ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Cerato, 2022 ABASC 31 **Date: 20220412**

Jan Gregory Cerato (a.k.a. Jan Strzepka)

Panel:	Kari Horn Tom Cotter Karen Kim
Representation:	Diana Piper Amelia Martin for Commission Staff John C. Zang for the Respondent
Submissions Completed:	March 9, 2021
Decision:	April 12, 2022

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I. INTRODUCTION

[1] In a Notice of Hearing dated February 28, 2020, staff (**Staff**) of the Alberta Securities Commission (the **ASC**) alleged that Jan Gregory Cerato (a.k.a. Jan Strzepka) (**Cerato**) contravened the *Securities Act* (Alberta) (the **Act**) by engaging in a distribution of securities without a receipted prospectus or an available exemption from the prospectus requirement.

[2] As part of his defence, Cerato challenged actions taken by Staff, which he claimed infringed his constitutional rights and warranted a stay of proceedings. He submitted a Notice of Constitutional Question dated October 28, 2020 (the **Charter Notice**) to the ASC and to the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta pursuant to s. 12(1)(a) of the *Administrative Procedures and Jurisdiction Act* (Alberta) (the **APJA**), neither of whom participated in the hearing (although counsel for the Attorney General of Alberta appeared in a prehearing application relating to the Charter Notice).

[3] We held a ten-day hearing, during which we received documentary evidence and heard testimony from eight witnesses. Cerato was represented by counsel throughout. Cerato did not testify in the hearing but transcripts from his compelled investigative interview with Staff were admitted into evidence. We also received written and oral submissions from the parties on the constitutional questions in the Charter Notice and the allegations in the Notice of Hearing. We consider first the Charter Notice in light of the remedies sought, which include a stay of proceedings.

[4] For the reasons set out below, we found that Cerato did not establish a violation of his constitutional rights and that he contravened s. 110 of the Act.

A. Constitutional Questions

[5] In the Charter Notice, Cerato claimed, among other things, that s. 2(b) of the Canadian *Charter of Rights and Freedoms* (the **Charter**) was infringed by the confidentiality obligations prescribed by s. 45 of the Act and Staff's application of s. 45 to Cerato and others.

[6] Section 45 provides:

> Anything acquired and all information or evidence obtained pursuant to an investigation is confidential and shall not be divulged except
>
> (a) by a person or company to the person's or company's counsel,
> (b) where authorized by the Executive Director, or
> (c) as otherwise permitted by Alberta securities laws.

[7] Although the Charter Notice was pled in broad terms, its scope was narrowed during the course of the proceeding. In essence, Cerato contended that his freedom of expression was infringed in a manner that cannot be justified under s. 1 of the Charter and that the proceedings should be permanently stayed. Staff submitted that Cerato did not establish that his rights were infringed, and that any alleged contravention was minimal and consistent with binding case law upholding s. 45 as a justified limitation of s. 2(b) of the Charter.

B. Staff's Allegations

[8] The Notice of Hearing alleged that Cerato issued securities from December 2017 to at least the middle of 2018 by soliciting members of the public to invest capital – a minimum of $10,000 or the equivalent in Bitcoin – in a pooled investment. Cerato promoted the investment on the basis that a trading team would use the pooled funds to trade cryptocurrencies with a view to a profit that would be shared among the trading team and investors. Staff alleged that Cerato contravened s. 110 of the Act by distributing securities without a prospectus or an exemption from the requirement to file a prospectus with the ASC.

[9] There was relatively little disagreement about the facts that gave rise to Staff's allegations. Investors provided money to Cerato knowing that their funds would be pooled and used to trade cryptocurrencies. No prospectus was filed with the ASC for these investments. The fundamental issues were whether there was a distribution and whether the investments fell within the private investment club exemption in section 2.20 of National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**).

[10] Deciding these issues required an analysis of Cerato's pooled investment scheme. The allegations did not raise any issue of whether the cryptocurrencies traded by Cerato's trading team fell within the definition of a "security" under the Act, and our decision should not be interpreted as addressing that issue.

C. Evidentiary Matters

1. Standard and Onus of Proof

[11] The applicable standard of proof is the balance of probabilities, requiring a determination of "whether it is more likely than not that an alleged event occurred" (*F.H. v. McDougall*, 2008 SCC 53 at para. 49). The evidence must be "sufficiently clear, convincing and cogent" to satisfy this standard (*F.H.* at para. 46).

[12] Proper consideration of Charter claims requires sufficient evidence, and their adjudication cannot be based on the "unsupported hypotheses of enthusiastic counsel" (*MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at 361-62). The burden of establishing a Charter breach lies on the person asserting the breach, with the burden then shifting to the party seeking to uphold the limitation to establish that the infringement is a reasonable limit that is demonstrably justified in a free and democratic society (*R. v. Oakes*, [1986] 1 S.C.R. 103 at 136-37).

2. Witnesses

[13] Staff called eight witnesses: a Staff investigator – Dale Fisher (**Fisher**), Scott Fleurie (**Fleurie**), and six investors (DK, MS, OS, AM, SC and GN).

[14] Cerato did not call any witnesses.

3. Transcript Evidence

[15] While represented by counsel, Cerato submitted to an interview with Staff investigators on March 25, 2019, in which he gave evidence under oath. The transcript from that interview (the **Cerato Transcript**) was admitted into evidence, along with all of the exhibits that were referred to during the interview.

[16] Staff sought to rely only on certain read-ins from the Cerato Transcript, but the entire Cerato Transcript (including associated exhibits) was admitted on the understanding that the remaining portions would not form part of Staff's case. Cerato contended that he could rely on any evidence contained in the transcript in support of his case, whether part of Staff's read-ins or not. We proceeded on the basis that Cerato could refer to any part of the Cerato Transcript, subject to our assessment of the weight we would give to that evidence. Cerato then read-in certain portions of the Cerato Transcript as part of his defence.

[17] During their investigation, Staff interviewed a number of investors, including those who testified at the hearing. We admitted transcripts from those interviews, largely consisting of excerpts in which Staff discussed s. 45 of the Act with the interviewee, although in three instances the entire transcript was admitted.

[18] ASC panels are not bound by hearsay rules, and we therefore admitted this evidence in accordance with s. 29 of the Act, subject to our assessment of weight.

II. CONSTITUTIONAL QUESTIONS

[19] We first address the constitutional issues raised by Cerato in the Charter Notice.

A. Background and Procedural Developments

1. Charter Notice

[20] Section 12 of the APJA provides that anyone who seeks to raise a question of constitutional law before a designated decision maker (such as the ASC) must provide written notice to the decision maker with particulars, including:

- the "grounds to be argued and reasonable particulars of the proposed argument, including a concise statement of the constitutional principles to be argued, references to any statutory provision or rule on which reliance will be placed and any cases or authorities to be relied upon",
- the "material and documents that will be filed with the decision-maker", and
- a "[l]ist of witnesses intended to be called to give evidence before the decision-maker and the substance of their proposed testimony" (*Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006, s. 3 and Schedule 2).

[21] The Charter Notice raised four constitutional questions: two relating to the validity of s. 45 of the Act, alleging contraventions of ss. 2 and 7 of the Charter; and two relating to alleged contraventions of Cerato's rights under ss. 2 and 7 of the Charter from the application of s. 45, the **Executive Director**'s actions pursuant to s. 45(b), and Staff's imposition of confidentiality requirements on Cerato and others. Cerato submitted that the contraventions alleged were not justifiable under s. 1 of the Charter.

[22] The Charter Notice contained sections described as "the material facts giving rise to the constitutional question" and "the legal basis for the constitutional question", and concluded with an enumeration of the remedies sought, including "a general declaration of the constitutional invalidity" of s. 45 of the Act and an order staying the proceedings.

[23] Other than three appended documents, the Charter Notice did not list or describe the material or documents that Cerato intended to file with the ASC, nor did it identify the witnesses whom Cerato intended to call. It was not suggested that these omissions made the Charter Notice defective or precluded our consideration of the constitutional questions, but they nonetheless contributed to procedural and evidentiary difficulties for the parties and the panel.

[24] We also observe that Cerato did not provide Staff with any pre-hearing disclosure pursuant to s. 7.2 of ASC Rule 15-501 *Rules of Practice and Procedure for Commission Proceedings* (the **ASC Rules**).

2. Request for Referral of Constitutional Questions to Court

[25] In a pre-hearing application, Cerato sought to have the constitutional questions in the Charter Notice referred to the Alberta Court of Queen's Bench pursuant to s. 13(1) of the APJA and to postpone the hearing pending the Court's determination. Cerato's request was denied and dates were reserved for Cerato to pursue the constitutional questions in advance of the hearing. As Cerato took no steps to do so, the provisional dates were released and the hearing proceeded as scheduled.

[26] On the first day of the hearing, Cerato's counsel said the Charter Notice remained extant, that evidence would be presented in relation to it, and the constitutional questions could be addressed in closing submissions.

3. Fisher's Evidence

[27] Cerato did not call any witnesses to give evidence regarding the Charter Notice. Instead he relied on cross-examination of Staff's witnesses. Because Fisher was the only Staff investigator called as a witness, his evidence was central to certain issues raised in the Charter Notice.

[28] In cross-examination, Fisher identified numerous statements made by Staff investigators to Cerato and others about the confidentiality restrictions in s. 45 of the Act. These statements were made in writing and orally during investigative interviews. Fisher was questioned about whether there were any subsequent communications to Cerato or others modifying or removing the confidentiality restrictions. He testified that neither he, nor to his knowledge anyone else at the ASC, communicated any modifications of the confidentiality restrictions before or after the Notice of Hearing was issued in February 2020.

[29] Following Fisher's testimony, Cerato's counsel sought to examine a witness who could testify "on behalf of the ASC" regarding Staff's communications with witnesses about confidentiality and s. 45 of the Act. After considerable discussion between counsel (including consultation with the panel), the hearing proceeded as follows:

- Fisher made inquiries about Staff's communications with witnesses regarding confidentiality and s. 45 of the Act;

- Fisher swore an affidavit (the **Fisher Affidavit**) to clarify Staff's communications with witnesses and Cerato regarding confidentiality and s. 45 of the Act;

- Cerato provided numerous documents to Staff (which we understand were primarily, if not entirely, from Staff's disclosure) so that Fisher could answer questions about them;

- the Fisher Affidavit and some (if not all) of the documents provided by Cerato were admitted into evidence; and

- Fisher was recalled for additional cross-examination on this evidence.

[30] In his affidavit, Fisher deposed that he believed that Staff's disclosure contained all witness communications regarding confidentiality and s. 45 of the Act, subject to noted exceptions.

4. Revised Scope of Charter Notice

[31] After Staff closed its case, the parties provided written submissions on the Charter Notice. Cerato reduced the scope of the Charter Notice in his submissions by confirming that he was not seeking a general declaration that s. 45 of the Act is invalid and that he was not claiming a "specific infringement" of his rights under s. 7 of the Charter.

[32] Cerato also clarified that his claim that his s. 2(b) Charter rights had been violated was based on the confidentiality restrictions imposed by Staff in their communications with Cerato and others, and that it was these restrictions as communicated by Staff, as distinct from the restrictions in s. 45 of the Act, that infringed his Charter rights.

[33] Accordingly, Cerato's submissions confirmed that the constitutional questions to be decided were whether his s. 2(b) Charter rights were infringed by:

(i) the confidentiality requirements communicated by Staff to Cerato and the witnesses; and

(ii) the Executive Director's refusal to authorize disclosure pursuant to s. 45(b) of the Act.

5. Supplemental Affidavit

[34] Staff sought to admit an affidavit (the **Supplemental Affidavit**) with their written submissions on grounds that certain facts and arguments in Cerato's written submissions could not have been anticipated because they were substantively different from those made in the Charter Notice. In particular, Staff pointed to a number of instances where Cerato's written submissions implied that Cerato was never authorized to use Staff's disclosure to make full answer and defence.

[35] The Supplemental Affidavit, sworn by a Staff legal assistant, appended four letters that Staff had sent to either Cerato or his counsel after the Notice of Hearing was issued. The first, dated March 2, 2020, accompanied the Notice of Hearing and Staff's initial disclosure, as required by s. 7.1(b) of the ASC Rules (referred to as ***Stinchcombe*** disclosure). Subsequent letters, dated September 16, October 8 and October 26, 2020, provided Cerato's counsel with further disclosure. Each of these letters included a statement that the disclosure was confidential and subject to s. 45 of the Act, "[e]xcept as necessary to permit full answer and defence" to the allegations in the Notice of Hearing.

[36] Staff asserted that the evidence was necessary to preclude Cerato from making a "deliberate omission of a fact that he knows to be true", namely that Cerato was expressly told on at least four occasions that he could use Staff's disclosure for the purpose of making full answer and defence to Staff's allegations despite the confidentiality restrictions in s. 45 of the Act. Staff also pointed out that the evidence was not new as one of the letters appended to the Supplemental Affidavit was already before us as part of the Charter Notice. Accordingly, Staff asked us to admit the Supplemental Affidavit to ensure there was a complete evidentiary record on this issue.

[37] Cerato objected to the admission of the Supplemental Affidavit. He argued that Staff had not applied to re-open their case and that they had not demonstrated that the evidence could not have been obtained by reasonable diligence or that it would probably change the result. Cerato did not contest the premise of Staff's position – that Staff expressly authorized Cerato to use Staff's disclosure to make full answer and defence – but asserted that Staff chose not to adduce such evidence and that it was unfair to do so after closing their case.

[38] Cerato's counsel denied that his submissions contained misleading statements and claimed that his submissions were premised on the lack of evidence before the panel rather than any assertion that the subject authorization was never granted (although when questioned by the panel, he acknowledged that at least one statement in his submissions did not characterize the issue as such). Cerato suggested that Staff opted not to provide this evidence after engaging in "protracted discussions" leading up to the admission of the Fisher Affidavit and having Fisher recalled. Cerato's position generally was that the timing and the manner in which Staff sought to adduce this evidence was unfair.

[39] Staff submitted that the applicable legal test for the admission of evidence in these circumstances primarily focuses on the relevance of the proposed evidence, not whether the evidence was available or could have been anticipated during the hearing.

[40] We addressed the admissibility of the Supplemental Affidavit at the outset of oral submissions.

[41] Consistent with s. 29(e) of the Act, our authority to admit the Supplemental Affidavit after Staff's case was closed is set out in *Re Ironside*, 2005 ABASC 62 at para. 21:

> . . . if, at this stage of the Hearing, we are persuaded that additional evidence is demonstrably relevant, then we are prepared to admit it. We do not consider it necessary that it be shown that such new evidence was not previously available, or that it bears upon a decisive issue for determination in the main proceeding.

