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IN THE MATTER OF THE SECURITIES ACT
R.S.O. 1990, CHAPTER S.5, AS AMENDED

AND

IN THE MATTER OF
AIT ADVANCED INFORMATION TECHNOLOGIES CORPORATION, BERNARD JUDE ASHE AND DEBORAH WEINSTEIN

Hearing: June 13, 2007

Panel:	Wendell S. Wigle	-	Commissioner (Chair of the Panel)
	Harold P. Hands	-	Commissioner
	Carol S. Perry	-	Commissioner
Counsel:	Jane Waechter Karen Manarin	-	for Staff of the Ontario Securities Commission
	Alistair Crawley Matthew C. Scott	-	for Deborah Weinstein

DECISION AND REASONS

I. OVERVIEW

[1] Staff of the Ontario Securities Commission ("Staff") bring a motion for directions of the Commission with respect to whether Alistair Crawley and Crawley Meredith LLP, counsel of record for the respondent Deborah L. Weinstein (the "Respondent"), stand in a conflict of interest and should be removed from the record.

[2] Deborah Weinstein is named in a "Notice of Hearing" and "Statement of Allegations", both dated February 12, 2007. The allegations involve a merger transaction (the "Merger Transaction") between AiT Advanced Information Technologies Corporation ("AiT") and 3M Company ("3M"). At the time of the Merger Transaction, the Respondent was one of eight members of the Board of Directors of AiT. Weinstein was also a partner at LaBarge, Weinstein

LLP, AiT's legal counsel. Staff allege that "AiT contravened section 75 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "Act") and engaged in conduct contrary to the public interest by failing to disclose forthwith the Merger Transaction as a material change." Staff also allege that Weinstein and Ashe committed an offence pursuant to section 122(3) of the Act and engaged in conduct contrary to the public interest by authorizing, permitting or acquiescing in AiT's failure to disclose forthwith the Merger Transaction as a material change.

[3] During Staff's investigation of this matter, Mr. Crawley was retained by six non-management members of the Board of Directors (the "Outside Directors") of AiT to provide responses to enforcement notices (the "Enforcement Notices") sent to each director in which Staff outlined facts suggesting that these directors may not have complied with securities law. However, after an exchange of correspondence with Staff, the Outside Directors were advised, in writing on February 28, 2006, that they would not be named as respondents in this matter. The Outside Directors were advised that Staff's decision was based in part because they received legal advice from Deborah Weinstein with respect to disclosure of the Merger Transaction.

[4] After the Notice of Hearing was issued nearly one year later, Mr. Crawley advised Staff that he was counsel of record for Deborah Weinstein.

[5] Staff submit that Mr. Crawley and his law firm, Crawley Meredith LLP, cannot represent the Respondent as some of the Outside Directors, Mr. Crawley's former clients, may be called as witnesses by Staff at the hearing. Staff argue that may give rise to a conflict of interest because Mr. Crawley will be put in the position of cross-examining his former clients.

[6] The Respondent submits that this motion is inappropriate, premature and speculative. The Respondent argues that Staff have failed to identify a conflict of interest in this case, and that Staff should respect Deborah Weinstein's counsel of choice and assume that Mr. Crawley is cognizant of his duties to current and former clients.

II. FACTS

[7] AiT was a reporting issuer in Ontario, located in Ottawa. During the spring of 2002, AiT was involved in discussions and negotiations with 3M regarding a strategic amalgamation between the two companies. On May 23, 2002, AiT and 3M executed a definitive agreement outlining the Merger Transaction. On the same date, AiT issued a press release and subsequently filed a material change report announcing that it had entered into a Merger Transaction with 3M.

[8] At the time of the Merger Transaction, Deborah Weinstein was one of eight directors of AiT. She was also a partner at LaBarge Weinstein LLP, AiT's legal counsel.

[9] During the investigation of the Merger Transaction, Staff sent Enforcement Notices dated June 23, 2004 to all eight members of the Board of Directors of AiT. The letters advised each of the members of the Board of Directors that Staff was of the view that they "authorized, permitted or acquiesced" in AiT's failure to disclose forthwith the Merger Transaction as a material change by April 26, 2002.

