2004 BCSECCOM 680

Corporate Express Inc., also known as Corporate Express Club and Corporate Express Club (CEC) 1988, Fortress International Ltd., Great American Gold Ltd., John Thomas McCarthy and Cameron Willard McEwan

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

Submissions on the Admission of Evidence

Panel	Brent W. Aitken	Vice Chair
	Robert J. Milbourne	Commissioner
	Roy Wares	Commissioner
Date of Ruling	November 29, 2004	
Submissions Made By		
Douglas H. Christie	For Cameron Willard McEwan	
Kristine Mactaggart	For the Executive Director	

Ruling

¶ 1 This is a ruling on the admissibility of evidence that the Executive Director seeks to introduce in this hearing. Cameron Willard McEwan has objected to the introduction of some of this evidence on various grounds.

¶ 2 In the course of the Executive Director's case, we marked for identification 19 sets of documents (assigned letters A through S) pending our ruling on their admissibility. The documents are described below.

¶ 3 In making this ruling we relied on the written submissions of:

1. Commission staff dated October 25, 2004,
2. McEwan (in response) dated November 9, 2004,
3. Commission staff (in reply) dated November 18, 2004, and
4. McEwan (in further response) dated November 25, 2004.

¶ 4 We are ruling only on whether these documents will be admitted into evidence. We will not determine the weight we should give them until after the hearing is

concluded and we are considering all of the evidence and the closing arguments of counsel.

¶ 5 Section 173 of the *Securities Act*, RSBC 1996, c. 418 states:

> The person presiding at a hearing
> . . .
> (b) must receive all relevant evidence submitted by a person to whom notice has been given and may receive relevant evidence submitted by any person, and
> (c) is not bound by the rules of evidence.

¶ 6 Despite the distinction made in section 173 between evidence submitted by respondents and other evidence, the Commission generally admits all relevant evidence.

¶ 7 We have admitted into evidence all undisputed documents marked for identification without considering their content. Except where we have said otherwise, relevance is the sole criteria we have used in this ruling to determine the admissibility of the disputed documents marked for identification.

¶ 8 When we refer to the notice of hearing, we mean the Further Amended Notice of Hearing dated as of July 13, 2004.

The Disputed Evidence

Documents Marked for Identification ((DMI) A and B

¶ 9 The documents in DMI-B are in a binder labelled "Vol. 4 – General Corporate Information". The documents in Tabs 1 through 14 of this binder are not in dispute and we admit them as evidence.

¶ 10 The documents in DMI-A are the originals of some of the undisputed documents in DMI-B. They are not in dispute and we admit them as evidence.

¶ 11 Tabs 15 through 18 are annual reports of the Office of the Arizona State Mine Inspector for the years 1999, 2000, 2001 and 2002. Each report contains a list of active mines in Arizona, organized by county. The 1999 report describes the list as "the operating mines inspected". The later reports describe the list as "the operating mines and contractors active in the year". None of the lists shows a mine under the name of Great American Gold or related companies.

¶ 12 McEwan objects to the admission of the documents in Tabs 15 through 18 on the basis they are not relevant because they are incapable of proving any facts that are

relevant to the notice of hearing. The Executive Director says these documents are relevant to the allegations in paragraphs 1.16 and 1.17 of the notice of hearing. The Executive Director intends to rely on these lists to help prove that Great American Gold had no mine.

¶ 13 The 1999 report purports to identify only mines that were inspected. At most it would only be proof that any mine owned by Great American Gold was not inspected, which is not relevant. We therefore do not admit Tab 15.

¶ 14 The 2000, 2001 and 2002 reports purport to identify all operating mines in Arizona. We do not know why the Office of the Mine Inspector compiles the lists, the sources it relies on to do so, the steps it takes to ensure the accuracy of the lists, or even that it intends that the lists be interpreted as conclusive evidence as to the existence or non-existence of a mine. The reports also do not disclose the protocol (for example, owner, operator or contractor) used in choosing the company names identified in the lists.

¶ 15 We therefore cannot rely on these reports for proof as to whether or not a mine exists. That makes them irrelevant and we therefore do not admit Tabs 16, 17 and 18.

Documents Marked for Identification C

¶ 16 These documents are contained in a binder labelled "Vol. 5 – Investor / Informant Documents". They are not in dispute and we admit them as evidence.