[42] As mentioned, the Charter Notice did not describe the evidence that Cerato planned to rely on in support of his position. In addition, the Charter Notice included the statement: "Prior to the issuance of the Notice of Hearing there was no lifting of the Confidentiality Requirements whatsoever" (at para. 14); whereas in his written submissions Cerato stated: ". . . there is absolutely no reason why the confidentiality requirements imposed by the ASC on Cerato and others could not have been lifted upon issuance of the Notice of Hearing." These two statements are clearly at odds. With that contradiction and the evolving nature of the constitutional issues, we did not consider Staff's decision not to adduce that evidence during the hearing as fatal. We would have expected Staff to adduce at least the March 2, 2020 letter if the Charter Notice stated that no exception to permit full answer and defence was communicated to Cerato following the issuance of the Notice of Hearing; however, the Charter Notice suggested the opposite.

[43] In light of the inconsistencies in the Charter Notice and the misstatements in Cerato's submissions on the point, we decided that the prevailing consideration should be to ensure that the evidentiary record was complete and accurate. It was unclear that all documentary evidence of Staff's communications about confidentiality had been adduced. When Fisher was recalled he acknowledged that he had reviewed the documents provided to him by Cerato "in the time allotted" and while he thought they had captured most of Staff communications relating to s. 45, he could not say definitively and said that a few might have been missed.

[44] There was no dispute over the relevance or the truth of the contents of the documentary evidence in the Supplemental Affidavit (*Re Flag Resources (1985) Ltd.*, 2010 ABASC 15 at paras. 7-8) and we thus admitted the Supplemental Affidavit into evidence.

[45] Cerato then sought to cross-examine on the Supplemental Affidavit. His proposed cross-examination was to pose "very similar questions" to those asked of Fisher about the timing and scope of the confidentiality restrictions. He also said that he would have cross-examined Fisher on this evidence had it been included in the Fisher Affidavit but the affiant's lack of personal involvement unfairly foreclosed his ability to effectively cross-examine on the Supplemental Affidavit.

[46] Staff objected, stating that neither the affiant nor Fisher could offer meaningful testimony because the documents speak for themselves. Staff also submitted that it was unnecessary to cross-examine the affiant about the timing of Staff's permission for Cerato to use Staff's disclosure to make full answer and defence, since a respondent's need to make full answer and defence does not arise until a Notice of Hearing has been issued. Staff suggested that any concern about the truthfulness of the evidence was a question of weight that could be left to the panel's discretion.

[47] We considered the parties' oral submissions, ruled that the Supplemental Affidavit would be admitted without cross-examination, and advised that our reasons would be included in this written decision.

[48] The following considerations informed our ruling:

- As mentioned, there was no dispute about the authenticity and truth of the contents of the correspondence attached to the Supplemental Affidavit, which was self-explanatory.

- Cerato had the Supplemental Affidavit exhibits and had an opportunity to put them to Fisher in cross-examination.

- Cerato had an opportunity to cross-examine on the Supplemental Affidavit before oral submissions, but he chose not to cross-examine either the affiant or Fisher at that time.

- Cerato's proposed line of questioning – to ask questions similar in nature to those asked of Fisher in cross-examination – was of limited, if any, utility. The cross-examination of Fisher addressed whether Staff investigators made exceptions to the confidentiality restrictions, in particular whether witnesses were told that they could disclose confidential information to Cerato so that he could make full answer and defence and whether any confidentiality restrictions were modified after the Notice of Hearing was issued. Those questions would be redundant (the Supplemental Affidavit merely showed that Staff expressly told Cerato on at least four occasions after the Notice of Hearing was issued that he could use Staff's disclosure to make full answer and defence) and would only confirm that Staff had not otherwise modified the confidentiality restrictions set out in s. 45 of the Act.

- Cerato had the opportunity to respond to the Supplemental Affidavit in his written reply submissions and in oral submissions.

[49] The Supplemental Affidavit was merely corroborative of other evidence admitted during the hearing. In the circumstances, we were satisfied that adjourning the proceedings for cross-examination on the Supplemental Affidavit was unwarranted and that admitting the untested Supplemental Affidavit would not result in procedural unfairness to Cerato.

[50] Aside from the Supplemental Affidavit, the ASC correspondence that was admitted into evidence during the hearing and tendered with the Charter Notice was sufficient to satisfy us, on a balance of probabilities, that Cerato was expressly told that he could use the disclosure as necessary to permit full answer and defence to Staff's allegations.

B. Evidence

[51] In their investigation, Staff collected documents from several persons and entities and interviewed various witnesses under oath, pursuant to Staff's investigative powers under Part 2 of the Act. In so doing Staff communicated the confidentiality restrictions in s. 45 of the Act. These restrictions are consistent with the ASC's recognized duty to protect the privacy interests and confidences of parties compelled to produce documents and to testify under oath to investigators (*Deloitte & Touche LLP v. Ontario (Securities Commission)*, 2003 SCC 61 at para. 29).

1. Confidentiality Restrictions in Written Communications

[52] Most of Staff's correspondence containing confidentiality restrictions was sent with summonses and notices compelling production issued to various persons and entities.

[53] Staff's December 19, 2018 email to Cerato's counsel included a summons for Cerato to attend an investigative interview and read, in part:

> Please also note the following which outlines your client's obligations under section 45 of the Act on this matter.
>
> Pursuant to section 45 of the Act, all information and evidence relating to the investigation and this Summons are confidential and must not be divulged, except where authorized by the Executive Director of the Alberta Securities Commission or as permitted by Alberta securities laws. All communications of any nature and kind regarding the investigation and this summons are expressly restricted by section 45 of the Act to communications between your legal counsel and you. Breaches of this statutory obligation of confidentiality may be subject to prosecution under section 194 of the Act.

[54] Appended to the email was a letter and summons. The letter contained a similar statement:

> Pursuant to section 45 of the *Act*, all information and evidence relating to the investigation and this Summons are confidential and must not be divulged, except where authorized by the Executive Director of the Alberta Securities Commission (or his delegate, the Director of Enforcement) or as permitted by Alberta securities laws. Pursuant to section 45 of the Act, all communications of any nature and kind regarding the investigation and this summons are expressly restricted to communications between your legal counsel and you. Breaches of this statutory obligation of confidentiality may be subject to prosecution under section 194 of the *Act*.

[55] Staff made similar, if not identical, statements in written communications to others with summonses or notices compelling production.

[56] Fisher testified that these confidentiality warnings were in Staff's communications template, to protect the integrity of Staff's investigations by preventing recipients from discussing the matter with others who may be interviewed. He also testified that he was unaware of any instances where he or anyone else from the ASC told recipients about any confidentiality exceptions, particularly whether they could disclose confidential information to Cerato or his legal counsel so that he could make full answer and defence to Staff's allegations. (We note that when Staff sent written correspondence with summonses and notices compelling production, the Notice of Hearing had not been issued, so there were no allegations for Cerato to answer and defend.)

[57] In addition to the written statements accompanying summonses and notices compelling production, Staff counsel sent documents to hearing witnesses before the hearing, including a copy of any transcript from their investigative interview and "a standard 'preparation to testify' memo". The letters accompanying those materials included a statement advising recipients that "the interview transcript and enclosed documents were obtained for the purposes of the investigation and remain confidential, and shall not be divulged except in accordance with section 45 of the [Securities] Act." These communications were identified in the Fisher Affidavit as documents that had not previously been disclosed to Cerato. Staff noted that these communications contained

privileged information – a point which Cerato did not contest – and that only the relevant portion was reproduced in the Fisher Affidavit.

2. Confidentiality Restrictions in Oral Statements

[58] On March 25, 2019, Staff investigators interviewed Cerato (who was represented by counsel). During the interview, a Staff investigator made the following statement (the **Confidentiality Warning**):

> I also wish to inform you that information or documentation may be revealed or discussed in this interview that is considered confidential pursuant to Section 45 of the *Securities Act*. Except with the expressed permission of the executive director of the ASC or otherwise permitted under Alberta's securities laws, you are not to divulge this information to anyone but your legal counsel.

[59] Near the end of the interview, a Staff investigator reminded Cerato of the confidentiality restrictions prescribed by s. 45 of the Act (the **Confidentiality Reminder**):

> So I'm just going to remind you that information and/or documentation revealed or discussed in this interview may be considered confidential, and pursuant to Section 45 of the Alberta Securities Act, you are not to discuss the contents of this interview with anyone other than your counsel.

[60] Staff investigators interviewed at least 13 other persons during their investigation. In addition to transcript excerpts of each of these interviews, full transcripts of three interviews (Fleurie, SC and GN) were in evidence. Except as indicated below, the transcripts indicated that Staff investigators gave the witnesses a Confidentiality Warning and a Confidentiality Reminder similar to those given to Cerato:

- in two of the interviews where the full transcripts were in evidence, no Confidentiality Reminder was given;
- in one interview, the transcript excerpt did not include a Confidentiality Reminder; and
- in the interview of GN, a Staff investigator made a statement that differed from the Confidentiality Warning, as it did not indicate that confidentiality was subject to permission from the Executive Director or as otherwise permitted by Alberta securities laws.

[61] In some instances, Staff investigators had additional discussion with the witness about the s. 45 confidentiality restrictions. In particular:

- after being given the Confidentiality Warning, MS inquired about the scope of the confidentiality restriction and Staff said the warning applied to "[w]hat we discuss here today";
- OS asked for some elaboration on the Confidentiality Reminder and was told that he could talk to Cerato about his investment "but not that we met and what we

discussed here. So you can talk to him about your investment, like statements . . ." but the interview was "confidential unless it becomes public . . .";

- DK asked Staff if he required a lawyer given the references to legal counsel as part of their warnings, and was told that if he had "a civil action or anything" he could discuss what was talked about during the interview with his counsel but "other than a legal counsel, our investigations are confidential"; and

- in response to SC's question about whether his transcript could be used in a civil case, the Staff investigator told SC that the interview transcript was "confidential for now" but if a decision was made to lay charges "there would be disclosure, but depending on the hearing, it might be public, might not".

[62] Fisher testified that the wording for the investigative interviews was "boilerplate language" and that the witnesses confirmed their understanding about what they were told.

[63] The Fisher Affidavit stated that except for certain of Staff's email communications with Fleurie, OS, AM, SC and IA (discussed later in these reasons),

> . . . Staff did not advise any witnesses that they could communicate with [Cerato] or his legal counsel to make full answer and defence. The opposite is also true, . . . Staff did not advise any witnesses that they could not communicate with [Cerato] or his legal counsel to make full answer and defence.

3. Authorization to Use Disclosure to Permit Full Answer and Defence

[64] In early March 2020, Cerato was served with the Notice of Hearing (dated February 28, 2020), and Staff's *Stinchcombe* disclosure. These materials were sent with a cover letter dated March 2, 2020, which included the following statement:

> Pursuant to section 45 of the *Act*, anything acquired and all information or evidence obtained pursuant to an investigation is confidential, and shall not be divulged except, (a) by a person or company to the person's or company's counsel; (b) where authorized by the Executive Director; or (c) as otherwise permitted by Alberta securities laws.
>
> The enclosed materials were obtained pursuant to an investigation. Except as necessary to permit full answer and defence of the allegations in the Notice, the materials remain confidential and are subject to section 45 of the *Act*.

[65] A similar statement was included in a letter from Staff to Cerato's counsel dated September 16, 2020, in which Staff provided their pre-hearing disclosure pursuant to s. 7.1(c) of the ASC Rules, along with additional disclosure pursuant to their ongoing disclosure obligations under s. 7.4 of the ASC Rules. Similar statements were also included in correspondence from Staff to Cerato's counsel dated October 8 and 26, 2020, in which Staff counsel provided additional disclosure, again pursuant to their ongoing disclosure obligations.

4. ASC News Release

[66] On March 4, 2020, the ASC announced the issuance of the Notice of Hearing in a news release (the **News Release**) titled "ASC issues Notice of Hearing against Jan Gregory Cerato for

illegal distributions of investments involving cryptocurrencies". The News Release largely reiterated information from the Notice of Hearing:

> The Alberta Securities Commission (ASC) has issued a Notice of Hearing alleging that Jan Gregory Cerato, also known as Jan Strzepka, engaged in illegal distributions of securities. Cerato solicited members of the public to invest in a fund, referred to as the "Whale Club," that would pool investor capital to buy, trade and hold cryptocurrencies in order to generate a profit.
>
> According to the Notice of Hearing, Cerato began issuing Whale Club investments in December 2017, raising at least $190,000. The Notice of Hearing alleges that these investments are distributions of securities within the meaning of the Securities Act (Alberta), and that Cerato breached securities laws by selling these investments without a prospectus and without qualifying for any prospectus exemptions.
>
> The allegations have not been proven.

5. Request for Authorization to Disclose

[67] On September 24, 2020, Cerato requested authorization from the Executive Director under s. 45(b) of the Act to divulge confidential information from Staff's disclosure (the **Disclosure Request**). In the Disclosure Request, Cerato claimed he required the authorization to "properly conduct his business" in the cryptocurrency industry (including to publicly discuss industry matters and to address his asserted "legal duty to warn colleagues") and to exercise his freedom of speech and expression. Cerato also claimed that the public interest favoured disclosure of information related to the Notice of Hearing, and that any concern about "market protection" was unnecessary in light of the ASC's public disclosure of the enforcement proceedings, which did not involve a distributing or public company. The Disclosure Request did not expressly reference Cerato's ability to make full answer and defence or his need to communicate with witnesses who had been interviewed in Staff's investigation.

[68] The ASC's Director of Enforcement (the **Director**), as delegate of the Executive Director, replied to the Disclosure Request in a letter dated October 9, 2020. The Director itemized certain factors relevant to the Disclosure Request and referred to the public policy considerations underlying the confidentiality requirements in s. 45 of the Act. Specific reference was made to the public interest in protecting the capital markets, including individual investors, and the privacy interests in evidence collected pursuant to the ASC's power to compel testimony and documents. The Director requested additional information, including clarification about the nature of the information sought to be disclosed, details about Cerato's asserted duty to warn, the specific business purposes that ostensibly necessitated disclosure, and the reason why dissemination of confidential records was in the public interest in the circumstances.

[69] Cerato's counsel replied with correspondence dated October 16, 2020, stating that the additional disclosure provided by Staff on October 8, 2020 included email communications involving Fleurie that were previously unknown to Cerato and contained relevant information that Cerato sought to publicly disclose. He suggested that the claimed duty to warn was a result of Cerato's stature in the cryptocurrency industry and that the "public may look to him to provide information regarding crypto currencies and in regard to the others in the industry (including Fleurie)." He also indicated that he should be permitted to use records from Staff's disclosure to

rebut the News Release and the unproven allegations in the Notice of Hearing as well as to publicly address Fleurie's apparent discussion of the "*ASC v. Cerato* matter with others".

[70] The Director denied the Disclosure Request in a letter dated October 23, 2020 (the **ED Decision**). The Director pointed out that Cerato had been given Staff's disclosure to permit full answer and defence to the allegations in the Notice of Hearing, but that the Disclosure Request sought the ED's authorization to disclose the information for other purposes without limitation or apparent regard for the privacy interests of third parties or the ASC's ability to effectively carry out its statutory mandate. The Director was not persuaded of Cerato's purported duty to warn, or that making the public aware of any or all of Staff's disclosure would be required should such a duty exist. Finally, regarding Cerato's wish to publicly rebut the News Release and Notice of Hearing, the Director noted that the pending public hearing would give Cerato that opportunity. The Director also reaffirmed the express authorization accompanying Staff's disclosure that it could be used as necessary to permit full answer and defence, and noted that neither Cerato nor any witnesses were precluded from discussing information within their personal knowledge or experience (including anything known prior to their investigative interview with the ASC) or from sharing records personally received, even those included in Staff's disclosure.

