Citation: 2012 BCSECCOM 493

Canaco Resources Inc., Andrew Lee Smith,
Randy Smallwood, David Parsons and Brian Lock

***Securities Act,* RSBC 1996, c. 418**

Application

Panel	Brent W. Aitken Kenneth G. Hanna	Vice Chair Commissioner
Date Submissions Completed	December 14, 2012	
Date of Ruling	December 24, 2012	
Submissions filed by		
Hein Poulus Patricia A. A. Taylor	For Canaco Resources Inc. and Andrew Lee Smith	
H. Roderick Anderson Owais Ahmed	For Randy Smallwood, David Parsons, and Brian Lock	
Jeremy Gellis Ryan Carrier	For the Executive Director	

Ruling

I Background

¶ 1 On April 24, 2012 the executive director issued a notice of hearing containing allegations against Canaco Resources Inc., Andrew Lee Smith, Randy Smallwood, David Parsons, and Brian Lock.

¶ 2 On June 18 the respondents applied for disclosure of documents not disclosed by the executive director, and in the executive director's possession or control, relating to his investigation of the allegations in the notice of hearing.

¶ 3 On November 6 we ordered (see 2012 BCSECCOM 418) that the executive director file with the Commission and provide to the respondents, a document that:

1. specifies each document in the executive director's possession or control relating to the investigation that the executive director has not disclosed, or after the date of the order did not disclose, to the respondents, and

2. describes each document in sufficient detail so that the grounds upon which the executive director has not disclosed it may be assessed.

¶ 4 On November 21 the executive director filed materials in response to the order. The response materials include a list of 70 documents, a log of emails, and a letter describing the basis for the non-disclosure of these items. The respondents say that the materials do not comply with our order.

¶ 5 The respondents are now proposing a shorter list for disclosure than they included in their original application. The actual documents they seek are listed in Schedule A to a November 27, 2012 letter from counsel for Canaco and Smith.

¶ 6 The executive director seeks disclosure from the respondents.

II Principles

¶ 7 The requirement for the executive director to make disclosure is stated in BC Policy 15-601 *Hearings*. Section 2.6 of that policy says:

> "2.6 Disclosure
>
> (a) General principle – Full and timely disclosure promotes fairness and efficiency in hearings.
>
> The Commission expects each party who intends to produce evidence in a hearing to disclose that evidence to the other parties long enough before the hearing to give them reasonable time to prepare.
>
> (b) Enforcement hearings – In an enforcement hearing, the executive director must disclose to each respondent all relevant information that is not privileged. The Commission considers it contrary to the public interest if respondents use information contained in the executive director's disclosure for any purpose other than answering the allegations made against them in the notice of hearing.

> (c) Timing – The Commission expects parties to make every effort to make disclosure as far in advance of the hearing as possible. However, sometimes relevant information is not discovered until the hearing is about to start or already under way. The Commission considers all relevant evidence. Therefore, it will permit a party to produce the evidence. In these circumstances, parties may ask for an adjournment to consider new information, to recall witnesses, or to produce other new evidence."

¶ 8 The executive director's disclosure obligation is based on that articulated by the Supreme Court of Canada in *R v. Stinchcombe,* [1991] 2 SCR 326 (see *Fernback* 2004 BCSECCOM 378).

¶ 9 That said, it is worth noting that *Stinchcombe* was articulated as a disclosure standard for criminal proceedings. Although a *Stinchcombe*-like standard has been applied in administrative proceedings before securities tribunals, it does not follow that every evolution of the *Stinchcombe* standard in the criminal courts, or indeed the *Stinchcombe* standard itself, automatically applies to proceedings before the Commission. As the Supreme Court of Canada has made clear (see, for example, *May v. Ferndale Institution* [2005] 3 SCR 809), the standard of disclosure for administrative tribunals is not *Stinchcombe*. The issue is whether the hearing process as a whole satisfied the requirements of procedural fairness in the context of proceeding before the tribunal concerned.

