



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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**IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c.S.5, AS AMENDED**

- AND -

**IN THE MATTER OF MEGA-C POWER CORPORATION, RENE PARDO, GARY USLING,
LEWIS TAYLOR SR., LEWIS TAYLOR JR., JARED TAYLOR, COLIN TAYLOR and 1248136
ONTARIO LIMITED**

**CONFIDENTIAL DECISION ON A MOTION FOR A STAY
[Editors Note: Made public on September 8, 2010.]**

In Camera Hearing: August 6 and 7, 2008

Decision: October 1, 2008

Panel: Lawrence Ritchie -Vice-Chair and Chair of the Panel
James E. A. Turner -Vice-Chair

Counsel: Matthew Britton -for Staff of the Ontario Securities
Commission

Rene Pardo -for himself

Linda Fuerst -for Gary Usling

Brian Greenspan -for Lewis Taylor Sr. and Lewis Taylor Jr.

Fred A. Platt -for Jared Taylor, Colin Taylor and 1248136
Ontario Ltd.

CONFIDENTIAL DECISION ON A MOTION FOR A STAY

[1] This matter relates to an investigation by Staff (“Staff”) of the Ontario Securities Commission (the “Commission”) that has been ongoing for five years. There is a hearing on the merits scheduled to commence on November 3, 2008. It is anticipated that the hearing will last for seven weeks. In light of the pending hearing, we are releasing this decision now and intend to supplement it with detailed reasons to follow. In keeping with the Commission’s previous confidentiality order in this matter, this decision will not be released to the public until the hearing on the merits.

[2] On November 16, 2005, the Commission issued a Notice of Hearing pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”) together with a Statement of Allegations (the “Statement of Allegations”). The Notice of Hearing and Statement of Allegations named the following as respondents: Rene Pardo (“Pardo”), Gary Usling (“Usling”), Lewis Taylor Sr., Lewis Taylor Jr. (“Taylor Sr. and Taylor Jr.”), Jared Taylor, Colin Taylor and 1248136 Ontario Limited (collectively, the “Respondents”), as well as Mega-C Power Corporation (“Mega-C”). An Amended Statement of Allegations and Notice of Hearing were issued on February 6, 2007 discontinuing proceedings against Mega-C.

[3] There have been numerous appearances in this matter. In total, the parties have appeared before the Commission seventeen times. The Commission has considered several motions, including a constitutional motion and a particulars motion. Furthermore, there have been numerous pre-hearing and case management conferences. The hearing on the merits, previously scheduled for October 29, 2007, was adjourned to commence on November 3, 2008. That date was agreed to by the parties and set by the Office of the Secretary in November 2007. Many of the issues in dispute in this motion were raised by the parties at previous pre-hearing conferences, case management conferences and motions.

[4] In this motion, the Respondents, except Pardo (the “Moving Parties”) seek a stay of proceedings. In the alternative, if a stay is not granted, the Moving Parties request an order that Staff produce a written itemized inventory of relevant materials that Staff does not intend to disclose along with the reason for non-disclosure of each document, and orders restricting the

use of disclosed materials. In addition, Jared Taylor, Colin Taylor and 1248136 Ontario Limited seek an order requiring Staff to provide further particulars of the allegations against them.

[5] The Moving Parties do not allege one factor as the basis for a stay, but rather a series of circumstances that together, in their submission, raise serious issues about Staff's conduct of the investigation and proceeding in this matter. These allegations include:

- (1) a failure by Staff to conduct a fair investigation;
- (2) misrepresentation by Staff to the Commission in obtaining a section 11 order;
- (3) failure by Staff to obtain and preserve all evidence from the investigation relevant to this matter;
- (4) failure by Staff to protect information and materials obtained pursuant to section 11 of the Act from improper disclosure and use; and
- (5) an ongoing and continuing refusal to meet Staff's disclosure obligations.

[6] The Moving Parties state in their submissions that, in making these allegations, they are not pointing a finger at any one member of Staff or group of members of Staff. However, they do say that, in whole, Staff's conduct was improper and has thrown the Commission's process into disrepute.

[7] Staff denies these allegations and submits that it has complied with all of its obligations in conducting the investigation and this proceeding. Staff submits, in any event, that the allegations, if proven, have resulted in no material prejudice to the Moving Parties.

[8] All the parties agree that a stay of proceedings is an extraordinary remedy. For example, in the criminal context, a stay of proceedings "is only appropriate 'in the clearest of cases', where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued" (*R. v. O'Connor*, [1995] S.C.J. No. 98 (S.C.C.) at para. 82).

