

2007 BCSECCOM 645

Hearing

**James Terrence Alexander, Anne Christine Eilers
and JT Alexander and Associates Holding Corporation**

Sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418

Panel	Robin E. Ford Neil Alexander John K. Graf	Commissioner Commissioner Commissioner
Dates of hearing	May 19, 23, 24, 26, 29-31, June 1, 2, 13, 14, 16, December 18-21, 2006	
Date of findings	October 24, 2007	

Appearing

Mark L. Hilford and Lisa D. Ridgedale	For the Executive Director
Robin N. McFee, Q.C. and Craig P. Dennis	For James Terrence Alexander and JT Alexander and Associates Holding Corporation
Michael J. Hewitt	For Anne Christine Eilers

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Findings of Neil Alexander and John K. Graf

INTRODUCTION

- ¶ 1 The executive director issued a notice of hearing on December 8, 2003, making allegations against James Terrence Alexander, Anne Christine Eilers and JT Alexander and Associates Holding Corporation. These are our findings following a hearing.
- ¶ 2 The principal allegations against Alexander are that he was a director and officer of eight companies, including Pinewood Resources Ltd, and that he engaged in investor relations activities on behalf of Pinewood, contrary to a consent order made by the executive director in February 1999.
- ¶ 3 The principal allegation against Eilers is that she assisted Alexander in contravening the consent order and so acted contrary to the public interest.

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- ¶ 4 We find that Alexander contravened the consent order by being a director and officer of various companies, including Pinewood, and by engaging in investor relations activities for Pinewood. We find that Eilers assisted Alexander in contravening the consent order by allowing him to direct JTA's affairs while she was the sole director and officer of record of JTA. We dismiss the other allegations against Alexander and Eilers and those against JTA.

Respondents

James Terrence Alexander

- ¶ 5 Alexander has a history of involvement in the oil and gas industry.
- ¶ 6 From 1974 to 1980, he ran his own business, Alexander Energy Corporation, which was engaged in financing the drilling of oil and gas wells in Canada and the US.
- ¶ 7 From 1989 to 1995, Alexander held a controlling interest in Arakis Energy Corporation, a reporting issuer listed on the Vancouver Stock Exchange, now the TSX Venture Exchange. Arakis acquired an interest in Sudanese oilfields from the Sudan government. Alexander served for varying periods as a director, chairman, president and CEO of Arakis. He sold his interest in Arakis and resigned as a director and officer in December 1995.
- ¶ 8 The British Columbia Securities Commission investigated Alexander's trading in Arakis shares. On February 23, 1999, Alexander entered into the settlement and consented to the order described below.
- ¶ 9 Alexander, through his family holding company, JTA, was also a major shareholder of Pinewood. He was a director of Pinewood from November 3, 1993 to May 15, 1998, and was president during part of that time. Pinewood was then in the mineral exploration business to "review projects of merit for investment". Pinewood, a reporting issuer, was listed on the CDNX, now the TSX Venture Exchange.
- ¶ 10 Alexander and Pinewood carried on business from premises located on West Esplanade in North Vancouver, British Columbia.

JT Alexander and Associates Holding Corporation

- ¶ 11 Alexander said that JTA is the Alexander family's holding company. JTA was a major shareholder of Pinewood, holding approximately 29% of the shares.

Anne Christine Eilers

- ¶ 12 Eilers had been Alexander's assistant and business associate since 1987. At various times, she was a director and officer of JTA and a director of Pinewood

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and its subsidiary Gambela Petroleum Corporation (GPC). Eilers (primarily through Buzz Communications Inc) provided investor relations and administrative services to Pinewood and to Alexander, from the West Esplanade premises. According to corporate records, she was the sole director, officer and shareholder of Buzz.

Other key persons

- ¶ 13 Ian Neilson was a professional engineer and consultant. In May 2000, Neilson was pursuing an oil exploration opportunity in the Gambela region of the Federal Democratic Republic of Ethiopia. In late May 2000, Neilson and Alexander signed a participation agreement for their joint development of the Gambela project.
- ¶ 14 GPC was a wholly owned subsidiary of Pinewood, incorporated in the Bahamas in September 2000 to hold Pinewood's interest in the Gambela project. In September 2000, the directors of Pinewood appointed Neilson a director, president, and CEO of GPC. Ernie Pratt was appointed the exploration manager. Pratt had been the president of Arakis and had headed Arakis' exploration and development efforts in Sudan.
- ¶ 15 Carlo Civelli directed and managed Clarion Finanz AG, an investment firm based in Zurich, Switzerland. He was a long time business associate and friend of Alexander. Civelli worked closely with Alexander in the financing of Arakis. A number of his clients owned Pinewood shares. At a meeting with Alexander in June 2000, Civelli agreed to seek financing for Pinewood's involvement in the Gambela project.
- ¶ 16 David Alexander was a chartered accountant who provided accounting and consulting services to Pinewood, also from the West Esplanade premises. He had been CFO of Arakis and was a director of Pinewood until March 2000. David Alexander became a director of GPC on December 5, 2000. David Alexander is Alexander's brother.
- ¶ 17 "R Co" made an offer to invest in the Gambela project through the purchase of JTA's shares of Pinewood and a new issue of Pinewood shares.

Allegations

- ¶ 18 In the notice of hearing, the executive director alleges:
- Alexander contravened the consent order, and acted contrary to the public interest, by acting as a *de facto* director and officer, or by acting as a director and officer of record, of the following companies:

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- 372171 BC Ltd
 - 568160 BC Ltd
 - Caulfeild Management Inc
 - 630679 BC Ltd
 - Silverado Estate Coffee Corp
 - JTA
 - Buzz
 - Pinewood;
- Alexander contravened the consent order, and acted contrary to the public interest, by engaging in investor relations activities on behalf of Pinewood and JTA;
 - Alexander contravened section 34(1) of the *Securities Act*, RSBC 1996, c. 418, and the consent order, and acted contrary to the public interest, by engaging in acts in furtherance of the sale of JTA's shares in Pinewood to R Co, and the issue of Pinewood shares to R Co to finance the Gambela project;
 - JTA contravened section 34(1) of the Act and the consent order, and acted contrary to the public interest, by engaging in acts in furtherance of the sale of JTA's shares in Pinewood to R Co;
 - Eilers contravened section 34(1) of the Act, and acted contrary to the public interest, by engaging in acts in furtherance of the sale of JTA's shares in Pinewood to R Co, and directing JTA to that purpose, and by assisting Alexander in contravening section 34(1) of the Act; and
 - Eilers acted contrary to the public interest by assisting Alexander in contravening the consent order, by:
 - allowing Alexander to direct JTA's affairs while she was the sole director and officer of record of JTA,
 - allowing Alexander to be a *de facto* director and officer of Buzz while she was its sole director and officer of record, and
 - being complicit in Alexander's concealing his direction of Neilson and Pinewood.

Credibility of witnesses

¶ 19 Credibility was a significant issue in this hearing.

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- ¶ 20 Alexander was not a credible witness. Much of his testimony was self-serving and he was often evasive and not forthcoming. A number of times, he changed his testimony when confronted with evidence that proved his testimony was wrong. Many times, we did not believe his testimony. We accepted Alexander's testimony only if it was corroborated, or was consistent with other evidence.
- ¶ 21 The respondents asked us to disregard all documentary evidence provided to BCSC staff by Neilson because:
- he did not testify and so could not be cross-examined,
 - his interview with BCSC staff was not conducted under oath,
 - when he spoke to BCSC staff, he was pursuing a civil claim against Alexander, Civelli, and Clarion Finanz for more than US \$100 million and had unsuccessfully sought payment from Pinewood for his work on the Gambela project,
 - he was hostile to Alexander and Eilers,
 - he selected the documents to show BCSC staff,
 - there was often no direct evidence that correspondence had been delivered to or received by the intended recipient, and
 - some correspondence was undated, incorrectly dated, or dated, but followed by plus/minus signs.
- ¶ 22 The respondents argued that much of the documentary evidence given to BCSC staff by Neilson was unreliable because it may have been fabricated after the fact. Nevertheless, they did not call Neilson to testify or provide any evidence that, in our view, proved any of it was fabricated.
- ¶ 23 As we did with Alexander's evidence, where the documents that Neilson claimed he sent to Alexander or Pinewood were corroborated or were consistent with other evidence, we accepted them as true. In applying this standard, we found that most Neilson documents were reliable.
- ¶ 24 BCSC staff interviewed the Pinewood directors (Courtland Brewster, Gordon Ellis, Christopher Farnworth and Carl von Einsiedel), Eilers, David Alexander and Civelli, under oath. None testified at the hearing, so we could not assess their credibility. The directors, Eilers and David Alexander all worked with Alexander in the same premises. Ellis, Farnworth, von Einsiedel, Eilers, David Alexander, Civelli and Pratt were all friends, family or long time business associates of Alexander.

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FACTS

Alexander's consent order

- ¶ 25 While Alexander was a director and officer of Arakis, he contravened the Act.
- ¶ 26 On February 23, 1999, Alexander, JTA and the executive director entered into a settlement. Alexander paid \$1,200,000 to the BCSC and voluntarily, with the benefit of counsel, consented to an order by the executive director under section 161(1) of the Act.
- ¶ 27 Under the consent order, for a period of 20 years from the date of the order:
- the trading exemptions described in sections 44 to 47, 74, 75, 98 and 99 of the Act do not apply to Alexander and JTA, subject to a one-year trading window;
 - Alexander must resign and is prohibited from acting as a director or an officer of any issuer; and
 - Alexander is prohibited from engaging in investor relations activities.
- ¶ 28 In the settlement, Alexander waived:
- ... any right he may have, under the Act or otherwise, to a hearing, hearing and review, judicial review or appeal related to, in connection with or incidental to this agreement and related orders.

Issuers other than Buzz and Pinewood

- ¶ 29 At the hearing, Alexander admitted that he continued to be, or was appointed, a director and officer of the following companies after the date of the consent order:
- 372171
 - 568160
 - Caulfeild
 - 630679
 - Silverado
 - JTA.
- ¶ 30 Alexander said 372171 and 568160 were inactive companies. He was the sole director and officer of these companies and, under the consent order, was required to resign as a director and officer in February 1999. He did not resign from 372171 until February 6, 2004 and from 568180 until August 24, 2005.
- ¶ 31 Alexander said Caulfeild was a private holding company for his wife. He was the sole director and officer from January 2, 2002 to July 1, 2004.

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- ¶ 32 Alexander was the sole director and officer of 630679 from July 8, 2002 to July 1, 2004. Alexander said Civelli was the beneficial owner of the company, the sole purpose of which was to hold the title to Civelli's boat.
- ¶ 33 Silverado was incorporated on January 21, 2003. Alexander said it conducted a coffee importing business. Alexander was the sole director and officer from May 29, 2003 to July 1, 2004.
- ¶ 34 Alexander was the sole director and officer of record of JTA from January 15, 2002 to July 1, 2004. He admitted that he was also a *de facto* director and officer of JTA from April 26, 1999 (when he resigned following the issue of the consent order) to January 15, 2002.
- ¶ 35 Alexander said that, except for Civelli's company, Alexander was the sole beneficial owner of these companies. None was a reporting issuer under the Act.
- ¶ 36 During the settlement negotiations, Alexander requested that any prohibition against acting as a director or officer be limited to publicly traded companies. The executive director denied this request. Then Alexander requested that he be permitted to remain a director of JTA. The executive director denied that request as well.
- ¶ 37 Alexander's then lawyers testified that they understood that the term "issuer" in the consent order included both public and private companies such as JTA. They advised Alexander that he could not be a director of JTA or any public or private issuer.
- ¶ 38 Although his lawyers told him it was not a good idea, Alexander nominated Eilers to act as the sole director and officer of JTA from April 26, 1999 to January 15, 2002. In her interview of October 22, 2003, Eilers told BCSC staff that Alexander was actually the directing mind of the company. She agreed she was a "figurehead director", but said JTA was not doing anything at the time of her appointment. In the spring of 2001, although Eilers was the sole director and officer of record, Alexander, not Eilers, negotiated with R Co for the sale of JTA's Pinewood shares.

Buzz

- ¶ 39 The executive director alleges that:
- Alexander contravened the consent order, and acted contrary to the public interest, by acting as a *de facto* director and officer of Buzz; and

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- Eilers acted contrary to the public interest by assisting Alexander in contravening the consent order, by allowing Alexander to be a *de facto* director and officer of Buzz while she was its sole director and officer of record.

¶ 40 We dismiss the allegations related to Buzz for lack of evidence.

Pinewood

¶ 41 Prior to the consent order, Alexander resigned as a director of record of Pinewood.

¶ 42 In January 2000, the directors of Pinewood were von Einsiedel, a consulting geologist, David Alexander, and Eilers. Von Einsiedel was president and Pinewood's solicitor was secretary. Von Einsiedel, Eilers and David Alexander resigned in March 2000.

¶ 43 On March 9, 2000, the directors of record of Pinewood were Ellis, Brewster and Farnworth. Ellis was president and Pinewood's solicitor was secretary. Shortly before that time, the Pinewood board commenced work on a technology opportunity that they abandoned in August 2000. Brewster later became president, most likely when Ellis resigned in August 2000.

¶ 44 Brewster told BCSC staff that the Pinewood directors received no compensation. He did, however, say that any "... rewards would ... be in the [stock] options".

¶ 45 Alexander occupied the corner office in the West Esplanade premises. It was the biggest office, with Eilers on one side and Ellis on the other. Beside Ellis was David Alexander. Beside Eilers were Farnworth and Brewster.

¶ 46 Brewster told BCSC staff he joined the board at Ellis' request, after he had proposed the technology project to Ellis. Brewster said he had not previously acted as a director or officer of a public company.

¶ 47 Ellis and Farnworth each told BCSC staff that Alexander was a long time business associate who asked them to join the Pinewood board.

¶ 48 Von Einsiedel also told BCSC staff he was a long time business associate of Alexander. He returned to the Pinewood board at the end of August 2000, when Ellis left the board. He said that Eilers asked him to join the Pinewood board.

¶ 49 Pinewood was a shell company that had limited assets and no operating business. On July 31, 2000, according to company financial statements, Pinewood's

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principal asset was cash of \$416,000. By April 30, 2001, Pinewood was left with working capital of \$148,000, most of which would have been cash.

Gambela project until September 7, 2000

¶ 50 Neilson had been working on an oil exploration opportunity in the Gambela region of Ethiopia and was negotiating with the Ethiopian government to obtain an oil production sharing agreement (PSA).

¶ 51 Neilson contacted Alexander in the first week of May 2000 and, at a meeting about a week later, presented the opportunity to him. When asked why Neilson contacted him about the Gambela project, Alexander testified:

Well, I had been very active in Sudan from 1990 through 1995. We had raised, in a company in Arakis, we had raised ... well over a hundred million dollars to develop this property and developed the properties of the Hegledg [*sic*] and Militu [*sic*] oilfields. The Melut Basin is very geologically favourably positioned in the oil runway that comes up from the lower middle of Somalia through Ethiopia and into Sudan. So, this was the oil runway. And we had worked in that runway developing the Hegleg Unity field [*sic*] for almost five years. So, I had a lot of experience regarding geology and the ability for some of these cases to produce oil.

¶ 52 Von Einsiedel said that, in May 2000 (when he was not a director), Alexander asked him to review the Gambela project and he did so as a favour. He concluded that it looked like a natural extension of the oil fields in Sudan and was worth pursuing.

¶ 53 Neilson drafted a participation agreement that Alexander signed in his personal capacity at a meeting with Neilson on May 29, 2000. The agreement contemplated Neilson and Alexander (or anyone Alexander sold his interest to) jointly developing the Gambela project.

Alexander's June 2000 meeting with Civelli

¶ 54 After signing the participation agreement, Alexander went to Zurich in the second week of June 2000, to discuss the Gambela project with Civelli.

¶ 55 As Civelli put it:

At [the June 2000] meeting Mr. Alexander and I discussed the various financing options, including private financing, institutional investment, a joint venture of oil exploration companies and/or public financing.

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¶ 56 In his interview with BCSC staff in December 2002, Civelli said that it was Alexander's idea to put the Gambela project into Pinewood so that Alexander could sell his shares:

Q So it's your understanding that Mr. Alexander introduced you to Mr. Neilson and this oil deal as part of a package for you to finance Pinewood and that, ultimately, Mr. Alexander could then sell his shares in Pinewood.

A Yes.

¶ 57 Alexander testified that it was Civelli who had first suggested that Pinewood be used as the vehicle to hold the Gambela project:

Q And what, if anything, did Mr. Civelli propose with respect to a potential way to develop Mr. Neilson's Gambela oil opportunity?

A ... somewhere along the line, he says, "Terry, why don't we take a look and maybe propose funding the same for Pinewood, this opportunity?"

¶ 58 On June 16, 2006, the last day of the evidentiary portion of the hearing, Alexander filed an affidavit of Civelli, sworn on June 1, 2006, in which Civelli recanted evidence that he had given under oath at his interview three and a half years earlier. Civelli said in the affidavit that, when he was served with the summons compelling him to appear at the BCSC for an interview, all his files on the Gambela project were in Zurich and he had not been able to review them first, to properly prepare for the interview. He said:

... Having reflected upon this matter, I believe that it was I, and not Mr. Alexander, who recommended that the Gambela oil exploration opportunity be presented to Pinewood.

¶ 59 Civelli's original evidence about who first suggested Pinewood was given at a time much closer to the actual event and was given without the benefit of having learned of the executive director's case against Alexander. Further, Civelli recanted the evidence three and a half years after he could have done so. On the other hand, Alexander (through JTA) and Civelli's clients owned Pinewood shares and, therefore, both Alexander and Civelli had good reason to want to use Pinewood as the vehicle for the Gambela project. We make no finding on who first suggested Pinewood because nothing turns on it. This late change in Civelli's evidence, however, raises concerns about his credibility.

¶ 60 Alexander testified that, once the possibility of using Pinewood was raised, he told Civelli:

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Carlo, there is no way, shape or form I can get involved with Pinewood. I'm under a ban, as you know, and I'm under restrictions. I cannot be involved as an officer or director, I cannot trade, and I own piece, I own a, an interest in Pinewood and I can't be involved. If that was your thought process and you're excited about this, and you're thinking about what happened in Arakis, then you are going to be responsible for everything that happens in Pinewood. I'm still working on my project outside of Pinewood as trying to grab a -- the interest of an international oil company to come in here and develop the Gambela oil project.

¶ 61 Alexander testified that he also told Civelli:

Anything to do with Pinewood, Carlo, if you want to present this to Pinewood, then that's your, that's what you would be doing. And I am here exclusively now only as a backup to the project. I will continue to look for a major oil company that may be interested in doing large projects such as this in Ethiopia.

¶ 62 Alexander's testimony about what he said to Civelli was corroborated in part in Civelli's interview, when Civelli said:

He [Alexander] did point out that he was -- he had this order banning him from doing whatever, and so he could not be a part of -- or did not want to be a part of any discussions or so.

...

[He told me] he was not going to raise any money.

¶ 63 Civelli made no mention of Alexander's "backup" plan.

¶ 64 We acknowledge Civelli's partial corroboration of Alexander's testimony; however, we have based our findings on Alexander's conduct relating to the Gambela project.

¶ 65 The excerpts from Alexander's testimony above contain the first mention of his purported new, more limited, role in planning a "backstop" or "backup" for the Gambela project; continuing "to look for a major oil company that may be interested in doing large projects such as this in Ethiopia". This backup plan, involving selling the project to one or more oil companies, was purported to be implemented only if Pinewood was unable to obtain the financing necessary to develop the project.

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Neilson's July 11, 2000 invoice to Pinewood

- ¶ 66 On or around July 7, 2000, within a month of Alexander's meeting with Civelli, Alexander again met with Neilson. On July 10, Neilson sent a letter addressed to Alexander at the West Esplanade premises, referring to a July 7 meeting between Neilson and Alexander. The letter also referred to:
- the requirements for the application for the PSA, including the necessity to obtain a US \$5.0 million bank guarantee,
 - the proposed exploration program and the additional funding needed for the exploration program,
 - Neilson's travel plans – 'I have booked a flight to Zurich on Friday, July 21, to sit down with Carlo Civelli on Monday, July 24...', and
 - Neilson's intention to discuss with Civelli 'the pertinent information that is now required to amend the previous Application in the name of the new applicant company, Pinewood Resources Ltd' and 'plans for the reorganization of [Pinewood] once the PSA is obtained'.

