BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Core Capital Partners Inc., 2024 BCSECCOM 349 Date: 20240808

Core Capital Partners Inc., Kamaldeep Thindal, Amandeep Thindal, Yazan Al Homsi, Mani Chopra, Pardeep Luddu and Aarun Kumar aka Aaron Rai Kumar

Panel	Gordon Johnson, Vice Chair Judith Downes, Commissioner Jason Milne, Commissioner
Submissions completed	May 2, 2024
Date of findings	August 8, 2024
Appearing	
Derek Chapman Deborah Flood Amir Ghorbani	For the Executive Director
J. Kenneth McEwan, KC Brendan Coffey	For Core Capital Partners Inc., Kamaldeep Thindal and Amandeep Thindal
Laesha Smith Kyle Thompson	For Yazan Al Homsi
H. Roderick Anderson Jessica Mank	For Mani Chopra
Patrick J. Sullivan Sara Shuchat	For Pardeep Luddu and Aarun Kumar

Reasons for Rulings on Disclosure

I. Introduction

[1] On July 21, 2023, the executive director issued a notice of hearing, as amended on March 26, 2024 (2024 BCSECCOM 111) (Amended Notice of Hearing) containing allegations against Core Capital Partners Inc. (Core Capital), Kamaldeep Thindal (K. Thindal), Amandeep Thindal (A. Thindal), Yazan Al Homsi (Al Homsi), Mani Chopra, Pardeep Luddu (Luddu) and Aarun Kumar aka Aaron Rai Kumar (Kumar) (collectively, Respondents).

[2] The Amended Notice of Hearing alleges the Respondents carried out a pump and dump scheme that created a misleading appearance of trading activity in, or an artificial price

for, the securities of three reporting issuers in British Columbia contrary to section 57(a) of the *Securities Act* RSBC 1996, c. 418 (Act).

[3] By notice of application dated March 22, 2024 (the First Disclosure Application), Luddu and Kumar (Applicants) sought disclosure of all case notes created by the executive director during the course of his investigation and, specifically, the 103 case notes listed in the application (Case Notes).

[4] On April 10, 2024, the executive director provided written submissions with respect to the First Disclosure Application in which, among other things, he:

- agreed to provide 60 of the Case Notes which the executive director determined were irrelevant; and
- argued that 40 of the Case Notes were not subject to disclosure as they were irrelevant and were confidential communications with regulators or were subject to classes of privilege.

[5] On April 15, 2024, counsel for the Applicants sent a letter to the executive director demanding evidentiary support for the executive director's submissions regarding the confidential nature of the Case Notes relating to communications with regulators.

[6] On April 16, 2024, the executive director filed an affidavit (Affidavit) sworn by the primary Commission investigator describing generally the contents of each category of Case Notes with a redacted sample of each category attached.

[7] On April 18, 2024, the start date of the First Disclosure Application hearing, the Applicants delivered further written submissions. They advised that the number of Case Notes remaining in issue was 28.

[8] The panel heard oral submissions from counsel for the Applicants and for the executive director. The other Respondents adopted the Applicants' submissions.

[9] After considering the parties' submissions, the panel issued a ruling dated April 25, 2024 (2024 BCSECCOM 171) ordering certain additional disclosure to be made by the executive director, with reasons to follow.

[10] On April 29, 2024, during the course of the liability hearing relating to the allegations in the Amended Notice of Hearing, counsel for the executive director advised there were 150 additional documents which were communications with regulators (Additional Documents) that the executive director did not intend to disclose on the basis they were irrelevant and subject to confidentiality agreements with regulators.

[11] Counsel for the Applicants requested immediate disclosure of the Additional Documents (the Second Disclosure Application) on the same basis as outlined in their submissions relating to the First Disclosure Application. The other Respondents adopted the Applicants' request for disclosure.

[12] Counsel for the executive director submitted that a formal application for disclosure of the Additional Documents was required as the documents in issue in the First Disclosure Application were different than those subject to the Second Disclosure Application.

[13] After considering the parties' submissions, the panel directed counsel for the executive director to provide more information regarding the Additional Documents and invited her to make additional written submissions specifically dealing with the information sharing memoranda of understanding among securities regulators (MOUs) which the executive director asserted prohibited the disclosure of the Additional Documents.

[14] On May 1, 2024, the executive director provided written submissions in response to the panel's directions in which the number of Additional Documents was reduced to 107.

[15] On May 2, 2024, the panel heard the Second Disclosure Application. At the commencement of the hearing, the chair of the panel provided the panel's views on onus as it related to establishing the relevance of the Additional Documents. For the reasons outlined in paragraphs 123 to 125 below, the panel determined that, in this particular case and in these circumstances, the onus was on the Respondents to establish the relevance of the Additional Documents.

[16] At the hearing, the panel heard submissions from all of the parties.

[17] On conclusion of the hearing, after considering the parties' submissions, the panel issued a ruling dismissing the Second Disclosure Application with reasons to follow.

[18] These are our reasons with respect to the First Disclosure Application and the Second Disclosure Application.

II. Applicable law

A. Disclosure

[19] Section 3.6(b) of BC Policy 15-601 *Hearings* provides that in an enforcement hearing "the executive director must disclose to each respondent all relevant information that is not privileged".

