

**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 REASONS AND DECISION REGARDING THE REQUEST
FOR REDACTION OF THE CONFIDENTIAL REASONS AND DECISION
DATED MAY 18, 2007**

[Editors Note: Made public on September 8, 2010.]

**Decided on the basis of
the written record:**

July 26, 2007

Panel:

Lawrence E. Ritchie	- Vice-Chair (Chair of the Panel)
James E. A. Turner	- Vice-Chair
Wendell S. Wigle, Q.C.	- Commissioner

Counsel:

Anne C. Sonnen	- For Staff of the Ontario Securities Commission
Sean Horgan	
Peter Copeland	-For Lewis Taylor, Sr. and Lewis Taylor Jr.
Fred Platt	-For Jared Taylor, Colin Taylor and 1248136 Ontario Limited
Steven Sofer	-For Gary Usling
James Camp	
David Hausman	-For the Liquidation Trustee of Mega-C Power Corporation

**CONFIDENTIAL REASONS AND DECISION REGARDING THE REQUEST
FOR REDACTION OF THE CONFIDENTIAL REASONS AND DECISION
DATED MAY 18, 2007**

I. Introduction

[1] On November 16, 2005, the Commission issued a Notice of Hearing against Mega-C Power Corporation (“Mega-C”), Rene Pardo, Gary Usling, Lewis Taylor Sr., Lewis Taylor Jr., Jared Taylor, Colin Taylor and 1248136 Ontario Limited (collectively, “the Respondents”) pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”) in connection with a Statement of Allegations delivered by Staff of the Commission (“Staff”) on that day. Staff alleges that the Respondents violated sections 25, 38 and 53 of the Act. The allegations relate to activities alleged to have taken place from August 2001 through mid-2003.

[2] By Order dated December 5, 2006, on consent of all parties, the Commission ordered the hearing on the merits to commence on October 29, 2007, to proceed over the following six weeks.

[3] An Amended Notice of Hearing was issued by the Commission on February 6, 2007. On June 4, 2007, a Notice of Withdrawal was issued by Staff withdrawing the allegations against the respondent, Mega-C.

[4] As of April 12, 2007, there were a number of motions pending, including: two motions, one brought by Lewis Taylor Sr. and Lewis Taylor Jr. (“Taylor Sr. and Jr.”), and one brought by Jared Taylor, Colin Taylor and 1248136 Ontario Limited (the “Taylor Group”), relating to the propriety and legality of certain statutory investigation provisions contained in the Act, and their use in this case (collectively, the “Constitutional Motions”).

[5] As we noted in our Confidential Reasons and Decision dated May 18, 2007 (the “Confidential Reasons and Decision”), while these motions were described as the “Constitutional Motions”, the Taylor Group and Taylor Sr. and Jr. also rely on principles of “fundamental and/or natural justice”, in addition to *Charter* protections (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 (the “*Charter*”).

[6] In response to these two Constitutional Motions challenging both the constitutionality of section 11 of the Act, as well as the manner and basis upon which an investigation order (the “Investigation Order”) was obtained and used in the circumstances of this Proceeding, Staff filed a “cross-motion” on March 29, 2007 (“Staff’s Motion”), to adjourn the hearing of the Constitutional Motions until the commencement of the hearing in this matter on October 29, 2007 (the “Hearing”), so that the Constitutional Motions would be dealt with at the discretion of the Hearing Panel.

II. Taylor Sr. and Jr. and the Taylor Group's Request for Redaction of the Confidential Reasons and Decision dated May 18, 2007

[7] At the hearing of Staff's Motion, some of the respondents pointed out that certain matters that would be addressed by the Panel in its reasons and decision may raise confidentiality issues. As a result, we agreed at the time to release our reasons and decision on a confidential basis until we could consider counsel's submissions regarding the need to preserve confidentiality of parts of the reasons and decision until the commencement of the Hearing.

[8] On May 18, 2007, we issued the Confidential Reasons and Decision. At the request of the Respondents, we issued our reasons on a confidential basis to allow them the opportunity to review the Confidential Reasons and Decision and to make submissions as to which parts, in their view, should be kept confidential until the commencement of the Hearing.

