IN THE MATTER OF THE *SECURITIES ACT*,
R.S.N.S. 1989, CHAPTER 418, AS AMENDED ("Act")

- AND -

IN THE MATTER OF KENNETH G. MACLEOD
AND CALVIN W. WADDEN

- AND -

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

- AND -

IN THE MATTER OF THE MOTIONS OF DANIEL F. POTTER,
KNOWLEDGE HOUSE INC., KENNETH G. MACLEOD
AND CALVIN W. WADDEN

DECISION dated December 4, 2012

1. On October 4, 2012, Staff of the Nova Scotia Securities Commission ("Staff") issued a Notice of Discontinuance of its allegations against Kenneth MacLeod ("MacLeod") and Calvin Wadden ("Wadden"). As a result, there are no outstanding allegations in the proceeding before the Commission.

2. Staff takes the position that, as a result of the discontinuance of the allegations, the proceeding before the Commission is complete and outstanding motions of Daniel Potter ("Potter"), Knowledge House Inc. ("KHI"), MacLeod and Wadden should not be heard.

3. Wadden, MacLeod and Potter take the position that the discontinuance of Staff's allegations against them does not put an end to the matter before the Commission and that their motions should be considered and decided.

4. The parties have provided briefs on the effect of the discontinuance of Staff's allegations, which I have considered. Potter also provided an affidavit in support of his position. I have read and considered Potter's affidavit, but much of the material in the affidavit is irrelevant to determining the issue before me.

BACKGROUND

5. The procedural history of this matter has been set out in my previous decisions but a brief overview is appropriate to set the context for my present decision.

6. An investigation order was issued by the Commission on February 4, 2003 (subsequently amended on April 23, 2003 and October 22, 2003) to investigate the affairs of KHI (collectively, the "Investigation Order").

7. While the investigation was underway, Potter applied to the Supreme Court of Nova Scotia for an Order for *certiorari* to quash the Commission's investigation on the basis that the investigators improperly obtained and used emails originally on KHI's email servers, some of which were subject to solicitor-client privilege.

8. Potter's application was granted by the Supreme Court. This decision was appealed by the Commission and the Court of Appeal determined that Potter's complaints regarding the investigation should be addressed by the Commission in the first instance: *Potter v. Nova Scotia Securities Commission*, 2006 NSCA 45 [*Potter*]. At paragraphs 28 at 30:

> The Commission submits, and I accept, that it has the statutory authority and the means to address Mr. Potter's complaints about the conduct of the investigators.
>
> Mr. Potter is certainly a person "directly affected" by the Commission's investigation orders and, in particular, by the way the investigation authorized by those orders has been conducted. He, therefore, has the right to apply to the Commission under s. 6 of the Act and to ask the Commission to invoke its broad, discretionary powers under s. 6(2). The Commission also has broad powers to "... make an order on such terms and conditions as may be imposed revoking or varying any decisions made under [the] Act ...": s. 151. This section appears to give the Commission broad powers to regulate the ways in which its investigation orders are being carried out. *The Securities Commission General Rules of Practice and Procedure* (1996), made under s. 150 of the Act contemplate the Commission originating proceedings of its own motion (s. 2.3) or on the application of a private party (s. 2.5). Investigators are obliged to provide a "full and complete report of investigation" to the Commission (s. 27(15)) and the Commission has a statutory discretion to permit disclosure of "any information or evidence obtained ..." s. 29A.
>
> In short, the Commission appears to have the power and the tools to address Mr. Potter's complaints.

At the time of the Court of Appeal's decision, there was an ongoing investigation into the affairs of KHI.

9. The Court went on to say in *Potter*:

> I should also say, respectfully, that the Commission appears from the material before us to have been slow to recognize the seriousness of the implications of the allegations made by Mr. Potter in relation to the

> investigation. I say this without in any way pre-judging the ultimate merits of those allegations. It has been obvious for many months that there are serious claims of solicitor-client privilege in relation to material in the Commission's hands and yet, so far as we can tell, it has done virtually nothing to come to grips with the implications of those claims for the investigation it has authorized. The Commission has also had the benefit for many months of Scanlan, J.'s decision in *National Bank Financial Ltd. v. Potter* (2005), 233 N.S.R. (2d) 123; [2005] N.S.J. No. 186 (Q.L.) (S.C.) which held that the onus is not on the party claiming privilege to take steps to have the privilege issue determined: see para. 62. The judge also set out some very clear statements of what he understood to be the ethical obligations of lawyers who come into the possession of material for which privilege is claimed: see paras. 62-63. It cannot have been lost on the Commission, which we are advised had counsel on a watching brief throughout the proceedings before Scanlan, J., that these statements have serious implications for some or all of its investigators. The Commission, through counsel, claims to have the authority and the tools to address these issues. This decision gives it the opportunity to put those submissions into action.

