IN THE MATTER OF THE *SECURITIES ACT*
R.S.N.S. 1989, CHAPTER 418, as amended

- and -

IN THE MATTER OF AN INVESTIGATION IN RESPECT OF KNOWLEDGE HOUSE INC.

BETWEEN:

KNOWLEDGE HOUSE INC., DAN POTTER, CALVIN WADDEN and **KENNETH G. MACLEOD**

(the "**Applicants**")

- and -

DIRECTOR OF ENFORCEMENT AND COMPLIANCE, NOVA SCOTIA SECURITIES COMMISSION

("**Staff**")

REASONS FOR DECISION

Commission Panel:	Mr. R. Daren Baxter, Vice Chairman
Representing Himself:	Mr. Dan Potter
Representing Knowledge House Inc.:	Mr. Dan Potter
Counsel for Mr. MacLeod and Mr. Wadden:	Mr. Dale Dunlop and Ms. Sarah Percival
Counsel for Mr. Raymond Courtney:	Mr. Tim Hill
Counsel for Staff:	Ms. Heidi Schedler
Date Heard:	July 25, 2006
Place Heard:	Halifax, Nova Scotia
Date of Decision:	December 11, 2006

Introduction

The mandate of the Nova Scotia Securities Commission (the "**Commission**") as set out in section 1A of the Nova Scotia *Securities Act*, R.S.N.S. 1989, Chapter 418, as amended (the "**Act**") is to provide investors with protection from practices and activities that tend to undermine investor confidence in the fairness and efficiency of capital markets.

By Order dated February 4, 2003 and amended on April 23, 2003 and October 22, 2003 (collectively the "**Investigation Order**"), the Commission authorized an investigation (the "**Investigation**") of the affairs of Knowledge House Inc. ("**KHI**") pursuant to section 27 of the Act. The Applicants, KHI, Mr. Dan Potter ("**Mr. Potter**"), Mr. Calvin W. Wadden ("**Mr. Wadden**") and Mr. Kenneth G. MacLeod ("**Mr. MacLeod**"), have filed motions before the Commission to revoke or vary the Investigation Order to, among other things, remove the investigators appointed and prohibit the use of the "fruits of the investigation" arising out of the Investigation Order. The Applicants allege serious improprieties on the part of investigators and the conduct of the Investigation. It is alleged by the Applicants that, among other things:

a. The investigators exceeded their jurisdiction with respect to obtaining copies of certain e-mail files from KHI servers (the "**E-Mails**") and their dealing with same;

b. The investigators violated the protections afforded the Applicants by section 7 of the *Canadian Charter or Rights and Freedoms*;

c. The investigators breached section 29A of the Act by disclosing to the RCMP information or evidence obtained pursuant to the Investigation Order without the prior consent of the Commission;

d. The investigators exceeded their jurisdiction by conducting an investigation for an improper or collateral purpose, namely a criminal investigation;

e. The investigators breached the Applicants' solicitor-client privilege by viewing the E-Mails;

f. The investigators breached legal and ethical duties by the manner in which they dealt with the E-Mails; and

g. The investigators were biased and failed to conduct a fair and impartial investigation.

Mr. Wadden and Mr. MacLeod further request an Order for the security and protection of privileged solicitor-client material in possession of Staff and an Order directing Staff to immediately disclose factual circumstances surrounding the seizure of KHI servers containing various E-Mails. Mr. Potter requests an Order for the return to him of his personal e-mails from the KHI servers, and KHI seeks the return of all the E-Mails in the possession of Staff.

As a preliminary matter, Mr. Potter and KHI advanced a motion to the Commission: for the removal of the Department of Justice as counsel to the Commission in respect of its hearing into these matters; for the production of documents and things from Staff; for the securing and protection of solicitor-client privileged material; and for directions for the procedure to determine solicitor-client privileged material.

I previously determined that Mr. Raymond Courtney is entitled to notice of and to participate in these proceedings as a party.

Issues

The motions to be determined in these proceedings are:

1. The removal of the Department of Justice as counsel to the Commission in this matter;
2. Issuance of an Order to Produce Documents and Things;
3. Directions respecting the protection and determination of solicitor-client privileged documents;
4. Revoking or varying the Investigation Order; and
5. Prohibiting the use of the fruits of the investigation.

The first three motions were heard on July 25, 2006 and my decisions and reasons therefore are set out below. The last two motions have not yet been heard and, as such, no decision is made in respect thereof.

Background

The motions arise out of rather complex and complicated affairs and legal wrangling reaching well beyond the Investigation. There are several proceedings before the Supreme Court of Nova Scotia and an ongoing criminal investigation. An outline of the background is appropriate.