- ¶ 67 In the July 10, 2000 letter, Neilson also requested funds for his trips to Zurich and Ethiopia:

You will note that the total expenses have been estimated at US \$18,500. (\$27,468 Canadian) I would appreciate a cheque for this amount on Thursday morning ...

- ¶ 68 Neilson sent an invoice to Pinewood dated July 11, 2000:

In accordance with our discussion, please accept this invoice to cover the projected expenses for my forthcoming business trip to Zurich and Addis Ababa to apply for a petroleum production Sharing Agreement for the Gambela concession with the government of Ethiopia on behalf of Pinewood Resources Ltd. The projected expenses, which have been detailed on the attached Table 1, are summarized as follows:

Payable to "PC Travel"
Can \$3,855.94

Payable to Ian Neilson
Can \$23,686.12

Total Advance Required
Can \$27,542.06. (There is a small difference between this amount and the amount in the July 10 letter, likely due to exchange rate fluctuations.)

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- ¶ 69 On July 11, 2000, Eilers and David Alexander signed cheques for \$23,686.12 and \$3,855.94 on behalf of Pinewood and issued them to Neilson and PC Travel.
- ¶ 70 David Alexander told BCSC staff that he prepared Pinewood's cheques and that Alexander never asked him to sign any Pinewood cheques, or authorized any payments on behalf of Pinewood. He said that only Pinewood's directors or its president approved payments. David Alexander, however, could not recall who the Pinewood directors and officers were at the time of the payments made on July 11, 2000 and could not recall who had approved the invoice for payment. In July 2000, the directors of Pinewood were Brewster, Ellis and Farnworth.
- ¶ 71 There was no direct evidence that anyone approved the payments of Neilson's expenses that we discuss here and below. We saw no directors' resolutions approving or ratifying the expenses, nor was there any other evidence of approval, such as signatures or initials on invoices or written communications authorizing the payments.
- ¶ 72 Brewster told BCSC staff he first heard about the Gambela project a few days before the board meeting on September 7, 2000.
- ¶ 73 Ellis had no memory of hearing about the Gambela project before September 2000. Ellis told BCSC staff his activities at Pinewood were related solely to the technology project.
- ¶ 74 Farnworth told BCSC staff he could not recall when he had first heard about the Gambela project. He said that Alexander brought the Gambela project to the attention of the Pinewood board through Brewster. Thus, Farnworth would have learned about the project at, or shortly before, the September 7, 2000 board meeting.
- ¶ 75 Pinewood's solicitor, who was secretary, told BCSC staff he learned of the Gambela project in the fall of 2000.
- ¶ 76 Von Einsiedel returned to the board on August 30, 2000. He did not attend the September 7, 2000 board meeting and told BCSC staff he did not learn of Pinewood's decision to proceed with the Gambela project until later in September 2000.
- ¶ 77 Each of the directors told BCSC staff they had neither met nor spoken to Neilson.
- ¶ 78 Eilers told BCSC staff that she signed only those cheques sent to her by David Alexander and she assumed he had the necessary board approval before he sent

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cheques to her for signature. She said Alexander did not approve invoices for payment.

- ¶ 79 Her evidence about the approval process for Neilson's expenses is inconsistent with her letters to Neilson of November 6, 2000 and April 18, 2001. In her letter to Neilson of November 6, 2000, she said "once Terry [Alexander] gets to the office I will request approval of the wire transfer". In her April 18, 2001 letter to Neilson, she said she had spoken to Alexander "...and he has agreed, so I will be transferring US\$10,000 to the bank..." Her evidence is also inconsistent with a note that Alexander sent to Neilson on April 18, 2001, in which Alexander said: "Received your request for further funds. ... Once we receive your completed reports we will wire transfer additional \$\$."
- ¶ 80 The directors' evidence is clear that none of them knew about the project in July 2000. Therefore, they could not have approved the July 11, 2000 invoice for payment. Both David Alexander and Eilers said they did not approve invoices for payment by Pinewood (other than Eilers approving small payments for office supplies and similar items and other than Eilers' payment to Neilson on August 3, 2000, referred to below). **We find that none of the Pinewood directors approved paying the July 11, 2000 invoice and that David Alexander and Eilers did not approve payment of the invoice.**
- ¶ 81 Despite admitting he had a meeting with Neilson on or around July 7, 2000, Alexander denied receiving the July 10 letter or the July 11 invoice and claimed he was out of town from the early part of July until the Labour Day weekend (early in September), on a sailing vacation. As a result, he said, he could not have approved the payment. He said he had no communication with anyone about the Gambela project during this period.
- ¶ 82 Alexander's credit card statements, however, show that he flew from Vancouver to Las Vegas for the July 8, 2000 weekend and passed through Vancouver on his return. Despite that, Alexander continued to deny he received the letter or gave instructions to pay the July 11 invoice.
- ¶ 83 Eilers told BCSC staff that, before she went on vacation from late July 2000 to early September 2000, "I was aware that Mr. Neilson kept running in and out of the office waving pieces of paper..." We know Neilson did not meet or speak to the directors. This testimony is consistent with Alexander meeting Neilson on July 7, 2000, as Neilson outlined in his July 10 letter to Alexander.
- ¶ 84 Neilson's July 10, 2000 letter is consistent with subsequent events. In the letter, Neilson referred to:

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- a bank guarantee, which was the subject of discussions in August 2000 among Alexander, Civelli and Neilson,
- the exploration program and the need for funding, which he and Civelli discussed at their July 24, 2000 meeting, and
- the meeting with Civelli on July 24, 2000, which took place.

¶ 85 Neilson also wrote about:

- making Pinewood the applicant for the PSA, which happened, through Pinewood's subsidiary, GPC,
- the requirements for the application for the PSA, which was filed with the Ethiopian government in September 2000, and
- the need for an expense advance of \$27,542.06, which was paid on July 11, 2000.

¶ 86 Neilson's July 10, 2000 letter refers to a meeting with Alexander on July 7. Alexander admitted he met with Neilson on or about July 7.

¶ 87 The July 11, 2000 invoice refers to "our discussion". It is evident from the sequence of events that, some time between the July 10 letter to Alexander requesting an expense advance and the July 11 invoice to Pinewood, someone told Neilson to send an invoice to Pinewood. Based on the fact Neilson sent the July 10 letter to Alexander, the instructions to Neilson to send an invoice to Pinewood logically came from Alexander.

¶ 88 In light of:

- our finding that none of the Pinewood directors, David Alexander and Eilers approved the July 11, 2000 invoice for payment,
- Eilers' testimony about Alexander not approving invoices for payment being inconsistent with other evidence,
- David Alexander's testimony about only Pinewood's directors, or its president, approving all invoices for payment being contradicted by the directors' evidence that they knew nothing about the project in July 2000,
- the evidence about Alexander's whereabouts,
- Eilers' testimony about Neilson's presence in the office,
- Neilson's July 10, 2000 letter being consistent with subsequent events,
- Neilson's July 10, 2000 letter referring to a meeting with Alexander on July 7, 2000, and
- Alexander's admission in cross examination about meeting with Neilson on or about July 7, 2000,

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we do not believe Alexander's testimony that he did not:

- receive either the July 10, 2000 letter or the July 11, 2000 invoice,
- approve the July 11, 2000 invoice for payment, and
- communicate with anyone about the Gambela project during the period from early July to the Labour Day weekend.

¶ 89 **We find that Alexander:**

- **met with Neilson on July 7, 2000,**
- **received the July 10, 2000 letter from Neilson, or was aware of its contents,**
- **had a discussion with Neilson on July 10 or 11, 2000, that was the basis for Neilson's reference to "our discussion" in his July 11, 2000 invoice,**
- **received the July 11, 2000 invoice from Neilson, or was aware of its contents, and**
- **approved the July 11, 2000 invoice for payment by Pinewood.**

¶ 90 The fact the directors were unaware of the payment of the July 11, 2000 invoice is particularly significant when put in context. This was a new business opportunity for Pinewood that involved oil exploration in Africa. It was an important event for Pinewood, as it meant a potentially significant change in its business. Indeed, at the time, Pinewood's only business activity involved the Gambela project and the technology project that was abandoned in August 2000. Moreover, while the initial payments were limited to \$28,000, one could reasonably expect them to be the beginning of a series of large payments to be made by Pinewood.

Neilson's July 24, 2000 meeting with Civelli

¶ 91 At his interview in December 2002, Civelli told BCSC staff that, in July 2000, Neilson presented the opportunity to him "as if it was already done". Civelli said he assumed that the Pinewood board was already "on side" because Alexander was "pretty close to the board".

Neilson's July 28, 2000 letter to Alexander

¶ 92 On July 28, 2000, Neilson sent a letter addressed to Alexander at the West Esplanade premises, to report on his meeting with Civelli on July 24. This letter is consistent with Neilson's July 10 letter that mentioned a July 24 meeting and with Civelli's evidence that he met with Neilson in July 2000. This letter is also consistent with subsequent events. Neilson wrote that Civelli committed to providing the US \$5 million bank guarantee requested by the Ethiopian government and had said it would not be a problem for him to raise up to US \$5 million in financing for Pinewood. Neilson said Civelli did not think that he could

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raise much more than that within the next few months. Neilson also reported that “it was understood [between him and Civelli] that we might well have to bring in [joint venture] Partners to pay for as much as [80%] of the Exploration Program”. Accordingly, Neilson revised his estimate of the funding requirement for Pinewood itself to US \$6 million over two years. He wrote:

... we have plenty of time to raise money for Pinewood and find Joint Venture Partners if things do not unfold as quickly as we hope.

¶ 93 Alexander testified that he did not receive the July 28, 2000 letter because he was on vacation sailing:

Q ... Were you in the office at all during that summer?

A I don't recall. I don't think I was. I was up there [Sechelt, etc] most of the time. I may have gone up to Whistler ... that year, but that was about it.

¶ 94 Alexander's credit card statements, however, show that, on July 28, 2000, the day Neilson's July 28 letter was sent to Alexander, he was buying a computer from a West Vancouver store.

¶ 95 Notwithstanding this evidence on his whereabouts, Alexander continued to deny he had received the July 28, 2000 letter. We do not believe him and **we find that Alexander received the July 28, 2000 letter from Neilson, or was aware of its contents.**

Eilers' August 3, 2000 payment to Neilson

¶ 96 On August 3, 2000, Eilers (through Buzz) sent US \$3,000 to Neilson. In her interview, Eilers told BCSC staff that Neilson needed funds urgently and she was unable to locate anyone who could approve the payment. Accordingly, she sent the funds from Buzz, on the belief that either Alexander or Pinewood would reimburse her, depending upon whether or not the Gambela project was “assigned to Pinewood”.

¶ 97 Eilers' testimony about the uncertainty over who would reimburse Buzz is inconsistent with her evidence about the July 11, 2000 payments, which she said she assumed the directors of Pinewood had approved before she signed the cheques. At that point, therefore, she knew that Pinewood was paying Neilson's expenses and she should have expected reimbursement of the US \$3,000 from Pinewood.

Neilson's August 22, 2000 letter to Civelli

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- ¶ 98 Neilson sent a letter to Civelli dated August 22, 2000. In it, Neilson referred to a conversation he had on August 18 with Alexander, concerning the proposed wording of a bank letter relating to the US \$5 million bank guarantee:

[Alexander] told me on Friday (August 18) that you have some concerns about the wording of the proposed Bank Letter that I had attached to my letter of August 7, 2000. He said that the way I had worded the letter, the ... Bank would very likely require you assign US \$5.0 Million to the Bank in support of the Bank Letter.

- ¶ 99 Neilson amended the proposed bank letter in response to Civelli's concerns. Civelli's bank sent the amended letter to the Commercial Bank of Ethiopia on August 25, 2000.
- ¶ 100 Civelli told BCSC staff that he spoke to Alexander from time to time about the Gambela project. This is consistent with Neilson's letter of August 22, 2000.
- ¶ 101 Alexander testified that he did not speak to Neilson or Civelli about Civelli's concerns about the bank letter on August 18, 2000, or on any other day, and that he was on vacation sailing on that date.
- ¶ 102 Alexander's credit card statements, however, show that he was in Vancouver on August 18, 2000, the day that Neilson said he spoke with him. Credit card records, for the third time, contradict Alexander's testimony on his whereabouts.
- ¶ 103 We do not believe Alexander's testimony and **we find that Alexander and Civelli discussed the bank letter and, following that, Neilson and Alexander discussed the bank letter on August 18, 2000, as described in Neilson's letter of August 22, 2000 to Civelli.**
- ¶ 104 Neilson's August 22, 2000 letter to Civelli also referred to proposed travel plans for him and Alexander to fly to Zurich on September 8 to meet with Civelli before Neilson flew to Ethiopia on September 12:

The three of us could then sit down on Sunday and/or Monday to discuss the Gambela Project and the re-organization of Pinewood before I fly onto [sic] Addis to finalize the PSA.

- ¶ 105 Alexander testified that he met with Neilson twice, in July 2000 and January 2001, and that he did not go to Zurich in September 2000. His credit card statements, however, show that, on September 10, 2000, he flew Vancouver-London-Zurich. Under cross-examination, when confronted with the credit card evidence, Alexander changed his testimony and admitted that he went to Zurich

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and admitted he met with Neilson in September 2000. This is the fourth time Alexander's testimony regarding his whereabouts is inconsistent with the credit card evidence.

Neilson's September 3, 2000 letter to Alexander

¶ 106 On September 3, 2000, Neilson sent a letter addressed to Alexander at the West Esplanade premises, referring to a future meeting between him and Alexander on September 5, the day after the Labour Day weekend. The letter also set out the following:

- Ethiopian government officials were ready to present Pinewood's application for the Gambela PSA to the Council of Ministers for their approval as soon as they received the directors minutes of Pinewood authorizing the incorporation of a subsidiary, Gambela Petroleum Corporation, the appointment of Neilson as president, CEO and a director of the company, the appointment of Ernie Pratt as exploration manager, and the authorization for Neilson and Pratt to sign the PSA;
- Neilson wanted the Pinewood directors to sign a participation agreement with him to ensure that he received a royalty and a fee for introducing the Gambela project to Pinewood;
- two prospective joint venture partners had expressed interest in participating in the Gambela project; and
- Neilson wanted to meet with Alexander to obtain his comments and suggestions.

¶ 107 Alexander said that he did not receive the September 3, 2000 letter and he said that, although he was back in town by September 5, he did not meet with Neilson on that date. Alexander admitted, however, that he met with Neilson in September. The only September meeting date referred to in the evidence is the September 5 meeting that Neilson mentions in his September 3 letter.

¶ 108 Neilson's September 3, 2000 letter is consistent with subsequent events.

¶ 109 On September 6, 2000, Neilson incorporated GPC, making him and Pratt the directors and himself president, secretary and treasurer.

¶ 110 On September 7, 2000, as requested in Neilson's September 3 letter, the Pinewood board approved the incorporation of GPC, and the appointment of its directors and officers, and authorized Neilson and Pratt to sign the proposed PSA.

¶ 111 Taking into account:

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- Alexander admitted going to Zurich,
- Alexander admitted meeting with Neilson in September 2000, and
- the fact that Neilson's September 3, 2000 letter is consistent with subsequent events,

we do not believe Alexander's testimony that he did not receive the September 3, 2000 letter from Neilson and **we find that Alexander received the September 3, 2000 letter from Neilson, or was aware of its contents, and that Alexander and Neilson met to discuss it, either on September 5, 2000 or September 6, 2000.**

Pinewood directors' meeting on September 7, 2000

¶ 112 On September 7, 2000, at a directors' meeting, Brewster and Farnworth discussed the Gambela project. Eilers also attended the meeting. The board approved the incorporation of GPC as a wholly owned subsidiary of Pinewood and the appointment of Neilson and Pratt as its directors, Neilson as president and CEO, and Pratt as exploration manager. The board also authorized Neilson and Pratt to sign the proposed PSA on behalf of GPC.

¶ 113 Brewster told BCSC staff there was no formal presentation to the board about the Gambela project, and there was "very, very little" discussion by the board about the project and no discussion about either the cost of the project or how much money Pinewood would have to raise to fund it. He said "it doesn't take a person more than a minute to decide 'Let's go for it'". He said he was aware, at the time of the meeting, that Alexander was in favour of it but, nevertheless, he said he exercised his own judgment independently and decided that it looked like a good opportunity. Brewster said the board received no briefing material. There is no reference in the minutes of the board meeting to any briefing material, despite the fact the project involved a US \$5 million bank guarantee and an initial exploration budget of US \$30 million, both significant amounts for Pinewood.

Gambela project after September 7, 2000

The PSA application – September 26, 2000

¶ 114 GPC submitted its PSA application to the Ethiopian government on September 26, 2000.

Neilson's October 11, 2000 letter to Alexander

¶ 115 On October 11, 2000, Neilson sent a letter addressed to Alexander at the West Esplanade premises, referring to:

- Neilson's discussions with the Ethiopian Prime Minister's office, the Ministry of Mines and Energy, and the Environmental Department,

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- a 155 kilometre road that had to be built into the exploration area to provide an access route for the seismic crew, and
- Neilson's request that US \$5,000 be transferred to pay his hotel bill.

¶ 116 Eilers responded to Neilson's letter on the same date, and indicated that she would transfer the funds "once I have the approval of the board".

¶ 117 On the same date, Eilers wrote again to Neilson that she "sent the wire request to David [Alexander] this morning and he processed the transfer so you should see the US \$5,000 Thurs, or more likely, Friday". Eilers also indicated that a note from Alexander was attached.

¶ 118 Alexander's note to Neilson included the following:

... I have read your last fax and it seems to me that a few other ministries have shown an interest in our conceived project.

It may help to get on the good side of the military by soliciting help from them to clear your 155 mile [*sic*] path to our proposed seismic camp. This, of course, would be done under contract. As we go further with the project we are going to have to make friends with these guys anyway. Perhaps just a meeting with the right guys to show respect for them could do us good, and who knows we may seriously need their help one day! They will certainly not come to you. It's worth a thought and discussion just to let them know the plan. Go to the top via an introduction from the Prime Minister after the signing. This would be your next call. Perhaps they can help, perhaps they can't. Either way we win by offering our hand in friendship. Seek out the right guys and get them on our side.

...All the best my friend, great work! Money is being sent to bail you out of the 'poor house'.

¶ 119 Alexander testified that he did not receive Neilson's letter of October 11, 2000. During cross-examination, he testified that he "didn't recall ever seeing that letter". Then, still under cross-examination, he testified that the information he included in his note of October 11 to Neilson "could have been [from] a phone call" with Neilson. In his response to Neilson's October 11 letter, Alexander wrote, "I have read your last fax", he referred to the other ministries Neilson had discussions with, he gave Neilson advice about the 155 kilometre road Neilson spoke of and he referred to the money Neilson requested, all matters that Neilson wrote about in his October 11, 2000 letter. The evidence contradicts Alexander's

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testimony. We do not believe Alexander and **we find that Alexander received the October 11, 2000 letter from Neilson.**

- ¶ 120 Eilers told BCSC staff that Neilson had consistently sent correspondence addressed to Alexander at the West Esplanade premises, even though he had been told not to do so:

I did on occasion tell Mr. Neilson that he should not be writing to Terry since Terry was not involved in the company. Terry was Terry, Pinewood was Pinewood, and to keep the two separate. Mr. Neilson never seemed to gather that.

- ¶ 121 Regardless of what Eilers said she told Neilson, the evidence shows that Neilson sent almost all his correspondence about the Gambela project to Alexander.

Neilson's October 18, 2000 letter to Alexander and Civelli

- ¶ 122 On October 18, 2000, Neilson sent a letter addressed jointly to Alexander at the West Esplanade premises and to Civelli at his business address, entitled "Financing of Pinewood Resources Ltd for Gambela Oil Exploration Project". It included the following:

It is now time to start thinking about the financing of Pinewood Resources.

...

... [Pratt does not] want to go to Vienna or Khartoum [to talk with prospective partners in the project] unless [he feels] that [he has] a 'real' company behind [him]. ...

To make a long story short, [Pratt's] idea of a 'real' company is a company with a minimum of US \$3.0 Million in the bank ... ideally US \$5.0 Million.

I am the first to appreciate that it is a chicken and egg situation. There would be no problem raising [the money] if we have signed agreements with [the prospective partners] ...

... We are both shooting for a January 15 start-up date.

But as [Pratt] points out, we can't really do anything unless we have a minimum of US \$3.0 Million in the bank.