In the *National Bank Financial Ltd. v. Potter* decision referred to by the Court, the solicitors of National Bank Financial Ltd. ("NBFL") were removed on the basis that they should reasonably have known about the risk of breaching solicitor-client privilege in accessing the KHI servers.

10. Following the Court of Appeal's decision, Staff issued a statement of allegations dated May 15, 2006 alleging that Potter, Wadden, MacLeod and another individual (Raymond Courtney) violated sections of the *Securities Act* and acted in a manner contrary to the public interest (the "Statement of Allegations").

11. Following the issuance of the Statement of Allegations, Potter filed two Notices of Motion on behalf of himself and KHI (collectively, the "Potter Motion") on June 30, 2006 seeking a number of remedies including:

    a. An order removing counsel to the Commission;

    b. An order compelling Staff to produce documents and things;

    c. An order providing for securing and protection of solicitor-client privilege in relation to certain documents in the possession of Staff;

    d. An order providing directions for the procedure to determine solicitor-client privilege;

e. An order revoking the Investigation Order and removing investigators named therein along with any Staff and other persons involved in the investigation and prohibiting the use of any findings of the investigation in any amended or new investigation or in any other proceeding;

f. An order for the return of material filed by the Commission; and

g. An order for the return of all CDs containing email documents from the KHI email server.

12. On July 6, 2006 Wadden and MacLeod filed a Notice of Motion (the "Wadden Motion") seeking:

a. An order revoking or varying the Investigation Order, removing the investigators named therein and prohibiting use of the fruits of the investigation in any amended or new investigation or any other proceeding;

b. An order providing for securing and protection of solicitor-client privilege in relation to certain documents in the possession of Staff; and

c. An order directing Staff and investigators to immediately disclose the full factual circumstances surrounding the seizure of the KHI email servers.

13. Staff takes the position that there is one proceeding before the Commission which was initiated by the issuance of the Statement of Allegations and now that the allegations have been discontinued, the proceeding is complete. Although the issuance of the Statement of Allegations pre-dates the filing of the Potter Motion and the Wadden Motion (together, the "Motions"), in light of the Court of Appeal's direction that Potter could take his complaints about the investigation to the Commission, it is clear that Potter had serious concerns about the conduct of the investigation prior to the issuance of the Statement of Allegations. The Court of Appeal directed the Commission to take steps to deal with those concerns.

14. Following the issuance of the Statement of Allegations and the Motions, the Commission began addressing the procedural steps necessary to move the matter toward a hearing. These procedural steps are briefly summarized below.

15. There have been various orders for Staff disclosure in the Commission proceeding, including an order pursuant to section 29AA of the *Securities Act* on September 9, 2008. The order for disclosure pertained not just to Staff, but also to the Investment Industry Regulatory Organization of Canada (formerly the Investment Dealers Association of Canada and Market Regulations Services). Disclosure was ultimately completed in July 2009.

16. Also at issue was determination of solicitor-client privilege claims. Contentious privilege claims were referred to the Supreme Court for determination. The parties agreed that the only contentious claims regarding privilege were those by Potter and KHI. The reference to the Supreme Court for determination of the contentious claims

of privilege resulted in a consent order on January 14, 2011, between Staff, Potter and Commission counsel setting out the determination of prima facie solicitor client privilege over the email communications identified by the parties.

17. Discoveries were commenced April 6, 2010 but adjourned due to Staff's objection to a question put to one of the investigators as to why enforcement proceedings were not commenced against NBFL.

18. The parties appeared before me on April 7, 2010 seeking determination on how they should proceed given Staff's objection. Staff objected on the basis that the impugned question called for irrelevant information and hearsay. Staff also objected on the basis that answering the question would violate Nova Scotia securities law, but would not disclose what securities law would be breached on the basis that even specifying the securities law at issue would violate it. I asked the parties to resume discoveries and proceed as far as possible, but the discoveries reached an impasse.

