2007 BCSECCOM 130

Fairtide Capital Corporation, Bayshore Management Corporation, Gibraltor Consulting Corporation, Richard Norman Jeffs, Robert Leigh Jeffs, and Francis Jason Dean Biller

***Securities Act*, RSBC 1996, c. 418**

Application by Richard Norman Jeffs

Panel	Brent W. Aitken	Vice Chair
	Neil Alexander	Commissioner
	Robert J. Milbourne	Commissioner
Dates of Hearing	February 19 and 20, 2007	
Submissions completed	March 12, 2007	
Date of Ruling	March 19, 2007	

Appearing

David G. Frederickson	For Richard Norman Jeffs
J. Kenneth McEwan Shawn R. McColm	For the Executive Director

Ruling

¶ 1 This is an application by Richard Norman Jeffs, a respondent in a notice of hearing issued June 28, 2006 by the executive director. The notice also names Fairtide Capital Corporation, Bayshore Management Corporation, Gibraltor Consulting Corporation, Robert Leigh Jeffs, and Francis Jason Dean Biller.

¶ 2 The notice of hearing alleges that the respondents operated what is known in ordinary parlance as a "boiler room" between May and November 2002, and in so doing contravened the *Securities Act*, RSBC 1996, c. 418 by:

- trading securities without being registered,
- engaging in cold calling,
- making prohibited undertakings as to future prices of securities, and
- engaging in unfair practices.

¶ 3 The notice of hearing also alleges that Biller contravened orders against him under the Act, and that the other respondents enabled him to contravene those orders.

¶ 4 Jeffs says that in the course of the investigation that led to the notice of hearing, commission staff mishandled documents that were subject to solicitor-client privilege of Jeffs and other respondents. In this application Jeffs asks us to remedy those circumstances by making orders that, among other things, would disqualify commission staff lawyers and investigators from acting further in connection with the notice of hearing.

¶ 5 The hearing into the allegations in the notice of hearing is currently scheduled to begin in May. None of us on this panel will be sitting on that panel.

I Background

A The search

¶ 6 On November 7, 2002 commission staff investigators searched office premises at a Melville Street address in downtown Vancouver under a search warrant.

¶ 7 In addition to the businesses that attracted the investigators' attention, the premises housed a law firm. The investigators did not search the law firm premises. Among the computers ultimately seized in the search of the business premises were two servers the law firm shared with the businesses. A representative of the law firm alerted the investigators conducting the search that the servers contained documents subject to solicitor client-privilege. Commission staff immediately took steps, including consultations with the Law Society, to ensure the protection of the privilege of those documents to the lawyer's satisfaction.

¶ 8 Those documents, and some other documents identified during the search as potentially privileged and sealed in envelopes, are not relevant to this application.

¶ 9 On December 3, 2002 commission investigators returned to the parties concerned eight personal computers, one server and an external hard drive seized in the search. Two weeks later, they returned a palm pilot, and on January 10, 2003 they returned the remaining items – one personal computer and two servers. All of the computers and servers were returned with hard drives containing copies of the documents that were seized.

B Events following the search

¶ 10 On November 13, 2002 the executive director issued a notice of hearing and temporary orders against Jeffs and several other respondents. In December 2002

the temporary order was revoked as against Jeffs. In April 2003, the executive director withdrew the November 2002 notice of hearing and revoked the remaining temporary orders because staff could not be ready for the hearing within the time ordered by the commission.

¶ 11 In April 2003 the commission issued a new investigation order, and amended it in October.

C New privilege issues

¶ 12 This section describes the circumstances surrounding the privileged documents relevant to this application.

¶ 13 On February 12, 2003, Jeffs' counsel, David Frederickson, notified commission staff by letter that there might be additional documents subject to claims of solicitor-client privilege by Jeffs and others. The letter was concerned primarily with e-mails referred to by Joseph Bernardo, who at the time was senior enforcement counsel at the commission, in submissions he made in an application before a commission panel in connection with the November 2002 notice of hearing. Frederickson was concerned that some or all of the e-mails might be subject to solicitor-client privilege.

¶ 14 In his letter, Frederickson did not ask that commission staff discontinue their review of the electronic documents seized. He said that when they encountered a document "which appeared to arguably raise a claim of confidentiality and/or privilege", they should segregate that document and forward it to Frederickson. He could then determine whether to make a claim of privilege over that document.

¶ 15 Bernardo responded two days later, on February 14. In that letter, Bernardo referred to the privilege issues that were raised and dealt with at the time of the search, and then said, "In the meantime, the investigators have freely examined the emails. In other words, it is now impossible to provide you with any assurances about what has been reviewed or not."

¶ 16 Bernardo went on to propose a procedure for dealing with solicitor-client privilege issues relating to the seized documents:

- I will provide a copy of your February 12, 2003 letter to the lead investigator in the matter as a reminder of the importance of this issue.

- I will ask the investigators to be vigilant about the possibility of encountering e-mails addressed to or from [named counsel].

> - I will ask the investigators not to further examine or use any e-mails they find that appear to relate to the giving of legal advice, pending the resolution of any privilege issues.
>
> - Should any privilege issues arise, I will take them up with you, provided that it turns out you are indeed the counsel who should be dealing with them.
>
> I recognize that this approach would be less than satisfactory, if undertaken at the commencement of a search. But the fact of the matter is that the records in question have already been released by [named counsel], seized and extensively examined.

¶ 17 Three months later, on May 15, Frederickson wrote to Bernardo. In that letter, he said "For the moment, I think it is best to agree to disagree with respect to the appropriate procedure to be followed in connection with the privileged documents . . . ."

¶ 18 Meanwhile, commission staff assigned a staff investigator, Pamela Russell, to review all of the electronic documents seized, with a view to identifying and segregating those potentially subject to solicitor-client privilege. Russell was not a lawyer, and had just been hired by the commission. Before beginning her work she was briefed on solicitor-client privilege by Bernardo and another lawyer, the lead investigator on the file. Bernardo says "it was always obvious" to him that, after Russell had completed her review, "a legally trained member of the Commission staff should look at the documents she had segregated."

