



Bulletin

Litigation & Dispute Resolution/ Securities Regulation

Court of Appeal Establishes Disclosure Procedure in Securities Commission Proceedings Arising from Joint Inter-Jurisdictional Investigations

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On June 16, 2010, the British Columbia Court of Appeal issued its reasons in *Hu v. British Columbia Securities Commission* (Decision), an important decision addressing the process and obligations of securities commission enforcement counsel when disclosing documents to a respondent in the context of a joint inter-jurisdictional investigation.

The Decision establishes such a procedure for the B.C. Securities Commission (Commission), which other provincial and international regulators will want to consider in establishing their own procedures.

The Decision also reiterated the well-accepted tenet that enforcement counsel are held to a broad disclosure standard that requires a respondent be given disclosure of all information unless that information is clearly irrelevant or privileged – the same standard developed in the criminal law arising from *R. v. Stinchcombe*. In strong language, the Decision further confirmed that when enforcement counsel refuse disclosure, the onus remains, at all times, upon those enforcement counsel to justify such non-disclosure.

BACKGROUND

The matter giving rise to the appeal followed a joint investigation between the Commission and the ASC. The ASC commenced an investigation into certain persons, not including the appellant. The ASC then approached the Commission to assist in its investigation, a request to which the Commission acceded (as is presumably the case when a co-regulator makes such a request). The Commission and the ASC exchanged documents obtained pursuant to their respective investigation orders throughout the investigation.

The focus of the investigation eventually shifted to the appellant, and a notice of hearing was issued against him in British Columbia. Once the notice of hearing

was issued, the appellant began to receive disclosure from enforcement counsel at the Commission. The appellant became concerned that he was not receiving the disclosure to which he was entitled and requested the disclosure of certain documents, including the ASC investigation file as well as a number of specific documents that, based on the disclosure, appeared to exist but were not disclosed to him. Those requests were denied by enforcement counsel, culminating in a hearing before the Commission.

The hearing panel of the Commission directed enforcement counsel to ask the ASC to provide enforcement counsel with copies of all information gathered under its investigation relevant to the allegations against the appellant. The appellant's request for specific documents was denied. Concerned that the ASC was not in a position to determine relevance in regards to B.C. proceedings, that he would have no ability to challenge the ASC's determinations of relevance and that the specific documents requested should be disclosed, an appeal of the hearing panel's decision was filed with the Court of Appeal.

COURT OF APPEAL DECISION

The Court of Appeal confirmed that the disclosure obligations on enforcement counsel for the Commission were, as in the criminal context, extremely broad and required disclosure of everything relevant to the allegations in the notice of hearing.

Inter-Jurisdictional Investigations

Having confirmed the application of that broad disclosure standard, the court went on to address the proper procedure for disclosure in inter-jurisdictional investigations.

The court concluded that in the circumstances of a cross-border investigation, upon the issuance of a notice of hearing, enforcement counsel ought to request the investigation file of its co-regulator and review that file for relevancy. If the respondent does not accept enforcement counsel's determination of relevancy then the matter can be referred to the Commission for a determination. If the co-regulator refuses to give

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enforcement counsel access to its investigation file, then such refusal is to be disclosed to the respondent so that other avenues to compel production could be pursued.

This process is important, as it provides procedural safeguards to a respondent. Notably, the Decision guards against co-regulators requesting specific inculpatory documents from its co-regulator, while not requesting exculpatory documents.

Broad Disclosure Obligation Generally

The Decision also confirmed that the Commission cannot wholly delegate the determination of relevancy to its staff and that, if the enforcement counsel's determination of irrelevancy is challenged, the Commission must itself determine whether the documents in question are relevant or irrelevant. It is incumbent on the enforcement counsel, when resisting disclosure, to satisfy the Commission that the documents need not be disclosed. Accordingly, the onus is on the enforcement counsel to justify non-disclosure.

In this case, the Court of Appeal observed that the Commission appeared to have concluded that there was nothing in the descriptions of the documents requested by the appellant to show that enforcement counsel had wrongly applied the standard of relevance and placed the onus on the appellant of proving that the documents were relevant (a difficult task without having the benefit of being able to review those documents). This was found by the court not to be the correct approach. Accordingly, the matter was remitted to the Commission to determine whether enforcement counsel had established that the documents would be of no use to the appellant and therefore not relevant.

Sean Boyle and Alexandra Luchenko of our Vancouver office acted as counsel for the successful appellant before the B.C. Securities Commission and on appeal.

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