CITATION: Continental Bank of Canada v. Continental Currency Exchange Canada Inc., 2022 ONSC 647
COURT FILE NO.: CV-16-11306-00CL
CV-17-11661-00CL
DATE: 20220128

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
CONTINENTAL BANK OF CANADA and SPROTT CONTINENTAL HOLDINGS LTD. Plaintiffs	*Paul Le Vay*, *Samuel M. Robinson*, and *Edward Marrocco* for the Plaintiffs Continental Bank of Canada and Sprott Continental Holdings Ltd.
AND:	
CONTINENTAL CURRENCY EXCHANGE CANADA INC. Defendants	*David S. Steinberg* and *Eric J. Freeman*, for the Defendants Continental Currency Exchange Canada Inc.
AND BETWEEN:	
CONTINENTAL CURRENCY EXCHANGE CANADA INC., SCOTT PENFOUND, TRACIE PENFOUND, KYLE PENFOUND, KOURTNEY PENFOUND, MADISON PENFOUND, ANGELA PENFOUND and TRACIE & COMPANY LIMITED Plaintiffs/Responding Parties	*David S. Steinberg* and *Eric J. Freeman*, for the responding parties Continental Currency Exchange Canada Inc., Scott Penfound, Tracie Penfound, Kyle Penfound, Kourtney Penfound, Madison Penfound, Angela Penfound and Tracie & Company Limited
AND:	
ERIC SPROTT, SPROTT INC., SPROTT CONTINENTAL HOLDINGS LTD., CONTINENTAL BANK OF CANADA, SHARON RANSON, JOHN TEOLIS, JIM RODDY, LARRY TAYLOR, JOHN JASON, JOHN LAHEY and PHIL WILSON Defendants/Moving Parties	*Paul Le Vay*, *Samuel M. Robinson*, and *Edward Marrocco* for the moving parties Eric Sprott, Sprott Inc., Sprott Continental Holdings Ltd., and Continental Bank of Canada **HEARD:** March 1 and 2, 2021

CAVANAGH J.

REASONS FOR JUDGMENT

Introduction

[1] This motion is made in two consolidated actions: (i) an action brought by Continental Bank of Canada ("CBOC") and Sprott Continental Holdings Ltd. ("SCHL") against Canadian Currency Exchange Canada Inc. ("CCEC"); and (ii) an action brought by CCEC and, among others, its shareholders, Scott Penfound, Tracie Penfound and their four adult children, against SCHL and its principal, Eric Sprott, and Sprott Inc.

[2] Eric Sprott, Sprott Inc., Sprott Continental Holdings Ltd., and Continental Bank of Canada are referred to as the "Sprott Parties".

[3] Scott Penfound, Tracey Penfound, their four adult children, Kyle Penfound, Kourtney Penfound, Madison Penfound, and Angela Penfound, and CCEC are referred to the "Penfound Parties".

[4] During the litigation, when the Sprott Parties received the Penfound Parties' productions, they learned that the Penfound Parties were in possession of documents that they should not have - including emails between CBOC's General Counsel and lawyers at Norton Rose (CBOC's outside counsel) and at Baker McKenzie (who acted for Mr. Sprott and SCHL), as well as emails between CBOC's General Counsel and officers of CBOC.

[5] The Sprott Parties made enquiries and there was an exchange of correspondence between counsel. This motion was brought, and an investigation ensued.

[6] On this motion, the Sprott Parties move to stay the claims made by CCEC, Scott Penfound, Tracie Penfound, Kyle Penfound, Kourtney Penfound, Madison Penfound, Angela Penfound and Tracie & Company Limited (collectively, the "Penfound Parties") as an abuse of process. In the alternative, the Sprott Parties seeks an order removing the Penfound Parties' lawyers as lawyers of record.

Factual Background

Parties to the Consolidated Action

[7] Eric Sprott is a businessman and investor. Mr. Sprott owns 100% of the shares of SCHL.

[8] CBOC is a wholly owned subsidiary of SCHL. CBOC is no longer a defendant in the action by CCEC and members of the Penfound family. CBOC remains a plaintiff in the action brought against CCEC.

[9] Sprott Inc. is a publicly traded investment firm and asset manager that was controlled by Mr. Sprott during a portion of the relevant period.

[10] CCEC is a corporation that was engaged, at the relevant times, in the provision of currency exchange and related financial services to retail clients. CCEC is owned by Scott Penfound, Tracie Penfound and their four adult children.

Proposed Business Transaction

[11] The litigation in the consolidated action arises from a proposed business transaction that failed.

[12] Under the proposed business transaction, Mr. Sprott, and his companies, SCHL and Sprott Inc., worked with CCEC and Scott Penfound and his family members towards establishment of CBOC as a new Schedule 1 licenced bank. The proposed transaction contemplated that (i) CBOC would be set up as a bank, wholly owned by SCHL, (ii) CBOC would purchase the shares of CCEC in exchange for shares to be issued by CBOC equal to 49% of the capital stock of CBOC; and (iii) the business and branch network of CCEC would become the genesis of the new bank.

[13] The parties entered into a series of agreements in furtherance of the proposed business transaction, including several term sheets executed between May 2011 and June 2014, and a letter agreement executed on November 28, 2014 (the "Letter Agreement)".

[14] The proposed business transaction was undertaken under a process overseen by the Office of the Superintendent of Financial Institutions ("OSFI").

[15] The parties were each represented by counsel. Gowlings LLP acted for CCEC, Scott Penfound and his family members. Baker McKenzie LLP acted for Mr. Sprott, SCHL and Sprott Inc. Norton Rose Fulbright LLP acted for CBOC. Angela Shaffer is a lawyer who was contracted to provide legal services as General Counsel of CBOC.

Failure of the Proposed Business Transaction

[16] The proposed business transaction was not completed.

[17] On January 12, 2015, Mr. Sprott advised the Board of Directors of CBOC that he would not continue to fund the business transaction. Mr. Penfound was notified the following morning, January 13, 2015, of Mr. Sprott's decision.

[18] Upon being advised that the transaction would not proceed, OSFI issued an order dated January 13, 2015 that CBOC should not carry on any business of banking or accept any deposits. That Order remained in place until CBOC ceased to be a bank on December 16, 2019.

Mr. Penfound's request that all CBOC email accounts be backed up

[19] On January 13, 2015, shortly after receiving news of Mr. Sprott's decision, Mr. Penfound instructed his assistant, Nicole Lafete, to email Horn IT Solution Inc. ("Horn IT"), CBOC's and CCEC's external information technology advisor, and request that all CBOC email accounts be backed up to a separate location.

[20] Ms. Lafete made this request of Horn IT on an urgent basis by email sent on the morning of January 13, 2015. The request was recorded by Horn IT in a service ticket.

[21] Horn IT's internal records show that the CBOC emails consisting of 22 "PST files" were copied onto a removable hard drive (the "Email Server Copy"). PST files are archived files created by Microsoft email systems. Each PST file contains many thousands of emails (as well as any attachments to those emails). The Email Server Copy contains a copy of every email ever sent or received by any user with an email address ending in @continentalbank.ca up to January 13, 2015.

[22] On January 14, 2015, Mr. Penfound emailed Horn IT to ask when he could collect the Email Server Copy and Horn IT responded that the hard drive containing the copied emails would be ready that morning. Mr. Penfound responded that he would send someone around to pick it up.

[23] Mr. Penfound acknowledges that the Email Server Copy was received from Horn IT, although his evidence is that he, personally, did not receive it.

