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 HUDBAY MINERALS INC.

AND

IN THE MATTER OF A DECISION OF THE TORONTO STOCK EXCHANGE

REASONS FOR DECISION REGARDING CONFIDENTIALITY

(Subsection 9(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended)

Hearing:	February 17, 2009	
Decision:	May 21, 2009	
Panel:	James E. A. Turner	- Vice-Chair and Chair of the Panel
	Suresh Thakrar	- Commissioner
	Paulette L. Kennedy	- Commissioner
Counsel:	Andrea Burke James Bunting	- For Jaguar Financial Corporation
	Lorne Silver Arthur Hamilton Jacqueline Wall	- For HudBay Minerals Inc.
	Laura Fric Craig Lockwood	- For Lundin Mining Corporation
	Justin Necpal	- For the Toronto Stock Exchange
	Jane Waechter Naizam Kanji Michael Tang	- For Staff of the Commission

REASONS FOR DECISION REGARDING CONFIDENTIALITY

I. Background

[1] This matter arises out of an application by Jaguar Financial Corporation ("**Jaguar**") related to a transaction (the "**Transaction**) under which HudBay Minerals Inc. ("**HudBay**") proposes to acquire all of the outstanding common shares of Lundin Mining Corporation ("**Lundin**").

[2] On January 6, 2009, Jaguar made an application, the Fresh as Amended Request for Hearing and Review (the "**Application**"), pursuant to sections 8(3) and 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") requesting the Ontario Securities Commission (the "**Commission**") to conduct a hearing and review of a decision of the Toronto Stock Exchange (the "**TSX**").

[3] On January 19 and 21, 2009, we held a hearing to consider the Application at which we heard evidence and received submissions from Jaguar, HudBay, Lundin, the TSX and Staff of the Commission ("**Staff**"). Lundin and the TSX were granted full intervenor status by Commission order dated January 12, 2009.

[4] At the commencement of the hearing on January 19, 2009, both HudBay and Lundin requested that we issue confidentiality orders for certain documents filed in evidence with us. The confidentiality orders requested were consistent with an order issued by Mr. Justice Morawetz of the Ontario Superior Court (Commercial List) on January 15, 2009, which was issued in connection with an oppression application brought by other shareholders of HudBay relating to the Transaction.

[5] At the commencement of the hearing, Jaguar submitted into evidence three binders of documents which were marked as Exhibits 1, 2 and 3 (the "**Documents**"), without objection from HudBay and Lundin, on the basis that Jaguar would be referring to the Documents during the cross-examination of two witnesses, Peter Gillin, a director and Chairman of the Special Committee of the Board of Directors of HudBay, and Philip Wright, the President and Chief Executive Officer of Lundin. Exhibits 1, 2 and 3 contain a large number of documents comprising 51 tabs in the HudBay Documents and 19 tabs in the Lundin Documents.

[6] HudBay and Lundin made the request for the confidentiality orders to protect what they submitted was commercially sensitive information contained in the Documents. The HudBay Documents were delivered to Jaguar by HudBay pursuant to an order made by the Commission on January 12, 2009. That order deferred to this Panel the question of the confidential treatment of those Documents. The Lundin Documents were delivered to Jaguar pursuant to Jaguar's document request dated January 15, 2009. We did not determine the relevance of the Documents at the commencement of the hearing.

[7] We agreed at the commencement of the hearing that the hearing would proceed *in camera* only during the cross-examinations of Peter Gillin and Philip Wright. The balance of the hearing was conducted in public. The Documents were introduced during the *in camera* portion of the hearing and were treated as confidential until we had the opportunity to properly consider the merits of the requests for confidentiality. This process allowed us to proceed with the hearing without interruptions to consider the relevance and confidentiality of each Document as it was referred to during the course of the hearing.

