The Ontario Securities Commission

OSC Bulletin

September 4, 2014

Volume 37, Issue 36

(2014), 37 OSCB

The Ontario Securities Commission administers the
Securities Act of Ontario (R.S.O. 1990, c. S.5) and the
Commodity Futures Act of Ontario (R.S.O. 1990, c. C.20)

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Published under the authority of the Commission by:
Carswell, a Thomson Reuters business
One Corporate Plaza
2075 Kennedy Road
Toronto, Ontario
M1T 3V4

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Subscriptions are available from Carswell at the price of $773 per year.

Subscription prices include first class postage to Canadian addresses. Outside Canada, these airmail postage charges apply on a current subscription:

U.S.	$175
Outside North America	$400

Single issues of the printed Bulletin are available at $20 per copy as long as supplies are available.

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ISSN 0226-9325

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AND

IN THE MATTER OF
NEWER TECHNOLOGIES LIMITED,
RYAN PICKERING AND RODGER FREY

AND

IN THE MATTER OF
A SETTLEMENT AGREEMENT BETWEEN
STAFF OF THE ONTARIO SECURITIES COMMISSION
AND NEWER TECHNOLOGIES LIMITED,
AND RYAN PICKERING

NOTICE OF HEARING
(Sections 127 and 127.1 of the Act and
Rule 12 of the Commission's *Rules of Procedure*)

TAKE NOTICE THAT the Ontario Securities Commission (the **"Commission"**) will hold a hearing pursuant to sections 127 and 127.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5, as amended (the **"Act"**) at the offices of the Commission at 20 Queen Street West, 17th Floor, Toronto, Ontario, M5H 3S8, on September 3, 2014 at 11:30 a.m., or as soon thereafter as the hearing can be held:

AND TAKE NOTICE that the purpose of the hearing is for the Commission to consider whether it is in the public interest to approve a Settlement Agreement between Staff of the Commission and Newer Technologies Limited and Ryan Pickering;

BY REASON OF the allegations set out in the Statement of Allegations of Staff of the Commission dated December 4, 2012, and such additional allegations as counsel may advise and the Commission may permit;

AND TAKE FURTHER NOTICE that any party to the proceedings may be represented by counsel at the hearing;

AND TAKE FURTHER NOTICE that upon failure of any party to attend at the time and place aforesaid, the hearing may proceed in the absence of that party and such party is not entitled to any further notice of the proceedings.

DATED at Toronto this 29th day of August, 2014.

"Daisy Aranha"

Per: Josee Turcotte
Acting Secretary to the Commission

1.2.2 Newer Technologies Limited et al. – ss. 127 and 127.1 and Rule 12 of the Commission's Rules of Procedure

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

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IN THE MATTER OF
NEWER TECHNOLOGIES LIMITED,
RYAN PICKERING AND RODGER FREY

AND

IN THE MATTER OF
A SETTLEMENT AGREEMENT BETWEEN
STAFF OF THE ONTARIO SECURITIES COMMISSION
AND RODGER FREY

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(Sections 127 and 127.1 of the Act and
Rule 12 of the Commission's *Rules of Procedure*)

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AND TAKE NOTICE that the purpose of the hearing is for the Commission to consider whether it is in the public interest to approve a Settlement Agreement between Staff of the Commission and Rodger Frey;

BY REASON OF the allegations set out in the Statement of Allegations of Staff of the Commission dated December 4, 2012, and such additional allegations as counsel may advise and the Commission may permit;

AND TAKE FURTHER NOTICE that any party to the proceedings may be represented by counsel at the hearing;

AND TAKE FURTHER NOTICE that upon failure of any party to attend at the time and place aforesaid, the hearing may proceed in the absence of that party and such party is not entitled to any further notice of the proceedings.

DATED at Toronto this 29th day of August, 2014.

"Daisy Aranha"

_____
Per: Josee Turcotte
Acting Secretary to the Commission

1.4 Notices from the Office of the Secretary

1.4.1 Jowdat Waheed and Bruce Walter

FOR IMMEDIATE RELEASE
August 27, 2014

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

AND

IN THE MATTER OF
JOWDAT WAHEED AND BRUCE WALTER

TORONTO – Following the hearing on the merits in the above noted matter, the Commission issued its Reasons and Decision.

A copy of the Reasons and Decision dated August 26, 2014 is available at www.osc.gov.on.ca.

OFFICE OF THE SECRETARY
JOSÉE TURCOTTE
ACTING SECRETARY

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Media Relations Specialist
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1.4.2 Pro-Financial Asset Management Inc.

FOR IMMEDIATE RELEASE
August 27, 2014

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

AND

IN THE MATTER OF
PRO-FINANCIAL ASSET MANAGEMENT INC.

TORONTO – The Commission issued an Order in the above named matter which provides that the hearing is adjourned to September 29, 2014 at 10:00 a.m. and the Temporary Order as amended by previous Commission orders is extended to October 1, 2014.

A copy of the Order dated August 26, 2014 is available at www.osc.gov.on.ca.

OFFICE OF THE SECRETARY
JOSÉE TURCOTTE
ACTING SECRETARY

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1.4.3 Conrad M. Black et al.

FOR IMMEDIATE RELEASE
August 27, 2014

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

AND

IN THE MATTER OF
CONRAD M. BLACK,
JOHN A. BOULTBEE
AND PETER Y. ATKINSON

TORONTO – The Commission issued an Order in the above named matter which provides that:

1. The parties shall serve and file any joint or separate hearing briefs by September 26, 2014.

2. Any preliminary motion, if made by Staff, be scheduled for October 6, 2014, commencing at 10:00 a.m., and any related materials be filed according to the following schedule:

   a. Staff shall serve and file written materials by 4:00 p.m. on September 12, 2014; and

   b. Respondents shall serve and file any responding materials by 4:00 p.m. on September 26, 2014.

3. Following consideration of Staff's motion on October 6, if applicable, the hearing will continue as scheduled on the following dates in October 2014: 6, 8-10, 14-17, 20, 22-24, and 27-31, or on such other dates as may be ordered by the Commission. If Staff do not make a motion, the hearing shall commence at 10:00 a.m. on October 6, 2014.

A copy of the Order dated August 25, 2014 is available at www.osc.gov.on.ca.

OFFICE OF THE SECRETARY
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1.4.4 Newer Technologies Limited et al.

FOR IMMEDIATE RELEASE
August 29, 2014

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

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IN THE MATTER OF
NEWER TECHNOLOGIES LIMITED,
RYAN PICKERING AND RODGER FREY

AND

IN THE MATTER OF
A SETTLEMENT AGREEMENT BETWEEN
STAFF OF THE ONTARIO SECURITIES COMMISSION
AND NEWER TECHNOLOGIES LIMITED,
AND RYAN PICKERING

TORONTO – The Office of the Secretary issued a Notice of Hearing for a hearing to consider whether it is in the public interest to approve a settlement agreement entered into by Staff of the Commission and Newer Technologies Limited and Ryan Pickering in the above named matter.

The hearing will be held on September 3, 2014 at 11:30 a.m. on the 17th floor of the Commission's offices located at 20 Queen Street West, Toronto.

A copy of the Notice of Hearing dated August 29, 2014 is available at www.osc.gov.on.ca.

OFFICE OF THE SECRETARY
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1.4.5 Newer Technologies Limited et al.

FOR IMMEDIATE RELEASE
August 29, 2014

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

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IN THE MATTER OF
NEWER TECHNOLOGIES LIMITED,
RYAN PICKERING AND RODGER FREY

AND

IN THE MATTER OF
A SETTLEMENT AGREEMENT BETWEEN
STAFF OF THE ONTARIO SECURITIES COMMISSION
AND RODGER FREY

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The hearing will be held on September 3, 2014 at 11:30 a.m. on the 17th floor of the Commission's offices located at 20 Queen Street West, Toronto.

A copy of the Notice of Hearing dated August 29, 2014 is available at www.osc.gov.on.ca.

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Chapter 2

Decisions, Orders and Rulings

2.1 Decisions

2.1.1 Needham & Company, LLC

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions (NP 11-203) – Applicant is dealers that participates in offerings of foreign securities into Canada on a private placement basis to permitted clients – when a foreign offering document is provided to prospective Canadian investors certain items of disclosure must be included in the foreign offering document – Canadian specific disclosure items are commonly included in a foreign offering document by adding a "wrapper" to the foreign offering document which contains any required Canadian disclosure – Applicant granted relief from certain disclosure requirements in the context of offerings of securities made under a prospectus exemption to Canadian investors that are permitted clients – the securities must be offered primarily in a foreign jurisdiction – the securities must be issued by an issuer that qualifies as a "foreign issuer" as defined in the decision – Applicant granted relief from the requirement in National Instrument 33-105 Underwriting Conflicts (NI 33-105) to provide disclosure on conflicts of interest between dealers and issuers provided that disclosure required for U.S. registered offerings is provided instead – Applicant granted relief from the requirement in NI 33-105 to provide disclosure of a connected issuer relationship where the issuer is a foreign government on certain conditions – Applicant granted relief from the requirement in OSC Rule 45-501 Ontario Prospectus and Registration Exemptions to include in an offering memorandum disclosure of the statutory right of action for damages and right of rescission provided to purchasers under the legislation on certain conditions – Applicant provided with a separate permission from the Director pursuant to s. 38(3) of the Securities Act(Ontario) for the making of a listing representation in an offering memorandum – Applicant provided with a separate letter from the Director confirming that the requirement in Form 45-106F1 Report of Exempt Distribution in Ontario to notify purchasers of the collection of their personal information only applies where such purchasers are individuals.

Applicable Legislative Provisions

National Instrument 33-105 Underwriting Conflicts, s. 2.1
OSC Rule 45-501 Ontario Prospectus and Registration Exemptions, s. 5.3
National Instrument 45-106 Prospectus and Registration Exemptions – Form 45-106F1
Securities Act, R.S.O. 1990, c.S.5, as am.

August 22, 2014

IN THE MATTER OF
THE SECURITIES LEGISLATION OF ONTARIO,
ALBERTA, BRITISH COLUMBIA, MANITOBA,
NEW BRUNSWICK, NEWFOUNDLAND AND LABRADOR,
NORTHWEST TERRITORIES, NOVA SCOTIA,
NUNAVUT, PRINCE EDWARD ISLAND,
QUEBEC, SASKATCHEWAN AND YUKON

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
NEEDHAM & COMPANY, LLC
(The "Applicant")

DECISION

Background

Connected and Related Issuer Disclosure

The securities regulatory authority or regulator in Ontario has received an application from the Applicant for a decision under the Legislation (as defined herein) of the jurisdiction of the principal regulator for the following exemptions (the "**Passport Exemptions**"):

(i) an exemption from the disclosure (the "**Connected Issuer Disclosure and Related Issuer Disclosure**") required by subsection 2.1(1) of National Instrument 33-105 *Underwriting Conflicts* ("**NI 33-105**") as specified in Appendix C of NI 33-105 in an Exempt Offering Document (as defined herein) with respect to distributions of securities that meet all of the following criteria (a "**Specified Exempt Distribution**"):

(a) a distribution under an exemption from the prospectus requirement (an "**Accredited Investor Prospectus Exemption**") set out in section 2.3 of National Instrument 45-106 *Prospectus and Registration Exemptions* ("**NI 45-106**"),

(b) of a security offered primarily in a "foreign jurisdiction" (as defined in National Instrument 14-101 *Definitions*) (a "**Foreign Jurisdiction**"),

(c) by the Applicant as underwriter,

(d) to Canadian investors each of which is a "permitted client" as defined in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("**NI 31-103**") (a "**Permitted Client**") and

(e) of a security issued by an issuer incorporated, formed or created under the laws of a Foreign Jurisdiction, that is not a reporting issuer in any jurisdiction of Canada, that has its head office or principal executive office outside of Canada ("**Foreign Issuer**"),

(ii) an exemption from the requirement to include Connected Issuer Disclosure and Related Issuer Disclosure in an Exempt Offering Document for a Specified Exempt Distribution of a security issued or guaranteed by the government of a Foreign Jurisdiction (a "**Foreign Government**") and that meets all of the criteria described in (i) above other than (e).

Right of Action Disclosure

The securities regulatory authority or regulator in each of Ontario, New Brunswick, Nova Scotia and Saskatchewan (the "**Coordinated Exemptive Relief Decision Makers**") has received an application (the "**Coordinated Exemptive Relief**") from the Applicant for a decision under the securities legislation of those jurisdictions for an exemption from the requirement to disclose in an Exempt Offering Document with respect to a Specified Exempt Distribution, a description of the statutory right of action available to purchasers for a misrepresentation in the Exempt Offering Document (the "**Right of Action Disclosure**").

Process for Exemptive Relief in Multiple Jurisdictions

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a hybrid application):

(a) the Ontario Securities Commission is the principal regulator for this application;

(b) the Applicant has provided notice that subsection 4.7(1) of Multilateral Instrument 11-102 *Passport System* ("**MI 11-102**") is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, Yukon, the Northwest Territories and Nunavut (and together with Ontario, the "**Jurisdictions**");

(c) the decision is the decision of the principal regulator; and

(d) the decision evidences the decision of each Coordinated Exemptive Relief Decision Maker.

Interpretation

Terms defined in MI 11-102 and National Instrument 14-101 – *Definitions* have the same meaning if used in this decision, unless otherwise defined.

"**Legislation**" means, for the local jurisdiction, its securities legislation.

"**Exempt Offering Document**" means:

(a) in New Brunswick, Nova Scotia, Ontario and Saskatchewan, an offering memorandum as defined under the securities legislation of that jurisdiction, and

(b) in all other jurisdictions, a document including any amendments to the document, if the document

i. describe the business and affairs of an issuer, and

ii. has been prepared primarily for delivery to and review by a prospective purchaser to assist the prospective purchaser in making an investment decision in respect of securities being distributed pursuant to an exemption from the prospectus requirement.

Representations

This decision is based on the following facts represented by the Applicant:

1. In Canada, the Applicant has filed Form 31-103F2 Submission to Jurisdiction and Appointment of Agent for Service in order to qualify for the international dealer exemption under section 8.18 of NI 31-103.

2. The Applicant is registered as a broker-dealer with the U.S. Securities and Exchange Commission ("**SEC**"), is a member of the Financial Industry Regulatory Authority, Inc., a self-regulatory organization, and the Securities Investor Protection Corporation.

3. The Applicant is involved in underwriting public offerings and private placements in the United States and elsewhere by U.S. and other Foreign Issuers.

4. The Applicant has considered extending offerings of Foreign Issuers or Foreign Government Issuers to Canadian investors that are Permitted Clients under the Accredited Investor Prospectus Exemption.

5. If a prospectus or private placement memorandum (a "**foreign offering document**") is provided to investors outside Canada, it is common practice where these offerings are extended to Canadian investors to provide the foreign offering document to Canadian investors. The foreign offering document when used in the jurisdictions constitutes an "Exempt Offering Document".

6. If an Exempt Offering Document is provided to Canadian investors, it is required to include, depending on the jurisdiction, one or both of (i) the Connected Issuer Disclosure and Related Issuer Disclosure; and (ii) Right of Action Disclosure.

7. The Connected Issuer Disclosure and Related Issuer Disclosure prescribes summary disclosure to be included on the cover page of an Exempt Offering Document, together with a cross-reference, and more detailed disclosure to be included in the body of an Exempt Offering Document concerning the nature of any relationship that the issuer or any selling securityholder may have with an underwriter of the distribution or any affiliate of an underwriter, either through a significant security holding (related issuer) ("**Related Issuer Disclosure**") or such that a reasonable prospective purchaser of the offered securities may be led to question if the underwriter or affiliate and the issuer or selling securityholder are independent of each other in respect of the distribution (connected issuer) ("Connected Issuer Disclosure") and the effect the distribution may have on the underwriter or affiliate.

8. The Right of Action Disclosure provides a description of the statutory right of action for rescission or damages available to purchasers in the event of misrepresentation in the Exempt Offering Document.

9. In order to have the prescribed Canadian disclosure included in the foreign offering document, that foreign offering document may either be amended to include the prescribed Canadian disclosure, or, more commonly, a "wrapper" with the prescribed Canadian disclosure and other optional disclosure (a "Canadian wrapper") is prepared by one or more underwriters making a Specified Exempt Distribution and attached to the face of the foreign offering document, so that the Canadian wrapper together with the foreign offering document form one document constituting a Canadian Exempt Offering Document for the purposes of that offering. The underwriters making the Specified Exempt Distribution or their affiliates provide the Canadian Exempt Offering Document to purchasers in Canada.

10. An offering document for an offering registered under U.S. federal securities laws (a "**U.S. Registered Offering**") by a U.S. domestic issuer or foreign private issuer must include disclosure, pursuant to section 229.508 of Regulation S-K

under the *U.S. Securities Act of 1933*, as amended (the "**1933 Act**") and FINRA Rule 5121 regarding underwriter conflicts of interest, that is substantially similar to that required by the Connected Issuer Disclosure and Related Issuer Disclosure, except that cover page disclosure is not required.

11. An offering document for a U.S. Registered Offering must identify each underwriter having a material relationship with the issuer and state the nature of the relationship. Pursuant to FINRA Rule 5121, no underwriter that has a conflict of interest may participate in a U.S. Registered Offering unless the offering document includes prominent disclosure of the nature of the conflict of interest.

12. Certain unregistered offerings (such as bank debt offerings exempt from registration under section 3(a)2 of the 1933 Act, offerings by foreign governments and securities exchange offerings exempt from registration under section 3(a)9 of the 1933 Act) are also subject to FINRA Rule 5121.

13. Right of Action Disclosure is only required in the provinces of Saskatchewan, Nova Scotia, New Brunswick and Ontario. The securities legislation of Manitoba, Prince Edward Island, Newfoundland and Labrador, Yukon, the Northwest Territories and Nunavut provide for statutory rights of rescission or damages in the event of misrepresentation in an Exempt Offering Document, but do not mandate disclosure of the rights in the Exempt Offering Document. The securities legislation of Alberta, British Columbia and Quebec provides for statutory rights of rescission or damages in the event of misrepresentation in an Exempt Offering Document when the exemption in section 2.9 of NI 45-106 is relied upon.

14. The added complexity, delays and enhanced costs associated with ensuring compliance with Canadian Exempt Offering Document requirements are frequently factors that issuers and underwriters take into consideration when deciding whether to include Canadian investor participation in an offering.

15. Non-Canadian issuers and underwriters will often extend the offering to Canadian institutional investors, provided that the timing requirements and incremental compliance costs do not outweigh the benefits of doing so.

16. In many cases, an offering proceeds on such an accelerated timetable that even a one-day turn-around to prepare a Canadian wrapper can make it impracticable to include participation by Canadian investors.

Decision

Each of the principal regulator and the Coordinated Exemptive Relief Decision Makers is satisfied that the decision meets the test set out in the Legislation for the relevant regulator or securities regulatory authority to make the decision.

The decision of the principal regulator under the Legislation is that the Passport Exemptions are granted, provided that:

a. the Applicant shall deliver to each prospective purchaser of securities under a Specified Exempt Distribution a notice, substantially in the form of Schedule A attached hereto, prior to the first reliance on this decision for distributions of securities to such prospective purchaser and the purchaser provides in return a written acknowledgement and consent to reliance by the Applicant upon this decision;

b. for a Specified Exempt Distribution by a Foreign Issuer, any Exempt Offering Document provided by the Applicant complies with the disclosure requirements applicable to a U.S. Registered Offering with respect to disclosure of underwriter conflicts of interest between the Applicant and the issuer or selling securityholder, whether or not the offering is a U.S. Registered Offering;

c. if Related Issuer Disclosure would have been required for a Specified Exempt Distribution of securities issued or guaranteed by a Foreign Government, any Exempt Offering Document provided by the Applicant:

    i. complies with the disclosure requirements applicable to a U.S. Registered Offering with respect to disclosure of underwriter conflicts of interest between the Applicant and the issuer or selling securityholder, whether or not the offering is a U.S. Registered Offering; or

    ii. contains the disclosure specified in Appendix C of NI 33-105 to be included in the body of a prospectus or other document;

d. on a monthly basis (unless and until otherwise notified in writing by the Director of the Corporate Finance Branch of the principal regulator), the Applicant will deliver to the Director of the Corporate Finance Branch of the principal regulator (within ten days of the last day of the previous month), a list of the Specified Exempt Distributions it has made in reliance on this decision stating the name of the issuer, the security distributed, the total value of the offering in Canadian dollars, the value in Canadian dollars of the securities distributed in

Canada by the Applicant, the date of the Form 45-106F1 Report of Exempt Distribution (Form 45-106F6 British Columbia Report of Exempt Distribution in British Columbia) filed with applicable regulators and the jurisdictions in which it was filed;

e. each Form 45-106F1 filed with the principal regulator by the Applicant in connection with a Specified Exempt Distribution shall be filed using the electronic version of Form 45-106F1 available on the website of the principal regulator; and

f. the Passport Exemptions shall terminate on the earlier of: (i) the date that is three years after the effective date of this Decision and (ii) the date that amendments to the Legislation become effective in each jurisdiction of Canada that provide for substantially the same relief as the Passport Exemptions.

"Jo-Anne Matear"
Manager, Corporate Finance Branch
Ontario Securities Commission

AND

The decision of the Coordinated Review Decision Makers under the Legislation is that the Coordinated Exemptive Relief is granted provided that:

a. the Applicant shall deliver to each prospective purchaser of securities under a Specified Exempt Distribution a notice, substantially in the form of Schedule A attached hereto, prior to the first reliance on this Decision for distributions of securities to such prospective purchaser and the purchaser provides in return a written acknowledgement and consent to reliance by the Applicant upon this Decision; and

b. the Coordinated Exemptive Relief shall terminate in a particular jurisdiction on the earlier of: (i) the date that is three years after the effective date of this Decision and (ii) the date that amendments to the Legislation become effective in the jurisdiction that provide for substantially the same relief as the Coordinated Exemptive Relief.

"Vern Krishna"
Commissioner
Ontario Securities Commission

"Deborah Leckman"
Commissioner
Ontario Securities Commission

SCHEDULE A

FOREIGN SECURITY PRIVATE PLACEMENTS

NOTICE TO CLIENTS

We may from time to time sell to you as principal or agent securities of Foreign Issuers (other than investment funds) or securities of or guaranteed by Foreign Governments sold into Canada on a prospectus exempt basis ("**Foreign Security Private Placements**"). On _____, 2014, the Canadian Securities Administrators issued a decision (the "**Decision**") exempting us from certain disclosure obligations applicable to such transactions on the basis that you are a permitted client as defined in National Instrument 31-103 - *Registration Requirements, Exemptions and Ongoing Registration Requirements*. The Decision is available at ? and terminates on the earlier of three years after the effective date of the Decision and the date amendments to the Legislation come into effect in each jurisdiction in Canada that provide for substantially the same relief as the Decision. Capitalized terms used but not otherwise defined in this notice have the meanings ascribed to such terms in the Decision.

It is a requirement of the Decision that we notify you of the following two matters set forth in this notice.

1. Statutory Rights of Action

If, in connection with a Foreign Security Private Placement, we deliver to you an offering document that constitutes an offering memorandum under applicable securities laws in Canada, you may have, depending on the province or territory of Canada in which the trade was made to you, remedies for rescission or damages if the offering memorandum and any amendment thereto contains a misrepresentation, provided that the remedies for rescission or damages are exercised by you within the time limit prescribed by the securities legislation of your province or territory. You should refer to any applicable provisions of the securities legislation of your province or territory for the particulars of these rights or consult with a legal advisor.

2. Relationship between the Issuer or Selling Securityholder and the Underwriters

We or our affiliates in respect of a Foreign Security Private Placement may have an ownership, lending or other relationship with the issuer of such securities or a selling securityholder that may cause the issuer or selling securityholder to be a "related issuer" or "connected issuer" to us or such affiliate under Canadian securities law (as those terms are defined in National Instrument 33-105 – *Underwriting Conflicts*). Under the terms of the Decision, the offering document for a private placement by a Foreign Issuer will disclose underwriter conflicts of interest in accordance with the requirements of U.S. federal securities laws and of the Financial Industry Regulatory Authority, a self-regulatory organization in the United States, applicable to an offering registered under the 1933 Act. The Decision grants an exemption from the requirement to include connected issuer disclosure or cover page related issuer disclosure in an offering document for a private placement of securities of or guaranteed by a Foreign Government.

Please note the following for your information.

Canadian Federal Income Tax Considerations

The offering document in respect of the Foreign Security Private Placement may not contain a discussion of the Canadian tax consequences of the purchase, holding or disposition of the securities offered. You are advised to consult your own tax advisor regarding the Canadian federal income tax considerations relevant to the purchase of securities offered in a Foreign Security Private Placement having regard to your particular circumstances. The Canadian federal income tax considerations relevant to you may differ from the income tax considerations described in the offering document and such differences may be material and adverse.

Dated ?, 2014

CLIENT ACKNOWLEDGEMENT, CONSENT AND REPRESENTATION

I, _____, on behalf of _____, acknowledge receipt of the Notice to Clients dated _____, 2014 and consent to Foreign Security Private Placements made to us by way of offering documents prepared and delivered in reliance on an exemption from the disclosure requirements described in the decision of the Canadian Securities Administrators dated _____, 2014, and represent that _____ is a "permitted client" as defined in National Instrument 31-103 - Registration Requirements, Exemptions and Ongoing Registration Requirements.

Per:_____

I have authority to bind the company

Name:_____

Title: _____

Date: _____

2.1.2 1832 Asset Management L.P.

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Relief granted to two mutual funds for extension of lapse date of respective prospectuses for 52 and 72 days, respectively – Filer will incorporate offering of the two mutual funds under the same offering documents as related family of funds when they are renewed – Extension of lapse date will not affect the currency or accuracy of the information contained in the respective prospectuses.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S. 5, as am., s. 62(5).

August 26, 2014

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
1832 ASSET MANAGEMENT L.P.
(the Filer)

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Filer on behalf of Dynamic U.S. Value Balanced Fund and Dynamic Premium Yield Fund (each, a **Fund**, and collectively, the **Funds**) for a decision (the **Exemption Sought**) under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) that the time limits for the renewal of the simplified prospectus of each Fund be extended to those time limits that would be applicable as if the lapse date of each simplified prospectus and annual information form dated September 20, 2013 and October 8, 2013, respectively, was November 29, 2014.

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission (**OSC**) is the principal regulator for this application, and

(b) the Filers have provided notice that section 4.7(1) of Multilateral Instrument 11-102 - *Passport System* (**MI 11-102**) is intended to be relied upon in each of the other provinces and territories of Canada (together with Ontario, the **Jurisdictions**).

Interpretation

Terms defined in National Instrument 14-101 – *Definitions a*nd MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filer:

1. Each of the Funds is an open-ended mutual fund trust established under the laws of the Province of Ontario and is a reporting issuer as defined in the securities legislation of each of the Jurisdictions.

2. Dynamic U.S. Value Balanced Fund currently distributes its securities in the Jurisdictions pursuant to a simplified prospectus dated September 20, 2013.

