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.

- and -

IN THE MATTER OF THE MOTION OF DAN POTTER

REASONS FOR DECISION

Commission Panel:	Mr. R. Daren Baxter, Vice Chairman
Counsel for the Panel	Mr. Thomas Donnovan and Katrine Giroux
Representing Himself:	Mr. Dan Potter
Representing Knowledge House Inc.:	Mr. Dan Potter
Counsel for Mr. MacLeod and Mr. Wadden:	Mr. Dale Dunlop
Counsel for Staff:	Ms. Heidi Schedler
Date Heard:	December 13, 2007
Place Heard:	Halifax, Nova Scotia
Date of Decision:	January 7, 2008

By Notice of Hearing dated November 30th, 2007, Mr. Dan Potter made an application that I, as the Panel assigned to this matter, recuse myself from any further involvement in hearing of this matter. Mr. Potter's application was heard by me on December 13th, 2007. Upon hearing the representations made at that hearing, I have decided that I will recuse myself from making any further decisions in this matter.

BACKGROUND

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 *Securities 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. 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 requested 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. Upon hearing this preliminary matter, I issued a decision on December 11th, 2006 which dealt with, among other things, disclosure and protection of solicitor -client privileged documents.

On January 17th, 2007 I issued an order (the "**January Order**") directing the disclosure of certain material in the possession of Staff and directing that the Applicants had the right to require all investigators named in the Investigation Order to attend for cross-examination as a form of pre-hearing disclosure. On January 19th, 2007 the Commission made an application to the Supreme Court of Nova Scotia seeking relief from earlier orders of the Court prohibiting access to certain e-mail boxes to permit Staff to make the disclosure contemplated by the January Order. An order in this respect was granted by the Supreme Court of Nova Scotia on January 24th, 2007, and the protocol for disclosure of certain e-mails set out in the January Order was undertaken by the Commission.

On February 1st, 2007 I joined the law firm of McInnes Cooper. The parties to this proceeding, including Mr. Potter, were notified of same on February 8, 2007.

On the Panel's own initiative, a pre-hearing conference (pursuant to section 9.1 of Rule 14-501 of the General Rules of Practice and Procedure) was held on August 8, 2007 for the Panel to evaluate the state of the disclosure process mandated by the January Order. During that pre-hearing conference, Ms. Schedler, on behalf of Staff, requested that an additional Order to ensure compliance with statutory disclosure be issued. I concluded that a further order was desirable with respect to completion of the disclosure process for certain printed e-mails and the use of e-mails by Staff. It was hoped that the parties would agree upon the form of the order, but failing consensus, and to maintain the pace of disclosure I wished to achieve, I issued the Order of August 22nd, 2007 mandating disclosure by September 7, 2007 of the printed e-mails and the use made by Staff of access of the e-mail boxes.

Subsequent to the August 8, 2007 pre-hearing conference, but prior to my order of August 22nd, 2007, counsel for the Panel, Mr. Donnovan, was advised by counsel for certain outside investigators appointed under the Investigation Order (which investigators are not in the employ of the Commission and who reside outside of Nova Scotia) that they wished to be heard before any further order was issued in respect of them. These outside investigators were scheduled to be heard by me on October 16th, 2007, which was the first date convenient for all the parties. December 13th, 2007 was also reserved as a date to hear any other matters that might arise, and if no matters required attention to resume hearing of the substantive applications of the Applicants.

On September 19th, 2007 I received correspondence from Mr. Potter requesting that I recuse myself from any further hearing of KHI related matters before the Commission because of bias. Mr. Potter perceived that I was biased in my decision-making in KHI related matters during and after the August 8, 2007 pre-hearing conference. The indicators of bias alleged by Mr. Potter may be summarized as follows:

- I seriously considered submissions of Staff during the August 8, 2007 pre-hearing conference;

- I issued the order of August 22nd, 2007 without the consent by the parties as to form;

- My August 22nd, 2007 order for disclosure excluded documents subject to privilege; and

- After the August 8, 2007 pre-hearing conference I agreed to hear counsel for the outside investigators.

In addition, Mr. Potter expressed concern that my association as a partner with the McInnes Cooper law firm impaired my ability to act as an impartial, quasi-judicial decision-maker in KHI matters. In support of his view Mr. Potter referenced certain civil actions in which McInnes Cooper is retained and where the subject matter involves alleged stock manipulation of KHI shares by KHI management.