[71] Cerato did not appeal the ED Decision.

6. Cerato's Communications with Witnesses

[72] We also received evidence of communications between Cerato or his counsel and six witnesses (Fleurie, OS, AM, SC, SI and GN). Most of these communications occurred shortly before the hearing, and in at least one case, after the hearing had commenced.

(a) Fleurie

[73] Fleurie received the Confidentiality Warning and the Confidentiality Reminder in his interview on December 11, 2018.

[74] Fleurie testified that following his interview with Staff investigators, he had one conversation with Cerato in December 2018. Cerato's counsel later contacted Fleurie through social media and requested Fleurie's contact information so "we can discuss this case with you". Fleurie replied: "[n]o, I cannot discuss the case with you, if you are acting in a legal capacity, you know I cannot" and "[t]hey advised me not to discuss the case with anyone, and your client threatened me . . .". Cerato's counsel said that he was not threatening and only wanted information from Fleurie, and asked if Fleurie was refusing to talk "cause the ASC said you can't?" Fleurie replied "You aren't, your client has, I will wait on instructions from the ASC, thanks". Cerato's counsel also stated that "I would have thought that you would be prepared to talk to me", to which Fleurie stated: "I am prepared to talk to the ASC, good day."

[75] On October 15, 2020, following his interaction with Cerato's counsel, Fleurie sent three emails to Staff and attached screenshots of his conversation with Cerato's counsel. In one email, Fleurie stated: "[t]his seems strange, was contacted on Facebook by Mr John Zang, please advise!" In another email, Fleurie stated: "Additional verbiage!" The third email stated: "Please advise, this is almost threatening!"

[76] On October 16, Staff counsel sent Fleurie the following email:

> Under section 45 of the [Act], you are not permitted to disclose any information that you learned during your interview with ASC investigators in December 2018, other than with your own personal legal counsel. For example, you cannot discuss any information you did not have prior to the interview, anything you learned about the nature of our investigation, or any documents you were shown that were not previously in your possession.
>
> You are allowed to discuss any information that is within your own personal knowledge or experience. For example, you could discuss information you knew prior to your interview with the ASC or share e-mails or statements you personally received, even if you provided them to the ASC. However, you are not obligated or legally required to share such information.

[77] Fleurie did not communicate further with Cerato or his counsel. Fleurie testified that the confidentiality restrictions relayed to him by Staff did not influence his decision not to speak with Cerato's counsel, rather he said he was not a lawyer and did not know if he could discuss the case but that "everything that needed to be said would be said in this hearing" and "would be on record".

(b) SC

[78] Staff investigators gave SC the Confidentiality Warning during his interview on December 17, 2018, and told SC near the end of his interview that his interview was "confidential for now" pending possible enforcement proceedings. SC testified that he understood that he was not allowed to discuss the contents of his interview.

[79] On November 3, 2020 SC emailed Staff, noting that he had just received a text message from Cerato, which stated:

> Our legal team is currently in the process of suing Scott Fleurie & Alex Jackson and anyone else that defamed Jan, exposed the club, discredited Jan, supplied false documents & witness to the securities commission about Jan, whaleclub [sic] etc. Legal is suing all these people for $500k each. If you want to help out because you were in the whaleclub [sic] Reach out and let Jan know your [sic] willing to support, all the legal costs will be covered for you no worries.

[80] SC wrote in his email: "[t]his strikes me as an attempt at threatening a witness, because it frankly feels like a threat to me since I could fall into his broad category of 'exposed the club' and 'witness to the securities commission'."

[81] Staff sent SC an email on November 5, 2020 advising that on November 4, an ASC panel directed that Cerato was to refrain from contacting witnesses except through Cerato's counsel. Staff also indicated that SC was not obligated to speak to Cerato's counsel.

(c) SI

[82] SI received the Confidentiality Warning and the Confidentiality Reminder during his interview with Staff investigators on January 10, 2019.

[83] On November 5, 2020, SI sent an email to Staff, asking:

> Can you have my entire statement redacted please? I received a message from Me. Cerato saying he's suing 500k to anyone that makes a claim against him with the [ASC].

[84] Staff counsel replied to SI's message the following day, stating that "according to s. 45 of the *Securities Act*, your transcript cannot be publicly disclosed without the permission of the Executive Director".

[85] SI was not called as a witness in the hearing, although excerpts from his interview transcript were admitted into evidence.

(d) OS

[86] Staff investigators gave the Confidentiality Warning and the Confidentiality Reminder to OS in his January 14, 2019 interview. When OS requested clarification on the latter, he was told that he could talk to Cerato "but not that we met and what we discussed here . . .". The transcript excerpts in evidence did not include subsequent pages, so we have no evidence of any further discussion on the topic.

[87] On November 16, 2020 – the first day of the hearing – OS informed Staff via email that Cerato's counsel had requested a meeting and OS asked Staff whether he was "obliged" to meet with Cerato's counsel. That same day the ASC's Manager of Litigation responded to OS:

> You are not prohibited by the ASC from meeting with or speaking to Mr. Cerato's counsel, but you are under no obligation to do so. As you may recall, there are some limitations as to the type of information that ASC asks you not to share with anyone prior to giving your testimony.
>
> To be more specific, under section 45 of the *Securities Act*, you are not permitted to disclose any information that you learned during your interview with ASC investigators in December 2018, other than with your own personal legal counsel. For example, you cannot discuss any information you did not have prior to the interview, anything you learned about the nature of our investigation, or any documents you were shown that were not previously in your possession.
>
> You are allowed to discuss any information that is within your own personal knowledge or experience. For example, you could discuss information you knew prior to your interview with the ASC or share e-mails or statements you personally received, even if you provided them to the ASC. However, you are not obligated or legally required to share such information.

[88] OS testified that he asked if he could communicate with Cerato's counsel because Staff had told him not to divulge information.

[89] We did not receive evidence indicating that OS spoke with Cerato's counsel after receipt of the email from the Manager of Litigation and prior to his testimony on November 23, 2020, and we infer that he did not speak with Cerato's counsel in that timeframe.

(e) AM

[90] Staff investigators interviewed AM on January 11, 2019 pursuant to a summons dated November 28, 2018. The cover letter to the summons included s. 45 confidentiality restrictions, which AM assumed meant that she was "not to talk to anybody about it". Staff gave AM the Confidentiality Warning and Confidentiality Reminder during her interview.

[91] AM sent an email to Staff on Saturday, November 21, 2020 – after the hearing commenced – indicating that Cerato's counsel had "requested a phone call with me prior to the hearing date" and requested clarification on "what the rules are as far as who I am allowed to talk to". AM testified on November 24 that Cerato's counsel first contacted her approximately one week before her scheduled testimony and she emailed Staff because she wanted to know if she was allowed to speak with Cerato's counsel.

[92] The ASC's Manager of Litigation responded to AM on Monday, November 23, 2020 with an email containing the same substantive information as was sent to OS.

[93] AM testified that she did not see this email, although in evidence was a reply email AM sent to the Manager of Litigation on November 23, stating: "Thank you. Hopefully today as they want to speak with me later today". Despite having replied to Staff's email, AM sent Cerato's counsel an email the next day – November 24, the date of her testimony – in which she stated: "I apologize that it didn't work to have a call yesterday. I didn't receive a reply with regards to the rules regarding discussion of the case so I didn't want to risk causing more trouble." AM did not speak with Cerato's counsel before testifying.

(f) GN

[94] GN received a summons from Staff dated May 30, 2019 and was interviewed on June 4, 2019. The cover letter to the summons included the s. 45 confidentiality restrictions, and Staff investigators gave GN the Confidentiality Warning during his interview. At the hearing, GN said that he understood the statement in the cover letter to his summons to mean that he was not to divulge any information to anyone except his counsel. He did not recall Staff telling him that he could discuss the case with Cerato or his legal counsel, but there was "a lot of legal talk and legal jargon" when he had his interview and he understood the Confidentiality Warning was "basically about confidentiality".

[95] GN testified that he was not contacted by Cerato's counsel but that he received a message from Cerato at some point after his interview with Staff. GN testified that Cerato's message stated something along the lines of: "I know you're a rat and so do a lot of very dangerous people; enjoy".

C. Analysis of Constitutional Questions

1. Summary of the Parties' Arguments

[96] Cerato's position was that the confidentiality restrictions imposed by Staff and the ED Decision contravened his freedom of expression under s. 2(b) of the Charter, and that these limitations cannot be justified under s. 1 of the Charter.

[97] Cerato maintained that the confidentiality restrictions precluded him from communicating with potential witnesses, which prejudiced his ability to make full answer and defence to the Notice of Hearing (including the ability to know the case against him). He asserted that he was unable to speak with potential witnesses to discuss relevant aspects of the case with them or share and discuss records and information with them (including materials not previously in the witnesses' possession), nor could he collect and gather records from them. He argued that his inability to collect and gather information from witnesses was contrary to the open court principle applicable to ASC proceedings.

[98] Cerato also claimed that his s. 2(b) Charter rights entitled him to publicly express himself on various topics, such as matters relating to Staff's allegations or his cryptocurrency-related business. According to Cerato, the confidentiality restrictions precluded him from using information known to him or obtained from Staff's disclosure to engage in a public rebuttal of the News Release and Notice of Hearing and to convey information to his business associates. Cerato argued that the ED Decision constituted a further infringement of his s. 2(b) Charter rights.

[99] Cerato pointed to three "key" cases (the dissenting judgment of Justice Lambert in *Smolensky v. British Columbia Securities Commission*, 2004 BCCA 81, which Cerato submitted was largely accepted in *Shapray v. British Columbia (Securities Commission)*, 2009 BCCA 322, and *Zang v. Alberta Securities Commission*, 2019 CarswellAlta 2233 (QB)) in which confidentiality restrictions relating to a securities investigation were found to be an infringement of s. 2(b) of the Charter, and he submitted that the only question is whether the infringement is saved by s. 1 of the Charter. Cerato argued that the *Zang* case was distinguishable and that we were not bound by Justice Miller's s. 1 analysis in which s. 45 of the Act was determined to be a proportionate and minimal impairment of s. 2(b). He also pointed out that Staff offered no evidence to establish that the confidentiality restrictions were minimally impairing or proportionate.

[100] Cerato sought a stay of proceedings based on his claimed inability to properly prepare his defence, which he said resulted in an "unlevel playing field" that undermined the integrity of the ASC process and offended society's sense of fair play.

[101] Staff's position was that the *Zang* case is binding authority and indistinguishable in the circumstances, particularly as Cerato received the same permission to use Staff's disclosure to make full answer and defence to Staff's allegations as was given in *Zang*. Staff also argued that Cerato lacked standing to challenge restrictions applicable to third-party witnesses. In his reply submissions, Cerato argued that he was not claiming a breach of the witnesses' Charter rights but that the confidentiality restrictions placed on those witnesses impeded his ability to gather information and therefore infringed his s. 2(b) Charter rights.

[102] Staff maintained that Cerato's ability to make full answer and defence was not impeded in any way, given the typical defences to allegations of illegal distribution. Staff pointed out that Cerato knew the case against him based on Staff's *Stinchcombe* disclosure, which he was authorized to use to make full answer and defence. Staff also observed that the hearing took place before an impartial panel, and during the hearing Cerato could submit evidence, cross-examine Staff's witnesses, and respond to Staff's case.

[103] Staff argued that Cerato was not entitled to pre-hearing witness discovery similar to civil court procedure. Cerato contended that he was not claiming such an entitlement and that his complaint related to Staff's control over witnesses by the imposition of confidentiality restrictions. Staff argued that the right to make full answer and defence includes neither an obligation on Staff to advise witnesses that they may discuss matters within their personal knowledge, nor a right to access Staff's witnesses before a hearing.

[104] Staff submitted that Cerato's Disclosure Request pursuant to s. 45(b) of the Act was unrelated to his ability to respond to Staff's allegations, and intimated that Cerato's attempt to dispute the ED Decision by the Charter Notice rather than by a review pursuant to s. 35 was a collateral attack on that decision. Staff contended that the ED Decision fairly responded to the broad, sweeping nature of the Disclosure Request, which did not identify what Cerato wanted to publicly disclose and did not articulate "why such a broad-based request (and corresponding breach of investors' privacy) would be required in the context of the enforcement process."

[105] In Staff's submission, a stay of proceedings would be an inappropriate remedy in the circumstances, if we were to find a Charter violation. Staff pointed out that Cerato did not pursue other available means of seeking redress – e.g., a review of the ED Decision or applications under ASC Rules. He had not demonstrated that his ability to make full answer and defence was irreparably prejudiced. Staff characterized Cerato's Charter challenge as one that had been "molded into an opportunity to raise a Charter breach" rather than a genuine attempt to rectify any prejudice to Cerato. Although Cerato contended that he did not know what witnesses would say when they testified and that he could not challenge a potentially untruthful statement, Staff pointed out that Cerato was given all of the witness interview transcripts as part of Staff's disclosure.

[106] Staff noted that Cerato's written submissions plainly state that the basis for the remedy sought is Cerato's claimed inability to make full answer and defence. Cerato's counsel conceded in oral submissions that the alleged infringement of Cerato's ability to engage in public discourse should not give rise to a stay of proceedings and suggested that perhaps a declaration or admonishment of Staff by the panel would suffice "so it doesn't happen again".

2. General Observations on the Charter Notice

[107] The events preceding the hearing and the absence of evidence in support of the Charter Notice during the hearing raised concerns about the genuineness of the constitutional questions. We agree with Staff's submissions on this point and find a distinct lack of *bona fides* in Cerato's advancement of the Charter Notice.

[108] Cerato's claim that he wanted to speak with potential witnesses to defend against Staff's allegations was belied by the absence of evidence that he sought to speak with any witnesses for this purpose between the issuance of the Notice of Hearing on February 28, 2020 and his contact with Fleurie (roughly seven months later and shortly before the hearing). Until then his only communication with witnesses was to intimidate them by threatening litigation and in one case by making a veiled threat of physical harm. A timetable for pre-hearing applications was established in April 2020 at the "set date" hearing, but Cerato never brought his purported concerns to an ASC panel in any of the several scheduled pre-hearing sessions, nor did he seek the assistance of Staff. Even Cerato's Disclosure Request made no mention of defending against Staff's allegations or any difficulty in speaking to witnesses.

[109] It was only after filing the Charter Notice and immediately before or during the hearing, that Cerato's counsel contacted OS and AM in what were obvious contrived attempts to support the claimed infringement of his rights under s. 2(b) of the Charter. Cerato did not specify what information he sought from these witnesses and whether that information might assist with his defence.

