

ALBERTA SECURITIES COMMISSION

ORAL RULING

Citation: Arbour Energy Inc., Re, 2009 ABASC 89

Date: 20090224

**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:

Don Young and Deanna Steblyk
for Commission Staff

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

C.J. Popowich
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:

24 February 2009

Date of Ruling:

24 February 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] 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. Mr. Archer's application had two components: first, a concern regarding recently disclosed or soon-to-be-disclosed materials; and, second, his request to have this panel direct Staff to apply to the Alberta Court of Queen's Bench for an order relating to the taking of evidence from Gary Sorenson – a respondent in this proceeding who currently appears to be resident in Honduras.

Background

[2] The Commission's Director of Enforcement issued an 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.

[4] As part of that process the panel made certain directions relating to disclosure on 1 May 2008. The panel noted at that time that 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 panel said that the lack of timeliness of disclosure of any such material would not necessarily result in such material being inadmissible, but could result in an adjournment to allow the Respondents a fair opportunity to address such material.

Disclosure Issues as a Ground for Adjournment

[5] We now turn to Mr. Archer's contention that certain disclosure problems are a ground for adjournment of the hearing which is scheduled to begin in approximately three weeks.

[6] Mr. Archer provided the panel with a document entitled "Report to a Justice", which apparently was disclosed by Staff to the Respondents on 11 February 2009. This report listed 28 items seized by the RCMP sometime earlier, seemingly from Merendon Mining Corporation Ltd. or Gary Sorenson or both. We were told that the Commission's

Director of Enforcement had successfully (with the consent of counsel for Merendon Mining Corporation Ltd. and Gary Sorenson) applied to the Court of Queen's Bench on 20 February 2009 for disclosure from the RCMP of one of those items. We were also told that the item – a box containing two file folders – was not yet in Staff's possession, but should be soon. We were further told that there was an interview transcript of Bradley Regier which Staff also were waiting to obtain. Counsel for Staff assured the panel and the Respondents that those items would be disclosed to the Respondents once they were in Staff's possession and that all other relevant material had been disclosed to the Respondents.

[7] Mr. Archer stated that he would be making an application in the Court of Queen's Bench on 27 February 2009 to obtain from the RCMP other items listed in the "Report to a Justice".

[8] Mr. Archer's application before us was opposed by Staff and by counsel for Merendon Mining Corporation Ltd. and Gary Sorenson. It was supported by counsel for Heinz Weis and apparently by counsel for Arthur Wigmore. Counsel for Milowe Brost and The Institute For Financial Learning, Group of Companies Inc. took no position on the application.

[9] 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. 28-30, 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.

There is no dispute that the principles of natural justice and fairness for enforcement proceedings under the *Act* support the application of a standard of disclosure of evidence similar to that required in a criminal trial: Staff must disclose all relevant information in accordance with the principles articulated by the Supreme Court of Canada in *Stinchcombe* [*R. v. Stinchcombe*, [1991] 3 S.C.R. 326] and that court's more recent amplification of those principles. . . .

[10] Further, as this Commission stated in *Ironside* at paras. 36 and 39:

The *Stinchcombe* standard only obliges the Crown to disclose information or material that is in its possession (at para. 12). . . .

. . .

Staff, like the Crown in criminal proceedings, cannot disclose what it does not have. Information that remains in the possession of some third party is not in the possession of Staff. The obligation to disclose does not extend to third parties. Accordingly, to the extent a respondent wishes disclosure of this type of information, some other procedural mechanism would have to be engaged.

[11] This Commission has also noted that disclosure is an ongoing obligation and that it need not be "perfect disclosure" – in fact, perfect disclosure is not "a realistic expectation in complex cases involving large volumes of material" (see *Re Workum*, 2005 ABASC 986 at para. 44).

[12] Mr. Archer contended that the recent Supreme Court of Canada decision *R. v. McNeil*, 2009 SCC 3 applied here, in that Staff of the Commission should be considered "inferentially" to possess the documents and records in the possession of the RCMP.

[13] We disagree. Staff and the RCMP were not conducting a joint investigation, nor were the RCMP acting as an investigator for Staff. The RCMP were not obliged to give their material to Staff, and Staff were not obliged to source such material from the RCMP. Our view is strengthened by the fact that Staff applied to the Court of Queen's Bench for an order when they wanted to obtain one of the items from the RCMP. In our view the remaining RCMP documents are not the "fruits of Staff's investigation".

[14] Here, Staff assured the panel and the Respondents that the two items not yet disclosed would be disclosed once Staff had possession of them.

[15] In our view the Respondents still have ample time to review and digest this new disclosure, and their ability to adequately conduct their case has not been compromised. Moreover we must consider the public interest in having enforcement proceedings resolved in a timely manner.

[16] In our opinion it will not be unfair to the Respondents if the hearing proceeds as scheduled, and it is in the public interest that the hearing proceed without undue delay.

[17] Should a party believe that the situation has changed after Mr. Archer's application in the Court of Queen's Bench on 27 February 2009, the panel would consider a new application at that time.

