ALBERTA SECURITIES COMMISSION

RULING

Citation: Re North America Frac Sand, Inc., 2020 ABASC 40 **Date: 20200401**

North America Frac Sand, Inc., Lambert (Bert) Joseph Lavallee, Brian Maurice Gibbs and David Malcolm Alexander

Panel:	Maryse Saint-Laurent Steven Cohen Karen Kim
Representation:	Don Young for Commission Staff R.W. Hladun, QC for Lambert (Bert) Joseph Lavallee, Brian Maurice Gibbs and David Malcolm Alexander Brian Maurice Gibbs for himself
Submissions Completed:	January 8, 2020
Date of Oral Ruling:	January 9, 2020
Date of Written Reasons:	April 1, 2020

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I. BACKGROUND

[1] We are currently engaged in a hearing (the **Hearing**) into allegations made by staff (**Staff**) of the Alberta Securities Commission (the **ASC**). Those allegations were made in a June 27, 2018 Notice of Hearing against several respondents: North America Frac Sand, Inc. (**NAFS**); Lambert (Bert) Joseph Lavallee (**Lavallee**); Brian Maurice Gibbs (**Gibbs**); and David Malcom Alexander (**Alexander**). (Allegations against Seton Securities International Ltd. have been settled.)

[2] On November 29, 2019, by notice of motion, an application (the **Initial Application**) was made by Robert Hladun (**Hladun**), counsel for Lavallee, "on behalf of" Lavallee, Gibbs and Alexander (the **Applicants**), to quash a certain notice issued by a Staff investigative analyst on October 2, 2017 to TELUS Communications Inc. (**Telus**) compelling production (the **Production Order**) and to exclude any evidence obtained from that Production Order. Gibbs provided "a supplemental submission" dated December 13, 2019 seeking the same relief (the **Supplemental Application**, and, together with the Initial Application, the **Applications**). Staff provided written submissions in response to the Initial Application on December 13, 2019 and to the Supplemental Application on December 20, 2019. On January 8, 2020, we heard oral submissions from Hladun, Gibbs and Staff (Alexander was not present during oral submissions).

[3] On January 9, 2020, we informed the parties that we were dismissing the Applications with written reasons to follow. These are those written reasons.

II. FACTS

[4] An investigation order was issued on December 3, 2015 and was amended on December 2, 2016 and February 17, 2017 (collectively, the **Investigation Orders**). Gibbs was not named as a party being investigated in any of the Investigation Orders. Those named in the Investigation Orders were NAFS, North America Frac Sand (CA) Ltd., Canadian Sandtech Inc., "each of their predecessors, related entities and affiliates", Lavallee, Alexander, and several other individuals.

[5] On January 19, 2017, Gibbs was issued a summons (the **Gibbs Summons**) pursuant to s. 42 of the *Securities Act* (Alberta) (the **Act**). The Gibbs Summons ordered him to attend a Staff investigative interview on February 27, 2017 and to "[p]rovide the following documents related to but not limited to" those named in the Investigation Orders:

- Copies of all communication including, but not limited to, emails, correspondence, notes, and text messages subsequent to January 01, 2013; and
- Copies of all agreements, contracts, letters, letters of intent, share certificates, corporate documentation and invoices.

[6] Gibbs provided some documents to Staff on February 22, 2017 in response to the Gibbs Summons, then attended the investigative interview on February 27.

[7] The Production Order, issued pursuant to s. 42(1)(c) of the Act, required Telus to produce "[a]ll current and archived received, sent, and draft emails for the time period of May 1, 2015 to October 2, 2017" (the **Telus Emails**) from Gibbs's email account with Telus (the **Gibbs Account**). It was common ground among all parties that Gibbs used the Gibbs Account for both personal and business emails, although the Applicants characterized it as Gibbs's "personal email account".