[10] In a letter dated July 30, 2004, Alistair Crawley advised Staff that he had been retained

by six of the directors of AiT, namely Paul Damp, Graham Macmillan, Stephen Sandler, Allan Churgin, Richard Lesher and Edward Lumley (collectively the Outside Directors), "to prepare a response to the matters raised by Staff in the invitation to provide information." The Respondent retained and was represented by separate counsel at that time.

[11] By letter dated February 15, 2005, Mr. Crawley, on behalf of the Outside Directors, further advised Staff that "the Outside Directors recall that at the April 25, 2002 Board meeting Deborah Weinstein advised that it would be premature to announce a possible transaction with 3M."

[12] After subsequent correspondence between Staff and Mr. Crawley, Staff decided not to name the Outside Directors as respondents. However, by letter dated February 28, 2006, Staff sent a "warning letter" to the Outside Directors. Staff informed the Outside Directors and Mr. Crawley that,

> [i]n making this decision, Staff have taken into consideration the particular circumstances of this matter, including the fact that they [the Outside Directors] have all asserted in their response to Staff's Enforcement Notice that they received legal advice from Deborah Weinstein with respect to the disclosure of the merger transaction.

[13] A Notice of Hearing and Statement of Allegations was issued by the Commission on February 12, 2007, naming AiT, Deborah Weinstein and Bernard Jude Ashe as respondents. AiT and Bernard Jude Ashe entered into Settlement Agreements with Staff, which were approved by the Commission on February 26, 2007.

[14] On February 26, 2007, Staff were advised by Alistair Crawley that he was retained by the Respondent in this matter.

III. ISSUES

[15] This motion raises the following issues:

1. Whether Mr. Crawley and Crawley Meredith LLP stand in a conflict of interest?

2. What order, if any, should the Commission give in the event that it determines that Mr. Crawley and Crawley Meredith LLP stand in a conflict of interest?

IV. POSITION OF THE PARTIES

A) Submissions from Staff

[16] Staff submit that the jurisprudence is clear that counsel cannot cross-examine a former client in respect of the same or related factual scenario that concerns the new retainer. Staff

argue that Mr. Crawley's representation of the Outside Directors was on precisely the same facts and issues that are now before the Commission in respect of the Respondent.

[17] Staff rely upon the following fundamental legal principles to argue that Mr. Crawley has a conflict of interest and should therefore be removed as counsel of record:

(a) Counsel has a fiduciary duty to his clients, which includes the duty to put the interest of the client above the interests of anyone else. This fiduciary duty survives the completion of the retainer. (*Re Regina and Speid*, (1983), 8 C.C.C. (3d) 18 (Ont. C.A.), at 22.)

(b) Fiduciary responsibilities include the duty of loyalty, which is focussed on the lawyer's ability to provide proper client representation. The client discloses confidential information to their lawyer, and that confidence is protected by the concept of solicitor-client privilege. Clients disclose information in the belief that nothing they say will be used against them and to the advantage of the adversary. (*MacDonald Estate v. Martin* (1990), 77 D.L.R. (4th) 249 (S.C.C.) ("*MacDonald Estate*"), at 255.)

(c) The duty of loyalty includes the duty to avoid conflicts of interest in representing clients. (*R. v. Neil*, [2002] 3 S.C.R. 631 (S.C.C.), at para. 19.) This duty is not only recognized in the *Rules of Professional Conduct*, but also in the common law. Counsel should examine whether a conflict of interest exists not only from the outset but throughout the duration of the retainer because new circumstances or information may establish or reveal a conflict of interest.

(d) A conflict of interest can occur where counsel previously acted for an individual to whom counsel is now in an adversarial position. An adversarial position may arise when a witness, although not technically a "party" to the hearing, is nonetheless going to be subjected to cross-examination. (*R. v. Edkins*, [2002] N.W.T.J. No. 8 (S.C.) (QL), at para. 11.)

(e) There can be no assurances or undertakings not to use the confidential information. Counsel cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. There is a risk that the cross-examination of a former client may become less effective or that questions put in cross-examination might cause the former client to believe they came from the previous relationship. (*MacDonald Estate*, *supra* at 268.)