[110] Cerato's claim that he wanted to engage in public discourse was similarly contrived and lacked an air of reality. The Disclosure Request did not identify the information he sought to divulge, and did not give an intelligible, much less cogent, reason for the Director to give him the authorization sought. When asked for clarification on the particulars of the Disclosure Request, the Director noted that Cerato's response only obfuscated matters further. We agree with that assessment. Indeed, the ill-conceived nature of the Disclosure Request suggests no genuine attempt to obtain the authorization sought, rather a rejection of the request appears to have been the goal. Instead of pursuing the statutory framework to appeal the ED Decision, Cerato included it in his Charter Notice in an attempt to distinguish the binding case of *Zang*.

[111] We also note that Cerato's written submissions were misleading – contesting a fact that could be reasonably inferred from his own Charter Notice (para. 14) – specifically submissions suggesting that Staff had not authorized his use of disclosure to make full answer and defence.

[112] We therefore concluded that the Disclosure Request and the Charter Notice were disingenuous contrivances advanced on the eve of the hearing for improper purposes. We have taken this lack of *bona fides* into account in our determination of the constitutional questions.

[113] Finally, we found Cerato's Charter Notice and written submissions to be convoluted and carelessly drafted, which made this decision far more time-consuming than would be the case if the arguments were concisely and intelligibly articulated. We had to spend a great deal of effort parsing and untangling Cerato's arguments so they could be addressed in a coherent manner.

3. Scope of Charter Consideration

[114] Cerato's Charter challenge was fundamentally based on claims that he was unable to access potential witnesses or use Staff's disclosure to engage in public discourse on various matters such as commenting on the Notice of Hearing or the cryptocurrency industry in general. Witness access could affect the fairness of the hearing and Cerato's defence against the allegations, but the public discourse claims were entirely extraneous to this proceeding. Cerato did not adduce any evidence that would bring the public discourse issue within our jurisdiction governing the fairness of enforcement hearings.

(a) Enforcement Hearing

[115] This hearing was the result of an enforcement proceeding brought by Staff, the purpose of which is to decide whether Staff have proved the allegations in the Notice of Hearing, and if so, whether the public interest warrants orders under ss. 198, 199 and 202 of the Act. ASC panels must ensure enforcement hearings are conducted in a fair and impartial manner, but ASC panels have often remarked that an enforcement hearing is not an inquiry into the conduct or adequacy of Staff's investigation (*Re Hennig*, 2005 ABASC 745 at paras. 42 and 105; see also *Re Arbour Energy Inc.*, 2008 ABASC 143 at para. 35 and *Re Workum and Hennig*, 2008 ABASC 719 at para. 123). Similarly, an enforcement hearing is not the venue to adjudicate complaints that are extraneous to the context and purpose of the hearing.

[116] Cerato complained that information from Staff's investigation formed the basis of an ASC News Release, but he was precluded from using Staff's disclosure to make public statements

refuting the News Release and Notice of Hearing. He also submitted that he could not publicly disclose the involvement of others in the conduct alleged in the Notice of Hearing.

[117] These issues had no bearing on the merits of Staff's allegations. As observed in *Re Hennig* at para. 127, public statements expressed by Staff do not represent the views of a hearing panel and are irrelevant to the fairness of an enforcement hearing.

[118] ASC panels derive their jurisdiction from statute; they do not have inherent or plenary jurisdiction. Part of Cerato's claim is that his s. 2(b) rights were infringed because he could not speak publicly about the materials collected in Staff's investigation (i.e., Staff's *Stinchcombe* disclosure). As an administrative tribunal, we have the jurisdiction to consider this complaint insofar as it affected Cerato's ability to make full answer and defence or more generally the fairness of the hearing.

[119] Our view is supported by the comments of Justice Millar in the *Zang* case at paras. 34-35:

> Supreme Court of Canada case law establishes that the Charter must be applied in individual cases using a contextual, rather than an abstract, approach. Particular rights or freedoms may have different values and meaning depending upon the context. The question is, what is the purpose of the freedom or right within the context in which it arises?
>
> In the present case, the purpose of freedom of expression is to enable individuals to prepare full answer and defence to allegations set out in a Notice of Hearing.

[120] We acknowledge that the right of freedom of expression in s. 2(b) of the Charter clearly has a broader purpose, but in the context of an ASC enforcement hearing the scope of our jurisdiction to hear complaints of s. 2(b) infringements is limited to ensuring procedural fairness, including a respondent's ability to make full answer and defence. The only other context in which that aspect of Cerato's complaint could fall within our purview would be in relation to an appeal of the ED Decision. However, that decision was not appealed. Instead, what is before us is the question of whether we have evidence sufficient to demonstrate that Cerato's inability to publicly broadcast information contained in Staff's disclosure affected his ability to make full answer and defence. We have no such evidence.

[121] As a result, Cerato's complaints concerning freedom of expression in the context of public discourse are well beyond the ambit of our jurisdiction to ensure that enforcement hearings are procedurally fair.

(b) Failure to Appeal the ED Decision

[122] Section 45(b) of the Act makes it clear that any concerns regarding the confidentiality restrictions in s. 45 should first be raised with the Executive Director, with further recourse to an ASC panel by appeal pursuant to s. 35. This is consistent with the overall structure of the Act, in which the ASC's enforcement and investigative functions are the responsibility of the Executive Director whereas adjudicative functions are carried out by designated hearing panels comprised of ASC members (*Re Arbour Energy Inc.*, 2010 ABASC 11 at paras. 69-72).

[123] Through the Disclosure Request, Cerato sought to resolve his apparent concerns about engaging in public discourse by seeking authorization from the Executive Director under s. 45(b) of the Act. Due in large part to the unlimited scope of his request – apparently covering all of Staff's disclosure – and his inability to provide adequate reasons for public disclosure, the Disclosure Request was denied in the ED Decision.

[124] Instead of appealing the ED Decision under s. 35 of the Act, Cerato challenged it in the context of the hearing, referencing it in his Charter Notice as a further infringement of his s. 2(b) Charter rights. The ED Decision denied the Disclosure Request without imposing any additional restrictions on Cerato, and we therefore do not understand how the ED Decision could be a further infringement of Cerato's Charter rights.

[125] Cerato's decision to challenge the ED Decision as part of the Charter Notice instead of appealing it in accordance with the Act has certain implications. Including this complaint in the Charter Notice limited consideration of his s. 2(b) rights to the enforcement hearing context where the purpose of freedom of expression is to permit full answer and defence. As neither party addressed it, we decline to comment on the ambit of our Charter jurisdiction in the context of an appeal of a decision of the Executive Director under s. 35 of the Act.

4. Section 2(b) of the Charter

[126] That leaves Cerato's contention that s. 2(b) of the Charter entitled him to speak with anyone "without impediment" to gather information for his defence to the allegations in the Notice of Hearing.

[127] Section 2(b) of the Charter provides everyone with the fundamental freedom of thought, belief, opinion and expression. Freedom of expression has been described as being among "the most fundamental rights possessed by Canadians" and "vital to a free and democratic society" in which the open exchange of ideas promote the search for truth, advance political and social discourse, and enable the pursuit of self-fulfilment (*R v. Sharpe*, 2001 SCC 2 at paras. 21-23, *R v. Zundel*, [1992] 2 SCR 731 at 752).

[128] The requisite analysis for an alleged breach of s. 2(b) of the Charter involves an assessment of whether the activity at issue constitutes expression, specifically whether the activity conveys or attempts to convey meaning and whether the manner of expression removes the activity from the protection afforded by the Charter (e.g., physical violence is not protected) (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927). Where the activity is within the scope of the freedom of expression, the analysis then focuses on whether there has been a restriction of that expression, either as its purpose or effect (*Libman v. Quebec (Attorney General)*, [1997] 3 SCR 569 at paras. 30-31, *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 at para. 38).

(a) Expressive Activity Protected by Section 2(b)

[129] Cerato asserted that his expressive activity included an ability to freely communicate with witnesses to make full answer and defence to Staff's allegations, and included sharing and exchanging documents and records with those witnesses (and they with him).

[130] Cerato pointed to evidence that he, either directly or through his counsel, sought to communicate with potential hearing witnesses shortly before and during the hearing. We accept that this was expressive activity. Although there was evidence that Cerato's communications with witnesses contained threats of civil proceedings and in one case insinuated potential physical harm, there was no suggestion that his communications involved actual physical violence that would remove his activity from s. 2(b) protection. Accordingly, we considered Cerato's communications and attempted communications with witnesses to be expressive activity within the scope of his freedom of expression.

(b) Infringement of Expressive Activity

[131] Cerato's position was that the confidentiality restrictions precluded him from accessing witnesses, which undermined his ability to properly defend against Staff's allegations. While he asserted that the statutory provision prevented witnesses from speaking about anything other than what was directly in their knowledge, he submitted that the effect of Staff's communications was to impose a broader prohibition against them speaking with him "whatsoever". He characterized the restrictions as a gag order that precluded him from accessing witnesses. In support of his position, Cerato relied primarily on evidence that three witnesses (Fleurie, OS and AM) refused to communicate with his counsel and then sought clarification from Staff.

[132] Staff disagreed that Staff's statements to witnesses established more onerous restrictions than prescribed by s. 45 of the Act and questioned whether Cerato could rely on the statutory restrictions applicable to witnesses as part of his constitutional challenge. Staff also contended that the evidence did not demonstrate that the confidentiality restrictions imposed on witnesses impeded Cerato's freedom of expression or precluded him from making full answer and defence.

(i) Staff's Statements

[133] In the Charter Notice, Cerato claimed his freedom of expression was infringed by s. 45 of the Act, the ED Decision denying authorization pursuant to s. 45(b), and the confidentiality restrictions that Staff investigators imposed on Cerato and others. Cerato asserted in his written submissions that the infringement of his Charter rights derived from Staff's oral and written statements to him and to witnesses and that Staff could not rely on the Act as authority for the confidentiality restrictions imposed in the circumstances because Staff's statements established broader restrictions than those prescribed by s. 45.

[134] Cerato submitted that s. 45 of the Act requires confidentiality over "information or evidence provided to the witness by the ASC", whereas Staff's statements were not similarly limited; rather those statements extended the scope of confidentiality, including in some instances to all information and that "**ALL** communications of **EVERY** nature and kind . . ." were restricted. In particular, he argued that Staff informed him that anything discussed or shown to him during his interview with Staff investigators was confidential, even if the information was previously known to him.

[135] Staff disagreed that their communications imposed restrictions beyond those established by s. 45, arguing that "[e]verything that Staff did was within the confines of the statutory obligation and . . . there were no requirements outside of this". Staff acknowledged in their oral submissions that the Confidentiality Warnings did not precisely distinguish "the kind of information they could

speak about and that which they could not speak about" and that their warnings are relayed "in a stern manner so that the witnesses aren't going around publicly disclosing what was discussed at the interview". Staff maintained that witnesses could discuss information within their own knowledge and any documents in their possession.

[136] Staff's oral and written communications referenced and relied on s. 45 as the basis for the confidentiality restrictions relating to their investigation. The relevant excerpt from Staff's letter to Cerato included three references to the applicable confidentiality restrictions, each of which clearly stipulated that the authority for the restrictions was from the Act:

> Pursuant to section 45 of the *Act*, all information and evidence relating to the investigation and this Summons are confidential and must not be divulged, except where authorized by the Executive Director of the Alberta Securities Commission (or his delegate, the Director of Enforcement) or as permitted by Alberta securities laws. Pursuant to section 45 of the Act, all communications of any nature and kind regarding the investigation and this summons are expressly restricted to communications between your legal counsel and you. Breaches of this statutory obligation of confidentiality may be subject to prosecution under section 194 of the *Act*. [emphasis added]

[137] Similarly, the Confidentiality Warning in Cerato's investigative interview included that "information or documentation may be revealed or discussed in this interview that is considered confidential pursuant to Section 45 of the *Securities Act*" (emphasis added).

[138] Cerato pointed out that those who received a summons were warned about the potential enforcement of the confidentiality restrictions under s. 194 of the Act.

[139] We do not accept Cerato's broad interpretation of the scope or effect of Staff's statements about confidentiality. Although Staff's statements did not repeat verbatim the language of the section, neither did they impose blanket restrictions on what Cerato and others could speak about. We again refer to Staff's written communication to Cerato that stipulated s. 45 applied to "all information and evidence relating to the investigation . . ." and that "[a]ll communications of any nature and kind regarding the investigation and this summons are expressly restricted by section 45 of the Act" (emphasis added). There were some non-substantive variations in Staff's oral statements to interview witnesses – the Confidentiality Warnings and the Confidentiality Reminders – but they were consistent in limiting confidentiality to information disclosed or discussed in the interview. These were not indiscriminate statements enjoining all discussion, instead they specifically referred to Staff's investigation. Section 45 similarly applies to "[a]nything acquired and all information or evidence obtained pursuant to an investigation . . .".

[140] Both parties agreed that information or evidence previously in the possession of an interviewee was not subject to s. 45 restrictions. However, Staff's Confidentiality Warnings – that information or documents "may be revealed or discussed" in the investigative interviews that would be considered confidential under s. 45 of the Act – may not have effectively conveyed this point. Certainly, information disclosed by Staff during those interviews was derived from Staff's investigation and was therefore confidential, including any discussion about that information in the interviews. In that regard, Staff's oral warnings were consistent with s. 45. Although Staff's statements did not clearly convey that information known to, and documents in the possession of,

the witness before the interview were not subject to the statutory restrictions, even if discussed in that interview, neither does s. 45 include that level of detail.

[141] Staff's subsequent communications with certain witnesses (Fleurie, OS and AM) clarified and explained that witnesses could discuss "any information that is within your own personal knowledge or experience" other than information they learned during their interviews, and that s. 45 applied to "any information you did not have prior to the interview, anything you learned about the nature of our investigation, or any documents you were shown that were not previously in your possession".

[142] It may have been more efficient had Staff's statements included this clarification, but there was no suggestion that Staff had an ulterior motive or acted in bad faith in their attempts to summarize the s. 45 confidentiality obligations. Cerato and others were bound by the statutory restrictions regardless of Staff's statements about their application, and Staff were not obliged to elucidate their scope or content.

[143] Despite any imperfection or imprecision in Staff's statements about the scope of the confidentiality restrictions applicable to Cerato or to other witnesses, those restrictions were clearly derived from, limited to, and consistent with s. 45 of the Act.

(ii) Restrictions Imposed on Witnesses

[144] As mentioned, Staff challenged Cerato's standing to assert infringement of witnesses' freedom of expression due to the confidentiality restrictions. Staff submitted that an applicant is not automatically entitled to seek redress for the violation of a third-party's Charter rights. Staff argued that s. 24(1) of the Charter may only be invoked to provide a remedy for the person whose constitutional right has been violated (*R. v. Edwards*, [1996] 1 S.C.R. 128).

[145] Cerato countered noting the issue was whether the confidentiality restrictions imposed on witnesses infringed his freedom of expression by impeding his ability to access those witnesses and gather their information. He argued that the restrictions precluded witnesses from discussing documents or evidence that came to their attention in their interviews with Staff, which prevented him from knowing the case against him because he could not discuss the full ambit of the evidence with witnesses.

