

BRITISH COLUMBIA SECURITIES COMMISSION

Securities Act, RSBC 1996, c. 418

Citation: Re Anglo-Bomarc, 2023 BCSECCOM 305

Date: 20230614

**In the matter of Anglo-Bomarc Mines Ltd.
and TSX Venture Exchange**

Panel	Gordon Johnson	Vice Chair
	Deborah Armour, KC	Commissioner
	Jason Milne	Commissioner

Submissions completed January 19, 2023

Ruling Date June 14, 2023

Parties

Veda Kenda	For the Executive Director
Paul Smith	

James Gotowiec	For TSX Venture Exchange
Linda Plumpton	

Eva Miao	For Anglo-Bomarc Mines Ltd.
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Ruling and Reasons for Ruling

I. Introduction

- [1] On February 18, 2022, Anglo-Bomarc Mines Ltd. (Anglo-Bomarc) applied to the Commission for a hearing and review of a decision by the TSX Venture Exchange (TSXV) to delist Anglo-Bomarc's securities effective at the close of business December 6, 2021 (Review Application). Although the applicant did not specify the basis for the application, the applicable section of the *Securities Act*, RSBC 1996, c. 418 (Act) is section 165(3), and this application has proceeded as if it had been commenced under that section.
- [2] On June 21, 2022, after delays by Anglo-Bomarc in taking certain steps, the Commission placed the Review Application on the Commission's inactive list, pursuant to section 7.7(c) of BC Policy 15-601 – *Hearings*.
- [3] On December 18, 2022, Anglo-Bomarc applied to have the Review Application removed from the Commission's inactive list (Removal Application).
- [4] The TSXV and the executive director oppose the Removal Application.

- [5] These are our Reasons for Ruling on the Removal Application. Given our conclusion on the Removal Application, we also issue an order on the Review Application, all as set out below.

II. Factual Background

- [6] On August 9, 2018, following the failure of Anglo-Bomarc to file required periodic disclosure, the Commission ordered that trading cease in respect of each security of Anglo-Bomarc (Cease Trade Order).
- [7] On October 29, 2021, the TSXV advised Anglo-Bomarc that due to non-payment of outstanding fees and in accordance with section 15.2 of Exchange Policy, the TSXV was placing Anglo-Bomarc on notice to delist and that if fees were not paid by November 30, 2021, the TSXV would proceed to delist the company's securities.
- [8] Having not received any response satisfactory to it by the deadline, the TSXV issued a public bulletin on December 2, 2021 which stated:
- Effective at the close of business, Monday, December 6, 2021, and in accordance with NEX Policy, Section 15, securities of the Company [Anglo-Bomarc] will be delisted from NEX, for failure to pay their quarterly NEX Listing Maintenance Fees. Prior to delisting, the shares of the Company were subject to a suspension from trading.
- [9] Anglo-Bomarc asserts that it did not receive notice from the TSXV of either the notice to delist or the delist itself. In an email dated December 30, 2021, the TSXV addressed this assertion and advised Anglo-Bomarc, among other things that:
- a) Anglo-Bomarc had last paid fees to the exchange in February 2019;
 - b) in addition to invoices, the TSXV had sent follow-up emails to Anglo-Bomarc at various email addresses, but that no response nor payments were received;
 - c) Anglo-Bomarc had a responsibility to ensure its SEDAR company profile and contact information was up to date, since it was the email address available on SEDAR that the exchange used to send to Anglo-Bomarc the notice to delist due to outstanding fees;
 - d) the amount of fees that had accumulated and were owing at the time of the delist were over \$10,000; and
 - e) the TSXV's delay in not taking action to delist earlier, even though the last payment from the company had been in February 2019, was an indication of the exchange's willingness to avoid delisting Anglo-Bomarc and to preserve its listing.

