

ALBERTA SECURITIES COMMISSION

ORAL RULINGS: TEXT

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**John Herbert Holtby, James Roger Douglas, Jeffrey Scott Bratvold,
Neil Donald Tanner, Kenneth Michael Burdeyney, Eric John Jaschke,
Gayle Marie Walton, Ken Landsiedel, Randall George Kowalchuk,
Dale Francis Holtby and John Jacob Shepert**

Panel: Stephen Murison
Kenneth Potter, QC

Counsel: Andrew Sunter and Jennifer Varzari
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Bratvold and Ken Landsiedel

Karen O'Keeffe
for John Herbert Holtby

Peter Verschoote
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William Pieschel, QC and Shayna Risseeuw
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Andrea Simmonds
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Andrew Wilson, Robert Stack and Tom
McCartney
for Commission Staff

Hearing: 15 and 16 December 2011

Rulings: 19 December 2011 and 4 January 2012

The following text of rulings on this application is taken from the transcripts of the two sessions in which the rulings were delivered, orally in instalments, on 19 December 2011 and 4 January 2012. This text has been edited – including some reordering such that broader aspects precede the more specific (the dates of particular rulings appearing in italic font) and the addition of headings – and approved by the hearing panel for the purpose of providing a public record.

I. INTRODUCTION

[1] These are rulings on a pre-hearing application for disclosure of material in the possession of staff ("Staff") of the Alberta Securities Commission ("Commission"), all of which (possible duplication or occasional error aside) had not yet been disclosed to all respondents in the main proceeding, Staff asserting that the undisclosed material is irrelevant, privileged or both.

[2] The application was made by one law firm on behalf of three clients, each of them respondents in the main proceeding, Messrs. Douglas, Bratvold and Landsiedel, who (through counsel) provided written and oral submissions. The application was supported by other respondents in the main proceeding, many or all of whom were represented by counsel at or throughout the hearing of this application; all who participated, we understand, were supportive of the application and some (through counsel) advanced concurring and supplementary arguments. Staff opposed the application and made written and oral submissions.

[3] The submissions of the parties were thorough and helpful.

II. GENERAL OBSERVATIONS AND RULINGS

[4] First, we make some general observations and rulings.

A. Document Lists Prepared by Staff Useful (*19 December 2011*)

[5] The lists prepared by Staff in advance of the hearing of this application – the so-called "New Irrelevant List" particularly – have been helpful to the panel and, in our observation, also to the respondents.

[6] The scale of the required effort, to which Staff counsel alluded, is justified by its utility. We would commend something similar for future Staff investigations, but begun at a much earlier stage. Such a proactive approach, we expect, would avoid some of the strain faced by Staff counsel Wilson in the present case, while delivering comparable (or enhanced) utility for respondents and hearing panels. We would expect it also to be useful to Staff themselves, in their management of large and evolving investigations and related hearing preparation. Such an approach might also avoid misunderstandings among parties and thereby avert some disclosure disputes and challenges or, at the very least, facilitate an informed and efficient consideration and resolution of such challenges when they arise. It could, we expect, prove useful to Staff also as investigations evolve such that assessments as to the relevance of information might change.

[7] Our positive response to the New Irrelevant List should not be taken to indicate that it represents the only possible template. The key, in our view, is that there be logical categories – the appropriate number, be it few or many, would be driven by the nature of material in question – but that such categories be described with sufficient clarity that any reader of the

corresponding list could reasonably understand what sorts of material would or would not be found within each category and also reasonably be able to discern or infer the reasons.

B. Narrowing of Issues Helpful (*19 December 2011*)

[8] In the course of oral submissions, the applicants narrowed the scope of what they seek to six grounds, as they termed them. This was helpful, although we think it would have been preferable had such refinement occurred earlier.

