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

- AND -

IN THE MATTER OF DAVID CHARLES PHILLIPS AND JOHN RUSSELL WILSON

REASONS AND DECISION ON A MOTION

Hearing:	November 26, 2012	
Decision:	November 30, 2012	
Panel:	James D. Carnwath	- Commissioner
Counsel:	Bruce O'Toole Kate McGrann	- For the Respondents
	Yvonne Chisholm	- For the Ontario Securities Commission

REASONS AND DECISION ON A MOTION

I. INTRODUCTION

[1] In this motion, David Charles Phillips ("**Phillips**") and John Russell Wilson ("**Wilson**") (together, the "**Respondents**"), seek disclosure of certain documents in the possession of Staff of the Ontario Securities Commission (the "**Commission**" and "**Staff**"). The Respondents say that the documents they seek are relevant to Staff's allegation that they engaged in fraud. Staff submits that the documents the Respondents seek are irrelevant to the allegations and in many cases privileged.

[2] For the following reasons, the motion is allowed in part, and Staff is ordered to disclose certain of the documents requested, as set out below, subject to privilege.

[3] The hearing on the merits is scheduled to commence on February 11, 2013, and to continue on February 13, 14, 15, 19, 20, 21, 22, 25, 27 and 28, and March 1, 4, 5 and 6, 2013 (the "**Merits Hearing**"). At the hearing of the motion (the "**Motion Hearing**"), Staff and the Respondents (the "**Parties**") expressed their intent to comply with the disclosure timelines set out in the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (the "**Rules**"). They are encouraged to be mindful that any further motions in this matter will need to be disposed of quickly to ensure that the Merits Hearing goes ahead as scheduled.

II. BACKGROUND

[4] This proceeding commenced on June 4, 2012, when the Commission issued a Notice of Hearing in relation to a Statement of Allegations issued by Staff on the same day. Staff alleges that the Respondents engaged in fraud, contrary to section 126.1(b) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"), between August 22 and October 28, 2011 (the "**Sales Period**"), by selling and overseeing the sales of securities by the First Leaside Group ("**FLG**"), raising approximately $18.9 million from investors, while withholding important information from investors, namely the August 19, 2011 report of Grant Thornton Limited ("**Grant Thornton**").

[5] Four important background facts are undisputed in this motion. First, there is no dispute that in March 2011, Staff urged FLG to retain an independent accounting firm to conduct a viability study, and that FLG selected Grant Thornton from a short-list of firms provided by Staff. Second, there is no dispute that on March 18, 2011, Phillips gave Staff an undertaking that while Grant Thornton conducted its review of FLG (the "**Review**") and for one week after the delivery to Staff of the Grant Thornton report (the "**Report**"), no sale of debt or equity in certain FLG funds would be made to any investors (the "**Undertaking**"). Third, there is no dispute that the Report was delivered to FLG on August 19, 2011, that FLG delivered it to Staff the same day, and accordingly that the Undertaking expired on August 26, 2011. Finally, there is no dispute that following the expiry of the Undertaking, FLG resumed offering all of its products to investors, including the products described in the Undertaking.

[6] The Respondents advise that at the Merits Hearing, they will submit, amongst other things, that: (a) the Report was reasonably viewed by FLG as being neither a material fact nor a material change, Staff did not raise the issue of its disclosure to investors at the time it was delivered to the Respondents and Staff, notwithstanding detailed discussions between Staff and

counsel for FLG, Staff was aware that the Undertaking expired one week after delivery of the Report, and Staff was aware that FLG sold its products during the Sales Period; (b) there were no conclusions or recommendations in the Report that required a reassessment of FLG's business model or that would affect the value or risk associated with the securities offered to investors; (c) the decision not to release the Report was made by the full board of directors of First Leaside Wealth Management ("**FLWM**"), who received legal advice; and (d) the decision to sell FLG's equity and debt products was discussed with the full board of directors of FLWM, with counsel present, and Staff was aware that FLG was selling its products, including those mentioned in the Undertaking, during the Sales Period.

