Date: 20200807
Docket: CI 20-01-25295
(Winnipeg Centre)
Indexed as: Winnipeg (City) v. Caspian Projects Inc. et al.
Cited as: 2020 MBQB 120

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:	) Counsel:
	) MICHAEL G. FINLAYSON and
THE CITY OF WINNIPEG,	) GABRIELLE C. LISI
	) for the plaintiff
plaintiff,	)
	) JEFFREY A. BAIGRIE and
- and -	) MATTHEW T. DUFFY
	) for the defendants
CASPIAN PROJECTS INC., CASPIAN CONSTRUCTION INC., ARMIK BABAKHANIANS, SHAUN ANDRE BABAKHANIANS, JENIK BABAKHANIANS, TRIPLE D CONSULTING SERVICES INC., PAMELA ANDERSON, 4816774 MANITOBA LTD. operating as MOUNTAIN CONSTRUCTION, PAUL R. LAMONTAGNE, FABCA PROJECTS LTD., FABCA-PMG PROJECTS LTD., FABCA WARDLAW LTD., FABCA KING EDWARD LTD., GREGORY CHRISTO FIORENTINO, PETER GIANNUZZI, MARIA ROSA FIORENTINO, DUNMORE CORPORATION, OSSAMA ABOUZEID, ADJELEIAN ALLEN RUBELI LIMITED (also known as A.A.R.), PETER CHANG, GRC ARCHITECTS INC., PATRICK DUBUC, 8165521 CANADA LTD. operating as PHGD CONSULTING, 2316287 ONTARIO LTD. operating as PJC CONSULTING, FSS FINANCIAL SUPPORT SERVICES INC., PHIL SHEEGL, 2686814 MANITOBA LTD., JAGS DEVELOPMENT LTD., BROOKE HOLDINGS LTD., LOGISTIC HOLDINGS INC., JAW ENTERPRISES INC., ABC LTD., DEF LTD., GHI LTD., JKL LTD.,	) Caspian Projects Inc., Caspian) Construction Inc., Armik) Babakhanians, Shaun Andre) Babakhanians,) Triple D Consulting Services Inc.,) JAW Enterprises Inc.,) Pamela Anderson, 4816774) Manitoba Ltd. o/a Mountain) Construction, JAGS Development) Ltd., Brooke Holdings Ltd. and) Logistic Holdings Inc.
	)
	) KEVIN P. NEARING
	) for the defendant Adjeleian Allen
	) Rubeli Limited (aka A.A.R.)
	)
	) PETER T. BERGBUSCH, Q.C., MELANIE
	) S. WIRE and MICHAEL J. WEINSTEIN
	) for the defendant GRC Architects Inc.
	)
	) ROBERT L. TAPPER, Q.C. and
	) SARAH R. McEACHERN
	) for the defendants Phil Sheegl,
	) FSS Financial Support Services Inc. and 2686814 Manitoba Ltd.

JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JOHN DOE V, JOHN DOE VI, JOHN DOE VII, JOHN DOE VIII,	)
	)
	) JOSEPH AIELLO
	) for the defendant Jenik Babakhanians
defendants.	)
	) SCOTT D. FARLINGER and
	) DAVID A. GROHMUELLER
	) for the Attorney General of Canada
	) on a watching brief
	)
	) DENIS G. GUÉNETTE
	) for the Attorney General of Manitoba
	) on a watching brief
	)
	) No one appearing for the defendants
	) Paul R. Lamontagne, FABCA
	) Projects Ltd., FABCA-PMG Projects
	) Ltd., FABCA Wardlaw Ltd., FABCA
	) King Edward Ltd., Gregory Christo
	) Fiorentino, Peter Giannuzzi, Maria
	) Rosa Fiorentino, Dunmore
	) Corporation, Ossama Abouzeid,
	) Peter Chang, Patrick Dubuc,
	) 8165521 Canada Ltd. o/a PHGD
	) Consulting, 2316287 Ontario Ltd.
	) o/a PJC Consulting, ABC Ltd., DEF
	) Ltd., GHI Ltd., JKL Ltd., John Doe I,
	) John Doe II, John Doe III, John
	) Doe IV, John Doe V, John Doe VI,
	) John Doe VII and John Doe VIII
	)
	) JUDGMENT DELIVERED:
	) August 7, 2020

JOYAL C.J.Q.B.

I. INTRODUCTION

[1] This judgment addresses two motions: the plaintiff's motion for non-party production pursuant to Queen's Bench Rule 30.10 and, the defendants' motion to strike significant portions of the plaintiff's supporting affidavits.

[2] The plaintiff, the City of Winnipeg (the "City"), seeks, pursuant to Queen's Bench Rule 30.10, production of certain documents and information relating to the Winnipeg Police Service Headquarters Project (the "WPSHQ Project") currently in the possession of a non-party, the Royal Canadian Mounted Police ("RCMP"). The production would include documents and information seized by the RCMP from the defendants Caspian Projects Inc. ("Caspian") and Adjeleian Allen Rubeli Limited ("A.A.R."). The City has been advised by those defendants that copies of the documents seized by the RCMP were, at the time of seizure, given to Caspian and A.A.R. Accordingly, these defendants insist that the documents are available to be produced through the "ordinary discovery process".

[3] Given the position of the defendants that these documents can be produced through the "ordinary discovery process" and given that the defendants also assert that s. 490(15) of the *Criminal Code* (explained at paras. 23-26, and further discussed below at paras. 118-49) would in the particular circumstances of this case, otherwise pre-empt access to these documents seized by the RCMP, the defendants oppose the City's Rule 30.10 motion for non-party production. In opposing the City's motion for non-party production, the defendants also seek to strike the identified portions of the five impugned affidavits that constitute some of the evidentiary foundation for the City's motion.

II. ISSUES

[4] Based on the submissions of the parties, the required determinations on the two related but distinct motions before the Court (the motion for non-party production and the motion to strike) reduce to the following questions:

1. **Should the identified paragraphs in the impugned affidavits, which constitute some of the evidentiary foundation for the City's motion pursuant to Rule 30.10, be struck?**

2. **On the particular facts of this case, does s. 490(15) of the *Code* and the connected and applicable legal principles, pre-empt the City from obtaining the production it seeks from the RCMP pursuant to Rule 30.10?**

3. **Even if s. 490(15) of the *Code* in the particular circumstances of this case does not pre-empt the use of Rule 30.10 by the City to obtain the seized RCMP documents, has the City nonetheless satisfied this Court that the production sought should be ordered pursuant to Rule 30.10?**

III. BACKGROUND AND CONTEXT

[5] The City has commenced an action against the defendants in respect of a fraudulent scheme which the City alleges was perpetrated by the defendants on the City in the course of the redevelopment of, amongst other locations, the former Canada Post Building located at 266 Graham Avenue, in Winnipeg. That building was redeveloped for use as the Winnipeg Police Service Headquarters (the "WPSHQ"). The redevelopment project took place from approximately 2011 to 2014.

[6] The City claims that the defendants conspired to defraud the City and to obtain monies under false pretenses during the WPSHQ Project by way of a fraudulent invoicing scheme (the "Scheme"), which consisted of:

(1) Creating fraudulent quotes, invoices, change orders, contemplated change notices, requests for progress payments and progress payments;

(2) Altering bona fide quotes and invoices;

(3) Approving these fraudulently-created and/or fraudulently-altered quotes, invoices, change orders, contemplated change notices, requests for progress payments and progress payments; and

(4) Paying secret commissions and/or other benefits ("Kickbacks") to the defendants and other unknown persons in return for their participation in the Scheme.

[7] Included as various named defendants in the City's claim are contractor principals and consultant principals who, the City alleges, controlled and directed the contractors and consultants who perpetrated the fraudulent Scheme. Included amongst the named defendants are Caspian, Armik Babakhanians, Shaun Andre Babakhanians, Jenik Babakhanians, Triple D Consulting Services Inc. and Pamela Anderson (whom the City collectively refers to as the "Caspian Defendants"). Included amongst the other defendants are the defendants Phil Sheegl, FSS Financial Support Services Inc. and 2686814 Manitoba Ltd. (whom the City collectively refers to as the "Sheegl Defendants"). The City notes the fiduciary duties attaching to Sheegl who, at the relevant time, was an officer of the City.

[8] The theory that underlies the City's claim is that the Sheegl Defendants received a bribe from the Caspian Defendants to arrange for Caspian to be awarded the WPSHQ contract in exchange for secret commissions and benefits. The City alleges that the

contractor defendants and the consultant defendants conspired to defraud, and did defraud, the City through a Scheme primarily related to the alteration or creation of invoices containing misrepresentations. These were allegedly submitted to the City (or used to support progress requests submitted to the City), and paid by the City. While far from sufficient so as to permit, at this stage, definitive conclusions on any standard of proof, there is currently before the Court some unexplained evidence that is supportive of the City's theory with respect to misrepresentative invoices.

[9] With respect to A.A.R., the City claims that A.A.R. and its employees were either a party to the alleged Scheme or, in the alternative, were negligent in not noticing the fraudulent invoices and in approving the Caspian progress payment requests.

[10] The full particulars of the Scheme are not yet known to the City, but the City says they are within the knowledge of the defendants.

[11] This claim by the City follows an earlier RCMP investigation and a Crown decision to not proceed with a criminal prosecution. In that regard, it was in or around 2014, the RCMP commenced its investigation into the WPSHQ Project. That RCMP investigation was designated as Project Dalton ("Project Dalton"). In the course of Project Dalton, the RCMP seized documents, notes, correspondence, records and other particulars (the "Seized Documents") from the defendants, including Caspian. Project Dalton was completed in or around December 2019 at which time the Manitoba Prosecution Service (the "MPS") declined to authorize criminal charges.

[12] The Seized Documents remain in the possession, control and/or power of the RCMP.

[13] The City asserts that the Seized Documents are relevant to matters in issue within these proceedings insofar as they relate to the defendants' involvement in the WPSHQ Project and the Scheme alleged above. The Seized Documents include but are not limited to design development submissions, Caspian invoicing and accounting practices, subcontractor invoicing, Caspian correspondence with subcontractors, construction meeting minutes and change orders.

[14] Since the statement of claim was filed, and after the City's first set of submissions made on this motion, the City has received further information and documentation. That information suggests that the City paid more than 24 million dollars to Caspian in the course of the WPSHQ Project in connection with invoices of Fabca Projects Ltd. ("Fabca"). These invoices were variously described as relating to demolition, asbestos remediation and other matters. None of the work described in the invoices was done by Fabca. It would appear that none of the 24 million dollars was ultimately paid to Fabca. Fabca did not subcontract any of the work to anyone. Invoices, and in some cases money, flowed between Caspian and Fabca and 4816774 Manitoba Ltd. operating as Mountain Construction ("Mountain"), Caspian and Fabca and JAGS Development Ltd., Caspian and Fabca and JAW Enterprises Inc., and Caspian and Fabca and Logistic Holdings Inc. The City suggests starkly that some of the transactions were completely phony. Mountain, for example, had no employees, a fact which suggests it could have performed no work on the WPSHQ Project.

[15] In the context of the City's claim, the further information set out above triggers some obvious and natural questions that may underscore the need and the importance

of the non-party production the City seeks pursuant to Rule 30.10. Those questions include the following:

- Who did the work that the Fabca invoices represented was done?
- How much was Caspian actually billed for that work and how much did Caspian pay for the work?
- Where did the millions of dollars which flowed through Fabca from Caspian to Mountain or JAW Enterprises or JAGS Development or Brooke Holdings or Logistic Holdings Inc. end up?
- Did any of these entities do any work on the Project; or did they play the same role as Fabca?

[16] On June 1, 2020, the City received an affidavit from the Attorney General affirmed by Cst. Stephane Theoret. At pages 16 and 17, in para. 32, the City learned about documentation received by the RCMP following the execution of Production Orders ("POs") at various financial institutions.

[17] The table below sets out when the various POs were issued, the organization or financial institutions from which the information was obtained, and the name of the individual or corporation to which the information pertained:

Date PO Obtained	**Organization PO Obtained from**	**Individual/Corporation PO Regarding**
December 10, 2015	TD Bank	Triple D Consulting Services Inc.
January 26, 2016	Canadian Western Bank	Triple D Consulting Services Inc.

February 18, 2016	TD Bank	4816774 MANITOBA LTD., operating as Mountain Construction
February 18, 2016	RBC Bank	8165521 CANADA LTD., operating as PHGD Consulting
February 18, 2016	TD Bank	2316287 ONTARIO LTD., operating as PJC Consulting
February 18, 2016	Steinbach Credit Union	Triple D Consulting Services Inc.
February 18, 2016	City of Winnipeg	Dunmore Corporation
May 25, 2016	TD Bank	4816774 MANITOBA LTD., operating as Mountain Construction
June 6, 2016	TD Bank	FSS Financial Support Services Inc.
June 9, 2016	TD Bank	Account 0517-5201928 (Associated with FSS Financial Services Inc.)
June 28, 2016	TD Bank	Accounts Associated to Phil Sheegl and Sam Katz
May 5, 2017	TD Bank	Logistic Holdings Inc.
May 28, 2017	TD Bank	Armik Babakhanians
July 17, 2017	TD Bank	Armik Babakhanians

[18] The information and documentation that the City received since its filing of the statement of claim, along with the nature and number of the seizures from the various organizations or financial institutions suggest, as the City claims, that before meaningful

examinations for discovery by the City of the defendants can occur, a forensic accounting analysis must be performed. The City suggests the analysis will require and involve:

(1) finding all versions of invoices relating to work on the WPSHQ Project, or at least the invoices actually paid by Caspian as general contractor/project manager and the invoices justifying the amounts requested by Caspian of the City and paid by the City in connection with the WPSHQ Project;

(2) the banking and accounting records of the many entities between and among whom money flowed, invoices and purchase orders were exchanged and emails were sent and received, relating to the "transactions" connected to the WPSHQ Project; and

(3) the mapping and matching of the money flow to the invoices, progress payment requests, associated covering email exchanges and other paper or electronic trails.

[19] The City insists that much, if not all, of the above will most reliably and expeditiously be realized through the production sought from the non-party, the RCMP.

[20] The WPSHQ Project occurred approximately five to eight years ago. The City suggests that it is reasonable to doubt whether financial institutions and sub-trades have maintained documentation pertaining to the WPSHQ Project. The City also has reasonable concerns that sub-trades or financial institutions may have already destroyed documents relating to them. The City also suggests that if documents are returned to the defendants at this late date, they might now be destroyed.

[21] This Court acknowledges, in the context of this complex claim, the necessity of a meaningful forensic accounting. Can and will such a meaningful forensic accounting occur if the informational basis for that accounting is dependent upon the "ordinary discovery process"? Similarly, can meaningful examinations for discovery be conducted without that forensic analysis? Does the more-immediate and potentially-necessary access to the RCMP seizures and information (which might avoid ongoing skirmishes about "relevance" which are likely to occur during the course of a protracted "ordinary discovery process") represent the most expeditious, proportionate and fair manner of proceeding such so as to not only enable the City to better evaluate its claim, but as well, better ensure a more meaningful one-time set of examinations for discovery? These are just some of the practical considerations which constitute the backdrop to the applicable legal framework discussed below.

