

IN THE MATTER OF
THE SECURITIES ACT
S.N.B. 2004, c. S-5.5

- and -

IN THE MATTER OF
PIERRE EMOND, ARMEL DRAPEAU and JULES BOSSÉ
(RESPONDENTS)

Date of Hearing of Motion: 21 April 2011
Date of Reasons for Decision on Preliminary Motion: 29 April 2011

Panel:

Guy Couturier, Q.C., Panel Chair
Anne La Forest, Panel Member
Céline Trifts, Panel Member

Counsel:

Jake van der Laan & Mark Wagg

For Staff of the New Brunswick
Securities Commission

Jack Blackier & Michel Arseneault
Barry Spalding

For respondent Armel Drapeau

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REASONS FOR DECISION ON MOTION

1. BACKGROUND

[1] On 24 June 2010, Staff of the New Brunswick Securities Commission ("Commission") filed a Statement of Allegations against the Respondents. Staff make several allegations against the Respondents, including the allegation that the Respondents were involved in illegal distributions of securities in the province. They request a cease-trade order, a disgorgement order and orders for administrative penalties and costs pursuant to the *Securities Act* ("Act").

[2] Pursuant to Local Rule 15-501 of the Commission, the respondent Armel Drapeau ("Drapeau") filed a Notice of Preliminary Motion ("Motion") on 29 March 2011, with the Office of the Secretary of the Commission. Drapeau seeks the following preliminary relief:

- (a) An order dismissing the allegations against the Respondent, Armel Drapeau, on the grounds that the Panel lacks jurisdiction to hear the complaint resulting from its lack of impartiality and/or independence as required by the rules of natural

justice and/or sections 7 and 11(d) of the *Charter of Rights and Freedoms, Constitution Act, 1982*;

- (b) In the event charges are not dismissed, an order requiring the Applicant [Staff of the Commission] to produce unredacted disclosure of all documents related to the allegations against the Respondents in the possession of the Respondent, failing which the allegations against Armel Drapeau be dismissed;
- (c) In the event charges are not dismissed, an order requiring the Applicant to disclose the audio-recordings of all the interviews of the Respondents by Ed LeBlanc or any other member of the New Brunswick Securities Commission, failing which the allegations against Armel Drapeau be dismissed;
- (d) In the event charges are not dismissed, an order requiring the Applicant to disclose the RCMP file 2009466210 to Armel Drapeau, failing which the allegations against Armel Drapeau be dismissed;
- (e) In the event charges are not dismissed, an order adjourning the hearing of the complaints on the grounds legal counsel are involved in a civil trial in the Court of Queen's Bench as advised to the NBSC on December 18, 2010;
- (f) An order that the issue that the Applicant is stopped from proceeding with the charges, based on the Applicant's recorded position that the securities in question were compliant with New Brunswick securities law during the period from at least April of 2006 to May of 2008, be determined in advance of the full hearing;
- (g) Such further and other relief as this Panel may deem just.

[3] The grounds alleged in paragraph (a) of the Motion involve a constitutional question and puts in issue the Commission's jurisdiction. Counsel for Drapeau notified the Attorney General of New Brunswick ("A.G.") of the challenge, and the latter has indicated to the Commission that it wishes to appear and be heard on that aspect of the Motion, but has indicated that it has no interest in the remaining issues. To avoid any delay of the consideration of the disclosure and estoppel issues, the Commission convened a session on 21 April 2011 and heard the parties on the issues detailed in paragraphs (b) through (f) of the Motion. The jurisdictional issue was severed and scheduled for hearing on 9 May 2011.

[4] Initially the Commission granted Drapeau's request to adjourn the 19-20 April 2011 hearing on the merits, thus resolving the claim made in paragraph (e) of the

Motion. All parties were advised of the rescheduling of the hearing on the merits via letter from the Office of the Secretary and via service of an Amended and Consolidated Notice of Hearing, which is now set for the afternoon of 9 May 2011.

