

# 2009 BCSECCOM 566

**Michael Kyaw Myint Hua Hu**

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

## Hearings

<b>Panel</b>	Brent W. Aitken Don Rowlatt David J. Smith	Acting Chair Commissioner Commissioner
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**Dates of Hearings** September 22, 2009; October 6, 2009

**Date of Ruling** October 7, 2009

### Appearing

Sean K. Boyle Alexandra Luchenko	For Michael Kyaw Myint Hua Hu
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Joyce M. Johner Derek Chapman	For the Executive Director
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## Ruling

### I Background

- ¶ 1 On September 8, 2009 we ruled on disclosure matters arising from an application by Michael Kyaw Myint Hua Hu on June 30, 2009 (see [2009 BCSECCOM 506](#)).
- ¶ 2 Alberta Securities Commission staff and staff of this Commission conducted a joint investigation into the facts behind the allegations in the notice of hearing against Hu under investigation orders made by each commission. The evidence is that only BCSC staff obtained documents under the BCSC investigation order. In our September 8 ruling, we directed the executive director to ask the ASC to provide BCSC staff with all information gathered under the ASC investigation that is relevant, under the *Stinchcombe* standard, to the allegations against Hu in the notice of hearing and to disclose that information to Hu.
- ¶ 3 The executive director asked the ASC for information and the ASC complied. The executive director has disclosed the information to Hu.

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- ¶ 4 In a subsequent hearing on September 22 we dismissed Hu’s application for an order to disclose the information in paragraph 4 of his June 30 application (we did not deal specifically with that paragraph in our September 8 ruling).
- ¶ 5 In the September 22 hearing, Hu argued that we could not be confident that the ASC had disclosed all relevant information. We directed staff to provide us with a copy of the executive director’s letter to the ASC in compliance with our September 8 ruling, as well as the covering letter from the ASC in reply. We also directed the executive director to disclose to Hu both letters and the enclosures to the letters, if not already disclosed, and offered Hu the opportunity to make submissions on the letters after reviewing them. Hu did not make any submissions.
- ¶ 6 On September 30 Hu applied to the Court of Appeal for leave to appeal our September 8 and 22 rulings, and applied to us for an adjournment of the hearing until the leave application is heard and decided.

### **II Analysis**

#### **A Disclosure application**

##### ***BCSC documents***

- ¶ 7 The executive director must disclose to respondents all information gathered in an investigation that, under the *Stinchcombe* standard as set out in *Fernback 2004 BCSECCOM 378*, is relevant to the allegations in a notice of hearing.
- ¶ 8 The evidence before us is that the executive director has complied with that obligation in making disclosure to Hu. The executive director says that some documents were not disclosed because they did not meet the *Stinchcombe* standard of relevance. For example, the affidavit in support of the investigation order is not, of itself, relevant. Any facts contained in that affidavit that are relevant under the *Stinchcombe* standard would have been otherwise disclosed. In submissions, the executive director provided descriptions of the documents that were sufficient for us to determine that there was no reason to doubt that Commission staff had properly applied the standard. It is not necessary, in our opinion, for us to review those documents for relevance.
- ¶ 9 Hu describes broad categories of documents that he says have not been disclosed, and says that we ought to order their disclosure on the basis that their relevance is established by his broad descriptions. For example, he says, “All documents relating to Ms. Tian are relevant” because her accounts were involved in the impugned trading, and therefore her credibility will be in issue. This is not the correct approach. Relevance is determined, not by categories of documents, but document by document.

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¶ 10 More important, the task of determining relevance and making disclosure lies with Commission staff. Once, as here, the executive director enters evidence that staff has properly disclosed relevant information under the *Stinchcombe* standard, the respondent who seeks additional disclosure has the onus of providing evidence that staff has not met the disclosure standard. Mere speculation or suspicion that the disclosure obligation has not been met is insufficient. Otherwise, the criteria of relevance would be meaningless. The disclosure obligation would amount to an obligation to disclose all information, relevant or not.