3. Dynamic Premium Yield Fund currently distributes its securities in the Jurisdictions pursuant to a simplified prospectus dated October 8, 2013.

4. Amended fund facts that incorporate the requirements of Form 81-101F3 that came into effect on January 13, 2014 (the **Fund Facts**) were supposed to be filed on behalf of each of the Funds on or before May 13, 2014. Due to an administrative oversight, amended Fund Facts were not filed on behalf of each of the Funds until August 19, 2014. The Filer will send to each investor that purchased units of the Funds between June 13, 2014 and August 19, 2014 a notice that will include a copy of the amended Fund Facts that were filed on August 19, 2014.

5. The lapse date of the simplified prospectus of Dynamic U.S. Value Balanced Fund under the Legislation is September 20, 2014. Accordingly, under the Legislation, the distribution of securities of Dynamic U.S. Value Balanced Fund would have to cease on September 20, 2014 unless: (i) Dynamic U.S. Value Balanced Fund files a *pro forma* simplified prospectus at least 30 days prior to September 20, 2014; (ii) the final simplified prospectus is filed no later than 10 days after September 20, 2014; and (iii) a receipt for the final simplified prospectus is obtained within 20 days of September 20, 2014.

6. The lapse date of the simplified prospectus of Dynamic Premium Yield Fund under the Legislation is October 8, 2014. Accordingly, under the Legislation, the distribution of securities of

Dynamic Premium Yield Fund would have to cease on October 8, 2014 unless: (i) Dynamic Premium Yield Fund files a pro forma simplified prospectus at least 30 days prior to October 8, 2014; (ii) the final simplified prospectus is filed no later than 10 days after October 8, 2014; and (iii) a receipt for the final simplified prospectus is obtained within 20 days of October 8, 2014.

7. The Filer is the manager of the Funds. The Filer is also the manager of 102 other Dynamic mutual funds (collectively, the **Other Funds**) that are offered under a simplified prospectus, the lapse date of which is November 29, 2014.

8. The Filer is an Ontario limited partnership, which is wholly-owned, indirectly, by the Bank of Nova Scotia (**BNS**). The general partner of the Filer is 1832 Asset Management G.P. Inc., an Ontario corporation wholly-owned directly by BNS with its head office in Ontario.

9. The Filer is registered as (i) a portfolio manager in all of the provinces of Canada and in the Northwest Territories and the Yukon; (ii) an exempt market dealer in all of the provinces of Canada (except Prince Edward Island and Saskatchewan); (iii) an investment fund manager in Ontario, Quebec, Newfoundland and Labrador and the Northwest Territories; and (iv) a commodity trading manager in Ontario.

10. Except as provided for in paragraph 4 above, neither the Filer nor any of the Funds is in default of securities legislation in any of the Jurisdictions.

11. The Filer wishes to combine the simplified prospectuses of the Funds with the simplified prospectus of the Other Funds in order to reduce the cost of renewing the simplified prospectuses of the Funds and on-going printing and related costs. Offering the Funds under the same offering documents as the Other Funds would facilitate the distribution of the Funds in the Jurisdictions under the same simplified prospectus and would also assist in disseminating information with respect to the Funds and the Other Funds in such matters such as switching between the Funds and the Other Funds. The Other Funds share many common operational and administrative features with the Funds and combining them in the same simplified prospectus will allow investors to more easily compare the features of the Other Funds and the Funds.

12. It would be impractical to alter and modify all the dedicated systems, procedures and resources required to prepare the renewal simplified prospectus, annual information form and fund facts of the Other Funds, and unreasonable to incur the costs and expenses associated therewith, so that the renewal simplified prospectus of the Other Funds can be filed earlier with the renewal simplified prospectus of Dynamic U.S. Value Balanced Fund. As the simplified prospectus of the Other Funds is a very large document and there is an in-depth internal review process that the Filer undertakes when renewing that document, the Filer would not have sufficient time to finalize and file the pro forma simplified prospectus of the Other Funds by at least 30 days prior to September 20, 2014.

13. The Filer may make minor changes to the features of the Other Funds as part of the process of renewing the Other Funds' simplified prospectus in November 2014. The ability to file the simplified prospectuses of the Funds with those of the Other Funds will ensure that the Filer can make the operational and administrative features of the Funds and the Other Funds consistent with each other.

14. If the Exemption Sought is not granted, it will be necessary to renew the simplified prospectuses of the Funds twice within a short period of time in order to consolidate those simplified prospectuses with the simplified prospectus of the Other Funds.

15. There have been no material changes in the affairs of Dynamic U.S. Value Balanced Fund since the date of the simplified prospectus of Dynamic U.S. Value Balanced Fund. Accordingly, the simplified prospectus of Dynamic U.S. Value Balanced Fund represents current information of Dynamic U.S. Value Balanced Fund. In addition, the Fund Facts filed on August 19, 2014 provide even more current information to investors regarding Dynamic U.S. Value Balanced Fund.

16. There have been no material changes in the affairs of Dynamic Premium Yield Fund since the date of the simplified prospectus of Dynamic Premium Yield Fund. Accordingly, the simplified prospectus of Dynamic Premium Yield Fund represents current information of Dynamic Premium Yield Fund. In addition, the Fund Facts filed on August 19, 2014 provide even more current information to investors regarding Dynamic Premium Yield Fund.

17. Given the disclosure obligations of the Funds, should any material changes be proposed, the respective simplified prospectus of each of the Funds will be amended accordingly.

18. New investors of each of the Funds will receive delivery of the respective Fund Facts dated August 19, 2014 of each of the Funds. The respective simplified prospectus of each of the Funds will still be available upon request.

19. The Exemption Sought will not affect the accuracy of the information contained in the respective simplified prospectus or Fund Facts of each of the

Funds, and therefore will not be prejudicial to the public interest.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted.

"Vera Nunes"
Manager, Investment Funds and Structured Products
Ontario Securities Commission

2.1.3 First Asset Investment Management Inc. and First Asset U.S. & Canada Lifeco Income Fund

Headnote

National Policy 11-203 Process for Exemption Relief Applications in Multiple Jurisdictions – The ETF is granted concentration restriction relief to invest up to 15% of its net assets taken at market value at the time of transaction in each of the 10 largest American and/or Canadian life insurance companies to pursue its investment objectives and strategies. Relief also granted to permit a closed-end fund converting into a mutual fund to show pre-conversion past performance in sales communications – the closed-end fund has had the same investment strategies as the ETF and any differences that may affect the performance will be disclosed.

Applicable Legislative Provisions

Section 2.1(1), 15.6(a), 15.6(d) and 19.1 of NI 81-102.

August 26, 2014

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
FIRST ASSET INVESTMENT MANAGEMENT INC.
(the Manager)

AND

FIRST ASSET U.S. & CANADA
LIFECO INCOME FUND
(The Fund)

DECISION

Background

The securities regulatory authority or regulator in the Jurisdiction (the **Decision Maker**) has received an application from the Manager for a decision under the securities legislation of the Jurisdiction (the **Legislation**) for an exemption relieving the Fund from the prohibitions in subsections 2.1(1), 15.6(a) and 15.6(d) of National Instrument 81-102 *Mutual Funds* (**NI 81-102**) to permit the Fund to (a) purchase a security of an issuer, enter into a specified derivatives transaction or purchase an index participation unit, notwithstanding the fact that, immediately after the transaction, more than 10 percent of the net asset value of the mutual fund will be invested in securities of a

single issuer, subject to certain restrictions, and (b) show the historic performance data of its Common Units (as defined below) and Advisor Units (as defined below) in sales communications notwithstanding that it has not, as a mutual fund, distributed its units under a prospectus for 12 consecutive months and to permit sales communications relating to the Fund to contain performance data of the Fund for the period prior to the Fund offering its securities under a prospectus, as a mutual fund (the **Requested Relief**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission (the Commission) is the principal regulator for this application, and

(b) the Manager has provided notice that section 4.7(1) of Multilateral Instrument 11-102 – *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, Yukon, Nunavut and Northwest Territories (collectively, the **Other Jurisdictions**).

Interpretation

Terms defined in National Instrument 14-101 – *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined herein.

Representations

This decision is based on the following facts represented by the Manager:

Organization and Structure of the Funds

1. The Fund is a closed-end investment fund and is in the process of converting into an exchange-traded fund (the Conversion). A press release announcing the conversion was issued on July 16, 2014.

2. Until the completion of the Conversion, the Fund is not a "mutual fund" as defined under applicable securities legislation and does not operate in accordance with the requirements of securities legislation applicable to mutual funds. After the Conversion, the Fund will be a mutual fund subject to NI 81-102, subject to any exemptions therefrom that may be granted by the securities regulatory authorities.

3. The prospectus of the Fund dated July 26, 2013 (the Closed-End Prospectus) stated, under the heading "Exemptions and Approvals", that "prior to the Conversion, the Fund will apply for exemptive relief from subsection 2.1(1) of NI 81-102 which prohibits the Fund from purchasing a security of an issuer if, immediately after the transaction, more than 10 percent of its net asset value would be invested in securities of any issuer".

4. The Manager is the trustee, portfolio adviser and manager of the Fund. The Manager is registered as an investment fund manager, a portfolio manager and an exempt market dealer under the Securities Act (Ontario) and a commodity trading manager under the *Commodity Futures Act* (Ontario). It is also registered as an investment fund manager under the *Securities Act* (Newfoundland and Labrador) and *Securities Act* (Quebec). The head office of the Manager is located at 95 Wellington Street West, Suite 1400, Toronto, Ontario, M5J 2N7.

5. The Manager filed the Closed-End Prospectus with the securities regulatory authority in each province and territory of Canada to qualify the units of the Fund (the **Closed-End Units**) for distribution to the public. The Commission issued a receipt for the Closed-End Prospectus on July 29, 2013.

6. Pursuant to the Declaration of Trust of the Fund, the Fund will automatically convert into an exchange-traded fund after March 31, 2014 if, for a period of 10 consecutive trading days, the daily weighted average trading price (or, in the event there has been no trading on a particular day, the average of the closing bid and ask prices) of the Closed-End Units is at a discount greater than 2% of the net asset value per Closed-End Unit for that day and, in any event, no later than March 31, 2015, subject to applicable regulatory approvals.

7. The Fund is a reporting issuer as defined under the applicable securities legislation of each province and territory of Canada and is not in default of any of the requirements of the securities legislation of the provinces and territories of Canada.

8. In connection with the Conversion, the Declaration of Trust of the Fund will be amended and restated in order to effect the Conversion and to permit the Fund to offer two classes of units: common units (the **Common Units**) and advisor units (the **Advisor Units**, and together with the Common Units, the **ETF Units**). The only difference between the Common Units and the Advisor Units is the management fee payable by the Fund due to the service fee payable by the Manager in respect of the Advisor Units.

9. Unitholders will not be required to take any action in connection with the Conversion, and on the date of the Conversion, the Closed-End Units outstanding will be redesignated as Common Units. Post-Conversion unitholders will have daily redemption rights.

10. The Manager filed a preliminary long form prospectus on July 21, 2014 (the **ETF Prospectus**) to qualify the distribution of the ETF Units under National Instrument 41-101 – *General Prospectus Requirements* in each of the provinces and territories of Canada.

11. A material change report in connection with the filing of the ETF Prospectus and the initiation of the Conversion as a result of the triggering of the Fund's automatic conversion feature in accordance with the Declaration of Trust of the Fund was filed on July 22, 2014.

12. The Closed-End Units are listed on the Toronto Stock Exchange (the **TSX**) and will remain listed on the TSX after the Conversion as Common Units. The Manager, on behalf of the Fund, has applied to list the Advisor Units on the TSX.

13. Following the Conversion, the Fund will be renamed "First Asset U.S. & Canada Lifeco Income ETF", and will be a mutual fund subject to NI 81-102.

Concentration Restriction

14. The Fund was created to invest (the "**Proposed Investments**") in a portfolio (the Portfolio) of publicly-traded common equity securities (the **Portfolio Securities**) of the ten largest U.S. and Canadian life insurance companies by market capitalization (**LifeCo Companies**).

15. As of the date hereof, the LifeCo Companies are comprised of Sun Life Financial Inc., Manulife Financial Corp., Lincoln National Corp., Torchmark Corp., Principal Financial Group, Unum Group, Metlife Inc., Great West Lifeco Inc., Prudential Financial Inc., and Aflac Inc., with an average market capitalization of US$26.6 billion as of July 31, 2014.

16. The Portfolio Securities are some of the most liquid equity securities listed on the NYSE and, if applicable, the TSX, and are less likely to be subject to liquidity concerns than the securities of other issuers. The average daily trading volume of the Portfolio Securities on the NYSE and, if applicable, the TSX, in the month of July 2014 was approximately $1.8 million.

17. The investment objectives of the Fund are to provide unitholders of the Fund with: (i) quarterly cash distributions; (ii) the opportunity for capital appreciation; and (iii) lower overall volatility of Portfolio returns than would be experienced by owning a portfolio of common equity securities of LifeCo Companies directly.

18. The investment strategy of the Fund is to invest in and hold the Portfolio Securities of the LifeCo Companies on an approximately equal weighted basis.

19. The Fund may also sell call options each month on up to 25% of the Portfolio Securities of each LifeCo Company. The Manager may decide, in its discretion, not to sell call options in any month.

20. The Portfolio will not be rebalanced upon Conversion, but will be rebalanced and reconstituted annually after each calendar year or in connection with corporate events, such as mergers or take-over bids, so that immediately following such rebalancing, the Portfolio is comprised of publicly-traded common equity securities of LifeCo Companies on an approximately equal weight basis based on the market capitalization at the end of the calendar year with respect to an annual rebalancing or the prior business day with respect to other rebalancings.

21. Between such rebalancings, the investment of premiums from call options in excess of amounts required to pay expenses and distributions is or, following Conversion, the investment of net proceeds from the sale of additional Units will be, subject to applicable regulatory relief, invested on a pro rata basis. Accordingly, depending on the relative value of the Portfolio Securities at the time of investment, it is possible that immediately after such investment, more than 10% of the Fund's net asset value would be invested in the securities of one issuer.

22. The investment objectives and investment strategies of the Fund, as well as the risk factors associated therewith, were disclosed in the Closed-End Prospectus and the ETF Prospectus and will be disclosed in each renewal prospectus of the Fund.

23. The Portfolio Securities are listed on, among others, either the TSX and/or the New York Stock Exchange (**NYSE**).

24. The LifeCo Companies are the ten largest LifeCo Companies by market capitalization, have a combined market capitalization of approximately $286 billion and represent approximately 87% of the total market capitalization of life insurance companies listed on a North American stock exchange.

25. The liquidity of the Portfolio Securities is further evidenced by the markets for options in connection with the Portfolio Securities. A liquid market for options on the Portfolio Securities is primarily provided by the Montreal Exchange, the NYSE, the Chicago Board Options Exchange, the International Securities Exchange and the NASDAQ, as applicable to each Lifeco Company.

Performance Data Restrictions

26. Following the Conversion, the investment objectives and investment restrictions of the Fund as described in the Closed-End Prospectus will remain substantially similar, except as may be necessary to comply with applicable law, including NI 81-102, subject to the Requested Relief.

27. The Manager expects that the Fund will be managed in a substantially similar manner post-Conversion as it was pre-Conversion. Any changes between the Fund pre- and post-Conversion that could have a material effect on the performance of the Fund will be disclosed in sales communications pertaining to the Fund.

28. For the Common Units, there will be no change in the management fee (0.75% of the net asset value) charged for the Common Units pre- and post-Conversion. For the Advisor Units, post-Conversion the management fee will be 1.50% of the net asset value, which includes a servicing fee of 0.75%.

29. Without the Requested Relief, sales communications pertaining to the Fund will only be permitted to include performance data pertaining to the Common Units for the period commencing after approximately August 25, 2014, being the date on which the Fund is expected to have commenced distributing securities, as a mutual fund.

Decision

The Decision Maker is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Maker under the Legislation is that the Requested Relief is granted, provided that, with respect to the relief for the Concentration Restriction:

(a) The Proposed Investments are in accordance with the investment objectives of the Fund;

(b) The Fund will not purchase equity securities of any LifeCo Company or enter into any transaction to obtain indirect exposure to equity securities of any LifeCo Company if immediately after the transaction, more than 15 percent of the net assets of the Fund, taken at market value at the time of the transaction, would be invested, directly or indirectly, in securities of such LifeCo Company; and

(c) the prospectus of the Fund will disclose the fact that the Fund has obtained the Requested Relief on the terms described in this decision.

"Vera Nunes"
Manager, Investment Funds and Structured Products
Ontario Securities Commission

2.1.4 CMQ Resources Inc.

Headnote

National Policy 11-203 Process For Exemptive Relief Applications in Multiple Jurisdictions – Issuer deemed to no longer be a reporting issuer under securities legislation.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c.S.5, as am., s. 1(10)(a)(ii)

Citation: Re CMQ Resources Inc., 2014 ABASC 334

August 26, 2014

Bennett Jones LLP
4500 Bankers Hall East
855 - 2 Street SW
Calgary, AB T2P 4K7
Attention: Chris Straub

Dear Sir:

Re: CMQ Resources Inc. (the Applicant) – Application for a decision under the securities legislation of Alberta, Ontario and Québec (the Jurisdictions) that the Applicant is not a reporting issuer

The Applicant has applied to the local securities regulatory authority or regulator (the **Decision Maker**) in each of the Jurisdictions for a decision under the securities legislation (the **Legislation**) of the Jurisdictions that the Applicant is not a reporting issuer.

In this decision, “securityholder” means, for a security, the beneficial owner of the security.

The Applicant has represented to the Decision Makers that:

(a) the outstanding securities of the Applicant, including debt securities, are beneficially owned, directly or indirectly, by fewer than 15 securityholders in each of the jurisdictions of Canada and fewer than 51 securityholders in total worldwide;

(b) no securities of the Applicant, including debt securities, are traded in Canada or another country on a marketplace as defined in National Instrument 21-101 *Marketplace Operation* or any other facility for bringing together buyers and sellers of securities where trading data is publicly reported;

(c) the Applicant is applying for a decision that it is not a reporting issuer in all of the jurisdictions of Canada in which it is currently a reporting issuer; and

(d) the Applicant is not in default of any of its obligations under the Legislation as a reporting issuer.

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met and orders that the Applicant is deemed to have ceased to be a reporting issuer and that the Applicant’s status as a reporting issuer is revoked.

"Denise Weeres"
Manager, Legal
Corporate Finance

2.1.5 iShares Advantaged Short Duration High Income ETF and Blackrock Asset Management Canada Limited

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Relief from the requirement to obtain the approval of securityholders before changing the fundamental investment objectives of an exchange traded mutual fund – Relief required as a result of changes to federal budget eliminating certain tax benefits associated with character conversion transactions – Required to send written notice at least 60 days before the effective date of the change to the investment objectives of the fund setting out the change, the reasons for such change, a statement that the fund will no longer distribute gains under forward contracts that are treated as capital gains for tax purposes.

Applicable Legislative Provisions

National Instrument 81-102 Mutual Funds, ss. 5.1(c) and 19.1.

August 26, 2014

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
iSHARES ADVANTAGED SHORT DURATION
HIGH INCOME ETF
(the Fund)

AND

IN THE MATTER OF
BLACKROCK ASSET MANAGEMENT
CANADA LIMITED
(the Filer)

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Filer on behalf of the Fund for a decision under the securities legislation of the Jurisdiction (the Legislation) for an exemption under section 19.1 of National Instrument 81-102 - *Mutual Funds* (**NI 81-102**) from the requirements of subsection 5.1(c) of NI 81-102 in order to permit the Fund to change its fundamental investment objective without obtaining the prior approval of the unitholders of the Fund (the **Exemption Sought).**

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this application; and

(b) the Filer has provided notice that paragraph 4.7(1)(c) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Nunavut and Yukon.

Interpretation

Terms defined in NI 81-102 have the same meaning in this decision as in NI 81-102. Certain other defined terms have the meanings given to them below under "Representations".

Representations

This decision is based on the following facts represented by the Filer:

The Filer

1. The Filer is the trustee and manager of the Fund and is a registered portfolio manager, exempt market dealer and investment fund manager in the Province of Ontario. The Filer is also registered as a commodity trading manager in the Province of Ontario.

2. The principal offices of the Filer and the Fund are located at 161 Bay Street, Suite 2500, Toronto, Ontario, M5J 2S1.

3. Neither the Filer nor the Fund is in default of the securities legislation of any province or territory of Canada.

The Fund

4. The Fund is an exchange-traded fund established under the laws of the Province of Ontario and is a reporting issuer in all provinces and territories of Canada (the Offering Jurisdictions).

5. The Fund is a mutual fund subject to NI 81-102, subject to any exemptions therefrom that have been granted by securities regulatory authorities.

6. The common units and advisor class units of the Fund are listed on the Toronto Stock Exchange (the TSX) and are qualified for distribution in all Offering Jurisdictions pursuant to a (final)

prospectus dated October 16, 2013 (the Prospectus).

7. The common units and advisor class units of the Fund currently trade on the TSX under the ticker symbols CSD and CSD.A, respectively.

8. The Fund's fundamental investment objective, as disclosed in the Prospectus, is as follows:

"[The Fund] has been created to maximize total returns for unitholders consisting of both tax-efficient monthly distributions and capital appreciation, and to preserve capital. Distributions are intended to be tax efficient when compared to units of a trust that depends solely on interest, dividend and/or other investment income to pay distributions."

9. The Fund's investment strategy, as disclosed in the Prospectus, is to obtain exposure to the performance of an actively managed diversified high-yield debt portfolio (the High Income Portfolio) consisting primarily of below investment grade debt securities as rated by Moody's Investor's Services, Inc., Standard & Poor's Financial Services LLC and Fitch Rating Service Inc. (Ba1/BB+/BB+ or below) or which are unrated but judged by the Filer, its affiliates or a sub-advisor to be of comparable quality, with an opportunistic allocation to investment grade debt securities and other select fixed income debt obligations with a near term maturity of five years or less and/or an effective duration of less than one year as determined by the Filer, its affiliates or a sub-advisor.

10. Historically, the Fund has obtained exposure to the High Income Portfolio indirectly by entering into one or more forward purchase and sale agreements with a Canadian chartered bank or an affiliate thereof and does not own and has no right to acquire the High Income Portfolio.

Amendments to the Income Tax Act (Canada)

11. On March 21, 2013 (the **Budget Date**), the federal Minister of Finance proposed new federal taxation rules in connection with the 2013 Federal Budget (the **Tax Amendments**).

12. The Tax Amendments, which were subsequently enacted on December 13, 2013, deem gains on the settlement of certain forward agreements (character conversion transactions) to be included in ordinary income rather than treated as capital gains. In certain circumstances that include compliance with certain growth limits in the notional size of a forward agreement set out in the Tax Amendments (the **Growth Limits**), forward agreements that existed prior to the Budget Date will be "grandfathered", meaning that the Tax Amendments will not apply to them. The two forward agreements of the Fund that were in effect as of the Budget Date, one forward agreement (the **CAD Legacy Forward**) relating to the Canadian dollar-denominated common units and Canadian dollar-denominated advisor class of units of the Fund and one forward agreement (the **USD Legacy Forward**) relating to the U.S. dollar-denominated common units and U.S. dollar-denominated advisor class of units of the Fund (collectively, the **USD Units**), were grandfathered.

13. In the fourth quarter of 2013, the Filer disclosed and implemented certain changes to the Fund in response to the Tax Amendments in order to enable the Fund to resume operating as an open-ended exchange-traded fund by accepting new subscriptions (which, generally, were suspended on an interim basis following the release of the Tax Amendments). In particular: (i) the Fund implemented a new interim investment strategy as described below; and (ii) the USD Units were terminated and de-listed from the TSX and are no longer offered and sold by the Fund. In addition, the USD Legacy Forward was terminated.

14. To preserve the grandfathered status of the CAD Legacy Forward until its final settlement, the Filer has not permitted, and plans not to allow, the Fund to enter into transactions that would result in the CAD Legacy Forward exceeding the Growth Limits.

15. The Fund has implemented a new interim investment strategy (the **Hybrid Strategy**), in accordance with its current investment objective, through which the Fund: (i) continues to maintain exposure to the High Income Portfolio indirectly through the use of the CAD Legacy Forward; and (ii) invests the proceeds from the sale of new units of the Fund in a portfolio of directly-held securities selected from the eligible universe of securities in which the High Income Portfolio is permitted to invest. As of June 20, 2014, approximately $350 million (approximately 87%) of the Fund's assets are invested in the High Income Portfolio indirectly through the use of the CAD Legacy Forward, while approximately $52 million (approximately 13%) of the Fund's assets are invested in a portfolio of directly-held securities.

16. With the implementation of the Hybrid Strategy, unitholders of the Fund will continue to benefit from the tax-advantaged (*i.e.*, capital gain) character of that portion of the Fund's distributions that are funded through the partial settlement of the CAD Legacy Forward until its scheduled expiry on February 24, 2016 or earlier termination. Upon investing the proceeds from new subscriptions directly through the Hybrid Strategy, the Filer expects that these tax benefits will diminish over time as the Fund accepts new subscriptions and the tax benefit is spread over the Fund's larger asset base. The portion of future distributions

derived from the Fund's direct investments is expected to be fully taxable as ordinary income (net of allowable expenses).

17. Following the expiry or earlier termination of the CAD Legacy Forward, the Filer expects that the Fund will invest primarily in a portfolio of directly-held securities and does not intend to enter into any character conversion transactions.

18. The temporary suspension of subscriptions in response to the Tax Amendments was disclosed to unitholders of the Fund in a press release dated April 3, 2013 and subsequently included in a prospectus amendment and material change report, each dated April 15, 2013. The Hybrid Strategy was initially announced to unitholders by way of a press release dated September 17, 2013 and was subsequently described in a prospectus amendment, material change report and amended and restated summary documents, each dated September 27, 2013 and in the Prospectus and final summary documents, each dated October 16, 2013. A description of the Hybrid Strategy was also included in the notice dated October 1, 2013 that was mailed to unitholders of the Fund in connection with the termination of the USD Units. On December 9, 2013, the Filer issued a press release notifying unitholders of the Fund of the implementation of the previously-disclosed Hybrid Strategy and the re-opening of the Fund and subsequently filed amended and restated summary documents on December 20, 2013.

19. The implementation of the Hybrid Strategy has been effected in accordance with the Fund's current investment objective that is described above.

20. The Filer expects that the Fund's distributions will remain tax-advantaged for the time being, with the tax-advantaged component of the Fund's distributions diminishing over time as the Fund accepts new subscriptions and the tax benefit is spread over the Fund's larger asset base. In planning for the expected change to the tax-advantaged nature of the Fund's distributions, it is necessary to change the investment objective of the Fund (the Change of Investment Objective) to remove the references to tax-efficiency such that the Fund's investment objective will read as follows:

"[The Fund] has been created to maximize total returns for unitholders consisting of both monthly distributions and capital appreciation, and to preserve capital, by investing in or obtaining economic exposure to a diversified high-yield debt portfolio consisting primarily of below investment grade debt securities."

