

CLERK OF THE COURT

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Court of Queen's Bench of Alberta
CALGARY, ALBERTA**Citation: Alberta (Market Surveillance Administrator) v. Enmax Energy Corporation,
2008 ABQB 54**

Date: 20080124

Docket: 0701 01778

Registry: Calgary

In the Matter of:*The Electric Utilities Act, S.A. 2003, c. E-5.1,
and regulations made thereunder*

Between:

Market Surveillance Administrator

Applicant

- and -

Enmax Energy Corporation and Enmax Energy Marketing Inc.

Respondents

**Reasons for Judgment
of the
Honourable Mr. Justice Alan D. Macleod**

[1] On July 5, 2007, this Court released Reasons for Judgment (2007 ABQB 309) confirming the entitlement of the Market Surveillance Administrator [MSA] to seek an order of this Court under s. 56 of *The Electric Utilities Act, S.A. 2003, c.E-5.1*, [the *Act*] to compel answers to reasonable questions. At that time, the Court devised a procedure in which this process could be accommodated under Part 30 of the *Alberta Rules of Court*. Its purpose was to keep the fruit of that investigation confidential and the process outlined in my Reasons for Judgment was designed to give effect to the rights of the MSA without making public what otherwise would be kept confidential had the assistance of the Court not been sought.

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[2] Following my ruling, the MSA did file an application containing, as directed, largely generic information and seeking my ruling on certain unanswered questions. Because all parties agreed, the matter was heard *in camera* for one half day in September and also on the afternoon of October 25, 2007.

[3] The issues before me are:

1. What is the threshold for an order under s. 56(3) of the *Act*?
2. Using that threshold, what questions ought to be answered?
3. To what extent, if any, is it appropriate for this Court to maintain its shielding directions to preserve the confidentiality of information?

Scope of the Current MSA Investigation

[4] The current investigation revolves around the importing of electricity by Enmax on September 28, 2005. In its letter to Enmax, dated October 28, 2005, the MSA casts its net quite a bit broader than that, but through subsequent requests, it now appears to be common ground that the thrust of the investigation surrounds the trades of September 28, 2005, and specifically the imports of electricity on that day.

The MSA's Mandate

[5] Notwithstanding that the focus is on one day's trading in 2005, it is clear that the mandate of the MSA is extremely broad as set out in s. 49. Subsections 1 and 2 of that section outline very broad areas of activity which may be the subject of surveillance and investigation by the MSA. Subsection 3 states:

3. In carrying out surveillance and investigation of any conduct, the Market Surveillance Administrator must assess whether or not:

(a) The conduct of market participants is consistent with the fair, efficient and openly competitive operation of the market,

(b) The person carrying out the conduct is complying with this *Act*, the regulations, the ISO rules, market rules, and any arrangements entered under this *Act* or regulations, and;

(c) The ISO rules are sufficient to discourage any uncompetitive practices in the electric industry and whether or not the ISO rules facilitate the fair, efficient and openly competitive operation of the market.

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The ISO is the Independent System Operator established by s. 7 of the *Act*.

[6] Subsection 4 provides that the MSA may establish guidelines to further the fair, efficient and openly competitive operation of the market. Those guidelines must be made public.

The Threshold

[7] Enmax argues that the questions must be related to the scope of the investigation which is limited to the importing of electricity on September 28, 2005. Moreover, the applicable standard for determining whether the question should be answered is that of reasonableness and necessity. The process is intrusive and if the MSA's powers are not fettered there is a danger that under s. 54 of the *Act* the investigation could be referred to another body including the competition bureau who could conceivably prosecute under its statute.

[8] As I have said repeatedly, the mandate of the MSA is extremely broad and in undertaking any investigation, the MSA is compelled by statute to consider the activity under investigation in light of the *Act*, the regulations, the ISO rules, the market rules and arrangements. In addition, it must consider whether the activity is consistent with the fair, efficient, and openly competitive operation of the market and whether new rules are desirable. In my view, the Market Participants or their employees can have little or no expectation of privacy insofar as their activities as market participants under the *Act* are being investigated.

[9] Another important consideration is that the MSA must possess considerable expertise in carrying out its function under the *Act*. I would be slow to second guess its views on what is important or relevant to its mandate. Furthermore, this is, after all, an investigation. I agree with counsel for the MSA that the comments of Keast J. Of the Ontario Court of Justice in *Children's Aid Society of Algoma v. D.P.*, [2006] O.J. No. 3570 at paras. 9 and 10 are applicable. An investigator often goes from reviewing evidence of a threshold relevance to a more focussed investigation involving what, in the investigator's opinion, is of ultimate relevance. As the investigation evolves, it will hopefully become more focussed, and focus can be the result of analysis and elimination. Also, it may be important to utilize information of threshold relevance to create or discover new information which may be of more relevance.