¶ 19 Russell began her review around the end of February 2003 and completed it in late July. She printed out all documents she considered could potentially raise solicitor-client privilege issues and gave them to Bernardo for review. Her review turned up something under 400 or so documents, about half of which the Supreme Court of British Columbia decided in June 2004 were privileged.

¶ 20 In September, Bernardo reviewed the documents. He organized them according to their general nature in five folders. He says:

> I looked at the documents solely for the purpose of assessing Ms. Russell's document review. I did not review the documents for any investigative purpose. I have not discussed the content of any of the documents with any of the investigators involved in this file, except for Ms. Russell and then only in a general way. I have no recollection of the specific content of any document.

¶ 21 On September 11, 2003 Bernardo then sent the documents to Frederickson. In his covering letter, he explained why he chose to review the documents before sending them. The relevant excerpts from his letter appear in our analysis of this aspect of the circumstances.

¶ 22 Frederickson responded in late September. He objected to the procedure followed by commission staff, saying that Bernardo ought not to have reviewed the documents. Instead, he said, once Russell had segregated the documents, she should have sealed them and sent them directly to Frederickson.

¶ 23 Correspondence ensued about the best way to determine which of the documents identified by commission staff as potentially privileged were actually privileged. Ultimately, commission staff commenced proceedings in the Supreme Court of British Columbia to resolve the issues surrounding privilege. In June 2004 the court ruled which documents were privileged.

¶ 24 Those documents are the ones at issue in this application.

¶ 25 After the court ruled, Jeffs' privileged documents were returned to him, and the documents whose privilege belonged to others were returned to them. All of the privileged documents were deleted from the commission's electronic files.

¶ 26 Meanwhile, between May 2003 and January 2004, Russell participated in 14 witness interviews with four other commission investigators on the case.

¶ 27 Russell says she did not discuss with any of the other investigators the documents she segregated as potentially privileged. She describes her role in the interviews as follows:

> I have attended several interviews during this investigation. Other than one partial interview, my role during those interviews has been to take notes with respect to matters on which I think follow up is required, arising from questions and answers given. I would tell the person conducting the interview my suggestions during a break near the end of the interviews. The person conducting the interview then either asked the question or let me ask the questions.
>
> None of the questions I have suggested or asked has been related to the documents that are potentially privileged.

D Description of the privileged documents

¶ 28 Jeffs swore an affidavit on November 20, 2003 in related court proceedings. Exhibits J, K and L to that affidavit were three sealed envelopes containing

documents. Those envelopes contained the documents over which claims of privilege were made, some of which were ultimately held by the court to be privileged. In this ruling, we refer to these exhibits as a means of identifying the documents.

E Events following the hearing of the application

¶ 29 As explained in the analysis below, the starting point to all the issues in the application is the relevance of the documents at issue.

¶ 30 In the hearing, Jeffs pointed out that in a case where the content of privileged documents is in issue, the person whose privilege it is can hardly be expected to produce the documents for the review of the court that is to hear the underlying matter, for to do so would violate the very privilege he seeks to protect.

¶ 31 However, in this case, another hearing panel that includes none of us will preside at the hearing into the allegations in the notice of hearing. We therefore concluded that if appropriate safeguards were put in place to protect the confidentiality of the documents in issue, we could view them. This would, we believed, allow us to determine the issues before us with a solid understanding of the documents, and their relationship to the proceedings.

¶ 32 Therefore, in an interim ruling on February 23, 2007 (2007 BCSECCOM 98) we proposed that Jeffs submit the privileged documents in issue for our review on a confidential basis, and that both parties make submissions about the standard we should apply to determine the relevance of those documents.

¶ 33 After considering the parties' initial responses to that interim ruling, we made a second interim ruling on March 1 (2007 BCSECCOM 102), essentially confirming the first ruling, with a minor change.

¶ 34 On March 2, 2007 Frederickson submitted the documents, organized into two packages. The first package contained documents drawn from Exhibits J and K to Jeffs' November 2003 affidavit.

¶ 35 The second package consisted of documents drawn from Exhibit L to the affidavit, along with other documents that Frederickson says are also privileged. He did not identify which of these were not included in Exhibit L. For convenience, we refer to all of these documents as the Exhibit L documents.

¶ 36 In addition to his submissions on the standard of relevance that we ought to apply, he made submissions about how we should apply the standard to the documents in question. On March 7 the executive director responded to Jeffs' submissions. After reviewing the response, we provided Jeffs the opportunity to reply. We

received his reply on March 12. There were some follow-up submissions by both parties.

II The Application

¶ 37 Jeffs says that the documents, or at least many of them, are relevant and that the commission followed improper procedures in dealing with them.

¶ 38 In his application, Jeffs says that once the commission was put on notice by Frederickson in February 2003 that there could be more documents on the seized computers that were subject to solicitor-client privilege, the investigators ought to have ceased their review of the documents. (This is inconsistent with what Frederickson called for at the time; then he said that as investigators encountered potentially privileged documents the course of their review, they should review those documents no further and send them to him.)

¶ 39 Jeffs says it was improper for Bernardo to have reviewed the documents before sending them to him, and for Russell to have participated in the interviews.

¶ 40 Jeffs seeks an order to the effect that:

- All commission staff, including lawyers and investigators, be disqualified from further acting on behalf of the executive director in connection with the hearing; and

- The executive director not provide to new counsel the transcripts of the interviews conducted by staff from May 21, 2003 to February 27, 2004 (which include, but are not limited to, all of the interviews in which Russell participated).

¶ 41 Jeffs also asks that we direct all staff lawyers and investigators who have been involved in the investigation or the preparation for the hearing not to disclose the contents of any of Jeffs' privileged documents, their notes about any of those documents, or any information obtained during the interviews described in the previous paragraph.