[8] In response, Telus provided the Telus Emails, which Staff described in their written submissions as "dozens of emails directly related to the parties and companies referenced" in the Gibbs Summons. According to Staff, the testimony of the Staff investigative analyst showed that "he did not believe the [Telus] Emails in evidence at the Hearing had been supplied by Gibbs in his earlier production" in February 2017. Staff did not point us to that testimony, and we did not find such a definitive statement in the testimony. However, that testimony addressed notations on the emails in evidence from the Gibbs Account, and those notations indicated that the majority of those emails were obtained from Telus through the Production Order. There was no evidence to the contrary. We are satisfied that Gibbs did not provide many of the emails from the Gibbs Account which Staff tendered as evidence in the Hearing, despite the Gibbs Summons (the lack of explanation for that failure was not relevant to this ruling). It should be noted also that some of the Telus Emails post-dated the Gibbs Summons and therefore could not have been provided by Gibbs pursuant to the Gibbs Summons. Gibbs also complained that he had never been asked to provide any emails from the Gibbs Account after his February 2017 production and was not given an opportunity to question the Production Order, so had not been able to take a position regarding that demand to Telus. We address that timing issue below.

[9] Staff seek to rely on some of the Telus Emails as evidence in the Hearing. The Applicants seek to have the Production Order quashed, thus making the Telus Emails inadmissible as evidence in the Hearing.

III. LEGISLATION

[10] Section 41 of the Act provides:

> (1) The Executive Director may, by order, appoint a person to make any investigation that the Executive Director considers necessary
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> (a) for the administration of Alberta securities laws,
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> (b) to assist in the administration of the securities or derivatives laws of another jurisdiction,
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> (c) in respect of matters relating to trading in securities or derivatives in Alberta, or
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> (d) in respect of matters in Alberta relating to trading in securities or derivatives in another jurisdiction.
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> . . .
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> (4) For the purposes of an investigation ordered under this section, the person appointed to make the investigation may with respect to the person or company that is the subject of the investigation, investigate, inquire into and examine
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> (a) the affairs of that person or company,
>
> (b) documents, records, correspondence, communications, negotiations, trades, transactions, investigations, loans, borrowings and payments to, by, on behalf of or in relation to or connected with that person or company,

(c) the property, assets or things owned, acquired or alienated in whole or in part by that person or company or by any person or company acting on behalf of or as agent for that person or company,

(d) the assets at any time held by, the liabilities, undertakings and obligations at any time existing and the financial or other conditions at any time prevailing in respect of that person or company, and

(e) the relationship that may at any time exist or have existed between that person or company and any other person or company by reason of

(i) investments,

(ii) commissions promised, secured or paid,

(iii) interests held or acquired,

(iv) the loaning or borrowing of money, securities or other property,

(v) the transfer, negotiation or holding of securities or derivatives,

(vi) interlocking directorates,

(vii) common control,

(viii) undue influence or control, or

(ix) any other matter not referred to in clauses (i) to (viii).

(5) For the purposes of an investigation under this section, a person appointed to make the investigation may examine any documents, records or other things, whether they are in the possession or control of the person or company in respect of which the investigation is ordered or of any other person or company.

[11] Section 42 of the Act provides:

(1) The person appointed to make an investigation under section 41 has the same power as is vested in the Court of Queen's Bench for the trial of civil actions

(a) to summon and enforce the attendance of witnesses,

(b) to compel witnesses to give evidence on oath or otherwise, and

(c) to compel witnesses to produce documents, records, securities, derivatives, contracts and things.

. . .

(3) The failure or refusal of a person summoned as a witness under subsection (1) to attend, to answer questions or to produce documents, records, securities, derivatives, contracts or things that are in that person's custody or possession makes that person, on application to the Court of Queen's Bench by the person making the investigation, liable to be committed for contempt by the Court of Queen's Bench in the same manner as if that person were in breach of an order or judgment of that Court.

. . .

> (6) A justice who is satisfied that there are reasonable grounds to believe that the premises may contain anything that is related to the investigation may at any time by order authorize a person conducting an investigation under section 41
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> (a) to enter into and search premises, and
>
> (b) to seize and take possession of any documents, records, securities, derivatives, contracts or things,
>
> related to the investigation.
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> . . .

[12] Section 8 of the *Canadian Charter of Rights and Freedoms* (the ***Charter***) provides: "Everyone has the right to be secure against unreasonable search or seizure."