KHI was a Nova Scotia based reporting issuer with its shares listed on the Toronto Stock Exchange. The price of the KHI shares collapsed in 2001 and KHI's shares were delisted from the exchange. As a result of this collapse, National Bank Financial Ltd. ("**NBFL**") called a number of its margin loan accounts supported by KHI securities, initiating a series of complex proceedings in the Nova Scotia Supreme Court. Allegations of stock manipulation were made early in the Court proceedings. The Applicants and Mr. Courtney are parties to a number of those proceedings. There are numerous other parties to the Supreme Court proceedings who have not sought standing in this proceeding.

The investigation of the affairs of KHI by Staff is separate from the proceedings in the Nova Scotia Supreme Court. On October 23, 2001 NBFL filed a uniform termination notice for Mr. Bruce Elliott Clarke (a registered representative of NBFL), citing his failure to carry out his responsibilities with respect to KHI. Market Regulation Services Inc. ("**RS Inc.**") prepared a market surveillance report in April of 2002 recommending further investigation to determine whether insider trading violations had occurred. In June of 2002 Staff commenced a preliminary investigation and coordinated its efforts with the Investment Dealers Association of Canada ("**IDA**") which also commenced an investigation. The Investigation Order formalized Staff's investigative process and vested the named investigators with certain powers of examination, summons, and seizure pursuant to section 27 of the Act.

The original Investigation Order, dated February 4, 2003, appointed R. Scott Peacock to investigate the affairs of KHI. The Commission's Order dated April 23, 2003 amended the February 4, 2003 Order by adding as investigators Alex Popovic, Ralph Gaston, Michael Haddad, Vito Pedone and Brian Connell Tombs of the IDA together with Jane Ratchford, Marie Oswald and Alexis Meanchoff of RS Inc. A further Order of the Commission dated October 22, 2003 appointed Maureen Jensen of RS Inc. as an investigator and revoked the appointment of Marie Oswald. Each of these Orders are signed by the Chairman of the Commission, Mr. H. Leslie O'Brien, QC.

In the course of its investigation, Staff obtained a CD containing digital copies of a number of e-mail accounts from a KHI computer server, including the e-mail accounts of Mr. Potter, Mr. Wadden and Mr. MacLeod. These were obtained from the solicitors for NBFL in the civil proceedings, Mr. Alan Parish and Mr. Brian Awad. It appears that NBFL's counsel, in turn, obtained the KHI e-mail server from Mr. Tim Hill, the solicitor for Mr. Raymond Courtney in the civil proceedings. That computer server contained in excess of 185,000 e-mails, however, it is my understanding based on the materials on file and representations advanced that only a portion of those e-mails were delivered to Staff. Staff received the e-mail accounts for nine employees, officers and directors of KHI, namely: Mr. Potter, Mr. Wadden, Mr. MacLeod, Gerard MacInnis, Fiona Imrie, Linda Sullivan, Jack Sullivan, Kate MacNutt, and Ruth Cunningham. These are the E-Mails referred to above. I understand that there is some uncertainty as to whether the e-mail account of Linda Sullivan was received by Staff and that, if it was received, it might be empty, but I have assumed it needs to be included in the potential disclosure process.

The e-mails contained on the KHI server were the subject of a decision of Justice J.E. Scanlan of the Nova Scotia Supreme Court, dated May 10, 2005[1]. Mr. Potter, KHI and Starr's Point Capital Inc., defendants in the civil proceedings, applied to Justice Scanlan for the removal of counsel for NBFL (from whom the E-Mails were obtained by Staff), on the basis they had violated the defendants' solicitor-client privilege. The defendants also sought to stay the proceedings on the grounds of abuse of process. Justice Scanlan declined to stay the

[1] *National Bank Financial Ltd.* v. *Potter*, 2005 NSSC 113

proceedings, but ordered the removal of NBFL counsel and struck portions of the plaintiff's pleadings. Justice Scanlan determined that there were unspecified e-mails on the KHI server which were privileged communication between solicitor and client.

Justice Scanlan confirmed that solicitor-client privilege is a privilege of the client and does not depend on the assertion of privilege claim. He decided that once it was apparent to counsel for NBFL that they had possible privileged communications in their possession, they should have stoped viewing the e-mails and alerted the privilege holders. Justice Scanlan determined it was incumbent on NBFL's solicitors to take the matter to Court to determine the privilege issue. Justice Scanlan is clear that it is not open season on privileged solicitor-client communications, regardless of how one comes into possession of same.