¶ 42 Neither the executive director nor her counsel had the opportunity to review the documents submitted to us. However, based on Jeff's descriptions of the documents in his November 2003 affidavit, and in Jeffs' March 2, 2007 submissions to us, the executive director says that the documents are not relevant.

¶ 43 The executive director also says that even if the documents are relevant, commission staff proceeded appropriately in the circumstances, and even if they did not, the remedies sought by Jeffs are not justified.

III The Notice of Hearing

¶ 44 This is the relevant portion of the notice of hearing:

Notice of Hearing

Fairtide Capital Corporation, Bayshore Management Corporation, Gibraltor Consulting Corporation, Richard Norman Jeffs, Robert Leigh Jeffs, and Francis Jason Dean Biller

Section 161 of the *Securities Act*, RSBC 1996, c. 418

¶ 1 The Commission will hold a hearing at which the Executive Director will tender evidence, make submissions and apply for orders against Fairtide Capital Corporation (Fairtide), Bayshore Management Corporation (Bayshore), Gibraltor Consulting Corporation (Gibraltor), Richard Norman Jeffs (RNJ), Robert Leigh Jeffs (RLJ) and Francis Jason Dean Biller (Biller) (collectively the Respondents), under sections 161, 162 and 174 of the *Securities Act*, RSBC 1996, c. 418.

¶ 2 The Executive Director alleges that the following conduct and activity was contrary to the public interest:

Background

1. On February 16, 2000, the British Columbia Securities Commission prohibited Biller for ten years from trading in securities and engaging in investor relations (the Order).

2. Fairtide, Bayshore and Gibraltor were British Columbia corporations with offices at Suite 600 – 1100 Melville Street in Vancouver (the Premises).

3. During the period May 2002 to November 2002, Fairtide, Bayshore, and Gibraltor operated a room at the Premises (the Phone Room) that promoted securities to retail investors by telephone.

4. Callers in the Phone Room made thousands of cold calls to residences in British Columbia and elsewhere to encourage and pressure call recipients to purchase securities. Phone Room callers gave

undertakings about the future price of securities and placed unreasonable pressure on call recipients to purchase securities.

5. Fairtide marketed the services of the Phone Room to issuers and billed them for those services.

6. Bayshore employed the Phone Room callers.

7. Biller managed the Phone Room, hired callers, organized the Phone Room, and drafted scripts for the callers to use. He provided these services as an employee of Gibraltor. Bayshore paid Gibraltor for Biller's services.

8. RNJ was a de facto officer or director of Fairtide and Bayshore. He provided start up capital for Fairtide and Bayshore, provided working capital to Bayshore, and made management decisions for both Fairtide and Bayshore. He recruited Biller to manage the Phone Room.

9. RLJ was a director of Bayshore, director and president of Fairtide, and director, president and secretary of Gibraltor. He supervised the Premises. On behalf of Gibraltor, RLJ set Biller's salary and subsequent pay increase.

Misconduct

10. Fairtide, Bayshore, Gibraltor, RNJ, RLJ, and Biller, through their operation and management of the Phone Room, and RLJ and RNJ, through their direction and management of Fairtide and Bayshore, and RLJ through his direction and management of Gibraltor, each :

    (a) traded in securities, contrary to section 34(1)(a) of the Act;

    (b) engaged in cold calling, contrary to section 49(2) of the Act;

    (c) made prohibited undertakings as to future prices of securities, contrary to section 50(1)(b) of the Act; and

    (d) engaged in unfair practices, contrary to section 50(1)(e) of the Act.

11. Biller traded in securities and engaged in investor relations, contrary to section 162(a)(ii) of the Act and the Order.

12. Based on the foregoing conduct and activity, Gibraltor, Bayshore, RNJ and RLJ, enabled Biller's contravention of the Order.

¶ 45 The executive director provided the respondents with a letter outlining the particulars of the facts she intends to rely on to prove that the allegations in the notice of hearing are true. The relevant portions of that letter are reproduced in the analysis below.

IV Analysis

A The issues

¶ 46 We have to consider these issues:

1. Are the documents relevant to the matter at hand?
2. If so, has Jeffs been prejudiced by their disclosure to commission staff?
3. If we find real or perceived prejudice, to what remedies is Jeffs entitled?

B Relevance

1. Test for relevance

¶ 47 One of the leading authorities relevant to the issues in this application, and cited by both parties, is *MacDonald Estate v. Martin*, [1990] 3 SCR 1235. In that case, the Supreme Court of Canada set out the test to be applied in cases where disclosure (real or constructive) of information subject to solicitor-client privilege has been made to opposing counsel. The court said (at para. 45):

> Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship *relevant to the matter at hand*? (2) Is there a risk that it will be used to the prejudice of the client? [our emphasis]

¶ 48 Therefore, the starting point is relevance. If any of the documents are relevant, then we will have to deal with the issue of prejudice and some or all of the other issues raised in the application. If none of the documents is relevant, there is no risk of prejudice, and therefore no basis to support the relief the applicant seeks.

¶ 49 Jeffs is the party seeking to establish relevance, so the onus of proving that the documents are relevant lies with him.

¶ 50 The first part of the first question posed by the court in *MacDonald* has already been settled in this case. Commission staff received documents that the court has determined were subject to solicitor-client privilege. The second part is whether those documents are "relevant to the matter at hand."

¶ 51 The "matter at hand" is defined by the allegations in the notice of hearing. Germane to those allegations are the particulars provided to the respondents by the executive director. The particulars are not allegations. They are the means by which the executive director discloses to respondents the facts that she intends to rely on to prove the allegations in the notice of hearing. The distinction is as follows. If the executive director fails to prove an allegation in the notice of hearing, that allegation falls away. If she fails to prove an element of the particulars, but the evidence from other elements identified in the particulars is otherwise sufficient to prove the allegations, no consequences flow from the failure to prove that element of the particulars.