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So I would appreciate your both giving some thought to the timing of putting some money into the Company. Whether we run seismic this season or not, there are going to be some sizable cash outlays required between now and the 1st of January, e.g., our first year's Land Rentals (US \$61,460.) are due 30 days after signing [of the PSA], the first year's Training Program payment (US \$60,000.) is due January 1 ...

... please give some thought to the financing of the Company, and let me know what you have in mind.

¶ 123 Alexander responded to Neilson's October 18, 2000 letter on the same date:

If you didn't already know I will remind you again. Carlo [Civelli] and myself raised all [Alexander's emphasis] the equity funds for Arakis, close to US \$150 million.

Please don't embarrass me by cc.ing a 'copy of doubt' to my partner in Switzerland. I don't tell you where to drill your exploration holes, please let us do our [Alexander's emphasis] job. We don't have a chicken yet, so how can you have an egg, let alone cook it!!

We trust you to do your job as professionals, please let us do ours as promoters. If you want a 'real' company you will find that Pinewood is a real company with real, influential people behind it, just as Arakis once was. Yes, everybody is at risk here, but if you want a riskless deal go drill development wells in the 'Foothills'. Yes, it will take some time to raise the entire capital we will need to accomplish our immediate goals, but it will be raised.

I'm sorry you guys lost face in Khartoum on your last deal, but today is here and we, as a team, will pick ourselves up and dust off our britches. Never give up, never surrender.

¶ 124 Alexander testified that, once Pinewood got involved, he ceased to look for financing for the project, other than as part of a backup plan in case Pinewood dropped out. Alexander's evidence is contradicted by Neilson's letter of October 18, 2000, and Alexander's response to it. There is no reference in Civelli's, Neilson's or Brewster's evidence to Alexander's backup plan. Civelli's evidence was that, at their June 2000 meeting, he and Alexander discussed various financing options for Pinewood and that Alexander told him he would not raise any money.

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¶ 125 Alexander produced no evidence that, in our view, corroborates his testimony that he was working on some kind of backup plan.

¶ 126 In Alexander's October 18, 2000 letter to Neilson, Alexander acknowledged that he and his "partner" Civelli were responsible for financing the Gambela project. We do not believe Alexander's testimony about the backup plan for the Gambela project and **we find that, in Alexander's October 18, 2000 letter to Neilson, Alexander acknowledged that he and Civelli were responsible for financing the Gambela project for Pinewood.**

Neilson's November 5, 2000 request for funds

¶ 127 On November 5, 2000, Neilson sent a letter addressed to Alexander at the West Esplanade premises, requesting US \$7,000 to cover past and future hotel bills. Eilers responded to Neilson on November 6, 2000:

Received your faxes from this weekend. Once Terry [Alexander] gets to the office I will request approval on the wire transfer.

¶ 128 On the same day, Eilers faxed Neilson confirming that the requested US \$7,000 had been wired to him.

¶ 129 Alexander testified that he had never seen the November 5, 2000 letter and that he never approved Neilson's invoices for payment by Pinewood. All he did was give advice to Eilers that amounts were reasonable. He said his experience in Africa enabled him to examine Neilson's Ethiopian costs for reasonableness. The costs Alexander was asked by Neilson and Eilers to approve were typically travel costs, and, in this case, hotel bills. They were not costs associated with some specialized African oil exploration activity requiring special expertise to assess.

¶ 130 Eilers' statement in her fax of November 6, 2000 that she would seek approval for the transfer once Alexander returned to the office has a ring of truth to it.

¶ 131 We do not believe Alexander and **we find that Alexander received the November 5, 2000 letter from Neilson, or was aware of its contents, and that Alexander approved the US \$7,000 payment to Neilson.**

PSA updates before November 8, 2000

¶ 132 On October 11 and 18, 2000, and November 5, 2000, Neilson sent letters addressed to Alexander at the West Esplanade premises that, among other things, discussed the status of the PSA. We have found that Alexander either received these letters or was aware of their contents. On October 31, 2000 and November 1, 2000, Neilson sent additional letters addressed to Alexander at the

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West Esplanade premises that included discussions about the status of the PSA. Alexander denied receiving these letters.

- ¶ 133 The October 31, 2000 and November 1, 2000 letters provided PSA updates, as did the letters sent by Neilson on October 11 and 18, 2000 and November 5, 2000, and are consistent with Neilson keeping Alexander up to date on all matters relating to the Gambela project, including expenditures, the organizational structure, the exploration program, contracts, budgets and relationships with the Ethiopian government. **We find that Neilson sent the October 31, 2000 and November 1, 2000 letters to Alexander and that Alexander received them, or was aware of their contents.**

November 8, 2000 Pinewood directors' resolution

- ¶ 134 Effective November 8, 2000, the directors of Pinewood passed a resolution authorizing Neilson alone to sign the PSA on behalf of GPC. The directors reviewed the draft PSA and asked Pinewood's solicitor questions about it. None of them spoke to Neilson about it. There was no evidence that the directors and officers of Pinewood had any other involvement in securing the PSA.

Neilson's November 14, 2000 letter to Alexander

- ¶ 135 On November 14, 2000, Neilson sent a letter addressed to Alexander at the West Esplanade premises, enclosing a proposed budget for the Gambela seismic program and a PSA update. He said that he had "been proceeding with the Project under the assumption that the PSA will be signed this week, and that the funding will be available shortly thereafter to facilitate the ordering of all of the camp facilities [etc]". He also asked Alexander to provide "...any comments you might have on the attached budget".

- ¶ 136 In the letter, Neilson informed Alexander of R Co's interest in the Gambela project and that he told R Co they could participate in the Gambela project, taking a 25% interest.

- ¶ 137 Alexander admitted he received the letter.

Neilson's November 17, 2000 letter to Pratt

- ¶ 138 In a letter from Neilson to Pratt dated November 17, 2000, Neilson referred to a conversation he had with Alexander about the November 14 letter Neilson wrote to Alexander:

I had a long telephone conversation with Terry Alexander last night. As you know I sent him my Budget a couple of days ago...

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‘Terry, what you have to decide, is whether you want to run seismic this winter, or are happy to wait for a year. At this juncture, because we are running so late, I personally don’t care. It’s your call. ...’

‘Ian, Christmas is already here. There is just no way we can put that kind of money together before Christmas. So I think we should just plan on running the seismic next year. It will give us all sorts of time to raise all the money we need. We might be able to raise the whole US \$30 million.’

¶ 139 During cross examination, Alexander denied he had provided his advice in those exact words:

Q Yeah. And then in quotes is your response, the next paragraph, "Ian, Christmas is already here, there is just no way that we can put [together] that kind of money before Christmas, so I think we should just plan on running the seismic next year. It will give us all sorts of (read in) whole U.S. \$30 million." That was your response, wasn't it?

A This is a letter to Ernie Pratt from Ian Neilson, I don't have anything to do with this letter.

Q That wasn't my question, sir. My question is, I just read to you a purported quote of yours, Mr. Neilson is saying you said this. I'm saying to you -- you did say this?

A Well, I didn't.

Q So you admitted you got the budget, you admit there was a phone call, you admit you talked about seismic, but this last part, that's false, is that what you're saying?

...

A Yes.

¶ 140 Alexander admitted to the phone call referred to in the November 17, 2000 letter from Neilson to Pratt. He admitted talking to Neilson about the budget and about the seismic work. He denied talking to Neilson about financing. The day after Neilson and Alexander spoke on the telephone, Neilson sent the letter to Pratt, telling him about the phone conversation. Alexander’s testimony that Neilson correctly advised Pratt about everything except the financing does not make sense. We do not believe Alexander and **we find that Neilson and Alexander discussed all the matters outlined in the November 17, 2000 letter from Neilson to Pratt, including financing.**

Neilson’s December 1, 2000 letter to Alexander

¶ 141 On December 1, 2000, Neilson sent a letter addressed to Alexander at the West Esplanade premises, in which he wrote:

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... Terry [Alexander], I hope that you are aware that the first years [sic] land rentals of US \$61,420 are due and payable 30 days following the execution of the PSA, and the first years Training Contribution of US \$60,000 is due and payable on January 1. ...

...

I have recently fine-tuned the draft Farmout and Conveyancing [sic] Agreement that [VP] prepared back in September for [potential participants]. I have attached it hereto for your review and comment.

¶ 142 Alexander denied receiving this letter.

¶ 143 The contents of the letter are consistent with other evidence of Alexander's involvement in the project. Neilson did not speak to any of the Pinewood directors. His letters of July 10 and 28, 2000, October 18, 2000, November 14, 2000, and December 1, 2000 show that he expected Alexander to obtain financing for the Gambela project for Pinewood. As his letter to Alexander of November 14 shows, he looked to Alexander for advice on the budget for the seismic program. He expected Alexander to approve his expenses and we have found that Alexander did approve his expenses. In this letter, he reminded Alexander about the upcoming land rental payments and training contributions. He also sought comments on a draft Farmout and Conveyance agreement. We do not believe Alexander and **we find that Alexander received Neilson's letter of December 1, 2000, or was aware of its contents.**

Appointment of Eilers, David Alexander and Pinewood's solicitor to the GPC board

¶ 144 On December 5, 2000, Eilers, David Alexander and Pinewood's solicitor were appointed as additional directors of GPC. In his interview, Pinewood's solicitor told BCSC staff he had recommended to Brewster that Pinewood increase its control over the GPC board "so that they would know exactly what was happening with Gambela and what Ian Neilson was doing".

Neilson's January 15, 2001 letter to Alexander

¶ 145 Notwithstanding the new GPC board appointments in December 2000, Neilson continued to write to Alexander. On January 15, 2001, he sent a letter addressed to Alexander at the West Esplanade premises, about the Gambela project "for your presentation to your prospective investor". Neilson, as president and CEO of GPC, signed the eight-page letter. The letter stated (on page 7):

We are now contemplating the funding of the US \$30 million Exploration Program. We are in a position to either fund the Project entirely in

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Pinewood and retain a 100% interest in the Concession and/or take on one or two partners to reduce our capital outlay. In the event we take on a partner, we are contemplating a joint venture pursuant to which the partner will participate on the basis of paying 60.0 percent of the cost of the proposed US \$30 Million Exploration Program in return for a 48.0 percent Participating Interest in the Concession. ... Thus, at this juncture we are considering the possibility of taking on one partner in addition to [S] that would pay 50.0 percent of the cost of the proposed US \$30.0 Million Exploration Program in return for a 40.0 percent interest in the Concession.

- ¶ 146 Alexander testified that he telephoned Neilson to say that the letter did not accurately reflect his role and he asked Neilson to change it. Neilson replaced the word “investor” on page 1 with “participant” and made other consequential changes. **We find there was no significance in changing “investor” to “participant” and that the letter was still to be used by Alexander to solicit financing for the Gambela project, for Pinewood.**

Pinewood’s January 26, 2001 press release

- ¶ 147 On January 21, 2001, Neilson sent a letter addressed to Alexander at the West Esplanade premises, saying:

Now Anne [Eilers] told me on Thursday that you would like me to draft a news release that the Vancouver office could put out on the wire service covering the signing of the PSA... Accordingly, I have put something together that I think is appropriate without being too promotional. Not knowing how long a news release you wanted, I have purposely made it a little on the long side so that you can cut back as you see fit.

- ¶ 148 Alexander testified that he did not tell Neilson to prepare a press release, nor did he instruct Eilers to do so. He said he did not receive this letter and, in any event, it was not his role to prepare news releases, that was Brewster’s job. Brewster told BCSC staff that Eilers and Pinewood’s solicitor drafted the release, based on the information received from Neilson, and he [Brewster] reviewed it, but primarily for excessive “hype”. He said he did not review or verify the technical information it contained or discuss the contents of the press release with Neilson. Brewster said he relied on Neilson’s expertise, but admitted he had neither met Neilson nor spoken to him. On January 26, 2001, the press release went out under Brewster’s name, on behalf of the board of Pinewood.
- ¶ 149 Neilson prepared the initial draft of the press release. He was the person most qualified to do so. It is improbable that Neilson would have prepared the draft press release on his own initiative. Brewster said he did not instruct Neilson to

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prepare the draft press release. That said, we have no corroborating evidence that Alexander instructed Neilson to prepare the press release. We do not, therefore, make a finding that Alexander instructed Neilson to draft the press release.

PSA updates after November 8, 2000

¶ 150 Following the directors' resolution of November 8, 2000, Neilson provided Alexander with further updates on the PSA on November 14, 2000 and December 1, 2000. Alexander admitted receiving the November 14 letter and we found that he either received the December 1 letter, or was aware of its contents. On November 24, 2000, December 6 and 9, 2000, and January 21, 2001, Neilson sent additional letters addressed to Alexander at the West Esplanade address, containing PSA updates. Alexander denied receiving these letters. The November 24, 2000, December 6 and 9, 2000, and January 21, 2001 letters provided PSA updates, as did all the letters referred to under the heading *PSA updates before November 8, 2000*, and as did the November 14, 2000 and December 1, 2000 letters referred to above. They are also consistent with Neilson keeping Alexander up to date on all matters relating to its Gambela project, including expenditures, the organizational structure, the exploration program, contracts, budgets and relationships with the Ethiopian government. **We find that Neilson sent the November 24, 2000, December 6 and 9, 2000, and January 21, 2001 letters to Alexander and that Alexander received them, or was aware of their contents.**

¶ 151 On or around January 24, 2001, the Ethiopian government signed the PSA.

Neilson's January 29, 2001 letter to Alexander

¶ 152 Neilson sent a letter addressed to Alexander at the West Esplanade premises on January 29, 2001, about potential oil reserves in a portion of the area covered by the Gambela PSA. Alexander testified that he received the letter.

Neilson's January 31, 2001 letter to Alexander

¶ 153 Neilson sent a letter addressed to Alexander at the West Esplanade premises on January 31, 2001, about the funding requirements for a winter work program. He said a total of US \$1,200,000 would be required "to see us through June 30". In the letter, Neilson stated he hoped that R Co would commit to a 25% participation in the exploration program and write a cheque for US \$787,500 within two weeks. He mentioned other less certain possibilities for funding, then said:

I am very interested in any comments you [Alexander] might have ... especially your thoughts on the timing of raising any money at your end.

¶ 154 Alexander admitted that he received the January 31, 2001 letter and that he provided Neilson with "input" about the budget, using his experience from Sudan. He testified that he had asked for the letter because it was useful for his backup

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database. He testified that he was getting ready to visit two potential participants in the Gambela project in Houston, Texas, in case Pinewood had to drop out. He testified that it remained Civelli's role to find money for Pinewood itself, and his role continued to be limited to a backup plan. Alexander would have us believe that, within days of signing the PSA, he was working on a backup plan. We do not believe Alexander and **we find that a plain reading of Neilson's letter contradicts Alexander's testimony that he was working only on a backup plan.**

Pinewood's February 2, 2001 press release

- ¶ 155 On February 2, 2001, Pinewood issued a press release about the PSA, elaborating on the January 26, 2001 press release. Brewster said Eilers drafted the release and Pinewood's solicitor reviewed it. Brewster also said he did not talk to either Neilson or Pratt about the release.

Civelli's February 5, 2001 email to Eilers

- ¶ 156 On February 5, 2001, Civelli sent an email to Eilers, providing details of "two more people for [Alexander] to contact regarding the oil deal". The two parties were both US oil companies that Alexander testified he did not contact. Alexander argues that this email corroborates his testimony about his backup plan. We do not see how Civelli's email corroborates Alexander's testimony about the backup plan. Civelli never mentioned the existence of a backup plan in his interview, this email, or any other correspondence. This email simply provided Alexander with two more names to contact about financing the Gambela project for Pinewood. **We find that Civelli's email does not corroborate Alexander's testimony that he was working only on a backup plan.**

Alexander's February 6, 2001 meetings in Texas

- ¶ 157 Alexander testified that entries in his day-timer for February 6, 2001 referred to the international exploration director and the chairman of two major oil companies he was planning to meet, to discuss the Gambela project. He said:

Q And so was this part and parcel of your separate role from Mr. Civelli to develop a plan and backup in the event Pinewood failed to implement?

A Yes. I had developed that database, which I had just received the last little pieces to and as soon as I had that in hand I went and visited both [of them] over a period of three days in Houston.

- ¶ 158 He testified he took with him a "volume" of material for each company. On further questioning from the panel, Alexander said:

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- Q Then in January of 2001 there was the signing of the PSA agreement with Gambela and the Ethiopian government; right.
- A Yes, there was.
- Q And at that point in time or soon thereafter that basically I understand that you arranged the meeting in Houston with [A and B]?
- A Yes, I did.
- Q And when you went down there to meet with them, for my benefit I'm not fully familiar with the oil industry, what exactly were you looking for from them?
- A **I was looking for anything.** [our emphasis] I had sort of highlighted both those companies as major corporations that had operations in Africa, that would need a project of this size to be able to interest them in committing to a wild cat [*sic*] exploration program six, eight months down the road. It was really an introduction project, so I presented the data to both corporates [*sic*] and both their technical directors, and that's what I did.
- Q So when you went into their respective offices, who were you representing?
- A Myself and Mr. Neilson.

¶ 159 Alexander testified that he met with two “major” oil companies over three days to discuss the Gambela project. Alexander said he was representing only the interests of himself and Neilson at these meetings. Alexander also admitted that he was “looking for anything”.

¶ 160 When he met with the oil companies, GPC was the holder of the PSA, and was a wholly owned subsidiary of Pinewood. Neilson was a director of GPC and its CEO. The only marketable interest Alexander had in the Gambela project was his shareholding in Pinewood. Alexander arranged and participated in the meetings without the approval of the Pinewood board. He disregarded Brewster’s request to bring any interested parties directly to the board. We do not believe Alexander was working on a back up plan or that he was only representing Neilson and himself. **We find that, at the meetings in Texas, Alexander was soliciting investors for Pinewood.**

Neilson’s February 6, 2001 letter to Alexander

¶ 161 On February 6, 2001, Neilson sent a letter addressed to Alexander and Civelli at their respective business addresses, saying that R Co would propose a US \$15 million private placement in Pinewood, rather than a joint venture partnership as they had all expected. This would provide sufficient funds to get the exploration program started. Eilers sent a copy of this letter to the Pinewood board.

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Neilson's February 16, 2001 letter to Pinewood

- ¶ 162 On February 16, 2001, Neilson sent a letter addressed to the Pinewood board, reminding them the PSA would be terminated if the US \$127,460 owing to the Ethiopian government was not paid by February 23, 2001.

US \$140,000 financing in February and April 2001

- ¶ 163 On February 22, 2001, Civelli arranged for a loan of US \$130,000 from a client to cover GPC's required payments to the Ethiopian government. On April 9, 2001, Civelli arranged for the client to make an additional US \$10,000 loan to fund Neilson's hotel expenses.

- ¶ 164 Brewster told BCSC staff that he had no knowledge of the US \$140,000 loan until after it was made:

Q Okay. Tell me, Mr. Brewster, who negotiated this loan on behalf of Pinewood?

A This was never done. This loan happened without my knowledge. The money flowed without my knowledge and I'm saddled with it after the fact.

- ¶ 165 Alexander said that he was not involved with the loan. Civelli told BCSC staff that he did not discuss the US \$140,000 loan with Alexander. Civelli said the additional US \$10,000 was sent at the request of Neilson.

- ¶ 166 On April 18, 2001, Eilers faxed Neilson a note "From Anne for Terry", purportedly from Alexander:

Ian,

Received your request for further funds. Please provide back-up expense reports for the outstanding amount from your last expense report, plus back-up [*sic*] for the US\$130,000. and US\$10,000. forwarded to you by Carlo [Civelli] as per my request.

Once we receive your completed reports we will wire transfer additional \$\$.

Regards,

Terry

- ¶ 167 **We find that a plain reading of this note shows that Alexander directed Civelli to forward a total of US \$140,000 to cover the US \$130,000 and US**

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\$10,000 payments referred to above and, in doing so, approved those payments, including Neilson's expenses of US \$10,000.

¶ 168 Eilers, when questioned in her interview with BCSC staff about whether she sent the note to Neilson for Alexander, said:

Q ...did you send this fax to Ian Neilson in April of 2001?

A I believe I did

Q ...why is Terry sending this fax to Mr. Neilson?

A I don't know

Q Did you ever ask him?

A No

Q Is there any particular reason why you wouldn't [ask him]...?

A ... I mean, I get asked to do something, I do it.

