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

INTRODUCTION:

(1) A long simmering problem in the conduct of this matter has come, or is about to come, to a boil: viz. Claims of solicitor-client privilege by parties before the panel over correspondence found in e-mails and possibly in other places or media pertaining to the subject matter of this proceeding.

(2) Knowledge House Inc. ("KHI"), Daniel Potter ("Mr. Potter"), Kenneth MacLeod, Raymond Courtney, Calvin Wadden and staff of the Commission, either personally or by counsel, have suggested that I, as the adjudicative panel of the Commission in this matter, have the jurisdiction to determine solicitor-client privilege. In the course of a pre-trial conference I drew the attention of the parties to the decision of the Supreme Court of Canada in Privacy Commissioner of Canada v. Blood Tribe Department of Health, 2008 SCC 44. ("Blood Tribe"). In view of that decision I questioned my authority to deal with solicitor-client privilege, as I had done previously. Before dealing with that matter, I want to set forth the torturous path of the conduct of this proceeding.

(3) I will not confine this decision to a consideration of that case but will, instead, address the matter of solicitor-client privilege generally, rather than protract this proceeding unnecessarily. I will not detail the allegations of the events which led to possession by Staff

of the Commission (herein "Staff"), of e-mails found in the computer equipment formerly owned by KHI. I refer to the decision of Justice Scanlan, dated May 10, 2005, for a detailed examination of the chain of events leading to such possession. I also refer to Mr. Daren Baxter's decision filed herein on December 11, 2006. Mr. Baxter is my predecessor as adjudicator in this proceeding.

(4) Virtually from the commencement of this proceeding Dan Potter, KHI, Calvin Wadden and Kenneth MacLeod have complained by Notices of Motion dated June 30 and July 6, 2006, of various aspects of Staff's investigation of the matters raised by the Commission's allegations . Of particular relevance the Respondents claimed solicitor-client privilege in relation to documents in the possession of Staff.

(5) I will not presently address other matters of complaint raised by the Respondents, some of which have been dealt with by the Commission and others which may require an evidentiary hearing to resolve.

(6) Justice Scanlan addressed the matter of solicitor-client privilege in his order of April 5, 2004, when he ordered Potter to provide the then solicitor for National Bank Financial, a chronological listing of e-mails over which solicitor-client privilege was claimed. Justice Scanlan in a decision dated May 14, 2004, recognized the broad public importance of solicitor-client privilege.

(7) The matter of "illegal purpose" and the effect of any finding of such with respect to the e-mails in question before Justice Scanlan was addressed by him in his decision of July 14, 2004. He decided that such an issue was too factually complex to proceed by way of a chambers application. He referred to the Supreme Court Civil Procedure Rule 9.02 (then in

effect) regarding such a matter which provided that a chambers application shall be confined ordinarily to matters in which there is unlikely to be any substantial dispute of fact.

He said:

> "[5] A number of parties have objected to the court dealing with the issue of "illegal purpose" by way of a chambers application. The thrust of their argument is that this is an issue which is properly left for trial. Counsel for the lawyer, and also the law firm involved, suggest that the issue of whether the lawyers involved were part of some illegal purpose or scheme, is a matter which will be resolved only after extensive disclosure and pre-trial proceedings, including discovery and the filing of lists of documents.
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> [6] The issue of solicitor/client privilege may well be determined without consideration as to the issue of whether the lawyer involved was communicating for the purpose of furthering an illegal purpose. For example, the issue of whether the solicitor/client privilege has been waived by the client will be before the court in October. If the court determines the privilege was waived or otherwise lost, then the issue of "illegal purpose" will become moot in relation to the matter of solicitor/client privilege. If the privilege has not been otherwise waived, then the issue of whether the privilege will be lost because the communications were in furtherance of an illegal purpose can be decided at trial.
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> [7] The issue of whether the communications were part of some "illegal purpose" is a very substantive issue as between the plaintiff, the various defendants, plaintiffs by counter-claim and cross-claim, and the lawyer and law firm involved. It is at the very heart of the issue as between many of the parties. If the plaintiff is permitted to have this matter adjudicated upon during the October chambers application, the counsel representing the lawyer and law firm will not have had an opportunity to obtain disclosure of many of the relevant documents. They will have lost an opportunity for discovery and disclosure which is afforded to parties in a trial process, as opposed to proceedings pursuant to the rules applicable to chambers applications.
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> [8] I accept that the question of whether the communications were part of some illegal scheme will be a factually complex issue. Counsel suggest

there are many file boxes full of relevant information. That type of factually complex issue is not one which contemplated by Rule 9.02 of The Nova Scotia Civil Procedure Rules.

[9] I am satisfied that it would be unfair to the defendant law firm and lawyer to have the matter of "illegal purpose" determined without them having the benefit of full pre-trial processes, including discovery and production of documents. That is an issue which is too factually complex to proceed by way of a chambers application. That issue will not be before the court during the October hearing."

(8) The essence of the allegations before me is that of insider trading and an arrangement to maintain the price of KHI shares on the Toronto Stock Exchange – allegedly an "illegal purpose". The scheme purportedly involved a National Bank Financial employee who had been dismissed for his involvement in the scheme. Justice Scanlan said, with respect to that allegation:

"10 By way of additional background it is noted that Mr. Clark has signed a settlement agreement with the Nova Scotia Securities Commission in which he agreed to pay a penalty of $75,000. That agreement also prevents him from trading in shares on the stock exchange for a period of five years. This penalty and prohibition was related to his activity in surrounding KHI shares. In that settlement agreement Mr. Clark acknowledged "...solely for the purpose of effecting a settlement..." there was an arrangement as regards liquidity of shares in KHI which was not disclosed pursuant to the regulations governing publicly traded companies. He also admitted violating exchange rules, assisting an "insider group" with an arrangement to maintain the price of KHI shares and to provide liquidity for the stock. He also admitted to entering purchases and bids to cause the KHI shares to close on an uptick.

11 Aside from the settlement agreement, in pleadings in actions before the Supreme Court, Mr. Clark has denied any involvement in a stock manipulation scheme."

(9) (I mention this comment by Scanlan, J., now as I will refer more fully below to the relationship between solicitor-client privilege and "illegal purpose".)