[9] We are concerned by the allegations that we have heard. We are particularly concerned by the allegation that Staff failed to take steps to scrupulously protect confidentiality of the documents and materials compelled under section 11 of the Act. In particular, among other things, there is an allegation that confidential documents and materials were delivered to counsel for Mega-C, without any caution, warning or reference to their confidentiality and restricted use, and that these materials then found their way into the hands of certain persons in the United States who have interests adverse to the Moving Parties. This alleged failure to protect confidentiality may have been inadvertent. Nonetheless, it is also alleged that the improprieties were amplified by Staff's additional failures after becoming aware that the confidential material had been improperly disseminated. In particular, the Moving Parties allege that when Staff had the opportunity to take action, it did nothing. The Moving Parties allege that Staff's action (or inaction) in failing to protect the confidentiality of the documents and materials obtained under section 11 was negligent at best and more likely a breach of its duty. This is a very serious allegation.

[10] Staff disputes the version of the facts promoted by the Moving Parties. Staff also, and in any event, submits that it has no obligation to warn a recipient of documents and materials obtained under section 11 of their confidentiality and restricted use. Staff also says that there has been no actual prejudice to any of the Moving Parties in the circumstances and that Staff has and is now taking all reasonable steps to ensure that third parties return the relevant documents and materials.

[11] The legal and factual issues raised on this motion are complex. The submissions before us raise concerns as to Staff's conduct in this matter. We are presented with submissions based on limited affidavit evidence. We do not have the benefit of hearing the evidence directly from witnesses, and the opportunity to assess that evidence in the factual context of the hearing on the merits. That opportunity, in our view, is necessary since questions of credibility, the propriety of the conduct of Staff and the integrity of the Commission as a whole are at issue.

[12] We have given this matter careful consideration and we have determined that we will not stay these proceedings on this preliminary motion. We point out that the allegations made by the Moving Parties against Staff, about the conduct of the investigation and this proceeding, would

cause us significant concern if they are proven. However, we are unable to properly assess these serious allegations on the limited evidence before us. This assessment is necessary before we can conclude that the granting of the extraordinary remedy of a stay is justified.

[13] Accordingly, in the circumstances, we dismiss the Moving Parties' motion for a stay, but without prejudice to the Moving Parties renewing their motion at the hearing on the merits. In our view, the panel hearing this matter on the merits would be better able to make the factual determinations required to assess the allegations made, and to decide whether a stay is appropriate in the circumstances, considering the entirety of the evidence.

[14] Staff has been put on notice that its conduct of the investigation and the conduct of this proceeding is at issue and Staff should be prepared to address those allegations if they are renewed before the panel hearing this matter on the merits.

[15] As noted, there have been previous requests for particulars. Some of the Moving Parties assert that the particulars previously ordered by a Commission panel remain outstanding. Staff responds that it has complied with the Commission's Order (dated September 7, 2007) in relation to a previous particulars motion. Little further was said on the motion before us about what specifically remains outstanding. We urge Staff to meet and work with the parties to ensure that the specifics of the allegations made against the Respondents are sufficiently known to each Respondent, to enable them to make answer and defence.

[16] On the issue of disclosure, the Moving Parties assert that Staff is in possession of materials relevant to this proceeding that have not yet been disclosed to the Moving Parties. Staff asserts that any undisclosed material is either irrelevant or subject to privilege. The Moving Parties respond that without knowing the nature of those materials, and the specific reason Staff has for not disclosing them, they cannot properly respond. We agree with the position of the Moving Parties on this point. If agreement cannot be achieved on these issues, they can be addressed at a case management conference scheduled in advance of the hearing on the merits.

[17] Accordingly, IT IS ORDERED THAT:

- (1) The motion for the stay of this proceeding is dismissed, without prejudice to the Moving parties to renew their request at the hearing on the merits;

- (2) Staff should immediately take appropriate steps to ensure that employees in the Enforcement Branch do not have any documents or materials, including e-mails, relevant to this matter that have not been disclosed to the Respondents;
- (3) Staff shall produce a written itemized inventory of documents and materials in its possession that are relevant to this proceeding that Staff does not intend to disclose to the Respondents. The inventory shall disclose in each case the basis upon which Staff proposes to withhold disclosure;

It may not be necessary for Staff to list each and every document. Rather, a grouping by nature and a generalized description of that group will suffice;

- (4) The itemized inventory described in paragraph 3 above shall be delivered to the Respondents no later than October 17, 2008; and
- (5) A pre-hearing/case management conference shall be held no later than October 31, 2008 to deal with any outstanding issues related to disclosure, particulars or any of the other matters dealt with in this decision (unless the parties determine such a conference is unnecessary).

[18] As stated above, the hearing on the merits in this matter is scheduled to commence on November 3, 2008; those dates have been set for almost a year. It is the Commission's intention that this matter proceed within the time set aside and we ask all parties to use their best efforts to do so.

DATED at Toronto this 1st day of October, 2008.

"Lawrence E. Ritchie"

Lawrence E. Ritchie

"James E. A. Turner"

James E. A. Turner