

BRITISH COLUMBIA SECURITIES COMMISSION

Securities Act, RSBC 1996, c. 418

Citation: Re Morabito, 2023 BCSECCOM 462

Date: 20230922

**Global Crossing Airlines Group Inc. (formerly known as Canada Jetlines Ltd.)
and Mark Morabito**

Panel	Judith Downes	Commissioner
	James Kershaw	Commissioner
	Marion Shaw	Commissioner

Submissions completed March 14, 2023

Ruling date April 3, 2023

Reasons date September 22, 2023

Counsel

Deborah Flood	For the Executive Director
James Torrance	

Sean K. Boyle	For Global Crossing Airlines Group Inc.
Jenna Green	

Robert J.C. Deane	For Mark Morabito
Paige Burnham	

Reasons for Paragraph 16(b) order in Second Supplemental Ruling on Disclosure

I. Introduction

[1] By notices of application dated March 24, 2022 and April 19, 2022 respectively (Disclosure Applications), Mark Morabito (Morabito) and Global Crossing Airlines Group Inc. (Global) sought orders requiring the executive director to disclose a broad range of materials on the basis that the executive director had failed to disclose to the respondents all relevant documents in his possession or control.

[2] To date, this panel has issued four rulings on the Disclosure Applications:

(a) *Re Morabito*, 2022 BCSECCOM 433 (First Ruling),

(b) *Re Morabito*, 2022 BCSECCOM 440, which extended the deadline set in the First Ruling for the filing of certain documents and information,

(c) *Re Morabito*, 2023 BCSECCOM 83 (Supplemental Ruling), and

(d) *Re Morabito*, 2023 BCSECCOM 150 (Second Supplemental Ruling).

II. Procedural History

- [3] The First Ruling required, among other things, the executive director to provide lists of certain documents and categories of documents not disclosed by the executive director, describing those documents and categories of documents in sufficient detail so that the grounds upon which the executive director had not disclosed them could be assessed.
- [4] On November 7 and 16, 2022, in response to the First Ruling, the executive director provided additional disclosure documents to the respondents as well as reasons for non-disclosure of certain documents and categories of documents. The information with respect to the grounds for non-disclosure was contained in an appendix to a letter from counsel for the executive director (Information Appendix).
- [5] The Information Appendix included descriptions of 12 documents relating to communications with a former executive officer of Global (Former CEO), which had not been disclosed by the executive director. The basis for non-disclosure with respect to four of those documents (Settlement Documents) was a claim of settlement privilege and, for the balance of the documents (Irrelevant Documents), an assertion that they were not relevant.
- [6] By letter dated January 3, 2023, Morabito advised that, after reviewing the Information Appendix, he was limiting the scope of the further disclosure sought in his Disclosure Application to the documents listed in ten schedules, Schedules A to J, identified in the letter (Morabito Schedules).
- [7] Schedule I of the Morabito Schedules included the Settlement Documents and the Irrelevant Documents, which we refer to collectively as the “Schedule I Documents”.
- [8] There was a dispute between the parties as to whether settlement privilege had been established with respect to the Settlement Documents and on January 6, 2023, the panel advised the parties that it would consider submissions on the issue of settlement privilege.
- [9] On January 17, 2023, as part of his reply submissions on the issue of settlement privilege, the executive director provided to the respondents the Schedule I Documents in redacted form.
- [10] On February 1, 2023, the executive director provided to the respondents redacted copies of the documents listed in Morabito Schedules A to H.
- [11] On February 17, 2023, the Commission issued the Supplemental Ruling, which required the executive director:
 - (a) to file with the Hearing Office and provide to the respondents certain further information regarding the redacted portions of certain categories of documents in certain of the Morabito Schedules, and
 - (b) to file with the Hearing Office the redacted Schedule I Documents.

- [12] On February 28, 2023, the executive director provided information and documentation to the Hearing Office and to the respondents in response to the Supplemental Ruling.
- [13] On March 14, 2023, in response to a direction from the panel, the executive director provided to the Hearing Office and to the respondents, among other things, additional information with respect to certain information in the Morabito Schedules.
- [14] On April 3, 2023, the Commission, after reviewing the documents and submissions provided by the parties, issued the Second Supplemental Ruling ordering that:
- (a) the executive director had established his claim for settlement privilege over the redacted portions of the Settlement Documents (Settlement Privilege Ruling), and
 - (b) the executive director had met his disclosure obligations with respect to the documents in the Morabito Schedules and the redacted materials within those documents need not be disclosed (Disclosure Ruling).
- [15] On April 19, 2023, Morabito requested reasons be given with respect to the Settlement Privilege Ruling. On May 4, 2023, the panel issued its reasons (*Re Morabito*, 2023 BCSECCOM 226).
- [16] On September 20, 2023, the panel issued its Reasons for Rulings on Disclosure and Cross-Examination (*Re Morabito*, 2023 BCSECCOM 457), providing reasons for the First Ruling and for the panel's Ruling on applications for cross-examination cited as *Re Global Crossing*, 2022 BCSECCOM 335.
- [17] We originally intended to include our reasons for the Disclosure Ruling with our findings on liability in this matter. However, as noted in the Reasons for Rulings on Disclosure and Cross-Examination, the time for release of our findings on liability in this matter is now unclear. As well, considerable time has passed since the issuance of the Disclosure Ruling. Given these facts, we determined to issue our reasons with respect to the Disclosure Ruling now.
- [18] These are our reasons.