(10) In Justice Scanlan's decision of May 10, 2005, he examined the evidence before him concerning the solicitor-client privilege claimed over e-mails found in the KHI mail boxes. He said there were a substantial number of solicitor-client communications in these mail boxes which would *prima facie* be privileged. He continued, however,

> "57 In my correspondence to counsel after reviewing the e-mail I did not deal with the issue of waiver of privilege through operation of law. In saying this I note solicitor-client communication in furtherance of illegal purpose will not be protected by privilege. In the present case there have been allegations of illegal purpose. These hearings on the issue of privilege have not thus far focused on illegal purpose. If at any time a court is satisfied any communications were in furtherance of illegal purpose then privilege for those documents or that series of documents will be lost. A hearing on that issue will be complex and likely involve extrinsic evidence beyond the e-mails themselves. For example TSE trade records. Counsel who have previewed the challenged e-mails are not the ones to carry the file in such an application. In the mean time it is not for NBFL or their counsel to appropriate to themselves the right to say whether privilege has been lost. Without getting into the content of the privileged communication I would indicate that KHI was a large corporation involved in many business transactions. It would be folly to suggest that all of the e-mails as between solicitor and client are subject to challenge based on allegations of illegal purpose."

(11) He later remarked, " I can only query as to why the regulatory investigators in this case have not applied to the court to have the issue of privilege addressed", a reference to section 29F of the Securities Act, (the "Act"), which he set forth in his reasons.

(12) Justice Scanlan concluded in part that some of the parties before him claimed to have relied upon the advice given to them by their solicitors, against whom they had taken action. By placing reliance upon legal advice in issue those parties have put their state of mind in

issue and to an extent to be determined had thereby lost their privilege. Justice Scanlan required specific identification of the documents falling into such a category. He then ordered the removal of National Bank's solicitors and adjourned addressing this issue until new counsel could appear.

(13) The first occasion for the adjudicative panel of the Commission to address by way of conference the statement of allegations of Staff occurred on May 25, 2006. At that time, it appears none of the parties was prepared to deal with substantive matters and accordingly it was adjourned until June 29, 2006.

(14) On the latter date it became clear to Mr. Baxter that more than Mr. Potter's e-mails were in issue, and that a criminal investigation had been undertaken. Mr. Dunlop alleged that taking control of the CDs (and e-mails) by the Commission was an illegal search and seizure - a subject I will not address at this time.

(15) At this conference Mr. Potter submitted that the conduct of Staff, in seizing and viewing e-mails containing solicitor-client privileged material, was such that the entire investigation was tainted and should result in the dismissal of the allegations. Such a position presupposes that the materials seized and viewed were privileged.

(16) During this conference, Mr. Baxter considered the matter of solicitor-client privilege as follows when he said:

> "So the first thing is first is there actually solicitor-client privileged material there. And we must determine, you know, which ones are, how do we do that. And I'll put on your radar screen for each of you to consider that, you know, to the extent that you can agree upon that. that is fantastic.
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> And if staff complies and if the respondents are pleased with that, then there's not an issue for me to deal with on which ones are solicitor-

client privileged material. If there is no agreement, then we're going to have to deal with it.

I understand that there is a proceeding in the Supreme Court and I understand from Ms. Schedler's memo to me is that Mr. Potter is going to be identifying certainly the ones that he believes to be solicitor-client privileged. That is going to be determined hopefully by the Supreme Court in September.

We are not bound by that, but I think that would give great direction to the parties. And it certainly would be something that would be of assistance for consideration by this Commission.

So the concept of ... so when we come up with a procedure, the concept of it we can't agree on which ones are which, the concept of waiting until after the Supreme Court makes its determination, that seems to me to be very appropriate and maybe a little bit time-consuming... or excuse me, time-saving for the parties and the Commission.

What I do want to have on your radar screen is that if after that the parties aren't in agreement, and it will need to be determined by the Commission, do I determine that, or do I appoint somebody else to determine that, or do you agree upon a third party or look to me for a third party to do that?

My concern is as follows. I believe I can do that, but I want to be very careful that there's no perception of prejudice. At this time, it's anticipated I will continue to deal with the substantive matters as they do arise. And I do not want to be seen as having been biased in some fashion by having reviewed e-mails and made a determination.

So I am concerned about that. I am concerned if we were to determine that we were to either agree upon a third party or for myself to delegate a third party, I'm concerned about my authority to do that. It's the Commission that must hear."

(17) On July 20, 2006, R. Scott Peacock (a lawyer), then Deputy Director, Compliance and Enforcement for the Securities Commission, filed a detailed affidavit with the Commission outlining some aspects of the investigation of the trading of KHI shares on the Toronto Stock Exchange. He described the events which led to his ultimate possession of KHI e-mails and further described his relationship with investigating bodies of the Ontario Stock Exchange and the Royal Canadian Mounted Police. He said

that in November, 2003, he received demands from Mr. Potter and KHI for the return of the material which he had obtained from the KHI server. He also stated that, upon the authorization of the Commission's Chairman, he gave a summary of his investigation to the RCMP. On November 2, 2006, Mr. Peacock filed a supplemental affidavit wherein he outlined further his involvement in the use of the information and material found on the KHI server. Mr. Peacock also filed an affidavit dated May 25, 2007, wherein he responded to certain disclosure questions as ordered by Mr. Baxter.

(18) During a lengthy hearing of the panel on July 25, 2006, various matters were addressed with respect to the e-mails found in the KHI mail boxes and the use (if any) made by the Staff of such material in the investigation of the subject matter of the Staff's allegations. Mr. Baxter expressed concern as to the method to be used to "contain the problem" of inadvertent disclosure of solicitor-client privileged material to adverse parties. He also addressed briefly a desire to await a decision of the Supreme Court of Nova Scotia in what he called a "parallel proceeding" with respect to solicitor-client privilege. After some discussion Mr. Baxter said:

> "VICE-CHAIR: Well, it seems to me the manner in which the e-mails are accessed or analyzed is not as much of a concern to me as the matter of protecting, you know, expectations of privacy or potentially solicitor/client materials in, you know, mailboxes other than, say for instance, your own, Mr. Potter, for disclosure to you.
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> So I'm concerned with a mechanism ... I'm concerned with not making a mistake. I don't want to make a mistake of ordering disclosure of these mailboxes to you and then subsequently find out that there are claims of privilege or claims of, you know, other items. I want to contain the problem. We apparently do have a problem with ... there is obviously some privileged material in there, we don't know exactly today which is which, but I want to contain that problem, I don't want to make it worse. And so the concern I have with your request, I understand why you're requesting it, I just don't (want) to make the problem worse. And when I reference ... and when I say making the problem worse, having, you know,

further disclosure, although it may be solicitor/client privilege material or other privacy expectations.

And by referencing the parallel proceeding I'm thinking if there is ... if the Supreme Court is going down this road as I understand you to tell me that they're doing, do, you know, is there some merit in us looking to that process or waiting for that process to complete before dealing with disclosure of those mailboxes?"

