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

AND

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

REASONS AND DECISION

Hearing:	September 5, 6, 7, 10, 11, 17, 19, 20, 21, 26, 27, 2007 October 16, 2007	
Decision:	January 14, 2008	
Panel:	Wendell S. Wigle, Q.C.	- Commissioner and Chair of the Panel
	Harold P. Hands	- Commissioner
	Carol S. Perry	- Commissioner
Counsel:	Jane Waechter Stephanie Collins Erez Blumberger Scott Pilkey	- For the Ontario Securities Commission
	Alistair Crawley Matthew Scott	- For Deborah Weinstein
	Wendy Berman	- Independent Counsel for Deborah Weinstein in attendance on September 5, 2007
	John Fabello	- For Bernard Jude Ashe, in attendance on September 5, 6, and 7, 2007

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REASONS AND DECISION

I. OVERVIEW

A. Introduction

[1] This was a hearing before the Ontario Securities Commission (the "Commission") to decide whether Deborah Weinstein ("Weinstein") authorized, permitted or acquiesced in a breach of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") and acted contrary to the public interest by authorizing, permitting or acquiescing in Advanced Information Technologies Corporation's ("AiT") failure to disclose forthwith the merger transaction between AiT and 3M Company ("3M") as a material change by April 25, 2002 and in any event not later than May 9, 2002 ("the Relevant Period"). The parties agreed that this proceeding should be bifurcated; first a hearing on the merits; and second, if necessary, a hearing to address sanctions.

[2] This proceeding was commenced by a Statement of Allegations (the "Allegations") and notice of hearing (the "Notice of Hearing"), dated February 8, 2007.

[3] It is alleged that AiT contravened section 75 of the Act and engaged in conduct contrary to the public interest by failing to disclose forthwith the merger transaction (the "Merger Transaction"), between AiT and 3M, as a material change; and that, Weinstein and Bernard Jude Ashe ("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. These are the issues which we must consider.

[4] It is important to note that this is not a case where bad faith is alleged. Staff of the Commission ("Staff") clarified in the opening statement that it is not alleged that Weinstein intended to violate securities law or actively mislead the market, nor is there any suggestion of impropriety or bad faith on the part of the AiT Board of Directors (the "AiT Board") in making its decision not to disclose the 3M negotiations during the Relevant Period.

[5] On September 5, 2007, the hearing on the merits commenced and evidence was heard on September 5, 6, 7, 10, 11, 17, 19, 20, and 21, 2007. Following the close of evidence, we heard submissions on the merits on September 26, and 27, and October 16, 2007.

B. Summary of our Decision

[6] Upon reviewing all the evidence and the applicable law, we have concluded that there is no clear and cogent evidence that a material change occurred during the Relevant Period. Specifically:

> (1) We agree with the submissions of Staff that, in appropriate circumstances, a material change can occur in advance of the execution of a definitive binding

agreement, and therefore, the determination of whether a material change has occurred is not a "bright-line" test. Instead, the assessment of whether a material change has occurred, particularly in the context of an arm's length negotiated transaction, will depend on the specific facts and circumstances of each case and will vary case to case;

(2) In considering whether a board resolution constitutes a "decision to implement such a [material] change" within the definition of material change in the Act, in the context of an arm's length negotiation of a merger transaction before a definitive agreement has been reached, there must be sufficient evidence by which the board could have concluded that there was a sufficient commitment from the parties to proceed and a substantial likelihood that the transaction would be completed;

(3) With specific reference to the AiT Board resolution of April 25, 2002, we conclude that there was insufficient evidence available at that time to determine that: (i) 3M was committed to proceed with a transaction; and (ii) there was a substantial likelihood that the transaction being discussed would be completed.

(4) In assessing the letter of intent ("LOI") entered into between AiT and 3M on April 26, 2002, we conclude from a detailed analysis of all the facts and circumstances in this case that entering into the LOI did not constitute a material change in the business, operations or capital of AiT;

(5) During the portion of the Relevant Period after the signing of the LOI, no developments occurred in the status of the negotiations which would have led AiT to conclude that 3M was then more committed to proceed or that there was at that time a substantial likelihood that the transaction would be completed;

(6) Having concluded that there was no material change in the business, operations or capital of AiT during the Relevant Period, AiT did not breach section 75 of the Act and was not required to make timely disclosure of its negotiations with 3M. Since the allegations against Weinstein were that she had breached sections 122(3) and 127(1) of the Act which were premised upon a breach by AiT of section 75, those allegations against her must be dismissed.

II. BACKGROUND

A. The Respondent: Weinstein

[7] AiT was a federally incorporated company located in Ottawa. It was a reporting issuer in Ontario, and its shares traded on the Toronto Stock Exchange ("TSX").

[8] Weinstein is a partner in the law firm LaBarge Weinstein LLP in Ottawa, and practices in the areas of securities and corporate finance. Weinstein's clients include both public and private companies. Since the spring of 1993, AiT was one of Weinstein's clients.

[9] Weinstein became a director of AiT in 1996, and during the Relevant Period, was one of eight directors of AiT.

B. History of Proceedings

1. The Statement of Allegations

[10] The Allegations alleged that the Merger Transaction constituted a material change within the meaning of section 75 of the Act by April 25, 2002, and in any event, not later than May 9, 2002.

[11] The Allegations were issued in relation to three respondents: (1) AiT; (2) Ashe; and (3) Weinstein (collectively the "Respondents"). The allegations are as follows:

> (1) AiT contravened section 75 of the Act and engaged in conduct contrary to the public interest by failing to disclose forthwith the Merger Transaction as a material change; and
>
> (2) Weinstein and Ashe committed an offence pursuant to subsection 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.

2. The Settlement Agreements

[12] On February 19, 2007, AiT entered into a Settlement Agreement, and on February 23, 2007, Ashe entered into a Settlement Agreement. Both Settlement Agreements were approved on February 26, 2007.

3. Preliminary Motions

[13] Before the hearing on the merits, a number of preliminary motions were dealt with. On May 9, 2007, a Panel heard Weinstein's motion to dismiss the proceeding (the "Motion to Dismiss"). It was ordered that "the Motion to Dismiss be adjourned until Staff has called its evidence at the hearing, subject to the discretion of [Weinstein] and subject to the discretion of the panel at the hearing" ((2007), 30 O.S.C.B. 4694).

[14] On June 13, 2007, Staff brought a motion to determine whether Alistair Crawley ("Crawley") and Crawley Meredith LLP should be removed as counsel of record for Weinstein due to a conflict of interest (the "Motion for Removal of Counsel"). In Staff's view, there was a conflict of interest because Staff might call witnesses at the hearing on the merits to testify against Weinstein who are Crawley's former clients, and Crawley would be put in the position of cross-examining them. The Panel determined that Crawley could continue to act for Weinstein, subject to conditions, which included having Weinstein retain independent counsel to cross-examine any witnesses that were former clients of Crawley.

[15] Staff also brought a motion returnable on August 24, 2007 to ask for directions regarding the order issued regarding the Motion for Removal of Counsel because one of Staff's witnesses, Paul Damp ("Damp"), gave his consent to be cross-examined by Crawley instead of Weinstein's independent counsel. Prior to the hearing of this motion, Staff and Weinstein's counsel resolved the motion by agreeing that Weinstein would irrevocably undertake to call Damp as a witness in defence, so that Crawley would be able to lead Damp's evidence by way of direct examination. This would eliminate the need for Crawley to cross-examine Damp, his former client. Weinstein acknowledged that the Motion to Dismiss may only be brought after Damp's testimony. During the hearing on the merits, counsel for Weinstein did not raise the issue of the Motion to Dismiss after Damp's testimony.

III. THE ISSUES

[16] Staff's allegations involve section 75 and subsection 122(3) of the Act, and the allegations raise two primary issues:

> (1) did the status of the negotiations with 3M constitute a "material change" in the business, operations or capital of AiT during the Relevant Period as alleged by Staff, in which case AiT would have been required by section 75 of the Act to: issue a news release forthwith providing notice of the material change and file a material change report, or in the alternative, file a confidential material change report with the Commission; and
>
> (2) if so, did Weinstein in her capacity as a director of AiT, authorize, acquiesce or permit a breach by AiT of section 75 in contravention of subsection 122(3) of the Act and contrary to the public interest under subsection 127(1) of the Act.

IV. THE EVIDENCE

A. Chronology of Events

[17] Staff and Counsel for Weinstein provided a joint hearing brief comprised of nine binders containing evidence relating to the chronology of events involving the Merger Transaction. Staff informed us at the outset of the hearing that the documents contained in the joint hearing brief were tendered on consent of the parties, unless otherwise specified at the hearing.

[18] The following is our summary of the chronology of events relating to the Merger Transaction based on the uncontested evidence adduced by the parties.

1. Description of AiT's Business

[19] In September of 2001, AiT had approximately 110 employees and annual revenue in the range of $16-17 million.

[20] At this time, Ashe was the President, Chief Executive Officer ("CEO") and a director of AiT.

[21] AiT's principal business was the sale of systems to issue and inspect secure travel documents, including passports (a.k.a. the ID business). AiT was a market leader in the ID business, with its largest customer being the Canadian government.

[22] AiT had also started a business unit called Affinitex, which was aimed at providing security identity solutions to the U.S. health care industry. At the time of the events surrounding the Merger Transaction, Affinitex was a new venture in development and had no customers.

2. AiT's Condition in 2001 to 2002

[23] For its fiscal year ending on September 30, 2001, AiT had a negative cash flow from operations of $2 million and had a net loss of over $3.6 million. The negative cash flow and net loss were primarily due to the investment in Affinitex.

[24] As at September 30, 2001 AiT had credit facilities totaling $4.5 million with CIBC, of which approximately $2.8 million was drawn. The total amount of $4.5 million comprised an operating facility of $3.5 million (that was secured by receivables, inventory and other assets), and a term facility in the amount of $1.0 million that was set up at the time that equity was raised for the investment in Affinitex. The term facility had a maturity date of March 31, 2002.

[25] On September 11, 2001, the AiT Board held a meeting, and the focus of this meeting was to agree on some spending cuts and employee terminations in both Affinitex and the core ID business. This was necessary at this time because AiT had not yet secured any customers for Affinitex.

[26] In response to the terrorist attacks of September 11, 2001, AiT decided to meet with customers and determine first hand what the priorities of customers (i.e. governments) would be post-September 11, 2001, and how AiT's business could respond. The outcome from meeting with customers revealed to AiT that AiT had to get bigger in order to be able to bid on some of the opportunities that would be coming up in the future. This meant that AiT would have to partner with or be acquired by a larger company.

[27] On October 26, 2001, AiT's Strategic Committee, which was a standing committee of the AiT Board composed of Ashe, Damp, Richard Lesher ("Lesher"), Graham Macmillan ("Macmillan") and Stephen Sandler ("Sandler") (the "Strategic Committee"), met to discuss opportunities for AiT and Affinitex. Ashe provided a memo to the Strategic Committee, which recommended that AiT focus on the traditional company business, the ID business, as a way to grow the company. This memo also alerted the Strategic Committee that AiT's cash position was very "tight" and that AiT needed to strengthen its financial position. At this time, the bank's position was that they wanted AiT to stop investing ID business profits into Affinitex product development.

3. The Proposed Equity Financing Transaction

[28] At the Strategic Committee meeting of October 26, 2001, Ashe recommended that AiT should raise equity and engage the investment dealer Raymond James as its agent for this purpose. Raymond James was an investment banker specializing in biometrics and security-related investments and deals. The recommendation was to raise between $3 million and $5 million by way of a private placement and on a best-efforts basis.

[29] AiT's shares were thinly traded, and AiT's directors and senior officers held approximately 30% of the outstanding shares. As well, no equity research analysts were covering AiT.

[30] The purpose of raising equity was to allow AiT to look at alternatives including further product development and possible partnering with larger companies. Ashe also recommended selling AiT. According to Ashe, raising equity would buy AiT time to consider its alternatives.

[31] On the recommendation of the Strategic Committee, the AiT Board approved the equity financing plan and the engagement of Raymond James at the AiT Board meeting on November 12, 2001.

[32] However, the efforts to raise equity financing were unsuccessful. Institutional investors had concerns about investing in AiT relating to AiT's history and relatively small market capitalization. AiT received only moderate interest and approximately $2 million of confirmed investment orders, and in December 2001 the equity financing was withdrawn.

4. The Proposal to Engage an M&A Advisor

[33] After the proposed equity financing failed, Ashe's opinion was that AiT was at a point where it needed to move to sell the company. In late January, he discussed with the Executive Committee the idea of finding an acquirer for AiT. There was general agreement that this was the right thing to do.

[34] Ashe also felt that AiT needed to engage an M&A advisor to assist with the process to sell AiT, to give advice on potential acquirors and how to position AiT for the best possible outcome. On January 25, 2002, Ashe discussed the idea of hiring an M&A advisor with the Strategic Committee and it agreed that the issue of hiring an M&A advisor should be brought for approval by the AiT Board at its meeting in February 2002.

[35] On February 19, 2002, the AiT Board unanimously agreed to engage an advisor to investigate strategic opportunities for AiT and delegated the responsibility for selecting the advisor to the Strategic Committee.

5. The Unsolicited Approach of 3M

i. Harrold's Telephone Call in February 2002

[36] Steve Harrold ("Harrold") was the manager of the Security Market Center at 3M headquarters in St. Paul, Minnesota.

[37] Prior to Harrold contacting Ashe, AiT had previously had some interaction with 3M. In late October 2001, a technical team from 3M came to visit AiT to get an update on AiT's products and technology. This meeting was organized after Ashe was contacted by email on October 15, 2002, by Andy Dubner of 3M to discuss exploring a new business opportunity. After this meeting, there was a continuing discussion between the technical people at 3M and AiT to keep each other informed on technical developments and other matters.

[38] By letter dated December 11, 2001, Harrold contacted Ashe to follow up on the discussions that took place in October 2001. A non-disclosure agreement was enclosed with this letter. In addition, Harrold followed up with an email to Ashe dated December 27, 2001 to set up a meeting to discuss business and technical issues and strategic partnership opportunities between 3M and AiT.

[39] Subsequent to this correspondence, Ashe signed the non-disclosure agreement on January 15, 2002. Ashe's meeting with Harrold in late January was cancelled.

[40] The next contact Ashe had with Harrold was by telephone around February 17 and 18, 2002, which was the same time when Ashe was meeting with M&A advisor candidates. In this telephone call, Harrold disclosed that 3M was looking for acquisitions, ways to grow its business, and was interested in looking at AiT.

[41] After this phone call from Harrold, Ashe focused on this opportunity with 3M and gave it priority.

ii. The February 28, 2002 Meeting with Harrold

[42] Ashe met with Harrold on February 28, 2002 in Ottawa to discuss opportunities for AiT and 3M. Harrold informed Ashe that 3M was looking for companies to acquire that fit their strategy, and that 3M was interested in AiT because 3M did not have any software and systems development capabilities and 3M wanted to have a stronger position in the document reader market.

[43] Harrold also informed Ashe that he was a manager for the Security Markets Centre for 3M, and that he reported to Pete Swain, the Vice-President of the Safety and Security Systems Division ("Swain"), who reported to Ron Weber the Executive Vice President, Transportation, Graphics & Safety Markets ("Weber"). Weber reported to the CEO, Jim McNerney ("McNerney").

[44] At this meeting, Harrold also informed Ashe that 3M used a process called Six Sigma ("Six Sigma") to make business decisions. It was understood that Six Sigma was a highly structured process that improved important decision-making by attempting to remove intuition and judgment and relying on extensive measurements of data and facts. For example, adhering to this process was believed to reduce costs, improve revenue and improve process throughputs. Ashe testified that Six Sigma required very deliberate

steps to be taken, and included a blue book process (the "Blue Book Process") that was to be followed in the second phase of due diligence.

[45] At the end of the meeting, Harrold informed Ashe that he would get back to Ashe regarding the issue of timelines.

[46] After the discussion with Harrold, AiT deferred its process to hire an M&A advisor.

iii. The March 4, 2002 Phone Call

[47] On March 4, 2002, Harrold called Ashe to confirm the timetable that 3M would use to conduct their due diligence and to follow the process that they had to follow in order to make a decision on the proposed purchase of AiT.

[48] The timetable included two phases of due diligence: first an overall high level version of due diligence, and second, the Blue Book Process that 3M adhered to. The latter was a much more detailed level of due diligence and required certain approvals by the 3M board and executive. It was an extensive process that involved looking at all the different dimensions of an investment decision, including cash and financing considerations, and issues relating to human resources, research and development, technology, intellectual property and taxation.

[49] According to the timetable, the first due diligence visit of AiT would be conducted by 3M on March 26, 27 and 28, 2002 and discussion regarding pricing and valuation of AiT would occur on April 10 to 12, 2002. Ashe agreed to this timetable and found that it was reasonable.

[50] Following the timetable discussions on March 4, 2002, AiT and 3M entered into a non-disclosure agreement specifically relating to such a potential transaction on March 12, 2002. The non-disclosure agreement included customary provisions prohibiting 3M from acquiring, or offering to acquire, shares of AiT without the consent of the AiT Board.

6. The First Due Diligence Visit: March 26, 27 and 28, 2002

[51] On March 14, 2002, Ashe received a copy of 3M's due diligence checklist by email, and AiT prepared the appropriate documentation and presentations for the scheduled due diligence review.

[52] On March 26, 27 and 28, 2002, the first due diligence visit took place at the offices of AiT and LaBarge Weinstein. Management presentations and product demonstrations took place at AiT's offices, while documentation, contract and financial reviews took place at the offices of LaBarge Weinstein.

[53] Swain, Harrold, and, approximately 8-10 other managers and directors in the business development, technical and financial areas of 3M's various divisions attended the due diligence review.

[54] AiT perceived their product demonstrations to have gone well. Overall, AiT felt that the due diligence was successful and received positive feedback from 3M about the visit. Based on the feedback received, Ashe believed 3M to be very serious about pursuing a transaction with AiT. AiT was also very serious and perceived the discussions to be progressing very well.

7. The Creation of the Valuation Committee: April 8, 2002

[55] After the due diligence visit, AiT felt confident that the discussions would proceed to pricing, which was going to be an important step in the process. Ashe was concerned about 3M's valuation of AiT, and created a Valuation Committee with Weinstein and Damp to prepare for upcoming pricing discussions with 3M.

[56] The Valuation Committee conducted research on how 3M approached valuation on previous deals and how they could present their own valuation of AiT. They prepared valuations of AiT based on various scenarios and assumptions, and prepared materials outlining its strengths and weaknesses for the pricing negotiations. The Valuation Committee also ensured they were on the same page regarding their understanding of the business issues facing AiT at that time.

8. The Meeting in St. Paul: April 11 and 12, 2002

[57] On April 11 and 12, 2002, a meeting regarding AiT's valuation was held at 3M's offices in St. Paul, Minnesota. Ashe, Damp and Weinstein attended the meeting on behalf of AiT. On 3M's side, the meeting was attended by Harrold, Walt Scheela who directly reported to Weber ("Scheela"), and Kevin Curran who was a marketing manager directly reporting to Harrold.

[58] On April 11, 2002, both AiT and 3M refused to put the first number on the table. AiT used this opportunity to gauge 3M's perceptions of AiT and the strengths and weaknesses in its business. At the end of the meeting, it was agreed that AiT would return with a number the next morning.

