

THIS RULING IS UNDER APPEAL.

**ALBERTA SECURITIES COMMISSION**

**RULING**

**Citation: Arbour Energy Inc., Re, 2009 ABASC 290**

**Date: 20090616**

**Arbour Energy Inc. and Dennis Morice**

**Panel:** Stephen Murison  
Roderick McKay, FCA

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

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

Glenn Solomon  
for Merendon Mining Corporation Ltd.  
and Gary Sorenson

David de Vlieger and Katrina Edgerton-McGhan  
for Heinz Weis

Patrick Sullivan  
for Arthur Wigmore

**Date of Hearing:** 9 June 2009

**Date of Decision:** 16 June 2009

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### **I. INTRODUCTION**

[1] Arbour Energy Inc. ("Arbour") and Dennis Morice ("Morice") are two of the eight respondents in a proceeding (the "Main Proceeding") commenced by staff ("Staff") of the Alberta Securities Commission (the "Commission") pursuant to a thrice-amended notice of hearing dated 27 May 2009 (the "Arbour NOH", the text of which is reproduced in the Appendix to this Ruling). The Arbour NOH sets out numerous allegations against the respondents in the Main Proceeding (the "Arbour Respondents"), in connection with what Staff term "an illegal distribution of Arbour securities" and "a course of conduct relating to the securities of Arbour that perpetrated a fraud". A hearing (the "Main Hearing") into the allegations is scheduled to begin in September 2009.

[2] Arbour and Morice (the "Applicants") filed with the Commission an application dated 15 May 2009 (the "Application") seeking the removal of Glenn Solomon ("Solomon") as counsel of record for two of the other Arbour Respondents, Gary Sorenson ("Sorenson") and Merendon Mining Corporation Ltd. ("Merendon"), on the ground of an alleged conflict of interest involving Solomon and two individuals anticipated to be called as witnesses in the Main Proceeding, Bradley Regier ("Regier") and Edna Forrest ("Forrest").

[3] A panel of two Commission members, neither of whom will be part of the panel that will preside over the Main Hearing, was designated to consider the Application. We received written submissions on the Application from the Applicants, from Merendon and Sorenson, from two of the other Arbour Respondents – Heinz Weis ("Weis") and Arthur Wigmore ("Wigmore") – and from Staff. At a hearing into the Application on 9 June 2009 we heard oral submissions from counsel for each of those parties. The two remaining Arbour Respondents, Milowe Brost ("Brost") and The Institute For Financial Learning, Group of Companies Inc. ("IFFL"), made no submissions and did not appear at the Application hearing.

[4] This is our decision on the Application, with our reasons. Stated briefly, we do not accept the Applicants' contention that the removal of Solomon as counsel for Merendon and Sorenson for purposes of the Main Proceeding is warranted, but we do conclude that there is sufficient indication of a potential conflict of interest involving Solomon and the likely witnesses Regier and Forrest to warrant protective measures (which we specify) for the conduct of the Main Proceeding. Notwithstanding the protective measures we direct, we discern nothing evidencing – or even hinting at – any actual impropriety or want of professionalism on the part of Solomon.

### **II. ESSENCE OF THE APPLICATION AND POSITIONS OF THE PARTIES**

[5] According to the Application:

- Solomon had previously acted for Regier and Forrest in another proceeding "with respect to matters directly related to the issues and allegations" in the Main Proceeding. (Among the respondents in that other proceeding was a company called Strategic Metals Corp. ("Strategic"); we therefore refer to that other proceeding as the "Strategic Matter".)

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- The evidence of Regier and Forrest "will be placed before the panel in the [Main Hearing] by parties adverse in interest to . . . Solomon's clients, either Staff or Arbour or both".
- "Based on the statements and other material provided by Staff in relation to the evidence provided by Regier and Forrest there is no doubt that both put . . . Solomon's present clients Sorensen [sic] and Merendon at the center [sic] of the fraudulent activity alleged."
- Solomon "is in an irreconcilable conflict of interest and cannot continue to act" in the Main Proceeding.

[6] In essence, the Applicants contended that Solomon's alleged "irreconcilable conflict of interest" renders him incapable of properly serving his current clients (Merendon and Sorenson) in the Main Proceeding while simultaneously fulfilling his enduring duty of loyalty to his former clients Regier and Forrest. More particularly, the Applicants asserted that Solomon would be unable to cross-examine Regier or Forrest appropriately in the Main Hearing – either having to soften his approach to such cross-examination to the detriment of his current clients, or finding himself, in such cross-examination, using (or risking his actual or perceived use of) confidential information that he acquired in the course of his earlier representation of Regier and Forrest in the Strategic Matter.

[7] The Applicants contended, through their counsel Christopher Archer ("Archer"), that nothing short of Solomon's removal for the purposes of the Main Proceeding would adequately resolve the claimed conflict.

[8] Merendon and Sorenson (through their counsel Solomon) vigorously opposed the Application. They argued that, among other things, Solomon's removal would significantly prejudice them by depriving them of the services of counsel of their choice (counsel with whom they have had a lengthy relationship founded on trust and respect) and forcing them to retain new counsel (from among a limited group who practise in a specialized area) who would require time to become familiar with the complex Main Proceeding, necessarily delaying the Main Hearing also to their prejudice. Solomon tendered an affidavit of a Merendon director echoing these concerns on that company's behalf, and Solomon stated unequivocally (a statement we accept) that his clients Merendon and Sorenson are fully aware of the Application and the outcome sought therein by the Applicants. Merendon and Sorenson contended that measures less intrusive than Solomon's removal would suffice to address the alleged conflict.