III. Applicable Law

Disclosure

- [19] A summary of the law relating to disclosure was provided in the September 20, 2023 Reasons for Rulings on Disclosure and Cross-Examination at paragraphs 37 to 46.
- [20] In *Fairtide Capital Corporation et. al.*, 2007 BCSECCOM 130, the Commission quoted with approval the British Columbia Supreme Court case *Construction (Canada) Ltd. v. Greater Vancouver Sewerage and Drainage District*, [2003] B.C.J. No. 2389, which relied on the well-known *Peruvian Guano* decision in setting out this test for relevance:

7. For convenience, I will set out the applicable law for determining relevancy of documents.

8. The test for determining relevancy of documents is found in *Compagnie Financiere Et Commercial du Pacifique v. Peruvian Guano Co.* (1882) 11 QBD 55. Peruvian Guano has been followed by the courts in Canada. The test (at p. 63) is:

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words “directly or indirectly”, because, it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.

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

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

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

[21] In deciding questions of relevance, we have employed that test.

IV. Analysis

Irrelevant Documents

[22] Morabito submitted that the executive director’s dealings with the Former CEO contained in the Irrelevant Documents were relevant and ought to be disclosed. He argued that the Former CEO was a key witness as the person ultimately responsible for Global’s disclosure obligations and, therefore, what the Former CEO said to the executive director was clearly relevant. He submitted there was no other way to obtain this evidence given the Former CEO’s subsequent death.

[23] Morabito said that certain of the Irrelevant Documents related to communications between the executive director, the Former CEO and others on matters pertaining to the Former CEO’s health. Morabito said it appeared from the description of these documents provided by the executive director that the executive director was aware the Former CEO was dying and the executive director failed to inform Morabito of what he knew.

- [24] Based on Morabito's characterization of the Former CEO as a key witness and that person's subsequent death, Morabito said the documents pertaining to the Former CEO's health were particularly relevant to the proceedings, including their basic fairness. Morabito noted that in the criminal context, the Crown's failure to inform the defence of a key material witness before the witness died had been said to be a "most extreme circumstance" that would justify a stay of proceedings.
- [25] The executive director submitted that the Irrelevant Documents were not relevant because they did not include any discussion of evidence that would directly or indirectly prove or disprove the allegations in the notice of hearing or lead the respondents to a train of inquiry which may disprove the allegations.
- [26] The Irrelevant Documents provided by the executive director comprised the following:
- (a) an email from counsel to the executive director dated June 4, 2021 to the Former CEO containing a list of securities lawyers in Vancouver. There are no redactions to the content.
 - (b) Notes made by counsel for the executive director dated June 7, 2021 regarding a telephone conversation with the Former CEO on that date in which counsel requested a brief email confirming the Former CEO's medical condition. There are no redactions to the content.
 - (c) Four email chains, all dated June 7, 2021, from the Former CEO to counsel for the executive director and a third party health provider regarding the provision of information regarding the Former CEO's medical condition. Contact information, email addresses and the name of an employee at the third party health provider have been redacted.
 - (d) An internal Commission email dated June 7, 2021, forwarding a document received from the third party health provider to counsel for the executive director. There are no redactions to the content.
 - (e) A facsimile from the third party health provider dated June 7, 2021 attaching a report regarding the Former CEO. The entire content of the report has been redacted.
- [27] The test for relevance in this application is the relevance of the documents in question to the allegations in the notice of hearing. Regardless of whether the Former CEO is a key witness to these proceedings, which has yet to be established, it is difficult to see how information regarding his health in 2021, three years after the events which are the subject of the notice of hearing, is relevant.
- [28] The allegations in the notice of hearing relate to the failure of Global to disclose a material change regarding its operations and insider trading on the part of Morabito. The events in issue take place between December 2017 and March 2018. Evidence regarding the Former CEO's subsequent state of health would not directly or indirectly prove or

disprove these allegations against the respondents in the notice of hearing or lead the respondents on a train of inquiry that would disprove the allegations.