IV. GROUNDS FOR APPLICATIONS

[13] The Applicants argued that the Production Order "was in essence a search and seizure by way of a third party production order" and "a fishing expedition". They characterized the Production Order as breaching the rights of each of Gibbs, Alexander and Lavallee "to be free from unreasonable search and seizure under Section 8 of the [*Charter*]". They also made the analogy to "a physical warrantless search of Mr. Gibbs' home or office and a carrying off of any correspondence that happened to be therein".

[14] There was some overlap between the two Applications. We set out here our summary of the grounds for each.

[15] In the Initial Application, the Applicants stated, on two main grounds, that Staff should have sought access to the Telus Emails using a warrant obtained under s. 42(6) of the Act (rather than a production order obtained under s. 42(1)), claiming that the Production Order was in substance an unauthorized warrant rather than a proper production order:

- Telus could not be considered a "witness", so was not appropriately subject to the Production Order under s. 42(1) of the Act, and the s. 40 warrantless process was not available because Telus was not a "party" under s. 40. The Applicants instead characterized Telus as a third party which had nothing to do with the alleged improper acts, had not created the Telus Emails, and "was simply a conduit for communications between Mr. Gibbs and his co-respondents, and indeed <u>anyone</u> who happened to communicate with him via his email account" (emphasis in original); and
- the Telus Emails were from the Gibbs Account (a combined personal and business account), so that some of the Telus Emails would contain personal information "going to the '[biographical] core' of" Gibbs's identity (the argument erroneously referred to "biological core").

[16] Further, the Applicants argued that the Production Order was "overbroad" and was a fishing expedition.

[17] Gibbs offered additional grounds in the Supplemental Application (we do not repeat grounds comparable to those in the Initial Application), including:

- "the present organizational structure [of the ASC or parts of it] has resulted in an unfair outcome";
- the Production Order "was an abuse of power by the Staff"; and
- the Production Order would not have been issued had there been proper and competent review and supervision surrounding its issuance, and it was illegal because Gibbs was not named in any of the Investigation Orders.

V. ANALYSIS

A. "Party" or "Witness"?

[18] We did not find any merit in the Applicants' argument that Telus not being a "party" under s. 40 of the Act was relevant to the validity of a s. 42(1) production order. Nor were we persuaded that Telus was not a "witness" in the proceeding before us and, therefore, could not be the subject of a valid production order under s. 42(1).

1. "Party"

[19] Section 40 of the Act defines "party", essentially as market participants such as issuers, officers, directors, and various registered or regulated entities. That definition relates to s. 40(2), which allows the ASC's Executive Director to require a party to provide certain information. Despite the Applicants' arguments relating to this definition, s. 40 was not relied on for the Production Order, and the term "party" is not used in s. 42(1). Accordingly, s. 40 and "party" are irrelevant to these Applications.

2. "Witness"

[20] A production order under s. 42(1) of the Act is made to compel witnesses to give evidence and produce documents or other materials.

[21] The Production Order stated that Telus "may be a witness in proceedings in relation to the Investigation Order[s]". The Applicants contended that Telus was not a "witness" and therefore no s. 42(1) production order could be made requiring Telus to produce the Telus Emails. The Applicants instead characterized Telus as "simply a conduit for communications". It was unclear from the Applicants' argument whether they were challenging Telus's potential to be a witness during the investigation or at the Hearing, or both.

[22] To the extent that the Applicants were asserting Telus was not a witness during the investigation because no Telus representative was examined in person by Staff investigators, we are satisfied that a Telus representative could have been examined with respect to the Gibbs Account and Telus Emails had Staff considered that to be necessary.

[23] To the extent that the Applicants were asserting Telus was not a witness during the Hearing, so that the Telus Emails – produced during the investigation – were somehow retroactively tainted, we are satisfied that it would be illogical and unworkable to conclude that someone issued a production order during an ASC investigation must be called as a witness in any later proceeding for the investigative-stage production order to be valid. Status as a witness for purposes of a production order under s. 42(1) of the Act cannot be determined based on something that may or

may not happen in the future (at the time of a production order there is no guarantee there will even be a notice of hearing or a hearing, let alone what witnesses will be called by Staff in any hearing).