Reasons for the Exemption Sought

21. Following a careful review of the impact of the Tax Amendments on the Fund, the Filer implemented the changes described above, including the Hybrid Strategy, in the fourth quarter of 2013 in order to enable the Fund to resume operating as an open-ended exchange-traded fund.

22. Given the expected change to the tax-advantaged nature of the Fund's distributions over time as a result of the implementation of the Hybrid Strategy, the Filer has determined that it is necessary to implement the Change of Investment Objective (through the amendment of the declaration of trust governing the Fund) as it will no longer be possible for the Fund to pursue the tax-advantaged elements of its current investment objective.

23. The Change of Investment Objective will become necessary as a consequence of the Tax Amendments and the implementation of the Hybrid Strategy in response thereto.

24. The Filer believes that the Change of Investment Objective will not affect the risk profile of the Fund or the suitability of the Fund for existing unitholders.

25. To effectively communicate the Change of Investment Objective to unitholders of the Fund, the Filer proposes to provide not less than 60 days' written notice to Fund unitholders of the Change of Investment Objective. In addition, the Filer will treat the Change of Investment Objective as a "material change" and, thereby, the Fund will issue a press release and file a material change report, prospectus amendment and amended and restated summary documents.

26. The unitholder notice and material change disclosure will provide sufficient notice and information to Fund unitholders of the Change of Investment Objective, particularly since the impact of the Tax Amendments and the corresponding implementation of the Hybrid Strategy by the Fund were previously fully disclosed to unitholders of the Fund as described above.

27. With such notice and material change disclosure relating to the Change of Investment Objective, the prior disclosure of the changes to the Fund, including the implementation of the Hybrid Strategy, and the general media coverage of the Tax Amendments, unitholders of the Fund will be in a fully informed position to make an investment decision relating to their continuing participation in the Fund following the implementation of the Change of Investment Objective and will have adequate notice in order to sell their units through the facilities of the TSX if they are not in favour of the change.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that, at least 60 days before the effective date of the Change of Investment Objective, the Filer sends to each unitholder of the Fund a written notice that sets out the change of investment objective, the reasons for such change and a statement that the Fund will no longer be able to provide tax-advantaged returns after the expiration or earlier termination of the CAD Legacy Forward.

"Vera Nunes"
Manager, Investment Funds and Structured Products Branch
Ontario Securities Commission

2.1.6 Tranzeo Wireless Technologies Inc.

Headnote

National Policy 11-203 Process For Exemptive Relief Applications in Multiple Jurisdictions – Issuer deemed to no longer be a reporting issuer under securities legislation.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c.S.5, as am., s. 1(10)(a)(ii)

August 28, 2014

McMillan LLP
1500 – 1055 West Georgia Street
Vancouver, BC V6E 4N7

Attention: Daniel Lau

Dear Mr. Lau:

Re: Tranzeo Wireless Technologies Inc. (the Applicant) – application for a decision under the securities legislation of Ontario, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia, Newfoundland and Labrador and Prince Edward Island (the Jurisdictions) that the Applicant is not a reporting issuer

The Applicant has applied to the local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions for a decision under the securities legislation (the Legislation) of the Jurisdictions that the Applicant is not a reporting issuer.

In this decision, "securityholder" means, for a security, the beneficial owner of the security.

The Applicant has represented to the Decision Makers that:

(a) the outstanding securities of the Applicant, including debt securities, are beneficially owned, directly or indirectly, by fewer than 15 securityholders in each of the jurisdictions of Canada and fewer than 51 securityholders in total worldwide;

(b) no securities of the Applicant, including debt securities, are traded in Canada or another country on a marketplace as defined in National Instrument 21-101 *Marketplace Operation* or any other facility for bringing together buyers and sellers of securities where trading data is publicly reported;

(c) the Applicant is applying for a decision that it is not a reporting issuer in all of the jurisdictions of Canada in which it is currently a reporting issuer; and

(d) the Applicant is not in default of any of its obligations under the Legislation as a reporting issuer.

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met and orders that the Applicant is not a reporting issuer.

"Kathryn Daniels"
Deputy Director, Corporate Finance
Ontario Securities Commission

2.2 Orders

2.2.1 Pro-Financial Asset Management Inc.

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

AND

IN THE MATTER OF
PRO-FINANCIAL ASSET MANAGEMENT INC.

ORDER

WHEREAS on May 17, 2013, the Commission issued a temporary order (the "Temporary Order") with respect to Pro-Financial Asset Management Inc. ("PFAM") pursuant to subsections 127(1) and (5) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") ordering that:

(i) pursuant to paragraph 1 of subsection 127(1) of the Act, the registration of PFAM as a dealer in the category of exempt market dealer be suspended and the following terms and conditions apply to the registration of PFAM as an adviser in the category of portfolio manager ("PM") and to its operation as an investment fund manager ("IFM"):

a. PFAM's activities as a PM and IFM shall be applied exclusively to the Managed Accounts (as defined in the Temporary Order) and to the Pro-Hedge Funds and Pro-Index Funds (as defined in the Temporary Order); and

b. PFAM shall not accept any new clients or open any new client accounts of any kind in respect of the Managed Accounts;

(ii) pursuant to subsection 127(6) of the Act, the Temporary Order shall take effect immediately and shall expire on the fifteenth day after its making unless extended by order of the Commission;

AND WHEREAS on May 28, 2013, the Commission ordered: (i) the Temporary Order be extended to June 27, 2013; (ii) the hearing to consider whether to further extend the terms of the Temporary Order and/or to make any further order as to PFAM's registration proceed on June 26, 2013 at 10:00 a.m.;

AND WHEREAS on June 26, 2013, the Commission ordered that: (i) the Temporary Order be extended to July 15, 2013; and (ii) the affidavit of Michael Denyszyn sworn May 24, 2013 not be marked as an exhibit until the next appearance in the absence of a Commission order to the contrary; and the hearing to consider this matter proceed on July 12, 2012;

AND WHEREAS on July 11, 2013, the Commission ordered that: (i) the Temporary Order be extended to July 22, 2013; (ii) the hearing be adjourned to July 18, 2013 at 11:00 a.m.; and (iii) the hearing date of July 12, 2013 at 10:00 a.m. be vacated;

AND WHEREAS on July 18, 2013, PFAM brought a motion (the "First PFAM Motion") that the hearing be held in camera and that the affidavits of Michael Denyszyn sworn May 24 and June 24, 2013 and the affidavit of Michael Ho sworn July 17, 2013 (collectively the "Staff Affidavits") either not be admitted as evidence or else be treated as confidential documents and the parties agreed that the motion should be heard in camera;

AND WHEREAS on July 18, 2013, PFAM's counsel filed supporting documents (the "PFAM Materials") in support of the First PFAM Motion and counsel for PFAM and Staff made oral submissions and filed written submissions;

AND WHEREAS on July 22, 2013, the Commission ordered:

(i) the Temporary Order be extended to August 26, 2013;

(ii) leave be granted to the parties to file written submissions in respect of the First PFAM Motion;

(iii) the Staff Affidavits, the transcript of the PFAM motion, the PFAM Materials, written submissions filed by Staff and PFAM and other documents presented during the course of the First PFAM Motion shall be treated as confidential documents until further direction or order of the Commission; and

(iv) the hearing be adjourned to August 23, 2013 at 10:00 a.m.;

AND WHEREAS on August 23, 2013, Staff filed with the Commission the affidavit of Michael Ho sworn August 22, 2013 and PFAM's counsel filed the affidavit of Stuart McKinnon dated August 23, 2013 but the parties did not seek to mark these affidavits as exhibits;

AND WHEREAS on August 23, 2013, Staff and counsel for PFAM advised the Commission that the parties had agreed on the terms of a draft order;

AND WHEREAS on August 23, 2013, PFAM requested that the hearing be held in camera so PFAM's submissions on certain confidentiality issues could be heard and Staff did not oppose PFAM's request;

AND WHEREAS on August 27, 2013, the Commission ordered:

(i) the Temporary Order be extended to October 11, 2013;

(ii) the affidavit of Michael Ho sworn August 22, 2013 and the affidavit of Stuart McKinnon sworn August 23, 2013 be treated as confidential documents until further order of the Commission;

(iii) PFAM will deliver to Staff the final principal protected note ("PPN") reconciliation report by 4:30 p.m. on September 30, 2013; and

(iv) the hearing to consider whether to: (i) make any further order as to PFAM's registration as an adviser in the category of PM or in respect of its operation as an IFM, as a result of PFAM's ongoing capital deficiency; and/or (ii) otherwise vary or extend the terms of the Temporary Order, proceed on October 9, 2013 at 11:00 a.m.;

AND WHEREAS on October 9, 2013, PFAM brought a second motion (the "Second PFAM Motion") for an order that the hearing be held in camera and for a confidentiality order treating as confidential documents: (i) the Staff and PFAM affidavits; (ii) all facta and correspondence exchanged by Staff and PFAM; and (iii) any transcript of this and prior *in camera* proceedings;

AND WHEREAS on October 9, 2013, PFAM's counsel filed written submissions dated October 8, 2013, the affidavit of Stuart McKinnon sworn October 7, 2013 and the affidavit of Kenneth White sworn October 7, 2013 in support of the Second PFAM Motion and Staff filed written submissions dated October 9, 2013 and the affidavit of Michael Ho sworn October 8, 2013 and opposed the request for an *in camera* hearing and for the confidentiality order;

AND WHEREAS on October 9, 2013, the Commission heard submissions from counsel on the Second PFAM Motion *in camera* and the Commission requested the parties to prepare a draft order that, among other matters, addressed the confidentiality of documents filed with the Commission and permitted BNP Paribas Canada ("BNP") and Société Générale Canada ("SGC") (collectively the "Banks") to review certain documents attached to Staff affidavits dealing substantively with the PPN reconciliation process, provided the Banks treated such documents as confidential;

AND WHEREAS on October 11, 2013, the Commission ordered that:

(i) the Temporary Order be extended to December 15, 2013;

(ii) the affidavit of Michael Ho sworn October 8, 2013, the affidavit of Stuart McKinnon sworn October 7, 2013, the affidavit of Kenneth White sworn October 7, 2013 and the written submissions of the parties dated October 8 and 9, 2013 be treated as confidential documents until further order of the Commission; and

(iii) the hearing to consider whether to: (i) make any further order as to PFAM's registration as an adviser in the category of PM or in respect of its operation as an IFM, as a result of PFAM's ongoing capital deficiency; and/or (ii) otherwise vary or extend the terms of the Temporary Order, shall proceed on December 12, 2013 at 10:00 a.m.;

AND WHEREAS on October 17, 2013, the Commission ordered (the "October 17, 2013 Order") that:

(i) the affidavit of Michael Ho sworn October 8, 2013, the affidavit of Stuart McKinnon sworn October 7, 2013, the affidavit of Kenneth White sworn October 7, 2013 and the written submissions of the parties dated October 8 and 9, 2013 be treated as confidential documents until further order of the Commission;

(ii) the previous orders as to confidentiality made by the Commission on July 22, 2013 and August 27, 2013 remain in force until further order or direction of the Commission; and

(iii) documents related to the PPN reconciliation process listed on Schedule "A" to the October 17, 2013 Order be provided to counsel for the Banks on condition that the Banks treat those documents as confidential documents and not provide copies to any third party without further direction or order of the Commission;

AND WHEREAS on September 30, 2013, PFAM agreed to sell to another portfolio manager (the "Purchaser") PFAM's interest in all of the investment management contracts for the Pro-Index Funds and the Managed Accounts (the "First Transaction"). In a second transaction, an investor agreed to purchase through a corporation (the "Investor") all of the shares of the Purchaser (the "Second Transaction"):

AND WHEREAS on October 22, 2013, the Purchaser and PFAM filed a notification letter providing Compliance and Registrant Regulation Branch ("CRR Branch") Staff with notice ("Notice") of the application filed under section 11.9 and 11.10 of National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("NI 31-103") relating to the First Transaction and the Second Transaction (collectively, the "Transactions");

AND WHEREAS on November 5, 2013, the staff member of the CRR Branch conducting the review of the Notice requested copies of the affidavits of Michael Denyszyn sworn May 24 and June 24, 2013, the affidavits of Michael Ho sworn July 17, August 22 and October 8, 2013, the affidavits of Stuart McKinnon sworn July 17, August 23 and October 7, 2013, the affidavit of Kenneth White sworn October 7, 2013 and the submissions of Staff and Pro-Financial Asset Management Inc. ("PFAM") (collectively, the "Confidential Documents");

AND WHEREAS on November 12, 2013, PFAM filed an application with the Investment Funds Branch ("IF Branch") of the Commission for an order under section 5.5 of National Instrument 81-102 – Mutual Funds ("NI 81-102") for approval of the Purchaser as investment fund manager of the Pro-Index Funds and the Purchaser applied on October 24, 2013 for registration in the investment fund manager category for this purpose;

AND WHEREAS on November 13, 2013, Staff filed a Notice of Motion returnable on a date to be determined by the Secretary's office seeking an Order that Staff of the Enforcement Branch be permitted to provide some or all of the Confidential Documents to certain staff members of the CRR Branch and the IF Branch;

AND WHEREAS on November 25, 2013, the Commission ordered that:

(i) Staff of the Enforcement Branch be permitted to provide the Confidential Documents to the following persons:

a. the staff members of the CRR Branch assigned to review the Notice;

b. the staff member who has been designated to act in the capacity of the Director on behalf of the CRR Branch for the purposes of deciding whether to object to the Notice;

c. the staff members of the IF Branch who have been assigned to review the application made by PFAM or the Purchaser under section 5.5 of NI 81-102; and

d. the staff member who has been designated to act in the capacity of the "Director" for the purposes of deciding whether to approve the application under section 5.5 of NI 81-102;

(ii) The CRR staff members assigned to review the Notice be permitted to provide relevant information derived from the Confidential Documents ("Relevant Information") to PFAM, the Purchaser and their counsel involved in the Notice as part of the CRR staff members' review and analysis of the Notice on condition that the recipients of such information treat it as confidential and not provide it to any third party without further direction or order of the Commission;

(iii) The IF staff members assigned to review the application for change of fund manager be permitted to provide Relevant Information to PFAM, the Purchaser and their counsel involved in the application filed under NI 81-102 as part of the Investment Funds staff members' review and analysis of the application on condition that the recipients of such information treat it as confidential and not provide it to any third party without further direction or order of the Commission;

(iv) The CRR staff members assigned to review the Notice be permitted to provide Relevant Information to the Investor or its counsel with the consent of PFAM; and

(v) The parties may seek direction from the Commission in the event that the CRR staff members and PFAM cannot agree on whether Relevant Information should be provided to the Investor or its counsel;

AND WHEREAS Staff has filed an affidavit of Michael Ho sworn December 10, 2013 attaching a letter from counsel to Investment Administration Solution Inc. ("IAS"), PFAM's recordkeeper for the PPNs, requesting a copy of the PPN reconciliation report submitted by PFAM to Staff;

AND WHEREAS PFAM's counsel provided to Staff and to the Commission and made submissions based on an affidavit of Stuart McKinnon sworn December 11, 2013 which was not marked as an exhibit on December 12, 2013 at the Commission hearing held that day;

AND WHEREAS on December 12, 2013, Staff and counsel for PFAM appeared before the Commission and made submissions on: (i) the appropriate form of order to govern the provision of the Confidential Documents to other members of Staff of the Commission; and (ii) whether IAS should receive copies of the PPN reconciliation reports submitted by PFAM to Staff;

AND WHEREAS by Commission Order dated December 13, 2013, the Commission ordered that:

(i) the Confidential Documents may be provided to any member of Staff of the Commission, as necessary in the course of their duties;

(ii) the Temporary Order be extended to January 24, 2014;

(iii) the hearing be adjourned to January 21, 2014 at 11:00 a.m.; and

(iv) Staff shall be entitled to provide a copy of each document relating to the PPN reconciliation process listed on Schedule "A" of the October 13, 2013 order to counsel for IAS on the conditions that: (a) IAS treat those documents as confidential and not provide them to any third party without further direction or order of the Commission; and (b) IAS may use the documents for the purpose of assisting Staff in resolving the PPN discrepancy, and for no other purpose;

AND WHEREAS on January 15, 2014, PFAM's counsel advised Staff that the prospectus for the distribution of securities of the Pro- Index Funds had passed its lapse date on January 14, 2014 and PFAM's counsel requested a lapse date extension of 40 days from Staff;

AND WHEREAS on January 17, 2014, PFAM's counsel filed a pre-hearing conference memorandum ("PFAM's Pre-Hearing Memorandum") with the Secretary's office to discuss various issues and seek an Order granting an extension to the lapse date for the Pro-Index Funds under subsection 62(5) of the Act (the "Lapse Date Relief");

AND WHEREAS PFAM filed the affidavit of Stuart McKinnon sworn January 19, 2014 with the Secretary's office and Staff filed the affidavit of Susan Thomas sworn January 20, 2014 with the Secretary's office but neither party marked either affidavit as an exhibit at the appearance on January 21, 2014;

AND WHEREAS on January 21, 2014, Staff and PFAM's counsel appeared before the Commission and Staff advised the Commission that: (i) Staff's review of the Notice was expected to take another three to four weeks; (ii) the parties agreed that the prior confidentiality orders should be revised to permit Staff to provide the Confidential Documents or excerpts therefrom to the Purchaser, the Investor and their counsel as Staff determines necessary in the course of their duties and on the condition that the recipients treat such documents as confidential and not disclose them to any third party without further direction or order of the Commission; and (iii) the parties agreed that the Temporary Order should be extended;

AND WHEREAS on January 21, 2014, PFAM's counsel requested that submissions relating to the issues raised in PFAM's Pre-Hearing Memorandum be made *in camera* pursuant to Rule 6 of the Commission's *Rules of Procedure*, Staff opposed PFAM's request, and the Commission directed and the parties made submissions *in camera* on the Lapse Date Relief;

AND WHEREAS on January 21, 2014, the Commission ordered that: (i) the Temporary Order be extended to February 24, 2014; (ii) the hearing be adjourned to February 21, 2014 at 2:00 p.m.; (iii) Staff who have received the Confidential Documents be permitted to provide the Confidential Documents or an excerpt of the Confidential Documents to the Purchaser, the Investor and their counsel as set out in the Order; and (iv) PFAM be granted the Lapse Date Relief under subsection 62(5) of the Act to extend the lapse date for the Pro-Index Funds to February 24, 2014 on the conditions set out in the Order;

AND WHEREAS on February 14, 2014, PFAM's counsel served on Staff and filed a pre-hearing conference memorandum with the Secretary's office and requested a confidential pre-hearing conference during the week of February 24, 2014;

AND WHEREAS on February 21, 2014, PFAM's counsel was unavailable to attend before the Commission so the Commission ordered: (i) the Temporary Order be extended to March 6, 2014; (ii) the hearing be adjourned to March 3, 2014 at 11:00 a.m.; and (iii) a confidential pre-hearing conference proceed on February 25, 2014 at 3:30 p.m.;

AND WHEREAS PFAM's counsel requested in his prehearing conference memorandum an extension to the lapse date for the Pro-Index Funds which was previously extended to February 24, 2014 by Commission order dated January 21, 2014 (the "Further Lapse Date Relief");

AND WHEREAS in connection with a confidential pre-hearing conference on February 25, 2014 and the appearance on March 3, 2014, Staff filed the affidavit of Michael Ho sworn February 24, 2014 and written submissions dated February 28, 2014 to oppose the request for the Further Lapse Date Relief and PFAM's counsel filed the affidavits of Stuart McKinnon sworn February 21, 2014 and March 3, 2014 and a factum dated March 3, 2014 in support of the Further Lapse Date Relief;

AND WHEREAS on March 3, 2014, counsel for PFAM requested that submissions relating to the Further Lapse Date Relief be heard *in camera* and the Commission agreed to this request and the parties made oral submissions *in camera* on the issue of whether the Commission should grant the Further Lapse Date Relief;

AND WHEREAS on March 3, 2014, the Commission ordered that the Further Lapse Date Relief would be granted until April 7, 2014 subject to: (i) PFAM issuing a news release, in a form satisfactory to Staff, to ensure that investors receive full disclosure of the matters identified by Staff as set out below; and (ii) PFAM only being permitted to distribute securities of the Pro-Index Funds to existing securityholders of the Pro-Index Funds;

AND WHEREAS on March 3, 2014, the Commission advised, in the public portion of the hearing, that there had been two Director decisions recently made affecting PFAM (the "Director Decisions") and PFAM's counsel advised that the affected parties would seek a hearing and review under subsection 8(2) of the Act of both of the Director Decisions on an expedited basis;

AND WHEREAS on March 4, 2014, the Commission ordered: (i) the terms and conditions imposed on PFAM's registration by the Temporary Order be deleted and replaced with new terms and conditions which provided that PFAM shall not accept any new clients or open any new client accounts of any kind in respect of its Managed Accounts and that PFAM may only distribute securities of the Pro-Index Funds to existing securityholders of the Pro-Index Funds (the "Distribution Restriction"); (ii) PFAM be granted the Further Lapse Date Relief under subsection 62(5) of the Act to extend the lapse date for the Pro-Index Funds to April 7, 2014 subject to the conditions that: (a) PFAM issue a news release by March 6, 2014, in a form satisfactory to Staff, providing disclosure about the specific items set out in the March 4, 2014 order; and (b) PFAM comply with the terms of the March 4, 2014 order; (iii) the hearing be adjourned to April 7, 2014 at 10:00 a.m.; and (iv) the Temporary Order be extended to April 10, 2014;

AND WHEREAS on March 6, 2014, a confidential prehearing conference was held to consider a motion by counsel to the Purchaser and the Investor to vary the Distribution Restriction imposed by the Commission in the March 4, 2014 order, so that PFAM could continue distributing securities until April 7, 2014 to new investors after issuing the press release provided for in the March 4 order (the "Variation Motion");

AND WHEREAS on March 6, 2014, the Commission was of the view that the hearing of the Variation Motion should proceed only after a notice of the Variation Motion has been filed with the Secretary's office so that the public could be advised of the hearing;

AND WHEREAS on March 6, 2014, the Commission ordered that: (i) portions of the Commission decision of March 3, 2014 imposing the Distribution Restriction and deleting and replacing the terms and conditions on PFAM's registration and operation be stayed until March 11, 2014; (ii) PFAM be granted lapse date relief to extend the lapse date for the Pro-Index Funds to March 11, 2014; (iii) the Purchaser and the Investor file notice of the Variation Motion with the Secretary's office; and (iv) the Variation Motion be adjourned to March 11, 2014 at 1:00 p.m.;

AND WHEREAS the Purchaser and Investor's counsel filed the affidavit of Diego Beltran sworn March 5, 2014, the affidavit of Stuart McKinnon sworn March 11, 2014 and written submissions dated March 6, 2014 in support of the Variation Motion and Staff filed the affidavit of Michael Ho sworn March 10, 2014 and written submissions dated March 10, 2014 to oppose the Variation Motion;

AND WHEREAS on March 11, 2014, the Purchaser and the Investor's counsel made a request that the hearing of the Variation Motion proceed *in camera* and Staff opposed the request and the Purchaser and Investor's counsel and Staff made oral submissions and the Commission denied the request that the hearing proceed *in camera*;

AND WHEREAS on March 11, 2014, Staff opposed the Variation Motion and the Purchaser and Investor's counsel and Staff made oral submissions on the Variation Motion and Staff advised that a separate order will be required to cease the distribution of securities of the Pro-Index Funds to new investors as of March 11, 2014 if the Variation Motion is dismissed;

AND WHEREAS on March 11, 2014, the Commission ordered that: (i) the Variation Motion be dismissed; and (ii) the distribution of securities of the Pro-Index Funds to new investors be ceased as of the end of the day on March 11, 2014;

AND WHEREAS PFAM filed the affidavit of Stuart McKinnon sworn April 4, 2014 in support of its request for a further lapse date extension (the "Third Lapse Date Extension Request") and requested that the affidavit be treated on a confidential basis and Staff filed an affidavit of Mostafa Asadi sworn April 4, 2014 and opposed the Third Lapse Date Extension Request on the basis that PFAM has not filed the annual audited financial statements or the annual management reports of fund performance for the Pro-Index Funds which were due on March 31, 2014;

AND WHEREAS on April 7, 2014, PFAM's counsel requested that the submissions of the parties be heard *in camera* and Staff opposed the request and the Commission directed PFAM's counsel and Staff to make oral submissions *in camera*;

AND WHEREAS on April 7, 2014, Staff requested permission to provide a copy of the affidavit of Stuart McKinnon sworn April 4, 2014 to IAS or its legal counsel prior to the argument of PFAM's Third Lapse Date Request and PFAM's counsel opposed Staff's request;

AND WHEREAS on April 7, 2014, the parties made submissions *in camera* and the Commission directed that the affidavit of Stuart McKinnon sworn April 4, 2014 shall not be received on a confidential basis and directed that the correspondence between Staff and PFAM's counsel be treated as confidential;

AND WHEREAS on April 7, 2014, the Commission ordered that: (i) the lapse date for the Pro-Index Funds be extended to April 21, 2014; (ii) the affidavit of Stuart McKinnon sworn April 4, 2014 shall appear on the public record except for exhibits containing the correspondence between Staff and PFAM's counsel, including enclosures; (iii) Staff shall be entitled to provide a copy of the affidavit of Stuart McKinnon sworn April 4, 2014 to IAS or IAS' legal counsel subject to the conditions that IAS shall treat as confidential all correspondence between PFAM and Staff forming part of the affidavit and IAS shall only use the affidavit to assist Staff in the ongoing proceeding; (iv) the Temporary Order be extended to April 21, 2014; and (v) the hearing be adjourned to April 17, 2014 at 11:00 a.m. to argue the Third Lapse Date Extension Request.

