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

Virtually since the inception of these proceedings the respondents have made applications for an order or orders which have not been heard. These motions are essentially grounded upon alleged *Charter* violations committed by the investigative staff of the Securities Commission.

For the purpose of this decision only I will assume that there was a *Charter* violation.

The proceedings had been fraught with delays which have been described by me in previous decisions.

The motion of Dan Potter ("Potter") and Knowledge house Inc. ("KHI") dated June 30, 2006 (the "Potter Motion") is for an order revoking or varying the investigation order in the Knowledge House Matter (and subsequent amending orders) by removing certain investigators along with any additional Staff and other persons involved in the investigation and prohibiting the use of the fruits or work product of the investigation and any amended or new investigation or in any other proceeding.

Potter states numerous grounds for this order including that Staff and investigators exceeded their jurisdiction by taking possession of certain documents without obtaining consent of affected persons or without a warrant. He also states that Staff and investigators violated his section 7 *Charter* right not to be deprived of life, liberty and security of person except in accordance with the principles of fundamental justice and his section 8 *Charter* right to be secure against unreasonable search and seizure. Potter also alleges that Commission Staff and investigators committed breaches of solicitor-client privilege and torts of trespass and conversion.

Potter also seeks the return of material filed by the Commission pursuant to the Supreme Court and Court of Appeal orders and the return of all electronic copies of email documents from the Knowledge House email server together with any paper-based copies of such documents.

The motion of Calvin Wadden and Kenneth MacLeod (the "Wadden Motion") is similar to the Potter Motion. Mr. Dunlop, on behalf of his clients, seeks an order on the grounds that Staff and investigators interpreted the Act incorrectly and exceeded their jurisdiction under the Act by taking possession of certain documents without either obtaining consent or applying for a warrant. He also claims that section 8 *Charter* rights have been violated and that the actions create an appearance of bias. It is also alleged that Staff and investigators refused to act immediately to have the issue of solicitor-client privilege determined with respect to the relevant documents and refusing to follow the Nova Scotia Court of Appeal order.

Mr. Dunlop seeks an order providing for the security and protection of solicitor-client privilege in relation to the relevant documents and an order directing Commission Staff and investigators to immediately disclose the full factual circumstances regarding the seizure of the Knowledge House servers.

Many, but not all, of the complaints of the respondents have been addressed by this Panel.

The respondents have from time to time requested relief sought in the basis of affidavit evidence adduced by them and by Staff of the Commission. This Panel has declined to rule on the respondents' motions in the absence of a full hearing.

The respondents have now requested that their motions be heard in advance of the hearing of Staff's allegations on the merits; that is, that the hearing of the motions be bifurcated from the full hearing.

Potter and KHI note that Staff's allegation of improper trading was for the period of December, 1999 to August, 2001, whereas the alleged investigative misconduct was from February 3, 2003 to the present.

Mr. Dunlop, on behalf of Calvin Wadden and Ken MacLeod, points out that the Notice of Motion to give effect to the prohibitions sought (and as set out above) was dated July 6, 2006, and the next step, according to the Commission rules, was to set a date for the hearing of the motion. No such date has been set as the Panel has indicated that oral evidence on the matters to be raised would be required.

Both Staff and Potter have referred to Re A, (2007), 30 OSCB 692, a decision of the Ontario Securities Commission (the "OSC"), wherein the matter of a hearing separate from and in advance of the hearing on the merits was considered. The OSC considered the exercise of its discretion as follows:

“ (2) The Exercise of Discretion

33. The essence of Staff’s argument is that it is premature, for a number of reasons, to have the Constitutional Motions heard and determined as a preliminary matter, in advance of the Hearing.

