

**ALBERTA SECURITIES COMMISSION**

**RULING**

**Citation: Arbour Energy Inc., Re, 2008 ABASC 85**

**Date: 20080208**

**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

**Appearing:** 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.

**Date of Hearing:** 1 February 2008

**Date of Decision:** 8 February 2008

## **I. INTRODUCTION**

[1] In a twice-amended notice of hearing dated 10 September 2007 (the "Notice of Hearing"), staff ("Staff") of the Alberta Securities Commission (the "Commission") set out several allegations and particulars thereof, and indicated that in a Commission hearing they would seek sanctioning and costs orders under the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act") against eight respondents: Arbour Energy Inc. ("Arbour"); 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 two-person panel was struck to set a date for the hearing into the merits of the allegations (the "Merits Hearing") – after hearing from counsel for the parties, we directed that the Merits Hearing commence on 12 May 2008 – and to deal with any preliminary matters that might fairly and efficiently be dealt with prior to the Merits Hearing. To that end, we heard from counsel for the parties in open sessions on 26 October 2007 and 7 January 2008 and scheduled a further such session for 1 February 2008.

[3] On 25 January 2008 counsel for Merendon and Sorenson gave written notice of his intention to raise three issues on 1 February 2008: the state of pre-hearing disclosure provided by Staff to the Respondents, Merendon and Sorenson in particular; material in Staff's possession that might be subject to solicitor-client privilege in favour of Merendon, Sorenson or, possibly, other Respondents; and the inclusion in the Notice of Hearing of what Merendon and Sorenson contended are inappropriate references to a past securities regulatory settlement agreement involving Merendon and Sorenson. At the session on 1 February 2008 counsel for Merendon and Sorenson tendered written material, including copies of correspondence, and he and counsel for Staff made submissions. Counsel for many of the other parties also made submissions. At the conclusion of the session we indicated that we would consider the material and submissions and deliver a ruling within one week. Those rulings, and our reasons, follow.

## **II. PRE-HEARING DISCLOSURE**

### **A. Disclosure Provided by Staff**

[4] Staff have provided to the Respondents what we understand to be a relatively large volume of disclosure, consisting of copies of material that has come into Staff's possession in the course of their investigation. However, Staff have not delivered to the Respondents copies of everything in Staff's possession. Staff claimed that what has not been not delivered is not required to be disclosed because it is either irrelevant, or subject to a privilege or privacy right, or in some cases both. Previously (this issue was also raised on 7 January 2008) we directed Staff to provide to the Respondents a useful

description of any material not disclosed (except to the extent that sustaining a claim of privilege made that impractical) and of Staff's reasons for non-disclosure.

[5] In letters dated 15 January 2008 (addressed to counsel for the Respondents) and 28 January 2008 (responding to a 25 January 2008 letter from counsel for Merendon and Sorenson and addressed to him but copied to the others), Staff provided a summary description of the material not disclosed and of their reasons for non-disclosure. In the course of the 1 February 2008 session, Staff provided additional explanation for some of their non-disclosure, which in some instances proved satisfactory both to counsel for Merendon and Sorenson and to this panel.

[6] In his submissions, counsel for Merendon and Sorenson indicated acceptance of certain instances of non-disclosure grounded on privilege. However, several other instances of non-disclosure, many grounded solely on irrelevance, remain in dispute. The issue for determination here is whether Staff's reasons for such non-disclosure are sufficient and sustainable and, if not, how the matter should be resolved.

## **B. Disclosure Obligation**

### **1. Relevance**

[7] It appeared to be common ground that 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, in the context of a criminal proceeding. There appeared to be no dispute that irrelevance is a legitimate ground for non-disclosure. However, Staff and some of the Respondents took a different view as to the practical application of the *Stinchcombe* standard here, and as to the meaning of "relevance" in this context.

