduced by the respondents of communications with or advice from Chilean legal counsel.

[161] T was L's lawyer. Johnson said, while making submissions for the respondents, that T did not handle any other clients. He said Mountainstar did not engage T directly but paid L to provide T's services. Johnson said that T did not speak English and, as Johnson did not speak Spanish, he relied on L to translate any advice provided by T.

[162] The respondents say that it was reasonable to rely on T's advice as, among other things, they were certain that T did not have an apparent or real conflict of interest with Barrick or any of its affiliates.

[163] The respondents appear to fail to understand that, while T may not have had an apparent or real conflict of interest with Barrick or its affiliates, he had a real conflict of interest in providing advice to Mountainstar regarding the ownership of the mining claims and the status of the related legal proceedings. T's sole client, L, was paid over US$4.6 million for the very rights which were the subject of T's legal advice to Mountainstar.

[164] The issue is further exacerbated by the fact that the respondents could not communicate directly with T and relied on L to translate T's advice.

[165] The respondents failed to obtain independent legal advice regarding ownership of L's Chilean mining interests and related legal proceedings When they became aware of the August 2010 decision of the 14th Civil Court of Santiago dismissing the Villar Proceedings in full, they decided not to disclose the court decision in Mountainstar's

MD&A. Johnson, in his interview with Commission staff, acknowledged that he became aware of the court decision. He said that Mountainstar did not disclose the decision and instead, described the proceedings as "not determinable" because the respondents believed the decision was "completely wrong".

[166] The respondents also submit that they made reference to the complexity of the litigation relating to L's Chilean mining interests as a risk factor in Mountainstar's press releases. It is not clear how this submission relates to the reasonable due diligence defence in section 168.1(2). The issue is not whether the respondents disclosed the risks related to the litigation but whether they knew or, with reasonable due diligence, could have known, that the disclosure Mountainstar provided regarding the litigation in the MD&A in issue was false or misleading.

[167] For the reasons stated above, we find that the respondents either knew that the disclosure in question was false or misleading or failed to exercise the reasonable due diligence required to find out whether the statements were false or misleading.

Section 168.1(1)(b) finding

[168] We have found that the disclosure in Mountainstar's MD&A specified above regarding the Amarillos 1 to 3000 Mining Claims, the Underlying Tesoro Mining Claims, the Optioned Property and the Villar Proceedings to be false or misleading in a material respect and at the time and in light of the circumstances under which they were made, or to have omitted facts necessary to make the disclosure not false or misleading.

[169] Pursuant to National Instrument 52-102, MD&A is a record required to be filed under the Act.

[170] We find that Mountainstar contravened section 168.1(1)(b) when it filed MD&A containing the disclosure described above.

Section 168.2 allegations

[171] The executive director alleges that Johnson, as an officer and director of Mountainstar, permitted or acquiesced in Mountainstar's contraventions of section 168.1(1)(b) of the Act and he therefore contravened that same provision under section 168.2 of the Act.

[172] Johnson was clearly aware of the filing of the MD&A in issue and had the ability to influence its content as he signed, as Mountainstar's CEO, the certificate required under National Instrument 52-109 which accompanied the filing of each of the MD&A in issue.

[173] These certificates state that Johnson has reviewed the MD&A and that, based on his knowledge, having exercised reasonable diligence, the filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it was made.

Section 168.2 finding

[174] We find that Johnson authorized, permitted or acquiesced in Mountainstar's repeated contraventions of section 168.1(1)(b) and therefore Johnson repeatedly contravened the same provision.

V. Submissions on Sanctions

[175] We direct the executive director and the respondents to make their submissions on sanctions as follows:

By November 2, 2018	The executive director delivers submissions to the respondents and to the secretary to the Commission.
By November 23, 2018	The respondents deliver their response submissions to the executive director and to the secretary to the Commission. Any party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission. The secretary to the Commission will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).
By November 30, 2018	The executive director delivers reply submissions (if any) to the respondents and the secretary to the Commission.

October 12, 2018

For the Commission

Judith Downes
Commissioner

Audrey T. Ho
Commissioner

Don Rowlatt
Commissioner