- [10] On January 13 and 14, 2022, Anglo-Bomarc paid \$10,010 to the TSXV in an attempt to resolve the delisting issue although the company took the position that the amount it paid was not properly owing.
- [11] In an email to the TSXV dated January 13, 2022, Anglo-Bomarc acknowledged that it had an issue of outstanding “required filings” and advised that it had a detailed plan and timeline to complete all its filings and to resume trading.
- [12] On January 17, 2022, Anglo-Bomarc advised the TSXV that it wished to dispute the delisting decision by the TSXV.
- [13] In a January 21, 2022 letter to Anglo-Bomarc, the TSXV advised that any concerns with respect to fees owing should have been communicated earlier. In the same letter, the TSXV advised Anglo-Bomarc that it would not reconsider its decision to delist the securities of the company.
- [14] By letter dated February 18, 2022, Anglo-Bomarc filed its Review Application with the Commission.
- [15] On February 25, 2022, the Commission hearing office asked that by March 1, 2022 the parties advise of their availability to attend a hearing management meeting on one of several specified dates.
- [16] On March 1, 2022, Anglo-Bomarc emailed the hearing office to advise that the company was retaining a lawyer and to request additional dates for a hearing management meeting.
- [17] On March 3, 2022, the hearing office emailed additional available dates to the parties and imposed a deadline of March 7, 2022 for a response. The executive director and the TSXV provided availability to attend a hearing management meeting in response to that email, but Anglo-Bomarc did not.
- [18] On March 8, 2022, the hearing office emailed the parties with a communication from the Vice Chair that:
- a) described the purposes of a hearing management meeting;
 - b) advised that until a hearing management meeting occurred, there was no expectation that the TSXV prepare a record and no expectation that the TSXV or the executive director prepare submissions;
 - c) advised that the onus was on Anglo-Bomarc either to appoint counsel or to make a decision to proceed without counsel, and to deliver a new request for a hearing management meeting;

- d) directed that Anglo-Bomarc deliver a request for a hearing management meeting to the Commission hearing office no later than 4:00pm on Monday, May 9, 2022;
- e) directed, subject to any different schedule that might be established at a hearing management meeting, that Anglo-Bomarc also deliver complete application materials to the Commission hearing office no later than 4:00pm on Monday, June 13, 2022; and
- f) advised that if materials were not delivered by that date, this proceeding would be placed on the Commission's inactive list pursuant to section 7.7(c) of BC Policy 15-601 – *Hearings*.

[19] On March 9, 2022, Anglo-Bomarc emailed the hearing office to advise: “We will deliver a request for a Hearing Management Meeting to the Commission Hearing Office no later than 4:00pm on Monday, May 9, 2022. We will deliver complete application materials to the Commission Hearing Office no later than 4:00pm on Monday, June 13, 2022.”

[20] On May 7 and 9, 2022, Anglo-Bomarc emailed the Commission hearing office to request a date for a hearing management meeting available to the Commission and the other parties to the Review Application.

[21] On May 10, 2022, the hearing office emailed the parties with additional dates available for a hearing management meeting, including dates in May, June and July, 2022. Anglo-Bomarc did not provide available dates in response to that email.

[22] On June 13, 2022, Anglo-Bomarc emailed the Commission hearing office to advise that the company was applying for an extension of time to file its materials for the Review Application. The extension request arrived without supporting materials.

[23] On June 21, 2022, the hearing office emailed the parties with a communication from the Vice Chair that:

- a) directed that the Review Application be placed on the inactive list maintained by the Commission hearing office;
- b) noted that Anglo-Bomarc could apply to have the Review Application removed from that list;
- c) directed that:
 - i. any such application be made with written submissions to address why it would be in the public interest for the Review Application to be removed from the inactive list, and

- ii. if Anglo-Bomarc brought any such application and wished the Commission to consider any materials in support of the application, those materials had to be included with the company's written submission; and

- d) advised that if the matter remained on the inactive list for 180 days, it would be dismissed as abandoned.

[24] On September 1, 2022, Anglo-Bomarc emailed the Commission hearing office to inquire from which date the 180-day period would run.