[8] The requirement for pre-hearing disclosure is not an abstract legalism, and it does not arise in a vacuum. The purpose is to ensure fairness and natural justice – in the present context, in the enforcement of Alberta securities laws. That purpose demands that respondents in an enforcement proceeding receive "[f]ull, fair and timely disclosure of all relevant material" (see *Re Ironside*, 2005 ABASC 683 at para. 28). We reproduce at length comments from *Ironside* at paras. 28-35, which we consider correctly state the reasons for the disclosure obligation and the application of the *Stinchcombe* standard in enforcement proceedings under the Act:

### **A. The Disclosure Obligation**

#### **1. Procedural Fairness**

Full, fair and timely disclosure of all relevant material is a key factor in ensuring fairness to respondents facing enforcement proceedings under the *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 [*R. v. Stinchcombe*, [1991] 3 S.C.R. 326] and that court’s more recent amplification of those principles. For examples in the securities context, see: *Re Fernback*, 2004 BCSECCOM 378 at para. 36 (also discussing, at paras. 29-31 and 33, *Re Shamblau* (2002), 25 O.S.C.B. 1850 (appeal dismissed [2003] O.J. No. 2089 (S.C.J.)) and *Deloitte & Touche LLP v. Ontario Securities Commission*, [2002] O.J. No. 2350 (C.A.), aff’d 2003 SCC 61); and *Re YBM Magnex International Inc.* (2000), 23 O.S.C.B. 623 (at 3-4 (QL)).

## **2. The *Stinchcombe* Standard**

In *Stinchcombe*, the Supreme Court of Canada stated that full disclosure was necessary, in the criminal context, for the accused to make full answer and defence (at para. 17). The opportunity to make full answer and defence is part of a fair trial.

The Supreme Court of Canada’s decision in *R. v. Taillefer; R. v. Duguay*, [2003] 3 S.C.R. 307 summarizes the Crown’s obligation to make disclosure to the defence in accordance with the *Stinchcombe* principles and their interpretation and application in subsequent decisions (at paras. 59-60):

After a period during which the rules governing the Crown’s duty to disclose evidence were gradually developed by the provincial appeal courts in recent decades, those rules were clarified and consolidated by this Court in *Stinchcombe*. The rules may be summarized in a few statements. The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown’s discretion to refuse to disclose information that is privileged or plainly irrelevant. Relevance must be assessed in relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea... Moreover, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses... This Court has also defined the concept of ‘relevance’ broadly, in *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 467:

One measure of the relevance of information in the Crown’s hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed – *Stinchcombe, supra*, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused

either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

As the courts have defined it, the concept of relevance favours the disclosure of evidence. Little information will be exempt from the duty that is imposed on the prosecution to disclose evidence. As this Court said in [*R. v. Dixon*, [1998] 1 S.C.R. 244], ‘the threshold requirement for disclosure is set quite low... . The Crown’s duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence’ (para. 21; see also *R. v. Chaplin*, [1995] 1 S.C.R. 727, at paras. 26-27). ‘While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant’ (*Stinchcombe*, *supra*, at p. 339).

### **3. Low Standard of “Relevance”**

As noted in the above quotation, the *Stinchcombe* threshold for disclosure is a low standard of relevance – a “reasonable possibility of the information being useful to the accused in making full answer and defence”. Accordingly, relevance in criminal proceedings has to be assessed in the context of the charge itself and any reasonably possible defences that might be available to the defendant. The difficulty is that the Crown makes the initial determination of relevance (subject to review by a court, as discussed below), despite the Crown’s obvious lack of knowledge regarding the defence’s case and strategy.

The procedure is much the same in enforcement proceedings under the *Act*. Staff use their discretion to determine the “relevant” information that must be disclosed to a respondent. That relevance is decided in relation to the use of the information by a respondent in meeting the allegations in the notice of hearing, in formulating reasonably possible defences and in making decisions regarding the conduct of that respondent’s case. As in the criminal context, Staff’s determination is necessarily governed by Staff’s interpretation of whether there is a reasonable possibility of the information being useful to a respondent in the circumstances.

We recognize that the necessary speculation can make the *Stinchcombe* standard difficult to apply. However, this is the reason for the low relevance threshold, and the reason why, to again cite *Stinchcombe*, Staff “must err on the side of inclusion” (at para. 20). The consequence of the low threshold is that the right to disclosure is broad and encompasses material that may appear to have only limited value to the issues for determination in the enforcement hearing.