III. DOCUMENTS DISCLOSED BY STAFF

[7] Staff has provided a substantial amount of disclosure. Staff provided affidavit evidence, which was not disputed by the Respondents, that between June 22 and August 27, 2012, Staff disclosed 49 volumes of material to the Respondents, including: interview transcripts, exhibits and documents of witnesses interviewed by Staff; the Report and other reports prepared by Grant Thornton after it was appointed monitor of FLG; the property valuation reports obtained by FLG in early 2011; documents from the proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA Proceeding**"); corporate documents; corporation profile reports; documents regarding the registration of the Respondents and a number of FLG companies; documents regarding the suspension of First Leaside Securities Inc. ("**FLSI**"), an investment dealer, and F.L. Securities Inc. ("**F.L. Securities**"), an exempt market dealer; correspondence; enforcement notices and replies; contact centre and investigation notes; and discs of emails of the Respondents and another individual during the Sales Period, with an explanation of the computer search terms employed.

IV. ADDITIONAL DISCLOSURE REQUESTED BY THE RESPONDENTS

[8] The Respondents ask for disclosure of the following additional categories of documents:

(a) Drafts of the Undertaking and correspondence, both internal and external, regarding the Undertaking;

(b) Documents evidencing receipt of the Report on August 19, 2011;

(c) Staff's commentary, in internal emails or otherwise, about the Report;

(d) Documents evidencing meetings between Staff and counsel for FLG between March and November 2011, including but not limited to notes taken during the meeting and internal emails following the meeting;

(e) Staff's commentary, in internal emails or otherwise, regarding the September 12, 2011 letter from counsel for FLG to Staff concerning the FLG response to the Report;

(f) Staff's commentary, in internal emails or otherwise, regarding FLG's retainer of Grant Thornton in late September 2011;

(g) Documents evidencing Staff's decision, more than two months after receipt of the Report, to seek a cease trade order; and

(h) the reports filed by FLG under National Instrument 45-106 – *Prospectus and Registration Exemptions* ("**NI 45-106**") and proof of payment made during the Sales Period.

V. THE LAW ON DISCLOSURE

[9] The parties agree that in this Motion, the Commission need not determine whether the documents described in paragraph 8 above (the "**Disputed Documents**") will be admissible in the Merits Hearing.

[10] The parties agree that Staff's disclosure obligations are set out in Rule 4.3(2), which says:

> In the case of a hearing under section 127 of the Act and subject to Rule 4.7, Staff shall make available for inspection by every other party all other documents and things that are in the possession or control of Staff that are relevant to the hearing. Staff shall provide copies, or permit the inspecting party to make copies, of these documents at the inspecting party's expense, as soon as is reasonably practicable after the Notice of Hearing is served, and in any case at least 20 days before the commencement of the hearing.

[11] The Respondents submit that given the nature of Staff's allegations against them (fraud), their good character and the propriety of their conduct is at issue in the proceeding, and therefore section 8 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**") and Rule 4.4 also have application. Section 8 of the SPPA states:

> Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

[12] Rule 4.4 is as follows:

> Subject to Rule 4.7, if the good character, propriety of conduct or competence of a party is an issue in a proceeding, Staff shall provide particulars of the allegations and disclose to the party against whom the allegations are made all documents and things in Staff's possession or control relevant to the allegations, as soon as is reasonably practicable after the Notice of Hearing is served, and in any case at least 20 days before the commencement of the hearing on the merits.

[13] The parties agree that Staff's duty of disclosure to the Respondents is "akin to the *Stinchcombe* standard", which requires the Crown, in criminal trials, to disclose all relevant information, whether inculpatory or exculpatory, and whether or not the Crown intends to introduce it into evidence (*R. v. Stinchcombe*, [1991] S.C.J. No. 83, at paragraph 29 ("***Stinchcombe***")). The Commission has adopted the *Stinchcombe* standard of disclosure in its enforcement proceedings. In *Re Biovail Corp.* (2008), 31 O.S.C.B. 7171 ("***Re Biovail***"), the Commission summarized Staff's disclosure obligations as follows:

> The parties agree that Staff has a broad duty of disclosure akin to the *Stinchcombe* standard. The *Stinchcombe* standard requires the Crown to disclose all relevant information, whether inculpatory or exculpatory, subject to the discretion of the Crown, which discretion is reviewable by the court. While the Crown must err on

the side of inclusion, clearly irrelevant documents should be excluded, and the initial obligation to separate "the wheat from the chaff" rests with the Crown. Documents should not be withheld if there is a reasonable possibility that doing so would impair the right of the accused to make full answer and defence.

