

2006 BCSECCOM 278

AB

Securities Act, RSBC 1996, c. 418

Hearing

Panel	Brent W. Aitken	Chair
	Neil Alexander	Commissioner
	Robert J. Milbourne	Commissioner

Date of Hearing April 18, 2006

Date of Ruling May 15, 2006

Appearing

David G. Fredericksen For AB

J. Kenneth McEwan, QC For the Executive Director
Kieran Siddall

Ruling

- ¶ 1 This is a hearing to determine whether the individual identified for the purposes of this application as “AB” has standing to initiate a hearing and review of a decision of the Chair of the Commission, Douglas M. Hyndman.

Background

- ¶ 2 AB is a respondent in a notice of hearing, since withdrawn, issued by the Executive Director in March 2003 (see *Fairtide* 2003 BCSECCOM 188). In connection with the investigation that led to the notice of hearing, the Executive Director seized documents belonging to AB. Some of these documents were subject to solicitor-client privilege. Once aware of the claim of privilege, the Executive Director followed a procedure to deal with the privileged nature of the documents, but AB says the procedure followed was not proper.
- ¶ 3 AB is concerned that the Executive Director may have relied on information in the privileged documents in obtaining an investigation order, and a later amendment to that order, both from Hyndman.
- ¶ 4 In March of 2004, AB made an application under section 171 of the *Securities Act, RSBC 1996, c. 418* for a variation of the investigation order. AB wants the

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order varied to replace the Commission staff investigators with persons not employed by the Commission, and to include a direction that lawyers employed by the Commission not be involved in the investigation or any related hearing.

- ¶ 5 AB asked for an oral hearing before a panel of Commissioners not including Hyndman. (AB later argued that his application could be heard under section 165 as a hearing and review.) Hyndman replied, noting that “the normal practice for an amendment of an investigation order is for the application to be made to the commissioner who made the order, in this case the chair.” Hyndman asked for written submissions about how the application should be heard. In response, the parties provided submissions.
- ¶ 6 On September 9, 2005, Hyndman made his decision. He decided that:
- AB was not a “person directly affected” by the investigation order, and therefore he does not have the right to a hearing and review of the investigation order under section 165.
 - Hyndman would deal with AB’s application under section 171.
 - He would decide the application based solely on written submissions.
- ¶ 7 In this ruling, we refer to this decision as “the Hyndman decision”.
- ¶ 8 On October 4, 2005, AB applied for a hearing and review, under section 165, of the Hyndman decision. The Executive Director says that AB does not have standing to initiate a hearing and review of the Hyndman decision.
- ¶ 9 The parties have asked us to decide only whether AB has standing to initiate a hearing and review of the Hyndman decision. They did not put before us the merits of AB’s arguments about the investigation order. Nor did they ask us to review Hyndman’s conclusion that AB did not have standing to initiate a hearing and review of the investigation order under section 165, although both parties made sufficient submissions on the point for us to deal with it now.
- ¶ 10 In our opinion, Hyndman, for the reasons in his decision, was correct in concluding that AB was not directly affected by the investigation order and therefore AB is not entitled to a hearing and review of that order under sections 165 and 166. It is also our opinion that Hyndman had the discretion to proceed under section 171 as he proposed to do, and that the procedure he proposed was reasonable.
- ¶ 11 That said, at this point it does not make sense to rule solely on whether AB is entitled to a hearing and review of the Hyndman decision, nor, given the passage of time, does it make sense to refer the matter back to Hyndman.

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¶ 12 We will deal with AB's March 2004 application under section 171. Like Hyndman would have, we will consider the application solely on the basis of the parties' written submissions.

¶ 13 We therefore direct the parties to file submissions as follows:

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| By June 5 | AB delivers submissions to the Executive Director and the Secretary to the Commission |
| By June 19 | The Executive Director delivers response submissions to AB and the Secretary to the Commission |
| By June 26 | AB delivers reply submissions (if any) to the Executive Director and the Secretary to the Commission |

¶ 14 May 15, 2006

For the Commission

Brent W. Aitken
Vice Chair

Neil Alexander
Commissioner

Robert J. Milbourne
Commissioner