[24] In our view, the determining factor for status as a "witness" for purposes of a production order during an ASC investigation is whether, at the time of the production order, the subject of the production order may have "information that is relevant to the investigation" (see *Taplin v. Alberta (Securities Commission)*, 2008 ABQB 173 at para. 15). Relevance in that sense was explained in *Taplin* (at para. 16): ". . . given that the predominant purpose of an investigation under the [Act] is to obtain information relevant to whether a breach of securities laws has occurred and ultimately whether a hearing before the [ASC] is warranted, [Staff are] not required to state with certainty that the information will be material or relevant to the investigation".

[25] Therefore, a production order is not inappropriate merely because the ultimate significance of material being sought is not known with certainty at the time of the investigation and the production order. In the context here, Gibbs was involved with the parties named in the Investigation Orders and used the Gibbs Account for business emails. In fact, pursuant to the Gibbs Summons, Gibbs had apparently already produced to Staff some emails from the Gibbs Account. It was, therefore, reasonable for Staff investigators to conclude that the Telus Emails sought from Telus may be material or relevant to Staff's investigation. That made Telus a "witness" within the meaning of s. 42(1) of the Act.

[26] We conclude that it was possible for Staff to use s. 42(1) of the Act to issue a production order to Telus as a witness. We now turn to whether the Production Order was appropriate in these circumstances.

B. Should Staff Have Used a Warrant Instead of a Production Order?

1. Applicants' Position

[27] The Applicants did not claim that it would be impossible during an investigation for Staff to obtain information such as the Telus Emails, but stated that Staff should have used the process of obtaining a warrant through judicial authorization, as set out in s. 42(6) of the Act, not the production order method provided for in s. 42(1). Although recognizing that there can be a lower expectation of privacy in the securities industry (as discussed below), the Applicants argued that the expectation of privacy was high in these circumstances, stating that "there are limitations to what you can ask for and what's required by way of compulsion without a search warrant or intervention". It became apparent that the Applicants' main points in this regard were that:

- the Gibbs Account had been Gibbs's personal email account for many years and, as such, could have contained (or did contain) extensive biographical information; and
- the Production Order "was overbroad" in that Telus was asked for (and provided) all the Telus Emails without any effort required or made to filter out those with personal information – therefore, the Production Order was both a fishing expedition and an exposition of privacy rights.

2. Staff's Position

[28] Staff contended that the Applicants' privacy rights were not engaged in these circumstances because the securities industry is known to be highly regulated and this is not a criminal matter.

Therefore, Staff argued that the Applicants had no reasonable expectation of privacy regarding the Telus Emails, so there was no unreasonable search or seizure in violation of rights under s. 8 of the *Charter*. In other words, there was no need to have sought a warrant instead of the Production Order.

[29] As for the breadth of the Production Order, Staff submitted that it was less intrusive to have Staff (rather than Telus) go through the Telus Emails to separate the ones with strictly personal information or which were otherwise irrelevant from those relevant to the Investigation Orders because Staff are subject to confidentiality obligations regarding all information they receive and review during an investigation. Further, a physical search and seizure executed under a warrant would have been more intrusive than the Production Order. Staff also contended that Gibbs had shown himself unwilling to produce all relevant emails from the Gibbs Account because he had failed to produce those in response to the Gibbs Summons.

[30] As an alternative argument to all of the above, Staff stated that if Gibbs or the other Applicants had any reasonable expectation of privacy in the Telus Emails, that was outweighed by the important public policy considerations underlying securities regulation.

3. Analysis

(a) Preliminary Matters

(i) Whose Privacy Rights?

[31] We note that the arguments centred on Gibbs's privacy rights, not those of the other two Applicants. Given the circumstances and our conclusion here, it is not necessary for us to determine whether Lavallee or Alexander could properly contend that their rights were breached by the Production Order.