(f) Counsel cannot give his exclusive, undivided attention to the interests of his client if he is torn between his client's interests and those of another client to whom he owes the same duty of loyalty. (*R. v. Neil*, *supra* at para. 26.)

(g) A conflict of interest of one lawyer in a law firm stand as a conflict of interest for any other lawyer in the same law firm unless it is demonstrated that the firm has set up appropriate screening mechanisms. This is so because there is a "strong inference that lawyers who work together share confidences". (*MacDonald Estate*, *supra* at 269.)

(h) The Respondent's right to choose counsel of her choice is not an absolute right. It is subject to reasonable limits. The Respondent cannot choose counsel that has a conflict of interest in circumstances which would ultimately affect the administration of justice. (*Re Regina and Speid, supra* at 21.)

(i) The Commission must consider the public interest and the need for public confidence in the administration of justice generally in examining issues of conflict of interest. Public confidence in the administration of justice is undermined by any appearance of impropriety in the conduct of the hearing or any lack of fairness in the cross-examination of a witness. (*R. v. Robillard* (1986), 28 C.C.C.) (3d) 22 (Ont. C.A.), at 27-28.)

(j) Staff's duty is to raise an objection about a potential conflict of interest at the earliest opportunity, well in advance of the hearing, in order to avoid a mistrial. Doing so avoids delays and decreases the likelihood that confidential information will be used improperly. (*R. v. Neil, supra* at para. 38.)

[18] Staff anticipate that the evidence at the hearing will be that the Respondent gave advice to the members of the Board of Directors of AiT on the questions which are the subject of the Statement of Allegations, and which the Outside Directors provided answers to during their responses to the Enforcement Notices. Mr. Crawley will therefore be put in the position of having to cross-examine or impeach the credibility of a former client. Staff argue that it is apparent that there may be possibilities for the misuse of confidential information obtained from the Outside Directors, Mr. Crawley's former clients.

[19] As such, Staff submit that they have raised the issue of Mr. Crawley's conflict of interest at the earliest opportunity. Staff raised the issue prior to the pre-hearing conference. Moreover, there is no evidence that the Respondent sought a formal waiver with any the Outside Directors, and there is no indication that the Outside Directors received independent legal advice. Staff argues, therefore, that the Outside Directors have not consented to the Respondent's retainer.

[20] Staff rely on the affidavit filed by Stephanie Collins, a Senior Forensic Accountant in the Enforcement Branch, which indicates that she was advised by Graham Macmillan that it would be "Ms. Weinstein's problem" and that "if the [Outside Directors] needed Alistair Crawley, he would have to represent them."

[21] Finally, Staff submit that the prejudice in this case is minimal since the retainer is relatively recent (shortly after February 12, 2007).

B) Submissions from the Respondent

[22] Mr. Crawley submits that Staff's motion to disqualify him as counsel of record is premature. Staff have not provided any particulars whether they intend to call any of the Outside Directors as witnesses during the hearing. If there is a prospect of prejudice to a witness, it

should be for the witness to object, or for the Commission to exercise its jurisdiction to control its own process to prevent any unfairness. Mr. Crawley argues that the Respondent previously discussed her intention to retain Mr. Crawley with the Outside Directors and none of them objected to the retainer.

[23] In addition, Staff have not adduced any evidence of potentially prejudicial confidential information that was imparted from the Outside Directors that could be used against them during the hearing. Mr. Crawley submits that there are other ways in dealing with potential conflict situations that might arise, short of automatic disqualification of counsel (as explained in more detail below). There is no issue at this stage of the proceedings that merits the Commission's intervention.

[24] Mr. Crawley submits that his removal as counsel of record will necessitate a further delay in these proceedings and will adversely affect the Respondent's rights and expectations to have this case proceed within a reasonable time frame.

[25] Applications to have counsel disqualified for conflict of interest should not be initiated except in situations where there is real evidence giving rise to a perception of an unfairness in the proceeding or a real or possible prejudice to the witness. Counsel referred to the *R. v. Stein*, [1996] O.J. No. 5482 (Prov. Ct.) (QL), decision. In that case, the Crown brought an application to disqualify a lawyer acting as counsel for the accused, Stein. The lawyer had represented both Stein and a co-accused before the Crown withdrew the charges against the co-accused and decided to call him as a witness. The Court found that there was no evidence that the testimony of the witness would be opposed in interest to Stein, nor anything to suggest that the lawyer would be required to challenge her credibility. The Court held that the Crown's allegation of conflict was purely speculative, and insufficient to remove Stein's counsel of choice.