[24] Mr. Penfound's evidence is that he requested the Email Server Copy to safeguard CBOC's data against the risk of possible relocation or destruction and to safeguard CBOC's interests. Mr. Penfound's evidence is that he planned to salvage CBOC's ability to proceed as intended either with Mr. Sprott or a new partner who would assume his position.

Mr. Penfound asks his assistant, Ms. Lafete, to copy files on a hard drive to her laptop

[25] At the end of September or the beginning of October 2015, Mr. Penfound handed Ms. Lafete a hard drive and asked her to put data from that hard drive to be saved to her laptop. Mr. Penfound's evidence is that he provided Ms. Lafete with a copy of files from his laptop for her to use, because he and Ms. Lafete were having conflicts accessing Mr. Penfound's laptop. Ms. Lafete was searching for documents in relation to the failed business transaction at Mr. Penfound's request.

[26] Mr. Penfound's evidence is that he went onto his laptop, determined what files may be useful, including agreements, term sheets and various emails, and put them on an external drive that he provided to Ms. Lafete so that she would not need to have access to his laptop and he

could do his own work. Mr. Penfound's evidence is that the documents on the hard drive included his email account.

[27] Mr. Penfound's evidence is that the hard drive given to Ms. Lafete was not a copy of the Email Server Copy that he had requested from Horn IT.

[28] Ms. Lafete gave evidence that she does not know the source of the data on that hard drive. The hard drive was given to her to be put on to her laptop to be used to view for the purposes of the litigation.

[29] Ms. Lafete was unable to open some files on the hard drive, so she went to a colleague at CCEC, Vince Carere, for assistance. Mr. Carere was CCEC's Vice President of Information Technology. Mr. Carere copied the data from the hard drive onto a laptop. The data on the hard drive included email archive files, including PST files. Mr. Carere purchased and installed a software program called "MailStore" on Ms. Lafete's laptop. MailStore is a program that permits a user to search emails by keyword and date, both in the body of email sent also in attachments to the emails. The MailStore program was installed on Ms. Lafete's laptop to enable her to search emails.

[30] Mr. Carere obtained approval from Mr. Penfound prior to purchasing the MailStore software. He told Mr. Penfound that MailStore could be used to search both PST files and MBOX files. Mr. Carere explained that PST files were generated by CBOC's email system, whereas MBOX emails came from the system previously used by CCEC.

[31] The 22 PST files on the Email Server Copy were, at some time, saved to Ms. Lafete's laptop. This is known because the files on Ms. Lafete's laptop were copied to a hard drive that was provided by the Penfound Parties to Commonwealth Legal, a division of Ricoh Canada ("Ricoh") for use in the e-discovery process in the litigation. These files included the 22 PST files on the Email Server Copy.

Horn IT instructed to make back-up copies of 17 PST files to be available to CCEC

[32] On February 4, 2015, Mr. Carere, who was then working for CBOC, instructed Horn IT to make backup copies of 17 CBOC email accounts that were to be provided to CCEC for its exclusive future use. This was done with the approval of Brian Black who was CBOC's Chief Information Officer. These emails were also saved to the File Server.

[33] The 17 PST files were email accounts of persons who had been employees of CBOC who would continue as employees of CCEC. The Horn IT ticket for this assignment shows that the listed users' CBOC email accounts are to be forwarded to their CCEA accounts. Mr. Carere confirms in his evidence that the users of these CBOC accounts were to continue on as CCEC employees.

[34] Ms. Lafete has given evidence that her review of emails included emails of persons who did not work subsequently at CCEC. Her review of CBOC emails was not limited to emails included in these 17 PST files.

CBOC data on the file server at shared premises of CBOC and CCEC

[35] After Mr. Sprott made the decision not to pursue the proposed business transaction, CBOC and CCEC continued to operate from shared premises at Ringwood Manor in Whitby Ontario for approximately nine months. CBOC and CCEC shared a common information technology environment.

[36] A file storage server (the "File Server") was located on site at the shared offices at Ringwood Manor. The File Server was used by both CBOC and CCEC to store non-email documents, and that shared use continued even after the relationship breakdown. The File Server was configured so that each time a CBOC user logged onto the CBOC network, their laptop or desktop computer would backup their computer by copying/synchronizing all documents contained in certain folders on their device to their personal backup folder on the File Server.

[37] Kevin Gilbride was the Chief Financial Officer of CBOC. In February 2015, Mr. Gilbride assumed responsibility on behalf of CBOC for managing the process for separation of CBOC and CCEC, including data security and segregation, after the employment of Brian Black was terminated.

[38] Prior to Mr. Black's departure, on February 4, 2015, he instructed Horn IT to take certain steps with respect to the CBOC data on the File Server. The Horn IT ticket for February 4, 2015 shows that necessary changes as requested by Brian were made. The ticket reads: "For all CBOC only folders (in green) - add Kevin Gilbride, John Lahey, Pam Gilkes, and Angela Shaffer to the permissions list; and remove all other permissions".

[39] Vince Carere, who then worked under Mr. Black at CBOC and later began working exclusively for CCEC in July 2015, was aware of this. His evidence is that he believed that by February 2015, all CBOC data on the File Server had been secured and rendered inaccessible to CCEC personnel. Mr. Penfound's evidence is that he had the same understanding and, based on what Mr. Black had communicated to him, understood that CBOC data on the File Server had been encrypted. Mr. Gilbride's evidence is that he was generally aware of what Mr. Black was doing but did not know the details.

[40] On September 2, 2015, about one month before CCEC's move to new premises, Mr. Carere wrote to Horn IT about having CBOC's remaining data removed from the File Server. The following day, Mr. Carere emailed Mr. Gilbride and outlined a process for removal of the data to a secure device owned and managed by CBOC. Mr. Gilbride agreed to the process which contemplated that the data would be delivered to him personally.

[41] As of September 5, 2015, Mr. Gilbride had Horn IT disconnect his CBOC laptop from the automated backup system on the File Server. Mr. Gilbride's last backup occurred in the morning of September 5, 2015, just before 8:00 a.m.

[42] On September 9, 2015, CBOC and SCHL had initiated an application to have a receiver appointed over CCEC's operations and assets.

[43] On September 16, 2015, Mr. Penfound emailed Mr. Gilbride to seek confirmation that he had "all CBOC data now on your own servers or those under your control". Mr. Gilbride responded on September 19, 2015 that he was on vacation and would look into this further in a couple of weeks.

[44] On September 22, 2015, Mr. Gilbride emailed Mr. Penfound and informed him that CCEC would have to vacate the shared premises at Ringwood Manor by September 30.

[45] On September 20, 2015, Mr. Gilbride emailed Mr. Penfound to let him know that he would be meeting with Horn IT at Ringwood Manor the following day to deal with the CBOC data remaining on the File Server.

[46] On September 27, 2015, after he returned from vacation, Mr. Gilbride went to the Ringwood Manor office. He did this in anticipation of meeting with Horn IT over the coming days to discuss CBOC data removal from the File Server. He observed that on that day, the File Server was still in place at the Ringwood Manor office.

[47] By September 29, 2015, the File Server had been taken away by CCEC. CBOC's data had not been removed.

[48] Mr. Penfound's evidence is that he was unaware whether Mr. Gilbride had taken the necessary steps to remove CBOC's data from the File Server by the time that CCEC vacated Ringwood Manor at the end of September 2015.

[49] On October 8, 2015, CBOC's counsel wrote to counsel for CCEC and demanded that a complete copy of the CBOC data remaining on the File Server be provided to CBOC. On November 5, 2015, CBOC's counsel sent a follow-up letter to CCEC's counsel requesting a response to the October 8 letter. Upon receiving this follow-up letter, CCEC's counsel sent the October 8 letter to Mr. Penfound. Mr. Penfound asked Mr. Carere to obtain written confirmation from Horn IT that CBOC data was not accessible.

