IN THE MATTER OF THE SECURITIES ACT,
R.S.N.S. 1989, CHAPTER 418, AS AMENDED

-AND-

IN THE MATTER OF
Allen E. Sheito and Gary A. Woods
(collectively, the Respondents)

Reasons for Decision of
Nova Scotia Securities Commission

Hearing Date:	August 29, 2012
Decision Date:	September 20, 2012
Panel:	Hon. David W. Gruchy, Q.C., Chair John A. Morash, C.A., C.B.V., F.C.M.A., Commissioner, and Paul E. Radford, Q.C., Commissioner
Counsel:	Jane O'Neill, for Respondents; and, Stephanie Atkinson, Enforcement Counsel, for Staff

1. Following are the reasons of our decision in the motion made by the Director of Enforcement, Nova Scotia Securities Commission for the following orders:

   (1) That the Respondents disclose copies of all preliminary or draft reports of their expert and any file materials pertaining to any reports of their expert, including any communications, discussions, correspondences, etc. which form, or help form, the basis of any draft reports and the final report of their expert ("Requested Materials").

   (2) That the Respondents deliver a list of documents ("8.12 List") protected by Part 8.12 of Rule 15-501 - General Rules of Practice and Procedure ("Rules"), as required by Part 8.3e of the Rules.

2. A brief review of the steps in the proceedings will highlight the issues involved.

3. An initial letter dated June 12, 2009 from the then Deputy Director, Compliance and Enforcement of the Commission was sent to each of the Respondents referring to a preliminary IIROC investigation report pertaining to trading in securities of Mountain Lake Resources Inc. ("MOA") for one period from January 12, 2009 to February 10, 2009 indicating a suspected infraction of trading in securities of MOA on undisclosed material information. The letter requests an opportunity to obtain a voluntary statement from the Respondents in the course of the Director's preliminary investigation.

4. A second letter dated November 30, 2009 from the Director of Enforcement to the Respondents refers to a meeting with the Respondents having taken place on June 18, 2009 and concludes that based on the interview and file materials, proceedings will not be commenced under Section 82 of the *Securities Act* (being the Section relating to trading on undisclosed material information) but rather will be commenced with respect to initiating and completing trades in MOA securities without investment intent as a violation of Nova Scotia Securities laws amounting to a "contamination of the provision of IN 33-101 3-1(a)". We understand the reference of IN 33-101 was corrected in the subsequent e-mail to refer to NI 23-101 3-1(a), and presumably "contamination" is intended to be "contravention".

5. National Instrument ("NI") 23-101 3-1(a) provides as follows:

> "A person or company shall not, directly or indirectly, engage in, or participate in any transaction or series of transactions, or method of trading relating to a trade in or acquisition of a security or any act, practice or course of conduct, if the person or company knows, or ought reasonably to know, that the transaction or series of transaction, or method of trading or act, practice or course of conduct
>
> (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or a derivative of that security; or..."

6. In a third letter dated November 21, 2011, the Director of Enforcement wrote to legal counsel for the Respondents referring to further investigation and a conclusion reached that the Respondents' "course of conduct relating to shares of MOA in late 2008 and early 2009 resulted or contributed to a misleading appearance of trading activity in those shares contrary to Section 132A(a) of the *Securities Act* and Part 3.1(a) of National Instrument 23-101" and stating that Staff will commence proceedings and seek sanctions and/or penalties and again inviting settlement discussions.

7. Section 132A(a) of the *Securities Act* provides as follows:

> "A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities or derivatives of securities that the person or company knows or reasonably ought to know
>
> (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or derivative of a security; or
> (b) perpetrates a fraud on any person or company.

8. On January 5, 2012, the Director of Enforcement issued a Statement of Allegations in respect of the period from December 4, 2008 to January 21, 2009, during which the Respondents entered bids for MOA shares without any bona fide investment intent and for the purpose of supporting the publicly reported price of those shares or for keeping the publicly reported price of MOA shares from falling due to selling pressure contributing to a misleading appearance of trading activity in MOA shares contrary to Section 132A(a) of the Act and Part 3.1(a) of National Instrument 23-101.

9. The Director of Enforcement engaged an expert, Kim Stewart of Market Resolution Inc. to prepare an expert's report. That report was dated January 31, 2012.