34. In our view, in exercising its discretion as “master of its procedure”, the Commission ought to have due regard for all of the circumstances described above, as well as concern for not unduly “judicializing” its processes. While fairness and the procedural rights of the Respondents and affected persons must be ensured, as stated above, administrative proceedings are intended to be less formal and more procedurally flexible than those of the courts. In considering the stage at which motions such as these should be heard and determined by a Commission panel, we believe that it is useful to ask the following questions:

(a) Can the issues raised in the motions be fairly, properly or completely resolved without regard to contested facts and the anticipated evidence that will be presented at the hearing on the merits? In other words, will the evidence relied upon on the motions likely be distinct from, and unique of, the evidence to be tendered at the hearing on the merits?
(b) Is it necessary for a fair hearing that the relief sought in the motions be granted prior to the proceeding on its merits?
(c) Will the resolution of the issues raised in the motions materially advance the resolution of the matter, or materially narrow the issues to be resolved at the hearing on the merits such that it will be efficient and effective to have them resolved in advance of the commencement of the hearing on the merits?

35. If the answer to any of these questions is “yes”, in our view, the Commission should hear the Constitutional Motions as pre-hearing motions, in advance of the Hearing, absent strong reasons to the contrary.

36 In contrast, if the answer to all of these questions is “no”, the Commission should be reluctant to address the motions as pre-hearing motions, absent strong reasons to the contrary.

37. To take an example, motions relating to Staff’s disclosure obligations and motions for particulars, are the types of motions that should be brought and heard well in advance of the substantive hearing on the merits: they raise issues which can be fairly, properly and completely resolved without regard to contested facts and anticipated evidence that will be the subject matter of the hearing. Further, if the relief sought is to be granted at all, it is necessary for fairness to the affected Respondents that the relief be granted prior to the commencement of the hearing on its merits. There may be other motions that, if heard in advance, could materially advance the matter or narrow the issues to be resolved on the hearing on the merits.

> 38. Of course, we recognize that there can be no "hard and fast" rules that govern the exercise of a Commission panel's discretion. Each case is unique, and a Commission panel's discretion should not be encumbered by generalities. We do, however, suggest this framework may assist the task of balancing the interests of fairness and administrative efficiencies in the face of pre-hearing motions."

At the conclusion of this decision I will address each of the three questions posed by the OSC.

The OSC, having set forth the questions to be addressed, then examined the jurisprudence to which they had been referred and which I have considered:

> Mackay v. Manitoba, [1989] 2 SCR 358
> Danson v. Ontario, (1987) 41 DLR (4th) 129
> Cuddy Chicks Ltd. v. Ontario, [1987] 2 SCR 5
> Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1SCR 100
> DeVries v. British Columbia (Attorney General) [2006] B.C.J. No. 3226

The thrust of the respondents' position is, in my view, that the evidence of Staff was obtained in a manner that infringed or denied their right or freedoms guaranteed by the *Charter*. It is irrelevant whether such infringement occurred in a civil, criminal or administrative milieu. If the motions are successful a possible result would be that all evidence obtained directly from the alleged *Charter* violations would become inadmissible, together with any derivative evidence. Indeed, the respondents have submitted that the actions of the investigators were so egregious that the entire proceedings should be quashed.

On April 1, 2010, at a conference with the parties a brief discussion occurred with respect to the possible bifurcation of the various motions during which I drew attention to Re. A (*Supra*) and the July 17, 2009, Supreme Court of Canada decision, R.v. Grant [2009] 2 S.C.R. 353. In the latter case McLachlin, C.J. and Charron, J., (with LeBel, Fish and Abella concurring) reviewed the jurisprudence concerning Section 24(2) of the *Charter*:

> "Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

Commencing at paragraph 67 of this decision the Court conducted an "Overview of a Revised Approach to Section 24(2)." Of particular relevance to this proceeding are the following:

> "71 A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public [page 394] interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence." (emphasis added)

The Court then examined each of the three enumerated subjects.

(a) *Seriousness of the Charter-Infringing State Conduct*

The Court said generally

> "72 The first line of inquiry relevant to the s.24(2) analysis requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct. The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law."

In conducting this line of inquiry the Court said it is necessary to evaluate the seriousness of the state conduct, keeping in mind that the main concern is to preserve public confidence in the rule of law. Inadvertent or minor violations must be contrasted with wanton or reckless disregard of *Charter* rights, while ignorance of *Charter* standards must not be rewarded or encouraged. Extenuating circumstances must also be considered.

For a recitation of the facts giving rise to the alleged *Charter* violations I refer to previous decisions of this panel and to the decisions of Scanlan, J. of the supreme Court of Nova Scotia.