[20] The disclosure standard which applies to Commission proceedings is based broadly on the standard established in *R v. Stinchcombe* [1991] 3 SCR 326. Under this standard, the Crown must disclose all relevant information, whether inculpatory or exculpatory, except evidence that is beyond the control of the Crown or is clearly irrelevant or privileged.[1]

[21] The Stinchcombe standard was developed in the context of criminal proceedings and does not automatically apply to proceedings before the Commission. In *Re Canaco Resources Inc.*, 2012 BCSECCOM 493, the panel said at paragraph 9:

[1] *R. v. Stinchcombe*, [1991] 3 SCR 326, p. 339

> ...it is worth nothing that *Stinchcombe* was articulated as a disclosure standard for criminal proceedings. Although a Stinchcombe-like standard has been applied in administrative proceedings before securities tribunals, it does not follow that every evolution of the *Stinchcombe* standard in the criminal courts or indeed the *Stinchcombe* standard itself, automatically applies to proceedings before the Commission. As the Supreme Court of Canada has made clear (see, for example, *May v. Ferndale Institution* [2005] 3 SCR 809), the standard of disclosure for administrative tribunals is not *Stinchcombe*. The issue is whether the hearing process as a whole satisfied the requirements of procedural fairness in the context of proceeding before the tribunal concerned.

[22] A document will be considered relevant if it directly or indirectly may enable a party to advance their own case or destroy that of their adversary or may fairly lead the party to a train of inquiry or disclose evidence which may have either of those consequences.[2]

[23] Generally, in an application challenging disclosure of existing documents, the onus is on the party subject to the challenge to justify non-disclosure.[3]

[24] The BC Court of Appeal in *Hu v. British Columbia (Securities Commission)*, 2010 BCCA 306, at paragraph 12, stated that the Commission cannot wholly delegate the determination of relevancy to its staff and, if the staff's determination of relevancy is challenged, the Commission itself must determine whether the documents in question are relevant or irrelevant. The Court described the role of the Commission in these circumstances as follows at paragraph 16:

> In making determinations of whether undisclosed documents need to be produced for review, the B.C. Commission is in the same position as a chambers judge making similar determinations in criminal and civil proceedings in the courts. The B.C. Commission must make determinations of relevancy or privilege when there is a disagreement between counsel but, like a chambers judge, the B.C. Commission has a discretion to decide whether it can make the required determination on the basis of a description of the documents provided by counsel, coupled with an assurance from counsel that the documents have been reviewed and either contain nothing relevant or are privileged, or whether the B.C. Commission should itself review some or all of the documents.

[25] The Applicants stated they were not asking the panel at this stage to review any of the documents in issue to determine relevancy. They submitted that the panel could rely on the descriptions of the documents provided by the executive director to determine relevancy and privilege.

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[2] *Re Morabito*, 2023 BCSECCOM 462, at para. 20 citing *Fairtide Capital Corporation et al,* 2007 BCSECCOM 130

[3] *Hu v. British Columbia)Securities Commission)*, 2010 BCCA 306, para. 17

B. Privilege

[26] Privilege need only be considered if the executive director seeks to rely on privilege as the basis for not disclosing relevant information. Privilege is not a consideration if the information alleged to be subject to privilege is irrelevant.[4]

Litigation privilege

[27] Litigation privilege protects documents created for the dominant purpose of use in actual, anticipated or contemplated litigation from disclosure.

[28] The elements required to claim litigation privilege over documents or communications are as follows:

- the documents or communications must be prepared, gathered or annotated by counsel or persons under counsel's direction;
- the preparation, gathering or annotating must be done in anticipation of litigation;
- the documents or communications must meet the dominant purpose test;
- the documents, or the facts contained in the documents, need not be disclosed under the legal rules governing the proceedings; and
- the documents or facts have not been disclosed to the opposing party or to the court.[5]

III. First Disclosure Application

A. *Parties' submissions*

i. Applicants' submissions

[29] For the purposes of their submissions, the Applicants divided the Case Notes into the categories set out in the Affidavit.

Internal Case Notes

[30] The Applicants sought production of four Case Notes regarding internal communications between Commission staff. All of the Cases Notes were prepared before the original Notice of Hearing was issued on July 21, 2023.

[31] These Case Notes were identified as:

Case Note Doc ID	Date	Description
BCSC033133	4/12/2019	Communication between counsel for the executive director and investigators regarding freeze orders.
BCSC033175	2/28/2020	Communications between counsel for the executive director and investigators regarding the investigation.
BCSC033178	3/10/2020	Communication between counsel for the executive director and investigators regarding the investigation and freeze orders.

[4] *Re Canaco Resources Inc.*, 2012 BCSECCOM 493, para. 17

[5] Hubbard and Doherty, *The Law of Privilege in Canada*, Release No. 5, §12:1

BCSC033265	1/5/2022	Communication between counsel for the executive director and investigator.

(Internal Case Notes).

[32] The executive director submitted the Internal Case Notes were subject to litigation privilege and were irrelevant.

[33] The Applicants argued the executive director had not established the Internal Case Notes were irrelevant. They submitted they were entitled to have the best evidence before them to exercise their right to make a full answer and defence to the allegations against them. They said this meant they needed to know not only what steps were taken by Commission staff in the investigation, but also what steps were not taken and this should be a consideration in determining relevance.

[34] Based on the description in the Affidavit, the Applicants said the Internal Case Notes clearly related to the investigation of matters which were the subject of the allegations in the Amended Notice of Hearing and, on their face, met the low threshold for relevance.

[35] With respect to privilege generally, the Applicants submitted an additional consideration in determining the relevance of all the Case Notes was the asymmetry of power created by the extraordinary investigative powers granted to the executive director under the Act. The Applicants argued this meant the panel should err on the side of caution in finding the establishment of privilege.