(19) Later in the same conference, Mr. Baxter said, " I want to be careful that I don't give an order that runs counter to what the Supreme Court has ordered." More broadly, Mr. Baxter addressed the matter at issue then under consideration as follows:

"It is very clear to me that privilege is only one of the issues that you are addressing with your concerns of the investigation, so I understand that. But nonetheless, it is one of the issues. And I think what you're looking for is you want to identify where your privilege has been abused and to try to trace as to what were the fruits of abusing your privilege and, you know, one of the matters will be, for me, will be what will be .... to the extent if there was an abuse of your privilege, and to the extent that we can identify what the fruits are, what are the consequences of that.

And I will tell you now, my objective, and I think the role of this panel, will be to ... if that is indeed the case, and again no determination has been made along those lines, but just making the assumption, for a moment, that if that is the case then my objective will be to put you into position that you would have been in but for an abuse of your privilege.

All that having been said, determining what documents are privileged for the purpose of that process is important. It's almost one of the first steps ... is to determine whether of not that has been a breach of that privilege. So, yes, I am very concerned about how are we going to proceed to determine what are privileged documents, and what are not.

And since our last hearing, the thoughts that I had were that although from what I can see, we may not squarely fall within ... I believe its 29(F) of the Securities Act. I believe that's the provision that says where a solicitor is claiming privilege. Although we may not fall within the four corners of that, it's certainly does set out a scheme in the Act of one way to determine privilege. The Act is very clear about preserving privilege.

So what I am thinking is that knowing that the e-mails that are before us are the subject matter of potential privilege are the same e-mails

> that are before Justice Scanlan who will be, I understand in September, correct me if I'm wrong, holding a hearing with respect to the determinating which ... determine which e-mails are privileged, and basically look at the same e-mails we're looking at."

(20) Mr. Potter appeared to agree with Mr. Baxter when he said, "... all the documents over which privilege or claim will be listed, they'll have a copy to be able to review"

(21) Mr. Baxter expressed the view that he did not want to view the documents under consideration. He then concluded:

> "However, my preference would be, knowing that the Supreme Court is already dealing this issue, my preference would be to, in some ... and I'm not quite sure of the legal way of doing it. I will consult with our ... with the Commission's counsel, but my thought it that the Commission and perhaps staff or someone can make an application to the Supreme Court much akin to a 29(F) sort of approach to ask the Court to determine what is solicitor/client privilege material.
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> I don't think that that runs contrary to the scheme of the Act, and the fact it's been contemplated on a 29(F) in a specific circumstance. I don't think we're in that specific circumstance but I think we're close to it.
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> So I think that would be appropriate and my thought is that the Supreme Court would probably have Mr. Justice Scanlan determine that since he's determining the others.
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> My concern is to keep myself, I'll call it pure. I would not want to review an e-mail, determine that its solicitor/client privilege and I continue on to hear other matters. My preference would be for me not to see solicitor/client privilege materials."

(22) In effect, as he said, the panel could "piggyback" on the Supreme Court's process. Mr. Potter seemed to agree that an application akin to one pursuant to section 29F of the Act would be appropriate. He also addressed very briefly a concern about the potential result of Justice Scanlan having viewed and then presumably relying upon solicitor-client privileged material. The exchange between Mr. Potter and Mr. Baxter was as follows:

"MR. POTTER: With disclosure, and I ... yes, I am. point one. Point two, your idea of some sort of a reference, more or less, under 29(F), I totally agree with as a good idea, and Justice Scanlan, in particular, because he's been around the (point?)

It was clearly decided there ... I'm representing this and Mr. Dunlop can say whether this is the case or not, and Mr. Hill. It's clear, from everyone involved in the civil proceeding that Mr. Justice Scanlan will not be able to conduct the trial because of what he's done ... the work he's done.

I think that's absolutely no ... I would ... you know, I'll be surprised if anybody contradicts that.

VICE –CHAIR: Right. Which is the ...

MR . POTTER: What seems to have been said, over and over.

VICE-CHAIR: Which you can appreciate is the concern that I have.

MR. POTTER: Exactly. So my submission to you would be, that if you were to take on the role, I don't think you can contract it out to a non-decision maker, frankly, you can get advice from them but you can't contract it out, in my submission.

Then you, at the end of the day, are going to have to determine, and once you do you cannot go into the substance that related to it, if you're following the same system, which you presumably are, as the Courts and, in this case, Justice Scanlan.

So there's been a lot of concern about that, whose ... who can do what, so he's doing case management, and the preliminary issues. Somebody else has to do trial."

(23) Mr. Dunlop, in addressing the matter of a procedure to deal with solicitor-client privilege, urged Mr. Baxter to "... cooperate, as it were, with the Supreme Court, identify the concerns and what you have to ... the privilege issue is there.". He pressed Mr. Baxter to use "great caution" in addressing privilege.

Mr. Baxter responded:

> "VICE-CHAIR: So you're (sic) suggestion, or your advice to this panel, is that we should find some mechanism of using the Supreme Court's processes for determining privilege, is that correct?
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> MR. DUNLOP: Yes. And I think that 29(F) certainly is broad enough to, you know, encompass that type of approach.
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> VICE-CHAIR: Yeah, and I don't think I need ... even if we don't fall within all four corners of 29(F), I think that sets out the scheme of the Act, I don't think I need to fall within all four corners. I think I do have the jurisdiction to make that reference.
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> MR. DUNLOP: Yes."

(24) Mr. Hill, on behalf of his client, echoed some of the concerns expressed by Mr. Potter and Mr. Dunlop. With respect to the determination of solicitor-client privilege Mr. Hill's position was that such a privilege ought to be determined by the Supreme Court and that Mr. Baxter await for a decision of the Court.

(25) Ms. Schedler, on behalf of Staff, based upon submissions of the various parties, said that it appeared to her "... that all the parties are at least on agreement that the issue of privilege could be determined by the Supreme Court". She cautioned Mr. Baxter against using a procedure parallel to that of the Supreme Court and expressed some concern about the possible effect of Mr. Baxter viewing solicitor-client privileged evidence.

(26) Following the July 25, 2006, hearing, on December 11, 2006, Mr. Baxter filed his decision on all matters which had been addressed to that time. The various motions addressed in the proceedings were identified by Mr. Baxter as follows:

> "1. The removal of the Department of Justice as counsel to the Commission in this matter;
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> 2. Issuance of an Order to Produce Documents and Things;

3. Directions respecting the protection and determination of solicitor-client privilege documents;

4. Revoking or varying the Investigation Order; and

5. Prohibiting the use of the fruits of the investigation."

Of particular relevance herein is, of course, item #3, although I do remark that Mr. Baxter did in fact deal with the matter of disclosures and he authorized the discovery of Mr. Peacock.

(27) With respect to an attempt to avoid a parallel process for determining solicitor-client privilege, Mr. Baxter said that the "... Commission will adopt, when available, the judicial determination of the scope of privileged material contained in the e-mails". It was, however, necessary for the Commission to apply to the Court for approval for Staff to access the e-mails which, application was subsequently made and granted.