10. Counsel for the Respondents engaged Dean Holley of CMC Capital Market Consulting Corp., whose expert report is dated May 24, 2012. That report commences as follows:

> "You have asked me to reply to the report of Kim Stewart dated January 31, 2012, in relation to trading in the shares of Mountain Lake Resources Inc. ("Mountain Lake" or "MOA") in December 2008 and January 2009. Ms. Stewart's report opines on trading activity undertaken by Mr. Allen E. Sheito and Mr. Gary Woods in the shares of Mountain Lake during the period from December 4, 2008 to January 21, 2009 (the "Relevant Period"). My analysis and conclusions regarding the opinions expressed by Ms. Stewart are set out below".

11. The Respondents' expert's report states in paragraph 4 as follows:

> "I have based my conclusions on an analysis of the materials listed in the schedule at Tab 2, on the assumptions you have provided, on publicly available trading data from Stockwatch.com, on my knowledge of industry standards and practices regarding equity trading on the TSX Venture Exchange ("TSXV") and on my years of experience in the investment industry."

12. Tab 2 of the Respondents' expert's report is a list of documents consisting primarily of correspondence to or from the Nova Scotia Securities Commission, the partial transcript of the interview of the Respondents in June 2009, relevant trading data and the report of Kim Stewart. Of note, the information reviewed does not recite an engagement letter from the Respondents or their counsel or correspondence with Respondents' counsel or other file materials whether before or after the date of the expert report of Kim Stewart.

13. At the hearing, the panel asked counsel for the Respondents what date Dean Holley had been retained but counsel was not able to answer as she did not have that information available.

14. Counsel for the Director of Enforcement submitted a brief with copies of numerous court decisions from civil and criminal cases establishing the principle that litigation privilege

has been narrowed considerably when it comes to producing documents that relate to information in the possession of an expert who has been called on by a party to testify at a trial.

15. In *Horodynsky Farms Inc. v. Zeneca Corp (C.O.B. Zeneca Agro)* [2006] O.J. 3012, E. E. Gillese, J. A. of the Ontario Court of Appeal in Chambers referred to *R. v. Stone*, [1999] 2 S. C. R. 290 whereby Binnie, J. said in relation to expert's testimony:

> "[Once] a witness takes the stand, he/she can no longer be characterized as offering advice to a party. They are offering an opinion for the assistance to the court. As such, the opposing party must be given access to the foundation of such opinions to test them adequately."

16. Gillese J.A. continues at paragraph 41:

> "Expert opinion tendered by a party is a unique type of evidence. Although generally retained by one side to the litigation or the other, experts are expected to be neutral. Their testimony is meant to assist the court and the trier of fact, not to bolster the theory of the case presented by one of the two sides. Their status of experts derives, in significant measure, from the assumption that they will offer the court objective opinions on which the court is entitled to rely".

17. And finally in paragraph 42:

> "Rule 31.06(3) is to be interpreted bearing in mind the role of the expert and the recent jurisprudence of the Supreme Court of Canada and this court. As such, a broad approach is warranted, one that – in the words of the Supreme Court of Canada in Stone – would enable opposing counsel to have access to the "foundation" of the expert's opinions. This approach would require disclosure of all foundational information for the expert's report whether or not the final findings, opinions or conclusions expressly reflect that information".

18. In *Horodynsky Farms* the court ordered the Appellants/Responding Parties to disclose a memorandum prepared by their prior counsel in relation to a conversation with their expert witness.

19. Counsel for the Director argues that these principles have been adopted and applied in numerous other cases and recognized in criminal proceedings by the Supreme Court of Canada in *R v. Stone* (supra) and should apply in proceedings before this Commission. Counsel for the Respondent submits that these principles should not apply to a respondent in a proceeding before the Securities Commission because its Rules place no obligation on respondents to disclose all relevant documents and only Staff is obligated to make full disclosure. She submits that this is a result of the differences in wording between Section

8.1 of the Rules which requires staff to make available for inspection by every party of "all documents and things which are in possession or control of staff that are relevant to the hearing...." and the lesser requirement for respondents under Section 8.3 to produce documents, materials, identity of witnesses, summary of witnesses testimonies and documents on which they intend to rely at the hearing. Counsel for Respondents notes that Counsel for the Director has not been able to cite a reported decision of any securities commission requiring a respondent to disclose the full foundational information of an expert.