[36] Specifically with respect to the litigation privilege claimed by the executive director with respect to the Internal Case Notes, the Applicants submitted the executive director had failed to establish that privilege and, in particular, had failed to establish that:

- Litigation was a reasonable prospect at the time the Internal Case Notes were created. The Applicants pointed out the Internal Case Notes were prepared well before the original notice of hearing was issued and while the investigation was in progress.
- The dominant purpose for creating each of the Internal Case Notes was litigation. They said there was nothing in the description of these Case Notes which gave any indication that their dominant purpose was litigation.

External Counsel Case Notes

[37] The Applicants sought disclosure of a Case Note regarding communications between Commission staff and counsel for a respondent. The Case Note was identified as BCSC33398 (External Counsel Case Note).

[38] The executive director submitted the External Counsel Case Note was irrelevant.

[39] The Applicants argued the executive director had already acknowledged this type of communication met the low threshold for relevance by disclosing a significant volume of similar case notes.

[40] The Applicants also submitted communications with counsel were not *de facto* privileged and there was nothing in the description of the External Case Note that suggested this Case Note was privileged.

Regulator Case Notes

[41] The Applicants sought disclosure of ten Case Notes relating to discussions between Commission staff and regulators.

[42] Six of these Case Notes were identified as:

Case Note Doc ID	Date	Description
BCSC033162	10/3/2019	Case Notes regarding communication with a regulator regarding the investigation.
BCSC033165	10/17/2019	Case Note regarding communications with a regulator regarding internal strategy.
BCSC033211	11/18/2020	Case Notes regarding communication with a regulator regarding the investigation.
BCSC033212	11/19/2020	Case Notes regarding communication with a regulator regarding the investigation.
BCSC033395	1/1/2018	Case Note regarding correspondence from a regulator.
BCSC033090	10/9/2018	Case Note regarding communications with a regulator requesting gatekeeper report.

(Regulator Case Notes).

[43] The executive director submitted the Regulator Case Notes were confidential communications between staff and regulators. Other than Case Note BCSC033090, he said they were all subject to the confidentiality provisions of a MOU. Furthermore, the communications referenced in all of the Regulator Case Notes originated in a confidence that these communications would not be disclosed.

[44] The Applicants submitted that confidentiality was not a recognized basis for non-disclosure. They said there was no evidence provided as to an expectation of confidentiality. The executive director had not specifically identified the MOU referenced in the Affidavit, and in any event, such an expectation was not sufficient to ground a claim for privilege. They cited *Re Canaco, supra,* at paragraph 17, where the panel stated: “[c]onfidentiality, as opposed to privilege, is not a recognized basis for non-disclosure.”

[45] They also argued that any expectation of confidence was not reasonable given the knowledge the communications were happening in the context of a Commission

investigation that might lead to the issuance of a notice of hearing under the Act. They cited section146 which requires persons appointed under the Act to investigate certain matters to provide, at the request of the Commission or a member of the Commission involved in the appointment, a complete report of the investigation including any transcript of evidence and material in the person's possession relating to the investigation. The Applicants argued this provision put regulators, staff and others with notice that documents provided to the Commission may be ordered to be disclosed.

[46] There were four other Case Notes which recorded discussions between Commission staff and regulators regarding an informer. The executive director initially claimed informer privilege with respect to these documents but, during the course of the hearing, abandoned the claim.

CRA Case Notes

[47] The Applicants sought disclosure of four Case Notes relating to discussions between Commission staff and the Canada Revenue Agency (CRA).

[48] These Case Notes were identified as:

Case Note Doc ID	Date	Description
BCSC033156	8/21/2019	Communication between Commission investigator and the CRA regarding requirement to pay over accounts subject to a freeze order.
BCSC033158	8/29/2019	Communication between Commission investigator and the CRA regarding requirement to pay over accounts subject to a freeze order.
BCSC033159	8/29/2019	Communication between Commission investigator and the CRA regarding requirement to pay over accounts subject to a freeze order.
BCSC038994	2/10/2023	Communications between counsel for the executive director and the CRA regarding requirement to pay over accounts subject a freeze order.

(CRA Case Notes).

[49] The executive director submitted the CRA Case Notes were irrelevant and they were confidential communications between a federal compliance body and the Commission.

[50] The Applicants argued the executive director had already clearly acknowledged this type of communication met the low threshold for relevance by disclosing and, in one case, relying on, other case notes evidencing discussions with the CRA.

[51] The Applicants also submitted the executive director had not provided any evidence of an expectation of confidentiality relating to the CRA Case Notes and, in any event, such expectation was not sufficient to ground a claim for privilege.

Registrant Case Notes

[52] The Applicants sought disclosure of nine Case Notes relating to discussions between Commission staff and registrants.

[53] These Case Notes were identified as:

Case Note Doc ID	Date	Description
BCSC033124	4/4/2019	Communications between investigators and registrants regarding brokerage accounts and freeze orders.
BCSC033126	4/4/2019	Communications between investigators and registrants regarding brokerage accounts and freeze orders.
BCSC033155	8/21/2019	Communications between counsel for the executive director or Commission investigator and a registrant regarding the CRA requirement to pay over accounts subject to freeze orders.
BCSC033157	8/27/2019	Communications between counsel for the executive director or Commission investigator and a registrant regarding the CRA requirement to pay over accounts subject to freeze orders.
BCSC033266	1/6/2022	Communication between a Commission investigator and a registrant discussing issues with a freeze order.
BCSC038988	8/17/2022	Communications between counsel for the executive director or Commission investigator and a registrant regarding the CRA requirement to pay over accounts subject to freeze orders.
BCSC038991	12/14/2022	Communications between counsel for the executive director or Commission investigator and a registrant regarding the CRA requirement to pay over accounts subject to freeze orders.
BCSC039001	7/25/2023	Communications between investigators and registrants regarding brokerage accounts and freeze orders.
BCSC039003	7/23/2023	Communications between investigators and registrants regarding brokerage accounts and freeze orders.