(28) Mr. Baxter decided that the Commission should await the determination by the Supreme Court "as to which e-mails are subject to solicitor-client privilege". He said:

> "Indeed, section 29F of the Act contemplates that in certain circumstances (which are not wholly applicable here) application may be made to the Supreme Court of Nova Scotia to determine solicitor-client privilege. Having regard to these considerations, the Commission on its own motion will make special application to the Supreme Court of Nova Scotia requesting the Court to determine whether any of the /E-Mails not currently being considered by it are subject to solicitor-client privilege. If the Court undertakes such review, once the Court's determination is final such determination shall be binding upon the parties to this proceeding. In the event the Court does not undertake the requested review, the Commission will seek relief from the sealing of Orders of the Supreme Court and will develop an independent process to determine solicitor-client privilege."

(29) During a conference on December 13, 2006, the manner of determining solicitor-client privilege was again discussed. While Ms. Schedler, on behalf of Staff, wondered if the Commission would want its jurisdiction "absconded" by the Court, Mr. Potter said:

> " ... what the Supreme Court says is privilege should be left to the Supreme Court and its made one determination in relation to a set of files and is making another one now. A lot of it is duplicate, but not all and for purposes of our discussion today, I would think it still can be corralled easily.
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> Certainly, I would consent to having Justice Scanlan look at both applications in which he has determined privilege ... in both matters and a composite list with the redundancies taken out ... be the result. And I would be happy to live with that result and then the staff can make its own submissions whether it is. But speaking for myself, to try to move it along, I'm saying yes but let's not forget the civil case where he has made us ... done some analysis."

(30) During the same conference Mr. Potter explained the process he had followed with Justice Scanlan as follows when dealing with the so-called "Dan Potter Mailbox".

> "MR. POTTER: In the first case, I wasn't directed to or invited to set aside documents over which Dan Potter and Knowledge House wanted to claim privilege. Because in that case, it was only the one e-mail box, the Dan Potter mailbox.
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> MR. DONOVAN: Your e-mail box.
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> MR. POTTER: And, in that case, I did a review and created a list on a spreadsheet of 365 documents which then there was a series of iterations between me and Justice Scanlan. No other party saw the correspondence of those iterations because he was asking me questions about privilege related items and in the result, he came up with some findings about some were privileged but not relevant. Others were not privileged and he made a cross-comparison between those which he considered to be prima facie privileged and which had been read, according to the then expert analysis."

(31) It was clear from the discussion of counsel at this conference that it was generally foreseen that Justice Scanlan's decisions with respect to solicitor-client privilege would be determinative for the purposes of the Commission and would enable it to move forward to a hearing on the merits.

(32) On January 11, 2007, the Commission ordered production of all documents in Staff's possession to the various parties and further that Scott Peacock "shall be examined as a form of pre-hearing disclosure". The order further provided that the determination of privilege was adjourned without day.

(33) On January 15 and 16, 2007, Justice Scanlan dealt with a series of applications in relation to the civil matters concerning KHI. He noted initially that Mr. Potter had acknowledged that by his action against his former solicitors he had waived his right to solicitor-client privilege as between himself and his counsel. Justice Scanlan said:

> "[7] Mr. Potter, on his own behalf and on behalf of KHI, acknowledged that the action against the defendants does result in a waiver of privilege in the "Potter" action. I am not prepared to rule at this juncture that the suit as launched by KHI and Potter waives privilege for all things. For example, there is currently an RCMP investigation and a Nova Scotia Securities Commission proceeding. It is not my intention <u>at this juncture</u> to rule on the issue as to whether the suit by Potter and KHI would result in a waiver of privilege in those matters." (emphasis added)

The possibility of future rulings by the Court was clearly left open.

(34) Justice Scanlan continued by ruling that the loss of privilege in the so-called "main" action resulted in the same loss in a related action in which the issues were identical or at least similar.

(35) In a later order, on May 31, 2007, Justice Scanlan ordered that Mr. Potter and KHI had "...waived solicitor-client privilege over communications between Mr. Potter and KHI and their solicitors – SMSS as set out (in) the 24 January waiver Order, for purposes of the proceeding herein."

(36) On August 8, 2007, in a conference, Mr. Potter complained that the Commission's order (of January 11, 2007) had not been complied with and documents had not been produced.

Accordingly, Mr. Potter said that discoveries of Mr. Peacock had not been conducted. Staff, however, took the position that it would only disclose what it was specifically authorized to do and further, Staff was concerned that disclosure to Mr. Potter of certain material might breach the solicitor-client privilege of other parties. Mr. Baxter questioned Staff about whether there had been complete disclosure of "all documents that might be relevant" and noted to Staff that Mr. Potter and others "...wish to have access to everything that was used in the investigation".

(37) Mr. Potter then pressed for disclosure of the investigative material of Investment Dealers Association ("IDA") and Market Regulatory Services Inc. ("RSI"), (which are now collectively Investment Industry Regulatory Organization of Canada ("IIROC")). Mr. Potter and Mr. Dunlop made it clear that notwithstanding the various requests by the panel they could not proceed with discoveries until full documentary disclosure had been made. Staff objected to such disclosure as the IIROC material was not in their possession and took the position that Staff's counsel did not represent IDA or RSI and would not undertake any production of that material. Ms. Schedler also submitted that Staff's position was that solicitor-client privilege had been waived by Mr. Potter in one action which had the effect of waiving it for the purposes of this proceeding.

(38) On December 13, 2007, Mr. Baxter heard and granted an application by Mr. Potter to the effect that he should recuse himself from the conduct of this matter. Mr. Baxter filed a written decision with respect to his recusal on January 7, 2008. As no other Commissioner was then available to replace Mr. Baxter, the matter was delayed until January 29, 2008, when I was appointed a Commissioner and was then assigned the conduct of this proceeding by the Commission Chair.

(39) The matter of full disclosure by IIROC and Staff was then addressed by me at a hearing. Staff's position was that disclosure was limited by section 29 of the Act. Upon hearing the parties I ordered IIROC to disclose, subject to solicitor-client privilege, all materials previously ordered to be disclosed by the Commission on January 7, 2007, August 22, 2007 and April 22, 2008. This order of production was granted pursuant to section 29AA(6) of the Act, a 2006 amendment.

(40) By way of explanation, on March 24, 2006, the Nova Scotia Court of Appeal heard an appeal by the Commission from a decision of Mr. Justice Richard whereby he had, in effect, ordered the Commission to disclose to Mr. Potter "...virtually all of the fruits of the investigation..." and the examination of the Commission's investigator. Cromwell, J.A. (as he then was) with Justices Bateman and Saunders concurring, expressed the Court's reluctance to interfere with the Commission's process and said that the complaints Mr. Potter had made to the Supreme Court should first be addressed by the Commission. Of particular note with respect to the matter of solicitor-client privilege, Mr. Potter had submitted that it ought to have been addressed by the Commission by an application to Court pursuant to section 29F(3) of the Act.