[25] The hearing office responded to Anglo-Bomarc and the other parties to the Review Application the same day and advised:

Again, the Vice Chair directed that Anglo-Bomarc Mines Ltd. may apply to have the Review Application removed from the inactive list. The Vice Chair also directed that any such application be made with written submissions to address why it would be in the public interest for the Review Application to be removed from the inactive list and that – if Anglo-Bomarc Mines Ltd. wishes the Commission to consider any materials in support of that application – those materials must be included with the written submissions.

If Anglo-Bomarc Mines Ltd. wishes to apply to have this matter removed from the inactive list, it must submit its application to the Hearing Office no later than **Monday, December 19, 2022**. Any application must include written submissions to address why it would be in the public interest for the Review Application to be removed from the inactive list and may include materials in support of that application, provided that those materials are included with the written submissions.

[emphasis in original]

[26] On December 18, 2022, Anglo-Bomarc delivered written submissions and supporting materials seeking to have the Review Application removed from the inactive list.

III. Requirement to be Removed from Inactive List

[27] Commission panels have wide discretion to conduct hearings that are fair, flexible and efficient. Sections 1.2 and 2.1 of BC Policy 15-601 – *Hearings* state:

1.2 General Principles The Commission holds administrative hearings, which are less formal than the courts. The Commission's goal is to conduct its proceedings fairly, flexibly and efficiently. The procedures set out in this Policy are in furtherance of this goal and the provisions of this policy are to be interpreted in light of this goal. Where the circumstances require a variation of the procedures set out in this policy in order to achieve this goal, the Commission may do so.

2.1 Procedures – The Act and Regulation prescribe very few procedures the Commission must follow in hearings. Consequently, the Commission is the

master of its own procedures, and can do what is required to ensure a proceeding is fair, flexible and efficient. In deciding procedural matters, the Commission considers the rules of natural justice set by the courts and the public interest in having matters heard fully and fairly, and decided promptly.

- [28] Part 7 of BC Policy 15-601 – *Hearings* addresses reviews and states, in section 7.2(a) that a review must be sought within 30 days of the notice of the decision in issue:

... A person directly affected by a decision referred to in paragraph 7.1 Purpose may have the decision reviewed by sending a request to the Commission Hearing Office within 30 days of the date the decision maker sent notice of the decision to the person seeking its review.

- [29] Section 7.7(c) of BC Policy 15-601 addresses the timing of filing materials:

Timing – If the party requesting the review does not file materials within the time frame established by the Commission, the Commission may place the review on the inactive list maintained by the Commission Hearing Office, and notify the parties. A party may apply to the Commission to have a review removed from the inactive list. If a review has remained on the inactive list for 180 days, the Commission will issue a decision dismissing the review as abandoned.

IV. Positions of the Parties

Anglo-Bomarc

- [30] Anglo-Bomarc’s written submissions focus in large measure on the impropriety, in its view, of the TSXV’s decision to delist the company. Anglo-Bomarc argues that the TSXV breached a duty of good faith and honest performance by failing to ensure that the company had received the notice to delist and by failing to ensure that the company understood the consequences of the delist. Anglo-Bomarc also continues to dispute the accuracy of the TSXV invoices.
- [31] Anglo-Bomarc submits that the TSXV has not raised arguments as to prejudice it would suffer if the Review Application were removed from the inactive list. It also says that the TSXV failed to address the core reasons that led to the delisting.
- [32] As to its history of delays within the proceedings before the Commission, Anglo-Bomarc submits both that it has been “actively preparing” and that it has been searching for counsel. It also argues that due to the limited resources caused partially by the Cease Trade Order, the company was not able to find suitable counsel before June 13, 2022, the deadline established by the Vice Chair for delivery of materials in the Review Application. Anglo-Bomarc submits: “The inability for the Company to find a legal counsel who charges within the Company’s budget resulted in the Company’s Review Application being added to the inactive list.”
- [33] Further, Anglo-Bomarc submits that the company suffered severe financial hardships and difficulties because of the delisting of its securities by the TSXV. Anglo-Bomarc also points to its nearly 1,000 public shareholders, some of whom are seniors and have been

shareholders for decades, and submits that it is in the shareholders' interest for the securities of the company to resume trading as soon as possible.