¶ 52 For that reason, the executive director says that the particulars are not relevant to the determination of which documents are relevant to the matter at hand. We think that goes too far. Because the particulars disclose the facts that the executive director intends to establish in order to prove the allegations, we do not see how a privileged document that related to those facts would not be relevant to the matter at hand. Otherwise, a privileged document that clearly bore directly on the facts the executive director intended to use to prove her case would be deemed not relevant – a strange result.

¶ 53 We therefore considered each document in light of the allegations in the notice of hearing and the disclosures in the particulars.

¶ 54 The parties put before us two tests we could use to determine relevance. One is the test used by the civil courts at the discovery stage of actions. The other is the test the courts use at trial. The test used at trial is slightly narrower.

¶ 55 This is the discovery test, as summarized by the British Columbia Supreme Court in *Construction (Canada) Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2003] B.C.J. No. 2389:

> 7. For convenience, I will set out the applicable law for determining relevancy of documents.
>
> 8. The test for determining relevancy of documents is found in *Compagnie Financiere Et Commercial du Pacifique v. Peruvian Guano Co.* (l882) 11 QBD 55. Peruvian Guano has been followed by the courts in Canada. The test (at p. 63) is:
>
>> It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose,

> contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "directly or indirectly", because, it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.

9. In other words, a document must be produced if it contains information which may directly or indirectly advance a party's case or damage an opponent's case, even if the document merely leads the party on a train of inquiry to a relevant fact.

10. Similarly, in *Fraser River Pile and Dredge Ltd. v. Can-Drive Services Ltd.,* [2002] BCJ No 604 (BCCA), the court said:

> Relevance in connection with the discovery of documents is broadly defined. Any document which directly or indirectly may enable the party to advance his own case or destroy that of his adversary or which may fairly lead the party to a train of enquiry or disclose evidence which may have either of these consequences must be disclosed.

¶ 56 The trial test was described in *R. v. Watson*, cited in Sopinka, Lederman, Bryant *The Law of Evidence in Canada* (2d) as follows (at p. 24):

> [relevance] requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A". If it does, then "Fact A" is relevant to "Fact B". As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation, then "Fact A" is relevant and *prima facie* admissible.

¶ 57 In *R. v. Cloutier*, [1979] 2 SCR 709, the Supreme Court of Canada accepted this definition from *Cross on Evidence*:

> For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter.

¶ 58 In our opinion, the appropriate test to apply in these circumstances is the discovery test. If the manner in which commission staff handled the privileged documents has resulted in a risk of prejudice to Jeffs, that risk will arise from the use commission staff could make of that information in the course of its investigation. The discovery test addresses this issue directly by testing relevance against potential trains of enquiry.

¶ 59 Furthermore, we do not think it makes sense to apply the trial test because we are not testing the relevance of facts that are can be entered as evidence. The information we are reviewing is privileged.

2. Summary of findings

¶ 60 In Jeffs' submissions, he identified the Exhibit J and K documents by stamped numbers in the upper right corner, beginning at number 56. He identified the Exhibit L documents by handwritten numbers in the upper left corner, beginning at number 1.

¶ 61 We find that none of the Exhibit J and K documents are relevant except the documents marked as pages 145 through 151. Of the Exhibit L documents, we find that none are relevant except those marked as pages 1, 4, 5 and 8.

¶ 62 Our reasons follow. We limit our descriptions of the privileged documents so as not to disclose any information about them that is not already part of the public record.

3. Documents we found not relevant

¶ 63 In our opinion, none of the documents that we have found not relevant contain information that would enable the executive director, directly or indirectly, to advance her case or destroy Jeffs' defence. Nor do they contain information that would have led commission staff to a train of enquiry to facts that would have that effect, or that the executive director intends to rely on to prove the allegations in the notice of hearing.

¶ 64 In particular, they are not relevant in establishing the business practices of Fairtide and Bayshore during the relevant period, nor do they show anything relevant to the question of how Jeffs or others operated the companies that were the predecessors to Fairtide and Bayshore.

¶ 65 They also fall far short of tending to show, as Jeffs suggests, that he would have the capability of running Bayshore and Fairtide from London, due to his sophistication, activity and success as a businessman.

A. Exhibit J and K documents – pp 56-59, 73, 144

¶ 66 Our copies of pages 56 through 59 and 73 of the Exhibit J and K documents are illegible (the print is too small to make out). We make no finding as to the relevance of these documents. There was no page 144 in the Exhibit J and K documents.

B. Exhibit J and K documents – pp 60-72, 74-143

¶ 67 All of the Exhibit J and K documents marked as pages 60 through 72 and 74 through 143 are dated or relate to transactions that predate the relevant period.

¶ 68 They have to do with the individual trading activity of Jeffs and others through Pacific Capital Markets Inc., a predecessor company to one of the corporate respondents, during periods that pre-date the relevant period in the notice of hearing. According to Jeffs November 2003 affidavit, these documents were prepared to assist counsel in connection with income tax matters.

¶ 69 When the executive director disclosed documents to the respondents in June 2006, the disclosure described documents that were not disclosed. One of the descriptions was "brokerage account records and other trading and bank records". According to the executive director, Jeffs did not object to this omission. The executive director says that shows Jeffs did not believe those documents to be relevant.

¶ 70 In Jeffs' reply, he said that the executive director's disclosure included documents that evidence Jeffs' trading, and included the index to the disclosure that shows that to be so. He says that shows that these kinds of records are relevant.

¶ 71 We did not find these arguments useful. All the exchange shows is that when staff applied the test they use to determine which documents they will disclose, some trading records were disclosed under that test and some were not. Our task is to determine the relevance of the specific documents put before us based on the standards we described above.

¶ 72 They are not relevant to the trading allegations in the notice of hearing against Jeffs. It is clear from both the notice and the particulars that the trading allegation is based on Jeffs' alleged operation of the boiler room, not on any trades executed by him individually.

¶ 73 His personal trading included trading shares in a company that, after a name change, was one of the companies the executive director says was touted in the alleged boiler room. However, this information is not relevant because there is no apparent link to his trading in the shares of that company and the allegations and particulars that refer to that company.