19. I referred the determination of the objection to the impugned question to the Nova Scotia Supreme Court. The judge hearing the matter agreed to hear the basis of Staff's objection in-camera, where he heard evidence from Director of Enforcement, Scott Peacock, and legal argument from Staff. After hearing Staff's rationale for objecting to the question, the judge provided NBFL and its employee Eric Hicks ("Hicks") the opportunity to make written submissions on the issue, which they did. The Court determined that the investigators would not violate Nova Scotia securities law by answering the impugned question and anticipated follow up questions. The public written reasons (*Nova Scotia (Securities Commission v. Potter*, 2011 NSSC 239) were supplemented with a sealed decision addressing the basis of Staff's objection. Staff appealed the decision and NBFL and Hicks were granted appellant status. The Court of Appeal allowed the appeal and remitted the matter to me for determination: *Nova Scotia (Securities Commission) v. Potter*, 2012 NSCA 12.

20. When the matter was remitted to me, I was then made aware of the basis of Staff's objection. At the heart of the objection was the fact that Staff entered into a settlement agreement with NBFL and Hicks in 2005, but the agreement was held in escrow and kept secret from the public.

21. In my decision of April 17, 2012, I ordered that the impugned question be answered and directed that the settlement agreement with NBFL and Hicks be presented to the Commission secretary in compliance with the Commission's *General Rules of Practice and Procedure*.

22. My decision was appealed by NBFL and discovery examinations were postponed pending the Court of Appeal's decision. The Court of Appeal issued its decision dismissing the appeal on September 21, 2012. Staff discontinued its allegations against Wadden and MacLeod on October 4, 2012. The discovery examinations were not resumed.

CURRENT STATUS

23. Courtney reached an agreement with Staff and the settlement agreement was approved by the Commission on November 4, 2010. Staff discontinued its allegations against Potter on May 16, 2011 in light of criminal charges filed against him arising from facts similar to those underlying the allegations. As mentioned above, Staff discontinued its allegations against Wadden and MacLeod on October 4, 2012.

24. As a result of the settlement with Courtney and the discontinuance of the allegations against Potter, Wadden and MacLeod, there are presently no outstanding allegations in this proceeding.

25. The parties disagree on the effect of the discontinuance of allegations on the Motions. Staff maintains that the proceeding is complete and the Motions should not be heard. Potter, Wadden and MacLeod contend that their Motions must be addressed in the absence of any allegations against them.

26. When the allegations against Potter were discontinued, Staff raised the question of Potter's continued standing in the proceeding. In a decision dated December 9, 2011, I decided that Potter would continue to have standing in the proceeding, but his standing was restricted to the Potter Motion.

27. My previous decision regarding Potter's continued standing was made in the context of outstanding allegations against Wadden and MacLeod that required determination. The situation has changed as there are now no outstanding allegations in the proceeding. The present question is whether the Motions should be heard in the absence of any outstanding allegations, or did they expire with the discontinuance.

REMEDIES SOUGHT IN THE MOTIONS

28. In order to address whether the Motions may be heard in the absence of any outstanding allegations, I must examine the remedies sought in the Motions. If the remedies are moot or are not within my purview to provide, the Motions should not be heard.

29. There are a number of remedies sought in the Potter Motion:

    a. An order removing Agnes MacNeil as counsel to the Commission.

    b. Notice to Staff and other investigators involved in the KHI investigation to produce documents and things requisite to a full hearing of the matters in motions brought before the Commission in respect of the KHI investigation.

c. An order providing for the securing and protection of solicitor-client privilege in relation to certain documents in the possession of the Commission Staff.

d. An order providing Directions for the procedure to be followed to determine solicitor-client privilege in relation to certain documents in the possession of Commission Staff.

e. An order revoking or varying the investigation order (and amending orders) in the mater of KHI by removing the investigators named therein along with any additional Commission Staff and other persons involved in the investigation and by prohibiting the use of the fruits or work product of the investigation in any amended or new investigation or in any other proceeding.

f. An order requiring the return to Potter of material filed by the Commission pursuant to paragraph 1 of the December 8, 2005 order of the Supreme Court and subsequently returned to the Commission to be dealt with according to law by the April 19, 2006 order of the Court of Appeal.

g. An order requiring the return to KHI of all other CDs containing email documents from the KHI email server demanded and obtained from Alan Parish, Q.C. on and after August 23, 2003, together with any paper-based copies of such documents printed on or on behalf of Staff and the other investigators.

h. Such other orders as may be considered just and necessary.