[146] We accept that Cerato's ability to communicate with witnesses includes the ability to listen and receive information from them and that this form of expression is protected by s. 2(b) of the Charter. We disagree with Staff's argument on standing because Cerato was not purporting to challenge the effect of confidentiality restrictions on the s. 2(b) rights of witnesses, rather he framed the issue as his freedom to receive information from and listen to witnesses. Section 2(b) protects "listeners as well as speakers" and applies to a wide array of expressive activity including the right to receive expressive material (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at para. 41, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1339-40 and *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 at 767).

(iii) Open Court Principle

[147] Although not included in the Charter Notice, Cerato argued the open court principle to refute Staff's assertion that he lacked standing. While we agree that Cerato has standing to assert that the confidentiality restrictions imposed on witnesses infringed his freedom of expression, we do not agree with Cerato's submissions on the scope of the open court principle.

[148] Cerato submitted that the open court principle is connected with or subsumed within s. 2(b) of the Charter and is applicable to ASC proceedings (*Re Lutheran Church-Canada, the Alberta-British Columbia District*, 2019 ABASC 43). He contended that it gives everyone the right to access information at every stage of court or tribunal proceedings so that they may engage in expressive activity.

[149] While Cerato's counsel accepted that the ASC could maintain confidentiality during the investigation, he argued that once a Notice of Hearing has been issued, "it's open court" and the proceedings should be open to public scrutiny (particularly if there has been a public announcement of the allegations). Cerato pointed to *Desjardins v. Canada (Attorney General)*, 2020 FCA 123 as an example of the Federal Court rejecting confidentiality in favour of the open court principle and he asserted that the "record" at the time the Notice of Hearing was issued consisted of Staff's *Stinchcombe* disclosure.

[150] Staff submitted that the open court principle applies only to evidence adduced in a public hearing and allows the media (and the public) to collect information about, and to publicly report on, public proceedings. Staff submitted that the public record does not include Staff's *Stinchcombe* disclosure – only evidence admitted during the hearing forms part of the public record. Staff also submitted that the open court principle does not entitle a respondent to gather information to make full answer and defence or to speak to witnesses prior to a hearing.

[151] Cerato contended that Staff's opposition to the confidentiality order sought in *Re Lutheran* is inconsistent with the position they have taken here. However, the issue in *Re Lutheran* was whether the entire enforcement hearing should be held *in camera* – Staff argued that it should not. Staff's position here is that the open court principle applies only to evidence adduced in a public hearing. Staff's arguments in the two cases address two different issues and are not at all inconsistent.

[152] We note that the facts in *Desjardins* were entirely different than in the present case – there, the open court principle was applied *following* the issuance of a decision of the Public Sector Integrity Commissioner of Canada and in the context of a pending judicial review of that decision. Here, Cerato argues that the open court principle ought to apply upon the issuance of the Notice of Hearing, well *before* a hearing commences. We accept that public attendance at open hearings and access to court and tribunal records are important norms in a democratic society and ensure a measure of fairness and accountability in the administration of justice (*Sherman Estate v. Donovan*, 2021 SCC 25 at para. 1). That said, we do not understand the open court principle to include public access to information, documents or other materials that have not been admitted into evidence in a public hearing and are thus not part of the public record.

[153] An investigation of potential securities misconduct is not a public process, and it does not become so once a notice of hearing has been issued. Rather, the notice of hearing initiates an adjudicative process that culminates in a public hearing in which an ASC panel receives evidence and submissions about alleged violations of Alberta securities laws. This is reflected in s. 29 of the Act, which provides that an ASC hearing is open to the public unless the public interest warrants otherwise (s. 29(l)) and that the record of the proceeding includes the oral evidence and all documents received into evidence (s. 29(h)) during the hearing.

(iv) Access to Witnesses

[154] Cerato's position was premised on an assertion that witnesses believed that they were unable to speak with Cerato because of the confidentiality restrictions. He submitted that the confidentiality restrictions therefore infringed his rights under s. 2(b) of the Charter and the only question was whether the infringement could be saved by s. 1.

[155] Staff argued that the confidentially restrictions did not stop Cerato from contacting witnesses to make full answer and defence and that witnesses were not prohibited from speaking with him; instead, the restrictions only limited the witnesses' ability to speak about certain matters discussed in their investigative interviews (particularly documents shown or other information learned that was not previously in their possession). Staff disagreed that witnesses were seeking "permission" to speak with Cerato – witnesses often ask for guidance when respondents wish to talk to them because they are not certain if they can or should do so. Staff submitted that this uncertainty is unrelated to s. 45 of the Act. Staff also pointed out that witnesses were not obligated to speak with Cerato and that they chose not to (in part because of Cerato's intimidating behaviour).

[156] Cerato acknowledged that witnesses were not obligated to speak with him, but he argued that the confidentiality restrictions effectively allowed the ASC to control material witnesses and that any impediment on his ability to communicate with witnesses was an infringement of his s. 2(b) Charter rights.

[157] As mentioned, Cerato or his counsel communicated with six witnesses before and during the hearing. Some of those witnesses heard directly from Cerato warning of civil action against those who assisted with the ASC investigation. At least one witness believed that Cerato was threatening him – this resulted in a panel direction prohibiting Cerato from contacting witnesses other than through his counsel. Cerato sent a message to another witness that made no reference to civil proceedings but referred to the witness as a "rat" and insinuated a physical threat. From this we infer that these witnesses did not want to speak to Cerato or his counsel, whether in relation to Cerato's defence of Staff's allegations or otherwise.

[158] Cerato's counsel contacted three of the six witnesses, but none of them engaged in any substantive discussion with Cerato's counsel and instead contacted Staff seeking additional information.

[159] Fleurie testified that his decision not to speak with Cerato's counsel was not influenced by the confidentiality restrictions but was instead based on his inexperience with legal proceedings and because he preferred not to talk until the hearing where everything "would be on record". We also took into account Fleurie's mentioning Cerato's threat in the online exchange between Fleurie

and Cerato's counsel. While Fleurie acknowledged in that online exchange that the ASC told him not to speak with anyone, he also said that he would seek instructions from the ASC. In his email communication with Staff, Fleurie described his exchange with Cerato's counsel as "almost threatening". After Staff advised Fleurie that he could, but was not obligated, to speak with Cerato or his counsel, he decided against it. On the evidence, we do not consider Fleurie's decision to have been caused by the confidentiality restrictions.

[160] OS's evidence was similar. In cross-examination, he agreed that he was told by Staff not to disclose information, although OS was not shown the transcripts from his investigative interview where he was told that he could speak with Cerato with some limitations. As mentioned, Cerato's counsel contacted OS near the start of the hearing. OS then sent an email to Staff asking if he was "obliged" to meet with Cerato's counsel. Staff indicated that OS was not precluded from speaking to Cerato's counsel, nor was he obligated to do so. We inferred that OS did not contact Cerato's counsel after this communication from Staff. From the evidence, OS seemingly did not want to speak to Cerato's counsel and simply wanted Staff's assurance that he was under no obligation to do so – his decision not to contact Cerato's counsel was not based on the confidentiality restrictions.

[161] After being contacted by Cerato's counsel, AM asked Staff about the applicable "rules". This seemed a reasonable course of action since Cerato's counsel contacted her only a few days before she was scheduled to testify. Staff sent a reply email to AM informing her that she was not precluded from speaking with Cerato's counsel. Although AM testified that she did not receive it, Staff's email and her reply to that email were in evidence. Despite having received Staff's witness list two months before the hearing commenced, Cerato's counsel waited until just a few days before AM's scheduled testimony to ask to speak to her. In our view it was not the confidentiality restrictions that caused AM not to speak to Cerato's counsel. Rather, it was Cerato's failure to pursue a discussion with AM in a timely manner. Had he done so, AM would have had adequate time to follow up with Staff and make arrangements to speak to Cerato's counsel (if she wished to do so).

[162] Cerato did not adduce any other evidence about efforts to speak with other witnesses interviewed by Staff (including those who testified in the hearing). Consequently, there is no evidence that the confidentiality restrictions impeded Cerato's attempts to communicate – if indeed there were any – with other witnesses.

[163] Having regard to all of the evidence, we find that the confidentiality restrictions, either as stipulated in s. 45 of the Act or as communicated to the witnesses by Staff, did not infringe Cerato's rights under s. 2(b) of the Charter.

(v) Full Answer and Defence

[164] Cerato claimed that he was denied the right to make full answer and defence to the allegations in the Notice of Hearing. While he argued the issues of witness access and making full answer and defence as separate grounds, Cerato's submissions made it clear that the latter was contingent on the former. Cerato also submitted that his inability to access witnesses prevented him from knowing the case against him.

[165] In light of our conclusion that the evidence did not establish a causal connection between the confidentiality restrictions and the witnesses' decisions not to speak with Cerato, we therefore do not find that the confidentiality restrictions interfered with Cerato's ability to make full answer and defence. In our view, Cerato received a procedurally fair hearing in which he was able to make full answer and defence and to know the case to be met.

[166] As mentioned, in his submissions, Cerato advised that he was not claiming an infringement of his rights under s. 7 of the Charter. However, Cerato's arguments placed significant emphasis on the alleged violation of his right to make full answer and defence – a right that falls squarely within the scope of s. 7 as a principle of fundamental justice (*R v. Barros*, 2011 SCC 51 at para. 2, *R. v. Stinchcombe* [1991] 3 S.C.R. 326 at 336). In light of this apparent contradiction and our earlier comments about the nature of Cerato's written submissions, we consider it prudent to address Cerato's complaints about procedural fairness despite his purported abandonment of the s. 7 complaint.

[167] As observed in *Zang* (at para. 34), Charter analysis requires a contextual approach that accounts for the purpose of the particular right or freedom and the context in which it arises. The analysis in *Zang* was principally focussed on whether the infringement of freedom of expression from s. 45 of the Act was justifiable under s. 1 of the Charter. However many of the Court's remarks in that analysis are apposite in setting out the relevant contextual framework that informs the issue of whether Cerato's right to make full answer and defence was impeded. Justice Millar identified the following relevant factors:

- Individuals voluntarily enter into the securities market for profit with the understanding that this is a highly regulated activity;
- Procedural safeguards in a regulatory proceeding are much less stringent than in the criminal context;
- Securities investigations are administrative in nature;
- Individuals are not in legal jeopardy during the investigation prior to the issuance of a Notice of Hearing (that is, a right of full answer and defence has not been triggered);
- Once a Notice of Hearing is issued, full disclosure on a *Stinchcombe* standard will be provided pursuant to Alberta Securities Commission Rules;
- Prior to the issuance of a Notice of Hearing, individuals are not prohibited from seeking authorization at any point and may appeal a decision of the Executive Director to the Commission, and further appeal a decision of the Commission to the Court of Appeal.

(*Zang* at para. 42).

[168] Staff pointed out several procedural safeguards that allowed Cerato to make full answer and defence, including:

- he had knowledge of the case against him;
- he was authorized to use Staff's *Stinchcombe* disclosure and Staff's pre-hearing disclosure to make full answer and defence;

- he had an opportunity to call witnesses or testify on his own behalf;
- he was able to challenge Staff's evidence by cross-examining witnesses; and
- the hearing took place before an impartial panel.

[169] Staff noted that Cerato could have raised any perceived procedural fairness concerns before filing the Charter Notice. (We note that Cerato submitted a draft application concurrent with the Charter Notice that included a request for an adjournment of the hearing so that he could collect "all evidence" from Fleurie, but he did not pursue that application.) Staff also submitted that they were willing to assist Cerato with any procedural fairness issues, as shown by the clarifications Staff gave to witnesses regarding their obligations under s. 45 of the Act.

[170] As summarized in *Re Hennig* at para. 23, procedural fairness encompasses the ability to be heard, which in turn includes the right to know the case to be met and to have an adequate opportunity to present one's case. Although the particular content of these rights will depend on the unique circumstances of each case, the right to know the case to be met involves knowledge of the allegations against a respondent as well as a reasonable understanding of the facts and evidence underlying Staff's case (*Re Hennig* at para. 132).

[171] As mentioned, the Notice of Hearing and Staff's *Stinchcombe* disclosure accompanied Staff's March 2, 2020 letter to Cerato in accordance with ASC Rules. Roughly 60 days before the hearing started, Staff sent him their pre-hearing disclosure (including a list of witnesses Staff intended to call and a list of documents upon which Staff intended to rely, as well as a link to electronic copies of those documents). At no time did Cerato assert any deficiency in the particulars set out in the Notice of Hearing or the content of Staff's disclosure. In our view, Cerato had the information necessary for him to know the case he had to meet and that this information was in his possession well in advance of the hearing.

[172] We also find that Cerato had a fair opportunity to make full answer and defence to the allegations in the Notice of Hearing. Before the Supplemental Affidavit was admitted into evidence, Cerato asserted that there was no evidence that he was permitted to use Staff's disclosure to make full answer and defence. We were satisfied from the evidence – including the Supplemental Affidavit and the ED Decision – and from the contents of Cerato's own Charter Notice (at para. 14), that Staff repeatedly advised Cerato that he was authorized to use Staff's disclosure for the purpose of making full answer and defence to Staff's allegations.

[173] Cerato argued that that this authorization was an insufficient safeguard for making full answer and defence, as he was left to "fly blind" without knowing what a given witness might say in the hearing and accordingly, he would not be in a position to challenge a witness who made a false statement while testifying. Staff pointed out that Cerato had the benefit of Staff's *Stinchcombe* disclosure, which included the interview transcripts of all of Staff's hearing witnesses. We agree that the interview transcripts gave Cerato knowledge of the witnesses' evidence, and his counsel effectively used those transcripts in the hearing to refresh witnesses' memories when faced with unexpected testimony.

[174] Cerato submitted that his ability to make full answer and defence was infringed because he was not given unrestricted access to witnesses to gather information and records from them, and that he could not give witnesses information and records that were not previously in the witnesses' possession. As an example of this latter assertion, Cerato said that WhaleClub investment statements belonging to one investor could not be disclosed to, or discussed with, another investor because the documents had not been in the possession of the second investor prior to Staff's investigation. Cerato did not explain how the authorization allowing him to use disclosure materials for the purpose of making full answer and defence did not apply to these statements, nor did he explain how discussing these statements with a witness who had not previously seen the documents would assist his defence.

[175] Cerato also claimed that he lost the opportunity to adduce evidence of available prospectus exemptions because the confidentiality restrictions precluded him from talking to witnesses about "a key player in the Whale Club", who Staff did not call as a witness. Staff pointed out that from the pre-hearing disclosure, Cerato knew which witnesses Staff planned to call – he had that information 60 days prior to the hearing. Staff noted that it was the respondent's prerogative to call a witness to testify in the hearing if that witness had relevant evidence but had not been called by Staff (see *Re Hennig* at paras. 109-113). We agree with Staff, and note that Cerato did not argue that he was unable to call the "key player" to testify at the hearing, nor did he request an adjournment to do so. We do not accept that the confidentiality restrictions precluded Cerato from discussing this person with witnesses, as he was authorized – since the Notice of Hearing was issued – to use Staff's disclosure to permit full answer and defence.