[9] We understand that discussion amongst the parties failed to result in agreement as to the public release of the Confidential Reasons and Decision. Accordingly, by way of letter dated June 14, 2007, sent to the parties by the Secretary to the Commission, on behalf of the Panel, we requested that the parties file written submissions regarding their position on the confidentiality issue raised during the hearing of Staff's motion, before we publicly release our Confidential Reasons and Decision.

[10] The parties filed written submissions by letter on June 21st and June 22nd, 2007. Each party filed a letter setting out its position on the issue of confidentiality. Three of the parties respectively filed suggested redacted versions of the Confidential Reasons and Decision to be considered by the Panel.

[11] We have reviewed the letters submitted by the parties and the suggested redacted versions of the Confidential Reasons and Decision proposed by the respective parties. These are our confidential Reasons and Decision regarding the request for redaction of the Confidential Reasons and Decision.

III. Parties' Position

Taylor Sr. and Jr.

[12] Counsel for Taylor Sr. and Jr. submits that paragraph 16(1)(b) of the Act prohibits the public disclosure of information which would help identify the names of persons, including his clients, "examined or sought to be examined under section 13" of the Act.

[13] In counsel's letter dated June 21, 2007, counsel proposed redactions of the Confidential Reasons and Decision with respect to two types of information:

- (i) the names of persons who were the subject of examinations pursuant to section 13 of the Act; and
- (ii) information that would tend to identify the names of persons who were the subject of examinations pursuant to section 13, including:
 - a. the name of the proceeding;
 - b. the identity of all the respondents and their counsel;
 - c. the history of the proceedings (paragraphs 1 and 2);
 - d. the time frame of the alleged conduct in the Statement of Allegations (paragraph 3);
 - e. the specific sections of the Act that are the subject of the allegations (paragraphs 1 and 28); and
 - f. the scheduled date of the section 127 Hearing (paragraphs 2, 8, 87, 88, 89, 99, 100).

[14] Counsel for Taylor Sr. and Jr. further submits that section 17(6) has no application in these circumstances, as the exceptions allow only for disclosure by “[a] person appointed to make an investigation or examination under the Act”. He acknowledges, however, that the scope of the two exceptions to confidentiality in subsection 17(6) of the Act have not been clearly established by the jurisprudence. Moreover, according to counsel, when Staff discloses materials to respondents pursuant to subsection 17(6) of the Act, the protections of section 16 are not displaced. In support of his argument, counsel relies on the decision of *A Co. v. Naster*, [2001] O.J. No 4997 at para. 25 (Div. Ct.) (“*A Co. v. Naster*”):

Second, there are the provisions of s. 16 of the Act. It is submitted that s. 17(6) does not confine disclosure to the other respondents. That is so, but I observe that the disclosure can only be made “for the purpose of conducting an examination or in connection with a proceeding commenced or proposed to be commenced by the Commission.” That appears to me to confine disclosure under s. 17(6) to other respondents, or persons being interviewed in an effort to obtain information. Section 16 extends the protection of confidentiality to any person or company, whether or not a respondent.

[15] Counsel for Taylor Sr. and Jr. filed a proposed redacted version of the Confidential Reasons and Decision for our consideration.

The Taylor Group

[16] In his letter dated June 21, 2007, counsel for the Taylor Group and 1248136 Ontario Limited submits that the following portions of the Confidential Reasons and Decision should be redacted:

- a. the name of his clients or portions that refer to his clients; and
- b. the names of the members of the Panel and counsel who appeared before the Panel.

[17] Counsel submits that the names of his clients ought to be redacted because the Act requires that the existence of a compelled examination be kept confidential. According to counsel, the information referred to above could be used to identify the proceeding and thereafter the identity of his clients. Counsel submits that the redacted names (other than the names of the members of the Panel and counsel), i.e. those in the body of the Confidential Reasons and Decision, can be given pseudonyms and the dates can be deleted without doing any injustice to the Confidential Reasons and Decision.

[18] Counsel also filed a suggested version of the redacted Confidential Reasons and Decision for our consideration, which follows this proposed approach.

Gary Usling

[19] In his letter dated June 22, 2007, counsel for Gary Usling indicated that Gary Usling has no objection to the Confidential Reasons and Decision being published in full, without redaction.

Staff

[20] In their letter dated June 21, 2007, Staff submit that the confidentiality provisions in section 16 of the Act do not support a *de facto* sealing order of the scope urged upon us by counsel for Taylor Sr. and Jr. and the Taylor Group.