[8] At the outset of the hearing, we expressed concern that the confidentiality requests and proposed confidentiality orders tendered by HudBay and Lundin were too broad. Our initial review of the Documents led us to doubt that all of the Documents were commercially sensitive or of a nature that should be the subject of a confidentiality order. We did recognize that all Documents in respect of which a claim of solicitor-client privilege was made should be treated as confidential.

[9] At the completion of the hearing on January 21, 2009, we indicated that we would like to receive further submissions with respect to the confidentiality of the Documents and we invited the parties to re-attend on February 3, 2009 to make oral submissions. The February 3, 2009 date was subsequently adjourned and we heard full arguments on the issue of confidentiality on February 17, 2009.

II. The Relevance of the Documents

[10] Prior to the hearing on February 17, 2009, members of the Panel reviewed the Documents. We concluded that we would grant a confidentiality order with respect to a large portion of the Documents because those Documents were not otherwise public and because they were not, in our view, relevant to our decision on the merits in this matter. We did not view it as necessary to require public disclosure of an extensive array of otherwise non-public documents that were not relevant to our decision on the merits.

[11] Our decision in this respect turned primarily on relevance and was driven in part by our desire to encourage the parties to an expedited hearing such as this to make broad documentary disclosure to permit the hearing to proceed in a very abbreviated timeframe.

[12] Accordingly, by letter dated February 13, 2009, we informed the parties that we were prepared to grant an order for confidentiality in respect of a large portion of the Documents and we asked the parties to address the need for confidentiality for the balance of the Documents.

[13] We also provided the parties with a draft of a redacted transcript relating to the *in camera* portion of the hearing on January 19, 2009 and asked the parties for submissions if they had views with respect to the redactions from the transcript. There were additional submissions made with respect to that matter.

[14] At the hearing on February 17, 2009, we heard submissions dealing with the confidentiality orders requested with respect to the Documents located at Tabs 4, 7, 16, 20 and 21 of Exhibit 1. These Documents can be grouped into three categories: handwritten notes of the corporate secretary of HudBay (Tabs 4, 7 and 20), minutes of the November 18, 2008 meeting of the Special Committee, to which a financial presentation of GMP Securities L.P. ("**GMP**") is attached (Tab 16), and the GMP engagement letter (Tab 21). We will refer to those Documents as the "**disputed Documents**".

[15] At the hearing on February 17, 2009, the parties also agreed expressly, or by raising no objection, that confidentiality was not necessary for the Documents at Tabs 1, 29, 30, 31, 40, 41, 46, 49, 50 and 51 of Exhibits 1 and 2. Therefore, these Documents form part of the public record in this proceeding. For privacy reasons, certain investor e-mails found in Tab 51 of Exhibit 2 shall remain confidential.

III. The Positions of the Parties

[16] Jaguar objected to the granting of the confidentiality orders being requested. Prior to the hearing on February 17, 2009, HudBay, Lundin, Jaguar and Staff provided written submissions with respect to confidentiality. The TSX made no submissions on this motion either in writing or at the hearing on February 17, 2009.

[17] At the hearing on February 17, 2009, Lundin stated that it had "determined to take no position with regard to whether the [disputed Documents] ought to be made public or sealed in their entirety or in part". Lundin took no position with respect to the redactions of the transcript.

[18] HudBay submitted that the disputed Documents should remain confidential. In the alternative, HudBay submitted that the Documents should be redacted to preserve the confidentiality of commercially sensitive information. According to HudBay, the disputed Documents meet the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 ("*Sierra Club*"). HudBay submitted, among other things, that the disputed Documents should remain confidential because they contain commercially sensitive information (which should not be available to their competitors or the general public) and because some of the Documents are also subject to confidentiality agreements with third parties. HudBay also submitted that there is an implied undertaking that the disputed Documents would not be used for purposes other than this proceeding and thus should not be made public.