The TSXV

- [34] The TSXV submits that while Anglo-Bomarc asserts financial hardship and that the shareholders have an interest in securities resuming trading as soon as possible, those assertions are inconsistent with Anglo-Bomarc's actions within this proceedings. The TSXV submits:

Anglo-Bomarc has in each case used the maximum amount of time permitted by the Commission before taking any step in this proceeding, missed deadlines, and sought extensions. It also required ten months to assemble its materials for the Review Application despite advising the Hearing Office in March that it would comply with the June deadline and then failing to do so without any explanation.

- [35] The TSXV submits that the Review Application should be dismissed as abandoned. In support of that position, the TSXV submits that Anglo-Bomarc has failed to demonstrate through its actions that the Review Application is a significant and important issue for the company and that the flexibility and accommodation provided to Anglo-Bomarc by the Commission need not be unlimited.

The executive director

- [36] The executive director submits that there is no compelling public interest reason to grant the Removal Application and submits that it should be dismissed. The executive director points out that despite directions from the Vice Chair to include written submissions to address why removal from the inactive list would be in the public interest, Anglo-Bomarc did not identify any compelling evidence that it did not previously possess or could not previously produce, nor did it identify any injustice that would result from the dismissal of the Removal Application.
- [37] The executive director also submits that it is in the public interest that the Commission ensure that the TSXV, as a recognized exchange, maintain and enforce rules and policies that govern its listing requirements and fees. The executive director points out that the Commission requires the TSXV to do so in a recognition order made pursuant to section 24 of the Act: *TSX Venture Exchange Inc.*, 2012 BCSECCOM 273, Schedule A at paragraphs 11, 31-38.
- [38] Finally, the executive director submits that the fact that Anglo-Bomarc's shareholders are members of the public does not mean that the company's interests are the public interest. To the contrary, the executive director submits that the only "real issue" engaged by the Review Application appears to be the cost to Anglo-Bomarc to reapply for listing if the decision to delist remains. That consideration, submits the executive director, does not engage the public interest.

V. Analysis and Conclusions

- [39] In our view, the public interest factors that are engaged in this context are primarily the following:

- a) the significance of the substantive issues which will not be decided if the Removal Application is dismissed;
- b) the merits of the substantive issues, to the extent that those can fairly be given a preliminary assessment on the materials before us;
- c) the degree of delay caused by the applicant and the quality of the explanations offered for that delay; and
- d) the degree of inconvenience which will be caused to those who were not responsible for the delay should the Removal Application be allowed.

We address those factors below.

A. Significance of Substantive Issues

- [40] The ultimate issues raised by the Review Application are whether Anglo-Bomarc was delinquent in payments owed under its listing agreement at the time of cancellation of the listing and whether the TSXV was arbitrary in cancelling the listing at a moment when the applicant claimed it was being over-charged and required further information to confirm the amounts payable.
- [41] The amount of the dispute is approximately \$10,000, an amount which is not trivial but we would not consider to reflect a highly significant financial dispute in the current context.
- [42] The expectation that an exchange will avoid arbitrary conduct in exercising its discretion to cancel a listing is of greater significance than the magnitude of the underlying financial dispute because exchanges should hold themselves to a high standard of procedural fairness and because the consequences of cancelling a listing can be quite severe on a listed issuer and its shareholders.
- [43] There is a legitimate concern about significant consequences to Anglo-Bomarc and its shareholders resulting from being delisted. However, in this case the concern is mitigated to a significant extent because the existence of the Cease Trade Order prevented trading in shares in the company in any event. We note that the Cease Trade Order has been in place for almost five years during which time Anglo-Bomarc has failed to take the necessary steps to have the Cease Trade Order revoked. There is also an admission by Anglo-Bomarc in the record, discussed in more detail below, which might have supported the decision which the TSXV made.
- [44] Considering all of the circumstances, and especially considering that the shares of Anglo-Bomarc could not be traded regardless of whether or not its listing remained valid, we conclude that the underlying substantive issue is not one which strongly justifies our intervention to remove the proceeding from the inactive list.