¶ 169 Alexander said that he had not authorized Eilers to send this note. He said that Eilers was having "trouble" with Neilson and she might have used his name to give her request more authority. Eilers' testimony contradicts Alexander's and she had no reason to misstate the facts. We do not believe Alexander and **we find that Alexander authorized sending the April 18, 2001 note to Neilson.**

¶ 170 Neilson consistently looked to Alexander, not Civelli, for everything about the Gambela project; including payment of his expenses, the organizational structure, the exploration program, contracts, budgets, and relationships with the Ethiopian government.

¶ 171 Civelli would not have provided the funds without authority from either Alexander or someone in authority at Pinewood. We know that the directors were unaware of the loan and there is no suggestion in the evidence that Eilers or David Alexander might have approved borrowing the money.

¶ 172 It makes no sense that Alexander would allow the PSA to lapse just 30 days after it was signed because of non-payment of the required amounts owing to the Ethiopian government. We would also have expected that Alexander would warn his "partner" Civelli if he intended to abandon the project. Moreover, Alexander's subsequent actions in dealing with R Co on the sale of JTA's Pinewood shares and his attempts to revive the project by his letter to Civelli (see heading *Alexander's May 24, 2001 letter to Civelli*) and his three letters to the Ethiopian government (see headings *Alexander's May 17, 2001 letter to the Ethiopian Government* and *Alexander's May 25 and June 7, 2001 letters to the Ethiopian Government*) are all inconsistent with someone who was prepared to allow the PSA to lapse in February 2001.

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¶ 173 In light of all this, together with our finding that the April 18, 2001 note from “Anne for Terry” shows that Alexander instructed Civelli to send the US \$140,000 to Neilson, we do not believe Alexander’s testimony that he was not involved with the loan and **we find that Alexander was involved in managing the US \$140,000 financing for the Gambela project for Pinewood.**

February 26, 2001 independent geologist’s report

¶ 174 On February 26, 2001, an independent professional geologist issued a three page report, addressed to the Pinewood board, on the hydrocarbon potential in the area of the Gambela project. There was no evidence as to who commissioned the report and why. Brewster told BCSC staff that he read the report.

R Co’s March 13, 2001 proposal

¶ 175 By letter dated March 13, 2001 addressed to Alexander and Civelli, R Co proposed:

- to, within 14 days, enter into a subscription agreement to purchase 10,000,000 Pinewood common shares in a private placement at US \$1.50 per share; and
- simultaneously, to purchase the shares of Pinewood held by JTA, at the same price.

¶ 176 Negotiations with Alexander for the sale of JTA’s Pinewood shares continued after this date, and the final draft of the share purchase and sale agreement between JTA and R Co contained a condition precedent as follows:

the Seller [JTA] shall have obtained the approval of the British Columbia Securities Commission to the transfer of the [Pinewood shares] to [R Co] pursuant to [this agreement].

¶ 177 The sale was to close (and the condition precedent to be fulfilled) by the date of the completion of the private placement in Pinewood. As it turned out, R Co did not complete the private placement with Pinewood and did not purchase JTA’s Pinewood shares.

Neilson’s April 9, 2001 letter to Pinewood

¶ 178 On April 9, 2001, Neilson sent a letter to Pinewood asking for funds for his hotel expenses of US \$10,000. On or about April 10, 2001, he followed up with a note to Alexander, indicating that he had just received US \$10,000 from Civelli and that he needed additional funds by the middle of the following week. Alexander denied receiving this note from Neilson.

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¶ 179 Eilers responded to Neilson on April 18 saying, “I have spoken to Terry [Alexander] and he has agreed, so I will be transferring US \$10,000 to the bank as before”. According to an April 25, 2001 note from Eilers to Neilson, Eilers transferred US \$10,000 to Neilson on April 19, 2001.

¶ 180 Alexander testified that Eilers brought Neilson’s expenses to him and asked whether the costs were in line. He said he did not view his comments as “approval”. Alexander also said that Eilers never asked for his approval of invoices, but occasionally asked for his advice on whether Neilson’s budgets and billings were in line, based on his experience in Sudan.

¶ 181 We have already found that Alexander approved payments to Neilson on July 11, 2000 and November 6, 2000. This payment, like the others, involved hotel costs, not complex expenditures requiring special expertise. Once again, there was no evidence the Pinewood directors were involved. Finally, Eilers told Neilson she had spoken to Alexander and “...he has agreed, so I will be transferring US \$10,000 to the bank...”. We do not believe Alexander’s testimony and **we find that Alexander received the April 10, 2000 note from Neilson, or was aware of its contents, and approved the April 19, 2001 US \$10,000 payment to Neilson.**

Brewster’s April 11, 2001 email to Eilers and Civelli

¶ 182 On April 11, 2001 Brewster emailed Eilers and Civelli, asking them to instruct Neilson to draft a budget, which was needed to address regulatory requirements.

Brewster’s April 18, 2001 email to David Alexander

¶ 183 On April 18, 2001 Brewster emailed David Alexander:

I understand you are working on the Gambela + Pinewood budget. I would appreciate you forwarding me a copy so I can review it. Also I understand you are working possibly from budgets put together by Ian. Any chance you could fax that to me??

¶ 184 There was no evidence that the directors of Pinewood were involved in budgets for the Gambela project before April 11, 2001.

Neilson’s May 8, 2001 letter to the Pinewood board

¶ 185 On May 8, 2001, Neilson sent a letter addressed to the Pinewood board, advising them that R Co had not provided the US \$5 million bank guarantee and that, after various extensions, the PSA deadline for provision of the bank guarantee would expire at the end of the day. He said he did not think he could get a further extension from the Ethiopian government unless someone were to appear in the next few days with the money in their hands.

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¶ 186 On the same day, Eilers responded to Neilson's letter:

... I will forward to Terry [Alexander], have you sent to Carlo [Civelli]?

...

The bottom line here is that we want the deal. However to scratch together financing at this late date we will need at least a full and clear month and a half. That would be a month and a half from the time we are notified to go ahead and try (i.e. we get an extension) we cannot go to financiers and say we think we might still have the deal how about putting up some \$\$\$. We have to have a firm commitment to go on, and then go the [*sic*] financiers.

Ian, if you want to continue, between you and me, your best method is to speak to Carlo immediately!! Then speak to Terry once Carlo has had time to talk to him first.

¶ 187 Noteworthy is that, upon receipt of the letter from Neilson, Eilers passed it along to Alexander and told Neilson to seek instructions from Alexander and Civelli, not the Pinewood board. There was no evidence that the letter was given to the Pinewood board or that the board made any attempt to revive the Gambela project.

Neilson's May 10, 2001 letter to the Pinewood board

¶ 188 On May 10, 2001, Neilson sent a letter to the Pinewood board, confirming that R Co did not provide the bank guarantee by the deadline and the PSA was lost.

Alexander's May 17, 2001 letter to the Ethiopian government

¶ 189 On May 17, 2001, after the PSA was lost, Alexander sent a letter on Arakis Capital Corporation letterhead to the Prime Minister of Ethiopia. The letter was signed "J. Terry Alexander, President, Arakis Capital Group, Major Shareholder, Pinewood Resources Ltd".

¶ 190 In this letter, Alexander repeatedly referred to Pinewood and GPC in possessive language. He stated that he wanted another chance at financing the Gambela project and that he could undertake "a serious international financing":

I am writing to express my deepest regret that **our** emissary, Mr. Ian Neilson has failed in his attempts to procure funding to proceed with oil exploration in the concession block located in the Gambella area of Ethiopia. This has been a major financial disaster for **our** Canadian company, Pinewood Resources Ltd., the mother company of Gambela Petroleum Corp ...

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We all believed that Mr. Neilson could accomplish this difficult task. I think he tried his best.

...

Its [*sic*] not the hundreds of thousands of dollars that **our** company invested in gaining the concession... it's the way it came to its end. It was totally out of your or my control. Don't be disappointed! A project of such magnitude needs a lion to drive it through to completion. It needs courage, patience, will and determination to be successful. This involves intertwining the complicated aspects of international financial markets, state of the art energy exploration, experienced management and varied corporate and political groups all working together, and managed by one ... Lion. [Alexander agreed during cross examination that he was the "Lion".]

Others will always take credit for Sudan's oil development, and ever since Talisman Energy bought out our company for US 800,000,000.00 they have done a great job... but in the beginning the Lion drove this with the support of Sudan's Government. There was no oil company large or small in the world that would fight through Sudan's political, economic, religious and social problems (whether perceived or real) yet the Arakis Team got the job done.

I would like to have another shot at putting this exploration project back together. I did not design the Production Sharing Agreement that was signed by your government and **our** subsidiary company. **We** can put this project back on track but it needs the Production Sharing Agreement to be revised and modified to accomplish a serious international financing. ...

...

... **We** need to pull this deal back together for the benefit of the Ethiopian people and on terms that a small North American oil company like **ours** can internationally finance, and with the time allotted to make it happen. **We** have the talent; our Arakis Team is assembled and ready and has the will to succeed. **We** now need the tools to garden the financial markets of Europe to secure the funds required to accomplish Ethiopia's goals of finding a new source of revenue.

[our emphasis]

¶ 191 Alexander said that he used possessive language to refer to Pinewood because he was a major shareholder of Pinewood, or to refer to his arrangement with Civelli in planning another backup. He also said, however, that he was writing only on

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behalf of Arakis Capital. Arakis Capital did not exist, but he said he would have incorporated it in Switzerland, if it proved necessary.

- ¶ 192 There is nothing in the letter that suggests any person other than Pinewood would revive the project. The statement: “We need to pull this deal back together for the benefit of the Ethiopian people and on terms that a small North American oil company like ours can internationally finance” must be referring to Pinewood as the small North American company. He can’t be referring to a Swiss company (Arakis Capital) that did not exist. We do not believe Alexander’s testimony and **we find that Alexander wrote to the Ethiopian government on behalf of Pinewood.**

Alexander’s May 24, 2001 letter to Civelli

- ¶ 193 On May 24, 2001, Alexander sent a letter to Civelli instructing him to enter into new negotiations for a PSA on behalf of GPC, telling him that he [Alexander] was “...working on a group for \$2.5 million...”:

There is nobody lining up to take this deal which brings me to the question ‘WHAT ARE WE DOING??’

Getting over that, send the guy [with the Ethiopian government] a fax telling him the only reason that the financing fell through was because of the student riots in Addis and peoples [*sic*] fear of the potential banking problem of this country. You may suggest to him that the deal could be reset and here are some suggestions:

- a) Gambela will spend a minimum of US\$5,000,000 on a rough seismic program over the next five (5) years.
- b) Gambela will spend a total of \$30,000,000 drilling exploration wells on identified seismic targets over the next ten (10) years. Gambela will have a choice to what and when to spend the \$30 million.
- c) Funds to be expended will be kept at all times under the control of the Board of Directors of Gambela Petroleum Corp.

Does this sound reasonable? We haven’t changed the deal much and the PSA basically remains the same. **I am working on a group for \$2.5 million** [our emphasis] and as I understand it you can raise the other \$2.5 million. That’s \$5 million to start and that should last us at least 2 years if we spend it wisely. The next round would be for drilling if needed.

Reintroduce yourself as the Swiss gnome that you are ... and reaffirm our willingness to give this deal another go ...

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Alexander's May 25, 2001 and June 7, 2001 letters to the Ethiopian government

¶ 194 On May 25, 2001 and June 7, 2001, Alexander sent a second and a third letter to the Ethiopian government on Arakis Capital Corporation letterhead. He addressed the letters to the Head, Petroleum Operations Dept., Ministry of Mines and Energy, with copies sent to the President, the Prime Minister and the Minister of Mines and Energy of Ethiopia. Again, the letters referred to international financings and Alexander's ability and willingness to obtain financing for the Gambela project. The May 25 letter included a statement that **"...I have a following looking to invest in our next oil deal..."**. [our emphasis]

¶ 195 Alexander said that he and Civelli intended to revive the PSA through a newly created Arakis Capital that would purchase GPC. There is no corroborating evidence from Civelli about this plan, and not a hint of it in the documentary evidence. We found that, on May 17, 2001, Alexander wrote to the Ethiopian government on behalf of Pinewood. These letters deal with the same issue – revival of the Gambela project. We do not believe Alexander and **we find that, when Alexander wrote the Ethiopian government on May 17, May 25 and June 7, 2001, Alexander wanted to revive the PSA through Pinewood and raise new financing for Pinewood.**

¶ 196 Again, there was no evidence that the directors of Pinewood or GPC knew about the Ethiopian letters and no evidence that they authorized them.

Neilson's May 31, 2001 invoice

¶ 197 On May 31, 2001, Neilson sent an expense invoice addressed to Pinewood, to the attention of David Alexander, mentioning, among other things, two payments of US \$5,000 each received from Pinewood on January 19, 2001 and February 5, 2001.

Neilson's October 31, 2001 letter to the Pinewood board

¶ 198 On October 31, 2001, Neilson sent a letter to the Pinewood board saying, among other things, that:

- Alexander made it clear to Neilson from the outset that Neilson was to take "instruction" only from Alexander or his "secretary" [Eilers], and
- he [Neilson], not Alexander, arranged the US \$140,000 financing.

¶ 199 Neilson sent the letter after he launched a US \$100 million civil suit against Alexander, Civelli and Clarion in June 2001. The letter may have been written to support the lawsuit. In our view, the letter is unreliable and we have not used it.

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Other evidence about Alexander's and others' involvement in Pinewood

- ¶ 200 In their interviews with BCSC staff, the Pinewood directors made various comments about their involvement in financing the Gambela project:
- Farnworth told BCSC staff the directors had agreed that Brewster was to handle the search for financing,
 - Brewster told BCSC staff both he and Neilson worked to secure the US \$5 million guarantee from R Co, and
 - Brewster also said he had contacted some potential sources of funding in Hong Kong and was aware that Neilson was pursuing his own contacts as well.
- ¶ 201 Nothing resulted from these efforts.
- ¶ 202 Brewster also told BCSC staff he thought Alexander was trying to help with Pinewood's financing of the Gambela project:
- A I think that he was probably looking for people who would be willing to finance, yes.
- Q ... In what capacity was he undertaking that – these efforts?
- A I think as a shareholder. He was interested in it succeeding.
- ¶ 203 He also said he warned Alexander not to step over any boundaries. He said that, when he became aware that Alexander might have a contact for financing in September 2000, he told Alexander he was not to deal with that person; he was to bring any potential financier directly to the board. Brewster told BCSC staff he had two discussions along these lines with Alexander. On both occasions, he said Alexander understood his message. On the second occasion, Alexander mentioned that 'some people in Texas' might be interested. Brewster said he cautioned him again to bring any interested person directly to the Pinewood board, to avoid contravening the consent order.
- ¶ 204 Brewster said his control over the company was in a sense "theoretical" because his control over Neilson, Eilers and Alexander was not strong. Brewster said he reminded Alexander that Alexander could not act as a director or manager and to stay out of the project. However, Brewster also said that most of the time he did not know what Neilson, Eilers, and Alexander were doing or saying to people. Brewster was not aware of Alexander's participation agreement with Neilson or that Alexander was communicating with Neilson about the Gambela project.
- ¶ 205 Brewster said he spoke to Eilers frequently "to keep me informed of how things unfolded". Brewster did not mention the time frame in which these conversations

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took place, so it is not possible to conclude what information might have been exchanged between them.

¶ 206 In his interview with BCSC staff, Brewster said this about the board's and Eilers' oversight of Neilson:

Q So, then to my question, did you ever ask Anne Eilers to convey any instructions to Ian Neilson, your answer would be no. Is that correct?

A Yes

Q Okay. Are you aware of any other members of the Board of Directors of Pinewood Resources ever asking Anne Eilers to convey instructions to Ian Neilson?

A No, I'm – I'm not aware of it.

Q ...you were not aware of situations that would directly refute what he's [Neilson] saying here with respect to getting all his [Neilson's] communications – or all his instructions from Terry Alexander. Is that correct?

A Well, no. No, It's not correct.

Q Okay

A Because my view is that he was receiving his instructions from Ms. Eilers

¶ 207 When asked what types of matters Eilers would have given instructions to Neilson on, Brewster said: "... he [Neilson] was communicating with Anne Eilers on matters that were of a housekeeping nature. I mean, he needed some money for hotel bills. ... We had to keep track of his progress and make sure we made suitable press releases." Brewster said he relied on Neilson's experience to deal with more substantive issues than just housekeeping issues.

¶ 208 Brewster, Farnworth and von Einsiedel all said that Alexander played a limited role in Pinewood's affairs. This testimony does not correspond to our findings of fact that Alexander was actively involved in the Gambela project for Pinewood. Given their limited involvement in the Gambela project, **we find that Brewster, Farnworth and von Einsiedel simply did not know what Alexander was doing.**

Alexander's convictions

¶ 209 On October 25, 2005, after pleading guilty, Alexander was convicted in Provincial Court on four counts of breach of the consent order of February 23, 1999 arising from his admitted roles as:

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- director and/or officer of JTA from January 15, 2002 to July 1, 2004,
- *de facto* director and/or officer of JTA from April 26, 1999 to January 15, 2002,
- director and/or officer of Caulfeild and 630678 [*sic*] from January 2, 2002 to July 1, 2004, and
- director and/or officer of Silverado from May 29, 2003 to July 1, 2004.

¶ 210 He was fined \$500 on each count for a total of \$2,000. See *R. v. Alexander*, 2005 BCPC 480.

¶ 211 In her reasons for sentence, Judge C Baird Ellan said this about Alexander's conduct:

[8] In terms of the degree of mens rea here, if I may put it that way, or Mr. Alexander's mindset, I cannot find that it was mere inadvertence or even just inattention to the terms of his order. He knew at one point that it required him to remove himself from J.T. Alexander and that it therefore could not have been limited to public companies. He either simply chose to ignore that aspect, or was at very least wilfully blind as to his obligations under the order. He should at least have been alive to the need to make proper inquiry, and it is difficult to accept that a man in his position may simply have forgotten that he was told to resign as a director of one of the companies that is now the subject of a charge.

[9] It may be that Alexander simply decided for himself that companies in which he or one other person was the only shareholder should not be covered by the order, that it was unlikely to be enforced, and chose to ignore it for those reasons. The facts placed before me do not go that far, however, and in my view it is appropriate to sentence Alexander only on the basis that he was or should have been alive to the need to ensure, before he assumed these positions, that the order did not apply to them, and that he simply declined to do so. That in law amounts to wilful blindness.

[10] On the other hand I am told that he formally registered as a director in most if not all of these companies, and it is clear he was not acting in an underhanded way.

ANALYSIS

Jurisdiction to make the consent order

Introduction

¶ 212 The respondents say that the executive director did not have the jurisdiction to make the consent order under section 161(1) of the Act. They say that, before

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issuing the consent order, the executive director was required to hold a hearing and that Alexander could not waive the requirement. The executive director agrees, but argues that she did hold a hearing.

The issue

¶ 213 We have framed the issue as follows. Can Alexander waive his right to a hearing under section 161(1) of the Act, and if he can, did he waive the right voluntarily. If we answer either of these questions in the negative, then we will consider whether the executive director held a hearing.

Relevant legislation

¶ 214 Following are provisions in the Act and *Securities Regulation*, BC Reg. 196/97 relevant to hearings under section 161(1).

¶ 215 Section 161 provides the Commission and the executive director with the power to make enforcement orders.

¶ 216 Under section 161(1), “if the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing,” may make enforcement orders. These orders directly affect only the person’s participation in the securities market. In the Alexander consent order, the exemptions in the Act do not apply to Alexander and Alexander is prohibited from acting as an officer or director and engaging in investor relations activities.

¶ 217 Section 161(1) provides a person with a right to a hearing before the Commission or the executive director makes an order. The Act does not provide that right in special circumstances set out in subsections (2), (3) and (6).

¶ 218 Section 161(2) provides that if the Commission or the executive director considers that the length of time required to hold a hearing under subsection (1) could be prejudicial to the public interest, they can make a temporary order, without a hearing, to have effect for no longer than 15 days after the date the temporary order is made.

¶ 219 Section 161(3) permits the Commission or the executive director to extend the temporary order, without a hearing, until a hearing is held and a decision is rendered.

¶ 220 After the consent order, the Act was amended to include section 161(6). It provides the Commission or the executive director with the power to make an order under subsection (1), after providing an opportunity to be heard, if another securities regulator or a court has found that a person has contravened securities laws or has committed securities related offences.