30. The following remedies are sought in the Wadden Motion:

a. An order revoking or varying the investigation order in the matter of KHI (and amending orders) removing the investigators named therein along with any additional Staff and other persons involved in the investigation and by prohibiting the use of the fruits or work product of the investigation in any amended or new investigation or in any other proceeding.

b. An order providing for the security and protection of the solicitor-client privilege in relation to certain documents in possession of Commission Staff in a manner consistent with section 29F of the *Act*.

c. An order directing Commission Staff and investigators to immediately disclose full factual circumstances surrounding the seizure of the KHI servers from Alan Parish, Q.C.

31. Following Staff's discontinuance of allegations against Wadden and MacLeod, I asked Potter, Wadden and MacLeod to identify the purported outstanding issues and remedies sought with respect to the Motions.

32. Potter states that he presently seeks the following remedies:

    a. A declaration that the investigators have exhibited actual bias or reasonably apprehensible bias or otherwise failed to conduct the investigation in a fair and impartial manner in accordance with the principals of natural justice;

    b. A declaration that the conduct of the investigators in the investigation and in the conduct of this proceeding amounts to abuse of process of the Commission which has brought the administration of justice in a disrepute;

    c. A declaration that the investigators required a warrant issued by a judge under section 27(5) to obtain the KHI email records;

    d. A declaration that the investigators were obliged to invoke the process under section 29F(3) of the *Act* to have a judge determine issues of solicitor-client privilege in relation to the KHI emails;

    e. An order requiring the investigators to provide a detailed report on all materials provided to the RCMP and all communications with the RCMP which relate in any way to the KHI emails received from NBFL and it's counsel; and

    f. An order for a substantial money payment to Potter as compensation for the time, effort and resources thrown away as a result of the conduct of the investigation.

33. Wadden and MacLeod state that they presently seek the following remedies:

    a. A finding of fact followed by declaration as to the true state of affairs in relation to Staff's investigation of NBFL and the applicants; and

    b. An award of compensation to the applicants for the expenses unnecessarily occurred in defending themselves for the past six years.

34. In summary, Potter, Wadden and MacLeod seek:

    a. Various declarations;

    b. An order requiring a report on materials provided to RCMP; and

    c. Monetary compensation.

35. I previously considered the possible remedy of exclusion of evidence if the Motions were granted. That was in the context of a request to bifurcate the proceeding and have the Motions heard in advance of the allegations. One posited remedy if the *Charter* violations alleged in the Motions were made out might have been the

exclusion of evidence pursuant to section 24(2) of the *Charter*. Obviously, now there are no allegations against Potter, Wadden and MacLeod therefore no evidence will be called against them. The exclusion of evidence remedy is no longer applicable.

STAFF'S DISCRETION TO DISCONTINUE ALLEGATIONS

36. Staff's decision to pursue or discontinue the allegations against Potter, Wadden and MacLeod is within its purview. In *Ironside*, 2002 LNADASC 24 at paragraphs 70 to 80:

> In our view, the Executive Director's decision in this case [not to pursue enforcement action following an investigation], and similar decisions made by staff during the investigation and enforcement process, are analogous to the exercise of prosecutorial discretion in criminal law. The Supreme Court of Canada thoroughly examined the reasons why courts have been reluctant to review prosecutorial discretion in *R. v. Power*, *supra*. While not all of those reasons are directly applicable to the situation before us, some are particularly relevant.
>
> Foremost is the need for the tribunal to remain independent and impartial. If staff decisions are subject to appeal, the Commission becomes a supervising prosecutor and ceases to be an independent tribunal.
>
> The exercise of prosecutorial discretion is affected by a myriad of factors, some of which are properly confidential. Even if all these factors could be presented on an appeal, it would be practically impossible for the Commission to lay down guidelines to be followed by staff in future cases.

37. I also note that in *Krieger v. Law Society of Alberta*, 2002 SCC 65, the court held that prosecutorial discretion includes discretion to bring a prosecution, enter a stay of proceedings, accept a guilty plea or plea to a lesser charge or withdraw from criminal proceedings all together (paragraphs 42 to 47). Although those comments were made in the criminal context, I believe that similar discretion should be afforded to Staff, subject to the requirements of the *Securities Act* and the Commission's *General Rules of Practice and Procedure*.

