

ALBERTA SECURITIES COMMISSION

ORAL RULING

Citation: Arbour Energy Inc., Re, 2008 ABASC 399

Date: 20080501

**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
Karen A. Prentice, QC

Counsel:

Tony Bell and Deanna Steblyk
for Commission Staff

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

Paul Johnston
for Heinz Weis

Patrick Sullivan
for Arthur Wigmore

John Blair
for Milowe Brost and The Institute For
Financial Learning, Group of
Companies Inc.

Glenn Solomon and Charles Blakey
for Merendon Mining Corporation Ltd.
and Gary Sorenson

Date of Hearing:

1 May 2008

Date of Ruling:

1 May 2008

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] Following are our oral ruling and reasons on the application made before us this morning.

[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.

[3] The merits hearing of this matter is scheduled to begin on 12 May 2008.

[4] Mr. Archer, as counsel for Arbour Energy Inc. and Dennis Morice, has applied for an adjournment of the merits hearing in order to have certain constitutional questions, as set out in their "Notice of Constitutional Question", heard in the Court of Queen's Bench of Alberta. We understand that similar, if not the same, constitutional questions have been raised in another matter before a different panel of this Commission and that another member of the Commission has directed that the appropriate forum to decide those questions is the Court of Queen's Bench. Mr. Archer indicated that, in the event we order the adjournment sought, he proposes, with Staff's agreement, to have the constitutional questions in the two matters consolidated and heard at the same time in the Court of Queen's Bench. Mr. Archer also indicated that every effort would be made to expedite the hearing and determination of these constitutional questions by the Court of Queen's Bench. According to Staff counsel, the trial coordinator for the Court of Queen's Bench has indicated that these matters could likely be heard in June 2008.

[5] Mr. Solomon, as counsel for Merendon Mining Corporation Ltd. and Gary Sorenson, opposed Mr. Archer's application. He argued that the Commission has the jurisdiction to decide the constitutional questions raised and that this is the appropriate forum to decide the questions.

[6] Counsel for the other Respondents and for Staff did not oppose Mr. Archer's application.

[7] Further, in the course of his application, Mr. Archer raised concerns – largely shared by counsel for all other Respondents – relating to Staff's failure to provide timely disclosure of all relevant documentation and Staff's failure as of yet to provide a witness list, witness will-says and a list of the documents that Staff propose to rely on during the

merits hearing. These were concerns given the imminent commencement of the merits hearing.

[8] We first note that, by operation of sections 10(d) and 11 of the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, and section 2 and Schedule 1 of the *Designation of Constitutional Decision Makers Regulation*, Alta. Reg. 69/2006, the Commission has the jurisdiction to determine the constitutional questions raised. That is, we have the jurisdiction to determine the constitutional validity of the impugned sections 29(e), 29(f) and 215 of the *Securities Act*, R.S.A. 2000, c. S-4.

[9] We next note that, under section 13(1) of the *Administrative Procedures and Jurisdiction Act*, the Commission may direct that constitutional questions over which it has jurisdiction be referred to the Court of Queen's Bench where the Commission "is of the opinion that the court is a more appropriate forum to decide" the questions.

[10] In all the circumstances here, we are of the opinion that the Court of Queen's Bench is a more appropriate forum to decide the constitutional questions raised for the following reasons.

[11] First, Commission decisions are not binding. A decision by this panel on the constitutional validity of sections 29(e), 29(f) and 215 of the *Securities Act* would be effective only for the purposes of this proceeding. As explained by Lynn Smith in "Administrative Tribunals as Constitutional Decision-Makers" (2004) 17 C.J.A.L.P. 113 at 146:

[P]resumably, until there is a judicial pronouncement on [the constitutional validity of a particular statutory provision], a tribunal presented with the same arguments would be required to hear and consider them again as if for the first time.

[12] Second, similar, if not the same, constitutional questions have been raised in another matter before a different panel of this Commission and another member of the Commission has directed that the appropriate forum to decide those questions is the Court of Queen's Bench.

[13] Third, and finally, a final binding decision on the constitutional questions raised would contribute to overall efficiency in Commission enforcement proceedings.

[14] Therefore, under section 13(1) of the *Administrative Procedures and Jurisdiction Act*, we direct that Mr. Archer, as counsel for Arbour Energy Inc. and Dennis Morice, apply to the Court of Queen's Bench to have the constitutional questions raised determined by that court. Having made this direction, we are required by section 13(3) to suspend this proceeding as it relates to the questions to be heard by the Court of Queen's

Bench until the decision of the court has been given. In the result, we grant the adjournment sought by Mr. Archer.