[50] Mr. Carere asked Horn IT to send him confirmation that nobody at CCEC had access to the CBOC data on the File Server. In response, Horn IT confirmed that "no Continental Currency Employees currently have access to the Continental Bank data stored on the server". In cross-examination, Mr. Carere agreed that the use of the word "currently" was included because, up until this email exchange, CBOC data on the File Server was accessible to CCEC users. Mr. Carere confirmed that he related this information to Mr. Penfound and Ms. Lafete to ensure that they knew that CBOC data had not been secured prior to November 6, 2015.

[51] CCEC's counsel responded by email dated November 10, 2015 and stated that the CBOC data had been secured by Horn IT and removed from CCEC's possession as of September 3,2015. In fact, the data had not been removed and made inaccessible until November 6, 2015, although CCEC's counsel did not know that. CCEC's counsel prepared the response based on information received from Mr. Penfound, which counsel believed to be true.

[52] Mr. Carere testified that the CCOC documents on the File Server were accessible to CCEC until at least November 6, 2015.

[53] On November 16, 2015, Mr. Gilbride emailed Horn IT and attached the November 6, 2015 email from CCEC's counsel and expressed doubt that CBOC's data on the File Server had been secured. Mr. Gilbride asked Horn IT to "clear that item up".

[54] The Sprott Parties rely on evidence that the Penfound Parties accessed files from Mr. Gilbride's personal backup folder on the File Server on October 19 and 20, 2015, after the File Server had been removed from Ringwood Manor. This is after the October 8, 2015 letter from the Sprott Parties' counsel. The files in question are two PST files that were backed up from Mr. Gilbride's laptop to his personal backup folder on the File Server. They were found by the Sprott Parties' computer expert, Steve Rogers, on the hard drive (a copy of Ms. Lafete's laptop) that was given to Ricoh for discovery purposes. This evidence shows that the Penfound Parties had access to documents from Mr. Gilbride's back-up folder on the File Server, at least until November 6, 2015.

[55] The Penfound Parties rely on evidence from Chris MacDonald, who provided expert evidence for the Penfound Parties of his forensic computer investigations, that the Gilbride PSTs could have been moved by Horn IT, who had administrative privileges, from Mr. Gilbride's personal folder to a separate folder created by Horn IT known as the Bank folder as part of the process of trying to isolate and secure the CBOC data. CBOC's expert, Steven Rogers, agreed that he does not know whether this occurred, but it was possible. The Penfound Parties submit that it is likely that in October 2015 Ms. Lafete unintentionally accessed documents from the Bank folder or that she or Mr. Carere may have unknowingly had elevated privileges and accessed the Bank folder. No logs were kept by Horn IT of who had elevated privileges.

[56] The Penfound Parties' position is that the evidence supports a finding that the Gilbride PST emails may have been inadvertently accessed by Ms. Lafete in the belief that the documents that were accessed were legitimately available.

The "Jump List" documents

[57] Steven Rogers is the computer forensic investigator retained by the Sprott Parties to investigate the issues raised on this motion. Mr. Rogers appended to his report an appendix described as the "Jump List" which is an index of all of the files from Mr. Gilbride's laptop that were synchronized to his personal backup folder on the File Server.

[58] The files in the Jump List include numerous documents, including documents prepared for the purpose of this litigation, as well as legal opinions and strategy documents prepared for the Sprott Parties by Norton Rose, Stockwoods, and Baker McKenzie.

[59] Mr. Rogers' evidence is that any file that was synchronized from a user's laptop to their user folder on the File Server, including the Jump List documents, would have been accessible in the same manner as the two PST files that originated on Mr. Gilbride's CBOC laptop. I accept this evidence.

[60] The Jump List documents were not on the Penfound Drive. Mr. Gilbride did not identify any of the Jump List documents on the Relativity database that was used by the parties for document review and production in the litigation.

The discovery plan approved in February 2018

[61] Counsel for the parties agreed that document review, production and exchange would be done using the Relativity system. Relativity is an e-discovery database that can be used to collect and review documents for litigation. To simplify matters, the lawyers agreed that both sides would retain Ricoh to host their respective Relativity databases. This meant that when the time came to exchange affidavits of documents, Ricoh could facilitate the release of each side's productions into the other side's database.

[62] Because both sides were using Relativity through the same provider, it was decided that an ethical wall would be put in place at Ricoh to ensure that each party could review its own documents in its own database without the risk of accidental disclosure.

[63] Each side provided its assigned Ricoh team with the documents it had assembled. These documents were then loaded into each party's respective Relativity database, on its side of the Ricoh ethical wall. Within their respective databases, each party could review its documents for relevance and privilege. Only documents that were coded as relevant and not flagged as privileged were shared with the adverse side. Documents that a party did not include in its affidavit of documents were to remain in its own Relativity database and would not be shared with the other side.

[64] The arrangements between the parties were finalized in a discovery plan that was approved by Justice Conway on February 6, 2018. This discovery plan contemplated that the Sprott Parties had control of the CBOC emails. In order to protect the Penfound Parties' privilege, the Sprott Parties instructed Horn IT to load the contents of Scott Penfound's and Tracie Penfound's email accounts, as well as that of another CCEC employee, Rose April-White, on to a separate hard drive that was delivered directly to the Penfound Parties' side of the Ricoh ethical screen. Nobody from the Sprott Parties ever looked at those accounts.

Documents saved to the Penfound Drive

[65] Vince Carere was the Vice-President of information technology for CCEC from July 2015 until CCEC sold its business in May 2018. Mr. Carere was asked by Mr. Penfound and Ms. Lafete in around March 2018 to assist with the creation of an external hard drive of data that could be sent to Ricoh to be used for documentary discovery in the litigation. His task was to copy the data on to the hard drive (the "Penfound Drive").

[66] Mr. Carere's affidavit evidence is that to his knowledge, the contents and structure of the data to be placed on the Penfound Drive was predetermined and agreed to by Ricoh and Mr. Penfound. Mr. Carere's evidence is that all of the documents that were copied to the Penfound Drive were a copy of what was on Ms. Lafete's laptop. The 22 PSTs on the Email Server Copy were among the more than 600,000 documents saved to the Penfound Drive.

[67] On March 8, 2018, CCEC delivered the Penfound Drive directly to Ricoh containing all potentially relevant documents. The Penfound Drive contained more than 600,000 documents, which were then winnowed down to 107,884 documents in accordance with the Discovery Plan. Lindsay Moffatt, who was then an associate lawyer at counsel for the Penfound Parties, reviewed the majority of these 107,884 documents. Her evidence is that she did not see any documents that raised a red flag with respect to privilege, and she is certain she did not see any legal opinions or memos.

Document review by the Penfound Parties and their lawyers

Review of electronic documents by Ms. Lafete

[68] Ms. Lafete gave evidence as a witness on this motion.

[69] Ms. Lafete testified that once the MailStore program was installed on her laptop, Mr. Penfound would ask her to conduct searches of emails loaded onto her laptop. She did the searches from the fall of 2015 when she was provided with the laptop set up by Mr. Carere until the end of her employment in or around May 2018. Ms. Lafete estimated that she received requests from Mr. Penfound roughly weekly throughout the approximately 2 ½ year period.

[70] Ms. Lafete was asked how she would do searches on the laptop and responded:

> So Scott would give me a request, whether it was a term or an idea he remembered seeing or a document he was looking for that he remembered being an attachment, and I would go on to my laptop, open up MailStore, and I would search whatever was required, and if I saw something that I thought was what he was looking for, I would forward it to him which then connects into my Outlook, so it comes, even if it wasn't an email from myself, it would come from myself to him. So I would either forward it to him or the odd time, I would print them, but most of the time, I would just forward them through to him so he could tell me yes or no: Yes, that's what he needed. "No, that's not what I needed."

