IN THE MATTER OF THE SECURITIES ACT,
R.S.NS. 1989, CHAPTER 418, AS AMENDED (the Act)

AND

IN THE MATTER OF
AN INVESTIGATION IN RESPECT OF
KNOWLEDGE HOUSE INC.
-AND-
IN THE MATTER OF THE MOTIONS OF DANIEL POTTER, KNOWLEDGE HOUSE INC.,
CALVIN WADDEN AND KENNETH MACLEOD

DECISION

On July 24, 2009, staff's counsel, Heidi Schedler, requested a telephone conference with me, Daniel Potter, representing himself and Knowledge House Inc., Dale Dunlop, QC, representing Calvin Wadden and Kenneth MacLeod and Tim Hill, representing Raymond Courtney was also given notice of the conference, but did not appear or participate.

The purpose of the conference, as stated by Ms. Schedler, was to address a request by Mssrs. Potter and Dunlop to Ms. Schedler to adjourn cross-examination of IIROC investigators then scheduled for the following week. Mr. Dunlop explained that disclosure of IIROC material, consisting of 116,000 pages, had been completed on July 10, 2009, and the parties required time to review that material for relevance, and to obtain a certain promised computer program to facilitate such a review. Ms. Schedler objected to the adjournment, particularly as it

was Staff's position that cross-examination should be limited to the scope provided by Commissioner Baxter's order of January 17, 2007. She gave "five points", in support of her position.

In my view, Ms. Schedler's position expanded the scope of the subject matter of the conference from a mere request for adjournment to a motion, in effect, to limit the proposed cross-examination.

Having heard the parties, I rendered orally a tentative ruling as follows:

"Ruling

> The Chair: I am going to speak extemporaneously about the matter. I am inclined to say I need more argument in writing from you but I don 't want to do that, it will just simply delay matter even further.
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> An adjournment will be granted but we are going to have to come to grips with what the extent of the discoveries will be. Commissioner Baxter was very clear in his decision at that time and it was entirely appropriate at that time. I have forgotten the dates and I do not the material here in front of me.
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> But since that time there was the application for a complete disclosure of the IIROC material. That was granted under Section 29(AA) of the Act, a relatively recent amendment to the Act which had the effect, really, of a complete disclosure of the Staff case and that included the IIROC material.
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> It was my intention, and if necessary a further order will be granted to this effect, that the discoveries will be full and complete. It seems to me, and I am speaking now perhaps as a former judge of the Superior Court, that a full disclosure is absolutely essential in a quasi-criminal matter such as this. Mr. Baxter's order was somewhat limited. It was my intention to, and it is my intention, to go around any such restrictions. The discoveries should be full and complete and discoveries may be based on all the material available and which has been disclosed. I recognize and had not really foreseen that the volume material disclosed.
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> I recognize and had not really foreseen that the volume of material disclosed recently would well likely result in this application. We had sufficient material, sufficient information from Ms. Schedler to realize that there would hundreds of thousands of documents.

> I am somewhat disturbed by the fact that a lot of new relevant material is involved and I would hope that somehow or other can find the technological aspects or technological ability to get around the problem but in the meantime an adjournment is absolutely essential.
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> I am going to adjourn the matter simply for one month at this point and one month from now I will convene a further conference to find out where we are. I do not want this matter to drift at all."

Ms. Schedler, then (quite properly) requested "an actual hearing" to determine the scope of the discoveries, to which request I agreed. I subsequently asked the parties to submit written submissions upon which I would render a decision.

I have received and reviewed written submissions of Ms. Schedler, Mr. Potter and Mr. Dunlop.

On August 20, 2009, I notified the parties of my conclusions which were as follows:

> "1. The discoveries originally scheduled to be begin on July 27, 2009 are adjourned to a time and place to be determined by mutual agreement of the parties, or failing that, further order of the Commission.
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> 2. Commission Staff shall forthwith provide Dale Dunlop, Tim Hill and Dan Potter with any software needed to allow access to the electronic materials produced on July 29, 2009 together with reasonable instruction and training on the use of such software.
> 3. The scope of the discoveries to be conducted pursuant to this Order is as directed by Commission Baxter in his December 11, 2006 decision together with a full scope of discovery regarding all material produced on July 29, 2009 in relation to the pending motions of Dan Potter, Knowledge House Inc., Calvin Wadden and Ken MacLeod and any issues identified in the Notice of Hearing in this matter."

