

2005 BCSECCOM 7

**Timothy Fernback, Brent Wolverton, Wolverton Securities Ltd.
and William Massey**

Securities Act, RSBC 1996, c. 418

Hearing

Panel	Brent W. Aitken Joan L. Brockman John K. Graf	Vice Chair Commissioner Commissioner
Date of Hearing	November 24, December 7 and 8, 2004	
Date of Ruling	December 9, 2004	
Reasons Issued	January 4, 2005	

Appearing

Mark D. Andrews	For Timothy Fernback
Robert S. Anderson	For Brent Wolverton and Wolverton Securities Ltd.
James Sasha Angus Joyce M. Johner	For the Executive Director

Reasons for Ruling

- ¶ 1 This was an application by the respondents for an order directing the Executive Director to make further pre-hearing disclosure in order to comply with our previous disclosure rulings on June 24 and October 29 (see 2004 BCSECCOM 378 and 2004 BCSECCOM 622). We ruled without reasons on December 9, ordering the Executive Director to make additional disclosures (see 2004 BCSECCOM 709). These are our reasons.
- ¶ 2 The documents in issue were:
- A document entitled “Log for Investigative Notes & Correspondence” (Document 1).
 - A binder labeled “CDNX Documents Not Disclosed” (Document 2).
 - A binder labeled “Commission Documents Not Disclosed” (Document 3).

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- An affidavit of Michael Pesunti sworn November 24 (Document 4).

¶ 3 In *Mason v. British Columbia (Securities Commission)*, 2003 BCCA 359, the British Columbia Court of Appeal considered how a Commission panel should proceed when faced with an application for further disclosure. The Court said that in these cases the Commission must decide, independently of staff, whether the disclosure made has met the applicable standard of relevance.

¶ 4 We therefore reviewed all of the documents before us to determine whether they contained information that ought to have been disclosed to the respondents under the standard of relevance we set out in our previous two rulings.

¶ 5 In many instances, the documents summarized material gathered in the investigation that would clearly be relevant. In those instances, we ordered that the information be disclosed. However, we did not have before us the complete disclosure made to the respondents so it is possible (we think probable) that much of the information had already been disclosed, in which event it would not be necessary to disclose it again. We therefore phrased our order so that it required further disclosure only if the information had not been previously disclosed.

Document 1

¶ 6 This document contains the investigator's notes. Commission staff delivered this document to the respondents in redacted form. The respondents were seeking disclosure of the entire document.

¶ 7 We reviewed the entire document. We ordered disclosure of all portions of the document that contained or described relevant evidence.

Document 2

¶ 8 This binder purports to contain all documents originated by the Canadian Venture Exchange (CDNX) that Commission staff did not disclose to the respondents. The binder was not disclosed to the respondents, although they were given its table of contents. Staff claimed privilege over some of these documents. The respondents sought disclosure of all of these documents and challenged staff's claim of privilege.

¶ 9 We reviewed all of the documents in the binder. We ordered disclosure of all documents, or portions of documents, that contained or described relevant evidence. Some of this information appeared in documents over which Commission staff claimed privilege. However, if privilege ever attached to these documents, the privilege was between CDNX staff and CDNX counsel. In our

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opinion, when CDNX provided these documents to Commission investigation staff, that privilege, if it existed, was waived.

- ¶ 10 We found no other relevant information over which privilege was claimed, so we did not need to consider issues of privilege any further in our review of these documents.

Document 3

- ¶ 11 This binder purports to contain all documents originated by Commission staff not disclosed to the respondents. The binder was not disclosed to the respondents, although they were given its table of contents. Staff claimed privilege over all of these documents. The respondents sought disclosure of all of these documents and challenged staff's claim of privilege.
- ¶ 12 We reviewed all of the documents in the binder. We ordered disclosure of all documents, or portions of documents, that contained or described relevant evidence. These were at Tabs 15, 17, 18 and 27. In our opinion, privilege did not attach to any of the information we required staff to disclose. There is nothing on the face of these documents, nor is there any other evidence before us, to suggest that they were created either for the purpose of seeking legal advice or in contemplation of litigation. The document at Tab 15 is a graph of the closing price and trading volume of Cinema Internet Networks Inc. The document at Tab 17 is a table containing trading data related to the shares of Cinema. The document at Tab 18 is a copy of a Cinema news release. The document at Tab 27 was a memo to file by a Commission staff investigator.
- ¶ 13 We found no other relevant information over which privilege was claimed, so we did not need to consider issues of privilege any further in our review of these documents.