[26] Mr. Crawley submits that it is speculative at this point whether any of the Outside Directors would contribute any evidence that is contrary to the Respondent's position. Each of the directors of AiT, including the Outside Directors, made multiple "with prejudice" submissions to Staff in response to the Enforcement Notices in which their recollections of April 25, 2002 Board meeting and the topic of Ms. Weinstein's legal advice were outlined in detail. All of the Outside Directors concur that Ms. Weinstein gave advice to the Board of AiT on April 25, 2002 that it would be premature to disclose the discussions with 3M at that time. Moreover, the Outside Directors, other than Paul Damp, were not directly involved in any of the negotiations with 3M, including the negotiation of the transaction and the due diligence process.

[27] As such, Mr. Crawley submits that the line of criminal authorities relied on by Staff in support of their position are inapplicable to Commission proceedings involving issues of corporate decision-making. Decisions of the boards of directors of corporations are legally, and by their nature, collective decisions. The likelihood that confidential prejudicial information will be used against a witness is greatly diminished from situations where counsel may have been retained by parties who are adverse in interest. In that context, Mr. Crawley submits that joint representation of officers and directors is common place in proceedings before the Commission.

IV. LAW AND ANALYSIS

A) Do Mr. Crawley and Crawley Meredith LLP Stand in a Conflict of Interest?

[28] The issue of conflict of interest is a current and ongoing problem facing practitioners and the courts. We note that the Canadian Bar Association has recently created a task force to attempt to develop practical guidelines to help lawyers with the growing issue of conflict of interest. The Committee is endeavouring to develop a workable approach to conflicts that best serves the interests of the public while preserving the fundamental legal and ethical obligations of the profession.

[29] In *De Perez v. Ontario (Securities Commission)*, [1994] O.J. No. 4502 (Gen. Div.), the court held that the Commission can hear an application for the removal of counsel for conflict of interest. More recently, in *Re Credit Suisse First Boston Canada* (2004), 28 O.S.C.B. 1571 (Ont. Sec. Comm.), the Commission removed counsel of record on the basis that "the nature of the impugned portion of the defence goes to the very root of the matters that Stikeman Elliott was originally retained to advise on".

[30] The solicitor-client relationship is overlaid with certain fiduciary responsibilities, which are imposed as a matter of law. The foundation of this branch of the law is the need to protect public confidence in the legal profession and the integrity of the administration of justice generally. In *R. v. Neil*, Justice Binnie stated the following: "it is of high public importance that public confidence in that integrity be maintained."

(*R. v. Neil*, *supra* at para. 12.)

[31] Fiduciary responsibilities include the duty of loyalty, of which an element is the avoidance of conflicts of interest, as set out in the jurisprudence and reflected in the *Rules of Professional Conduct* of the Law Society of Upper Canada, which govern the practice of law in Ontario. While not legally binding, the *Rules of Professional Conduct* are considered as important statements of public policy which provide helpful guidance on this issue.

[32] In its discussion regarding impartiality and conflict of interest, the Supreme Court in *MacDonald Estate*, quotes the following rule from the Canadian Bar Association Code of Professional Conduct of 1974, which was adopted by the Law Society of Upper Canada:

> The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client, he should not act or continue to act in a matter when there is or there is likely to be a conflicting interest. A conflicting interest is one which would be likely to affect adversely the judgment of the lawyer on behalf of or his loyalty to a client or prospective client or which the lawyer might be prompted to prefer to interests of a client or prospective client.

(*MacDonald Estate*, *supra* at 256.)