(ii) Prospective Right

[32] The Applicants emphasized their contention that the rights provided by s. 8 of the *Charter* are "prospective", which means that there must be a consideration of those rights before material is sought. In the Applicants' view, this meant that there was "a requirement of prior authorization" and that the prior authorization required here was a warrant. We did not find that argument helpful, nor did we find helpful the criminal and quasi-criminal law cases to which the Applicants referred. The characterization of s. 8 as a "prospective" right was not at issue – the issue here was whether the reasonable expectation of privacy in these circumstances meant that a warrant was required or meant that the Production Order was sufficient.

(b) Reasonable Expectation of Privacy – the Law

(i) General

[33] The protection from unreasonable search and seizure has been equated to an entitlement to a reasonable expectation of privacy, as stated in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 at 641, citing *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 159-60:

> The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's

> interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement. [Emphasis in *Hunter*.]

[34] In other words, "the underlying value to be protected by s. 8 of the *Charter* [is] the individual's interest in privacy", and that protection is "confined to 'a reasonable expectation'" (*McKinlay* at 641).

[35] The Applicants relied on the approach taken by the court in *R v. Craig*, 2016 BCCA 154 (at para. 90), which set out a framework for the "totality of the circumstances" approach "to determine whether one has a reasonable expectation of privacy and therefore has standing under s. 8 of the *Charter* to challenge a search". That approach looks at: "(1) the subject matter of the search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject matter; and (4) the objective reasonableness of the expectation, having regard to the totality of the circumstances".

[36] Staff focused on the particular context in the present case, which was the reasonableness of the Production Order in administrative proceedings in the highly regulated securities field.

[37] We do not discern an appreciable difference between those two approaches in these circumstances. Using either one, the key issue here is determining the reasonable expectation of privacy for the Telus Emails.

(ii) Contexts for Privacy Expectations

[38] In *McKinlay*, Wilson J. set out the criteria to be met in assessing whether a search would be considered reasonable in the context of "the validity of a section which was, in essence, criminal or quasi-criminal in nature" (*McKinlay* at 642-43 referring to the criteria in *Hunter*, as summarized by Wilson J. in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at 499):

> (a) a system of prior authorization, by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the State against those of the individual;
> (b) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds, established under oath, to believe that an offence has been committed;
> (c) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds to believe that something which will afford evidence of the particular offence under investigation will be recovered; and
> (d) a requirement that the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation.

[39] This is essentially what the Applicants argued was required here, which would be the warrant process under s. 42(6) of the Act.

[40] However, these *Hunter* criteria do not apply in all circumstances. Generally, "a reasonable expectation of privacy" would be less in an administrative context than in a criminal context, less in a highly regulated industry such as the securities field, and less for business information in contrast to personal information.

(A) Administrative

[41] In *McKinlay*, Wilson J. distinguished between the criteria for assessing the reasonable expectation of privacy in a criminal or quasi-criminal case and the less-restrictive criteria appropriate in an administrative case (at 643, citing *Thomson* at 495-96).

[42] For example, in the context of customs searches, the *Hunter* criteria would not need to be met because there is a low expectation of privacy (*McKinlay* at 644 referring to *R. v. Simmons*, [1988] 2 S.C.R. 495 at 528). In *McKinlay* at 647, Wilson J concluded:

> I refer to [certain] cases not to approve or disapprove the results achieved but rather as evidence of the need to take a flexible and purposive approach to s. 8 of the *Charter*. It is consistent with this approach, I believe, to draw a distinction between seizures in the criminal or quasi-criminal context to which the full rigours of the *Hunter* criteria will apply, and seizures in the administrative or regulatory content to which a lesser standard may apply depending upon the legislative scheme under review. . . .

(B) Securities

[43] In the securities regulatory context, there is a provision for both a production order process under s. 42(1)(c) of the Act (as used here) and a warrant process under s. 42(6) (as contended for by the Applicants). The context of this proceeding as administrative is relevant in assessing the reasonable expectation of privacy, as evident in the following authorities.

[44] Justice L'Heureux-Dubé's concurring decision in *British Columbia Securities Commissions v. Branch*, [1995] 2 S.C.R. 3 (at para. 89) distinguished "between unlicensed fishing expeditions that are intended to unearth and prosecute criminal conduct, and actions undertaken by a regulatory agency, legitimately within its powers and jurisdiction and in furtherance of important public purposes that cannot realistically be achieved in a less intrusive manner. Whereas the former may run afoul of s. 7 of the *Charter*, the latter do not." We consider that reasoning applicable in the present case to s. 8 of the *Charter* as well.