(Registrant Case Notes).

[54] The executive director submitted the Registrant Case Notes were irrelevant and were confidential communications between registrants and the Commission.

[55] The Applicants argued that, given trading allegations formed part of the pump and dump allegations and questions of best evidence were in issue, the Registrant Case Notes

were clearly relevant as it was important to know not only what the executive director discussed with the registrants but also what the executive director did not discuss.

[56] The Applicants pointed out the executive director had disclosed dozens of case notes relating to discussions between Commission staff and registrants and included at least one in his reliance list. They submitted this was a clear acknowledgement by the executive director that this type of communication met the low threshold for relevance.

[57] The Applicants made similar submissions to those described in paragraph 51 regarding the lack of evidence of an expectation of confidentiality relating to the Registrant Case Notes and any such expectation not being sufficient to ground a claim for actual privilege.

ii. Executive director submissions

Internal Case Notes

[58] As noted above, the executive director submitted the Internal Case Notes were subject to litigation privilege and were irrelevant.

[59] At the First Disclosure Application hearing, counsel for executive director provided more detail regarding the discussions referenced in the description of Internal Case Notes as follows:

- BCSC033133. The author of the Case Note was a Commission investigator and the subject was a discussion with Commission litigation counsel regarding the application of a freeze order issued against the Respondents.
- BCSC033175. The author of the Case Note was the primary Commission investigator and the subject was a discussion with Commission litigation counsel regarding legal issues relating to the timing of the misconduct.
- BCSC033178. The author of the Case Note was counsel for the executive director and the subject was a discussion with co-litigation counsel regarding a legal opinion on freeze order issues.
- BCSC033265. The author of the Case Note was counsel for the executive director and the subject was a discussion with a Commission investigator regarding freeze order issues and an upcoming freeze order application.

[60] Counsel for the executive director made a number of points regarding the freeze orders:

- All of the Internal Case Notes post-dated the issuance of freeze orders against the Respondents in April 2019.
- Starting shortly after issuance of the freeze orders and before the dates of the Case Notes, there had been a number of applications made by the Respondents under section 171 of the Act to revoke these orders.
- The BC Court of Appeal in *Party A v. British Columbia (Securities Commission)*, 2021 BCCA 358, had found that, in order to issue a freeze order, there must be sufficient evidence to raise a serious question the Commission investigation

could show breaches of the Act leading to monetary consequences against the parties against whom the orders were to be issued.

[61] Counsel for the executive director submitted that given the requirements of *Party* A, the dates of issuance of the freeze orders and the dates of the section 171 applications, it was evident litigation was anticipated or taking place before the dates of the Internal Case Notes. Given this and the contents of these Case Notes, counsel for the executive director argued it was clear these Case Notes were prepared in anticipation of litigation or in connection with litigation that was actually taking place and the dominant purpose of these Case Notes was litigation. She argued, therefore, litigation privilege had been established.

[62] The executive director also submitted the Internal Case Notes did not contain facts relevant to the allegations in the Amended Notice of Hearing and, therefore, did not need to be disclosed.

External Counsel Case Note

[63] As noted above, the executive director submitted that the External Counsel Case Note was irrelevant.

[64] At the First Disclosure Application hearing, counsel for the executive director advised that the author of the External Counsel Case Note was a Commission investigator and the subjects were a discussion with a regulator and a discussion with previous counsel for Al Homsi.

[65] In its April 25, 2024 ruling, the panel ordered the executive director to provide the panel with a redacted copy of the External Counsel Case Note so that relevancy could be assessed.

Regulator Case Notes

[66] As noted above, the executive director submitted the Regulator Case Notes were confidential communications between staff and regulators. Other than Case Note BCSC033090, he said the Regulator Case Notes were subject the confidentiality provisions of a MOU. Furthermore, the communications referenced in the Regulator Case Notes originated in a confidence that they would not be disclosed.

[67] The executive director argued that the element of confidentiality between regulators is vital to the maintenance of a working relationship between regulators and that it was in the public interest that this relationship be diligently fostered and protected. The executive director submitted the public interest in maintaining the relationship and the confidence of these communications greatly outweighed the benefit gained by the disclosure of the Regulator Case Notes in this proceeding.

[68] At the hearing, counsel for the executive director reviewed a provision which she said was section 11 of a MOU which set out specific requirements regarding the confidentiality of the information exchanged under the MOU. She said these

requirements prohibited the sharing of requests made under the MOU but permitted disclosure of non-public information furnished in response to a request. The Affidavit stated, and counsel for the executive director confirmed, all relevant documents provided by regulators resulting from confidential communications under the MOU had been disclosed to the Respondents.

[69] Counsel of the executive director did not identify for the panel the specific MOU that was referenced in her submissions.

CRA Case Notes

[70] As noted above, the executive director submitted the CRA Case Notes were irrelevant and they were confidential communications between a federal compliance body and the Commission.