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- ¶ 221 Section 15 of the Regulation requires the Commission or the executive director to provide written notice of the time, place and purpose of a hearing to any person “directly affected by it”.
- ¶ 222 The executive director, a commissioner or a panel of commissioners may hold a hearing under section 161(1). If a panel is to hear the matter, then under section 6 of the Act, the chair must establish a panel of at least two commissioners.
- ¶ 223 Under section 19 of the Regulation, every hearing is open to the public unless a public hearing would be unduly prejudicial to a party or witness and a hearing in private would not be prejudicial to the public interest.
- ¶ 224 Under section 173(b) of the Act, the person presiding at the hearing “must receive all relevant evidence submitted by a person to whom notice must be given and may receive relevant evidence submitted by any person”.
- ¶ 225 Section 18 of the Regulation requires the person presiding at a hearing to issue written reasons and to give notice of the section 161(1) orders and reasons to the persons “directly affected by the [orders]”.
- ¶ 226 The Act includes appeal rights for persons directly affected by orders issued under section 161. Where a commissioner or the executive director makes the order, the person may appeal to the Commission under sections 165(3) and 166. Where the Commission makes the order, the person may appeal to the Court of Appeal, with leave, under section 167.

Analysis

- ¶ 227 The respondents and the executive director argue that the requirement for a hearing under section 161(1) is for the benefit of the public and therefore Alexander may not validly waive the requirement. They say that if it is waived and there is no hearing, then neither the executive director nor the Commission has the jurisdiction to make an order (by consent or otherwise). Any such order would be a nullity.
- ¶ 228 The parties support this view with cases where parties to hearings agreed, by consent or waiver, that persons could preside even though these persons were not authorized under governing legislation.
- ¶ 229 Rosenfeld had a hearing before a panel of the College of Physicians and Surgeons. The next year, a differently constituted panel imposed sanctions. Rosenfeld did not object. The governing legislation did not allow a differently constituted panel to impose sanctions. The Court held that Rosenfeld could not through waiver

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grant the new panel jurisdiction that it did not have under the governing legislation - *Rosenfield v. College of Physicians and Surgeons* (1969), 11 DLR (3d) 148 (Ont HC).

- ¶ 230 Hueper appealed a decision of the Board of Naturopathic Physicians. The governing legislation required that a Supreme Court judge hear appeals. A County Court judge heard the appeal with the consent of the parties. The BC Court of Appeal found that the parties could not confer jurisdiction on the County Court judge - *Hueper and Board of Naturopathic Physicians* (1976), 66 DLR (3rd) 727 (BCCA).
- ¶ 231 Litigants to a collective bargaining dispute appeared before the Public Service Commission. The governing legislation required three member panels. With the waiver of the litigants, a two member panel heard the dispute. The BC Supreme Court speaking on the question of waiver held: “Because of the explicit language of the statute requiring no less than three members to conduct such a hearing, the Commission could not acquire jurisdiction on the basis of a waiver whether two or only one member sat to hear the appeal” - *BC Government Employees Union et al. and Public Service Commission et al* (1979), 96 DLR (3d) 86 (BCSC).
- ¶ 232 Scivitarro had a hearing before a panel of the Board of Arbitration. The governing legislation allowed rehearings before the same panel and only if there was new evidence. The parties appeared before a second panel, waived the conditions and had a rehearing. The BC Court of Appeal found “An appearance before the tribunal cannot confer jurisdiction where there is none” - *Scivitarro v. British Columbia* (1982), 134 DLR (3d) 521 (BCCA).
- ¶ 233 We agree that consent or waiver cannot confer jurisdiction. However, these cases were about persons presiding at hearings when the governing legislation gave jurisdiction to others, not to them.
- ¶ 234 In a similar vein, the respondents cite *Amerato v. Registrar, Motor Vehicle Dealers Act* (2005), 257 DLR (4th) 146 (Ont CA). In 2002, the registrar under the *Motor Vehicle Dealers Act* sent a notice proposing to revoke a dealer’s licences. Under the legislation, the dealer was entitled to a hearing before the Licence Appeal Tribunal. The *Statutory Powers Procedure Act* provided that any procedural requirement may be waived with the consent of the parties and the tribunal and if the parties consent a proceeding may be disposed of by a decision of the tribunal given without a hearing. A negotiation resulted in a consent order of the tribunal. Paragraph 24 of the order stated that if the dealer breached any term of the order, the registrar would carry out the proposal to revoke their licences. About 20 months later, the registrar notified the dealer that their licences had been revoked.

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¶ 235 The Court of Appeal found that the consent order was invalid in two ways. First, it amounted to an improper delegation of authority from the tribunal to the registrar. It was the tribunal's obligation to consider the evidence and make factual determinations; the registrar was an investigator, not a fact finder. Second, by stipulating that the registrar could automatically revoke the dealer's licences for any breach, the tribunal fettered its discretion. The court found that while the tribunal had the power to dispose of the 2002 proposal by means of the consent order, it could not authorize the registrar's revocation of the dealer's licences for breaches of the terms of the consent order.

¶ 236 The circumstances in the *Amerato* case are not the ones before us. In the matter before us, the executive director had the power to make the consent order under section 161(1). The question for us is whether the waiver of the requirement for a hearing takes the jurisdiction away.

¶ 237 The parties cite *Wassilyn v. Ontario (Racing Commission)*, [1993] OJ No. 564 (Ont H CJ). The Ontario Racing Commission suspended Wassilyn's racing license for 5 years for race fixing. An issue before the court was whether the parties must comply with the commission's rule that a suspended licensee could make an application for a license "and in such case, the Commission shall hold a hearing to determine such application".

¶ 238 The court found:

The rule in question is for the benefit of the public at large and not for the benefit either of the Commission or the applicant. Accordingly it can only be waived through proper process by the legislature on the public's behalf but not by the Commission.

¶ 239 The court reasoned that the rule in question is for the benefit of the public because the rule was passed by the Legislature who "have the authority to make rules and that implies the authority to change or delete rules but they cannot do this on an individual basis".

¶ 240 Based on the court's reasoning in *Wassilyn*, a requirement in legislation to hold a hearing would be only for the benefit of the public and could not be waived. The court reached its decision based on the reasons we have set out, without citing any law.

¶ 241 We do not find the *Wassilyn* case helpful.

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- ¶ 242 The Supreme Court of Canada has recognized that in *Criminal Code* matters a person may waive a procedural requirement enacted for their benefit.
- ¶ 243 In *R v. Park*, [1981] 2SCR 64, the Supreme Court of Canada found that an accused's right to a *voir dire* is a procedural requirement that the accused could waive.
- ¶ 244 Soon after deciding *Park*, in *Korponay v. Canada (Attorney General)*, [1982] 1 SCR 41, the Supreme Court of Canada considered the issue of whether an accused can waive *Criminal Code* requirements applicable when an accused wants to change an election for a trial by judge and jury to an election for a trial by judge alone. Prior to concluding that Korponay did and could waive the statutory procedural requirements, the court stated:

Some procedural requirements are enacted for the protection of the rights of one of the parties, Crown and accused and others for both. A party may waive a procedural requirement enacted for his benefit, the concurrence of both being required when enacted for both. Generally speaking, the right to waive that type of procedural requirement has been recognized by all courts, including this Court, and has been recently affirmed by this Court's decision as regards the waiver of a *voir dire*.

- ¶ 245 The parties cite *obiter* comments that Justice Kelleher made in *Seifert v. BCSC*, 2006 BCSC 174 when he was referring to a consent order made by the executive director under section 161(1):

[53] It is arguable that the Executive Director lacked jurisdiction to issue a consent order. The Executive Director does have the power to make an order but only after a hearing. The consent of the defendant cannot confer jurisdiction on the Executive Director in this regard. Moreover, the portion of the \$450,000 that is not "costs of the investigation", namely \$250,000, would appear to be in lieu of an administrative penalty imposed by the Commission. The Executive Director lacks jurisdiction to order such a penalty, whether by consent or otherwise.

[54] But these issues are not before me. The question posed to the Court is not whether the Executive Director could make an order but whether the Executive Director had jurisdiction to resolve the matter with the payment of \$450,000 without a decision of the Commission. The fact

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that the parties chose to use a consent order is a matter of form, not substance.

- ¶ 246 As the parties accept, Mr Justice Kelleher’s *obiter* comments do not bind us. The comments were not relevant to the issue before Justice Kelleher. We do not view the comments as anything more than suggesting a line of argument.
- ¶ 247 The respondents cite *Roeder v. British Columbia Securities Commission*, 2005 BCCA 189 where the Court of Appeal pointed out that the predecessor to section 161(1):
- provides for a full hearing before a protective and preventative order is made ‘to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets’: *Committee for the Equal Treatment of Asbestos Minority Shareholders*, [2001] 2 SCC 37 at para. 43. Before such an order can be made, the Commission must hold a full hearing.
- ¶ 248 In our view, the Court of Appeal made this statement to show that Roeder had had his ‘day in Court’. The issue before the court had nothing to do with whether the right to a hearing could be waived.
- ¶ 249 The Act and the Regulation have several provisions that should be read together.
- ¶ 250 Section 161(1) of the Act says that the executive director may make an order after a hearing. That order directly affects only the party and their participation in the securities markets.
- ¶ 251 Under section 161(2) of the Act, the executive director may issue an order under section 161(1) without a hearing and under section 161(3) of the Act, the executive director may extend the order without a hearing until the hearing is held and the decision is rendered. Often, this is for many months and in some cases years. During this time, while the party may apply for a hearing, and has appeal rights under the Act, the public have no such rights.
- ¶ 252 Section 15 of the Regulation requires the executive director to give notice of a hearing to any person “directly affected by it”. The executive director fulfills this requirement by providing notice to the party to a hearing. This is because only the party’s conduct is the subject of the notice and the notice only asks for orders against the party and therefore only the party to the hearing is directly affected by the notice – see *Greenwell Resources Corporation and Supreme Resources Inc. et al*, [1992] 8 BCSC Weekly Summary 5. The legislation does not require the executive director to give the public notice of a hearing.

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- ¶ 253 Section 173(b) of the Act requires that the executive director “must receive all relevant evidence submitted by a person to whom notice must be given and may receive relevant evidence submitted by any person”. Again, the legislation does not give the public a right to produce evidence or make submissions at a hearing.
- ¶ 254 Section 18 of the Regulation requires the executive director to issue reasons for its section 161(1) orders in certain circumstances and to give notice of the orders and reasons to persons directly affected by the notice of hearing and by the orders. Again, these persons are the parties to the hearing, not the public.
- ¶ 255 Sections 165(3), 166 and 167 of the Act provide a person “directly affected” by the orders under section 161 rights to appeal. Again, the legislation does not give the public rights to appeal. The Commission considered who is “directly affected” in an appeal of a Vancouver Stock Exchange decision to halt trading in the securities of GHZ Resources Corp. Sections 28(1) and 165(3) were the relevant provisions. Only persons “directly affected” may use the provisions. The Commission concluded that although the shareholders of GHZ were incidentally affected by the Vancouver Stock Exchange halt trading order, they were not “directly affected”. The VSE made the order against GHZ, not the shareholders. Therefore, the shareholders did not have a right to appeal the VSE decision to the Commission. (*GHZ Resources Corp. and the Vancouver Stock Exchange* [1992] 27 BCSC Weekly Summary 18). On appeal, the Court of Appeal did not deal with the issue.
- ¶ 256 When we consider the provisions in the legislation relevant to a hearing, we find that the Legislature is concerned that the party to a hearing have notice and the opportunity to make full answer and defence to the allegations in the notice of hearing. The public may attend the hearing, but do not have a right to participate in the hearing.
- ¶ 257 Indeed, when the Commission or the executive director consider it in the public interest, they may issue section 161(1) orders that directly affect a party to a hearing without a hearing and for a period of time that may be months and in some cases years. In these circumstances, the party has rights and the public have none.
- ¶ 258 Further, the orders the executive director makes under section 161(1) directly affect only the party to the hearing and it is only that party who gets notice of the orders and the reasons for them.
- ¶ 259 Finally, only the party directly affected by the orders the executive director makes under section 161(1) has appeal rights.

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¶ 260 The *Securities Act* does not contain a provision that prohibits a person from waiving their right to a hearing under section 161(1). However, here are two BC Acts that prohibit waiving rights.

¶ 261 The first is the *Business Practices and Consumer Protection Act*, SBC 2004, c. 2:

Waiver or release void except as permitted

3 Any waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act.

¶ 262 The second is the *Employment Standards Act*, RSBC 1996, c. 113:

Requirements of this Act cannot be waived

4 The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3 (2) or (4), has no effect.

¶ 263 In light of these provisions in BC legislation, the Legislature could have prohibited a party from waiving a hearing under section 161(1) of the Act. They did not.

¶ 264 Considering the case law, the securities legislation and other BC legislation, **we find that Alexander could, and did, waive his right to a hearing under section 161(1) of the Act.** In the consent order, Alexander waived his right to a hearing in paragraph 5 and consented to orders under section 161(1) in paragraph 2. Senior counsel represented Alexander when he waived and consented. **We find both were voluntary.**

¶ 265 After the parties made their submissions, the Court of Appeal issued its judgment (2007 BCCA 484) in an appeal of the Seifert judgment referred to above. The Court made no comment on the line of argument suggested by Mr Justice Kelleher in the court below. We see nothing in the Court of Appeal judgment that suggests that a hearing is required for jurisdiction under section 161(1).

¶ 266 **We therefore find the executive director acted within jurisdiction when the executive director made the consent order.** It is not necessary for us to consider whether the executive director held a hearing.

Allegations against Alexander
Director and officer of an issuer

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¶ 267 Under the consent order, Alexander was required to resign as an officer and director and is prohibited from acting as a director or officer of any issuer. The executive director alleges that Alexander contravened the consent order and acted contrary to the public interest by acting as a *de facto* director and officer or a director and officer of record of :

- JTA
- 372171
- 568160
- Caulfeild
- 630679
- Silverado
- Buzz
- Pinewood.

¶ 268 In section 1(1) of the Act:

“director” means:

a director of a corporation or an individual occupying or performing, with respect to a corporation or any other person, a similar position or similar functions.

“officer” means:

the chair or a vice chair of the board of directors, the president, a vice president, the secretary, an assistant secretary, the treasurer, an assistant treasurer, the general manager and any other individual appointed an officer of a corporation or acting in a capacity similar to those specified offices on behalf of an issuer or a registrant.

“issuer” means:

a person who has a security outstanding, is issuing a security, or proposes to issue a security.

¶ 269 Each of the following:

- **JTA**
- **372171**
- **568160**
- **Caulfeild**
- **630679**
- **Silverado**
- **Buzz**

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- **Pinewood,**

had a security outstanding and therefore we find that each was an issuer.

Director and officer of issuers other than Buzz and Pinewood

¶ 270 Alexander admitted that he was a director and officer of:

- JTA
- 372171
- 568160
- Caulfeild
- 630679
- Silverado.

¶ 271 He argues that these failures to comply with the consent order should be excused because he exercised due diligence.

¶ 272 In the negotiations leading to the settlement of February 23, 1999, Alexander requested that the prohibition to act as a director or officer be limited to publicly traded companies. The executive director denied the request. He also asked the executive director to allow him to remain as a director of JTA. The executive director also denied that request.

¶ 273 Alexander's then lawyers testified that they advised Alexander he could not be a director of any public or private issuer.

¶ 274 Nevertheless, Alexander testified that he thought the order prohibited him only from acting as a director and officer of a public company. He said:

Well, I, I always thought that ... the issuer was a publicly traded company, or soon to be publicly traded company, ... or a company that was selling shares to the public.

¶ 275 Alexander said he knew that JTA was a private company, and that the executive director had required him to step down as a director and officer, but he thought that this was because JTA was a party in the regulatory matter. He was again appointed as director and officer in January 2002 because, he said:

Well, at that time, I thought there had been enough time pass that I could go back as being the officer and director of my own private holding company that we owned -- that my family owned a hundred percent shares in.

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¶ 276 Alexander said he did not recall his lawyer's advice:

Uhm, it's -- it was a very busy time and there was press, I had companies to deal with, I had families to deal with. Uhm, I, I, I sort of got -- I knew that I couldn't be involved in any public company or any company that was selling shares to, to the public, become an officer or director of that, but I really missed this part about being a, being an, an officer and director of my own private holding company that I owned a hundred percent of. ... with the exception of JTA ...

¶ 277 As a result of this "misunderstanding", he said, he remained a director and officer of certain private companies on or after February 23, 1999, and became a director and officer of others. The annual reports of all these companies, showing his formal appointments, were filed with the Registrar of Companies. He did not try to hide them.

¶ 278 To repeat the words of Judge Baird Ellan:

... [Alexander] knew at one point that [the order] required him to remove himself from [JTA] and that it therefore could not have been limited to public companies. He either simply chose to ignore that aspect, or was at very least willfully blind as to his obligations under the order. He should at least have been alive to the need to make proper inquiry, and it is difficult to accept that a man in his position may simply have forgotten that he was told to resign as a director of one of the companies that is now the subject of a charge. (*R. v. Alexander*, Reasons for Sentence, October 25, 2005, BC Provincial Court, para 8)

¶ 279 The consent order states in plain language that Alexander could not be a director or officer of any issuer. Alexander's lawyers advised him to remove himself from JTA and that he could not be a director of any private or public issuer. **We find that there is no basis for Alexander to argue a due diligence defence and that Alexander knew the terms of the consent order but simply chose to ignore them.**

¶ 280 **We find Alexander was a director and officer of the following issuers:**

- JTA
- 372171
- 568160
- Caulfeild

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- 630679
- Silverado.

Consequently, he contravened the consent order and acted contrary to the public interest.

Director and officer of Buzz

¶ 281 The executive director alleges that Alexander contravened the consent order and acted contrary to the public interest by acting as a *de facto* director and officer of Buzz.

¶ 282 We have earlier dismissed this allegation for lack of evidence.

Director and officer of Pinewood

Introduction

¶ 283 The executive director alleges that Alexander contravened the consent order, and acted contrary to the public interest, by managing the business and affairs of Pinewood from May 2000 to June 2001, thereby acting as a *de facto* director and officer of Pinewood.

¶ 284 To determine if Alexander was a *de facto* director and officer we reviewed the following:

- Pinewood's business from May 2000 to June 2001,
- Alexander's involvement in managing Pinewood's business, and
- Pinewood's directors' and officers' involvement in managing Pinewood's business.

Pinewood's business from May 2000 to June 2001

¶ 285 For the period from May 2000 to June 2001, Pinewood was a reporting issuer listed on the CDNX, now the TSX Venture Exchange. Pinewood was a shell company with limited assets and no operating business. In March 2000, Pinewood commenced work on a technology opportunity that was abandoned in August 2000. The Gambela project was Pinewood's only other business. On July 31, 2000, according to company financial statements, Pinewood's principal asset was cash of \$416,000, which was depleting over time. By April 30, 2001, Pinewood was left with working capital of \$148,000.

¶ 286 The Gambela project represented a major capital investment, requiring a US \$5 million bank guarantee and an initial exploration budget of US \$30 million. In July 2000, Neilson estimated the financing requirements for Pinewood to be US \$6 million over two years with the remainder coming from potential joint venture

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partners. Given the importance of the Gambela project to Pinewood, we would expect the directors and officers of Pinewood to have been diligent in managing the project.

¶ 287 At the end of August 2000, the directors of Pinewood were Brewster, Farnworth, and Von Einsiedel. Brewster was president and Pinewood's solicitor was secretary.

Alexander's involvement in managing Pinewood's business

¶ 288 We analyzed Alexander's involvement in managing the Gambela project for Pinewood from two perspectives:

- Alexander's management of operational activities, including managing expenditures, the organizational structure, the exploration program, contracts, budgets, relationships with the Ethiopian government, and Neilson; and
- Alexander's management of financing activities, including managing financing activities before September 7, 2000, acknowledging responsibility for financing, managing the US\$ 140,000 financing, and soliciting potential investors.

Alexander's management of operational activities

Expenditures

¶ 289 Control over expenditures is an important business activity, especially for a public company like Pinewood, with limited assets and no operating business.

¶ 290 Over the period from May 2000 to April 2001 there were ten payments of Neilson's expenses. We found that Alexander approved five of these payments, in the amounts of approximately \$24,000 and \$4,000 in July 2000, US \$7,000 in November 2000 and two for US \$10,000 in April 2001.

¶ 291 At the time of the July 2000 payments, the directors and officers of Pinewood were unaware of the Gambela project and the payments for Neilson's expenses. These payments are significant when one considers that the Gambela project was a new business opportunity for Pinewood that involved oil exploration in Africa. Moreover, while the initial payments were limited to \$28,000, one could reasonably expect them to be the beginning of a series of large expenditures, based on Neilson's July estimate of US \$30 million for an initial exploration program.