38. It is not necessary for me to approve Staff's decision to discontinue its allegations, as I believe it is within Staff's discretion to do so. Furthermore, Potter, Wadden and MacLeod have not objected to Staff discontinuing the allegations against them. They do not seek to compel Staff to proceed with the allegations. Rather, they want the Motions heard.

SHOULD THE MOTIONS BE HEARD ABSENT OF ANY ALLEGATIONS?

39. For the purpose of this decision, I am not determining the substance of the Motions. I am addressing whether the remedies sought in the Motions are moot, can be

addressed by the Commission in the absence of a full hearing or are beyond the scope of what the Commission can grant.

REMEDIES SOUGHT THAT ARE MOOT

40. A number of the remedies sought in the motions have already been granted in the proceeding to date or are no longer applicable.

a. *Removal of Agnes MacNeil as counsel to the Commission.* Ms. MacNeil did not act as counsel to the Commission following the issuance of the Statement of Allegations and the Notices of Motion. The question of the Commission's counsel was addressed in the December 11, 2006 decision of Commissioner Daren Baxter.

b. *Production of documents and things for hearing the matters in the motion and disclosure of the factual circumstances surrounding the seizure of KHI servers.* There are numerous disclosure orders in the Commission process that required disclosure of all materials relevant to the allegations and the Motions. Staff disclosure was completed in July, 2009. The Director of Enforcement, Scott Peacock, has provided affidavits detailing the circumstances surrounding Staff's acquisition of the KHI servers.

c. *Procedure for determining solicitor-client privilege.* The determination of solicitor-client privilege was made by the Supreme Court and resulted in a consent order regarding a prima facie determination of contentious privilege claims. Prima facie determination of solicitor-client privilege has been made.

d. *Order revoking or varying the investigation order (and amending orders) in the mater of KHI by removing the investigators.* The allegations have been discontinued and there is no ongoing investigation, therefore there is no investigation order to be revoked or varied and no investigators to be removed.

e. *Order requiring report on the materials provided to the RCMP.* Disclosure of documents has been made in the Commission proceeding. I have no jurisdiction over the criminal proceeding, but obviously there are disclosure requirements in that proceeding. The criminal court may determine the admissibility of any communications between Staff and the RCMP in that proceeding.

REMEDIES SOUGHT THAT CAN BE DEALT WITH SUMMARILY

41. Certain additional remedies sought in the Motions and described below can now be dealt with summarily given that the allegations have been discontinued.

a. *Order providing for securing and protection of solicitor-client privileged documents.* Prima facie determination of solicitor-client privilege has been carried out in the process before the Supreme Court. On agreement between

the parties, there are no other contentious claims of solicitor-client privilege. Given that Staff has discontinued its allegations and the matter for which the documents and records were seized is concluded, it is appropriate that Staff return all documents, including all copies, per section 27(11) of the *Securities Act*. Section 27(11) requires return of the documents to the person from whom they were seized. However, in this matter, I believe it is appropriate that the CDs containing email documents from the KHI email server be returned not to the party from whom they were obtained but to Potter. At the first hearing in this proceeding on June 29, 2006 Potter represented to the Commission that he has the authority to represent KHI before the Commission. His authority has not been challenged. The CDs should be provided to Potter within sixty days of this decision as contemplated in the *Act*.

b. *Prohibit use of fruits or work product of the investigation in any amended or new investigation.* In its October 10, 2012 submissions to me, Staff states "[t]he investigation is over and the fruits of the investigation will not be used in any proceeding before the Commission". Given that statement the remedy sought may be moot. However, I will issue an order that the fruits of the investigation will not be used in any other proceeding before the Commission.

c. *Order requiring the return of material filed with Commission and CDs with KHI email documents and any paper-based copies.* Potter seeks the return to him of material returned to the Commission following the April 19, 2006 Order of the Court of Appeal. Given that the allegations have been discontinued, it is appropriate that the requested documents be returned to Potter or destroyed if he prefers. As described above, in the circumstances, I believe it is appropriate that the CDs containing email documents from the KHI email server and any paper-based copies be returned to Potter (or destroyed if he prefers). This should be done within sixty days of this decision.

POSSIBLE OUTSTANDING ISSUES

42. The possible outstanding issues are declarations regarding various factual findings and monetary compensation.

DECLARATIONS

43. Potter, Wadden and MacLeod rely on Rules 3.2 and 11.2 of the Commission's *General Rules of Practice and Procedure* for the authority that I may make declarations regarding various issues.