[59] Damp used the information they extracted from the meeting regarding 3M's valuation criteria to prepare a forecast and develop a proposed valuation for AiT in the amount of $75 million. On April 12, 2002, AiT revealed their number to 3M. 3M objected to AiT's valuation of $75 million. This led to a discussion over a few hours regarding numbers, statistics and objections.

[60] By the end of the discussion, AiT and 3M agreed to disagree, and AiT left with the understanding that 3M valued AiT between $35 and $45 million. There was also some discussion that the proposed transaction would be structured as an asset purchase because 3M did not see value in Affinitex or AiT's tax loss carry-forwards.

[61] At this point Ashe consulted with Weinstein whether disclosure had to be made of the events that were unfolding with 3M, and Weinstein informed Ashe that there was no obligation to disclose at this stage of the negotiations because "nothing had happened".

9. Harrold's Telephone Calls Regarding the Value of AiT

i. The Telephone Call of April 23, 2002

[62] On April 23, 2002, Harrold, Scheela and Sarah Grauze telephoned Ashe and held a conference call to discuss 3M's view of AiT's value. During this conference call, it was revealed that 3M felt AiT's value should be pegged at $40 million. Ashe made it clear that he had no authority to agree or disagree with this number and that he would have to take it to the AiT Board. During this phone call, Ashe was not successful in making any progress to improve 3M's number of $40 million.

ii. The Telephone Call of April 24, 2002

[63] On April 24, 2002, there was another telephone conference call regarding AiT's value. Harrold, Scheela and Ashe participated in this call. During this call, Ashe asked for approximately $3 million dollars to be added to 3M's number of $40 million. After further discussions, 3M added $1 million on their original price, for a total of $41 million. It was also established during this call that the $41 million was for the whole company, including Affinitex. The proposed transaction was to be structured as a share purchase with $41 million representing a price of $2.88 per share of AiT.

[64] Through further discussions, AiT also resolved the issue of the treatment of "in-the-money" stock options, and 3M agreed to pay a total of $42.6 million for the company, which included stock options.

[65] According to Ashe this was the end of the pricing discussions with 3M, and the next step was to inform the AiT Board.

10. The AiT Board Meeting: April 25, 2002

i. The AiT Board's Approval

[66] The AiT Board meeting on April 25, 2002, was held by telephone conference call. The minutes state that all of the directors of AiT (Ashe, Allan Churgin, Damp, Lesher, Edward C. Lumley ("Lumley"), Macmillan, Sandler and Weinstein) were present.

[67] During the meeting, Ashe updated the AiT Board regarding the phone calls and meeting with 3M since the beginning of April, including the meeting in St. Paul on April 11 and 12, 2002, and the phone calls on April 23 and 24, 2002. The purpose of this meeting was to obtain the AiT Board's support for the proposed valuation of AiT, in order to enable 3M to proceed with the next step in the negotiations, the preparation of a non-binding LOI.

[68] During the AiT Board meeting of April 25, 2002, the issue of disclosure of the 3M proposal was discussed. This issue was raised by Lumley, and the discussion on disclosure lasted approximately 20 minutes. Further evidence regarding the discussion on disclosure is addressed in the section of our Reasons dealing with the testimony of the witnesses and the affidavits.

[69] The Minutes of the AiT Board meeting on April 25, 2002, summarize Ashe's update to the AiT Board:

> As a result of further discussions 3M came back with a verbal offer of $2.88 per share payable in cash on closing by 3M for all the outstanding shares and options of the company. After taking into account the exercise price of outstanding options this resulted in an aggregate purchase price of approximately Cdn $41 million. Subject to Board approval by AiT, 3M would draft for execution by both parties a non-binding letter of intent to acquire all the shares as discussed. The parties have agreed to work diligently towards a definitive agreement and announcement.

[70] Following Ashe's update, the minutes of the AiT Board meeting record that the AiT Board unanimously "approved the recommendation to shareholders of the acquisition by 3M of all of the outstanding shares and options in [AiT] at a cash purchase price of $2.88 per share […]."

[71] In addition, the Minutes of April 25, 2002 state that this approval was subject to:

> […] confirmation of the fairness of this price by AiT's financial advisor, CIBC Investment Banking, and satisfaction of the Board with the final terms of the transaction, including the tax consequences to the Company's shareholders.

[72] The AiT Board also authorized Ashe to execute any documents in furtherance of the transaction with 3M, including the non-binding LOI.

ii. The Email to the Bank

[73] The term loan with CIBC was still outstanding and it was important to keep the bank onside while 3M was exploring a potential transaction. Accordingly, Ashe sent out an email on April 25, 2002, immediately after the AiT Board meeting to Mauro Spagnolo, a vice-president of CIBC, to update the bank on the status of the discussions with 3M. This email states that:

> The discussions have been on a fast track. Since our first meeting on February 28, they have visited and completed the first phase of due diligence, we have visited them and completed the first phase of a pricing discussion. There have been numerous telephone conversations and exchange of information. They received the approval of their group VP last Tuesday April 16th and received the approval of the CEO on Monday April 22. We have been in a second phase of a pricing discussion since Monday and today our Board agreed to a price of $2.88 per share or CDN $42.6M for the company.

[74] Subsequent testimony revealed that some of the content of this email was inconsistent with the events that took place. With respect to the statement that 3M

received approval from the Group VP on April 16, and approval of the CEO on Monday April 22, there is no corroborating evidence, documentary or otherwise, that demonstrates that approvals were given on this date. Further, when Ashe was questioned about these approvals, he testified that he could not recall who had informed him of the approvals. Because the purpose of the email appears to be an attempt to convey a level of comfort to the bank that it would be paid out, we give little weight to this email when considering the evidence as a whole (see paragraph 112 *infra*).

11. The LOI: April 26, 2002

[75] On April 26, 2002, Ashe signed the LOI on behalf of AiT, after a few changes were made to the text at the suggestion of Weinstein and her associates at LaBarge Weinstein.

[76] In view of the importance of the LOI to this hearing and the relevance of its content, the entire text of the LOI is set out below:

> Dear Mr. Ashe:
>
> This letter confirms our mutual understanding with respect to a proposal by 3M Company ("3M") for the purchase of the outstanding capital stock of AiT Advanced Information Technologies Corporation ("AiT"). The purchasing entity shall be 3M Company and/or one or more of its affiliates.
>
> 1. Based upon the data furnished by you regarding AiT, 3M is prepared to offer CAD $2.88 for each fully diluted share of common stock of AiT. We have assumed in formulating this level of value that the stock is sold to 3M under similar Balance Sheet conditions and levels as shown in AiT's most recent quarterly filing with the Canadian Securities Administrators.
>
> 2. 3M currently has adequate resources to fund the purchase price as well as the ongoing working capital needs. As such, there is no financing contingency associated with this transaction.
>
> 3. Any agreement for the purchase of the stock of AiT is subject to a favorable due diligence review by 3M that is to be completed prior to 5:00 pm Eastern Time on May 13, 2002. This review will include, but is not limited to, a review of AiT's business operations, research and development, manufacturing, financial, legal, environmental and regulatory matters. A definitive purchase agreement will also contain representations, warranties and covenants which are usual and normal in a transaction of this type and size.
>
> 4. (a) In consideration of 3M's continued evaluation of a potential transaction with AiT, and as an inducement for 3M to continue to expend time and incur expenses in connection therewith, AiT agrees

that it shall immediately cease and cause to be terminated all existing discussions, negotiations and communications with any persons with respect to any Acquisition Proposal (as defined below). From the date of this letter until May 24, 2002, the Company shall not, and shall not permit any of its Representatives (as defined below) to, (i) solicit, initiate, consider, encourage or accept any Acquisition Proposal or (ii) except as provided in paragraph 4(b), participate in any discussions, negotiations, or other communication regarding, or furnish to any other person any information with respect to, or otherwise cooperate in any way, assist or participate in, facilitate or encourage any effort or attempt by any other person to make, any Acquisition Proposal. It is understood that any violation of the foregoing restrictions by any of the AiT's Representatives, whether or not such Representative is so authorized and whether or not such Representative is purporting to act on behalf of AiT or otherwise, shall be deemed to be a breach of this obligation by A1T.

(b) Notwithstanding anything to the contrary in paragraph 4(a) above, nothing herein shall prohibit AiT from furnishing information regarding AiT to, or entering into discussions or negotiations with, any person in response to an unsolicited "Superior Offer" (defined to be an offer to purchase each fully diluted share of common stock of AiT, payable in cash or freely marketable securities of a third party, at a price of not less than $3.20 per share) that is submitted to AiT by such person (and not withdrawn) if (a) neither AiT nor any of its Representatives shall have breached or taken any action inconsistent with any of the provisions set forth in paragraph 4(a) above, (b) the board of directors of AiT concludes in good faith, after considering the written advice of its outside legal counsel, that such action is required in order for the board of directors of AiT to comply with its fiduciary obligations to AiT's shareholders under applicable law, (c) AiT complies with its obligations to 3M under paragraph 4(c) below, and (d) AiT receives from such Person an executed confidentiality agreement in substantially similar form and content to the Confidential Disclosure Agreement dated March 12, 2002 between the parties hereto.

(c) AiT shall promptly advise 3M of AiT's receipt of any Acquisition Proposal and any request for information that may reasonably be expected to lead to or is otherwise related to any Acquisition Proposal, the identity of the person making such Acquisition Proposal or request for information and the terms and conditions of such Acquisition Proposal. AiT agrees to give 3M the right to respond to any Superior Offer before concluding negotiations with any person making the Superior Offer.

(d) "Acquisition Proposal" means any proposal or offer from any person (other than 3M or one or more of its affiliates) (i) relating to any direct or indirect acquisition of five percent or more of any class of capital stock (or securities exercisable for or convertible or exchangeable into five percent or more of any class of capital stock) of AiT or any of its direct or indirect subsidiaries, or five percent or more of any class or series of debt securities of AiT or any of its direct or indirect subsidiaries, or all or a substantial portion of the assets of AiT or any of its direct or indirect subsidiaries, (ii) to enter into any merger, consolidation or other business combination with AiT or any of its direct or indirect subsidiaries or (iii) to enter into any other extraordinary business transaction (including, without limitation, any reorganization, recapitalization, liquidation, dissolution or similar transaction) involving or otherwise relating to AiT or any of its direct or indirect subsidiaries.

(e) "Representative" means, as to any person, such person's affiliates and its and their directors, [officers], employees, agents, advisors (including, without limitation, financial advisors, counsel and accountants) and controlling persons.

(f) As used in this letter agreement, the terms "person" shall be interpreted broadly to include, without limitation, any corporation, company, partnership, limited liability company, other entity or individual, as well as any group [or] syndicate that would be deemed to be a person under the law.

5. Both parties undertake to retain in confidence the existence of this letter and no written or oral announcement of the transaction will be made. This letter agreement is to remain confidential pursuant to the terms of the Confidential Disclosure Agreement dated March 12, 2002 between the parties hereto.

6. 3M's obligation to close the transaction shall be conditioned upon the AiT shareholders, listed in Schedule I, entering into Voting and Stock Option Agreements in favor of the approval and adoption of the transaction, subject to customary limitations and conditions. This indication of value and letter is understood as non-binding and subject to the approval of the appropriate management committees and the board of directors of 3M, as well as any applicable government agencies and the termination or waiver of any AiT Shareholder Rights Plans. Notwithstanding the foregoing sentence, 3M and AiT hereby agree that paragraphs 4 and 5 hereof and this paragraph 6 are binding. Accordingly, you should not make any business decisions in reliance upon this letter or the successful consummation of the proposed transaction. If, for any reason, 3M and AiT are unable to consummate

the transaction or to pursue further negotiations, neither 3M nor AiT shall have any liability or obligations to each other and each party shall pay its own costs and expenses.

If the foregoing meets with the approval of AiT, we are prepared to proceed with our due diligence review and other actions necessary to complete a transaction, with a target signing date not later than May 24, 2002. We look forward to receiving your response within five (5) days from the date of this letter, otherwise consider this letter withdrawn.

Very truly yours,

3M COMPANY

By: "*Ronald A. Weber*"
Ronald A. Weber
Executive Vice President, Transportation, Graphics & Safety Markets

Acknowledged this 26th day of April, 2002

Advanced Information Technologies, Inc.

By: "*Bernard J. Ashe*"
Bernard J. Ashe
President & CEO

12. The Insider Trading Warning Letter: April 26, 2002

[77] After the AiT Board meeting on April 25, 2002, Ashe and Weinstein discussed that it would be prudent to inform anyone working on the due diligence from this stage forward that they would need to maintain their knowledge and information as confidential and not engage in any trading or tipping or communication regarding the 3M discussions.

[78] Michael Dunleavy ("Dunleavy"), a lawyer at LaBarge Weinstein was charged with the task of preparing this document (the "Warning Letter"). The purpose of the Warning Letter was to ensure that the people involved in the due diligence, and the people who had any knowledge or involvement in AiT's discussions with 3M understood their obligations of confidentiality and their obligations not to trade or communicate anything that they knew. The Warning Letter addressed the Act's prohibitions on trading contained in section 76 of the Act.

[79] On April 26, 2002, the Warning Letter was circulated to the insiders of AiT and the members of the due diligence team. Ashe personally addressed the Warning Letter to all the recipients. In addition, Ashe met one on one with each of the individuals to explain the Warning Letter and its implications.

13. The Second Due Diligence Visit: May 7, 8 and 9, 2002

[80] AiT received 3M's second due diligence checklist on May 1, 2002, which outlined the issues to be discussed and addressed during the second due diligence visit. The checklist requested information regarding: financial information, tax filings and related tax information, sales and marketing, manufacturing, service, research and development, employees (organization, benefits, compensation), intellectual property, general legal agreements and commitments, real estate, environmental issues, health and safety, and AiT's information technology operating environment.

[81] AiT had previously prepared due diligence binders for the first due diligence visit on March 26, 27 and 28, 2002; however, the volume of information required by the May 1, 2002 checklist was much greater. During the second due diligence visit, AiT needed to compile information regarding their policies and procedures for managing their employees. Other concentrated areas at the due diligence session included product demonstrations and looking at a more detailed level of source code; customer issues regarding agreements and relationships; financial statements; and, some integration planning with respect to the compatibility of their businesses on the issues of managing employees, business culture and values.

[82] On May 7, 8 and 9, 2002, the second due diligence visit took place in the offices of LaBarge Weinstein and AiT. Close to 20 people attended this session on behalf of 3M, including a new group from 3M Canada.

14. The Rumours Circulating at AiT and the Telephone Call from RS

[83] During the second due diligence visit, the presence of 3M personnel on site at AiT led to internal rumours of an impending acquisition. Ashe was made aware by Roseann Vaughan ("Vaughan"), an administrative assistant at AiT, that rumours were being circulated by AiT employees that 3M was buying AiT. The affidavit of Vaughan, sworn September 9, 2007, confirmed that she drafted an email to alert Ashe to this fact on May 9, 2002.

[84] On May 9, 2002, AiT received a phone call from Bert De Souza ("De Souza") from Market Regulation Services Inc. ("RS") regarding an unusual increase in the trading volume and price of AiT shares. Wendy Smith ("Smith"), took the call at AiT and was informed by De Souza that AiT's stock was at a 52 week high and volume had also increased. Smith informed De Souza that AiT did not have any news and was not planning on sending any news out.

[85] Smith called Dunleavy to report the RS discussion. Dunleavy then called RS and left a voice message for De Souza explaining that AiT was in discussions to be "potentially acquired". Dunleavy informed RS of some aspects of the transaction, for example, that there was a non-binding LOI and that they were in the process of due diligence. Dunleavy also stated that they were at a formative stage and would have nothing to announce until later in a couple of weeks.

[86] Dunleavy also spoke to another employee at RS, and it was suggested that based on the trading activity in AiT's shares, it would be best to issue a press release. A draft press release was prepared by Dunleavy, which was circulated by email to in-house legal counsel at 3M, 3M's Canadian counsel and Ashe for comments. The final version of the press release was sent to De Souza, who approved it.

[87] At the end of the day on May 9, 2002, after trading had closed, AiT issued a press release entitled "AiT Comments on Recent Stock Activity." It stated that AiT was "exploring strategic alternatives that would ultimately enhance value for our shareholders." It further stated that AiT had "no further announcements to make at this time and do not intend to provide updates in respect of this process as we consider the various alternatives available to AiT." No material change report was filed with respect to the press release.

15. The Negotiation of the Merger Agreement

[88] After the signing of the LOI, Ashe requested Dunleavy to prepare a first draft of a pre-acquisition agreement as a way to move the potential transaction forward.

[89] On April 29, 2002, Dunleavy emailed Ashe a draft of the agreement. On April 30, 2002, Dunleavy emailed the draft of the agreement to Kim Price ("Price") and Roger Larson ("Larson") at 3M. In this draft agreement, the proposed transaction was structured as a take-over bid for AiT with 3M offering to purchase all of the issued and outstanding AiT shares, consistent with the LOI.

[90] In the period between April 30, 2002 and May 14, 2002, AiT waited for a response from 3M. On May 2, 2002, there was a preliminary phone discussion relating to the proposed agreement. On May 7, 2002, Price informed Dunleavy that having an agreement by May 14, 2002 was too aggressive, and on May 8, 2002, Dunleavy was informed that the proposed deal would be structured as an amalgamation, and that AiT should receive 3M's draft of the proposed agreement by May 14, 2002.

[91] On May 14, 2002, 3M provided AiT with their own draft merger agreement ("Merger Agreement"). This was a new document and it was a different document from the one that Dunleavy had initially provided to 3M.

[92] Many changes were made during the negotiation of the definitive version of the Merger Agreement. Some of the major changes on the draft agreement included the treatment of employees and the break-up fee. 3M was agreeable to making the changes that AiT suggested on these issues. Approximately 10 drafts went back and forth during the negotiation process to reach the final Merger Agreement. The structure of the transaction ultimately took the form of an amalgamation for tax reasons, so that the merged company could utilize AiT's tax losses.

16. The Support Agreements

[93] The delivery of signed support agreements by major shareholders of AiT was also a condition for the execution of the Merger Agreement. There was some concern that the

requirement of putting appropriate support agreements to third parties would potentially delay the process, and on May 15, 2002, Dunleavy requested a copy of the support agreement to move the process along.

[94] On May 17, 2002, Dunleavy received a draft of the support agreement. At this time, there were two problems with the agreement, in particular the inclusion of an atypical non-competition clause and the omission of the negotiated term in the Merger Agreement that provided an out if there was a superior offer above an agreed price.

[95] Through negotiation, 3M accepted AiT's position on these two issues, and the support agreements were revised and signed contemporaneously with the Merger Agreement. The support agreements represented 38.8 % of the outstanding common shares, including 29.7 % controlled by the directors and senior officers of AiT.

17. The 3M Approval Process

[96] On May 14, 2002, the board of directors of 3M approved the acquisition of AiT subject to the approval of the CEO of the due diligence report and the integration plan. It is evident from Price's affidavit that a number of assessments (as part of the Blue Book Process) took place between May 14 to 20, 2002, including: sales and marketing assessment, manufacturing assessment, finance assessment, R&D assessment, IT assessment, real estate assessment, service assessment, insurance assessment, human resources assessment, environmental health and safety assessment, and office of intellectual property assessment.

[97] On May 21, 2002, the due diligence report and integration plan was completed. On that date, the 3M CEO also gave final approval of the transaction following the meeting of the Corporate Operations Committee held to consider the matter and the approval of the report and plan.