AND WHEREAS on April 17, 2014, Staff filed the affidavit of Michael Ho sworn April 11, 2014 to oppose the Third Lapse Date Extension Request and PFAM filed the affidavit of Stuart McKinnon sworn April 16, 2014 in support of the Third Lapse Date Extension Request;

AND WHEREAS on April 17, 2014, PFAM's counsel requested that the submissions of the parties on the Third Lapse Date Extension Request be heard *in camera* and Staff opposed PFAM's request and the Commission directed that the parties' submissions on the Third Lapse Date Extension Request would not be heard *in camera*;

AND WHEREAS on April 17, 2014, PFAM's counsel made oral submissions and filed written submissions dated April 7 and 17, 2014 in support of the Third Lapse Date Extension Request and Staff made oral and filed written submissions dated April 14, 2014 to oppose PFAM's request and after hearing the parties' submissions, the Commission reserved its decision and adjourned the hearing to April 21, 2014 at 2:00 p.m.;

AND WHEREAS on April 21, 2014, the Commission dismissed the Third Lapse Date Extension Request and provided oral reasons for its decision;

AND WHEREAS on April 21, 2014, the Commission ordered that: (i) the Third Lapse Date Extension Request be dismissed without prejudice to PFAM bringing an application under section 144 to vary or revoke this order if the audited financial statements and management reports of fund performance for the Pro-Index Funds are filed with the Commission; (ii) notwithstanding that the lapse date for the Pro-Index Funds was previously extended to April 21, 2014, the distribution of securities of the Pro-Index Funds shall cease as of the end of the day on April 21, 2014; (iii) the Temporary Order be extended to May 27, 2014; and (iv) the hearing be adjourned to May 23, 2014 at 10:00 a.m.;

AND WHEREAS on May 23, 2014, Staff filed the affidavit of Michael Ho sworn May 22, 2014 to: (i) update the Commission on the payments by PFAM on March 31, April 7 and 8, 2014 of maturity proceeds for certain series of PPNs to an escrow agent as arranged by the Banks and agreed to by PFAM; and (ii) confirm that the current discrepancy between the records of the recordkeeper and the trustee remains unchanged and indicates that the total cash obligation to PPN noteholders exceeds the amount in the trustee's records by $1,222,549.45;

AND WHEREAS on May 23, 2014, the Commission ordered that: (i) the term and condition on PFAM's registration which stated that "PFAM may only distribute securities of the Pro-Index Funds to existing security holders of the Pro-Index

Funds" be deleted and replaced with "PFAM shall not distribute securities of the Pro-Index Funds"; (ii) a confidential pre-hearing conference be held on June 5, 2014 at 10:00 a.m.; (iii) the hearing be adjourned to July 2, 2014 at 10:00 a.m.; and (iv) the Temporary Order be extended to July 4, 2014;

AND WHEREAS the Secretary's office advised the parties that the Commission was not available on July 2, 2014 and the parties agreed to adjourn the hearing to July 9, 2014 at 10:00 a.m. and to extend the Temporary Order to July 11, 2014;

AND WHEREAS on June 11, 2014, the Commission ordered that: (i) a confidential pre-hearing conference in respect of the section 8 hearing and review of the Director Decisions be held on June 26, 2014 at 2:00 p.m.; (ii) the hearing be adjourned to July 9, 2014 at 10:00 a.m.; and (iii) the Temporary Order be extended to July 11, 2014;

AND WHEREAS on July 9, 2014, the Commission ordered that: (i) the hearing be adjourned to August 8, 2014 at 10:00 a.m.; and (ii) the Temporary Order as amended by previous Commission orders be extended to August 11, 2014;

AND WHEREAS on July 9 and 10, 2014, the Commission held a hearing and review under subsection 8(2) of the Act to consider the decision of the Director of the CRR Branch to object to the Transactions;

AND WHEREAS on July 16, 2014, the Commission approved the Transactions under subsections 11.9(5) and 11.10(6) of NI 31-103 subject to nine terms and conditions;

AND WHEREAS on August 8, 2014, counsel for PFAM requested a short adjournment to permit counsel with carriage of the PFAM matter to attend before the Commission to make submissions on the affidavit of Michael Ho sworn August 7, 2014;

AND WHEREAS on August 8, 2014, the Commission ordered that the Temporary Order be extended to August 29, 2014 and the hearing be adjourned to August 26, 2014 at 10:00 a.m. to hear submissions from the parties;

AND WHEREAS on August 26, 2014, Staff filed the affidavit of Michael Ho sworn August 7, 2014 to update the Commission on the complaints received by Staff from PPN noteholders and advisers to PPN noteholders and to set out Staff's information that: (i) in June 2014, PFAM resigned as administrator for the PPNs issued by the Banks; (ii) eight of the nine series of PPNs have matured; (iii) two series of PPNs have been paid out to PPN noteholders at maturity in 2010 and 2011; (iv) in March and April, 2014, the maturity proceeds for five series of PPNs which matured between December 2012 and March 31, 2014 inclusive were paid to escrow accounts at the BMO Trust Company ("BMO Trust"); (v) one series of PPNs matured on June 30, 2014 and the maturity proceeds have been paid to BMO Trust; (vi) BNP has advised Staff that BNP intends to fund the shortfall and to pay the PPN noteholders the full redemption amounts on the matured series of PPNs issued by BNP; (vii) SGC has advised Staff that SGC has paid the full proceeds payable upon maturity for the matured series of PPNs issued by SGC and such funds are being held in escrow at BMO Trust; (viii) BNP has advised Staff that BNP is currently making the necessary administrative arrangements to make payments to PPN noteholders directly; and (ix) SGC has advised Staff that SGC is carefully reviewing the registers and other records available to identify PPN noteholders and SGC will make arrangement for payment once sufficient reliable information is available;

AND WHEREAS Staff and counsel for PFAM have advised that the parties consent to the adjournment of the hearing to September 29, 2014 and to the extension of the Temporary Order to October 1, 2014;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make this order;

IT IS HEREBY ORDERED that the hearing is adjourned to September 29, 2014 at 10:00 a.m. and the Temporary Order as amended by previous Commission orders is extended to October 1, 2014.

DATED at Toronto this 26th day of August, 2014.

"James E. A. Turner"

2.2.2 Kalenjin Advisory Ltd. – s. 74(1)

August 27, 2014

Headnote

Investment advice by an investment adviser registered with the United States Securities and Exchange Commission exempted from the requirements of paragraph 25(3) of the Act, subject to certain conditions - investment advice is with respect to foreign securities – advice only provided to high net worth individuals resident in the United States – supervisory memorandum of understanding between the Ontario Securities Commission and the filer's principal regulator – relief subject to five year sunset clause.

Applicable Legislative Provisions

Statutes Cited

Securities Act, R.S.O. 1990, c. S.5, as am., s. 25(3).

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, AS AMENDED
(The Act)

AND

IN THE MATTER OF
KALENJIN ADVISORY LTD.

ORDER
(Subsection 74(1) of the Act)

UPON the application (the **Application**) of Kalenjin Advisory Ltd. (the **Applicant**) to the Ontario Securities Commission (the **Commission** or **OSC**) for an order, pursuant to subsection 74(1) of the Act, that the Applicant and any individuals engaging in, or holding themselves out as engaging in, the business of advising others on the Applicants' behalf (the **Representatives**) be exempt, for a period of five years, from the adviser registration requirements in subsection 25(3) of the Act, subject to certain terms and conditions (the **Exemption Sought**);

AND UPON considering the Application and the recommendation of staff of the Commission;

AND UPON the Applicants having represented to the Commission that:

1. The Applicant is a corporation formed pursuant to the laws of Belize with a head office located in Belize City and an office located in Toronto, Ontario.

2. The Applicant is registered with the United States Securities and Exchange Commission (SEC) as an investment adviser and is subject to all of the provisions of the United States *Investment Advisers Act of 1940* and the rules thereunder.

3. Martin Walsh McGuire, the principal and the sole advising representative of the Applicant, is resident in Toronto, Ontario (the **Representative**).

4. The Commission has a supervisory memorandum of understanding (**MOU**) in place with the SEC for mutual cooperation and information sharing. The MOU would include oversight of the Applicant.

5. The Applicant is not registered in any capacity under the Act. Neither the Applicant, nor any individual acting on its behalf, will act as an adviser to persons or companies resident in Ontario unless the Applicant or any individual acting on its behalf is appropriately registered, or relying on an exemption from registration, under Ontario securities law.

6. The Applicant and its Representatives provide advice (**Securities Advice**) to high net worth individuals resident in the United States (**U.S. Clients**) on securities that are traded on organized exchanges located outside of Canada (hereinafter referred to as **Foreign Securities**).

7. The Applicant and the Representative are currently in compliance with all registration and other requirements of applicable securities laws of the United States in respect of providing Securities Advice to U.S. Clients. The Applicant

and its Representatives will continue to comply with all registration and other requirements of applicable securities laws of the United States in respect of providing Securities Advice to U.S. Clients.

8. The Applicant will not provide any Securities Advice to residents of Canada.

9. The Applicant is in default of securities laws in Ontario in respect of the following activities carried out from Ontario that did not comply with the registration requirements under applicable Ontario securities laws. The Applicant understands that the Exemption Sought is only in effect from the date of this decision:

   a. Since December 28, 2011, the Applicant and the Representative have provided discretionary advice to U.S. Clients. The Applicant currently has approximately five accounts for U.S. Clients.

   b. Although the above activities of the Applicant and the Representative were conducted in compliance with applicable licensing and registration requirements under applicable securities laws of the United States, the activities did not comply with the registration requirements under applicable Ontario securities laws because the Representative, as a resident of Ontario, conducted the activitites from Ontario and neither the Applicant or the Representative were registered in Ontario to conduct such activities on behalf of the Applicant and had not obtained exemptive relief in such jurisdiction to conduct such activities.

10. The execution and clearance of the Foreign Securities is done by a registered broker/dealer in the US.

11. The Applicant does not have any affiliated companies registered with any securities regulatory authorities in Canada and therefore there is no potential for client confusion as to which entities provide the Securities Advice.

12. Before advising a U.S. Client, the Applicant and its Representatives will notify the U.S. Client of the location of the Applicant's head office or principal place of business and that there may be difficulty enforcing legal rights against the Applicant because of this.

13. U.S. Clients will be advised at the time they enter into an investment management agreement or similar documentation with the Applicant, and periodically thereafter, that if they relocate to a Canadian jurisdiction, their accounts will have to be transferred to another adviser that is appropriately registered or relying on an exemption from registration in the Canadian jurisdiction.

14. The Act requires that a person or company in the business of advising in Ontario on securities be registered in Ontario as an adviser under the Act. Even though the Applicant is incorporated in Belize and none of the clients of the Applicant is resident in Ontario, the fact that one or more of its Representatives are resident in Ontario triggers the requirement to be registered as an adviser in the category of Portfolio Manager under the Act.

15. The Applicant submits that it would not be prejudicial to the public interest for the Commission to grant the Exemption Sought because:

   (a) the Applicant will only advise U.S. Clients as to trading in Foreign Securities; and

   (b) the Applicant and each of its Representatives are appropriately registered to act as an adviser to the U.S. Clients under applicable securities laws of the United States.

16. The Applicant will become a "market participant" as defined under subsection 1(1) of the Act as a consequence of this decision. As a market participant, among other requirements, the Applicant is required to comply with the record keeping and provision of information provisions under section 19 of the Act, which includes the requirement to keep such books, records and other documents as are necessary for the proper recording of its business transactions and financial affairs and to deliver such records to the Commission if required.

AND UPON being satisfied that it would not be prejudicial to the public interest for the Commission to grant the Exemption Sought on the basis of the terms and conditions proposed,

IT IS ORDERED pursuant to subsection 74(1) of the Act that the Applicant and its Representatives are exempt from the adviser registration requirements of subsection 25(3) of the Act in respect of the provision of advice to U.S. Clients as to the trading of Foreign Securities, provided that:

(a) the Applicant provides advice to U.S. Clients only as to trading in Foreign Securities;

(b) the Applicant and each of its Representatives are appropriately registered under applicable securities laws of the United States to act as an adviser to the U.S. Clients;

(c) the Applicant and each of its Representatives notifies the Commission of any regulatory action initiated with respect to the Applicant or its Representatives by completing and filing Appendix "A" or Appendix "B", as applicable, within 10 days of the commencement of such action; and

(d) the Applicant and its Representatives comply with the requirements under OSC Rule 31-505 *Conditions of Registration*, as amended from time to time, namely, to deal fairly, honestly and in good faith with its, his, or her clients.

IT IS FURTHER ORDERED THAT, this order shall expire on the date that is the earlier of:

(a) any change in the recognition, supervision or oversight of the Applicant by the SEC; or

(b) five years from the date of this order.

DATED August 27, 2014, 2014

"Edward P. Kerwin"
Commissioner
Ontario Securities Commission

"Christopher Portner"
Commissioner
Ontario Securities Commission

APPENDIX A

NOTICE OF REGULATORY ACTION – FIRM

1. Has the firm, or any predecessors or specified affiliates[1] of the firm entered into a settlement agreement with any financial services regulator, securities or derivatives exchange, SRO or similar agreement with any financial services regulator, securities or derivatives exchange, SRO or similar organization?

Yes _____ No _____

If yes, provide the following information for each settlement agreement:

Name of entity
Regulator/organization
Date of settlement (yyyy/mm/dd)
Details of settlement
Jurisdiction

2. Has any financial services regulator ,securities or derivatives exchange, SRO or similar organization:

	Yes	No
(a) Determined that the firm, or any predecessors or specified affiliates of the firm violated any securities regulations or any rules of a securities or derivatives exchange, SRO or similar organization?		
(b) Determined that the firm, or any predecessors or specified affiliates of the firm made a false statement or omission?		
(c) Issued a warning or requested an undertaking by the firm, or any predecessors or specified affiliates of the firm?		
(d) Suspended or terminated any registration, licensing or membership of the firm, or any predecessors or specified affiliates of the firm?		
(e) Imposed terms or conditions on any registration or membership of the firm, or predecessors or specified affiliates of the firm?		
(f) Conducted a proceeding or investigation involving the firm, or any predecessors or specified affiliates of the firm?		
(g) Issued an order (other than en exemption order) or a sanction to the firm, or any predecessors or specified affiliates of the firm for securities or derivatives-related activity (e.g. cease trade order)?		

If yes, provide the following information for each action:

Name of Entity
Type of Action

Regulator/organization	
Date of action (yyyy/mm/dd)	Reason for action
Jurisdiction	

[1] In this Appendix, the term "specified affiliate" has the meaning ascribed to that term in Form 33-109F6 to National Instrument 33-109 – *Registration Information.*

3. Is the firm aware of any ongoing investigation of which the firm or any of its specified affiliate is the subject?

Yes _____ No _____

If yes, provide the following information for each investigation:

Name of entity
Reason or purpose of investigation
Regulator/organization
Date investigation commenced (yyyy/mm/dd)
Jurisdiction

Name of firm
Name of firm's authorized signing officer or partner
Title of firm's authorized signing officer or partner
Signature
Date (yyyy/mm/dd)

Witness

The witness must be a lawyer, notary public or commissioner of oaths.

Name of witness
Title of witness
Signature
Date (yyyy/mm/dd)

This form is to be submitted to the following address:

Ontario Securities Commission
Suite 1903, Box 55
20 Queen Street West
Toronto, ON M5H 3S8
Attention: Registration Supervisor, Portfolio Manager Team
Telephone: (416) 593-8164
email: amcbain@osc.gov.on.ca

APPENDIX B
NOTICE OF REGULATORY ACTION – INDIVIDUAL

Name of Individual

Last name	First name	Second name (N/A ☐)	Third name (N/A ☐)

1. Securities and derivatives regulation

Are you now, or have you ever been subject to any disciplinary proceedings or any order resulting from disciplinary proceedings under any securities legislation or derivatives legislation or both in any province, territory, state or country?

Yes ☐ No ☐

If "Yes", complete the following:

For each order or disciplinary proceeding, state below (1) the name of the firm, (2) the securities or derivatives regulator that issued the order or is conducting or conducted the proceeding, (3) the date any notice of proceeding was issued, (4) the date any order or settlement was made, (5) a summary of any notice, order or settlement (including any sanctions imposed), (6) whether you are or were a partner, director, officer or major shareholder of the firm and named individually in the order or disciplinary proceeding, and (7) any other relevant details.

2. SRO regulation

Are you now, or have you ever been, subject to any disciplinary proceedings conducted by any SRO or similar organization in any province, territory, state or country?

Yes ☐ No ☐

If "Yes", complete the following:

For each order or disciplinary proceeding, state below (1) the name of the firm, (2) the SRO that issued the order or that is, or was, conducting the proceeding, (3) the date any notice of proceeding was issued, (4) the date any order or settlement was made, (5) a summary of any notice, order or settlement (including any sanctions imposed), (6) whether you are or were a partner, director, officer or major shareholder of the firm and named individually in the order or disciplinary proceeding, and (7) any other information that you think is relevant or that the regulator or, in Québec, the securities regulatory authority may request.

3. Non-securities regulation

Are you now, or have you ever been, a subject of any disciplinary actions conducted under any legislation relating to your professional activities unrelated to securities or derivatives in any province, territory, state or country?

Yes ☐ No ☐

If "Yes", complete the following:

For each order or disciplinary proceeding, indicate below (1) the party against whom the order was made or the proceeding taken (if insurance licensed, indicate the name of the insurance agency), (2) the regulatory authority that made the order or that is, or was, conducting the proceeding, or under what legislation the order was made or the proceeding is being, or was conducted, (3) the date any notice of proceeding was issued, (4) the date any order or settlement was made, (5) a summary of any notice, order or settlement (including any sanctions imposed), (6) whether you are or were a partner, director, officer or major shareholder of the firm and named individually in the order or disciplinary proceeding and (7) any other information that you think is relevant or that the regulatory authority may request.

Name of firm
Name of firm's authorized signing officer or partner
Title of firm's authorized signing officer or partner
Signature
Date (yyyy/mm/dd)

This form is to be submitted to the following address:

Ontario Securities Commission
Suite 1903, Box 55
20 Queen Street West
Toronto, ON M5H 3S8
Attention: Registration Supervisor, Portfolio Manager Team
Telephone: (416) 593-8164
email: amcbain@osc.gov.on.ca

2.2.3 Conrad M. Black et al.

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

AND

IN THE MATTER OF
CONRAD M. BLACK, JOHN A. BOULTBEE
AND PETER Y. ATKINSON

ORDER

WHEREAS on March 18, 2005 the Ontario Securities Commission (the "**Commission**") issued a Notice of Hearing (the **"Notice of Hearing"**) pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the **"Act"**) in relation to a Statement of Allegations (the "**Original Proceeding**") filed by Staff of the Commission ("**Staff**") with respect to Hollinger Inc., Conrad M. Black (**"Black"**), F. David Radler ("**Radler**"), John A. Boultbee ("**Boultbee**") and Peter Y. Atkinson ("**Atkinson**") (collectively, the "**Original Respondents**");

AND WHEREAS the Commission held a contested hearing on October 11 and November 16, 2005, to determine the appropriate date for a hearing on the merits of the Original Proceeding;

AND WHEREAS on January 24, 2006, the Commission issued its Reasons and Order setting down the matter for a hearing on the merits commencing June 2007, subject to each of the individual Original Respondents agreeing to execute an undertaking to the Commission to abide by interim terms of a protective nature within 30 days of that decision;

AND WHEREAS following the Reasons and Order dated January 24, 2006, each of the individual Original Respondents provided an undertaking in a form satisfactory to the Commission;

AND WHEREAS on March 30, 2006, the Commission issued an Order with attached undertakings provided by the individual Original Respondents and ordered, among other things, that the hearing on the merits commence on Friday, June 1, 2007, or as soon thereafter as may be fixed by the Secretary to the Commission and agreed to by the parties;

AND WHEREAS the individual Original Respondents further provided to the Commission amended undertakings, in a form satisfactory to the Commission, stating that each of the Original Respondents agreed to abide by interim terms of a protective nature (the "**Amended Undertakings**"), pending the Commission's final decision regarding liability and sanctions in the proceeding commenced by the Notice of Hearing;

AND WHEREAS on April 4, 2007, the Commission issued an Order which attached the Amended Undertakings, and ordered that the hearing on the merits be scheduled to commence on November 12 through to December 14, 2007, and January 7 to February 15, 2008 or such other dates as may be fixed by the Secretary to the Commission and agreed to by the parties;

AND WHEREAS Black and Boultbee brought motions and requests to adjourn the Original Proceeding pending the outcome of a criminal proceeding in the United States and Staff consented to the adjournment requests;

AND WHEREAS on September 11, 2007, the Commission issued an Order which adjourned the hearing on the merits of this matter and scheduled a hearing on December 11, 2007 for the purpose of addressing the scheduling of the Original Proceeding;

AND WHEREAS Black and Boultbee brought a series of additional motions and requests to adjourn the Original Proceeding, pending the outcome of criminal proceedings in the United States, and Staff consented to the adjournment requests;

AND WHEREAS the Commission issued orders on December 10, 2007, January 7, March 27, and September 25, 2008, February 12, May 20 and July 9, 2009, which granted Black and Boultbee's motions and adjourned the hearing of the matter;

AND WHEREAS by Order dated October 7, 2009, the Commission adjourned the hearing *sine die*, pending the release of a decision of the United States Supreme Court, in relation to an appeal brought by Boultbee, or until such further order as may be made by the Commission;

AND WHEREAS on November 12, 2012, Staff filed a new Statement of Allegations against Radler alone;

AND WHEREAS on November 13, 2012, Radler provided a new undertaking to the Commission;

AND WHEREAS on November 14, 2012, the Commission approved a settlement agreement reached between Staff and Radler and approved an Order resolving the new proceeding against Radler and releasing Radler from the Amended Undertakings;

AND WHEREAS on November 15, 2013, Staff withdrew its allegations in the Original Proceeding with respect to Radler;

AND WHEREAS on July 12, 2013, Staff withdrew its allegations in the Original Proceeding with respect to Hollinger;

AND WHEREAS on July 12, 2013, the Commission issued a new Notice of Hearing pursuant to sections 127 and 127.1 of the Act in relation to an Amended Statement of Allegations filed by Staff with respect to Black, Boultbee and Atkinson (together, the "**Respondents**");

AND WHEREAS the new Notice of Hearing stated that a hearing before the Commission would be held on August 16, 2013;

AND WHEREAS on August 16, 2013, the Commission heard submissions from counsel for Staff, counsel for Black, and from Atkinson and Boultbee on their own behalf;

AND WHEREAS on August 16, 2013, Staff requested that the matter be adjourned to a pre-hearing conference and the Respondents consented to this request;

AND WHEREAS on August 16, 2013, the Commission ordered that the matter be adjourned to a confidential pre-hearing conference to be held on Monday, October 21, 2013;

AND WHEREAS on September 23, 2013, the Commission approved a settlement agreement reached between Staff and Atkinson and approved an Order releasing Atkinson from the Amended Undertakings and requiring Atkinson to comply with a new undertaking;

AND WHEREAS counsel for Black filed a signed consent of all parties to reschedule the confidential pre-hearing conference of October 21, 2013 to October 23, 2013;

AND WHEREAS a confidential pre-hearing conference was held on October 23, 2013 and the Commission heard submissions from counsel for Staff, counsel for Black, and from Boultbee on his own behalf;

AND WHEREAS on November 26, 2013, Black filed a Notice of Motion in which he sought an Order staying the proceeding before the Commission against him or, in the alternative, directions regarding the scope of the issues to be determined;

AND WHEREAS all parties agreed to adjourn the matter to a further confidential pre-hearing conference to be held on December 2, 2013;

AND WHEREAS a confidential pre-hearing conference was held on December 2, 2013 and the Commission heard submissions from counsel for Staff, counsel for Black, and from Boultbee on his own behalf;

AND WHEREAS all parties agreed to adjourn the matter to a further confidential pre-hearing conference to be held on January 9, 2014;

AND WHEREAS a confidential pre-hearing conference was held on January 9, 2014 and the Commission heard submissions from counsel for Staff, counsel for Black, and from Boultbee on his own behalf;

AND WHEREAS on January 9, 2014, the Commission ordered that Black's motion to stay the proceeding against him or, alternatively, for directions regarding the scope of issues to be determined at the hearing would be heard on March 26 and March 27, 2014, and that a further confidential pre-hearing would be held on February 26, 2014;

AND WHEREAS a confidential pre-hearing conference was held on February 26, 2014 and the Commission heard submissions from counsel for Staff and counsel for Black;

AND WHEREAS on February 26, 2014, the Commission ordered that Black's motion scheduled for March 26 and March 27, 2014 to stay the proceeding against him or, alternatively, for directions regarding the scope of issues to be determined at the hearing would be re-scheduled to April 10 and April 11, 2014, and that a further confidential pre-hearing conference would take place on March 20, 2014, or on such other date as agreed by the parties and set by the Office of the Secretary;

AND WHEREAS a confidential pre-hearing conference was held on March 20, 2014 and the Commission heard submissions from counsel for Staff and counsel for Black, and from Boultbee on his own behalf;

AND WHEREAS on April 1, 2014, the Commission ordered that:

1. A further confidential pre-hearing conference take place on June 16, 2014 at 10:00 a.m., or on such other date as may be ordered by the Commission; and

2. A motion requested by Boultbee for severance of the allegations against him be heard on July 22 and July 23, 2014, commencing at 10:00 a.m., or on such other date as may be ordered by the Commission; and

3. A hearing on the merits be scheduled to commence on October 3, 2014 and continue on the following dates in October 2014: 6, 8-10; 14-17; 20; 22-24; 27-31; and on the following dates in February 2015: 2-6, 9, 11-13, or on such other dates as may be ordered by the Commission;

AND WHEREAS on April 10 and 11, 2014, the Commission held a hearing relating to Black's motion for:

1. An order staying the proceeding against Black on the condition that the undertaking given to the Commission by Black on February 2, 2006, as amended on March 30, 2007 remain in effect; or

2. In the alternative, directions regarding the scope of the issues to be determined at any hearing of the proceeding against Black and hence the evidence permitted to be presented at the hearing;

AND WHEREAS on June 13, 2014, the Commission issued its reasons and decision regarding Black's Motion;

AND WHEREAS on June 13, 2014, the Commission ordered that:

1. The following dates be vacated: June 16, 2014 and July 22 and 23, 2014; and

2. A confidential pre-hearing conference take place on July 30, 2014 at 10:00 a.m., or on such other date as may be ordered by the Commission;

AND WHEREAS a confidential pre-hearing conference was held on July 30, 2014, at which counsel for Staff and counsel for Black attended in person and Boultbee attended by telephone, and the Commission heard submissions from counsel for Staff and counsel for Black, and from Boultbee on his own behalf;

AND WHEREAS on July 31, 2014, the Commission ordered that:

1. A motion by Boultbee for the severance of the allegations against him be heard on August 11, 2014, commencing at 11:00 a.m., or on such other date as may be ordered by the Commission;

2. The parties shall disclose witness lists, witness summaries, and all documents that they intend to use as evidence at the hearing by August 20, 2014 at 4:00 p.m.;

3. The following hearing dates are vacated: October 3, 2014 and February 2-6, 9, and 11-13, 2015; and

4. A further confidential pre-hearing conference take place on August 25, 2014 at 10:00 a.m., or on such other date as may be ordered by the Commission;

AND WHEREAS on August 11, 2014, the Commission held a hearing to consider Boultbee's motion for severance, at which Boultbee attended by telephone and counsel for Staff attended in person, and at which the Commission heard submissions from Boultbee on his own behalf and from counsel for Staff, and the Commission reserved its decision on the motion;

AND WHEREAS on August 12, 2014, the Commission ordered that Boultbee's motion for severance be dismissed, and stated that formal reasons would follow the issuance of its order;

AND WHEREAS a confidential pre-hearing conference was held on August 25, 2014 and the Commission heard submissions from counsel for Staff and counsel for Black, and from Boultbee on his own behalf;

AND WHEREAS the Commission is of the view that it is in the public interest to make this order;

IT IS HEREBY ORDERED THAT:

1. The parties shall serve and file any joint or separate hearing briefs by September 26, 2014.

2. Any preliminary motion, if made by Staff, be scheduled for October 6, 2014, commencing at 10:00 a.m., and any related materials be filed according to the following schedule:

   a. Staff shall serve and file written materials by 4:00 p.m. on September 12, 2014; and

   b. Respondents shall serve and file any responding materials by 4:00 p.m. on September 26, 2014.