. . . .

As a matter of law, Staff has an obligation to disclose to the Respondents all documents that are relevant to this proceeding, whether inculpatory or exculpatory, in accordance with principles akin to those articulated in *Stinchcombe*. There is no dispute between Staff and the Respondents with respect to that conclusion. The obligation to disclose is a matter of fundamental justice based on fairness to respondents to permit them to make full answer and defence to the allegations against them.

. . . .

With respect to determining relevance, we adopt the following statement from the Court of Appeal decision in *Deloitte* [*Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2002] O.J. No. 2350 (Ont. C.A.) ("***Deloitte CA***"), at paragraph 44]:

> Relevant material in the *Stinchcombe*, *supra*, sense includes material in the possession or control of Staff and intended for use by Staff in making its case against the [Philip] respondents. Relevant material also includes material in Staff's possession which has a reasonable possibility of being relevant to the ability of the [Philip] respondents to make full answer and defence to the Staff allegations. This latter category includes material that the [Philip] respondents could use to rebut the case presented by Staff; material they could use to advance a defence; and material that may assist them in making tactical decisions.

(*Re Biovail*, above, at paragraphs 15, 32 and 40. See also, for example, *Re Berry* (2008), 31 O.S.C.B. 5441, at paragraphs 66-68.)

[14] In *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] 2 S.C.R. 713 ("***Deloitte SCC***"), the Supreme Court of Canada, applying a reasonableness standard of review, accepted that the Commission's use of the *Stinchcombe* relevance standard and its application in that case were reasonable decisions (*Deloitte SCC*, at paragraph 26).

[15] The parties agree that the Commission's disclosure power is subject to privilege and that any claims of solicitor-client or litigation privilege raised by Staff in relation to specific documents included in the categories of documents ordered disclosed in this Motion will need to be addressed in another motion before the start of the Merits Hearing.

VI. THE RESPONDENTS' SUBMISSIONS

[16] The Respondents submit that they need the Disputed Documents in order to make full answer and defence to Staff's allegation that they engaged in fraud. They submit (and it is not

disputed by Staff) that in order to prove fraud, Staff must establish the four elements set out by the Supreme Court of Canada in *R. v. Théroux*, [1993] 2 S.C.R. 5 ("***Théroux***"), as follows:

> . . . the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
>
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
>
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).
>
> (*Théroux*, above, at paragraph 27)

[17] The Supreme Court of Canada further expanded upon the act element and mental element of fraud in the following passage:

> . . . . To establish the *actus reus* of fraud, the Crown must establish beyond a reasonable doubt that the accused practised deceit, lied, or committed some other fraudulent act. Under the third head of the offence it will be necessary to show that the impugned act is one which a reasonable person would see as dishonest. Deprivation or the risk of deprivation must then be shown to have occurred as a matter of fact. To establish the *mens rea* of fraud the Crown must prove that the accused knowingly undertook the acts which constitute the falsehood, deceit or other fraudulent means, and that the accused was aware that deprivation could result from such conduct.
>
> The requirement of intentional fraudulent action excludes mere negligent misrepresentation. It also excludes improvident business conduct or conduct which is sharp in the sense of taking advantage of a business opportunity to the detriment of someone less astute. The accused must intentionally deceive, lie or commit some other fraudulent act for the offence to be established. Neither a negligent misstatement, nor a sharp business practice, will suffice, because in neither case will the required intent to deprive by fraudulent means be present. A statement made carelessly, even if it is untrue, will not amount to an intentional falsehood, subjectively appreciated. Nor will any seizing of a business opportunity which is not motivated by a person's subjective intent to deprive by cheating or misleading others amount to an instance of fraud. Again, an act of deceit which is made carelessly without any expectation of consequences, as for example, an innocent prank or a statement made in debate which is not intended to be acted upon, would not amount to fraud because the accused would have no knowledge that the prank would put the property of those who heard it at risk. We are left then with deliberately practised fraudulent acts which, in the knowledge of

> the accused, actually put the property of others at risk. Such conduct may be appropriately criminalized, in my view.
>
> (*Théroux*, above, at paragraphs 39-40)

[18] The Supreme Court of Canada also stated, in *Théroux*, that the *mens rea* element of fraud is subjective, but a guilty mind or wrongful intentions can be inferred from the prohibited acts themselves, barring some explanation casting doubt on such an inference (*Théroux*, above, at paragraphs 20, 21 and 23). Finally, recklessness or wilful blindness as to the consequences of the prohibited acts may be sufficient evidence of wrongful intentions (*Théroux*, above, at paragraphs 26 and 28).

