

In the Court of Appeal of Alberta

Citation: Arbour Energy Inc. v. Alberta (Securities Commission), 2009 ABCA 278

Date: 20090828

Docket: 0901-0169-AC

0901-0219-AC

Registry: Calgary

Between:

Arbour Energy Inc. and Dennis Morice

Appellants (Applicants)

- and -

Alberta Securities Commission

Respondent (Respondent)

**Reasons for Decision of
The Honourable Mr. Justice J.D. Bruce McDonald**

Applications for a Stay
Decisions of the Alberta Securities Commission
Dated the 16th day of June, 2009 and 28th day of July, 2009

**Reasons for Decision of
The Honourable Mr. Justice J.D. Bruce McDonald**

I. Introduction

[1] Arbour Energy Inc. (Arbour) and Dennis Morice (Morice) seek a stay of two rulings of the Alberta Securities Commission (ASC), dated June 16, 2009 and July 28, 2009 respectively, and a stay of the current ASC proceedings pending hearing of their appeals in this matter.

[2] The ASC's position is that these applications for stays of proceedings pending appeal be dismissed and the appeals be stayed pending conclusion of the ASC proceedings in question.

II. Background Facts

[3] The applicants Arbour and Morice are subject to ASC proceedings along with Heinz Weis (Weis), Arthur Wigmore (Wigmore), Milowe Brost (Brost), Gary Sorenson (Sorenson) and two companies, Institute for Financial Learning (IFFL) and Merendon Mining Corporation Ltd. (Merendon). They are alleged to have engaged in fraudulent conduct related to the shares of Arbour.

[4] Arbour was incorporated in 2001. Brost, Sorenson and Weis promoted Arbour. Morice became president of Arbour in June 2004. From June 2004 to November 2005, preferred shares of Arbour were sold totalling approximately \$46 million. Most of the sales were to IFFL which claims to be an educational institute for the purpose of promoting international investment. IFFL is an Alberta company but not a reporting issuer nor registered to trade in securities or act as an advisor.

[5] ASC staff allege, among other things, that the sale of Arbour shares was promoted by Brost and IFFL as unregistered advisors; that offering memoranda, prepared by Morice, were false and misleading; and that funds raised by Arbour were put at risk and without sufficient disclosure to investors. Among the allegations of fraudulent conduct were loans of most of the funds raised to Merendon, a company with little income and a deficit of over \$23 million in 2005.

[6] In earlier proceedings, Brost along with Edna Forrest, Carol Weeks, Bradley Regier, Capital Alternatives Inc. and Strategic Metals Corp. were sanctioned for fraud by the ASC. The appeal to this Court was dismissed: *Alberta Securities Commission v. Brost*, 2008 ABCA 326, 440 A.R. 7.

[7] The RCMP are investigating criminal allegations of fraud against Brost, Regier, Forrest and others arising from the matters in *Brost*. Statements made by Regier and Forrest to the RCMP are in the possession of ASC staff and have been disclosed to the parties in the current proceedings. The statements include references to Arbour and the other parties involved in the current proceedings.

[8] The affidavit of Morice deposes that the RCMP investigation also includes a larger and broader Ponzi scheme including the funds raised and used by Arbour. Morice and Arbour's defence

is that Brost and Sorenson principally orchestrated the broader fraud and the testimony from Regier and Forrest would point away from any implication of Arbour.

[9] Among the witnesses to be called in the present hearing is Regier. The applicants allege that Regier's evidence will be adverse to Sorenson. Regier was represented by Glen Solomon at the ASC hearings and appeal of *Brost*. Mr. Solomon is now representing Sorenson and Merendon in the current proceedings.

[10] The ASC declined Morice's application to have Mr. Solomon removed as counsel. The ASC found that the *Brost* matters and the current proceedings were not inseparable, as the current proceedings focus on distribution of Arbour securities and the use of the funds raised. The ASC held Mr. Solomon is not acting for opposing or potentially opposing interests in the same matter. It acknowledged the potential for conflict and addressed what steps could be taken in the main hearing. Morice is appealing that decision.

[11] Morice also sought documents in possession of the RCMP. The ASC, with the consent of counsel, commenced the hearing on July 8th in order to give itself the requisite power to compel the witnesses to appear with documentation during the hearing.

[12] The ASC then issued a summons to the RCMP requiring the RCMP investigator to attend with the requested materials. The Attorney General sought to have the notice to attend quashed. The ASC quashed all but one request for disclosure. It found the other requests were too vague, breached confidentiality agreements, or were of insufficient merit. The ASC described in detail the information sought and the reasons for declining to order its production. Morice is appealing that decision.

