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

Citation: Re Morabito, 2023 BCSECCOM 457 Date: 20230920

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

Panel	Judith Downes	Commissioner
	James Kershaw	Commissioner
	Marion Shaw	Commissioner
Hearing date	September 6, 2022	
Date of Ruling	October 28, 2022	
Date of Reasons	September 20, 2023	
Counsel	For the Executive Director	
Deborah Flood		
Sean K. Boyle	For Global Crossing Airlines Group Inc.	
Jenna Green		
Robert J.C. Deane	For Mark Morabito	
Paige Burnham		

Reasons for Rulings on Disclosure and Cross-Examination

I. Introduction

[1] On October 7, 2021, the executive director issued a notice of hearing (2021 BCSECCOM 397) containing allegations against Global Crossing Airlines Inc. (Global) and Mark Morabito (Morabito) (collectively, the applicants). The notice of hearing alleges a failure by Global and Morabito to disclose material information relating to the operations of Global and insider trading conducted by Morabito.

[2] On October 22, 2021, the executive director provided disclosure to the applicants of 461 documents in a list of documents.

[3] On March 24, 2022 and April 19, 2022, respectively, Morabito and Global filed applications (Disclosure Applications) seeking orders that:

(a) the executive director disclose all of the materials in his possession, including but not limited to, all documents, notes, transcripts, letters, emails, other electronic messages, recordings, and any other information of, concerning, or relating in any way to a former executive officer and a former

director of Global (respectively, the Former CEO and the Former Director) or any other then-existing or former Global personnel that were obtained or created by the executive director or his staff in the course of the investigation or in respect of the matters set out in the notice of hearing within five days of the order being made;

(b) the executive director file with the Commission and provide the applicants with a document that:

(i) specifies each document in the executive director's possession or control relating to the investigation that the executive director has not disclosed, or after the date of the order does not disclose, to the applicants, including documents over which the executive director has claimed privilege and the basis for such a claim of privilege, if any; and

(ii) describes each document in sufficient detail so that the grounds upon which the executive director has not disclosed it may be assessed

within 14 days of the order being made; and

(c) an order granting such further and other relief as counsel may seek and as the Commission considers proper or not to be prejudicial to the public interest.

[4] On April 21, 2022, the executive director provided submissions with respect to the Disclosure Applications and filed an affidavit (First Affidavit) dated April 21, 2022 from a Commission investigator (Investigator).

[5] On April 21, 2022, the executive director provided additional disclosure to the applicants of an internal Commission memorandum (Memorandum) to the Chair dated August 18, 2018 requesting an investigation order relating to the applicants.

[6] On April 29, 2022, the applicants filed replies to the executive director's submissions. In his reply, Morabito sought an additional order that the executive director produce a referral from the Investment Industry Regulatory Organization of Canada (IIROC) dated 23 March 2018 referred to in the Memorandum and any relevant related documents.

[7] A hearing with respect to the Disclosure Applications was set for July 4, 2022.

[8] On June 22, 2022, the executive director provided disclosure to the applicants of a supplemental list of documents dated May 30, 2022 (supplemental list of documents) comprising seven documents, six of which were from IIROC (IIROC documents) and one that was a printout from the System for Electronic Disclosure by Insiders (SEDI).

[9] On June 30, 2022, the executive director filed a second affidavit (Second Affidavit) dated June 30, 2022 from the Investigator supplementing the First Affidavit. The Second

Affidavit was the focus of many of the applicants' submissions. The key paragraphs included the following:

> 8. I [the Investigator] have reviewed the following communications between [counsel for the executive director] and [the Former CEO], which [counsel for the executive director] advises are the entirety of her communications with [the Former CEO]:
>
> (a) Notes detailing telephone discussions with [the Former CEO] on June 3, 4, and 7, 2021
> (b) Emails dated June 3, 4, and 7, 2021
> (c) Emails dated June 7, 2021 with [name omitted] of the Mayo Clinic, which include [the Former CEO].
>
> ([the Former CEO] Communications)
>
> 9. From my review of the [Former CEO] Communications, the communications concerned the following:
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> (a) Discussions about potential allegations in a notice of hearing against [the Former CEO];
> (b) Settlement discussions including market prohibitions and [the Former CEO]'s financial situation;
> (c) [the Former CEO]'s desire to seek legal advice;
> (d) Information about engaging a securities lawyer;
> (e) [the Former CEO]'s serious health issues.
>
> 10. In my review of the [Former CEO] Communications, I found no communications concerning the following:
>
> (a) The facts or the circumstances surrounding the allegations, specifically, there was no communications concerning:
> (i) Canada Jetlines' loss of airplanes and change to the start-up date;
> (ii) Canada Jetlines' non-disclosure and disclosure of the loss of the airplanes and change of the start-up date;
> (b) Mark Morabito or any other Canada Jetlines' personnel.
>
> 12. I have been informed by [counsel for the executive director] that any documents created or obtained by the Executive Director or his staff in the investigation that have not been disclosed are either subject to litigation privilege or relevancy or both.

[10] The July 4 hearing was adjourned. The hearing of the Disclosure Applications was subsequently set for September 6, 2022.

[11] On July 13, 2022, the applicants filed applications (Cross-Examination Applications) seeking an order that the Investigator attend the September 6 hearing for cross-examination on the First Affidavit and the Second Affidavit (together, the Affidavits).

[12] The panel determined it would hear the Cross-Examination Applications in writing. After considering the written submissions of the parties, the panel issued a ruling dated August 8, 2022 (2022 BCSECCOM 335) dismissing the Cross-Examination Applications with reasons to follow.

[13] The hearing of the Disclosure Applications proceeded on September 6, 2022. At the hearing, Morabito made application for an order requiring the executive director to disclose unredacted copies of the documents included in the supplemental list of documents.

[14] At the hearing, all parties made oral submissions which were supported by written submissions.

[15] After considering the parties' submissions, the panel issued a ruling dated October 18, 2022 (2022 BCSECCOM 433) ordering certain additional disclosure to be made by the executive director, with reasons to follow.

[16] We originally intended to include reasons with our findings on liability in this matter. However, liability hearing dates in this proceeding have been set and adjourned several times. Most recently, on August 30, 2023, the Commission adjourned the scheduled liability hearing dates of September 6 and 8, 2023 (*Re Morabito,* 2023 BCSECCOM 424) and on September 7, 2023, set new hearing dates on December 19 and 20, 2023 (*Re Morabito,* 2023 BCSECCOM 436).

[17] Given considerable time has now passed since the panel issued its rulings on the Cross-Examination Applications and the Disclosure Applications and the fact that the time for release of our findings on liability is unclear, we determined to issue these reasons with respect to the Cross-Examination Applications and the Disclosure Applications now.

[18] These are our reasons.

II. Cross-Examination Applications

A. Applicable law

[19] A Commission panel has the power to (a) summon and enforce the attendance of witnesses, and (b) compel witnesses to give evidence on oath pursuant to sections 144 and 173(a) of the Act.

[20] Section 2.1 of BC Policy 15-601 *Hearings* (BCP 15-601) provides that the Commission is the master of its own procedures and "can do what is required to ensure a proceeding is fair, flexible and efficient." It also provides that in determining procedural issues, the Commission considers the rules of natural justice set by the courts and the public interest in having matters heard fully and fairly and decided promptly.

[21] Section 4.1(a) of BCP 15-601 deals with the admissibility of evidence at hearings. Part of that section deals with the circumstances in which leave will be granted to cross-examine a deponent on an affidavit tendered in connection with an application:

> …
>
> When an application or a hearing is in writing, the Commission generally does not permit a party to cross-examine witnesses on their affidavit evidence. If a party applies to cross-examine another party on their affidavit, the Commission may allow it where there are contested facts at issue in the affidavit. If cross-examination is allowed, it will generally be restricted to the facts in issue in the tendered affidavits.

[22] The Supreme Court of BC in *Hydro Aluminum Rolled Products GmbH v. MFC Bancorp Ltd.*, 2019 BCSC 1536 at paragraph 14, citing *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2015 BCSC 1995 at paragraph 27, confirmed the principles to be considered on an application for cross-examination on an affidavit:

> [26] Normally, where the affidavit on which cross-examination is sought includes facts that are in issue, the deponent will be ordered to attend for cross-examination …[Citations omitted]
>
> [27] Factors to be considered in the exercise of the court's discretion include whether there are material facts in issue; whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application; and whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue …[Citations omitted.]