[71] On his cross-examination, Mr. Penfound agreed with Ms. Lafete's description of what she was doing.

[72] The parties disagree on whether the evidence supports a finding that Ms. Lafete reviewed emails from the Email Server Copy during the course of her review of documents on her laptop over two and a half years.

[73] The Sprott Parties contend that the evidence supports a finding that Ms. Lafete reviewed emails from the Email Server Copy during the course of her review because the Email Server Copy was contained on the Penfound Drive when it was provided to Ricoh on March 8, 2018. The Sprott Parties contend that Mr. Penfound, through Ms. Lafete, searched and reviewed CBOC's emails, including privileged emails, over a period of two and a half years.

[74] The Penfound Parties contend that there is no direct evidence that Ms. Lafete searched or reviewed emails from the Email Server Copy. They rely on Mr. Penfound's evidence that he did not provide Ms. Lafete with the Email Server Copy when he gave her the hard drive that was saved to her laptop. Ms. Lafete was asked on her examination whether, once the laptop had been set up in the autumn of 2015, other documents or emails were added to the laptop during the two and a half years that she was at CCEC and her response was that the only documents she remembers being added were from Mr. Penfound's previous laptops that he had used before his then current one.

[75] Ms. Lafete reviewed emails from persons at CBOC who did not become employees of CCEC. Angela Shaffer was CBOC's General Counsel. Ms. Lafete's evidence is that emails from and to Ms. Shaffer would have been on her laptop, as would emails of Mr. Gilbride. The Penfound Parties argue that Ms. Lafete would have seen emails from Ms. Shaffer, Mr. Gilbride, and other CBOC employees during her review because Mr. Penfound had regular email correspondence with Ms. Shaffer and Mr. Gilbride and emails from and to each of them would have been in his email account that was saved to Ms. Lafete's laptop.

[76] The Penfound Parties contend that there is no direct evidence that Ms. Lafete searched or reviewed emails from the Email Server Copy. They rely on Mr. Penfound's evidence that he did not provide Ms. Lafete with the Email Server Copy when he gave her the hard drive that was saved to her laptop. The Penfound Parties submit that it is not known when or how the Email Server Copy was saved to Ms. Lafete's laptop, although they accept that the Email Server Copy was on her laptop when it was copied to the Penfound Drive and provided to Ricoh.

[77] The Penfound Parties submit that in the absence of evidence that the Email Server Copy was on Ms. Lafete's laptop when she reviewed documents, the evidence does not support an inference that Ms. Lafete searched and reviewed emails from the Email Server Copy at Mr. Penfound's request.

Two CBOC email chains forwarded by Ms. Lafete to Mr. Penfound in February and October 2015

[78] Mr. Gilbride appended as exhibits to his first affidavit two emails from Ms. Lafete to Mr. Penfound dated February 23, 2015 and October 12, 2015 by which she forwarded two email chains between CBOC employees, not copied to Mr. Penfound, Ms. Lafete, or anyone else at CCEC, that dealt with documents for the proposed business transaction.

[79] Mr. Gilbride's evidence is that he did not provide access to these emails or to his email account to Ms. Lafete and, at the time these emails were forwarded, other recipients were no longer working for CBOC and did not have access to their CBOC email accounts. Mr. Gilbride was unable to explain how Ms. Lafete could have forwarded these emails unless she found a way to access his CBOC email account or the CBOC email account of one of the other recipients.

[80] These emails from Ms. Lafete were found by the Sprott Parties because they were listed on Schedule A of the Penfound Parties' affidavit of documents. The Sprott Parties say that they do not have access to the CCEC emails and have not obtained other emails from Ms. Lafete to

Mr. Penfound over the two-and-a-half-year period that she was searching emails on her laptop and responding to Mr. Penfound's inquiries.

[81] None of the 17 CBOC PST files that were copied and made available to CCEC with CBOC's approval is an email account of a sender or recipient of either of the two CBOC emails appended as exhibits to Mr. Gilbride's first affidavit.

[82] None of the other emails sent by Ms. Lafete to Mr. Penfound forwarding emails in response to his requests for searches over the two-and-a-half-year period that Ms. Lafete performed these searches is in the evidentiary record.

[83] This evidence shows that during her review, Ms. Lafete had access to CBOC emails that were not limited to emails sent to or by Mr. Penfound and stored on his laptop or emails on the 17 PST files that were copied and made available to CCEC.

Document review by Ms. Moffatt and other members of the Penfound document review team

[84] The Penfound Drive was delivered to Ricoh on March 8, 2018 from Scott Penfound. Its contents - including the Email Server Copy and the documents obtained from Mr. Gilbride's personal backup folder - were loaded onto the Penfound Group's Relativity database.

[85] By April 2, 2018, the Penfound Relativity database had been populated with the contents of the Penfound Drive. Soon thereafter, Ricoh created user accounts for Lindsay Moffatt of Ormston List Frawley, Scott Penfound, Tracie Penfound, Kyle Penfound, and three CCEC employees, Emerald Bergeron, Bridget Irish, and Conlon Prasad. Ms. Bergeron, Ms. Irish, and Mr. Presad were part of Scott Penfound's internal document review team at CCEC. The persons who worked with Ms. Moffatt were only Ms. Bergeron, Ms. Irish, and Mr. Persad, and Mr. Persad to only a limited extent. Some documents were reviewed and coded before Ms. Moffatt began her review, although she coded the majority of the documents. Ms. Moffatt was the only lawyer reviewing documents for the Penfound Parties.

[86] Ms. Moffatt agreed that there may have been documents she reviewed in which no CCEC personnel were either senders or recipients and she explained that she did not turn her mind to the significance of potentially possessing emails of the Sprott Parties during her review because she was focused on issues of relevance and potential privilege applicable to her own clients' interests.

Review of Relativity database by Penfound review team after this motion was brought

[87] On October 16, 2020, counsel for the Penfound Parties on this motion wrote to counsel for the Sprott Parties to advise that Mr. Penfound's review team had continued searching the Relativity pool up until October 2020.

[88] On November 17, 2020 the Sprott Parties were provided with an audit prepared by Ricoh showing continued review by the Penfound Parties of the Penfound Relativity database.

[89] Mr. Penfound's evidence is that he did not until shortly before he swore his affidavit appreciate that he was not to make any further review of the documents in the Relativity database pending resolution of the motion. He states that he asked Emerald Bergeron and Bridget Irish to review the database for the purpose of helping him prepare for the discovery process.

[90] On her cross-examination, Ms. Moffatt gave evidence that by April 2020 she had stopped reviewing documents in the Relativity database and that she expects that she and Mr. Ormston would have communicated to Mr. Penfound that he was not to do so.

Discovery that affidavit of documents of Penfound Parties included emails that belonged to Sprott Parties

[91] When the Sprott Parties received the Penfound Parties' productions in late May 2019, they learned that the Penfound Parties were in possession of documents they should not have - including emails between CBOC's General Counsel, Angela Shaffer, and lawyers at Norton Rose (CBOC's outside counsel) and at Baker McKenzie (who are acting for Mr. Sprott and SCHL), as well as emails between Ms. Shaffer and officers of CBOC.

[92] By letter dated June 7, 2019, counsel for the Sprott Parties asked how the Penfound Parties had obtained these documents. Mr. Ormston provided the June 7, 2019 letter to Mr. Penfound very shortly after receiving it. Mr. Ormston and Ms. Moffatt then made inquiries with Mr. Penfound.