[9] Staff, Weis and Wigmore also opposed the Application. They each contended that the outcome sought by the Applicants would involve unwarranted delay of the Main Hearing, contrary to the public interest, to the interests of the respective Arbour Respondents, or both. They asserted either that no protective measures are required to address the alleged conflict, or that measures less intrusive than Solomon's removal would suffice to address any concerns.

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**III. BACKGROUND**

**A. Background to Alleged Conflict of Interest**

[10] The Strategic Matter is concluded and its outcome is not in issue here. However, the merits of the Application turn, to a considerable degree, on the extent of any relationship, overlap or commonalities between the Main Proceeding and the Strategic Matter. It is therefore useful to review briefly what is, or was, at issue in the two matters.

**1. The Strategic Matter**

[11] The Strategic Matter was heard by the Commission in 2006 and 2007 (the "Strategic Hearing"). It culminated in two Commission decisions, the first on the merits of Staff's allegations in that case and the second on sanctions (cited respectively as *Re Capital Alternatives Inc.*, 2007 ABASC 79 and *Re Capital Alternatives Inc.*, 2007 ABASC 482). There were six respondents (the "Strategic Respondents"): Strategic; Capital Alternatives Inc. ("CAI"); Brost (the only Strategic Respondent who is also an Arbour Respondent); Carol Weeks ("Weeks"); Regier; and Forrest. Staff's allegations included: illegal (because of the absence of registration, a prospectus or available exemptions) trades and distributions of securities of Strategic; false or misleading statements in offering memoranda and to investors and Staff investigators; and conduct amounting to a fraud on shareholders of Strategic. In September and October 2005, in the course of Staff's investigation before the Strategic Hearing, Regier and Forrest, having been affirmed and with counsel present, were interviewed by Staff. Solomon acted for Regier and Forrest at the Strategic Hearing, but he was (as he explained in the Application hearing) retained only about six weeks before it began; Regier and Forrest had different counsel at their earlier investigative interviews just mentioned.

[12] In common with the other Strategic Respondents, Regier and Forrest (through their counsel, Solomon) contested the allegations against them. None of the Strategic Respondents testified at the Strategic Hearing, but a considerable volume of documentary evidence and witness testimony was proffered by various parties. The documentary evidence included excerpts from the transcripts of Regier's and Forrest's earlier investigative interviews. Public records named Weeks, Regier and Forrest as the three directors of Strategic (although Brost, Sorenson and Wigmore had previously, but supposedly erroneously, been so identified in those records). The evidence at the Strategic Hearing, and the resulting decisions, included references to most (perhaps all) of the Arbour Respondents.

[13] Many (but not all) of Staff's allegations in the Strategic Matter were sustained, and the Commission ordered sanctions against all of the Strategic Respondents. Among the allegations sustained were that Regier and Forrest had made false or misleading statements to Staff, and that all Strategic Respondents had engaged in a course of conduct that amounted to a fraud on Strategic shareholders. None of the findings in the Strategic Matter is determinative of any of the issues in the Main Proceeding.

**2. The Main Proceeding**

[14] The scope of a Commission enforcement hearing is delineated by the notice of hearing. We reproduce here excerpts from the introductory and closing summaries of the Arbour NOH (portions referring solely to Brost and IFFL are omitted):

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### *Summary of Breaches*

1 [Staff] alleges that [Arbour], [Morice], [Weis], [Wigmore], [Brost], [IFFL], [Merendon], and [Sorenson] (collectively, the Respondents), engaged in a course of conduct relating to the securities of Arbour that perpetrated a fraud on Alberta investors.

...

3 Staff alleges that Arbour, Morice, Weis, Wigmore, Brost, and IFFL engaged in an illegal distribution of Arbour securities.

...

5 Staff alleges that Arbour, Morice, Weis, and Wigmore made false or misleading statements to investors in offering documents.

6 Staff alleges that Arbour, Morice, Weis, and Wigmore failed to file continuous disclosure documents as required by the Alberta securities laws, and failed to provide timely and reliable continuous disclosure to existing and prospective investors.

7 Staff alleges that the Respondents acted contrary to the public interest.

...

### *Breaches*

40 As a result of the above, Staff alleges that:

40.1 The Respondents, except for Merendon, breached section 75(1)(a) of the *Act* by trading in securities of Arbour without being registered with the Executive Director to do so;

40.2 The Respondents, except for Merendon, breached section 110 of the *Act* by engaging in a distribution of the securities of Arbour without a receipt for a preliminary or final prospectus issued by the Executive Director and without an appropriate exemption;

...

40.4 Arbour, Morice, Weis, and Wigmore breached subsection 92(4.1) of the *Act* by making statements that they knew or ought reasonably to have known were misleading or untrue in OM1, OM 2 and OM 3;

40.5 The Respondents breached subsection 93(b) of the *Act* by engaging in a course of conduct relating to the sale of preferred shares of Arbour and the use of proceeds, which perpetrated a fraud on investors;

...