I understand from the materials on file and submission of the parties that in respect of a Warrant Application by the Royal Canadian Mounted Police, the Supreme Court of Nova Scotia is currently in the process of determining which of the e-mails on the KHI server are privileged. The timing of this determination has not been established. I understand that the Applicants and Mr. Raymond Courtney are parties to that proceeding.

History of Proceedings with the Commission

Mr. Potter applied to the Supreme Court of Nova Scotia on March 29, 2004 for an Order in the nature of *certiorari* to quash the Investigation. In that proceeding he made an interlocutory application for an Order requiring the Commission to file a complete return as required by Civil Procedure Rule 56.08, and for an Order staying the Investigation pending the judicial review application and returning to him the contents of his e-mails. Mr. Potter sought access to virtually everything the investigators had obtained and issued a notice of examination to Mr. Scott Peacock, one of the investigators appointed by the Investigation Order. The Commission moved to set aside Mr. Potter's notice of examination, among other things. Justice Richard, in Supreme Court Chambers, granted Mr. Potter's application and dismissed the Commission's motion and required the filing of a supplemental return with the Court containing Mr. Peacock's investigation file.

The Commission appealed to the Nova Scotia Court of Appeal from the decision of Justice Richard and the Court of Appeal issued its decision on April 19, 2006[2]. The Court of Appeal concluded that Mr. Potter's complaints about the Investigation should be determined in the first instance by the Commission and the Commission has the statutory authority and the means to address Mr. Potter's complaints regarding the conduct of its investigators.

The Court of Appeal stated that there are many administrative and practical issues which the Commission could properly address even before the privilege issue is finally resolved. These were stated to include: how to respond to the risk that privilege materials have been obtained, how the allegedly privileged material should be dealt with in the interim, and what disclosure should be made to Mr. Potter. Justice Cromwell noted that the decision whether to release information requires balancing of the competing interests and, as a specialized tribunal, the Commission is in the best position to make that determination. It is, therefore, an acknowledged jurisdictional fact that it is the Commission's responsibility, in the public interest, to balance the interests of fair investigation and effective regulation of capital markets.

The Court of Appeal set aside the Order of Justice Richard, with the exception that Mr. Potter's own e-mail account could remain in his possession and the material filed by the Commission with the Prothonotary at the Supreme Court should remain sealed and in the custody of the Court. The Court of Appeal further ordered that the judicial review application made by Mr. Potter be stayed and the Order for the examination for discovery of Mr. Scott Peacock struck out.

It is the Commission's understanding that the purpose of the stay was to afford Mr. Potter an opportunity to raise his concerns with respect to the Investigation directly with the Commission. This is exactly what Mr. Potter has done in this matter. The first procedural matter arising out of the Investigation was heard on May 25, 2006, and a subsequent hearing was held on June 29, 2006 to address matters preliminary to the July 25, 2006 hearing.

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[2] *The Nova Scotia Securities Commission* v. *Daniel Potter*, 2006 NSCA 45.

Counsel for Staff confirmed in one of the earlier hearings that Staff has complied with all Orders and directions of the Courts relating to the E-Mails (in both electronic and printed form) and that same have been and continue to be sealed. Counsel for Staff specifically confirmed that the E-Mails have been secure for some time and are not accessible by anyone.

Removal of Department of Justice as Counsel to the Panel

Prior to commencement of the hearing of this matter the parties were advised, presumably by the Secretary of the Commission, that Ms. Agnes MacNeil of the Nova Scotia Department of Justice would likely be legal counsel to the Panel in this matter. Mr. Potter, in his Notice of Motion dated June 30, 2006, requested that Ms. MacNeil be removed as counsel to the Panel on the basis of her involvement as counsel responding to Mr. Potter's application to the Supreme Court with respect to the Investigation and the subsequent appeal to the Court of Appeal.

The parties were subsequently advised that Ms. MacNeil was not assigned as counsel to the Panel and that it was likely another lawyer with the Department of Justice would be assigned. Mr. Potter communicated his objection to any lawyer from the Department of Justice representing the Panel and gave notice that he was expanding his motion to preclude the Department of Justice acting as counsel to the Panel.

On July 24, 2006 the parties, including Mr. Potter, were advised by the Secretary to the Commission that the Department of Justice would not be counsel to the Panel. At the July 25, 2006 hearing I introduced Mr. Scott Sterns of the law firm Merrick Jamison Sterns Mahody Washington as counsel to the Panel. The Panel has discretion in the selection of its own counsel. I advised the parties that having regard to the complexity of the matter before the Panel, the history, the objections of Mr. Potter and for other reasons of its own, the Panel selected Mr. Stern's firm as its counsel. I indicated that, in my view, this made Mr. Potter's application regarding removal of the Department of Justice as counsel moot.