Mr. Potter subsequently clarified that his request that I recuse myself because of bias refers to reasonable apprehension of bias. He has argued that it is my direct relationship as a partner of McInnes Cooper that renders me ineligible to act as a quasi-judicial decision maker in the present circumstances. Mr. Potter has identified at least three Supreme Court of Nova Scotia actions involving KHI and its management in which McInnes Cooper lawyers have been retained to represent interests stated to be directly opposed to KHI and Mr. Potter. Upon review, I note that those actions raise allegations that management of KHI, including Mr. Potter, were involved in a stock market manipulation scheme. This is not part of the current motion before me but could be relevant should the Applicants' motion fail and a statement of allegation arising out of the Investigation proceed to hearing before the Commission.

I replied to Mr. Potter's concerns (with copy to all the parties) and offered to hear Mr. Potter at the October 16th, 2007 scheduled hearing. Due to time constraints, this date was not convenient for Mr. Potter, and December 13th, 2007 (a date reserved for additional hearings in this matter) was the next convenient date for the parties and the Panel.

Having regard to Mr. Potter's concerns, the hearing of the outside investigators scheduled for October 16th, 2007 was postponed pending determination of Mr. Potter's concerns regarding reasonable apprehension of bias.

LEGAL PRINCIPLES

It is clear that this Panel is bound by the principles of natural justice, which requires impartial decision-making. The Supreme Court of Canada in *Pearlman* v. *Manitoba Law Society Judicial Committee* [1991] 2 S.C.R. 869, referring to an earlier decision (*Valente* v. *The Queen*, [1985] 2. S.C.R. 673) noted at page 884 that "*The word "impartial"...connotes absence of bias, actual or perceived.*"

There are situations identified by the authorities where a decision-maker is automatically disqualified. In *Barrett* v. *Glenn*, 209 D.L.R. (4th) 735 the Newfoundland and Labrador Court of Appeal referred to *R.* v. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)*, [1999] 1 All E.R. 577 (H.L.) where it was stated at page 586:

> *The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behavior may give rise to a suspicion that he is not impartial, for example because of his friendship with a party.*

In *Pearlman* v. *Manitoba Law Society Judicial Committee* [1991] 2 S.C.R. 869 Iacobucci J. was clear that the principles of fundamental justice apply to administrative tribunals and require impartial decision-makers. At page 884 Iacobucci J. states:

> *Thus, in the administrative law context, principles of fundamental justice include natural rules which in turn require that the members of the tribunal be impartial and disinterested: see de Smith's Judicial Review of Administrative Action (4th ed.1980), at page 248. Impartiality of the decision-making body is a critical*

feature of natural justice which is captured by the Latin maxim, nemo judex in causa sua debet esse – no one should be the judge in their own cause. There are many different factual settings which could place the impartiality of a decision-making body in question. Among such contexts are situations where the decision-makers have or are perceived to have a pecuniary interest, either direct or indirect, in the outcome of the hearing before them. Another such context is here the relationship of the decision-maker to one of the parties or counsel is sufficiently close to give a reasonable apprehension of bias.

The Supreme Court of Canada in *Committee for Justice & Liberty* v. *Canada (National Energy Board)* [1978] 1 S.C.R. 369 states at paragraph 30 that the test for reasonable apprehension of bias "*is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies*", and refers to the "*probability or reasoned suspicion of biased appraisal and judgment, unintended though it be*". At paragraph 40 Grandpré J. (in dissent) stated:

> *"...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through – conclude. Would he think it that it is more likely than not that Mr. Crow* [the decision maker]*, whether consciously or unconsciously, would not decide fairly."*

The test set by the Supreme Court of Canada for determining reasonable apprehension of bias is whether a third party, aware of the facts at issue, would reasonably believe that a decision-maker may not act in an entirely impartial manner, whether consciously or unconsciously.

CONCLUSION

I have concluded that I am not a judge in my own cause automatically disqualified to hear this matter. McInnes Cooper lawyers are not involved in any way with the proceedings before the Commission. Furthermore, the proceedings before the Commission are quite distinct from the Supreme Court of Nova Scotia proceedings in

which McInnes Cooper lawyers are retained, and neither process has a dispositive bearing on the other.

That having been said, I accept that a third party, aware of my partnership with McInnes Cooper and the matters where members of my firm are acting against the interests of Mr. Potter and KHI in the civil actions, would reasonably apprehend that I might not act in an entirely impartial manner, whether consciously or unconsciously and unintended as it would be. As such, I have concluded that to maintain the public confidence in the impartiality of Commission it is appropriate that I recuse myself from any further decision-making in this matter .

Dated at Halifax, Nova Scotia, this 7th day of January, 2008.

R. Daren Baxter
Vice Chairman
Nova Scotia Securities Commission