41 As a result of the fraudulent conduct, the failures to comply with the registration and prospectus requirements in the *Act*, . . . the misrepresentations and misleading statements made to investors in offering documents, the false certification of the accuracy of the OM's, . . . Staff alleges that the Respondents variously acted contrary to the public interest.

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[15] According to the Arbour NOH, Arbour is an Alberta company of which, at "all material times", Morice was president and he, Weis and Wigmore were directors. As noted, both Weis and Wigmore opposed the Application made by Arbour. While it was suggested at the Application hearing that this raised at least a question of corporate governance, it is unnecessary to explore the point here.

[16] Staff conducted another investigative interview of Regier in March 2009. Staff's pre-hearing disclosure to the Arbour Respondents – apparently totalling over 130 000 pages – included (or Staff otherwise made available to the Arbour Respondents) the transcripts of Staff's investigative interviews of Regier (from 2005 and 2009) and Forrest (from 2005).

### **3. Police Investigation**

[17] The Royal Canadian Mounted Police ("RCMP") have also launched an investigation involving or touching on at least some whose names arose in the Strategic Matter or appear in the Arbour NOH. The scope of the RCMP investigation is not known to us. There are, however, transcripts of "Cautioned/KGB Video Recorded Statement[s]" made to the RCMP by Regier and Forrest (the "RCMP Statements"), which appear to have come into Staff's possession and then been shared with the Arbour Respondents as part of Staff's pre-hearing disclosure for the Main Proceeding. In the RCMP Statements, Regier and Forrest describe events, conversations and relationships involving various individuals and companies including all of the Arbour Respondents; although Arbour is mentioned several times, the focus appears to have been on other entities (including Strategic and CAI).

### **4. Regier and Forrest**

[18] Staff have declared their intention to call Regier as a Staff witness – and indicated that they might also call Forrest as a Staff witness – in the Main Hearing. Archer declared his intention to call Forrest as a witness if Staff do not. There was no suggestion that Regier or Forrest should not be called – or be permitted to be called – as a witness in the Main Hearing.

[19] Archer asserted that the testimony of Regier and Forrest (based presumably on what they have said in their post-Strategic Matter investigative interview and statements) would go to the heart of his clients' defence and thus assist in exonerating his clients in the Main Proceeding. Archer also suggested that Regier's and Forrest's testimony would support his clients' theory of what the Main Proceeding is all about, and be damning to Sorenson and Brost.

[20] Archer went further, characterizing Forrest (or Regier or perhaps both) as a potential "loose cannon" who might even name Solomon in such a way that Solomon could become a witness in the Main Hearing. Archer came to this view apparently based on a reference, in Forrest's RCMP Statement, to her having received purportedly suspect documents from Sorenson's "legal counsel" (not identified by name). This, it was suggested, underscores or heightens the degree of Solomon's conflict and the necessity for his removal.

### **5. Theories of the Case in the Main Proceeding**

[21] The Applicants contended, through Archer, that the Main Proceeding is really a case about an overarching fraud – a Ponzi scheme involving "approximately half a billion dollars" – principally orchestrated by Sorenson and Brost. (Archer suggested, it seemed, that the testimony

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of Regier and Forrest would essentially treat these two Arbour Respondents as joint actors – a suggestion, Solomon countered, based on an isolated reference or references by Regier and Forrest to Sorenson and Brost having been "partners" in something.) According to Archer, the fraud alleged in the Arbour NOH, the one adjudicated in the Strategic Hearing and the one being investigated by the RCMP are essentially the same. Archer asserted that Regier and Forrest, in their testimony at the Main Hearing, would point the finger of culpability for this overarching fraud partly at Sorenson (and that the claimed overarching fraud "points away from Arbour's being implicated"). Thus, in Archer's submission, were Solomon to represent Merendon and Sorenson in the Main Hearing, Solomon would find himself acting for his current clients in opposition to former clients for whom he had also acted, all in respect of the same overarching matter – the claimed irreconcilable conflict of interest.

[22] None of the other parties supported the Applicants' interpretation. Merendon and Sorenson (through Solomon) contended that the Main Proceeding is distinct from the Strategic Matter. Staff – whose case, after all, the Main Proceeding is – concurred. They pointed to the Arbour NOH in support of their contention that the case relates discretely to Arbour – what Arbour funds were used for and how they were raised. In other words, Staff's position was that this is a case of capital market misconduct with Arbour and Arbour securities at the centre and that the Strategic Matter, although involving some of the same "players" and similar capital market misconduct, centred on Strategic and Strategic securities. Parallels and possible larger background connections notwithstanding, Staff's position was that the two cases are not the same but rather discrete matters. Weis and Wigmore (who adopted Staff's position on this) agreed.

### **B. Parties' Positions on Existence of Conflict and Appropriate Outcome**

[23] The Applicants contended that Solomon is in an "actual . . . not potential" conflict, one that is "unsurpassed" and "irreconcilable", which "strikes at the heart of the administration of justice". They argued that the conflict is so egregious that it cannot be cured by anything short of Solomon's removal.