[93] By letter dated June 20, 2019, Mr. Ormston responded to the June 7, 2019 letter. In his response, Mr. Ormston did not mention the Email Server Copy or his clients' access to the File Server. Mr. Ormston was not aware when he wrote his letter that Mr. Penfound had requested and received a copy of CBOC's email exchange server in January 2015.

[94] Mr. Penfound's evidence is that he did not disclose the fact that he had requested backup copies of the emails on the Email Server Copy when this issue arose in June 2019 because over the ensuing years he had forgotten that he had made this request.

This motion is brought, and further investigations are undertaken

[95] After this motion was brought, an order was obtained from Hainey J. on July 24, 2019 to obtain information from Horn IT, which was CBOC's information technology provider. A computer forensic investigator was retained. Inquiries were made of Ricoh. Ms. Lafete was examined under Rule 39.03. The parties retained experts who undertook investigations and provided reports.

Analysis

[96] This motion raises issues in respect of the protection of communications that are subject to solicitor and client privilege. The importance of protecting solicitor and client communications made or received for the purpose of giving or obtaining legal advice is well-

established. In *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, Fish J. described the rationale for the protection of solicitor-client privileged communications, at para. 26:

> Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

[97] The issues on this motion are:

a. Did the Penfound Parties obtain privileged materials belonging to the Sprott Parties?

b. If so, what is the appropriate remedy?

Did the Penfound Parties obtain privileged documents belonging to the Sprott Parties?

[98] The Sprott Parties submit that the Penfound Parties accessed and reviewed two groups of documents that are known to contain materials that belong to the Sprott Parties and are subject to solicitor and client privilege:

a. A copy of every email sent or received by anyone with a CBOC email address; and

b. Email archive files taken from Mr. Gilbride's personal back-up folder on the File Server, which also contained internal documents prepared for the purpose of this litigation, including legal opinions and advice from external counsel for the Sprott Parties in respect of the failed business transaction and in respect of the litigation.

[99] A central issue on this motion is the extent of the universe of electronic documents over which the Sprott Parties claim privilege which is relevant to the relief sought on this motion. In order to address this issue, I first refer to the affidavit evidence from Mr. Gilbride on this motion.

[100] In his first affidavit, Mr. Gilbride states that the Sprott Parties learned that the Penfound Parties had had unauthorized access to CBOC email accounts when they produced hundreds of emails and attachments from accounts listed in Exhibit A to his affidavit. Exhibit A is a table with six columns containing information described under the following headings: "DocID",

"Joint Book ID", "LeadDate (Date)", "Doc Date (Date)", "DocTitle", and "Family Indicator". The table lists 308 emails.

[101] In his first affidavit at paragraph 54, Mr. Gilbride states that "[a]mong the emails (with attachments) that were produced by the Penfound Group were numerous documents that are privileged to the Sprott Group. These include: …". Mr. Gilbride, in paragraphs 55 to 78 of his first affidavit, then identifies 28 emails from the list of 308 emails in Exhibit A to his affidavit which he separates into the following groups: (i) six emails between Angela Shaffer and Sonia Yung (a partner at Baker McKenzie, external corporate counsel for SCHL and Mr. Sprott); (ii) six emails between Angela Shaffer and Mr. Gilbride; (iii) five emails between John Lahey (then the CEO of CBOC) and outside directors of CBOC, sent after the business relationship was terminated; (iv) ten other emails sent to or from Mr. Gilbride's account; and (v) one email from Mr. Gilbride to himself.

[102] In his supplementary affidavit sworn September 9, 2020, Mr. Gilbride refers to additional information the Sprott Parties obtained since he swore his first affidavit including additional information obtained from Horn IT and information from investigations undertaken by the forensic investigator retained by the Sprott Parties. Mr. Gilbride states that it appears that the Penfound Parties had access to the entire CBOC file server system until June 2019 and accessed these files to review confidential documents belonging to the Sprott Parties. He states that the Penfound Parties accessed a full backup of his laptop which included materials prepared by CBOC for its legal counsel for the purpose of receiving legal advice with respect to strategy surrounding matters relevant to the litigation as well as materials he prepared for the purpose of informing the Board of Directors of CBOC about this litigation and giving instructions to counsel in regards to the litigation. Mr. Gilbride states that the full extent to which the Penfound Parties and their lawyers have obtained privileged and confidential information belonging to the Sprott Parties remains unknown.

[103] In his supplementary affidavit, Mr. Gilbride states that the emails on the Email Server Copy include (a) communications between the Sprott Parties and its legal counsel about the transaction at issue in the litigation; and (b) communications amongst directors and management of CBOC in the immediate aftermath of the termination of the transaction, at a time when litigation was already a reasonable possibility. He states that the CBOC email accounts contain emails to and from Baker McKenzie, Norton Rose Fulbright, Stockwoods LLP, Ms. Shaffer, and the CIBC Board of Directors, for the purpose of seeking and obtaining legal advice, and giving directions for the conduct of the litigation. He states that the documents that were backed up to the File Server include legal opinions from litigation counsel to the Sprott Parties.

[104] The Sprott Parties submit that communications to or from Ms. Shaffer regarding that transaction are privileged to all of the Sprott Parties by operation of the doctrine of common interest privilege. Mr. Sprott was the sole shareholder of SCHL which was the sole shareholder of CBOC. Mr. Sprott was also, at the time, the controlling shareholder of Sprott Inc.

[105] The Sprott Parties are clear that on this motion they are not simply addressing the 308 emails (382 documents, including emails and attachments) that are listed on Exhibit "A" to Mr.

Gilbride's affidavit. The Sprott Parties submit that the Penfound Parties, by obtaining the complete copy of CBOC's emails, including all of Ms. Shaffer's emails, and by obtaining access to Mr. Gilbride's backup folder on the File Server, had access to relevant privileged material belonging to the Sprott Parties.

[106] The Sprott Parties submit that through this evidence, they have met their onus of showing that the Penfound Parties obtained relevant and privileged materials belonging to the Sprott Parties and the remaining question is the remedy that is appropriate.

[107] The Penfound Parties, on the other hand, submit that the onus is on the Sprott Parties to establish that a privilege applies to particular documents over which privilege is claimed. They contend that the Sprott Parties are required to specify which emails from the Email Server Copy are privileged. They submit that the Sprott Parties are required to provide some particulars of the emails over which privilege is claimed, at least information sufficient to identify the nature of the privilege claimed and the relationship of the document to the issues in the litigation. The Penfound Parties submit that the Sprott Parties have failed to discharge this onus.

[108] The Penfound Parties submit that only 17 of the 28 emails identified by Mr. Gilbride in his first affidavit (and taken from Exhibit A listing 308 emails) are subject to a claim of privilege. The Penfound Parties submit that in respect of these 17 emails, the Sprott Parties have not shown that any of them is *prima facie* privileged as a communication between lawyer and client made in confidence for the purpose of giving and seeking legal advice.

[109] With respect to the six emails between Ms. Shaffer and SCHL's outside counsel (Ms. Yung), the Penfound Parties submit that these documents are not privilege because the lawyers represented different parties and they were not providing legal advice to one another. The Penfound Parties submit that there is no common interest privilege because no underlying privilege has been made out. They cite *Barclays Bank PLC v. Metcalfe and Mansfield*, 2010 ONSC 5519, at para. 11 as authority. Although Mr. Gilbride states in his affidavit that each of these six emails contains information that is privileged to the Sprott Parties, the Penfound Parties contend that this statement is not, by itself, sufficient to establish a legal conclusion that the emails are protected by lawyer and client privilege. See *Barclays*, at para. 6.

