

**ALBERTA SECURITIES COMMISSION  
IN THE MATTER of the *Securities Act*  
R.S.A. 2000 c.S-4 (the Act)**

**Citation: Colby Cooper Inc., Re, 2011 ABASC 640**

**Date:20111217**

**IN THE MATTER OF Colby Cooper Inc.**

**Application pursuant to s.47 for a variation by the Executive Director of an Order issued on May 20, 2011, which froze certain property of Colby Cooper Capital Inc.**

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**Decision of the Executive Director**

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**Appearing:**                   Johanna C. Price, Peacock Linder & Holt LLP  
                                      For the Applicant, Colby Cooper Inc.

                                      Brooke A. Shulman, Ontario Securities Commission  
                                      For OSC Staff

                                      W.E. Brett Code, Alberta Securities Commission  
                                      For ASC Staff

**Introduction**

1. This is an urgent application brought by Colby Cooper Inc. (the “Applicant”) pursuant to s.47 of the Act that the Executive Director consent to the release of funds held by way of bank draft payable to Avalon Energy Ltd. in the amount of \$240,000.00 (the “Avalon Bank Draft”). The draft is in the care and custody of the Toronto solicitor for the Applicant. The facts of the matter are unique and somewhat complicated, and the hearing occurred with very little time for counsel to prepare. The Applicant provided an affidavit from a consultant who provided essentially evidence solely on information and belief from the president of the Applicant (the “Carter Affidavit”). The president was unavailable due to health issues. The Ontario Securities Commission (“OSC”) submitted an affidavit from one of its investigators (the Ciorma Affidavit”) and another affidavit from an OSC Forensic Accountant (the “Chak Affidavit”) sworn June 1, 2011, which had been filed in the proceedings before the Ontario Superior Court of Justice in an extension application of a freeze order by the OSC relating to Colby Cooper Capital Inc., a related company to the Applicant. Submissions were made by the Applicant, OSC Staff, and by the Staff of the Alberta Securities Commission (“ASC Staff”).

2. The Applicant was seeking an urgent determination of its ability to use the draft as it was needed to consummate a commercial transaction relating to land sales, which were scheduled to close on the date of the application. OSC Staff had agreed that they would be bound by the determination of the ASC Executive Director regarding whether the funds should be released, subject to their right to appear as a party, submit evidence and make submissions. This agreement is contained within an exchange of emails which were not provided to the Executive Director.
3. The facts are that on May 2, 2011 the Applicant entered into an agreement with Avalon Energy Ltd. ("Avalon Agreement") to purchase a working interest in certain lands, leases and leased substances. As part of the Avalon Agreement, the Applicant had an option to purchase an additional interest for consideration of \$240,000.00. On May 20, 2011, OSC Staff obtained a Direction from the OSC (the "OSC Order"), pursuant to s.126(1) of the *Securities Act* (Ontario), freezing funds and property at the Royal Bank of Canada ("RBC") at one of its branches in Toronto (the "Toronto RBC Branch"). The OSC Order included the Applicant, Colby Cooper Capital Inc., a related company to the Applicant, and others. The OSC Order was continued by an Order of the Ontario Superior Court of Justice, Commercial List, dated June 21, 2011. On May 20, 2011, ASC Staff obtained a freeze order under s.47 of the Act against the Applicant (the "ASC Order") and it was directed to a RBC branch in Calgary (the "Calgary RBC Branch").
4. The facts surrounding the issuance of the Avalon Bank Draft are set out in the Ciorma Affidavit. On May 9, 2011, the Applicant issued a cheque for \$300,000.00 payable to itself drawn on the Calgary RBC Branch. This cheque was negotiated the same day at the Toronto RBC Branch and converted into a bank draft payable to the Applicant in the amount of \$300,000.00. This draft was then converted, again at the Toronto RBC Branch, on June 10, 2011 to two further drafts, one being a bank draft payable to Avalon for \$240,000.00. This draft was further converted, once more at the Toronto RBC Branch on November 22, 2011 to the Avalon Bank Draft. All transactions after May 9, 2011 were conducted during a time when the Toronto RBC Branch was subject to an order which directed them to retain all funds, securities or property of, *inter alia*, the Applicant. The Applicant apparently also had notice of these provisions. As previous stated, the Avalon Bank Draft now is in the possession of the Applicant's Toronto counsel.

### **Submissions of the Parties**

5. The Applicant's position commenced with the fact that the funds were retrieved from the Calgary RBC Branch before either of the freeze orders were in place. The Applicant maintains that the Avalon Bank Draft is being used for a proper and legitimate commercial purpose and that is evidenced through the agreement with Avalon, which formed part of the Carter Affidavit. The Applicant maintains that the funds from the time they were withdrawn from the Calgary RBC Branch were meant for that purpose.
6. The Applicant admitted that the Avalon Bank Draft is presently subject to the ASC Order.