Documents Marked for Identification D and E

¶ 17 These are in two binders labelled "Vol. 6A – Website and Related Documents" and "Vol. 6B – Website and Related Documents".

¶ 18 McEwan objects to their admission on the grounds that Commission staff contravened sections 184 and 193 of the *Criminal Code* (Canada) in acquiring this evidence and therefore it is illegally obtained and should not be admissible. He says sections 7 and 8 of the *Charter of Rights and Freedoms* applies.

¶ 19 Sections 184(1) of the *Criminal Code* says:

> 184. (1) Every one who, by means of any electro-magnetic, acoustic, mechanical or other device, willfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

¶ 20 The evidence in DMI-D and DMI-E was obtained under a demand issued under section 144 of the Act. Commission staff imposed the demand on MiDesigns.com

and as a result received copies of emails and other information stored on the server operated by MiDesigns. In our opinion, this is not an interception of private communications by means of an electro-magnetic, acoustic, mechanical or other device, within the meaning of section 184.

¶ 21 The documents obtained by Commission staff from MiDesigns revealed the passwords to websites operated by the respondents. Commission staff then used those passwords to gain access to the sites. This was not, as suggested by McEwan, an improper breach of his privacy. Commission staff are entitled to use any information they acquire under section 144 to further the investigation they have been authorized to make.

¶ 22 It is also well-settled that the proper exercise of investigative powers in the Act do not offend sections 7 and 8 of the *Charter* (*British Columbia Securities Commission v. BDS*, 2003 BCCA 244; *British Columbia Securities Commission v. Branch*, [1995] 2 SCR 3). There is no evidence here of improper purpose.

¶ 23 These documents are relevant to the allegations in the notice of hearing and therefore we admit them as evidence.

Documents Marked for Identification F, G and H

¶ 24 The documents in DMI-F are in a binder labelled "Vol. 7A – BDS Records". They consist of correspondence between Bryce Stewart (a British Columbia lawyer) and McEwan about the movement of funds and correspondence between Stewart and various investors.

¶ 25 DMI-G and DMI-H are lists prepared by Commission staff based on entries made in the trust account maintained by Stewart for Fortress and Great American Gold.

¶ 26 McEwan objects to the admission of these documents. He notes that Stewart is within the jurisdiction and is compellable to testify and should properly be made available for cross-examination. He says that without testimony by Stewart about the circumstances surrounding the documents they are subject to erroneous inferences and therefore irrelevant.

¶ 27 The Executive Director says these documents are relevant because they relate to the movement of funds and link the alleged trades to British Columbia.

¶ 28 For the reasons cited by the Executive Director, we agree that these documents are relevant. We therefore admit them as evidence. However, the best evidence in this area would include *viva voce* evidence from Stewart. The Executive Director should call him as a witness. If it turns out that Stewart is not available to testify,

the parties can address in argument the weight we ought to attach to these documents in those circumstances.

Documents Marked for Identification I, J, K, L, M and N

¶ 29 DMI-I, DMA-J, DMI-K, DMI-L and DMI-M are documents provided by a Colin Charnley, a resident of Australia. They consist of copies of correspondence with Commission staff and with persons related to Corporate Express, as well as documents related to Charnley's investments. The documents in DMI-N are original colour photographs, and photocopies of photographs, purportedly of the Great American Gold property in Arizona.

¶ 30 All of these documents surfaced during the hearing and were first disclosed to McEwan about the time they were put before the Executive Director's witness in direct examination on September 17, 2004.

¶ 31 McEwan objects to their admission because they are irrelevant. The Executive Director says they are relevant to various allegations in the notice of hearing, in particular, paragraph 1.26.

¶ 32 The introduction of these documents at this late stage in the proceedings would require to McEwan to incur cost and inconvenience to deal with them. The Executive Director was not aware of this evidence when the notice of hearing was issued, so not admitting this evidence cannot be prejudicial to the Executive Director's case. For these reasons, we do not admit these documents.

Documents Marked for Identification O

¶ 33 These are in a binder labelled "Vol. 8A – Transcripts: Van Wezel / Baxter / Zilliox / Rahemtulla". They consist of transcripts and related exhibits of interviews by staff of the Alberta Securities Commission of Harry John Van Wezel (Tab A), Grace Baxter (Tab B), Marilyn Zilliox (Tab C), and by BCSC staff of Karim Rahemtulla (Tab D).