IV. LEGAL FRAMEWORK

[22] In the following brief paragraphs, I set out some of the legal framework for what will be my determinations in respect of those questions earlier posed at para. 4 of this judgment. As it relates to the defendants' motion to strike portions of the impugned affidavits, any discussion of the relevant and applicable jurisprudence is found at paras. 46 to 117 where I deal with that specific issue and the evidentiary foundation for the City's motion for non-party production.

[23] While the City is not seeking an order pursuant to s. 490(15) of the *Code*, it nonetheless contends that s. 490(15) and its underlying rationale should favourably inform my analysis as to whether the non-party production should be granted pursuant

to Rule 30.10. For their part, the defendants insist that, properly understood, s. 490(15) pre-empts, for both procedural and substantive reasons, the production of the Seized Documents currently in the possession of the RCMP.

[24] Subsection 490(15) of the *Code* provides:

> Where anything is detained pursuant to subsections (1) to (3.1), a judge of a superior court of criminal jurisdiction, a judge as defined in section 552 or a provincial court judge may, on summary application on behalf of a person who has an interest in what is detained, after three clear days' notice to the Attorney General, order that the person by or on whose behalf the application is made be permitted to examine anything so detained.

[25] The test applicable to a s. 490(15) application was enunciated by Bond J. in ***Canada Post Corporation v. Canada (A.G.),*** 2018 MBQB 87 ("***Canada Post***") (at para. 17):

> Based on the foregoing, my interpretation of the test to be applied to a section 490(15) application is as follows. The court must apply a two-step test. First, the court must consider whether the applicant has a legal interest in the item seized. In my view, as illustrated by the cases referred to, the interest must be not only legal but also actual rather than potential, and it must be concrete, defined and identified. Second, if such a legal interest is established, then the court must engage in a balancing of interests. In my view, this balancing must consider, at a minimum, the nature of the applicant's legal interest, whether access to the item is necessary for the purposes of advancing that legal interest in some concrete fashion, the law enforcement related interests of the police agency that is in possession of the item, the privacy interests of third parties, the interests of any suspect or accused person in a fair trial, and interests related to the proper administration of justice.

[26] It is clear then that when conducting an analysis in relation to s. 490(15), the Court must first consider whether a party has a "legal interest" in the Seized Documents. Second, *if* a legal interest is established, the Court must engage in a balancing of interests which includes the consideration of whether the orders sought are necessary, and as well, consideration of the ownership/privacy interests of the defendants and third parties, and the proper administration of justice. The second branch of the test reflects the fact that

an order pursuant to s. 490(15) is discretionary; a judge "may", not must, grant an order. Each aspect of the test is considered later in this judgment at paras. 118-150.

[27] For its part, Rule 30.10(1) provides:

> **Order for inspection**
>
> 30.10(1) The court may, on motion by a party, order production for inspection of a relevant document that is in the possession, control or power of a person not a party and that is not privileged where it would be unfair to require the moving party to proceed to trial without having discovery of the document.
>
> [emphasis added]

[28] Rule 30.10 was considered by this Court in ***Callinan Mines Limited v. Hudson Bay Mining and Smelting Co., Limited***, 2011 MBQB 159 (CanLII) ("***Callinan***"), where the Court identified guiding reference points and additional factors to be considered as it relates to Rule 30.10. They were first identified and discussed in ***Ontario (Attorney General) v. Stavro***, 1995 CanLII 3509 (ON CA) ("***Stavro***"). These reference points and factors include:

- "relevance";
- whether a privilege attaches to the documents;
- "the importance of the documents in the litigation";
- "whether the discovery of the defendants with respect to the issues to which the [defendant] documents were relevant was adequate and if not, whether responsibility for that inadequacy rested with the defendants";
- "the position of the non-parties with respect to production"; and
- "the availability of the documents or their informational equivalent from some other source which was accessible to the [moving parties]".

[29] As will be noted from the following paragraphs wherein I set out the positions and submissions of the parties, the City and the defendants take very different positions with respect to how the relevant law and this legal framework have application to the particular circumstances in this case.

V. SUBMISSIONS OF THE PARTIES

The City

[30] In providing as I did earlier some of the background and context for these motions, I have already, in a general way, set out the tenor of the City's position respecting what it identifies as the necessity of the non-party production it seeks. Nonetheless, in this section, I provide a more complete synthesis of the City's submissions.

[31] To prove its case, the City submits that it requires the entire paper and electronic trails of the Scheme. To that end, the City seeks production of certain documents and information relating to the WPSHQ Project currently in the possession of the RCMP, including documents seized by the RCMP from Caspian and A.A.R., documents voluntarily provided to the RCMP during its investigation into the WPSHQ Project and banking documents obtained further to POs (collectively the "RCMP Documents").

[32] The City has expressed serious concerns as to the likelihood of the paper and electronic trails ever being disclosed and produced to it, should the RCMP Documents be returned to Caspian and A.A.R. In that regard, they note that ordinary civil discovery imports significant discretion. Only "relevant" documents are required to be disclosed. In that process, it is the parties who decide what is or is not relevant – what is or is not disclosed.

[33] The City's position is in part informed by the intuitive preoccupation that a party who has perpetrated a fraud is unlikely to readily disclose the evidence of its wrongdoing to the victim party suing it. This is particularly true, says the City, when that party has already attempted to burn incriminating evidence or create a false paper trail or record in an effort to avoid conclusions otherwise inevitable. Further, the City insists that both Caspian and A.A.R. are concerned about what might be revealed by these documents and may have a serious incentive to take a narrow view of what is relevant and discloseable. In fact, the City argues that Caspian has already adopted this narrow view of relevance (see para. 12 of the Affidavit of Pamela Anderson, sworn May 27, 2020 (the Anderson Affidavit).

[34] Motivated by these concerns, the City seeks all the relevant and non-privileged documents in the possession of, what they describe as, a neutral third party who has or should have no interest in the documents or in these proceedings.

[35] The City has accordingly brought its motion pursuant to Rule 30.10, which contemplates production from a non-party. Although the City has brought its motion pursuant to Rule 30.10, it notes that s. 490(15) of the *Code* also provides a means by which an interested party with a concrete legal interest could obtain these RCMP Documents (although an order under s. 490(15) would only relate to the documents "seized" by the RCMP).

[36] While it is the position of the City in the particular circumstances of this case that any order for production of the RCMP Documents ought to be granted pursuant to Rule 30.10, it notes that s. 490(15) continues to be informative in the present case.

Section 490(15) is informative in that documents have been seized from Caspian and A.A.R. by the RCMP and remain in possession of the RCMP in a case where the City has an interest in the documents currently being detained by the RCMP. In this context, the City suggests that the underlying purpose for and rationale behind s. 490(15) may be considered by this Court and can inform this Court's analysis or application of Rule 30.10. In that connection, the City notes that the underlying rationale of s. 490(15) is to grant victims of crime, amongst others, the right to examine documents seized by police in furtherance of the societal interests in seeing that justice is done.

[37] In the face of the defendants' opposition, the City argues forcefully that if, as suggested by the defendants, the RCMP Documents would or will be produced in the ordinary course of discovery, then there should be no objection by the defendants to the City getting access to these documents now rather than later. Respecting the possibility that the RCMP Documents could vindicate the defendants, the City asks: "[g]iven the insistence by the defendants that the City's action is without merit, should the defendants not have an even greater interest than the City in showing now, rather than after a lengthy discovery process and trial, that the City's claim is groundless?"

[38] As it relates to the defendants' motion to strike portions of the various and identified affidavits, the City characterizes the defendants' arguments as an attempt to erroneously eliminate a proper evidentiary foundation justifying an earlier, fair and necessary production of documents about which a more complete and full access is warranted in the interests of the administration of justice. In pointing to what it says may be the defendants' efforts to "filter" the RCMP Documents via the normal discovery

process and limit the City's reliable access to the entirety of the relevant documents and records, the City contends that the objections of the defendants, which ground the motion to strike, are based on allegations of hearsay where no hearsay exists, allegations of irrelevance where there is in fact obvious relevance and suggestions of the use of expert evidence where the nature of the evidence is not only not expert evidence, it may not even be opinion evidence.

[39] Except for the already-stipulated portions of the affidavit evidence involving newspaper articles filed by the City, it is the position of the City that the defendants' motion to strike ought to be dismissed.

The Defendants

[40] For their part, the defendants argue that they have the right to rely upon the rigours of the law and the applicable legal tests that govern the sort of production that the City is now trying to effect. In this regard, apart from identifying what they say is the legally-flawed and inadequate evidentiary foundation contained in the impugned and supposedly supportive affidavits, the defendants also insist that neither s. 490(15) of the *Code* nor Rule 30.10 can justify the relief the City seeks.

[41] Insofar as the City indirectly relies upon s. 490(15) of the *Code* to inform this Court's analysis, the defendants submit that s. 490 provides the City no assistance and, indeed, it actually pre-empts the relief sought by the City under Rule 30.10. In this regard, the defendants argue that the Seized Documents must be returned to the defendants because the periods of detention have expired and proceedings have not been instituted in which the Seized Documents may be required.

[42] To the extent that the City suggests that s. 490(15) ought to favourably inform the Court's analysis on this motion, the defendants submit that such an argument is misplaced. The defendants point to the fact that the City can have no "legal interest" in the Seized Documents which are no longer lawfully detained, given that the periods of detention have expired and no proceedings were instituted. Moreover, the defendants contend that any "balancing of interests" that would be conducted under a s. 490(15) analysis would, in the circumstances of this case, weigh against the orders sought. This is particularly so as there is no "necessity" for the orders, and accordingly, the ownership and privacy interests of the defendants (and third parties) are paramount. Accordingly, in the circumstances of this case, the defendants submit that the administration of justice is best served by declining the orders.

[43] In arguing as it does that s. 490(15) of the *Code* provides no assistance to the City's position (and it in fact creates a pre-emption), the defendants are also clear in stating that the City cannot justify the relief it seeks pursuant to Rule 30.10. In that regard, the defendants oppose the orders sought on the following grounds:

i. The orders are unnecessary because the Seized Documents were available from another source who possesses copies of the Seized Documents;

ii. The Seized Documents will be reviewed, disclosed and produced in the normal course of discovery;

iii. The discovery of the defendants who have copies of the Seized Documents will be adequate;

iv. The City has not established that the discovery of the defendants would be inadequate;

v. The City's invocation of Rule 30.10 is premature;

vi. The Seized Documents contain privileged solicitor-client communications; and

vii. The Seized Documents contain many irrelevant documents, unrelated to the project in question and related contracts and that the sheer scope of the orders sought by the City (all "Seized Documents") contravenes the "relevance" requirement under Rule 30.10 because all "seized documents" as sought by the City, include irrelevant material.

[44] As it relates to their motion to strike portions of the various affidavits, the defendants point to the alleged hearsay and opinion evidence which they say is not only inadmissible but irrelevant.

[45] The defendants submit that the individual and cumulative effect of this impugned affidavit evidence is to, inappropriately and in a conclusory way, put before the Court a false and distortive evidentiary foundation which not only unfairly portrays the defendants as "fraudsters", but also uses that impugned evidence to justify circumventing the ordinary discovery process.

VI. ANALYSIS

ISSUE #1: Should the identified paragraphs in the impugned affidavits which constitute some of the evidentiary foundation for the City's motion pursuant to Rule 30.10, be struck?

[46] In support of its motion brought pursuant to Rule 30.10 to obtain documents now preserved by a non-party, the RCMP, the City relies on the January 6, 2020 affidavit of Michael Jack (the First Jack Affidavit); the March 21, 2020 affidavit of Michael Jack (the Second Jack Affidavit); the May 21, 2020 affidavit of Michael Jack (the Third Jack Affidavit); the January 8, 2020 affidavit of Victor Neufeld (the First Neufeld Affidavit); and the April 9, 2020 affidavit of Victor Neufeld (the Second Neufeld Affidavit).

[47] The defendants submit that portions of these affidavits, along with the exhibits attached, should be struck. While the defendants suggest that each of the five affidavits suffer from more or less the same flaws, deficiencies and inclusions of inadmissible evidence, they do note particular problems with specific parts of each affidavit. That said, the defendants contend that the primary grounds to strike the affidavits are as follows:

- The Jack Affidavits, for the most part, are not based upon Mr. Jack's personal knowledge, but rather purport to "review" and summarize various hearsay taken from the "Informations to Obtain" ("ITOs") prepared by RCMP officers in pursuit of a criminal investigation;
- Mr. Jack's review and summary of the "evidence" of others adds nothing in that it simply summarizes what the defendants say is the hearsay information from the ITOs of RCMP officers;

- Insofar as the Jack Affidavits rely upon the RCMP ITOs, those ITOs are, according to the defendants, inadmissible: the defendants submit they contain opinion by persons who have not been shown to be "fair, objective and non-partisan", they also contain conclusions of fact and law, conclusions of fact which purport to ascribe a state of mind and intent (fraud), unspecified sources of information, hearsay and double-hearsay;
- The Jack Affidavits improperly shield the RCMP deponents of the ITOs from cross-examination;
- The Jack Affidavits purport to "review" and rely upon the ITOs and documents concerning the Winnipeg Mail Processing Plant (the "WMPP"), an entirely different construction project undertaken by Caspian Projects Inc. for Canada Post Corporation ("Canada Post"). Accordingly, such ITOs and documents are not probative of any issue in the pleading which concerns the WPSHQ;
- The First Neufeld Affidavit contains unqualified opinions about a Guaranteed Maximum Price contract (the "GMP") and a connected progress claim process. The defendants claim that the opinion is based on an inadmissible interpretation of the requirements of a GMP contract, which interpretation is founded in turn on inadmissible hearsay coming from unspecified sources;
- The Second Neufeld Affidavit contains an unqualified opinion concerning GMP contracts based on inadmissible ITOs by RCMP officers without admissible factual foundation; and

- The Second Neufeld Affidavit improperly shields the deponents of the ITOs from cross-examination.

[48] The essence of the various objections of the defendants respecting the different portions of the impugned affidavits, reduce to allegations identifying improper hearsay, opinion evidence, and conclusions of fact and law, as well as issues of relevance respecting the WMPP project undertaken by Caspian for Canada Post.

[49] For the reasons that follow, I have determined that the defendants' motion to strike ought to be dismissed. In explaining that determination, I intend to address in a general manner, the identified categories of objection (hearsay, opinion and relevance) made by the defendants. In doing so, I should be understood in the particular circumstances of this case, as providing an explanation as to why, in respect of each and every objection made by the defendants in relation to specific paragraphs, those objections (in relation to hearsay, opinion and relevance) are without merit.