18. AiT Board Approval of the Merger Agreement

[98] On May 22, 2002, the AiT Board approved the definitive Merger Agreement and related documents and received a fairness opinion from CIBC Investment Banking, which concluded that the consideration offered to the shareholders of AiT in connection with the Merger Transaction was fair, from a financial point of view, to shareholders. At this time, AiT's shareholder rights plan was also waived. These events are reflected in the minutes of the May 22, 2002 AiT Board meeting:

> NOW THEREFORE BE IT RESOLVED THAT:
>
> 1. The entry by the Corporation into the Agreement, the Transition Agreement and the performance by the Corporation of its obligations under those agreements (and the amalgamation agreement contemplated in the Agreement) are in the best interests of the Corporation and its shareholders and the consideration to be received by the shareholders of the Corporation from 3M, as contemplated by the Agreement is fair; and

> 2. The entry by the Corporation into the Transition Agreement and the Agreement as placed before the Board of Directors, including the form of amalgamation agreement contemplated in the Agreement, is approved and the President and Chief Executive Officer of the Corporation is authorized for and on behalf of the Corporation to sign the Agreement with such changes from the version approved by the Board as he determines to be necessary or desirable; and
>
> […]
>
> 4. Conditional on the prior execution of the Agreement, the Shareholder Rights Plan Agreement (the "Rights Agreement") between the Corporation and CIBC Mellon Trust Company, as Rights agent thereunder, dated February 20, 1998, and all of the Rights (as defined in the Rights Agreement) granted thereunder shall be deemed not to apply to the Amalgamation and shall terminate for no consideration without any act or formality on the part of a holder thereof on the effective date of the Amalgamation (and, without limiting the generality of the foregoing, no Flip-In Event or Separation Time (as those terms are defined in the Rights Agreement) shall be considered to have arisen as a result of the Amalgamation); and
>
> […]

[99] On May 23, 2002, AiT and 3M executed the definitive Merger Agreement. On the same day, AiT issued a press release and subsequently filed a material change report announcing that it had entered into the definitive Merger Agreement.

19. AiT Shareholder Approval of the Merger Transaction

[100] The process called for by the Merger Agreement required AiT to hold a shareholders meeting to approve the amalgamation of AiT with 3M. A special meeting of shareholders was held on July 15, 2002 for this purpose. The shareholders approved the transaction.

[101] The Merger Transaction closed on July 19, 2002, and a press release was issued and a material change report was filed by AiT.

B. Evidence Relating to Disclosure, Commitment and the Likelihood of Implementing the Proposed Transaction

[102] During the hearing, we heard and considered evidence from six witnesses, including Ashe, Michael Prior, Dunleavy, Damp, Philip Anisman ("Anisman") and Peter Dey ("Dey") (the latter two were expert witnesses). In addition, Weinstein also testified on her own behalf.

[103] We also received in evidence affidavits from Lumley, Macmillan, Price and Vaughan.

1. The Witnesses

i. Ashe

[104] Ashe was the president and CEO of AiT during the time period when AiT was involved in negotiating the Merger Transaction with 3M. In addition, Ashe was a member of the Valuation Committee and the Strategic Committee. During the hearing, he gave testimony regarding the detailed chronology of the events surrounding the Merger Transaction, and he also provided testimony regarding the issue of disclosure and commitment of AiT and 3M.

[105] With respect to the issue of disclosure, Ashe testified that on April 25, 2002, disclosure issues were discussed at the AiT Board meeting. He recalled that Weinstein mentioned that there was no obligation to disclose because the proposed deal was non-binding and numerous conditions existed that were beyond AiT's control. At this time there was still the issue of 3M approvals and AiT did not have any documents at this point. Ashe testified that he thought that AiT's disclosure obligations would arise when there was commitment from 3M.

[106] Ashe also gave testimony relating to his understanding of the situation at the time the LOI was signed. He testified that there did exist some uncertainties as to whether the proposed deal would work out. These uncertainties included: concluding the second due diligence phase; concluding definitive purchase and sale agreements; getting approval from 3M's executive committee and board; and 3M's concluding of its Blue Book Process.

[107] As for the drafting of the proposed Merger Agreement, Ashe testified that at the time the document was being drafted, issues arose regarding severance and AiT's obligations to its employees and the break fee. However, 3M was ultimately amenable to AiT's suggestions on these issues.

[108] During cross-examination, Ashe explained that on May 14, 2002, when he received the draft Merger Agreement from 3M for the first time, he did not know at that time whether the negotiations would go smoothly. As well, Ashe conceded that the issue of the break fee was an important issue to be resolved. Counsel for Weinstein referred Ashe to Dunleavy's email dated May 15, 2002, which stated that "the timing of the break fee is a crucial point" and "AiT is simply not in a position to fund this commitment if the second transaction does not close for some reason". Ashe admitted that it would be a difficult issue for AiT to secure the amount of the break fee.

[109] In addition, Ashe admitted that he could not imagine completing the deal by not paying severance to terminated employees and by having employees agree to sign up to conditions where they waived their termination rights under existing change of control

provisions. In hindsight, Ashe agreed that issues like severance and the break fee could have been deal breakers if they were not resolved during the negotiation process.

[110] With respect to the drafting of the agreement, Ashe testified that 3M did not work with the draft agreement that AiT sent them, and that 3M had their own way of doing things.

[111] During cross-examination, Ashe also revealed that the minutes of the April 25, 2002 AiT Board meeting were not prepared until the period between June 27 and July 4, 2002.

[112] He also admitted that during the negotiations with 3M he never spoke with the CEO of 3M and never received any indication from the CEO of 3M that the deal was approved. Similarly, Ashe testified that he never spoke directly to Weber, the 3M Executive Vice-President.

[113] Further, during cross-examination, Ashe testified that the support agreements were negotiated starting on May 17, 2002 and the negotiation lasted over a few days. Ashe also admitted that the exclusion of the non-compete and the addition of an opt-out provision were provisions that had a material influence on whether key shareholders would sign the support agreements.

ii. Damp

[114] Damp was a director of AiT. He testified that after the execution of the LOI on April 26, 2002, his personal view was that AiT had reached the first major gate in the process, had a reasonably good chance of a deal, but believed there were still a number of factors that could cause the transaction not to happen at all, or that 3M would not be prepared to proceed at the price agreed to on April 25, 2002.

[115] According to Damp, 3M was trying to get AiT to a price that the significant shareholders would be willing to accept on April 25, 2002. He also testified on cross-examination that there was a good-faith expectation that both AiT and 3M were working towards negotiating and completing a transaction.

[116] In his testimony, Damp discussed what he felt were the remaining gates to be reached in getting the LOI to a definitive agreement. These included:

- Harrold was a mid-level manager who would have to obtain a series of corporate approvals to get the transaction completed, including the CEO of 3M and the board of directors. He felt it was unpredictable how each level of management would view the transaction, simply because 3M was a large corporation that made many acquisitions and AiT was a small company that was likely inconsequential to 3M. It was Damp's belief that 3M was looking at other acquisitions other than AiT;

- Damp found the human resources aspect unpredictable in all mergers and acquisitions, especially in high-tech companies where acquirers often wanted assurance that employees would stay with the company after the transaction. Damp testified that AiT was especially vulnerable because Alan Boate, the head of research and development and the "brain power" of AiT, was unhappy with the discussions. Boate was "acting in an emotional and erratic way" and Damp was concerned Boate would "denigrate the management team, denigrate the activities of [AiT]" during the due diligence process;

- AiT had presented aggressive financial forecasts for 3M to use during the first due diligence process, and Damp expected that there would be a full review of the forecasts by 3M's finance team who would challenge the assumptions. He was concerned that there would be a credibility issue with the attainability of the forecasts and a resulting price reduction; and

- There was a due diligence process that had to be done regarding tax losses.

[117] Damp also testified that AiT had negotiated a very good price with a significant premium, and although 3M seemed willing to proceed towards that price, he felt it was vulnerable to a review by 3M because of the typical reluctance of big companies to pay premiums that were viewed as too high.

[118] On the issue of disclosure, Damp recalled that there was a general discussion amongst the directors at the AiT Board meeting on April 25, 2002, where Weinstein had advised that disclosure wasn't required based on the fact that the LOI was non-binding. Damp also testified that he relied on and agreed with Weinstein's legal advice regarding disclosure, and that she did not mention the possibility of confidential disclosure to the Commission.

[119] In Damp's view, the AiT Board approved the proposed transaction on May 22, 2002. On this date, a number of significant issues for the AiT Board were resolved at this time, for example, the due diligence was complete, 3M was ready to proceed, the negotiation of significant terms was completed and the AiT Board reviewed the Merger Agreement after a presentation and discussion on it.

[120] In his testimony, Damp also commented on the situation that would probably have occurred if the potential transaction with 3M was not completed. He was of the view that AiT's business plan would have involved continuing in its core ID business, which was still viable and profitable for AiT, and shutting down Affinitex to save money. In addition, Damp testified that the formal M&A process that AiT had postponed to pursue the transaction with 3M would have been re-commenced, to survey whether there were any other organizations that were interested in acquiring AiT. Damp believed the main issue that AiT had with their bank loan was the cash flow that was going into Affinitex, and he was of the opinion that AiT's business would have been able to move forward once they were able to cut those losses.

iii. Dunleavy

[121] Dunleavy was not involved in the AiT-3M negotiations until the execution of the non-binding LOI. His testimony focused on his perspective of the transaction between that date, April 26, 2002 and its closing. When asked what his knowledge of the status of negotiations with 3M on April 26, 2002 was, Dunleavy testified:

> "Well, obviously, we had received a letter of intent. And it, in typical fashion, created an obligation on AiT not to proceed with any other acquisitions for a period of time of 30 days while the parties continued their discussions.
>
> It did have a price of [$]2.88 per share that was the proposed price. It did have other provisions that would have permitted -- that were negotiated into the document that would have permitted AiT to back out of the restriction on considering alternative transactions if an alternative transaction of a superior nature came in.
>
> So at that point, I knew that we had reached a juncture of the transaction that the parties felt that they want to begin a legal process. It didn't necessarily mean that we would conclude a transaction in the end.
>
> But the parties were willing to take the next step, which was to engage in the more complete due diligence, and to see if they could negotiate a transaction to close at the end of the day." (*Hearing Transcript in the Matter of AiT Information Technologies Corporation, Bernard Jude Ashe and Deborah Weinstein*, dated September 17, 2007 (the "*Sept. 17 Transcript*") at 20:15 to 21:10)

[122] Dunleavy felt that the primary purpose of an LOI was only for the buyer to obtain a lock-up of the target company to make its assessment of whether to make the acquisition. Dunleavy also testified that it was his view that the approval at the AiT Board meeting on April 25, 2002 was merely to proceed with discussions with 3M by moving to an LOI, and approving a target ceiling price of $2.88 per share. Dunleavy explained that in his experience, he treated a price listed in an LOI as a ceiling price because it usually meant that the parties were willing to move forward at the given price, notwithstanding that it could potentially be driven down after due diligence and other factors. In his experience, terms of an LOI were often modified substantially once parties entered the due diligence process. However, Dunleavy also testified that during the negotiations with 3M, the parties did not revisit the issue of price.

[123] According to Dunleavy, the first 10 days after the execution of the LOI were slow; AiT was taking steps to try to move the deal forward, but received few responses from 3M. This included sending a draft of an acquisition agreement to Price at 3M on April 30, 2002. Dunleavy testified that it was not typical for acquirees to produce the first draft of such agreements, and further that it was often the case that acquirers would present an acquisition agreement draft very soon after the LOI had been signed.

Dunleavy testified that by the first few days of May, he felt that either 3M was not as interested as he thought, or that 3M was going to take its time in doing the transaction despite that they only had an exclusivity period for 30 days. On May 7, 2002, Price communicated to Dunleavy that having an agreement by May 14, 2002 was too aggressive.

[124] Dunleavy testified that after a preliminary call on May 2, 2002, discussions about the structure of the transaction did not take place until a conference call on May 8, 2002, where he was first informed that the deal would be in the form of an amalgamation. Dunleavy was also informed by 3M at that time that he would be receiving a draft acquisition agreement by May 14, 2002. It was in this draft of the Merger Agreement from 3M that the structure of the transaction was confirmed as an amalgamation. In his view, the structure of the transaction could potentially have had a material impact on the tax treatment and economic value of the transaction to AiT shareholders which may in turn have impacted AiT's willingness to proceed.

[125] On May 9, 2002, Dunleavy felt he was accurate about the status of negotiations with 3M when he spoke to RS and characterized the negotiations as at a nascent stage. At this time, he believed that due diligence was still ongoing; the deal structure was not confirmed; a draft agreement had not been received; and, 3M board approval had not been obtained.

[126] Dunleavy also testified that he was not part of the discussions regarding the 3M approval process. He had no idea what the process was, other than that it was highly complicated and bureaucratic, and he was not informed about the status of the approvals.

[127] With respect to the issue of disclosure, Dunleavy testified that he agreed with Weinstein that usually circumstances do not require disclosure of a non-binding LOI in the context of a merger and acquisition transaction. Although he didn't believe disclosure only occurred when there was a final binding agreement, he felt it was very typical for disclosure to occur at that time. From his experience, it was often only when such an agreement was signed that there were sufficient indicators of commitment to trigger the obligation.

iv. Weinstein

[128] Weinstein testified that she became aware of the discussions between AiT and 3M regarding a potential acquisition around March 1, 2002. Ashe informed her that he had been speaking with someone at 3M and that there could be a potential interest in the company.

[129] Subsequently, Weinstein became involved in the discussions with 3M and became involved with the process to review the confidentiality agreement. According to Weinstein, "[it] took seven days to negotiate what I would have considered to be fairly standard provisions." Weinstein's testimony also demonstrated that through negotiating the confidentiality agreement 3M's bureaucracy and way of conducting business became apparent.

[130] Weinstein also testified that she was aware that the CEO of 3M followed the Six Sigma process. With respect to this, Weinstein explained that:

> "And so as -- I found it very surprising that they had these levels, but I wasn't surprised by the bureaucracy, and I -- it sort of gave me a sign of, I think, what I expected to come and, in fact, what did come." (*Hearing Transcript in the Matter of AiT Information Technologies Corporation, Bernard Jude Ashe and Deborah Weinstein*, dated September 19, 2007 (the "*Sept. 19 Transcript*") at 101:24 to 102:3)

[131] After the confidentiality agreement, Weinstein testified that she and LaBarge Weinstein were involved with the preparation for the due diligence process. She also testified that she advised AiT regarding disclosure obligations. In particular:

> "So I wanted to ensure that [Ashe] understood the importance of confidentiality. We would not want premature disclosure at a preliminary stage. And so I would have provided him, as [Dunleavy] would have, with advice around the stages of a transaction, in a very general way at this point, because we had no idea what to expect from them. And as a lawyer, always reminding him of the various obligations of a public company." (*Sept. 19 Transcript, supra* at 103:23 to 104:5)

[132] From the period of March 26 to April 8, 2002, Weinstein was away on vacation. Upon return from her vacation, she attended the meeting in St. Paul with 3M on April 11 and 12, 2002. According to Weinstein, her role at this meeting was to assist Damp and Ashe and she explained that:

> "And it was my understanding that going down there was to continue to sell them on our technology, our people, our assets, and try to get them interested in moving towards a price." (*Sept. 19 Transcript, supra* at 107:6-9)

[133] At the time of the meeting in St. Paul on April 11 and 12, 2002, Weinstein recalled that she was unsure whether 3M was serious about acquiring AiT:

> "So reading the annual report, I was – I was very pessimistic that they were actually interested in buying us. I thought they were interested in learning about our technology.
>
> They had -- they had a big organization, and they had a lot of smart people, and it's been my experience with high-technology companies that a lot of people do a lot of shopping of the kinds of technologies and the kinds of vision and strategy small -- smaller, agile companies have. But there's this philosophy of 'not in my backyard', which is a lot of technology companies have engineers who say, no, we don't have to acquire it. We can do it ourselves.
>
> So I was a skeptic." (*Sept. 19 Transcript, supra* at 108:10-23)

[134] In addition, Weinstein testified that it was unclear if AiT was negotiating with someone at 3M who had authority:

> "I never really knew who I was talking to. I mean, Steve Harrold was there […]
>
> But all of the purse strings and all of the authority for making the business decision on whether to acquire is made by corporate development people.
>
> And I also recall in that annual report, there were over a hundred officers mentioned at the back of the annual report. Steve Harrold wasn't one of them.
>
> And so I was concerned that we -- I didn't know who we were negotiating with." (*Sept. 19 Transcript, supra* at 109:5-18)

[135] Weinstein also testified that 3M made it very clear to AiT that any negotiation regarding a price range would be subject to a non-binding letter of intent and board approval.

[136] Following the meeting in St. Paul, Weinstein was of the view that a number of uncertainties existed as to whether the negotiations with 3M would be successful. These uncertainties dealt with the issue of 3M not being interested in Affinitex, tax issues and the structure of the deal itself. According to Weinstein:

> "[3M] kept suggesting they were going to buy assets, and that was just going to be a horrendous after-tax result for our shareholders, and I believe would not be of – supportive of our principal shareholders." (*Sept. 19 Transcript, supra* at 111:25 to 112:3)

[137] With respect to the phone call between Ashe and representatives from 3M on April 23, 2002, Weinstein's view (although she was not a participant in the call) was that this call was a step in the direction of working towards the proposed transaction. It is her recollection of being advised that there was a price 3M had in mind, and if the AiT Board was supportive of that price range, then 3M would move to the next stage. She saw this step as a precursor to the next stage of preparing a non-binding LOI, with which the proposed transaction would begin what she considered to be a standard process.

[138] Weinstein was not involved with the call that took place on April 24, 2002; however, she was updated by Ashe with respect to the pricing discussions.

[139] Weinstein also gave testimony regarding the AiT Board meeting on April 25, 2002. In her view, the purpose of this meeting was the following:

> "[…] that in order for [3M] to proceed to begin to expend resources and go through their in-depth process, they would have to know that our board would be open to receiving an offer at $2.88.