¶ 292 While we made no findings about the five remaining payments to Neilson, Alexander is connected to two of them. On August 3, 2000, Eilers sent US \$3,000

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to Neilson from Buzz. Eilers said Neilson needed funds urgently and she was unable to locate anyone who could approve the payment. She said she sent the funds on the belief that either Alexander or Pinewood would reimburse her, depending upon whether or not the Gambela project was “assigned to Pinewood”.

- ¶ 293 In July 2000, Eilers signed two Pinewood cheques totaling \$28,000 for Gambela project expenses. Eilers therefore knew in July that Pinewood was paying Neilson’s expenses. We find it interesting that in August, Eilers would expect either Alexander or Pinewood to reimburse Buzz.
- ¶ 294 The other payment was made by Pinewood on October 11, 2000, when Neilson wrote to Alexander requesting funds. On the same day, Eilers responded to Neilson saying that she “sent the wire request to David [Alexander] this morning and he processed the transfer so you should see the US \$5,000 Thurs, or more likely, Friday”. In her response, Eilers also attached a note from Alexander which said “All the best my friend, great work! Money is being sent to bail you out of the ‘poor house’” referring to the money Neilson had requested and was sent by Pinewood.
- ¶ 295 While we did not find that Alexander approved the October 11, 2000 payment, we note that, on the same day that Neilson requested money from Pinewood, Alexander knew that Neilson needed money and that the money had been sent by Pinewood. Other than Eilers’ statement to Neilson that she would seek board approval for the payment, there was no evidence that a director or officer of Pinewood approved the October 11, 2000 payment.
- ¶ 296 We have no evidence about the remaining three payments of US \$10,000 on September 7, 2000 and US \$5,000 each on January 19, 2001 and February 5, 2001, other than they were paid to Neilson by Pinewood.
- ¶ 297 In addition to the payments made to Neilson for Gambela project expenses, there were also payments due from GPC to the Ethiopian government under the terms of the PSA. In Neilson’s October 18 and December 1, 2000 letters to Alexander, and his February 16, 2001 letter to the Pinewood board, Neilson advised of upcoming payments to the Ethiopian government that would be due within 30 days of signing the PSA. The Ethiopian government signed the PSA on January 24, 2001, and 29 days later, on February 22, 2001, Civelli arranged a US \$130,000 loan to allow GPC to make the required payments.
- ¶ 298 On April 18, 2001, Eilers faxed Neilson a note “From Anne for Terry”, which said:

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Received your request for further funds. Please provide back-up expense reports for the outstanding amount from your last expense report, plus back-up for the US\$130,000. and US\$10,000. forwarded to you by Carlo [Civelli] as per my request.

Once we receive your completed reports we will wire transfer additional \$\$.

¶ 299 We found that Alexander was involved in managing the US \$140,000 financing and that he had instructed Civelli to forward to GPC US \$130,000 in February 2001 to make the payments to the Ethiopian government. In instructing Civelli to make the US \$130,000 payment, Alexander ensured that funds were available to GPC to make the payments due to the Ethiopian government. Brewster testified that the directors and officers of Pinewood were unaware of the loan until after the fact.

¶ 300 **We find that Alexander was involved in managing expenditures for the Gambela project for Pinewood.**

Organizational structure

¶ 301 The organizational structure for the Gambela project was important to Pinewood because the project was Pinewood's only business and Pinewood's directors and officers needed to be able to exercise control over the project.

¶ 302 In Neilson's September 3, 2000 letter to Alexander, Neilson referred to a meeting with Alexander to take place on September 5 and outlined organizational matters to be discussed as follows:

- incorporate a wholly owned subsidiary of Pinewood to hold the Gambela project, and
- appoint Neilson and Pratt as the subsidiary's officers and directors.

¶ 303 After meeting with Alexander, Neilson incorporated GPC on September 6, 2000, the day before the Pinewood board meeting at which the Gambela project was approved. Neilson appointed himself and Pratt as the sole directors and himself as, among other things, the president. Unlike Alexander, the Pinewood directors and officers did not have any involvement in any discussions concerning the incorporation or the proposed organizational structure of GPC.

¶ 304 At the September 7, 2000 board meeting, the directors of Pinewood approved the incorporation of GPC as a wholly owned subsidiary of Pinewood, as outlined in Neilson's September 3, 2000 letter. Brewster told BCSC staff there was no formal presentation to Pinewood's directors and the directors received no briefing

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material about the Gambela project at that meeting. Brewster also said there was “very, very little” discussion by the board. Brewster said, “it doesn’t take a person more than a minute to decide ‘Let’s go for it’”.

- ¶ 305 Neilson was appointed one of only two directors (the other was Pratt), and president and CEO. None of Pinewood’s directors or officers was appointed to the GPC board at the September 7, 2000 meeting. Although Neilson was a key employee and appointed to the most senior positions in Pinewood’s wholly owned subsidiary, none of the directors or officers of Pinewood had ever spoken to or met with Neilson.
- ¶ 306 On December 5, 2000, Eilers, David Alexander and Pinewood’s solicitor were appointed as additional directors of GPC. In his interview, Pinewood’s solicitor told BCSC staff he had recommended to Brewster that Pinewood increase its control over the GPC board “so that they would know exactly what was happening with Gambela and what Ian Neilson was doing”. It is significant that none of Pinewood’s directors was appointed to the GPC board despite the acknowledged need for Pinewood to increase its control over GPC. Instead, the two new GPC directors (David Alexander and Eilers) were long time business associates of Alexander.
- ¶ 307 The new directors did not improve the control of Pinewood’s directors over the affairs of GPC. Even though Neilson reminded Pinewood’s directors on February 16, 2001 of the US \$121,460 owing to the Ethiopian government, there was no evidence the directors did anything to ensure the payment was made and it was Alexander who directed Civelli to provide the necessary funds to GPC.
- ¶ 308 Brewster’s testimony was that his control over the company was in a sense “theoretical” because his control over Neilson, Eilers and Alexander was not strong. Civelli told BCSC staff that, in his meeting with Neilson on July 24, 2000, Neilson presented the Gambela project to him “as if it was already done”. Civelli said he assumed that the Pinewood board was already “on side” because Alexander was “pretty close to the board”.
- ¶ 309 **We find that Alexander was involved in managing the organizational structure for the Gambela project for Pinewood.**

Exploration program

- ¶ 310 The Gambela project was an oil play and Pinewood’s success was dependent on it. Management of the exploration program is crucial to the success of an oil opportunity.

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¶ 311 In Neilson's November 14, 2000 letter to Alexander, Neilson wrote about a proposed budget for the Gambela seismic program. The letter stated that he [Neilson] had "been proceeding with the Project under the assumption that the PSA will be signed this week, and that the funding will be available shortly thereafter to facilitate the ordering of all of the camp facilities". Neilson was looking for direction from Alexander about the timing of an exploration program, its budget and financing. Alexander talked to Neilson and suggested that Neilson delay the seismic program. Neilson delayed the seismic program.

¶ 312 There is no evidence to show that the directors or officers of Pinewood reviewed or commented on the exploration program.

¶ 313 **We find that Alexander was involved in managing the exploration program for the Gambela project for Pinewood.**

Contracts

¶ 314 There were two important contracts in evidence before us:

- the PSA, and
- the Farmout and Conveyance agreement.

¶ 315 The terms of the agreements were important in determining how Pinewood would develop and finance the Gambela project.

¶ 316 In Neilson's July 10, 2000 letter to Alexander, Neilson wrote about the requirements for the PSA. The application for the PSA was prepared in GPC's name in August 2000.

¶ 317 On September 7, 2000, the Pinewood directors authorized Neilson and Pratt to sign the PSA. In that meeting, the directors of Pinewood did not review the application for the PSA and they did not discuss any terms for the proposed PSA. Furthermore, none ever met with, spoke to, or gave instructions to Neilson about the PSA.

¶ 318 Neilson submitted the application for the PSA to the Ethiopian government on September 26, 2000. After the submission of the PSA application, Neilson sent letters to Alexander on October 11, 18, and 31, and November 1 and 5, 2000, discussing, among other things, the status of the PSA. All of these letters were addressed to Alexander, not the directors or officers of Pinewood.

¶ 319 On November 8, 2000, Pinewood's directors passed a resolution authorizing Neilson alone to sign the PSA. Before passing the resolution, the directors of

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Pinewood asked questions of Pinewood's solicitor about the PSA but there is no evidence that the directors were otherwise involved in securing the PSA.

¶ 320 Neilson provided similar updates on the status of the PSA to Alexander in letters dated November 14, and 24, December 1, 6, and 9, 2000 and January 21, 2001. Again, all of these letters were addressed to Alexander, not the directors or officers of Pinewood. The Ethiopian government signed the PSA on January 24, 2001.

¶ 321 All these letters show that, during the period from July 10, 2000 to January 24, 2001, Neilson was in constant contact with Alexander about the status of the PSA.

¶ 322 The Farmout and Conveyance Agreement was an important contract for the Gambela project. In Neilson's December 1, 2000 letter to Alexander, Neilson said:

I have recently fine-tuned the draft Farmout and Conveyancing [*sic*] Agreement that [VP] prepared back in September for [potential participants]. I have attached it hereto for your review and comment....

¶ 323 Neilson was clearly looking for direction from Alexander about this contract. There was no evidence that a Pinewood director or officer reviewed the Farmout and Conveyance Agreement.

¶ 324 **We find that Alexander was involved in managing contracts for the Gambela project for Pinewood.**

Budgets

¶ 325 In Neilson's July 28, 2000 letter to Alexander, Neilson estimated the exploration program for the Gambela project would cost US \$30 million and Pinewood's share of that expenditure would be US \$6 million. Management of those expenditures was an important business activity for Pinewood, given that it had limited assets and no operating business.

¶ 326 At the September 7, 2000 Board meeting, the directors approved the incorporation of GPC as a wholly owned subsidiary of Pinewood, to hold the Gambela project, after "very very little" discussion. At that meeting, the directors of Pinewood were not advised of estimated costs and did not receive any project budgets.

¶ 327 In Neilson's November 14, 2000 letter to Alexander, Neilson outlined a proposed exploration budget, asked Alexander for his comments, and assumed that "the funding will be available". Alexander admitted he talked to Neilson about the budget.

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¶ 328 In Neilson's January 31, 2001 letter to Alexander, Neilson wrote about the budget for a winter work program. Neilson said a total of US \$1,200,000 would be required "to see us through June 30". Neilson went on to say: "I am very interested in any comments you [Alexander] might have" In this letter, Neilson was looking to Alexander for direction regarding upcoming expenditures.

¶ 329 Alexander said he had experience with oil budgets and costs in Sudan and used that to provide input to Neilson on the January 31, 2001 budget.

¶ 330 There was no evidence that the directors or officers of Pinewood considered Gambela project budgets before April 2001.

¶ 331 **We find that Alexander was involved in managing budgets for the Gambela project for Pinewood.**

Relationships with the Ethiopian government

¶ 332 The PSA for the Gambela project was with the Ethiopian government. Developing and maintaining good relations with the government was therefore an important business activity.

¶ 333 In Neilson's October 11, 2000 letter to Alexander, Neilson referred to discussions he had with various ministries within the Ethiopian government. In his response to Neilson, Alexander advised:

Go to the top via an introduction from the Prime Minister after the signing. This would be your next call. Perhaps they can help, perhaps they can't. Either way we win by offering our hand in friendship. Seek out the right guys and get them on our side.

¶ 334 He also suggested that:

It may help to get on the good side of the military by soliciting help from them to clear your 155 mile [*sic*] path to our proposed seismic camp.

¶ 335 We found that, following the collapse of the PSA, Alexander sent three letters to the most senior officials within the Ethiopian government on behalf of Pinewood, in an attempt to revive the agreement. He did so without the authorization or knowledge of the directors of Pinewood.

¶ 336 There is no evidence the directors and officers of Pinewood were involved in managing the relationships with the Ethiopian government.

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¶ 337 **We find that Alexander was involved in managing relationships with the Ethiopian government for the Gambela project for Pinewood.**

Neilson

¶ 338 Neilson was a professional engineer, consultant, and president, CEO and a director of GPC. Neilson was involved in the Gambela project expenditures, the organizational structure, the exploration program, contracts, budgets, and relationships with the Ethiopian government. On the record and to the public, Neilson was the key officer of GPC. The Gambela project was Pinewood's only business and, in these circumstances, we would expect the president and the directors of Pinewood to manage Neilson.

¶ 339 The directors of Pinewood said that they relied on Neilson but none ever met with him, spoke to him, or gave any instructions to him.

¶ 340 Brewster acknowledged the lack of control that the directors and officers had over the affairs of the Gambela project and Pinewood, saying that his control was in a sense "theoretical" because his control over Neilson, Eilers and Alexander was not strong.

¶ 341 Alexander met, talked on the phone and corresponded with, and gave instructions to Neilson, throughout the period from May 2000 to June 2001. Neilson looked to Alexander for direction on expenditures, the organizational structure, the exploration program, contracts, budgets, and relationships with the Ethiopian government.

¶ 342 **We find that Alexander was managing Neilson as president, CEO and a director of Pinewood's subsidiary, GPC.**

Conclusion – Alexander's management of operational activities

¶ 343 We analyzed Alexander's involvement in managing operational activities for the Gambela project for Pinewood and found that he was involved in managing:

- expenditures,
- the organizational structure,
- the exploration program,
- contracts,
- budgets, and
- relationships with the Ethiopian government,

and that Alexander managed Neilson.

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¶ 344 **We find that Alexander was involved in managing the operational activities for the Gambela project, and that he managed Neilson, for Pinewood.**

Alexander's involvement in managing financing activities

¶ 345 The Gambela project was a significant financial undertaking for Pinewood. Managing financing for the Gambela project was therefore an important business activity.

Financing activities before September 7, 2000

¶ 346 Discussions regarding the financing of the Gambela project started with Alexander's first meeting with his "partner" Civelli in June 2000, two weeks after Alexander signed the participation agreement with Neilson. In that June meeting, Alexander and Civelli agreed that Pinewood was the corporate vehicle in which to develop the Gambela project. As well, Civelli and Alexander talked about a wide range of financing options. As Civelli put it:

At [the June 2000] meeting Mr. Alexander and I discussed the various financing options, including private financing, institutional investment, a joint venture of oil exploration companies and/or public financing.

¶ 347 In Neilson's letter of July 28, 2000 to Alexander, Neilson reported on his meeting with Civelli on July 24, 2000. Neilson wrote that Civelli had committed to providing a bank guarantee for US\$5 million and that Civelli said it would not be a problem to raise up to US \$5 million in financing for Pinewood. Neilson reported that "it was understood [between him and Civelli] that we might well have to bring in [joint venture] Partners to pay for as much as [80%] of the Exploration Program". He wrote:

...we have plenty of time to raise money for Pinewood and find Joint Venture Partners if things do not unfold as quickly as we hope.

¶ 348 The letter shows how extensive the financing discussions were among Civelli, Neilson and Alexander at this early stage.

¶ 349 In August 2000, following discussions among Alexander, Neilson and Civelli, the wording of a proposed bank letter to the Ethiopian government was settled.

¶ 350 **We find that Alexander was involved in managing financing for the Gambela project for Pinewood before September 7, 2000.**

Acknowledging responsibility for financing

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¶ 351 We found that Alexander acknowledged that he and Civelli were responsible for financing the Gambela project for Pinewood. (see heading *Neilson's October 18, 2000 letter to Alexander and Civelli*)

Potential Investors

¶ 352 We found that Alexander was soliciting investors for Pinewood. (see heading *Alexander's February 6, 2001 meetings in Texas*)

US \$140,000 financing

¶ 353 We found that Alexander was involved in managing the US \$140,000 financing for the Gambela project for Pinewood. (see heading *US \$140,000 financing in February and April 2001*)

¶ 354 We found that Alexander wanted to raise new financing for Pinewood. (see heading *Alexander's May 25, 2001 and June 7, 2001 letters to the Ethiopian government*)

Conclusion – Alexander's management of financing activities

¶ 355 In light of our findings about Alexander's involvement in financing the Gambela project, **we find that Alexander was managing financing for the Gambela project for Pinewood.**

Pinewood's directors' and officers' involvement in managing Pinewood's business

¶ 356 The directors and officers were not aware of the Gambela project until just before September 7, 2000, when the Pinewood's directors approved the incorporation of GPC as a wholly owned subsidiary of Pinewood. The directors and officers of Pinewood were not, therefore, involved in the Gambela project prior to September 7, 2000, including:

- identifying Pinewood as the appropriate corporate vehicle in which to hold the Gambela project in June 2000,
- authorizing payment of Gambela project expenses in July and August 2000,
- settling the wording of a US \$5 million bank letter in August 2000,
- developing a project budget and future financing estimates in July and August 2000,
- developing an organizational structure for GPC, and
- preparing the PSA application.

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¶ 357 On September 7, 2000, a meeting of the directors of Pinewood approved the incorporation of GPC. Brewster said there was “very, very little” discussion by the board about the project. We note that:

- there was no formal presentation to directors about the Gambela project,
- the two persons most knowledgeable about the Gambela project, Neilson and Pratt, did not attend,
- a project budget was not provided and there was no discussion about project expenditures,
- the directors did not ratify payments already made by Pinewood to Neilson,
- the draft PSA application was not provided and there was no discussion about the PSA application or possible terms of the PSA, and
- there was no information provided about future financing requirements for the Gambela project, including the US \$5 million bank guarantee.

¶ 358 In that meeting, the Pinewood directors also:

- appointed Neilson as a director, president and CEO without the directors ever having met with or spoken to him, and
- authorized Neilson and Pratt to sign the PSA without knowing the terms of the agreement.

¶ 359 Despite the fact that GPC was a wholly owned subsidiary of Pinewood, and held Pinewood’s only business, none of Pinewood’s directors was made a director of GPC.

¶ 360 Brewster said he spoke to Eilers frequently “to keep me informed of how things unfolded”. Brewster said he thought Neilson was taking direction from Eilers “of a housekeeping nature” such as hotel expenses, and monitoring project events to meet Pinewood’s regulatory obligations.

¶ 361 Neilson was a director and president and CEO of GPC and Brewster said he relied on Neilson. Despite Neilson’s important role in the overall management of the Gambela project, none of the directors and officers ever met with, spoke to, or gave instructions to Neilson on any matter about the Gambela project.

¶ 362 On November 8, 2000, the Pinewood directors and officers authorized Neilson to sign the PSA. The PSA was a material contract for the Gambela project. The directors asked Pinewood’s solicitor questions about the PSA. There was no evidence that the Pinewood directors had any other involvement in securing the PSA.

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- ¶ 363 In January and February 2001, Pinewood issued two news releases which were drafted by Neilson, Eilers and Pinewood's solicitor. Brewster said he reviewed the news releases, but only for excessive "hype". He said he did not verify the technical information in the releases or discuss the contents with Neilson. He said he relied on Neilson's expertise.
- ¶ 364 Brewster said he reviewed a three page independent "engineering" report produced on behalf of Pinewood in February 2001 to better understand the project "issues". There was no evidence as to who commissioned the report and why.
- ¶ 365 Brewster said he contacted potential investors in Asia. Whatever efforts Brewster may have made to contact investors, they did not play any part in the Gambela project.
- ¶ 366 Brewster told BCSC staff that he thought Alexander was trying to help with Pinewood's financing of the Gambela project. Brewster said that, on two occasions, he told Alexander that Alexander was to bring any potential financier directly to the board. Despite Brewster's warnings, Alexander went ahead with discussions with potential investors independently and without authorization from the Pinewood board.
- ¶ 367 The directors of Pinewood were involved in Pinewood's proposed private placement with R Co, which ultimately failed.
- ¶ 368 In response to a regulatory requirement arising from the proposed R Co private placement, Brewster asked for copies of budgets for the Gambela project in April 2001, just prior to the collapse of the PSA. There was no evidence that the directors of Pinewood were involved in budgets for the Gambela project before April 2001.
- ¶ 369 The Gambela project was critical to the future of Pinewood. Pinewood's directors said that they, not Alexander, were involved in the Gambela project. Except for the R Co private placement, however, the evidence is that the directors assumed a narrow role, limited to specific duties that only a director could fulfill, such as passing board resolutions and complying with regulatory requirements. Brewster said they relied on Neilson and Eilers although he also recognized that he had little control over them. We also found that, given their limited involvement in the Gambela project, Brewster, Farnworth and von Einsiedel simply did not know what Alexander was doing.
- ¶ 370 In contrast, we have found that Alexander was extensively involved in managing operational and financing activities for the Gambela project, for Pinewood.