[19] Jaguar submitted that HudBay failed to meet the test set out in *Sierra Club* and thus failed to justify the confidentiality of the disputed Documents. According to Jaguar, HudBay did not meet the heavy onus to establish with respect to each Document that the "open court principle" should not apply and that a sealing or confidentiality order is appropriate. Jaguar also stressed that the Commission should take a restricted or limited approach to redacting any Documents.

[20] Staff submitted that the Commission has previously recognized the importance of having Commission proceedings open to the public and having timely disclosure of the record of a proceeding available to the public. Staff expressed the concern, however, that if a confidentiality order is not made, it could "chill" the "real-time" nature of the adjudication process before the Commission in a matter such as this.

[21] Staff took the position that confidentiality should be preserved for some of the disputed Documents. Staff supported HudBay's argument that handwritten notes are more susceptible to misinterpretation than other types of documents and should be kept confidential on that ground. Staff also supported HudBay's position that the GMP financial presentation made to the Special Committee on November 18, 2008 (attached to the minutes of that meeting) ought to be kept confidential because of the non-public financial information contained in that presentation.

IV. The Applicable Law

[22] The principle of openness is a fundamental legal principle that promotes public confidence in the integrity of the judicial process (see for example: *Re Vancouver Sun*, [2004] 2 S.C.R. 332 and *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188). This principle applies to administrative tribunals. The Commission has considered the importance of the openness of its proceedings and has stated:

> "Openness" is important for the Securities Commission which is charged with the responsibility of helping to ensure the integrity of the capital markets in Ontario. Disclosure is particularly important for a body which itself uses disclosure as one of its principle techniques for ensuring compliance with the law by others. Investors, those being regulated, and the general public, all have a strong interest in knowing what the Commission is doing and why it is doing it.
>
> (*Gaudet v. Ontario (Securities Commission)* (1990), 13 O.S.C.B. 1405 at 1408)

[23] There is no doubt that the Commission attaches great weight to the need for openness in its administrative proceedings. As stated in *MacIntyre v. Nova Scotia (Attorney Genereal)*, [1982] 1 S.C.R. 175 at page 189:

> Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the juridical documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

[24] As discussed more fully below, the courts have recognized that there are circumstances in which a confidentiality order may be appropriately issued. While there is a strong presumption that all matters ought to take place in an open and public manner, a confidentiality order may be granted if the moving party can meet the heavy burden of justifying it.

1. The *Statutory Powers Procedure Act*

[25] Subsection 9(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**"), reflects the principle that hearings of administrative tribunals (such as those conducted before the Commission) should be open to the public, subject to limited exceptions. That section states:

> **Hearings to be public; maintenance of order**
> **Hearings to be public, exceptions**
>
> 9(1) An oral hearing shall be open to the public except where the tribunal is of the opinion that,
>
> (a) matters involving public security may be disclosed; or
>
> (b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,
>
> in which case the tribunal may hold the hearing in the absence of the public.

Written Hearings

(1.1) In a written hearing, members of the public are entitled to reasonable access to the documents submitted, unless the tribunal is of the opinion that clause (1)(a) or (b) applies.

[26] Accordingly, subsection 9(1) of the SPPA authorizes a tribunal to decide that a hearing or a portion of it should not be accessible to the public. In addition, subsection 9(1.1) contemplates that, in a written hearing, a confidentiality order may be made under subsection 9(1) with respect to documents submitted in such a hearing.

[27] It would undermine the effect of a decision under subsection 9(1) of the SPPA to hold a hearing *in camera* if the public could have access to documents filed in that hearing. Accordingly, in our view, a tribunal has the authority to order that documents tendered in such a hearing remain confidential.