[33] Rule 2.04 of the *Rules of Professional Conduct* is entitled "Avoidance of Conflicts of Interest." It defines a conflict of interest or a conflicting interest as an interest:

(a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or

(b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

[34] Rule 2.04(3) of the *Rules of Professional Conduct* provides as follows:

> (3) A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

[35] In *Re Regina and Speid*, the court outlined the competing values the Commission must consider in assessing the merits of a disqualification order:

> The right of an accused to retain counsel of his choice has long been recognized at common law as a fundamental right… However, although it is a fundamental right and one to be zealously protected by the court, it is not an absolute right and is subject to reasonable limitations. It was hoped that these limitations would be well known to the bar, but if not honoured, the court [in this case the Commission] has jurisdiction to remove a solicitor from the record and restrain him from acting.
>
> In assessing the merits of a disqualification order, the court [in this case the Commission] must balance the individual's right to select counsel of his own choice, public policy and the public interest in the administration of justice and basic principles of fundamental fairness. Such an order should not be made unless there are compelling reasons.
>
> (*Re Regina and Speid*, *supra* at 20-21.)

[36] The test for removal of counsel is an objective one. The Commission must determine whether the public, represented by the reasonably informed person, would conclude that the proper administration of justice requires the removal of counsel of record. The two-step test was set out by Sopinka J. in *MacDonald Estate* as follows:

> Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor-and-client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?
>
> (*MacDonald Estate*, *supra* at 267.)

[37] Under the *MacDonald Estate* test, once the client is able to show a sufficient connection between a previous relationship and the new retainer, the court should then infer that confidential information was imparted unless the lawyer can show that this was not the case. The onus on the

lawyer to establish that no confidential information was imparted that could be relevant is a "difficult burden to discharge." This onus is described as follows:

> … In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.
>
> The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. Moreover, the former client would feel at a disadvantage. Questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship. [Emphasis added.]
>
> (*MacDonald Estate*, *supra* at 267-68.)

[38] The *MacDonald Estate* rule protecting against disclosure of confidential information is applied as a "bright line" rule. The client's right to confidentiality trumps the lawyer's desire for mobility. In *R. v. Neil*, the Supreme Court stated:

> The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client… unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyers reasonably believes that he or she is able to represent each client without adversely affecting the other.
>
> (*R. v. Neil*, *supra* at para. 29.)

[39] More recently, in *Strother v. 3464920 Canada Inc.*, [2007] S.C.J. No. 24 (S.C.C.) (QL), the Supreme Court confirmed that the impact arising from the new retainer must be "material and adverse." The Court stated that "while it is sufficient to show a possibility (rather than a probability) of adverse impact, the possibility must be more than speculation."

(*Strother v. 3464920 Canada Inc*., *supra* at para. 61.)

[40] We agree with the Respondent that her ability to secure the advice of Mr. Crawley as counsel is an important consideration. However, it does not trump the requirement to avoid conflicts of interest. Staff submit that in the course of his retainer with the Outside Directors, Mr. Crawley received confidential information relevant to the central issue that will be argued before the Commission during the hearing – what did the Respondent say to the Outside Directors and Bernard Jude Ashe during the Board meeting of April 25, 2002 with respect to the issue of material change pursuant to section 75 of the Act. While it is recognized in the jurisprudence that conflict of interest concerns arise from possibilities rather than probabilities, there is some evidentiary foundation, according to Staff, upon which a given possibility could be assumed. Staff argue that this possibility alone would support a potential disqualifying conflict of interest. For the reasons set out below, we concur.

[41] The danger of allowing the same counsel to act on a matter where confidential information has been imparted by a former client was highlighted by Sopinka J. in *MacDonald Estate*: "questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship."

(*MacDonald Estate, supra* at 268.)

[42] We repeat that for members of the public to have confidence in the legal profession and the administration of justice generally, "they must know that their confidences will be respected and not used against them in the future for the benefit of another client". (*R. v. Baltovich*, [2003] O.J. No. 2285 (C.A.) (QL), at para. 12.)

[43] In other words, the caveat in *MacDonald Estate* that "the lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere" is particularly problematic in this case, since the same counsel is involved in both retainers. We agree with Staff's submission that "it is inherently adversarial to cross-examine someone." We are mindful in this context that there may exist circumstances for the use, potential for use, or opportunity to use, confidential information secured in the course of the earlier retainer relationship if any the Outside Directors are called as witnesses for Staff. The risk may be very minimal at this stage but it nevertheless exits.