[18] No adjournment is warranted based on Mr. Archer's first contention.

Commission Evidence as a Ground for Adjournment

[19] We now turn to the second contention – testimony from Gary Sorenson.

[20] The second component of Mr. Archer's application for an adjournment of this hearing is that he needs time to obtain "commission evidence" from Gary Sorenson, one of the other Respondents in this proceeding, who resides outside of Alberta – apparently in Honduras – because the Commission may not have the ability to compel or enforce the attendance of a resident of another country as a witness in a Commission hearing. It does not appear that Mr. Sorenson will appear voluntarily as a witness to testify, and we understand that Staff did not interview Mr. Sorenson during their investigation.

[21] Mr. Archer has asked this panel to facilitate the taking of commission evidence from Mr. Sorenson in Honduras because Mr. Archer's clients believe that Mr. Sorenson has relevant information and that it would be unfair to them if they were denied the ability to present that witness's evidence to the panel during the hearing. This application appears to the panel most untimely, given that the identity of Mr. Sorenson as a Co-Respondent has been known to Mr. Archer and his clients for almost two years.

[22] However, that said, section 26 of the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act") permits the Commission or the Executive Director to apply to the Court of Queen's Bench for an order appointing a person to take the evidence of a witness outside of Alberta for use in a hearing before the Commission and providing for a written request to be "directed to the judicial authorities of the jurisdiction in which the witness is to be found for the issuance of any process as is necessary" to compel the person to attend and give testimony on oath (or otherwise) and to produce relevant documents, records and things.

[23] It appears to us that Mr. Archer's desire to use this procedure relates to his clients' right to present their case and call their witnesses at the hearing. In our view this request does not involve Staff's conduct of their investigation but rather is a request from two Respondents – in the absence of a subpoena mechanism – to compel an individual who has relevant information but is not physically present in the country to give evidence for use in the hearing. We are satisfied that, as a Respondent in this proceeding, Mr. Sorenson will be able to give evidence relevant to the matters which will be before us during the hearing, and we may not be able to compel his attendance at the hearing.

[24] Therefore, in order to facilitate Mr. Archer's clients' request to take commission evidence from Mr. Sorenson for use in the hearing, we direct Staff to, as soon as possible, make an application to the Court of Queen's Bench, pursuant to section 26 of the Act, for an order:

- (a) appointing a person who shall be a lawyer qualified to practise in the laws of that jurisdiction and independent of Mr. Sorenson to take the evidence of Mr. Sorenson outside of Alberta for use in the hearing of this matter before the Commission or appointing the hearing panel to take the evidence of Mr. Sorenson

during the hearing through the means of video-conference, which hearing is currently scheduled to commence on 16 March 2009;

(b) providing for the issuance of a written request directed to the judicial authorities of the jurisdiction in which Mr. Sorenson is to be found, requesting the issuance of any process that is necessary:

(i) to compel Mr. Sorenson to attend to give testimony on oath or otherwise before the person appointed for that purpose; and

(ii) to produce documents, records and things relevant to the subject-matter of this proceeding; and

(c) that any of the parties in this proceeding are entitled to be in attendance at the examination of Mr. Sorenson, in person or by video-conference, and to put questions to him.

[25] We note that section 26 provides that the practice and procedure in connection with the appointment of a person (including its certifying and return) and the taking of Mr. Sorenson's evidence shall, to the extent possible, be the same as those that govern similar matters in civil proceedings in the Court of Queen's Bench in Alberta. There is no assurance that the Court would exercise its discretion to grant the order in question, and we understand that these types of orders may be very difficult to obtain. Given that this is not part of the investigation or discovery process, it might be appropriate for the parties to ask the Court to order the evidence be taken by way of video-conference during the course of the hearing.

[26] We also emphasize to all parties that evidence taken on commission is still subject to the issues of admissibility, credibility and weight. Counsel will have every opportunity to object to the admissibility of such evidence at the hearing, to point out concerns with credibility and to argue what weight, if any, should attach to testimony so obtained. Determinations on those matters will be made by the panel when and if the evidence is tendered as evidence during the hearing.

[27] The subsequent continuation of the hearing will not be dependent on Mr. Archer's and his clients' success or satisfaction with this section 26 process. We also note that, after the March dates, the next dates set for the hearing are during the last week of April 2009.

[28] We see no reason or unfairness at this time to adjourn the hearing, as the taking of Mr. Sorenson's evidence in Honduras, if it occurs, will not affect the presentation of Staff's case nor any Respondent's ability to cross-examine Staff's witnesses.

Ruling

[29] For the above-noted reasons Mr. Archer's request for adjournment of the hearing is denied. The hearing will commence as scheduled at 9 am on Monday 16 March 2009.

[30] That concludes our ruling on the application before us today. As discussed during the course of the application today, we believe Mr. Archer's questions as to the issuance of summonses for other witnesses have been answered. Obviously, if there are any other procedural issues that arise, we ask the parties to bring them to our attention as soon as possible in view of the fact that the hearing for this matter is fast approaching.

24 February 2009

Approved:

"original signed by"

Glenda A. Campbell, QC