[10] In looking at the *Act*, s. 55 provides that the MSA can make reasonable inquiries and that persons working on the business premises of the Market Participant must cooperate reasonably with the MSA. Section 56(3) provides that a Court may make an order of assistance if it is satisfied that access to the business premises is necessary for the MSA to carry out its mandate.

[11] As I indicated in my previous reasons, in interpreting sections 55 and 56 of the *Act*, I must consider the provisions of the *Interpretation Act*, R.S.A. 2000 c.I-8. Section 10 of that *Act* provides:

10. An enactment shall be construed as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

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[12] Having read the affidavit of Robert Spragins, Manager, Investigations MSA, I have little trouble in concluding that there are reasonable and probable grounds to believe that access to Enmax's premises and employees is necessary to carry out the investigation. Having determined that, it is unnecessary, in my view to determine whether each question posed to employees is itself necessary. I need only ask whether the inquiry is reasonable within the meaning of s. 55(1).

[13] Also, Enmax complains that the investigation has taken a long period of time and that some of the questions constitute, in its opinion, a "fishing expedition." This is not an application in which it alleged the MSA is abusing its office contrary to s. 50 of the *Act*, requiring it to act fairly and responsibly. Moreover, there is no evidence before me upon which I could draw such a conclusion.

[14] Given that, and given my previous comments related to the broad mandate of the MSA during an investigation, the threshold is in my view a low one and it is not in my view appropriate to conduct a minute examination of each question for the purpose of determining whether its answer may or may not advance the investigation.

The Questions

[15] The first group of questions under objection related to a January 2007 interview of ABC. The objection to the questions was based upon the fact that ABC, while a trader with Enmax at the time, did not perform or supervise the trades in question. The questions related to ABC's knowledge of trading policies and procedures in general as well as facts related to a certain portfolio value added bonus plan. There were questions related to documents ABC had apparently signed, MSA documents and questions related to hedging. There were also questions related to certain documents and policies utilized by the witness in the course of trading that were also objected to on the basis that ABC did not perform or supervise any of the trades in question.

[16] In my view, the understanding of ABC may well be relevant and may be helpful in advancing the investigation. I direct that answers be given to all of those questions objected to during the course of the interview.

[17] I've also considered the questions put to DEF which were objected to. In my view, all of the questions meet the threshold and I would direct answers to all the questions. The main objection related to whether or not one of the documents formed one of the current policies of Enmax. Enmax's position is that it does not. There appears to be some uncertainty and I think the MSA is entitled to explore that. Furthermore, whether or not it was in force, I think the MSA is entitled to make inquiries as to whether the policy was followed in practice.

[18] Similarly, I think the questions put to GHI meet the threshold, and I would direct responses to those as well.

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[19] Sometimes the objection was to a witness interpreting a document. While I agree that it is not for a witness to interpret a document, the understanding of a witness as to a document and its impact is relevant.

[20] In conclusion, I direct that answers be given to all of the questions objected to. One of the witnesses is no longer employed by Enmax but no objection or argument was made on that account.

Shielding Directions

[21] As I said at the outset, the process devised for this application was designed to keep confidential information which would otherwise have been kept confidential but for the MSA's invocation of s. 56 of the *Act*. In doing so, I thought that I was giving appropriate effect to the reasonable expectations of the parties that generally information gleaned during the investigative stage would be kept confidential. I did not direct that the media be served in accordance with Civil Practice Note 12. Moreover, because the parties agreed that certain confidential information might be referred to during the argument and the MSA was in agreement, I directed that the application be held *in camera*.

[22] I have come to the view that the public interest is not served by an order which would shield any future proceedings in this matter from public scrutiny.

[23] During the course of the *in camera* arguments, it was very forcefully argued on behalf of Enmax that, in order to compel responses, the MSA had to have some very cogent evidence before the Court to demonstrate that the questions are reasonable and necessary. Moreover, it was Mr. McGrath's view that Mr. Spragins' affidavit did not satisfy that test and had cogent evidence been put forward, he would have cross examined Mr. Spragins on it. Mr. Camp, on behalf of GHI, who is no longer employed by Enmax, argued much to the same effect and insisted that I ought to compel the MSA to justify each and every question by demonstrating that it will advance the investigation.