[71] The executive director noted that all of the CRA Case Notes related to requirements to pay over accounts subject to freeze orders. At the First Disclosure Application hearing, counsel for the executive director confirmed that none of the Case Notes referencing freeze orders included any discussion of trading by the Respondents in their brokerage accounts during the relevant period or any other matters in issue in the Amended Notice of Hearing. She stated that freeze orders are a method of preserving assets for possible future sanctions and have nothing to do with allegations in a notice of hearing. Counsel for the executive director submitted that, as a result, the CRA Case Notes were irrelevant.

[72] The executive director argued further that the communications between the CRA and the Commission staff originated in a confidence the communications would not be disclosed. The executive director submitted that the element of confidentiality between federal and provincial agencies was essential to the maintenance of a working relationship between government agencies. He stated it was in the public interest that this relationship between government agencies is diligently fostered and protected and the public interest in maintaining the relationship and the confidence of these communications greatly outweighed the benefit gained by the disclosure of the CRA Case Notes.

[73] At the hearing, counsel for the executive director advised there were two additional CRA Case Notes described in the Affidavit with respect to which she was seeking non-disclosure. These CRA Case Notes outlined communications with the CRA regarding a CRA employee. She submitted these documents were irrelevant as they related to a separate issue and a separate event which had nothing to do with the allegations in the Amended Notice of Hearing. She also argued they were subject to confidentiality on the same basis as outlined above. These CRA Case Notes were identified as: BCSC033268 and BCSC033271.

[74] Counsel for the executive director also stated that another a CRA Case Note regarding CRA communications on the same subject, BCSC033270, had been disclosed in error and should remain confidential.

Registrant Case Notes

[75] As noted above, the executive director submitted the Registrant Case Notes were irrelevant and were confidential communications between registrants and the Commission.

[76] The executive director pointed out that all of the Registrant Case Notes dealt with freeze orders. He made the similar submissions regarding the relevancy of freeze orders as set out in paragraph 71.

[77] The executive director argued further the discussions between the registrants and Commission staff originated in a confidence that these communications would not be disclosed. He submitted that the element of confidentiality between registrants and their regulator was essential to the maintenance of a working relationship in the capital markets and made similar submissions regarding the public interest in maintaining this relationship and the confidence of these communications as set out in paragraph 72.

B. Analysis

[78] In our analysis, we have adopted the same categories of Case Notes as employed by the parties in their submissions.

Internal Case Notes

[79] Counsel for the Applicants withdrew his request for disclosure of BCSC033178 during the course of the First Disclosure Application hearing.

[80] We found that two of the remaining three Internal Case Notes were irrelevant and did not need to be disclosed.

[81] BCSC033133 and BCSC033265 related to internal Commission discussions regarding freeze orders issued against the Respondents.

[82] Given the description of these Internal Case Notes provided by counsel for the executive director at the First Disclosure Application hearing and the purpose and effect of freeze orders, we found that the Internal Case Notes did not contain any information relevant to the allegations in the Amended Notice of Hearing or otherwise relevant to the defence.

[83] BCSC033175 was an Internal Case Note dated May 1, 2022. It related to a discussion between the primary Commission investigator and Commission litigation counsel regarding the timing of the misconduct.

[84] We found that the executive director had established litigation privilege with respect to this Internal Case Note.

[85] In her submissions relating to the establishment of litigation privilege, counsel for the executive director relied, in part, on the requirements relating to the issuance of freeze

orders outlined in the *Party A* decision. However, the dates of issuance of the freeze orders in issue preceded the date of the *Party A* decision by over two years at a time when those requirements had not been established.

[86] Counsel for the executive director also pointed out that as of the date of the Internal Case Note in issue, litigation was in progress relating to applications by the Respondents under section 171 of the Act to revoke the freeze orders. She submitted this formed another basis for a claim of litigation privilege with respect to the Internal Case Note.

[87] We determined that litigation with respect to which litigation privilege may be claimed is not limited to the substance of the matters in issue under the Amended Notice of Hearing. Ongoing litigation regarding another issue, such as an application to revoke a freeze order, will provide a proper basis to invoke the privilege to the same extent as would contemplation of litigation over the substance of the Amended Notice of Hearing.

[88] We found that the section 171 applications in progress at the time of preparation of the Internal Case Note formed a basis for a claim of litigation privilege by the executive director. Given the parties to, and the subject of, the discussion in the Internal Case Note we found it reasonable to conclude the discussion was conducted in anticipation of litigation.

[89] As the discussion set out in the Internal Case Note was with litigation counsel and concerned issues potentially relevant to the section 171 applications, we found it was reasonable to conclude the dominant purpose of the discussion was litigation.

[90] We also found that the other requirements necessary to establish litigation privilege had been met

External Counsel Case Note

[91] We found that the External Counsel Case Note was irrelevant and did not need to be disclosed.

[92] As noted above, in our April 25, 2024 ruling, we ordered that the executive director provide the panel with a redacted copy of the External Counsel Case Note so that relevancy could be determined.

[93] We reviewed the redacted copy of the External Counsel Case Note and concluded its content was not relevant to the allegations in the Amended Notice of Hearing or otherwise relevant to the defence.

Regulator Case Notes

[94] We found the Regulator Case Notes were relevant and should be disclosed to the Respondents.

[95] As noted in paragraph 23, in an application challenging disclosure of existing documents, the onus is on the party subject to the challenge to justify non-disclosure.

[96] For all of the Regulator Case Notes except BCSC033090, the executive director relied on the binding nature of confidentiality obligations imposed under a MOU. While counsel for the executive director reviewed with the panel section 11 of a MOU, she failed to identify which MOU the section was taken from or to provide the panel with a copy of the MOU. She also failed to provide evidence as to the requirements under the MOU for the confidentiality provisions to be triggered or that those requirements had been met.