[23] The BC Court of Appeal in *Stephens v. Altria Group Inc.*, 2021 BCCA 396, found that, depending on the context in which an application to cross-examine is brought, contested facts may be grounded in a respondent's pleadings. In *Stephens*, among other issues, the respondents claimed jurisdiction over the appellant as a foreign defendant. The respondents' pleadings stated that the appellant resided in British Columbia and marketed and sold certain products in Canada. The appellant submitted affidavits squarely refuting these facts. The respondents sought to cross-examine the deponents of the appellant's affidavits.

[24] The Court of Appeal upheld the decision of the lower court that the juxtaposition of the pleaded facts and the appellant's affidavits was sufficient to establish "material facts in issue". The Court of Appeal said that where contesting affidavits are before a court, it is appropriate to review them to determine whether there are material facts in issue but that while affidavits are a consideration in that assessment, they are not a precondition to the exercise of discretion.

B. Parties' submissions

Applicants

[25] The applicants submitted that these were circumstances in which the Commission should exercise its discretion and allow cross-examination of the Investigator on the Affidavits.

They argued that the Disclosure Application was proceeding orally, not in writing and the Affidavits contained contested facts at issue that were directly relevant to whether or not the executive director had met his disclosure obligations. They said it was in the interests of justice and fair conduct of the proceedings that the cross-examination take place.

[26] Citing *Stephens*, the applicants submitted that contested facts need not arise from conflicting affidavits of opposing parties. They argued that, in this case, contested facts arose by virtue of gaps and inconsistencies in the Affidavits and factual discrepancies between the Affidavits and the executive director's various assertions that he had complied with his disclosure obligations.

[27] The applicants submitted that the contested facts that were relevant to the Disclosure Applications included:

(a) the type of information that was included in the Commission case files personally reviewed by the Investigator,

(b) the manner, timing and content of the Investigator's conversations with the Commission staff named in the Second Affidavit,

(c) how paragraphs 9 and 10 of the Second Affidavit could be reconciled, and

(d) the meaning of paragraph 12 of the Second Affidavit and the overlapping, contradictory claims that the same documents were withheld on the basis of privilege and/or relevance.

Executive director

[28] The executive director objected to the cross-examination of the Investigator. He said that, for there to be material contested facts, contrary affidavit evidence must be introduced by the applicants, which was not the case in the application before the panel.

[29] The executive director submitted that the applicants incorrectly alleged "gaps" in the Affidavits to support their claim there were material facts in issue. He argued the test was not whether there are "gaps" or irrelevant questions a party seeks to ask but whether there are conflicting material facts in issue.

[30] The executive director also submitted that the proposed cross-examination was not relevant to an issue that might affect the outcome of the Disclosure Applications and would not yield evidence that would assist the panel in making a determination on the Disclosure Applications. Among other things, he said that:

(a) the material contested facts identified by the applicants in paragraph 27(a) and (b) above had no bearing on the issues before the panel,

(b) there were no discrepancies between paragraphs 9 and 10 of the Second Affidavit. He submitted that communications about "the facts or the

circumstances surrounding the allegations" were quite different from "discussions about potential allegations in a notice of hearing," and

(c) the source of the information in paragraph 12 of the Second Affidavit was identified as counsel for the executive director and the information included statements relating to litigation privilege and relevance. The executive director stated that courts have found that in such circumstances, cross-examination was not of assistance. He also submitted that relevance and privilege are questions of law for the panel to determine.

C. Analysis

[31] The threshold issue for the panel was whether the Affidavits included contested material facts at issue.

[32] We agreed with the applicants' submissions that contested facts do not need to arise from conflicting affidavits of opposing parties. However, although the applicants cited *Stephens* to support their submissions, the circumstances the applicants identified as creating contested material facts in this case were very different from the circumstances in *Stephens*. In *Stephens*, the Court of Appeal found that the facts stated in the respondents' pleadings squarely conflicted with the facts contained in the appellant's affidavit.