Objections Based on Allegations Respecting the Use of Evidence Not Based on Personal Knowledge

[50] In addition to the other specific categories of objection (including the concerns about hearsay), running through much of the defendants' argument is a repeated allegation that the Jack and Neufeld Affidavits contain information not based on personal knowledge. This allegation pervades the defendants' argument and manifests in different variations. At some points, the defendants suggest that no weight should be afforded evidence that is not based on personal knowledge where matters are contentious. At other points, the defendants suggest that a failure to specify the source of belief will

render the evidence based on that belief, inadmissible. As a somewhat distinct but related concern (identified by the defendants as an additional objection relating to hearsay or double-hearsay), the defendants also impugn the use (in the Jack Affidavits) of a summary of the ITO documents. This concern, like the other concerns, while potentially overlapping the other categories of objection, is similarly rooted in use of information not based on personal knowledge. I address below all of these concerns.

[51] While the concerns identified by the defendants in the above paragraph always warrant the Court's attention and caution, they are not as pre-emptive as the defendants seem to suggest. In fact, they are concerns that have been recently addressed in jurisprudence that suggest an approach to the potential use of such evidence that is decidedly less rigid and reflexive.

[52] It need be noted that Rule 4.07(2) states that an affidavit is to be "confined to the statement of facts within the personal knowledge of the deponent ... <u>except</u> where these rules provide otherwise" (emphasis added). As the City has argued, the Rules do provide otherwise. Indeed, pursuant to Rule 39.01(4), an affidavit for use on a motion can include statements of the deponent's information and belief. Accordingly, the assertion that the impugned statements should be struck because they are not within the affiant's personal knowledge is, on the basis of the Queen's Bench Rules alone, too stark. Further, on the basis of recent Manitoba appellate authority, the position of the defendants seems insufficiently appreciative of the nature and purpose of the specific evidence and the context in which the Court is considering its admissibility.

[53] In ***Fawley et al. v. Moslenko***, 2017 MBCA 47 ("***Fawley***"), the Court of Appeal considered Rule 4.07(2). In so doing, it stated the following (at para. 123):

> In my view, QB r 4.07(2) should not be read so strictly as to prevent potentially admissible evidence under the principled exception to the hearsay rule from being admitted simply because it would come from some other witness or, in this case, a video recording. Such an interpretation of QB *r* 4.07(2) is inconsistent with QB r 1.04(1) which provides:
>
> > **General principle**
> > 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[54] ***Fawley*** does not support the defendants' position that little or no weight should be afforded to evidence not based on personal knowledge where matters are contentious. In ***Fawley***, the Court concluded that the lower Court was entitled to rely on hearsay and double-hearsay on a contentious matter in the context of an application to which Rule 39.01(5) applies. That judgment reminds courts to remain aware of the "context of a given case in terms of the issues and the impact [of] the hearsay evidence" (at para. 95). That context will include the need to consider the unique dynamics in a civil case, including "the importance of access to civil justice and the principle of proportionality" when determining admissibility (at para. 95). The Court's conclusion in this regard is especially noteworthy where, as in the present case, the City is arguing as its main position, that the so-called hearsay evidence (so characterized by the defendants) is not hearsay at all, insofar as it is not being tendered for the truth of the statements themselves. When I proceed below to address the defendants' specific hearsay concerns, I will more fully outline the City's position (and my connected analysis) with respect to that category of impugned evidence.

[55] Although I acknowledge that the identification of the source information and belief in an affidavit is generally a precondition to admissibility, it is erroneous to approach the requirement to specify the source of information and belief "in an overly rigid fashion" (***Allianz Global v. Attorney General of Canada***, 2016 ONSC 29 (CanLII) at para. 15) ("***Allianz***"). In ***Allianz***, the Court stated that "[t]he rule is not designed to require a formulaic recital and it may be sufficient if the source of the information and belief is obvious if the affidavit is read generously" (at para. 15).

[56] As it relates to the defendants' more specific assertion that the summaries in the Jack Affidavits of the ITO documents provide nothing reliably of assistance and should thus be struck, I disagree. Instead, I am in agreement with the Alberta Court of Appeal which considered a similar argument in ***R. v. Monkhouse***, 1987 ABCA 227 (CanLII) ("***Monkhouse***"). In ***Monkhouse***, the Court was dealing with a witness who had prepared a summary of individual time entries. In concluding that the summary was not hearsay or double-hearsay, the Court stated the following (at para. 12):

> The extract prepared by the witness is, in one sense, not hearsay at all. He is not saying that the original time records prepared by the appellant are true nor is he saying that the transcription of those records by some unknown person is correct. <u>What he says to the Court is: "I read this document and my extract correctly summarizes it". He is able to say that because he personally read the document which he summarized, and he can be cross-examined about that.</u> I will consider first the admissibility of the transcription of the original time records and then the further problem of the extract.
>
> [emphasis added]

[57] The Court's analysis in ***Monkhouse*** is instructive when considering a number of the defendants' objections in relation to Michael Jack's reliance upon his summaries of the ITO information. In ***Monkhouse***, the Court said that the admissibility of the

summary of time entries was admissible and that their admissibility "depended upon the veracity of the witness [in saying] that he had read them and had accurately extracted the relevant evidence" (at para. 30). In other words, in ***Monkhouse***, what the witness had done was to exclude the entries irrelevant to that case and in relation to the other 1999 employees. As the City has argued, that is precisely what Mr. Jack has done in the present case in his summaries of the ITO information. In that sense, it is reasonable for the City to contend that, absent a persuasive credibility challenge, Mr. Jack has read the documents in question and accurately extracted the relevant evidence and, to the extent anything has been excluded, that information is irrelevant to the present case insofar as it would not assist this Court in understanding the significance of the RCMP Documents.

Objection Based on Allegations Respecting the Use of Hearsay

[58] It is the position of the defendants that significant portions of the impugned affidavits contain improper hearsay. I disagree.

[59] I have considered carefully the contention of the defendants with respect to the identified paragraphs in the various impugned affidavits. For the reasons that follow, and after a full consideration of the alleged hearsay statements and nature and context of this hearing, I have determined that there is nothing in the defendants' argument respecting hearsay that should justify the striking of the identified paragraphs in any of the five affidavits. It is my determination that many of the so-called hearsay statements contained in the Jack and Neufeld Affidavits do not constitute hearsay insofar as they have not been adduced to prove the truth of the contents of the allegations, but merely to explain why the City believes that the RCMP has documents relevant to the matters at

issue in its action. Insofar as some of those impugned statements are presented so as to explain why it would be unfair and inefficient to require the City to proceed with its claim without production through the RCMP, those statements should be seen as similarly adduced for a purpose other than for their truth.

[60] Nonetheless, if and where any of the identified statements in the affidavits can be characterized as hearsay, they should still be considered by this Court, as the City is entitled to rely on such evidence, given that this motion is of an interlocutory nature and thus, the evidence at this interlocutory stage, need only be "potentially capable of being admitted" at any eventual civil trial (***Fawley*** at para. 76). In that respect, I take the Manitoba Court of Appeal's reasoning in ***Fawley*** (as it relates to the challenged hearsay evidence in that case) as applicable to the alleged hearsay statements in this case. In other words, if those alleged statements in the impugned paragraphs and exhibits are in fact hearsay, I am of the view that they are admissible or "potentially capable of being admitted" pursuant to the principled approach to the hearsay exclusionary rule.

[61] The remaining portions of this section will explain the above determinations. That explanation will address why I have determined that the alleged statements are not hearsay and why, in these interlocutory proceedings, even if they are hearsay, they need not be struck given that they are, in any event, potentially capable of being admitted at the civil trial, pursuant to the principled exception to the hearsay exclusionary rule.

The Non-Hearsay Purpose of Much of the Impugned Affidavit Evidence

[62] Contrary to the contention of the defendants, much of what the defendants characterize as improper hearsay in the impugned affidavits is not. Separate and apart from what the City has permissibly included in its affidavits on the basis of information and belief, many of the impugned and so-called hearsay statements are included in the affidavits for a purpose other than their truth. Accordingly, they are not hearsay.

[63] It is well established that hearsay is an out-of-court statement tendered for the truth of its contents. In ***R. v. Khelawon***, 2006 SCC 57 ("***Khelawon***"), the Court noted that an out-of-court statement will only be hearsay if it is adduced to prove the truth of its contents and, there is no opportunity for contemporaneous cross-examination of the deponent. As the Court noted, "[t]he first matter to determine before embarking on a hearsay admissibility inquiry, of course, is whether the proposed evidence is hearsay" (at para. 56).

[64] To determine whether an alleged hearsay statement is being relied upon for a purpose that renders the statement hearsay, it is necessary to consider not only the stated purpose itself, but the adjudicative context in which the evidence in question is being adduced. In this sense, it should be remembered that in any judicial proceeding, the judicial gatekeeper function in respect of the challenged evidence is carried out such that the judge uses the context or nature of the proceeding to assist not only in better understanding the intended purpose of the adduced evidence, but also, the degree to which the context or nature of the proceeding may require his or her gatekeeper function

to be exercised (with respect to the challenged evidence) in a more restricting and/or pre-emptive fashion.

[65] The Manitoba Court of Appeal in ***Fawley*** noted (at para. 74):

> Judges have an evidentiary gate-keeper role in any judicial proceeding to ensure the fairness and integrity of the fact-finding process (see *R v Grant*, 2015 SCC 9 at para 44). This role is particularly important when dealing with expert opinion evidence (see *White Burgess Langille Inman v Abbott and Haliburton Co*, 2-15 SCC 23 at para 16) and hearsay evidence (see *R v Youvarajah*, 2013 SCC 41 at paras 21-24). This evidentiary gate-keeper obligation must, however, be understood in context. Not all judicial proceedings call for fact finding on the merits of the underlying dispute between the parties. The judge's gate-keeper obligation is greatest when dealing with a trial or another proceeding, such as certain types of applications, where a final disposition of the rights of the parties will be made. <u>However, when the judge is conducting a proceeding that will not result in a final disposition of the rights of the parties as to the dispute in question, the judge must adjust his or her evidentiary gate-keeper role to conform to the reality that the ultimate fact-finding necessary to resolve a dispute is not occurring. Accordingly, the judge must decide whether the nature of the hearing he or she is conducting requires him or her to decide whether the challenged evidence is potentially admissible or actually admissible.</u>
>
> [emphasis added]

[66] Where the context (as on the present motion) is one where the moving party on a motion is not seeking an ultimate determination on the merits of the dispute between the parties and the judge is not being asked in that connection to weigh the evidence, it is reasonable to submit, as the City does, that the potential hearsay evidence is not in fact hearsay evidence given that its purpose is not to show the truth of any of the allegations made, but rather, to establish why or how, for example, the City has come to believe that the allegations may be true and why on a motion pursuant to Rule 30.10, the City should be permitted access to the Seized Documents.

[67] In considering the purpose for which the City is presenting its challenged evidence, and the adjudicative context and the nature of the proceedings in which that evidence is

being presented, it is instructive to note the difference between Rule 39.01(4) and Rule 39.01(5), rules which govern in distinctive ways, motions and applications respectively. Rule 39.01(4) is applicable to affidavits for use on motions and it permits "statements of the deponent's information and belief". Rule 39.01(5) is applicable to affidavits for use on applications. In that context (applications), where one is more likely to see a final disposition of the rights of the parties as to the dispute in question, Rule 39.01(5) does not permit such evidence.

[68] In the present case, where an interlocutory motion has been brought, the Court is not being asked to consider the content of the Jack and Neufeld Affidavits in a manner in which the Court is required to weigh the evidence in order to decide the merits of a dispute between the parties. Rather, the Court is being asked to consider the City's evidence in order to decide whether the City should be permitted under Rule 30.10 to inspect and, if necessary, copy the RCMP Documents/Seized Documents. The purpose of Jack's and Neufeld's reliance upon any out-of-court and as yet uncross-examined statements from third parties, is not to suggest that they are, on the basis of their presentation, true and/or deserving of an "ultimate finding of fact" by the Court. In other words, given the context of this motion and the nature of this procedural determination, the sole issue currently before this Court on this motion and the sole purpose for which the City has adduced any alleged out-of-court statements from third parties, relates to its attempt to justify the relief it seeks under Rule 30.10. To repeat, the City's purpose in that connection is not to suggest that the Court can, on the affidavit evidence in question, determine at this stage that the defendants did everything that may be alleged

in the statement of claim, but rather, to establish why or how the City came to believe that this was the case and why relief under Rule 30.10 is justified.

[69] Although I will more fully address the issue of potential admissibility of the impugned evidence in interlocutory proceedings in the next section, it will suffice at this point to assert that if the impugned and alleged hearsay evidence is not being adduced for its truth, then that evidence is not hearsay and if it is relevant, it is presumptively admissible.

[70] In the present case, the Jack and Neufeld Affidavits were filed in support of the City's motion for non-party production, namely of certain documents currently in the possession of the RCMP. The possession of those documents came about as a result of sworn or affirmed ITOs which would have satisfied an independent judicial officer. In examining the first and subsequent affidavits of Michael Jack, the ITOs contained in those affidavits are not being adduced to prove their contents, which is to say, they are not being adduced to establish that Caspian, in conjunction with others, defrauded the City. While that will be the ultimate fact-finding exercise required of the Court when it comes time to adjudicating the dispute between the parties, that is not the issue before this Court at this time. Rather, the issue is whether the City has provided information to the Court with respect to which the Court can conclude on a very different threshold, that the City has established why or how it came to reasonably believe that its concerns and/or suspicions in the circumstances of this case, justify an order pursuant to Rule 30.10.

[71] An understanding of the City's position in this regard, is useful when examining the Court's rationale in ***RCG Forex Service Corp. v. Chen***, 1997 CanLII 3482 (BC SC);

51 BCLR (3d) 223 ("***RCG***"). In that case, the Court considered an application for particulars supported by an affidavit containing alleged hearsay filed by the plaintiff showing the grounds for believing the defendants had engaged in wrongdoing. In dismissing the application for particulars, the Court noted the following (at para. 16):

> In this case I find that requirement has been met. Mr. Ho has sworn an affidavit in which he reveals hearsay evidence from others which give grounds for believing that the defendant Mr. Chen is the controlling mind for this property and that he supplied the purchase price for it. I have already referred to it. While that evidence is not admissible to prove its truth on the ultimate question, it satisfies me that there is ground for believing there may be fraud and that if the fraud does exist its particulars are known to the defendants and not to the plaintiffs. There is also substantial evidence in that affidavit to give rise to the plaintiffs' suspicion that the defendant Mr. Chen would be likely to take steps to conceal assets. I do not say such an allegation is proved, only that it provides ample ground to satisfy the requirements of the Marine Midland Bank and Proconic cases.
>
> [emphasis added]

[72] In ***Phillips Legal Professional Corporation v. Cowessess First Nation No. 73***, 2020 SKCA 16 (CanLII) ("***Phillips***"), a similar conclusion was reached by the Saskatchewan Court of Appeal in a case where the Court confirmed that the hearsay evidence "was not admitted for the purpose of establishing that [the law firm] did in *fact* overcharge, mislead or poorly advise [the applicant]; rather it established why and how [the applicant] came to believe that was the case" (at para. 77). In that case, the Saskatchewan Court of Appeal confirmed that the lower Court was entitled to rely on alleged hearsay evidence in support of an application for an order referring legal services for assessment.