[19] The Respondents submit that while they will deny, at the Merits Hearing, that they engaged in any prohibited acts, it will be open to them to provide an explanation that casts doubt on any inference that their actions demonstrate a wrongful intention or that they were reckless or wilfully blind in selling and causing the sales of FLG equity and debt offerings while not disclosing the Report to investors. The Respondents submit that the Disputed Documents are relevant to the "factual matrix" that informed their decisions. They submit that they will be impaired in making full answer and defence if the Disputed Documents are not disclosed.

[20] The Respondents also submit that they want the Disputed Documents for tactical reasons, including deciding whether to testify and whether to waive privilege with respect to the communications between Staff and counsel for FLG.

VII. STAFF'S SUBMISSIONS

[21] Staff submits that the Respondents are attempting to convert the Merits Hearing into an enquiry into Staff's actions and state of mind. Staff submits that the Disputed Documents are not relevant to the allegations, which relate to the Respondents' actions and state of mind during the Sales Period.

[22] Staff submits that internal documents evidencing Staff's views, opinions, analysis, and decisions about whether or when to commence proceedings are irrelevant and of no assistance to the Commission. Staff relies on three decisions: *Re Shambleau* (2002), 25 O.S.C.B. 1850 ("***Re Shambleau***"), affirmed by *Shambleau v. Ontario Securities Commission* (2003), 26 O.S.C.B. 1629 (Div. Ct.) ("***Shambleau Div. Ct.***"), *Re Vancouver Stock Exchange*, [1999] 31 B.C.S.C. Weekly Summary 20 (British Columbia Securities Commission) ("***Re VSE***"), and *Re Mills*, [1999] I.D.A.C.D. No. 41 ("***Re Mills***").

[23] In *Re Mills*, a decision of the Ontario District Council of the (Investment Dealers Assocation ("**IDA**"), the issue was whether IDA Staff should be required to produce to the respondent the report of an investigator who was no longer employed by the IDA and would not be called as a witness for IDA Staff. The report appeared to contain conclusions or recommendations inconsistent with the evidence to be given by another IDA Staff investigator, who would be called to testify. The respondent's counsel submitted that the report might be relevant to the credibility of the witnesses called by IDA Staff, noting also that the respondent would be unable to compel the attendance of the former investigator since the IDA does not have power to power to subpoena witnesses. The disclosure motion was dismissed. The District Council held that "neither *Stinchcombe* nor the cases applying its principles in the regulatory

context" go so far as to require the disclosure of documents relating to internal deliberations about whether to commence proceedings (*Re Mills*, above, at p. 6).

[24] In *Re VSE*, the B.C. Securities Commission overturned a decision of a hearing panel of the Vancouver Stock Exchange ("**VSE**") that ordered VSE Staff to produce internal documents, including internally-generated investigation reports, to the respondent. The B.C. Securities Commission drew a distinction between documents that were gathered by VSE Staff during the investigation (the "fruits of the investigation"), which must be disclosed, subject to privilege, in accordance with *Stinchcombe,* and documents that were internally generated by VSE Staff, which need not be disclosed:

> It is the responsibility of the hearing panel to determine whether the allegations ... have been met. The views of ... staff, as expressed in internally generated documents such as investigation reports, are of no relevance in this regard.
>
> (*Re VSE*, above, at page 7).