> And I took that to mean that it wasn't a definitive offer of [$]2.88 that day. It was that should they go through their process and come out the other side, that, as Mr. Dunleavy said, if [$]2.88 was, again, offered to them after all the negotiations, after all the due diligence, after all the definitive agreements, that our board would look positively on that.
>
> And so I looked at it as a precursor. And they wanted to know back from Mr. Ashe if our board was inclined to allow them to continue the process." (*Sept. 19 Transcript, supra* at 119:4-17)

[140] According to Weinstein this meeting was held because the AiT Board needed to give its approval to allow Ashe to continue with the negotiations with 3M. Specifically, Weinstein stated:

> "[…] an officer should not commit the company to a process that might result in an offer, a friendly negotiated offer, without the board allowing him to continue the process.
>
> And so in my mind, whether it was a verbal of [$]2.88 or whether it was -- and there are many different ways one can do it, an expression of interest, a memorandum of understanding, a non-binding LOI. You can call it whatever you want.
>
> When you start to move into the disruptive process that we were about to enter into, it would -- it is always appropriate that the board sanction that move." (*Sept. 19 Transcript, supra* at 119:25 to 120:11)

[141] In her testimony, Weinstein also described her recollection of what was discussed during the AiT Board meeting of April 25, 2002:

- "[Ashe] would have discussed the -- the prior two days and how we came to the $41-million, and he would have discussed that we were expecting a non-binding LOI after the board meeting and after he was able to advise 3M that the process could continue." (*Sept. 19 Transcript, supra* at 120:21-25)

- "There would have been -- or there was discussion, as Mr. Damp alluded to, about the price. Obviously, we were all there trying to maximize shareholder value. And wanted to be sure, when you undertake a non-competitive process -- this wasn't an auction; there was a one-on-one negotiation -- that the board -- every board member had to feel confident and sure that there wasn't another amount of money that was available for the shareholders." (*Sept. 19 Transcript, supra* at 121:1-9)

- "After that discussion and [Ashe's] overview of what he had been advised were the next steps, I would have, in my role as legal counsel, provided an overview of the various legal ramifications of what we were about to enter into. I would have

talked about communications, i.e. don't communicate, and the confidential nature." (*Sept. 19 Transcript, supra* at 121:10-15)

- "I was asked about what kind of public disclosure was required, if any. And it was my opinion then and still is my opinion today that we did not have a change, and I would have advised the board or I did advise the board that no public disclosure was necessary." (*Sept. 19 Transcript, supra* at 121:16-20)

- "So we were -- albeit all coming from a different perspective, we were united on what the facts were. And based on those facts, my analysis of the law was that there was no material change." (*Sept. 19 Transcript, supra* at 121:25 to 122:3)

- "We would have talked about the timing of the evolution, the various approvals and commitments that we still needed to obtain, but that we had a lot of work to do around due diligence, negotiation of every agreement and every term. And the participation of myself and [Ashe] in that -- myself as legal counsel and [Ashe] and the rest of the management team." (*Sept. 19 Transcript, supra* at 122:12-18)

- "We would have talked in general terms that they were going -- that we had not resolved how they were going to buy the company, if, in fact, they ended up buying the company or making an offer to buy the company, and we would have talked about the due diligence that was required and the fact that we didn't have any paper at that point. We didn't even have a non-binding LOI draft. We didn't have anything." (*Sept. 19 Transcript, supra* at 122:22 to 123:4)

[142] With respect to the prospect of whether the proposed transaction with 3M would be successful, on April 25, 2002, Weinstein recalled that there was some skepticism. She testified that:

> "I think it's safe to say that we were all hopeful that we could convince 3M and manoeuvre our way through due diligence and their process and their bureaucracy to an end point.
>
> There was a lot of skepticism, but there was hopeful optimism, even though Mr. Sandler thought we were worth $100-million, or wanted, at least, to have the company be worth that value, I think inherently, we all knew that if we could achieve an outcome at $41-million, that that would be a very good outcome for shareholders. But there was healthy skepticism.
>
> […]
>
> I recall being told at that time that their board would be looking to approve it on May 14. Again, I didn't have a letter of intent, so I thought, my goodness. There's so much work to be done. I reflected back on sort of the month or so in between." (*Sept. 19 Transcript, supra* at 123:8 to 124:2)

[143] Weinstein also explained that she did not believe 3M was committed to the transaction at that date, and if she thought 3M was committed at this time, then she would have advised the AiT Board to waive the shareholder rights plan. Weinstein explained that when a company is ready to commit and has committed to do a transaction, the board has to approve entering into the agreement. At this point, then the board waives the shareholder rights plan with respect to that agreement only. Next, the shareholders need to approve the transaction and waiving of the shareholders rights plan at the shareholders meeting to consummate the transaction. Weinstein testified that the AiT Board did not waive the shareholders rights plan at the April 25, 2002 meeting. Specifically, Weinstein stated:

> "[…] we had put in a shareholder rights plan, which is the legal equivalent to a poison pill, which permitted the board to have up to 45 days -- that was about the proper range of time -- to seek a superior offer, should a hostile bid come in.
>
> If our board had not waived that plan, we would have been offside and caused havoc in our shareholdings, because it's a mechanism that if the board doesn't waive it, your shareholders get thousands more shares for every share they hold.
>
> Had I thought we were entering into an agreement on April 25th, I would have had the board waive the pill on April 25th. Had I thought we were making a commitment on April 25th, I would have had the board do that." (*Sept. 19 Transcript*, *supra* at 143:3-17)

[144] Therefore, according to Weinstein, at this time, there was uncertainty regarding whether 3M was committed, and Weinstein explained that AiT did not have the "ability to implement or force 3M to purchase the company or commit to purchasing the company".

[145] Weinstein also gave testimony relating to the support agreements. According to Weinstein:

> "The individuals on the board had to confirm that as shareholders, they would sign the support agreement. Because the board meeting we held in April did not bind any of the board members to vote in favour of the transaction as a shareholder." (*Sept. 19 Transcript*, *supra* at 142:14-18)

[146] With respect to the minutes of the April 25, 2002 AiT Board meeting, Weinstein explained that the wording of the minutes is identical to the wording in the proxy circular and that they were both prepared in late June 2002. According to Weinstein, the minutes are accurate, but the characterization of what was approved is "less legal". She pointed out that the key words from the minutes are: "Subject to board approval by AiT, 3M would draft for execution by both parties a non-binding letter of intent to acquire all the shares as discussed." She explained that during the April 25, 2002 AiT Board meeting, Ashe advised the AiT Board that he received a verbal

commitment from 3M to enter into a non-binding letter of intent, and this is what the AiT Board was approving.

[147] In Weinstein's view there was no approval of the AiT Board to enter into a transaction at this time; it was only approval to continue the negotiation process with 3M, and if AiT had not given this approval on April 25, 2002, then the parties would have not been able to move to the next steps of negotiation. In particular, Weinstein took the view that there was no approval for the Merger Transaction with 3M prior to the AiT Board meeting on May 22, 2002.

[148] On the subject of the LOI, Weinstein recalled that AiT received the draft LOI from 3M on April 26, 2002. In her view, the LOI was "very short, very non-binding", and it confirmed that negotiations should proceed based on a price of $2.88 per share. In her view, AiT did not have an agreement with 3M at this time and the effect of the LOI was as follows:

> "The letter of intent merely had [3M] re-confirm their obligation not to use [AiT's] confidential information in accordance with the earlier confidentiality agreement. 3M had no other commitments at that time." (*Sept. 19 Transcript, supra* at 126:8-11)

[149] She also testified that in her view, the issue of the negotiation of price could be reopened by 3M and 3M could walk away at any time.

[150] With respect to 3M's corporate approval process, Weinstein testified that the LOI mentioned that there were committee approvals, but at that time she did not know which committee approvals were required and she was not sure of the timing of that process.

[151] On the issue of disclosure at this time, Weinstein was of the opinion that there was no obligation to disclose, and if there was, she would have spoken up and advised AiT accordingly. Weinstein also acknowledged that with respect to the confidentiality provisions "no contract entered into ever trumps statutory law."

[152] Following the execution of the LOI on April 26, 2002, Weinstein testified that the next step in the negotiations with 3M was the preparation of the "pre-acquisition agreement", and her involvement during this process was to review the work of the lawyers at LaBarge Weinstein.

[153] On April 26, 2002, Weinstein recalled that she spoke with Price and another individual from 3M regarding AiT's corporate structure. According to Weinstein, the purpose of this conversation was as follows:

> "And I believe they needed to gather up a bunch of information, even preliminary to the due diligence, to try to figure out how they would entertain an acquisition, should they proceed with it.
>
> […]

> And so from April 26 until the phone call with Kim Price and Jonathan Lampe, I think on the 8th, we would just provide them with whatever information they needed, I believe because they were trying to figure out how to potentially do the transaction within their own corporate makeup." (*Sept. 19 Transcript, supra* at 130:12 to 131:1)

[154] According to Weinstein, at this time AiT did not know what the structure of the transaction would be. She also testified that it is not up to the target (in this case AiT) to determine the structure of the transaction.

[155] On cross-examination, Weinstein admitted that on April 26, 2002 there was material information that AiT was beginning a process with 3M, and that is why the Warning Letter was prepared to warn insiders of AiT that they could be held liable under section 76 of the Act.

[156] When asked about confidential disclosure, Weinstein explained that she did not turn her mind to confidential disclosure, because on April 25 and 26, 2002, there was no [material] change, and there were no terms that were definitive to put in a confidential material change report.

[157] Also, during the second due diligence on May 7, 8, and 9, 2002, Weinstein recalled that at this time there were a number of existing concerns, including intellectual property, employee related issues and financial issues that could affect 3M's perception of AiT's value. Specifically, Weinstein was concerned that AiT's technology and source code would be outdated and not be compatible with other technologies used at 3M; that AiT's liability from previously issued warranties (as a result of doing their own manufacturing) was not sufficiently covered in their financial statements; that 3M would restructure or relocate AiT, resulting in significant layoffs of its employees; that 3M would view AiT's revenue projections to be too aggressive; and, the general concern that by buying all of AiT's shares, 3M would be picking up all of AiT's potential liabilities, including any patent infringement claims.

[158] Weinstein recalled that on May 9, 2002 when she left to go on vacation the structure of the transaction was not settled; however, an initial structure had been discussed. Also, when she left on vacation on May 9, 2002, AiT had still not yet heard back from 3M regarding the draft acquisition agreement prepared by Dunleavy.

2. The Affidavits

i. Lumley

[159] Staff read into evidence an affidavit sworn August 29, 2007, by Lumley, who was a director of AiT during the Relevant Period. In his affidavit, Lumley outlined his current and prior work experience outside AiT; his role as a director of AiT, his working relationship with Weinstein before he recommended her appointment to the AiT Board,

and Weinstein's role in providing expertise and judgment with respect to legal issues in a public company context.

[160] Lumley recollected the material events that occurred between April and June of 2002 surrounding the Merger Transaction. With respect to the discussion about disclosure at the AiT Board meeting on April 25, 2002, Lumley recollected that:

> "I believe that I raised the issue of disclosure of the proposed 3M transaction as a normal question, a standard thing that I would ask at a Board meeting in such circumstances. I obtained information about the proposed transaction through Bernard Ashe or Deborah Weinstein at Board meetings. I accepted Deborah Weinstein's advice on the issue of disclosure. I don't recall any debate on the issue. While the AiT persons negotiating the deal were optimistic and it appeared to me that there was a strong possibility that the deal would be completed, I strongly worried whether the deal would fall away." (*Affidavit of Edward C. Lumley*, sworn August 29, 2007, ("*Lumley's Affidavit*") at para. 10)

[161] Lumley also stated that the disclosure discussion involved most of the AiT Board members and in particular "it was a serious discussion regarding the substantial chance that the transaction would not be completed and that premature disclosure could result in the failure of the deal" (*Lumley's Affidavit*, *supra* at para. 14).

[162] He also relied heavily on the correspondence from his counsel in response to Staff inquiries made in July 2004 and February and July of 2005 to more accurately recollect the events. Specifically, this correspondence states:

> "The Outside Directors recall that discussion took place during the Board meeting on April 25, 2002 as to whether the proposed transaction with 3M should be announced as a material change. It was the conclusion of the Board of AiT that it would be premature to announce a possible transaction with 3M at that time. As outlined above, the main reason for the Board arriving at that conclusion was the degree of uncertainty as to whether 3M would proceed with the transaction as proposed.
>
> It is the recollection of each of the Outside Directors that Deborah Weinstein, whose law firm LaBarge Weinstein was counsel to AiT and who was intimately familiar with the details of the negotiations with 3M, expressed her opinion that based on the non-binding nature of the letter of intent, it would be premature at that time to announce a possible transaction with 3M. […]
>
> […] The Outside Directors relied on Deborah Weinstein's advice in this instance that it would be premature to announce a possible transaction. Based on their understanding of the status of the discussions with 3M, they agreed with her advice.

> Due to the significant uncertainty as to whether the proposed transaction would proceed, the AiT Board, was mindful that the announcement of a possible transaction with 3M at that time could be misleading and cause turmoil in the market for AiT's shares, particularly in the event that the proposed transaction did not proceed. Such an occurrence would have damaged AiT and its shareholders. Furthermore, there was a realistic possibility that an announcement by AiT at that time would have terminated 3M's interest in reviewing a transaction, to the loss of AiT and all its-stakeholders." (*Lumley's Affidavit*, *supra* at para. 8)

[163] In addition, Lumley confirmed that the approval process at 3M was not automatic, instead there were a number of approvals that had to be given by higher authorities within 3M. For instance, there was still the issue of getting 3M approvals as a part of 3M's Six Sigma process. Lumley recollected that:

> "[…] there existed a real concern that the transaction would not be approved by higher authorities at 3M. In other words, approval at 3M was not a rubber stamp process. I did question at Board meetings whether the potential transaction was real or not." (*Lumley's Affidavit*, *supra* at para. 12)

[164] Lumley also referred to AiT's deteriorating financial condition. In his view, "[at] this time, AiT was not in good shape [and] sales were falling" (*Lumley's Affidavit*, *supra* at para. 11).

[165] Lastly, Lumley explained that he did not play an integral part in the transaction. He also referred to his experience in other take-over situations and his practice of relying on legal advice with respect to the issue of disclosure.

ii. Macmillan

[166] Staff also submitted an affidavit from Macmillan, another former director of AiT during the Relevant Period, sworn September 10, 2007. In his affidavit, Macmillan outlined his current and prior work experience (in his work experience, he was not involved in disclosure decisions around securities transactions), his working relationship with Weinstein, how he became involved with AiT, and his recollection of the events surrounding the 3M transaction. Macmillan confirmed the financial difficulty that AiT was experiencing at the end of 2001, the failure of diversification strategies pursued by AiT, and the plan to retain an advisor to assist in exploring strategic opportunities before it was put on hold to pursue discussions with 3M.

[167] Macmillan revealed his lack of involvement in the 3M negotiations beyond the occasional updates from Ashe and Weinstein and the AiT Board meeting on April 25, 2002. (*Affidavit of Graham Macmillan*, sworn September 10, 2007 ("*Macmillan's Affidavit*") at para. 6).

[168] He did recall discussing at the April 25, 2002 AiT Board meeting the potential transaction with 3M and the AiT Board being satisfied that the price of $2.88 per share proposed by 3M was fair in the circumstances; however, he also recalled concern among the directors that 3M would change its mind about proceeding with the transaction because of AiT's poor financial performance. In particular, he states:

> "Although the general mood was that this represented an excellent opportunity for AiT to maximize shareholder value, I recall that there was concern amongst the directors that 3M could change its mind at any time about proceeding with a transaction. We were cognizant of the fact that 3M was a multi billion dollar company and that AiT would not have been important to 3M. I was also of the view that with these kinds of transactions, the "devil is in the detail"." (*Macmillan's Affidavit, supra* at para. 18)

[169] Macmillan also emphasized that there was a great deal of uncertainty surrounding the proposed transaction:

> a) Whether 3M would require the agreement of the key technical personnel at AiT to continue to work for merged AiT/3M entity (in fact, Alan Boate, the Chief Technology Officer, did not agree to work for 3M);
>
> b) There was discussion about whether the AiT research and development facility would be relocated by 3M from Ottawa to St. Paul, Minnesota. A decision to make such a move would undoubtedly have affected the willingness of key personnel to work for the merged entity;
>
> c) There was a question as to whether 3M would want to discontinue the affinitex healthcare division and it was unclear how that would effect the proposed transaction; and
>
> d) AiT's sales results for the first quarter of 2002 were poor, raising a question as to whether 3M would perceive that AiT would be unable to meet the revenue targets in the forecasts that formed the basis of the valuation discussions. (*Macmillan's Affidavit, supra* at para. 25)

[170] In addition, Macmillan refers to correspondence to Staff dated July 25, 2004:

> "At that time, [I] believed that there was a great deal of uncertainty as to whether a transaction could be concluded with 3M at the price discussed at the board meeting. [I] was extremely concerned that AiT's poor financial performance through that time period would derail the proposed transaction or lead to a renegotiation of the price, which may or may not have attracted the support of the major AiT shareholders." (*Macmillan's Affidavit, supra* at para. 19)

[171] With respect to the discussion about disclosure, Macmillan states that:

> "I recall that there was discussion at the April 25 Board meeting respecting disclosure which lasted approximately 20 minutes. There was no dissent amongst the directors about the approach to disclosure.
>
> From my perspective, disclosure of the non-binding letter of intent would be premature from a business point of view. I looked to Ms. Weinstein for the legal point of view. At the time, I was generally familiar with the material change provision in the Ontario Securities Act but not with the provision which provides for a confidential disclosure to be made upon a material change.
>
> The main factors which indicated to me that disclosure would be premature included the fact that the letter of intent was non-binding, due diligence had to be performed by 3M, and I was not sure how AiT's recent quarterly financial results would affect 3M's opinion of the proposed transaction." (*Macmillan's Affidavit, supra* at paras. 20 to 22)

[172] Further, Macmillan also relied on his correspondence with Staff in July 2004 to confirm that the AiT Board relied on Weinstein's legal advice that disclosure would be premature based on the fact that the letter was non-binding, and that it would potentially terminate 3M's interest in the transaction, causing turmoil in the market and damage to AiT and its shareholders. This correspondence states:

> "The AiT Board, including the Outside Directors, were made aware of the significant caveats contained in the letter of intent provided by 3M and they took those caveats very seriously. 3M is a massive corporation with annual revenues of US $16 billion. The AiT Board was aware that 3M reviewed numerous acquisitions and had its own procedures to assess and approve such transactions. It was apparent from the outset that it was going to be the "3M way or the highway". In terms of the discussions that AiT had with 3M regarding a possible transaction, AiT was aware that the primary 3M representative, Steven Harrold, was at a middle management level at 3M and did not have the authority to commit 3M to the acquisition of AiT or to otherwise cause 3M to commit to the proposed transaction. AiT was therefore aware that senior management at 3M could choose not to accept Mr. Harrold's assessment of the benefits to 3M of acquiring AiT." (*Macmillan's Affidavit, supra* at para. 24)

[173] Based on this information, Macmillan takes the position that "the advice that Deborah Weinstein gave to the AiT Board that disclosure would be premature at that time, appeared to [him] to be reasonable" (*Macmillan's Affidavit, supra* at para. 26).

iii. Price

[174] Counsel for Weinstein adduced into evidence an affidavit, sworn September 21, 2007, from Price, the Assistant General Counsel at 3M Company currently and at the

material time. In her affidavit, Price outlined her involvement in the negotiations as the 3M representative primarily responsible for reviewing all legal matters in relation to the proposed transaction.

[175] Price outlined the perspective of 3M on the status of the proposed transaction between April 26, 2002, the date the letter of intent was executed, and May 21, 2002, the date 3M corporate approvals were obtained. She relied on her correspondence to counsel of the merged 3M-AiT in July 2004, which was intended to be forwarded to Staff in response to inquiries regarding the transaction. In view of the relevance of this correspondence to the issue of commitment to the potential transaction by 3M, we have set out the relevant text:

> A letter of intent is, from the perspective of 3M, a reflection of our interest in pursing a commercial transaction <u>if</u> a number of substantive hurdles are cleared, including (among other things) completion of:
>
> - substantive due diligence,
> - integration and business planning,
> - internal review by the board and other members of management,
> - definitive documentation (which may include substantive agreements with persons other than the company with which 3M has entered into the letter of intent), and
> - various regulatory and commercial third party approvals.
>
> It is for this reason that virtually all letters of intent entered into by 3M (including the letter that was sent to AiT) expressly provide that:
>
> - the letter is non-binding (other than in respect of certain provisions that dictate the process through which the parties will continue to endeavour to move towards definitive documentation),
> - the party to whom 3M has addressed the letter should not make business decisions in reliance upon the letter or the successful completion of the transaction contemplated by the letter, and
> - if negotiations cease or the transaction otherwise does not proceed, neither 3M nor the party to whom the letter is addressed will have liabilities or obligations to the other (except in respect of such things as maintaining the confidentiality of certain information and not soliciting customers or employees).