3. Following consideration of Staff's motion on October 6, if applicable, the hearing will continue as scheduled on the following dates in October 2014: 6, 8-10, 14-17, 20, 22-24, and 27-31, or on such other dates as may be ordered by the Commission. If Staff do not make a motion, the hearing shall commence at 10:00 a.m. on October 6, 2014.

DATED at Toronto this 25th day of August, 2014.

"Christopher Portner"

2.2.4 UBS Global Asset Management (Canada) Inc. et al. – s. 80 of the CFA

Headnote

Section 80 of the Commodity Futures Act (Ontario) – Relief from the adviser registration requirement in paragraph 22(1)(b) of the CFA granted to sub-advisers not ordinarily resident in Ontario in respect of advice regarding trades in commodity futures contracts and commodity futures options, subject to certain terms and conditions – Renewal of previous relief – Relief mirrors exemption available in section 7.3 of OSC Rule 35-502 Non-Resident Advisers made under the Securities Act (Ontario).

Applicable Legislative Provisions

Commodity Futures Act, R.S.O. 1990, c.C.20, as am., ss. 22(1)(b) and 80
Securities Act, R.S.O. 1990, c.S.5, as am.
OSC Rule 35-502 Non-Resident Advisers, s. 7.3

August 26, 2014

IN THE MATTER OF
THE COMMODITY FUTURES ACT,
R.S.O. 1990, CHAPTER C.20 AS AMENDED
(the CFA)

AND

IN THE MATTER OF
UBS GLOBAL ASSET MANAGEMENT (CANADA) INC.,
UBS GLOBAL ASSET MANAGEMENT (AMERICAS) INC.,
UBS GLOBAL ASSET MANAGEMENT (UK) LTD., UBS O'CONNOR LLC,
UBS ALTERNATIVE AND QUALITATIVE INVESTMENTS LLC,
UBS GLOBAL ASSET MANAGEMENT (JAPAN) LTD.,
UBS GLOBAL ASSET MANAGEMENT (SINGAPORE) LTD. AND UBS AG

ORDER
(Section 80 of the CFA)

UPON the renewal application (the **Application**) of UBS Global Asset Management (Americas) Inc. (**UBS Americas**), UBS Global Asset Management (UK) Ltd. (**UBS UK**), UBS O'Connor LLC (UBS O'Connor), UBS Alternative and Qualitative Investments LLC (**UBS Alternative**), UBS Global Asset Management (Japan) Ltd. (**UBS Japan**), UBS Global Asset Management (Singapore) Ltd. (UBS Singapore), and UBS AG (collectively, the Sub-Advisers) and UBS Global Asset Management (Canada) Inc. (the **Principal Adviser**) to the Ontario Securities Commission (the **Commission**) for an order, pursuant to section 80 of the CFA, that each of the Sub-Advisers (including their respective directors, officers, partners and employees engaging in, or holding themselves out as engaging in, the business of advising others when acting on behalf of their respective Sub-Adviser in respect of the Advisory Services (as defined below)) be exempt, for a specified period of time, from the adviser registration requirements of paragraph 22(1)(b) of the CFA when acting as an adviser for the Principal Adviser in respect of the Funds (as defined below) regarding commodity futures contracts and commodity futures options traded on commodity futures exchanges (the **Contracts**) and cleared through clearing corporations.

AND UPON considering the Application and the recommendation of staff of the Commission;

AND UPON the Sub-Advisers and the Principal Adviser having represented to the Commission that:

Principal Adviser

1. The Principal Adviser is a corporation existing under the laws of the Province of Nova Scotia with its head office located in Toronto, Ontario.

2. The Principal Adviser is registered with the Commission under the *Securities Act* (Ontario) (the **OSA**) as a dealer in the category of exempt market dealer, as an adviser in the category of portfolio manager and as an investment fund manager and, under the CFA, as an adviser in the category of commodity trading manager.

3. The Principal Adviser is also registered as a dealer in the category of exempt market dealer and as an adviser in the category of portfolio manager in all other provinces and territories of Canada, as an investment fund manager in Quebec and Newfoundland and as an adviser under the *Commodity Futures Act* in Manitoba.

4. The Principal Adviser is an indirect wholly-owned subsidiary of UBS AG, a publicly-traded company listed on the New York Stock Exchange and the SIX Swiss Exchange. As such, the Principal Adviser leverages the global expertise of investment professionals at its affiliates worldwide.

5. The Principal Adviser is not in default of securities, commodity futures or derivatives legislation in any jurisdiction in Canada.

The Sub-Advisers

6. The Sub-Advisers are not resident of any province or territory of Canada and are entities organized under the laws of a jurisdiction other than Canada and the provinces and territories of Canada.

7. The Sub-Advisers are properly registered or licensed, or are entitled to rely on appropriate exemptions from such registrations or licenses, to provide advice to clients in respect of securities and in respect of Contracts pursuant to the applicable legislation of their principal jurisdictions.

The details of each Sub-Adviser, its jurisdiction of incorporation and its applicable licenses are as follows:

a. UBS Americas is incorporated under the laws of the state of Delaware, United States of America. The head office for UBS Americas is in New York, New York. UBS Americas is registered as an investment adviser with the U.S. Securities and Exchange Commission.

b. UBS UK was incorporated under the laws of England and Wales. The head office for UBS UK is in London, United Kingdom. UBS UK holds a financial services license with the Financial Conduct Authority, the agency in the UK that regulates the financial services industry.

   UBS UK acts in Ontario in reliance on the exemption from registration as an investment fund manager in Multilateral Instrument 32-102 Registration Exemptions for Non-resident Investment Fund Managers (MI 32-102) in respect of non-resident investment fund managers whose investment fund securities were distributed under prospectus exemption to a permitted client.

c. UBS O'Connor was incorporated under the laws of the state of Delaware, United States of America. The head office for UBS O'Connor is in New York, New York. UBS O'Connor operates under exemptions from the commodity pool operator registration requirement and the commodity trading advisor registration requirement pursuant to the Commodity Exchange Act. UBS O'Connor is also registered as an investment adviser with the U.S. Securities and Exchange Commission.

   UBS O'Connor acts in Ontario in reliance on the exemption from registration as an investment fund manager in MI 32-102 in respect of non-resident investment fund managers whose investment fund securities were distributed under prospectus exemption to a permitted client.

d. UBS Alternative was incorporated under the laws of the state of Delaware, United States of America. The head office for UBS Alternative is in Stamford, Connecticut. UBS Alternative is registered as a commodity pool operator with the U.S. Commodity Futures Commission pursuant to the Commodity Exchange Act. UBS Alternative is also registered as an investment adviser with the U.S. Securities and Exchange Commission.

e. UBS Japan was incorporated under the laws of Japan. The head office for UBS Japan is in Tokyo, Japan. UBS Japan holds an investment adviser's license and investment management license with the Financial Services Agency, an agency of the Japanese government.

f. UBS Singapore was incorporated under the laws of Singapore. The head office for UBS Singapore is in Singapore. UBS Singapore holds an investment adviser's license with the Financial Supervisory Service, South Korea's integrated financial regulator, and a capital market services license with the Monetary Authority of Singapore, the central bank of Singapore.

g. UBS AG was incorporated under the laws of Switzerland. The head office for UBS AG is in Zurich, Switzerland. UBS AG holds a financial services license with the Swiss Financial Market Supervisory Authority.

   In Ontario, Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Prince Edward Island, Quebec and Saskatchewan, UBS AG acts in reliance on the exemptions from the OSA's dealer and adviser registration requirements available to international dealers and to international advisers in sections 8.18 and 8.26, respectively, of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*.

8. The Sub-Advisers are not, and have no current intention of becoming, registered under the CFA or the OSA.

9. The Sub-Advisers are all indirect wholly-owned subsidiaries of UBS AG and are all affiliated companies of the Principal Adviser.

The Funds

10. The Principal Adviser acts as an adviser to clients on a variety of investment strategies, which may include the use of Contracts traded on Canadian or other organized exchanges outside of Canada. The Principal Adviser advises: (i) institutional clients who have entered into investment management agreements with the Principal Adviser (the Managed Accounts), (ii) investment funds, the securities of which are qualified by prospectus for distribution to the public in Ontario and the other provinces and territories of Canada (the Mutual Funds), (iii) pooled funds, the securities of which are sold on a private placement basis in all the provinces of Canada to accredited investors pursuant to prospectus exemptions contained in National Instrument 45-106 Prospectus and Registration Exemptions (the Pooled Funds), and (iv) such other Managed Accounts, Mutual Funds and Pooled Funds as may be established in the future and for which the Principal Adviser engages one or more of the Sub-Advisers to provide Advisory Services (as defined below) (each of the Managed Accounts, Mutual Funds and Pooled Funds in (i), (ii), (iii) and (iv) is referred to individually as a Fund and collectively as the Funds).

11. The Funds may, as part of their investment program, invest in Contracts.

12. The mandates for many of the Funds managed by the Principal Adviser are global in nature. The Principal Adviser offers the investment management services of the Sub-Advisers to the Funds in respect of capital markets in which the Sub-Advisers have the requisite experience, skills and knowledge.

13. The Mutual Funds, Pooled Funds and other Mutual Funds or Pooled Funds that may be established in the future are or will be formed in Ontario where the Principal Adviser is registered under the CFA as an adviser in the category of commodity trading manager.

The Advisory Services

14. The Principal Adviser may, pursuant to a written agreement with each Fund:

    (a) act as an adviser (as defined in the OSA) to the Fund in respect of securities; and

    (b) act as an adviser (as defined in the CFA) to the Fund in respect of Contracts

    by exercising discretionary authority in respect of the investment portfolio of the Fund, with discretionary authority to purchase or sell on behalf of the Fund:

        (i) securities; and

        (ii) Contracts.

15. In connection with the Principal Adviser acting as an adviser to the Funds in respect of the purchase or sale of securities and Contracts, the Principal Adviser, in reliance on the Previous Order (defined below) and pursuant to a written agreement made between the Principal Adviser and each of the Sub-Advisers, has retained and continues to retain each Sub-Adviser to act as adviser for the Principal Adviser by exercising discretionary authority on behalf of the Principal Adviser, in respect of all or a portion of all of the assets of the investment portfolios of the Funds, including discretionary authority to buy or sell Contracts for the Funds (the **Advisory Services**), provided that:

    a) In each case, the Contract must be cleared through an acceptable clearing corporation; and

    b) Such investments are consistent with the investment objectives and strategies of the Funds.

16. The written agreement between the Principal Adviser and each Sub-Adviser sets out the obligations and duties of each party in connection with the Advisory Services and permits the Principal Adviser to exercise the degree of supervision and control it is required to exercise over the respective Sub-Adviser in respect of the Advisory Services.

17. The Principal Adviser delivers, and will continue to deliver, to the Funds all applicable reports and statements required under applicable securities, commodity futures and derivatives legislation.

18. If there is any direct contact between a Fund and a Sub-Adviser in connection with the Advisory Services, a representative of the Principal Adviser, duly registered in accordance with Ontario commodity futures law, will be present at all times either in person or by telephone.

19. Paragraph 22(1)(b) of the CFA prohibits a person or company from acting as an adviser unless the person or company is registered as an adviser under the CFA, or is registered as a partner or an officer of a registered adviser and is acting on behalf of a registered adviser. Under the CFA, "adviser" means a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others as to trading in "contracts", and "contracts" means commodity futures contracts and commodity futures options.

20. By providing the Advisory Services, the Sub-Advisers are engaging in, or holding themselves out as engaging in, the business of advising others with respect to Contracts, and, in the absence of being granted the requested relief, would be required to be registered as advisers under the CFA.

21. There is presently no rule or other regulation under the CFA that provides an exemption from the adviser registration requirement in paragraph 22(1)(b) of the CFA for a person or company acting as an adviser in respect of Contracts that is similar to the exemption from the adviser registration requirement in section 25(1)(c) of the OSA for acting as an adviser (as defined in the OSA), in respect of securities that is provided under section 7.3 of OSC Rule 35-502 *Non Resident Advisers* (**Rule 35-502**).

22. The relationships among the Principal Adviser, the Sub-Advisers and the Funds satisfy the requirements of section 7.3 of Rule 35-502.

23. As would be required under section 7.3 of Rule 35-502:

    a) the duties and obligations of each respective Sub-Adviser are set out in a written agreement with the Principal Adviser;

    b) the Principal Adviser has contractually agreed with the Funds to be responsible for any loss that arises out of the failure of any or all of the Sub-Advisers;

        i. to exercise the powers and discharge the duties of their offices honestly, in good faith and in the best interests of the Principal Adviser and the Funds; or

        ii. to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances (together with (i), the Assumed Obligations); and

    c) the Principal Adviser cannot be relieved by the Funds from its responsibility for any loss that arises out of the failure of any or all of the Sub-Advisers to meet the Assumed Obligations.

24. Each Sub-Adviser is, or will be, appropriately registered or licensed or is, or will be, entitled to rely on appropriate exemptions from such registrations or licences, to provide the Advisory Services for the Funds pursuant to the applicable legislation of its principal jurisdiction.

25. The Sub-Advisers will only provide the Advisory Services so long as the Principal Adviser is, and remains, registered under the CFA as an adviser in the category of commodity trading manager.

Disclosure

26. The prospectus or similar offering document for each Mutual Fund, Pooled Fund or other Mutual Funds or Pooled Funds that may be established in the future and for which the Principal Adviser has engaged or engages one or more of the Sub-Advisers to provide the Advisory Services will include the following disclosure:

    (a) a statement that the Principal Adviser is responsible for any loss that arises out of the failure of any or all of the Sub-Advisers to meet the Assumed Obligations; and

    (b) a statement that there may be difficulty in enforcing any legal rights against any or all of the Sub-Advisers (or any individuals engaging in, or holding themselves out as engaging in, the business of advising others when acting on behalf of the respective Sub-Advisers in respect of the Advisory Services) because the Sub-Advisers are resident outside of Canada and all or substantially all of their assets are situated outside of Canada.

27. Prior to purchasing any securities of one or more of the Mutual Funds, Pooled Funds or other Mutual Funds or Pooled Funds that may be established in the future directly from the Principal Adviser or entering into an investment management agreement with the Principal Adviser, all investors who are Ontario residents will receive written disclosure that includes:

    (a) a statement that the Principal Adviser is responsible for any loss that arises out of the failure of any or all of the Sub-Advisers to meet the Assumed Obligations; and

    (b) a statement that there may be difficulty in enforcing any legal rights against any or all of the Sub-Advisers (or any individuals engaging in, or holding themselves out as engaging in, the business of advising others when acting on behalf of the respective Sub-Advisers in respect of the Advisory Services) because the Sub-Advisers are resident outside of Canada and all or substantially all of their assets are situated outside of Canada.

Previous Order

28. On September 2, 2009, the Commission granted each of the Sub-Advisers an exemption from the registration requirement in paragraph 22(1)(b) of the CFA for advisory services provided in respect of the investment portfolios of the Funds and for which the Principal Adviser engages the Sub-Advisers to provide advisory services (the **Previous Order**). The Previous Order is scheduled to terminate on September 2, 2014.

AND UPON being satisfied that it would not be prejudicial to the public interest for the Commission to grant the exemption requested;

IT IS ORDERED, pursuant to section 80 of the CFA, that the Sub-Advisers and any individuals engaging in, or holding themselves out as engaging in, the business of advising others when acting on behalf of a Sub-Adviser in respect of the Advisory Services are exempt from the adviser registration requirement in paragraph 22(1)(b) of the CFA in respect of the Advisory Services, for a period of five years, provided that at the relevant time that such activities are engaged in:

a) the Principal Adviser is registered under the CFA as an adviser in the category of commodity trading manager;

b) each Sub-Adviser and any individuals engaging in, or holding themselves out as engaging in, the business of advising others when acting on behalf of a Sub-Adviser in respect of the Advisory Services are appropriately registered or licensed, or are entitled to rely on appropriate exemptions from such registrations or licenses, to provide the Advisory Services to the Funds pursuant to the applicable legislation of their principal jurisdiction;

c) the obligations and duties of each Sub-Adviser are set out in a written agreement with the Principal Adviser;

d) the Principal Adviser has contractually agreed with each Fund to be responsible for any loss that arises out of any failure of a Sub-Adviser or Sub-Advisers to meet the Assumed Obligations;

e) the Principal Adviser cannot be relieved by a Fund or its securityholders from its responsibility for any loss that arises out of the failure of a Sub-Adviser or Sub-Advisers to meet the Assumed Obligations;

f) the prospectus or similar offering document, if any, for each Mutual Fund or Pooled Fund or other Mutual Funds or Pooled Funds that may be established in the future and for which the Principal Adviser engages one or more Sub-Advisers to provide the Advisory Services will include the following disclosure:

    (i) a statement that the Principal Adviser is responsible for any loss that arises out of the failure of a Sub-Adviser or Sub-Advisers to meet the Assumed Obligations; and

    (ii) a statement that there may be difficulty in enforcing any legal rights against the Sub-Advisers (or any individuals engaging in, or holding themselves out as engaging in, the business of advising others when acting on behalf of the Sub-Advisers in respect of the Advisory Services) because the Sub-Advisers are resident outside of Canada and all or substantially all of their assets are situated outside of Canada; and

g) prior to purchasing any securities of one or more of the Mutual Funds, Pooled Funds or other Mutual Funds or Pooled Funds that may be established in the future directly from the Principal Adviser or entering into an investment management agreement with the Principal Adviser, all investors who are Ontario residents will receive written disclosure that includes:

(i) a statement that the Principal Adviser is responsible for any loss that arises out of the failure of a Sub-Adviser or Sub-Advisers to meet the Assumed Obligations; and

(ii) a statement that there may be difficulty in enforcing any legal rights against the Sub-Advisers (or any individuals engaging in, or holding themselves out as engaging in, the business of advising others when acting on behalf of the Sub-Advisers in respect of the Advisory Services) because the Sub-Advisers are resident outside of Canada and all or substantially all of their assets are situated outside of Canada.

IT IS FURTHER ORDERED, that this Order is effective as at September 2, 2014 (the **Effective Date**) and will terminate on the earlier of (i) the coming into force of any amendments to section 7.3 of OSC Rule 35-502, (ii) the effective date of the repeal of section 7.3 of OSC Rule 35-502, and (iii) five years from the Effective Date.

DATED at Toronto, Ontario this 26th day of August, 2014

"Edward P. Kerwin"
Commissioner
Ontario Securities Commission

"Christopher Portner"
Commissioner
Ontario Securities Commission

2.2.5 DMD Digital Health Connections Group Inc. – s. 144

Headnote

Application by an issuer for a revocation of a cease trade order issued by the Commission - cease trade order issued because the issuer had failed to file certain continuous disclosure materials required by Ontario securities law - defaults subsequently remedied by bringing continuous disclosure filings up-to-date - cease trade order revoked.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., ss. 127 and 144.

August 28, 2014

IN THE MATTER OF
THE SECURITIES ACT, R.S.O. 1990, c. S.5,
AS AMENDED
(the Act)

AND

IN THE MATTER OF
DMD DIGITAL HEALTH CONNECTIONS GROUP INC.
(the Issuer)

ORDER
(Section 144)

WHEREAS the securities of the Issuer are subject to a cease trade order issued by the Ontario Securities Commission (the Commission) on July 20, 2012 (the Cease Trade Order) under section 127 of the Act ordering that the trading in the securities of the Issuer cease until the Cease Trade Order is revoked;

AND WHEREAS the Cease Trade Order was made on the basis that the Issuer was in default of certain filing requirements under Ontario securities law as described in the Cease Trade Order and outlined below;

AND WHEREAS the Issuer has applied to the Commission in compliance with National Policy 12-202 Revocation of a Compliance-Related Cease Trade Order (the Application) for an order pursuant to section 144 of the Act revoking the Cease Trade Order;

AND UPON the Issuer having represented to the Commission that:

1. The Issuer is a Canadian corporation existing under the Canadian Business Corporations Act (CBCA) on April 1, 2005 under the name 6369898 Canada Inc. On May 10, 2005 the Issuer modified its articles and changed its name to Zermatt Capital Inc. On December 8, 2006 the Issuer modified its articles and changed its name to Aptilon Corporation. On June 20, 2014 the Issuer modified its articles and changed its name to DMD Digital Health Connections Group Inc. / Groupe DMD Connexions Santé numériques Inc. The head office of the Issuer is located in the province of Quebec.

2. The Issuer's authorized capital consists of an unlimited number of Class A Common Shares that are voting and participating and an unlimited number of Class B Preferred Shares that are non-voting, issuable in series B to H, having such attributes as the Board of Directors may determine. 193,078,780 Class A Common Shares are issued and outstanding and no Class B Preferred Shares are issued and outstanding.

3. The Issuer is a reporting issuer in Ontario, Quebec, British Columbia, Alberta and Manitoba (the Reporting Jurisdictions) and is not a reporting issuer in any other jurisdiction.

4. The Issuer’s common shares are listed on the TSX Venture Exchange (TSXV) under the symbol DMG but are currently suspended from trading. The Issuer is only listed on the TSXV at this time and is not listed on any other exchange, marketplace or facility.

5. The Commission made the decision ordering that trading cease in respect of the securities of the Issuer because the Issuer failed to file its audited annual financial statements and the related management’s discussion and analysis (MD&A) for the year ended December 31, 2011, the interim financial statements and the related MD&A for the three-

month period ended March 31, 2012 and the certification of the foregoing as required by National Instrument 52-109 Certification of Disclosure in Issuer's Annual and Interim Filings (NI 52-109 Certificates).

6. The Issuer is also currently subject to an order similar to the Cease Trade Order in each of the Reporting Jurisdictions other than Ontario as a result of its failure to file its annual and interim financial statements, MD&A and NI 52-109 Certificates and has concurrently applied for a revocation of the cease trade orders in each of the Reporting Jurisdictions.

7. Since the issuance of the Cease Trade Order, the Issuer has filed on the System for Electronic Document Analysis and Retrieval (SEDAR) the following continuous disclosure documents with the Reporting Jurisdictions:

   a. the audited annual financial statements, MD&A and NI 52-109 Certificates of the Issuer for the years ended December 31, 2011, December 31, 2012 and December 31, 2013; and

   b. the comparative interim unaudited financial statements, MD&A and NI 52-109 Certificates of the Issuer for the periods ended March 31, 2012, June 30, 2012, September 30, 2012, March 31, 2013, June 30, 2013, September 30, 2013, March 30, 2014 and June 30, 2014;

8. The Issuer has paid all outstanding activity, participation and late filing fees required to be paid to the Commission and has filed all forms associated with such payments.

9. The Issuer's SEDAR profile and SEDI issuer profile supplement are current and accurate.

10. The Issuer is in compliance with the annual meeting requirements and held its most recent annual meeting of shareholders on June 27, 2014.

11. The Issuer (i) is up-to-date with all of its other continuous disclosure obligations; (ii) is not in default of any of its obligations under the Cease Trade Order; and (iii) is not in default of any requirements under the Act or the rules and regulations made pursuant thereto.

12. Upon the issuance of this revocation order, the Issuer will issue a news release and file a material change report on SEDAR to announce the revocation of the Cease Trade Order and to outline the Issuer's future plans.

AND UPON considering the Application and the recommendation of the staff of the Commission;

AND UPON considering that it would not be prejudicial to the public interest to revoke the Cease Trade Order;

IT IS ORDERED pursuant to section 144 of the Act that the Cease Trade Order is revoked.

DATED this 28th day of August, 2014.

"Kathryn Daniels"
Deputy Director, Corporate Finance Branch
Ontario Securities Commission

2.3 Rulings

2.3.1 Carthos Services LP – ss. 144 and 74(1)

Headnote

Section 144 – variation of ruling previously granted in respect of relief from the prospectus requirements of the Act to permit issuance of units in limited partnership to family trusts established for the benefit of active partners of the law firm and certain of their qualified eligible beneficiaries – limited partnership units not transferable except for redemption – no market has developed or will develop for the resale of the units - variation in ruling to expand the group of eligible beneficiaries of the family trusts to include the nephews and nieces of an active partner – registration relief not required as filer does not receive any fees or other income from engaging in trades or acts in furtherance of distributions, and its activities do not have the attributes typical of a person or company carrying on the business of a dealer –ruling subject to certain conditions.