[45] *Branch* is the leading case regarding reasonable expectations of privacy in the securities regulatory context. After referring to the British Columbia equivalent of s. 42(1) of the Act, the majority in *Branch* stated (at 38, 39-40):

> It is clear that in numerous instances a regulatory regime will be needed in order to act as a check on an individual's self-interest. There are surely times when one's own motivations and objective are not of benefit to society on a wider scale. As we have already mentioned, the primary goal of securities regulation is the protection of the investing public. The importance of this goal, as against the reasonable expectation of privacy of securities traders, is what we are considering here. At this intersection, the words of our colleague, La Forest J., in [*Thomson* at 506-07] ring particularly true:
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> > But the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state. In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. . . .
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> . . .

> Hence, [securities legislation] is essentially a scheme of economic regulation which is designed to discourage detrimental forms of commercial behaviour. The provisions provided by the legislature are pragmatic sanctions designed to induce compliance with [securities legislation]. After all, the [securities legislation] is really aimed at regulating certain facets of the economy and business. This has obvious implications for the nation's material prosperity: [*Thomson*]. As such, the effective implementation of securities legislation depends on the willingness of those who choose to engage in the securities trade to comply with the defined standards of conduct. In this respect, we fully agree with Wilson J.'s comments that "[a]t some point the individual's interest in privacy must give way to the broader state interest in having the information or document disclosed": [*Thomson* at 495].

(C) Business or Personal Information

[46] The authorities distinguish between business and personal records. For example, the majority in *Branch* stated (at 41):

> As our final point, we note the distinction between business records and personal papers. We are of the view that in order to determine the relative privacy rights that attach, the type of document at issue is important. Documents produced in the course of a business which is regulated have a lesser privacy right attaching to them than do documents that are, strictly speaking, personal. Again, the words of La Forest J. in [*Thomson* at 517-18] are helpful:
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> > While such records are not devoid of any privacy interest, it is fair to say that they raise much weaker privacy concerns than personal papers. The ultimate justification for a constitutional guarantee of the right to privacy is our belief, consistent with so many of our legal and political traditions, that it is for the individual to determine the manner in which he or she will order his or her private life . . . But where the possibility of such intervention is confined to business records and documents, the situation is entirely different. These records and documents do not normally contain information about one's lifestyle, intimate relations or political or religious opinions. They do not, in short, deal with those aspects of individual identity which the right of privacy is intended to protect from the overbearing influence of the state. On the contrary, as already mentioned, it is imperative that the state have power to regulate business and the market both for economic reasons and for the protection of the individual against private power. Given this, state demands concerning the activities and internal operations of business have become a regular and predictable part of doing business. Under these circumstances, I cannot see how there would be a very high expectation of privacy in respect of records and documents in which this information is contained.

[47] The majority in *Branch* concluded that those who are ordered (under the British Columbia provision equivalent to s. 42(1) of the Act) to produce records "can claim only a limited expectation of privacy in respect of these materials" (at 41-42). The majority further concluded that the provision did not infringe the rights under s. 8 of the *Charter* because (at 42):

> . . . in a highly regulated industry, such as the securities market, the individual is aware, and accepts, justifiable state intrusions. All those who enter into this market know or are deemed to know the rules of the game. As such, an individual engaging in such activity has a low expectation of privacy in business records. . . .

[48] The Applicants argued that the Telus Emails – being emails to and from the Gibbs Account, which Gibbs used for personal communications – fell outside of this conclusion in *Branch*. In contrast, they referred us to cases such as *R. v. TELUS Communications Co.,* 2013 SCC 16 at

paras. 39-41. In that case, the majority held that a warrant was not available for "*prospective* production of *future* private communications from a computer maintained by a service provider as part of its communications process" (at para. 45; emphasis in original). In our view, *TELUS Communications* was not relevant here, as it related to future communications. This is consistent with statements in *British Columbia (Securities Commission) v. Clozza*, 2017 BCSC 419 at paras. 165-66, which upheld the British Columbia Securities Commission's production order for text messages from Telus, stating that there was no unreasonable search, given the low expectation of privacy.