[5] The Commission has thus grouped for convenience the remaining issues raised in paragraphs (b), (c), (d) and (f) of the Motion. For ease of reference in this ruling they are referred to as follows:

- i. **Unredacted Disclosure**
- ii. **Audio-recordings of compelled interviews**
- iii. **RCMP file 2009466210**
- iv. **Estoppel**

[6] Drapeau and Staff of the Commission ("Staff") both appeared before the Panel on the 21 April 2011. Service of the Notice of Hearing of Motion on the respondents Pierre Emond and Jules Bossé was made on 12 April 2011 via email, and was evidenced by an Affidavit of Service sworn by B K on 14 April 2011

[7] Despite having been served with the Notice of Hearing, Pierre Emond ("Emond") did not appear. Emond did however advise Staff, via email, that he would not be attending the 21 April 2011 hearing. The other respondent, Jules Bossé ("Bossé"), also did not appear, despite having being properly served with the Notice of Hearing.

2. ANALYSIS and DISPOSITION

i. Unredacted Disclosure

[8] The Commission in its review of the evidence, and submissions made on the issue of "Unredacted Disclosure", reserves its ruling and will be issuing a separate decision on this item.

ii. Audio-recordings of compelled interviews

[9] According to the evidence before the Panel, Drapeau was interviewed by Commission Senior Investigator Ed LeBlanc (“Investigator”) on four occasions in 2008 and 2009. All four interviews were audio-recorded and transcribed. As part of the disclosure requirement Staff provided Drapeau the transcripts for all four interviews.

[10] In early 2011, counsel for Drapeau requested the audio-recordings of the interviews to confirm the accuracy of the transcripts. Staff provided the audio-recordings of two of the four interviews; however the audio-recordings of the other two interviews were not remitted to Drapeau. These interviews, conducted on 12 June 2008 and 20 March 2009, were recorded and transcribed by Henneberry Reporting Service. The uncontested affidavit evidence indicates that the audio recordings for these interviews were recycled after the transcripts were prepared, as is the practice of Henneberry Reporting Service, and all existing audio deleted.

[11] The evidence is, and Drapeau acknowledges, that Staff never had these tapes in their possession or control. However, Drapeau’s position is that the Investigator had a duty to preserve the audio recordings, and seeks an order from the Commission that Staff is prevented from using the transcripts of the non-preserved audio-recordings in these proceedings.

[12] The Commission does not agree with Drapeau’s position on this issue. As acknowledged by all parties, the audio tapes of the June 2008 and March 2009 interviews no longer exist. However, transcripts of these interviews were provided to Drapeau. Drapeau’s evidence is that he believes that there exist inaccuracies with the transcription but provides no particulars or examples of what he claims. The Commission has difficulty with this lack of specificity. Drapeau does not cite, nor does he rely, on any specific provision of the Act that requires the Investigator to secure and preserve audio tapes made by a Court Stenographer.

[13] Further, the caselaw cited by counsel for Drapeau deals with video transcripts, not audio transcripts¹. In *Burns*, the Court highlighted the importance of considering the nuances of body language, mood and demeanour in determining credibility. The Commission is of the view that these matters are not applicable in the context of an audio transcript. In the present case, the written transcripts are the best evidence available. The Panel notes in this regard that the *Recording of Evidence Act*² provides that a transcription prepared and certified by a court stenographer has the same effect as the original evidence.

[14] The recycling of the tapes frustrate the remedy Drapeau seeks, as the Commission is truly unable to order the disclosure of the June 2008 and March 2009 interview audio-recordings. They no longer exist. The transcriptions of Drapeau's interviews are undoubtedly relevant to this complaint. The Commission is not prepared to exclude the existing transcripts based on a vague claim of "some inaccuracies" in the transcription. For these reasons, Drapeau's motion in relation to the audio-recordings and exclusion of transcripts is dismissed.

iii. RCMP file 2009466210

[15] Drapeau also seeks the production and disclosure of a RCMP file 2009466210 ("RCMP File"), claiming that Staff have a duty to disclose this file, as it is relevant to the current proceeding. Drapeau is requesting that the Commission, pursuant to subsection 23(1) of the *Act*, order the RCMP to disclose its file.

[16] The evidence before the Panel is that Staff do not have a copy of the RCMP File, nor have they ever seen the file and do not know what it contains. The Investigator's unchallenged affidavit evidence states that the RCMP provided him with no evidence regarding the matter. Staff, in their submission, claim that they are under no obligation to obtain and provide information that is in the possession of third parties, including the RCMP.