At the hearing Mr. Potter suggested that his application in this regard was not moot and requested that I issue a ruling to the effect that the Department of Justice be prohibited from acting as counsel, not only to the Panel but also to "administrative" staff of the Commission, in particular the Secretary and the Executive Director, with respect to any matters involving KHI.

It is my determination that the selection of its counsel is within the absolute discretion of the Panel. In making this determination, the Panel should take into account factors such as the apprehension of bias and the public interest. The reasons for the determination of its counsel and the Panel's communication with its counsel or prospective counsel are confidential.

Parties before the Panel certainly have the right to object to the Panel's selection of counsel and the reasons for any such objections should be heard and considered by the Panel. In the present matter Mr. Potter's objection is to the Department of Justice acting as counsel, but the Panel previously determined that the Department of Justice would not be its counsel in this matter. The removal of Ms. MacNeil or the Department of Justice as counsel to the Panel is moot and does not require a ruling from me.

As for Mr. Potter's expansion of his motion to the selection of counsel by administrative staff of the Commission, this matter is also moot. In Mr. Potter's submission his concern is with respect to the possible bias of counsel influencing the conduct and determination of the matters before the Panel. In this regard the Panel has control over counsel advising the Panel or otherwise assisting the Panel with the administrative tasks required for the proper conduct of this matter. The Department of Justice is not retained in any such respect. I have no reason to even suspect that the Secretary (who facilitates the administrative functions required for the conduct of this matter under the direction of the Panel) consults with any counsel, other than as selected by the Panel. The Executive Director has no participation in this matter, other than perhaps in the role of Acting Secretary upon the unavailability of the Secretary. Nonetheless, the conduct of this matter is ultimately the responsibility of the Panel and not that of the Secretary nor the Executive Director (whether as Acting Secretary or otherwise).

The Department of Justice acting as counsel to the Secretary or Executive Director with respect to these proceedings is moot and does not require a ruling from me. Further, it is not

necessary, and perhaps not even appropriate, for me to prohibit the Department of Justice from acting as counsel to any administrative staff of the Commission in the future. This event is presently unforseen, but if it were to occur, the reasons therefore and the particulars thereof are unknown. Should that event occur, it could be addressed at that future time.

I note for the record that subsequent to the July 25, 2006 hearing the Panel retained the law firm of Cox Hanson O'Reilly Matheson, and in particular Mr. Thomas Donovan, QC, as its legal counsel. Having regard to the breadth of the proceedings in the Supreme Court and the conduct of the Investigation, it has taken some time for the Panel to retain counsel.

Production of Documents and Things

The Applicants, Mr. Potter, KHI, Mr. Wadden and Mr. MacLeod, have made applications to the Commission for an Order for Staff to produce documents and things requisite for a full hearing of the motions to revoke or vary the Investigation Order. Staff does not oppose providing information and documents to the Applicants, but takes the position that it is for the Commission to direct the disclosure and determine the issues of solicitor-client privilege. I agree with Staff that defining the scope of disclosure and identification of a process to determine solicitor-client privilege is the responsibility of the Commission, to be exercised by this Panel in this case. In making this determination the Commission must have regard to the purposes of the Act. As noted in subsection 1A(2) of the Act, the Commission, in pursuing the purposes of the Act, shall have regard to such factors it may view as appropriate in the circumstances.

Section 29A Considerations

Section 29A of the Act provides that no person or company, without the consent of the Commission, shall disclose, except to that person's or company's counsel, any information or evidence obtained or the name of any witness examined or sought to be examined pursuant to an investigation authorized by an Order under section 27 of the Act. This section clearly applies to the conduct and fruits of the investigation that is the subject matter of this proceeding. Many

of the documents and things sought by the Applicants are confidential and, by virtue of section 29A of the Act, may only be disclosed with the consent of the Commission.

In an effort to be responsive and to address the Applicants' inquiries, the Director of Enforcement and Compliance, Mr. Scott Peacock, who is also one of the investigators named in the Investigation Order, delivered an affidavit, dated July 20, 2006, giving an overview of the investigation process. This affidavit was sent to the Panel and copies given to the Applicants. The contents of the July 20, 2006 affidavit were the subject of much discussion at the July 25, 2006 hearing. At that hearing the Applicants requested clarification of many statements contained in the affidavit and refined their request for further disclosure. On November 2, 2006 Mr. Peacock delivered another affidavit, again in an effort to be responsive, which was delivered to the Panel and copies given to the Applicants.