C. No Indication of Systemic Mishandling by Staff (*19 December 2011*)

[9] A third preliminary observation is that nothing we heard in this application indicates to us any broad or systemic misunderstanding or mishandling by Staff, through their assessments and categorization of material in their possession, of their pre-hearing disclosure obligation. The differences between the parties as to what must be disclosed appeared, for the most part, confined to relatively narrow topics or grounds – not all of which, in our view, would prima facie have been obvious to Staff, until raised in this application. Indeed, some of what we heard from the applicants did not appear in their written submissions, and seems to have been heard by all for the first time in the course of oral submissions.

[10] A dispute over one broader category – documents of the former Eveready company – appeared to turn essentially on claimed relevance based on a possible defence or defences that, in our view, might similarly not have been obvious to Staff. The disputes over documents for which privilege is claimed appeared to us to turn less on whether privilege was correctly asserted than on whether a privilege so asserted ought to be "trumped" by a combination of relevance and importance to a posited defence.

[11] It follows that the rulings we make neither imply, nor should be taken as, a condemnation of Staff's overall assessments and recent categorization of material in their possession.

D. Staff's Earlier Approach (*4 January 2012*)

[12] We now address an introductory point of a general nature made by the applicants' counsel.

[13] The applicants' counsel began his oral remarks with an allusion to what he described as a "highly adversarial" approach by Staff earlier in the process, and seemed to suggest that this background reinforces a claimed obligation of this panel to review undisclosed material in Staff's possession. It seemed also to be suggested that Staff's earlier posture means that information more recently presented by Staff, during or in anticipation of this application hearing, merits less weight than might otherwise be the case.

[14] Both members of this panel have had occasion, in various hearing or hearing-management sessions over recent months, to hear of and to observe aspects of Staff's conduct in this proceeding. The unmistakable impression conveyed was of a Staff attitude of generalized disdain, punctuated by bursts of belligerence – directed variously at respondents or their counsel and at panel members. This was and remains surprising and disappointing (to say the least), as well as unproductive and ultimately counterproductive.

[15] However, as this panel noted in the course of the applicants' oral submissions – and as the applicants' counsel acknowledged – the environment of this proceeding and Staff's conduct therein have recently changed. It is apparent that Staff – including, in particular, Staff counsel Wilson from whom we heard on this application – have undertaken a great deal of work in a short span of time (although the extent of and short time-frame for the task were aggravated by the posture previously adopted by Staff), and that the work thus done has helped significantly in advancing the prospects of fairly and productively resolving disputed aspects of the pre-hearing disclosure in this case. For present purposes, therefore, past frustrations are best left in the past. More particularly, they do not determine or alter any obligation of this panel to review undisclosed material in Staff's possession, or the weight, if any, we give to the submissions and information presented by Staff in this application.

E. Burden (4 January 2012)

[16] We turn to an issue that has ramifications for more than one of the specific disclosure requests. This goes, essentially, to the burden in these types of application – who bears it, and to what extent?

[17] The applicants pointed to a body of decisions, among them the recent British Columbia Court of Appeal decision in *Hu v. British Columbia (Securities Commission)*, 2010 BCCA 306. The applicants seemed to read the jurisprudence, including decisions of this Commission, as dictating that, once a disclosure request is made, a Commission panel has no option but to accede to it and review the undisclosed material in question.

[18] That goes too far.

[19] The decisions cited – *Hu* among them – tell us that, where a respondent seeks disclosure of something that Staff have declined to disclose, the panel cannot simply defer automatically to Staff on the basis that, Staff having made their assessment, such assessment is binding. Staff's conduct in the matter of disclosure can indeed be tested and, in appropriate cases, different results can be ordered. That is clear, and it is fair. Disclosure issues boil down, ultimately, to the question of whether those who wish to defend themselves against Staff allegations have fair access to material that Staff have amassed and which might be helpful for a respondent in answering and defending allegations – that is, material that might be exculpatory or otherwise plausibly help in the defence.

[20] To repeat, therefore, it is clear – from *Hu* most recently, but just as clearly before that decision – that it would not suffice for a panel, in the face of an application like the present one, simply to rule that, Staff having decided not to disclose something, it is therefore not disclosable.