[97] While there may be public interest considerations in determining whether confidentiality obligations under a MOU might limit disclosure of confidentiality requests made under the terms thereof, in the absence of the evidence noted above, we were not able to make that determination.

[98] The executive director also submitted that generally all of the Regulator Case Notes had originated in a confidence the communications not be disclosed and the public interest required this confidentiality be maintained.

[99] The executive director cited *Slavutych v. Baker et al.,* [1976] 1 SCR 254, page 260 outlining the conditions necessary to establish privilege against disclosure of obligations:

> In his reasons for judgment, Sinclair, J.A., first dealt with the admissibility of this tenure form sheet under the classification of qualified privilege and cited from vol. 8 of *Wigmore on Evidence*, 3rd ed. (McNaughton Revision, 1961), para. 2285, outlining four fundamental conditions as necessary to the establishment of a privilege against the disclosure of communications [1973 ALTASCAD 59 (CanLII), 41 D.L.R. (3d) 71 at p.77, [1973] 5 W.W.R. 723]:
>
> "(1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation."

[100] In *Re Slavutych*, the issue before the Court was whether arbitrators had misdirected themselves or otherwise erred in law in considering, as grounds for dismissal of the appellant from his employment at the University of Alberta, statements made by the appellant in a confidential document referred to as a "tenure form sheet".

[101] Although the Court ultimately made its decision on another basis, it said that if the matter were considered solely from an evidentiary point of view, under the doctrine of privilege outlined in *Wigmore* in the above quote, the Court would have ruled the confidential tenure form sheet inadmissible.

[102] A redacted copy of Regulator Case Note BCSC033090 was attached to the Affidavit. The Regulator Case Note was not marked "confidential" nor was there anything in the redacted content which suggested the communication originated in a confidence. No other evidence was provided that there was an expectation of confidentiality.

[103] Similarly, other than the section 11 extract from a MOU, no evidence was provided that the other Regulator Case Notes otherwise originated in an expectation of confidence.

[104] The circumstances in *Re Slavutych* were very different from those before us. The tenure form sheet was headed "Confidential". The directions for its submission said it was to be forwarded in a sealed envelope marked "Confidential". Moreover, the appellant was told that the information in the tenure form sheet would be kept strictly confidential until the tenure committee met and then it would be destroyed.

[105] The executive director has provided no evidence to satisfy the requirements in *Re Slavutych*. For example, there was no evidence these documents were marked confidential or were forwarded on an understanding that they would be kept confidential or were subject to a policy or agreement relating to confidentiality obligations.

[106] In the absence of this evidence, we are unable to consider whether the Regulator Case Notes were subject to a limited privilege of confidentiality.

CRA Case Notes

[107] We found that the CRA Case Notes and Case Notes BCSC033268 and BCSC033271 were irrelevant and did not need to be disclosed.

[108] All of the CRA Case Notes related to requirements to pay over accounts subject to freeze orders.

[109] We applied the same analysis regarding the purpose and effect of freeze orders as set out in paragraph 82 in concluding none of the CRA Case Notes contained information relevant to the allegations in the Amended Notice of Hearing or otherwise relevant to the defence.

[110] As to Case Notes BCSC033268 and BCSC033271, based on the description of these Case Notes provided by counsel for the executive director at the First Disclosure hearing, we similarly concluded they did not contain information relevant to the allegations in the Amended Notice of Hearing or otherwise relevant to the defence.

[111] As to Case Note BCSC033270 which counsel for the executive director said had been disclosed in error, the panel concluded it had no ability to remedy this error in disclosure. To the extent there may be remedies available, the executive director will have to seek them elsewhere.

Registrant Case Notes

[112] We found that the Registrant Case Notes were irrelevant and did not need to be disclosed.

[113] All of the Registrant Case Notes dealt with freeze orders.

[114] Given that counsel for the executive director confirmed none of the Registrant Case Notes included any discussion of trading by the Respondents in their brokerage accounts during the relevant period and our preceding analysis regarding the purpose and effects of the freeze orders, we concluded none of the Registrant Case Notes contained information relevant to the allegations in the Amended Notice of Hearing or otherwise relevant to the defence.

C. Disclosure procedures

[115] During the First Disclosure Application hearing, a question was raised by the panel regarding the executive director's practice in disclosing to respondents that he was withholding relevant documents on the basis of privilege. In this case, the executive director had not disclosed he was withholding relevant Case Notes on the basis of privilege until an inquiry was made by counsel for the Applicants a few weeks before the hearing.

[116] Counsel for the executive director stated it is the executive director's view that as Commission proceedings and criminal proceedings are both subject to *Stinchcombe* disclosure standards, the same disclosure practices apply to both. She said it was not the practice of the criminal bar to list documents held back on the basis of irrelevancy or privilege and the executive director has adopted the same practice.

[117] While the disclosure practices in criminal proceedings may be a factor to consider in determining the executive director's disclosure practices, what we considered more relevant are the disclosure practices at other Canadian securities regulators. We noted section 27(1) of the Ontario Securities Commission's *Rules of Procedure and Forms* (2019) 42 OSCB 9714, requires staff to "(a) provide to every other Party copies of all non-privileged documents in Staff's possession that are relevant to an allegation [and] (b) identify to every other Party all other things in Staff's possession that are relevant to an allegation…" [emphasis added]

[118] In our view, this procedure would contribute to the fairness and efficiency of the Commission's proceedings. It would minimize delays due to disputes over disclosure, eliminate surprise and reduce the additional time required by counsel to review and prepare once additional disclosure is received.