[110] The Penfound Parties submit that the six emails between Ms. Shaffer and Mr. Gilbride are not privileged as against the Penfound Parties because Ms. Shaffer communicated with both Mr. Penfound and Mr. Gilbride and provided legal advice, including sharing advice she had received from Norton Rose. The Penfound Parties contend that, in the circumstances, Ms. Shaffer was not in an exclusive solicitor-client relationship with CBOC and SCHL, to the exclusion of CCEC and the Penfound Parties. They submit that, on the evidentiary record, a joint retainer should be inferred. Alternatively, they submit that any privilege in relation to advice provided by Ms. Shaffer or Norton Rose has been explicitly or implicitly waived because accounts from Norton Rose were provided to CCEC and reviewed by Mr. Penfound, and CCEC was paying these accounts. They contend that this evidence reveals an intention to waive privilege in relation to all matters in respect of which charges for legal services were being paid by CCEC.

[111] The Penfound Parties submit that the five emails identified in Mr. Gilbride's first affidavit between John Lahey and outside directors of CBOC are not privileged as against the Penfound Parties because litigation was not contemplated by CBOC on or before January 14, 2015 and, therefore, these documents were not prepared for the purpose of litigation and are not subject to litigation privilege.

[112] With respect to the Jump List documents, the Penfound Parties submit that there is no evidence that these documents were actually accessed or reviewed by representatives of the Penfound Parties, including their lawyers, and there is no evidence that these documents are on the Penfound Drive.

[113] The Penfound Parties submit, therefore, that the Sprott Parties have not identified any documents from the Penfound Drive that are privileged as against the Penfound Parties.

[114] In support of the Penfound Parties' submission that the onus is on the Sprott Parties to establish that a privilege applies to particular documents that were accessible to the Penfound Parties, they rely on *The Corporation of the City of Guelph v. Super Blue Box Recycling Corp.*, 2004 CanLII 34954 (ON SC). In that case, a motion was brought for production of documents over which privilege was claimed. The motion judge cited several authorities that summarize the law of privilege and, at para. 76(d), confirmed the principle that the onus rests on the party asserting privilege to establish that the communications in question are, in fact, privileged.

[115] The Sprott Parties submit that the principles that govern this motion are those expressed by the Supreme Court of Canada in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 and in *Celanese Canada v. Murray Demolition*, [2006] 2 S.C.R. 189.

[116] In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, Sopinka J., at p. 1260, addressed the dilemma with which the court is confronted when asked to determine whether confidential information attributable to a solicitor and client relationship was received by a solicitor for another party, where exploring the matter in depth may require the very confidential information for which protection is sought to be revealed, which would defeat the purpose of the application. Sopinka J. held that once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. Sopinka J. observed that this will be a difficult burden to discharge.

[117] In *Celanese*, a search authorized by an *Anton Piller* order was executed. Documents that were subject to solicitor-client privilege were disclosed to lawyers for the searching party. A motion was brought to disqualify the lawyers. Binnie J., at para. 42, noted that in *MacDonald Estate*, Sopinka J. imposed no onus on the moving party to adduce further evidence as to the nature of the confidential information beyond that which was needed to establish that the lawyer had obtained confidential information attributable to a solicitor and client relationship which was relevant to the matter at hand. Binnie J., at para. 49, held that the party whose privileged information was obtained was not required to reveal "the universe of potential confidences" to

the recipient of the privileged information and its lawyers "who refuse (or have rendered themselves unable) to identify precisely what they have seen".

[118] I do not agree that the Sprott Parties have an onus to identify all of the emails and other documents over which they claim privilege. The authority upon which the Penfound Parties rely, *Super Blue Box*, involves a very different fact situation. In *Super Blue Box*, the opposing party had not gained access to privileged documents. The issue was whether relevant documents were protected from disclosure in the litigation because they are privileged. The governing authorities on this motion are *Celanese* and *MacDonald Estate* which involve advertent or inadvertent disclosure of confidential and privileged documents to the opposing party or its lawyers. Once it is shown that an opposing party or its lawyers have had access to relevant confidential information that is protected by privilege, prejudice is presumed and the onus rests on the recipient of the information to rebut the presumption of prejudice.

[119] Ms. Shaffer's evidence is that, in her capacity as General Counsel of CBOC, she used her email account to send and receive privileged and confidential correspondence with lawyers retained by CBOC and its sole shareholder with respect to the transaction and the agreements that are at issue in this litigation. She also sent emails to officers of CBOC. The Penfound Parties' submissions in relation to the 17 emails does not support a finding that this evidence is untrue. I accept Ms. Shaffer's evidence in this regard.

[120] The Penfound Parties submit that I should find that the Penfound Parties were part of a joint retainer of Ms. Shaffer with the Sprott Parties. Mr. Penfound's evidence is that he was involved in every aspect of the proposed business transaction and had access to all material information relating to CBOC's formation and development. He states that he was actively involved in all material decision-making concerning CBOC's development, both internally and in relation to the length the regulatory application process with OSFI, which process was ultimately successful. Mr. Penfound states that, throughout, he had access to, reviewed, and had substantial input into the content of numerous documents which were otherwise confidential to CBOC and the proposed business relationship. His evidence is that in this role, he regularly communicated with Ms. Shaffer by email about these matters.

[121] Ms. Shaffer, on her cross-examination, agreed that in her capacity as General Counsel for CBOC, she had numerous communications with Mr. Penfound with respect to matters such as CBOC's ongoing development, the regulatory process, the integration of CCEC and its operations into CBOC, and the eventual contemplated opening of CBOC as a functioning bank.

[122] Mr. Penfound's evidence is that he was named and held out as CBOC's President and Chief Operating Officer and was intimately involved in its day-to-day operations and management as it was readied for entry into the marketplace pending final regulatory approval. He states that it was expected that he would join the Board of Directors of CBOC following receipt of his CBOC shares. He states that he was invited to and present at every Board meeting except the final one held on January 12, 2015, at which Mr. Sprott announced that he would not be proceeding with the proposed business relationship.

[123] The fact that Ms. Shaffer also communicated by email with Mr. Penfound while the parties were working towards completion of the transaction does not mean that Ms. Shaffer was jointly retained by the Penfound Parties. The Penfound Parties were separately represented by their own counsel. Before the transaction was completed, the Penfound Parties and the Sprott Parties had separate interests, although they shared an interest in managing the process involving CBOC while working towards completion of the transaction. It would not be unexpected that there would be communications from and to Ms. Shaffer that were shared with Mr. Penfound concerning issues arising from operational matters. I do not find that Ms. Shaffer was jointly retained to provide legal advice to Mr. Penfound. Ms. Shaffer was retained as General Counsel for CBOC.

[124] I also do not accept that the fact that Ms. Shaffer communicated by email with Mr. Penfound, that advice from Norton Rose was, on occasion, shared with Mr. Penfound, or that he reviewed accounts from Norton Rose, supports a conclusion that the Sprott Parties waived the privilege attaching to all confidential communications between Ms. Shaffer and external counsel in relation to the transaction and the agreements that are the subject of this litigation. There is no evidence that Ms. Shaffer provided legal advice to Mr. Penfound about the negotiations of the terms upon which CBOC would acquire the shares of CCEC or about the terms of the Letter Agreement or other agreements that were being negotiated in respect of the proposed transaction.