[21] However, the applicants read a good deal more into the jurisprudence. The effect of the applicants' reading would be that, when a respondent claims not to be satisfied with the disclosure it has received from Staff, the respondent can demand and obtain, as of right, merely on request, a panel review of undisclosed material.

[22] The logical implication of the applicants' suggestion is that, whatever Staff may have done, and whatever Staff may submit or demonstrate in response to a contested disclosure

application, a panel has no choice but to undertake the disclosure review-and-assessment process itself. Quite apart from what this might imply for a panel's authority and discretion, such an understanding would effectively seem to obviate the need for – or at least to render redundant if not entirely pointless – any serious effort and work by Staff to assess material in their possession, or indeed to make any disclosure before being ordered to do so.

[23] In our view, this is not a sensible result and it cannot be correct. Such an approach is not dictated by *Hu*, or *R. v. Chan*, 2002 ABQB 287, or any other decision presented, when such decisions are read and understood in context. Viewed correctly, the body of disclosure decisions serves to guide sound disclosure practice, and so to minimize disputes and the need for second-guessing – not to encourage them.

[24] This reasonable and sensible perspective does not amount simply to a blind acceptance that the fact something was not disclosed by Staff alone demonstrates it not to be legally disclosable. Nor do we adopt any such blindly deferential approach.

[25] That said, we need not and do not simply disregard whatever Staff may say in support of their position on disclosure or, more crucially, non-disclosure. Here again, we need not simply accept without question or challenge everything Staff say on this issue. We think it appropriate for a panel in these circumstances to undertake some probing, to gain an understanding of how Staff arrived at the positions or conclusions they did, on the basis of what understanding of the law and other considerations. We questioned Staff to that end, and received answers from – as it happened – the very individual who seems to have done essentially all of the pertinent Staff disclosure assessments for this case. His responses included elaboration on Staff's categorization of undisclosed material on grounds of claimed irrelevance – 66 categories – or claimed privilege (nominally six, but in reality four such categories having been applied).

[26] In response to our probing of Staff as to their understanding and performance of their disclosure obligation, Staff counsel, in submissions and in response to panel questions, elaborated usefully to us – and to all the parties – on the process undertaken to assess and screen material for disclosability. His responses to this probing persuade us that he – and, through him, Staff generally – fully and correctly appreciated the nature and scope of Staff's disclosure obligation. He also gave examples of how particular items of doubt or uncertainty were resolved in favour of disclosure. Staff's submissions also conveyed to us that Staff had a good understanding of the concept and categories of privilege, and helped illuminate how that understanding was applied to the material amassed in this investigation. The aggregate of the information presented by Staff was not vague, nor so general as to be meaningless (suggestions by the applicants, if we understand them correctly, notwithstanding). It was informative. We are entitled to – and we do – assign considerable weight to it.

[27] For reasons mentioned, we do not accept the suggestion that the burden in a disclosure dispute rests permanently on Staff. Logically there must be the prospect that Staff, by some means, can demonstrate sufficient performance of their obligation that their challengers then themselves assume a burden of their own. Otherwise, as mentioned, the whole body of law instructing Staff on their disclosure obligation, and indeed all efforts by Staff to discharge that

obligation, could be pointless – and the door would be opened wide to unending challenges with or without merit or substance.

[28] Staff do, clearly, bear an initial and significant burden in disclosure cases. Here, through the material and other information that they presented in or with their submissions and their responses to panel questioning, Staff not only assumed, but in our view discharged, this initial burden on them. Staff demonstrated that their claims of non-disclosability are plausible and prima facie justified.

[29] That does not, and has not, concluded the matter. Indeed, in our rulings in this application, we came to different conclusions than Staff had on some elements of disclosure.