Applicable Legislative Provisions

Securities Act, R.S.O., 1990, c. S.5, as am., ss. 53 and 74(1)

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O.1990, C. S.5, AS AMENDED
(the "Act")

AND

IN THE MATTER OF
CARTHOS SERVICES LP

ORDER AND RULING
(Section 144 and Subsection 74(1))

UPON the application of Carthos Services LP ("**Carthos**") to the Ontario Securities Commission (the "**Commission**") for an order pursuant to section 144 of the Act and a ruling pursuant to subsection 74(1) of the Act revoking and replacing a ruling made by the Commission pursuant to subsection 74(1) of the Act on December 19, 1995 and entitled In The Matter of Carthos Services LP (the "**Original Ruling**");

AND UPON considering the application and the recommendation of the staff of the Commission;

AND UPON Carthos having represented to the Commission that certain facts set out in the recitals to the Original Ruling have changed;

AND UPON the Commission being satisfied that to do so would not be prejudicial to the public interest;

IT IS ORDERED pursuant to section 144 of the Act that the Original Ruling be revoked and it is ruled, pursuant to subsection 74(1) of the Act, that the following be substituted therefor:

"RULING

(Subsection 74(1))

UPON the application of Carthos Services LP ("Carthos") to the Ontario Securities Commission (the "**Commission**") for a ruling pursuant to subsection 74(1) of the Act that the issuance by Carthos of limited partnership units (the "**Units**") to certain trusts ("**Family Trusts**" and individually, a "**Family Trust**") that have been or will be established for the benefit of the active partners ("**Active Partners**" and individually, an "**Active Partner**") of Osler, Hoskin & Harcourt LLP ("**Osle**r") and/or members of their respective families described in paragraph 9 below is exempt from section 53 of the Act;

AND UPON considering the application and the recommendation of the staff of the Commission;

AND UPON Carthos having represented to the Commission as follows:

1. Carthos is a limited partnership established under the laws of Ontario on November 10, 1995 for the primary purpose of providing secretarial, accounting, administrative, financial and other services for Osler pursuant to a services agreement that was entered into between Carthos and Osler on January 1, 1996;

2. Carthos is not a reporting issuer in the Province of Ontario or in any other province or territory of Canada and has no present intention of becoming a reporting issuer in Ontario;

3. The general partner of Carthos is 3192423 Canada Inc. (the "**General Partner**"), a corporation incorporated under the *Canada Business Corporations Act* whose sole beneficial shareholder is 3054900 Canada Inc.;

4. Osler is a limited liability partnership of lawyers established under the laws of Ontario with offices in Toronto, Ottawa, Calgary and Montreal, and is in the process of opening an office in Vancouver; it also operates in affiliation with Osler, Hoskin & Harcourt LLP, a limited liability partnership of lawyers established under the laws of the State of New York with offices in the City of New York. As of August 13, 2014 there were 206 Active Partners of Osler;

5. From time to time, Carthos issues Units to Family Trusts for a subscription price of $100 per Unit pursuant to a subscription agreement that, among other things, discloses the risks associated with investing in the Units; the Family Trust of an Active Partner has not been and will not be induced to subscribe for a Unit by expectation of the Active Partner becoming or continuing to be a partner of Osler; the limited partnership agreement of Carthos dated November 10, 1995, as amended (the "**LPA**") provides that the Units are not transferable but may be redeemed by Carthos in certain circumstances at a redemption price of $100 per Unit plus the amount of any distributions owing in respect of such Unit as of the date of redemption;

6. The LPA also provides that Carthos shall redeem the Unit held by a Family Trust, and that Family Trust shall cease to be a limited partner of Carthos, in the event that: (i) the Family Trust has one or more beneficiaries who do not satisfy prescribed eligibility criteria, provided that in such event the General Partner may delay the redemption of the Unit until such date as the General Partner determines, in its sole discretion, to be in the interests of Carthos; (ii) the Family Trust purports to transfer the Unit held by it; or (iii) the General Partner, in its sole discretion, so determines and such determination has not been revoked by a resolution of the limited partners of Carthos within thirty (30) days after receiving notice of such determination; the prescribed eligibility criteria referred to in (i) above is the same as that set out in paragraph 9 below, except for the inclusion of nephews and nieces of an Active Partner, and the LPA will be amended to conform the prescribed eligibility criteria to that set out in paragraph 9 below following the granting of this ruling;

7. As of August 13, 2014, 174 Family Trusts each held one Unit; new Family Trusts will be established under the laws of Ontario from time to time, each of which will be resident in the Province of Ontario, and it is proposed that Carthos would issue one Unit to each such new Family Trust; new Family Trusts will either be created for individuals who become an Active Partner of Osler, or to replace a Family Trust previously created for an Active Partner;

8. Each Family Trust is a trust with three trustees, one of whom is generally an Active Partner (but may, in limited instances, be a former partner of Osler), and two of whom are former partners of Osler; the investment decision of a Family Trust to subscribe for a Unit will be made by all of the trustees, including the Active Partner or former partner of Osler;

9. The beneficiaries of each Family Trust may vary depending upon the type of trust but the categories of eligible beneficiaries will be limited to the following:

   (a) an Active Partner;

   (b) the spouse of such Active Partner;

   (c) the living issue of such Active Partner or the living issue of the spouse of such Active Partner;

   (d) the parents of such Active Partner or the parents of the spouse of such Active Partner;

   (e) the grandparents of such Active Partner or the grandparents of the spouse of such Active Partner;

   (f) the siblings of such Active Partner;

   (g) the nephews and nieces of such Active Partner;

   (h) a trust established for the benefit of any one or more of the foregoing; and

   (i) a corporation all of the issued and outstanding shares of which are beneficially owned by one or more of the foregoing;

10. Units of Carthos are not transferable, but may be redeemed by Carthos at the discretion of the General Partner at a redemption price of $100 per Unit plus the amount of any accrued and undistributed income in respect of such Unit as of the date of the redemption; as a result, no market has developed, or will develop, for the resale of the Units;

11. The Units will be redeemed in the event of the death, retirement, resignation or other departure of the Active Partner from Osler;

12. Each limited partner of Carthos and each Active Partner will be provided with audited annual financial statements of Carthos on or before May 31 of each year; and

13. National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("**NI 31-103**") was adopted in September 2009; Carthos has considered whether under NI 31-103 and the Act it would be considered to be engaged in or holding itself out as engaging in the business of trading in securities and therefore required to register as a dealer. Carthos does not receive any fees or other income from engaging in trades or acts in furtherance of distributions, and its activities do not have the attributes typical of a person or company carrying on the business of a dealer. Having considered those facts and the guidance in section 1.3 of the Companion Policy to NI 31-103, Carthos has concluded that it does not require relief from the registration requirement of the Act;

AND UPON the Commission being satisfied that to do so would not be prejudicial to the public interest;

IT IS RULED pursuant to subsection 74(1) of the Act that the issuance of Units of Carthos to the Family Trusts is exempt from section 53 of the Act, provided that:

(a) the Units are not transferrable except for their redemption by Carthos; and

(b) prior to the issuance of Units to a Family Trust subscribing for Units (a "**Subscriber**"), Carthos:

(i) delivers a copy of this ruling and the most recent financial statements of Carthos to the Subscriber;

(ii) obtains a written statement from the Subscriber acknowledging receipt of a copy of this ruling and the above-noted financial statements, and of the Subscriber's understanding that the protections of the Act, including the right to rescission, to make claims for damages and to receive continuous disclosure, are not available to the Subscriber in respect of the Units; and

(iii) obtains a representation from the Subscriber that no beneficiary of a Family Trust other than an Active Partner, or his or her spouse, or any of the adult children of either of them: (A) has contributed or will directly or indirectly contribute money or other assets to such Family Trust; (B) is or will be liable for any loan or form of financing obtained by such Family Trust; or (C) is or will be involved in making investment decisions for the Family Trust, except to the extent such beneficiary is a trustee."

DATED in Toronto this 29th day of August, 2014

"Vern Krishna"
Commissioner
Ontario Securities Commission

"Edward P. Kerwin"
Commissioner
Ontario Securities Commission

Chapter 3

Reasons: Decisions, Orders and Rulings

3.1 OSC Decisions, Orders and Rulings

3.1.1 Jowdat Waheed and Bruce Walter – s. 127

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

AND

IN THE MATTER OF
JOWDAT WAHEED AND BRUCE WALTER

REASONS AND DECISION
(Subsection 127(1) of the Act)

Hearing:	January 12, 16-18, 21-25, 28, 30 and 31, 2013 February 4-8, 11, 13-15, 19-22, 2013 April 25, 2013 May 22, 2013 June 5, 6, 10-12, 14, 17-21, 2013 July 24-26, 2013 September 5, 2013		
Decision:	August 26, 2014		
Panel:	Christopher Portner	–	Commissioner and Chair of the Panel
	Sarah B. Kavanagh	–	Commissioner
	Paulette L. Kennedy	–	Commissioner
Appearances:	Lawrence Thacker Jennifer Lynch Brent Kettles Harald Marcovici	–	For Staff of the Commission
	R. Paul Steep Jameel Madhany Larissa Moscu	–	For Jowdat Waheed
	Kent E. Thomson Andrea L. Burke Sarah L.M. Weingarten Andrew R. Carlson	–	For Bruce Walter

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REASONS AND DECISION

I. OVERVIEW

A. Introduction

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") pursuant to subsection 127(1) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"). This matter arises from a Notice of Hearing issued by the Commission on January 9, 2012 in relation to a Statement of Allegations issued by Staff of the Commission ("**Staff**") with respect to Jowdat Waheed ("**Waheed**") and Bruce Walter ("**Walter**") (together, the "**Respondents**") on the same date (the "**Statement of Allegations**").

[2] In the Statement of Allegations, Staff makes allegations of insider trading[2], tipping and conduct contrary to the public interest in connection with the purchase of 20 million common shares and five million warrants of Baffinland Iron Mines Corporation ("**Baffinland**")[3] by Nunavut Iron Ore Acquisition Inc. ("**Nunavut Acquisition**") on September 9, 2010 (the "**Toehold Purchase**") and Nunavut Acquisition's subsequent hostile take-over bid for Baffinland which was launched on September 22, 2010 (the "**Take-Over Bid**").

[3] At the time of the conduct at issue, Baffinland was a publicly-traded junior mining company which was entirely focused on the development of the iron ore deposits on its wholly-owned Mary River property located on Baffin Island in Nunavut (respectively, the "**Mary River Project**" and the "**Mary River Property**"). Baffinland was a reporting issuer in each of the provinces and territories of Canada with its head office located in Toronto. Baffinland's common shares were listed on the TSX.

[4] On February 18, 2010, Waheed entered into a consulting agreement with Baffinland to provide services that included the provision of strategic advice to the Board of Directors and Chief Executive Officer ("**CEO**") of Baffinland with respect to potential partnerships, mergers, certain capital raising transactions and the Mary River Project (the "**Consulting Agreement**")[4]. Although the expiry date of the Consulting Agreement was June 15, 2010, Waheed ceased to work as a consultant to Baffinland on or about April 30, 2010.

[5] In early July 2010, Waheed approached Walter about a potential transaction involving Baffinland. Discussions between them progressed over the summer of 2010 and ultimately resulted in the launch of the Take-Over Bid. Nunavut Acquisition was incorporated on August 27, 2010 and, up to the time of the Take-Over Bid, had not carried on any material business other than in connection with the Take-Over Bid. At the time of the Take-Over Bid, Walter was the Chairman and Waheed was the President and CEO of Nunavut Acquisition.

[6] Staff alleges that both Waheed, as President and CEO of Nunavut Acquisition, and Walter, as Chairman of Nunavut Acquisition, authorized, permitted or acquiesced in the Toehold Purchase while they were persons in a special relationship with Baffinland and while they had knowledge of material facts with respect to Baffinland that had not been generally disclosed,

2 Referred to in subsection 76(1) of the Act as "Trading where undisclosed fact".

3 In a number of excerpts from e-mail messages and documents which are reproduced in these Reasons, Baffinland is referred to by its stock symbol "BIM".

4 Although the Consulting Agreement was dated February 18, 2010, it was signed on February 17, 2010.

contrary to subsection 76(1) of the Act.

[7] Staff further alleges with respect to Waheed that, while in a special relationship with Baffinland, he informed third parties, including Walter, of material facts about Baffinland before the material facts were generally disclosed, contrary to subsection 76(2) of the Act.

[8] In addition to the foregoing allegations of breaches of Ontario securities law, Staff alleges that the Respondents used material facts and confidential information belonging to Baffinland to make the Toehold Purchase on September 9, 2010 and launch the Take-Over Bid on September 22, 2010, contrary to the public interest. Staff alleges that Waheed also acted contrary to the public interest by not always acting in the best interests of Baffinland while he was a consultant to Baffinland and, after his consultancy ended, by obtaining information from officers and directors of Baffinland under the guise of assisting Baffinland to identify an alternative strategic partner.

[9] Immediately following the launch of the Take-Over Bid, Baffinland issued a press release in which it advised shareholders that a Special Committee had been formed to consider the Take-Over Bid and make recommendations to Baffinland's Board of Directors (the "**Baffinland Board")** with respect to the Take-Over Bid and other alternatives that were available to the company. At the time of the Take-Over Bid, Baffinland had a shareholder rights plan that had originally been adopted in 2006. By employing its shareholder rights plan, Baffinland was able to delay the Take-Over Bid long enough to encourage ArcelorMittal S.A. ("**ArcelorMittal**") to become engaged in the bidding process. On November 8, 2010, Baffinland and ArcelorMittal entered into a support agreement pursuant to which ArcelorMittal agreed to make an offer to acquire Baffinland's outstanding common shares and, on November 12, 2010, ArcelorMittal launched a take-over bid for Baffinland (the "**ArcelorMittal Bid**"). On November 19, 2010, the Commission ordered that Baffinland cease-trade its shareholder rights plan and, on December 22, 2010, the Commission ordered that Baffinland cease-trade a subsequent shareholder rights plan that was adopted by the Baffinland Board on December 18, 2010. During the period from November 8, 2010 to January 10, 2011, each of Baffinland and ArcelorMittal made further competing bids which, at the instigation of ArcelorMittal, eventually resulted in the parties agreeing to make a joint bid (the "**Joint Bid**") for Baffinland. The Joint Bid, which was dated January 13, 2011, provided that, if successful, ArcelorMittal and Nunavut Acquisition would own 70% and 30%, respectively, of the outstanding common shares of Baffinland. Under the Take-Over Bid before it was amended, Nunavut Acquisition offered to purchase all outstanding Baffinland common shares for $0.80 per common share. The price ultimately paid to Baffinland shareholders pursuant to the Joint Bid was $1.50 per Baffinland common share and $0.10 per warrant.

[10] The hearing on the merits in this matter (the "**Merits Hearing**") was held over a period of 43 days from January 12 to September 5, 2013. Each of the Respondents was represented by counsel at the Merits Hearing and attended in person on most days.

B. The Respondents

1. Waheed

[11] Waheed received degrees in Engineering and Economics from the University of Pennsylvania and is a Chartered Financial Analyst. At the time he was retained as a consultant by Baffinland, Waheed had 20 years of experience providing strategic, financial and operations services to resource-based companies. Prior to his work as a consultant to Baffinland, Waheed held various executive positions at Sherritt International Corporation ("**Sherritt**"), latterly as President and CEO, and had been employed by and was a director of a number of large public corporations.

[12] At the time of the Merits Hearing, Waheed was a director and the CEO of Nunavut Acquisition and the President and CEO of WW Mines Inc., a company that provided management services to Nunavut Acquisition ("**WW Mines**").

2. Walter

[13] Walter received a law degree and an MBA from York University and a Ph.D. in Law from the University of Cape Town. He worked as a lawyer at Davies, Ward & Beck[5] in the 1980s and, subsequently, was a senior officer and director of several large public corporations, including BMO Nesbitt Burns, where he was a Managing Director from 1999 to 2001. At the time that Waheed approached him in July 2010, Walter was semi-retired.

[14] Walter and Waheed met and became friends in the 1980s while they were both employed at The Horsham Corporation, an acquisition vehicle associated with Barrick Gold, and had remained in contact socially since that time.

[15] At the time of the Merits Hearing, Walter was a director and the Chairman of Nunavut Acquisition and WW Mines.

[5] Now Davies Ward Phillips & Vineberg LLP.

C. Staff's Allegations

[16] In its submissions at the conclusion of the Merits Hearing, Staff has, in a number of instances, described the allegations against the Respondents much more broadly than in the Statement of Allegations, including allegations relating to factual matters that are alleged to be material and the dates on which the trades relating to the Toehold Purchase are alleged to have occurred. The Respondents are entitled to notice of the allegations to which they must respond and it is not open to Staff to modify the allegations during the hearing from those made in the Statement of Allegations. Accordingly, consistent with the principles of procedural fairness, we have confined our analysis to the allegations as set out in the Statement of Allegations and summarized below.

1. Allegations of Insider Trading and Tipping

(a) Waheed – Insider Trading

[17] Staff alleges that Waheed learned of material facts with respect to Baffinland from Baffinland officers and directors and from the Baffinland documents and records provided to him while he was a consultant and that, while in a special relationship with Baffinland, he authorized, permitted or acquiesced in the Toehold Purchase with knowledge of material facts about Baffinland that were not generally disclosed, contrary to subsection 76(1) of the Act.[6]

[18] Staff alleges that Waheed learned of material facts about (i) Baffinland while he was a consultant at Baffinland between February 18, 2010 and April 30, 2010 (the "**Consultancy Period**")[7]; and (ii) negotiations between Baffinland and ArcelorMittal in June and July 2010 (the "**Post-Consultancy Period**").

[19] More specifically, Staff alleges that, during the Consultancy Period, Waheed became aware of the status and terms of the negotiations between Baffinland and ArcelorMittal regarding a potential joint venture as follows:

(a) Shortly after joining Baffinland, Waheed met and spoke extensively with Daniella Dimitrov ("**Dimitrov**"), at the time a consultant to Baffinland, about Baffinland's negotiations with ArcelorMittal and Dimitrov provided Waheed with, among other things:

(i) a detailed chronology of the negotiations between the parties;

(ii) presentations made to the Baffinland Board by CIBC World Markets Inc. ("**CIBC**"), Baffinland's financial advisor in the negotiations;

(iii) Baffinland's presentations to ArcelorMittal; and

(iv) proposals and term sheets exchanged between Baffinland and ArcelorMittal;

(b) In March and April 2010, Waheed was kept fully apprised of the status of negotiations between Baffinland and ArcelorMittal and was actively involved in discussing and providing input on Baffinland's strategy in the negotiations and assisted Baffinland's senior management in preparing a presentation to ArcelorMittal;

(c) In mid-March 2010, Waheed learned that ArcelorMittal was very serious about moving ahead with a transaction with Baffinland as it had hired financial advisors and legal counsel for the transaction;

(d) Waheed was present at a Baffinland Board meeting on March 23, 2010 during which it was agreed that

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[6] Although not explicitly cited in the Statement of Allegations, in its written submissions, Staff relies on section 129.2 and subsection 122(3) of the Act as the basis for this allegation. These sections of the Act provide as follows:

129.2 Directors and officers—For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario securities law, a director or officer of the company or person who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law, whether or not any proceeding has been commenced against the company or person under Ontario securities law or any order has been made against the company or person under section 127.

122 (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 $5 million or to imprisonment for a term of not more than five years less a day, or to both.

Staff submits that Waheed and Walter authorized all purchases of Baffinland securities of which the Toehold Purchase was constituted.

[7] In its written submissions, Staff describes the Consultancy Period as commencing on February 17, 2010, the date on which Waheed met with Dimitrov and McCreary to sign the Consulting Agreement which was dated the following day. We do not find this difference to be material, but have employed February 18, 2010 as the commencement date of the Consultancy Period.

Baffinland would enter into an exclusivity agreement with ArcelorMittal until August 12, 2010 (the "**First Exclusivity Agreement**")[8]; and

(e) Waheed reviewed and provided Baffinland with advice on a term sheet provided to Baffinland by ArcelorMittal that was dated April 4, 2010 (the "**April 4th Term Sheet**"), which formed the basis for ongoing negotiations between Baffinland and ArcelorMittal and ArcelorMittal conducting its due diligence in the summer of 2010.

[20] With respect to Waheed's alleged knowledge acquired during the Consultancy Period, Staff also alleges that the fact that ArcelorMittal, the world's largest steelmaker and one of the world's largest mining companies, was interested in and engaged in active negotiations with Baffinland, a junior mining company, would reasonably be expected to have a significant effect on the market price or value of Baffinland's securities.

[21] Staff alleges that, in June and July 2010, Waheed learned of material facts about the status and details of the negotiations between Baffinland and ArcelorMittal as follows:

(a) On June 9, 2010, Waheed met with Dimitrov and she provided him with information about the status of Baffinland's potential joint venture transaction with ArcelorMittal;

(b) On July 12, 2010, Waheed contacted the Chairman of the Baffinland Board, Richard McCloskey ("**McCloskey**"), to request a meeting to discuss Baffinland's recently completed internal conceptual study which reviewed producing one to two million tonnes of ore at the proposed mine and trucking the ore to a port by road (the "**Road Haulage Conceptual Study**") and advised McCloskey, "I continue to be covered by the confidentiality agreement";

(c) On July 13, 2010, Waheed met with Dimitrov and learned that Baffinland had terminated its exclusivity agreement with ArcelorMittal which resulted in ArcelorMittal providing an enhanced offer to Baffinland as compared to the last offer he had seen while a consultant at Baffinland[9], and that Baffinland was in an advanced stage of negotiations with ArcelorMittal;

(d) Waheed's notes of a July 20, 2010 meeting with Dimitrov and Barclays Natural Resource Investment Fund ("**Barclays**") reflect his knowledge of the status of the ArcelorMittal negotiations; and

(e) Waheed subsequently learned that Baffinland executed a second exclusivity agreement with ArcelorMittal on August 12, 2010 which was to run until October 15, 2010 (the "**Second Exclusivity Agreement**").[10]

[22] With respect to Waheed's alleged knowledge from the Post-Consultancy Period, Staff alleges that the fact that ArcelorMittal was in advanced negotiations with Baffinland, as evidenced by the revised and improved term sheet and the parties executing the Second Exclusivity Agreement, would reasonably be expected to have a significant effect on the market price or value of Baffinland's securities.

[23] The material facts that Staff alleges Waheed learned during the Consultancy Period and the Post-Consultancy Period, as set out in paragraphs [19] to [22] above, are collectively referred to in these Reasons as the "**Alleged Material Facts**".

(b) Waheed – Tipping

[24] Staff alleges that Waheed learned of material facts about Baffinland, both while and after ceasing to be a consultant to Baffinland, from officers and directors of Baffinland and from Baffinland's documents and records which he reviewed while he was a consultant, and informed third parties of these material facts before the material facts were generally disclosed, contrary to subsection 76(2) of the Act.

[25] Specifically, Staff alleges that, during the period from July to September 2010, Waheed advised Walter of material facts about the status and details of the advanced state of negotiations between Baffinland and ArcelorMittal relating to a potential joint venture that had not been generally disclosed as follows:

(a) On July 19, 2010, Waheed advised Walter that Baffinland had terminated exclusivity with ArcelorMittal which had resulted in ArcelorMittal providing an enhanced offer to Baffinland;

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8 We note that the terms of the First Exclusivity Agreement between Baffinland and ArcelorMittal did not contemplate that exclusivity would continue until August 12, 2010 as indicated in the Statement of Allegations.

9 The enhanced offer is the July 13th Term Sheet as defined in paragraph 0 of these Reasons.

10 The Second Exclusivity Agreement between Baffinland and ArcelorMittal was actually executed on August 10, 2010 and not on August 12, 2010 as alleged by Staff. All references to the Second Exclusivity Agreement in these Reasons are to the agreement executed on August 10, 2010.

(b) On July 26, 2010, Waheed advised Walter that there were two options for Baffinland: either an enhanced offer from ArcelorMittal or a possible offer from Rio Tinto[11] and informed Walter that management was in favour of advancing the process with ArcelorMittal and that some Baffinland Board members were keen to sign a deal with ArcelorMittal;

(c) On August 20, 2010, Waheed advised Walter and John Calvert ("**Calvert**"), a principal of The Energy & Mineral Group ("**EMG**")[12], that "ArcelorMittal has been around the company for a while. It is probably still toiling away to steal the company through a farm in"; and

(d) On August 29, 2010, Waheed told Walter that Baffinland was in exclusivity discussions with ArcelorMittal;

(collectively, the "**Alleged Tipped Facts**").

(c) Walter – Insider Trading

[26] With respect to Walter, Staff alleges that, as the Chairman and a director of Nunavut Acquisition and while in a special relationship with Baffinland, he authorized, permitted or acquiesced in the Toehold Purchase with knowledge of material facts about Baffinland that were not generally disclosed, contrary to subsection 76(1) of the Act.

[27] More specifically, Staff alleges that Walter learned of the Alleged Tipped Facts as set out in paragraph [25] above.

(d) Special Relationship with Baffinland

[28] Staff alleges that Waheed was in a special relationship with Baffinland as he learned of material facts with respect to Baffinland from officers and directors of Baffinland (section 76(5)(e) of the Act) and from Baffinland documents and records provided to him while he was a consultant (section 76(5)(d) of the Act). Staff alleges that Walter was in a special relationship with Baffinland (pursuant to paragraph 76(5)(e) of the Act) for the following reasons:

(a) Walter knew that Waheed was a person in a special relationship with Baffinland as he knew that Waheed had been a consultant at Baffinland from February to April 2010 and was aware of the fact that Waheed learned of and was privy to material facts and confidential information[13] about Baffinland that had not been generally disclosed while he was a consultant at Baffinland; and

(b) Walter further knew that Waheed met with Dimitrov in June and July 2010 and that he received further material facts and confidential information about Baffinland during those meetings.

2. Allegations of Conduct Contrary to the Public Interest

(a) Waheed

[29] Staff alleges that, in addition to being contrary to subsections 76(1) and 76(2) of the Act, Waheed's conduct was also contrary to the public interest. Further and, in any event, Staff alleges that Waheed acted contrary to the public interest by informing Walter and other third parties[14] of the Alleged Tipped Facts before they were generally disclosed and by causing Nunavut Acquisition to purchase securities of Baffinland pursuant to the Toehold Purchase.

[30] Staff further alleges that Waheed, as a director and the President and CEO of Nunavut Acquisition at the time of the Take-Over Bid, used confidential information belonging to Baffinland and material facts about Baffinland to launch the Take-Over Bid as follows:

(a) Waheed used a financial model, which he had developed and conducted extensive work on while a consultant at Baffinland as the basis of the Take-Over Bid and provided a copy of it to Walter, Barclays and Calvert in breach of the confidentiality provision of the Consulting Agreement;

(b) Waheed used the Road Haulage Conceptual Study in the planning and launch of the Take-Over Bid and, in breach of the confidentiality provision of the Consulting Agreement, provided the Road Haulage Conceptual Study to Barclays and Calvert; and

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11 A multinational metals and mining corporation with its headquarters in the United Kingdom.

12 See paragraphs 0 and following of these Reasons for a description of EMG's role in the Take-Over Bid.

13 We note that subsection 76(1) of the Act only deals with material facts and not "confidential information".

14 The Statement of Allegations identifies Barclays and Calvert as the other third parties which or who were informed of material facts before they were generally disclosed.

(c) Waheed used the royalty rates being proposed to Baffinland by the Qikiqtani Inuit Association (the "**QIA**") in his planning of the Take-Over Bid and, in breach of the confidentiality provision of the Consulting Agreement, advised Walter and Calvert of the proposed QIA royalty rates.

[31] Staff alleges that Waheed, along with Walter, acted contrary to the public interest by using material facts and confidential information belonging to Baffinland to make the Toehold Purchase and launch the Take-Over Bid which put Baffinland in play. Staff further alleges that Waheed knew the Take-Over Bid would disrupt the joint venture negotiations between Baffinland and ArcelorMittal and that, by their actions, Waheed and Walter deprived Baffinland shareholders of the opportunity and ability to benefit from future developments of the Mary River Project as a joint venture with ArcelorMittal.

[32] Lastly, Staff alleges that Waheed acted contrary to the public interest by not always acting in the best interests of Baffinland while a consultant, but at times acted on behalf of Baffinland's majority shareholder, Resource Capital Fund ("**RCF**"), and/or in his own self-interest as follows:

(a) Waheed often reported to RCF without providing the same reports to Baffinland and provided advice to RCF on various issues, including advocating that RCF commence a proxy battle to take control of the Baffinland Board, in breach of Waheed's duty of loyalty owed to Baffinland and contrary to the public interest; and

(b) During June and July 2010, Waheed obtained information from McCloskey and Dimitrov under the guise of assisting Baffinland to identify an alternative strategic partner and allowed this deception to continue until Nunavut Acquisition's launch of the Take-Over Bid on September 22, 2010.

[33] In the Statement of Allegations, Staff describes the confidential information that Waheed is alleged to have received about Baffinland as including:

(a) Baffinland's budgets and financial forecasts;

(b) Baffinland's exploration plans;

(c) Baffinland's business plans and strategies;

(d) Details about Baffinland's negotiations relating to permitting;

(e) Baffinland Board materials;

(f) The 2008 Scoping Study (defined at paragraph [93] below);

(g) The Road Haulage Conceptual Study;

(h) Details about Baffinland's search for a strategic partner; and

(i) Details about Baffinland's negotiations with ArcelorMittal;

(collectively, the "**Alleged Confidential Information**")

(b) Walter

[34] Staff alleges that Walter, along with Waheed, acted contrary to the public interest by using material facts and confidential information belonging to Baffinland to make the Toehold Purchase and launch the Take-Over Bid which put Baffinland in play, as set out above in paragraph [31] above.

