

**ALBERTA SECURITIES COMMISSION**

**ORAL RULING**

**Citation: Arbour Energy Inc., Re, 2009 ABASC 116**

**Date: 20090305**

**Arbour Energy Inc., Dennis Morice, Heinz Weis, Arthur Wigmore, Milowe Brost, The Institute For Financial Learning, Group of Companies Inc., Merendon Mining Corporation Ltd. and Gary Sorenson**

**Panel:** Glenda A. Campbell, QC  
Neil W. Murphy  
Karen A. Prentice, QC

**Counsel:** Don Young and Deanna Steblyk  
for Commission Staff

Chris Archer and John James  
for Arbour Energy Inc. and Dennis  
Morice

C.J. Popowich and K. Edgerton-McGhan  
for Heinz Weis

Patrick Sullivan  
for Arthur Wigmore

Samantha Fenton  
for Milowe Brost and The Institute For  
Financial Learning, Group of  
Companies Inc.

Glenn Solomon  
for Merendon Mining Corporation Ltd.  
and Gary Sorenson

**Date of Hearing:** 5 March 2009

**Date of Ruling:** 5 March 2009

**The following ruling and reasons have been prepared from excerpts of the transcript of the hearing of this application, which have been edited and approved by the chair of the panel for the purpose of providing a public record.**

[1] The following are our oral ruling and reasons on the adjournment application made before us this afternoon by Mr. Archer, as counsel for Arbour Energy Inc. and Dennis Morice.

### **Background**

[2] The Commission's Director of Enforcement issued an amended amended notice of hearing on 10 September 2007 alleging contraventions of Alberta securities laws and conduct contrary to the public interest against Arbour Energy Inc.; Dennis Morice; Heinz Weis; Arthur Wigmore; Milowe Brost; The Institute For Financial Learning, Group of Companies Inc.; Merendon Mining Corporation Ltd.; and Gary Sorenson (together, the "Respondents").

[3] The merits hearing of this matter was scheduled to begin on 12 May 2008, but was ultimately adjourned to 16 March 2009 due to an application to the Court of Queen's Bench on certain constitutional questions. As part of that process, the panel made certain directions relating to disclosure on 1 May 2008.

[4] On 6 February 2009 Mr. Archer applied for an adjournment of the March hearing dates on the basis that, as a result of the decision issued by the Court of Queen's Bench on the constitutional questions, he required additional time to deal with the appeal and stay process. The panel ruled that there was sufficient time for all parties to prepare for the upcoming March hearing dates and declined to grant Mr. Archer's adjournment request.

[5] On 24 February 2009 Mr. Archer applied for an adjournment of the March hearing dates – first, because of concerns expressed regarding recently disclosed or soon-to-be-disclosed materials; and, second, in light of his request to have the panel direct Staff to apply to the Court of Queen's Bench for an order relating to the taking of commission evidence from Mr. Sorenson. The panel determined that it would not be unfair to proceed with the hearing on the basis that, considering the public interest in having enforcement proceedings resolved in a timely manner, the Respondents still had ample time to review and digest the new disclosure, and their ability to adequately conduct their case, including their cross-examination of Staff's witnesses, had not been and would not be compromised. However, the panel stated that a new application could be made if a party believed that it was warranted.

### **Disclosure Issues as a Ground for Adjournment**

[6] Mr. Archer applied today for an adjournment of the hearing currently scheduled to begin on 16 March 2009. Mr. Archer contended that there are volumes of material that have not yet been disclosed to or received by him, and there is an uneven playing field because certain of the Respondents have had access to much of that material through another proceeding. Further, recent information indicates the material from that proceeding may be potentially relevant to Mr. Archer's clients' ability to make full answer and defence to Staff's allegations.

[7] Mr. Archer advised that Staff disclosed a 100-some page RCMP interview transcript of Bradley Regier to the Respondents on 27 February 2009. This transcript apparently refers to a

large volume of as-yet-undisclosed documents used in the taking of that statement. Mr. Archer noted that he became aware on 2 March 2009 that Staff intend to call Mr. Regier as a witness in the hearing. We also heard that Staff plan to interview Mr. Regier shortly. Mr. Archer contended that the as-yet-undisclosed documents are relevant and ought to be disclosed, when available.

[8] Staff acknowledged that, although they do not have the documents referred to in the Regier interview transcript, they should be getting them shortly during their upcoming interview of Mr. Regier and that those documents may well be relevant and, if so, would be disclosed to the Respondents. Staff were not certain as to the timing of that interview or disclosure.