¶ 11 Hu has not provided any evidence to show that staff has improperly applied the disclosure standard. In the absence of that evidence, there is no basis for us to conclude that any relevant information has not been disclosed, and so no basis to order staff to make further disclosure.

### *ASC documents*

¶ 12 On September 9 the executive director sent a letter to the executive director of the ASC enclosing our September 8 ruling, the notice of hearing, and particulars. The letter says,

“The Commission has directed me to ask the ASC to provide BCSC staff with all information gathered under the ASC investigation into Maple Leaf Reforestation Inc. and others that is relevant to our allegations against Hu in the Notice of Hearing.”

¶ 13 On September 18, the ASC sent three documents in response, all relating to the initial referral of the matter to the ASC by the relevant market regulator. In the covering letter the ASC says:

“Staff has reviewed the contents of the appropriate investigation file with a view to locating information that is relevant to the existing administrative proceeding against Mr. Hu, but which has not previously been provided to Staff of the British Columbia Securities Commission.

“Staff confirms, that to the best of its knowledge, all other potentially relevant information has previously been provided to your office.”

¶ 14 The ASC had a copy of our ruling, which refers specifically to the *Stinchcombe* standard. It also had the notice of hearing and the particulars. Its staff participated in the investigation. The disclosure obligations of staff at both commissions are identical: both apply the *Stinchcombe* standard (see, for example, *Arbour Energy Inc* 2009 ABASC 366).

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¶ 15 In these circumstances, there is not, in our opinion, any basis to conclude that any relevant information remains with the ASC that has not been disclosed to Hu.

### **B Adjourment application**

¶ 16 Hu says we should adjourn the hearing until the application for leave to appeal is decided because:

- there is a serious issue involved in the appeal
- he may suffer irreparable harm were the hearing to go ahead and the appeal be ultimately successful
- the balance of convenience is in his favour
- the parties are not ready for the hearing

¶ 17 Hu says that the alleged disclosure deficiencies that have been the subject of his applications will result in the hearing being conducted without his being given a proper opportunity to meet the case against him. He says that were the hearing to proceed and the appeal ultimately succeed, he would suffer irreparable harm by incurring costs he could not recover, and by damage to his reputation.

¶ 18 We have found that the disclosure obligation has been met. It follows that Hu has the proper opportunity to meet the case against him.

¶ 19 Hu says the balance of convenience is in his favour because there is no particular harm to the public interest in granting the adjournment. We do not agree. It seems unlikely the leave application could be decided before the hearing is scheduled to begin on October 16 and, if adjourned, it would likely be some months before it could be rescheduled. In the meantime, witnesses are standing by, some of whom are outside the jurisdiction and are agreeing to appear voluntarily. A delay in the hearing could put at risk the obtaining of the evidence of these witnesses.

¶ 20 Hu says the parties are not ready for the hearing because he has not received

- electronic versions of documents disclosed by the executive director on September 17 and 18,
- will-say statements for the executive director's witnesses, and
- notice of the documents that the executive director intends to rely on at the hearing.

¶ 21 Although Hu does not have electronic versions of the September 17 and 18 documents, staff expects to deliver them shortly and in the meantime he has hard copies.

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- ¶ 22 Following the hearing yesterday the executive director provided Hu with will-say statements for the witnesses for whom there are not interview transcripts. The executive director added a witness to the list. The executive director also provided a list of the documents the executive director intends to rely on in the hearing. The total number of documents disclosed for the hearing is about a hundred; the reliance list numbers 46.
- ¶ 23 In our opinion, none of this justifies an adjournment. Hu now has the information necessary to prepare for the hearing, and the number of documents requiring review is not large. We also note that although the hearing begins fairly soon (October 16), it is in session only that day and the afternoon of October 20 before adjourning to October 26 – almost three weeks from now. In our opinion, that timing affords Hu sufficient time to prepare for the hearing.
- ¶ 24 We dismiss Hu’s application for an adjournment.
- ¶ 25 October 7, 2009.
- ¶ 26 For the Commission

Brent W. Aitken  
Acting Chair

Don Rowlatt  
Commissioner

David J. Smith  
Commissioner