[35] Staff further alleges that Walter knew that the Take-Over Bid would disrupt the joint venture negotiations between Baffinland and ArcelorMittal and that, by their actions, Waheed and Walter deprived Baffinland shareholders of the opportunity and ability to benefit from future developments of the Mary River Project as a joint venture with ArcelorMittal.

D. Overview of the Evidence

[36] During the Merits Hearing, we heard the testimony of 15 witnesses who are described in paragraphs [37] to [46]. [49] to [51 and [53] below.

1. Witnesses called by Staff

[37] Dimitrov joined Baffinland in June 2009 as a consultant in a role similar to that of a corporate secretary. Prior to working

for Baffinland, Dimitrov worked in the areas of corporate law and mergers and acquisitions at a large Toronto law firm and with the Dundee group of companies, and worked as a consultant to a number of mining companies. Dimitrov became a director and Vice-Chair of Baffinland on April 29, 2010 and continued in that role until Nunavut Acquisition and ArcelorMittal acquired control of Baffinland in January 2011.

[38] Gordon McCreary ("**McCreary**") became a member of the Baffinland Board in 2001 and the President and CEO of Baffinland in May 2004. McCreary ceased to be the President and CEO on March 18, 2010, but continued as a director of Baffinland until his resignation on November 5, 2010. McCreary has a background in mining engineering and, in the late 1970s, wrote his MBA thesis on the Mary River iron ore deposits. Prior to joining Baffinland, McCreary worked as an investment analyst and held executive positions in the mining sector.

[39] Mehran Shahviri ("**Shahviri**") is a Senior Investigator in the Enforcement Branch of the Commission. Shahviri testified about his involvement in the initial stages of Staff's investigation in this matter in 2010 and early 2011.

[40] Russell Cranswick ("**Cranswick**") joined the Baffinland Board as RCF's nominee in 2008 and subsequently became a member of the Baffinland Board's Strategic Committee (described in paragraph [118] below). At the time of the Merits Hearing, Cranswick was a Partner of RCF, a private equity fund based in Denver, Colorado that was focused on hard rock mining. Between early 2007 and late 2008, RCF participated in three Baffinland financings thereby becoming Baffinland's largest shareholder.

[41] Carole Whittall ("**Whittall**") was, at the time of the Merits Hearing, Vice-President and head of M&A Mining at ArcelorMittal in London, England. Whittall was involved in ArcelorMittal's discussions with Baffinland about a strategic investment beginning in November 2009 and was subsequently involved in the discussions relating to the Joint Bid.

[42] John Humphreys ("**Humphreys**") is a Senior Legal Counsel in the Enforcement Branch of the Commission and testified about his involvement in Staff's investigation in this matter.

[43] Prior to the start of evidence in the Merits Hearing, Staff requested leave to add Gwen Gareau ("**Gareau**") to Staff's witness list. We issued a summons to Gareau on the basis that we would accommodate the Respondents' ability to respond to her evidence if they were prejudiced as a result of her late addition to Staff's witness list. Gareau was initially employed by Baffinland in 2008 as the Controller, and was the Chief Financial Officer of Baffinland from December 2008 until May 2011.

[44] Christine George is a Senior Forensic Accountant in the Enforcement Branch of the Commission. She testified about her involvement in Staff's investigation in this matter beginning in November 2012, and testified specifically with respect to her review of the financial models at issue in this proceeding.

[45] John Lydall ("**Lydall**") was an independent member of the Baffinland Board from the time of its initial public offering in 2004 until May 2011. He was appointed a member of the Strategic Committee on January 12, 2010 and a member and Chair of the Special Committee which was established by the Baffinland Board on September 22, 2010 to, among other things, review, consider and evaluate the Take-Over Bid and any strategic alternatives that might be available to the company (the "**Special Committee**").

[46] Bruce Minns ("**Minns**") was, at the time of the Merits Hearing, the Director of Institutional Trading at GMP Securities L.P. ("**GMP**"). Minns testified about his role at GMP and his activities at GMP in August and September 2010 with respect to trades in Baffinland securities.

[47] As they were not originally on Staff's witness list, Staff sought leave to call Lydall and Minns. Staff requested that Minns be permitted to testify as he could address potential issues to which Staff had been alerted during the Respondents' opening statements with respect to the timing and beneficial ownership of Baffinland shares that had been purchased in connection with the Toehold Purchase. Staff submitted that Lydall could provide evidence that would be directly relevant to the issues in this case, including Waheed's retention as a consultant, Baffinland's financial models and the status of Baffinland's ongoing negotiations with ArcelorMittal. The Respondents objected to Staff's request that Lydall and Minns be permitted to testify on the basis that neither of them appeared on the witness list Staff provided to the Respondents prior to the Merits Hearing. The Respondents also submitted that Lydall's testimony was not essential and that Minns's anticipated testimony related to issues not alleged by Staff in the Statement of Allegations.

[48] We determined that we would permit Staff to call Lydall and Minns as we considered their evidence to be important to the Panel's understanding of the relevant facts. With respect to Minns, in particular, we determined that his evidence relating to trading matters could be relevant, with ultimate relevance and the weight ascribed to his evidence to be determined once all of the evidence had been heard. We also noted that the Respondents' original witness list included Lydall and Mark Wellings, another individual from GMP.

2. Witnesses called by the Respondents

[49] Both Respondents testified at the Merits Hearing. In addition, they called three other witnesses.

[50] William Gula ("**Gula**") was a senior partner of Davies Ward Phillips & Vineberg LLP ("**Davies**") during the relevant period in 2010 and was retained by Walter and Waheed to advise them in connection with the potential transaction involving Baffinland. Gula subsequently represented Nunavut Acquisition in connection with the Take-Over Bid. Gula practiced in the areas of mergers and acquisitions, corporate governance, securities and corporate finance until he left Davies in 1997 to join Scotia Capital, the investment banking arm of the Bank of Nova Scotia, where, until 2004, he was a Managing Director and Head of Mergers and Acquisitions. After rejoining Davies for approximately seven years, Gula left Davies to join Morrison Park Advisors, a boutique investment bank, of which he was the Managing Director at the time of the Merits Hearing**.**

[51] Steven Harris ("**Harris**") was a partner of Davies during the relevant period in 2010 and assisted Gula in representing Walter and Waheed and, subsequently, Nunavut Acquisition. Harris practiced in the areas of mergers and acquisitions, corporate/commercial, mining, capital markets and communications and media.

[52] Prior to the Merits Hearing, Nunavut Acquisition waived privilege solely over the portion of the Davies file that related to the period from July 26, 2010 to September 9, 2010 and had a bearing on the defence of legal advice in this proceeding (*i.e.* concerned the review by or with Davies of issues relating to Mr. Waheed's consultancy) for the exclusive purpose of the Respondents' defence in this proceeding (the "**Limited Waiver of Privilege**"). Gula and Harris testified about their professional backgrounds and practices and with respect to matters within the scope of the Limited Waiver of Privilege.

[53] The Respondents called one additional witness, Jan van Veelen ("**van Veelen**"), who testified that he had worked exclusively in the iron ore industry since 1978. Commencing in 2000, van Veelen worked through his company, Atlantic Aggregates, as a commercial advisor and marketing consultant to various junior mining projects. From 2005 to 2011, van Veelen was an independent consultant to Baffinland in connection with marketing and business development in the iron ore industry. During the Merits Hearing, van Veelen was described as being "the eyes and ears of the company in Europe identifying who would want to purchase its product" (Hearing Transcript, June 14, 2013 at page 7368). Van Veelen testified at the Merits Hearing by video link from Zug, Switzerland, where he lives.

3. Read-Ins of Compelled Examinations

[54] Staff sought to read excerpts of the Respondents' compelled examinations into the record. It was eventually agreed that Staff would provide the Respondents with copies of the excerpts they intended to read in and the Respondents would have an opportunity to communicate to Staff any issues with respect to the scope of the proposed read-ins. It was also agreed that, rather than read the compelled examination excerpts into the hearing transcript, Staff would file a written brief.

[55] As Staff's read-ins had not yet been finalized by the time the closing submissions had been completed, Staff filed a Staff Read-in Brief, which included excerpts of Walter's compelled examination. Staff did not file excerpts of Waheed's compelled examination as read-ins.

[56] Staff also sought to rely on the transcripts of their compelled examination of Peter Kukielski ("**Kukielski**"), who was the Senior Executive Vice President and head of Mining for ArcelorMittal in 2010 and, subsequent to the completion of the Joint Bid, was a senior executive and a director of Baffinland. Staff noted that Kukielski was on the Respondents' witness list and sought to admit the transcript of his examination into evidence unless the Respondents were prepared to undertake that he would be called to testify. Staff submitted that, absent such an undertaking, it was important that Kukielski's transcript be admitted because the prospect of a potential non-suit motion had been raised by counsel to Walter a number of times during the Merits Hearing. Counsel for the Respondents submitted that it was incumbent on Staff to demonstrate why Kukielski, who was a senior executive at ArcelorMittal at the time of the Merits Hearing, could not appear as a witness.

[57] We determined that we would not admit the transcript of Kukielski's examination into evidence as Staff had failed to provide a compelling argument for doing so or to respond to our concerns about procedural fairness to the Respondents who would not have an opportunity to cross-examine Kukielski on the evidence of his compelled examination by Staff. We also agreed with the Respondents' submission that the prospect of a motion for non-suit, which Staff potentially faces in every case, was irrelevant to our consideration of whether the transcript of Kukielski's examination should be admitted as part of Staff's case.

4. Documentary Evidence

[58] On the first day of the Merits Hearing, the parties jointly filed a hearing brief which was comprised of over 2,600 documents organized in 64 volumes and a compact disc on which the documents had been saved in electronic form (the "**Joint Hearing Brief**" or "**JHB**").

[59] Counsel for Walter explained that the parties intended to refer to the documents in the Joint Hearing Brief throughout the Merits Hearing by reference to their respective tab numbers, rather than request that the Panel individually mark each document as an exhibit. At the end of the Merits Hearing, the parties would collaborate in the preparation of a condensed joint hearing brief of the documents in the Joint Hearing Brief that had been referred to during the course of the Merits Hearing which, together with any other documentary evidence introduced during the Merits Hearing, would constitute the written record of the proceeding.

II. PRELIMINARY ISSUES

A. The Standard of Proof

[60] The standard of proof in Commission proceedings is as described by the Supreme Court of Canada in *F.H. v. McDougall,* [2008] 3 S.C.R. 41 ("***McDougall***"), namely, proof on a balance of probabilities. As stated by the Court:

> … I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.
>
> (*McDougall*, *supra* at para. 40)

[61] The evidence "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test", however, this requirement does not elevate the standard of proof beyond a balance of probabilities (*McDougall*, *supra* at paras. 40 and 46).

B. Admission and Consideration of Evidence

[62] We rely on subsection 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990 c. S.22, as amended (the "**SPPA**"), which permits us to admit evidence relevant to a proceeding, including hearsay evidence that may not be admissible as evidence in a court:

> … a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

[63] We note that, although hearsay evidence is admissible in Commission proceedings, we must still have regard to issues of natural justice and fairness when determining whether any evidence should be admitted. As stated by the Commission in *Re Norshield Asset Management (Canada) Ltd.* (2010), 33 O.S.C.B. 2139, aff'd 2011 ONSC 4685 (Div. Ct.) at paragraph 87:

> The Panel has the discretion under s. 15 of the SPPA to admit hearsay evidence, but in exercising its discretion it must have regard to the matter before it. The more serious and contentious the matter, the more a tribunal must have regard to the rights of the parties. Though the Panel has the discretion to admit hearsay evidence, the rules of evidence are relevant and applicable in Commission proceedings. Natural justice and fairness issues must still be considered by the Panel when ruling on admissibility.

[64] With respect to assessments of the reliability of a witness' testimony about events or communications in dispute, we refer to the case of *Springer v. Aird & Berlis LLP* (2009), 96 O.R. (3d) 325 (Ont. Sup. Ct.) ("***Springer***"), in which the court cites with approval the statement of the British Columbia Court of Appeal that:

> The judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.
>
> (*Springer, supra* at para. 14, citing *R. v. Pressley*, [1948] B.C.J. No. 63, 94 C.C.C. 29 (C.A.) at para. 12).

Ultimately, where the parties have urged different interpretations of the facts in dispute, we have considered the evidence of a

witness in the context of all other oral and documentary evidence and drawn our conclusions based on whether that evidence is "in harmony with the preponderance of probabilities disclosed by the facts and the circumstances" of this case.

C. Rulings with respect to Evidence Admitted through the Testimony of the Staff Investigator

1. Ruling with respect to JHB 1843

[65] On July 24, 2013, the fortieth day of the Merits Hearing, the parties commenced their oral closing submissions. Shortly before the end of the hearing day, counsel for Staff announced that Staff had come to the end of its closing submissions and would use the remaining 15 minutes of its allocated time to address some additional issues. Staff's counsel then posed the question, "… why would they do this, why would Mr. Walter do this?" (Hearing Transcript, July 24, 2013 at page 9150, lines 3 to 4) and referred to a September 20, 2010 e-mail message ("**e-mail**") sent by EMG to Waheed and Walter, which was found at Tab 1843 of the Joint Hearing Brief ("**JHB 1843**"). Counsel for Walter immediately objected to Staff counsel's reference to JHB 1843 on the basis that it had never been put to any witness and was not part of the record in the case.

[66] Staff's counsel submitted that JHB 1843 was in evidence because it had been introduced through Humphreys, Staff's investigator, who testified that the document was given to Staff by EMG through its counsel. Counsel for Walter responded that Humphreys's identification of the document as one in a list of several hundred documents did not put JHB 1843 into evidence as it was never put to a witness and submitted that it would be improper and unfair to permit Staff to rely on the document in their closing arguments. Counsel for Waheed agreed with the submissions made by Walter's counsel.

[67] Counsel for Staff submitted that they could rely on JHB 1843 because the document was (i) in the Joint Hearing Brief; (ii) introduced through Humphreys; and (iii) sent by Calvert who refused to testify despite being on the Respondents' witness lists. Staff submitted that there was no unfairness to the Respondents, who had not denied receiving JHB 1843. The Panel undertook to consider the matter overnight.

[68] When the Merits Hearing resumed the following day, we ruled that, after reviewing the manner in which JHB 1843 was referred to by Humphreys, we were satisfied that the document had been tendered by or through Humphreys by reference to its JHB tab number alone and did not form part of the evidence as it was one of many documents in the Joint Hearing Brief that had not been adverted to or introduced in any other way. We ruled that it would therefore not be appropriate for Staff to refer to JHB 1843 in its closing arguments as though it were an exhibit, i.e., properly introduced in evidence. Our reasons for the foregoing ruling are as follows.

[69] As we noted in our oral ruling, after Respondents' counsel objected to the reference to JHB 1843 by Staff's counsel while making his closing submissions, we reviewed Humphreys's testimony and the documents admitted in evidence through him. Exhibits 15, 16, 17, 19, 21, 22 and 27 are lists of Joint Hearing Brief tab numbers identified by Humphreys during his testimony (collectively, the "**Humphreys Lists**"). In total, the Humphreys Lists list 727 documents solely by reference to their respective JHB tab numbers.

[70] Other than the source of the document and the JHB tab number, the Humphreys Lists do not include any additional information. Humphreys testified as to the total number of documents received from each source during Staff's investigation and the number of documents included by Staff in the Joint Hearing Brief and was not questioned further by Staff about any of the documents listed in the Humphreys Lists. The Humphreys Lists do not provide any information that would assist us in determining their substance or relevance to the allegations in this matter.

[71] It appears that the documents listed in the Humphreys Lists constitute all of the documents Staff included in the Joint Hearing Brief, other than publicly-available documents, communications between the parties or documents created by Staff investigators. In our view, Humphreys's brief and generic testimony with respect to the sources of the documents, without any further identification or explanation of the documents, did not provide a sufficient basis for us to treat the documents as evidence. To be clear, neither the Panel nor the Respondents were informed of the nature or type of each document or the authors or recipients of each document. Further and, importantly, Staff did not specifically request that the documents listed by JHB tab number in the Humphreys Lists be entered as exhibits or introduce relevant documents through another witness thereby affording the Respondents the opportunity to address the contents of such documents, including their relevancy and legitimacy. This approach was similar to that employed by the parties when their respective counsel produced separate binders of documents for each of their witnesses to facilitate their examination of the witness. In each such case, only the index to each binder was entered as an exhibit but not the contents of the binder. The individual documents in these binders were included in the hearing record only if put to a witness during the Merits Hearing, consistent with the process for introducing documentary evidence described in paragraph [59] above.

[72] In light of the foregoing considerations, we found that the Respondents' objections to Staff's reliance on JHB 1843 in its closing submissions on the basis of fundamental fairness were reasonable.

2. Denial of Staff's request to re-open its case

[73] On July 25, 2013, while counsel for Waheed was making his closing submissions, Staff requested leave to reopen its case for the purpose of putting JHB 1843 to Waheed and/or Walter so that it would become part of the evidentiary record. Staff's counsel submitted that Staff had proceeded throughout the Merits Hearing on the basis that JHB 1843 had been introduced through Humphreys and was part of the record. Staff's counsel characterized the effect of our ruling with respect to JHB 1843 as the removal of a document from evidence that already formed part of the evidence.

[74] Counsel for Waheed submitted that it would be inappropriate for Staff to be permitted to recall Waheed or Walter for the purpose of putting JHB 1843 to them as all of the parties had closed their cases and he was two-thirds of the way through his closing submissions. He also noted that Staff had the opportunity to put the document to Waheed and Walter during cross-examination, but did not do so. Counsel for Walter agreed with the submissions of Waheed's counsel.

[75] We provided an oral ruling on this issue and informed the parties that we were not prepared to grant Staff leave to reopen its case to put JHB 1843 to either of the Respondents.

[76] Our ruling takes into account the specific circumstances of this case in which (i) the process for entering exhibits was agreed to by the parties at the outset of the Merits Hearing as described in paragraphs [58] and [59] above; (ii) Staff had ample opportunity to put JHB 1843 to either of the Respondents during cross-examination but did not do so; (iii) all of the parties had closed their respective cases; and (iv) allowing Staff to recall one or both of the Respondents for the purpose of entering JHB 1843 as an exhibit would have necessitated a delay if the Respondents had requested time to permit them to adduce reply evidence. In these circumstances, we concluded that it would not be fair to the Respondents to permit Staff to re-open its case for the purpose of entering as an exhibit a document of which it was fully aware and that had formed part of the Joint Hearing Brief from the outset of the Merits Hearing.

3. Ruling with respect to other JHB documents similarly adverted to by Humphreys

[77] Following our ruling above with respect to JHB 1843, Staff sought clarification as to whether our ruling was confined to JHB 1843, or whether it also applied to all documents similarly adverted to by Humphreys.

[78] Staff submitted that the effect of our ruling with respect to JHB 1843 was to exclude other documents, some of which Staff relied upon in its closing submissions. Staff identified 35 documents of concern in this respect, including JHB 1843. Staff argued that the fact that the Respondents relied on some of these documents supports the conclusion that all parties were under the impression that the documents introduced through lists of JHB numbers put to Humphreys were in evidence.

[79] Staff requested leave to reopen its case to introduce the 34 additional documents of concern, excluding JHB 1843 on which we had already ruled (collectively, the "**34 Humphreys Documents**"). Staff submitted that reopening the case would cause no prejudice in the circumstances where the parties were proceeding on the basis that the documents were, in fact, in evidence by virtue of having been spoken to by Humphreys.

[80] There was uncertainty at the time of the Merits Hearing as to whether the Respondents had referred in their closing submissions to any documents that were listed in the Humphreys Lists but were not spoken to by any other witness. We determined that if the parties collectively concluded that there had been an inadvertent exclusion of documents, the Panel could determine whether it would be appropriate to reopen Staff's case to permit the admission of those documents. If not done on consent, the Panel's view would remain that the evidence was closed and that it was far too late in the proceeding to reopen the evidence.

[81] There was no consent on this issue and, at a later hearing date to address issues relating to the record, we communicated to the parties that our ruling in this matter was fact-specific and was not intended to have any implications with respect to Staff's ability to rely on section 15 of the SPPA in the manner in which it prosecutes its cases.

D. Ruling with respect to Expert Reports

[82] The witness lists for Staff and the Respondents included expert witnesses. Each of Staff and the Respondents raised a number of objections relating to the contents of the expert reports of the other party or parties. In addition, the Respondents objected to Staff's stated intention to lead its responding expert opinion evidence during its case-in-chief. The parties made oral and written submissions on issues relating to expert reports, which issues included the order in which expert reports in response may be introduced into evidence. The procedure for the disclosure of intent to call an expert and service of an expert's report or affidavit is set out in rule 4.6 of the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (the "**Rules**"):

> **4.6 Expert Witness – (1) Intent to Call an Expert** – A party who intends to call an expert to give evidence at a hearing shall inform the other parties of the intent to call the expert and state the issue on which the expert will be giving evidence, at least 90 days before the commencement of the hearing.

> **(2) Provision of an Expert's Affidavit or an Expert's Report** – A party who intends to introduce evidence of an expert witness at the hearing shall either:
>
> (a) serve the expert's report on each other party at least 60 days before the commencement of the hearing; or
>
> (b) if granted leave by a Panel, serve an affidavit of the expert witness on each other party, at least 60 days before the commencement of the hearing. Where an affidavit of an expert witness is used, and the deponent is cross-examined prior to the hearing, the Panel reserves the right to call the expert to testify at the hearing if necessary.
>
> **(3) Provision of an Expert's Affidavit or an Expert's Report in Response** – A party on whom an expert's affidavit or expert's report referred to in subrule 4.6(2) has been served and who wishes to respond with expert evidence to a matter set out in the affidavit or report, shall serve an expert's affidavit or expert's report in response on each other party, at least 30 days before the commencement of the hearing.
>
> …

[83] Staff submitted that it has an absolute right to lead the evidence of qualified experts in its case-in-chief where the evidence is relevant and might be of assistance to the Panel. Staff further submitted that even if expert reports are responding in nature, the fundamental prohibition against case-splitting does not raise any bar to Staff's introduction of that evidence.

[84] The Respondents took the position that the ability of a party to lead expert evidence is explicitly subject to the dictates of procedural and substantive fairness and the framework set out in rule 4.6 of the Rules as well as to the admissibility of such evidence having regard to established common law principles.

[85] In our oral ruling on this issue, we noted that, prior to the Merits Hearing, Staff consistently indicated to the Respondents that they did not intend to introduce expert evidence. When they did seek leave to introduce expert reports, Staff did not indicate whether its expert reports were reports within the meaning of subrules 4.6(1) and (2) of the Rules, or whether they were experts' reports in response within the meaning of subrule 4.6(3) of the Rules. We ruled that the contents of Staff's experts reports made it quite clear that they were experts' reports in response within the meaning of subrule 4.6(3), and that the right of Staff to lead expert evidence is circumscribed by rule 4.6 of the Rules to ensure procedural and substantive fairness.

[86] As experts' reports in response, the reports and testimony of Staff's experts had to be responsive and limited to the matters set out in the Respondents' expert report or reports to which they were in response. As a result, we found that Staff would only be permitted to lead the evidence of its experts in response to the evidence of the Respondents' remaining expert, [15] if called to testify, and not as part of Staff's case-in-chief.

[87] The Respondents elected not to call any expert evidence. As there was no expert evidence to which they could respond, Staff's responding experts did not testify and no expert evidence was introduced at the Merits Hearing.

III. BACKGROUND TO THE ALLEGATIONS

A. Baffinland and the Mary River Project up to 2010

1. Background and History of Baffinland and the Mary River Project

[88] Baffinland's only mining asset was the Mary River Property on which high grade iron ore deposits are located. The Mary River Property is located approximately 100 kilometres south of the northern coast of Baffin Island which is north of the Arctic Circle.

[89] Mining claims and prospecting permits for the Mary River Property were initially acquired in the early 1960s. In 1963, a geological consulting firm commenced an exploration program on the Mary River Property. The exploration work continued during the 1960s and included surveying and mapping, the drilling of holes at the first iron ore deposit, Deposit 1, the construction of gravel airstrips and the construction of a 100 kilometre tote road to the closest navigable water at Milne Inlet (the "**Milne Inlet Tote Road**").

[90] Very little field work was undertaken with respect to the Mary River Property from 1965 to 2002, at which time

[15] The Respondents served three expert reports on Staff, the expert report of Bradley Heys, the expert report of Christopher Lattanzi and the reply report of Mr. Heys dated January 10, 2013. During the Merits Hearing, the Respondents advised that they would not be seeking to introduce the evidence of Mr. Heys. As a result, as of the date of our oral ruling, Mr. Lattanzi was the only remaining prospective expert witness of the Respondents.

McCloskey and McCreary became involved with the intention of revitalizing the Mary River Project and finding new avenues for development. McCloskey and McCreary had been good friends since they met as engineering students at Queen's University in 1969. Both were familiar with the Mary River Property as McCloskey's father had been involved with the Mary River Property and it was the subject of McCreary's MBA thesis. McCloskey approached McCreary about the Mary River Project in 2000 and, in 2002, McCloskey and McCreary gained a controlling interest in Baffinland Iron Mines Ltd., the private company that held the Mary River Project claims and leases. Through a reverse take-over, Baffinland Iron Mines Ltd. was taken public in 2004 and the company became Baffinland Iron Mines Corporation.

[91] Throughout the Merits Hearing, the iron ore deposits located on the Mary River Property were described as "world-class". The deposits contain direct shipping iron ore, known in the iron ore industry as "**DSO**", with iron ore grades between 60% and 71%. As a result of its high grade, DSO iron ore does not require further processing before being fed into the blast furnaces of steel mills. Dimitrov testified that DSO is generally 5% to 15% less expensive than iron ore that requires refinement. McCreary testified that "The challenge of Baffinland is the remote location. The quality of the ore is absolutely superb …" (Hearing Transcript, January 21, 2013 at page 864, line 24 to page 864, line 1).

[92] Initial drilling and exploration in the 1960s led to the identification of four iron ore deposits on the Mary River Property, referred to as Deposits 1, 2, 3 and 4. From 2008 to 2010, Baffinland raised capital and undertook exploration and drilling activities on the Mary River Property, which resulted in the discovery of additional deposits. At the relevant time, Deposit 1 was the only deposit that was a reserve-level deposit pursuant to National Instrument 43-101 – *Standards of Disclosure for Mineral Projects*.

[93] Baffinland reactivated exploration work on the Mary River Project in 2004 and, by January 2008, had spent over $150 million advancing the Mary River Project. As discussed further below, Baffinland commissioned a definitive feasibility study focused on a direct-shipping iron ore operation producing 18 million tonnes per annum ("**mtpa**") and had initiated a scoping study to investigate the possibility of an annual production rate of 30 mtpa based on the development of Deposits 1, 2 and 3, which was completed later in 2008 (the "**2008 Scoping Study**"). By this time, Baffinland was also well advanced on its plan to mine and ship a large bulk sample of iron ore to prospective customers in Europe.

[94] In March 2008, Baffinland completed a $193 million public equity offering for the stated purpose of funding further exploration and development activities and for general corporate purposes. McCreary testified that the funds were used to complete the shipment of the bulk sample of iron ore to prospective customers, discussed further below.