In this context, 3M generally would not contemplate public disclosure of the delivery of a letter of intent, and in fact, our letters of intent generally contemplate that the existence of the letter will be maintained in confidence and generally no announcement of the transaction contemplated by the letter will be made.

On April 26, 2002, a 3M business team and representatives of AiT had identified a price on which those individuals believed a transaction could be pursued if a number of substantive hurdles could be cleared. However, before definitive documentation could be executed by 3M and before legal obligations in respect of the transaction would be assumed by 3M:

- 3M would have to complete substantive due diligence, including a review of AiT's business operations, research and development, manufacturing, financial, legal, environmental and regulatory matters,

- definitive documentation would have to be drafted and negotiated between 3M and AiT containing substantive representations, warranties and covenants,

- voting and stock options agreements would have to be drafted and negotiated with nine individuals and an unidentified shareholder, and

- the appropriate management committees and the board of directors of 3M would have to approve the acquisition and the plan for the integration of the acquired business.

At the time that the letter of intent was signed, 3M had not yet even retained Canadian counsel.

In the week following our engagement of Canadian counsel, progress was made on the completion of due diligence and, on May 14, 2002, the 3M board approved the acquisition of AiT:

> "subject to the approval of the Chairman of the Board and Chief Executive Officer of the due diligence report and the integration plan".

The completion of that report and the development of those plans, which are substantive and fundamental elements of our acquisition process were not completed until May 21, 2002, when the Chairman and CEO of 3M gave his approval following the meeting of the Corporate Operations Committee held on that date to consider the matter. Similarly, the negotiation of the substantive elements of the transaction documents (including the merger agreement between 3M and AiT, the voting and

> stock option agreements and employment agreements with key employees) was ongoing, drafts of those documents continued to be circulated and negotiated until virtually the time of their execution.
>
> Put simply, until these steps were completed, there was no deal.
>
> (*Affidavit of Kim Price*, sworn September 21, 2007 at para. 5)

[176] Price attached as exhibits materials supporting the process used by 3M to assess and approve the transaction with AiT. These included presentation materials to the 3M board; the resolution passed by the Board on May 14, 2002; meeting minutes of the legal team on May 20, 2002, and a report prepared for the Operations Management Committee on May 21, 2002.

C. The Expert Evidence

1. Anisman

[177] Anisman was called by Staff as an expert witness and was asked to provide an opinion about the analytical process to be followed in making an assessment of when disclosure should be made under section 75 of the Act.

[178] Anisman's Expert Report, dated August 31, 2007, stated that his evidence was three-fold:

> i. to provide a description of the policy underlying section 75 of the Act;
>
> ii. to provide an opinion on the analytical process to be followed in making an assessment as to when disclosure should (or presumably should not) be made under section 75 of the Act; and
>
> iii. to illustrate the analytical process that ought to have been used on the basis of the factual materials provided to him by Staff in this case.

[179] Counsel for Weinstein objected to Anisman's evidence on the basis that the report resembled closing argument instead of an expert report. In particular, counsel for Weinstein submitted that it appeared that Anisman's evidence interpreted the facts and applied the law, which is the jurisdiction of the Panel. Counsel for Weinstein and Staff made submissions on this issue and referred us to the relevant case-law.

[180] The role of an expert witness is to provide the court or tribunal with special knowledge or expertise beyond the knowledge or expertise of the court or tribunal. It is not the role of an expert to express an opinion on domestic law or the ultimate issues before the Court or tribunal. With respect to Anisman's expert evidence we concluded that points (i) and (iii) set out above, related to the description and interpretation of domestic law, and were thus inappropriate topics to be dealt with in expert evidence. As a result, we restricted Anisman's expert evidence to point (ii) to provide an opinion on

the analytical process to be followed in making an assessment as to when disclosure should (or should not) be made under section 75 of the Act. We note that Weinstein also led expert evidence in response.

[181] With respect to the analytical process to be followed in making an assessment when disclosure should be made under section 75 of the Act, Anisman testified that the overall approach was to be fact-based, contextual and purposive, and three basic questions were to be asked. The first two questions address whether there is a "material change": first, whether the information or event in question is "material"; second, whether a "change" has occurred. If it is concluded that there is a material change, the third question is whether disclosure should be made publicly, or whether there is sufficient reason to disclose to the Commission confidentially.

[182] Anisman suggested that the acquisition of a small issuer by a large issuer would have a sufficiently significant impact on the smaller issuer to cross the materiality threshold, and most of his testimony focused on approaching the second question of when it becomes a "change".

[183] Anisman emphasized that the timely disclosure obligation in the Act is inconsistent with a bright-line test. Instead, the determination is factual and must be made in the circumstances of each transaction.

[184] The core of Anisman's testimony was the concept of commitment by the parties. The relevant test is to determine when in the course of a negotiation can it be said that there is sufficient commitment by the relevant parties to go forward with the transaction that "constitutes an alteration of the issuer's business or affairs in the circumstances." In his view, it is at this point that a material change occurs and the disclosure obligation is triggered.

[185] In the course of negotiating a single transaction, Anisman testified that there may be more than one material change. For example, it is possible that there is a change where there is agreement to the material terms of a transaction, even if negotiations continue with respect to other significant issues.

[186] Anisman testified that matters such as board resolutions, agreements in principle, and letters of intent may represent a sufficient degree of commitment to constitute a material change. Accordingly, one or more material changes may occur well before the signing of a definitive agreement that contains all the terms of the transaction. This determination must be made in the specific context of the transaction, with an objective view of all the information available at the time. In his expert report, Anisman stated:

> The factors that are relevant to determining whether an agreement in principle, for example, is a material change will depend on the nature of the decision it represents, the conditions to which it is subject, how central they are to achieving a transaction and the likelihood that they will, or will not, be satisfied. These factors may be assessed in light of the nature of the

> negotiations relating to them prior and subsequent to reaching an agreement in principle. In other words, it might be reasonable to ask whether any "deal-breakers" remain outstanding. Of particular significance are resolutions adopted by a board of directors, the terms of any such resolutions, and the desire of the parties to achieve the transaction in question. (Philip Anisman, *Expert Report prepared for Re AiT Advanced Information Technologies Corporation, et al*., dated August 31, 2007, p. 15)

[187] Upon cross-examination, Anisman agreed that with respect to a letter of intent, the terms of the letter of intent would be part of the analysis, and the more binding the terms that start to flesh out an agreement between the parties, the more likely the issuer may have a change.

[188] Where the outstanding conditions are in the control of a third party, Anisman testified that the issuer would still have to make an assessment of the likelihood of the conditions being fulfilled, even if the issuer itself doesn't have the ability to fulfill them. This assessment would similarly flow from the entire negotiation and relevant circumstances up to that point. For example, the issuer's understanding that the acquirer was willing to complete the transaction, or was committed to it, would be an important consideration.

[189] Anisman testified that once the issuer determines that there is a material change, it must consider whether public disclosure would cause undue harm to the issuer, in which case confidential disclosure might be appropriate. In making this assessment, Anisman stated that it is again a factual determination, taking into account the nature of the detriment, the degree of harm and impact it would have on the issuer, and whether it warrants filing a confidential report with the Commission.

[190] According to Anisman, the purpose of confidential disclosure is to alert the Commission that there has been a change so that the market could be monitored for leakage and potential insider trading. He testified that the permissibility of confidential filing serves as a compromise between protecting investors and causing prejudice to issuers.

2. Dey

[191] Peter Dey ("Dey") was the expert witness called by the Respondent. He was asked to comment on the types of issues and approach that a board of directors would be expected to take with respect to disclosure of a material change in the context of a merger and acquisition negotiation.

[192] The core of Dey's testimony was the concept that in a negotiated transaction, the board of an issuer must determine if there is a reasonable prospect that the transaction could be completed. In his opinion, a material change occurs when the understanding between the parties is such that there is a reasonable prospect that the transaction could be completed. Otherwise disclosure could be premature, such as where an issuer has no

reasonable assurances that the transaction will be completed. This judgment has to be made in the context of the transaction, which is defined by the surrounding facts and circumstances.

[193] Dey also explained that a board cannot wait until the completion of the transaction is guaranteed before making disclosure. Often, there will be outstanding conditions at the time disclosure is made. With respect to the outstanding conditions, the test to be applied by the board is whether there is a reasonable prospect that the outstanding conditions will be satisfied. Even when the outstanding conditions are not within the issuer's control, the same analysis must be undertaken.

[194] As an example, Dey considered a condition where a transaction could not be completed without approval of the board of the acquirer. In assessing this condition, the board of the acquiree must consider the indications of the other party, such as communications from the acquirer that they were recommending the transaction to the board, who they believed would approve the transaction. In such a situation, this would probably be a condition that had a reasonable prospect of being fulfilled, therefore triggering disclosure. On the other hand, if management of the acquiree indicated that they had no sense whether the acquirer's corporate approvals would be forthcoming, the acquiree would probably resist disclosure.

[195] With respect to confidential disclosure, Dey's opinion was that it is very rare and that it is something that is best to avoid. He testified that there would have to be compelling reasons for the company not to make public disclosure at the time that a material change occurred.

IV. THE STATUTORY REGIME

[196] It is important to note that the Statement of Allegations deals with breaches of the Act that took place in 2002; thus the provisions in the 2002 version of the Act apply in this decision. These provisions are set out in "Schedule A" of our Reasons and Decision. In addition, *National Policy 40 –Timely Disclosure* is set out in "Schedule B" for reference, although it does not form the basis of the allegations against Weinstein in this case.

V. ANALYSIS OF THE LEGAL ISSUES AND EVIDENCE

A. The Standard of Proof

[197] The standard of proof applicable in Commission proceedings is the civil standard of the balance of probabilities and we find that it remains the applicable standard in this case. We do however acknowledge that the allegations in this case are serious and relate to Weinstein's professional career and livelihood. As a result, we are of the view that this burden can only be discharged by clear and cogent evidence. As stated in *Re Lett* (2004), 24 O.S.C.B. 3215 at paragraph 31:

> Requiring proof that is "clear and convincing and based upon cogent evidence" has been accepted as necessary in order to make findings involving discipline *or affecting one's ability to earn a livelihood*. [emphasis added]

[198] Further, we note Staff's submission that although section 122 of the Act is a quasi-criminal offence section, it can be referenced in a section 127 proceeding as long as it does not seek a punitive power beyond the scope of section 127. As stated in *Wilder v. Ontario Securities Commission*, [2001] O.J. 1017, at para. 24:

> The Act provides for various remedial routes which themselves entail varying procedural consequences. The reduction in procedural rights under s. 127 from those available in a prosecution under s. 122 results from the simple fact that there is no criminal sanction attached to a s. 127 order. The essence of the statutory scheme is remedial flexibility, not remedial exclusivity, and differing procedural consequences are an inevitable result of such a scheme.

B. The Importance of Timely Disclosure

[199] Section 1.1 of the Act sets out two important purposes: (1) to provide protection to investors from unfair, improper or fraudulent practices; and (2) to foster fair and efficient capital markets and confidence in capital markets. One of the primary means of fulfilling these statutory purposes is by enforcing requirements for timely, accurate and efficient disclosure of information. This is because, through timely disclosure, fairness can be achieved for all investors participating in the capital markets. Disclosure serves to level the playing field such that all investors have access to the same information upon which to make investment decisions. As stated by the Commission in *Re Philip Services Corp.* (2006), 29 O.S.C.B. 3971:

> Disclosure is the cornerstone principle of securities regulation. All persons investing in securities should have equal access to information that may affect their investment decisions. (*Re Philip Services Corp.*, *supra* at para. 7)

[200] Further, disclosure benefits the capital markets because:

> Disclosure in securities markets encourages investing and therefore growth. Disclosure protects investors, aids in ensuring that securities markets operate in a free and open manner and ensures that a security will nearly correspond to its actual value. (*Re YBM Magnex et. al.* (2003), 26 O.S.C.B. 5285 at para. 89)

[201] National Policy 40, which was in force during the Relevant Period, contemplated a broader disclosure regime than the continuous disclosure provisions of the Act. Although it did not have the force of law, it recommended a continuous disclosure system for market participants based upon "material information". Material

information refers to "any information relating to the business and affairs of an issuer that results in or would reasonably be expected to result in a significant change in the market price or value of any of the issuer's securities." As such, the Policy differs from the Act by requiring timely disclosure of both material facts and material changes.

[202] The Policy also contained a caution to issuers concerning premature and misleading disclosure announcements. As set out in the Policy:

> While all material information must be released immediately, the timing of an announcement of material information must be handled carefully, since either premature or late disclosure may damage the reputation of the securities market. Misleading disclosure activity designed to influence the price of a security is improper. Misleading news releases send signals to the investment community which are not justified by an objective examination of the facts, and may detract from the issuer's credibility. Announcements of an intention to proceed with a transaction or activity should not be made unless the issuer has the ability to carry out the intent (although proceeding may be subject to contingencies) and a decision has been made to proceed with the transaction or activity by the issuer's board of directors, or by senior management with the expectation of concurrence from the board of directors.

[203] Staff also addressed confidential disclosure in their submissions and argued that the option of confidential disclosure was available to AiT. Subsection 75(3) of the Act provides for confidential disclosure of material changes where in the opinion of the reporting issuer, public disclosure would be unduly detrimental to the reporting issuer. In Anisman's expert testimony, he stated that confidential filing acknowledges the harm that premature public disclosure could cause to the issuer. He testified that the purpose of confidential disclosure is to alert the Commission to the fact that there has been a change and provides the Commission the opportunity to monitor the market for leakage and potential insider trading. In his view therefore, it serves as a compromise function in the statutory scheme that is designed to both accomplish some protection of investors and not prejudice issuers. We note however, that the issue of confidential disclosure arises in this case only if we determine that a material change has occurred.

C. The Concept of Materiality

[204] In any interpretation of material fact or material change, it is first necessary to review and understand the concept of "materiality" in our disclosure regime:

> The test for materiality in the Act is objective and is one of market impact. An investor wants to know facts that would reasonably be expected to significantly affect the market price or value of securities. (*Re YBM Magnex et al., supra* at para. 91)

[205] The British Columbia Securities Commission has addressed the issue of materiality in the context of negotiations leading up to a transaction (although in the

context of a broader "material information" regime). The following principles were articulated in *Re Siddiqi*, 2005 LNBCSC 375 at paragraph 87:

> Whether information is material depends on the facts of each case. The test is the expected impact the information would have on the market price or value of the issuer's securities. Where transactions are involved, it is not enough to consider only the materiality of the transaction itself, but also the materiality of the information that negotiations are underway that could lead to a possible transaction. In some cases, the existence of negotiations would or could reasonably be expected to affect the stock price, and is therefore material. (Of course, the existence of negotiations about a proposed transaction can be material only if the underlying transaction itself, if completed, would be material.)

[206] Staff also referred us to the applicable test used in the United States, the probability/magnitude test. Staff referred us to the cases: *SEC v. Texas Gulf Sulphur*, 401 F. 2d 833 (2nd Cir., 1968) aff'd F. 2d 1301 (U.S.C.A. 2nd Cir., 1971); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976); and *Basic v. Levinson* (1988), 485 U.S. 224 (U.S.S.C.) (WL). In particular, Staff points out that the probability/magnitude test has been applied in the context of merger and acquisition transactions in the United States.

[207] However, we note that the law in the United States does not include the concept of a "material change" as defined in our Act. The probability/magnitude test was formulated as an appropriate test for determining the materiality of speculative or contingent information. Although the American probability/magnitude test may be useful with respect to materiality, it is not particularly useful in determining whether a change has occurred, which is crucial in this case. As a result, we are wary of quoting and adhering to the American case law, especially when the American law does not incorporate the concept of a "material change" as the Ontario statute does.

[208] In the present case, the negotiations between AiT and 3M were material in relation to AiT as a reporting issuer: negotiations of a potential acquisition transaction by 3M could reasonably be expected to affect the market price or value of AiT's shares and were therefore material. AiT was also a small company relative to 3M, and materiality often occurs at a much earlier stage for smaller issuers than larger issuers.

D. The Distinction Between a Material Fact and a Material Change

[209] Having determined that the negotiations between AiT and 3M were material to AiT, it is necessary to determine whether those negotiations represented a "material fact" or a "material change". The definition of a material fact is much broader than that of a material change. As set out in subsection 1(1):

> "material fact", where used in relation to securities issued or proposed to be issued, means *a fact* that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of such securities [emphasis added].

On the other hand, a material change is defined as:

> "material change", where used in relation to the affairs of an issuer, means *a change in the business, operations or capital of the issuer* that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer and includes a decision to implement such a change made by the board of directors for the issuer or by senior management of the issuer who believe that confirmation of the decision by the board of directors is probable [emphasis added].

[210] Not all material facts will be significant enough to constitute a change in the business, operations or capital of the issuer, and therefore be a material change. The Act makes an important distinction between the definitions of a material fact and a material change in subsection 1(1). This distinction is fundamental to the various requirements under the Act since certain disclosure requirements are triggered by the occurrence of a material change (but not a material fact). For example, only in the event of a material change does section 75 of the Act require an issuer to issue a news release and also file with the Commission a material change report on a timely basis, or alternatively file a confidential material change report with the Commission. In contrast, section 76 of the Act does not require disclosure of either material changes or material facts, but prohibits anyone from purchasing or selling securities with knowledge of a material fact or material change that has not been generally disclosed to the public.

[211] As Anisman explains in his expert report, the distinction between "material facts" and "material changes" in the legislation recognizes the need of issuers to keep certain developing transactions confidential in the course of negotiations. For example, in a negotiation for a merger transaction, such negotiations may be material at a very early stage and for the purpose of insider trading laws, persons aware of such "material facts" should be prohibited from trading on this information. However, this may be well before the negotiations have reached a point of commitment to be characterized as a change in the issuer's business, operations or capital, and therefore, before public disclosure of the information would be appropriate.

[212] The legislature specifically chose to distinguish material changes from material facts and to create different disclosure requirements for them. This was emphasized in *Kerr v. Danier Leather Inc*., [2005] O.J. No. 5388 (C.A.) ["*Danier CA*"]:

> […] the OSA has preserved the distinction. Thus we must assume that the Legislature intended the distinction to yield different disclosure obligations. In the Court of Appeal decision in *Pezim v. British Columbia (Superintendent of Brokers)* (1992), 96 D.L.R. (4th) 137 (B.C. C.A.), at 150, Lambert J.A. made this point in discussing the same distinction under the British Columbia statute:
>
> > There is a legislative reason for distinguishing between material facts and material changes and it is no accident that the legislature

> did not impose an obligation under s. 67 [of the B.C. Act] to disclose material information unless that information amounted to a change in the business, operations, assets or ownership of a reporting issuer. In enacting s. 67 in its present form the legislature must be taken to have rejected the more exacting standard that would have been imposed if "material facts" (or "material information" as it is described in national policy No. 40) were included in that section.
>
> Although the Supreme Court of Canada overturned the decision of the British Columbia Court of Appeal, it did not quarrel with Lambert J.A.'s conclusion on the legislative distinction between material facts and material changes: see *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.). (*Danier CA, supra* at para. 105)

[213] The legislation clearly differentiates between material changes and material facts, setting up different disclosure obligations and restrictions for each. It clearly contemplated that issuers might be aware of a material fact and insiders must be prevented from trading with such knowledge (section 76 of the Act). However, the existence of a material fact alone does not give rise to the disclosure obligation under section 75 of the Act.