[24] All other parties who made submissions disagreed. Merendon and Sorenson contended that measures less intrusive than Solomon's removal would suffice to address the alleged conflict. Staff and Wigmore contended that this is not a true conflict of interest situation at all. Staff, Weis and Wigmore asserted either that no protective measures are required to address the alleged conflict, or that measures less intrusive than Solomon's removal would suffice to address any concerns.

#### **1. Professional Conduct Codes**

[25] In support of their position, the Applicants pointed in part to the *Code of Professional Conduct* (the "Conduct Code") of the Law Society of Alberta (the "Law Society"), which regulates the practice of law in the province. The Application also referred to a code of conduct issued by the Canadian Bar Association (the "CBA"), a voluntary lawyers' organization. Both of these codes include provisions to the effect that a lawyer should not, or must not, put himself or herself in the position of rendering legal service for one party in circumstances in which the lawyer could thereby act to the detriment, or perceived detriment, of another party for whom the lawyer acts or has acted in the past.

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### 2. Judicial and Tribunal Decisions

[26] The parties who made submissions directed us to a number of judicial and administrative tribunal decisions.

[27] There was no dispute that a pertinent authority was the Supreme Court of Canada decision in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235. The Applicants emphasized the following comments of Sopinka J. in that decision (at 1259-1261):

. . . [T]he test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest? In this regard, it must be stressed that this conclusion is predicated on the fact that the client does not consent to but is objecting to the retainer which gives rise to the alleged conflict.

Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

In answering the first question, the court is confronted with a dilemma. In order to explore the matter in depth may require the very confidential information for which protection is sought to be revealed. This would have the effect of defeating the whole purpose of the application. American courts have solved this dilemma by means of the "substantial relationship" test. Once a "substantial relationship" is shown, there is an irrebuttable presumption that confidential information was imparted to the lawyer. In my opinion, this test is too rigid. There may be cases in which it is established beyond any reasonable doubt that no confidential information relevant to the current matter was disclosed. One example is where the applicant client admits on cross-examination that this is the case. This would not avail in the face of an irrebuttable presumption. In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.

The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. Moreover, the former client would feel at a disadvantage. Questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship.

[28] It was the Applicants' position, first, that the solicitor-client relationships between Solomon and Regier and Solomon and Forrest in the Strategic Matter give rise to a presumption, not rebutted, that confidential information was imparted to Solomon in the course of those relationships relevant to the Main Proceeding. That confidential information was imparted to

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Solomon in the course of those relationships was not disputed, although there was some issue taken with the relevance of such information to the Main Proceeding.

[29] Second, the Applicants contended that the duty of loyalty that a lawyer owes to a client – here, the duty owed by Solomon to Regier and Forrest – survives that retainer. This, too, was not disputed.

[30] As to the scope of that duty of loyalty and the constraints it imposes on Solomon, the Applicants claimed that Solomon's representation of Regier and Forrest in the Strategic Matter bars him from "act[ing] against" (in the words of *MacDonald*) those former clients in the Main Hearing. Moreover, again citing *MacDonald*, Archer asserted that Solomon's consequent disqualification from the Main Hearing "is automatic. No assurances or undertakings not to use [relevant confidential] information will avail" him.

[31] Merendon and Sorenson (through Solomon) and Weis asserted that Solomon would not actually be "act[ing] against" Regier or Forrest in the Main Hearing, so the strict consequences of *MacDonald* do not apply here. Solomon also noted that, in *MacDonald*, Sopinka J. made clear that his conclusion as to the appropriate test was "predicated on the fact that the client does not consent to but is objecting to the retainer which gives rise to the alleged conflict" but that, in this case, "there is some reason to believe that both Regier and Forrest would waive any conflicts, with the benefit of independent legal advice".

[32] The Applicants also pointed us to *R. v. Neil*, 2002 SCC 70, *R. v. Brissett*, 2005 CarswellOnt 370 (S.C.J.), and *R. v. Edkins*, 2002 NWTSC 9. The Applicants noted that *Neil* is authority for the proposition that a conflict should be raised at the earliest practicable stage. They urged reliance on *Brissett*, in which the court found that simply having independent counsel cross-examine a former client of the accused's counsel would not resolve the conflict of interest where the former client was a principal Crown witness and the defence strategy revolved around countering the former client's evidence, despite the prior representation not involving substantially the same subject matter. The Applicants also noted that, in *Edkins*, in ordering the removal of the accused's counsel of choice, the court reasoned (at para. 21) that, "[e]ven if [the accused's counsel] does not consciously remember anything that he thinks could be used adversely against his former client [the complainant witness], one can never be sure as to what unconscious thoughts may emerge so as to prompt questions".

[33] Merendon and Sorenson countered that, in *Neil*, Binnie J. noted that a lawyer's freedom from conflicting interests and a litigant's right to retain his or her counsel of choice are both aspects of protecting the integrity of the legal system and that, in certain circumstances in which a disqualification motion arises, public confidence in the legal system could be undermined by interfering with the latter aspect. In a similar vein, Staff directed our attention to the following comment of Binnie J. in *Neil* (at para. 15): "The issue always is to determine what rules are sensible and necessary and how best to achieve an appropriate balance among the competing interests." In this regard, Staff argued that, while the right to retain counsel of one's choice is not absolute, the need for public confidence in the administration of justice is not always served by the removal of counsel, particularly in situations where the conflict can be managed.