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Conclusion - Alexander as a director and officer of Pinewood

- ¶ 371 Alexander was well qualified to assume a lead role in the development of the Gambela project given his experience with Arakis. Alexander testified that Neilson originally approached him regarding the Gambela project because of his prior experience in the region.

Well, I had been very active in Sudan from 1990 through 1995. We had raised, in a company in Arakis, we had raised ... well over a hundred million dollars to develop this property and developed the properties....

...So, I had a lot of experience regarding geology and the ability for some of these cases to produce oil.

- ¶ 372 We have found that Alexander knew the terms of his consent order.
- ¶ 373 The Gambela project was Pinewood's only business and it was not in Alexander's nature to play a passive role. In Alexander's letter to the Ethiopian Government dated May 21, 2001, Alexander describes himself as follows:

A project of such magnitude needs a lion to drive it through to completion. It needs courage, patience, will and determination to be successful. This involves intertwining the complicated aspects of international financial markets, state of the art energy exploration, experienced management and varied corporate and political groups all working together, and managed by one ... Lion.

- ¶ 374 Brewster described his control over the affairs of Pinewood as "theoretical" given that his control over Neilson, Eilers and Alexander was not strong.
- ¶ 375 The Pinewood directors' testimony was that Alexander played a limited role in Pinewood's affairs. However, our analysis has led us to conclude that Alexander, not the directors or officers of Pinewood, was actively managing the Gambela project for Pinewood. We have found that Alexander was involved in:

- managing operational activities for the Gambela project for Pinewood, including managing expenditures, the organizational structure, the exploration program, contracts, budgets, relationships with the Ethiopian government and Neilson; and
- managing financing for the Gambela project for Pinewood, including managing financing responsibilities before September 7, 2000,

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acknowledging responsibility for financing, managing the US \$140,000 financing and soliciting investors.

¶ 376 In light of these findings, **we find that Alexander was acting as a *de facto* director and officer of Pinewood and, in doing so, chose to ignore the terms of his consent order, thereby contravening the consent order and acting contrary to the public interest.**

Allegation Alexander engaged in investor relations activities on behalf of Pinewood and JTA

¶ 377 Under paragraph 3 of the consent order, Alexander is prohibited from engaging in investor relations activities for a period of 20 years, beginning February 23, 1999.

¶ 378 The executive director alleges that Alexander contravened the order and acted contrary to the public interest by engaging in investor relations activities on behalf of Pinewood and JTA.

¶ 379 In section 1(1) of the Act:

“investor relations activities” means:

any activities or oral or written communications, by or on behalf of an issuer or security holder of the issuer, that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer, ...

The definition of investor relations activities also contains some exclusions, but none of them apply in these circumstances.

¶ 380 We found that Pinewood and JTA were issuers. JTA was a holder of securities in Pinewood.

¶ 381 We found that, in Alexander’s October 18, 2000 letter to Neilson, Alexander acknowledged that he and Civelli were responsible for financing the Gambela project for Pinewood (see heading *Neilson’s October 18, 2000 letter to Alexander and Civelli*)

¶ 382 We found that Alexander was soliciting investors for Pinewood when he traveled to Texas in February 2001 (see heading *Alexander’s February 6, 2001 meetings in Texas*)

¶ 383 In May 2001, Alexander wrote to Civelli, instructing him to enter into new negotiations with the Ethiopian government for a new PSA for Pinewood’s wholly

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owned subsidiary and telling him that he [Alexander] was “working on a group for \$2.5 million” (see heading *Alexander’s May 24, 2001 letter to Civelli*).

- ¶ 384 We found that, when Alexander wrote to the Ethiopian government on May 17, May 25 and June 7, 2001, Alexander wanted to revive the PSA through Pinewood and raise new financing for Pinewood (see heading *Alexander’s May 25, 2001 and June 7, 2001 letters to the Ethiopian government*). When Alexander wrote to the Ethiopian government on May 25, 2001, he told them “I have a following looking to invest in our next oil deal”.
- ¶ 385 Alexander engaged in activities and communications for Pinewood that promoted, or reasonably could be expected to promote, the purchase and sale of Pinewood securities.
- ¶ 386 Alexander argues that he is in breach of the consent order only if he acted “knowingly”. He produced nothing to support this argument. The consent order states in plain language that Alexander cannot engage in investor relations activities. Furthermore, Alexander was represented by senior counsel in his settlement negotiations.
- ¶ 387 **We find that, when Alexander engaged in the conduct described above, he chose to ignore the terms of the consent order and engaged in investor relations activities, thereby contravening the consent order and acting contrary to the public interest.**
- ¶ 388 The executive director also alleges that Alexander engaged in investor relations activities on behalf of JTA. There was no evidence that JTA intended to sell any of its own shares. The executive director argues that Alexander’s involvement in receiving and documenting the offer from R Co for the purchase of JTA’s Pinewood shares constituted his engaging in investor relations activities on behalf of JTA, as a security holder of Pinewood. We do not consider these to be activities that “promote” the purchase or sale of securities. We dismiss the allegation that Alexander engaged in investor relations activities on behalf of JTA.
- Allegation Alexander traded while unregistered*
- ¶ 389 Under the terms of the consent order, Alexander’s and JTA’s trading exemptions in sections 44 to 47, 74, 75, 98 and 99 of the Act are removed for 20 years, beginning February 23, 1999.

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¶ 390 The executive director alleges that:

- Alexander and JTA contravened section 34(1) of the Act, and the consent order, and acted contrary to the public interest by engaging in acts in furtherance of the sale of JTA's shares in Pinewood to R Co, and
- Alexander contravened section 34(1) of the Act, and the consent order, and acted contrary to the public interest by engaging in acts in furtherance of the issue of Pinewood shares to R Co to finance the Gambela project.

¶ 391 Section 34(1) states:

A person must not

(a) trade in a security ... unless the person is registered

¶ 392 Exemptions from the requirement to be registered are contained in sections 44 to 47 of the Act.

¶ 393 Alexander and JTA were not registered under the Act and, because of the consent order, have no statutory exemptions available to them. Accordingly, any trade by Alexander or JTA would be in breach of section 34 of the Act, unless the commission or the executive director granted them an exemption under section 48 of the Act.

¶ 394 "Trade" is defined in section 1(1) of the Act to include:

(a) a disposition of a security for valuable consideration ...,
..., and

(f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (e).

Sale of JTA shares in Pinewood to R Co

¶ 395 Alexander's and JTA's activities in preparing for a possible sale of JTA's Pinewood shares to R Co were acts in furtherance of a trade. JTA, however, clearly intended to seek an exemption from the consent order before selling the Pinewood shares. Obtaining an exemption was a condition precedent to the sale. In our view, as long as Alexander obtained the variation of the consent order before the trade was completed, he would have been in compliance with the legislation and the consent order. As it turned out, R Co did not complete the purchase.

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¶ 396 Under these circumstances, we dismiss the allegation that Alexander and JTA contravened section 34(1) of the Act and the consent order, and acted contrary to the public interest by engaging in acts in furtherance of the sale of JTA's shares in Pinewood to R Co.

Issue of shares by Pinewood to R Co

¶ 397 There is no evidence that Alexander acted in furtherance of the issue of shares of Pinewood to R Co to finance the Gambela project. While R Co's proposal came to Alexander and Civelli, and Alexander was involved in the negotiations for the sale of JTA's Pinewood shares, the evidence is that the Pinewood directors, not Alexander, were involved in the issue of Pinewood shares.

¶ 398 Under these circumstances, we dismiss the allegation that Alexander contravened section 34(1) of the Act and the consent order, and acted contrary to the public interest, by engaging in acts in furtherance of the issue of Pinewood shares to R Co to finance the Gambela project.

Allegations against Eilers

¶ 399 The executive director alleges that Eilers:

- contravened section 34(1) of the Act, and acted contrary to the public interest, by engaging in acts in furtherance of the sale of JTA's shares in Pinewood to R Co, and also directing JTA to that purpose, and by assisting Alexander in contravening section 34(1) of the Act; and
- acted contrary to the public interest by assisting Alexander in contravening the consent order, by:
 - allowing Alexander to direct JTA's affairs while she was the sole director and officer of record of JTA,
 - allowing Alexander to be a *de facto* director and officer of Buzz while she was its sole director and officer of record, and
 - being complicit in Alexander's concealing his direction of Neilson and Pinewood.

¶ 400 The executive director alleges that Eilers contravened section 34(1) of the Act, and acted contrary to the public interest, by engaging in acts in furtherance of the sale of JTA's shares in Pinewood to R Co, and also directing JTA to that purpose, and by assisting Alexander in contravening section 34(1) of the Act. We found that Alexander did not contravene section 34(1) of the Act and that his conduct with respect to the sale of JTA's shares of Pinewood was not contrary to the public interest. We therefore dismiss this allegation against Eilers.

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- ¶ 401 The executive director alleges that Eilers acted contrary to the public interest by assisting Alexander in contravening the consent order, by allowing Alexander to direct JTA's affairs, while she was its sole director and officer of record. We found that Alexander was a *de facto* director of JTA. Eilers admitted in her interview with BCSC staff that she was a "figurehead" director of JTA and that Alexander was the directing mind of JTA. **We find that Eilers acted contrary to the public interest by assisting Alexander in contravening the consent order, by allowing Alexander to direct JTA's affairs while she was its sole director and officer of record.**
- ¶ 402 The executive director alleges that Eilers acted contrary to the public interest by assisting Alexander in contravening the consent order by allowing Alexander to be a *de facto* director and officer of Buzz, while she was its sole director and officer of record. We dismissed the allegation that Alexander was a *de facto* director of Buzz and we therefore dismiss this allegation against Eilers.
- ¶ 403 The executive director alleges that Eilers acted contrary to the public interest by assisting Alexander in contravening the consent order by being complicit in Alexander's concealing his direction of Neilson and Pinewood. There is insufficient evidence to support this allegation and we therefore dismiss it.

SUBMISSIONS ON SANCTIONS

- ¶ 404 We direct the parties to make their submissions on sanctions as follows:

By November 7, 2007, the executive director will deliver submissions to Alexander and to Eilers and to the secretary to the Commission;

By November 21, 2007, Alexander and Eilers will deliver their response submissions to each other, to the executive director, and to the secretary to the Commission;

By November 28, 2007, the executive director will deliver reply submissions (if any) to Alexander and Eilers and to the secretary to the Commission.

- ¶ 405 Any party wishing an oral hearing on the issue of sanctions will so advise the other parties and the secretary to the Commission by November 14, 2007. Any oral hearing will take place on December 3, 2007.
- ¶ 406 October 24, 2007
- ¶ 407 **For the Commission**

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Neil Alexander
Commissioner

John K. Graf
Commissioner

Findings of Robin E Ford

- ¶ 408I agree with most of the findings of fact of commissioners Alexander and Graf. I explain the important differences in my reasons below. I have accepted Alexander's testimony and Neilson's evidence (whether hearsay or not) only where it was corroborated.
- ¶ 409I agree that the executive director acted within his jurisdiction when he made the consent order.

Issuers other than Buzz or Pinewood

- ¶ 410I agree with commissioners Alexander and Graf that in acting as a director and officer of:
- JTA
 - 372171 BC Ltd
 - 568160 BC Ltd
 - Caulfeild Management Inc
 - 630679 BC Ltd
 - Silverado Estate Coffee Corp,

Alexander contravened the consent order and acted contrary to the public interest.

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Buzz

¶ 411 I agree with commissioners Alexander and Graf that the executive director has not proved that Alexander was directing and managing the affairs of Buzz and to dismiss the allegations related to Buzz.

Director and officer of Pinewood

Introduction

¶ 412 The executive director alleges that Alexander contravened the consent order by directing and managing the business and affairs of Pinewood from May 2000 to June 2001.

¶ 413 The executive director argues that Alexander's role as *de facto* director and officer is shown by many matters that amount to directing and managing the affairs of Pinewood. Although the level of his involvement varied over time, she says he was consistently, throughout the period May 2000 to June 2001, acting as a director and officer.

¶ 414 If we find that Alexander:

- was performing similar functions as a director, or
- was acting in a capacity similar to the offices specified in the definition of "officer",

for Pinewood, then, unless we find that his conduct was excused for some reason, he would have been contravening the consent order.

¶ 415 The BC Securities Commission, Alberta Securities Commission and Ontario Securities Commission have all addressed the issue of what constitutes a *de facto* director and officer. To paraphrase the words in *World Stock Exchange* (2000), 9 ASCS 658 (at 18) and *Momentas Corporation* (2006), 29 OSCB 7408 (at 101), the test is whether, under the particular circumstances, the alleged director or officer is an integral part of the mind or management of the company, taking into consideration the entirety of his or her involvement in the context of the business activities at issue. No individual factor is necessarily determinative.

¶ 416 Relevant factors for determining whether a person is a *de facto* director or officer (identified in *World Stock Exchange* and *Momentas Corporation*) include:

- appointed nominees as directors,
- responsible for the supervision, direction, control and operation of the company [alone or with other directors],

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- ran the company from his or her office,
- negotiated on behalf of the company,
- company's sole representative on a trip organized to solicit investments,
- substantially reorganized and managed the company,
- arranged a public offering, and
- made all significant business decisions.

¶ 417 Pinewood had a functioning board. Alexander was a major and perhaps a controlling shareholder in Pinewood (through JTA) who therefore had a legitimate interest in the company and in increasing the value of his shares. One would expect that the Pinewood board would inform, and obtain the views of, one of its major shareholders.

¶ 418 Alexander had also entered into a participation agreement with Neilson on the Gambela opportunity. It was Neilson's role under the participation agreement to design and implement the exploration project. It was logical and appropriate that Neilson would stay in close touch with Alexander on the project, whether through Eilers or directly, at least until the Ethiopian government had signed the PSA with GPC.

¶ 419 Alexander was also very knowledgeable about oil plays in the Sudan (near the Gambela region) and was experienced in finding financing for start-up projects. One would expect the directors of Pinewood and GPC to ask Alexander for his advice from time to time. Nor is it surprising that Alexander was consulted by Eilers, whether in fulfilling her duties for Buzz (for Pinewood) or in fulfilling any other duties for the Pinewood board.

¶ 420 Alexander testified that he did not receive many of the letters that Neilson said he sent to him and that he met with Neilson only two or three times after they signed the participation agreement. That may be. Whether he received the letters or not, as one would expect, he kept up-to-date with the main details of the project through phone calls and face-to-face discussions with Neilson, Civelli, Eilers, and Brewster, and by reviewing at least some of the written correspondence.

¶ 421 On the other hand:

- Alexander's major shareholding,
- his experience with oil plays and finding funding,
- his participation agreement with Neilson,
- the multiplicity of roles he was playing,
- the less formal and less rigorous processes in a smaller company, and

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- the fact that the Gambela project was (during this period) the whole of Pinewood's business,

meant that, in choosing to be involved in any way at all, Alexander had to be very careful indeed not to breach the consent order.

- ¶ 422 Alexander's very nature increased the risk of breach. As Ellis put it – "He always acts like he's running the show. He's a promoter."
- ¶ 423 Despite all this, Alexander did not make clear his roles in writing to the Pinewood board, Neilson, and Civelli, and he did not obtain legal advice to ensure there were mechanisms in place adequate to protect him and Eilers, and to ensure compliance with the order.
- ¶ 424 Nevertheless, the onus is on the executive director to prove the allegations in the notice of hearing. This onus, taken with some significant issues on the credibility of witnesses and the reliability and probative value of some of the evidence, play an important role in this case.

Analysis

- ¶ 425 As commissioners Alexander and Graf describe in their findings of fact, Alexander was involved with the Gambela project from May 2000. In addition to his roles as major shareholder, "partner" with Neilson, and adviser to Brewster (president of Pinewood) and Neilson (wearing his GPC hat), he was looking for financing for the Gambela project with Civelli, Neilson, and Brewster. In my view, however, these roles did not, in themselves, make Alexander a *de facto* director or officer. Nor, in my view, was any single matter raised by the executive director (if proved) sufficient, in itself, to amount to acting as a director or officer of Pinewood.
- ¶ 426 Nevertheless, taken as a whole, do these roles and Alexander's conduct amount to more than the sum of their parts? Was Alexander an integral part of the mind and management of the company, taking into account the entirety of his involvement in the context of the company's activities? Did he assume office?
- ¶ 427 There appears to have been little involvement by the board in the Gambela project beyond the bare necessities. The directors collectively had little experience with oil plays and Brewster said they relied to a significant degree on Neilson (and presumably Pratt). Neilson and Pratt were competent individuals, and the board's reliance was to an extent justified. Yet none of the directors had met or even spoken with Neilson who communicated with the board by written correspondence and through Eilers. Brewster said that he also relied to a

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significant degree on Eilers. Minimal oversight by the board or minimal management by its officers does not, however, necessarily mean that someone (whether Alexander or Eilers or Neilson or anyone) stepped in to fill any gap.

Gambela project until September 7, 2000

¶ 428 The executive director says that from May to August 2000, Alexander took steps to “cause” Pinewood to pursue the Gambela opportunity. She says that Alexander:

- led Neilson to believe that he was representing Pinewood;
- engaged in extensive discussions with Neilson concerning the Gambela opportunity and agreed with Neilson and Civelli, among other things, that Neilson would apply for the PSA on behalf of Pinewood through a Pinewood subsidiary;
- arranged the payment of Neilson’s expenses by Pinewood; and
- communicated with Civelli about the financing of the opportunity.

¶ 429 In his interview, Neilson told BCSC staff that Alexander led him to believe that he had signed the participation agreement on behalf of Pinewood. Alexander argued that we should reject this evidence.

¶ 430 I agree that we should give little or no weight to Neilson’s unsworn evidence that Alexander led him to believe he was signing the agreement on behalf of Pinewood. It is uncorroborated hearsay and I am suspicious of Neilson’s motives in making such a statement for the reasons that commissioners Alexander and Graf have set out in the section on credibility of witnesses. Alexander did testify and he expressly contradicted Neilson’s statement. The participation agreement did not mention Pinewood, and Alexander signed it in his personal capacity.

¶ 431 The executive director asks us to find that because none of Pinewood’s appointed directors were aware of the Gambela opportunity at that time, they could not have approved the July 2000 trip or the payment. She says that Alexander must have approved Neilson’s July trip to Zurich and Ethiopia and the advance payment to him on behalf of Pinewood. In my view, the evidence on the awareness of Ellis and Farnworth is at best ambiguous. In addition, the directors did not testify and in their interviews BCSC staff did not ask them direct questions about the approval of any of Neilson’s invoices. I am not prepared to infer that Ellis or Farnworth could not have approved the trip or the July 11 payment.

¶ 432 Given Alexander’s close relationship with Eilers and her habit of asking his advice on Neilson’s invoices (see below), it would have been consistent for her to have done so on this occasion. However, even assuming that she did speak to

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Alexander, Eilers' evidence was that the board, or at least a director, would customarily have authorized any such payment. David Alexander and Eilers told BCSC staff that Alexander did not authorize it and Alexander denied it. We have no direct evidence that Alexander authorized or purported to authorize the payment. In my view, it is equally plausible that Eilers and David Alexander, on their own initiative, perhaps after receiving an assurance from Alexander on reimbursement, made the payment without the board's authorization, on the expectation that the board would later ratify or approve it (as it did).

- ¶ 433 The Pinewood board later ratified an unauthorized payment that Eilers made to Neilson in August through Buzz. In her interview, Eilers agreed with the words of her lawyer:

[At] the time she made this payment [of \$3,000], the deal was, so to speak, in the office. It was either Terry Alexander's deal – 'cause it was originally his deal – or it was in the course of being assigned to Pinewood. She was satisfied that if she made the payment, one or the other would reimburse her. Pinewood formally adopted the deal, Pinewood reimbursed her.

- ¶ 434 Neilson must have had a discussion with either Alexander or Eilers about sending the July 11 invoice to Pinewood, but I am not prepared to infer, on the evidence before us, that Alexander went so far as to authorize, or purport to authorize, the July 11 payment on behalf of Pinewood. I add that, although \$27,542 was not a small amount, in my view it was not significant in the light of Pinewood's operating history. In 2000, for example, Pinewood lost \$1,069,000, including a write-down of some mineral properties (\$579,000), completed a \$710,000 financing through the exercise of warrants and shares, and spent funds in aggressively pursuing a broadband satellite opportunity and an internet gateway opportunity, as well as the Gambela opportunity. (Pinewood abandoned both communications opportunities in 2000.) The Gambela opportunity was just one more in a long line of opportunities pursued and abandoned by Pinewood.