In coming to these conclusions, I attempted to put into context the matter presently before me with the overall objective of the proceeding.

In July, 2009, I rendered a decision with respect to the matter of solicitor-client privilege. I concluded that decision with a direction concerning "future conduct". It remains my intention to attain the objectives I set forth therein.

Commissioner Baxter's order January 17, 2007, clearly restricted the scope of the cross-examination of the investigators then contemplated. Subsequent to that order, however, I ordered disclosure of the "IIROC material", a subject which I will address below.

There then followed a long series of delays in that production, which production has purportedly now been completed. I use the word "purportedly" as I have not been privy to its content for reasons set forth in my decision concerning solicitor-client privilege.

Mr. Dunlop has said the disclosure consists of approximately 116,000 pages, poorly indexed, much of which may be "highly relevant" and much of which may be totally irrelevant. I make no finding on that matter, but I do remark that Mr. Dunlop is a respected and senior counsel and is an officer of the Court.

It is clearly open to me to restrict the cross-examination of the investigators as Mr. Baxter had ordered; but that would leave outstanding the result of the IIROC disclosure, a matter which had clearly not been contemplated by Mr. Baxter. That disclosure only came about after my decision concerning the effect of section 29 AA(6) of the *Securities Act*.

While I have not had access to the IIROC disclosure, I believe I may infer that it is so massive that much of the material will require explanation and exploration. Obviously, an adjournment is warranted. In addition, I can think of no better method of obtaining the result of explanation and exploration than by discoveries/cross-examination and re-examination.

To restrict the contemplated discovery to the ambit of Commissioner Baxter's order would result in a two step process:

A. One restricted to the motions for the revocation or variance of the investigative order as originally requested by Mr. Potter; and

B. An examination regarding the material produced on July 29, 2009, both in relation to the pending motions of Mr. Potter, Knowledge House Inc., Calvin Wadden and Ken MacLeod and any issues identified in the Notice of Hearing issued in this matter.

Combining the latter process would make possible the compliance with my request for "future conduct" as set forth above.

Certain specific points were raised by the parties in their submissions to me, which I will now address.

The Compliance Officer of the Commission, Mr. Peacock, filed certain affidavits in support of his allegations. The affidavits showed that he relied upon what is now called IIROC information. In my view, a cross-examination or discovery of Mr. Peacock and other investigators upon whom he relied became necessary.

Ms. Schedler submitted that all parties have had the affidavits of the various investigators for some time. Those affidavits have not been accessed by me or the Commission staff , as I have stated on several occasions it is not my intention to explore the specific evidence so as to avoid the tainting of an eventual trial.

The cross-examination was set to begin on July 27, 2009, but in view of the size of the disclosure and on the assumption that the cross-examination would extend to the content of the disclosure, an application for adjournment was appropriate in these circumstances. While no notice was given or of an intention to expand the scope of the conference, the transcript shows that staff without notice to the other parties or to me made submissions to limit the extent of the

discoveries. Indeed, Ms. Schedler made a submission consisting of five prepared points with respect to the scope of the discovery. I conclude that the expanded scope of the discovery should not have been a surprise to any of the parties.

Staff has taken the position that I should not vary or revoke the previous order granted by Commissioner Baxter. I reject that position. The situation now before me, in view of the disclosure is vastly different from that addressed by Commissioner Baxter and in my view, for practical purposes, the extent of the discovery should be expanded.

Section 151 of the Securities Act, reads as follows:

> "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 the Act or the regulations, R.S., c.481, s.151; 1990, c.15, ss. 79, 80."

It is my conclusion that this section specifically allows a revocation or variation if it is not prejudicial to the public interest. I fail to see how a full and frank disclosure in the manner contemplated would be prejudicial to the public interest.