E. The Assessment of a Material Change is Not a Bright-Line Test

[214] Staff in its submissions placed great emphasis on the addition of the words "a decision to implement such a change made by the board of directors of the issuer" to support the proposition that a material change can occur in advance of the execution of a definitive binding agreement and therefore the determination of whether a material change has occurred is not a "bright-line" test.

[215] We agree that there is no "bright-line test". Instead, the assessment of whether a material change has taken place will depend on the circumstances and series of events that took place. This is because the determination of a material change is a question of mixed fact and law (*Re YBM Magnex et al., supra* at para. 94). This determination requires ascertaining whether the existing facts fulfill the legal test. Each case will be unique, and the specific facts and circumstances will vary case by case. Since the fact scenarios will differ in all cases, it is impossible to articulate a bright-line test that will apply in all circumstances.

F. Interpretation of "Decision to Implement a Change" by a Board of Directors

[216] The definition of a "material change" in the 1978 legislation was the first time a reference to a material change included "a decision to *implement* such a change made by the board of directors of the issuer" [emphasis added]. The word "implement" is not defined in the Act, however, we note that the *Canadian Oxford Dictionary* defines the word "implement" as "to put into effect". (*The Canadian Oxford Dictionary*, 2001, s.v. "implement").

[217] Anisman noted in his expert report:

> As a "material change" must be reported when it occurs, the question of what may constitute a change is frequently characterized in terms of when a change occurs, particularly in the context of negotiated transactions involving mergers and acquisitions. Such negotiations may move from overtures, through tentative discussions, into exclusive or non-exclusive arrangements involving confidentiality agreements, to letters of intent and agreements in principle, preparation of a definitive agreement, submission to shareholders for approval, fulfillment of conditions, and ultimately to closing and implementation. Any or all of these steps may be material, as outlined above. *A change will occur when a decision has been made indicating a substantial likelihood that implementation will be forthcoming.* [emphasis added] (Philip Anisman, *Expert Report prepared for Re AiT Advanced Information Technologies Corporation, et al*., dated August 31, 2007, p. 12)

[218] While the Act is silent regarding the definition of "implement" we note that the Commission has addressed this issue in *Re Burnett* (1983), 6 O.S.C.B. 2751. The Commission stated that:

> An intention by a person or company to do something, which once implemented would constitute a material change in the affairs of the reporting issuer, but which at the time the intention is formed, *for reasons beyond the control of the person or company is still not capable of achievement is not ordinarily a material change* in the affairs of the issuer. [emphasis added] (*Re Burnett, supra* at para. 7)

[219] A decision by a board of directors of an issuer to pursue a potential transaction that is not yet within its control to put into effect (and therefore is not then capable of achievement), would not ordinarily be a material change in the business, operations or capital of an issuer at that point in time unless the board has reason to believe that the other party is also committed to completing the transaction, as discussed below.

[220] Staff also referred us to *Re Bennett (Doman),*1996 LNBCSC 38 (QL), rev'd in part [1998] B.C.J. No. 2378 (B.C.C.A.), leave to S.C.C. refused [1998] S.C.C.A. No. 601. Staff takes the position that this case stands for the proposition that a decision to sell a control block of shares is a material change even though there was no agreement and no purchaser had been identified. The British Columbia Securities Commission noted that since legal and financial advisors had been retained for a possible transaction and serious discussions had taken place, this constituted a material change.

[221] The present case can be distinguished from the British Columbia Securities Commission case *Re Bennett (Doman)*. First, *Re Bennett (Doman)* was an insider trading case. Second, Doman was a controlling majority shareholder of Doman Industries:

> Doman controlled Doman Industries. If he decided to sell Doman Industries, Doman Industries would be sold. It would be irrelevant what the directors had to say. The decision to sell Doman Industries was his alone to make. (*Re Bennett (Doman), supra* at 99 and 100)

[222] In any event, we find that there is no bright-line test with respect to a material change, and the fact that legal and financial advisors are retained will not on its own be sufficient to demonstrate that a material change has occurred. Therefore, the fact that legal and financial advisors are retained is not determinative of the existence of a material change.

[223] However, in our view, in the context of a proposed merger and acquisition transaction, where the proposed transaction is speculative, contingent and surrounded by uncertainties, a commitment from one party to proceed will not be sufficient to constitute a material change. In the context of a merger and acquisition transaction, it is necessary to establish whether there is sufficient commitment from both parties of the transaction to determine whether a "decision to implement" the transaction has taken place. Therefore, in the case at bar, we need to establish whether a sufficient indication of commitment was made by AiT and 3M during the Relevant Period.

[224] We rely on Anisman's wording "when a decision has been made indicating a substantial likelihood that implementation will be forthcoming". In our view, for there to be a substantial likelihood that a proposed transaction will be completed, there needs to be sufficient signs of commitment on behalf of all the parties involved to proceed with the transaction.

[225] In the present case, the determination of whether a material change occurred requires ascertaining whether the series of events that took place during the Relevant Period constitute a material change. As a result, this requires an in depth analysis of the facts in this case.

G. Application of the Evidence and Law

1. Did the status of negotiations with 3M constitute a "material change" in the business, operations or capital of AiT by April 25, 2002 and during the subsequent period up to May 9, 2002, in which case triggering the requirements under s. 75 of the Act?

i. Summary of Staff's Allegations

[226] Staff allege that a material change in the business, operations or capital of AiT occurred during the Relevant Period as a result of: the AiT Board meeting of April 25, 2002, the negotiation and signing of the LOI on April 26, 2002, the ongoing discussions between 3M and AiT, and the completion of the on-site due diligence review undertaken by 3M on May 7 to May 9, 2002. Accordingly, Staff allege that AiT breached section 75 of the Act by failing to make timely disclosure of the material change within the Relevant Period.

[227] We have identified three key events during the Relevant Period which must be analyzed to determine whether those events alone, or in combination, represented a material change to AiT as alleged:

a) the events leading up to April 25, 2002, and the AiT Board meeting of April 25, 2002;

b) the LOI signed by AiT and 3M on April 26, 2002; and

c) the balance of the Relevant Period, including the second due diligence review undertaken by 3M from May 7 to May 9, 2002.

We have analyzed the evidence and the arguments of Staff surrounding each of these events below.

[228] In view of the Supreme Court's decision in *Kerr v. Danier*, 2007 SCC 44, we cannot defer to the business judgment of the AiT Board to determine when or if a material change occurred. Instead, we must objectively assess the facts that were available to the AiT Board during the Relevant Period, to determine in all the circumstances whether the three events constituted a material change in the business, operations or capital of AiT that triggered its disclosure obligation under section 75. It is important therefore, to recognize the dangers of hindsight in coming to this conclusion and to be careful not to look at the situation based on what subsequently happened. Staff referred us to the following passage from *The Regulation of Corporation Disclosure*:

> First, negotiations can only be material if the resulting agreement is material. Second, the ultimate outcome of the negotiations has no direct bearing on the analysis. *The materiality of ongoing negotiations turns upon the facts known at the time the duty to disclose was triggered, with subsequent developments not affecting the outcome.* [Emphasis added] (Robert Brown, *The Regulation of Corporation Disclosure*, looseleaf ed. (Wolters Kluwer, 2007) at 6-13.)

[229] Therefore, we must assess the information as it existed during the Relevant Period to determine whether a material change occurred.

ii. The Events Leading up to, and the April 25, 2002 AiT Board Meeting

[230] The first discussions with Harrold in February 2002, through the signing of a non-disclosure agreement, the first due diligence session, the pricing discussions in St. Paul and the April 23 and 24, 2002 telephone calls from 3M to Ashe constituted the early stages of negotiation towards a potential share purchase transaction that collectively constituted a material fact in relation to AiT within the definition of that term in the Act. However, considering that the negotiation was still in its early stages, we do not find that any of these events individually, or all of them collectively, constituted a material change for AiT.

[231] On April 25, 2002, an AiT Board meeting was called by Ashe to report on the culmination of the early negotiations with 3M which had resulted in 3M advising Ashe that they were prepared to offer $2.88/share for the outstanding shares (and in-the-money options) of AiT. 3M had requested Ashe to obtain the support of the AiT Board to the proposed price because they were not interested in expending additional time and effort to conduct further due diligence and evaluate whether they wanted to enter into a transaction without this support. At this point in time, AiT had received nothing in writing from 3M relating to the proposed offer of $2.88/share.

[232] The minutes of the AiT Board meeting on April 25, 2002 confirm that Ashe provided the AiT Board with an update of the discussions with 3M and communicated the verbal offer of $2.88/share of AiT. It is also clear from the minutes that the AiT Board was informed that subject to their approval, 3M would draft a non-binding LOI to continue the process, which included the due diligence, the negotiations of the definitive agreement and the requisite approvals required to culminate the potential transaction.

[233] As of the date of the April 25, 2002 meeting, there had been no actual change in the business, operations or capital of AiT, but Staff rely on the reference in the material change definition to "a decision of the board to implement such a change" as being a material change in itself, without the need for there to be an actual change in the issuer's business, operations or capital.

[234] Staff draw support for their position from the wording of the minutes of the AiT Board meeting on April 25, 2002: "the board approved the recommendation to shareholders of the acquisition by 3M of all of the outstanding shares and options in the Company at a cash purchase price of Cdn $2.88, subject to confirmation of the fairness of this price by the Company's financial adviser, CIBC Investment Banking, and satisfaction of the Board with the final terms of the transaction, including the tax consequences to the Company's shareholders". In the view of Staff, the AiT Board was clearly signing off on the transaction and providing their unqualified support, subject to conditions favourable to AiT, which constituted a "decision to implement such a change" within the material change definition language.

[235] We disagree with Staff's interpretation of the AiT Board resolution based on the evidence presented during the hearing as to the purpose of the meeting, the discussions held by the AiT Board at that meeting on the status of the transaction, and the timing and preparation of the actual minutes of the meeting:

- The purpose of the meeting, as requested by 3M in their timetable for the negotiation and settlement of the transaction, was to obtain the support of the AiT Board for the level of value 3M was proposing to offer for the shares of AiT. The evidence indicates that the board discussions that took place that day are not accurately reflected in the wording of the minutes or in the resolution itself. For example, Damp recollected that the discussion on April 25, 2002 regarded 3M's request for agreement from significant shareholders that they would be open to accepting a transaction at the proposed price. Weinstein further confirmed this and testified that she understood the AiT Board's support

on April 25, 2002 to be a precursor to 3M proceeding with their in-depth process and the expending of resources to continue the negotiation process.

- As the report from Ashe indicated, the negotiations were at a preliminary stage which was inconsistent with an experienced board of directors signing off on a negotiated transaction in order to "implement" a proposed material change. Due diligence to confirm a $2.88 per share price and other matters had not yet been carried out. Nothing had been received in writing on the proposed transaction and key items important to the transaction (such as the Voting and Stock Option support agreements from key shareholders and the break fee) still had to be negotiated.

- According to Weinstein, if the AiT Board was in fact attempting to implement the transaction at this stage, it would have been necessary for the AiT Board to waive AiT's shareholder rights plan, as the accepted offer would have constituted a triggering event. As evidenced by Weinstein's testimony, she would have recommended to the AiT Board to waive the shareholders' rights plan had she thought that a decision to implement the proposed transaction had been made.

- Although the wording of the AiT Board resolution passed on April 25, 2002 indicated that it was subject to confirmation of the fairness of the price by AiT's financial advisor, CIBC Investment Banking, it appears from the fairness opinion that CIBC Investment Banking was not formally retained as AiT's financial advisor until May 2, 2002.

- Dunleavy's testimony is that the minutes were not prepared until late June and amended in July, just before the closing of the transaction, as a clean-up item. He testified that he used wording for the resolution from the proxy circular mailed to AiT's shareholders for consistency. Dunleavy was not present at the AiT Board meeting on April 25, 2002.

[236] We find that the AiT Board minutes of the April 25, 2002 meeting are problematic, and we do not believe that the AiT Board resolution conveys the substance of the decision made by the AiT Board. The evidence shows that these minutes were initially drafted in late June 2002 and then amended in early July 2002 to conform with disclosure that had been included in the proxy circular. Based on the stage of negotiations with 3M at April 25, 2002 and the evidence presented to us, we believe the better depiction of the AiT Board's decision is described in CIBC Investment Banking's Summary Chronology of Events included in its May 22, 2002 presentation of its fairness opinion:

- Following various negotiation discussions (including matters such as financial forecast, tax losses carry forward and tax credits pool), Tenor [3M] agrees to raise the valuation of Amigo [AiT] common shares to $2.88 per share (approximately $42.6 million).

- Bernie Ashe meets Amigo's [AiT's] Board of Directors to discuss the Tenor [3M] opportunity and how it is the best alternative for Amigo [AiT] in light of similar transactions in the industry.

- Amigo's [AiT's] Board of Directors communicates to Bernie Ashe that a Tenor [3M] offer at the proposed level would likely be approved.

We conclude after reviewing the evidence that the minutes of the April 25, 2002 meeting do not accurately reflect the AiT Board's discussions, and that the resolution was not intended by the AiT Board to be a "decision to implement such a change" within the meaning of the definition of material change, as alleged by Staff.

[237] By contrast, the resolution of the AiT Board on May 22, 2002, after reviewing the Merger Agreement, the Fairness Opinion and other relevant information, did represent a "decision to implement such a change" and the resolution specified that the transaction was fair and in the best interests of AiT and its shareholders. In addition, at this time on May 22, 2002, the AiT Board waived the shareholder rights plan with respect to the Merger Transaction.

[238] In arriving at the conclusion that there was no material change on April 25, 2002, we were mindful of the more than 5 year timeframe which had elapsed between the events giving rise to the allegations, and the completion of the hearing. That timeframe posed difficulties in obtaining accurate recollections of the events from witnesses, reconstructing the factual information available to the AiT Board and Weinstein at that time and determining whether there was clear and cogent evidence necessary to support Staff's allegations.

[239] Our decision process was not helped by concerns we identified in the recording of the minutes of the April 25, 2002 AiT Board meeting. Dey testified that if a board's governance process, in the view of the Commission, is effective, then it is difficult for anyone to interfere with the judgments that are the product of that process. We agree with that proposition, while being mindful of the recent Supreme Court decision in *Danier*, which opined that the disclosure requirements under the Act are not to be subordinated to the exercise of business judgment.

[240] In determining whether the governance system within which a board functions is effective, Dey suggested one would look for a board with an appropriate set of competencies, a board that is motivated to do the right thing for the corporation and a board that receives effective advice from management and external legal advisors.

[241] In the case of the AiT Board, we believe that it was very experienced and properly motivated. There was no evidence presented to suggest a lack of independence or any conflicts of interest existed with respect to the 3M transaction. We do note that Weinstein acted as both a director of AiT and as legal counsel to the AiT Board and AiT, which would not be an appropriate corporate governance practice today. However, there is no evidence that she was biased by her role and engagement as a service provider to

AiT. The difficulty in judging the AiT Board's governance process is the quality of the written record as to the advice sought by and received by the AiT Board and as to the decision made by the AiT Board at its April 25, 2002 teleconference meeting.

[242] We have a concern that the AiT Board may have been unduly influenced in its assessment of the requirement to disclose its decision by concerns relating to the potential negative implications of public disclosure. We must rely on the uncontested affidavits of Lumley and Macmillan and the testimony of Damp, Ashe and Weinstein to assess what the AiT Board's view of the potential transaction with 3M was at the April 25, 2002 meeting. It is clear that the AiT Board believed there were many risks and uncertainties to getting a deal done with 3M at the indicated valuation of $2.88 per share. Most of these concerns related to business matters that could emerge through the detailed due diligence process, as well as the possibility that 3M could ultimately decide not to proceed with an offer for its own reasons not related to AiT.

[243] The AiT Board also had concerns that the disclosure of the negotiations with 3M could result in 3M not proceeding further with the transaction and/or cause negative reactions from AiT competitors. What is not clear, more than 5 years after that meeting on April 25, 2002, is the degree to which these concerns influenced the AiT Board's collective judgment that there was no material change resulting from their decision at that meeting.

[244] There is no written record of the legal advice the AiT Board requested and received from Weinstein at that meeting regarding AiT's disclosure obligations. The evidence does show that the requirement to disclose the negotiations with 3M was raised by an AiT Board member (Lumley) and discussed by the AiT Board. However, there is no written record of this discussion to assist us in understanding how the AiT Board addressed this issue. We are left with an impression that the AiT Board generally was not advised that a confidential filing with securities regulators, rather than a public press release, was an option available to AiT if the AiT Board had determined that there had been a material change resulting from their decision at the April 25, 2002 meeting, and that public disclosure of the material change would be unduly detrimental to AiT at that time.

[245] Although we have some concerns about the quality of the AiT Board's minutes of its April 25, 2002 meeting, it was not alleged that there was bad faith involved in the preparation of the minutes. We believe AiT benefitted from the AiT Board's collective experience, motivations and level of engagement through its special committee process that were all brought to bear in its decision making and, by extension, to the judgments that flowed from the AiT Board's governance process.

iii. The April 26th Non-Binding LOI

[246] Our review of the importance of the LOI in the material change analysis is undertaken in the context of an arm's length negotiated third party transaction, and specifically this factual situation in which a small public issuer acquiree with substantial motivation to sell its business is in protracted negotiations with a large, multi-national

acquirer which has disclosed to the issuer a detailed review and authorization process (Six Sigma) which it must follow in order to complete such an acquisition.

[247] Staff's position, Anisman's expert testimony and Weinstein's testimony support the view that a signed, definitive agreement is not a prerequisite to finding a material change in a merger transaction. As noted above, there is no "bright line" test by which to determine whether a material change has occurred in such a negotiated transaction; rather the determination must be made on the specific facts surrounding each negotiation, including the nature of the parties to the negotiations, their specific circumstances, the progress of the negotiations toward agreement on all major terms, outstanding conditions or contingencies, and all other relevant factors.

[248] We agree that, in appropriate circumstances, a material change can occur with respect to an issuer in advance of the execution of a definitive agreement, requiring that issuer to comply with the timely disclosure obligations imposed by section 75 of the Act. That determination will depend entirely on the facts of each case and the progress and uncertainties facing the parties during the negotiation process.

[249] In assessing whether a LOI or an agreement in principle constitutes a material change, Anisman suggests looking at the nature of the commitment that they represent, the substance of what has been agreed to in principle, and whether it specifies all of the key terms, even if it leaves out some matters still to be concluded. Also, he states that the more binding the terms that start to flesh out an agreement between the parties, the more likely the issuer may have a change.

[250] The nature of any conditions to the transaction is an important factor as well – Anisman suggests looking at the conditions that remain outstanding, how central they are to the transaction in question, the likelihood of their being satisfied (both objectively and in the belief of the parties at the time), and all of those would be factors in weighing whether there was a sufficient commitment from the parties to conclude that there has been a material change to the issuer.

[251] Dey testified that a board can't wait until completion of the agreement is guaranteed (for example, when any remaining conditions to closing specified in a definitive agreement have been satisfied). There will be outstanding conditions at the time disclosure is usually made. The board must assess whether there is a reasonable prospect that those conditions will be satisfied so that the transaction can be completed. Disclosure before there is a reasonable prospect of the conditions being satisfied would be premature.