[30] The applicants noted that one document that Staff ultimately acknowledged to be relevant – an assignment agreement relating to the settlement of certain allegations – was not originally disclosed. We do not know the circumstances of this document or its delayed disclosure. We do, however, know that the material accumulated in the investigation is voluminous, and that disclosure is a continuing rather than a one-time obligation. The law is also clear that, although disclosure must be adequate, it need not be perfect. In short, whatever the circumstances of the delayed disclosure of that assignment agreement, it does not warrant disregard of Staff's information as to their understanding and conduct of the disclosure obligation and process, nor a second-guessing of all that they have done.

[31] In our view, Staff have in fact satisfied the initial burden on them of justifying their non-disclosure of what they claim to be irrelevant or privileged material.

[32] That is not the end of this application. It does, however, mean that the burden shifted to the applicants to demonstrate some cause to doubt Staff's position. We are not bound to, and we will not, order wholesale disclosure, nor ourselves wade through undisclosed material, without good cause having been shown to do so by the applicants.

III. SPECIFIC RULINGS

[33] With these preliminary and general observations and rulings, we move to several specific rulings.

A. Settlement-Related Communications (*19 December 2011*)

[34] First, we address material relating to the Kowalchuk and Wreggit settlement communications.

[35] Application was made for documents and communications relating to the settlements – which were ultimately concluded successfully – of Staff's investigation into conduct of Richard Bruce Kowalchuk and Allan Ross Wreggit (for convenience, we refer to them as the "Settling Individuals").

[36] Staff asserted that the requested material is governed by a privilege attaching to "settlement", or "without prejudice", or "plea" negotiations; that such privilege ought not to be surrendered or overridden lightly (if at all); and that such information was in any event of no

plausible relevance. Those seeking the material suggested that it was relevant – essentially for the purpose of testing and perhaps impugning the credibility of the Settling Individuals or their statements in sworn investigative interviews or, perhaps, in testimony in the hearing.

[37] It did not seem seriously disputed that whatever might exist within this category does qualify for what we will term "settlement privilege". Nor, ultimately, did it seem seriously disputed that such privilege is not absolute, but rather it can be overridden (at least in the case of settlement discussions that ultimately result in a settlement) but only for reasons of compelling importance.

[38] In our view, this is not a low-threshold issue, and must be contrasted with that applicable to basic relevance, for disclosure purposes, outside the realm of privilege. Put differently, privileged material is prima facie not disclosable, and something positive must be demonstrated before the cloak of privilege – if capable of being lifted – will be lifted. That demands more than a mere possibility of potential utility to a defence. Even that characterization, though, would overstate what we believe was presented to us.

[39] Even though Staff would not state explicitly that whatever settlement discussions took place after the Staff interviews of the Settling Individuals, it seems from what we heard more likely than not that there was no temporal overlap – and, by implication, that the settlement discussions would present no posited utility in challenging the interview statements.

[40] More concretely, and more importantly, we do not consider there to be a sufficient degree of demonstrated anticipated utility and importance – whatever the relative timing of the settlement discussions and the Staff interviews – of pre-settlement discussions for use in impeaching the credibility of the Settling Individuals, be it in respect of their statements in Staff interviews or on the stand in the hearing.

[41] This is because the fact that they settled is clear, and disclosure has already been made of the relevant interview transcripts. A related document, an assignment agreement, seems also to have been disclosed in a limited or indirect way, and perhaps not in the most timely fashion. But, in any event, we will be directing that it be formally disclosed to all respondents.

[42] Even if Staff do not present either or both Settling Individuals as witnesses at the hearing, a respondent can do so, causing either or both Settling Individuals to be summoned to testify, and undergo cross-examination at the hearing. Then, with the documentary material already in the respondents' hands, the respondents would have the opportunity to test credibility on the basis of the facts of the settlements themselves. What slight and hypothetical advantage might be gained by access also to mere settlement discussions does not suffice to warrant overriding the clear public interest in facilitating and encouraging forthright settlement discussions.

[43] We, therefore, find no basis – and hence no requirement – for us either to review this material (it was not suggested that it had been wrongly classified) nor (apart from the mentioned assignment agreement) to order its disclosure. That aspect of the application is (with the mentioned exception) dismissed. As to the assignment agreement, to the extent it has not been fully and formally disclosed to all respondents, we direct that now be done.