In support of Staff's position with respect to the question whether the Baxter order could be revoked or varied Ms. Schedler referred to # 27A.3(a) of Practice and Procedure before Administrative Tribunals, as follows:

> "Just as an agency's initial proceedings may be subject to the requirements of fairness, equally (and logically to the same extent) rehearings or reconsiderations should be subject as well. Thus, in discussing the authority of the Saskatchewan Public Utilities Commission to exercise its statutory power to vary a decision, Justice Bayda stated:

> It is fair to read subs 12(1) in a way that vests the commission with the power to vary and rescind with a view to changing the effect of an earlier order, but any such power must be circumscribed by the tradition of natural law and procedural fairness which dictates that the power can be exercised only after all of the parties to the earlier order have been given notice of the proposed change and have been given an opportunity to be heard in respect thereof. Moreover, the power can be exercised by the commission only in a judicial manner, that is, by the commission weighing all of the factors presented to it and coming to a reasoned decision consonant with the conscience and good faith of the commission members.
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> An agency which has received a request to reconsider a matter of which is considering acting on its own motion faces two decisions. First, should it even think about reconsidering the original decision at all. And secondly, if it does decide to reconsider the original decision what should be done with that original decision if anything.
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> To the extent that fairness applies to the original exercise of a reconsideration power. A preliminary decision as to whether the decision –maker feels that it is appropriate to reopen the matter at all; and if the decision to reopen is made, the subsequent reconsideration of the substantive issue. To the degree that the agency's decisions are subject to the principles of fairness, both of these aspects of a reconsideration decision are similarly subject to those principles.

I conclude that in the circumstances now before me the parties had or now have adequate notice of my intention to allow full discovery and fairness dictates that it should be allowed. The original decision will stand, but will be expanded to allow the full discovery.

It has been my stated intention to apply R v. Stinchcombe (1991), 68 CCC (3^{rd}) 1 (S.C.C.) and order full disclosure of the Commission's case. I know of no reason why this case should not apply.

There is no Nova Scotia jurisprudence which applied Stinchcombe to Nova Scotia Securities Act proceedings. There is, however, a relevant decision of the Ontario Court of Appeal: Deloitte & Touche LLP V. Ontario (Securities Commission) (2002), 159 O.A.C. 257. The Ontario Securities Commission commenced proceedings under section 127 of the Ontario Securities Act, R.S.O. 1990, c. S. 5 against Philip Services Corporation. Section 127 of the

Ontario Act is similar to section 134 of the Nova Scotia Act in that it contemplates penalties such as cease trade orders and prohibition of a person from acting as a director of an officer of an issuing company. There is no penalty of imprisonment pursuant to section 127 of the Ontario Act.

The Ontario Securities Commission ordered commission Staff to disclose documents compelled from Deloitte & Touche in the course of the investigation. Deloitte & Touche successfully appealed to the Division court, who quashed the Commission's order. The mater was subsequently appealed to the Ontario Court of Appeal, who upheld the Commission's order of full disclosure. Doherty, J.A., writing for the Court, states at para.16:

> "The Commission accepted that Staff had a disclosure obligation to the Philip respondents. It described the scope of that obligation in terms of the concept of relevance as developed in R. v. Stinchcombe (1991), 68 C.C.C. (3d) 1 (S.C.C.) and subsequent cases."

At para.47 Doherty, J.A. states:

> "Considering the focus of the allegations against the Philip respondents and the description of the documents, albeit generic, I think it was open to the Commission to reasonably conclude that all of the documents cleared the relevance threshold described in Stinchcombe, *supra*."

The decision of the Ontario Court of Appeal was upheld by the Supreme Court of Canada: [2003} 2 S.C.R. 713. Iacobucci, J, writing for the Court, states at para. 26.

> "The use of the Stinchcombe relevance standard and its application in this case by the [Ontario Securities Commission] were both reasonable decisions."

Given the above, it is reasonable and appropriate for the disclosure standard set out in Stinchcombe to be applied to proceedings before the Nova Scotia Securities commission in the matter at hand.

Ms. Schedler relied on Section 29A of the Securities Act which prohibits disclosure in the circumstances set forth therein, but that has been amended by section 29AA(6), which has been the subject of a previous ruling by myself.