(41) With respect to solicitor-client privilege, Mr. Justice Cromwell said:

> "[33] Mr. Potter says, secondly, that the issues of solicitor and client privilege would inevitably be addressed in court under s. 29F(3). Without expressing a final view on the matter, the present case does not at first blush appear to be one that falls within s. 29F(2) and s. 29F(3) does not appear on its face to provide the only mechanism to resolve issues of solicitor-client privilege. I do not understand **Nova Scotia Securities Commission v. W.** (1996), 152 N.S.R. (2d) 1; N.S. J. No. 232 (Q.L.) (S.C.) to have decided otherwise.

> [34] I note, as is well known, that there is extensive litigation already before the Supreme Court of Nova Scotia addressing the issue of privilege in relation to this material. It would seem regrettable to have parallel proceedings dealing with that issue."

(42) In an attempt to address the complaints of the respondents since the decision of the Court of Appeal the Commission has ordered the investigative staff to be subject to discovery and, subject only to solicitor-client privilege, to disclose its documentary evidence. To this time no discoveries have been conducted, despite the urging of the panel, as the IIROC material has not been available.

(43) In Justice Cromwell's concluding paragraph of his decision he said:

> "[53] I should also say, respectfully, that the Commission appears from the material before us to have been slow to recognize the seriousness of the implications of the allegations made by Mr. Potter in relation to the investigation. I say this without in any way pre-judging the ultimate merits of those allegations. It has been obvious for many months that there are serious claims of solicitor-client privilege in relation to material in the Commission's hands and yet, so far as we can tell, it has done virtually nothing to come to grips with the implications of those claims for the investigation it has authorized. The Commission has also had the benefit for many months of Scanlan, J.'s decision in **National Bank Financial Ltd. v. Potter** (2005), 233 N.S.R. (2d) 123; N.S.J. No. 186(Q.L.)(S.C.) which held that the onus is not on the party claiming privilege to take steps to have the privilege issue determined: see para.62. The judge also set out some very clear statements of what he understood to be the ethical obligations of lawyers who come into the possession of material for which privilege is claimed: see paras. 62-63. It cannot have been lost on the Commission, which we are advised had counsel on a watching brief throughout the proceedings before Scanlan, J., that these statements have serious implications for some or all of its investigators. The Commission, through counsel, claims to have the authority and the tools to address these issues. This decision gives it the opportunity to put those submissions into action.
>
> [54] In short, while I prefer to extend considerable judicial deference to the Commission in the discharge of its regulatory responsibilities in the public interest, that deference is neither absolute nor open-ended. It is, in my view, essential that the Commission take serious and immediate steps

> to come to grips with the obvious issues which have arisen in the course of the investigation which it has ordered."

(44) The Commission has taken very seriously Justice Cromwell's advice and has attempted "to come to grips" with the various issues, including in particular the matter of solicitor-client privilege. Justice Scanlan had partially at least foreseen the problems inherent in the disclosure of "TSE trading records" in paragraph [53] of the decision to which Justice Cromwell referred. Unless and until those records, properly demanded of IIROC by the respondents, were produced and those over which solicitor-client privilege has been claimed are identified, discoveries and proceedings to determine privilege have been stalled. We have been informed by Ms. Schedler that the IIROC production has consisted of many thousands of documents, all of which had to be reproduced from an electronic medium and then reviewed. A firm date for the production of these documents has now been established.

(45) It appears from the content of the various conferences to which I have referred above, the parties appear to have agreed that the matter of solicitor-client privilege ought to be referred to the Nova Scotia Supreme Court. Their position with respect to that process now appears to have changed and they requested that I proceed to deal the matter notwithstanding that would set up a process parallel to one anticipated to be held by the Court.

(46) Of recent concern has been, as I have noted above, the effect of the Supreme Court of Canada decision in " Blood Tribe". I have requested and received from the parties briefs about the effect of that decision and whether I have the authority or jurisdiction to deal with solicitor-client privilege.

The effect of that decision is that it expresses and emphasizes the importance of the protection of solicitor-client privilege in the function of the legal system. In that case the Privacy Commissioner's statutory powers were the same as those of a superior court of

record. The Commissioner was an administrative officer and the Court found that compelled disclosure of confidential (or privileged) material would constitute an infringement of that confidentiality. As well, Justice Binnie of the Supreme Court of Canada pointed out that the Privacy Commissioner might, under the provisions of the Federal Courts Act refer the question of privilege to the Federal Court, a procedure somewhat similar to a course of action open to the Commission whereby a reference might be made to the Nova Scotia Supreme Court. As well, Justice Binnie expressed concern that the Commissioner might "...decide to share compelled information with prosecutorial authorities without court order or the consent of the party from whom the information was compelled."

STAFF'S POSITION:

(47) The parties, including Staff, have urged that I have the authority to determine solicitor-client privilege and that Blood Tribe does not apply. Ms. Schedler, for Staff, urges that amongst the key determinations in findings of Blood Tribe are the following principles which aid in distinguishing that case from the matter now under consideration:

> "Solicitor-client privilege is a legal rule of substance.
>
> The existence of solicitor-client privileged documents alone does not provide sufficient basis for compelling production.
>
> Legislative language which may allow incursions on solicitor-client privilege must be interpreted restrictively.
>
> Open-textured language governing production of documents will be read not to include solicitor-client documents.
>
> The authority to review a document to determine a disputed claim for privilege is derived from the authority to adjudicate disputed claims over legal rights."

(Frankly, these principles appear to support the position of a lack of authority to determine the privilege, rather than the opposite.)

(48) But Ms. Schedler urges that Blood Tribe only interprets the authority of the Privacy Commissioner and cannot be interpreted so as to apply to the panel of this Commission, which does not function as an investigator and is an independent decision maker which has the authority to determine issues of fact and law related to its function as a regulator of securities. She submits that courts have traditionally paid curial deference to such boards (presumably with respect and restricted to their area of expertise) and she refers to Deloitte & Touche LLP v. Ontario Securities Commission [2003] 2 S.C.R. 713. She submits that a reference to Court for a determination of solicitor-client privilege would result in a fragmentation of the proceeding and create intolerable delay. Ms. Schedler submits that Section 29F of the Act does not apply in the circumstances of this case and the Commission

has the power and authority to decide the legal question of solicitor-client privilege. In fact, she says, that if the Commission does not accept Staff's position, "... potentially privileged documents may have already been considered and determined by the Nova Scotia Supreme Court in the civil proceedings" and it would be regrettable to have parallel proceedings dealing with this issue.