- [29] Similarly, it is difficult to see how a list of securities lawyers is relevant to the allegations in the notice of hearing.
- [30] As to the issue of the impact of the failure of the executive director to notify Morabito of the Former CEO's state of health on the fairness of these proceedings, this question is more properly the subject of an application for a stay of proceedings for abuse of process than a disclosure application. We note that subsequent to raising the fairness issue in these proceedings, Morabito and Global filed stay applications for abuse of process in which this issue was raised. The panel issued its ruling and reasons on the stay applications on August 17, 2023 (*Re Morabito*, 2023 BCSECCOM 405).
- [31] In the circumstances, we found that the Irrelevant Documents were not relevant and the executive director had no obligation to disclose them. As there was no disclosure obligation attached to these documents, we found there was no requirement to disclose the redacted portions of them.

The other Morabito Schedules documents

- [32] As noted above, in addition to the Schedule I Documents, Morabito sought disclosure of unredacted copies of all documents listed in Morabito Schedules A to J.
- [33] The Schedule J documents provided by the executive director comprised the following:
- (a) IIROC Canada Jetlines Case Referral. This document is an email chain initiated on March 23, 2018 from an IIROC employee to a Commission investigator referring a possible insider trading matter relating to Global to the Commission based on unusual price and volume prior to Global's March 13, 2018 news release. There were no redactions to the contents of this document.
 - (b) Canada Jetlines Ltd. Insider Trading Risk Report dated May 9, 2018. This is an internal Commission document providing a risk assessment score for Global based on IIROC trading data. Details of the underlying risk score variables, the calculation of the risk score and the resulting risk score number have been redacted along with identifying information relating to individual brokers, accounts and similar information.
 - (c) Insider Trading Risk Assessment Template – Negative News. This is an internal IIROC document showing volume and value of shares traded from 2018/1/29 to 2018/3/20.
 - (d) IIROC Trade Order Quotes for Canada Jetlines Ltd. from 1/29/2018 to 3/20/2018. Account IDs, broker order numbers, market order numbers and user ID numbers have been redacted.

- [34] As noted above, the allegations against the respondents in the notice of hearing relate to a failure by Global to disclose a material change in its operations and insider trading on the part of Morabito. In considering the allegations, the issues will be whether the events described in the notice of hearing constitute a “material change” that was not disclosed in accordance with the Act and whether Morabito traded in Global shares with knowledge of an undisclosed “material change” or “material fact”, as defined in the Act.
- [35] It is difficult to see how the IIROC case referral and the internal IIROC and Commission risk analyses would directly or indirectly prove or disprove these allegations or lead the respondents on a train of inquiry that would disprove the allegations. The same analysis applies to trading data regarding Global shares. Such data may be relevant in the sanctions phase if liability is found against the respondents. If that is the case, we will consider the relevance of any such evidence at that time.
- [36] The disclosure provided by the executive director relating to Schedules A to H of the Morabito Schedules comprised over 630 documents. As noted in *Hu v. British Columbia (Securities Commission)*, 2010 BCCA 306 at paragraph 16, while the Commission must make determinations of relevancy or privilege when there is a disagreement between counsel, the Commission has a discretion to decide whether it can make the required determinations on the basis of the description of the documents by counsel, coupled with an assurance that the documents have been reviewed and contain nothing relevant or privileged. The Court stated it becomes more likely that the adjudicator will rely, at least initially, on the description of the documents and the assurance from counsel as the number of documents grows.
- [37] The panel reviewed all of the Schedule J documents. However, given the number of Schedule A to H documents, the panel relied on the information included in the Information Appendix, as supplemented by information and documents filed in response to the Supplemental Ruling and the March 14, 2023 direction from the panel. The Information Appendix included a description of the documents and the basis on which the executive director had determined that they were not relevant or subject to solicitor-client privilege, as applicable. The panel concluded it was reasonable to assume that, in arriving at these conclusions, the executive director reviewed the documents in issue. If the description of a document raised a question as to its relevancy or privilege, as applicable, or if the document was not included in the Information Appendix, the panel reviewed the individual document.
- [38] Based on the above, the panel concluded the documents listed in Schedule A to H and J of the Morabito Schedules were either subject to solicitor-client privilege or not relevant, in that they would not directly or indirectly prove or disprove the allegations against the respondents or lead the respondents on a train of inquiry that would disprove the allegations. As there were no disclosure obligations attached to these documents, we found that there was no requirement to disclose the redacted portions of them.

- [39] In the circumstances, we found that the executive director had met his disclosure obligations with respect to the documents in the Morabito Schedules and that the redacted materials within those schedules need not be disclosed.

September 22, 2023

For the Commission

Judith Downes
Commissioner

James Kershaw
Commissioner

Marion Shaw
Commissioner