[9] Having considered these comments in *Re Capital Alternatives*, 2006 ABASC 1441 at para. 18, this Commission stated:

The threshold of relevance is thus quite low. There is, nonetheless, a threshold. There must be at least a reasonable prospect of usefulness to a defence. The standard, we

believe, calls for more than a mere commonality of subject matter, and more than a remote possibility of usefulness.

## **2. Exceptions to Disclosure Obligation**

[10] There appeared to be no dispute that Staff can, in appropriate circumstances, justify non-disclosure of otherwise relevant material on the ground of privilege or privacy right. Here, in justification of their non-disclosure, Staff variously asserted litigation or work product privilege, solicitor-client privilege, section 45 of the Act, public interest immunity and provisions of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FIPPA"). It appeared to us, from Staff's submissions, that Staff's view of the scope of these exceptions to their disclosure obligation may be somewhat overbroad.

### **C. Review of Material Remaining in Dispute**

[11] As we noted, counsel for Merendon and Sorenson indicated his acceptance of certain instances of the non-disclosure grounded on privilege. (The parties, in their submissions, referred to many of the items in dispute by reference to the numbering apparently used by Staff in their disclosure to the Respondents. We adopt that numbering here.) We also understand that counsel for Merendon and Sorenson was satisfied with certain information given by Staff in the course of the 1 February 2008 session and thus no longer seeks disclosure of items 19, 21, 22, 26, 57, 60 and 62, and, by extrapolation, item 39's "Affidavit of Service" and "correspondence to the process server".

[12] As for item 39's "Section 42 Order", "correspondence to counsel for Merendon enclosing Investigation Order" and "correspondence from Merendon requesting a copy of the Section 42 Order", Staff submitted that this material is already in Merendon's possession. We are satisfied that this material, even if already in Merendon's possession, meets the *Stinchcombe* standard of relevance and direct that it be disclosed.

[13] Concerning the instances of non-disclosure remaining in dispute – items 1, 29 (limited to documents characterized by Staff as irrelevant), 30 (limited to information described by Staff as "personal information of third parties"), 31 (limited to information characterized by Staff as irrelevant), 33, 47 to 53 and 56; documents concerning a complaint by one Angel Lori; and correspondence between securities regulators apart from that not disclosed under item 33 – we find ourselves unable to determine, from the information we have been given, whether Staff's reasons for non-disclosure are sufficient and sustainable. We conclude that we must review this material in order to determine whether Staff have satisfied their disclosure obligation in relation thereto. This is a process that other Commission panels have undertaken on other occasions. It is, in our view, a practical, effective and fair way to proceed.

#### **D. Direction and Invitation to Make Written Submissions**

[14] Accordingly, we direct Staff to deliver the material identified in the preceding paragraph (to the extent that it has not yet been disclosed to the Respondents) to this panel **by 16:00 on Friday 15 February 2008** for our review and ultimate rulings on disclosure.

[15] We also invite written submissions, by that time, from all parties who wish to provide them on the scope of certain asserted exceptions to Staff's disclosure obligation: section 45 of the Act; public interest immunity; and FIPPA.

### **III. SOLICITOR-CLIENT PRIVILEGE**

#### **A. Adair Material**

[16] Staff have come into possession of material (the "Adair Material", apparently obtained by them from the Securities and Exchange Commission (the "SEC") in the United States) originating with Larry Adair ("Adair"), whom we are given to understand by counsel for Merendon and Sorenson is a lawyer in Florida who at one time acted as such for one or both of those Respondents and perhaps others of the Respondents. Staff indicated that some of the Adair Material "appeared on cursory review to be possibly subject to a claim of privilege" and therefore was "separated and sealed" and not disclosed to any of the Respondents. (We note that the other Adair Material, included in item 47, was not disclosed on the ground of irrelevance.)