[119] We direct the executive director to consider amending their disclosure practices to provide to respondents a list of materials which are relevant but are being withheld on the basis of privilege or other reasons.

IV. Second Disclosure Application

[120] As noted above, the Second Disclosure Application was made orally by the Applicants during the course of the liability hearing on April 29, 2024.

[121] The executive director's May 1, 2024 submissions included a review of the provisions of the three MOUs he said were relevant to the Second Disclosure Application: two International Organization of Securities Commissions (IOSCO) Multilateral Memorandums of Understanding) dated November 10, 2003 and April 9, 2018 respectively and a bilateral Memorandum of Understanding with the Financial Industry Regulatory Authority (FINRA) dated June 29, 2016.

[122] The following key provisions of all of these MOU were substantially similar:

- Purpose: to provide each other with assistance to increase the effectiveness of investigations and the enforcement of the laws in the respective jurisdictions of the MOU signatories.
- Permissible use of information: to permit signatories to disclose non-public information furnished in a response to a request for assistance under the MOU for the purposes set out in the request or within the general framework for the use stated in the request including, among other things, conducting an investigation or enforcement proceeding.
- Confidentiality obligations: to obligate signatories to keep confidential requests for assistance, responses, referrals and related communications made under the MOUs except as contemplated in the MOU.
- Notification obligations: to obligate requesting signatories to provide notification to a signatory to whom a request for assistance has been made if the requesting signatory receives a legally enforceable demand to provide non-public information outside the terms of the MOU. Additionally, the FINRA MOU requires the requesting signatory to use reasonable efforts to allow the signatory who has provided the confidential information an opportunity to seek injunctive relief or a protective order.
- Termination events: to provide for termination of a signatory's participation in a MOU in the event of a demonstrated change in the willingness or ability of the signatory to comply with the provisions of the MOU.

[123] At the commencement of the Second Disclosure Application hearing on May 2, 2024, the chair of the panel provided the panel's views on onus as it related to establishing the relevance of the Additional Documents. The chair said that, after reviewing the executive director's May 1, 2024 submissions, the panel determined the executive director had established, at a minimum, there is a public interest in maintaining consultation and cooperation among securities regulators to facilitate the conduct of securities investigations in British Columbia which are international in scope.

[124] Given the panel's legal obligation to take the public interest into account in its deliberations, the panel determined, in this particular case and in these circumstances, the onus was on the Applicants to establish relevance of the Additional Documents.

[125] The chair said the panel concluded the change in onus would not cause unfairness to the Respondents. He said that the panel had seen nothing in the description of the communications in the Additional Documents that would suggest they are relevant to the allegations in the Amended Notice of Hearing. He stated that these communications were alleged by the Applicants to be relevant on the basis of their potential to reveal lines of inquiry for cross-examination but that the potential line of inquiry which the Applicants had in mind was not apparent to the panel. In order to assess the potential relevance, the panel would need to understand the specific line of inquiry and would need to hear a submission from the Applicants which disclosed that potential line of inquiry. The chair said that given any cross-examination would take place almost immediately, the panel did not see any prejudice to the Respondents should they be required to disclose in advance the theory underlying their cross-examination. The Applicants elected not to disclose the potential line of inquiry at the time of the panel's ruling regarding the Additional Documents.

A. Parties' submissions

i. Applicants' submissions

[126] The Applicants submitted that all of the Additional Documents were relevant and should be disclosed.

[127] The Applicants adopted their submissions on relevancy and confidentiality made in connection with the First Disclosure Application. They noted, in particular, their previous submission regarding section 146 of the Act which they said argued against the expectation of privacy with respect to documents provided to the Commission in the course of an investigation.

[128] The Applicants made a number of submissions relating to the MOUs:

- They argued that as the MOUs were not intended to create legally binding obligations or supersede applicable laws, this meant that the MOUs were not intended to "usurp" existing laws. We assume this submission was made in the context of their position that confidentiality is not a basis for non-disclosure.
- They submitted that the obligation to keep non-public information confidential except as contemplated in the MOUs or in response to a legally enforceable demand, permitted the disclosure of non-public information provided by a regulator to the Commission in response to a request for assistance. This was not contested by the executive director. What was in issue was whether the MOUs permitted the disclosure of the request for assistance itself.
- They submitted that the notification requirements under the MOUs in the event of receipt by a requesting authority of a legally enforceable demand to disclose confidential non-public information simply required the requesting signatory to

provide notice before complying with the demand. As noted in paragraph 122 above, the provisions of at least one of the MOUs require more than notification in those circumstances.

[129] Counsel for Core Capital, K. Thindal and A. Thindal adopted the Applicants' submissions on relevancy.

[130] He also made submissions related to case law cited by the executive director to support his submission regarding the importance of safeguarding the confidentiality of international assistance requests. He acknowledged the importance of the confidentiality in international relations but argued that it is not unyielding. He argued that should the Respondents establish the relevancy of the Additional Documents, neither the Act nor the MOUs contained alternate remedies for the Applicants relating to the disclosure sought. He submitted that, in those circumstances, the confidentiality provisions of the MOUs should not prevail.

ii. Executive director's submissions

[131] In his May 1, 2024 submissions, the executive director agreed to disclose 49 of the Additional Documents almost all of which he said were irrelevant or of marginal relevance to the allegations in the Amended Notice of Hearing.

