

ALBERTA SECURITIES COMMISSION

RULING

Citation: Re Kilimanjaro Capital Ltd., 2018 ABASC 106

Date: 20180705

**Kilimanjaro Capital Ltd. now known as N1 Technologies Inc., Ashmit S. Patel,
Jonathan Harris Levy, Zulfikar Hussein Rashid, John Charles Zang,
Richard Kenneth Moore and Gregory Scott Buczynski**

Panel: Tom Cotter
Maryse Saint-Laurent

Representation: Garner Groome
Carson Pillar
for Commission Staff

Andrew Wilson
for Ashmit S. Patel

John Charles Zang
self-represented

Emmett Scrimshaw
for Richard Kenneth Moore

Hearing Date: May 10, 2018

Decision: July 5, 2018

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I. INTRODUCTION

[1] On October 11, 2017, staff (**Staff**) of the Alberta Securities Commission (the **ASC**) issued a notice of hearing alleging that seven respondents (the **Respondents**) – Kilimanjaro Capital Ltd. now known as N1 Technologies Inc., Ashmit Patel (**Patel**), Jonathan Harris Levy (**Levy**), Zulfikar Hussein Rashid (**Rashid**), John Charles Zang (**Zang**), Richard Kenneth Moore (**Moore**) and Gregory Scott Buczynski (**Buczynski**) – breached Alberta securities laws and acted contrary to the public interest. A hearing into these allegations has been scheduled to begin in October 2018.

[2] Staff's allegations stem from its investigation – conducted primarily from March 2014 to April 2017 – in relation to a suspected market manipulation scheme. Patel says that Staff disclosed more than 2,000 documents to him, most of which he claims were unlawfully acquired by Staff "with reckless and wanton disregard" for his clients' rights to "attorney-client" privilege. On March 14, 2018, Patel applied for either an order dismissing this enforcement proceeding against him and Levy or various other orders, as set out below (the **Application**).

[3] Patel provided two affidavits in support of the Application – one that he swore on February 22, 2018 and the other sworn by Rashid (Kilimanjaro's director, president and chief executive officer until he resigned on August 25, 2014) on February 27, 2018. Staff submitted an affidavit, sworn by a Staff investigator on April 25, 2018. We also received written submissions from Patel and Staff, and we heard oral submissions on May 10, 2018. Even with the three affidavits before us, many important points of evidence remained unclear, some of which will be touched on in this ruling.

[4] We note that Patel referred in his Application materials to both solicitor-client privilege and attorney-client privilege, apparently interchangeably for the most part, though in his affidavit he referred to professional codes of conduct from Illinois and California, as well as the American Bar Association "Model Rule", in the context of attorney-client privilege. As we received insufficient evidence on any distinctions to be drawn between the two species of privilege as applied in the various jurisdictions mentioned, we consider only the law of solicitor-client privilege as it applies in Alberta. We therefore only use the term "solicitor-client privilege" hereafter in this ruling.

II. ORDERS SOUGHT

[5] The Application was premised on Patel's claim that documents obtained by Staff in the course of their investigation – some with the assistance of the U.S. Securities and Exchange Commission (the **SEC**) – were subject to solicitor-client privilege that had not been waived, and that the manner in which Staff obtained the allegedly privileged documents was unlawful and inconsistent with safeguards meant to protect this fundamental privilege. Patel asserted that Staff acquired a significant number of privileged documents, and that Patel, as a licensed attorney, cannot defend Staff's allegations against him because he remains bound by solicitor-client obligations.

[6] We note that Patel's Application materials gave varying accounts of the identities of his clients. The Application identified Kilimanjaro Capital Ltd. (incorporated in Alberta) and Kilimanjaro Capital Ltd. (incorporated in Belize, and subsequently named N1 Technologies Inc. according to the notice of hearing) as his clients. Although the entity referred to in the notice of

hearing is the Belize company, we use the term **Kilimanjaro** in this ruling to mean both the Belize and the Canadian companies, if the context so indicates. Patel's affidavit also claimed that Buczynski was a client, and Patel's written submissions indicated that he and Levy (who is also an attorney) had a solicitor-client relationship with Rashid.