B. Merits of Substantive Issues

- [45] Anglo-Bomarc has had more than one opportunity to demonstrate to the Commission the merits of the underlying Review Application. The company could have provided detailed, substantive materials as part of the Review Application when it was filed. Anglo-Bomarc then had well over three months prior to the June 13, 2022 deadline established by the Vice Chair to deliver complete application materials. After missing that deadline, the company was given another opportunity to demonstrate the merits of its position by providing materials within the Removal Application.
- [46] Throughout the proceedings before the Commission, Anglo-Bomarc's materials have been, at best, thin. In order to substantiate the submissions it was making we would have expected Anglo-Bomarc to provide us a variety of documents which are crucial to the understanding of Anglo-Bomarc's positions. For example, we expected to receive copies of the agreements under which payments were owed. We expected to receive documents establishing the prior practice regarding the types of payments made by Anglo-Bomarc to the TSXV. We would also have expected some explanation as to who within Anglo-Bomarc was, or should have been, regularly checking the email addresses which the TSXV normally used for billing communications and the email address used for the December, 2021 communication which the TSXV asserts that it sent. The onus was on Anglo-Bomarc to establish its substantive position yet we did not receive evidence supporting Anglo-Bomarc's position on the important points we have mentioned.
- [47] Some of the information needed to assess the substantive issues could have come from the TSXV. However, there is no basis to fault the TSXV for failing to provide a full response to the substantive issues in light of the fact that the Review Application was placed on the inactive list before the time came for the TSXV to provide such evidence.
- [48] If Anglo-Bomarc had a prior record of non-compliance with TSXV requirements, that could provide a basis for the TSXV to show less leniency toward a non-payment by the company. We do not know what Anglo-Bomarc's prior record is with any confidence, but we know there are some reasons to be concerned based on the existence of the Cease Trade Order.
- [49] Anglo-Bomarc admitted in its January 13, 2022 letter to the TSXV that its filings with the exchange were not current. The company wrote:
- The Company has a detailed plan and time line to submit to the TSXV to complete all its filings and resume the trading on TSXV before June 30, 2022. The Company is in the process of completing all the filings to disseminate on Sedar in the next few months.
- [50] Anglo-Bomarc bears the onus on this application of demonstrating that it is in the public interest for us to grant to the Removal Application and to permit the Review Application to proceed. While neither the Cease Trade Order nor Anglo-Bomarc's admission about its filings is determinative, the admission about its filings is contained within the materials

the company filed in support of the Removal Application. Having submitted that material, Anglo-Bomarc then failed to provide any explanation about the state of its filings that would support its position that the Removal Application is in the public interest.

- [51] An additional factor with respect to the merits of the application is that we would be unlikely to treat this proceeding as a hearing *de novo*. We would likely show deference to the discretionary decision made by the TSXV, consistent with paragraph 7.9 of BC Policy 15-601 – *Hearings*, which reads as follows:

Where the review of a Recognized Entity decision proceeds as an appeal –

The Commission does not provide parties with a second opinion on a matter decided by a Recognized Entity. If the decision under review is reasonable and was made in accordance with the law, the evidence, and the public interest, the Commission is generally reluctant to interfere simply because it might have made a different decision in the circumstances. For this reason, generally, the person requesting the review presents a case for having the decision revoked or varied and the Recognized Entity responds to that case. The Commission generally confirms the decision of the Recognized Entity, unless:

- the Recognized Entity has proceeded on an incorrect principle
- the Recognized Entity has made an error in law
- the Recognized Entity has overlooked material evidence
- new and compelling evidence is presented to the Commission or
- the Commission's view of the public interest is different from that of the Recognized Entity

Where the review of a Recognized Entity's decision may proceed as a new hearing – The Commission may allow the review of a Recognized Entity's decision to proceed as a new hearing, rather than an appeal, where:

- the parties have consented
- there is new and compelling evidence that requires the panel to reconsider all of the evidence
- there is a significant change in the circumstances
- the decision maker considered significant oral evidence that was not recorded
- there are parties directly affected by the decision who were not represented at the hearing before the Recognized Entity and who may suffer significant prejudice if unable to challenge the evidence leading to the findings in the decision or
- the Commission considers it in the public interest

If the Commission holds a new hearing, the Recognized Entity presents the case in support of the decision and the person requesting the review responds to that case.