[44] Sopinka J. in *MacDonald Estate* held that an inference should be drawn that confidential information was shared during a previous relationship which is sufficiently related to the retainer unless the court is otherwise satisfied by clear and convincing evidence. There is no evidence before the Commission to rebut the inference that relevant confidential information passed between the Outside Directors and Mr. Crawley.

[45] Accordingly, we do not find that Mr. Crawley and Crawley Meredith LLP have met their heavy burden of proof that they did not receive, and would not use, the relevant confidential information. The Outside Directors cannot be taken to have consented to conflicts of which they are ignorant. The prudent practice for the lawyer, as set out in the jurisprudence, is to obtain informed written consent from the former and current client, preferably with access to independent legal advice. There is nothing in the evidence to suggest that the Outside Directors

provided such informed written consent.

[46] The Respondent submits that the Outside Directors are "supportive" of her decision to retain Mr. Crawley and the Outside Directors confirmed their support to Mr. Crawley by email. However, nothing was produced to support this submission in the course of this motion. As a result, we are unable to conclude that the nature and the scope of the consent was broad enough to extend to the possibility of a cross-examination. Only evidence of a clear written consent signed by the Outside Directors would be sufficient to produce such a result.

[47] While the Commission has acknowledged a potential conflict of interest in this case, we have certain specific concerns on the evidence put before us which leads us to ponder whether removing counsel of record is the most appropriate remedy.

[48] First, we do not agree that the evidence elicited by Staff, that it would be "Ms. Weinstein's problem" if the Outside Directors wished to be represented by Mr. Crawley, amounts to a formal objection on behalf of the Outside Directors.

[49] In addition, we question whether any of the Outside Directors will contribute any fresh evidence regarding whether there was a material change pursuant to section 75 of the Act. The Outside Directors (with the exception of Paul Damp) did not participate actively in negotiating the Merger Transaction and were not kept informed on a daily basis of what was transpiring between 3M and AiT. Staff informed us that they did not intend, at the time of the motion, to call Paul Damp as a witness. In short, while the Outside Directors participated in the discussions regarding disclosure, they were not involved in any significant role in connection with negotiation of the Merger Transaction.

[50] In all of the material before us including the affidavit of Weinstein, it does not appear that there is any dispute with respect to the advice given by the Respondent to the Outside Directors and that they relied on this advice. Further, we note that this case raises a number of unique circumstances that can be distinguished from the line of criminal cases provided by Staff, where witnesses were clearly adverse to the lawyer's current client. These circumstances are:

- All of the Outside Directors and Weinstein served on the AiT board together;
- The board decision not to issue disclosure before May 9, 2002 was a collective decision, with no evidence on the record that any members dissented;
- Having been aligned in interest in defending themselves against Staff's allegations, the Outside Directors would not be suddenly adverse in interest merely because they have been subpoenaed to give evidence of their recollections of events and advice received from Weinstein during the Merger Transaction;
- Weinstein does not deny that she gave the advice that the Merger Transaction did not constitute a material change within the meaning of the Act during the relevant time;
- Staff's case does not turn on whether Weinstein gave the advice, it turns on whether the Merger Transaction was a material change at the relevant time, which should have been

disclosed on a timely basis; and

- The various stages of the Merger Transaction and the conditions outstanding are well documented on the record and the evidence of the Outside Directors is likely to be corroborative rather than dissenting or adversarial to Weinstein's position.

[51] Given the unique circumstances of this case, we believe it is appropriate for the Commission to consider alternative protective measures, as set out in more detail below.

B) What is the Appropriate Remedy?

[52] Having determined that the Outside Directors were former clients of Mr. Crawley and Crawley Meredith LLP and that counsel to the Respondent stand in a potential conflict of interest, the next issue to be determined is the appropriate order in the circumstances. In *R. v. Neil*, the Supreme Court stated emphatically: "It is one thing to demonstrate a breach of loyalty. It is quite another to arrive at an appropriate remedy".

(*R. v. Neil*, *supra* at para. 36.)