[17] Counsel for Merendon and Sorenson contended that any solicitor-client privilege attaching to legal work (if that is indeed what the Adair Material is) belongs not to Staff but to the clients involved; that his clients have never waived any such privilege; and that any such privileged material should be released to his clients or the clients involved. He pointed to section 57 of the Act and urged that a referral of this matter be made to the Court of Queen's Bench (the "Court") for its determination of privilege and its direction. He also sought information as to who at the Commission reviewed the sealed Adair Material and to what extent. Staff did not take issue with a referral under section 57 but indicated they were not inclined to provide the information sought, at least at this time.

#### **B. Section 57**

[18] Section 57 of the Act provides that an application can be made to the Court when "a person is about to examine or seize under this Act any documents, records . . . or things in the possession of a lawyer and the lawyer with respect to those documents, records . . . or things claims that a privilege might exist between the lawyer and the lawyer's client".

[19] The situation here is apparently not one within the contemplation of section 57 of the Act. The Adair Material has made its way into Staff's possession, apparently from the

SEC rather than from Adair himself. Staff apparently have no plans to make any further use of the sealed Adair Material. The other Adair Material included in item 47 has been reviewed by Staff and characterized by them as irrelevant. We conclude that section 57 is inapplicable in this case. How, then, are the concerns raised by counsel for Merendon and Sorenson to be addressed?

[20] We do not read section 57 of the Act as necessarily precluding other recourse to the Court for direction in situations not contemplated by this section. Nor do we consider that the existence of section 57 means, or even implies, that no other course of action is open to the Commission where issues of potential solicitor-client privilege arise. The Commission, after all, is master of its own procedure, guided always by a view to fairness and the public interest.

### **C. Review of Adair Material**

[21] We conclude that it is appropriate that someone review the Adair Material with a view to: assessing whether there is solicitor-client privilege attaching to any of it; if so, identifying the client or clients affected; and in any event giving direction as to what is to be done with it.

[22] Mindful that recourse to the Court apart from section 57 of the Act is not necessarily precluded, we consider that we have the authority and ability to perform the identified tasks and that our doing so would contribute to the efficiency of the pre-hearing process without working any unfairness on any of the Respondents.

### **D. Direction**

[23] We therefore direct Staff to deliver the sealed Adair Material to this panel **by 16:00 on Friday 15 February 2008** for our review and rulings on solicitor-client privilege.

[24] As for the Adair Material included in item 47, we have already directed that it be delivered to this panel for our review and ultimate ruling on disclosure. Should we, on our review, determine that solicitor-client privilege attaches to any of it, we will identify the client or clients affected and give directions as to what is to be done with it.

## **IV. NOTICE OF HEARING**

[25] Counsel for Merendon and Sorenson argued that sections 29.17 and 32.16 of the Notice of Hearing, which make reference to an acknowledged securities regulatory settlement agreement involving Merendon and Sorenson, should be excised because the references are prejudicial to his clients and probative of little or nothing.

[26] A Commission panel hearing an enforcement proceeding under the Act is an expert panel, knowledgeable about Alberta securities laws and attuned to its public interest mandate and responsibilities. The hearing itself is an administrative hearing dealing with conduct in a regulated capital market, to which the laws of evidence applicable to judicial proceedings do not apply.

[27] We disagree with the suggestion of counsel for Merendon and Sorenson that mention of a prior enforcement proceeding involving a respondent in a notice of hearing (or indeed during the merits portion of a hearing) would prejudice a Commission hearing panel against the respondent, impair the panel's ability to reach an impartial decision on the admissible, relevant evidence on the merits of the allegations against the respondent and thereby work an irreparable unfairness on the respondent. Commission hearing panels are simply not that naïve. In any case, Commission sanctions and settlement agreements are public information.

[28] Section 29 of the Notice of Hearing alleges several disclosure failures by Arbour and its directors in offering memoranda used to facilitate sales of Arbour securities, the pertinent one, at section 29.17, being an allegation as to a failure to disclose that a director of Arbour had been a director of Merendon when Merendon was subject to a Commission sanction.