B. CIBC Policy Documents (19 December 2011)

[44] We turn to the material that had been described as "CIBC policy documents".

[45] The application seeks disclosure of copies of material in Staff's possession that originated with CIBC and constitutes CIBC policies or procedures – as we understand it, those relating to securities trading practices and the handling of material (or potentially material) information relating to securities or to issuers – by which Mr. Kowalchuk was bound while in that firm's employ. The contention, as we understood it, was that this might illuminate, with utility for possible defences, something of the environment in which Mr. Kowalchuk operated.

[46] On this matter, the relevance threshold is a low one. We consider that the plausibility or utility of such information – and hence its potential relevance – while not necessarily obvious to Staff or anyone else before it was presented in this hearing, has been sufficiently established for present purposes.

[47] We therefore grant the application in this respect, and direct Staff to disclose such information to the respondents. Logistical obstacles or matters of clarification, if not promptly resolvable by agreement among the parties, can be directed to this panel. We direct that such disclosure is to be made – in paper or electronically as Staff determine – by the close of business on 16 January 2012.

C. Eveready Records (19 December 2011)

[48] We turn now to what were referred to as the "Eveready Records".

[49] Disclosure of material provided by the successor to the Eveready company to Staff – several categories identified collectively in the applicants' written submissions as the "Eveready Records", which term we will adopt here – was sought on the basis primarily of two arguments: (i) that such material might evidence that Mr. Holtby, at the relevant time, had limited involvement in and knowledge of Eveready; or (ii) as we understood the submissions and supplementary submissions, that such material might assist in defending the allegations as they turn on the materiality of information.

[50] While the threshold of relevance for this purpose is, as stated, a low one, we are not entirely convinced even that was met, in the case of the first argument just mentioned. That is, even were such Eveready Records to demonstrate conclusively that (for example) Mr. Holtby seldom attended Eveready meetings or its offices, it is unclear to us that such a finding would amount to a defence against the allegations against him or any other respondent in the main proceeding. However, we need not decide that issue here. It suffices that we consider that the second-mentioned argument, relating to a possible defence grounded on lack of materiality, does cross the applicable low threshold. Relevance, for present purposes, is demonstrated.

[51] There are, however, two related issues. First, as was discovered quite late in the hearing of this application, the Eveready Records were delivered to Staff under what were expressed as rather broad, and on the face of them constraining, conditions of use.

[52] While the law, as we understand it, permits such conditions to be overridden for disclosure purposes in a context such as the present one, we question the appropriateness of taking such a step without informing the person who delivered the Eveready Records to Staff in the first place.

[53] We therefore direct, first, that such material so disclosed is to be used by counsel for the respective respondents in the main proceeding solely for the purposes of that proceeding, and we expect – even within that limitation – any material within the Eveready Records that contains sensitive personal or proprietary information to be treated with due delicacy.

[54] Second, we direct Staff promptly to communicate to the person (or the successor of such person, as applicable) from whom they received the Eveready Records, that the Eveready Records will be used in connection with a hearing arising from the investigation in connection with which the material was so sent, that it has been disclosed or ordered disclosed to counsel for the respondents in that hearing, and that such counsel will be reminded that the use of such material is restricted to the purposes of that proceeding.

[55] The second issue relating to the Eveready Records is the rather imprecise or uncertain nature of just what it is that the applicants seek or expect to find therein. To require Staff to make that assessment and screen such material – potentially voluminous – for relevancy on the bases advanced could – and, we think, would – be a difficult task. Difficulty alone might not preclude us so directing, but we also suspect that assigning the task to Staff might invite further disclosure disputes and challenges based on differences as to whether Staff properly understood and screened for the characteristics of relevance sought by the applicants. The same concerns would apply were the task undertaken by this panel itself.