[7] Patel's position was that the only fair and just remedy in the circumstances would be to dismiss the enforcement proceeding "in its entirety" against him and against Levy. Alternatively, Patel sought an order to prohibit Staff, permanently or temporarily, "from reviewing, examining, copying, or otherwise making any further use of" privileged documents "gathered or provided to [Staff] in the investigation of this matter". Patel requested that any temporary prohibition order remain in place pending the establishment of a "protocol for identification of privileged materials" in Staff's possession. The Application also sought (whether as an alternative or in addition to the other requested orders was unclear) to have an ASC panel assess the claim of privilege (from a list of documents that Patel would provide) and order the removal, deletion and destruction of any materials in Staff's possession found to be privileged (including any documents derived from information obtained from privileged materials).

[8] On the evidence before us, we conclude that the impugned documents either were not initially protected by solicitor-client privilege or were initially protected, but any such privilege had been waived. In light of our findings, it is unnecessary for an ASC panel to consider reviewing any of the subject documents, nor is it necessary for this panel to determine the other issues raised by the Application.

III. PROCEDURAL BACKGROUND

[9] Scheduling of the Application occurred in the course of two hearing management sessions. Between these two sessions, Patel submitted his notice of application and supporting affidavit evidence to the ASC Registrar.

[10] At the second hearing management session, counsel for Patel contended that the evidence demonstrated "a prima facie argument that privilege has been breached" and suggested that an ASC panel might not need to review documents over which solicitor-client privilege was claimed in order to decide the Application, which he suggested could be heard in a single hearing.

[11] Also at that second session, Staff indicated that their affidavit evidence (which had yet to be submitted at that point) would demonstrate that the subject documents were obtained from individuals who were not in a solicitor-client relationship with either Patel or Levy. Staff also indicated that resolution of the Application may require an ASC panel to review documents identified by Patel as protected by solicitor-client privilege, which raised a preliminary issue as to whether the ASC had the jurisdiction to engage in such review. Staff suggested a bifurcated process in which the parties would first address this preliminary jurisdictional issue, and that its resolution would determine whether a subsequent review of materials could be done by either an ASC panel or a justice of the Court of Queen's Bench to assess the validity of the claimed privilege.

[12] Aside from the jurisdictional issue identified by Staff, additional preliminary issues were identified in the second hearing management session, including:

- whether s. 57 of the *Securities Act* (Alberta) – as relied upon by Patel as the basis for the Application – would apply in the circumstances and whether the ASC or the Court of Queen's Bench would need to determine whether that provision applied;
- if s. 57 were to apply, whether the orders stipulated in s. 57(4) as available to the Court of Queen's Bench would be exhaustive or whether the ASC would have any jurisdiction under s. 57 to make the orders sought by Patel;
- if s. 57 were not to apply, whether the ASC would have the authority or jurisdiction – and on what basis – to make the orders sought by Patel;
- whether the Application was premature; and
- whether Patel would have standing, as a lawyer, to claim relief for the purported violation of solicitor-client privilege belonging to another.

[13] Also raised in the second hearing management session was the potential need for evidence to prove the applicable laws of a foreign jurisdiction, to the extent they were considered relevant. As well, there remained a question as to whether Levy would be entitled to any relief, particularly given that he had not appeared on the Application and that Patel's counsel was not authorized by Levy to bring the Application on his behalf.

[14] The parties were asked to address these issues in their submissions, with the understanding that a panel would not be in a position to inspect any of the impugned documents until such issues were resolved. A timeline was established to allow Staff to provide their evidence and to allow the parties to provide written and oral submissions.

[15] Patel maintained in his written submissions that there is "*prima facie* evidence rather than mere conjecture" as to the issue of solicitor-client privilege, such that the "fairness of the entire proceeding" was affected. Staff's position was that the Application should be dismissed on the basis that solicitor-client privilege did not apply to the communications obtained during the course of the investigation, or that any applicable privilege was waived before the communications were obtained by Staff. Alternatively, Staff submitted that an ASC panel lacked the jurisdiction to grant the relief sought by Patel.

[16] In oral submissions, Patel's counsel relied on written submissions prepared by Patel and made no request to adduce further evidence following the receipt of Staff's evidence and written submissions. He also maintained that the evidence established "a *prima facie* issue of privilege that needs to be determined" and that an ASC panel has the jurisdiction to address that issue before the formal hearing into the merits of Staff's allegations. Staff argued that Patel had not established that "there is an issue of privilege engaged in this case", as there was a lack of intent to maintain confidentiality over purportedly privileged communications and that the Application should therefore be dismissed. Zang and counsel for Moore each attended the hearing but took no position on the Application and declined to make any submissions. None of Kilimanjaro, Levy, Rashid or Buczynski appeared or made submissions on the Application.