[9] Mr. Archer also submitted, in light of Staff's decision to call Mr. Regier as a witness, that Staff's entire file in the matter of Capital Alternatives is "extremely relevant" and should be disclosed. Mr. Archer indicated that Staff recently advised that they agreed some of the material in the Capital Alternatives file may well be relevant. Staff confirmed they have made arrangements for the Respondents to attend at the Commission to view and copy, at their cost, any documents from the Capital Alternatives file. Mr. Archer indicated that the potential volume of documents could be so great that this process, including his review and hearing preparation, could not be completed by the week of 16 March 2009 or even the week of 20 April 2009 – the next dates scheduled for the hearing.

[10] Mr. Archer then turned to the matter of the material listed in a document titled "Report to a Justice" (the "RCMP Report"). The Respondents apparently received the RCMP Report on 11 February 2009 from Staff. We understand that Staff successfully applied to the Court of Queen's Bench on 20 February 2009 for production from the RCMP of two file folders from one of the boxes and disclosed that material to the Respondents this week.

[11] Mr. Archer's application to the Court of Queen's Bench to obtain from the RCMP other items listed in the RCMP Report was adjourned from 27 February 2009 to tomorrow – 6 March 2009. Mr. Archer is uncertain as to the outcome of that application but believes there may be relevant information held by the RCMP that will assist his clients in making full answer and defence to Staff's allegations against them. Mr. Archer contended that, as it is uncertain when he will receive this information from the RCMP, it would not be fair to proceed with the hearing in the absence of what he characterized as potentially exculpatory evidence.

[12] Counsel for Heinz Weis and Arthur Wigmore supported Mr. Archer's application for essentially the same reasons. Counsel for Merendon Mining Corporation Ltd. and Mr. Sorenson opposed the application for adjournment. That counsel argued that, if the adjournment were granted, his clients should be severed from this proceeding and Staff should proceed with the hearing of their allegations against his clients on 16 March 2009, as scheduled.

[13] Counsel for Milowe Brost and The Institute For Financial Learning, Group of Companies Inc. took no position.

## **Decision**

[14] This Commission has often commented on the importance of disclosure and the principles surrounding disclosure in the context of a securities regulatory hearing – for example, in *Re Ironside*, 2005 ABASC 683 at paras. 28-29, the Commission stated:

Full, fair and timely disclosure of all relevant material is a key factor in ensuring fairness to respondents facing enforcement proceedings under the [*Securities Act*].

Allegations of inadequate disclosure, when raised, strike at one of the core principles of natural justice – ensuring that a respondent has an adequate opportunity to be heard. In the securities regulatory context, that includes knowing the case to be met and being able to make full answer and defence.

[15] Here there were no suggestions that Staff have failed in their disclosure obligation. However, certain Respondents advised that new, potentially relevant information has come to light that may assist at least some of the Respondents in making full answer and defence and ensure a level playing field among all parties.

[16] We recognize that disclosure is an ongoing process and there can be no perfect disclosure in complex cases. That said, it does appear that it would be unfair to at least some of the Respondents if we were to proceed with the hearing on 16 March 2009 when it is not certain – and seems unlikely – that this new, potentially relevant information will be available to them in sufficient time for review and hearing preparation. It is also possible that this new information may well assist the hearing panel in its determination of Staff's allegations.

[17] Staff agreed that the March hearing dates are not feasible. Although prepared to begin presenting their case on 20 April 2009 they acknowledged that there still might not be complete and effective disclosure by that date. Staff suggested that the panel retain the April hearing dates as a means of ensuring that the parties continue their efforts to prepare for the hearing. Staff also suggested that monthly dates be set aside for the purpose of case management to ensure this matter proceeds to hearing.

[18] In all the circumstances, we too are of the view that it is not feasible for the hearing to begin on 16 March 2009. We are also of the view that it would not be efficient to commence the hearing for only one week in April. We therefore grant Mr. Archer's application for adjournment of the hearing to 1 September 2009 at 9 am. We are also ordering that this matter proceed to case management, with the first date set for Wednesday 25 March 2009 at 10 am and the second case management date on Friday 24 April 2009 at 10 am.

[19] At the first case management date counsel are requested to advise the panel whether the following dates in May, June, July and August 2009 are acceptable for the purpose of case management:

13 May at 2 pm;  
15 June at 10 am or 2 pm; or 16 June at 10 am;  
7 July at 10 am or 2 pm; or 8 July at 2 pm; and  
12 August at 2 pm.

[20] Regarding Mr. Solomon's request for severance of his clients from this proceeding, we are of the view that the allegations against the Respondents, including Mr. Solomon's clients – Merendon Mining Corporation Ltd. and Mr. Sorenson – are interwoven to such an extent that it would be inefficient, and would not be in the public interest, to order severance. We therefore do not grant Mr. Solomon's request for severance.

[21] That concludes our ruling on today's application.

5 March 2009

**Approved:**

*"original signed by"*  
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Glenda A. Campbell, QC