7. OSC Staff provided history to the issuance of the OSC Order, making reference principally to the Chak Affidavit. In essence, the allegations by OSC Staff are that the Applicant, and its principals, have misappropriated investor funds and very little of the \$4.8 million raised were used for oil and gas purposes (see paragraph 4 of the Ciorma Affidavit). OSC Staff then proceeded to go through the chronology of the funds from the original cheque through the numerous conversions into, ultimately, the Avalon Bank Draft. OSC Staff's position was that the Applicant by bringing the negotiable instruments into the Toronto RBC Branch and entering into transactions to convert the drafts into further drafts and the Avalon Bank Draft brought the latter instrument within the purview of the OSC Order. Further, OSC Staff pointed to the fact that the funds had initially been payable to the Applicant and not to Avalon. The payee on the drafts became Avalon after the OSC Order and the ASC Order were in force. The OSC Order is directed to the Toronto RBC Branch and not to the Applicant. OSC Staff stated that the Applicant had been served with the OSC Order, had full knowledge of its contents, and accordingly was cognizant that its banking privileges were subject to the OSC Order.
8. ASC Staff briefly provided an overview that the Executive Director had jurisdiction through consent of the parties, that the Avalon Bank Draft was subject to the freeze, which was confirmed by counsel of the Applicant, and that it would not be in the public interest to release the Avalon Bank Draft to be used by the Applicant for its business purposes. Further, ASC counsel noted that the Avalon Agreement provided that the option payment of \$240,000.00 was to be held in trust by a law firm identified in the Avalon Agreement. If the Applicant was in accordance with the agreement then the funds would have been in the law firm's trust account and no issue would have arisen concerning whether the subsequent Avalon Bank Draft was subject to the freeze orders of the ASC or the OSC.

### **Analysis**

9. The test for maintenance of a freeze order in Alberta, referred to by both the Applicant and OSC Staff, is set out in *Re Hennig*, ABASC 425 (see also *Exchange Bank & Trust Inc. v. British Columbia (Securities Commission)*, [2000] B.C.J. No. 227), where the Alberta Securities Commission confirmed on appeal from a decision of the Executive Director that the following principles apply (at paragraph 19):
  - (a) prima facie evidence of a breach of securities laws was present at the time of granting the freeze order;
  - (b) it is proper to continue the freeze order to preserve property for potential claimants; and
  - (c) it is in the public interest to preserve the freeze order.
10. When the funds were first removed from the Calgary RBC Branch account, it is clear that they were not subject to either the ASC Order or the OSC Order, as neither yet existed. At some point, the funds became subject to the ASC Order, the OSC Order or both. It may have been when the Applicant entered the Toronto RBC Branch and converted the existing drafts to other negotiable instruments and ultimately into the Avalon Bank Draft.

It is not necessary that I decide this issue, as the Applicant has admitted that the Avalon Bank Draft is subject to the ASC Order.

11. The Applicant submits that the Avalon Bank Draft is, and has always been in whatever form it previously existed, intended to be payment for the option under the Avalon Agreement. The submissions by OSC Staff and ASC Staff are that the evidence does not point to that conclusion. OSC Staff argued that when the funds were taken from the Calgary RBC Branch, they were payable to the Applicant, and that conduct continued when the original cheque of May 9, 2011 was converted the same day into a bank draft payable to the Applicant rather than Avalon. The next conversion of the draft occurs on June 10, 2011 and this is the first time the payee is Avalon. This is subsequent to the issuance of the OSC Order and the ASC Order. This would then suggest that the Applicant, subsequent to the issuance of the Orders, changed tact to use the funds for a legitimate purpose ie. to consummate the option under the Avalon Agreement. ASC Staff point to the Avalon Agreement, specifically paragraph 17 thereof, and submit that if the intention from the commencement was to comply with the Avalon Agreement, then why were the funds not simply placed in trust as contemplated thereunder?
12. Regardless of the intention of the Applicant, ie. whether its intention was always to make payment to Avalon using the funds initially withdrawn from the Calgary RBC Branch, or the intention was formed later to try and avoid the freeze order, it does not influence the determination of the issue. Once it is found that the Avalon Bank Draft is subject to the ASC Order, and that has been admitted by the Applicant, then there is no exemption to bring those funds out of the freeze order for a legitimate or any other business purpose. Rather the frozen funds are being held on behalf of investors who were allegedly deceived. At some point in the future there may be a hearing as to whether the funds subject to the freeze order (including the Avalon Bank Draft) properly belong to the investors, or the Applicant, or even possibly the creditors of the Applicant, but that argument is not for this venue.
13. I am satisfied that :
  - (a) based on the Chad and Ciorma Affidavits, that there was prima facie evidence of a breach of securities laws present at the time of granting the freeze order;
  - (b) based on paragraph 16 of the Chad Affidavit, there are at least 272 investors, some of whom reside in Alberta, who are potential claimants to, *inter alia*, the Avalon Bank Draft; and
  - (c) the investigation into the Applicant is ongoing, and the allegations involve the alleged misappropriation of a considerable amount of money and a not inconsiderable amount of investors from at least three provinces. The Applicant may lose its option under the Avalon Agreement, however if it had complied with the express terms of the agreement, it would not have done so. The protection of the public interest is the primary purpose of securities legislation and in these circumstances, it is in the public interest to preserve the ASC Order.

**Finding**

14. Based on the foregoing, I deny the application of the Applicant to vary the ASC Order.

Dated at the city of Calgary, in the province of Alberta, this 17<sup>th</sup> day of December, 2011.

) *"original signed by David C. Linder"*

) David C. Linder, Q.C.

) Executive Director

) Alberta Securities Commission