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[34] Merendon and Sorenson also provided the panel with *R. v. Parsons*, 1992 CarswellNfld 9 (C.A.), and *R. v. Dix*, 1998 ABQB 92. In *Parsons*, the court allowed the accused's counsel to remain on the record where the counsel's former client, scheduled to be a witness at the accused's trial, had signed an irrevocable waiver and consent (waiving the solicitor-client privilege arising out of the former relationship and consenting to his former counsel representing the accused) and the accused had signed a consent and declaration (stating that he had retained his counsel in full knowledge of his counsel's representation of the former client and realizing that the former client might be called as a witness and have to be cross-examined), each signed after the receipt of independent legal advice. We note that in that case the court stated (at para. 27):

... Whilst waivers and consents will remain important considerations, the test as to whether use of confidential information might occur should be applied, regardless of the presence of consents of immediately affected parties, in all criminal proceedings where the disqualification of counsel for conflict of interest in circumstances like the present case is in issue. If the conclusion is that such use might occur, then this fact should be balanced against the existence of the consents in an assessment of the overriding concern of the public perception in the fairness of the process.

[35] In *Dix*, the court directed that the accused's lawyer could continue to represent the accused provided that an independent lawyer were retained to conduct the cross-examination of the accused's lawyer's former client and sufficient safeguards were put in place to ensure that the independent lawyer would have no access to confidential information obtained by the accused's lawyer. The court stated that this result might have been different had the conflict application been brought earlier in the proceedings. The court also observed (at para. 42) that, although the accused's lawyer was not acting against his former client, the Supreme Court of Canada in *MacDonald* "acknowledged that it would even be permissible, given the appropriate protections, for a lawyer to act against a former client".

[36] Weis referred us to *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, and *Coutu v. Jorgensen*, 2004 BCCA 400, for the propositions, respectively, that a party's choice of counsel in complex matters is an important consideration in assessing conflict applications and that a cautious approach, acknowledging the right of a party to his or her choice of counsel, is required in addressing such applications.

[37] Finally, the panel drew the attention of the parties to *Re AiT Advanced Information Technologies Corporation* (2007), 30 OSCB 6484, and invited comment on its relevance to the Application. *AiT* involved an enforcement hearing before the Ontario Securities Commission (the "OSC") in which the lawyer for a respondent had represented several other individuals in the OSC investigation that resulted in the notice of hearing being issued. It was anticipated that some of those other individuals might appear at the hearing as witnesses. OSC staff challenged the lawyer's participation in the hearing. The OSC panel permitted the lawyer to remain as counsel of record for the respondent on the basis, first, that independent counsel would be retained to cross-examine any of the first lawyer's former clients called as witnesses and, second, that the first lawyer would undertake that: there would be no communication between him and independent counsel with respect to any matter pertaining to the cross-examination; independent counsel would not consult with the first lawyer as to the nature of the evidence or the defence; and any former client of the first lawyer called as a witness by the respondent would provide,

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after having received independent legal advice, a waiver of the right to object to be examined or re-examined by the first lawyer.

[38] The Applicants, Weis and Wigmore contended that *AiT* is factually distinguishable. Solomon, on behalf of Merendon and Sorenson, agreed; he contended that an appropriate remedy is very fact-specific and that written waivers and consents from Regier and Forrest, if obtainable, might appropriately address any concerns regarding cross-examination by him. Staff submitted that the approaches as to protective measures suggested in *AiT* (at para. 53) strike a reasonable balance of the competing interests at stake in the Application.

### **3. Harm Posited**

[39] We heard submissions as to the harm that might follow either from Solomon's alleged conflict or from possible responses to the Application.

[40] Archer, as noted, asserted that Solomon would find himself either: (i) softening his stance in cross-examination, and thereby softening his defence of his clients Merendon and Sorenson; or (ii) enjoying an unfair advantage in cross-examining Regier and Forrest – witnesses whose testimony, Archer asserted, would go to the heart of his clients' defence and thus assist in exonerating his clients in the Main Proceeding. As to the former, Archer suggested that Merendon and Sorenson, despite vigorously opposing the Application, might have a basis for appealing any ultimately unfavourable decision rendered in the Main Hearing (grounded, presumably, on inadequate legal representation) – the implication being that such an appeal would adversely affect the Applicants or others. This supposition aside, Archer clarified that the alleged conflict exposed his clients to the risk that Solomon could use confidential information, obtained by him in his earlier retainer, to unfairly expose untruths in testimony that Regier or Forrest might give in the Main Hearing or otherwise diminish the credibility of their anticipated testimony favourable to the Applicants.

[41] Merendon and Sorenson argued that Solomon's removal would cause them significant harm. First, they would be deprived of representation by their chosen counsel, with whom they have had a lengthy relationship founded on trust and respect. Second, Solomon has already expended considerable time and effort on the Main Proceeding and in preparation for the Main Hearing. Replacing him now would mean much wasted time, effort and expense, and Merendon and Sorenson would bear the burden of finding a new lawyer to redo much of that work.