¶ 10 In *Stinchcombe,* the Court said (at p. 339), "While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant." In *David Charles Phillips and John Russell Wilson,* a November 30, 2012 decision of the Ontario Securities Commission on a disclosure application, the OSC summarized the disclosure obligation in the context of proceeding before the Commission as follows:

> "29 The parties agree and the Commission has accepted that Staff's duty of disclosure to the respondents in the Commission's enforcement proceedings is 'akin to the *Stinchcombe* standard', which means that Staff must disclose to the respondents all relevant information in Staff's possession or control, whether inculpatory or exculpatory, and whether or not Staff intends to introduce it into evidence at the merits hearing (the fruits of the investigation) (*Re Berry, Re Biovail, and Re Deloitte).* Disclosure enables the respondents to know the case they have to meet, prepare to rebut Staff's evidence, and make tactical

> decisions about how to present their case. It 'is a matter of fundamental justice based on fairness to respondents to permit them to make full answer and defence to the allegations against them.' For that reason, 'relevance' is defined broadly in the context of disclosure, and includes material that has 'a reasonable possibility of being relevant to' the respondents' ability to make full answer and defence to Staff's allegations, though it may not, ultimately, be admitted at the merits hearing. On these principles, there is no dispute. The parties agree about the application of these principles to the Disputed Documents.
> . . .
> 34 The crux of the dispute between the Parties in this Motion is whether Staff must disclose internally-generated documents evidencing Staff's analysis, commentary, opinion, or discussions about commencing proceedings ("Staff work product"). *Re Shambleau* governs the disposition of this question. I find that Staff is not required to disclose Staff work product because it is irrelevant to the issues that will be considered by the Commission at the Merits Hearing."

¶ 11 In *Shambleau* (2002), 25 OSCB 1850 aff'd. (2003), 26 OSCB 1629, the OSC ruled against the disclosure of a report of a TSE Regulation Services Inc. investigator. The TSE Board had required RS staff to disclose the report to the respondent. The Commission held that the investigator was a fact witness, not an opinion witness, and her opinions were irrelevant to the decision of the TSE hearing panel, noting that "her opinions are irrelevant" and that it was "ultimately up to the Hearing Panel to make the final determinations on the issues in dispute . . ."

¶ 12 The OSC in *David Charles Phillips* described the OSC's decision in *Shambleau* as follows:

> "26 The Commission held that while *Stinchcombe* required disclosure of the fruits of the investigation, including all of the facts underpinning [the investigator's] opinion, the report she had generated setting out that opinion was not relevant to the issues before the hearing panel and therefore need not be disclosed."

III Issues

A Sufficiency of the executive director's response

¶ 13 The respondents argue that the executive director's response does not meet the letter of our November 6 order. It is not necessary for us to make a finding on that issue – what matters is whether the executive director's response provided us with sufficient information to enable us to make rulings as to whether the documents must be disclosed. In our opinion, the executive director's response is sufficient for that purpose for most of these documents. For the rest, we are asking the executive director to provide more information.

¶ 14 The executive director's response to our November 6 order allocates the undisclosed documents among seven categories:

1. litigation counsel communication
2. litigation counsel and investigation staff communication
3. enforcement staff communication
4. enforcement staff and corporate finance staff communication
5. enforcement staff notes, internal memoranda and drafts
6. enforcement staff communications with the TSX-V, Ontario Securities Commission, New Brunswick Securities Commission, IIROC, Searchlight, and George Cavey
7. executive director and the chair of the Commission

¶ 15 The executive director states, regarding the documents in all of these categories, that none of them contains any "undisclosed evidence related to the allegations made against the Respondents in the Notice of Hearing." Unfortunately, this clear statement that all relevant information had been disclosed was clouded by other statements in the executive director's response. We deal with these ambiguities below.