[56] For these reasons, we are directing that disclosure of the Eveready Records is to be made as follows:

- The Eveready records will be made available, in paper form, for inspection and copying (at respondents' cost) at the offices of the Commission, during business hours on workdays, for a reasonable interval (we expect that one week would be ample) during a period reasonably convenient to all parties, to begin not later than 16 January 2012.
- We further direct that Staff display (merely as a reminder) proximate to the material so made available, a written reminder of the panel's direction and expectation concerning the use made of such material.

To the extent that these arrangements cannot be fixed by agreement among the parties, the matter can, of course, be referred back to this panel.

D. Additional Name Searches

(19 December 2011)

[57] Counsel for certain of the respondents either (depending how one interprets it) added a new category or categories, or narrowed one already proposed, of material for which disclosure

was sought, in asking for certain correspondence – all emails, as we understand it – sent to named respondents by specified individuals or classes of individuals. More particularly, the request, as stated today, was for emails from Peter Stubbs at Eveready to Richard Bruce Kowalchuk; from Rod Marlin at Eveready to Richard Bruce Kowalchuk or to Kenneth Michael Burdeyney; and emails from any Eveready director to Richard Bruce Kowalchuk.

[58] The basis advanced for the request, in our view, satisfied the applicable, low threshold of relevance. We do regret that the request had not been conveyed to Staff much earlier. There may be differing views on the practicality of that.

[59] Nonetheless, given our view that this seems the same sort of request that could have been made some time ago, we suggested a compromise approach that, in our view, would fairly balance the interests of all parties, and which we understood at the time would be acceptable to, if not favoured, by the parties, were that aspect of the application granted.

[60] We therefore direct that Staff are to conduct an electronic search in the relevant categories of material for these three classes of email. If the searches generate any such email over which no privilege is asserted, Staff are, on or before 16 January 2012, to disclose such email, even if (as is possible) this results in either, or both, a large volume of new disclosure or disclosure of material of little or no relevance. Staff may make this disclosure in paper form or electronically, or in some combination, as they determine (but, if searching in the "native format", we would expect that at least the "hits" would be highlighted in some fashion).

[61] If any of these matters cannot be resolved amicably and efficiently among the parties, the panel can be summoned to deal with disputes.

(4 January 2012)

[62] Although we did not make any direction as to coding of the results, we were subsequently informed by Staff, through the Registrar, that they had conducted the additional name searches and would code the results, along with other production, in accordance with the terms of a separate ruling on coding issued by another panel of this Commission (*Re Holtby*, 2011 ABASC 622). We advised that this approach was acceptable to this panel; indeed, we think it entirely appropriate.

E. Names of Individuals Contacted by Staff *(4 January 2012)*

[63] As is clear from our earlier specific rulings in this matter, we considered that the applicants (and their supporters) did show good cause to doubt Staff's position on non-disclosure in some respects – hence the disclosure orders made in the rulings above. We explained how we came to our conclusions on those points. Those conclusions were not determinative of the other matters still outstanding.

[64] The first such outstanding issue is a request that we direct Staff to disclose to the respondents in the main proceeding the names of individuals with whom, in the course of their investigation to date, Staff have spoken or from whom Staff have obtained documents, if such individuals have any relationship with any of the respondents in the main proceeding.

[65] The focus of the request is, we understand, on individuals who have a relationship with one or other of three individuals in particular, those against whom Staff allege (or alleged) what is sometimes termed illegal "tipping", namely John Herbert Holtby, Kenneth Michael Burdeyney and Richard Bruce Kowalchuk (the allegations against this Mr. Kowalchuk were resolved by settlement agreement). We understand that the claimed relevance of the names sought relates to the circumstantial nature of the case anticipated to be brought by Staff and similarly circumstantial defences that may be advanced by at least some of the respondents – along the lines of Staff pointing to instances of one or other of the alleged tippers having said something to one individual or another, with the implication that something similar was said by the same alleged tipper in dealings with someone else. As we understand it, respondents seek the names of those individuals with whom Staff have had contact and who also had contact with those just named in order to assist respondents in mounting a similarly circumstantial defence along the lines of "here is an individual with whom one or other of the alleged tippers had contact, yet the type of information in question was not given, so by implication the alleged tipper was not in the habit of tipping as alleged". We were pointed to an instance in another matter in which names of third parties had been ordered by this Commission to be disclosed – in particular, names of apparent investors in alleged illegal distributions.