[73] To summarize this section, much if not all of the alleged hearsay statements contained in the Jack and Neufeld Affidavits do not constitute hearsay insofar as they have not been adduced to prove the truth of the contents thereof, but merely to explain

why the City believes that the RCMP has documents relevant to the matters at issue in its action and why it would be unfair and inefficient to require the City to proceed with its action without discovery of those documents by this means at this time. Even if I am incorrect in this regard, the defendants cannot justify the striking out of the evidence on the basis of their hearsay argument. As I discuss below, even if the paragraphs and exhibits identified by the Caspian Defendants constitute hearsay, the City is entitled to rely on such evidence, given that the motion in which it is filed is interlocutory and thus, the evidence at this stage need only be "potentially capable of being admitted" (***Fawley*** at para. 76). As I later explain, it is more than reasonable to conclude that even if the impugned evidence is in fact hearsay, it is "potentially capable of being admitted" pursuant to the principled approach to the hearsay rule.

The Question of "Potential Admissibility" in Interlocutory Proceedings

[74] It is the position of the City that given that the impugned evidence is filed on an interlocutory motion, that evidence, at this stage, need only be "potentially capable of being admitted" at an eventual trial. The City argues that with respect to the challenged hearsay evidence, the Manitoba Court of Appeal's reasoning in ***Fawley*** is applicable to the alleged hearsay statements in the present case. In that regard, the City notes:

a) The proceeding in which the hearsay evidence has been adduced will not "determine the substantive rights of the parties to a dispute" (***Fawley*** *at* para. 90), rather it is a procedural matter;

b) The hearsay declarants would be competent and compellent witnesses and they would be able to provide direct evidence of the hearsay statements at

trial (see ***Fawley*** at paras. 91 and 103). In the present case, the various RCMP officers who conducted the investigation, counsel for Winnipeg Police Services WPS (Kim Carswell), Deputy Chief Gord Perrier, David Eggerman of Qualico, and counsel for Tiger Ventures (Kenneth Zaifman), could all be called to give evidence and the defendants would have the opportunity to test their evidence by way of cross-examination; and

c) In any event, the hearsay evidence would be admissible under the principled exception to the hearsay rule insofar as the evidence is both necessary and reliable.

[75] I again note that in ***Fawley***, the Manitoba Court of Appeal determined that the contentious hearsay evidence on the applicant's application to extend the limitation period was admissible as it was found to be potentially capable of being admitted at a civil trial. The Court stated (at para. 102):

> ...Given that there appears to be no realistic alternative to ensure that the trier of fact has the benefit of all of the potential facts of this case, contextual factors, such as a lesser burden of proof, access to civil justice on a serious matter and the principle of proportionality, would all favour admissibility of the hearsay evidence.

[76] I accept the submission of the City that the admission of the alleged hearsay evidence (and in particular, the ITOs), is the only realistic way that the City can put before this Court, on this motion, "all of the potential facts of this case" that are currently available to the City. Those facts demonstrate the basis of the City's concerns and the basis for the order it seeks pursuant to Rule 30.10 (***Fawley*** at para. 102). This is particularly so given the impractical and untenable alternative which, to get the relevant evidence contained in the ITOs before the Court, would require the City to obtain

affidavits from (or otherwise examine under Rule 39.03) every RCMP officer involved in the investigation and every person interviewed by the RCMP in the course of that investigation. The City is correct to suggest that such an approach would be neither practicable nor proportional. I note in this regard as well, the City's submission that counsel for the RCMP have expressed the view that RCMP officers may be immune from a notice of examination under Rule 39.03. While the City does not agree with this position, it is an additional fact which, as the City suggests, attests to the alleged hearsay evidence being the only realistic way in which that evidence can be put before the Court at this time.

[77] I agree with the City's contention that courts have regularly admitted and relied upon hearsay evidence in the context of interlocutory proceedings. These interlocutory proceedings range from *ex parte* remedies to and including criminal applications. See ***RSC Enterprise Canada Inc. v. Tan***, 2018 BCSC 67 (CanLII) ("***RSC***"); ***Westra Law Office (Re)***, 2009 ABQB 391 (CanLII) ("***Westra***"); and ***Canada Post***.

[78] In ***RSC***, the Court refused to discharge a *Mareva* injunction based upon the defendants' argument that the plaintiff's affidavit mainly consisted of hearsay. As the Court explained at para. 99, although it agreed that the affidavit materials contained some hearsay, it found that these materials: "at least on a *prima facie* basis, provide good support for [the plaintiff's] theory; that is, funds invested with [one defendant]...were actively funnelled into [real estate projects] that were under the name [of another defendant]". At para. 112 of the judgment, the Court also explained how the

impugned hearsay materials provided "a strong *prima facie* case that [the defendant] was a party to a fraudulent scheme that resulted in a loss to [the plaintiff]".

[79] The Alberta Court of Queen's Bench in ***Westra***, was required to consider an application of the Crown to disclose certain documents seized from a lawyer's office during its investigation into fraudulent real estate transactions in respect of which solicitor/client privilege had been claimed. Filed in support of the application, was an ITO sworn by an RCMP officer. The party whose privilege it was, asserted that the ITO was entirely hearsay and double-hearsay and as such, improper. Following a review of the law, the Court determined that "hearsay evidence, in the form of affidavits sworn in support of search warrants, may be used to establish the requisite proof to displace or disallow the claim of privilege by alleging fraud" (at para. 49). The Court went on to note at para. 50, that "where the factual background is sufficient for the affiant peace officer to reasonably form an opinion that an offence has been committed, a *prima facie* case of criminal activity is established such that any solicitor/client privilege...is displaced." In an even more specific consideration of and reference to the interlocutory nature of the application, the Court noted (at para. 57):

> ...Second, even if the *Rules* do apply, when the entire context of this matter is considered, it is apparent that this is a step along the way towards possible criminal charges. <u>In that sense, this is an interlocutory application. The *Rules* were not intended to be roadblocks, but rather to be facilitative of efficient process</u>....
>
> [emphasis added]

[80] In invoking the reasoning in ***Westra***, the City is justified in noting that it would indeed be strange if the evidence sufficient to displace the solicitor/client privilege in the

context of a criminal matter would not also be sufficient to meet the requirements of Rule 30.10 in the civil context.

[81] In ***Canada Post***, Bond J. considered a similar application to that of the City's motion in the present case. In ***Canada Post***, the Court was required to consider a motion for non-party production where Canada Post sought production of the documents seized from the Caspian Defendants by the RCMP in respect of the WMPP project. In considering similar objections to the admissibility of the evidence filed by Canada Post in support of its application (the ITOs filed by the City in the present case), Bond J. noted that she was "not convinced that the evidence need be so closely scrutinized" and that she "would not be inclined to apply strict rules of evidence or a strict standard of proof to the evidence on section 490(15) applications" (at para. 21).

[82] Given the foregoing, I am of the view that even if the impugned paragraphs and exhibits objected to are in fact hearsay, the City is nonetheless entitled to rely on that evidence insofar as these are interlocutory proceedings in which potential, rather than actual, admissibility is the more determinative reference point. In the present case, the identified hearsay evidence contained in the affidavits can be seen as potentially admissible at a civil trial. In satisfying myself of the potential admissibility of the hearsay evidence at a civil trial, I am, as I explain below, persuaded that the evidence would be potentially admissible pursuant to the principled approach to the hearsay exclusionary rule.

The Principled Approach to the Hearsay Rule

[83] If the identified and impugned paragraphs and exhibits challenged on the basis of hearsay are in fact hearsay, that evidence is nonetheless admissible on this interlocutory motion on the basis of its potential admissibility pursuant to the principled approach to the hearsay exclusionary rule.

[84] The principled approach permits hearsay evidence to be admitted where the criteria of necessity and reliability have been met (***Khelawon*** at para. 42). In ***Fawley***, these two criteria were described as not "separate thresholds" but rather as thresholds which "work in tandem" (at para. 99). The functioning of these two thresholds means that where (as in ***Fawley***) there is a strong necessity for the hearsay evidence, less reliability may be required to satisfy the principled approach (***Fawley*** at para. 120). This is consistent with the Court's earlier comments (at para. 99) where it noted that "[t]he circumstances of the given case will determine where a particular strength or weakness in one of the characteristics is accommodated by the opposite quality of the other characteristic."

[85] At paras. 100 and 105 of ***Fawley***, the Court addressed what is required in relation to the respective criteria of necessity and reliability. Concerning necessity, the Court noted at para. 100 that "[n]ecessity means the hearsay evidence is reasonably necessary, not absolutely necessary". This is consistent with what the Supreme Court noted in ***Khelawon*** where it stated at para. 78, "[t]he necessity criterion is given a flexible definition." In ***Fawley***, the Manitoba Court of Appeal cited the judgment of the Alberta Court of Appeal in ***R. v. Dionne***, 2004 ABCA 400 (CanLII), where the Court seemed to

suggest that "[t]he relevant question [when considering necessity] is whether the interests of justice are better served by admitting the testimony, or by leaving the witness's knowledge unutilized" (at para. 100).

[86] As it relates to reliability, ***Fawley*** (at para. 105), notes the now well-established jurisprudence that suggests that a finding of "reliability" is possible where "the hearsay statement was made in circumstances which provide sufficient guarantees of its trustworthiness". The focus on such an admissibility inquiry should be on "threshold reliability, not ultimate reliability".

The Indicia of Necessity and Reliability in the Present Case

[87] Most of the objections raised by the Caspian Defendants as part of its motion to strike, relate to paragraphs and exhibits which include reference to ITOs. As it relates to these paragraphs and exhibits, an analysis on the basis of necessity and reliability is favourable to the City's position concerning potential admissibility pursuant to the principled approach to the hearsay exclusionary rule.

[88] Respecting necessity, I accept the City's submission that the ITO evidence contained in the Affidavits is necessary insofar as the alternative would have required the City to obtain affidavits or otherwise examine every person involved in the investigation and every person interviewed by the RCMP during the investigation in order to obtain what the defendants suggest should have been the direct evidence. As I previously noted, the RCMP has already communicated to the City that it would oppose any use on the part of the City of Rule 39.03 to require its officers to attend to be examined. Given

these realities, the City persuasively argues that the only realistic manner of obtaining the evidence found in the RCMP investigation in question is through hearsay.

[89] In considering the criterion of necessity and the referenced ITO evidence in the City's Affidavits, I note the Ontario Superior Court of Justice decision in ***R. v. Armour Pharmaceutical Company***, 2006 CanLII 81826 (ON SC); [2006] O.J. No. 587 ("***Armour***"). In ***Armour***, the defendants sought to exclude evidence of a multi-centred study on HIV. Their effort to exclude was made on the basis that the results from the study represented hearsay and double-hearsay. In addressing the necessity criteria, the Court noted as follows (at para. 12):

> Reasonable necessity is usually founded on the unavailability of witnesses. It is argued here that Dr. O'Shaughnessy, who headed the lab in Ottawa at the relevant time, could have been called to give evidence. This, however, only partially addresses the issue. The evidence here was compiled by various people as part of a multi-centered study. It would be impractical, inconvenient and virtually impossible to call all the technicians who participated in the study to provide evidence. In *R. v. Smith* Chief Justice Lamer, citing Professor Wigmore, expanded the notion of necessity to include "expediency or convenience." This is consistent with the approach in *Terceira* referred to above. On this basis, the admission of the evidence meets this branch of the principled approach.

[90] As it relates to reliability, I am again in agreement with the submission made by the City. When considering "reliability", the context in which the alleged hearsay statements are made is relevant. In the present case, the ITOs at issue, which were as earlier noted, the subject of most of the defendants' objections in relation to the allegations and hearsay, are statements taken under oath or solemn affirmation by RCMP officers who prepared these documents in the performance of their duties. This information contained in the ITOs was generally obtained contemporaneously with the investigation taking place and was so recorded by the RCMP officers in the course of their

business as RCMP investigators. It is these documents that were used in support of the RCMP's attempts to obtain either search warrants and/or production orders in the course of its criminal investigation. That process involved evaluation by an independent judicial officer for the purposes of determining whether or not the threshold of "reasonable and probable grounds" was satisfied. Many of the factors that I just noted were found to be sufficient to find threshold reliability in ***Armour*** (at paras. 14-15).

[91] In considering the indicia of reliability, it is also important to address potential evidence which corroborates the hearsay information contained in the ITOs. At the threshold reliability stage of the principled approach, corroborative evidence may work in conjunction with the circumstances to overcome specific hearsay dangers raised by the tendered statements. See ***R. v. Bradshaw***, 2017 SCC 35 ("***Bradshaw***") at paras. 45-48. Accordingly, in the present case, if the ITOs are indeed hearsay and are seen as adduced for the truth of their contents, the City is right to point to the fact that the evidence in the Fabca documents contained in the Second Neufeld Affidavit and the Third Jack Affidavit is corroborative of the material aspects of the ITOs, namely that the Caspian Defendants may have defrauded the City by altering or creating false invoices. In this regard, it can be reasonably submitted that the Fabca Scheme that was explained in the Second Neufeld Affidavit (and the Third Jack Affidavit) sets forth a clear example of the Caspian Defendants directing their subcontractors to fabricate false invoices, which false invoices were submitted to the City for payment. All of this, as the City has argued, supports the threshold reliability of the ITOs.

[92] For the foregoing reasons, the defendants' submissions concerning the alleged hearsay contained in the impugned paragraphs of the various affidavits, do not satisfy me that the identified paragraphs should be struck.

Objections Based on Allegations Respecting the Use of Improper Opinion Evidence

[93] As with most of their objections in respect of the alleged hearsay evidence, the defendants' objections concerning the City's improper use of opinion evidence arises in respect of the Affidavit references to ITOs containing purported opinion proffered by RCMP officers. It is the position of the defendants that those opinions are improper in that they are advanced without the requisite qualifications, that they are not fair, objective and non-partisan and that they are based on inadmissible conclusions of fact and law.

[94] For the reasons that follow, I am not persuaded by the defendants' submissions.

[95] Many of the concerns raised by the defendants with respect to the qualifications of the various RCMP officers and others in respect of opinions proffered, either de-emphasize or completely ignore the well-established proposition that there are subjects upon which non-experts are entitled to give opinion evidence. Such lay opinion evidence includes opinion based upon such things as perception and common experience. Many of the impugned portions of the Affidavit as it relates to the alleged improper opinion evidence, are in fact opinions which can be properly given by a lay person or witness. In ***R. v. Fedyck***, 2018 MBCA 74 (CanLII), the Manitoba Court of Appeal noted (at para. 19) that "[t]here has traditionally been a long list of subjects upon which lay witnesses can

provide opinion evidence" and, in invoking ***Graat v. The Queen***, [1982] 2 S.C.R. 819, further stated that "if lay opinion evidence is relevant, it should only be excluded based upon 'a clear ground of policy or of law'" (at para. 19).