[176] We reiterate that we were not persuaded that the confidentiality restrictions had any measurable effect on Cerato's ability to make full answer and defence to the allegations in the Notice of Hearing.

D. Conclusion on Constitutional Questions

[177] For the foregoing reasons, we find that Cerato has not proved an infringement of his s. 2(b) Charter rights. Accordingly, it is unnecessary for us to determine whether the alleged infringements could be justified as being "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Had this been necessary, we are bound by *Zang* and thus any infringement of Cerato's s. 2(b) right was minimally impairing and justifiable under s. 1 of the Charter.

III. STAFF'S ALLEGATIONS

[178] We now turn to the merits of Staff's allegations against Cerato.

A. Evidence

1. Cerato and Affiliated Entities

[179] Cerato, an Alberta resident, used the name Jan Gregory Strzepka as an alias. His alias was named as a director of Stylewerx Communications Inc. (**Stylewerx**), an Alberta company incorporated in July 2002 but struck from Alberta corporate registry in January 2005. Cerato had sole signing authority for Stylewerx's bank account.

[180] Cerato and Alex Jackson (**Jackson**) were named as directors of 2095912 Alberta Inc. (**2095912**), an Alberta company incorporated on January 31, 2018. Both Cerato and Jackson had signing authority for 2095912's bank account. The tradename "Bitcoin Investments.ca" was registered to 2095912.

[181] Both Stylewerx and 2095912 received deposits from Alberta residents for a cryptocurrency trading business organized by Cerato, usually referred to as the **WhaleClub** or "Whale Club". "Whale Club" did not appear in Alberta corporate registry searches conducted in February 2020.

[182] According to a June 2018 National Registration Database search, Cerato was not registered with any provincial securities regulators.

2. Meetup

[183] Cerato claimed to be well-known in the Calgary cryptocurrency community. He organized weekly Bitcoin workshops called "Learn to Buy, Sell, Trade, Hold & Mine" – from September 2017 through to at least March 2019. These workshops were often referred to as **Meetups**, presumably named for the online platform through which they were organized – the website "meetup.com" is a public forum that allows people with common interests to connect with one another. Cerato's Meetups appeared on the website as a public group that at times had roughly 1,000 members.

[184] Meetups were free to attend and held at different venues in Calgary. Prospective attendees were encouraged to pre-register at Bitcoin Investments.ca. Attendance at Meetups ranged from about ten persons to as many as 80. During the Meetups, Cerato generally led the discussion about trading in Bitcoin and other cryptocurrencies. Some Meetups were recorded and posted on YouTube with links to a **Telegram** messaging forum and the Meetup website.

[185] Starting in December 2017, Cerato promoted the WhaleClub as an investment opportunity at the weekly Meetups. One investor witness said that Cerato mentioned the WhaleClub investment opportunity during the Meetups, and others indicated that he approached individual attendees after his Meetup presentation to discuss the WhaleClub. The WhaleClub was promoted as an investment similar to a mutual fund, in which unsophisticated subscribers could pool their funds to trade Bitcoin and other cryptocurrencies.

[186] Cerato conveyed very optimistic projections for WhaleClub returns to prospective investors (including that funds might double "a number of times" in the first 90 days) but he rarely, if ever, discussed the risks of investing in the WhaleClub. The only apparent requirement was a minimum investment of $10,000, either in fiat currency or the equivalent in Bitcoin. Cerato set a January 2018 deadline to enter the WhaleClub, although some people invested with Cerato after that deadline.

3. Telegram

[187] According to the Cerato Transcript, Cerato promoted the WhaleClub on Telegram by posting an advertisement that he drafted. The advertisement included the caption "Private WhaleClub YYC" and a picture of two sports cars. Other versions of this advertisement contained an additional message stating: "Msg me if you have the $10k to play, we will get you setup in our

WhaleClub YYC for January 1st", and provided an email for "info & questions". Another WhaleClub promotion posted on Telegram contained a screenshot of a $50,000 cheque with the message: "Get your funds in by Friday, to take advantage of the Gains in this 90day window!"

[188] The Telegram account, identified as "@BitcoinWorkshopsYYC", required an invitation to participate. Cerato invited Meetup attendees to participate in the Telegram forum by displaying the link on a screen during his presentation or by sending the link to attendees. As mentioned, a link to the Telegram account was also posted with the YouTube Meetup recordings.

4. WhaleClub Investors

[189] In the Notice of Hearing, Staff alleged that Cerato raised at least $190,000 from WhaleClub investors. The evidence was that he raised $200,000, and perhaps more, from at least 16 investors. Staff were told that there were approximately 33-35 WhaleClub investors, which corresponded to statements in evidence indicating as many as 34 investors had contributed approximately $250,000 to the investment pool. Participation in the WhaleClub was mostly offered to Meetup attendees, although some investors heard about the WhaleClub elsewhere.

[190] None of the WhaleClub investors made a profit on their investment.

[191] Evidence from investor witnesses about their investment with Cerato was consistent. To summarize, witnesses generally testified that:

- they understood that their investment funds would be pooled with others and used by Cerato and his trading team to trade cryptocurrencies, and that Cerato had control over their funds during the term of their investment in the WhaleClub;
- from March through September 2018, Cerato occasionally sent investment statements by email;
- they did not know any of the other WhaleClub investors before subscribing;
- they had no involvement with trading decisions (although one investor witness indicated that he offered input, including technical analysis, but there was no response);
- Cerato was in charge of the WhaleClub and was their sole contact.

[192] Consistent with investor witness evidence, Cerato told Staff investigators that the majority of investors dealt only with him, they were not involved in trading the invested funds and their only participation was as investors with "zero" say in what or how to trade. He also said that investors were told there was a four person trading team who would trade cryptocurrencies, that investors were not asked to fill out any documents (such as a subscription agreement) before investing in the WhaleClub, and they were not asked questions about their financial circumstances. Cerato also confirmed that he controlled the keys to the various cryptocurrency wallets that received, pooled and repaid investor funds, but was aware that some investor funds were still held in a Bitcoin wallet controlled by Fleurie.

[193] Most investor witnesses testified to having received a document from Cerato in relation to their investment, titled "WhaleClub Agreement 2018" (**WhaleClub Agreement**). One version of the WhaleClub Agreement sent to some of the investors read:

> Welcome to the WhaleClub, by providing your funds you have agreed to the following details[:]
>
> 1. You accept the risks associated with the Crypto marketplace and understand that nothing is guaranteed in this segment.
> 2. You are trusting the whaleclub [sic] to use the funds provided to growth [sic] wealth for you and the club for a total of 90 days.
> 3. You will receive a number of paybacks as outlined on the spreadsheet on a varied basis throughout the 90days.
> 4. All members of the Club are grandfathered into future clubs and opportunities.
> 5. You agree to share 25% of the upside/profits with the trading team involved in growing the funds.
> 6. All dealings are to be kept private regarding communications between the facilitators of the fund and you.
> 7. All paybacks have to be received by the members no exceptions, payouts must be sent and noted, then the funds can be sent back into the fund by your choice.
> 8. In the event of a total meltdown in the marketplace, something drastic and beyond our control, we will pull all funds and setup [sic] a refund schedule to all Club members.
> 9. All funds will be transacted in BTC and reflected on the original base value in CAD received.

[194] Cerato claimed to have drafted the WhaleClub Agreement near the end of December 2017 and emailed it to WhaleClub investors after he received their funds in order to provide them with "details regarding the club's procedures".

[195] A slightly different version of the WhaleClub Agreement, stipulating a 365-day term and referring to "returns" rather than paybacks, was also in evidence.

[196] Cerato said the document was updated to reflect a 365-day term and that he sent this version to existing investors by email. None of the investor witnesses identified this updated version of the WhaleClub Agreement, and we saw no evidence of emails attaching the revised document. DK learned from a Cerato email in June 2018 (approximately five months after his investment) that the term was being modified from 90 to 365 days, but that email did not include a revised WhaleClub Agreement and DK did not receive any other documents to reflect this change. SC testified that his investment was not returned after 90 days and it continued without him asking to maintain the investment or receiving any communication from Cerato. MS said that he was not paid out in 90 days, contrary to the terms of his WhaleClub Agreement.

[197] Investors did not sign the WhaleClub Agreement and the terms were inconsistent with their understanding at the time of their subscription. As an example, MS said that he was not advised before investing about the 25% profit share and he did not consider the WhaleClub Agreement to be binding on him. GN did not recall any reference to a 90-day term, and thought that he would receive his funds back within a month of making a request to Cerato.

[198] Cerato organized a meeting in Calgary of WhaleClub investors in April 2018. Cerato emailed DK an invitation to a "Private Crypto Club Quarterly Meeting" scheduled for April 9,

which indicated "only management approved RSVP's [sic] allowed to attend". DK attended the meeting with his brother, and recalled that approximately 20 people were there, all of whom he thought were WhaleClub investors. He described the meeting as "a lot of marketing stuff", with Cerato and other speakers promoting additional investment opportunities after Cerato provided a brief update on the WhaleClub business.

[199] Not all WhaleClub investors attended. SC was not aware of any WhaleClub investor meetings, and OS ignored the invitation to attend the April 2018 meeting.

[200] The following summarizes the testimony of WhaleClub investor witnesses.

(a) DK

[201] DK learned about the Meetups from Jackson, whom he knew from high school. DK understood that Jackson was initially involved with the WhaleClub, but DK did not deal directly with Jackson regarding his investment after he was introduced to Cerato. Jackson later told DK that he was no longer involved.

[202] DK attended about three Meetups in December 2017 and January 2018. He learned, both at these meetings and from Telegram, that Cerato was investing for others in exchange for 25% of the profit, and that he required a minimum investment of $10,000.

[203] On December 31, 2017 DK discussed the WhaleClub with Cerato in a Telegram chat. Cerato explained the investment in these terms:

> We are accepting investors with a $10k & up worth of BTC funds.
>
> We plan to grow & trade the investors [sic] funds in our trading pool. Once we hit double the investment (our minimum goal) we will be sending profits/upside back to investors in BTC.
>
> We ask that you give us a 90day window to trade the funds. We may double the funds a number of times together in the 90days. This will obviously be a good thing for the investors to be able to profit multiple times, results will be varied.
>
> Our profit sharing is simple;
> Investor gets 75% of the upside/profit
> Trader gets 25% of the upside/profit
>
> The initial investment of BTC remains the investors [sic] at all times and will be returned at the end of 90days or rolled into a 2nd whalepool for the next [quarter] of the calendar year. We plan to do 4 whalepools for 2018.

[204] On or about January 2, 2018, DK gave Cerato $20,000 cash for his WhaleClub investment. He invested for himself and on behalf of his brother and four friends. Cerato likely did not know that DK was investing on behalf of others and he did not ask about DK's financial circumstances.

[205] Cerato did not give DK any documents before or at the time of his investment, although DK thought he may have signed an Excel spreadsheet Cerato gave him. On January 10, 2018 Cerato emailed DK confirming his investment and attaching DK's WhaleClub Agreement.

[206] DK's funds were not returned to him at the end of the 90-day period. He attended the April 2018 WhaleClub investor meeting and thought he recalled Cerato saying during his presentation, "[y]ou can pull out or you can stay in". DK learned from a June 5, 2018 email that Cerato had unilaterally changed the investment term from 90 days to 12 months.

[207] After making many unanswered requests of Cerato for an update on his WhaleClub investment, DK sent Cerato an email on August 15, 2018 with a "final request" for an updated account balance and payout of his investment. Of his $20,000 investment, DK received $6,544 (in Bitcoin).

(b) MS

[208] MS attended several Meetups from August 2017 to January 2018. He testified that Cerato began discussing the WhaleClub during the Meetups in December 2017.

[209] MS invested in the WhaleClub by giving Cerato a $10,000 cheque dated January 4, 2018, payable to "Stylewerx" at Cerato's request. The cheque was deposited to Stylewerx's account.

[210] Cerato did not send any documents to MS before or at the time of his investment, nor did Cerato send a receipt. MS did not sign any documents when he invested, and Cerato did not ask him any questions about his financial circumstances.

[211] Between March 2 and September 26, 2018, Cerato sent six emails to MS with statements showing a decline in his investment balance. He contacted Cerato in December 2018 for an update and Cerato told him that the funds were gone. MS then asked Cerato to refund his $10,000 investment. Cerato later called MS and blamed things on "Alex", accused MS of threatening him and his family and threatened to contact the police. MS testified that he never threatened Cerato.

[212] Cerato emailed MS on December 18, 2018, stating: "[d]ue to unforeseen happenings [in] the crypto marketplace we are being forced to return your [B]itcoin located in the mining pool you belong to". Cerato requested a wallet address to return the Bitcoin, which MS did not provide. MS said that he received about $2,000 from Cerato soon thereafter.

(c) OS

[213] OS testified that he first met Cerato in January 2018. Cerato claimed in his interview that OS was a family friend of Cerato's father, that he had known of OS since he was a child, and had seen OS two or three times since then. OS was not cross-examined on this point.

[214] In their meeting, Cerato discussed his success investing in Bitcoin and mentioned the WhaleClub. OS decided to invest with Cerato, and explained that Cerato was "a good talker" and made the WhaleClub seem like a great investment opportunity. OS wrote two cheques in January 2018 for his WhaleClub investment, both deposited to Stylewerx's bank account. OS gave Cerato a cheque for $10,000 on January 3, 2018 at their initial meeting, payable to "Style Werx Communications Inc." (at Cerato's request). He gave Cerato a second cheque for $50,000, dated January 4, 2018, payable to "Stylewerx Communications". From these amounts, $20,000 went to OS's investment in the WhaleClub with the remaining funds apparently used for other investments.

[215] Cerato did not give OS any documents at the time of his WhaleClub investment, nor did OS sign any documents. Cerato did not ask OS any questions about his financial circumstances. OS said that he followed some of the conversations in the Telegram chat group, although he did not understand all that was being discussed.

[216] In January 2019, OS received some of his funds back from Cerato. OS recalled an email from Cerato requesting his Bitcoin wallet information because "his system was crashing, and they needed to move the money". OS could not recall how much he received, only that it was less than the initial amount of his investment.

(d) SC

[217] SC heard about Cerato from his daughter, who worked for Cerato at one point. SC attended approximately five Meetups, from November 2017 through to March or April 2018. SC asked Cerato about the WhaleClub after meeting Cerato at one of these Meetups.

[218] SC decided to invest in the WhaleClub in December 2017, and sent $10,000 in Bitcoin to Cerato on or about January 6, 2018.

[219] Cerato did not ask SC questions about his financial circumstance or give him any documents at the time of SC's investment, although Cerato sent him a document listing his percentage ownership in the WhaleClub soon after. SC agreed to invest via text message and did not sign any documents at the time he invested. SC thought Cerato emailed him a WhaleClub Agreement before investing, some time in late December 2017 or early January 2018.

[220] Soon after SC met with the ASC (his interview occurred on December 17, 2018), Cerato sent SC approximately $2,000 to $3,000 in Bitcoin representing "what was left" of SC's investment.

(e) AM

[221] AM invested $10,000 with Cerato after meeting him and learning about the WhaleClub at the Meetups.