[33] In this case, the applicants did not contest any of the statements included in the Affidavits with the exception of paragraphs 9, 10 and 12, which are dealt with separately below. Rather the applicants asked the panel to find there were material contested facts based on information that was <u>not</u> included in the Affidavits which they described as "gaps". The applicants appeared to be speculating that cross-examination relating to these "gaps" might elicit some additional facts that could assist them in making their case in the Disclosure Applications. Speculation is not a basis on which we can find the existence of contested material facts.

[34] The applicants also alleged there were discrepancies in paragraphs 9 and 10 of the Second Affidavit which constituted material contested facts. We did not find the language in these two paragraphs on its face to be inconsistent. The "facts and circumstances" underlying allegations are distinct from the allegations themselves.

[35] The applicants also submitted that the meaning of paragraph 12 of the Second Affidavit and the overlapping, contradictory claims regarding certain documents described in that paragraph constituted material contested facts. Paragraph 12 set out a summary of a statement made to the Investigator by counsel for the executive director that any undisclosed documents created or obtained by the executive director or his staff in the investigation were either subject to litigation privilege or relevancy or both. Even if this statement was considered contradictory, cross-examination of the Investigator would be of no assistance as the evidence in issue comes from a third party and was not within the Investigator's personal knowledge.

[36] We concluded that these were not circumstances in which we should exercise our discretion to allow cross-examination of the Investigator. Accordingly, we dismissed the Cross-Examination Applications.

III. Disclosure Applications

A. Applicable law

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

[38] The disclosure standard which applies to Commission proceedings is based broadly on the standard established in *R v. Stinchcombe*, [1991] 3 SCR 326.[1] 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.[2]

[39] One measure of the relevance of information is its usefulness to the defence. If it is of some use, it is relevant and should be disclosed.[3]

[40] The disclosure obligation is ongoing. In *Re Forum National*, 2020 BCSECCOM 93 at paragraph 92, the panel said "the disclosure obligation is an ongoing one, as it should be, with the disclosure of any potentially relevant documents that come to light as the case proceeds."

[41] 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:

> ...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.

[42] 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.

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[1] *Re Fernback*, 2004 BCSECCOM 378, para 40

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

[3] *R v. Stinchcombe*, [1991] 3 SCR 326, p. 345

[43] The Court of Appeal described the role of the Commission in an application challenging the executive director's disclosure 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. When the number of documents in question is few, it may be an easy task for the adjudicator to review the documents, but 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.

[44] Generally, in an application challenging disclosure, the onus is on the party subject to the challenge to justify non-disclosure.[4]

[45] However, in circumstances where the Crown alleges that it has discharged its obligation to disclose and the defence contends that material the existence of which is in dispute ought to have been produced, the onus may be reversed.

[46] In *R v. Chaplin*, [1995] 1 SCR 727, the Supreme Court of Canada considered the limits of the Crown's disclosure obligations flowing from *Stinchcombe* in criminal proceedings. The Supreme Court found that once the Crown alleges it has fulfilled its obligations to produce, it cannot be required to justify the non-disclosure of material the existence of which it is unaware or denies. In those circumstances, the defence must establish a basis which could enable the court to conclude that there is in existence further evidence which is potentially relevant. The Court said that the existence of the material must be sufficiently identified not only to reveal its nature but also to enable the presiding judge to conclude it may meet the test with respect to material the Crown is obligated to disclose.[5] The Court said that, in many cases, the obligation to establish a basis for the court to find the existence of disputed documents can be discharged not by leading or pointing to evidence but by oral submissions of counsel.[6]

B. Parties' submissions

Applicants

[47] The applicants alleged that the executive director had failed to fulfill his disclosure obligations. They submitted there were gaps and inconsistencies in the executive director's disclosure which led to the necessary inference that there were additional

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

[5] *R v. Chaplin*, [1995] 1 SCR 727, para 30

[6] *R v. Chaplin*, [1995] 1 SCR 727, para 31

relevant documents in the executive director's possession or control which had not been disclosed.

[48] The applicants said the disclosure provided by the executive director did not include the steps taken to investigate information held by then-current or former Global personnel even though, they argued, it was clear that the executive director would have acquired such information in the course of his investigation.

[49] To substantiate this conclusion, they gave a number of examples.

[50] The applicants pointed to the questions put to Susan Morabito, Morabito's wife, by Commission staff in a compelled interview on January 24, 2019. Commission staff asked Mrs. Morabito if she knew the Former CEO or the Former Director. The applicants argued that those questions could not have "popped out of thin air" and the necessary inference was that they were based on the Commission's prior undisclosed investigation of those individuals.