IV. LAW

[17] Solicitor-client privilege has been recognized as "a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law" (*Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, 2002 SCC 61 at para. 49). The Supreme Court of Canada "has repeatedly affirmed that, as a substantive rule, solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary" (*Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 43).

[18] Solicitor-client privilege will be established in circumstances involving: (i) a communication between a solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended by the parties to be confidential (*Solosky v. The Queen* (1979), [1980] 1 S.C.R. 821 at 837). Once established, the privilege applies to all communications made within the framework of the solicitor-client relationship but it does not extend to communications in which legal advice is not sought or offered or where the communications are not intended to be confidential (*Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 16, citing *Solosky* at 835). In other words, "not everything that happens in a solicitor-client relationship will be a privileged communication" (*Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para. 19), nor will a lawyer's advice on matters outside the solicitor-client relationship be privileged (*British Columbia (Attorney General) v. Lee*, 2017 BCCA 219, at para. 36; *R v. Campbell*, [1999] 1 S.C.R. 565 at para. 50). The proper approach requires a contextual analysis that assesses "the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered" (*Campbell* at para. 50).

[19] The party asserting solicitor-client privilege bears the onus of establishing its existence on a balance of probabilities. Blanket assertions as to the existence of solicitor-client privilege in instances where the protection is clearly unavailable "is a litigation tactic that ought to be discouraged" (*Alberta v. Suncor Energy Inc.*, 2017 ABCA 221 at para. 45). Indicators of the existence of a solicitor-client relationship may include any of the following:

- a contract or retainer;
- a file opened by the lawyer;
- meetings between the lawyer and the party;
- correspondence between the lawyer and the party;
- a bill rendered by the lawyer to the party;
- a bill paid by the party;
- instructions given by the party to the lawyer, and the lawyer acting on instructions provided;
- statements made by the lawyer that the lawyer is acting for the party;
- a reasonable expectation by the party about the lawyer's role;
- legal advice given; and
- any legal documents created for the party (*Jeffers v. Calico Compression Systems*, 2002 ABQB 72 at para. 8, as recently cited by *Trillium Motor World Ltd. v. General Motors of Canada Limited*, 2015 ONSC 3824 at para. 412, aff'd on other grounds (*sub nom Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP*), 2017 ONCA 544).

[20] Once established, solicitor-client privilege will be maintained unless waived by the client, subject to certain limited exceptions. For example, "in legal proceedings, where professional secrecy prevents an accused from making full answer and defence, it can be set aside only if the innocence of the accused is at stake" (*Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20 at para. 83). Additionally, solicitor-client privilege has no application to "communications criminal in themselves or intended to further criminal purposes" (*Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 10).

[21] It is well-accepted that the party asserting waiver of solicitor-client privilege bears the burden of proving waiver (*Western Canadian Place Ltd. v. Con-Force Products Ltd.* (1997), 202 A.R. 19 at para. 18). Disclosure of a privileged solicitor-client communication to a third party may result in a waiver of the privilege based on the lack of confidentiality (*Pinder v. Sproule*, 2003 ABQB 33 at paras. 46, 49).

V. ANALYSIS

[22] According to Patel's affidavit, he was licensed to practice law in the state of Illinois and Levy was licensed to practice law in the state of California and the District of Columbia. However, Patel provided few details as to a solicitor-client relationship between Kilimanjaro and either or both of Patel and Levy. Patel's affidavit contained general statements, stating that management of a publicly-traded Alberta company (one seemingly affiliated with Kilimanjaro) retained both Patel and Levy "to represent" Kilimanjaro. The timeframe of that retainer was vague, having occurred after Patel and Levy ceased their representation of the public company "in or around August of 2012".