[66] Staff opposed this request. Staff said that they did disclose transcripts of Staff interviews of 17 third parties, those not disclosed having in Staff's assessment no relevance as asserted by the applicants. Moreover, Staff asserted that disclosing other third-party names would breach section 45 of the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act") and the statute-based expectation of privacy of these third parties.

[67] We think there is merit to Staff's position, in the circumstances. Whether or not section 45 of the Act is as all-encompassing as Staff suggested, we do believe that the provision, coupled with the nature of the investigative process generally, may give third parties who undergo investigation some reasonable expectation that such involvement – unless obviously relevant to an eventual enforcement proceeding – will be handled with some delicacy, including a measure of privacy. Clearly that expectation will not always bind Staff – otherwise it might be difficult indeed to satisfy *Stinchcombe (R. v. Stinchcombe)*, [1991] 3 S.C.R. 326) or similar disclosure obligations. That said, were it thought to be the norm that the identities of everyone questioned in the course of an investigation would be made known to respondents – whether or not there was any connection between those questioned and alleged misconduct – it seems to us highly plausible to anticipate greater reluctance on the part of third parties voluntarily and forthrightly to assist in investigations.

[68] In any event, the key, in our view, is relevance. If a particular third party had some sort of role plausibly relevant, if not to Staff's case, then to a respondent's potential defence to an allegation of misconduct, then we think (absent a formal claim of privilege), consistent with *Stinchcombe*, that the third party's expectation of privacy must reasonably be constrained, if not wholly trumped, by the need to disclose. Such was likely the thinking in instances in which third-party names have been ordered disclosed. It is not difficult to conceive – for example, in a case of an alleged illegal distribution – that information about the buyers in the distribution might be of use – of relevance – to someone defending allegations of having acted wrongly in the distribution.

[69] Here, though, the roles of those whose names are sought are very different – and much less obviously related to the allegations or, indeed, the conduct of respondents. We simply are not persuaded of the claimed relevance. The supposed utility of the names sought is too tenuous, and its utility in mounting a defence too hypothetical and speculative. This very tenuous posited relevance is even less persuasive when viewed against the backdrop of what we consider the reasonable (albeit potentially surmountable) expectation of privacy on the part of third parties who found themselves in the investigative net.

[70] We are therefore making no order that Staff disclose the names of third parties contacted in the investigation and not already disclosed.

[71] Having said that, we mentioned earlier that disclosure is a continuing obligation. Should Staff come to learn that some particular context of contact with an alleged tipper – a particular meeting or social occasion, perhaps – is relevant to Staff's case, or might plausibly be relevant to a defence, we would expect Staff – they being mindful of their disclosure obligation – to re-evaluate what they know about that context, meeting or occasion, with a view to determining whether something at present reasonably assessed as irrelevant has become relevant and disclosable.

F. Internal Staff Documents Relating to the Respondent Douglas (*4 January 2012*)

[72] Another outstanding category of disclosure sought was described as that consisting of "Internal Staff documents regarding [the respondent] Douglas' alleged concealing or withholding of information".

[73] The issue here appears to turn on both privilege and relevance. Staff's position, as we understand it, was that internal Staff documents – we interpret this to mean internally-generated material, as distinct from documents or emails procured from elsewhere – are irrelevant because they would constitute interpretations, advice or opinions, rather than objective factual evidence of probative value in an enforcement hearing. Moreover, such material by its nature would fall within one or other (or perhaps both) of the categories of material protected by solicitor-client privilege and work-product privilege. This was Staff's position.

[74] The applicants urged that we at least review this material, and noted also that work-product privilege can (and should be) trumped by compelling relevance to a defence.