I agree with Ms. Schedler that disclosure should be limited to that necessary to serve the policies of the Act. I have not seen the disclosure but I rely on Mr. Dunlop's assertion that it contains material which he claims to be totally irrelevant yet it was disclosed. The parties are entitled to know why it was disclosed and if it is relevant to the matters before this Commission for some any reason. I have considered Ms. Schedler's correspondence in which she advised some disclosure might be irrelevant but that position is not acceptable in the circumstances described to me by Mssrs. Dunlop and Potter. Commissioner Baxter said

> "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 Applicants to advance the allegations in their Applications."

I agree with Commissioner Baxter in the circumstances before him. He considered that Staff would give a measured disclosure of relevant information. Obviously, if I accept Mr. Dunlop's assertion that did not occur then now the parties must be given the opportunity to review the material with IIROC to establish what is relevant. Such an examination must not be and will not be a fishing trip.

In the past, there has been a question whether the IIROC material is "in possession of Staff". I have ruled in the past that IIROC, for the purposes of this investigation and as a result of Mr. Peacock's reliance on the IIROC material, has been considered Staff or an agent of Staff.

Ms. Schedler has submitted that the Commission must consider the public interest over the interest of the parties. In my view, the concept of public interest does not exclude the interest of the parties in a full and fair disclosure. A full and fair disclosure supported by oral

examination will not undermine investors' confidence. Indeed, it seems to me that such confidence will be enhanced by the disclosure. The public interest may well include an examination to determine if Staff has acted in accordance with its duties and/or a consideration of the effects of a Charter breach.

Ms. Schedler has said there is a lack of "any new evidence or information which would justify examination". I find it very difficult to accept such a position when, as Mr. Dunlop asserts, 116,000 pages of material have been disclosed.

Pursuant to the Deloitte case the Commission is "obligated to order disclosure only to the extent necessary to carry out its mandate" . The disclosure ordered pursuant to section 29AA(6) was for relevant material. It was incumbent upon Staff to vet the IIROC material upon which Mr. Peacock relied. If Staff has failed to do that (as Mr. Dunlop alleges) then the parties must be given an opportunity to examine and test the material disclosed.

I remark that there is a considerable difference between the Nova Scotia method of discoveries and that carried out in certain other provinces. In Nova Scotia discoveries are wide in scope and witnesses are required to answer questions. Objections may be taken to the trial court. The Nova Scotia method of discovery, *mutatis mutandi,* should be followed in this case.

Ms. Schedler, has taken issue with my description of this proceeding as "quasi criminal". There are varying definitions of that phrase, but as nothing herein turns on it, I will not address its use.

I have concluded that Staff did in fact undertake to provide certain software to facilitate the review of the IIROC material. Mr. Potter has made such a position clear in his submission and I will order the necessary software and training period.

Mr. Potter has once again complained that the Panel has not dealt with his motions. I have, in the past, as I do now, express reluctance to make any decisions with respect to a Charter breach in the absence of clear evidence upon which I may exercise the balancing process as required by the Charter.

The Panel has attempted to address Mr. Potter's complaints. But such consideration would be subject to Charter considerations and hearing or receiving appropriate evidence. My suggestion to address the complaints by *voir dire* was understandably declined by Mssrs. Potter and Dunlop. That disclosure was partly accomplished with the production of all Knowledge House Inc. e-mails and correspondence on July 25, 2006, but the production of IIROC material (as described above), has been massive and in addition, the parties declined piece-meal disclosure which might possibly have accelerated the process.

As I have previously mentioned, I have not seen the documentary productions and therefore I will not make any determination as to the adequacy of the present disclosure. I do, however, express some concern in view of the allegations made by Mssrs. Potter and Dunlop.

In correspondence directed to the Commission dated September 4, 2009, Ms. Schedler has stated, "it is expected that the written reasons for Commissioner Gruchy will assist staff in determining the deficiencies in the disclosure that has been provided to date, and that the anticipated order will provide further direction to staff in determining the most appropriate action." I remind Staff that I have not seen the disclosure. I do, however, draw to Staff's attention the Stinchcombe case. It is my direction that Staff will produce all relevant information in accordance with Stinchcombe standards.

I have instructed Commission Counsel to prepare the order necessary to give effect to this decision which, I understand, is presently being circulated to the parties.

DATED at Halifax, Nova Scotia this 15th day of September, 2009

David W. Gruchy, Q.C.
Commissioner