2. The Standard Established in *Sierra Club*

[28] In applying subsection 9(1) of the SPPA, it is helpful to consider the common law relating to the confidentiality of documents filed in court or administrative tribunal proceedings. The leading authority is the decision of the Supreme Court of Canada in *Sierra Club*. In that case, the Court set out the test to be applied in determining whether a publication ban and confidentiality order should be granted. The test established reflects the strong presumption against any order that restricts public access to court proceedings or records. Under *Sierra Club*, a confidentiality order should be granted only when:

> 1. such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and
>
> 2. the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.
>
> (*Sierra Club*, *supra* at para. 53)

[29] The first prong of the *Sierra Club* test requires that three elements be met (1) the risk in question must be real and substantial, well grounded in evidence, and be one that poses a serious threat to the commercial interest in question, (2) the risk must pertain to a general principle at stake, rather than be party-specific, and (3) there must be no reasonable alternatives to a confidentiality order (*Sierra Club*, *supra* at paras. 54 to 57). An alternative must be reasonable; it is insufficient to show that there simply exists a less restrictive alternative (*Sierra Club*, *supra* at para. 66). Generally, if disclosure of confidential information poses a serious risk to an important commercial interest, and there is no reasonable alternative to granting a confidentiality order, then such an order satisfies the first prong of the test (*Sierra Club*, *supra* at para. 68).

[30] The second prong of the *Sierra Club* test requires a balancing of competing interests. The more detrimental an order may be to the core values underlying freedom of expression, the more difficult it will be to satisfy the second prong of the test and to justify the granting of a confidentiality order (*Sierra Club, supra* at para. 75).

[31] *Sierra Club* emphasizes that a respondent requesting a confidentiality order has a heavy onus to justify the making of such an order.

3. The Standard Established Pursuant to Subsection 9(1) of the SPPA

[32] The legal question under subsection 9(1) of the SPPA is whether the tribunal is of the opinion that matters that may be disclosed at a hearing are of such a nature that the desirability of avoiding disclosure in the interests of a party affected, or in the public interest, outweighs the desirability of having an open hearing. That subsection, like *Sierra Club*, requires a balancing of relevant factors and interests. We note that the provisions of subsection 9(1) of the SPPA are somewhat different from the test articulated in *Sierra Club*. However, the principles articulated in *Sierra Club* assist us in interpreting and applying subsection 9(1) of the SPPA.

V. Analysis

1. Importance of Public Hearings

[33] As an administrative tribunal, we have a very strong interest in ensuring that our hearings are open to the public. It is essential that all stakeholders, and the public in general, have an understanding of, and confidence in, the processes followed by the Commission in its hearings and in the outcomes of those hearings.

[34] Nevertheless, the principle of open hearings of the Commission must be balanced with competing interests, such as protecting the confidentiality of sensitive commercial information and encouraging parties to make extensive documentary disclosure quickly where the timeframe for a hearing is expedited. We wish to encourage parties in hearings such as this to make disclosure at a time when all of the issues in contention may not have been fully defined and when all of the documents of the parties may not have been fully vetted from the perspective of relevance and confidentiality.

[35] We note that, although we admitted the Documents into evidence, relatively few of them were referred to during the cross-examinations of the two witnesses, in the affidavits submitted to us or in oral submissions.

[36] We also note that in our decision on the merits we did not find it necessary to disclose what we considered to be confidential information contained in the Documents.

2. Relevance of Documents

[37] In our view, if a Document is not relevant to this proceeding, there is no need to cause it to be publicly disclosed. The Court noted in *Knight v. KPMG LLP* (1999), 20 C.B.R. (4th) 258 (Ont. Gen Div.) at paras. 4 and 5:

> If the material is not relevant, then it has no juridical purpose. It should not, *ab initio,* have been included in the application record.
>
> The court [and any tribunal] process cannot be allowed to make public a non-public document which has no relevance to the issue in question.

We granted a confidentiality order with respect to most of the Documents on the basis that, in our view, they were not relevant to the hearing on the merits. We have applied subsection 9(1) of the SPPA in making our decisions below with respect to the disputed Documents.