[51] The applicants also submitted it was not credible that the executive director would bring enforcement proceedings against Morabito and Global arising from the alleged non-disclosure of material information without Commission staff interviewing the Former CEO or other Global personnel or reviewing independently obtained documents concerning them.

[52] They made a similar argument with respect to the settlement communications with the Former CEO disclosed in paragraph 8 of the Second Affidavit (Former CEO settlement communications). They said the Former CEO settlement communications were evidence the executive director thought he was in a position to make allegations against the Former CEO and it was not credible that the executive director could have reached that conclusion without undertaking an investigation of the Former CEO.

[53] The applicants stated the supplemental disclosure made by the executive director amplified their concern that the executive director had not complied with his disclosure obligations. They pointed to the delivery by the executive director on April 21, 2022 of the Memorandum which had been prepared three years earlier containing what they alleged was relevant and unprivileged information and the disclosure for the first time of the Former CEO settlement communications in the Second Affidavit.

[54] In addition to their submissions regarding the disputed existence of undisclosed evidence, the applicants made submissions regarding material which had been identified by the executive director but which had not been disclosed.

[55] The applicants submitted that the executive director had not established the settlement privilege he claimed with respect to the Former CEO settlement communications. They said there was no evidence, other than a bare assertion by the executive director, that these communications were subject to settlement privilege.

[56] The applicants also sought an order requiring the executive director to disclose unredacted copies of the documents listed in the supplementary list of documents. The redactions to the IIROC documents appeared to relate to the names and contact information of IIROC personnel or notes recorded by IIROC personnel concerning specific buyers and sellers of Global shares during the indicated period. The applicants argued that the information was relevant and that privacy was not a recognized ground for redaction.

[57] With respect to the redactions made to the printout from the SEDI website, the applicants submitted that it was not appropriate to make redactions to this document as the information on SEDI was publicly available and information regarding other insiders making trades in the time frame in issue was relevant information.

Executive director

[58] The executive director submitted he had complied with his disclosure obligations and the Disclosure Applications should be dismissed. He argued that the applicants' submissions were unsupported and relied primarily on speculation about what the executive director did in the course of his investigation.

[59] The executive director said that Commission staff did not interview employees of Global as the focus of the investigation was the Morabitos. He stated that under the terms of the investigation order issued on August 14, 2018, the executive director's investigation was focused on the trading in securities of Global by Morabito and his wife and their knowledge of the information contained in the news release issued by Global on March 13, 2018 relating to changes in its operation as well as the Morabitos' use of proceeds from their trading activities.

[60] The executive director submitted a review of the transcript of the compelled interview with Mrs. Morabito showed that the focus of the interview was not on her relationship with the Former CEO and the Former Director but on Mrs. Morabito, her knowledge of the business of Global and whether she traded securities of Global with knowledge of undisclosed material information. Counsel for the executive director pointed to questions regarding Mrs. Morabito's knowledge of Global's projects, her access to and review of its financial statements and news releases as well as who she knew who was involved with Global. It was in connection with this latter point that Mrs. Morabito was asked if she knew the Former CEO or the Former Director as well as other named and unnamed persons involved with Global.

[61] As to the applicants' submission that it was not plausible the executive director did not review independently obtained documents, the executive director argued that the applicants had failed to take into consideration the over 1,500 documents provided by the applicants in response to production orders issued by the executive director. The executive director pointed out that, among other things, these orders requested the identities of all individuals associated with Global with knowledge of the matters disclosed in Global's March 13, 2018 news release and the date they first became aware of such matters as well as a chronological listing of all the events including meetings,

telephone conversations and correspondence in relation to Global's progress in securing aircraft leading up to the news release. The executive director stated that included in the 1,500 documents provided by the applicants were communications with Global personnel, including the Former CEO and the Former Director, for the months both before and after the news release.

[62] The executive director submitted that the supplemental disclosure provided to the applicants was not evidence of the executive director's failure to comply with his disclosure obligations but simply the exercise of the executive director's ongoing obligation to disclose potentially relevant documents as the case proceeds. He also stated the IIROC documents were produced not because he was of the view they were relevant but to move the case along.