[25] In *Re Shambleau*, Staff of TSE Regulation Services Inc. ("**RS**") brought an application, pursuant to section 21.7 of the Act, for hearing and review of a decision of the board of the Toronto Stock Exchange (the "**TSE Board**") that upheld a decision of a TSE hearing panel requiring RS Staff to disclose an investigation report to the respondent. The hearing panel held that the report was relevant to opinion evidence that its author, Kim Stewart ("**Stewart**") would give at the merits hearing and would help the respondent cross-examine Michael Prior ("**Prior**"), another investigator who would be called by RS Staff to give expert evidence at the hearing. The Commission overturned the decision of the TSE Board. The Commission held that Stewart was a fact witness, not an expert witness, and her opinions were irrelevant to the decision of the TSE hearing panel:

> Ms. Stewart is a fact witness and her opinions are irrelevant. . . . It is ultimately up to the Hearing Panel to make the final determinations on the issues in dispute and Ms. Stewart's opinion or interpretation of the facts, as contained in the investigation report, is of no relevance for the purposes of disclosure.
>
> Unlike in *Howe* [*Howe v. Institute of Chartered Accountants (Ontario)* (1994), 19 O.R. (3d) 483 (Ont. C.A.)], investigators are generally only called as fact witnesses. They introduce the documents, outline the investigation and introduce transcripts but they do not advance opinions on the ultimate issue. It is ultimately up to the Hearing Panel to determine whether, on the facts of the case, Mr. Shambleau executed a trade that was intended to establish an artificial price. Ms. Stewart's opinions, which may or may not be contained in her report, are not relevant to the Hearing Panel's determination.
>
> (*Re Shambleau*, above, at paragraphs 27-28)

[26] The Commission held that while *Stinchcombe* required disclosure of the fruits of the investigation, including all of the facts underpinning Stewart's opinion, the report she had generated setting out that opinion was not relevant to the issues before the hearing panel and therefore need not be disclosed.

[27] On appeal, the Divisional Court found that the decision of the Commission was not unreasonable. After noting that Stewart had been "extensively cross-examined" by the respondent's counsel about her investigation, the Court made the following comments:

> The duty of disclosure which applies in disciplinary matters is a high one. The Commission recognized this and the standard of disclosure set out in its Reasons is entirely consistent with that set out in *Stinchcombe* (1991), 3 S.C.R. 327 and also that set out in the dissenting reasons of Mr. Justice Laskin in *Howe v. Institute of Chartered Accountants (Ontario)* (1994) 19 O.R. (3d) 483 on which counsel for the appellant relies. The Appellant submits that these cases mandate that the investigative report must in all cases be produced. In *Howe v. Institute of Chartered Accountants (Ontario)*, the report in question was that of an accountant who had examined all the books of the accountant charged with professional misconduct, formed opinions as to the propriety of the accused's conduct and was to be called as an expert witness at the hearing as to his findings. Clearly in those circumstances, the entire report was required to be produced. Mr. Justice Laskin noted that the issue was so clear that there was no need to even examine the report itself to decide that a mere summary of the report would not suffice. The reasons of Justice Laskin were given in the context of the case before him and did not purport to establish nor does it establish any rule that in all cases all investigative reports must be released.
>
> The basis of the disclosure requirement is found in the duty of fairness. The question is not whether a particular class of documents must be disclosed or not. Whatever disclosure is necessary to satisfy the duty of fairness must be made. The Commission recognized and accepted this and found that in the present case, the disclosure already made satisfied the duty of fairness without the actual report of Kim Stewart, the document gathering investigator, being produced. We are unable to find that the Commission was unreasonable in so finding.
>
> (*Re Shambleau (Div. Ct.)*, above, at paragraphs 6-7)

[28] Staff submits that at the Merits Hearing, it will be open to the Respondents to testify about their actions and state of mind, including what advice they received from counsel. The Commission will decide, based on the evidence before it, including Staff's evidence and any evidence that may be introduced by the Respondents, whether Staff has met its burden of proving, on a balance of probabilities, that the Respondents, amongst other things, engaged in fraud contrary to section 126.1(b) of the Act. The Disputed Documents, in Staff's submission, are irrelevant to that decision.

VIII. ANALYSIS

[29] The parties agree and the Commission has accepted that Staff's duty of disclosure to the respondents in the Commission's enforcement proceedings is "akin to the *Stinchcombe* standard", which means that Staff must disclose to the respondents all relevant information in Staff's possession or control, whether inculpatory or exculpatory, and whether or not Staff intends to introduce it into evidence at the merits hearing (the fruits of the investigation) (*Re Berry, Re Biovail and Re Deloitte*). Disclosure enables the respondents to know the case they have to meet, prepare to rebut Staff's evidence, and make tactical decisions about how to present their case. It "is a matter of fundamental justice based on fairness to respondents to permit them

to make full answer and defence to the allegations against them." For that reason, "relevance" is defined broadly in the context of disclosure, and includes material that has "a reasonable possibility of being relevant to" the respondents' ability to make full answer and defence to Staff's allegations, though it may not, ultimately, be admitted at the merits hearing. On these principles, there is no dispute. The parties disagree about the application of these principles to the Disputed Documents.