44. Rule 3.2 contemplates that a person or company may bring a motion to review a decision of a Director:

> An Applicant requesting a Hearing for the review of a decision, which in this section means any direction,

> decision, order, ruling or other requirement made by a Director [...].

45. Rule 11.2 states:

> Upon the hearing of a motion, the Commission may make any order it deems just in the circumstances on any issue brought before the Commission.

46. Staff contends that the Rules do not enlarge the Commission's statutory authority in the *Securities Act* and that there is no authority under the *Act* for declaratory relief.

47. The Rules are made pursuant to section 150 of the *Securities Act*. Section 150(aat) permits the Commission to make rules "prescribing procedures or practices to be followed in relation to matters coming before the Commission". The Rules set out practice and procedure before the Commission. They do not confer authority on the Commission to grant remedies beyond the authority contained in the *Securities Act*.

48. The Commission is created by statute. It only has those powers conferred on it by statute. In *Ontario Securities Commission v. Bennett* (1991), 72 OR (2d) 77 (CA), the Ontario Court of Appeal stated that the Ontario Securities Commission is "an administrative tribunal with only the powers granted to it by statute."

49. The statutorily-defined limits on the powers of administrative bodies such as the Commission is described in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4 [*ATCO*] at paragraph 35:

> Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they must "adhere to the confines of their statutory authority or 'jurisdiction'[; and t]hey cannot trespass in areas where the legislature has not assigned them authority" [...].

The powers of an administrative body must be stated in its enabling statute, but they may also exist by necessary implication from the wording of the act, its structure and its purpose (see paragraph 51 of *ATCO*).

50. The Court of Appeal has stated that the Commission has a "central role in securities regulation under a complex and detailed statutory scheme" (*Nova Scotia (Securities Commission) v. Schriver*, 2006 NSCA 1 at paragraph 17), "the Commission is given a broad mandate to determine and act in accordance with the public interest" (*Electronic Benefits Inc. v. Nova Scotia Securities Commission*, 2009 NSCA 6 at paragraph 36) and "the courts have been generous in acknowledging broad powers of the Commission in governing its own process (*Nova Scotia (Securities Commission) v. Potter*, 2012 NSCA 12 at paragraph 29).

51. However, the Commission remains a statutorily-created body. The remedies it may grant are prescribed in the *Act*. The Commission does not have the jurisdiction of the

Supreme Court to issue declaratory judgment. Although the Commission enjoys the powers, privileges and immunities of a commissioner under the *Public Enquiries Act*, the Commission's role is different from that of a public enquiry commission. The Commission is not appointed by the Governor in Council to study, investigate, hear and determine a matter of common concern. Its role pursuant to section 5(2) of the *Securities Act* is to hold hearings relating to the exercise of its powers and the discharge of its duties and functions assigned to it by the *Securities Act* or the regulations, the Governor in Council or the Minister.

52. When the Court of Appeal directed that Potter could take his complaints regarding the investigation to the Commission in the first instance in 2006, section 6(2) and 151 of the Act were identified as authority for the Commission to address Potter's concerns with the conduct of the investigation. I do not believe that the Court of Appeal's comments were intended to enlarge the Commission's authority beyond what is in the *Act*, nor could they.

53. Section 6(2) and (3) of the *Act* states:

> (2) Any person or company directly affected by a decision of the Director may, by notice in writing sent by registered mail to the Commission within thirty days after the mailing of the notice of the decision, request and be entitled to a hearing and review thereof by the Commission.
>
> (3) Upon a hearing and review, the Commission may, by order, confirm the decision under review or make such other decision as the Commission considers proper.

54. Section 151 of the *Act* states:

> 151 The Director or the Commission may, where in his or its opinion to do so would not be prejudicial to the public interest, make an order on such terms and conditions as may be imposed revoking or varying any decisions made under this Act or the regulations.

55. In 2006, the Commission had issued the Investigation Order and the investigation was ongoing. The Director presumably made various decisions in the course of the investigation. After the Court of Appeal issued its decision, the Director issued the Statement of Allegations.

56. The investigation is now complete and the allegations have been discontinued. If there was an ongoing investigation or outstanding allegations, the decision of the Commission or Director could be reviewed pursuant to sections 6(2) and 151 of the *Securities Act*. There is now no ongoing investigation and no outstanding allegations. There are no current decisions of the Director or Commission to review, revoke or vary.