The Court then generally addressed the matter of the impact of the breach as follows:

"(b) *Impact on the Charter-Protected Interests of the Accused*

76 This inquiry focuses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute."

The Court said that it is necessary to look to the "interests engaged" by the infringement and to examine the impact of the violation on those interests. The Court related this aspect of the necessary inquiry to such incursions as offending the *Charter* right to silence (self-incrimination) and protection from unreasonable search. With respect to the latter consideration the Court said:

"An unreasonable search that intrudes on an area in which the individual enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not."

The Court then addressed:

"(c) *Society's Interest in an Adjudication on the Merits*

79 Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law": *R. v Askov*, [1990] 2 S.C.R. 1199, at pp. 1219-20. Thus the court suggested in *Collins* that a judge on a s.24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of *failing to admit* the evidence."

The Court emphasized that s. 24(2) "mandates a broad inquiry into <u>all the circumstances</u>, not just the reliability of the evidence" (emphasis added). That is, the process must "balance the interests of truth with the integrity of the justice system".

The majority of the Court then concluded the subjects of inquiry as follows:

> "85 To review, the three lines of inquiry identified above – the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and the societal interest in an adjudication on the merits—reflect what the s.24(2) judge must consider in assessing the effect of admission of the evidence on the repute of the administration of justice. Having made these inquiries, which encapsulate consideration of "all the circumstances" of the case, the judge must then determine whether, on balance, the admission of the evidence obtained by *Charter* breach would bring the administration of justice into disrepute.
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> 86 In all cases, it is the task of the trial judge to weigh the various indications. No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible. However, the preceding analysis creates a decision tree, albeit more flexible than the *Stillman* self-incrimination test. We believe this to be required by the words of s. 24(2). We also take comfort in the fact that patterns emerge with respect to [page 400] particular types of evidence. These patterns serve as guides to judges faced with s. 24(2) applications in future cases. In this way, a measure of certainty is achieved. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination." (emphasis added)

The issue before me is centered largely around the admissibility of the KHI e-mail evidence. I have not had access to that evidence, but I have been informed by Counsel that it consists of hundreds of thousands of items of correspondence by KHI employees and others, some of which would presumably be relevant to this proceedings. Subject to possible privilege claims that correspondence may well form part of the circumstances to be considered in the hearing of these motions.

I consider that impugned evidence to be "non-bodily physical evidence", or "Derivative Evidence". With respect to the former the court said that "the seriousness of the *Charter* infringing conduct will be a fact-specific determination". Society's interest must be related to the merits of the case. The Court said:

> "115 The third inquiry, whether the admission of the evidence would serve society's interest in having a case adjudicated on its merits, like the other, engages the facts of the particular case. Reliability issues with physical evidence will not generally be related to the *Charter* breach. Therefore, this consideration tends to weigh in favour of admission."

The latter consideration (derivative evidence) deals with the matter of evidence discovered as a result of an unlawfully obtained statement (or other evidence), sometimes called "fruit of the poisoned tree". The Court examined the anomalous results of the existing rules of

derivative evidence and discoverability and then set forth three enquiries to be made by a court to determine admissibility.

> "123 To determine whether the admission of derivative evidence would bring the administration of justice into disrepute under s. 24(2), courts must pursue the usual three lines of inquiry outlined in these reasons, taking into account the self-incriminatory origin of the evidence in an improperly obtained statement as well as its status as real evidence.
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> 124 The first inquiry concerns the police conduct in obtaining the statement that led to the real evidence. Once again, the extent to which this inquiry favours exclusion will depend on the factual circumstances of the breach: the more serious the state conduct, the more the admission of the evidence derived from it tends to undermine public confidence in the rule of law. Were the police deliberately and systematically flouting the accused's *Charter* rights? Or were the officers acting in good faith, pursuant to what they thought were legitimate policing policies?
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> …
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> 126 The third inquiry in determining whether admission of the derivative evidence would bring the administration into disrepute relates to society's interest in having the case adjudicated on its merits. Since evidence in this category is real or physical, there is usually less concern as to the reliability of the evidence. Thus, the public interest in having a trial adjudicated on its merits will usually favour admission of the derivative evidence.
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> 127 The weighing process and balance of these concerns is one for the trial judge in each case. Provided the judge has considered the correct factors, considerable deference should be accorded to his or her decision. As a general rule, however, it can be ventured that where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the accused's protected interests, the trial judge may conclude that it should be admitted under s. 24(2). On the other hand, deliberate and egregious police conduct that severely impacted the accused's protected interest may result in exclusion, notwithstanding that the evidence may be reliable.