C. Exhibit L documents – pp 2 and 3

¶ 74 The document marked as pages 2 and 3 of the Exhibit L documents is dated during the relevant period. It is not addressed to Jeffs, nor does his name occur anywhere on the document, which raises the question of whether the privilege over this document is Jeffs'. Because we have found the document not relevant, we do not have to deal with this issue. These documents contain legal advice about unsolicited communications, but through a medium that is not mentioned in the allegations in the notice of hearing or the disclosure of the particulars. All of the communications alleged in the notice of hearing to be improper involved voice telecommunications. The information in this document is of no relevance to those allegations.

D. Exhibit L documents – pp 6 and 7

¶ 75 The document marked as page 6 of the Exhibit L documents pre-dates the relevant period. It is correspondence on which Jeffs is copied. Jeffs says it is relevant to the allegation that he "was involved in the management and operation of Fairtide and Bayshore, and in particular, the alleged relationship between Bayshore and Fairtide and one if its alleged issuer clients, GlobTrac." Contrary to this submission, none of these entities is mentioned anywhere in the document, nor is there any apparent connection between the document and any entity mentioned in the notice of hearing or the particulars.

¶ 76 Page 7 of the Exhibit L documents is blank.

E. Exhibit L documents – pp 9-16

¶ 77 The documents marked as pages 9 through 16 of the Exhibit L documents are dated during the relevant period. Most of them are addressed to Jeffs; on some he is copied. There is no apparent connection between these documents and any of the allegations or the particulars. The documents concern a company that is one of the alleged issuer client companies, but, contrary to Jeffs' submissions, there is no apparent connection to the relationships between that company and Fairtide and Bayshore that are relevant for the purposes of the notice of hearing. Neither do these documents contain any information of any relevance to the issue of whether Jeffs was a *de facto* director of Fairtide and Bayshore.

F. Exhibit L documents – pp 17-18

¶ 78 The documents marked as pages 17 and 18 of the Exhibit L documents pre-date the relevant period. They consist of correspondence with Jeffs related to transactions that are not in any way connected to the allegations or the particulars. Contrary to Jeffs' submissions, they contain no information that is useful to advance the allegation that Jeffs was a *de facto* director of Fairtide and Bayshore during the relevant period, or to damage Jeffs' defence to that allegation.

G. Exhibit L documents – pp 19-20

¶ 79 The documents marked as pages 19 and 20 of the Exhibit L documents predate the relevant period. They refer to entities not mentioned in the notice of hearing or the particulars. Contrary to Jeffs' submissions, they make no reference to Brek Energy (one of the alleged issuer clients). They do include tangential references to an entity mentioned in the particulars, but in circumstances completely unrelated to the allegations.

H. Exhibit L documents – pp 21-22

¶ 80 The documents marked as pages 21 and 22 of the Exhibit L documents are dated during the relevant period. Jeffs is copied. They involve news releases created by an alleged client issuer of Bayshore and Fairtide. There is no mention of any kind of news releases in the notice of hearing or the particulars. Contrary to Jeffs' submissions, they contain no information useful for establishing or refuting the allegation that Jeffs was a *de facto* director of Bayshore and Fairtide, or for establishing or refuting his role in the operation of the boiler room.

4. Documents we found relevant

A. Exhibit J and K documents – pp 145-151

¶ 81 Paragraph 8 of the notice of hearing alleges that Jeffs:

> . . . was a *de facto* officer or director of Fairtide and Bayshore. He provided start up capital for Fairtide and Bayshore, provided working capital to Bayshore, and made management decisions for both Fairtide and Bayshore. . . .

¶ 82 The particulars of this allegation state that Jeffs:

- was a significant source of start up capital for Fairtide and Bayshore
- provided the working capital by way of loans to Bayshore of over $300,000

  . . .
- funded the phone room . . .

¶ 83 The documents marked as pages 145 through 151 of the Exhibit J and K documents are dated during the relevant period, although the transactions they describe all occurred earlier. Jeffs says that they show that Jeffs earned "millions of dollars" from trading securities from 1998 through 2001. That makes them relevant, he says, because this information suggests that Jeffs had the wherewithal to fund Fairtide and Bayshore as alleged.

¶ 84 We find these documents relevant, both for the reasons that Jeffs states, and because they could have led an investigator to a train of enquiry leading to facts that could advance the executive director's case.

B. Exhibit L documents – p 1

¶ 85 The document marked as page 1 of the Exhibit L documents is dated during the relevant period. It is addressed to Jeffs, among others, and contains information alluding to activities related to the executive director's allegations of the activities in the alleged boiler room, and in so doing mentions one of the companies the executive director says was touted. We find it relevant because it could be used to advance the executive director's case.

C. Exhibit L documents – pp 4 and 5

¶ 86 The documents marked as pages 4 and 5 of the Exhibit L documents contain information about the corporate organization of Fairtide and Bayshore. The documents identify certain individuals as directors, officers and shareholders. We find them relevant because they relate to the allegation that Jeffs was a *de facto* director of Fairtide and Bayshore.

D. Exhibit L documents – p 8

¶ 87 The document marked as page 8 of the Exhibit L documents is an email dated during the relevant period.

¶ 88 The email purports to be accompanied by an attachment. If the attachment, which is not before us, exists and is as described in the email, it could advance the executive director's allegation that Jeffs enabled Biller to contravene an earlier commission order. Because the email could have led an investigator to a train of enquiry leading to that attachment, we find it relevant.

¶ 89 Jeffs' name does not appear anywhere on the email. This makes us wonder whether the privilege in this document belongs to Jeffs. We deal with this ambiguity later in this ruling.

C Prejudice

¶ 90 We have found that some of the privileged documents are relevant. The next question is whether the disclosure of these documents to commission staff has prejudiced Jeffs' defence.