[15] Cognizant that sections 13(4) and (5) of the *Administrative Procedures and Jurisdiction Act* require that the application to determine the constitutional questions must be brought on for hearing, heard and determined as soon as is practicable, and given that it is in the parties' and the public interest that Commission enforcement proceedings be resolved in a timely manner, we ask the parties what dates they are available for tentative rescheduled dates for the merits hearing.

[DISCUSSION AS TO TENTATIVE RESCHEDULING]

[16] We thank counsel for making themselves available for rescheduling. We are going to reschedule the merits hearing to commence on 1 December 2008, for that week. It will continue for the week of 8 December 2008, with the exception of 10 December. It will continue for the week of 15 December 2008, with the exceptions of 15 and 16 December. We will also set aside the weeks of 12 January, 19 January and 26 January 2009, which will be more than sufficient time, as we understand it, for the merits hearing.

[17] Obviously, these are tentative dates as we await the decision of the Court of Queen's Bench. Rescheduling of these dates may be necessary, but we can address that issue if and when it needs to be addressed.

[18] Turning to the disclosure issues raised by Mr. Archer, as mentioned, he submitted that he required more time to review the disclosure already made. He also expressed concern about Staff's failure to date to disclose the identities and will-says of the witnesses Staff propose to call and the documents that Staff propose to rely on during the merits hearing. These concerns were largely shared by counsel for all other Respondents.

[19] The amended amended notice of hearing was issued on 10 September 2007. At the end of October 2007 the hearing dates were set, with a commencement date of 12 May 2008. Apparently Staff disclosed a voluminous amount of documentation to the Respondents in March 2008, and a smaller amount of additional documentation was disclosed as recently as 17 April 2008. Staff have yet to disclose the identities of the witnesses they propose to call and the documentary evidence they propose to rely on during the merits hearing. Staff counsel indicated that he was uncertain as to what he would disclose in this regard.

[20] The law is clear that in a proceeding of this nature respondents are to be provided with adequate prior notice of the case they must meet. Specifically, the obligation of Staff to make disclosure to respondents corresponds to the standard enunciated by the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. Disclosure to the

Stinchcombe standard protects respondents' right to make full answer and defence. It also contributes to the more efficient administration of Commission enforcement proceedings by eliminating the element of surprise and reducing delays.

[21] In *Re Cartaway Resources Corp.*, [1999] 22 B.C.S.C.W.S. 27, the British Columbia Securities Commission stated that the duty on Commission staff counsel requires disclosure of:

1. the particulars of the case against the respondents; and
2. all relevant material gathered in the investigation relating to the allegations in the notice of hearing, whether Commission staff intend to rely on the material or not, unless there is any special reason why such material should not be disclosed and in those circumstances the special reason should be brought to the attention of the respondents. Of the relevant materials disclosed, Commission staff counsel should continue to distinguish between the materials upon which Commission staff intend to rely and that which they do not.

[22] We repeat, for emphasis, the last sentence of that quotation:

Of the relevant materials disclosed, Commission staff counsel should continue to distinguish between the materials upon which Commission staff intend to rely and that which they do not.

[23] In that case, Commission staff counsel had disclosed a proposed list of witnesses and all documents on which they intended to rely.

[24] Having regard to *Stinchcombe*, *Cartaway* and other pertinent case law, including this Commission's decision in *Re Ironside*, 2005 ABASC 683, we direct that Staff counsel disclose to the Respondents, no later than one month before the merits hearing of this matter commences, a list of the witnesses Staff propose to call at the merits hearing, all available will-says of those witnesses and a list of the documents Staff propose to rely on at the merits hearing.

[25] Of course, there may be occasions when relevant material comes to Staff's attention late in the day, material which, in Staff's opinion, should be put before a hearing panel to assist it in fulfilling its public interest mandate. Should this occur in this proceeding, the lack of timeliness of disclosure of any such material will not necessarily result in such material being inadmissible, but may result in an adjournment to allow the Respondents a fair opportunity to address it.

[26] In the interval before the merits hearing begins, we encourage the parties to consult among themselves with a view to reaching consensus on matters that will add to the efficiency of the merits hearing, such as agreement on facts and exhibits. Also, in this

interval, we request that any issues that arise among the parties that cannot be resolved be brought, as soon as is practicable, before the pre-hearing panel or this panel, as is appropriate, for resolution.

[27] That concludes our ruling and reasons on this application.

1 May 2008

Approved:

"original signed by"

Glenda A. Campbell, QC