[96] Illustrative of the above latitude is the case of ***R. v. Ilina***, 2003 MBCA 20 (CanLII) ("***Ilina***"), where the Court permitted the lay opinion evidence of two RCMP officers who observed evidence of an attempt to "clean up" the crime scene. The Court agreed with the Crown's submission that the matter under consideration (the clean up) did not give rise to the opinion of a specialist. See paras. 78-79. In ***Ilina***, the Court cited with approval the following passage respecting the law on lay opinion (at para. 77):

> In E. G. Ewaschuk, *Criminal Pleadings & Practice in Canada*, 2nd ed. (Toronto: Canada Law Book, 2002), the author puts the matter this way (at c. 16, pp. 246-47):
>
> > A "conclusory" opinion may be given by a lay or non-expert witness, as an exception to the general rule, when the opinion constitutes a "compendious statement" of the facts the witness observed if the facts involve matters of common experience and it is difficult to transmit the basis of the opinion.

[97] If some of what is referenced in the Affidavits and contained in the ITOs constitute "opinions", then it is reasonable to argue, as the City does, that they relate to facts observed by the RCMP officers who are, in the ITOs, giving those opinions. As such, given their nature, those opinions should be permitted pursuant to the lay opinion evidence rule in that they amount to a compendious way of transmitting the result of their observations and they involve matters of common experience.

[98] As it relates to any suggestions of bias on the part of the RCMP officers involved, I note that the defendants have provided the Court no evidence in this regard. The absence of any evidence in this connection seems to suggest that the defendants are

asking this Court to conclude *a priori* that bias follows from the mere fact that an RCMP officer was in the course of his or her duties, at one time involved in a criminal investigation. Allegations of bias should not become or seen to be a legitimate method of argument which, absent any accompanying and supporting evidence, becomes an inappropriate and casual characterization meant to pre-empt or neutralize otherwise relevant and admissible evidence. In ***Lehne v. R.***, 2019 SKQB 314 (CanLII) (although the case involved "expert evidence"), in the absence of evidence to indicate bias or partiality, it was determined that the trial judge had correctly qualified the Crown's witness to give the expert evidence in question. See paras. 66-69.

[99] Separate and apart from the permissibility of the RCMP giving the sort of lay opinion evidence they have (where it is properly characterized as opinion evidence), and leaving aside the unfounded allegations of bias, I note in any event, the City's stated purpose in adducing the ITOs. As part of its submissions, the City insists that it is not seeking to adduce the ITOs with the intent that the opinions expressed by the various RCMP officers be adopted by this Court. It is contended that as far as any opinions or conclusions are expressed by the various RCMP officers, they are not expressed for the purposes of supporting or obtaining any ultimate determinations by this Court on other determinative legal or factual issues arising from the claim. Instead, as noted in the earlier discussions respecting the alleged hearsay, any of the opinions properly expressed by the RCMP, are adduced for the purposes of supporting the City's concerns, which, in the circumstances of this case on this interlocutory motion, assist in justifying an order pursuant to Rule 30.10. Nonetheless, to the extent that there is any improper opinion

evidence and/or conclusions with respect to fact or law contained in the ITOs, I am guided by the simple and obvious proposition that, as a gatekeeper on this motion, I can simply disregard any such improper evidence. As was noted by Perell J. in ***Brazeau v. Attorney General (Canada)***, 2019 ONSC 1888 (CanLII), when addressing certain correctional investigative reports: "[w]here the Correctional Investigator expresses a legal argument or a conclusion on a legal issue, I shall come to my own conclusion about the matter" (at para. 176).

[100] Although I have attempted to remain attentive to any inappropriate conclusions or opinions of fact and law, as should be apparent from my determinations with respect to the permissibility of any of the opinions expressed by the various RCMP officers, there is, in my view, little in the opinions expressed by the various RCMP officers that would cause me to ignore or discount that evidence given its nature and the purpose for which it is being adduced on this interlocutory motion.

[101] The objections raised by the defendants on the basis of improper opinion evidence extend beyond RCMP officers. In respect of the nature and basis of the opinion evidence given by non-RCMP officers (for example, Victor Neufeld, Ken Zaifman and David Eggerman), I am not persuaded by the defendants' argument that such evidence must be struck.

[102] For example, it has been submitted that Mr. Eggerman is without the requisite education, experience, credentials and qualifications so as to enable him to provide the narrative he provides in paras. 26 and 27 of the First Jack Affidavit. I disagree. In my view, the City is correct when it maintains that no expertise or specialized knowledge is

required to ascertain that Caspian Purchase Order No. 9400-P151 was altered to increase or inflate the dollar amount (the exhibits attached to the First Jack Affidavit are the three versions of that change order). I similarly agree with the City when it contends that no expertise is required to compare an Order Aging Report (see Exhibit AA) showing that work performed at 2050 Chevrier Boulevard (Soul Sanctuary) at values of $60,000 and $68,250 and then note the identical values on Caspian Change Order No. 3 (see Exhibit Y). It is reasonable for the City to submit that the exhibits to the First Jack Affidavit relating to The Floor Show speak for themselves. This is no different when it comes to the information from David Eggerman as contained in para. 18 of the Second Jack Affidavit.

[103] As it relates to the defendants' challenge of Mr. Neufeld's evidence based on what the defendants say are the unqualified opinions of Mr. Neufeld on the various contracts between the City and Caspian and on the Caspian monthly progress claims of which the defendants say he had no personal knowledge, I am similarly not persuaded by the defendants' position. Mr. Neufeld asserts early in his Affidavit that he had personal knowledge of the facts deposed by him "except where same are stated to be based on information and belief". In any event, the City is right to insist that the evidence before the Court constitutes almost a full answer to this part of the defendants' objections. As the City stated at para. 55 of its June 1, 2020 written submission:

> As Mr. Neufeld indicated at paragraph 1 of the first Neufeld Affidavit, he was retained to conduct an investigation into the Caspian progress claims paid by the City and reviewed those progress claims. As such, it is not clear on what basis the Caspian defendants say that he has no personal knowledge. If a forensic accountant reviewing the progress claims cannot interpret their meaning, who could?

[104] The defendants have similarly objected to the provision of Mr. Neufeld's opinion respecting the GMP contract and supplemental agreement. Again, the City is on solid ground when it responds by saying that the City is not asking the Court to adopt or accept the opinions of Mr. Neufeld in that regard. Rather, the paragraphs in Mr. Neufeld's Affidavit concerning the GMP and supplemental agreements are meant only to provide context for his later conclusions in respect of the change orders and progress claims. In that connection, I note that courts have been willing to accept affidavit material which has been objected to on the basis of opinion, speculation or hearsay, where that material in question "is absolutely necessary for the Court to get the complete picture of the present situation as between the [parties]", ***Rubin v. Ross***, 2008 SKQB 31 (CanLII) at para. 10.

[105] Insofar as some of the Neufeld evidence is taken from the ITOs (evidence to which the defendants also objected in the context of their hearsay arguments), that evidence, in my view, remains admissible. As I similarly noted in my discussion of the defendants' hearsay objections, that evidence is adduced by the City in its Affidavits for what I accept is a non-hearsay purpose. If and where such evidence can properly be characterized as hearsay, it is being adduced in an interlocutory proceeding (which will not result in a final disposition of the parties' rights) and it is nonetheless admissible or "potentially capable of being admitted" pursuant to the principled approach.

[106] There is nothing in the alleged improper opinion evidence that requires this Court to strike any of the impugned paragraphs in the identified Affidavits.

Objections as to the use of Irrelevant Evidence Respecting the WMPP Project

[107] The defendants contend that any of the ITOs and any references in the Jack and Neufeld Affidavits in respect of the WMPP Project are irrelevant and are therefore inadmissible. The defendants maintain that the WMPP project is unrelated to the City's action.

[108] For its part, the City submits that the references to the WMPP project are indeed relevant and that any such evidence in that regard is also relevant. The City offers two justifications or reasons for its position, both of which I accept.

[109] First, I agree with the City's position that there is unchallenged evidence before this Court to suggest that a subcontractor was directed by Caspian to issue invoices for work done on the WPSHQ Project and for work done on a different project on the same quote. See First Neufeld Affidavit at para. 11 (ff), page 18. Abesco, the subcontractor, performed work on both the WMPP project and the WPSHQ Project.

[110] Second, I also accept that the evidence relating to the WMPP project is relevant to the extent that it does represent potentially admissible similar-fact evidence of the Caspian Defendants' Scheme of altering and/or fabricating invoices. In that connection, the City's argument is persuasive when it submits that the information relating to the WMPP project contained in the First Jack Affidavit is relevant insofar as there is unchallenged evidence that the work for unrelated constructions projects, including the WMPP project, may have been charged to the City. Such evidence may reasonably amount to similar-fact evidence in that the fraud alleged in the two projects is strikingly

similar and there is some evidence that would suggest a link between Caspian and the fraud on both projects.

[111] In ***R. v. Laporte (PLR)***, 2016 MBCA 36 (CanLII), the Manitoba Court of Appeal wrote the following (at paras. 143 and 145) in the context of a criminal proceeding:

> Similar fact evidence will only be considered probative if a trier of fact is able to infer from that evidence that 1) the accused has a situation-specific propensity; and 2) the accused acted in conformity with that propensity in the situation leading to the charges. These are referred to as the "double inferences"....
>
> ...
>
> Probative value will exceed prejudice where "the force of similar circumstances defies coincidence or other innocent explanation" (*Handy* at para 47). In other words, it is the objective improbability of coincidence that underpins the admission of similar fact evidence. See *Arp* at para 44.

[112] Threshold admissibility for similar-fact evidence is determined by a court addressing two principle questions:

(1) First, whether the acts are so strikingly similar that it is likely that the same person committed those acts;

(2) Second, whether there is some evidence linking the accused to the similar acts. See ***R. v. Majeed***, 2017 ONSC 5514 at paras. 14-17 ("***Majeed***").

[113] In examining the first question respecting whether the acts are so strikingly similar that it is likely that the same person committed those acts, I note that in both the WPSHQ and WMPP projects, there was evidence of subcontractor invoices and quotes being altered and submitted to the project owner via change orders or progress claims. In both instances, the City is correct to emphasize that the altered invoices were submitted to the project owner at a higher dollar amount than that of the original invoice submitted by the subcontractor to Caspian. The City also highlights that in both cases, the

subcontractors were, for the most part, unaware that their invoices and quotes had been altered. The timing of the two projects involved the WMPP project being completed between 2008 and 2012 and the WPSHQ Project being completed between 2011 and 2014.

[114] Concerning the second question as to whether there is some evidence linking the accused to similar acts, I note as was discussed in ***Majeed***, the "relatively low threshold". In other words, the City need only demonstrate that there is some evidence linking Caspian or the Caspian Defendants to these similar acts. In that regard, the City satisfies me on that relatively low threshold by underscoring that the evidence suggests that in both cases, Caspian was the general contractor on the project and was responsible for preparing and submitting change orders and progress claims to the project owner. It was to Caspian that the subcontractors (whose invoices or quotes were altered) submitted their invoices or quotes. It is reasonable to suggest (as the City does for the purposes responding to the defendants' motion to strike) that those documents would have been altered at some point after the invoices or quotes were submitted to Caspian, but before they were submitted to the City.

[115] For the above reasons, I have determined that the defendants' objections respecting any references to the WMPP project on the basis of relevance, are at this stage of the proceeding, without merit.

Conclusions Respecting the Defendants' Motion to Strike

[116] Having addressed in the foregoing paragraphs the specific categories of objection (hearsay, opinion and relevance) that the defendants have raised in relation to the

impugned paragraphs in the various Affidavits, I do not intend to proceed with a repetitive and specific paragraph-by-paragraph analysis of those parts of the Affidavits to which the defendants have raised objections. It will suffice, having reviewed carefully each and every impugned paragraph identified by the defendants, that mindful of my above analysis in relation to the defendants' objections, there is nothing in any of those paragraphs with respect to improper hearsay, opinion or relevance that should cause this Court to strike those paragraphs as requested by the defendants.

[117] Accordingly, I answer the first question set out at para. 4 in the negative and have concluded that the defendants' motion to strike should be dismissed.

ISSUE #2: On the Particular Facts of this Case, Does s. 490(15) of the *Code* and the Connected and Applicable Legal Principles, pre-empt the City from Obtaining the Production it Seeks from the RCMP Pursuant to Rule 30.10?

[118] Insofar as the City indirectly relies upon s. 490(15) of the *Code* to further inform this Court's analysis of the City's position on its motion pursuant to Rule 30.10, the defendants contend that s. 490(15) not only provides no assistance to the City, it in fact pre-empts the relief the City seeks under Rule 30.10.

[119] As part of its initial position, the defendants had argued that this Court's jurisdiction to hear this motion is very much in question. That position was initially and more-obviously advanced when the City was more clearly seeking its relief under both s. 490(15) and Rule 30.10. Now, as has already been explained, in the particular and unique circumstances of this case, the City is simply using s. 490(15) as an additional analytical reference point with respect to the application of Rule 30.10 and the specific and sole relief it seeks pursuant to that Rule. Given the new and/or refined position of

the City, it is not clear the extent to which one aspect of the initial jurisdictional argument advanced by the defendants now remains. That particular jurisdictional argument asserted that insofar as the City's motion is, in any way, founded on s. 490(15) of the *Code* and may be broadly considered a "criminal proceeding", an "application" pursuant to the *Code* and the *Queen's Bench Criminal Rules* is required. In making that argument, the defendants rely upon certain comments by Bond J. (in obiter) in ***Canada Post***. As I suggest, although it is unclear whether this part of the defendants' argument remains (given the City's now more-refined position respecting its use of s. 490(15) of the *Code*), I will nonetheless briefly address this jurisdictional point as part of the analysis below.

[120] Separate from the above jurisdictional question, the defendants also argue that because the stipulated period of detention for the documents seized pursuant to s. 490(15) has expired (a period in which the Seized Documents may have been required in a "proceeding"), the Seized Documents must be returned to the defendants. With the period of detention having expired and no proceeding having been initiated, the defendants argue that the City cannot be a party with a "legal interest" in the Seized Documents which, according to the defendants, are now no longer lawfully detained.

[121] Finally, the defendants contend that any "balancing of interests" that would be conducted under a s. 490(15) analysis would, in the circumstances of this case, weigh against the order sought by the City.

[122] In summary, the defendants maintain that, properly considered, the existence of, and any analytical reference to, the legal framework of s. 490(15) of the *Code* should actually pre-empt the relief the City seeks pursuant to Rule 30.10 of the *Queen's Bench*

Civil Rules. Given the initial seizure of the documents pursuant o the *Criminal Code* and given what the defendants assert would be the City's inability to satisfy the test connected to s. 490(15), it would be incongruous and inappropriate to permit the City to use Rule 30.10 to access the production from the non-party the RCMP.

[123] For the reasons that follow, I have determined that there is no jurisdictional impediment, nor is there anything with reference to the underlying rationale or applicable legal principles in connection with s. 490(15) of the *Code* that would pre-empt the relief the City seeks pursuant to its motion brought under Rule 30.10. Indeed, any analytical reference to the applicable rationale or legal principles in relation to s. 490(15) is favourable to the City's position in respect of its motion made under Rule 30.10.