57. Potter, Wadden and MacLeod do not request revocation or variation of the decisions or the decision to discontinue the allegations. Rather, they seek declarations with respect to the conduct of the investigation. As set out above, the majority of the remedies sought in the Motions have been granted in the process to date. A number of additional remedies will be granted by order following this decision.

58. I conclude that there are no current decisions of the Director or Commission to be reviewed, revoked or varied and that the Commission does not have authority under the *Securities Act* to issue declaratory relief.

MONETARY COMPENSATION

59. Potter, Wadden and MacLeod seek monetary compensation for the time, effort, resources and expenses incurred to defend themselves against the now discontinued allegations. I do not find any authority under the *Act* for an award of compensation in favour of Potter, Wadden and MacLeod.

60. A person or company that breaches the *Act* is subject to the penalties set out in sections 129, 134 and 135. The *Act* does not provide for damages against Staff or the Commission. There is nothing in the *Act* to suggest that the Commission may award monetary compensation in favour of a respondent.

61. What Potter, Wadden and MacLeod seek is in effect an award of costs. The *Act* provides for payment of costs to the Commission in connection with an investigation, prosecution or hearing:

> **Payment of costs**
>
> 135A The Commission may, after a hearing, order a person or company convicted of an offence or against whom an order has been made pursuant to Section 133, 134 or 135 to pay costs in connection with the investigation and prosecution of the offence or the investigation and conduct of the proceeding in respect of which the order was made pursuant to Section 133, 134 or 135, such costs not to exceed the costs prescribed in the regulations.
>
> **Costs of hearing**
>
> 135B Where the Commission, after a hearing and review of a decision, order or ruling of a self-regulatory organization, considers it to be in the public interest to make an order, the Commission may order the self-regulatory organization or the person or company which requested the hearing and review to pay the costs of or related to the hearing and review that are incurred by or on behalf of the Commission.

62. Pursuant to these sections of the *Act*, a person or company convicted of an offense may be ordered to pay costs, but there is no provision for costs to be awarded against Staff or the Commission. Likewise, after a hearing and review of a decision, order or ruling of a self-regulated organization, the Commission may order the self-

regulated organization or the person or company that requested the hearing to pay costs incurred by the Commission, but these are not costs in favour of an individual defending themselves against allegations.

63. The *Act* does not provide for costs in favour of a respondent, even when a respondent has successfully defended the proceeding or the proceeding has been abandoned. In *Canadian Securities Regulation*, 4th ed. (Markham: LexisNexis 2006), the authors state at page 410:

> It is interesting, and somewhat disturbing, to note that the Commission may not order costs against Commission staff. That is, there is no "loser pays" system in place (except in Manitoba). In our view, the Commissions should be granted the authority to award costs to the respondents, where appropriate.

64. In *Tindall* (2000), 23 OSCB 6889, the Ontario Securities Commission recognized that there is a "lack of corresponding authority for a respondent to seek costs" under the Ontario *Securities Act*. There is the same lack of authority under the Nova Scotia *Act*. It may be appropriate to discount the costs awarded against an unsuccessful respondent if certain allegations are abandoned or not sustained (*KCP Innovative Services Inc.*, 2009 ABASC 521), but there is no authority for awarding costs against Staff.

65. While it may appear unfair that costs may be awarded against a respondent if he or she loses, but not in favour of a respondent if he or she is successful, that is clearly the effect of the *Act* and I have no authority to order monetary compensation or costs in favour of Potter, MacLeod and Wadden.

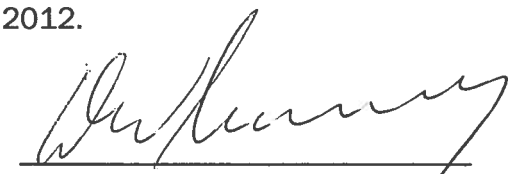
CONCLUSION

66. Staff shall return to Potter the material returned to the Commission following the April 19, 2006 Order of the Court of Appeal. Staff shall return the CDs containing the KHI email servers and any paper-based copies thereof to Potter. If Potter prefers, these materials may be destroyed rather than returned to him. This shall be done within sixty days of this decision.

67. Staff shall not use the fruits or work product of its investigation in any amended or new investigation.

68. There will be no hearing on the Motions given that the remedies sought have already been granted, will be granted in this decision or are not within the Commission's authority to grant.

Dated at Halifax, Nova Scotia this 4th day of December 2012.



Commissioner David W. Gruchy