The July 20, 2006 and the November 2, 2006 affidavits of Mr. Peacock (collectively the "**Affidavits**") may be considered a unique form of disclosure created to assist the Applicants in making their application before the Commission. The delivery of the Affidavits has narrowed, but not eliminated, the scope of the remaining disclosure sought by the Applicants.

By Order of this Panel dated November 24, 2006, the release of the Affidavits to the parties to this proceeding was consented to by the Panel. I further ordered that the Affidavits were to remain confidential until the issue of public disclosure pursuant to section 9.2 of the current General Rules of Practice and Procedure was addressed. I have requested and received submissions from the parties as to whether the Affidavits should remain confidential. Staff has no objection to the Affidavits being made public, but some of the parties have argued that disclosure of the Affidavits will be unduly prejudicial to them.

By virtue of section 29A of the Act, information or evidence obtained during an investigation and disclosed to parties to a proceeding with the consent of the Commission remains confidential, at least until introduced as evidence in a public hearing before the Commission. Having regard to the circumstances of this proceeding, the Affidavits may be considered as a unique form of disclosure. Due to the unusual nature of this proceeding, the Affidavits were delivered to the Panel, but have not been introduced as evidence in a public hearing on the merits.

Section 9.1 of the current General Rules of Practice and Procedure addresses the issue of whether any document in a proceeding is open to the public for inspection. Section 9.2 provides for an exception to public inspection where the Commission is of the opinion that public inspection of any document would be unduly prejudicial to a person who has status in the proceeding or to a witness, and that restricting public inspection would not be contrary to the public interest. It is clear that the Commission may Order that a document in a proceeding not be open to public inspection.

I have considered the contents of the Affidavits, the unique circumstances of this proceeding, and the representations of the parties. I am of the opinion that public inspection of the Affidavits could be unduly prejudicial to some, if not all, of the Applicants, and that the public interest in the current circumstances does not require that the Affidavits be open to inspection. As a result, the Affidavits shall remain confidential and not be open to public inspection until determined otherwise by the Commission.

Additional Disclosure and Procedure

The issue to be determined by this Panel is what further disclosure should be made by Staff to the Applicants regarding the Investigation. As noted above, section 29A of the Act prohibits Staff and any other person or company from disclosing any information or evidence obtained or the name of any witness examined without the consent of the Commission. I must determine if it is in the public interest to consent to further disclosure and, if so, what is to be disclosed. In this regard I must evaluate the extent to which the policies of the Act are served by the purpose for which disclosure is sought. This requires that I balance the Applicants' need to know (in order to make out their case in this matter) with the protection of the integrity of the investigative process. For example, I need to consider if unlimited disclosure threatens information sources, discloses confidential investigative techniques, or otherwise is injurious to the conduct of an investigation. I must also be sensitive to third party privacy expectations and interests. If the harm from disclosure might outweigh the harm to the Applicants from non-disclosure, the Applicants' right to know may be subordinated to some extent by the greater interest at stake. If

so, the public interest may not warrant that the Applicants be given full disclosure of all details of the Investigation. The Panel should only consent to disclosure to the extent necessary to serve the policies of the Act.

That having been said, there must be a valid policy based reason established to justify non-disclosure in the current Applications. As noted above, the Applicants have made very serious allegations about the conduct of the Investigation and claim that their legal rights have been trampled upon. These asserted rights have been the focus of decisions by Justice Scalan and the Court of Appeal.

The Applicants seek to have the Investigation Order amended by removing the investigators appointed therein and prohibiting the use of the fruits of the investigation. They require enough information to allow their position to be properly assessed.

I have considered the purposes for which disclosure is sought and the policies of the Act. I have further considered the circumstances of the proceeding before me, including:

a. the complaints of the Applicants;

b. the possibility that Staff had contact with privileged E-Mails;

c. the disclosure made by Mr. Peacock to date in the Affidavits;

d. the advice of counsel for Staff that the investigation is complete;

e. the lack of objection on the part of Staff to disclosure of relevant information and documents in the possession or under the control of Staff;

f. the lack of argument by Staff that disclosure of relevant information and documents would impair the integrity of the investigative process;

g. the advice of the parties that the individual Applicants have each received a copy of his own e-mail account comprising the E-Mails; and

h. the decisions and Orders of the Supreme Court of Nova Scotia and the Nova Scotia Court of Appeal drawn to the attention of the Panel.