[21] Staff submit that the redactions proposed by counsel for Taylor Sr. and Jr. and by counsel for the Taylor Group are overly broad and contrary to the presumption in favour of open proceedings, which fosters public confidence in the integrity of the administration of justice.

[22] Staff argue that the expedient release of the reasons in an unredacted form is necessary to provide guidance to the public on pre-hearing motions of this nature and to help inform those involved in subsequent proceedings.

[23] Staff point out that the Confidential Reasons and Decision falls within the application of paragraph 17(6)(a) of the Act and that accordingly, no disclosure order is required.

[24] In the alternative, Staff submit that, in the event that the Panel were to conclude that subsection 17(6) of the Act was of no assistance in resolving this legal issue, Staff would be prepared to proceed by way of an application for an order under subsection 17(1) of the Act. Staff submit that it would bring such application on the basis that the moving respondents' rights to confidentiality under section 16 of the Act is not absolute, but rather, any prejudice to the moving respondents from the disclosure of the fact that a section 11 order was issued and the fact that section 13 evidence was obtained is outweighed by the public interest in having a full copy of the Confidential Reasons and Decision available for public review.

[25] Although Staff are of the view that it is not necessary to redact the Confidential Reasons and Decision, Staff do not oppose an amendment such that references to the Respondents are made generically to ensure that the Confidential Reasons and Decision do not disclose to whom the section 11 order was applied or from whom section 13 evidence was obtained. Staff filed a suggested version of the redacted Confidential Reasons and Decision for our consideration.

IV. Analysis

[26] Sections 16 and 17 of the Act are the relevant provisions to determine the matter in issue. Section 16 of the Act provides confidentiality relating to the nature and content of section 11 orders and evidence obtained under section 13 of the Act. Section 16 provides:

- 16.** (1) Except in accordance with section 17, no person or company shall disclose at any time, except to his, her or its counsel,
- (a) the nature or content of an order under section 11 or 12; or
 - (b) the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13. 1994, c. 11, s. 358.
- (2) If the Commission issues an order under section 11 or 12, all reports provided under section 15, all testimony given under section 13 and all documents and other things obtained under section 13 relating to the investigation or examination that is the subject of the order are for the exclusive use of the Commission or of such other regulator as the Commission may specify in the order, and shall not be disclosed or produced to any other person or company or in any other proceeding except as permitted under section 17.

[27] Subsection 17(6) of the Act reads as follows:

(6) A person appointed to make an investigation or examination under this Act may disclose or produce anything mentioned in subsection (1), but may do so only *in connection with*,

(a) a proceeding commenced or proposed to be commenced by the Commission under this Act; or

(b) an examination of a witness, including an examination of a witness under section 13. [Emphasis added]

[28] In our view, subsection 16(2) makes it clear that information and material obtained pursuant to an Investigation Order are for the exclusive use of the Commission (or such other regulator identified in the Order). Further, the words used in subsection 16(2), set out above, presume that information obtained pursuant to sections 11, 12 and 13 can be produced or disclosed in the course of a Commission proceeding, since there is a prohibition from disclosure of such information and material “in any other proceeding” “except as permitted by section 17”. The reference to “any other proceeding” must be a reference to a proceeding other than the relevant Commission proceeding and/or a proceeding of any other regulator named in the relevant order.

[29] Section 17 of the Act establishes a legal framework for disclosure. We note that subsection 17(6) makes reference to disclosure by the person appointed to make the investigation, but not the Commission. However, we must read all of the relevant provisions as a whole to make them meaningful. In our view, sections 16 and 17 are meant, among other things, to provide some comfort to persons who are examined or who provide information to Staff in the course of an investigation pursuant to an investigation order, that the identities of those individuals, the information they provide and the fact that they have been involved at all, will remain confidential, subject to the terms of the Act. However, the fact that disclosure can be made by a person appointed to make an investigation, “in connection with a proceeding” commenced or proposed to be commenced, qualifies the reasonable expectation of confidentiality of an affected person.

[30] In circumstances such as these, where a proceeding has been commenced and a preliminary motion has been brought, the Act contemplates that information obtained pursuant to the statutory investigation powers can be disclosed in the course of the relevant Commission proceeding.