Having considered the jurisprudence drawn to my attention by the parties, and in considering the overall effect of R. v. Grant, and Re. A it is my conclusion that a decision to allow the bifurcation of the impingement evidence must be based on a full examination of the merits of the case. The evidence I have before me is limited to the affidavits of Staff's enforcement officer, Scott Peacock, and Dan Potter. I have considered these, together with a copy of the affidavit of Potter filed with the Supreme Court of Nova Scotia. I have also considered the various decisions of the Courts which, strictly speaking, are not evidence but which I certainly consider carefully. But none of the evidence has been subjected to the

adversarial process of examination and cross-examination. More importantly, they do not deal with many of the factors set forth in such cases as Re. A and R. v. Grant.

At the risk of being repetitive, I set forth the three questions posed by Re. A together with my responses:

> "(a) Can the issues raised in the motions be fairly, properly or completely resolved without regard to contested facts and the anticipated evidence that will be presented at the hearing on the merits? In other words, will the evidence relied upon on the motions likely be distinct from, and unique of, the evidence to be tendered at the hearing on the merits?"

The answer to this question (or questions) is "no". On the basis of the scant evidence before me I cannot conclude that a bifurcated inquiry into the subject matters of the motions will be properly resolved without evidence presented on the merits of the entire matter. With respect to this point, I again remind counsel that I have, for reasons stated in previous decisions, avoided exposure to the facts of the case. A hearing held in advance of the hearing of the merits would unavoidably have that effect. I would anticipate that the evidence of such a hearing as sought will deal with the events leading to the possession of the impugned evidence. That evidence cannot be divorced from the entirety of the case and the potentially negative and positive effects of either possibility must be considered.

> "(b) Is it necessary for a fair hearing that the relief sought in the motions be granted prior to the proceeding on its merits?"

The answer to this question is "no". The motions can be heard fairly during the proceedings on the merits. Indeed, it is my opinion that the opposite may be true: it is necessary to hear the motions when the entire case is considered. The segregation of the impugned evidence from the facts of the entire matter, in my opinion, would bring the administration of justice into disrepute. The public interest is in the search for truth accompanied by a consideration of all the circumstances. If those circumstances ultimately require the finding of inadmissibility of the impugned evidence it will have been accomplished only after a full consideration of the facts of the case.

> "(c) Will the resolution of the issues raised in the motions materially advance the resolution of the matter, or materially narrow the issues to be resolved at the hearing on the merits such that it will be efficient and effective to have them resolved in advance of the commencement of the hearing on the merits?"

The resolution of the issues raised in the motions will not materially advance the resolution of the matters raised by the allegations filed by the Commission Staff.

I have considered the grounds set forth in the respondents' motions. I conclude that these grounds should be considered in relation to the following questions, selected from my reading of the jurisprudence set for herein:

1. In all the circumstances, was there in fact a seizure of evidence?
2. What was the extent of the expectation of the privacy of the impugned evidence?
3. Was there a waiver of privilege of evidence over which privilege is claimed?
4. Was the alleged infringement deliberate or inadvertent?
5. Was the seizure conducted with wanton or reckless disregard of *Charter* rights?
6. Did any extenuating circumstances exist concerning the seizure?
7. How serious was the alleged offence?
8. How serious was the alleged *Charter* infringement?
9. Will the admission of the impugned evidence, bring the administration of justice into disrepute?
10. Will a ruling of the inadmissibility of that evidence have the same effect?
11. Was there an illegal purpose evidenced by the impugned evidence?
12. Was there derivative evidence arising from the alleged *Charter* breach?

CONCLUSION:

There will be no bifurcation of the respondents' motions.

Dated at Halifax, Nova Scotia, this 18th day of June, 2010.

Commissioner David W. Gruchy