I consider that a measured disclosure of relevant information and documents to the Applicants regarding the conduct of the Investigation to be of substantial importance to ensuring the public confidence in the regulation of capital markets in Nova Scotia. The only information and documents that should be disclosed, however, is that which is in the possession or control of Staff which have a reasonable possibility of being relevant to the ability of the Applicants to advance the allegations in their Applications. In my opinion relevance occurs when the allegations of the Applicants (as set out in their Notices of Motion) intersect with the contents of the information and documents in the possession or under the control of Staff.

Subject to my directions and the conditions precedent set out below, I consent to and direct Staff to make disclosure to the Applicants and their counsel of relevant information and documents in their possession or under their control and gathered in the Investigation as follows:

1. Mr. Peacock shall make himself available to be cross examined by the Applicants under oath on the contents of the Affidavits. The scope of this examination shall be limited to evidence directly relevant to the Applications, and is not to evolve into a "fishing expedition" on topics beyond the information requested in paragraph 33 of the written submission on behalf of Mr. Potter and KHI in this matter dated July 11, 2006. Any disclosure requiring Mr. Peacock to access the E-Mails shall be subject to obtaining relief from existing Supreme Court of Nova Scotia Orders (discussed below).

2. To the extent that any of the Applicants require, each other investigator shall be made available to be examined by the Applicants under oath. This scope of any such examination shall be limited to evidence directly relevant to the Applications, and is not to evolve into a "fishing expedition" on topics beyond the information requested in

paragraph 33 of the written submission on behalf of Mr. Potter and KHI in this matter dated July 11, 2006. Any disclosure requiring the investigators to access the E-Mails shall be subject to obtaining relief from existing Supreme Court of Nova Scotia Orders.

3. Subject to item 6 below, Staff shall provide the Applicants with copies of all documents in their possession or under their control relevant to the information requested in paragraph 33 of the written submission on behalf of Mr. Potter and KHI in this matter dated July 11, 2006, which documents are not subject to privilege in favour of Staff. Any such disclosure with respect to the E-Mails shall be subject to obtaining relief from existing Supreme Court of Nova Scotia Orders.

4. For reasons which are described below, and to avoid the potential of conflicting findings, the Commission will adopt, when available, the judicial determination of the scope of privileged material contained in the E-Mails. It is my understanding that the E-Mail accounts of Mr. Potter, Mr. Wadden, Mr. MacLeod, Gerard MacInnis and Fiona Imrie are currently subject to a process under the direction of Justice Scanlan. In the event the employee E-Mail accounts of Linda Sullivan, Jack Sullivan, Kate MacNutt, and Ruth Cunningham are not currently before Justice Scanlan, the Commission will seek to include them in the process and failing such inclusion will identify an alternate process. The result of these actions will identify the "privileged E-Mails".

5. Once the scope of privileged E-Mails is determined, information and documents in the possession or under the control of Staff relating to or arising from the access to or the use of the privileged E-Mails shall be disclosed to the holder of the privilege.

6. Subject to obtaining relief from existing Supreme Court of Nova Scotia Orders and subject to the procedure to be followed for employee E-Mail accounts (discussed below), copies of the E-Mails in the e-mail accounts of employees of KHI that are related to the business of KHI and are not subject to the solicitor-client privilege of the subject employee shall be delivered to KHI. For this purpose, "employees" includes officers and directors of KHI.

7. The laptop computers of each investigator which at one time contained any of the E-Mails (being those computers identified in the November 2, 2006 Affidavit of Mr. Peacock and listed as Schedule "A" to this Order) shall be submitted to a qualified forensic computer specialist approved by the Commission for examination to assess the ability to determine the extent to which any of the E-Mails accounts were reviewed. If possible, the extent to which any of the E-mails were reviewed shall be determined. The report of such investigation shall be delivered to the Staff. In addition, each individual Applicant shall be entitled to an abbreviated report detailing the extent to which, if any, the E-Mails in his employee E-Mail account were reviewed. Finally, and subject to the procedure to be followed for employee E-Mail accounts, KHI shall be entitled to receive the report outlining the extent to which, if any, employees' E-Mail accounts identified in the KHI motion of June 30, 2006 were reviewed.