[125] The Email Server Copy containing all CBOC emails up to January 13-15, 2015 was contained on the Penfound Drive when it was provided by Mr. Penfound to Ricoh on March 8, 2018. Ms. Lafete and Mr. Carere testified that the files on the Penfound Drive were an exact copy of the Lafete laptop. The evidence that Ms. Lafete forwarded email chains between CBOC employees to Mr. Penfound on February 23, 2105 and October 12, 2015 shows that Ms. Lafete had access to the Email Server Copy during her review of documents which included all CBOC emails, including privileged communications to and from Ms. Shaffer, under the supervision of Mr. Penfound.

[126] With respect to the documents on the File Server, including the Jump List documents, the evidence is that these documents were accessible to the Penfound Parties at least until November 6, 2016. The files on the Jump List documents include documents prepared for the purpose of this litigation and legal opinions and strategy documents prepared for the Sprott Parties by Norton Rose, Stockwoods and Baker McKenzie. The evidence in relation to whether these documents were actually viewed by the Penfound Parties is not relevant to the question at this stage of the analysis, that is, whether the Penfound Parties obtained access to privileged materials belonging to the Sprott Parties.

[127] I am satisfied that the Sprott Parties have shown that the Penfound Parties obtained access to confidential and privileged information belonging to the Sprott Parties which is relevant to the issues in this litigation.

What is the appropriate remedy?

[128] The appropriate remedy will depend significantly on whether the recipient of the privileged material has discharged the onus of rebutting the presumption of prejudice that arises once it is shown that this party obtained access to privileged material.

[129] The Sprott Parties seek, as the primary relief on this motion, an order staying the claims by the Penfound Parties as an abuse of process. They submit that an order disqualifying counsel from continuing to represent the Penfound Parties is an inadequate remedy.

[130] In *MacDonald Estate*, the issue was the appropriate standard to be applied in determining whether a lawyer said to have received relevant confidential information attributable to a solicitor and client relationship should be disqualified by reason of a conflict of interest. Sopinka J., at pp. 1259-1260, observed that in dealing with the question of the use of confidential information the matter is usually not susceptible of proof. For this reason, Sopinka J. held that the test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur.

[131] If the lawyer received relevant confidential information attributable to a solicitor and client relationship, the question to be answered is whether there is a risk that it will be used to the prejudice of the client: *MacDonald Estate*, at p. 1260.

[132] Sopinka J., at p. 1263, addressed the quality of the evidence that is needed to rebut the presumption of prejudice from access to privileged information:

> *A fortiori* undertakings and conclusory statements and affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used.

[133] Although in *MacDonald Estate* the heavy burden was on the lawyer to show that no relevant confidential information was imparted, this burden would also apply to a litigant who obtained access to relevant privileged information belonging to the opposing party.

[134] In *Celanese*, Binnie J., at para. 3, cited *MacDonald Estate* for the principle that prejudice will be presumed to flow from an opponent's access to relevant solicitor-client confidences. Binnie J. noted that in *MacDonald Estate*, the precise extent of solicitor-client confidences acquired over a period of years was unknown and unknowable. Binnie J., at para. 4, considered that in the context of a search under an *Anton Piller* order, the searching solicitors ought to have a record of what was seized and what material, for which confidentiality is claimed, they looked at. He held that the recipient of relevant solicitor-client confidences had the onus to rebut the

presumption of prejudice and that to do so the recipient of the privileged information was required to disclose to the court what has been learned and the measures taken to avoid the presumed resulting prejudice.

[135] The Penfound Parties ask me to find that their obtaining the Email Server Copy was not prejudicial to the Sprott Parties because Ms. Lafete did not search the CBOC emails on the Email Server Copy during the weekly searches over two and a half years when she searched her laptop for emails responsive to requests made by Mr. Penfound. They ask me to make this finding based on Mr. Penfound's evidence that the Email Server Copy was not on the hard drive he gave to Ms. Lafete to be saved to her laptop in the fall of 2015 and the absence of any direct evidence that the Email Copy Server was copied to Ms. Lafete's laptop. The Penfound Parties accept that the Email Server Copy was on Ms. Lafete's laptop when it was copied to the Penfound Drive to be used for discovery in this litigation in March 2018 but say that it is unknown when this happened.

[136] The Penfound Parties argue on this motion that any CBOC emails that Ms. Lafete reviewed could have come from Mr. Penfound's own email account that would have included emails with CBOC employees, including Ms. Shaffer, or from the 17 CBOC PST files that Mr. Carere asked Horn IT to make copies of and provide to CCEC for its future use, with the permission of Mr. Black of CBOC.

[137] The Penfound Parties have not offered an explanation for how Ms. Lafete obtained access to the two CBOC email chains she sent to Mr. Penfound on February 23, 2015 and October 12, 2015. Mr. Penfound was not the sender or a recipient of either of the emails that were forwarded by Ms. Lafete to Mr. Penfound. None of the 17 PST files is an email account of a sender or recipient of the two emails forwarded by Ms. Lafete to Mr. Penfound. This means that the two email chains would not have been found through Mr. Penfound's email account or by accessing the 17 PST files that CBOC authorized CCEC to receive and use.

[138] The Penfound Parties did not produce in their evidence for this motion the many emails that Ms. Lafete sent to Mr. Penfound following her searches in response to his inquiries. There is no evidence that they searched for these emails. The complete record of the many reporting emails from Ms. Lafete to Mr. Penfound during the long period of time when she was searching for emails on his instructions would have disclosed the CBOC emails that Ms. Lafete forwarded to Mr. Penfound, and this record would show whether they are privileged and whether they appear to have come from the Email Server Copy. The Penfound Parties do not offer an explanation for why these emails were not put into evidence on this motion. As Binnie J. made clear in *Celanese*, the onus was on the Penfound Parties to do so in order to rebut the presumption of prejudice.

[139] The Penfound Parties have not discharged their onus of showing that they did not access and review privileged emails from the Email Server Copy.

[140] The evidence establishes that the Penfound Parties requested and obtained a copy of all of CBOC's emails, including those of Ms. Shaffer, without the knowledge of the Sprott Parties.

This was done immediately after Mr. Penfound was notified of Mr. Sprott's decision not to proceed with the transaction involving CBOC and CCEC. On the same day, a letter was written by Gowlings, lawyers for the Penfound Parties, stating that they would be in contact with the lawyers for SCHL to discuss Mr. Penfound's substantial damages.

[141] The relevant emails are not limited to those that were included in the Penfound Parties' affidavit of documents, or to the 17 emails taken from this collection and identified as being privileged in Mr. Gilbride's first affidavit. The emails included those which contained communications with Ms. Shaffer about the transaction and the agreements in respect of that transaction that are at issue in the litigation. Mr. Penfound directed a review of the CBOC emails, and he received reports from Ms. Lafete about her searches for emails on Mr. Penfound's directions, approximately weekly, over a long period of time. Ms. Lafete's reporting emails to Mr. Penfound are not in evidence. What was reviewed cannot be known. The data was turned over to the lawyers for the Penfound Parties who had access to the CBOC emails for their review for the purpose of documentary production for the litigation. The Penfound Parties continued to review the CBOC emails even after this motion was brought.

[142] The Sprott Parties submit that on this evidence, an objective observer could not be confident that to allow the Penfound Parties to proceed with the litigation would be fair. The Sprott Parties rely on the court's inherent and residual power to prevent an abuse of the court's process that would render a proceeding unfair.

[143] In *Toronto (City) v. C.U.P.E.*, [2003] 3 S.C.R. 77, Arbour J. described the doctrine of abuse of process as one that engages the inherent power of the court to prevent the misuse of its procedure in a way that would bring the administration into disrepute. Arbour J. cited the following passage from the dissenting judgment of Goudge J.A. in *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55 (approved [2002] 3 S.C.R. 307, 2002 SCC 63):

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990 2 All E.R. 990 (C.A.).