20. Counsel for the Respondents submits the information to be disclosed by a respondent who calls an expert to testify should be limited to that specified in Rule 8.9 which provides as follows:

> "8.9 Where a Party intends to call an expert to give evidence at a Hearing, written notice shall be given by that Party to the other Parties and to the Secretary as soon as reasonably practicable, but not less than fifteen (15) days before the date on which the Hearing is to commence, informing of the intent to call the expert and the issue upon which the expert will be giving evidence, and attaching a copy of the report prepared and signed by the expert containing the following information;
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> a. The name, address and qualifications of the expert;
> b. The substance of the expert's evidence; and
> c. A list identifying the Documents, if any, which the expert considered."

21. Counsel for the Director refers to several general provisions in the Rules which provide as follows:

> "4.1 The Commission may, on its own motion or on an ex parte application of a Party, issue a:
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> a. Summons to appear at a Hearing and give evidence on oath orally or in writing, or on solemn affirmation if the witness is entitled to affirm in civil matters; or
> b. A notice to produce Documents and things,
>
> as the Commission deems requisite to a full hearing of the matters in the Hearing."
>
> "8.4 A Party may, subject to section 8.12, seek an order of disclosure in advance of a Hearing by bringing a motion before the Commission."
>
> "18.4 At any time during a Hearing, the Commission may order that:

a. A Party provide to another Party and to the Commission such particulars as the Commission considers necessary for a full and satisfactory understanding of the subject of the hearing; and
b. Any other disclosure required by the Rules be made by a Party, within such time and on such conditions as may be specified by the Commission."

22. In *Horodynsky Farms*, the court considered Civil Procedure Rule 31.06(3) then in effect in Ontario regarding opinions of experts which refers to disclosure of the "findings, opinions and conclusions" of an expert. The Court interpreted those words broadly to give effect to the requirement for disclosure of foundational information in files of an expert who is called to testify as enunciated in paragraph 33 and 41 of that case. We interpret that case and other cases cited by Counsel for the Director to be generally applicable to expert testimony presented to a trier of fact so as to allow that expert opinion to be tested for independence, objectivity and reliability. Thus we conclude that Section 8.9 of the Rules should be interpreted broadly such that the disclosure required by Section 8.9(c) of "Documents, if any, which the expert considered" should be interpreted to require disclosure of all foundational information referred to by the expert in the formation of the opinion produced.

23. In our view this principle is not confined to civil proceedings where equal disclosure obligations are prescribed but also applies to regulatory proceedings before the Commission where the Director's general obligation of disclosure under Rules 8.1 and 8.2 are greater than a respondent's under Rule 8.3. However, once a party, whether the Director or a respondent, decides to call an expert to give expert opinion evidence, litigation privilege is waived in respect to a broad category of information which is relevant to the expert in drawing his conclusions and obligates disclosure of that information to allow the Commission to evaluate the objectivity of the expert's opinion. This principle was recognized by the Supreme Court of Canada for criminal cases in *Stone*. We consider that regulatory tribunals, such as this Commission, which must act in the public interest, are so acting by applying this principle in proceedings before us.

24. Generally, foundational information will include prior draft reports; any file materials of the expert pertaining to his or her reports, including any communications, discussions, correspondences which form or help form the basis of his or her reports. A corollary principle is that the foundational information is not restricted to what the expert actually relied upon but rather extends to that which was examined by the expert relating to a matter in issue. Disclosure would allow an expert's opinion to be tested by comparing the information in the expert's possession, and questioning why other information was not considered, considering whether the expert's opinion was influenced by the request of counsel or by information provided by counsel or if there were any other influences brought to bear on the expert.

