

**ALBERTA SECURITIES COMMISSION**

**RULING**

**Citation: Arbour Energy Inc., Re, 2008 ABASC 224**

**Date: 20080415**

**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:**

Stephen R. Murison  
Roderick J. McKay, CA

**Counsel:**

Tony Bell and Deanna Steblyk  
for Commission Staff

Glenn Solomon  
for Merendon Mining Corporation Ltd.  
and Gary Sorenson

Chris Archer  
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.

**Ruling Application:**

8 April 2008

**Date of Ruling:**

15 April 2008

## I. INTRODUCTION

[1] This ruling addresses certain issues of pre-hearing disclosure in respect of a proceeding arising from a twice-amended notice of hearing issued on 10 September 2007 (the "Notice of Hearing") by staff ("Staff") of the Alberta Securities Commission (the "Commission"), which set out allegations 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. ("Merendon"); and Gary Sorenson ("Sorenson") (collectively, the "Respondents").

[2] This panel was assigned to set a date for the hearing into the merits of the allegations and to deal with any preliminary matters that might fairly and efficiently be dealt with prior to the hearing. One such matter came to our attention when counsel for two of the Respondents, Merendon and Sorenson, raised concerns about (among other things) the state of Staff's pre-hearing disclosure of material that had come into Staff's possession in the course of their investigation. On 8 February 2008 we issued a preliminary written ruling on the disclosure issues raised (the "Preliminary Ruling", cited as *Re Arbour Energy Inc.*, 2008 ABASC 85).

[3] We noted in the Preliminary Ruling that the description of most of the undisclosed material given to us did not enable us to determine whether Staff's reasons for not disclosing it to the Respondents were sufficient and sustainable. We therefore reviewed the material ourselves and then issued a further ruling on 13 March 2008 (the "March Ruling", cited as *Re Arbour Energy Inc.*, 2008 ABASC 143). This was followed shortly by an addendum, issued on 19 March 2008 (the "Addendum", cited as *Re Arbour Energy Inc.*, 2008 ABASC 155) once we were in receipt of an assurance mentioned in the March Ruling. The ruling that follows should be read together with the Preliminary Ruling, the March Ruling and the Addendum (together, the "Prior Rulings").

[4] It was this panel's understanding that the Prior Rulings had fully addressed the original application and brought to an end our task in this regard. However, on 8 April 2008 the panel received a document box directed to our attention by Staff. This box and its contents were similar to several others that we dealt with in the March Ruling. Like those others, this new box appeared to contain material (the "New Material") received by Staff from the Securities and Exchange Commission in the United States (the "SEC"), and to have been obtained by the SEC from the same source as the material in those other boxes (we referred to that material, in the March Ruling, as the "SEC Material"). The New Material was accompanied by one additional document that did not appear to have come from the SEC.

[5] No application accompanied the New Material. However, the Executive Assistant to the Commission Chair (who had received it on our behalf) informed us that Staff were seeking – with the consent of counsel for the Respondents – our ruling and direction on

pre-hearing disclosure of the New Material. Apparently the additional document box had been overlooked somewhere following Staff's having requested material from the SEC.

[6] We infer that the parties took the position that the New Material was of a class of material that we had directed in the Preliminary Ruling be provided to the panel for our review and determinations, and therefore that the original direction extended also to this New Material. That would account for the absence of a new application. We therefore undertook the requested task, as an extension of the process that resulted in the March Ruling.

## **II. MATERIAL RECEIVED**

[7] The New Material consists of unstapled pages of paper, sequentially numbered, some pages clipped to one another (by whom we do not know), the pages divided at irregular intervals by unmarked coloured pages. Each page of the New Material (but for the dividing pages) bears a notation to the effect that it was provided (to the SEC, apparently) pursuant to a subpoena issued to LLA – Larry Adair ("Adair") – who is or was a Florida lawyer. The New Material, like the SEC Material that preceded it, appears to have been obtained from Adair's office.

[8] As mentioned, the new document box was accompanied by another document, which apparently originated with Staff, not the SEC. This is a three-page stapled document apparently printed (as indicated by a date appearing at the bottom) on 25 March 2008 from the website "www.ipc-offshore.com". We refer to this document as the "IPC Screenprint".

[9] We understand that Staff, having reviewed the New Material, concluded that some of it might be subject to privilege. Red stickers, which we understand to have been added by Staff to indicate where that determination applied, appear on some of the pages of the New Material. A red sticker also appears on one page of the IPC Screenprint, next to some highlighted text.

## **III. ANALYSIS**

### **A. Applicable Law and Principles**

[10] We considered, analysed and applied the applicable law and principles as set out in the Prior Rulings. We adopt but do not repeat our comments in those rulings here.