Document 4

- ¶ 14 The Wolverton trader, Nicole Stevens, in an affidavit sworn March 30, 2004, says she had a conversation with CDNX Control on February 11, 2000 that is not reflected in the transcripts so far disclosed of the tapes from that day's conversations. In an affidavit dated December 7, she deposed as follows:
4. During my interview with Mr. Pesunti on October 3, 2000 I said I did not believe I had a conversation with CDNX Control prior to commencing trading of shares of Cinema Internet. However, upon reflection, and having reviewed the transcripts which are "Exhibit A" and the various trading records, it is my belief that I placed a call to CDNX Control and had a conversation with Mr. Jones prior to my commencing to trade in Cinema Internet shares on February

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11, 2000. What I have a clear recollection of is having a conversation prior to the one at 11:23 a.m. in which I indicated that Wolverton Securities Ltd. was going to be trading in shares of Cinema Internet and that the trading had been approved by the CDNX Corporate Finance department.

¶ 15 In our October 9 ruling, we ordered as follows:

25 . . . The only conversations on these tapes that are relevant . . . are those in which Stevens participated. The tapes must be disclosed but they may first be edited to erase all conversations not involving Stevens. All conversations with Stevens must be left intact. Stevens alleges that she had additional conversations with CDNX Control that day that have not been disclosed and that involved trades in shares of Cinema Internet Networks Inc. Disclosure of all her conversations that day will resolve this issue.

¶ 16 Document 4 is an affidavit sworn November 24 of Michael Pesunti, Commission staff investigator, describing the steps he took to find the conversation Stevens mentions. He deposes as follows:

12. I took the following steps to confirm that there are only 4 relevant telephone calls relating to Cinema on the [tape] . . .

. . .

e. On August 23, 2004 at approximately 9:00 a.m., . . . I personally listened to the [tapes] for the trading day of February 11, 2000.

. . .

16. I have also read the affidavit of Stevens sworn March 20, 2004 that states that Stevens believes that she had an earlier conversation than the [conversation at 11:23 a.m.]. I was unable to identify an earlier conversation involving Stevens.

17. I make this affidavit in support of the Executive Director's submissions to the Commission and the Panel's review of the disclosure in this proceeding.

¶ 17 The respondents quibble with Pesunti's statement that he took steps "to confirm that there are only 4 relevant telephone calls", saying that shows that his focus was to prove there were only 4 calls, instead of assiduously looking for other calls. We disagree. Since the issue was whether there were calls in addition to the 4 already found, all these words convey to us is that he sought to confirm the accuracy of this information.

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- ¶ 18 The respondents also found paragraph 12 e. ambiguous because it does not specifically say that Pesunti listened to the tapes for all of the day on February 11. We disagree. The common-sense interpretation of the plain statement that Pesunti listened to the tapes “for the trading day of February 11”, without the presence of any qualifying language, is that he listened to the tapes for the whole day.
- ¶ 19 In our October 9 ruling, we ordered that all calls for that day involving Stevens be disclosed, whether or not those calls related to Cinema Internet. In our opinion, this affidavit, sworn after that order, shows compliance with it. According to the affidavit, Pesunti reviewed the tapes and was unable to identify “an earlier conversation involving Stevens”. The portions that are relevant have been disclosed.
- ¶ 20 We therefore made no further orders regarding the tapes.
- ¶ 21 January 4, 2005.
- ¶ 22 **For the Commission**

Brent W. Aitken
Vice Chair

Joan L. Brockman
Commissioner

John K. Graf
Commissioner