[144] In *Celanese*, the Supreme Court of Canada, at para. 56, addressed the appropriate remedy on a motion to disqualify the solicitors who had access to and reviewed privileged material and accepted that if a remedy short of removal of the searching solicitors will cure the problem, it should be considered. The Court identified the task as determining whether the integrity of the justice system, viewed objectively, requires removal of counsel or whether a less drastic remedy would be effective.

[145] In *Celanese*, Binnie J., at para. 53, noted that if the lawyers who had viewed relevant and privileged material had been able to show the court what privileged material they had seen, such material might on the face of it have appeared to the court mundane or insignificant. Binnie J. noted that a privileged document could be a lawyer's letter to his or her client enclosing a draft contract in terms virtually the same as the contract subsequently executed and publicly available, which would not likely be capable of creating prejudice.

[146] Binnie J. raised the prospect that where the searching lawyers could indicate with some precision what they have looked at, the motions judge might properly call on the party who asserts privilege (in the absence of the lawyers for the searching party if appropriate) to explain why such material could lead to significant prejudice. In *Celanese*, that could not be done because the searching solicitors could not indicate what documents they had looked at. The Penfound Parties submit that many or all of the privileged documents to which they had access would, similarly, not be capable of creating prejudice, on the basis of their submission that the outcome of the litigation will turn on the interpretation and enforcement of executed contracts.

[147] The Penfound Parties rely on the statements made by Binnie J. at para. 53 of *Celanese* and submit that if I should find that they had access to privileged documents and the presumption of prejudice is not rebutted, an independent referee could be appointed to determine which, if any, of the approximately 600,000 documents in Relativity are in fact subject to privilege claimed by the Sprott Parties. The Penfound Parties submit that before ordering the extreme remedy of a stay of proceedings, I should call on the Sprott Parties to explain, with reference to any privileged documents on the Penfound Drive that were copied to the Relativity database, and in the absence of counsel for the Penfound Parties, why review of such material by the Penfound Parties or their counsel could lead to prejudice. The Penfound Parties emphasize that they and their lawyers have all undertaken not to make use of any privileged document that may be identified.

[148] Because the Penfound Parties have not put into evidence the emails sent by Ms. Lafete to Mr. Penfound responding to his inquiries over two and a half years, it is impossible to know whether the CBOC emails she viewed and forwarded to Mr. Penfound appear to be mundane or insignificant. On the evidence before me, the Penfound Parties have not shown the documents that that Ms. Lafete reviewed at Mr. Penfound's request and forwarded to him by email. In addition to Ms. Lafete's review, reviews of CBOC documents including privileged documents were made by Mr. Penfound's review team and by a lawyer for the Penfound Parties. It is impossible for me to determine, from objectively verifiable evidence, the extent of the Penfound Parties' review of privileged documents and I am unable to find that the material that was reviewed is not significant to the litigation and not capable of creating significant prejudice.

[149] The suggestion by the Penfound Parties an order be made calling on the Sprott Parties to identify all relevant and privileged documents on the Penfound Drive that were copied to the Relativity database to which the Penfound Parties had access and then make submissions with respect to all such documents, in the absence of counsel for the Penfound Parties, to explain why they would lead to significant prejudice in the litigation would, in my view, impermissibly reverse the onus that applies in these circumstances. In *Celanese*, Binnie J. was clear, at para. 55,

that the onus is on the party with unauthorized access to another party's privileged documents to show that there is no risk that privileged and confidential information attributable to a solicitor and client relationship will be used to the prejudice of the party possessing the privilege. The onus is on the Penfound Parties to identify with some precision what privileged information they saw and then show that there would be no real risk of significant prejudice from use of that information. The difficulties that the Penfound Parties have in discharging their onus should not fall on the Sprott Parties.

[150] Here, the Penfound Parties have not discharged their onus of rebutting the presumption of prejudice that arises when it is shown that the Penfound Parties, and their lawyers, have had access to relevant confidential and privileged documents over an extended period of time.

[151] I have come to the conclusion that the Penfound Parties have failed to show that there is another remedy, short of a stay of their action, that will cure the problem that has arisen. Mr. Penfound had access to all CBOC emails over an extended period of time, including privileged emails from Ms. Shaffer about the proposed transaction at issue in the litigation, and these emails were reviewed by Ms. Lafete under Mr. Penfound's direction for a long period of time. Although it is less clear whether, or the extent to which, privileged documents from Mr. Gilbride's backed up emails on the File Server were reviewed by the Penfound Parties (the Penfound Parties and their lawyers state that they did not see privileged documents), these documents, including highly confidential and privileged documents on the Jump List, were accessible to the Penfound Parties until November 6, 2015. In these circumstances, prejudice is presumed.

[152] In the absence of a stay, the Sprott Parties will be forced to defend the litigation brought against them by adverse parties who have had access to and reviewed all of their emails about the transaction at issue, including privileged emails. In my view, to allow the Penfound Parties' action to proceed in these circumstances would be manifestly unfair to the Sprott Parties and would bring the administration of justice into disrepute. If the litigation were to continue, even if the Penfound Parties had new lawyers, the public represented by the reasonably informed person would not be satisfied that no use of confidential information would occur. The Penfound Parties have not shown that there is a remedy, short of a stay, that will cure the problem.

[153] As a result of my decision on the primary remedy sought by the Sprott Parties, it is not necessary for me to decide, if I had not granted the primary remedy, whether the lawyers of record for the Penfound Parties should be disqualified from continuing to act.

[154] The Penfound Parties submit that if a stay is granted, it should be limited to a stay against Scott Penfound only, and not against other members of his family. I do not accept this submission. Mr. Penfound was in a position to share any privileged information he received with his family members who are aligned with him in the Penfound action and, to the extent that he had access to privileged documents, his family members would be presumed to also have had access. Although Mr. Penfound's other family members have given affidavit evidence that they did not receive or review privileged information, this is the kind of evidence that Sopinka J. in *MacDonald Estate*, at p. 1263, cautioned was not acceptable to rebut the presumption of prejudice that arises following access to confidential and privileged information.

Disposition

[155] For these reasons, I grant the motion by the Sprott Parties and make an Order permanently staying the claims by the Penfound Parties in the consolidated proceeding.

[156] If the parties are unable to resolve costs, I ask them to agree on a timetable for written submissions and provide it to me for approval.

Cavanagh J.

Released: January 28, 2022

CITATION: Continental Bank of Canada v. Continental Currency Exchange Canada Inc., 2022 ONSC 647
COURT FILE NO.: CV-16-11306-00CL
CV-17-11661-00CL
DATE: 20220128

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CONTINENTAL BANK OF CANADA and SPROTT CONTINENTAL HOLDINGS LTD.

Plaintiffs

AND:

CONTINENTAL CURRENCY EXCHANGE CANADA INC.

Defendants

AND BETWEEN:

CONTINENTAL CURRENCY EXCHANGE CANADA INC., SCOTT PENFOUND, TRACIE PENFOUND, KYLE PENFOUND, KOURTNEY PENFOUND, MADISON PENFOUND, ANGELA PENFOUND and TRACIE & COMPANY LIMITED

Plaintiffs/Responding Parties

AND:

ERIC SPROTT, SPROTT INC., SPROTT CONTINENTAL HOLDINGS LTD., CONTINENTAL BANK OF CANADA, SHARON RANSON, JOHN TEOLIS, JIM RODDY, LARRY TAYLOR, JOHN JASON, JOHN LAHEY and PHIL WILSON

Defendants/Moving Parties

REASONS FOR JUDGMENT

Cavanagh J.

Released: January 28, 2022