### **B. Process Followed with New Material**

[11] We followed the same process with the New Material as we did with the SEC Material, as described in the March Ruling.

[12] Given that the New Material apparently came from a lawyer's office – and given the earlier contention by counsel for some of the Respondents that some or all of the material from that source was privileged in favour of those Respondents – we

concentrated in the first instance on endeavouring to discern whether solicitor-client privilege might attach to any of the New Material and, if so, with what consequences. Where we found no such privilege, we then assessed the material for relevance, in the sense of there being "a reasonable possibility of the information being useful to [a Respondent] in making full answer and defence". New Material that we concluded is not relevant is not disclosable, on that ground alone. The remaining, relevant New Material we then assessed to determine whether some other privilege or immunity might bar its being disclosed.

[13] As discussed in the March Ruling, we drew inferences from the content of some of the New Material, and from the proximity of some pages to others, as to what pages formed parts of multi-page documents and what documents related to others. Much as viewing material in its original files in an office might do, this assisted us in assessing the disclosability of the New Material.

### **C. IPC Screenprint - Process and Conclusion**

[14] The IPC Screenprint not having apparently originated from a law office, we began our assessment with the question of relevance and only then looked for a privilege or immunity. Given the low threshold of relevancy applicable for present purposes, we concluded that it was surpassed in this case. This is a public document and therefore not nondisclosable on grounds of privilege or immunity. While the highlighting on the IPC Screenprint (discussed below) and adjacent sticker might be viewed as examples of Staff work product, we gather that Staff directed this document to us at least partly in furtherance of the task before us – that is, that it was in the nature of an implied submission, were such a thing to exist – and therefore that the document is appropriately shared with the Respondents. We therefore conclude, and we direct, that the IPC Screenprint be disclosed to the Respondents.

### **D. The New Material**

#### **1. Solicitor-Client Privilege**

[15] As discussed in the March Ruling, solicitor-client privilege does not attach to a document simply because it was given to or received from a lawyer, or is in a lawyer's possession. Adair, moreover, was both a lawyer and a businessman, and much of what originated in his office and made its way into the New Material (as was the case with the SEC Material) was in the nature of business records, not requests for or the provision of legal advice.

[16] There was no suggestion that the IPC Screenprint itself is subject to solicitor-client privilege, and of course it is not. It appears to provide information about "IPC - International Privacy Corporation" and specifically names "IPC Corporate Services LLC". It describes services apparently offered by this entity (or these entities) including "Offshore Company Formation", "Nominee Services", "Trust Formation", "Licensed Trustee Services" and banking services, and indicates that "Belize IBC documentation"

can be obtained. Included in this information – and both highlighted and tagged with a red sticker in the copy given to us – is the following statement:

**IPC Corporate Services LLC** *does not render any legal, tax or accounting advice whatsoever.* [emphasis and italics in the original]

[17] We surmised that this IPC Screenprint was provided to the panel to assist us in assessing whether certain contents of the New Material are subject to solicitor-client privilege. The panel is aware that incorporation, trustee and corporate-secretary services need not involve a lawyer and do not necessarily indicate that any legal advice has been sought or provided. We are also aware that some or all such services are sometimes provided by or through a lawyer, or otherwise in connection with legal advice.

[18] Our view – no different from what we expressed in the March Ruling – is that for the purpose of assessing whether solicitor-client privilege applies to a document, it may be necessary to consider both the content of the document and its context, including (but not necessarily limited to) the identities and professional standing (if any) of sender and recipient. We treated the IPC Screenprint as a piece of information that might assist us in considering the contextual background of some of the New Material.

[19] In the result, we reached the same conclusion, for similar reasons, in respect of the majority of the New Material as we had previously reached in respect of most of the SEC Material. Most of the New Material is not subject to solicitor-client privilege.

[20] However, we concluded that some of the New Material is subject to this privilege. In certain cases only portions of a document were subject to the privilege. Recognizing the importance of disclosure, where we considered that this could be done without producing a result either meaningless or destructive of the solicitor-client privilege, we redacted privileged portions of the document. We did so in a way that makes apparent, from the redacted copy, the fact of redaction, but not the content of the redaction. Where we considered this approach not feasible, we concluded that the document in its entirety is not disclosable. We discuss below the further disposition of the solicitor-client privileged New Material (the "Privileged New Material").

## **2. Unprivileged New Material**

[21] We next assessed the New Material that is not subject to solicitor-client privilege (the "Unprivileged New Material") for relevance. We bore in mind the applicable low threshold of relevance, and the fact that we are not in a position to know every Respondent's understanding of the facts and possible lines of defence.