- [52] Because we would be showing some deference to the discretionary decision which the TSXV made in relation to Anglo-Bomarc's listing, there would be an onus on Anglo-Bomarc to satisfy us that the decision should be overturned.

- [53] To summarize, we do not have a basis to draw firm conclusions about the merits of the substantive Review Application, but to the extent we do have indications about the strength of the Anglo-Bomarc's position, the merits do not look strong. In addition, the company had the opportunity and the obligation to provide us with a better picture of the merits and did not do so.

C. Degree of Delay, Explanation Given

- [54] It is notable that Anglo-Bomarc did not seek this review until February 18, 2022. The company has taken the position that it did not receive notice of the TSXV decision until January 21, 2022 and thus its application was within the 30 days required by section 7.2(a) of BC Policy 15-601. It is clear from Anglo-Bomarc's own communications that it had notice well before January 21. On January 13 and 14, 2022, it paid \$10,010 to the TSXV in an attempt to resolve the delisting. It also sent an email to TSXV on January 13, 2022 containing the admission about outstanding filings. Given our decision below, we do not need to rule on whether the company met the 30-day period set out in the Commission's hearing policy, but Anglo-Bomarc's failure to take action promptly has been consistent throughout the proceedings before both the TSXV and now the Commission.
- [55] The summary provided above creates a picture of an applicant who attempts to do everything at the last moment, who sometimes meets a deadline but who often does not and who frequently blames others for the consequences of its own delay. Anglo-Bomarc has created significant delay in this process, despite repeated help from the Commission hearing office explaining what steps must be taken in order to meet deadlines which were clearly communicated.
- [56] The explanations given by Anglo-Bomarc have not been convincing. The primary explanation given is that Anglo-Bomarc needs time to retain counsel. Other explanations have included the suggestion that legal counsel is too expensive and the hearing office has not been sufficiently helpful in explaining to Anglo-Bomarc what the company needs to do to move this proceeding forward in a timely way. We reject those explanations, they are not accurate.
- [57] Anglo-Bomarc has not provided a convincing explanation for the substantial delay that the company itself is responsible for.

D. Balancing the Inconvenience to Others

- [58] We do not assign significant weight to the degree of inconvenience that Anglo-Bomarc's delays have caused to others. There is no suggestion of actual prejudice caused by the delay, for example there is no suggestion that evidence is no longer available. However, Anglo-Bomarc's delays have caused some inconvenience and that inconvenience deserves at least some modest weight. If this proceeding had been conducted efficiently, it would have been brought to a conclusion on the merits long ago. Instead, each of the hearing office, the TSXV and counsel for the executive director have had to learn and re-learn the details of this file and respond to Anglo-Bomarc. The inconvenience has not been significant, but there has been some and it has been completely unjustified.

[59] As noted above, Anglo-Bomarc has argued that the TSXV has not raised issues as to prejudice it would suffer if Anglo-Bomarc's hearing was removed from the inactive list. This is an example of Anglo-Bomarc pointing the finger at others. The onus is on Anglo-Bomarc to establish a basis for removal from the inactive list. It is not on the TSXV to establish prejudice.

E. Conclusion

[60] Upon balancing all of the factors we conclude it is not in the public interest to grant the Removal Application.

[61] The Removal Application is dismissed and the Review Application is dismissed as abandoned.

June 14, 2023

For the Commission:

Gordon Johnson
Vice Chair

Deborah Armour, KC
Commissioner

Jason Milne
Commissioner