[42] All parties who argued against the Application apprehended that Solomon's removal from the Main Proceeding at this late stage (less than three months before the scheduled commencement of the Main Hearing) and his replacement by someone unfamiliar with the case would delay the Main Hearing. This, it was contended, would be detrimental to all of the Arbour Respondents who opposed the Application – delaying unreasonably the ultimate resolution of the allegations against them – and also contrary to the public interest in seeing enforcement matters brought to a timely conclusion.

### **4. Alternatives Proposed by Solomon**

[43] Solomon suggested means of addressing his potential conflict in the Main Proceeding. First, he urged that we consider an undertaking, from him alone, to (among other things):

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(i) refrain from acting against Regier (or Forrest) were they somehow to become parties to the Main Proceeding; (ii) advise Regier (or Forrest, as the case may be) that Solomon would withdraw any question on cross-examination, an answer to which would violate a confidence that had been shared with Solomon, without Regier's (or Forrest's) consent; and (iii) refrain (without Regier's (or Forrest's) consent) from using any confidential information that Solomon possesses as a result of his previous representation of Regier (or Forrest).

[44] Second, Solomon suggested two alternatives that he saw as being of equivalent stringency:

- an undertaking from him, as just discussed, coupled with waivers and consents from Regier and Forrest; or
- the retention of a new, independent "delegate" lawyer to cross-examine Regier and Forrest for Merendon and Sorenson, provided that Solomon could assist that lawyer, within limits (specifically, without using confidential information derived from Regier or Forrest), coupled with undertakings to the same end from both Solomon and that delegate lawyer.

[45] Solomon proposed that, in the absence of express consent from Regier or Forrest, he would use no information to cross-examine them unless he could point (if asked) to an independent source (other than Regier or Forrest) for the information. We understood his proposal to be that the same would apply were Solomon to be assisting a delegate lawyer.

[46] Solomon presented draft forms of an undertaking from himself, and of a waiver and consent that might be obtained from Regier. He also indicated his belief that Merendon and Sorenson would be willing to acknowledge and waive Solomon's alleged conflict.

[47] As a further alternative, Solomon proposed that he might be allowed to conduct examination-in-chief (as distinguished from cross-examination) of Regier and Forrest at the Main Hearing, with the parties (or counsel for the parties) who actually call those witnesses also examining them "in chief". Solomon contended that there is no prohibition against counsel examining a former client "in chief" and that, accordingly, under this approach there would be no basis for a claim of conflict or the need for any other constraints on Solomon's acting in the Main Hearing. None of the parties took issue with his contention of there being no such prohibition.

[48] All parties at the Application hearing, other than the Applicants, indicated that alternatives proposed by Solomon would be generally acceptable. The Applicants suggested that they would be wholly inadequate and maintained their position that Solomon must be removed.

### **5. Parties' Positions Summarized**

[49] In summary, the Applicants argued that Solomon is in such an egregious conflict situation that nothing less than his removal from the Main Proceeding will suffice. The other parties who made submissions contended that, in the circumstances, Solomon's removal is unnecessary and would be harmful; to the extent that they considered any protective measures necessary at all, they expressed general agreement with alternatives proposed by Solomon.

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### IV. ANALYSIS

#### A. Issues Summarized

[50] The issues may be summarized as follows:

- "standing" concerning the Application;
- whether a conflict of interest exists and, if so, its nature; and
- the appropriate response (if any) to such conflict of interest as may be found.

#### B. Standing

[51] There was no dispute as to this panel's authority to consider and rule on the Application (*AiT* at para. 29). Nor was there any dispute that such orders as we make here will govern the parties' conduct in the Main Hearing.

[52] That the Application originated neither with the party (Staff) identified as intending to call a witness in connection with whom a conflict was alleged, nor with a respondent who is a current client of the lawyer alleged to be in conflict, made it somewhat unusual. The Application and most of the Applicants' submissions appeared grounded more on claimed general principles (the integrity of the administration of justice) or potential harm to others (Solomon's current or former clients) than on any specified interest of the Applicants. For these reasons – although none of the other Arbour Respondents disputed it – we consider the Applicants' standing.

[53] As mentioned, Archer did in his submissions posit a harm that the Applicants might incur from the claimed conflict of interest, namely the risk that Solomon might, in cross-examination, unfairly reveal untruths or a lack of credibility in witness testimony otherwise (if believed) likely to be favourable to the Applicants. Archer also declared his intention to call Forrest as a witness if Staff do not. In the circumstances we are satisfied that the Applicants had standing and were entitled to have the Application adjudicated.

#### C. Is There a Conflict?

##### 1. Relevance of Professional Conduct Codes

[54] The practice of law in Alberta is regulated by the Law Society, a body empowered to investigate and discipline Alberta lawyers for professional misconduct. Such authority does not rest with the Commission or this panel; we do not enforce the Law Society's Conduct Code. Nor do we enforce the code of conduct of the CBA, a voluntary organization for lawyers. The relevance here of the Conduct Code (and the CBA's code) lies essentially in indicating the sorts of conflict that lawyers practising in Alberta are warned against, and why. These codes are not determinative of our conclusions.