Referring to the objective of reasonable mobility in the legal profession, Justice Binnie in *R. v. Neil* held that it is important to link the duty of loyalty to the policies it is intended to further:

> … An unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation. The issue is always to determine what rules are sensible and necessary and how best to achieve an appropriate balance among competing interests.

(*R. v. Neil*, *supra* at para. 15.)

[53] The determination of whether counsel should be removed is very much fact specific. (*R. v. Greenwood*, [1995] O.J. No. 387 (Gen. Div.) (QL), at para. 15.) In the course of his oral submissions, Mr. Crawley suggested alternative protective measures that limit the possibility of prejudice to the Outside Directors in the event that one or more of the Outside Directors testify during the hearing. Suggested approaches include:

- Staff may identify which witness they intend to call, and Mr. Crawley may require that witness sign a waiver after obtaining independent legal advice.

- Mr. Crawley may waive his right of cross-examination and undertake that the Respondent will not engage in cross-examining the witness.

- Mr. Crawley may also undertake to call the Outside Directors as witnesses, in order to elicit evidence through an examination-in-chief by asking open-ended and non-leading questions.

- The Respondent may retain independent counsel to cross-examine the Outside Directors should that prove necessary. The Respondent would instruct her independent legal counsel with

regards to the cross-examinations. The independent counsel would not communicate with Mr. Crawley and would be available during the days when the Outside Directors are called as witnesses, if indeed they are called.

[54] As we stated above, the Commission has two particular concerns in considering an application for removal of counsel: (1) the public interest in the administration of justice including confidence in the legal profession; and (2) an individual's right to select counsel. In coming to our conclusion, we are satisfied that it is possible to reconcile these concerns.

[55] If both the Respondent and Mr. Crawley undertake in writing to comply with the conditions set out herein, within 15 days from the date of this decision, the Respondent may retain independent counsel to conduct the cross-examination of the Outside Directors and Mr. Crawley may remain as counsel of record.

[56] The conditions are that:

- There shall be no communication between Mr. Crawley and independent counsel with respect to any matter pertaining to the cross-examination of the Outside Directors;

- The independent counsel will not be entitled to consult with Mr. Crawley as to the nature of the evidence or the defence; and

- In the event that any of the Outside Directors are being called by the Respondent to testify as a witness, the Outside Director called shall provide, after having received independent legal advice, a waiver of the right to object to be examined or re-examined at the hearing by Mr. Crawley.

[57] In our opinion, the public represented by the reasonably informed person would be satisfied that no unauthorized disclosure of confidential information would occur if the above conditions are agreed to. The partial disqualification of Mr. Crawley ensures that our remedy is protective of the public interest and the administration of justice, while respecting the Respondent's right to be represented by Crawley as her counsel in all other respects.

[58] The duty of loyalty to a former client is also protected since Mr. Crawley will not be acting against his former clients by undertaking their cross-examination if they are called as witnesses by Staff. There is no longer any risk of misuse of confidential information nor is Mr. Crawley taking an adversarial position against any of the Outside Directors.

[59] The Statement of Allegations dated February 12, 2007 was issued almost five (5) years after the date of the Merger Transaction. The Respondent is entitled, and the Commission should endeavour, to have this hearing dealt with as expeditiously as possible by counsel in whom she has confidence. It is also very much in the public interest that this hearing be heard expeditiously.

[60] While not an absolute right, the right to retain counsel is a right which deserves protection. It should not be taken away unless required by the public interest in the proper administration of justice and the basic principles of fundamental fairness. We are not convinced that requirement has been established in this case. Accordingly, we are satisfied that the

compromise solution that allows Mr. Crawley to remain as counsel of record and allows the Respondent to retain independent counsel to cross-examine any of the Outside Directors, if they are called by Staff as witnesses, is consistent with the public interest and the best interests of the administration of justice.

[61] If the Respondent and Mr. Crawley do not provide the above undertaking in writing within the prescribed time limit, then Mr. Crawley and Crawley Meredith LLP shall be removed as counsel of record for the Respondent.

Dated at Toronto, this 12th day of July, 2007

"Wendell S. Wigle" "Harold P. Hands"

Wendell S. Wigle Harold P. Hands

"Carol S. Perry"

Carol S. Perry