[31] As the Confidential Reasons and Decision relate to a pre-hearing motion brought in the context of a proceeding that is scheduled for a hearing, we are of the view that disclosure regarding the section 11 Order and the section 13 evidence provided in the Confidential Reasons and Decision falls within the ambit of subsection 16(2) and subparagraph 17(6)(a) of the Act and no separate order is required. Subsection 17(6) does not say: “at the outset of a proceeding”, or “in the course of a proceeding”. Rather, it states that disclosure is permitted “in connection with” a proceeding. The use of that

phrase indicates that once a Notice of Hearing is issued, disclosure of information made confidential pursuant to section 16, may be made if the disclosure is in connection with the proceeding. For example, it is expected that disclosure of such confidential information would be made in satisfaction of Staff's production obligations to respondents, and once that disclosure is made, the information can be used by any party to the proceeding, in the course of that proceeding. We recognize that there could be special circumstances that would warrant the preservation and protection of confidentiality. However, absent any such special circumstances, we are of the view that disclosure in connection with a proceeding ordinarily would include disclosure of preliminary or interlocutory motions made in the connection with the proceeding.

[32] In any event, we agree with Staff that the Confidential Reasons and Decision does not refer to the section 17 application, does not refer to the nature and content of the section 11 order, nor to the contents of the information obtained under section 13 of the Act.

[33] Counsel for Taylor Sr. and Jr. referred us to the decision of *A. Co. v. Naster*, cited above, which is relied upon to support the proposition that subsection 17(6) of the Act is not applicable in these circumstances. First, we note that the portion cited by counsel refers to the application of paragraph 17(6)(a) to the disclosure of the actual compelled evidence in that proceeding. While the released reasons in that matter referred to the applicant as "A. Co.", but for that redaction, the reasons were released in an unredacted form.

[34] Further, when reviewing the reasons in *A. Co. v. Naster*, we note that this decision did not redact: the nature of the proceeding, the underlying facts of the proceeding, the name of counsel, the names of the Panel members or dates of events in the proceeding. These are all elements of the decision that Respondents' counsel in this case wish to have redacted.

[35] We also note that in other Commission decisions relating to section 11 and or section 13 of the Act, the reasons were published in an unredacted form (see for instance: *Biscotti v. Ontario (Securities Commission)* (1990), 76 D.L.R. (4th), 762 and *OSC v. Gatti* (unreported: March 27, 2001), and *Universal Settlements International Inc. v. Ontario* (2003) 26 O.S.C.B. 7611).

[36] The Commission is a public body, exercising its statutory powers in the public interest. It is important, in our view, that it fulfill its mandate as transparently as practically possible. This means that matters coming before the Commission, including the details about those matters, be made public, to the broadest extent possible, absent special circumstances that would warrant some degree of confidentiality. Where such circumstances exist, the Commission should exercise its discretion narrowly, so as to provide the public with as much information about the proceedings before the Commission as possible in the circumstances.

[37] In the circumstances before us, although we are of the view that the Commission has the authority to release the Confidential Reasons and Decision publicly in an

unredacted form pursuant to subsection 16(2) and as contemplated by 17(6) of the Act, we are prepared to release our Confidential Reasons and Decision in a redacted form at this time until the commencement of the Hearing.

[38] In coming to this conclusion, we have considered the fact that Staff do not oppose Taylor Sr. and Jr. and the Taylor Group's request to publish the Confidential Reasons and Decision in a redacted form which removes the names of the parties. We also note that the substantive Hearing on the merits is scheduled to commence shortly, and that the nature of the redactions are largely limited to concealing the names of the parties to that proceeding.

IV. Decision

[39] Accordingly, the Confidential Reasons and Decision dated May 18, 2007 shall be released publicly in a redacted form which removes reference to the parties affected.

[40] These Confidential Reasons and Decision Regarding the Request for Redaction of the Confidential Reasons and Decision dated May 18, 2007, and the Confidential Reasons and Decision, shall be made available to the public in an unredacted form on the first day of the Hearing on the merits.

DATED at Toronto this 26th day of July, 2007.

"Lawrence E. Ritchie"

"Wendell S. Wigle"

Lawrence E. Ritchie

Wendell S. Wigle

"James E. A. Turner"

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