[132] He argued that the remaining 58 Additional Documents were irrelevant and were not required to be disclosed. He stated that these communications related to the mechanics of cross-border information sharing and did not contain relevant information and all relevant documents received in response to these communications had been provided to the Respondents.

[133] He also argued there is a statutory duty and public interest in protecting confidential communications between the Commission and other regulators during an investigation. He said section 11(1) of the Act requiring every person acting under the authority of this Act to keep confidential all facts, information and records obtained under this Act except so far as the person's public duty required, mandated that the Commission keep the regulator communications confidential. He submitted that, as the communications themselves were irrelevant, the public duty exception in section 11 was not engaged.

[134] He also submitted that 53 of the Additional documents were subject to confidentiality obligations under the MOUs. He said that these documents, which he described as communications related to the mechanics of cross-border information sharing, were communications to and from regulators relating to requests for assistance under the MOUs. He submitted that these communications fell squarely within the provisions of the MOUs prohibiting disclosure of requests for assistance, responses, referrals and related communications made under the MOUs and any order for disclosure would trigger time-consuming notice and other obligations.

[135] The executive director argued the international cooperation fostered by the MOUs was of the highest importance in the cross-border landscape of today's securities

enforcement world as a substantial amount of securities misconduct is cross-border. He submitted it was critical that the Commission live up to its obligations under the MOUs so that it can protect the public and fulfill its mandate.

[136] The executive director also submitted that should disclosure of the documents be ordered, the harm to the Commission's reputation with its international partners would be devastating and trust in the Commission compromised. He argued such disclosure would have a chilling effect going forward in both the making and receiving requests for assistance under the MOUs which would extend beyond the regulators who were parties to the MOU.

[137] The executive director submitted that ordering disclosure of the documents could result in suspension or termination of the Commission's participation in the MOUs and, in some cases, trigger the notice provisions outlined in paragraph 122 above.

[138] The executive director cited several legal decisions which commented on the importance of interjurisdictional cooperation including the Supreme Court of Canada in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, at paragraph 51:

> …given the reality of interprovincial, if not international, capital markets, "[t]here can be no disputing the indispensable nature of interjurisdictional co-operation among securities regulators today"…

[139] The executive director also cited another decision of the Supreme Court of Canada in *Sharp v. Autorité des marches financiers*, 2023 SCC 29, in the context of the "sufficient connection" analysis where the majority held at paragraph 128:

> The "sufficient connection" analysis must recognize the transnational nature of modern securities regulation and the public interest in addressing international market manipulation. Securities regulation raises unique considerations that highlight the need for transnational enforcement. As this Court noted in *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, the "securities market has been an international one for years" and the "Internet has greatly increased the ability of securities traders to extend across borders" (para. 28). To effectively regulate the securities market, "regulators must equally be able to respond, and surmount borders where legally possible" (para. 28).

[140] The executive director submitted the Commission's obligations under the MOUs support and promote interjurisdictional cooperation while at the same time ensuring procedural fairness to a respondent in an enforcement hearing. He argued this balance is achieved by keeping all communications between the Commission and the other regulators about carrying out a request for assistance confidential while allowing the executive director to disclose all information obtained from the request to the Respondents.

B. *Analysis*

[141] We agreed with the Applicants that generally, confidentiality is not a basis for withholding disclosure of relevant documents. However, there may be limited

circumstances in which the significance of confidentiality obligations overrides the general rule requiring disclosure of all relevant materials.

[142] In the First Disclosure Application, the executive director failed to provide evidence supporting his submissions that the Case Notes in issue were subject to the confidentiality provisions of information sharing agreements among international securities regulators and should not be disclosed.

[143] However, in the Second Disclosure Application, the executive director provided evidence as to the specific MOUs relevant to the proceedings and their key provisions.

[144] After reviewing them, we found the MOUs prohibit disclosure of the 53 Additional Documents relating to communications made under the MOUs. We also concluded that, given the reality of international capital markets, effective securities law enforcement requires there be international cooperation and reciprocal assistance between regulatory agencies.

[145] We found it is in the public interest that the provisions of the MOUs be upheld if the Commission is to be able to effectively investigate cross border misconduct and fulfill its mandate to protect the capital markets and the public in British Columbia.

[146] The notification and other procedures that would be triggered if disclosure of the 53 Additional Documents was ordered are time consuming, cumbersome and would result in significant delay to the liability hearing. In particular, we noted that one of the MOUs would require the Commission not only to notify the disclosing authority of relief or a protective order with respect to the contemplated disclosure but also to allow them the opportunity to seek injunctive relief.

[147] Given our determination with respect to onus in the Second Disclosure Application, to justify delaying the hearing to permit this process, the Applicants were required to establish that the disclosure they were seeking was sufficiently relevant to the allegations in the Amended Notice of Hearing or otherwise relevant to the defence. The Applicants argued it was not always clear from the description of the Case Notes in issue whether they related to a MOU request for assistance. However, the Applicants did not make any submissions specifically dealing with why a MOU request for assistance was relevant despite being provided with the relevant materials delivered in response to these requests.

[148] We found that the Applicants failed to establish the relevancy of the 53 Additional Documents subject to the MOUs.

[149] We also found that the five other Additional Documents in issue which were not subject to the MOUs were irrelevant. We determined there was nothing in the description of these communications that would suggest they were relevant to the allegations in the Amended Notice of Hearing or were otherwise relevant to the defence.

[150] We dismissed the Second Disclosure Application.

August 8, 2024

For the Commission

Gordon Johnson
Vice Chair

Judith Downes
Commissioner

Jason Milne
Commissioner