[222] AM did not recall how she provided her funds to Cerato, nor could she remember if she was given a receipt or proof of payment. She did not think she signed any documents, nor did she recall Cerato asking any questions about her financial circumstances at the time of her investment. Cerato claimed that he had a business relationship with AM, although she testified that she first met him through the Meetups and that she did not consider him to be a close friend or business associate at the time.

[223] Cerato returned some of AM's investment to her, although she could not recall the amount.

(f) GN

[224] GN went to eight or nine Meetups starting in about April 2018 after searching the Meetup website for cryptocurrency groups in his area. At the conclusion of the first Meetup, GN was approached by Cerato to discuss the WhaleClub. Cerato told GN that the only requirement was to

invest at least $10,000, which would be pooled with the money of other investors for trading cryptocurrencies, and that profits would be distributed to the investors.

[225] GN met with Cerato a few days later to talk more about the investment. Cerato showed GN a spreadsheet on his phone and sent GN a link to that document. GN testified that the spreadsheet document resembled the WhaleClub Agreement shown to him by Staff. GN could not remember whether Cerato mentioned the 25% profit-sharing reflected in the WhaleClub Agreement.

[226] On May 8 or 9, 2018, GN invested in the WhaleClub by wiring $10,000 to 2095912 using banking instructions from Cerato. He did not sign any documents at the time of his investment. Cerato did not ask GN any questions about his financial circumstances, other than asking if he had $10,000 ready to invest.

[227] On February 28, 2019, GN received an email from Cerato stating: "We are changing software systems for the Club this week and need your BTC wallet address emailed back asap, so we can send the current btc funds in your account by this Friday March 1". GN provided his Bitcoin wallet address, and received about 0.25 of a Bitcoin, which he said was worth around $1,000 at the time.

(g) Other WhaleClub Investors

[228] Two of Fleurie's friends (WG and RS) were interested in investing in Bitcoin, and Fleurie told them about the WhaleClub. In early January 2018, they decided to invest; WG paid $10,000 and RS paid $15,000, both by cheque payable to Stylewerx. Fleurie gave the cheques to Cerato and they were deposited to Stylewerx's bank account.

[229] We also received evidence concerning other WhaleClub investors:

- AG gave two cheques to Cerato, each for $10,000, dated December 31, 2017, payable to Stylewerx, and deposited to Stylewerx's bank account;

- ND gave a $10,000 bank draft, dated January 3, 2018, and payable to Stylewerx;

- TB invested $10,000 by cheque dated January 8, 2018, payable to Stylewerx, and deposited to its bank account;

- SI did not meet Cerato at the Meetups but (according to Cerato) probably learned about the WhaleClub after seeing a flyer. SI communicated with Cerato through Telegram about investing with the WhaleClub and on December 30, 2017 he sent $10,000 in Bitcoin to a wallet identified by Cerato, where the funds were pooled with those of other investors and distributed to the WhaleClub traders;

- AK, who apparently met Cerato at the Meetups, invested $10,000 with the WhaleClub by making a partial payment to Stylewerx from her credit card and the balance paid in Bitcoin. She communicated with Cerato on Telegram, he gave her a description of the WhaleClub investment similar to that given to DK;

- DW wrote a cheque for $50,000, dated January 4, 2018, payable to "Stylewerx Communications", and deposited to Stylewerx's bank account (some evidence indicated that half this amount constituted his WhaleClub investment);

- ER gave a cheque for $10,000, dated January 8, 2018, payable to "Style Werx", and deposited to Stylewerx's bank account; and

- CL invested $10,000 in the WhaleClub in January 2018.

[230] Some evidence suggested that Cerato may have invested $20,000 of his own money in early January 2018.

5. Trading Team

[231] Cerato's trading team consisted of four persons, including Jackson and Fleurie.

[232] Fleurie, who knew Cerato for many years, was previously an investment banker experienced in public offerings and private placements. He said Cerato approached him in late December 2017 or early January 2018 about the WhaleClub and he agreed to join the trading team.

[233] Fleurie's testimony was that Cerato was in charge of the WhaleClub, and Cerato gave the trading team Bitcoin to trade cryptocurrencies. Initially, the plan was that the trading team would trade daily and have weekly progress reviews, with the intention of selling the cryptocurrencies at a profit and converting the pooled proceeds back into Bitcoin. Fleurie testified that the team discussed trading strategies and that investors were not involved in those discussions. Fleurie would sometimes report his trades on Telegram.

[234] Fleurie traded for approximately two months, and received two tranches of Bitcoin from Cerato in that time to trade cryptocurrencies. Although he could not recall the amount of the first tranche, Fleurie said that he closed out his trading positions and returned the Bitcoin (including some gains) to Cerato in early January or February 2018. The second tranche consisted of about 2.4 Bitcoin, which Fleurie again used to trade cryptocurrencies until approximately mid-February or March 2018. At that time Fleurie was contacted by an ASC investigator on another matter, and Fleurie told Cerato that he was going to stop his trading for the WhaleClub because he might get back into investment banking and "didn't want to muddy" his reputation. Fleurie said that he retained the second tranche of Bitcoin in an electronic wallet.

[235] Fleurie adopted certain statements from his investigative interview, including that Cerato initially wanted to charge a fee for managing WhaleClub funds but that Fleurie told him not to charge a fee, and that he thought Cerato had sent an email to all WhaleClub members advising that there were no fees attached to the WhaleClub. We saw no evidence of an email to any WhaleClub member advising that there were no fees.

[236] Cerato contended that Fleurie's evidence demonstrated that participation in the WhaleClub did not involve profit-sharing. He argued that this evidence was corroborated by:

- another statement from Fleurie's interview, telling Staff that the profit-sharing term in the WhaleClub Agreement was changed to "zero", based on his understanding that it is illegal to charge a fee in an investment club; and

- his written statement to Staff that "there was no fee related to the club", that the 20 percent fee had been "changed to 0 percent after the first month" and that "no fees were ever charged".

[237] He also pointed to his statement in the Cerato Transcript that there were no management fees associated with the WhaleClub. However, Cerato made other statements in his interview that confirmed WhaleClub investors would share any profits with the trading team:

> . . . that was . . . the understanding when the traders would . . . make any type of wealth from their moves within the marketplace, then 25 percent of the total of that amount, whatever that would be in crypto, would be shared with the team, and the other 75 percent would go back to the said investor in this case.

[238] That was consistent with the written statement Cerato gave Staff before his interview. There he stated "[a]s the concept was profit sharing and no profit was ever made, no commissions, finder fees or other compensation was ever paid or received by any individual to my knowledge". However, other WhaleClub documents reflected that profit-sharing was a component of the WhaleClub, including statements emailed by Cerato to WhaleClub investors and both the 90-day and 365-day versions of the WhaleClub Agreement.

[239] We conclude that profit-sharing among the investors and the trading team was a term of the investments when they were made and that Cerato did not change that term of participation in the WhaleClub.

B. The Law Relating to Illegal Distribution

[240] Absent an applicable exemption (a **Prospectus Exemption**), s. 110 of the Act prohibits the distribution of a security without a preliminary prospectus and a prospectus having been filed with the ASC and receipted by the ASC's Executive Director (the **Prospectus Requirement**).

[241] A "distribution", as defined in s. 1(p)(i) of the Act, means a "trade" in "securities" of an "issuer" that have not been previously issued. The definition of "security" in the Act is broad and includes any profit-sharing agreement or any investment contract (in s. 1(ggg)(ix) and (xiv), respectively). Under s. 1(jjj)(i), a "trade" includes any sale or disposition of a security for valuable consideration. Section 1(cc) provides that an "issuer" is a person or company that has outstanding securities, is issuing securities or proposes to issue securities.

[242] Alberta securities laws provide Prospectus Exemptions that allow capital-raising on terms intended to preserve investor protection – for example, by limiting sales to investors with prescribed financial capacity. Relevant Prospectus Exemptions are set out in NI 45-106. Strict compliance with such exemptions is required, and the onus is on those seeking to rely on an exemption to prove that the exemption was available and applicable in the circumstances, and that

there was compliance with the terms of the exemption. As stated in *Re Cloutier*, 2014 ABASC 2 at paras. 308-09:

> Those who seek to rely on an exemption from . . . the Prospectus Requirement must make a "reasonable, serious effort – or take whatever steps were reasonably necessary – to satisfy themselves that the exemption was available" at the time of the . . . distribution of the security (*Re Robinson*, 2013 ABASC 203 at para. 151). It is insufficient to assume or hope that an exemption was available at the time of the trade or distribution of the security. Nor is it sufficient that some, but not others, of the trades within a distribution qualify for a claimed exemption.
>
> Once Staff have proved that a respondent has . . . engaged in a distribution without filing a prospectus, the onus shifts to the respondent to demonstrate the availability of, applicability of, and strict compliance with the conditions of, a claimed exemption (*Re Arbour Energy Inc.*, 2012 ABASC 131 at para. 737).

[243] An ASC panel in *Re Aitkens*, 2018 ABASC 27 at para. 148 summarized the elements of an illegal distribution as follows:

> To find that s. 110 of the Act was breached, we must conclude that: (i) the conduct involved a "security", a "trade" and a "distribution" (all as defined in the Act); (ii) prospectuses for the distribution were not filed with or receipted by the ASC; and (iii) no exemptions from the Prospectus Requirement were available.

[244] We address each of these elements in turn.

C. Analysis of Staff's Allegations

1. Security

[245] Staff's position was that the "oral and/or written agreements" to invest capital in a pooled investment constituted profit-sharing agreements or investment contracts and were therefore securities as defined by s. 1(ggg) of the Act.

[246] Cerato did not specifically argue that the WhaleClub investments were not securities. Instead, as discussed below, his submissions focussed on whether there was a distribution of securities.

[247] The WhaleClub investments were clearly investment contracts, a term not defined in the Act but the law is settled that it means an investment of money in a common enterprise with the expectation of profit to come significantly from the efforts of others (*Pacific Coast Coin Exchange v. Ontario (Securities Commission)*, [1978] 2 SCR 112). It is self-evident that those who invested in the WhaleClub did so with an expectation of profit – their funds would be pooled and profits would come from the cryptocurrency trading expertise of Cerato or his trading team. Cerato told at least one investor that pooling investment funds provided an opportunity to get discounts on tokens, implying that investors were more likely to profit by pooling their funds with other WhaleClub investors. In return, most investors understood that they would receive 75% of any realized profit and the trading team would receive the other 25%.

[248] Investors' involvement in the enterprise was limited to providing Cerato with their investment funds for a set period of time – initially 90 days although later unilaterally extended by Cerato to 365 days – with all trading decisions left to the discretion of the trading team.

[249] In determining whether the common enterprise part of the investment contract test is met, we are guided by *Pacific Coast*, where the Supreme Court (at 129), followed *SEC v. Glen W. Turner Enterprises, Inc.*, 474 F. 2d 476 (1973):

> In the . . . case of *Turner*, the expression "common enterprise" has been defined to mean (p. 482) "one in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties".

[250] In this case, the necessary commonality is clearly present – the fortunes of the WhaleClub investors were interwoven with and dependent on the efforts of the person seeking the investment (Cerato) or of third parties (the trading team).

[251] We have no hesitation in finding that the WhaleClub agreements between investors and Cerato were investment contracts, and thus securities as defined in the Act. In light of this finding, we need not consider whether the agreements were also profit-sharing agreements within the meaning of s. 1(ggg)(ix).

2. Trading

[252] A "trade" is defined in s. 1(jjj) of the Act to include "any sale or disposition of a security for valuable consideration", as well as "any act, advertisement, solicitation, conduct or negotiation made directly or indirectly in furtherance of" a trade.

[253] Staff's position was that Cerato traded securities by selling agreements to invest in the WhaleClub, for which he received at least $10,000 from each investor, either in fiat currency or in Bitcoin. Staff also argued that Cerato engaged in acts in furtherance of a trade through his promotion of the WhaleClub at Meetups and in Telegram posts, and by soliciting members of the public to invest.

[254] Cerato argued that neither he nor the WhaleClub received any fees, which precluded a finding of a trade or an act in furtherance of a trade because there was no valuable consideration given for the investment contracts. He also submitted that the WhaleClub Agreement was not a binding contract and that the 25% profit-sharing provision was "removed", such that there were no fees associated with the WhaleClub investment.

[255] In response, Staff pointed out that Cerato received funds – at least $10,000 or the equivalent in Bitcoin – from each investor. Staff also submitted that Cerato's referral fees and the "contemplated consideration" – namely, the contemplated profit-sharing between the investors and the trading team – constituted valuable consideration. On the latter point, Staff submitted that there was no revocation of the profit-sharing term and that the requisite consideration need not flow to the individual selling the security.

[256] The parties focussed much of their submissions on whether the profit-sharing term of the WhaleClub investment was removed and whether it sufficed as valuable consideration. As mentioned, we found that the profit-sharing term continued and was not modified by Cerato.

[257] Staff also submitted that Cerato received a referral fee and that this fee constituted valuable consideration. According to the Cerato Transcript, Cerato and the Bitcoin broker (who charged a commission to convert currencies into Bitcoin) discussed a 1% referral fee. It was unclear whether Cerato actually received any referral fees and some investments were paid directly to Cerato using Bitcoin, in which case the investments would not have been subject to a referral fee. In any event, it is unnecessary to decide whether the referral fee was valuable consideration.

[258] Payment for an investment contract suffices as valuable consideration, and the requisite consideration need not flow directly (or at all) to a particular person or company to meet the definition of a "trade" under s. 1(jjj)(i) of the Act: *Re Delta 3 Capital Corporation Inc.*, 2010 ABASC 328 at para. 34. Cerato alone received investors' funds in various forms (cheques, e-transfer, cash, Bitcoin and credit card charges), which were pooled with other investors' funds and given to the trading team to trade cryptocurrencies. Accordingly, Cerato engaged in trades by issuing investment contracts to WhaleClub investors, and receiving valuable consideration when he accepted payment from investors for those securities. We also consider that the promise to share profits (if any) from cryptocurrency trading in exchange for the invested funds constituted valuable consideration for the purposes of the Act.

[259] We also find that Cerato engaged in acts in furtherance of trades, including:

- promoting the WhaleClub through Telegram and at the Meetups;
- meeting with investors to communicate the terms of their investments (including the WhaleClub Agreement);
- receiving investors' funds, converting the funds to Bitcoin (if necessary) and providing the Bitcoin to the trading team;
- engaging and supervising a trading team to trade cryptocurrency with investors' pooled funds; and
- making virtually all communications with prospective investors, including responding to their inquiries regarding terms and method of payment.

[260] Cerato's contention that valuable consideration must change hands to engage in acts in furtherance of a trade is nonsensical. That interpretation would effectively render meaningless s. 1(jjj) (vi) of the definition of "trade" in the Act, contrary to the well-established principle of statutory construction that "courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant" (R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014), at para. 8.23).

3. Distribution

[261] As mentioned, a distribution is defined in the Act to include a trade in securities of an issuer "that have not been previously issued".