- ¶ 435 Nor am I prepared to infer that Alexander received Neilson's July 10 and 28, September 3, and November 29, 2000 letters. Even if I do not believe Alexander's testimony that he did not receive them, there is no direct or indirect evidence that he did receive them. That is not to conclude, however, that Alexander did not receive the information contained in the letters. In his telephone conversations and meetings with Eilers, Neilson, and Civelli, although the evidence does not show that these communications were "extensive", as the executive director alleges, in my view, he must have done so.

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- ¶ 436 Under the participation agreement, Neilson was to deal with the Ethiopian government and manage the project. Alexander was to find the funds. Alexander believed that they would need \$25 to 30 million to fund the Gambela exploration program and that he could raise the money through a group of private companies in Europe. He testified that he and Neilson contemplated bringing a multi-national into the project and collecting a finder's fee. The evidence shows that Alexander and Civelli did some planning on the financing options at their June 2000 meeting and continued to discuss the financing of Pinewood from time to time during the year.
- ¶ 437 Alexander also gave advice to Neilson on preparing the application for the PSA on the assumption that the Pinewood board would approve it. In my view, however, the correspondence prior to the board meeting of September 7, 2000 does not show that Alexander had agreed or purported to agree to the application on behalf of Pinewood. In my view, on the evidence before us, Alexander's involvement in the planning prior to the board meeting did not amount to directing or managing Pinewood.
- ¶ 438 In my view, the executive director has not proved that Alexander led Neilson to believe that he was representing Pinewood, or that he arranged the payment of Neilson's July 11 invoice in a way that amounted to directing or managing Pinewood. As for the rest, I do not read into Alexander's activities anything more than a contribution to the planning undertaken by Neilson and Civelli. This did not amount to 'causing Pinewood to pursue the Gambela opportunity'. The Pinewood board took that decision on its own on September 7, 2000.

Gambela project after September 7, 2000

- ¶ 439 The executive director points to various matters after September 7, 2000 that she says show Alexander's involvement in directing and managing Pinewood:
- Neilson regularly reported directly to Alexander;
 - on a number of occasions, Alexander provided Neilson with direct instructions, for example:
 - Alexander directly and specifically advised Neilson in writing to cultivate good relations with the Ethiopian military in the interests of advancing the Gambela opportunity,
 - Alexander wrote directly to Neilson to address his concerns about the funding of the Gambela project and to assure him that Alexander and Civelli would, as promoters, be able to raise the necessary capital, and

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- Alexander wrote directly to Neilson to discuss his expenses in connection with pursuing the Gambela opportunity; and
- Alexander approved payments to Neilson on behalf of Pinewood.

¶ 440 Turning first to the alleged approval of payments to Neilson, Alexander testified that Eilers never asked for his approval of Neilson's invoices, but occasionally asked for his advice on whether Neilson's budgets and billings were in line, based on his experience in Sudan. Eilers corroborated Alexander's testimony. Brewster said that he discussed matters, which I infer included Neilson's hotel bills, with Eilers regularly. He said: "My understanding was that [Neilson] was communicating with ... Eilers on matters that were of a housekeeping nature in a way. I mean, he needed some money for hotel bills." "[Eilers] and I communicated on a regular basis by phone, or sometimes I would go into the office, and I would keep up-to-date on what was happening."

¶ 441 The executive director says that several documents contradict Alexander's version of events. I do not think they do.

¶ 442 On November 5, 2000, Neilson faxed Alexander to request \$7,000 to cover past and future hotel bills. Eilers responded by fax dated November 6, 2000:

Received your faxes from this weekend. Once Terry gets to the office I will request approval on the wire transfer.

¶ 443 Eilers faxed Neilson on November 6 confirming that the requested \$7,000 had been wired to him. This amount was charged to Pinewood's US\$ account. On all the evidence, I am not prepared to infer from the words in her fax that Eilers requested approval from Alexander on behalf of Pinewood or that he gave it.

¶ 444 On or around April 9, 2001, Neilson faxed Pinewood for further funds for his expenses in the amount of \$10,000. He wrote again in urgent terms to Alexander in an undated fax. Alexander denied receiving these faxes. Eilers faxed Neilson on April 18 to say that she had spoken to Alexander "and he has agreed, so I will be transferring US\$10,000 to the bank as before". Again, I am not prepared to infer from the words "he has agreed" that Alexander did anything more than agree that the costs were in line.

¶ 445 Also on April 18, 2001, Eilers faxed Neilson a note, purportedly from Alexander:

Received your request for further funds. Please provide back-up expense reports ... as per my request.

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Once we receive your completed reports we will wire transfer additional \$\$.

- ¶ 446 Whether or not Alexander authorized this note, I do not view it as evidence that he authorized or purported to authorize the payment. The note simply says that the money would be wired once the expense reports were received. It says nothing about who had, or would, formally approve the payment.
- ¶ 447 Pinewood paid nine invoices from Neilson for his travel expenses from July 11, 2000 to April 18, 2001. Without any direct evidence on the involvement of the board in the November 6, 2000 and April 18, 2001 payments, and taking into account evidence that the Pinewood board or Brewster approved Neilson's expenses on other occasions and BCSC staff did not ask any of the directors questions about the approval of Neilson's invoices., I am not prepared to infer that Alexander played a role in Pinewood's approval of Neilson's expenses beyond the one he asserts.
- ¶ 448 As a result of Neilson's reports to him, Alexander knew more about what Neilson and Pratt were doing than the Pinewood board. Nevertheless, in the period September 2000 to January 2001, Neilson had not addressed all the correspondence in evidence before us to Alexander. He sent an up-date to Eilers, for Pinewood, on September 27. He sent up-dates to Pratt on October 16 and November 2 and copied them to the Pinewood board.
- ¶ 449 After November 2, it appears that he sent several up-dates and requests for advice to Alexander, but not to Pinewood, until his report to the Pinewood board dated January 15, 2001 (but probably not sent until early February 2001). It appears that Neilson addressed most, if not all, of his up-dates (and invoices) after that only to the Pinewood board. In addition, Eilers forwarded at least some of the earlier letters addressed to Alexander to the board or one of the directors. In any event, his passive receipt of up-dates on the PSA application, and information relevant to his investor relations activities, does not support a finding that Alexander was a *de facto* director and officer of Pinewood.
- ¶ 450 On September 7, 2000, the Pinewood board had put Neilson firmly in the driver's seat when they decided to put the Gambela project into a subsidiary, GPC, and to make him a director and the CEO. It was then for Brewster and the Pinewood board to oversee GPC's activities, but not to direct and manage the company; that was the role of GPC's board and its officers.
- ¶ 451 Because he introduced the Gambela opportunity to the Pinewood board and provided advice to Neilson from time to time, Alexander should have informed the board about his participation agreement (and ongoing involvement) with

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Neilson. His failure to do so, however, did not in itself make him a *de facto* director or officer of Pinewood.

¶ 452 I do not agree with the finding of commissioners Alexander and Graf that Alexander was involved in the US\$140,000 loan to GPC. Alexander testified he was not involved. Civelli corroborated his evidence and told BCSC staff that:

Q Did you discuss with Terry Alexander the raising of the \$140,000?

A No.

...

Q ... Is there any particular reason why you agreed to raise 130,000 US as opposed to Terry Alexander?

A Well, yes, he was not going to raise any money.

Q He told you that?

A Yes.

¶ 453 In his letter to Pinewood of October 31, 2001, Neilson asserted that he had been working on the Gambela project for Alexander and acting on Alexander's instructions under their participation agreement. He said he had no agreement with Pinewood and explained why, in his view, Alexander was liable personally to pay his professional fees. Nevertheless, in discussing his performance as President and Treasurer of GPC, he said:

... I had the responsibility of conducting the day to day affairs of the Company in Ethiopia in preparation for the proposed US \$30 Million Exploration Program that was to commence as soon as the Gambela PSA was executed. Nobody told me what to do. I knew what had to be done. From July of last year until the date the Gambela PSA was executed, my primary responsibility was to finalize the terms of the Gambela PSA with the Ethiopian Ministry of Mines & Energy while at the same time making preparation for the infrastructure that had to be put in place for the construction and completion of the base camp by the fall of 2001 ...

As soon as the PSA was signed on January 24, I immediately went to work on the preparation of the infrastructure for the base camp. I retained [B] as Legal Counsel to the Company, and I put my two engineers, [E and M], on the payroll ... The two of them had already been working for me for two months without pay. As President and Treasurer of the Company it was my responsibility, **among many other things**, to pay [B], to pay [E and M], to pay my hotel bills, to pay my traveling expenses, to pay the Land Rentals and National Training Contribution to the Ethiopian Ministry of Mines & Energy when due and payable, and to pay all of the Company's operating expenses, and to pay myself. I did not need authorization from

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anyone to make any of these payments. I was fully empowered to make all of these payments myself, and it was my responsibility to make these payments. ... [Neilson's emphasis]

... On February 16 [2001] I sent an urgent letter to the Board of Directors of Pinewood Resources Ltd requesting a minimum of US \$300,000 to conduct the day to day affairs of the Company. The request was ignored.

... [Some] US \$140,000 ... was provided by Carlo Civelli ... at my entreaty. As it was, I had to plead with Carlo to advance the funds at the risk of losing the Concession. Terry Alexander had flat out refused my request to advance the money to pay the Land Rentals ... which were due on February 23, 2001 ...

- ¶ 454 The executive director asked us to rely on this letter as evidence that Neilson took instructions from Alexander. For that purpose, I do not place much weight on it. It is uncorroborated hearsay and I am suspicious of Neilson's motives in making that assertion. However, the evidence on Alexander's lack of involvement in the US \$140,000 loan was corroborated by Alexander and Civelli. In addition, I can see no motive for Neilson to lie about the origins of the loan.
- ¶ 455 On April 18, 2001, Alexander wrote (or authorized Eilers to write) to Neilson to ask for "back-up expense reports for the outstanding amount from your last expense report, plus back-up for the US \$130,000 and US \$10,000 forwarded to you by Carlo as per my request". The phrase "as per my request" can be read as modifying the "back-up" or the "US \$130,000 and US \$10,000". Looking only at the document, both are equally plausible.
- ¶ 456 In the light of all the evidence, however, in my view, the phrase was intended to apply to the back-up reports. It did not mean that Alexander had requested that Civelli forward US \$140,000 to Neilson. The note to Neilson repeated an earlier request for backup reports. Eilers had asked Neilson earlier that day for a receipt for the land rental payment. Later, Neilson faxed a note to Eilers, undated but apparently responding to both faxes of April 18, attaching "in accordance with your request" the receipt for the land rental payment and Swift confirmations of the transfers of US \$130,000 and US \$10,000 by Clarion Finanz. (By this time, both Brewster and Pinewood's solicitor had become aware of the US \$140,000 loan to GPC and so it is not surprising that Pinewood was seeking backup documentation for the transfer.)
- ¶ 457 I read in Eilers' letter of May 8, 2001 no more than an assertion that Neilson would need Civelli's and Alexander's help if he were to have any chance of getting an extension of the PSA and finding the financing. While I agree that

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Alexander's letters to the Ethiopian government show that Alexander continued to seek funding for Pinewood, I do not think they show that Alexander continued to direct and manage Pinewood. The directors did not know what Alexander was doing. In my view, Alexander was doing no more than try against all the odds to keep the deal alive. This did not amount to directing or managing Pinewood.

Conclusion

- ¶ 458 During the relevant period, the directors of Pinewood were not Alexander's nominees (in the sense that they followed his instructions) or mere figureheads. There was a legitimate, functioning board, president, accountant, administrative officer, and company solicitor in place. It is odd that Neilson and Brewster never met or spoke to each other, but it is clear that Neilson did communicate with Brewster and the board through Eilers, and via Neilson's written correspondence.
- ¶ 459 Pinewood's solicitor told BCSC staff that from September 2000 he spoke to both Eilers and Brewster fairly regularly on Pinewood matters. He said that, so far as he knew, Alexander had no influence over the affairs of Pinewood and he had never spoken to him. The directors made similar statements. There is no evidence that the board was accustomed to act in accordance with Alexander's instructions and it appears that the directors applied independent thought to the matters before them.
- ¶ 460 The executive director says that Alexander concealed his direction of Pinewood by using Eilers to provide instructions to both Neilson and Pinewood's board of directors. In my view, there is no credible evidence to support this allegation. I do not view Alexander's few written communications to Neilson as instructions; rather, they seem to me more in the nature of advice or reports on Alexander's efforts to find funding. Nor do I think that these activities in relation to Neilson amounted to oversight of GPC or Neilson on behalf of Pinewood.
- ¶ 461 Alexander did not undertake any functions that would normally properly only be discharged by a director or officer. He did not, for example, approve the payment of Neilson's invoices. In my view, his investor relations activities were not activities or functions that would normally only be performed by a director or officer. The activities he did engage in were limited (and produced no results).
- ¶ 462 In my view, on the evidence before us, Alexander did not go so far as to participate, with the appointed directors and officers, in the supervision, direction, control and operation of Pinewood. There is very little evidence that Alexander *did* anything. During the relevant period, he participated with Civelli to help Neilson put the Gambela PSA application together, introduced the project to the board through Brewster and Eilers, and provided his views and advice when

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asked. There is no evidence that he made, or participated in, important business decisions by Pinewood.

- ¶ 463 The executive director makes much of the fact that Alexander, Eilers, David Alexander and Pinewood and its directors shared office space. I agree that it is a factor we should take into account in our assessment. But, in my view, it would also be unreal to expect that no one would talk to anyone else about matters of common interest in these circumstances.
- ¶ 464 There is no credible evidence that Alexander held himself out, or was held out by, Pinewood as a director and officer. The directors, particularly Brewster, were aware that the consent order prohibited Alexander from acting as a director and officer and Brewster took some steps to ensure he did not do so.
- ¶ 465 Alexander is right to point out that his activities were not on a par with those of others who have previously been found to be *de facto* directors. However, conduct not on a par with the examples in the cases cited to us may still amount to directing or managing a company. That begs the question of where to draw the line, particularly in the case of a small company with few resources and no significant business activities. Pinewood, like many companies of its type, was not well-endowed with expertise, money, or staff. Individuals tended to dive in to get things done. In my view, we should not set a standard so high that individuals such as consultants, lawyers, accountants, and shareholders would be unduly concerned about being viewed as *de facto* directors or officers, with the resulting duties and responsibilities that would follow.
- ¶ 466 In my view, the executive director has not proved the allegation that Alexander was a *de facto* director and officer of Pinewood. Accordingly, I would dismiss the allegation and the allegation that Eilers assisted him.

Engaging in investor relations activities on behalf of Pinewood and JTA

- ¶ 467 I agree with commissioners Alexander and Graf that Alexander contravened the consent order and acted contrary to the public interest by engaging in investor relations activities on behalf of Pinewood. In my view, he also engaged in such activities on behalf of JTA.

Alexander was on the look-out for a company or companies that might partner with Pinewood. He was also looking for financing for Pinewood itself. He wanted to sell JTA's shares in Pinewood. Any financing for the exploration program would very likely have involved the purchase or sale of securities of Pinewood, whether through a private placement in Pinewood or a sale of Pinewood's shares by JTA, or both (as R Co proposed).

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- ¶ 468 Alexander argues that there is no evidence he actively publicized Pinewood in order to promote the sale of Pinewood shares. I agree with the executive director that “promote” in the definition of “investor relations activities” does not mean “actively publicize”. I prefer the ordinary (broader) meaning, that is, activity or communications that ‘support, advance or encourage’ the purchase or sale of securities.
- ¶ 469 Alexander argues that if any investor relations activities took place, they could only have been aimed at the sale of JTA’s shares in Pinewood. He says any such activity would have been “protected” by the prohibition on trading JTA’s shares (and the protective condition precedent intended for the Share Sale Agreement) and the corresponding need to first obtain a variation of the order. I do not agree. Alexander was here acting on behalf of both Pinewood and JTA. In addition, the prohibition on investor relations activities in the consent order was intended to keep Alexander from carrying on this type of market activity. There could be no cure in an eventual variation of the order to allow a specific trade.
- ¶ 470 Alexander complained, with some justification, that the executive director had not explained how the evidence before us fell within the definition of “investor relations activities” and therefore implicated him. Commission panels should not have to fill in any blanks in the executive director’s submissions but, in this case, after hearing oral submissions, in my view, it is not a big step to complete the picture and there is no unfairness to the respondents in doing so.

Trading while unregistered

Sale of JTA’s shares in Pinewood to R Co

- ¶ 471 Did Alexander and JTA engage in acts in furtherance of the disposition of JTA’s shares in Pinewood to R Co contrary to section 34(1)? I agree with commissioners Alexander and Graf to dismiss these allegations.
- ¶ 472 There is no evidence that Alexander or JTA solicited an offer from R Co for the purchase of JTA’s shares in Pinewood. As *de facto* director and officer of JTA, Alexander merely signed documents on behalf of JTA and instructed his lawyers. Nevertheless, in my view, these were acts in furtherance of the disposition of JTA’s shares in Pinewood for valuable consideration and so were a “trade”.

- ¶ 473 However:

when the trade at issue is not a physical trade, but an ‘act in furtherance’, obviously section 34 would not require registration if the trade being facilitated would not itself require registration if consummated. (*Kenneth Walter Hrapstead*, [1999] 15 BCSC Weekly Summary 13, page 8)

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- ¶ 474 It was not the intention of the legislation to require registration for such acts. In my view, the same principle applies to a discretionary exemption (whether under the securities legislation or by variation of an order). Where an application for exemption from the securities legislation or variation of a decision is reasonably likely to be granted, then reasonable acts in furtherance are also exempt, whether the application is granted or not and whether the trade is executed or not.
- ¶ 475 On the evidence before us, the executive director would almost certainly have granted an application from Alexander and JTA to vary the consent order to allow the sale of JTA's shares in Pinewood to R Co. Alexander and JTA intended to apply for a variation. Before applying for a variation of the consent order, Alexander's and JTA's acts in furtherance were not unreasonable, although obtaining legal advice and putting the BCSC on notice sooner would have been desirable. All those involved were aware that the trade would take place only if the executive director granted a variation. Since the deal fell through for other reasons and Alexander and JTA did not apply for the variation, there was no actual consequential exemption for the acts in furtherance, but it would be an unreasonable interpretation of the legislation to say that the acts nevertheless breached section 34.

Issue of shares in Pinewood

- ¶ 476 I agree with commissioners Graf and Alexander that Alexander did not act to further the issue of shares in Pinewood to R Co.
- ¶ 477 Did Alexander contravene section 34(1) of the Act and act contrary to the public interest by engaging in acts in furtherance of the disposition of shares of Pinewood to finance the Gambela opportunity (apart from the proposed R Co private placement)? Any search for financing of Pinewood or GPC reasonably could be expected to promote the purchase or sale of securities of Pinewood, for example, through a private placement in Pinewood or the sale of JTA's shares. As described above, this put Alexander's activities in creating a database and communicating with potential sources of financing squarely within the definition of "investor relations activities".
- ¶ 478 Alexander's activities and communications also fell squarely within the definition of a "trade" in section 1(1) of the Act. His investor relations activities were also acts, solicitations, conduct or negotiations directly or indirectly in furtherance of a disposition of a security (in Pinewood) for valuable consideration.
- ¶ 479 Alexander was prohibited from trading without registration unless the trade was allowed under an exemption. As a result of the consent order, no such exemption applied. Accordingly, in my view, Alexander breached section 34(1) of the Act and acted contrary to the public interest.

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Allegations against Eilers

¶ 480 In allowing Alexander to act as director and officer of JTA, Eilers arguably assisted Alexander in contravening the consent order, but the allegation in the notice of hearing is more specific than that. The executive director says that Eilers “assisted Alexander in concealing the fact that he was actually directing JTA while attempting to dispose of his Pinewood shares”. There is no evidence that Eilers or Alexander directly or indirectly concealed anything when Alexander acted to accept R Co’s offer to purchase JTA’s shares. I would dismiss this allegation. I agree with commissioners Alexander and Graf that the other allegations against Eilers are not proved.

¶ 481 October 24, 2007

Robin E. Ford
Commissioner