(49) Ms. Schedler, however, seems to caution that the parties to a proceeding cannot consent to or agree that the panel has jurisdiction but rather that jurisdiction must be found in its legislation in clear and precise terms.

RESPONDENTS' POSITION:

(50) Messrs. Potter and Dunlop on behalf of their clients, agree with Ms. Schedler's submission. Mr. Potter submits that the Court of Appeal stated that the Commission should address Mr. Potter's complaints, including, presumably the matter of solicitor-client privilege.

(51) Mr. Potter submits that the adjudicative role of the panel distinguishes it from the investigative role of the Privacy Commissioner in the context of Blood Tribe. He also raises the matter of the Commission's authority and the Appeal Court's direction to deal with his complaints. But the subject of this decision is related only to the matter of solicitor-client privilege. Mr. Potter's position is, further, that Blood Tribe deals with an investigative commission's authority to order it to produce solicitor-client privileged documents, whereas in the instant case, those documents are already in the hands of the investigative arm of the Commission.

(52) In this latter regard it is important to emphasize that while staff has had access to documents over which privilege has been claimed, those records have not been available to the panel. Mr. Baxter and I carefully avoided any access to those records.

COMMISSION'S ROLE:

(53) Ms. Schedler takes the position that Blood Tribe dealt with an administrative investigator and not an independent trier of fact and therefore must be distinguished from the instant case. I do not accept that this is necessarily a good ground of distinction.

(54) I am not convinced the role of the panel pursuant to the Act is entirely adversarial in nature and not inquisitorial. The Commission's duties, powers and functions (including those of this panel) are set forth in section 5 of the Act:

> "5(1) The Commission shall perform such duties as are vested in or imposed upon the Commission by this Act or the regulations, the Governor in Council or the Minister.
>
> (2) The Commission is authorized and empowered to hold hearings relating to the exercise of its powers and the discharge of its duties and functions assigned to it by this Act or the regulations, the Governor in Council or the Minister.
>
> (3) For the purpose of any hearing pursuant to this Act, the Commission and each member of the commission shall have an may exercise all the powers, privileges and immunities of a commissioner appointed to the Public Inquiries Act. *R.S., c. 418, s.5.*"

(55) Traditionally the Commission's hearing panel has conducted its process as an adversarial proceeding, but strictly speaking it is an inquisitorial body. Thus, the distinction sought to be drawn between the Commission and the Privacy Commissioner in Blood Tribe in this regard is not accurate.

BLOOD TRIBE

(56) This case addresses the matter of the authority of the Privacy Commissioner to compel access to personal information (solicitor-client privileged) pursuant to the Personal Information and Electronic Documents Act, S.C. 2000, C.5 ("PIPEDA") and, on the other hand the right of the target of the complaint… to keep solicitor-client confidences confidential". I have not been requested to order access to privileged information. Rather I have been asked to determine the validity of claims of privilege with respect to documents already in the possession of Staff and, which presumably Staff wishes to have adduced in support of its allegations. The question I must address is therefore whether I have the authority to receive evidence over which the privilege has been claimed.

(57) Justice Binnie, in the commencement of his analysis in Blood Tribe remarked:

> "[9] solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice."

(58) Justice Binnie set forth succinctly his conclusion in this case in one of his opening paragraphs:

> "[2] Section 12 of *PIPEDA* gives the Privacy Commissioner express statutory authority to compel a person to produce any records that the Commissioner considers necessary to investigate a complaint "in the same manner and to the same extent as a superior court of record" and to "receive and accept any evidence and other information … whether or not it is or would be admissible in a court of law". She therefore argues that, as is the case with a court, she may review documents for solicitor-client privilege is claimed to determine whether the claim is justified. I do not agree. The Privacy Commissioner is an officer of Parliament vested with administrative functions of great importance, but she does not, for the purpose of reviewing solicitor-client confidences, occupy the same position of independence and authority as a court. It is well established that general words of a statutory grant of authority to an office holder such as an ombudsperson or a regulator, including words as broad as those

> contained in s. 2 of *PIPEDA*, do not confer a right to access solicitor-client documents, even for the limited purpose of determining whether the privilege is properly claimed. That role is reserved to the courts. Express words are necessary to permit a regulator or other statutory official to "pierce" the privilege. Such clear and explicit language does not appear in *PIPEDA*. This was the view of the Federal Court of Appeal and I agree with it. I would dismiss the appeal."

(59) It is to be noted that Justice Binnie did not restrict his conclusion to the matter of conferring a right to order access to documents but, as well "…even for the limited purpose of determining whether the privilege is properly claimed", a right reserved to the courts.

(60) Blood Tribe, makes clear that tribunals cannot compel access to solicitor-client privilege in the absence of express statutory authority – even for the limited purposes of assessing the validity of a claim of privilege.

EXPRESS AUTHORITY

(61) Express statutory language is required to allow incursions on solicitor-client privilege. No such language exists in the Act and in fact the opposite is true. Section 29F of the Act requires an application to the Court to obtain a warrant to examine or seize potentially privileged documents. The absence of express authority in the Act is also relevant in a negative sense, for as Justice Binnie said, with respect to *PIPEDA*, the absence of express authority is one "…from which we may draw an adverse inference. It is not there because Parliament (or the Legislature) did not put its collective mind to the solicitor-client issue or because Parliament (or the Legislature) had no intention of giving the Privacy Commissioner (or the Commission) the power she now claims.

(62) It must be recognized that at law, solicitor-client privilege is a type of privilege that is close to absolute. (see Paccioco and Steusser, The Law of Evidence , 5th Ed. P. 217.). It belongs to the privilege-holder, but it may in certain circumstances be waived. Inadvertent

or accidental disclosure will not constitute waiver of the privilege. Without specific statutory authority solicitor-client privileged documents are usually inadmissible in court. While the Commission's General Rules of Practice and Procedure (s.14.1) states that the Commission is not bound by the rules of evidence, it is clear that solicitor-client privilege is a substantive right and not merely a rule of evidence. (see Descôteaux et. Al. v. Mierzwinski [1982] 1S.C.R. 860 and Blood Tribe). Accordingly, absent express statutory authority, the privilege must be protected by all courts and tribunals.

> *Descôteaux* stated:
>
> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.[6]"

(63) Blood Tribe emphasizes that explicit statutory language authorizing interference with solicitor-client privilege is required. Justice Binnie said:

> "[11] To give effect to this fundamental policy of the law, our Court has held that legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively.

> The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read *not* to include solicitor-client documents: *Lavallee,* at para. 18; *Pritchard,* at para.33. This case falls squarely within that principle."