[30] Before considering the categories of Disputed Documents, I make the following general remarks. First, it is no answer to a request for disclosure for Staff to say that the documents are, or should be, independently obtainable by the Respondents from another source, or by waiving privilege. That is not the test. Staff is required to disclose all relevant documents in the possession or control of Staff, including documents that evidence communications between Staff and the Respondents or their counsel, subject to privilege. Amongst other things, it is helpful for the Respondents, in making full answer and defence, to "know what Staff knows".

[31] It is also no answer to a request for disclosure for Staff to say, in effect, "you know what you did and what you were thinking, and it's for you to provide the evidence". That is not the test. Staff bears the onus of proving its allegations on a balance of probabilities at the Merits Hearing, and Staff is required to disclose to the Respondents all relevant documents it has gathered in the investigation, whether or not they are independently available to the Respondents, subject to privilege.

[32] Finally, the parties agree that any claims of privilege in respect of the Disputed Documents will need to be addressed in another motion at a later date, based on an adequate evidentiary record. For the purposes of this Motion, I make no assumptions about whether any of the internal documents sought by the Respondents may raise issues of solicitor-client or litigation privilege.

[33] I accept that documents evidencing communications between Staff and the Respondents may be relevant in considering the Respondents' actions and state of mind during the Sales Period and they must, therefore, be disclosed, subject to privilege. I do not accept that Staff's disclosure obligations are limited to the Sales Period because I find that previous events, especially communications with Staff before and during the Sales Period, may be relevant in considering the Respondents' actions and state of mind during the Sales Period.

[34] The crux of the dispute between the Parties in this Motion is whether Staff must disclose internally-generated documents evidencing Staff's analysis, commentary, opinion or discussions about commencing proceedings ("**Staff work product**"). *Re Shambleau* governs the disposition of this question. I find that Staff is not required to disclose Staff work product because it is irrelevant to the issues that will be considered by the Commission at the Merits Hearing.

[35] Nothing prevents the Respondents from seeking further disclosure before or during the Merits Hearing. The Commission would then decide the relevance of any particular documents sought by the Respondents in making full answer and defence to the allegations.

IX. CONCLUSION

[36] At the Motion Hearing, Staff provided evidence that it had disclosed "documents evidencing receipt of the Report on August 19, 2011" (item (b) at paragraph 8 above). Staff also advised that the NI 45-106 reports and proof of payment documents (item (h)) will be disclosed,

once available to Staff. Staff is required to disclose these documents, if they have not already done so, subject to privilege.

[37] Staff also advised, at the Motion Hearing, that it had not been aware that Grant Thornton was retained by FLG in late September 2011 (item (f) at paragraph 8 above). Any such documents in the possession or control of Staff are to be dealt with in accordance with paragraphs 38-39 below.

[38] With respect to items (a), (c), (d), (e), (f) and (g) at paragraph 8 above, the Motion is allowed with respect to documents that were gathered during the investigation and documents that evidence communications between Staff and the Respondents and counsel in relation to the allegations, because such documents may be relevant at the Merits Hearing in considering the Respondents' actions and state of mind. Staff is required to disclose these documents, subject to privilege.

[39] The Motion is dismissed with respect to internally-generated documents, described in items (a), (c), (d), (e), (f) and (g) at paragraph 8 above, evidencing Staff's analysis, commentary, opinion or discussions about commencing proceedings (Staff work product).

[40] For clarity, this order is subject to any privilege issue that may be raised in a subsequent motion, and any further disclosure orders that may be made by the Commission before or during the Merits Hearing. The Parties are urged to attempt to resolve any such issues in a timely way, and in accordance with the Rules, to ensure that the Merits Hearing goes ahead, as scheduled, on February 11, 2013.

DATED at Toronto this 30th day of November, 2012.

"James D. Carnwath"

_____

James D. Carnwath