Application to Supreme Court for Access to E-Mails

In addition to the sealing of the Commission Investigation file as a result of an Order issued by Justice Richard (as confirmed by Justice Cromwell in the Court of Appeal) in the stay application of Mr. Potter, it is my understanding from the parties that the E-Mails are subject to various Orders of the Supreme Court of Nova Scotia in other proceedings, including those Orders dated April 5, 2004 and January 3, 2006, restricting access to the E-Mails and disclosure thereof. The Commission and the parties herein are bound by such Orders. This Panel does not have the jurisdiction to vary the Orders of the Supreme Court of Nova Scotia, nor to consent to or direct any action contrary to the Orders. As such, the disclosure of the E-Mails and information regarding E-Mails that requires access to same, including the contemplated forensic analysis, is subject to the condition precedent that such disclosure of the E-Mails is first approved by the Supreme Court of Nova Scotia, and, if so, upon such conditions as the Supreme Court may direct. The Commission shall, on its own motion, make application to the Supreme Court of Nova Scotia seeking such approval.

If the Supreme Court of Nova Scotia authorizes the investigation of the laptops, access to CD's containing E-Mails, access to printed E-mails and other documents relating to the E-Mails

necessary to provide the disclosure contemplated herein, and to the delivery of copies of the E-Mails and documents related thereto, only then may such disclosure proceed. If so, such disclosure shall be subject to any limitation or condition that the Supreme Court may impose.

Procedure for KHI Employee E-Mail Accounts

If the Supreme Court authorizes disclosure of the employee E-Mails as contemplated herein, the Commission shall then notify each affected employee of the proposed disclosure of their respective e-mail account. If the respective employee does not object to disclosure of his or her e-mail account within 30 days, KHI shall be given a copy of the respective employee's E-Mail, but subject to any limitation or condition that the Supreme Court of Nova Scotia may impose.

In the event an employee does object to disclosure of his or her e-mail account, then the Commission will set out a process to determine which e-mails are related to the business of KHI and not subject to any employee solicitor-client privilege. With respect to the parties to this proceeding, namely Mr. Wadden and Mr. MacLeod, their email accounts shall be vetted by their counsel, Mr. Dunlop, to determine which e-mails are not related to the business of KHI or are subject to a personal solicitor-client privilege claim. Following this review, Mr. Dunlop shall deliver to KHI a copy of the E-Mails in the e-mail accounts of Mr. Wadden and Mr. MacLeod that are related to the business of KHI and are not subject a claim of solicitor-client privilege on the part of his clients.

Overall Disclosure Conditions

The disclosure of information and documents, including the Affidavits and the additional disclosure ordered herein, is consented to on the condition that:

a. The parties and their counsel will not use the disclosed information and documents (including the Affidavits) for any purposes other than for advancing their arguments with respect to the allegations in the motions herein;

b. Any use of the disclosed information and documents (including the Affidavits) other than for the purpose of advancing their arguments with respect to the allegations in the motions will constitute a violation of the disclosure Order;

c. The respective parties and their counsel shall maintain custody and control over all the disclosed information and documents, so that copies thereof are not improperly disseminated; and

d. The disclosed information and documents (including the Affidavits) shall not be used for any collateral or ulterior purpose.

The parties and their counsel are reminded that the disclosed information and documents continues to be subject to confidentiality imposed by section 29A of the Act. The parties may disclose such information and documents to their counsel and, in their absolute discretion, to the other parties to this proceeding and their counsel. The parties and their counsel may not disclose the information and documents to any other person or company without the prior written consent of the Commission.

Determination of Solicitor-Client Privileged Documents

It is my understanding from the parties that there are certain proceedings in the Supreme Court of Nova Scotia to determine whether some of the e-mail accounts from the KHI server are subject to solicitor-client privilege. I have been advised that all but four of the e-mail accounts comprising the E-Mails are included in this review by the Supreme Court. As the parties to this proceeding are also parties to the Supreme Court proceedings in which solicitor-client privilege is being determined it does not seem appropriate for the Commission to embark upon a duplicative examination of whether certain E-Mails are subject to solicitor-client privilege.

It is my conclusion that given the practicalities and the legal effect of issue estoppel, for purposes of the Applications herein, the parties shall await the determination of the Supreme

Court of Nova Scotia as to which E-Mails are subject to solicitor-client privilege and, once that determination is final, such determination shall be binding upon the parties in this proceeding.

With respect to any E-Mails not currently being considered by the Supreme Court an independent process could be initiated by the Commission. This would require relief from the Orders of the Supreme Court sealing the E-Mails. It seems, however, that there would be risk that upon the review of only these four E-Mail accounts the reviewer would not have the full context of the E-Mails, which might otherwise be available to a reviewer of the balance of the E-Mails, and which has occupied considerable judicial and party attention to date in the Supreme Court of Nova Scotia. Indeed, section 29F of the Act contemplates that in certain circumstances (which are not wholly applicable here) application may be made to the Supreme Court of Nova Scotia to determine solicitor-client privilege. Having regard to these considerations, the Commission on its own motion will make special application to the Supreme Court of Nova Scotia requesting the Court to determine whether any of the E-Mails not currently being considered by it are subject to solicitor-client privilege. If the Court undertakes such review, once the Court's determination is final such determination shall be binding upon the parties to this proceeding. In the event the Court does not undertake the requested review, the Commission will seek relief from the sealing of Orders of the Supreme Court and will develop an independent process to determine solicitor-client privilege.