¶ 34 McEwan objects to admission of the Van Wezel, Baxter and Zilliox documents on the basis that (1) the interviews were confidential and intended for no other purpose than the ASC's investigation, and (2) he does not have reasonable access to these witnesses.

¶ 35 The Executive Director says the Van Wezel documents are relevant because he worked with persons the Executive Director alleges are connected with Corporate Express and who worked in that capacity in British Columbia, and that Van Wezel was present at a seminar in Kelowna.

¶ 36 It is well settled that a securities regulator in Canada, in this case the ASC, is entitled to share information gathered under its investigative powers with a securities regulator in another jurisdiction, in this case the British Columbia Securities Commission, to assist an investigation by the regulator in the other jurisdiction: *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 SCR 494.

¶ 37 The Van Wezel documents are relevant to the allegations in the notice of hearing; we admit them as evidence. Van Wezel cannot be compelled to testify and is therefore not subject to cross-examination on his transcript. We invite counsel to address in argument how this should affect the weight we give to this evidence.

¶ 38 The Executive Director says the Baxter and Zilliox documents are relevant because they say they are investors in Corporate Express, and had contact with persons from British Columbia purporting to represent Corporate Express.

¶ 39 Baxter and Zilliox are friends. Their interviews happened because Zilliox contacted the ASC. They were interviewed together, so each witnessed the interview of the other. Like Van Wezel, they are outside the jurisdiction and cannot be compelled to testify. Unlike Van Wezel, their connection to British Columbia is tenuous and their transcripts offer little information that is useful about the operations of the respondents. For these reasons, we are unlikely to find their evidence useful, although perhaps technically relevant. We do not admit the Baxter and Zilliox documents as evidence.

¶ 40 The Rahemtulla documents are not disputed. We admit them as evidence.

Documents Marked for Identification P

¶ 41 These documents are in a binder labelled "Vol. 8B – Transcript: Stojak". They consist of a transcript of an interview of Pat Stojak by Commission staff and related exhibits.

¶ 42 McEwan objects to the admission of this evidence on the basis that it should not be admissible without providing McEwan the opportunity to cross-examine Stojak, given that there is no evidence that Stojak is unavailable to testify.

¶ 43 The Executive Director says the evidence is relevant to the allegations in the notice of hearing and that Stojak had significant contact with the respondents.

¶ 44 For the reasons cited by the Executive Director, we agree these documents are relevant. We therefore admit them as evidence. However, the best evidence in this area would include *viva voce* testimony from Stojak. The Executive Director should call him as a witness. If it turns out that Stojak is not available to testify,

the parties can address in argument the weight we ought to attach to these documents in those circumstances.

Documents Marked for Identification Q and R

¶ 45 DMI-R is a series of photographs purportedly of a mine site. DMI-Q is a letter from an investigator at the Arizona Corporation Commission enclosing a memo to file that describes what the photographs purport to show.

¶ 46 McEwan objects to the admission of this evidence because there is no witness to establish the authenticity of the photographs. The Executive Director says the photographs are relevant because they show the location of the mine operated by Great American Gold.

¶ 47 These documents are not sufficient to establish that the photographs in fact have anything to do with properties related to Great American Gold and are therefore irrelevant. We do not admit them as evidence.

Documents Marked for Identification S

¶ 48 These documents are in a binder labelled "Volume 9 – Court Orders and Affidavits". They are not in dispute and we admit them as evidence.

Ruling

¶ 49 The following summarizes our rulings above:

DMI	Disposition
A	Tabs 1 – 14 become Exhibit 24; Tabs 15 – 18 not admissible
B	Becomes Exhibit 25
C	Becomes Exhibit 26
D,E	Become Exhibits 27A and 27B
F,G,H	Become Exhibits 28, 28A and 28B, respectively
I,J,K,L,M,N	Not admissible
O	Van Wezel and Rahemtulla documents (Tabs A and D) become Exhibit 29; Baxter and Zilliox documents (Tabs B and C) not admissible

P	Becomes Exhibit 30
Q,R	Not admissible
S	Becomes Exhibit 31
T	Has already been admitted as Exhibit 22

¶ 50 November 29, 2004

¶ 51 **For the Commission**

Brent W. Aitken
Vice Chair

Robert J. Milbourne
Commissioner

Roy Wares
Commissioner