[23] Details as to the nature and scope of Patel's and Levy's representation of Kilimanjaro were also obscure. Patel said that he and Levy were initially retained by the publicly-traded Alberta company "to perform certain legal tasks under the supervision of . . . Canadian counsel and management", that they were also retained "to provide additional legal services" for a related "non-Canadian" company, and that Patel's and Levy's retainer with Kilimanjaro pertained "to matters that had been part of [these other companies'] representation". Correspondence authored by Patel indicated that he and Levy worked with Kilimanjaro's unnamed "Canadian lawyers on matters of joint representation and interest to" Kilimanjaro. According to Staff's evidence, Patel claimed in documents he authored (none of which were in evidence before us) that he was Kilimanjaro's chief operating officer and he described "himself as being in 'partnership' with Rashid and Levy in Kilimanjaro". Levy similarly described his involvement with Kilimanjaro "as some sort of joint business enterprise".

[24] In short, we have little evidence to assess the nature of Patel's and Levy's relationship with Kilimanjaro, and no evidence from Kilimanjaro. However, we are prepared to accept, for the purposes of this Application, that as early as August 2012, Patel and Levy were retained by Kilimanjaro to perform "certain legal tasks" in conjunction with Kilimanjaro's unidentified Canadian counsel, and to provide "additional legal services".

[25] Patel also claimed that both he and Levy were in a solicitor-client relationship with Buczynski (who we understand was an auditor for Kilimanjaro), which "crystalized when

Buczynski communicated with [Patel] and Levy for the purposes of obtaining legal advice". In support of this claim, Patel reproduced in his affidavit excerpts from Buczynski's July 28, 2016 interview with representatives of the SEC. These excerpts indicated not a solicitor-client relationship but that Buczynski spoke to Patel and Levy without retaining them as counsel: "I talked to both of them [but] I didn't hire them to be my attorney, but as part of working with them on this account, what's going on guys?" He also said that he "did not pay them money".

[26] Given Patel's own evidence, we are unable to find a solicitor-client relationship between Buczynski and either or both of Patel and Levy.

[27] Patel did not provide any evidence as to how Staff obtained the impugned documents. He did state in his affidavit that he received a subpoena from the SEC demanding that he produce documents relating to Kilimanjaro to assist the ASC's investigation, and that he (and Levy, who also was issued a subpoena from the SEC) refused to produce any documents in response, claiming (among other things) that some or all of the requested material was protected by solicitor-client privilege. Patel's written response to the subpoena stated that "the materials sought are available from non-privileged sources" and that the subpoena issued to him was "very likely duplicative of requests" to others for documents that might not be privileged. There are other indications in the evidence that Patel did not intend to suggest that all documents sought by the SEC were available from non-privileged sources or were duplicative.

[28] Staff's evidence confirmed that they did not obtain any documents in their investigation directly from Patel or Levy, nor did Staff obtain any documents from Buczynski (who was also issued a subpoena from the SEC but responded by stating that "all related correspondence and documents were lost or destroyed"). Instead, Staff obtained the impugned documents – consisting of email communications among or between Patel, Levy, Rashid and Zang (and others), along with documents attached to such communications – from other sources.

[29] One such source was Blaine Parks (**Parks**), whom Staff identified as a friend of Rashid's and a seed shareholder in Kilimanjaro. Parks, in response to a Staff-issued summons requiring production of Kilimanjaro-related documents in his possession, provided Staff with two types of emails. First were those Parks received through Rashid – Patel and Levy sent emails to Rashid, who, according to Staff's evidence, forwarded the emails to Parks "deliberately and repeatedly". Second were those sent directly to Parks from Patel and Levy. Regarding the first category, there was no indication that those documents were intended to be confidential given their deliberate and continued provision to Parks. Further, if (as Patel claimed) Rashid was "at all material times . . . the proper person to waive" Kilimanjaro's privilege, intentionally forwarding the documents to Parks strongly indicated waiver of the privilege. We reach this conclusion despite Rashid's affidavit evidence that he had not waived, and never intended to waive, any privilege. Based on the evidence before us, his actions belied that statement. Regarding the second category, there was no claim of a solicitor-client relationship between Parks and one or both of Patel and Levy. There could be no suggestion that such documents were sent in a solicitor-client context. Accordingly, we find, based on the evidence before us, that documents obtained by Staff from Parks were not subject to solicitor-client privilege.