25. In *Browne (litigation guardian of) v. Lavery*, [2002] O.J. 564 Ferguson J. of the Ontario Superior Court of Justice in paragraph 59 questioned as follows:

> "It is difficult to understand how a determination could be made as to what is influential. Would counsel decide? Would the expert decide? Why should this decision not be open to scrutiny? The expert might not realize or acknowledge the extent to which information provided has influenced his or her opinion"

And in paragraph 62:

> "In *Stone* the court did not require the trial judge to consider the content of the report before ordering its production. In my view this indicates that the court need not conduct a *voir dire* in this regard. The *Stone* decision also implies that there is no need to rely on counsel's vetting the material or rely on the expert doing so because the court did not suggest that either instructing counsel or the expert should be involved in the decision. The Judge simply ordered production."

Finally, in paragraph 63:

> "*Stone* makes clear that production should be ordered even if involves the disclosure of information, such as statements of the client, which would otherwise be subject to solicitor and client privilege."

26. There is a narrow category of material in the hands of the expert which may not be required to be disclosed and remain subject to litigation privilege. This includes communications with the expert to discuss what information the expert needed to prepare an opinion and secondly communications with the expert to discuss questions which might be put to the expert or to the opposing expert at trial, though Ferguson, J. states that if such communications took place before the preparation of the report it would be best if they were producible because they could influence the opinion (*Browne*, paragraphs 67 and 68). In *Flinn v. McFarlane* [2002] N.S.J. 547, McAdam J. of the Nova Scotia Supreme Court concluded that a portion of a file of a family doctor whose expert evidence was to be submitted which consisted of comments by the Plaintiff about his lawyer's handling of his legal case need not to be disclosed unless they contain information or facts or suggested facts that were considered by the expert in rendering her opinion.

27. In *Lax Kw'alaamns Indian Band v. Canada (Attorney General)*, 2007 BCSC 909 Justice Satanove deals with the obligation to disclose experts' file material pertaining to an expert witness's advice for cross examination of the other side's witnesses or trial strategy. Justice Satanove states in paragraph 15 that such exceptions are not blanket exceptions but "the court must balance the competing policies of disclosure versus privilege and determine what is fair in each particular case". Justice Satanove reviewed the material of several of the Defendant's expert witnesses and ruled on whether material was producible.

28. Justice Satanove distinguished between a situation where an expert's advice on cross examination or trial strategy is given after the expert has finalized his or her opinion, from a situation where the expert is simultaneously formulating her opinion and providing cross examination advice on the same issue, as was the case in the matter before her. With one expert's material Justice Satanove found in paragraphs 22 and 26 that the expert was simultaneously researching and finalizing her own expert report while consulting with counsel on the other expert reports and testimony, and since it was not possible to neatly divide her consulting role from the expert role, there is an overlap, and she ordered significant portions of the material be disclosed.

29. Secondly in paragraphs 18 through 20 Justice Satanove dealt with a series of emails between the expert and counsel for the Defendant who retained her which were sent after the expert delivered her report and which contained advice by the Defendant's expert for cross-examining the Plaintiff's expert. Although normally subject to litigation privilege, Justice Satanove held that these emails must be disclosed because they dealt with the same subject matter as in her report, notwithstanding that her report was delivered to opposing counsel a month before and reflected the expert's opinion and credibility with respect to the subject matter of her report.

30. We are called upon by counsel for the Respondents in the motion before us to exclude from disclosure any documents relating to materials of the Respondents' expert for a number of reasons. First, she submits that any materials arising prior to the date of the report of the Commission's expert, should be excluded because the Respondents' expert's report is a critique of that report and thus until the Respondents had a copy of it, no earlier material would be relevant to it. Secondly, she submits any materials and advice relating to the trading period mentioned in the Director's first letter, namely from January 12, 2009 to February 10, 2009 be excluded because it is for a different period and thus is not relevant to the period of trading in the Statement of Allegations, namely from December 4, 2008 to January 21, 2009. Thirdly, the Respondent says their expert's materials and advice with respect to the insider trading issues arising out of the Director's first letter is not relevant to the present proceedings with respect to market manipulation allegations set out in the Statement of Allegations. Finally Respondents' counsel urges that such materials and advice are from an expert who was acting as a confidential advisor to the Respondents – a claim for litigation privilege.

31. As to relevance, the Respondents submit that relevancy to the Statement of Allegations should be the test and that the burden should be on the Director to prove relevance.

32. Counsel for the Director states that as the trading periods are short and overlap no distinction should be drawn between materials relating to the trading period set out in the Director's first letter and the trading period in the Statement of Allegations. Because the periods are so short and overlap and involve trading in the same securities any comments about conduct relating to insider trading during the similar periods may be relevant to market manipulation.