¶ 91 The courts have always given great protection to solicitor-client communications, and over the years that protection has grown. The reasons are succinctly explained by the Supreme Court of Canada in *Lavallee, Rackell & Heintz v. Canada (Attorney General)*, [2002] SCJ 61 (at para. 36):

> . . . Where the interest at stake is solicitor/client privilege – a principle of fundamental justice and civil right of supreme importance in Canadian law – the usual balancing exercise referred to above is not only the privacy interests of the potential accused, but also the interests of a fair, just and efficient law enforcement process. . . .

¶ 92 The court went on to comment on the scope of the protection, citing its earlier decision in *R. v McClure*, [2001] 1 SCR 445, where the court said:

> . . . Despite its importance, solicitor-client privilege is not absolute. It is subject to exceptions in certain circumstances.
> . . .
> However, solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balance of interest on a case by case basis.

¶ 93 However, despite the best efforts of all concerned, it sometimes happens that privileged documents get into the hands of the opposing party. The courts have developed principles to deal with these situations. These principles establish how to determine whether the disclosure has prejudiced the party whose privilege has been violated, and how to determine the appropriate remedy.

¶ 94 It does not matter whether commission staff actually saw any privileged document. In *Celanese Canada v. Murray Demolition Corp.*, [2006 SCJ 35] the Supreme Court of Canada said (at para. 42):

> In *MacDonald Estate*, the Court held, in the context of a moving solicitor, that once the opposing firm of solicitors is shown to have received "confidential information attributable to a solicitor and client relationship relevant to the matter at hand" (p. 1260), the court will infer "that lawyers who work together share confidences" (p. 1262) and that this will result in a *risk* that such confidences will be used to the prejudice of the client, unless the receiving solicitors can show "that the public represented by the reasonably informed person would be satisfied that no use of confidential information could occur" (p. 1262). Only where there is "clear and convincing evidence" (p. 1263) to the contrary will the presumption be rebutted.

¶ 95 We heard extensive argument on the issue of whether Jeffs has the onus of proving prejudice or whether the executive director has the onus of proving that Jeffs was not prejudiced.

¶ 96 We did not have to deal with these arguments. *Celanese* makes it clear that what matters, where there is no evidence of actual prejudice, is the perception of risk that there could be prejudice, as judged by a reasonably informed person.

¶ 97 In this case, we have no evidence of actual prejudice. However, in Bernardo's words, the commission investigators have "freely examined" the documents, and it is now "impossible to provide [Jeffs] with any assurances about what has been reviewed or not." We also know that Bernardo reviewed the documents himself. In these circumstances, there is no doubt that there is a substantial risk that the privileged documents we have found relevant could be perceived to have been used to the prejudice of Jeffs. In these circumstances, how could any reasonably informed person think otherwise?

¶ 98 The only question that remains is what remedy is appropriate. It is in that context that the courts have considered the importance of the degree of the prejudice.

D Remedies

1. Factors to consider

¶ 99 The remedies applied by the courts in cases where privileged information has been disclosed to opposing counsel range from directions to return the privileged documents and not to use the impugned information, to removal of opposing counsel.

¶ 100 In *Celanese,* the court listed six factors relevant to the appropriate remedy (at para. 59):

> In helpful submissions, the intervenors Advocates' Society and the CBA suggest a number of factors to be considered in determining whether solicitors should be removed: (i) how the document came into the possession of the plaintiff or its counsel; (ii) what the plaintiff and its counsel did upon recognition that the documents were potentially subject to solicitor-client privilege; (iii) the extent of the review made of the privileged material; (iv) the contents of the solicitor-client communications and the degree to which they are prejudicial; (v) the stage of the litigation; (vi) the potential effectiveness of a firewall or other precautionary steps to avoid mischief. Other factors may, of course, present themselves in different cases . . .

¶ 101 This is how we have applied these factors to these circumstances.

A. How the documents came into the possession of commission staff

¶ 102 Commission staff obtained the documents through the execution of a valid search warrant. There is no suggestion that in executing that warrant commission staff strayed outside its boundaries, or otherwise behaved carelessly, rashly, or wrongfully, as is the case in several of the authorities cited by Jeffs.

B. Conduct of commission staff when the new solicitor-client issues arose

¶ 103 Even when solicitor-client privilege issues are handled properly on an initial search, there is always the possibility that investigators will subsequently encounter items subject to solicitor-client privilege among the seized documents.

¶ 104 When that happens, the courts have said that the appropriate thing to do is to stop viewing the documents until the privilege issues are sorted out. For example, in *National Bank v. Potter*, [2005] NSJ 186 (Nova Scotia Supreme Court), the court said (at para. 73):

> . . . Once counsel become aware of the fact that they have communications between solicitor and client or should reasonably expect that they are in possession of such communication, they should stop viewing the documents. Notice should then be given to all potential privilege holders so as to afford them a reasonable opportunity to assert privilege.

¶ 105 In this case, things were not so clear cut. The commission investigators had “freely examined” the seized documents, but we do not know with certainty whether they encountered any of the privileged documents. If they did not, the obligation to follow the procedure described in *National Bank* did not arise.

¶ 106 In any event, the issue did not come to light through commission staff recognizing documents they thought might be privileged. It arose when Frederickson raised the issue with commission staff in his letter of February 12, 2003. It was at that point that the *National Bank* test came into play.

¶ 107 That said, Frederickson did not insist on the procedure described in *National Bank*. Instead of demanding that staff cease its review of the documents, he proposed that they continue their review, provided that when they encountered a document “which appeared to arguably raise a claim of confidentiality and/or privilege”, they segregated it and forwarded it to him so he could decide whether to claim privilege.

¶ 108 In response, commission staff went one better, in a sense. Rather than continuing their investigation and segregating potentially privileged documents as they came to them, they suspended their examination of the documents pending Russell’s review.

¶ 109 As for the results of her review, it appears that she erred appropriately on the side of caution, given that only about half of the documents she segregated were ultimately determined to be privileged.

¶ 110 Up to that point, Jeffs can have no complaint about the process. It is worth mentioning that it was open to him, once he realized that there were potential solicitor-client privilege issues, to demand that commission staff stop reviewing the documents until he reviewed them.