[30] Staff also obtained documents from Zang, a lawyer admitted to the Law Society of Alberta, pursuant to a notice compelling production of any Kilimanjaro-related documents in his possession. In response, Zang provided Staff with emails between him and Patel and Levy. We have no evidence that Zang acted in a professional capacity on behalf of Kilimanjaro or that he had a professional relationship with any of the other parties. Accordingly, we find, based on the evidence before us, that the documents obtained from Zang were not made in the context of a solicitor-client relationship, nor was there any intent that such communications be kept confidential.

[31] Staff also obtained "emails between or among Moore, Zang, Patel and Levy" from Richardson GMP Limited (via a production order), COR Clearing LLC (via an SEC-issued subpoena) and Integral Transfer Agency Inc. (via a Staff request). The precise nature of these entities' involvement with Kilimanjaro was unspecified, although we inferred from Staff's evidence that each had some involvement in share-transfer activities in respect of Kilimanjaro securities. Based on the evidence before us, we find that the emails obtained from these three entities were not made in the context of a solicitor-client relationship, nor was there any intent that such communications be kept confidential.

[32] In the course of their investigation, Staff also obtained communications originating from Patel and Levy from publicly-available sources, such as news releases and promotional materials. We find that these communications were not protected by solicitor-client privilege, given the lack of intent that they be confidential.

[33] Rashid was the final source of potentially privileged documents obtained by Staff. According to the evidence, Rashid had previously declined to waive any solicitor-client privilege over documents and communications concerning Kilimanjaro. However, on December 11, 2017 he attended (on his own volition) the ASC office and requested a meeting with Staff. At that time, Rashid provided certain material to Staff, including a printout of a "screenshot" from Rashid's email account showing "a partial email message from Patel to Levy and Rashid" dated June 20, 2017. Staff indicated that this was the only communication among Rashid, Patel and Levy that was obtained directly from Rashid. We are satisfied that, even if this document had originally been subject to solicitor-client privilege, the circumstances demonstrated a clear intent to waive any such privilege. Accordingly, we find that this email communication obtained by Staff from Rashid was not protected by solicitor-client privilege.

[34] In his Application materials, Patel also complained that solicitor-client privilege was breached during Staff's investigative interviews of Rashid and Buczynski. It was common ground that Staff interviewed Rashid over the course of three days (September 24, September 29 and October 24, 2014), and that he was represented by legal counsel during the first two days. As mentioned, Buczynski was interviewed by the SEC on July 28, 2016. Evidence from these interviews consisted of brief passages in Patel's affidavit summarizing portions of the interviews, along with some specific questions and (in some cases) the witnesses' answers.

[35] Patel claimed that both the questions asked by Staff of Rashid and those asked by the SEC of Buczynski breached solicitor-client privilege. We were unable to find a breach of solicitor-client privilege based solely on the fact that questions were asked, without any evidence of the

answers, if any. Moreover, in light of our finding on the available evidence that Buczynski was not in a solicitor-client relationship with either Patel or Levy, we need not address whether Buczynski's purported solicitor-client privilege was breached during his SEC interview.

[36] We were left with the evidence of specific questions and answers during Staff's interviews of Rashid, as reproduced in Patel's affidavit. It was difficult to assess this evidence as the lack of context provided by Patel precluded a full understanding of the interactions between Staff and Rashid. From the evidence that was available, we noted the impugned questions and answers from Rashid's first two interviews involved the identification of Patel as a lawyer (presumably acting for Kilimanjaro, although the context to the questions failed to establish that). We discerned no breach of solicitor-client privilege from such questions, particularly as both Rashid and Patel have volunteered information concerning those matters. Turning to Rashid's final interview in October 2014, Patel's affidavit reproduced three specific series of questions and answers in which Patel claimed that Staff breached privilege. Again, we were not provided sufficient context to fully appreciate the nature of the discussion between Rashid and Staff, and we were therefore unable to conclude that these exchanges breached any privilege. What was clear was that these questions and answers focused on communications that occurred at a time when Rashid was no longer an officer or director of Kilimanjaro. Accordingly, we conclude that those questions could not have breached Kilimanjaro's solicitor-client privilege.

VI. CONCLUSION

[37] In summary, we are not persuaded that the evidence has established a breach of solicitor-client privilege. It is therefore unnecessary for us to determine the various other issues raised by the Application, and we decline to do so.

[38] For the reasons given, the Application is dismissed.

July 5, 2018

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Maryse Saint-Laurent