Conclusions on First Order Sought for Disclosure of Requested Materials:

33. We dismiss the Respondents' claim that expert advice is subject to litigation privilege, as it is established by the jurisprudence referred to above (of which we find *Horodynsky Farms* particularly persuasive) that when calling an expert to give an expert opinion, a party waives litigation privilege with respect to that expert's opinion and all foundational information relating to his or her opinion. Allowing a party to rely on an expert witness's testimony at a hearing without providing in advance the foundational information to allow that witness to be cross examined would cause serious problems at the hearing, including the high likelihood of a motion for disclosure and adjournment.

34. We conclude that what must be disclosed is not solely that which is relevant to the Statement of Allegations but whether such material would be relevant in assessing the independence, objectivity and reliability, of the Respondent's expert.

35. Although the report of Dean Holley was specifically written to analyze the report of Kim Stewart, Mr. Holley may have been retained prior to the creation of Kim Stewart's report. Thus, the information in Mr. Holley's file forming the foundations on which he based his opinions may well pre-date Kim Stewart's report. We accept there is a jurisprudential principle applicable to this proceeding of implied waiver of litigation privilege and an obligation to disclose an expert's foundational information to provide information which will allow a party to cross examine and challenge the independence, objectivity and reliability of the expert. Thus in the present case, if Dean Holley were retained by the Respondents prior to the date of Kim Stewart's report, the material considered by him at that time may well be relevant to foundations of his opinion and have had an effect on his response to Kim Stewart's report and therefore would be producible.

36. We consider that, for example, if the Respondents' expert had been retained to provide advice on whether the Respondents' conduct constituted insider trading and in making comments had also commented about how such conduct might be viewed if there were allegations of market manipulation, then such comments would most certainly be relevant to assess how the expert may have changed his opinion when the Statement of Allegations was issued including an allegation of market manipulation.

37. However, there may be information that was only relevant to reacting to or providing information with respect to the investigation of the insider trading that is not relevant to the ultimate allegation with respect to market manipulation.

38. As the above decisions clearly state (most clearly set out in the *Browne* case) the onus of proving that the expert's information is not producible is on the party who wishes not to disclose it, not on the party who wants it produced. In short, all relevant information which Dean Holley had accumulated, including correspondence with the Respondents' legal counsel, notes and meetings, other communications, draft reports and instructions letters that touch on the trades referred to in the Statements of Allegations must be

produced. Given that there is a ten day overlap in the period of the Respondents' trading activities from the one month period initially communicated by the Director to the one month period over which the Statement of Allegations covered, counsel for the Respondents submits that information concerning its first period is not relevant and is not producible but we conclude that Respondents have the onus to show that such information does not relate to the formulation of the Respondent's expert's opinion in relation to the market manipulation allegations.

39. Our Order, has thus been drafted in such a manner as to create an onus on the Respondents and their counsel to disclose all file materials of Dean Holley that may have contributed to his opinion and report and that in the event of any doubt, counsel for the Respondents may upon motion to the Commission submit the material and seek a ruling as to whether disclosure of such material is required.

Conclusions on Second Order Sought for 8.12 List:

40. The second order sought in the motion of the Director for the Respondents to deliver a list of documents protected by Part 8.12 of the Rules pursuant to Part 8.3e of the Rules is dismissed. The Respondents' obligation to disclose foundational information of its expert is covered by the first order made. The Respondents' obligation to disclose other material is limited under Part 8.3 of the Rules to those documents the Respondents' intend to rely upon at the hearing, as discussed earlier in this decision. The Respondents cannot rely on material at the hearing but refuse to disclose it on the basis it is privileged – the Respondents either produce it so they can rely on it at the hearing or they choose not to produce it and are thereby not entitled to rely on it at the hearing. Thus in the present case we see no need for the Respondents to produce an 8.12 List.

Dated at Halifax, Nova Scotia this 20th day of September, 2012.

Hon. David W. Gruchy, Q.C., Chair

John A. Morash, C.A., C.B.V., F.C.M.A., Commissioner

Paul E. Radford, Q.C., Commissioner