[75] An applicant challenging a claim of privilege has a not-insignificant burden of showing a reasonable basis for doubting the validity of the claim and, then, a reasonable basis to justify trumping an acknowledged privilege.

[76] The burden was not discharged here.

[77] Some tentative suggestions by the applicants notwithstanding, there seems to be no serious dispute that Staff counsel in this case is a litigator, that he works on enforcement files, and that a good deal of his communication with other members of Staff involves the giving or

seeking or receipt of legal advice – such communication being governed by, we find, an essentially untrumpable solicitor-client privilege.

[78] All other communications with this Staff counsel over which solicitor-client privilege is claimed would seem to fall into the categories of either investigation-related communications received by or transmitted to this lawyer from elsewhere within the enforcement department, or some sort of communication that the applicants characterized as administrative, with other personnel in that department. As to the latter category, we do not perceive that internal administrative communications would reasonably be expected to have any measurable utility in defending allegations of capital market misconduct. We see no relevance there, whether or not any privilege attaches. As for the other mentioned category, even if (as has not been demonstrated) some receipt or transmission of investigative information from or to this Staff counsel was somehow mischaracterized as attracting solicitor-client privilege, it seems to us the very sort of material that falls within the category of privileged work-product.

[79] Were that so, the applicants contended that this different category of privilege is capable of being trumped – that is, recognized or acknowledged but disclosure ordered nonetheless by reason of an outweighing relevance. As we understand Staff's position, they did not dispute such a difference between these classes of privilege.

[80] We therefore considered whether the applicants made a sufficient case, turning on relevance, that what might be termed something akin to a rebuttable presumption of non-disclosure could plausibly be rebutted. (We have not reviewed the material to determine whether Staff have indeed miscategorized the privilege; such a task would not be required unless we have first determined there is a plausible reason for doing so.)

[81] The material in question is, we believe, Staff-created, it being our clear understanding that this is how it came to be categorized as subject to solicitor-client privilege (or, in the alternative, as Staff work-product). Even if either such privilege was incorrectly assigned, we discern no reasonable likelihood of the material being of utility in mounting a defence. Mere expressions of non-expert opinion, even if for some reason making its way into evidence in an enforcement hearing, would have no probative value. And the sort of material that might have probative value – a verifiable third-party document, for example, would (according to our understanding of why Staff categorized this material as they did) seem not to form part of this material in the first place (except, we were warned, as a duplicate copy, attached to something for which privilege is claimed, but which also appears elsewhere within the material in Staff's possession but not so accompanied; in that case, such duplicate material can be excluded from this discussion of privilege, because disclosure or a governing disclosure ruling will already have applied to the duplicate material in its unaccompanied form in such other category of material). The applicants did not present even a hypothetical example of what, within this material, might plausibly be relevant, and we ourselves discern none.

[82] Thus, even a prima facie case for relevance is not established. We find nothing here that would come close to trumping, if applicable, the privilege that facilitates and enables investigative Staff to communicate openly, in writing, with one another as their investigations develop – or the public interest in seeing that process go forward.

[83] In short, the applicants have not made a case for disclosure of this category of material – even if (as they suggest) it does not fall under the cloak of solicitor-client privilege. It follows, and we find, that the applicants have not demonstrated sufficient cause to compel this panel to review undisclosed material over which solicitor-client or work-product privilege is claimed.

[84] It is therefore unnecessary for us to rule on the disputed issue of whether, in light of the cited *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, this or any other panel of this administrative tribunal has the authority to review material over which solicitor-client privilege is asserted.

G. Certain CIBC Communications (4 January 2012)

[85] A final category involved "Communications between CIBC employees and Kowalchuk or any Respondent during the relevant period". It is our understanding that, following an interchange among applicants' counsel, Staff and others, the request for disclosure under this head was effectively withdrawn.

IV. RULINGS CONCLUDED

[86] This, then, concludes our rulings on the substantive disclosure application.

This Text Approved: 10 January 2012

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Kenneth Potter, QC