# 2007 BCSECCOM 637

**Henry Jung, David John Allen**
**and Reginald Clarke Handford**

***Securities Act*, RSB-C 1996, c 418**

**Hearing**

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| **Panel** | Brent W. Aitken<br>John K. Graf | Vice Chair<br>Commissioner |
| **Date of Hearing** | September 21, 2007 | |
| **Date of Ruling** | September 21, 2007 | |
| **Date reasons issued** | October 19, 2007 | |
| **Appearing** | | |
| Kristine Mactaggart Wright | For the Executive Director | |
| Michael Armstrong | For Henry Jung | |

**Reasons for Decision**

¶ 1 In an August 2, 2007 notice of hearing, the executive director made allegations against the respondents under section 161(1) of the *Securities Act*, RSBC 1996, c. 418 (see 2007 BCSECCOM 473).

¶ 2 The executive director provided the respondents with disclosure on August 3, 2007. The evidence disclosed is contained on two compact discs. Respondent Reginald Clarke Handford proposed to publish the disclosure on the internet.

¶ 3 On September 21, 2007 the executive director applied for an order prohibiting the respondents from using the disclosure for purposes other than preparing for the hearing. We ordered that that the respondents and their counsel not use the information contained in the executive director's disclosure for any purpose other than making full answer and defence to the allegations made against them in the notice of hearing (see 2007 BCSECCOM 566). These are our reasons.

¶ 4 The commission is master of its own procedures, subject to the principles of administrative law and a few provisions in the Act and the regulations under the Act. Disclosure requirements are part of those procedures.

¶ 5 The commission has in several decisions prescribed the requirements for disclosure that the executive director must make to respondents in proceedings before the commission. These requirements have evolved over time: see, for example, *Simon Fraser Resources et al.*, [1996] 47 BCSC Weekly Summary 25; *Cartaway*, [1999] 22 BCSC Weekly Summary 27; *Cox*, 2001 BCSECCOM 204; and most recently, *Fernback et al.*, 2004 BCSECCOM 378.

¶ 6 In *Fernback*, the commission said (at paragraph 18), "Disclosure is an issue that goes to the heart of fairness in proceedings before the Commission." Its primary purpose, therefore, is to ensure that respondents in commission proceedings are given all of the relevant evidence so that they can prepare adequately to meet the case against them.

¶ 7 In *Fernback*, the commission adopted the *Stinchcombe* disclosure standard for enforcement hearings under the Act, as described in *R. v. Stinchcombe*, [1991] 3 SCR 326. Under the *Stinchcombe* standard, a broad standard of relevance applies in determining what must be disclosed. In *R. v. Taillefer*, [2003] 3 SCR 307, the Supreme Court of Canada summarized the *Stinchcombe* standard as originally enunciated by the Court and as interpreted in subsequent decisions. On the issue of determining relevance, the Court in *Taillefer* said this (at paragraph 60):

> "As the courts have defined it, the concept of relevance favours the disclosure of evidence. Little evidence will be exempt from the duty . . . to disclose evidence. As this Court said in [*R v. Dixon*, [1998] 1 SCR 244], 'the threshold requirement for disclosure is set quite low. . . . The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence.' "

¶ 8 This broad test for relevance means that the evidence the executive director discloses to respondents is often voluminous, and often contains information relating to others, including other respondents and third parties (including investors and clients). Disclosure can, and often does, include a great array of information about these other parties. Some of the information is personal in nature, such as account numbers, social insurance numbers, and information about financial affairs.

¶ 9 Section 148 of the Act prohibits a person, without the consent of the commission, from disclosing to anyone but their counsel, evidence or information gathered in an investigation under the Act. In BC Instrument 15-501 *Disclosure of Investigation Information*, the commission, in paragraph 5 of that Instrument, has granted a blanket consent to disclose information in a matter once the notice of hearing has been issued in that matter.

¶ 10 In the Companion Policy to the Instrument, the commission says, "Section 5 of the Instrument allows everyone . . . to share information once a notice of hearing has been issued . . . . It allows respondents . . . to prepare for and conduct . . . hearings.

¶ 11 This is consistent with the views of the Supreme Court of Canada about disclosure of compelled information to respondents in enforcement proceedings before the Ontario Securities Commission as expressed in *Deloitte & Touche LLP v Ontario (Securities Commission)*, 2003 SCR 661. In that case, the Supreme Court of Canada considered whether the OSC was entitled to disclose to a respondent information relating to Deloitte Touche LLP under the Ontario equivalent of section 148. The court decided that it was proper for the OSC to disclose the information, on the basis that (at paragraph 29) "the OSC properly weighed the necessary disclosure and interest of Deloitte." In so concluding, the court relied on the terms of the OSC disclosure order that required that:

- the respondents and their counsel not use the evidence "for any purposes other than making full answer and defence to the allegations" in the proceedings
- the respondents and their counsel maintain custody and control over the evidence, "so that copies of the evidence are not improperly disseminated"

¶ 12 Section 148, BCI 15-501 and *Deloitte* deal with information gathered by commissions under powers to compel persons to testify or produce documents. However, regardless of the means by which information comes into the hands of commission staff in the course of an investigation, the purpose of disclosure is solely for respondents to make full answer and defence to allegations in a notice of hearing. Use of the disclosure for any other purpose, including its publication, is not in the public interest.

¶ 13 It is true that much of the information in disclosure becomes public when it is entered into evidence at a hearing. However, many proceedings are settled before reaching a hearing. When matters do proceed to a hearing, parties who wish to keep evidence confidential can be heard on the issue by making application to the hearing panel.

¶ 14 We therefore ordered in the public interest that the respondents and their counsel not use the information contained in the executive director's disclosure for any purpose other than for making full answer and defence to the allegations made against them in the notice of hearing.

¶ 15 October 19, 2007

¶ 16 **For the Commission**

Brent W. Aitken, Vice Chair

John K. Graf, Commissioner