[124] As it relates to the jurisdictional question, I have reviewed carefully the comments of Bond J. in ***Canada Post***, a case in which an application was made by Canada Post for documents seized from Caspian (who is a defendant in the present action) by the RCMP in respect to the WMPP project. Following her dismissal of Canada Post's application for its lack of a requisite legal interest in the documents sought, Bond J. addressed additional questions, including: into which court the application should have been brought; whether the application brought by Canada Post constituted either a criminal or civil proceeding; and, depending upon the nature of the proceeding, whether the criminal or civil rules of court apply. In the particular circumstances of the case she had to decide, Bond J. noted, "the applicable rules for [that] application are the *Criminal Proceedings Rules of the Manitoba Court of Queen's Bench*" (at para. 35).

[125] Insofar as there is any potential application to the present case, I am in agreement with the City when it characterizes Bond J.'s comments as *obiter dicta* and accordingly, not binding on this Court in the present case. In the circumstances of the proceedings in which Bond J. made her comments, I do not read those comments as addressing the question of jurisdiction in all future proceedings where s. 490(15) might have some relevant application. Additionally, it is well to note the very different context and circumstance in which the comments of Bond J. were made. In that regard, I note that Canada Post did not have any pending civil proceedings against Caspian and had therefore not invoked the *Court of Queen's Bench Civil Rules*, but rather the *Criminal Rules*. I also note that, at the time of Canada Post's application and the reasons provided by Bond J., there was still an ongoing criminal investigation into the WMPP project and the Crown was still considering its position with respect to possible criminal charges. In that context, Bond J. understandably characterized Canada Post's application before her as a criminal matter to which the *Criminal Rules* would logically and properly apply. Conversely, the present case involves an action initiated under the *Court of Queen's Bench Rules* and has thereby brought itself within the ambit and jurisdiction of those Rules. As has already been noted, there are no longer any ongoing criminal investigations in relation to the defendants and the WPSHQ Project nor is the Crown considering what if any charges it will lay against the defendants named in this action.

[126] The distinguishing aspects of the present case were also relevant and sufficient to cause the Ontario Court of Appeal in ***Canadian Broadcasting Corp. v. Ontario***, 2011 ONCA 624 (CanLII) to conclude that the moving party's application to obtain access to a

video (entered as an exhibit in a criminal hearing) was properly characterized as a civil proceeding to which the civil rules of procedure applied. The Court noted (at paras. 31-32):

> In characterizing the proceeding, however, it is important to emphasize what is not at stake. Mr. Omar's fair trial rights and any other right he has arising from his former status as an accused are not in any way engaged by this application. Whatever order is made, it will not impact on his criminal trial rights or the criminal proceedings that were brought against him. Those proceedings were fully and finally disposed of well before this application was brought.
>
> Where the criminal proceedings in which the exhibit was tendered are complete and the order sought does not affect any order made in the criminal proceedings, or the criminal trial rights of any accused, there is no reason to characterize the proceedings as criminal. Those proceedings should be subject to the generally applicable rights of appeal granted in civil proceedings.
>
> [emphasis added]

[127] Irrespective of the context-specific comments of Bond J. in ***Canada Post*** where she noted that an application pursuant to the *Criminal Code* is required for relief that flows from s. 490(15), it is worth emphasizing yet one more time, that the City's motion in the present case is made pursuant to Rule 30.10 and its reliance on or mention of s. 490(15) is merely as an analytical reference point which the City contends is favourable to its position.

[128] Respecting the defendants' arguments concerning the pre-emption caused by the expiration of the detention period, I note the defendants' reliance on ***Obégi v. Kilani***, 2011 ONSC 4636 ("***Obégi***"). In invoking ***Obégi*** as support, the defendants suggest that the Seized Documents must be returned pursuant to s. 490(9) of the *Code*. Rejecting the defendants' arguments on this point, I accept and adopt the submissions of the City. First, the facts in ***Obégi*** are unique and are distinguishable. In that case, the seized

documents had already been returned to the former accused pursuant to an order requiring their return, and it was only "due to an oversight" that the order did not reflect the fact the four computer items in question had also been returned to the accused (for which the Crown retained mirror images which were marked for deletion) (at para. 6). It was when the applicant in ***Obégi*** sought to examine the mirror images still retained by the Crown (against the backdrop of the previous order for the return of the documents) that the Court found that the CBSA no longer lawfully detained the mirror images. Second, the City is persuasive when it argues that the defendants' interpretation of s. 490 is not in keeping with the section itself. The defendants seem to suggest that once the periods of detention in ss. 490(1) to 490(3) had expired and no proceedings have been instituted, the seized documents must be returned. That approach, however, seems directly contrary to s. 490(12) of the *Code* which provides as follows:

> **Detention pending appeal, etc.**
>
> **(12)** Notwithstanding anything in this section, nothing shall be returned, forfeited or disposed of under this section pending any application made, or appeal taken, thereunder in respect of the thing or proceeding in which the right of seizure thereof is questioned or within thirty days after an order in respect of the thing is made under this section.
>
> [emphasis added]

[129] Section 490(12) clearly suggests that even if an order returning seized documents is granted, no documents will be returned until after 30 days have passed "pending any application made, or appeal taken [under s. 490]" including an application under s. 490(15). Accordingly, it can be argued, as the City does, that the City's legal interest in the Seized Documents does not cease to exist simply because detention periods have expired and no proceedings have been commenced. In fact, it is specifically

contemplated in s. 490(12) that a party like the City could assert its legal interest by way of s. 490(15). I agree with the City's position that it is significant that s. 490(12) stipulates "notwithstanding anything in this section", and that ss. 490(1), 490(9) and 490(10) all begin with the words "subject to this or any other Act of Parliament". It is reasonable for the City to argue that Parliament clearly intended the 30-day grace period contemplated by s. 490(12) to take precedence over any order returning seized documents under ss. 490(1), 490(9) and 490(10).

[130] Leaving aside the defendants' unsuccessful jurisdictional argument, when I consider the other factors that permit the accessing of the seized records pursuant to s. 490(15), I note the City's "legal interest" in the documents. The defendants had argued that the City cannot have a legal interest in documents "unrelated to the WPSHQ and the GMP Contract" since such documents are "irrelevant". I disagree. The City is correct to say that relevance is determined by the pleadings. In its pleadings, the City alleges that the defendants "fraudulently issued to the City quotes, invoices...in respect of work performed on different construction projects unrelated to the [WPSHQ Project]" (Statement of Claim at para. 76(a)(iv)). It is not reasonable to say that the identified documents are not relevant to the City's claim. As the City has suggested, while some of the documents may be seemingly unrelated to the WPSHQ Project, they may nonetheless form part of the paper trail of the alleged fraud. Given the nature of the City's allegations, the need for a meaningful forensic accounting and the potential relevance of the documents respecting newly-identified, similar-fact evidence that may be adduced in respect of the Scheme, the City has an obvious legal interest in those documents.

[131] In finding that the City has a legal interest in the documents, I wish to be understood as determining that the interest is not only a potential legal interest, but an actual one. The interest is "concrete, defined and identified" (***Canada Post*** at para.17). The City's actual legal interest puts it in a similar position to the applicant in ***R. v. Haynes***, [1998] O.J. No. 4386 (Ont. Gen. Div.) ("***Haynes***"). In that case, the applicants sought to examine documents seized by the Ontario Police from an accused fraudster. The applicant initiated legal proceedings in Michigan against the accused and the Court therefore found that this created a sufficient legal interest to trigger the right to examine the documents under s. 490(15). See para. 11. In this sense, the City is like the applicant in ***Haynes*** insofar as both represent the category of person that Parliament had identified as entitled to examine documents seized by police. The recognition of and the rationale for this sort of production was noted by the Ontario Court of Appeal in ***D. P. v. Wagg***, 2004 CanLII 39048 (ON CA) (at para. 53):

> In considering a request for production the police and Crown will bear in mind the comments by Vertes J. in *Fullowka v. Royal Oak Mines Inc.* that the Crown does not have a simple proprietary interest in the Crown disclosure. As he said at para. 15, "the 'fruits of the investigation' in the possession of the Crown 'are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done'". Society has an interest in seeing that justice is done in civil cases as well as criminal cases, and generally speaking that will occur when the parties have the opportunity to put all relevant evidence before the court. The Crown disclosure may be helpful to the parties in ensuring that they secure all relevant evidence.
>
> [emphasis added]

[132] Put simply, I accept that the underlying rationale of s. 490(15) is, as the City submits, to grant victims of crime, amongst others, the right to examine documents seized by police in furtherance of the societal interests in seeing that justice is done. That

rationale, along with the other factors that inform an analysis under s. 490(15), suggests that not only does s. 490(15) not preclude an order for production pursuant to Rule 30.10, it provides additional support for the City's position.

[133] In order to fully and completely address this second question or issue as identified at para. 4 of this judgment, I will briefly address the other considerations that need be addressed with reference to s. 490(15). In that regard, is also my view that, having established a legal interest in the documents, the City's legal interest can be favourably balanced against those of any other party, including the law enforcement agency or any third parties. See ***Canada Post*** at para. 17.

[134] The task of balancing competing interests in s. 490(15) requires the consideration of such factors as the necessity for the order sought, the privacy interest of third parties and the interest related to the proper administration of justice. I consider those factors below.

Necessity for the Order Sought

[135] Respecting the "necessity for the order sought", it need be determined whether access to the items or documents seized is necessary for the purposes of advancing the City's legal interest in some concrete fashion. In other words, are the Seized Documents necessary for advancing the City's claim? In this connection, I note the defendants have assured the Court that the Seized Documents will be produced in the course of the ordinary discovery process. As a result, the defendants submit that the relief the City seeks is not "necessary". I am not so persuaded.

[136] As I will explain and conclude later, in connection to a similar factor that need be considered pursuant to Rule 30.10, the City has satisfied me that under s. 490(15) of the *Code*, there would be (had an application been made under s. 490(15)) a necessity for the order sought. Despite the assurances provided by the defendants, I accept the City's concerns as well-founded in respect of whether or not the entirety of the Seized Documents will be disclosed or produced if left entirely to the discretion of the defendants. In this respect, while I certainly draw no ultimate conclusions, I do note the evidence in the supporting affidavits concerning the alleged fraudulent conduct, the evidence suggested in the ITO documents respecting altered or fabricated invoices and the evidence that suggests that some of the defendants have already attempted to dispose of what the City identifies as "incriminating evidence". As noted by the British Columbia Supreme Court in ***Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.***, 2017 BCSC 1587 (CanLII), "[a] party who commits fraud...is unlikely to voluntarily disclose [evidence of this fraud] to the party suing him" (at para. 66).

[137] I also share the City's concerns as to the improbability that production will occur in respect of the full paper and electronic trails, free of needless delay and unnecessary challenge and skirmish. My concerns are animated in part by what has already been the comparatively narrow view that some of the Caspian Defendants have taken in respect of what is "relevant".

Privacy Interests

[138] Relief pursuant to s. 490(15) (had it been sought by the City) would also normally require, as part of the Court's analysis, a balancing of the applicant's legal interest with any privacy interests on the part of an accused (or a defendant(s)) and third parties.

[139] Again, while it need be remembered that the City seeks its relief under Rule 30.10, it is nonetheless instructive to note that this part of the s. 490(15) balancing also plays out in a manner that is favourable to the City in what will be later discussed as the analysis required for Rule 30.10 relief.

[140] The jurisprudence respecting s. 490(15) does not support the defendants' contention that their interests and the interests of third parties ought to prevail over society's interests in seeing that justice is done. In ***Haynes***, the Court determined that concern for the protection of a privacy interest is diminished where, for example, the Crown seeks an order on behalf of certain victims who suffered at the hands of an accused. Similarly, in ***R. v. DiGiuseppe***, 2008 ONCJ 126 (CanLII), the Court determined (in the context of a s. 490(15) application) that where "the documentation was lawfully obtained at the time of the initial seizure by the police there was a substantially 'reduced expectation of privacy' in the seized materials thereafter" (at para. 18).

[141] Insofar as the defendants rely in part on the comments of Bond J. in ***Canada Post*** where she observes that "broad access to, and potential disclosure of, evidence seized by police during a criminal investigation would not adequately protect privacy interests", those comments need be contextualized and certain distinguishing facts need be noted. For example, it is clear that when Bond J. refers to a "broad access to...evidence seized

by police", she is in fact referring to "applicants who may have an interest that is not sufficiently concrete or crystallized" (at para. 18). It would seem that her comments as to broad access are specifically in relation to her finding that Canada Post lacked the requisite interest to trigger s. 490(15). In that connection, Bond J. stated: "Canada Post has not commenced any legal action in relation to what it claims is a plain and obvious fraud. Its interest in the documents remains contingent" (at para. 25). Unlike the applicant in ***Canada Post***, in the present case, the City seeks access to Seized Documents in which it has a concrete, defined and actual legal interest. That is not the type of "broad access" which gave rise to the expressed caution and concern of Bond J. in ***Canada Post***.

[142] It is obvious that any time documents are lawfully received or obtained by the police, there exists the possible intrusion into the private affairs of an accused and/or third parties. Foundationally, the very rationale of s. 490(15) acknowledges that in some cases, where the applicable criteria have been met, the public interests will override the privacy interests of an accused person. This holds true for civil cases where it has been noted that the asserted privacy interests do not necessarily trump the public interests in the efficient conduct of civil litigation. In that regard, the British Columbia Court of Appeal in ***Duncan v. Lessing***, 2018 BCCA 9 (CanLII) ("***Duncan***"), cited ***Juman v. Doucette***, 2008 SCC 8, stated as follows (at para. 37):

> As explained by Justice Binnie, the "root of the implied undertaking is the statutory compulsion to participate fully in pre-trial oral and documentary discovery" (at para. 20). Pre-trial discovery is an invasion of the private right to be left alone and the implied undertaking offers some protection to a party's privacy interests. Justice Binnie explained the relationship between privacy interests and the litigation process at common law:

> [25] The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone.

[143] The City reminds this Court that the protection provided to those whose privacy interests are affected by civil litigation is the implied undertaking rule under Rule 30.10. The City argues that a party to litigation cannot employ its privacy interests to circumvent the civil discovery process nor a motion for non-party production under Rule 30.10. Accordingly, the fact that there are third-party documents among the Seized Documents is not determinative. A salient question in respect to production is whether the documents are relevant, and if they are, they are required to be disclosed and any privacy concerns are then addressed through the implied undertaking rule. As I suggested earlier in this judgment, the banking and financial records contained in the Seized Documents are obviously relevant based on the statement of claim and the supporting affidavits on this motion.

[144] I am satisfied in the circumstances of this case, that a balancing of the City's legal interest with privacy interests of the defendants favours the position of the City. In other words, the City's legal interest should not be overborne by the privacy interests of the defendants or any other third parties.