[252] Where corporate approval by the acquirer's board and senior management is a condition, both Anisman and Dey suggest it will come down to what the acquiree understands about the acquirer's approval process and its status, and whether the acquiree has an understanding of the likelihood of those approvals being forthcoming, in determining whether disclosure would be premature.

[253] The LOI was submitted to AiT on April 26, 2002 and was not acceptable to AiT's legal counsel without further negotiation. For example, AiT negotiated the reduction of the exclusivity period from 120 days to 30 days, the addition of a provision allowing AiT to back out if a superior proposal came along at an agreed to amount, and modified the requirement regarding support agreements.

[254] The LOI confirmed the parties "mutual understanding" of the negotiations to that point in time for a proposal by 3M to purchase all of the outstanding shares of AiT:

- [Para. 1] 3M was prepared to offer $2.88/share "based on the data furnished by AiT" and not previously validated by 3M, and AiT was required to maintain similar balance sheet conditions and levels shown in AiT's most recent quarterly regulatory filing, up to the time of closing;

- [Para. 3] The proposal to purchase the shares and the price to be paid, was subject to a favourable due diligence review by 3M covering AiT's business operations, research and development, manufacturing, financial, legal, environmental and regulatory matters, as well as negotiation of a definitive purchase agreement containing usual representations, warranties and covenants;

- [Para. 4] The LOI refers to "3M's continued evaluation of a potential transaction with AiT, and as an inducement for 3M to continue to expend time and incur expenses" 3M required a "no shop" restriction from AiT. At that time, 3M had not made a commitment to proceed and there was more work to be accomplished on 3M's side with respect to the evaluation of a potential transaction with AiT;

- [Para. 6] 3M's obligation to complete the transaction was also conditional on certain key shareholders entering into voting and stock option agreements and the "indication of value" and LOI was expressly stated to be non-binding and subject to the approval of the appropriate management committees and board of directors of 3M and termination or waiver of any AiT shareholders' rights plan. The letter added "Accordingly, you should not make any business decisions in reliance upon this letter or the successful consummation of the proposed transaction"; and

- The LOI concludes "If the foregoing meets with the approval of AiT, we are prepared to proceed with our due diligence review and other transactions necessary to complete a transaction...", signalling the preliminary nature of the LOI.

[255] Staff referred us to *Re Anthian Resources Inc.* 1999 LBBCSC 132, as an authority which supports the position that an LOI triggers disclosure obligations. In our view, disclosure obligations do not automatically arise upon the signing of an LOI under our material change timely disclosure system. We note that in some cases the signing of an LOI may trigger disclosure, and this will depend on the content of the provisions of

the LOI and the degree of commitment reached by the parties. In the present case it is clear from the terms of the LOI itself that:

- the LOI was non-binding with respect to the offer to purchase the shares of AiT, and 3M did not intend to assume any legal obligations or infer any commitment in regard to completing a purchase of the shares by signing the LOI;

- the proposed price of $2.88/share was not a firm commitment, and was subject to renegotiation downwards if the due diligence review identified substantive problems or if AiT's financial condition worsened;

- 3M was prepared to continue its evaluation of a potential transaction with AiT in return for a 30 day "no shop" and exclusivity period; and

- most of the conditions of the LOI necessary to be satisfied before 3M would commit to the transaction were beyond the ability of AiT to resolve.

[256] In light of these facts, we conclude that entering into the LOI in the present case did not trigger disclosure obligations by AiT. The principal term contained in the LOI (the proposed purchase price of $2.88/share) was based on information supplied by AiT and was not firm, as it was subject to a detailed due diligence review yet to be completed; several key terms contemplated by the LOI (such as the break fee and the Voting and Stock Option Agreements from specified key shareholders) had not yet been negotiated; and, 3M was clearly not committed to complete the potential transaction. As such, entering into the LOI was not a material change in the business, operations or capital of AiT.

iv. The Degree of Commitment by the Parties

[257] Both Anisman and Dey testified that even in the absence of a legally binding agreement, there could be a material change if both parties to the negotiations were clearly committed to completing a transaction.

[258] From the testimony of Ashe, Damp, Lumley and Macmillan it is clear that senior management and the AiT Board believed that the proposal from 3M was a fair price and that they would support the completion of a transaction at that value. We have no difficulty concluding that AiT was committed to pursuing the transaction from a very early stage in the negotiations, and that the AiT Board supported the efforts of Ashe to conclude the transaction on the most favourable terms possible, including the proposed price, and in the shortest timeframe possible. We believe the AiT Board meeting of April 25, 2002 authorized Ashe to execute the LOI and to pursue completion of a definitive agreement with 3M as quickly as possible in view of the financial condition of AiT at that time.

[259] We are unable to conclude from the evidence that 3M was also committed to the transaction at the LOI stage, or that Ashe or the AiT Board could reasonably conclude

at that time that there was a substantial likelihood that the LOI conditions would be satisfied and that the transaction would be completed:

- Ashe, Damp, Lumley and Macmillan were all hopeful that the process identified by 3M would go well and supported completion of the 3M proposal, but all had serious reservations that the due diligence and other stages of the internal approval process of 3M would be favourably determined so that 3M could complete the transaction;

- Determining the prospects of a successful completion of the transaction requires supporting factual evidence of the commitment necessary from 3M and the likelihood that any outstanding conditions would be satisfied, not mere emotional optimism or "hope";

- Ashe and the AiT Board were well aware of how structured the 3M approval process was (the Six Sigma process) and that the primary contact during the negotiations was Harrold, a middle management level manager who did not have the authority to bind 3M to proceed or to waive compliance with the remaining elements of the Six Sigma approval process. In particular, Damp and Weinstein testified that Harrold would have to obtain a series of corporate approvals to get the transaction completed, including approvals from the CEO of 3M and the board of directors. At the time, Damp and Weinstein felt that it was unpredictable how each level of 3M's management would view the transaction;

- With an organization as large and as complex as 3M it is important to distinguish between the business team's enthusiasm for doing a transaction which will enhance their operating unit's size and contribution to the 3M organization's success, and the corporate level approvals which had to be in place before 3M was committed to proceed with the acquisition of the AiT shares. The importance of corporate level approval within 3M is clearly evidenced by the affidavit of Price, which is set out above in paragraph 175 of our Reasons and Decision. In the specific context of the potential transaction with AiT, Price stated that there were a number of substantive hurdles that were required to be cleared as of April 26, 2002. These included the completion of substantive due diligence, the drafting and negotiation of definitive documentation, drafting of voting and stock option agreements, and the approval of management committees and the board of directors of the acquisition and the plan for the integration of the acquired business;

- Price stated that the approval of the 3M board did not occur until the completion of the due diligence, and even then, when the board approved the acquisition on May 14, 2002, it was still subject to the approval of the CEO of the due diligence report and integration plan. Price further stated that the completion of this report and plan was considered a substantive and

fundamental element of 3M's acquisition process, and did not actually occur until May, 21, 2002; and

- AiT had an experienced board who were knowledgeable about corporate level approvals and were aware that the 3M negotiation was conducted by a "middle management" team three levels below the CEO. This is not a transaction that was negotiated by the senior management whose approval would be required, and there is no clear and cogent evidence adduced by Staff that Ashe or the AiT Board members had any factual basis by April 26, 2002 to conclude that the essential 3M corporate level approvals were reasonably likely to be obtained, or that there was a substantial likelihood that 3M would complete the transaction. As stated above, all were hopeful of a favourable outcome but all were aware that the conditions were largely beyond the control of AiT. AiT was later informed that the first of these corporate approvals was not made until the 3M board meeting of May 14, 2002, five days after the end of the Relevant Period.

[260] Staff also put significant weight in argument on several allegations by which AiT's management and the AiT Board could have concluded that 3M was committed to proceeding by the April 26, 2002 LOI date:

- the proposed acquisition fit within the post-9/11 corporate strategy of 3M as articulated by its CEO;
- Harrold's boss, Swain, and Swain's boss Weber, and the CEO were all aware of the negotiations with AiT;
- the LOI was signed by Weber, an Executive Vice-President of 3M who reported directly to the CEO;
- Harrold had set out a process timetable which was aggressive and 3M seemed to be adhering to it;
- Ashe reported to his banker that the 3M CEO had signed off on the price on April 22, 2002;
- the total value of the AiT transaction in USD was barely over the $25 million threshold level requiring 3M board approval;
- 3M had acted in good faith throughout the negotiations up to the LOI date;
- The fact that AiT was in dire financial circumstances; and
- AiT would not have given exclusivity to 3M on April 26, 2002, if there was not a reasonable prospect of completing a transaction with 3M.

[261] With respect, we do not find Staff's arguments compelling:

- although some senior members of 3M's management team were "aware" of the negotiations, it was clearly in the context of a detailed fact-driven and disciplined acquisition process (Six Sigma) designed to ensure that corporate decisions were made prudently based on fundamental data, and not emotional factors;

- the Six Sigma process had many stages that had to be satisfied sequentially in order to obtain the corporate level approvals necessary to result in a binding commitment and the closing of the negotiated transaction;

- a board's governance process is not likely to be more casual or less substantive merely because the transaction value is close to the $25 million threshold limit, and 3M still followed their Six Sigma process notwithstanding the relatively modest purchase price (for 3M); and

- the fact that an Executive Vice-President is signing a clearly non-binding LOI should not be construed as an indication of commitment on the part of 3M to complete a subsequent transaction, particularly when the LOI refers to expending time and money with a view to evaluating a potential transaction, and in the context of the 3M Six Sigma process.

[262] As a result, we conclude that the facts available to AiT's management and the AiT Board during the discussion of the 3M proposal and the negotiation and execution of the LOI were not sufficient to override the clear non-binding nature of the proposal and the LOI and would not have led to a conclusion that, at that point in the negotiations, 3M was committed to completing a potential transaction.

[263] We agree that in appropriate circumstances (for example, a smaller, less process-driven acquirer; negotiations being led by the acquirer's CEO and within his level of corporate commitment authority; a previous board resolution setting out pre-authorized criteria for acquisition transactions) it might well be appropriate to conclude that a material change has occurred at an agreement in principle or letter of intent stage, and that an issuer acquiree should make timely disclosure of that material change based on a determined level of commitment of the parties to complete the transaction, although no definitive agreement has been negotiated or entered into. In our view, in the context of whether a board decision constitutes a material change, an issuer's disclosure obligations arise not when a potential transaction is identified and discussed with the board, but instead, when the decision by the board to implement the potential transaction is based on its understanding of a sufficient commitment from the parties to proceed and the substantial likelihood that the transaction will be completed.

v. The Balance of the Relevant Period

[264] Our review of the evidence and Staff's argument does not suggest that there were significant developments after the signing of the LOI on April 26, 2002 and the completion of the on-site due diligence review that would have suggested to AiT's

management or the AiT Board that 3M was then more committed to completing the proposed transaction than they were at the LOI stage:

- 3M did not respond to Ashe's efforts to move the transaction along by having Dunleavy prepare a pre-acquisition agreement setting out proposed terms for review by 3M;

- Although 3M appointed Canadian legal counsel on May 6, 2002 and discussions between that counsel and Dunleavy resulted in a better understanding of a proposed structure for the transaction on May 8, 2002 (changing from a share purchase transaction to a merger transaction with a Canadian affiliate of 3M), it remained subject to completion of the due diligence review and the other 3M corporate approvals identified in the LOI;

- Although Ashe testified that he was not aware of any "deal breakers" which were outstanding as 3M began its in-depth second stage due diligence review from May 7 to May 9, 2002, he was aware that the process was far more extensive and detailed than he had estimated and recounted to his banker on April 25, 2002 after the AiT Board meeting. The due diligence process did not alleviate all of Ashe's concerns that issues may emerge that could dissuade 3M from proceeding. For example, two issues remaining after the conclusion of the due diligence of May 7, 8 and 9, 2002 which had to be resolved included tax treatment for the option holders and employment issues regarding severance. Ashe was also focussed on "business related" deal breakers and did not address the obvious potential deal breakers such as the failure of Harrold and his team to obtain the required 3M corporate level approvals;

- The May 7 to May 9, 2002 due diligence process was not only extensive, its purpose was to assemble documents and information to be taken back to 3M headquarters for more detailed review and follow-up analysis post-May 9, 2002. Ashe received no indication of 3M's satisfaction with the due diligence review before 3M's due diligence team departed on May 9, 2002 and the first indication that 3M was prepared to proceed to the next stage of their acquisition process was the receipt of the draft Merger Agreement by AiT on or about May 14, 2002. 3M board approval was given on May 14, 2002 subject to further internal 3M committee and CEO approvals to be obtained before the signing of a definitive agreement, but the evidence is unclear as to when Ashe was notified of the 3M board's approval.

[265] We conclude that during the balance of the Relevant Period from April 27 to May 9, 2002, no information came to the attention of Ashe or the AiT Board that would reasonably have caused them to believe that 3M was at that time committed to proceeding to complete the transaction.

vi. Conclusion

[266] For the reasons set out above, we conclude that with respect to the ongoing negotiations between AiT and 3M up to the April 25, 2002 AiT Board meeting and to the end of the Relevant Period, there is no clear and cogent evidence that any events during that period, either alone or collectively, constituted a material change in the business, operations or capital of AiT. As a result of that determination, AiT was not in breach of section 75 of the Act and was not required to make timely disclosure of its negotiations with 3M for the purchase by 3M of all of the shares of AiT during that time.

[267] Having reached the conclusion that AiT did not breach section 75 of the Act, the allegations against Weinstein must be dismissed.

> **2. If there is a material change, did Weinstein in her capacity as a director of AiT, authorize, acquiesce or permit a breach by AiT of section 75 in contravention of section 122(3) of the Act and contrary to the public interest under section 127(1) of the Act?**

[268] Having determined that a material change did not occur during the Relevant Period, it is unnecessary for us to address this issue.

DATED at Toronto on this 14th day of January 2008.

"*Wendell S. Wigle*"
Wendell S. Wigle, Q.C.

"*Harold P. Hands*"
Harold P. Hands

"*Carol S. Perry*"
Carol S. Perry

Schedule A – Excerpts From the 2002 version of the *Securities Act*

R.S.O. 1990, c. S.5, as am. S.O. 1992, c. 18, s. 56; 1993, c. 27, Sched,; 1994, c. 11, ss. 349-381; 1994, c. 33; 1997, c. 10, ss. 36-41; 1997, c. 19, s. 23; 1997, c. 31, s. 179; 1997, c. 43, Sched F, s. 13; 1999, c. 6, s. 60; 1999, c. 9, ss. 193-222 [s. 202 not in force at date of publication]; 2001, c. 23, ss. 209-218.

1. (1) Definitions – In this Act,

[…]

"material change", where used in relation to the affairs of an issuer, means a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer and includes a decision to implement such a change made by the board of directors for the issuer or by senior management of the issuer who believe that confirmation of the decision by the board of directors is probable;

"material fact", where used in relation to securities issued or proposed to be issued, means a fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of such securities;

[…]

1.1 Purposes – The purposes of this Act are,

(a) to provide protection to investors from unfair, improper or fraudulent practices; and

(b) to foster fair and efficient capital markets and confidence in capital markets.

75. (1) Publication of material change – Subject to subsection (3), where a material change occurs in the affairs of a reporting issuer, it shall forthwith issue and file a news release authorized by a senior officer disclosing the nature and substance of the change.

(2) Report of material change – Subject to subsection (3), the reporting issuer shall file a report of such material change in accordance with the regulations as soon as practicable and in any event within ten days of the date on which the change occurs.

(3) Idem – Where,

(a) in the opinion of the reporting issuer, the disclosure required by subsections (1) and (2) would be unduly detrimental to the interests of the reporting issuer; or

(b) the material change consists of a decision to implement a change made by senior management of the issuer who believe that confirmation of the decision by the board of directors is probable and senior management of the issuer has no reason to believe that persons with knowledge of the material change have made use of that knowledge in purchasing or selling securities of the issuer,

the reporting issuer may, in lieu of compliance with subsection (1), forthwith file with the Commission the report required under subsection (2) marked so as to indicate that it is confidential, together with written reasons for non-disclosure.

(4) Idem – Where a report has been filed with the Commission under subsection (3), the reporting issuer shall advise the Commission in writing where it believe the report should continue to remain confidential within ten days of the date of filing of the initial report and every ten days thereafter until the material change is generally disclosed in the manner referred to in subsection (1) or, if the material change consists of a decision of the type referred to in clause (3)(b), until that decision has been rejected by the board of directors of the issuer.

76. (1) Trading where undisclosed change – No person or company in a special relationship with a reporting issuer shall purchase or sell securities of the reporting issuer with the knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed.

(2) Tipping – No reporting issuer and no person or company in a special relationship with a reporting issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed.

(3) Idem – No person or company that proposes,

(a) to make a take-over bid, as defined in Part XX, for the securities of a reporting issuer;

(b) to become a party to a reorganization, amalgamation, merger, arrangement or similar business combination with a reporting issuer; or

(c) to acquire a substantial portion of the property of a reporting issuer,

shall inform another person or company of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed except where the information is given in the necessary course of business to effect the take-over bid, business combination or acquisition.

(4) Defence - No person or company shall be found to have contravened subsection (1), (2) or (3) if the person or company proves that the person or company reasonably believed that the material fact or material change had been generally disclosed.

(5) Definition - For the purposes of this section, "person or company in a special relationship with a reporting issuer" means,

(a) a person or company that is an insider, affiliate or associate of,

(i) the reporting issuer,

(ii) a person or company that is proposing to make a take-over bid, as defined in Part XX, for the securities of the reporting issuer, or

(iii) a person or company that is proposing to become a party to a reorganization, amalgamation, merger or arrangement or similar business combination with the reporting issuer or to acquire a substantial portion of its property,

(b) a person or company that is engaging in or proposes to engage in any business or professional activity with or on behalf of the reporting issuer or with or on behalf of a person or company described in subclause (a) (ii) or (iii),

(c) a person who is a director, officer or employee of the reporting issuer or of a person or company described in subclause (a) (ii) or (iii) or clause (b),

(d) a person or company that learned of the material fact or material change with respect to the reporting issuer while the person or company was a person or company described in clause (a), (b) or (c),

(e) a person or company that learns of a material fact or material change with respect to the issuer from any other person or company described in this subsection, including a person or company described in this clause, and knows or ought reasonably to have known that the other person or company is a person or company in such a relationship.

(6) Idem - For the purpose of subsection (1), a security of the reporting issuer shall be deemed to include,

(a) a put, call, option or other right or obligation to purchase or sell securities of the reporting issuer; or

(b) a security, the market price of which varies materially with the market price of the securities of the issuer.

122. (1) Offences, general – Every person or company that,

[…]

(c) contravenes Ontario securities law,

is guilty of an offence on conviction is liable to a fine of not more than $1,000,000 or to imprisonment for a term of not more than two years, or both.

[…]

(3) Directors and Officers – Every director or officer of a company or of a person other than an individual who authorizes, permits or acquiesces in the commission of an offence under subsection (1) by the company or person, whether or not a charge has been laid or a finding of guilt has been made against the company or person in respect of the offence under subsection (1), is guilty of an offence and is liable on conviction to a fine of not more than $1,000,000 or to imprisonment for a term of not more than two years, or to both.