[63] The executive director disputed the applicants' submission that he had not established that settlement privilege applied to the communications between counsel for the executive director and the Former CEO. He argued that the information set out in the Second Affidavit was sufficient to establish that privilege.

[64] The executive director also disputed that the redactions made to the documents listed on the supplemental list of documents were not proper. As noted above, he argued that the redactions made to the IIROC documents were made at the request of IIROC to protect the privacy interests of IIROC employees. He said the redactions to the SEDI printout were made on the basis of relevancy.

[65] The executive director submitted that it was not appropriate in the circumstances of this case to make the order requested in paragraph 3(b), which the executive director referred to as a "Laporte-type" list, referring to the Saskatchewan Court of Appeal decision in *Laporte v. Saskatchewan*, 1993 CanLII 9145 (SK CA). In that case, the Court ordered the Crown, at paragraph 18, to provide:

> …a written, itemized inventory of the information in [the Crown's] possession identifying those items which it intends to disclose and those which it does not, and containing, in respect of the latter items, a statement in each case of the basis upon which the Crown proposes to withhold disclosure. Each item should be described as to its nature with sufficient detail that counsel will be enabled to make a reasoned decision as to whether to seek disclosure or not.

[66] *Laporte* involved a judicial review of a disclosure order made in a criminal law matter relating to the limited disclosure provided by the Crown of reports prepared by the police describing interviews with potential witnesses.

[67] The executive director submitted that the facts in *Laporte* were very different than in the case before us. He said that the applicants had failed to establish that relevant non-privileged documents responsive to the order had not been produced and that the applicants were asking the panel to order a *Laporte*-type list based on speculation.

C. Analysis

[68] For the purposes of our analysis, we have divided the disclosure in issue into the two categories described in *Chaplin* and adopted by counsel for the parties in their oral submissions:

> (a) material which has been identified and is in existence and the applicants contend ought to have been produced, and
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> (b) material the existence of which is in dispute and the applicants contend ought to have been produced.

Material which has been identified and is in existence

[69] We have allocated the material in this category into four groups: the Former CEO settlement communications, the material with respect to which the executive director claims litigation privilege, the material which the executive director submitted was irrelevant and the documents which have been redacted by the executive director.

The Former CEO settlement communications

[70] Settlement privilege protects communications and documents created for the purpose of settlement from disclosure to persons who are not party to the settlement discussions.

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

> (a) a litigious dispute must be in existence or in contemplation,
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> (b) there is an express or implied intention that the communication must not be disclosed to the court if the negotiations fail, and
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> (c) the purpose of the communication is to effect a settlement.[7]

[72] We agreed with the applicants that the executive director had not established that settlement privilege applied to the Former CEO settlement communications. Paragraph 9 of the Second Affidavit provided an overall description of the content of the Former CEO settlement communications without any details as to the content of the individual documents. As a result, we were unable to determine whether the entirety of the communications was subject to settlement.

[73] In order to properly assess whether settlement privilege applied to the Former CEO settlement communications, we made an order requiring the executive director to provide to the Commission hearing office and the applicants a list of each document over which the executive director claimed settlement privilege and describing each document in sufficient detail so that the grounds upon which the executive director claimed settlement privilege may be assessed.

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[7] Lederman, Bryant & Fuerst, *The Law of Evidence in Canada*, 5th Ed (2018) §14.348.

Documents with respect to which litigation privilege was claimed

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

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

> (a) the documents or communications must be prepared, gathered or annotated by counsel or persons under counsel's direction,
>
> (b) the preparation, gathering or annotating must be done in anticipation of litigation,
>
> (c) the documents or communications must meet the dominant purpose test,
>
> (d) the documents, or the facts contained in the documents, need not be disclosed under the legal rules governing the proceedings, and
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> (e) the documents or facts have not been disclosed to the opposing party or to the court.[8]

[76] The reference in paragraph 12 of the Second Affidavit to documents subject to litigation privilege was the first time the executive director indicated that there were undisclosed potentially relevant documents subject to such privilege.

[77] The executive director did not make any submissions regarding the nature of the documents subject to the claim of litigation privilege or how that privilege had been established. In oral submissions, counsel for the executive director simply said it was incorrect to rely on paragraph 12 to infer that there were other relevant documents which should have been disclosed.