[49] The Applicants referred to other cases in claiming that the Gibbs Account should be protected from the production order process under s. 42(1) of the Act because of the personal nature of some of the Gibbs Account content. The Applicants relied heavily on *Craig*. In that criminal case, the court held that certain online messages should be admitted into evidence, even though the search and seizure of them violated the accused's rights under s. 8 of the *Charter*. At issue in particular was whether Craig could challenge a warrant based on which the police obtained online messages sent by Craig to others (including the victim) and which were seized from the others' online accounts. The court in *Craig* referred to earlier cases in assessing the reasonable expectation of privacy in the circumstances, including (at para. 72) *R. v. Plant*, [1993] 3 S.C.R. 281 at 293, in which the court referred to the "biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include intimate details of the lifestyle and personal choices of the individual" (emphasis added in *Craig*).

[50] The court in *Craig* (at para. 142) concluded that the accused in those circumstances had an objectively reasonable expectation of privacy, which gave him standing under s. 8 of the *Charter* to challenge the search and seizure. In contrast to the Gibbs Account, there was no indication that the accused in *Craig* used his online account (from which messages at issue were sent) for any business purpose, and the *Craig* context was not that of an investigation into conduct within a highly regulated industry. Therefore, although we acknowledge the principles upon which the *Craig* decision was based, the circumstances surrounding the Telus Emails were markedly different. For similar reasons, we did not find persuasive the other cases referred to on this point by the Applicants, including those dealing with wiretaps, infrared surveillance and power consumption instruments.

[51] The Applicants' argument on this point essentially hinged on establishing that an email account used for both personal and business email communications should be treated as a personal account for the purposes of an administrative securities regulatory investigation. As set out below, we conclude that such an overly restrictive approach is not warranted in these circumstances.

(iii) Application of the Law in These Circumstances

[52] We now turn to the application of these legal principles in the present circumstances.

(A) Administrative and Securities Context

[53] We earlier set out principles relating to the expectation of privacy in administrative contexts in general and in the securities regulatory context in particular, especially as stated in *Branch*. We also note the extensive investigatory powers under s. 41(4) of the Act. Further, s. 41(5) permits an investigator to "examine any documents, records or other things, whether they are in

the possession or control of the person or company in respect of which the investigation is ordered or of any other person or company". Those provisions, in conjunction with s. 42(1), reinforce the principle discussed by the majority in *Branch* (at 38, citing *Thomson* at 506-07) that securities regulation strives "to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations." Further, as stated above, *Branch* (at 39) emphasized that securities legislation "is essentially a scheme of economic regulation which is designed to discourage detrimental forms of commercial behaviour. The provisions provided by the legislature are pragmatic sanctions designed to induce compliance with [securities legislation]."

[54] Therefore, due to the special nature and purposes of securities regulation, we conclude the law is clear that the reasonable expectation of privacy in this administrative and securities context is low.

(B) Personal or Business Context

[55] We accept that Gibbs used the Gibbs Account for both personal and business email communications. We do not know the percentage of personal versus business emails (personal emails irrelevant to the Hearing would not have been tendered), nor do we consider that percentage to have been determinative. In essence, the Applicants' argument is that the dual nature of the Gibbs Account should protect it from Staff's investigation other than through a warrant process.

[56] The important question here is whether Gibbs's personal use of the Gibbs Account made it reasonable for Gibbs to consider that he could conduct business communications related to securities matters in the Gibbs Account yet still claim that the Gibbs Account should be protected from a production order made under s. 42(1) of the Act.

[57] There was no dispute that Gibbs had a business relationship with at least some of the parties involved in the Alberta capital market and named in the Investigation Orders. Business information in the Gibbs Account was relevant and material to the investigation at the time the Production Order was made. Further, Gibbs could have chosen to conduct business in a separate email account.

[58] We conclude that the existence of personal or biographical information in the Gibbs Account did not raise the reasonable privacy expectations in the Gibbs Account to the level of a purely personal email account, particularly since Gibbs chose to use his personal email account for business purposes.