127. (1) Orders in the public interest – The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders;

1. An order that the registration or recognition granted to a person or company under Ontario securities law be suspended or restricted for such period as is specified in the order or be terminated, or that terms and conditions be imposed on the registration or recognition.

2. An order that trading in any securities by or of a person or company cease permanently or for such period as is specified in the order.

3. An order that any exemptions contained in Ontario securities law do not apply to a person or company permanently or for such period as is specified in the order.

4. An order that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Commission.

5. If the Commission is satisfied that Ontario securities law has not been complied with, an order that a release, report, preliminary prospectus, prospectus, return financial statement, information circular, take-over bid circular, issuer bid circular, offering memorandum, proxy solicitation or any other document described in the order,

i. be provided by a market participant to a person or company,
ii. not be provided by a market participant to a person or company, or
iii. be amended by a market participant to the extent that amendment is practicable.

6. An order that a person or company be reprimanded.

7. An order that a person resign one or more positions that the person holds as a director or officer of an issuer.

8. An order that a person is prohibited from becoming or acting as director or officer of any issuer.

[…]

Schedule B –National Policy 40

National Policy Statement 40
Timely Disclosure

A. INTRODUCTION

This policy statement applies to all issuers whose securities are publicly traded in Canada, including reporting issuers or the equivalent in any Canadian jurisdiction. It replaces Uniform Act Policy 2-12, and is effective as of December 1, 1987.

Where the requirements of the Policy go beyond the technical requirements of existing legislation, the securities administrators and stock exchanges request that issuers, their counsel, and market professionals regard such requirements as guidelines to follow in order to assist in the operation in Canada of an open and fair marketplace which merits the trust and confidence of the investing public.

Issuers are reminded that this policy statement does not replace the disclosure requirements set out in the provincial securities statutes and compliance with this Policy must be supplementary to compliance with the relevant provincial statutes. Moreover, if securities of an issuer are listed on one or more stock exchanges in Canada, the issuer must also comply with the rules of the relevant exchange(s) concerning timely disclosure.

Further, nothing in this Policy Statement abrogates from the discretion of a securities administrator to request information from an issuer or to issue cease trading orders or apply other sanctions within its jurisdiction where, in the view of the administrator, there is inadequate public disclosure as to the affairs of an issuer whose securities are publicly traded.

B. BASIC PRINCIPLE - DISCLOSURE OF MATERIAL INFORMATION

It is a cornerstone principle of securities regulation that all persons investing in securities have equal access to information that may affect their investment decisions. Public confidence in the integrity of the securities markets requires that all investors be on an equal footing through timely disclosure of material information concerning the business and affairs of reporting issuers and of companies whose securities trade in secondary markets. Therefore, immediate disclosure of all material information through the news media is required.

C. DETERMINING THE RELEVANT REGULATORY AUTHORITY FOR CONSULTATION, DISCLOSURE AND FILING OF MATERIAL INFORMATION

The following sections discuss the meaning of “material information” and how such information is to be disclosed. This section discusses the general rules for determining which securities administrator and/or stock exchange is to be consulted for requirements relating to, and the disclosure and filing of, material information. Any references to “the

relevant securities regulator" in the following commentary should refer to this part of the policy statement.

It is intended that the number of regulatory authorities that must be consulted in a particular matter be kept to a minimum. There are six general principles in determining the relevant securities regulator for consultation on, disclosure, and filing of material information. The particular rules that apply depend on the jurisdiction, whether the security is listed and, if so, the particular exchange on which the security is listed. These rules are as follows:

1. In the case of unlisted securities, the relevant securities regulator is the administrator in the jurisdiction having the principal market for the unlisted security.

2. In the case of securities listed on The Toronto Stock Exchange ("TSE"), the Montreal Exchange ("ME"), or the Vancouver Stock Exchange ("VSE") the stock exchange is the relevant securities regulator, although the issuer may consult with the securities administrator of the particular jurisdiction.

3. In the case of securities listed on any other Canadian stock exchange, both the stock exchange and the securities administrator in the jurisdiction having the principal market for the listed security are considered to be the relevant securities regulators.

4. In the case of securities listed on two or more Canadian stock exchanges, each stock exchange is a relevant securities regulator, and must be dealt with. The issuer may also consult with the securities administrator in the jurisdiction having the principal market for the listed security.

5. Material change reports and media releases must be filed in accordance with the requirements of legislation in jurisdictions having such legislation. See Part D.

6. The rules of all stock exchanges upon which securities are listed must be observed.

These rules for determining the relevant securities regulator for consultation, disclosure, and filing of material information are fundamental to the commentary that follows. For example, where a news release is required these rules will determine the relevant securities regulator(s) for disclosure and the jurisdiction(s) in which the news release must be filed.

D. MATERIAL INFORMATION

The requirement to disclose material information supplements the provisions of the Securities Acts of Alberta, British Columbia, Ontario, Quebec and Nova Scotia which require disclosure of any "material change" by issuing a press release, and filing with the

securities administrator the press release in the case of Quebec, and the press release and a material change report in the case of Alberta, British Columbia, Ontario and Nova Scotia.

Definition

Material information is any information relating to the business and affairs of an issuer that results in or would reasonably be expected to result in a significant change in the market price or value of any of the issuer's securities.

Material information consists of both material facts and material changes relating to the business and affairs of an issuer. The market price or value of an issuer's securities is sometimes affected by, in addition to material information, the existence of rumours and speculation. Where this is the case, the issuer may be required to make an announcement as to whether such rumours and speculation are factual or not.

It is the responsibility of each issuer to determine what information is material according to the above definition in the context of the issuer's own affairs. The materiality of information varies from one issuer to another according to the size of its profits, assets and capitalization, the nature of its operations and many other factors. An event that is "significant" or major" in the context of a smaller issuer's business and affairs is often not material to a larger issuer. The issuer itself is in the best position to apply the definition of material information to its own unique circumstances.

Consultation with Regulatory Authorities

Decisions on disclosure require careful subjective judgments and issuers are encouraged to consult on a confidential basis the relevant regulatory authority and, where applicable, the relevant exchange when in doubt as to whether disclosure should be made.

Immediate Disclosure

An issuer is required to disclose material information concerning its business and affairs forthwith upon the information becoming known to management, or in the case of information previously known, forthwith upon it becoming apparent that the information is material. Issuers are required to provide the relevant regulatory authority with a copy of any news release concurrently upon dissemination to the public.

Immediate release of information is necessary to ensure that it is promptly available to all investors and to reduce the risk that persons with access to that information will act upon undisclosed information. Unusual trading marked by significant changes in the price or trading volumes of any of an issuer's securities prior to the announcement of material information is embarrassing to management and damaging to the reputation of the securities market since the investing public may assume that certain persons benefited from access to material information which was not generally disclosed.

In restricted circumstances disclosure of material information may be delayed for reasons of corporate confidentiality. See Part G.

Developments to be Disclosed

Issuers are not generally required to interpret the impact of external political, economic and social developments on their affairs. However, if an external development will have or has had a direct effect on the business and affairs of an issuer that is both material (in a sense outlined above) and uncharacteristic of the effect generally experienced by other issuers engaged in the same business or industry, the issuer is urged to explain, where practical, the particular impact on them. For example, a change in government policy that affects most issuers in a particular industry does not require an announcement, but if it affects only one or a few issuers in a material way, such issuers should make an announcement.

The market price or value of an issuer's securities may be affected by factors relating directly to the securities themselves as well as by information concerning the issuer's business and affairs. For example, changes in an issuer's issued capital, stock splits, redemptions and dividend decisions may all impact upon the market price of a security.

Actual or proposed developments that are likely to give rise to material information and thus to require prompt disclosure include, but are not limited to, the following:

1. Changes in share ownership that may affect control of the issuer.

2. Changes in corporate structure, such as reorganizations, amalgamations etc.

3. Take-over bids or issuer bids.

4. Major corporate acquisitions or dispositions.

5. Changes in capital structure.

6. Borrowing of a significant amount of funds.

7. Public or private sale of additional securities.

8. Development of new products and developments affecting the issuer's resources, technology, products or market.

9. Significant discoveries by resource companies.

10. Entering into or loss of significant contracts.

11. Firm evidence of significant increases or decreases in near-term earnings prospects.

12. Changes in capital investment plans or corporate objectives.

13. Significant changes in management.

14. Significant litigation.

15. Major labour disputes or disputes with major contractors or suppliers.

16. Events of default under financing or other agreements.

17. Any other developments relating to the business and affairs of the issuer that would reasonably be expected to significantly affect the market price or value of any of the issuer's securities or that would reasonably be expected to have a significant influence on a reasonable investor's investment decision.

Disclosure is only required where a development is material according to the definition of material information. Announcements of an intention to proceed with a transaction or activity should be made when a decision has been made to proceed with it by the issuer's board of directors, or by senior management with the expectation of concurrence from the board of directors. However, a corporate development in respect of which no firm decision has yet been made but that is reflected in the market place may require prompt disclosure. See "Rumours" under Part E and Part G "Confidentiality".

Forecasts of earnings and other financial forecasts need not be disclosed, but where a significant increase or decrease in earnings is indicated in the near future, such as in the next fiscal quarter, this fact must be disclosed. Forecasts should not be provided on a selective basis to certain investors not involved in the management of the affairs of the issuer. If disclosed, they should be generally disclosed. Reference should be made to National Policy Statement No. 48, "Future-Oriented Financial Information".

E. DISCLOSURE

Decisions as to the dissemination of information and the temporary halting of trading are, in the case of listed securities, usually made by the relevant stock exchange, with or without consultation with the securities administrator of the jurisdiction. However, in certain circumstances, trading in a listed security may be halted as a result of a cease trading order issued by a securities administrator. Decisions relating to unlisted securities are made by securities administrators.

Timing of Announcements

The general principle is that significant announcements are required to be released immediately. This rule is subject to exception in certain situations for issuers whose securities are listed for trading on a stock exchange or other organized market (at this time only CDN in Ontario). Subject to the approval of the relevant securities regulator,

release of certain announcements may be delayed until the close of trading, provided the material information is not reflected in the price of the stock. Issuer officials are encouraged to seek assistance and direction from the relevant securities regulator as to when an announcement should be released and whether trading in the issuer's securities should be halted for dissemination of an announcement.

Pre-Notification

The policy of immediate disclosure frequently requires that media releases be issued during trading hours, especially when an important corporate development has occurred. Where this is so, it is essential that issuer officials notify the relevant securities regulator by telephone prior to issuance of a media release. The relevant securities regulator will then be able to determine whether trading in any of the issuer's securities should be temporarily halted.

Where a media release is to be issued during trading hours, securities administrators of provinces in which there is a market for the securities and stock exchanges or where securities are listed should be supplied with a copy forthwith upon its release.

Trading Halts

If an announcement is to be made during trading hours, trading in the stock may be halted until the announcement is made public and disseminated. The relevant securities regulator will determine the amount of time necessary for dissemination in any particular case, which determination will be dependent upon the significance and complexity of the announcement. Issuers should understand that a trading halt does not reflect upon the reputation of an issuer's management nor upon the quality of its securities, but is simply for the purpose of providing for adequate dissemination of the relevant information.

In order to determine whether a trading halt is justified, the relevant securities regulator will consider the impact which the announcement is expected to have on the market for the issuer's securities. Any trading halts that are imposed are normally for less than a two hour duration. Where an issuer's securities are listed or traded elsewhere, those exchanges or other markets will coordinate trading halts. There is a convention among exchanges, NASDAQ and CDN that trading in a security traded or listed in more than one market shall be halted and resumed at the same time in each market.

Rumours

Unusual market activity is often caused by the presence of rumours. If the issuer makes a public statement about a rumoured activity, the disclosure must be accurate and not misleading. It is impractical to expect management to be aware of, and comment on, all rumours, but when market activity indicates that trading is being unduly influenced by rumour the relevant securities administrator will request that the issuer make a clarifying statement. A trading halt may be imposed pending a "no corporate developments" statement from the issuer. If a rumour is correct in whole or in part, the issuer, in

response to the request, must make immediate disclosure of the relevant material information and a trading halt may be imposed pending release and dissemination of that information.

F. DISSEMINATION

Transmission to Media

A media release should be transmitted to the media by the quickest possible method and in a manner which provides for wide dissemination. Media releases should be made to news services that disseminate financial news nationally, to the financial press and to daily newspapers that provide regular coverage of financial news.

Content of Announcements

Announcements of material information should be factual and balanced, neither overemphasizing favourable news nor under-emphasizing unfavourable news. Unfavourable news must be disclosed just as promptly and completely as favourable news. While it is clear that news releases may not be able to contain all the details that would be included in a prospectus or similar document, news releases should contain sufficient detail to enable media personnel and investors to appreciate the true substance and importance of the information so that investors may make informed investment decisions. The guiding principle should be to communicate clearly and accurately the nature of the information, without including unnecessary details, exaggerated reports or editorial commentary designed to colour perception of the announcement. The issuer should be prepared to supply further information when appropriate; the name and telephone number of the company official available for comment should be provided in the release.

Misleading Announcements

While all material information must be released immediately, the timing of an announcement of material information must be handled carefully, since either premature or late disclosure may damage the reputation of the securities market. Misleading disclosure activity designed to influence the price of a security is improper. Misleading news releases send signals to the investment community which are not justified by an objective examination of the facts, and may detract from the issuer's credibility. Announcements of an intention to proceed with a transaction or activity should not be made unless the issuer has the ability to carry out the intent (although proceeding may be subject to contingencies) and a decision has been made to proceed with the transaction or activity by the issuer's board of directors, or by senior management with the expectation of concurrence from the board of directors.

G. CONFIDENTIALITY

When Information May be Kept Confidential

In certain circumstances disclosure of material information concerning an issuer's business and affairs may be delayed and kept confidential temporarily where immediate release of the information would be unduly detrimental to the issuer's interests. In such a situation, issuers are required under the law of certain provinces to disclose to the securities administrator on a confidential basis, information that is not being disclosed immediately to the public. Issuers are reminded of subsection 75(4) of the Securities Act (Ontario), subsection 67(3) of the Securities Act (British Columbia), subsection 118(3) of the Securities Act (Alberta), subsection 84(3) of the Securities Act, 1988 (Saskatchewan), subsection 81(4) of the Securities Act (Nova Scotia), and subsection 76(4) of the Securities Act (Newfoundland) which stipulate that a reporting issuer that wishes to keep information confidential must renew that request every 10 days. Subsection 118(4) of the Securities Act (Alberta) also provides, however, that a reporting issuer must file and issue a news release and file a material change report not later than 180 days from the day such changes became known to the issuer. Section 74 of the Securities Act (Quebec) provides that a reporting issuer need not prepare a press release where senior management has reasonable grounds to believe not only that disclosure would be seriously prejudicial to the issuer, but also that no transaction in the issuer's securities has been or will be carried out on the basis of the information not generally known. The issuer must issue and file a press release only once the circumstances justifying non-disclosure have ceased to exist.

Examples of instances in which disclosures might be unduly detrimental to an issuer's interests are where:

> (1) Release of the information would prejudice the issuer's ability to pursue specific and limited objectives or to complete a transaction or series of transactions that are under way. For example, premature disclosure of the fact that an issuer intends to purchase a significant asset may increase the cost of the acquisition.
>
> (2) Disclosure of the information would provide competitors with confidential corporate information that would significantly benefit them. Such information may be kept confidential if the issuer is of the opinion that the detriment to it resulting from disclosure would outweigh the detriment to the market in not having access to the information. A decision to release a new product, or details on the features of a new product, may be withheld for competitive reasons, but such information should not be withheld if it is available to competitors from other sources.
>
> (3) Disclosure of information concerning the status of ongoing negotiations would prejudice the successful completion of those negotiations. It is unnecessary to make a series of announcements concerning the status of negotiations with another party concerning a particular transaction. If it seems that the situation is going to stabilize within a short period, public disclosure may be delayed until a definitive announcement can be made. Disclosure should be made once "concrete information" is available, such as a final decision to proceed with the transaction or, at a later point in time, finalization of the terms of the transaction.

Withholding of material information on the basis that disclosure would be unduly detrimental to the issuer's interests can only be justified where the potential harm to the issuer or to investors caused by immediate disclosure may reasonably be considered to outweigh the undesirable consequences of delaying disclosure. While recognizing that there must be a trade-off between an issuer's legitimate interest in maintaining secrecy and the investing public's right to disclosure of corporate information, securities administrators and stock exchanges discourage delaying disclosure for a lengthy period of time since it is unlikely that confidentiality can be maintained beyond the short term.

Maintaining Confidentiality

Where disclosure of material information is delayed, the issuer must maintain complete confidentiality. In the event that such confidential information, or rumours respecting the same, is divulged in any manner (other that in the necessary course of business), the issuer is required to make an immediate announcement on the matter. The relevant securities regulator must be notified of the announcement, in advance, in the usual manner. During the period before material information is disclosed, market activity in the issuer's securities should be closely monitored by the issuer. Any unusual market activity probably means that news of the matter is being disclosed and that certain persons are taking advantage of it. In such case, the relevant securities regulator should be advised immediately and a halt in trading will be imposed until the issuer has made disclosure on the matter.

At any time when material information is being withheld from the public, the issuer is under a duty to take precautions to keep such information completely confidential. Such information should not be disclosed to any of the issuer's officers, employees or advisers, except in the necessary course of business. The directors, officers and employees of an issuer should be reminded on a regular basis that confidential information obtained in the course of their duties must not be disclosed.

H. Insider Trading

Issuers should make insiders and others who have access to material information about the issuer before it is generally disclosed aware that trading in securities of the issuer while in possession of undisclosed material information or tipping such information is an offence under the securities laws of a number of jurisdictions, and may give rise to civil liability.

In any situation where material information is being kept confidential because disclosure would be unduly detrimental to the issuer's best interests, management is under a duty to take every possible precaution to ensure that no trading whatsoever takes place by any insiders or persons in a "special relationship" with the issuer in which use is made of such information before it is generally disclosed to the public.

In the event that a stock exchange or securities administrator is of the opinion that insider or improper trading may have occurred before material information has been disclosed and disseminated, that stock exchange or securities administrator may require that an immediate announcement be made disclosing such material information.

I. RECIPIENTS OF COMMUNICATIONS

Material change reports and media releases should be delivered to the Market Surveillance Branch or the equivalent in all jurisdictions where there is a legal requirement to file such reports and media releases.

Confidential communications should be made as follows:

British Columbia Securities Commission -
Deputy Superintendent, Registration & Statutory Filings or, if unavailable,
Deputy Superintendent, Compliance & Enforcement, or Superintendent of Brokers

Alberta Securities Commission - Director, Market Standards

Saskatchewan Securities Commission - Registrar or, if unavailable, Chairman
Manitoba Securities Commission - Director or, if unavailable, Chairman or Senior Counsel

Ontario Securities Commission - Office of the General Counsel

Commission des valeurs mobilières du Québec - Directeur du contentieux, or, if unavailable Vice-President or President

Government of New Brunswick - Administrator of the Securities Act

Nova Scotia Securities Commission - Director, Securities

Government of Newfoundland and Labrador - Director of Securities

Government of Prince Edward Island – Registrar

Office of the Registrar of Securities for the Northwest Territories – Registrar

Office of the Registrar of Securities for Yukon Territory - Registrar of Securities or, if unavailable, Deputy Registrar of Securities

It is suggested that confidential written communications be made in sealed envelopes within outer envelopes.