(64) There is no language in the Act permitting such inference. Indeed, s. 29F suggests the opposite and sets out specific privilege item protecting procedures. It requires documents to be returned to the privilege holder if a court determines that they are privileged. I conclude that the lack of explicit statutory authority and the policy enunciated by s. 29F lead to the conclusion that this Commission cannot (or should not) abrogate solicitor-client privilege.

THE PROCESS

(65) It may be argued that this Commission with the consent of the alleged privilege holders may review the potentially solicitor-client privilege documents without constituting a breach or waiver of the privilege. That is, it may be possible that a Securities Commission may determine the existence of privilege as a matter of law without accessing and reviewing the specific documents. In addition, it may be that even if the Commission reviews the documents, in the absence of waiver by the privilege-holder, the privilege is not lost. (See Philip Services Corporation v. Ontario Securities Commission, (2005), 7 O.R. (3rd) 209).

(66) The distinction between a finding of solicitor-client privilege documents and the use of them is clearly defined in British Columbia Securities Commission v. S.(B.S.), 2003 BCCA 244; 13 BCLR (4th) 107. In that case, the British Columbia Court of Appeal upheld a judge's order dictating a procedure to be followed with regard to documents, over which solicitor-client privilege was claimed, and which the British Columbia Securities Commission sought to have produced. That procedure required the privilege-holder's lawyer to describe documents, without revealing information that is privileged, so that the

Commission could assess the claim of privilege. If, however, the Commission did not agree, on the basis of the description, that a document over which privilege was claimed was in fact privileged, then it was ultimately for the court to review the documents if necessary and make a final determination as to the existence of privilege.

(67) I conclude on the basis of these cases that this Commission may have the jurisdiction to make findings of law related to solicitor-client privilege where it is not necessary to review the allegedly privileged documents.

(68) In certain public inquiries, such a Lyons v Toronto Leasing Inquiry Commission, 183 O.A.C. 273 and Walkerton Inquiry, arrangements were made to have documents over which solicitor-client privilege had been claimed examined by counsel to determine relevance and privilege and if no agreement was reached, the matter would be referred to a judge for arbitration. These proceedings, however, were conducted as required by statute, by a Superior Court Judge. It is to be noted that there is no such requirement in the Act and the commissioner or commissioners conducting a hearing under the Act need not be a judge or a retired judge or even a lawyer. In this particular case I happen to be a retired Superior Court Judge, but there is no requirement for such in the Act. An adjudicative panel in Nova Scotia need not be legally trained.

(69) In ordinary circumstances, therefore, a determination of solicitor-client privilege is a two step process – firstly a determination at law that the privilege exists in the circumstances of the case, and secondly, a review of the specific documents or communications over which privilege is claimed.

"ILLEGAL PURPOSE"

(70) But in the present case a further element is involved; that addressed by Justice Binnie as "the rare exception… when no privilege attaches to communications criminal in themselves or intended to further criminal purposes."

(71) A finding of solicitor-client privilege in this case necessarily involves an examination of possible illegal purpose. A preliminary finding of that privilege in the present circumstances without consideration of illegal purpose would either preclude the consideration of the material in question at the main hearing or necessitate a reconsideration of same. In order to deal with the question of illegal purpose it would be necessary to review evidence with respect to the legal advice given and to address the question of whether that advice was sought or obtained in order to facilitate an illegal purpose, in which case the privilege does not apply. Such a finding would not necessarily be a reflection on the solicitor as it is the intention of the client which is germane to the question. An inquiry into the matter of illegal purpose would require an in-depth review of the purpose of the advice sought, the entire context of the request for advice and evidence of criminality or fraud. Such an exercise carried out prior to a hearing by the ultimate trier of facts on the case should be avoided. An obvious means of avoiding the tainting of the Commission in an eventual hearing is to refer the matter to the Supreme Court for determination. Such a procedure would avoid the necessity of tainting the Commission by conducting a *voir dire*. It is my conclusion that the court would be in the best position to determine whether any privilege is lost (or never existed) by virtue of the illegal purpose exception.

(72) Justice Scanlan proposed to deal with the matter of solicitor client privilege in two stages (a process approved by the Court of Appeal of Nova Scotia); the matter of "illegal purpose" was to be the second stage. Justice Bateman said:

> "... We are not persuaded that the judge erred in principle or at law in deciding that the issue of privilege should be approached in stages. Nor are we persuaded the the fact that the illegal purpose response to the claim of privilege will not be addressed at the October application results in a patent injustice. Should the presiding judge find that the disputed communications are not subject to solicitor/client privilege, it will not be necessary to hear the illegal purpose argument in order to resolve the privilege issue. The necessity or timing of any further consideration of the illegal purpose issue should be left to be determined at a future time by the judge then seized with the matter. Counsel for the law firm Stewart McKelvey Stirling Scales and counsel for lawyer Blois Colpitts acknowledge that, despite the language contained in Justice Scanlan's reasons, nothing in the order prevents him from considering the illegal purpose issue prior to trial, if found necessary, and that it would be problematic for the judge to uphold privilege without first providing counsel for the appellants with an opportunity to address the illegal purpose argument.

(73) Ultimately a determination of privilege in this case must eventually involve a consideration of illegal purpose.

RECUSAL

(74) In addition, in the event that I should enter into a procedure of examining documents over which privilege was claimed, even with the consent of the parities, an application to recuse myself from further conduct of the case would probably follow. I refer, of course, to the statements of Mr. Potter when he remarked that it seemed inevitable that Justice Scanlan would have to recuse himself as he had access to and reviewed the solicitor-client privileged documents. As no other Commissioners would presently be available to replace me, and if I were to recuse, an intolerable delay would be inevitable. I am not suggesting I have

prejudged the possible success of such an application for recusal, but it would be folly to ignore the distinct possibility of such an application.

(75) Justice Cromwell was clear in his view that Mr. Potter's complaints (without specifying which) should best be resolved by the Commission as it is the appropriate forum for such a function. While Mr. Potter had taken the position before the Nova Scotia Appeal Court that the matter of solicitor-client privilege would inevitably have to be dealt with in court under s. 29F(3) of the Act, Justice Cromwell disagreed. He said that the present case did not appear to fall within s. 29F(2) and therefore s. 29F(3) does not appear to be the only mechanism to resolve issues of solicitor-client privilege. Indeed, it is clear that s. 29F(2) is effective in anticipation of seizure of documents, whereas in the instant case Staff is in possession of some of the documents already. Justice Cromwell suggested that the Commission may be able to "resolve issues of solicitor-client privilege", but at that time the matter of documents in possession of IIROC had not been contemplated. It is also not clear that the jurisdiction to resolve such issues contemplated by Justice Cromwell extended to a review of the documents, or simply a determination of the privilege as in Philip and B.C. Securities Commission. A possible method to resolve the issue may be a reference to the Court in the manner contemplated by s. 29F.