¹ R. v. Burns, 2010 Carswell Sask 53

² SNB c.R-4.5, at sections 4 and 5

[17] The Commission has difficulty with Drapeau's request. First, with respect to the issue of relevance, counsel for Drapeau have indicated that Drapeau requires the RCMP File in order to make full answer and defence to the allegations against him. However, the evidence is that Staff never saw the RCMP File and is unaware of its contents. Accordingly, Staff's allegations are evidently not based on the contents of the RCMP File.

[18] The RCMP File is not in Staff's possession or control, nor has it ever been. The Panel adopts of the following passage found in *Re Arbour Energy Inc.*², "*the RCMP's investigation does not form part of Staff's pre-hearing disclosure package that they are obliged to disclose to the Respondents in accordance with the standard set by Stinchcombe. In short, we view the RCMP investigative material as material in the hands of a third party.*"⁴ In this case, as in *Arbour*, the RCMP is a "stranger" to Staff's investigation.

[19] Indeed the Commission further doubts its statutory authority to order, or compel, the RCMP to produce a criminal file for use in this administrative proceeding. Absent any clear statutory provision to this effect, the Commission is not prepared to issue such an order. For these reasons Drapeau's motion for an order for production of the RCMP File is dismissed.

iv. Estoppel

[21] Drapeau also seeks an order that Staff be estopped from proceeding against him. This position results from certain actions, or inactions, of the Investigator and Staff, following the initiation of an investigation into CTIC which began in 2006.

[22] Counsel for Drapeau, in his argument, detailed the Investigator's activities and Staff's investigation into CTIC and into Drapeau, focussing on the years 2006 to 2008. His argument focussed on when, and on what was or was not, disclosed to Drapeau by the Investigator.

⁴ 2009 ABASC 366 at para 65, 68

[23] Counsel for Drapeau argues for the application of the doctrine “*Estoppel by silence*”. He asserts that Staff somehow induced their client to believe that he was operating in accordance with the Act. Drapeau relies, in part, on *Johnston v. Law Society (Prince Edward Island)*⁵. However, this decision clearly requires that the evidence establish that the person induced, must also be shown to have relied upon, the Staff’s action or inaction and consequently to his detriment. There is no reliable evidence before the Panel at this point that Drapeau knew of the Investigator’s activities at any relevant time, and therefore he could not, and has not, demonstrated to have relied on the Investigator’s activities. In addition, neither the Investigator, nor Staff, according to the evidence, were aware, or possessed any information, to lead them to believe that Drapeau was in any way affected by or had knowledge of the Investigator’s pursuits.

[24] Estoppel is an equitable remedy and is dependent upon established facts warranting its application. At this preliminary stage of the proceeding, the Commission does not possess enough facts to rule favourably on this issue.

[25] The lack of a complete factual picture is particularly disconcerting given that the remedy requested directly impacts upon section 177 of the Act. Section 177 provides the Investigator with discretion in disclosing information in relation to an investigation. Using Estoppel to interfere with an investigation or with an investigator’s discretion, must be used sparingly and only where there are clearly established and compelling facts that justify such an intervention.

[26] Staff also claim that upon all relevant evidence being disclosed at the hearing on the merits, they may be presenting a different narrative of the facts. Also a different version of the facts may also be presented by the other respondents to the proceeding. In summary to base a decision on Estoppel – of any type – at this early stage, without benefit of all relevant evidence and thus a complete picture of the facts, is unjustified. Though Drapeau claims there is an adequate factual foundation at this stage for the Commission to determine the issue of Estoppel, the Commission does not agree.

⁵ 156 A.P.R. 181

[27] For the reasons set out above, the Commission dismisses Drapeau's motion for estoppel relief. However, this decision does not preclude Drapeau from raising this argument at the conclusion of the hearing on the merits.

Dated this 2nd day of May, 2011.

"original signed by"

Guy Couturier, Q.C., Panel Chair

"original signed by"

Anne La Forest, Panel Member

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Céline Trifts, Panel Member

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