[13] The applicants now seek a stay of the two rulings of the ASC and a stay of its ongoing hearing until their appeals to this Court are determined.

[14] The ASC opposes the applications and asks that the appeals be stayed pending conclusion of the current proceedings to which the rulings relate.

III. Test for Stay Pending Appeal

[15] The tripartite test applied for a stay requires that there be: (1) a serious question as opposed to a frivolous and vexatious one; (2) the applicant suffer irreparable harm if the stay is refused; and (3) the balance of convenience is in favour of the applicant who would suffer greater harm than the respondent would suffer if the stay were granted.

IV. Appeals During Ongoing Proceedings

[16] This Court has repeatedly stated that an appeal may be entertained while a trial is proceeding only in unusual and exceptional circumstances. See, for example, *CIBC v. Alberta Tank Ltd.*, [1987]

A.J. No. 546, 53 Alta. L.R. (2d) 190 and *Paterson v. Hamilton*, [1996] A.J. No. 381, 181 A.R. 382. That policy has given rise to Part J of the Practice Directions requiring leave be granted when an appeal is of an order during a trial. The policy has also been applied to ASC proceedings. As stated in *Workum v. Alberta Securities Commission*, 2006 ABCA 181 at para. 2, 150 A.C.W.S. (3d) 968, this Court does "...not hear appeals from rulings given partway through a hearing that will not resolve any final or significant issues, except in rare circumstances . . . In most cases, disagreement with an interim ruling can be ground for the appeal of the final decision."

[17] Similarly, this Court discourages litigation by installment. In *KCP Innovative Services Inc. v. ASC*, 2009 ABCA 102 at paras. 9, 12-13; 448 A.R. 268, the Chief Justice rejected the argument that it was too cumbersome to await the sanction decision of the ASC and reiterated the policy that appellate intervention should be declined where there is an adequate alternative remedy in the statutory right of appeal.

V. Application to the Current Motions

[18] The ASC proceedings in this matter are still ongoing. The applicants have not shown unusual and exceptional circumstances. Their situation is no more unusual or exceptional than the parties in *Workum* and *KCP Innovative*.

[19] Moreover, application of the tripartite test suggests that there would be no irreparable harm and the balance of convenience is in favour of refusing the stay.

[20] In the case of the continued representation of Sorenson by Mr. Solomon, the ASC has proposed steps to avoid potential conflict. There is no evidence that the proposed steps cannot avoid conflict. With respect to the disclosure of information, the ASC found that the information and materials sought were too vague, breached confidentiality agreements which public policy supported that they should be maintained or were of insufficient merit. Much of the disclosure sought was related to the broader and larger fraud scheme which the applicants allege as part of their defence. The ASC has questioned the merits of that defence and whether the RCMP are conducting such an investigation as the applicants allege. Given those conclusions, it does not appear that the applicants can show that lack of disclosure will cause irreparable harm.

[21] In any event, the applicants have a full statutory right of appeal. Section 38 of the *Securities Act* provides for an appeal directly to this Court, without leave. There is no privative clause and there are no restrictions on the nature of the questions that can be brought before this Court. Accordingly, it is difficult to see how the applicants will suffer any irreparable harm in the event these applications are denied.

[22] The third step, namely the balance of convenience, favours the continuation of the hearing which involves a number of parties other than the applicants.

[23] Counsel for the applicants argued that the ASC hearing has not yet commenced and will only do so on September 1st, 2009. He went on to argue that this fact distinguishes the present case from the facts in *Workum* and numerous other decisions of this Court ruling against a stay of proceedings pending an appeal brought during the course of a trial or a hearing.

[24] On the other hand, counsel for ASC argued that the hearing was commenced on July 8th with the consent of counsel for the applicants. In my view the position advanced by counsel for the ASC is the correct one.

[25] That said, in my view, not much turns on this point. As this Court has repeatedly indicated, there is a clear policy against litigation by instalments: *Robertson v. Edmonton (City) Police Service*, 2003 ABCA 279, 339 A.R. 169. This strongly militates against the applicants' position herein.

[26] Furthermore, despite able argument from counsel for the applicants, there is nothing in the material before this Court to suggest that the rulings being appealed are so unusual or exceptional such that these applications constitute "rare circumstances" thereby justifying a departure from this Court's usual policy.

[27] Therefore I do not find there to be any merit in the applications brought on behalf of the applicants.

VI. Conclusion

[28] The applications for stays of the two rulings and the ASC hearing are denied. The appeals in question are stayed pending the conclusion of the ASC hearing.

Application heard on August 25, 2009

Reasons filed at Calgary, Alberta
this 28th day of August, 2009

McDonald J.A.

Appearances:

E.C. Archer
for the Appellants

D.A. Young
for the Respondent