CONCLUSION

(76) I conclude that a tribunal such as this Commission cannot compel access to solicitor-client documents. With the privilege-holders consent the Commission may review the documents but it is not authorized to violate privilege. A review by the Commission of solicitor-client privileged documents with privilege-holders permission may arguably be permissible, but this conclusion is based largely on obiter comments in cases such as Blood

Tribe, and I am not aware of any clear authority for such a proposition. Generally speaking, disputes of this nature before Securities Commissions are usually left to the courts – a practice which seems to accord with the general intention of s. 29F(2) of the Act. An examination of the discussions of Mr. Baxter and the parties reveals that it was Mr. Baxter's intention to follow that practice.

(77) I agree with Mr. Baxter's stated intention to refer the matter of solicitor-client privilege to the Supreme Court. It is clear, as well, that the parties had previously agreed that was the appropriate procedure to follow and Justice Scanlan held the possible procedure open .

(78) I have therefore decided that while it might not arguably be entirely clear that Blood Tribe has the effect of disallowing a board or commission such as this from deciding upon issues of solicitor-client privilege, I will decline to embark on a process of doing so. I understand the factual and evidentiary background of this matter will lead to a lengthy and expensive process. In my opinion it would be unwise for me to proceed down the path of a full hearing on the merits unless and until the scope of my jurisdiction to deal with matters of solicitor-client privilege has been clarified or has been decided by the Court.

PARALLEL PROCESS

(79) There is another aspect of the matter which strongly supports my decision to refer the matter of solicitor-client privilege to the Court.

(80) The parties and the Courts have all expressed the wisdom of avoiding a situation where the Court and the Commission are conducting parallel proceedings. To avoid that potential was the hope of the Commission when the matter was before Justice Scanlan. That hope had to be held in abeyance, however, when Justice Scanlan found, with the consent of Mr. Potter, that solicitor-client privilege had been waived by his action against his former solicitors.

Justice Scanlan, however, was clear that such a ruling was not made with respect to this Commission's process. Nor did such a decision affect the solicitor-client privilege claimed by any of the other parties or any possible documents to be produced by IIROC. If I were to proceed to deal with solicitor-client privilege in the present circumstances, and knowing that the same or similar issues are yet to be dealt with by the Court, I will have commenced a parallel proceeding.

CONTRA DECISIONS

(81) There have been cases in which tribunals including Securities Commission have reviewed potentially privileged documents and determined the existence of privilege.

(82) In *Arbour Energy Inc.* (*Re)* 2008 LNABASC 117, 2009 ABASC 143 the Investment Dealers Association held that it could determine the existence of solicitor-client privilege.

Similarly, in *Union Securities Ltd.* (*Re*) [2005] I.D.A.C.D. No. 51, Bulletin No. 3468, October 17, 2005.

> "45 If, as a result of this investigation, charges are laid against Union Securities and /or Mr. Frangos, **the hearing panel charged with presiding over those charges will be the appropriate body to pass upon the claim of solicitor client privilege**. In the meantime, we direct that the documents referred to in paras 6, 7 and 8 of Mr. Frangos' affidavit shall be removed from the material referred to in the letter of November 30, 2004. That information shall be sealed and kept in the custody of Mr. Patrick J. Sullivan, counsel for Union Securities, pending any further order of a hearing panel which may be seized of charges against either Union Securities or Mr. Frangos (emphasis added).

(83) In *Robinson* (*Re*) 1994 LNONOSC 312 (Ontario Securities Commission) the Ontario Securities Commission determined the existence of privilege with regard to a number of documents and it appears that it reviewed at least some

of them in so doing. The same is true of the Alberta Securities Commission in *Capital Alternatives Inc*. (*Re*). 2008 LNABASC 117, 2008 ABASC 143

(84) There have also been cases involving other tribunals. For example, the B.C. Labour Relations Board in *Starbucks Corp (Re)* [2003] B.C.L.R.B.D. No. 233, 94 C.L. R. (2d) 201 held that it had jurisdiction to determine issues of SCP.

> 9 There is little doubt that courts will review Board decisions on matters of general law, such as natural justice and solicitor-client privilege, on a standard of correctness. However, courts have generally found the Board has jurisdiction under Section 141 to reconsider original decisions involving such issues, if only for the practical advantage of correcting errors of law without the necessity for judicial review. We note that there is no question that the original panel had jurisdiction to deal with the issue of solicitor privilege and to decide whether to allow the Questions (see Section 124(1) of the code). Accordingly, we are not persuaded that the Board lacks jurisdiction to reconsider the Original Decision under Section 141.

These cases, however all pre-date Blood Tribe.

(85) I have only become aware of one tribunal case post-dating Blood Tribe – Walden v. Canada (Social Development) [2008] C.H.R.D. No. 35, 2008 CHIC 35. It, however, addressed the matter of privileges as follows:

> **"ISSUE ONE: DOES THE TRIBUNAL HAVE JURISDICTION TO INSPECT THE DOCUMENTS?**
> [4] In *Blood Tribe (Department of Health) v. Canada (Privacy Commissioner)* 2008 SCC 44 (CanLII), 2008 SCC 44 334, the Supreme court held that that Privacy Commissioner did not have the jurisdiction to inspect documents over which a claim of solicitor-client privilege had been asserted. The Court stated that express language is required to abrogate solicitor-client privilege because it is presumptively inviolate (*Blood Tribe* at para. 26).
>
> [5] The issue in the present case is different from that in the Blood Tribe case. Here we are dealing with litigation privilege. As the Supreme court noted in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII),

> 2006 SCC 39, litigation privilege and solicitor-client privilege are two very different legal constructs; they are driven by different policy considerations and generate different legal consequences. Therefore, I do not think that the reasoning in *Blood Tribe* applies to the present case."

(86) It if there are any claims of litigation privilege involved herein, I will hear the party making such a claim.

FUTURE CONDUCT

(87) It is anticipated that the IIROC material will be produced to the parties on July 9. The respondents are requested to then identify to me specific documents over which solicitor-client privilege is claimed. I will convene a conference with the parties to determine a time frame or schedule for that purpose, it being presently unknown by the respondents the extent of this task.

(88) I will then require Staff to identify those documents over which the privilege has been claimed and which Staff wishes to have adduced in evidence.

(89) Following any motions by the parties I will instruct counsel to make application to the Nova Scotia Supreme Court to adjudicate the validity of the claims of privileges over the documents (if any) identified by the parties.

DATED at Halifax, Nova Scotia this 25th day of June, 2009

"D. W. Gruchy"
David W. Gruchy, Q.C.
Commissioner

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