Protection of Solicitor-Client Privileged Documents

I understand that all the CDs containing the E-Mails and all the printed E-Mails in the possession or under the control of Staff have been sealed by Order of the Supreme Court. The information provided to me by the parties indicates that all digital records of e-mails in the possession or under the control of Staff, other than the CDs sealed by Order of the Court, have been deleted. Counsel for Staff confirmed to me that the electronic and printed copies of the E-mails in the possession or under the control of staff have been sealed and are not accessible by anyone. During an earlier hearing the Applicants indicated their satisfaction that the E-Mails are secure.

Subject only to any direction or Order of the Supreme Court of Nova Scotia or the Nova Scotia Court of Appeal, I direct that the E-Mails shall continue to be sealed and shall not be disclosed, copied or accessed in any way, other than as expressly directed herein or by subsequent direction of the Commission.

Only if approved by the Supreme Court of Nova Scotia will any the E-Mails be disclosed to the parties hereto as directed above. In such event, the disclosed E-Mail and fruits of the investigation will remain subject to confidentiality imposed by section 29A of the Act and any further dissemination of same is strictly prohibited. Given the actions taken to date to secure Investigation material, no further action is required by the Commission to protect possible solicitor-client privileged E-Mails from further dissemination.

The laptop computers of each investigator (specified in Schedule "A" of this decision) which at one time contained any of the E-Mails, being those computers identified in the Affidavit of Mr. Peacock dated November 2, 2006, shall be delivered to the Secretary of the Commission for safe keeping pending delivery of same to a qualified forensic computer specialist approved by the Commission as contemplated above. The Secretary shall secure the laptop computers and not permit any information contained on those laptop computers to be disclosed, copied or accessed in any way, other than as directed by the Commission.

If in the process of making the disclosure directed herein or otherwise Staff accesses or becomes aware of any document in its possession that may contain privileged E-Mails, or any other privileged communications, or may reference particulars of privileged E-Mails, or any other privileged communications, such documents shall immediately be sealed and delivered to the Secretary of the Commission for safe keeping and Staff shall forthwith seek further direction from the Commission. The holder of the privilege shall be notified of the delivery of the sealed documents to the Secretary and be given a general description thereof. The Secretary shall secure the sealed documents and not permit same to be disclosed, copied or accessed in any way, other than as directed by the Commission.

If in the process of receiving disclosure or otherwise a party receives, accesses or becomes aware of any document in his or its possession that may contain privileged E-Mails, or any other

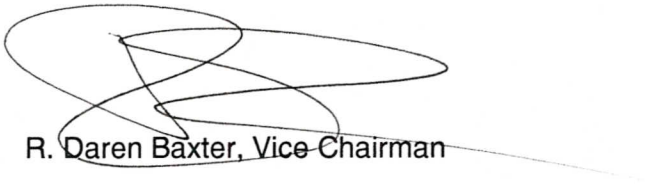
privileged communications, of another person or company, or may reference particulars of privileged E-Mails, or any other privileged communications, of another person or company, such documents shall immediately be sealed and delivered to the Secretary of the Commission for safe keeping and such party shall forthwith seek further direction from the Commission. The holder of the privilege shall be notified of the delivery of the sealed documents to the Secretary and be given a general description thereof. The Secretary shall secure the sealed documents and not permit same to be disclosed, copied or accessed in any way, other than as directed by the Commission.

Conclusion

I will meet the parties in a Pre-Hearing Conference to discuss the form of Order and to develop a plan to implement this decision. A date for hearing the substance of the motion will be set when the directed disclosure is complete.

DATED at Halifax, Nova Scotia, this 11th day of December, 2006.

NOVA SCOTIA SECURITIES COMMISSION



R. Daren Baxter, Vice Chairman

Schedule "A"

Laptop #1	Government of Nova Scotia "Peacock" Toshiba Laptop 6100 Satellite Pro Serial # 22036607P
Laptop#2	Market Regulation Services Inc. "Meanchoff" Dell Serial # 126GD43AE249
Laptop #3	Investment Dealers Association "Tombs" IBM Think Pad Serial # 78AVPMH