[78] As the executive director did not provide any of the information required to allow us to assess whether a claim of litigation privilege had been established, we made an order requiring the executive director to provide a list of the categories of documents over which the executive director claimed litigation privilege and describing each category in sufficient detail so that the grounds upon which the executive director claimed litigation privilege may be assessed.

Documents which are irrelevant

[79] As noted above, paragraph 12 of the Second Affidavit referenced documents created or obtained by the executive director or his staff in the investigation that had not been disclosed on the basis of relevancy.

[80] As stated in *Hu*, the Commission cannot wholly delegate the determination of relevancy to its staff and, if the staff's determination of relevancy is challenged, the Commission must determine whether the documents in question are relevant or irrelevant.

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

[81] The executive director did not make any submissions regarding the nature of the documents that he determined were irrelevant or provide any of the information required to allow us to assess the basis on which he concluded these documents were irrelevant.

[82] Accordingly, we made an order requiring the executive director to provide a list of the categories of documents described in paragraph 12 of the Second Affidavit which the executive director asserts are irrelevant and describing each category in sufficient detail so that the grounds upon which the executive director has determined relevancy may be assessed.

Redacted documents

IIROC documents

[83] We agreed with the applicants that privacy is not a recognized ground for redaction. We also found that the information that was redacted from the IIROC documents was arguably relevant in the context of the standard for relevancy established in *Stinchcombe* that if information is of some use to the defence, it is relevant and should be disclosed.

[84] Accordingly, we made an order that the executive director provide unredacted copies of the IIROC documents.

SEDI printout

[85] We agreed with the applicants that it was not appropriate to make redactions to the SEDI printout as the information on SEDI was publicly available. We also agreed that information regarding other insiders making trades in the time frame in issue was relevant information.

[86] Although it was clear the applicants had been able to access the unredacted information on their own, we made an order requiring the executive director to provide an unredacted copy of the SEDI printout.

Material the existence of which is in dispute

[87] The executive director alleged that he had disclosed all relevant materials in his possession other than those subject to privilege.

[88] Under the test in *Chaplin*, the onus then shifted to the applicants to establish a basis which would enable the panel to conclude there was in existence further material that is potentially relevant.

[89] The applicants submitted it was not credible that the executive director would bring enforcement proceedings against Morabito and Global or commence settlement discussions with the Former CEO without Commission staff interviewing the Former CEO or other Global personnel or reviewing independently obtained documents concerning them. However, a review of the volume and nature of the disclosure provided by the applicants in response to the executive director's production orders showed that there was already in existence material that appeared relevant to the executive director's allegations in the notice of hearing and discussions with the Former CEO.

[90] The applicants also submitted that the questions put to Mrs. Morabito in her compelled interview regarding the Former CEO and the Former Director necessarily must have been based on a prior undisclosed Commission investigation of those individuals. However, a review of the full transcript showed that a number of subject matters were canvassed in the interview and that the questions regarding the Former CEO and the Former Director were part of a broader line of questioning relating to Mrs. Morabito's acquaintance with various persons involved with Global.

[91] The applicants submitted that the supplemental disclosure made by the executive director amplified their concern the executive director had not complied with his disclosure obligations. Regardless of whether the supplemental disclosure provided by the executive director was evidence of a failure by the executive director to timely comply with his disclosure obligations or evidence of compliance by the executive director with his ongoing disclosure obligations, we did not find this to be a compelling argument on which to base a finding that there was in existence undisclosed potentially relevant documents. As noted in *Chaplin*, while the applicants did not need to lead or point to specific evidence to establish a basis to conclude there was in existence undisclosed potentially relevant material, the disputed material must be sufficiently identified not only to reveal its nature but also to enable us to conclude it is potentially relevant. The applicants' general submission on this point falls far short of this requirement.

[92] In the circumstances, we found the applicants failed to meet the test in *Chaplin* to establish a basis which could enable the panel to conclude there is in existence further evidence which is potentially relevant.

[93] Accordingly, we dismissed the application for the order outlined in paragraph 3(b) above**.**

September 20, 2023

For the Commission

Judith Downes
Commissioner

James Kershaw
Commissioner

Marion Shaw
Commissioner