[29] Counsel for Merendon and Sorenson acknowledged before us that his clients were once parties to a securities regulatory settlement agreement that resulted in sanctions, which he said had expired before the distributions alleged in the Notice of Hearing. However, we do not know whether the individual referred to in section 29.17 was (as alleged) a director of both Merendon and Arbour at the (different) mentioned times, nor, if so, whether there was (as alleged) any duty on Arbour or its directors to disclose that and the mentioned prior sanction in the mentioned offering memorandum. That said, there is a link drawn in the Notice of Hearing between the reference to the prior sanction and the alleged deficiencies in the offering memorandum, and we cannot agree that the reference, so made, lacks potential probative value.

[30] Nor do we discern an overriding prejudice to Merendon or Sorenson that might follow from this reference, whether or not it proves relevant in sustaining Staff's allegation of disclosure failures by Arbour and its directors. Counsel for Merendon and Sorenson noted that the fact that someone did something wrong at one time does not prove that the same someone did another wrong (the same or a different wrong) at a later time. We do not believe that the Commission panel that is to conduct the Merits Hearing will have any difficulty recognizing this obvious truth – a truth of which counsel for Merendon and Sorenson will of course be able to remind them.

[31] For the reasons given, we see no reason to order the excision of section 29.17 of the Notice of Hearing, and we decline to do so.

[32] Section 32.16 of the Notice of Hearing alleges that Merendon, Sorenson and another individual were sanctioned by the Commission in 2000 for certain misconduct.

[33] The linkage between this allegation and the broader allegation in section 32 of the Notice of Hearing is less obvious to us than the linkage between section 29.17 and section 29. Section 32 as a whole seems to outline a Staff theory of conduct by the Respondents that they "knew or ought reasonably to have known perpetrated a fraud on . . . investors". Perhaps section 32.16 relates to the question of knowledge. Perhaps Staff imagine that they can draw some other link. Possibly, Staff will fail (assuming they are permitted to try) to draw any link between the facts alleged in the impugned section and the broader allegation; however, we cannot say that the facts alleged in the impugned section lack potential probative value.

[34] Nor do we discern an overriding prejudice to Merendon or Sorenson in consequence of the allegation set out in section 32.16 of the Notice of Hearing. We are confident that the Commission panel that is to conduct the Merits Hearing will not draw any inference against Merendon or Sorenson from the mere allegation set out in section 32.16 or (if proved) from the facts alleged in section 32.16, unless Staff can also establish a compelling link between such facts (if proved) and the broader allegation of fraud against Merendon and Sorenson in connection with the alleged Arbour distributions.

[35] We therefore are not persuaded that there are grounds to order the excision of section 32.16 of the Notice of Hearing.

[36] We do not overlook comments made by counsel for Merendon and Sorenson in his submissions. There, he noted that the chair of the Commission panel that is to conduct the Merits Hearing approved the settlement agreement that gave rise to the sanctioning history mentioned in the impugned sections of the Notice of Hearing and that "my client advises me that he and his counsel met privately with [the chair] in advance of agreeing to a Settlement Agreement, to discuss the substance of that Agreement".

[37] It is unclear what exactly we are to make of these comments. However, we conclude that nothing in them alters our conclusions above. Whether or not a member of the Commission panel that is to conduct the Merits Hearing was party to discussing or approving the acknowledged settlement agreement will do nothing to make the existence and outcome of the settlement agreement (if proved) more true, or of any greater or lesser consequence.

[38] In short, we reject the suggestions of counsel for Merendon and Sorenson that allegations of prior sanctions or (if proved) the fact of prior sanctions involving his clients, whether or not the chair of the Commission panel that is to conduct the Merits Hearing was party to discussing or approving the prior sanctions, will impair that panel's ability to assess – consistent with the dictates of fairness and natural justice – the allegations against his clients on the basis of the admissible, relevant evidence adduced and the submissions put to it in the Merits Hearing. We decline to order the requested excisions from the Notice of Hearing.

8 February 2008

**For the Commission:**

"original signed by"  
Stephen R. Murison

"original signed by"  
Roderick J. McKay, CA