2002 BCSECCOM 793

COR#02/103

Reasons

Michael Lee Mitton and Bradley Nixon Scharfe

Section 161(1) of the *Securities Act*, RSBC 1996, c. 418

Hearing

Panel	Adrienne Salvail-Lopez	Vice Chair
	John K. Graf	Commissioner
	Robert J. Milbourne	Commissioner

Date of Hearing September 3, 2002

Date of Reasons September 16, 2002

Appearing

Richard N. Bandstra For Bradley Nixon Scharfe

Lorne Herlin For Commission staff

Introduction

¶ 1 Bradley Nixon Scharfe applied for further disclosure.

Background

¶ 2 On March 26, 2001, Scharfe entered into a settlement agreement with the Canadian Venture Exchange (now the TSX Venture Exchange) relating to his participation between December 1995 and March 1996 in a share trading scheme involving companies listed on the Exchange.

¶ 3 On December 27, 2001, the Executive Director issued a notice of hearing under section 161(1) of the *Securities Act*, RSBC 1996, c. 418, against Scharfe and Michael Lee Mitton. The notice alleges that Scharfe and Mitton contravened the Act and acted contrary to the public interest by participating in the share trading scheme.

¶ 4 On September 3, 2002, Scharfe applied for an order requiring Commission staff to disclose communications between Commission and Exchange staff in connection with the matters raised in the notice of hearing. We denied Scharfe’s application. These are our reasons.

Analysis

¶ 5 The Commission established the standard of disclosure to be met by Commission staff prior to section 161(1) enforcement hearings in *Re Cartaway Resources Corporation*, [1999] 22 BCSC Weekly Summary 27. At page 39, the Commission said:

> The duty on Commission staff counsel requires disclosure of:
>
> 1. the particulars of the case against the respondents; and
>
> 2. all relevant material gathered in the investigation relating to the allegations in the notice of hearing, whether Commission staff intend to rely on the material or not, unless there is any special reason why such material should not be disclosed and in those circumstances the special reason should be brought to the attention of the respondents. Of the relevant materials disclosed, Commission staff counsel should continue to distinguish between the materials upon which Commission staff intend to rely and that which they do not.

¶ 6 Counsel for Scharfe advised that he intends to bring a preliminary application alleging abuse of process, in which he will argue res judicata, estoppel and double jeopardy. He submitted that he needs disclosure of the communications between Commission and Exchange staff to bring his application and that he is entitled to this disclosure "because otherwise I have to make it [his application] completely without a factual foundation."

¶ 7 He also submitted that this disclosure is relevant and argued as follows:

> … I believe that Commission proceedings are no different than – in a lot of respects than civil proceedings. The issues a defendant raises in response reflect what is relevant in the proceedings. You can't look at the Notice of Hearing or a Statement of Claim in the abstract. You have to look at what arguments the defendant is going to make to determine what is relevant, and I don't believe Commission Staff has done that here.

¶ 8 Commission staff submitted that they have made disclosure to the standard established in *Cartaway*. This standard requires them to disclosure "all relevant material gathered in the investigation relating to the allegations in the notice of hearing". On the issue of what is "relevant", they rejected Scharfe's analogy between civil proceedings and Commission proceedings, arguing that

Commission proceedings are regulatory in nature and designed to protect the public interest. Finally, Commission staff argued that the application to be made by Scharfe is a legal one and does not require a factual foundation. They suggested that Scharfe is attempting to go on a fishing expedition by gaining access to communications between Commission and Exchange staff.

¶ 9 The issue before us was whether communications between Commission and Exchange staff in connection with the matters raised in the notice of hearing are "relevant material gathered in the investigation relating to the allegations in the notice of hearing".

¶ 10 In *Cartaway*, the Commission provided additional direction in this regard, observing at page 39 that:

> … In our view, it is not appropriate to permit fishing expeditions into Commission staff files for purposes unrelated to the allegations in the notice of hearing or to simply see what is there. There may be materials in the Commission staff's file that were not gathered in the course of the investigation but rather created by Commission staff in preparation for the hearing. In our view, these kinds of materials are not "fruits of the investigation" as suggested by Johnson [a respondent] and need not be disclosed.

¶ 11 We agreed that relevance must be determined in reference to the allegations in the notice of hearing, not in reference to arguments made by the respondents that are unrelated to those allegations.

¶ 12 We also agreed that only relevant material "gathered in the investigation" should be disclosed. We were of the view that communications between Commission and Exchange staff are not themselves "fruits of the investigation". If those communications enclose or refer to relevant material gathered in the investigation, that material would have to be disclosed; the communications themselves, however, would not.

¶ 13 Therefore, we denied Scharfe's application for disclosure of those communications.

September 16, 2002

¶ 14 **For the Commission**

Adrienne Salvail-Lopez
Vice Chair

John K. Graf
Commissioner

Robert J. Milbourne
Commissioner