[22] We did not believe that all of the Unprivileged New Material would in fact prove useful to every Respondent in answering and defending against the allegations against them. However, for most of the Unprivileged New Material we could not rule out a

reasonable possibility that it might prove useful in that way to one or more of the Respondents, and thus that it surmounted the applicable threshold.

[23] It follows that, absent some other applicable privilege or immunity, most of the Unprivileged New Material would be disclosable to the Respondents.

[24] There were, though, portions of the Unprivileged New Material that we concluded fell below even the low disclosability threshold that applies for this purpose. This material (the "Irrelevant New Material") is, on that ground alone, not disclosable. We discuss its further handling, below.

### **3. No Other Privilege or Immunity**

[25] We did not find that any other privilege or disclosure immunity applied to any of the remainder of the Unprivileged New Material that we determined to be relevant. Staff advised, in connection with the delivery of the New Material to the panel, that their assurance in this regard, mentioned in the March Ruling, applied also to the New Material.

[26] Accordingly, all of the Unprivileged New Material, other than the Irrelevant New Material, is disclosable. We discuss its further handling, below.

## **IV. DISPOSITION OF NEW MATERIAL**

### **A. Privileged New Material**

[27] The panel has separated the Privileged New Material from the other New Material. The panel will arrange for the delivery of such of the Privileged New Material as we have determined to be subject to solicitor-client privilege in favour of a Respondent, to such Respondent, through their respective counsel.

[28] To assist in explaining gaps in sequential page numbering among the disclosed New Material, the page numbers of the Privileged New Material are set out in Schedule A to this ruling. Schedule A also identifies pages disclosed but with solicitor-client-privileged portions redacted.

### **B. Irrelevant New Material**

[29] The panel has separated the Irrelevant New Material (which Staff need not disclose to the Respondents) from the remaining New Material. To assist in explaining gaps in sequential page numbering among the disclosed New Material, the page numbers of the Irrelevant New Material are set out in Schedule B to this ruling. The panel will arrange for the return of the Irrelevant New Material to Staff.

**C. Remaining Material to be Disclosed**

**1. Availability for Inspection and Copying**

[30] We direct Staff to disclose to the Respondents all of the Unprivileged New Material except the Irrelevant New Material. This amounts in the aggregate to a considerable volume of material (most of a document box), none of which might in fact prove useful to every (or any) Respondent. We therefore do not insist that it all be copied and delivered immediately to each Respondent.

[31] Instead, our direction concerning this material (and the IPC Screenprint) can be satisfied by Staff making it available to each Respondent and their counsel, for inspection at the premises of the Commission during the hours of **09:00 to 16:00 on business days during the period Thursday 17 April 2008 through Thursday 24 April 2008**. The Respondents are entitled, at their respective expense, to copies of this disclosable material; this can be arranged in the same manner as applied to the disclosable SEC Material pursuant to the March Ruling.

**2. Terms of Use**

[32] No terms restrict the Respondents' use of the IPC Screenprint. The disclosable Unprivileged New Material, however, is subject to the following terms and conditions:

- (a) it shall not be used by any of the Respondents or their counsel for any purpose – collateral, ulterior or otherwise – other than making answer and defence to the allegations against them in this proceeding; and
- (b) the Respondents and their counsel shall maintain custody and control over the disclosed material from the time it comes into their possession to ensure that none of such material is improperly disseminated.

15 April 2008

**For the Commission:**

\_\_\_\_\_  
"original signed by"  
Stephen R. Murison

\_\_\_\_\_  
"original signed by"  
Roderick J. McKay, CA

**SCHEDULE A**  
**Privileged New Material**  
(by serial page number)

**Privileged**

31121-35	31483-84	32211-12
31207-50	31487-88	32221-27
31298-99	31567	32282-331
31316-17	31570-84	32337
31320-22	31782-85	32343-45
31326-28	31838-39	32366-67
31333-36	31845-47	32373
31340	32137-38	32402-05
31366-74	32141-46	32408-09
31432-38	32148-56	32459-75
31450-51	32165-68	32479-85
31472-73	32203-07	32488-92
31479	32209	

**Redacted**

31108	32114
31112-13	32117
31262	32260-65
31265-66	32270-72
31273	32398-99
31310	32415-16
31313-14	32424
31359	
31377	
31385-87	
31467	
31542	
31557	
31975	
31978	
32052	
32055	
32093	
32096	

**SCHEDULE B**  
**Irrelevant New Material**  
(by serial page number)

31897-98  
31966  
32066-67  
32493-96