¶ 16 Almost all of the undisclosed documents fall into the category of work product and accordingly are not required to be disclosed. The executive director describes them as follows:

- communications relating to strategy and case management
- circulation of materials for hearing preparation
- distributions and reviews of drafts of the notice of hearing, submissions and other documents created in connection with the investigation and hearing of the matter
- communications relating to administrative matters such as scheduling meetings and document management
- technical advice to litigation counsel

¶ 17 That said, the executive director's response contains these ambiguities:

- The executive director claims that the communication contained in categories 1 through 4 is "subject to litigation privilege, or it is irrelevant". Privilege is not a consideration if the information alleged to be subject to privilege is irrelevant. Privilege need only be considered if the executive director wishes to rely on privilege as the basis for not disclosing *relevant* information. Our ruling seeks clarification on this issue.
- Similarly, the executive director claims that the communication contained in category 7 is "confidential and irrelevant". Confidentiality, as opposed to privilege, is not a recognized basis for non-disclosure. That said, it is moot if the information is irrelevant. Our ruling seeks clarification on this issue.
- The executive director claims that the communication in Category 5 is subject to litigation privilege and, when it involves communication between litigation counsel and the executive director, solicitor client privilege. There is no claim that the communication is irrelevant, which raises the implication that privilege is the basis for non-disclosure. Our ruling seeks clarification on this issue.
- Category 6 is a somewhat confusing category because it includes communications with other regulators, with Searchlight (the firm the enforcement division uses to manage evidence for hearings), and George Cavey, a person we understand is an expert with knowledge relevant to the allegations in the notice of hearing.
- The ambiguity arises in connection with the communication with other regulators. The executive director claims that this communication is "subject to litigation privilege, or it is irrelevant." This statement refers to communication with the whole group of other regulators, including the New Brunswick Securities Commission (and, of course, also raises the same ambiguity associated with categories 1 through 4). However, the executive director goes on to say, "Communication between Enforcement staff and the New Brunswick Securities Commission is irrelevant." Claiming irrelevance only for the NBSC in the context of communication with three other regulators raises the implication that the communication with the other regulators is relevant, and the basis for non-disclosure is litigation privilege. Our ruling seeks clarification on this issue.

B Documents sought to be disclosed by the respondents

¶ 18 The respondents have narrowed the scope of the documents they seek. Below we make rulings about which of these documents the executive director must disclose, which he need not disclose, and which require a more complete description before we can decide.

C Documents sought to be disclosed by the executive director

¶ 19 Below we make rulings about the documents the respondents must disclose.

IV Rulings

A Disclosure by the executive director

¶ 20 The executive director must disclose, not later than December 28, 2012:

1. the documents numbered 1, 3, 4, 5, 29 and 41 on the executive director's list and the items in the email log between litigation counsel Gellis and Cavey and between Gellis and Dundee Capital Markets if any of those documents contains any discussions or interviews with a witness the executive director intends to call at the hearing, or contains information other than information that is only opinion or is otherwise clearly irrelevant; and
2. the document described in number 68 as "SEDI insider trading report for insiders of Canaco".

¶ 21 The executive director must, not later than December 28, 2012, provide more complete descriptions addressing the relevance of the following documents:

1. the document numbered 44; and
2. the document described in number 68 as "CSA Committee email".

¶ 22 The executive director must, not later than December 28, 2012, identify any documents that contain relevant information that the executive director is not disclosing on the basis of privilege or "confidentiality".

¶ 23 The respondents note that Mr. Muir was involved in the investigation prior to his move from the Enforcement Division to become Associate General Counsel to the Commission. The panel has had no discussions with Mr. Muir about the Canaco matter. He has provided no information or advice in connection with the matter.

B Disclosure by the respondents

¶ 24 The respondents must, not later than December 28, 2012, disclose the evidence that they intend to rely on at the hearing (not including any other evidence they may rely on as a result of the additional disclosure the executive director is required to make under this ruling).

¶ 25 The respondents must, not later than January 3, 2013, disclose the additional evidence, if any, they intend to rely on as a result of the additional disclosure the executive director is required to make under this ruling.

¶ 26 December 24, 2012.

Brent W. Aitken
Vice Chair

Kenneth G. Hanna
Commissioner