¶ 111 Certainly he needed to have no doubt about what documents had been seized – as noted above, by January 10, 2003 commission staff had returned to the parties all of the computers, servers and handheld devices. The hard drives had copies of all of the documents that were seized.

¶ 112 Instead, he chose to leave the search for potentially privileged documents to commission staff.

¶ 113 We are, however, troubled by Bernardo's decision to review the documents himself before sending them to Jeff's counsel. In his letter of September 11, 2003, he explained why he decided to do so:

> After the [Russell] review, the next step was to assess whether any of the segregated communications could – in any way – be possibly construed as being related to the giving of legal advice. We faced two options in this regard. One was to forward them directly to you for review; the other was for me to examine them first. We decided to follow the second option.
>
> As I pointed out in my February 14, 2003 letter, the privilege issue had already been canvassed at the time of the search and, to all appearances, been settled. It was only long after the search – and after the initial review of the documents had commenced – that you articulated a general concern about the issue. That you could not point to any particular client's interest added a general perplexing layer of uncertainty to the whole matter.
>
> Without any meaningful guidance, we were being asked to try to find potentially privileged documents that should have been specifically identified in or around the time of the search. Irrespective of when the privilege claim was made, pertinent documents should at least have been identified by time period or some other sort of category. . . .
>
> In any event, the inescapable fact remained that the confidentiality interest in the records had become a moot point after the investigators commenced their review. That is, the only potential remaining "privilege" issue is the

admissibility in proceedings of documents over which a claim might be made.

In these circumstances, having Commission counsel further examine the segregated documents was, in our view, reasonable.

¶ 114 In our opinion, his reasons are not convincing.

¶ 115 His first reason seems to be based on the fact that Jeffs raised new solicitor-client privilege issues after staff thought they had been resolved. However, when, as in this case, thousands of documents are seized, it is not surprising that issues of privilege could arise later. In any event, when they did arise, Jeffs was prepared to allow commission staff to continue its review so long as they segregated problematic documents as they encountered them.

¶ 116 Bernardo's second reason seems to be a complaint that Jeffs left it to commission staff to sort through the documents. However, Bernardo accepted Jeffs' proposal to proceed in this fashion. If staff thought it Jeffs' responsibility to establish privilege, they could have sought direction from the court to deal with the privilege issue. The likely outcome was that the court would have established a mechanism and timelines to deal with the issue on a fair and timely basis.

¶ 117 Finally, as this application shows, the confidentiality issue was far from a moot point. The authorities are clear that the failure to properly protect solicitor-client privilege can have significant consequences to the prosecution of an action.

¶ 118 The upshot is that the process was sloppy all around. Jeffs' could have insisted the investigation stop pending his review of the documents for privileged material. He chose not to do so. Instead he said that commission staff should do it as they sifted through the documents.

¶ 119 For staff's part, they in fact did cease their review until the potentially privileged documents were segregated. However, Bernardo should not have reviewed the documents. We have no reason to doubt his sworn statement that he did not review them for any investigative purpose, and that he now recalls nothing of their contents. That, however, is not the point. The issue, as articulated in *MacDonald Estate*, is whether there would be any risk of confidential information being used to the prejudice of the client in the mind of a reasonably informed person. In our opinion, a reasonably informed person would conclude that Bernardo's review of the documents would create that risk.

¶ 120 That said, Bernardo told Frederickson how he intended to proceed, and in doing so indicated a role for himself. Although it was not clear from Bernardo's letter

that he intended to "carefully review" the privileged documents, the language he used should have alerted Frederickson that Bernardo was going to be involved in some way.

¶ 121 It appears that there was something in Bernardo's description of the process that concerned Frederickson; at the time he wrote his May 15, 2003 letter he thought "it best to agree to disagree with respect to the appropriate procedure". The only substantive difference between the procedure described by Frederickson in his February 12, 2003 letter, and that proposed by Bernardo in his February 14 response, was Bernardo's participation in the process. We are left wondering what else would have led Frederickson to conclude the parties should agree to disagree. We also wonder why he did not respond to Bernardo for three months, and why, if he objected to the procedure, he did not do so more strenuously. He had to have known that by then the process was well underway. In any event, Jeffs chose not to challenge that aspect of the process until he received the Bernardo's September 11, 2003 letter. By then it was too late.

¶ 122 We are also of the opinion that Russell ought not to have participated in witness interviews. In the circumstances, it was a good idea to appoint a single investigator to review the documents. However, the benefit of so separating the segregation process from the general investigation went out the window when Russell was asked to participate in interviews.

¶ 123 We have no reason to doubt that she is telling the truth when she says that she did not use whatever she learned in the review when she participated in the interviews. However, that is not the point. The issue, as articulated in *MacDonald Estate*, is whether there would be any risk of confidential information being used to the prejudice of the client in the mind of a reasonably informed person. In our opinion, a reasonably informed person would conclude that Russell's participation in the interviews would create that risk.

C. The extent of the review of the privileged material

¶ 124 We do not know the extent of the review of the privileged material. However, we do know that the investigators had "freely examined" the class of material that included the privileged documents, and that commission staff could not assure Jeffs about what had been reviewed or not. In these circumstances, we must assume for the purposes of this ruling that the privileged documents that we have found relevant were reviewed by commission staff. At a minimum, we know that they were reviewed by Russell and Bernardo.

D. Contents of the privileged information and the degree of prejudice

¶ 125 Unlike *Celanese*, where the privileged information was not available to the court, we have the advantage of having reviewed the privileged documents. Considering

our analysis of the documents that we have found relevant, we draw these conclusions:

Exhibit J and K documents – pp 145-151

¶ 126 We found the documents marked as pages 145 through 151 of the Exhibit J and K documents relevant because (1) they show that Jeffs earned substantial sums from trading securities and so had the wherewithal to fund Fairtide and Bayshore as alleged, and (2) they could have led an investigator to a train of enquiry leading to facts that could advance the executive director's case. There is potential for prejudice to Jeffs arising from the disclosure of these documents. We have addressed this potential prejudice in the orders we are making in this ruling.