Privilege

[145] Privilege is always a potentially relevant fact when considering production, whether it be in circumstances involving s. 490(15) of the *Code* or Rule 30.10. I will address later in this judgment, in slightly more detail, the defendants' position that the Seized

Documents in question contain documents in connection to which solicitor-client privilege can be and will be asserted. It will suffice to note at this stage, as it relates to my consideration of the defendants' argument (that s. 490(15) pre-empts the relief the City seeks under Rule 30.10) that the defendants' broad claim of privilege is unspecified, unsubstantiated and insufficient for the purpose of any meaningful analysis concerning the production of Seized Documents in the context of s. 490(15).

Proper Administration of Justice

[146] As part of any of the balancing analysis that must take place under s. 490(15), consideration must be given as to whether the administration of justice favours the granting of an order under s. 490(15). The City has argued, and I am in agreement, that s. 490(15) was designed for the exact situation in which an applicant like the City finds itself. In other words, the section provides relief for a victim of a crime (in this case, fraud and bribery, amongst others) who, in allegedly being victimized by the defendants, is also potentially going to be denied access to the means by which it might seek recovery (access to the evidence of the Scheme that will provide an opportunity to substantiate its claim). As I have already suggested, I agree with the City's submission that s. 490(15) reflects Parliament's recognition that, in some cases, the privacy interests of an accused are in fact outweighed by the societal interest of realizing justice by getting at the truth. See ***Duncan*** at para. 37. As part of the City's submission, it asks the rhetorical question: "which option better serves the interests of justice: permitting a victim of crime to see the evidence that the Crown has collected against a suspect or being victimized a second

time by being denied the means by which to seek at least, a means to recover in a civil proceeding?"

[147] In commenting earlier about the potential delays that may accompany production in the ordinary course of civil discovery, I suggested that there was nothing untoward or unreasonable about the City's attempt to seek access to the Seized Documents in a manner other than by way of the ordinary civil discovery process. I do not accept that, in making those attempts, the City is circumventing any otherwise applicable rule or statute. As is its right, the City chose to bring a motion pursuant to Rule 30.10. As will be seen in the final part of these reasons, I have no difficulty concluding that the City has satisfied me that it has brought itself within its parameters and discharged its onus pursuant to Rule 30.10. As it relates to the defendants' argument that the City is in some way "circumventing the rules", I note the Court's comments in ***Haynes*** (at para. 10):

> Mr. Neeb, on behalf of Mr. Gagne, opposing an order for examination, submits that Mr. Haynes should be required to bring an action in Ontario, to, in effect, perfect his legal right to disclosure and production. Indeed, submits Mr. Neeb, if he did so, Mr. Haynes would have recourse to the scheme of disclosure and discovery under the *Rules* (*inter alia*, the relevant portions of Rules 30 and 31). Mr. Haynes should not be permitted to "circumvent" his entitlement and obligations under the *Rules of Civil Procedure* by bringing this "summary application" pursuant to the *Criminal Code*. I, with respect, disagree.
>
> [emphasis added]

[148] In ***Haynes***, although the Court did focus on the accused's argument that the applicant should be required to bring an action in Ontario, the applicant in ***Haynes*** was also able to access the scheme of disclosure and discovery under the Michigan rules of civil procedure. In other words, the applicant in ***Haynes*** was in precisely the same position as the City, which is to say, he could have waited for the seized documents to

be returned to the accused and then relied upon the normal discovery process (as the defendants insist should be done in the present case) to obtain the documents. In the end, the applicant chose to proceed with an application under s. 490(15) and it did so with the apparent endorsement of the Court.

[149] As with the other factors that need to be considered under a s. 490(15) analysis, when I consider the "proper administration of justice", I am required to repeat my earlier comment that, had the City in the circumstances of this case, sought an order under s. 490(15), that order would have been justified, not only because the City has a clear legal interest in the Seized Documents for the purposes of advancing its claim, but also, because the City's and the broader societal interest requires this Court to ensure that true, accurate and complete information about the alleged Scheme be obtained. With reference to the proper administration of justice, the City's legal interest and the broader societal interest, together outweigh what were already diminished privacy interests of the defendants and/or third parties.

[150] Accordingly, I answer the second question set out at para. 4 of this judgment by concluding that s. 490(15) of the *Code* and the connected and applicable legal principles, do not pre-empt the City from obtaining the production it seeks from the RCMP pursuant to Rule 30.10. Indeed, on the particular facts of this case, while the City takes the view that Rule 30.10 is the more appropriate basis for any order granted by this Court (permitting the RCMP Documents to be produced to the City), had the City sought such an order, I would have concluded that the City would also have been justified in obtaining access to the Seized Documents pursuant to s. 490(15).

ISSUE #3: Even if s. 490(15) of the *Code* in the particular circumstances of this case does not pre-empt the use of Rule 30.10 by the City to obtain the seized RCMP Documents, has the City nonetheless satisfied this Court that the production sought should be ordered pursuant to Rule 30.10?

[151] Rule 30.10 provides that a Court may, on a motion, order the production of a relevant document for inspection that is in the possession, control or power of a person not a party to the action where it is not privileged and where it would be unfair to require the moving party to proceed to trial without having discovery of the documents in question.

[152] In ***Callinan***, this Court had occasion to consider a plaintiff's motion for the production of documents pursuant to Rule 30.10. Those documents were documents reviewed, relied on or generated by Deloitte & Touche LLP (a non-party) during an audit that it conducted of the defendant's statements of net profits, interest and royalties. The underlying claim in relation to that motion, was in respect of the defendant's alleged failure to make proper payments of profits pursuant to a profit-sharing agreement between the parties. In addressing the plaintiff's motion for non-party production, this Court noted as follows (at paras. 139-42):

> The two reference points which guide any analysis respecting Rule 30.10 are relevance and unfairness (in respect of requiring the party to proceed to trial without the discovery of the documents in question).
>
> It is trite that a relevant document is one which relates to any matter in issue in an action. The determination for relevance respecting a document sought from a non-party involves a threshold no higher than the threshold applicable in cases involving documents sought from a party. In other words, if a document could reasonably contain information which may (not must) enable a party to advance its case or damage the opposing party's case, then it is relevant. See ***Ministic Air Ltd. v. Canadian Broadcasting Corp.*** (1995), 1995 CanLII 16128 (MB QB), 103 Man.R. (2d) 296 (Q.B.) at paras. 39-40; ***Envoy Business Services Inc. v. 3196969 Manitoba Ltd.***, 2000 MBQB 219 at paras. 14 and 20, 102 A.C.W.S. (3d) 45. Relevance was determined in ***Ministic Air*** on the basis of Oliphant,

A.C.J.'s (as he then was) conclusion that it was "reasonable to suppose" that the documents sought from the non-party would speak to an issue raised in the action, *supra*, at para. 44.

Hudbay properly emphasizes that in addition to the consideration of the relevance of the documents in question (the usually dominant consideration on most applications for production), additional considerations apply when dealing with a motion to produce documents from a non-party. I agree. Those additional considerations, when properly undertaken, constitute an enhanced caution. It is a caution that need accompany a court's analysis, which analysis is meant to distinguish between a party's justifiable need to obtain documents from a non-party and the potential abuse that can come from a time-consuming and costly fishing expedition. The additional considerations identified by Hudbay which otherwise protect non-parties from unnecessary intrusion, are those associated with the analysis of the unfairness requirement of Rule 30.10(1).

In ***Stavro***, *supra*, the Ontario Court of Appeal identified some of those additional factors to be considered under the Ontario rule governing production from a non-party. The Ontario rule is, for all intents and purposes, the same as the Manitoba rule. Those factors include:

- The importance of the documents in the litigation;
- Whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness to the moving party;
- Whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and, if not, whether responsibility for that inadequacy rests with the defendants;
- The positions of the parties with respect to production;
- The availability of the documents or their informational equivalent from some other source which is accessible to the moving parties;
- The relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation.

[emphasis added]

[153] As stated above in ***Callinan***, the two guiding principles in respect of an analysis concerning Rule 30.10 are relevance and unfairness.

[154] For the reasons that follow, I have determined that the City has satisfied this Court that the production sought should be ordered pursuant to Rule 30.10. The documents in question are relevant and further it would be unfair to require the City to proceed, at this stage of the proceedings, without the production of the Seized Documents.

Relevance

[155] The threshold for determining what is relevant is low and a party need only show that the documents "could reasonably contain information which may (not must) enable a party to advance its case or damage the opposing party's case" (***Callinan*** at para. 140). The City has submitted that the following categories of documents are included in the Seized Documents and they all clearly meet the low threshold for relevance as was set out in ***Callinan***:

I. *All versions of all invoices, quotes, change orders, progress claims and requests for payments.*

The City submits that, given that it alleges a fraudulent invoicing scheme, the very nature of the Scheme requires further exploration and clarification which requires that the City have access to the entirety of the invoices and quotes that subcontractors provided to Caspian and that Caspian sent to the City. The City explains that the fraud will, in part, be a matter of the difference between these two sets of documents. This category of documents, says the City, is essential to its case and will necessarily contain information that will enable the City to advance its claim;

II. *Banking information and financial records, including those produced via production orders*

As suggested with the above category, the City also insists that financial records are absolutely essential where, as here, a fraudulent scheme is alleged, particularly one in which the defendants are alleged to have derived a secret profit from the Scheme. The City argues that, absent the financial

records, the City would have no means to trace the monies that were fraudulently obtained. Accordingly, this category of evidence would necessarily enable the City to prove its claim that the defendants derived secret profits from the Scheme and that the alleged Kickbacks were paid among and between the defendants; and

III. *Emails and correspondence between the Caspian Defendants and the other defendants, and between the Caspian Defendants and its subcontractors*

As the City has explained, the ITOs in evidence before this Court suggest that the subcontractors were directed to combine quotes, to create fraudulent invoices or to charge work from an unrelated project to the WPSHQ Project. The City emphasizes that any correspondence containing such directions would speak to the defendants' fraudulent intent and would accordingly, greatly damage the defendants' defence. The City makes the same argument for any correspondence relating to the approval of fraudulent or altered invoices or the payment of alleged Kickbacks. Again, the City maintains that this category of documents also meets the low threshold of relevance outlined in ***Callinan***.

[156] All of the above categories of documents meet the threshold for relevance.

Unfairness

[157] I have concluded that it would indeed be unfair to require the City to proceed at this stage without the production of the Seized Documents currently in the possession of the RCMP. I have come to that determination based upon my consideration of the

relevant factors which are set out in ***Callinan*** (at para. 142). I discuss below those factors in the context of and in relation to the particular facts of this case.

The Importance of the Documents to the Litigation

[158] It seems clear that the Seized Documents in question do indeed relate to the central issue in this action, namely, whether or not the defendants participated in the Scheme. The documents in question were seized by the RCMP in the course of their investigation respecting the same issue and accordingly, are likely to have relevance to the central issue or issues in this action. As the City has suggested, those documents may even be determinative.

[159] I have noted the defendants' opposition respecting which they argue that the City's motion for non-party production is overly broad, captures irrelevant material and is, in essence, a "fishing expedition". Those arguments are not persuasive in relation to my consideration of the "unfairness" factor and in my consideration of the importance of the RCMP Documents to the litigation. The reality is that the City has not seen the RCMP Documents and by necessity, a description in relation to those documents on the part of the City is likely to be somewhat generalized. That said, given that what the City seeks are those documents that the RCMP gathered in the course of its investigation into the WPSHQ Project and the allegations of fraud and bribery, the documents are, by definition, limited by the very nature of the RCMP investigation itself.

[160] Although the City steadfastly rejects any suggestion that it is "fishing", it does nonetheless rely upon the commonsensical comments of the Court in ***Belitchev v. Grigorov***, 1998 CanLII 6623 (BC SC) (at paras. 11-12):

Southin J. (as she then was) in ***Proconic Electronics Limited and Far East United Electronics Ltd. v. Wong*** (1985), 1985 CanLII 253 (BC SC), 67 B.C.L.R. 237 (S.C.) stated at page 239:

> While the expression "a fishing expedition" is hallowed by usage, it really does not provide a principle upon which a decision can be founded. Some fishing expeditions are, if I may put it so, licensed by the Rules of Court and authority; others are not. Perhaps it is not too fanciful to say that a litigant cannot have a licence to fish in his opponent's private swimming pool unless he can provide some evidence from which it can be inferred that there may be fish in that pool. If there is no such evidence, the defendant need not let him in to see if there is a fish.

Here we know that there are fish in the pool. The defendant merely wants the license to catch those fish, not to determine whether there are any fish.

[161] In the present case, the City submits, somewhat glibly but not inaccurately, that the affidavit evidence before this Court suggests that there are potential fish in the RCMP pool. For the purposes of this motion and mindful of the question of fairness, I agree.

Whether Production at this Stage as Opposed to Production at Trial is Necessary to Avoid Unfairness to a Moving Party

[162] I have already determined that the Seized Documents and the information contained in those documents are potentially of central importance to the City's case against the defendants. The importance of those documents is such that they need be accessed by the City at an early stage of these proceedings, which in the particular circumstances of this case, requires production even prior to examinations for discovery. That production is most dependably provided with the relief now sought by the City.

[163] As with the applicant in ***Callinan***, the City argues that production should be made at this stage for a number of reasons. They include the need for the City to assess the merits of its claim against these defendants and perhaps other potential defendants not yet identified; the need to clarify the precise nature and scope of the alleged Scheme;

and the need to properly prepare for discovery and be better able to identify and pursue additional potential issues requiring discovery. See ***Callinan*** at para. 162.

[164] When considering this factor, of particular significance for this Court is the practical importance of the City getting access to the Seized Documents at a stage that will maximize the efficiency, proportionality and meaningfulness of future discovery, particularly the examinations for discovery. This makes the contemplated production both necessary to and consistent with the proper administration of civil justice in a complicated case such as this one.

[165] It has already been emphasized that the RCMP Documents will require significant review and analysis on the part of the City's experts before any meaningful examinations for discovery can take place. The City suggests that it is likely that it will require a report from its expert. It is reasonable, as the City has submitted, that given the breadth of the documents, the task of reviewing and analyzing the documents will take a significant amount of time. In fact, I note that Cst. Theoret, in his Affidavit of June 1, 2020, asserted that it would take the RCMP (even with all its personnel and resources) many months to review the Seized Documents for the purposes of separating relevant and irrelevant documents. The City is not exaggerating when it expresses the concern that it may take that much longer for an accounting firm to review, compare and analyze those same RCMP Documents with a view to identifying and understanding the nature and the extent of the Scheme, and then preparing an expert report summarizing the relevant findings.

[166] I have significant doubts and concerns about the speed with which any of the relevant seized RCMP Documents would be produced "in the ordinary discovery process".

Without in any way coming to any ultimate determination with respect to the truth of any of the allegations contained in the City's claim or in the supporting Affidavits on this motion, given the nature of the allegations, the City nonetheless has some basis to worry that production in the ordinary course could become a potential source of significant delay. Even if any hesitation or unwillingness on the part of the defendants in the "ordinary discovery process" is not for reasons of self-protection, the evidence thus far suggests that hesitation is quite likely to be grounded in issues surrounding relevance. The obvious uncertainty about the identification and availability of those relevant and currently Seized Documents in the ordinary discovery process, creates serious questions about when those documents, to the extent that they are provided, will be reviewed and analyzed in a way so as to make examinations for discovery meaningful.