[262] Cerato's submissions focussed on whether he was issuing "new" securities – i.e., securities that had not been previously issued. He argued that investors' funds were used to acquire previously-issued cryptocurrencies. This entirely mischaracterized the nature of the WhaleClub investment – investors purchased interests in a pooled fund, the WhaleClub. The trading team (not the investors) used the pooled fund to trade cryptocurrencies and that activity determined the value of the securities purchased by the investors.

[263] Those securities – the investment contracts issued by Cerato – had not been previously issued. We therefore find that the trades in investment contracts constituted a distribution within the meaning of the Act.

4. Prospectus

[264] There was no dispute that a prospectus had not been filed and receipted for the WhaleClub investment contracts.

5. Private Investment Club Exemption

[265] Cerato argued that the Prospectus Requirement did not apply in the circumstances because any distribution fell within the scope of the private investment club exemption under s. 2.20 of NI 45-106.

[266] Section 2.20 provides for an exemption from the Prospectus Requirement where the distribution is of a security of an "investment fund" that:

- has no more than 50 beneficial security holders;
- does not seek and has never sought to borrow money from the public;
- does not and has never distributed its securities to the public;
- does not pay or give any remuneration for investment management or administration advice in respect of trades in securities, except normal brokerage fees; and
- for the purpose of financing the operations of the investment fund, requires security holders to make contributions in proportion to the value of the securities held by them.

[267] Staff disagreed that the WhaleClub investment met all of these requirements and submitted that Cerato did not demonstrate the availability of, and strict compliance with, the conditions of this (or any other) exemption. Specifically, Staff argued that Cerato did not show that the WhaleClub investment contracts were not distributed to the public and that the trading team did not expect to be remunerated for their investment management advice.

[268] As mentioned, the onus was on Cerato to establish the availability, applicability, and strict compliance with the exemption claimed (*Cloutier*, citing *Re Arbour Energy Inc.*, 2012 ABASC 131 at para. 737).

(a) Distribution of Securities to the "Public"

[269] The private investment club exemption is not available for a distribution of securities "to the public". Staff argued that the Whale Club investment contracts were distributed to the public, which precluded Cerato from being able to rely on that exemption.

[270] Staff noted that the Act does not define "the public", but submitted that the public includes anyone needing full disclosure to make an informed investment decision. In Staff's view, this approach is consistent with the Prospectus Requirement's objective of providing investors with full, true and plain disclosure of material facts about an issuer. Staff submitted that the case law has established two tests for deciding whether an investor is a member of the public – the "common bonds" test and the "need to know" test – neither of which were met by Cerato in the circumstances.

[271] Cerato acknowledged that the private investment club exemption has not been the subject of much prior consideration. He cited *Future Solar Developments Inc.*, 2016 ONSEC 17, where the Ontario Securities Commission (the **OSC**), in *obiter dicta*, noted that the private issuer exemption applies to a distribution of securities to (among others) "a person that is not the public". The OSC observed that "regulators have permitted a distribution to fewer than 50 persons where there is an affinity between them and the principals of the issuer" and that the exemption recognized that the quality of the investor's relationship with the issuer led to a presumption "that they either have, or can easily obtain, sufficient information regarding the issuer to come to an informed decision whether to invest or not" (para. 78). The OSC panel in *Future Solar* (at para. 81) concluded that the distribution was from a private issuer because most investors qualified as either accredited investors or were otherwise known by the principals of the issuer, and that the remaining few investors had received adequate materials and were able to make sufficient inquiries about the investment.

[272] Cerato submitted that the same question (i.e., what is the public) is the fundamental issue here, and that *Future Solar* suggested that an absence of close association among investors did not mean that the investment was open to the public.

[273] Staff did not disagree with the principles outlined in *Future Solar*, and suggested that the OSC's approach was consistent with both the "common bonds" and the "need to know" tests. Staff nevertheless submitted that *Future Solar* was distinguishable, given the tenuous relationship between Cerato and the investor witnesses and the scant materials given to WhaleClub investors.

(i) "Common Bonds" Test

[274] The common bonds test is from the Alberta Court of Appeal decision *R. v. Piepgrass* (1959), 23 DLR (2d) 220, which considered whether securities had been "offered for sale to the public". In its analysis, the court determined that it did not mean that the offer of securities had to be made to all members of a community, but instead distinguished between the marketing and

promotion of a private company to a relatively close-knit circle of friends or associates and the more aggressive promotion to a broader base of potential purchasers:

> It seems to me that the very essence of a private company envisages the idea that it is of a private, domestic concern to the people interested in its formation or in later acquiring shares in it. It is one thing for an individual or group of individuals to disclose information to friends or associates, seeking support for a private company being formed or in existence, pointing out its attractions for investment or speculation as the case may be, but it is quite another thing for a private company to go out on the highways and byways seeking to sell securities of the company and particularly by high pressure methods, that is by breaking down the sales resistance of potential purchasers and inducing them to purchase. (at pp. 227-28)

[275] In *Piepgrass*, the court found little assistance in previous authorities interpreting the phrase "offer for sale to the public", but approached the issue as a fact-specific analysis to determine whether the sale of securities "transcended the ordinary sales of a private domestic concern to a person or persons having common bonds of interest or association" (at 228). In applying this test, the court found that one of the five purchasers was a stranger to the appellant, while the other four had previous dealings with him but lived a considerable distance away and "were not in any sense friends or associates . . ., or persons having common bonds of interest or association". Several other potential investors had been rejected as they did not have the capital to invest. The court concluded that the securities were sold to the public:

> Indeed, the company, in reality, did more than openly advertise an offer of its shares to the public. It, through the appellant, put on a vigorous selling campaign to certain members of the public, members who had no common bonds of interest or association with the appellant. The logical inference from the evidence is that the company would sell its shares to such members of the public as could purchase a substantial block of shares. (at p. 229)

[276] The common bonds test has since been applied to the application of the private issuer exemption, where the analysis focussed on both the relationship between the seller of the securities and the purchaser, and the exclusivity of the offering – whether solicitations extended outside of an inner group. As summarized in *R. v. Boyle*, 2001 ABPC 152 at para. 54:

> What constitutes the "public" is a question of fact and dependant on the circumstances of the case, but is defined by the relationship of the investor to the issuer. In *R. v. McKillop*, [1972], 1 O.R. 164, 4 C.C.C. (2d) 390 (Ont. P.C.), the court found that the exemption failed because the evidence showed that the sales were not confined to a strictly private circle, and were therefore not exclusive to a private group. Thus, if some but not all the investors would meet the "private" vs. "public" character, the fact that the public was not excluded from the inner group results in the exemption not being available, and the offence therefore established (*Renco Energy Corp.*, *supra*; *Buck River Resources*, *supra*; (see also B.C.S.C. *Interpretation Note*, Meaning of "The Public". Weekly Summary, Ed. 89:141, which defines the expression by way of excluding a specified list of persons: holders of securities of the issuer, close relatives of the trader, employees, directors and officers of the issuer, their close relatives, and companies owned by such persons)).

[277] Though some prior decisions suggest otherwise (see *Boyle* at para. 46, *Re Del Bianco* (unreported, AB Securities Commission, May 31, 2002) at p. 16), Cerato argued that the proximity of relationship required by the private investment club exemption should differ from that required by the close friends and business associates exemption, because the former exemption would be otherwise meaningless and unnecessary. He argued that the private investment club exemption

only requires a common interest or goal, and that the WhaleClub members were associated with one another by a common interest of investing in cryptocurrencies. He submitted that the WhaleClub was intended to be a "club", not in name only, but also because members communicated in a private Telegram chat room and held a private WhaleClub investors' meeting in April 2018. Staff countered that the private investment club exemption requires that all five elements of s. 2.20 be met, not simply that there be a common interest and an intention to establish a "club".

[278] Cerato also suggested that we should adopt a flexible approach in our assessment of the club member's connections with one another, one that recognizes the modern realities of how people commonly associate with one another online, including through chat rooms. He submitted that WhaleClub investor communications in the Telegram chat room reflected this reality and their common interest in cryptocurrency investments. While an invitation to join the Telegram chat room was necessary, access to the Telegram account or chat room was by no means exclusive to WhaleClub investors. Rather, invitations were readily available at the Meetups and from links posted on YouTube with the Meetup videos – both of which were generally accessible to the public.

[279] The Companion Policy to NI 45-106 provides the following useful commentary regarding the value of internet-based relationships in assessing the requirements of various Prospectus Exemptions: "We would not consider a relationship that is primarily founded on participation in an internet forum to be that of a close business associate." (at p. 11). Participation in social media platforms by itself does not create the bonds of affinity contemplated by exemptions that are premised on relationships of trust and ready access to information.

[280] Staff submitted that Cerato did not share common bonds with WhaleClub investors, most of whom had no prior relationship with him and first met Cerato at Meetups. Although Cerato claimed to have a connection with a few investors (including OS and AM), Staff argued that the evidence fell short of meeting the common bonds test.

[281] Consistent with the case law on the common bonds test, we considered the relationship between WhaleClub investors and Cerato at the time of their investment. From that perspective, Cerato did not demonstrate that he had a relationship with WhaleClub investors that would be considered a close connection or association. Cerato did not know most of the investor witnesses and typically met them at Meetups. Although not determinative, we took into account that none of the investor witnesses considered Cerato to be a close personal friend or business associate at the time of their investment, nor did Cerato consider most investors to be friends or business associates. While he identified OS as a close friend and claimed to have had business dealings with AM, both testified that they did not know Cerato before investing. Even if we accepted Cerato's claims, the evidence fell far short of demonstrating that the quality of these relationships objectively met the common bonds test. In any event, as mentioned in *Boyle*, the exemption does not apply if members of the public are not excluded, and it is insufficient if some, but not all, of the investors had a relationship that might be characterized as private.

[282] We also note that there was no exclusivity to accepting investors to the WhaleClub – Cerato was willing to accept anyone prepared to invest at least $10,000 (or the equivalent in Bitcoin). He

told DK in an online chat message that "[w]e are accepting investors with a 10K and up worth of BTC funds." He similarly told GN, an individual he had never met before, that the only requirement was to have $10,000 to invest. He promoted the WhaleClub in the Telegram chat group without knowing how many people were part of that group or their identity, and at the Meetups which were open to anyone.

[283] We therefore find that Cerato did not satisfy the common bonds test.

(ii) "Need to Know" Test

[284] The leading case on the "need to know" test is *Securities & Exchange Commission v. Ralston Purina Co.*, 346 US 119 (1953), where the Supreme Court of the United States considered whether a company's share offering to key employees qualified for a registration exemption applicable to non-public transactions. The court interpreted the "public" from the perspective of the share purchasers and whether they needed the protections afforded by the registration requirement. Because the registration requirement ensured disclosure of information necessary to make an informed investment decision, the scope of the term "public" turned on an assessment of whether the class of purchasers had access to material information or whether they required the protection given by that disclosure. If the class of persons was privy to sufficient information and "able to fend for themselves", the offering was not considered to be to the public (at p. 125).

[285] Similarly here, the Prospectus Requirement is meant to ensure that investors receive full, true and plain disclosure of material information about the issuer and the nature of the offered securities so as to make an informed investment decision (see *Re Limelight Entertainment Inc.*, 2008 ONSEC 4 at para. 139). However, there was no evidence that any of the investor witnesses were given adequate information necessary to make an informed decision.

[286] Investor witnesses' evidence about their knowledge and experience concerning cryptocurrency, their reasons for investing with Cerato, and the disclosed risk factors, included the following:

- DK did not recall Cerato mentioning the risks of his investment, and said that he invested because it "all sounded too good not to" and seemed "like a pretty sure thing". He acknowledged knowing that investments are risky, but he said ". . . that's not how it was marketed".

- MS said that he invested with the WhaleClub because Cerato was an expert who said several times that "he had the ability to profit from Bitcoin whether or not the Bitcoin was actually going up or down". He also said that there was "absolutely no talk of risk", that the focus was on multiplying the principal "by ten times in a short period of time", and that Cerato's pitch was that he was "an expert" so "[i]f you're shitty in investing yourself, put the money with him . . .".

- OS did not consider himself "knowledgeable enough" to make suggestions for the WhaleClub to trade certain cryptocurrencies, and he did not understand much of the discussion in the Telegram chat group.

- AM testified to having limited investment experience and knowledge, but she acknowledged that the WhaleClub was a risky investment.

- GN did not recall Cerato discussing the risks of the WhaleClub investment opportunity, and he invested because he thought that pooling funds would allow for tokens to be bought at a discount, that the trading team "worked on these crypto things" all day, and that they would have "known a lot more about it than me".

- SC described his investment knowledge as "[w]eak to middling", and while he had some investment experience he did not consider himself to be an accredited investor.

[287] In our view, the WhaleClub investors were precisely the type of people who needed the protection of prospectus-like disclosure for the securities offered by Cerato. He marketed the WhaleClub as ideal for cryptocurrency novices, without giving any meaningful risk disclosure. Instead, Cerato made extravagant promises of spectacular returns from his trading team's purported ability to successfully trade cryptocurrencies.

[288] We therefore find that Cerato did not satisfy the "need to know" test.

(iii) Conclusion Regarding Distribution to the "Public"

[289] Cerato's distribution of investment contracts did not meet either the "common bonds" or the "need to know" tests, and we find that the distributions were made to the public, within the meaning of s. 2.20 of NI 45-106. Accordingly, we find that Cerato's investment contracts do not qualify for the private investment club exemption.

(b) Remuneration

[290] The private investment club exemption is not available unless all of the conditions of the exemption are satisfied. Our conclusion that the WhaleClub securities were distributed to the public is therefore determinative – one of the conditions is not satisfied and the exemption is not available. We need not address whether the profit-sharing term in the investment contracts constituted remuneration for trading or for advice.

(c) Conclusion on Available Exemptions

[291] To summarize, we find that the WhaleClub investment did not qualify as a private investment club for the purpose of NI 45-106. Without that exemption, and because there was no suggestion that any other exemption from the Prospectus Requirement applied to the distribution of securities by Cerato (nor was it apparent from the evidence that any other exemption might have been available), we find that Cerato's distribution of investment contracts was not conducted pursuant to any exemption from the Prospectus Requirement.

D. Conclusion on Staff's Allegations

[292] We find that Cerato contravened s. 110 of the Act by distributing securities without a prospectus or an available Prospectus Exemption.

IV. CONCLUSION AND NEXT STEPS

[293] Having found that Cerato's Charter rights were not infringed and that he breached Alberta securities laws, this proceeding will now move into a second phase for the determination of what, if any, orders for sanction or cost-recovery ought to be made in light of our findings.

[294] Staff and Cerato are each directed to inform one another and the Registrar, in writing, not later than noon on Tuesday, April 26, 2022, of the following: (i) whether they propose to adduce new evidence on the sole issue of appropriate orders; and (ii) their expected timing requirements and suggested dates. After the panel has received and considered the responses to this direction (or after the date specified for such responses has passed), the Registrar will inform the parties of the timing of next steps in this proceeding.

April 12, 2022

For the Commission:

"original signed by"
Kari Horn

"original signed by"
Tom Cotter

"original signed by"
Karen Kim