[24] Of course, the reason that Mr. Spragins' affidavit is not more explicit, is because I directed him to submit primarily generic information. Specifically, I said in my earlier reasons at paragraphs 41 and 42:

I believe that Rule 395 would permit the MSA to appear before a Judge of this Court with an unfiled affidavit upon notice to the market participant(s) affected. The affidavit might list the questions for which answers are sought and a generic explanation of the investigation and why the questions are relevant. In this case, for example, there are a number of public reports which are exhibits to Mr. Spragin's affidavit and which explain the nature of the investigation. There is no need to attach copies of documents that have been obtained in the investigation and which are confidential; nor is there any need in my view to attach the transcripts of interviews obtained under section 55 which are also confidential. If more material is needed for a decision, the Judge may make directions as

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to what material is necessary for a shielding order. Such a hearing would be held in a court room and would only be held *in camera* if the Judge so directed. The affidavit would be filed subject to any sealing order the presiding Judge may make.

In deciding what information to include in the affidavit filed on behalf of the MSA, I would expect the same degree of fairness and responsibility that the MSA has demonstrated in publishing the reports thus far with respect to this investigation. This ought to minimize any controversy with market participants. Moreover, I would not expect to see material attached as part of an affidavit which could be considered a record obtained during an investigation including transcripts of interviews. Such a record would only be disclosed if the MSA decided it was necessary and then only after reasonable notice to the market participant(s) affected in order to provide it with an opportunity to object. If this process is followed I would not anticipate many instances where shielding orders are sought.

[25] Had I not been satisfied that the questions thus far objected to met the threshold required, I would have permitted the MSA to file a more specific affidavit setting out particulars and, of course, counsel for the respondents would have had the opportunity to cross-examine on the material.

[26] That is neither here nor there. What is important, however, is the process. In effect, the respondents argue that the threshold test, as I have stated it, is wrong at law and unfair. The further implication in their arguments is that the MSA's investigation is misdirected, inefficient, and wasteful. These issues are of public importance, and not only does the public have the right to know about these issues, public access to court proceedings serves a very useful function. As was said by the Supreme Court of Canada in *Re Vancouver Sun*, [2004] 2 S.C.R. 332 (Bastarache and Deschamps JJ dissenting but not on this point) at paragraphs 24 and 25:

The open court principle has long been recognized as a cornerstone of the common law: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 21. The right of public access to the courts is "one of the principle ... turning, not on convenience, but on necessity": *Scott v. Scott*, [1913] A.C. 417 (H.L.), *per* Viscount Haldane L.C., at p. 438. "Justice is not a cloistered virtue": *Ambard v. Attorney-General for Trinidad*, [1936] A.C. 322 (P.C.0, *per* Lord Atkin, at p. 335. "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity": J. H. Burton, ed., *Benthamiana: Or, Select Extracts from the Works of Jeremy Bentham* (1843), p. 115.

Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. V. New Brunswick (attorney General)*, *supra*, at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy

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of the judicial process and why the parties and the public at large abide by the decision of courts.

[27] The utility of allowing public access to this proceeding far outweighs any possibility of disclosing what might otherwise be confidential but for these proceedings. Indeed, I heard nothing in the course of argument which would cause me any significant concern if it were made public. Furthermore, I think the public is entitled to scrutinize the debates between the MSA and Enmax as to whether or not the extent of this investigation is in the public interest and as to whether the respondents have had the benefit of due process.

[28] Accordingly, these reasons will be made public along with the filed documents. I will honour the expectation of the parties by not requiring the filing of those exhibits not annexed to Mr. Spragins' affidavits and for similar reasons I will not order that the transcripts of the *in camera* proceedings be made public. Similarly, the briefs need not be filed.

[29] While I am still of the view that the process outlined in my previous reasons is a workable one, in most cases, it is my view that when the parties disagree over important issues which relate to the right of those being investigated to due process, the public interest trumps any confidentiality considerations.

Conclusion

[30] As a result, the MSA's application is allowed. The MSA is allowed to re-interview the witnesses who will answer the questions previously objected to. Witnesses will not be required to interpret documents but they will, if requested, convey to counsel for the MSA their understanding of the documents and their understanding as to how it affected trades.

[31] If the parties can agree to provide the answers in writing, that is acceptable. But in either event, the MSA is permitted to ask further questions following upon the answers given to those objected to.

[32] Costs may be spoken to by correspondence.

Heard on the 6th day of September and the 25th day of October, 2007.

Dated at the City of Calgary, Alberta this 24th day of January, 2008.



Alan D. Macleod
J.C.Q.B.A.

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Appearances:

Robert W. Hunter
for the Applicant

Dalton W. McGrath
for the Respondents

Robin Camp
for G.H.I.