[167] Separate and apart from the necessity of ensuring a meaningful examination for discovery, this Court is not and cannot be indifferent, in the context of an already-complicated civil proceeding where case management has been justified and designated, to the consequences of the identified potential delays. This is so for reasons not only of efficiency and proportionality, but also, because of the need to ensure that this Court's practice directions respecting trial timelines remain rigorously enforced and respected. Put simply, without the relief the City seeks, the anticipated and long delays that would envelop the ordinary discovery process will unnecessarily distract from what should be the focus of this proceeding and any ultimate adjudications required at the eventual trial. In this connection, the comments of the Ontario Superior Court of Justice in ***Cacciato v. Grégoire***, 2015 ONSC 4751 (CanLII) are worth noting (at paras. 41-42):

> The documents are important and their production at trial would unnecessarily delay the trial of this action. These factors are important and go "...a long way to demonstrating that it would be unfair to require the party to proceed to trial without production of those documents" (see *Ballard Estate*).
>
> Although I agree with the plaintiff that the defendant could have obtained some additional information through more efficient discovery, this is outweighed by the importance of the documents, their number and relevance to material issues. The defendant would otherwise have to proceed to trial without these documents, calling some of these witnesses and slowly obtaining some of these documents at trial. This would not be an efficient use of trial time as it would invariably lead to adjournments and delays. The documents sought are readily available, requiring no additional efforts on the part of the non-party, such that the factors outlined at rule 29.2.03 also favor disclosure.
>
> [emphasis added]

[168] A reasonably-timed trial date in the circumstances of this case, can only be set if the examinations for discovery are rendered meaningful and conducted after the entirety of the relevant RCMP Documents have been produced and subjected to a forensic analysis. In ***Callinan***, this Court discussed the need to appreciate the requirement that in some circumstances, there is a need for a comparatively earlier production. That analysis has application to the present case (at para. 164):

> In reviewing this factor, I have determined that it would indeed be unfair to deprive Callinan of the benefit of Deloitte's work effort in preparation for the eventual discoveries. It is reasonable to suppose that the nature of the documents in question will include what Callinan anticipates to be detailed calculations and analyses in relation to the Net Profits Interest calculation. That being the case, it is also reasonable to suggest that some expert assistance may be needed for the purpose of flagging, organizing and otherwise interpreting those documents so as to make not only the examinations for discovery more meaningful and efficient, but also, the entirety of the pre-trial preparation for all parties. With the documents from the defendant's files produced, Hudbay will be able to provide and Callinan will be able to receive explanations concerning any of the documents in question.
>
> [emphasis added]

[169] In the circumstances of this case, the Rule 30.10 production sought by the City is necessary at this stage so as to avoid unfairness to the City.

Whether the Discovery of the Defendants with Respect to the Issue to Which the Documents are Relevant is Adequate

[170] Considerable time has already been spent in this judgment addressing this Court's concerns about what the City has identified as the narrow view of relevance already taken by some of the Caspian Defendants. The suggestion in this regard is that that approach will pervade and perhaps dominate the City's attempts to obtain relevant documents in the ordinary course of discovery. I have already expressed my appreciation for that concern and indeed, believe that it is a concern of sufficient seriousness so as to cause me to conclude that the ordinary discovery of the defendants with respect to the issue or issues connected to the relevant documents, will not be adequate.

[171] My concern is not lessened when I consider that the tenor of and approach taken by some of the defendants suggest that they see the City's action as an overly-zealous prosecution of a claim where they, as defendants, are blameless but nonetheless obliged to defend against allegations which were otherwise not seen as suitable for or justifying a criminal prosecution. While such a position is perfectly legitimate for a party and it will undoubtedly dominate the defendants' approach at trial, procedural delays and potential unfairness to the City's action that flow from that approach and posture cannot be reflexively or rhetorically justified. I say that given what is the unchallenged evidence of $24 million in fraudulent, fabricated invoices submitted to the City during the WPSHQ Project. In the face of that still-unchallenged evidence, the delays and disputes about relevance that can realistically be anticipated throughout most of the discovery process may be neither reasonable nor benign.

[172] It may well be that the indignation on the part of the defendants with respect to what they say is the groundless nature of the City's allegations is justified. It may also be the case that if groundless, the inaccurate allegations can (and should be) revealed and demonstrated in due course. Common sense and fairness would suggest that such groundless allegations should be exposed earlier than later. Yet, without access to all versions of the invoices and quotes, that cannot and will not be done.

[173] Conversely, to the extent that there currently is in the evidence some basis for parts of the City's theory, without access to all versions of the invoices and quotes, an examination of the defendants on the issue of whether they did in fact alter or fabricate invoices would be useless. As the City has contended, in the face of confirmation from Fabca, for example, that it did not do the work represented, absent the true, bona fide versions of the invoices, the defendants can simply deny that the invoices in the City's possession have been altered or are fraudulent. Similarly, without access to the banking and financial records contained in the RCMP Documents, an examination of the various parties who are alleged to have received or were paid Kickbacks would also be useless. Having no documentation in support of Kickbacks, the City's examination of the defendants would consist of but one question: Did you ever receive Kickbacks?

[174] For the purposes of this motion, that the ordinary discovery process is inadequate is best revealed when one considers the obvious consequence of forcing the City to proceed without the Seized Documents at this earlier stage. Without those seized RCMP Documents, the City will have no alternative but to accept whatever denials or explanations the defendants provide. Given what is already some evidence in the

supporting affidavits with respect to certain aspects of the City's claim, the consequent unfairness to the City should be obvious. That unfairness is not adequately answered or in any way mitigated by the defendants' argument that the City's motion is ignoring the usual chronology for production. As this Court noted in ***Callinan*** (at para. 166):

> In the end, while each case is different, there is no magic chronology requiring that a motion pursuant to Rule 30.10(1) be made only after examinations for discovery have taken place. Indeed, this is a case where the production sought is most fairly provided not only before trial, but before any such examination for discovery.

The Positions of the Parties with Respect to Production

[175] Along with most of the defendants who opposed production pursuant to Rule 30.10, the Attorney General of Canada (while taking no position on the production of the documents that were voluntarily provided to the RCMP), did initially express concern about the production of the Seized Documents. The Attorney General's concern on behalf of the RCMP was based on what it insisted was the ability in the course of ordinary discovery to acquire these documents from another source. It also expressed the concern that Rule 30.10 not become the "go to" rule that will reflexively permit parties in a civil proceeding to circumvent the rigours of s. 490(15) of the *Code*. Connected to that point is the Attorney General's concern about the undue burden that could fall to the RCMP if it were required to "vet or filter out" irrelevant material in the event of court-ordered production pursuant to a Rule like 30.10.

[176] I can well understand the Attorney General's above-stated concern, but in the circumstances of this case, the City has stated that it has no intention or interest in imposing such a burden on the RCMP. As it relates to the "slippery slope" that could (as

the Attorney General worries) lead to routine reliance on Rule 30.10 to circumvent the rigours of s. 490(15), my earlier analysis should be noted. In that connection, I determined that in the circumstances of this case, not only would the rigours of s. 490(15) not have pre-empted the relief the City now seeks pursuant to Rule 30.10, but in fact, the City would have had a compelling justification for any order sought pursuant to s. 490(15).

[177] When I consider the position of the parties (including the particular concerns of the Attorney General of Canada) there is nothing that militates against granting the City the Rule 30.10 order it seeks.

The Availability of the Documents or their Informational Equivalent from Some Other Source Which is Accessible to the Moving Party

[178] The defendants contend that the City's motion should be declined "on this ground alone". I disagree. As was clearly noted in ***Callinan***, the availability of the documents from some other source "is but one factor to be considered and will not be, by itself, determinative or decisive on a motion for production from a non-party" (at para. 80).

[179] Even if this factor is non-determinative or decisive by itself, I am of the view that on the facts of this case and for the purposes of this motion, the RCMP Documents are not reliably or predictably available from some other source.

[180] As it relates to the documents that were voluntarily provided to the RCMP, I accept the City's submission that there is nothing before the Court to suggest that their equivalent exists elsewhere. In any event, the City submits that obtaining these documents elsewhere would require the City to bring multiple motions for non-party

production when there is currently a neutral non-party from whom we know the documents are readily available and producible.

[181] As it relates to the Seized Documents, I again accept the position of the City that these documents are not as reliably or predictably available from some other source – at least not in their entirety as the City requires them and as the City has, on the evidence, justified its access to them. As I have indicated elsewhere in this judgment, the City has, through its evidence and submissions, satisfied me that there is a justified concern as to whether the defendants will produce all of the documents currently in the RCMP's possession with the willingness, expeditiousness, efficiency or economy required. There is some evidence to suggest that some of the defendants have already made it clear that their view of relevance would be much more narrow than that of the City. The City suggests that such evidence foreshadows an approach by the defendants that will rely upon a view of relevance that is determined more on the basis of their own discretion than on that which is contained in the pleadings. In other words, the City has a very real and not a mere conjectural concern that if returned to the defendants, the documents currently in the possession of the RCMP will never "in their entirety" be provided as required or alternatively, they will be produced selectively based upon reference points for relevance unduly connected to the defendants' discretion and interests.

The Relationship of the Non-Parties from Whom Production is Sought, to the Litigation and the Parties to the Litigation

[182] The only non-parties involved in the City's motion are the RCMP and the MPS.

[183] For their part, the involvement of the MPS was largely limited to the potential assistance they could provide with respect to the interaction of s. 490(15) and Rule 30.10. Any additional concerns that may have also given rise to their involvement had largely dissipated by the time submissions were made.

[184] The RCMP is the police force that had completed its investigation into the WPSHQ Project after which the MPS declined to lay any charges. It has been confirmed that there are no ongoing investigations related to the WPSHQ Project, nor are there any pending charges against the defendants in respect of that project. Neither of the two non-parties, the RCMP and the MPS have any obvious or ongoing interest in the Seized Documents nor do they have any legal interest in the litigation. The City is right to describe the respective relationship of these parties to the litigation as appropriately neutral.

[185] I have earlier described and addressed some of the concerns raised by the RCMP on the order of policy grounds relating to their worry that if care is not taken, courts may too routinely permit in the course of civil proceedings, parties to pursue these types of non-party documents in a way that either circumvents s. 490(15) or attempts to leapfrog over the ordinary civil discovery process (and in so doing, create undue and impractical resource burdens on the RCMP). With those concerns having been noted, there is nothing further that need be added respecting the RCMP's relationship to the broader litigation and proceeding. The same can be said for the MPS.

[186] In light of the above, there is nothing in my consideration of this factor which negates or dilutes my view that it would be unfair to require the City to proceed without the production of the Seized Documents.

The Defendants' Claim of Privilege

[187] In considering the above relevant factors that inform the question of fairness, I would be remiss if I did not briefly revisit the issue of privilege as it relates to some of the seized RCMP Documents in respect of which the City seeks access.

[188] As I earlier stated at para. 145, privilege can always be a potentially relevant fact when considering production, including in circumstances involving s. 490(15) of the *Code* or Rule 30.10. However, as I earlier noted in the context of my consideration of s. 490(15) of the *Code*, the defendants' broad claim of privilege on this motion is unspecified, unsubstantiated and insufficient. While those earlier comments were addressing my analysis concerning the defendants' arguments in respect of s. 490(15) of the *Code*, they are no less applicable and germane in the context of my consideration of Rule 30.10.

[189] The manner in which the defendants have argued the issue of privilege on this motion suggests that Rule 30.10 precludes production of "privileged" documents. Properly read, Rule 30.10 sets forth a procedure whereby the Court may assess any asserted claim of privilege which presumably will be specified, substantiated and sufficiently explained. Rule 30.10(3) notes "[w]here privilege is claimed for a document referred to in subrule (1)...the court may inspect the document to determine the issue".

[190] Before the inspection and/or evaluation of a document for an asserted privilege, there must be some evidentiary basis for the assertion of the privilege. In the present case, the defendants have failed to satisfy the burden of showing the evidentiary basis for their assertion of privilege. The absence of such an evidentiary foundation and any

accompanying specificity and substantiation, will usually cause any broad claim of privilege to fail. The present case is no exception.

[191] In the context of their broad claim for privilege, the defendants have done nothing other than suggest starkly that *some* documents may contain privilege. Their pre-emptive assertion is not currently verifiable or meaningful in terms of any related adjudication. The City has never seen the documents in question whereas the defendants themselves, have had access to them since they were seized or voluntarily provided to the RCMP. Accordingly, neither the City or more significantly, the Court, has been given any details or particulars with respect to the nature of the defendants' claim of privilege. Such minimalism is neither helpful nor persuasive when it comes to meeting a preliminary threshold test.

[192] The broad and unspecified claim of privilege invoked by the defendants renders what may be a legitimate issue meaningless for the purposes of my immediate decision on this motion. If privilege is to be a factor in respect of what would otherwise be the City's ability to access all of the Seized Documents pursuant to the Rule 30.10 order that I will be granting, the issue will have to be raised more rigorously and helpfully within the Rule 30.10(3) framework. That will obviously require, amongst other things, a level of specificity and evidentiary support that satisfies the defendants' persuasive burden.

Conclusion

[193] For the foregoing reasons I have come to the following conclusions:

i. The defendants' motion to strike the impugned affidavits is dismissed.

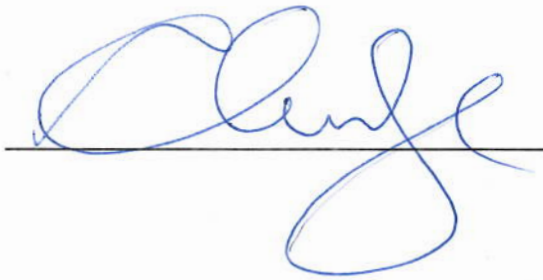
ii. There is nothing in s. 490(15) of the *Code* that otherwise pre-empts the City from obtaining the production it seeks from the RCMP (a non-party) pursuant to Rule 30.10.

iii. The City has satisfied me that the production sought should be ordered pursuant to Rule 30.10 in that the documents are relevant, and that it would be unfair to require the City to proceed without that production at this stage.

[194] Based upon the above conclusions, the City ought to be given immediate access to any financial, accounting or banking documentation seized by the RCMP from the defendants and they should be similarly given permission to copy what it considers necessary. This would of course be, as the City has acknowledged, on the basis that an itemized list of what is copied would be provided to all of the parties and that the copies be provided by the City upon request.

[195] If any of the defendants wish to raise a claim about the privileged nature of some of the documents within the material seized by the RCMP, they will be required to file the necessary initiating documents and with the filed materials, provide an itemized list of those documents for which privilege is claimed. The itemized list should have an accompanying description which need be clear and detailed enough for the Court, the City and any other party in order to determine whether a specific review of that document or documents should be conducted by the Court.

[196] The City will have its costs.



C.J.Q.B.