Exhibit L documents – p 1

¶ 127 We found the document marked as page 1 of the Exhibit L documents relevant because it could be used to advance the executive director's case. However, neither the notice of hearing nor the letter of particulars includes anything that appears to be based on the contents of this document, directly or indirectly. Taken in the context of the other facts the executive director intends to establish to make out the allegations in the notice of hearing, we think the potential prejudice to Jeffs is minimal and no order is required to address it.

Exhibit L documents – pp 4 and 5

¶ 128 We found the document marked as pages 4 and 5 of the Exhibit L documents relevant because it relates to the allegation that Jeffs was a *de facto* director of Fairtide and Bayshore. However, the contents of the document would not be of use to advance the executive director's case, nor would they have led an investigator to a train of enquiry leading to facts that could advance the executive director's case. For those reasons, we think the potential prejudice to Jeffs is minimal and no order is required to address it.

Exhibit L documents – p 8

¶ 129 We found the email document marked as page 8 of the Exhibit L documents relevant because it could have led an investigator to another document which, if it existed and were as described in the email, would advance the executive director's allegation that Jeffs enabled Biller to contravene an earlier commission order. There is potential for prejudice arising from the disclosure of this document. We have addressed this potential prejudice in the final paragraph of this ruling.

¶ 130 As for who holds the privilege over this document, if it is not Jeffs, it would appear to be at least two of the other respondents. We acknowledge that as a legal matter there is some doubt as to whether Jeffs is entitled to a remedy for a breach of another party's privilege. However, we have concluded that in the overall circumstances of this case, a remedy may be appropriate.

E. Stage of the litigation

¶ 131 In *Celanese,* the court, in applying this factor, noted that at "advanced stages of litigation, an order removing counsel can be 'extreme' and may have a 'devastating' effect on the party whose counsel is removed . . . ". This case is at an advanced stage. The investigation is complete, the notice of hearing as been issued, disclosure is complete, and a four-week hearing is scheduled to begin on May 7, less than two months from now.

F. Precautionary steps

¶ 132 Staff appeared to have appropriate steps in place to safeguard privilege at the time of the search, although that is not relevant to this application as it relates only to documents that came to light later, at the instance of Frederickson. We have no evidence before us as to the steps commission staff may have had in place to identify privileged documents it may have discovered in its review of the seized documents, so we have no basis to reach any conclusions relevant to this factor.

G. Other factors

¶ 133 In most of the cases cited by the parties, the ultimate consequences of an order disqualifying counsel are primarily cost and delay. Even so, the courts refer to that remedy as "drastic".

¶ 134 In this case, the orders sought by the applicant would amount to a stay. Those orders would disqualify both commission counsel and commission investigators. None of the witness interview transcripts could be used.

¶ 135 This would generate a raft of practical, if not legal, difficulties. Here are just two of the most obvious. (1) New counsel would have to prepare the case without the benefit of briefs from the investigators who conducted the investigation, and none of those investigators could appear as witnesses. (2) The witnesses previously interviewed would have to be located, summonsed, and interviewed again.

¶ 136 The efforts necessary to continue the matter would consume enormous amounts of time and resources. The associated delay would run to many months. A year or more would not be outside the realm of possibility.

¶ 137 It is foreseeable that the executive director, considering all of that, might well conclude that as a practical matter it no longer made sense to continue the case.

2. Remedies

¶ 138 In *Celanese* the court acknowledged the value of considering less drastic remedies. It said:

> 57 I agree with the courts below that if a remedy short of removing the searching solicitors will cure the problem, it should be considered. As the intervenor Canadian Bar Association . . . puts it in its factum, the task "is to determine whether the integrity of the justice system, viewed objectively, requires removal of counsel . . . or whether a less drastic remedy would be effective". . . . In modern commercial litigation, mountains of paper are sometimes exchanged. Mistakes will be made. There is no such thing, in these circumstances, as automatic disqualification.

¶ 139 Considering the six factors in *Celanese*:

- How the documents came into staff's possession is not an issue.
- Staff's response to the new solicitor-client privilege issues was flawed, but to some extent that was offset by Jeffs' conduct.
- We have to assume the privileged documents we found relevant were reviewed by staff, but the importance of that is very much tied to their content.
- Some of the privileged documents that we have found relevant represent minimal risk of prejudice to Jeffs and no orders are required. To deal with the documents that represent a greater risk of prejudice, the integrity of the justice system, viewed objectively, can be preserved without taking the drastic step of removing commission counsel and investigators from the case.
- The proceedings are well advanced.
- We have no evidence as to the existence and nature of precautionary steps.
- Other factors support a less drastic remedy than an order removing commission counsel and investigators from the case.

¶ 140 The orders we are making address the risk of prejudice to Jeffs by prohibiting the executive director from using evidence related to information in the documents that carry the risk of prejudice. The result will be that the hearing can proceed, but Jeffs will not be exposed to the risk of having evidence entered that may be tainted by the disclosure to staff of documents subject to solicitor-client privilege.

V Orders

¶ 141 We order that the executive director not introduce at the hearing evidence that Jeffs:

1. was a significant source of start up capital for Fairtide and Bayshore,
2. provided the working capital by way of loans to Bayshore of over $300,000, or
3. funded the Phone Room (as defined in the Notice of Hearing).

¶ 142 We make no order regarding the document marked as page 8 in the Exhibit L documents because to do so we would have to disclose the content of that privileged document. If the attachment to that document is among the documents that the executive director has identified as the ones she intends to rely on in the hearing, Jeffs can apply to us for an order that the attachment not be admitted as evidence in the hearing.

¶ 143 March 19, 2007

¶ 144 **For the Commission**

Brent W. Aitken
Vice Chair

Neil Alexander
Commissioner

Robert J. Milbourne
Commissioner