[38] We would note that parties to a proceeding before us should not expect to keep minutes of meetings of directors, or handwritten notes relating to such meetings, confidential if they are relevant to the proceeding or the decision of the Commission. Similarly, parties should not expect confidential treatment merely because they may have entered into a confidentiality agreement with a third party that applies to otherwise relevant documents. The Commission will address such matters on a case by case basis applying applicable law.

3. Minutes of the Special Committee

[39] We have concluded that the minutes of the meeting of the Special Committee held on November 18, 2008 should be made public (but not the GMP financial presentation attached to such minutes).

[40] The minutes of that meeting deal with discussions about and consideration of the Transaction. They are relevant to the issues that were before us and, in our view, after considering and balancing the relevant interests, HudBay has not met the standard established by the SPPA for granting a confidentiality order in respect of them.

[41] The GMP financial presentation attached to the minutes contains non-public information that is not relevant to our decision on the merits. Accordingly, we have concluded that the GMP financial presentation can remain confidential.

4. Handwritten Notes

[42] We have concluded that the handwritten notes of the Corporate Secretary of HudBay relating to the meetings of the Special Committee held on November 4, 12 and 20, 2008 can be kept confidential. While notes of this nature may be susceptible to misinterpretation, our decision is not being made on that ground. Those notes are not relevant to our decision on the merits. We recognize that handwritten notes may be very relevant in another proceeding for purposes of determining matters such as what was discussed at a meeting and what was considered in making a decision.

5. The GMP Engagement Letter

[43] The GMP engagement letter is relevant to this proceeding. In our view, after considering and balancing the relevant interests, HudBay has not met the standard established by the SPPA for granting a confidentiality order in respect of it. We have agreed to the redaction of certain financial and other information in that letter to protect the confidentiality of possibly sensitive commercial information of a person which is not a party to this proceeding (i.e., GMP).

6. The *In Camera* Transcript

[44] We agreed at the hearing on the merits that certain portions of that hearing would be held *in camera*. Subsequently, we reviewed the transcript and have concluded that a redacted version of the transcript should be made publicly available. The redactions relate to information that was not relevant to our decision on the merits. We reject the submission that portions of the transcript should be automatically redacted simply because the questions relate to Documents that we have ordered may remain confidential, but do not, in fact, disclose any confidential information.

VI. Conclusions

[45] We will grant a confidentiality order in this matter in respect of Documents that we have concluded are not relevant to our decision on the merits or that we concluded for other reasons can remain confidential. We believe that we have appropriately balanced the public interest in ensuring that Commission hearings are open to the public with the desirability of expediting our hearings and with balancing the private interests of parties to a proceeding before us to preserve confidentiality with respect to non-public information that may be commercially sensitive. In doing so, we have also taken into consideration the need to review and rely on relevant information in making our decision on the merits. We reiterate that a party to a proceeding before us must meet the high standard established by subsection 9(1) of the SPPA in order to obtain a confidentiality order in respect of otherwise relevant information and documents.

[46] The procedure we adopted for conducting the hearing in this matter as it relates to confidentiality did not, in our view, unduly interfere with the conduct of the hearing or the access of the public to that hearing. These are relevant factors that a hearing panel should consider in deciding whether a matter should proceed *in camera* or whether a confidentiality order should be issued. Our decision in this matter should not be interpreted as limiting the broad discretion of a hearing panel to address such matters in the particular circumstances of another proceeding.

[47] HudBay and Lundin are reporting issuers and, as such, have continuous and timely disclosure obligations under the Act. Our assessment of whether a particular Document can be treated as confidential for purposes of this proceeding is not a determination of whether a particular Document, or information contained in a Document, is material or whether HudBay or Lundin have complied with, and are complying with, their respective disclosure obligations under applicable law.

[48] We will issue an order giving effect to our decisions reflected in these reasons with respect to the confidentiality of the Documents.

Dated at Toronto this 21st day of May, 2009.

"James E. A. Turner"

James E. A. Turner

"Suresh Thakrar"

Suresh Thakrar

"Paulette L. Kennedy"

Paulette L. Kennedy