##### 2. Relation between the Strategic Matter and the Main Proceeding

[55] We are not persuaded that the Main Proceeding and the Strategic Matter are inseparable as the Applicants contended. Nor are we persuaded by Archer's suggestion in oral submissions that, whatever our understanding of the two cases, we must accept his theory of them as the basis for our analysis of the Application. Whether or to what extent Solomon is in conflict depends not on one or another of the parties' own theories, but rather on the actuality of the two cases giving rise to his supposed conflict.

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[56] The task of the panel in the Main Hearing will be to determine whether the allegations levelled by Staff in the Arbour NOH are proved and then, if so, whether any orders ought to be made in consequence. The scope of the Main Hearing is thus delineated by the Arbour NOH. It is apparent from a plain reading of that document that the allegations centre on distributions of Arbour securities and the use of funds raised thereby. As in any enforcement proceeding, any attempt by a party to steer the Main Hearing beyond the allegations might be met with prompt, and probably successful, objections on grounds of irrelevance. Further, even if Staff or an Arbour Respondent were successfully to pursue Archer's theory and demonstrate some overarching fraud that embraced what was found to have occurred in the Strategic Matter, it does not automatically follow that this would prove – or disprove – Staff's explicit allegations in the Main Proceeding, or exonerate any particular Arbour Respondent.

[57] There are, undoubtedly, areas of commonality between the Strategic Matter and the Main Proceeding. The evidence at the Strategic Hearing, and the resulting decisions, included references to most (perhaps all) of the Arbour Respondents, and information uncovered in the Strategic Matter may be used as evidence in the Main Proceeding. One of the Strategic Respondents is among the Arbour Respondents. The two matters also involved similar capital market misconduct. However, and importantly, the allegations in the Strategic Matter were focused on distributions of Strategic securities and the use of funds raised thereby.

[58] For the reasons given, we are convinced that the Strategic Matter and the Main Proceeding are distinct matters, and that for Staff to succeed in the Main Proceeding they must prove a "discrete" set of facts.

[59] The situation here is thus distinguishable from others (that considered in *AiT*, for example) in which a lawyer was alleged to be acting for opposing, or potentially opposing, interests in the same matter. We do not find Solomon to be in quite the state of "actual", "unsurpassed" and "irreconcilable" conflict alleged by the Applicants.

### **3. Potential for Conflict is Present**

[60] There remains, though, potential for a degree of conflict. Ultimately, this did not seem to be seriously disputed.

[61] Based on the information presented at the Application hearing, Regier or Forrest (or both) might testify at the Main Hearing in a manner unfavourable to Merendon and Sorenson. (It is unnecessary, for this purpose, to assess the likelihood that their testimony might assist in exonerating the Applicants, as Archer suggested.) Unconstrained, Solomon could therefore easily find himself seeking to defend his current clients in the Main Hearing by attacking (in cross-examination) the testimony, or the general credibility, of his former clients Regier and Forrest.

[62] There are enough areas of commonality between the Strategic Matter and the Main Proceeding for it to be foreseeable that Regier or Forrest (or both) might testify in the Main Hearing about matters that had also arisen in the Strategic Matter. It is possible, too, that, in the course of Solomon's representation of them in the Strategic Matter, they could have given

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Solomon confidential information that has not since – and might never – come to light from other sources.

[63] It is, therefore, also foreseeable that Solomon, if unconstrained, could find himself at the Main Hearing possessed of information, obtained from former clients in confidence when they were his clients, that could be, or appear, useful to him in challenging the testimony or credibility of those same former clients in the service of his current clients Merendon and Sorenson. In this sense, and to this extent, we conclude that there is potential for Solomon to find himself in a position of conflict with former clients. We stress that this conclusion implies no finding – nor even a hint – of actual impropriety or want of professionalism on Solomon's part.

[64] Our finding of potential conflict of interest does not amount to a finding that Solomon would be "act[ing] against" those former clients, in the sense of *MacDonald*. That was a case in which a lawyer – then working at a firm acting for a party to a lawsuit – had previously acted for the opposing party in the very same lawsuit. That fact gives important context to the decision.

[65] The situation is very different here. Regier and Forrest are not suing Merendon and Sorenson (or vice versa). Merendon and Sorenson are respondents in the Main Proceeding. Regier and Forrest are not parties at all. There are no allegations against them, and Staff seek no sanctions against them, in the Main Proceeding. They are to be witnesses at the Main Hearing, nothing more. Even the most vigorous and successful cross-examination by Solomon (or any other party), using information from any source, would not, by itself, suddenly expose Regier or Forrest to orders like those Staff seek against the Arbour Respondents. Thus, Solomon would not be "act[ing] against" Regier and Forrest in the *MacDonald* sense.

[66] As to Archer's suggestion that Forrest (or Regier or perhaps both), as a "loose cannon" witness, might cause Solomon himself to be called as a witness in the Main Hearing, we are not persuaded. First, the evidentiary basis for the suggestion was virtually non-existent. Second, people are termed "loose cannons" precisely because of their unpredictability. We discern no useful purpose – nor any reliable likelihood of succeeding – in attempting in advance to address the possible consequences of the hypothesized cannonade. This aspect of the Applicants' submissions demonstrates no conflict of interest.

### **D. Addressing the Potential Conflict**

#### **1. Interests to be Weighed**

[67] Having found that Solomon is in a position of potential conflict of interest, we turn to a consideration of how it might appropriately be addressed.