(iv) Conclusion on Reasonable Expectation of Privacy

[59] The context here is an administrative process under a comprehensive securities regulatory regime, with the target of the Production Order being email communications in an email account used for both personal and business purposes. We conclude that: (1) the administrative context generally has a lower expectation of privacy than would be present in a criminal or quasi-criminal context; (2) the significant public interest concerns in the securities regulatory context mean that those conducting themselves in the securities field have a lower expectation of privacy; and (3) records in a business account or, as here, in a mixed business and personal account, attract a lower expectation of privacy than records in a purely personal account.

[60] Therefore, the reasonable expectation of privacy in the Telus Emails was low.

(c) Fishing Expedition and Overbreadth Claims

(i) Issue

[61] The Applicants also argued that the Production Order was overbroad and a fishing expedition because it asked for all of the emails from the Gibbs Account during a lengthy period, with no attempt to limit what was sought as relating to those named in the Investigation Orders or to limit the personal information handed over from Telus to Staff.

[62] Staff acknowledged that the Production Order was broad and contended that was justified in the circumstances. Gibbs had an opportunity (pursuant to the Gibbs Summons) to provide relevant emails from the Gibbs Account dated between January 1, 2013 and February 2017, but instead chose not to provide all of the relevant emails. As noted earlier, Staff pointed to their confidentiality obligation when reviewing material gathered during an investigation and submitted that it was more appropriate – and less potentially damaging to privacy rights – for such a review to be conducted by Staff.

(ii) Conclusion

[63] We agree with Staff. Gibbs had the opportunity to provide all of the relevant business emails from the Gibbs Account up to the date he responded to the Gibbs Summons. He did not do so. This also meant there was no reason to expect Gibbs would be more cooperative in providing emails between the date of his response to the Gibbs Summons and the last date in the Production Order. Gibbs's conduct contributed to – or even led to – the necessary breadth of the Production Order.

[64] Moreover, Staff were in a better position than Telus to determine what was relevant in the Telus Emails, and Staff were also able to control any use or dissemination of the content of the Telus Emails to ensure that personal or biographical core information in the Telus Emails was not publicly disclosed or otherwise misused.

4. Conclusion on Warrant or Production Order

[65] Given the low reasonable expectation of privacy here, privacy rights under s. 8 of the *Charter* were not engaged. Therefore, a warrant was unnecessary and the Production Order was valid. We also conclude that the Production Order was not overly broad. As we found s. 8 of the *Charter* had not been engaged, we did not need to address Staff's alternative argument that any reasonable expectation of privacy attracting s. 8 protections was outweighed by public policy considerations underlying the regulation of securities.

C. Organizational Structure

[66] In the Supplemental Application, Gibbs contended that the ASC's enforcement and compliance divisions collaborated and had blurred the demarcation lines between them. He stated that this "results in an unsound and compromised organizational structure and encourages potential conflicts of interest". In his view, this "resulted in an unfair outcome in this matter". Gibbs did not address this in his oral argument.

[67] Gibbs did not point to any evidence or law on this ground, nor did he set out how his contention, if proved, would have affected the validity of the Production Order. Accordingly, we did not consider this contention.

D. Abuse of Power

[68] Gibbs contended that issuing the Production Order instead of seeking a warrant was an abuse of power.

[69] As we concluded above that Staff did not need to seek a warrant, there was no basis for claiming an abuse of power.

E. Review and Supervision Relating to Investigation Orders

[70] Gibbs argued that proper review and supervision processes would have shown that Gibbs was not named in the Investigation Orders and, as such, he asserted that it was improper or illegal to issue a production order in relation to the Gibbs Account.

[71] We note, as mentioned, that investigatory powers under the Act are broad, therefore there was nothing before us that would support the restrictive view asserted by Gibbs, and this ground fails.

VI. CONCLUSION

[72] The Applications are dismissed.

April 1, 2020

For the Commission:

"original signed by"
Maryse Saint-Laurent

"original signed by"
Steven Cohen

"original signed by"
Karen Kim