[68] The Applicants contended (relying heavily on *MacDonald*) that there is no option: Solomon must be removed. They were alone in that contention.

[69] We concluded above that the circumstances here differ importantly from those in *MacDonald*, and that Solomon would not be "act[ing] against" his former clients in the sense found there. It follows, in our view, that the disqualification of counsel that seemed so necessary, even automatic, in *MacDonald* is less necessary here.

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[70] This does not dispose of the Application; it tells us only that more analysis is required. The law is clear that the appropriate response to a conflict of interest will depend on the circumstances, and may require a weighing of competing interests (*Neil* at paras. 12-15).

[71] The key interests at issue here, as we see them, are:

- fairness and natural justice;
- the right to representation by counsel of choice;
- the public interest – and the presumed interest of all parties to a Commission enforcement proceeding – in the timely conclusion of the proceeding and the consequent resolution of all allegations; and
- the public interest inherent in ensuring that nothing undermines the integrity, or public confidence in the administration, of Commission enforcement hearings.

[72] Some of these interests overlap or compete. All were invoked, directly or indirectly, explicitly or not, in the Application hearing.

[73] The Applicants' claim of a conflict of interest that "strikes at the heart of the administration of justice" suggested either that there would be a deprivation of fairness and natural justice or something that would undermine the integrity, or public confidence in the administration, of Commission enforcement hearings. Their more specific assertion that they would be harmed were a witness favourable to them to be unfairly shown to be untruthful or not credible might also invoke one or both of these two interests.

[74] All who opposed the Application cited or alluded to the delay that would follow Solomon's removal as an important factor which would harm them or the public interest (or both) – invoking the third interest listed above, timely resolution of Commission enforcement proceedings.

[75] As discussed, Solomon raised additional burdens that Merendon and Sorenson would bear were he to be removed – not only the denial of their choice of counsel, but the need for new counsel to duplicate effort in order to be able to defend the case against them. For these two Arbour Respondents, the first three interests listed above were invoked more-or-less directly. Solomon also suggested that the Application might be "another attempt by [the Applicants] to further delay the [Main] Hearing", invoking the final two of the four listed interests.

[76] We consider the interests in turn.

### **2. Fairness and Natural Justice**

[77] A respondent in a Commission enforcement proceeding is entitled to fairness and natural justice, including of the right to know the case against the respondent and the opportunity to make full answer and defence to that case.

[78] We are not persuaded that the Applicants would face a true deprivation of natural justice, even were we not to constrain Solomon in the Main Hearing. The case against them is that alleged by Staff, not by Solomon's clients. Could they somehow, in the circumstances, be

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deprived of the ability to make full answer and defence? We think not. Even in what seemed to be the most direct, negative consequence of the claimed conflict, the Applicants' concern was that witness testimony that might be very helpful to them could be shown unfairly to be untrue or unconvincing. That worst-case (from their perspective) scenario might make for an unsuccessful defence, and it might indeed be unfair to the affected witnesses, but we conclude that it would not constitute a denial of or constraint on the Applicants' ability to mount a full defence.

[79] It may be that the Applicants consider that Solomon's hypothetical use of confidential information to undermine their favoured witnesses' testimony would demonstrate a want of fairness – as implied by their use of the adjective "unfair". We do not agree. Such a position would imply that the Applicants enjoy some sort of fundamental right to have their favoured witnesses believed, and to vindication on the basis of their testimony regardless of its truth. Their worst-case scenario is of hypothetical improper treatment of – unfairness to – certain witnesses. The witnesses might in that case be genuinely aggrieved, and the Applicants disappointed, but that falls short of a deprivation of the Applicants' fundamental rights to fairness and natural justice.

[80] The Applicants' assertion that the conflict here "strikes at the heart of the administration of justice" might suggest a deprivation of natural justice. However, given the true meaning of natural justice, that assertion is at once too broad and too vague to fall into that category.

[81] The situation of Merendon and Sorenson is very different. The removal of their current counsel at this stage of the relatively complex Main Proceeding, with the Main Hearing approaching, would have serious consequences for them. Apart from the effect on their right to counsel of choice (discussed below), it seems probable that any replacement counsel would have insufficient time to adequately prepare for the Main Hearing. Thus, were Solomon to be removed without postponement of the Main Hearing, we think that Merendon and Sorenson would likely suffer in their ability to make full answer and defence to the allegations against them. This would be a serious impairment of their fundamental rights to fairness and natural justice. The impairment might be mitigated or avoided by delaying the Main Hearing, but that would affect other interests discussed below. New counsel might not possess the same experience as Solomon, or gain his degree of apparent trust from Merendon and Sorenson; arguably, were the differences to prove considerable, these respondents might claim on those grounds also to be impaired in their ability to make full answer and defence. Such a claim, though, could only be assessed at the time; it is at this point too hypothetical to constitute a real concern.

[82] We do not consider that either Solomon's potential conflict or the various measures proposed would truly affect any of the other Arbour Respondents' rights to fairness and natural justice.

[83] In sum, we consider that the potential conflict itself would not call into question any of the Arbour Respondents' rights to fairness and natural justice. However, the removal of Solomon would likely undermine those rights of Merendon and Sorenson unless addressed by postponement of the Main Hearing, something that would have other effects.