[95] In December 2008, after the commencement of the financial crisis in the fall of 2008, Baffinland completed a distress financing, raising $21 million through two concurrent private placements, one with RCF for $7 million and one with a syndicate of agents led by CIBC for $14.8 million.

[96] By late March 2009, Baffinland had spent more than $400 million on the Mary River Project, including the $193 million financing referred to in paragraph [94] above.

[97] On November 19, 2009, Baffinland announced that it had entered into agreements with GMP in connection with a public offering on a bought deal basis of units comprised of common shares and warrants in the aggregate amount of approximately $10 million, and a private placement on a bought deal basis of units comprised of "flow-through" common shares and warrants in the aggregate amount of approximately $20 million. Baffinland stated at the time that its intention was to use the proceeds of both the public offering and the private placement "to increase and upgrade the mineral resources" on the Mary River Property, to modestly advance development activities on Deposit 1 and for general corporate purposes.

2. The 2008 Definitive Feasibility Study and the 2008 Scoping Study

[98] In 2007, Baffinland commissioned Aker Kvaerner E&C, a Division of Aker Kvaerner Canada Inc. ("**Aker Kvaerner**"), to prepare a definitive feasibility study to determine the commercial and financial feasibility of the Mary River Project. Aker Kvaerner considered the construction and operation of an open-pit mine site at Deposit 1 on the Mary River Property, a port at Steensby Inlet on Baffin Island and a 143 kilometre railway between the two locations. The definitive feasibility study was completed by Aker Kvaerner and released to the public and filed on the System for Electronic Document Analysis and Retrieval ("**SEDAR**") in February 2008 as the *Technical Report of the Definitive Feasibility Study: Mary River Iron Ore Project, Northern Baffin Island, Nunavut* (the "**Aker DFS**").

[99] The Aker DFS was intended to be used by Baffinland to further the development of the Mary River Property by providing an estimate of resources and reserves and an economic valuation of the Mary River Project. In addition to the mine infrastructure at the Mary River Property, the Aker DFS included a process plant at the mine site. As the iron ore is of DSO quality, the only processing required would be crushing and screening which would produce both lump and fine products.

[100] The lump and fine ore would be separately transported from the mine site to the Steensby Inlet port south-southeast of the Mary River Property by means of the 143 kilometre railway mentioned above. To provide access to steel mills in Europe, the

primary markets for DSO, the Aker DFS contemplated that the iron ore would be shipped from Steensby Inlet to Rotterdam by bulk carriers that would operate 12 months of the year. Because the open water period lasts for approximately three months from mid-August to mid-October, vessels with ice-breaking capacity would have to be used to facilitate year-round shipping.

[101] Although the Aker DFS addressed the construction of the railway and the port, it did not address the costs of and methodology for shipping iron ore from Steensby Inlet to its ultimate destination, likely Europe.

[102] The Aker DFS was based on the reserve amounts in Deposit 1, an 18 mtpa production rate and an estimated mine life of 21 years. The total estimated capital costs according to the Aker DFS would be approximately $4.075 billion and the estimated operating costs would be approximately $14.62 per tonne of iron ore mined and transported to port by rail.

[103] Later in 2008, Aker Kvaerner completed the 2008 Scoping Study of the potential expansion of the production rate of the Mary River Project to 30 mtpa, based on the development of a second open-pit mine encompassing Deposits 2 and 3. The 2008 Scoping Study had contemplated an estimated capital cost of $4.877 billion and estimated operating costs of $15.43 per tonne.

[104] The 2008 Scoping Study was completed to a scoping level of detail and with an estimating confidence of +/-20%. It relied on inferred mineral resources, considered too geologically speculative to be categorized as mineral reserves. Baffinland's request for an exemption that would have permitted Baffinland to disclose the results of the 2008 Scoping Study was denied by the Commission in July 2008. Following the Commission's response to Baffinland's request, Baffinland removed a document entitled *Additional information related to the significant components of an expansion of the Mary River Project* from its website.

3. The 2008 Bulk Sample Shipment to European Steel Mills

[105] In 2007 and 2008, Baffinland mined a large bulk sample of iron ore for large-scale blast furnace testing at steel mills in Europe. In August and September of 2008, Baffinland shipped three cargo loads totalling 113,217 tonnes of lump and fine iron ore (the "**Bulk Sample**") to two steelmakers, ArcelorMittal and ThyssenKrupp Steel AG ("**ThyssenKrupp**"), for testing. The purpose of the Bulk Sample was to provide steelmakers with a final geological and metallurgical test and final confirmation of the superior quality of Baffinland's high grade iron ore. Baffinland hoped the results of the testwork would enable it to establish long-term sales contracts for its lump and fine iron ore sales products.

[106] The Bulk Sample was mined from Deposit 1 and then transported to the north coast of Baffin Island along the Milne Inlet Tote Road, which had to be upgraded to an all-weather condition. From Milne Inlet, the Bulk Sample was shipped to Europe during the open water season.

[107] ArcelorMittal and ThyssenKrupp tested the productivity of the Bulk Sample against the more expensive processed iron ore the companies were using in their steelmaking blast furnaces. Dimitrov testified that the results generally showed that productivity was the same, if not better, when they used Baffinland's DSO. In a January 2010 internal report, Baffinland noted that "ArcelorMittal in its lab-based sinter[16] testwork saw a 13% productivity increase by substituting Mary River fine ore directly for Carajás fine ore. ArcelorMittal uses 25% Carajás fine ore in its normal sinter mix" (Baffinland Monthly Report, January 2010).

[108] The Bulk Sample cost Baffinland approximately $100 million, which was financed through the issuance of common shares.

4. Baffinland's Search for a Strategic Partner up to 2010

[109] Dimitrov testified that it would have been practically impossible for a company the size of Baffinland to put the Mary River Project into commercial development by itself, based on the related capital costs (of approximately $4.0 billion) and Baffinland's market capitalization (which was less than $150 million prior to the Take-Over Bid). Accordingly, in 2008, Baffinland initiated a process to identify a strategic partner (or partners) that would assist in financing the Mary River Project.

[110] On January 3, 2008, Baffinland announced that it had engaged CIBC and Citigroup Global Markets Inc. ("**Citigroup**") to act as its co-financial advisors in seeking a minority strategic partner or partners. CIBC and Citigroup were to assist Baffinland in identifying potential minority strategic partners, evaluating potential transactions, assisting in the course of negotiations and rendering other financial advisory and investment banking services.

[111] Baffinland entered into a number of confidentiality agreements with companies in 2008 and, in August and September 2008, Baffinland hosted two potential strategic partners, Anglo American Services (UK) Ltd. ("**Anglo American**") and ArcelorMittal, for confidential site visits to the Mary River Property. McCreary testified that, although another steelmaker, ThyssenKrupp, had previously been at the site, the company did not make a site visit at that time. McCreary testified that ThyssenKrupp was not "on the hunt" because it had diverted its attention to doing a transaction in Brazil.

[16] Sintering is a method for making objects from powder by heating the material in a sintering furnace without causing it to melt.

[112] Following the commencement of the financial crisis in the fall of 2008, Baffinland's search for a strategic partner stalled. McCreary testified that "… we were rudderless and floundering at the end of 2008" (Hearing Transcript, January 21, 2013, page 876, lines 1 to 2). In his letter to shareholders in Baffinland's 2008 Annual Report, McCreary commented on Baffinland's search for a strategic partner that year as follows:

> … The primary risk that Baffinland faces is financing, or as I said in last year's annual report, "Can we raise the dough to do what we have to do?" Strategic partnering is a key component of reducing financing risk and the global financial crisis has increased the complexity of this task. I believe that we would have accomplished strategic partnering in 2008 had it not been for the global financial crisis. The obvious candidates for strategic partnering are from the steel and mining industries or the metal trading houses that work between these two industries. During 2008 we executed confidentiality agreements with more than ten potential strategic partners representing some of the largest companies in the world from these industries. These firms gained access to our virtual data room where we have amassed about 20,000 pages of data and some of these firms have made site visits. Although this process has not yet resulted in strategic partnering for Baffinland, it has raised global awareness about our unique Mary River project and "Our Achievements" to date, while laying the foundation for our success.

[113] On December 9, 2008, McCreary was quoted as reporting that Baffinland was "talking to the biggest of the big in steel, mining and metals trading" (Jana Marais, "Baffinland still in talks with potential strategic partners", *MetalBulletin*, December 9, 2008).

[114] Baffinland did not renew its relationship with Citigroup as a financial advisor and, in early 2009, CIBC became Baffinland's sole financial advisor. In February 2009, Reuters reported that Baffinland had "about a dozen confidentiality agreements signed with some of the largest mining and steel companies in the world and … some of the intermediaries, the metal trading houses that work in between" ("Baffinland hopes to ink partnerships this year", February 25, 2009). On March 25, 2009, it was reported that representatives from 18 banks had visited the Mary River Property and more than 10 potential partners had signed confidentiality agreements. McCreary was quoted as saying that the German state-run international project and export finance bank, KfW IPEX-Bank ("**KfW**"), had indicated that the German government could provide a loan guarantee for up to $1.2 billion to help develop the Mary River Project (*Factiva*, "Baffinland continues hunt for $3.4B project financing", March 25, 2009).

[115] In June 2009, Baffinland contacted ArcelorMittal to reinitiate discussions about a strategic partnership and, in November 2009, ArcelorMittal requested a meeting with Baffinland to discuss its proposal of a direct investment in Baffinland of approximately $150 million. The proposal was not acceptable to Baffinland at that time as Baffinland was interested in an investment at the asset level, rather than at the public company level. At Whittall's first meeting with Baffinland in Toronto in November 2009, she requested, and Baffinland agreed, that the parties treat their negotiations as confidential notwithstanding the absence of a written confidentiality agreement.

[116] McCreary and McCloskey were also in discussions with China Minmetals Corporation ("**Minmetals**"), a Chinese state-owned entity and one of the largest metals trading houses in the world and, in July 2009, McCreary and a representative of CIBC went to Beijing to meet with Minmetals. However, a Baffinland Monthly Management Commentary dated July 2009 noted that there were polarized views within CIBC regarding Minmetals and it was decided in mid-August that Baffinland would delay its response to Minmetals to focus on getting other potential strategic partners more advanced. Dimitrov testified that Baffinland and Minmetals were discussing a memorandum of understanding in the fall of 2009, but the discussions with Minmetals were intermittent, and never went beyond each company checking-in with the other from time to time.

[117] On July 23, 2009, a CIBC *World Markets Institutional Equity Research* report on Baffinland stated:

> We anticipate Baffinland will most likely form a strategic partnership, which would be dilutive at the project level. We believe possible acquirers include a steelmaker looking to fully integrate its upstream supply chain or a mining major looking to control the timing of when the project comes online.
>
> (CIBC World Markets Institution Equity Research Initiating Coverage – Baffinland Iron Mines Corporation, "Executive Summary – World-class Assets Don't Stay Undeveloped Forever", July 23, 2009)

[118] On September 17, 2009, Baffinland appointed a strategic committee (the "**Strategic Committee**"), initially comprised of McCloskey, Cranswick and Donald Charter ("**Charter**"), another Baffinland director, to oversee its strategic partnering activities and advance the search for a strategic partner. At the time of the first meeting of the Strategic Committee on October 1, 2009, Baffinland had active confidentiality agreements with six companies, including Minmetals, Franco-Nevada Corporation and Rio Tinto, and recently expired confidentiality agreements with 13 additional companies, including Anglo American, ArcelorMittal, Mitsubishi Corporation, POSCO Canada Ltd. ("**POSCO**"), Salzgitter Flachstahl GmbH ("**Salzgitter**"), ThyssenKrupp and Xstrata (Schweiz) AG.

[119] In the fall of 2009, Cranswick, the RCF representative on the Baffinland Board, was contacted by Rod Beddows ("**Beddows**"), a London investment banker and CEO of Hatch Corporate Finance ("**Hatch**"), about the options available to Baffinland. Cranswick testified that Beddows advised him that Hatch had met "with several parties which are relevant to Baffinland" and that Beddows "was trying to sell himself as knowledgeable in the space with potential strategic partners that he might be able to deliver over time."

[120] In early November 2009, Beddows and a colleague at Hatch met with Cranswick to discuss a number of topics relating to RCF's participation in Baffinland, including identifying potential counterparties and strategic partners and their levels of interest and competencies. In this presentation, Hatch identified ArcelorMittal in a list of potential strategic counterparts for Baffinland, noting it had a high perceived interest, financing capability and iron ore mining capability and had "arctic experience".

B. Waheed's Role as a Consultant

1. Retention of Waheed as a Consultant

[121] As of the fall of 2009, RCF, which had invested approximately US$90 million in Baffinland and owned over 20% of Baffinland's common shares, concluded that management enhancement was necessary for Baffinland to mature. RCF initiated a recruitment process for an experienced mining professional with the ability to assist Baffinland in realizing its full potential. Late in 2009, Cranswick communicated to Beddows the concerns that he and RCF had with Baffinland's management and its CEO. Beddows suggested to Cranswick that Baffinland "might need someone with more strategic thinking at the top to help get a transaction over the next year or so" and suggested Waheed.

[122] In November 2009, Cranswick initiated discussions with Waheed to get to know him and inquire whether he would potentially be interested in the position of CEO of Baffinland. Cranswick continued discussions with Waheed to the end of 2009 and into January 2010. On January 25, 2010, Cranswick introduced Waheed to McCloskey over lunch. Cranswick testified that McCloskey instantly recognized that Waheed had strategic thinking skills that could help Baffinland and was initially receptive to the idea of Waheed joining Baffinland, but he wanted to get some other opinions and do some research himself.

[123] By early February 2010, Waheed and Cranswick were discussing the possibility of Waheed joining Baffinland as a strategic advisor to the Baffinland Board. Waheed did not want a passive role and the role of strategic advisor would not be offensive as he would not be replacing someone in a role that already existed. On February 11, 2010, Cranswick sent an e-mail to Waheed to confirm that he would be joining Baffinland as a consultant and attached the form of contract that Baffinland had been using with a number of contract executives. Cranswick sent a modified copy of the contract to Dimitrov on February 16, 2010 and asked her to clean up the contract so that Cranswick could get Waheed's approval prior to submitting it to McCloskey and/or the Strategic Committee.

[124] Waheed met Dimitrov and three members of Baffinland's Board, namely, Charter, Cranswick and Brian Acton, over dinner in early February, 2010. On February 17, 2010, Waheed met with Dimitrov and McCreary at Baffinland's offices to sign the Consulting Agreement and start his consultancy with Baffinland. As summarized in detail in paragraphs [232] and following, Dimitrov described the progress of negotiations with ArcelorMittal to get Waheed up to speed on discussions that had been ongoing since November 2009.

[125] Dimitrov prepared the Consulting Agreement using the same form of agreement that she had previously executed as a consultant to Baffinland with the required changes to the job description. The Consulting Agreement, which was dated February 18, 2010 and expired on June 15, 2010, provided that Waheed was an independent contractor and not an employee or agent of Baffinland and was to be compensated at a monthly rate of $27,500, based on full-time engagement. The services to be provided by Waheed were set out in Schedule "A" to the Consulting Agreement which provided as follows:

> Consultant shall provide the following services (the "Services"):
>
> 1. Strategic advice to the Board or to its designated committee in respect of potential partnerships, mergers, acquisitions or dispositions of [Baffinland's] assets.
>
> 2. Strategic advice to the President and CEO and management designated by the CEO in matters relating to evaluating potential transactions, capital raising transactions and other matters related generally to the development of the Mary River Property.
>
> 3. Interact with the Board (or its designated committee) and communicate and implement the vision thorough direct interaction with the President and CEO and designated management on a day-to-day basis.
>
> 4. Represent [Baffinland] externally at the direction of the Board and/or CEO to give effect to the above.

Waheed was engaged to perform the foregoing services on a non-exclusive basis and on an "as and when needed basis" as requested by Baffinland.

[126] The confidentiality provisions of the Consulting Agreement stated that Waheed would not use for his own account or disclose to anyone else, any confidential or proprietary information or material relating to Baffinland's operations or business to which he had access by virtue of his position with Baffinland or obtained from Baffinland or its directors, officers, employees, agents, suppliers or customers. It also required that Waheed use his best efforts to protect and maintain the confidentiality of such confidential information for a period of two years following the termination of the Consulting Agreement.

2. Waheed's Work at Baffinland, February 18, 2010 to April 30, 2010

[127] In addition to the information that she provided to Waheed when they met on February 17, 2010, Dimitrov also provided information to Waheed by e-mail and by providing copies of documents "to get him up to speed with everything that was going on" (Hearing Transcript, January 31, 2013 at page 2727, lines 2-5). Dimitrov testified that, at that time, Baffinland's management was not sure whether Waheed's role would ultimately extend beyond that of a consultant. She had heard discussions that Waheed might join the Baffinland Board or take over as Chairman. Thinking that Waheed might become her "boss" shortly, she dealt with him in that manner and provided him with whatever information he requested and assisted him by working through his questions, ideas and suggestions.

[128] On February 18 or 19, 2010, Waheed travelled to Denver, Colorado to meet with James McClements ("**McClements**"), RCF's Managing Partner, and others at RCF. Waheed testified that they met for about half a day and discussed Waheed's history and thought process, RCF's experience with iron ore and the transport of iron ore by truck in relation to Baffinland and another company in Australia that was developing an iron ore deposit and planning to truck iron ore over 500 to 600 kilometres.

[129] On February 21, 2010, Waheed sent an e-mail to Dimitrov and McCreary with a draft memorandum to be provided to the Strategic Committee. The memorandum was divided into three sections entitled (1) *Certain Initial Observations on the Arcelor-Mittal Initiative*, (2) *Some Strategic Considerations for going Forward*, and (3) *Draft Indicative Terms for a Revised [ArcelorMittal] Transaction*. In the memorandum, Waheed noted that the proposed ArcelorMittal transaction had very limited, if any, benefits for Baffinland which would be "structurally crippled to finance its share of the costs or enter into accretive mergers" and forced into a potentially much longer time line to commence ore deliveries and generate cash flow. Waheed recommended that Baffinland immediately create an aggressive new business plan that would divide the Mary River Project into two phases. The first phase would involve at least one to two mtpa of production to be shipped by truck within the following 18 months (the "**Trucking Option**"), while the second phase would entail a "scale-up" to 18 or more mtpa of production over the following three years. In Waheed's view, the new business plan should have become the basis for negotiating with ArcelorMittal and would have allowed Baffinland to disavow certain elements of the proposal to which it had already agreed, the phasing-out of CIBC and the insertion of "suitable management representatives into the interface with AM."

[130] When questioned by Staff about Waheed's proposal, Lydall testified as follows:

> I must admit I was pretty excited when I saw it because here was a consultant who, after about four days, had come up with a pretty comprehensive review of some of the challenges facing the company and also, even more important, with some ideas as to other things that we should be looking at. Which, considering the time period that he had been involved, I thought was extremely constructive.
>
> (Hearing Transcript, February 14, 2013 at page 4659, lines 6 to 14)

[131] Following discussion of the phasing proposal at Baffinland's weekly management meeting on February 26, 2010, people were assigned various tasks set out in the memorandum. Mike Zurowski ("**Zurowski**"), Baffinland's Executive Vice President, was asked to complete a "back-of-the-envelope" assessment of the Trucking Option and found that the assumptions used, including a two mtpa base production level, suggested that the Trucking Option was economically viable at then current iron ore prices. Baffinland eventually determined that it would consider the Trucking Option in more detail and undertook to complete the Road Haulage Conceptual Study, an internal conceptual study to look into the Trucking Option.

[132] From February 25 to March 19, 2010, Waheed was out of the country on a previously arranged family holiday. He testified that, during this time, he checked his e-mail messages infrequently and Cranswick was the only person involved with Baffinland with whom he was in contact. Waheed returned to the Baffinland office during the week of March 22, 2010.

[133] In late March 2010, Waheed had discussions with Dimitrov and others at Baffinland regarding a transaction with ArcelorMittal and an upcoming meeting with ArcelorMittal representatives in Toronto to discuss the terms of the proposed transaction. Dimitrov testified that RCF wanted to ensure that Waheed was involved in the negotiations with ArcelorMittal going forward, and, in particular, that Waheed would be present at the forthcoming meeting with ArcelorMittal in Toronto as Cranswick was unable to attend.

[134] In the end, Waheed did not attend the meeting with ArcelorMittal that took place in Toronto on April 6, 2010. Dimitrov testified that it was clear to the Strategic Committee that Waheed was of the view that Baffinland should not proceed with a transaction on the basis that had been discussed with ArcelorMittal, and that Baffinland should pursue the Trucking Option as the initial phase. Once Baffinland had become an operating company with production, Baffinland could consider a structure that was more similar to what it had been negotiating with ArcelorMittal. The Strategic Committee was concerned that, after four or five months of discussions and negotiations around a particular structure, tabling a proposal that was quite different would drive ArcelorMittal away as a potential strategic partner.

[135] At the time Waheed arrived as a consultant, Baffinland had a financial spreadsheet or model (the "**Financial Model**")[17] which had been prepared from the model completed as part of the Aker DFS and pertained only to the transport of iron ore by rail. At Waheed's request, work on revising the existing Financial Model to incorporate the Trucking Option, the potential transaction with ArcelorMittal and a number of other options commenced on or about March 23, 2010. Quinn Roussel ("**Roussel**"), a financial analyst employed by RCF, was essentially loaned to Baffinland at Gareau's request to assist in the development of a financial model that would be easier to manipulate and allow the Trucking Option to be incorporated along with the capability to evaluate alternative financing scenarios. On March 25, 2010, Dimitrov sent an e-mail to Roussel attaching materials and summarizing what Baffinland was hoping to achieve. The following is an excerpt from the e-mail:

> We are attaching the following:
>
> - BIM's working model – this is based on the original model prepared by Akker [*sic*] as part of the DFS with some BIM modifications – there are various things that do not "work" in this model and Mike is preparing a list of these items
>
> - BIM's working model with the ask from the QIA (Inuit group) in respect of financial participation
>
> - Back-of-the-envelope NPV/sensitivity of trucking vs. rail
>
> We are trying to achieve the following:
>
> - a new working Baffinland LOM model
>
> - trucking option / rail option / integrated trucking & rail option
>
> - fully integrated with interest and equity
>
> - ability to calculate "financial participation"
>
> - include project financial statements
>
> - JV interest scenario analysis
>
> - per share/NAV analysis
>
> - terms of reference
>
> - assumptions

Roussel worked at the Baffinland offices for two or three days and, on April 1, 2010, after reviewing the Financial Model's assumptions and how it worked, he sent Waheed, Dimitrov, Gareau and Zurowski an electronic copy of the new Financial Model (the "**April 1st Roussel Model**").

[136] At approximately the same time, Waheed prepared a presentation to and arranged a meeting between contacts he had at National Bank Financial ("**NBF**") and Baffinland to discuss funding for the Trucking Option. The NBF presentation included information on reserves (375 million tonnes), resources (485 million tonnes) and potential resources (460 – 1,250 million tonnes) for Deposits 1 through 5 on the Mary River Property.[18] In addition, the NBF presentation included information on Baffinland's

[17] We use the term "Financial Model" to refer generally to all iterations of the spread sheets that were used in connection with the planned development and financing of the Mary River Project, including the model in use at the time Waheed joined as a consultant, the various versions of the model that Waheed and others worked on while he was a consultant, the models that Baffinland used after Waheed's consultancy ended and the models used by Waheed during the Post-Consultancy Period. When referring to specific versions of the Financial Model that were entered in evidence, we identify the Financial Model by date or otherwise.

[18] The Technical Report of the Aker DFS, which was filed on SEDAR, only included data about mineral reserves for Deposit 1 (proven and

business strategy, described as focusing on immediate development of lower capital cost operations and simpler mining, crushing, trucking and shipping operations, highlights from the Aker DFS, results of the Bulk Sample and proposals for shipping, amongst other things. When he provided a draft of the NBF presentation to Gareau, Zurowski and Dimitrov by e-mail on April 8, 2010, Waheed noted that all of the numbers, which were based on the Financial Model, were placeholders for the time being and a lot of work still needed to be done to complete the Financial Model. Waheed opined that "Clearly the next major step is getting the model to incorporate basic metrics on operating costs, capacities etc."

[137] After Gareau and Zurowski had run various scenarios using the April 1st Roussel Model, external testers were retained to ensure the working functionality of the April 1st Roussel Model and identify what additional corrections were necessary to ensure such functionality. Waheed subsequently developed a simplified version of the April 1st Roussel Model dated April 14, 2010 in which data that had been spread-out over multiple linked spreadsheets was reduced to a single page spreadsheet. On April 22, 2010, Waheed sent a further version of this simplified Financial Model (the "**April 22nd Model**") to Gareau and Zurowski.

[138] The April 22nd Model included various assumptions, including assumptions relating to production metrics, commodity price and exchange rates, operating expenses and capital expenditures for rail and trucking, QIA royalty rates and Inuit Impact Benefit Agreement payments, depreciation and amortization, taxes, cash flow statements and reserves.

[139] Waheed's consultancy effectively came to an end by April 30, 2010, although there was no formal termination of the Consulting Agreement. When sending his final invoice dated April 30, 2010 to Baffinland, Waheed noted that he would await communication from Dimitrov or McCloskey in the event that they required any further services from him. No such communication was forthcoming.

C. Proposed Changes to the Baffinland Board and Management

[140] During his recruitment of Waheed and after Waheed began his consultancy, Cranswick expressed concerns about the structure of the Baffinland Board and Baffinland's management. Cranswick referred to the Baffinland Board as "buddy directors" who were close to McCreary and expressed serious concerns about Baffinland's corporate governance. On March 10, 2010, Cranswick reported to Waheed that McCreary had been "prepped" so as to be prepared to let go of his CEO role. Cranswick then inquired about Waheed's interest in joining the Baffinland Board:

> With the CEO situation front and center, I really need to sort out board suggestions and/or an entirely new slate, depending how reasonable people are. Are you interested in being suggested for a board seat?
>
> With respect to the CEO position, it is probably best to act while everyone is ready than let things drag out. That means that we either need to have the new candidate in hand now or go with an interim. Are you up for either or should I try for Don [Charter] or Daniella [Dimitrov]? …

Waheed replied that he was happy to assist Cranswick in arriving at a slate of proposed directors to make something out of the Mary River Project or Baffinland. Waheed stated that he would accept a Baffinland Board position if that would help the interim process, but that an executive role was a more serious commitment and "[Cranswick] really does need to focus on the Chair [then, McCloskey] as well otherwise life will get real complicated fast".

[141] On or about March 24, 2010, Cranswick sent a memorandum to Baffinland's Corporate Governance and Nominating Committee, with a copy to McCloskey, entitled "Resource Capital Funds' New Board Nominations and Requested Changes to the Board of Directors of Baffinland". In the memorandum, Cranswick noted that RCF had stated for some time that it was unsatisfied with Baffinland's CEO (then, McCreary) and nominated three individuals, namely, Gary Fietz ("**Fietz**"), Ron Simkus ("**Simkus**") and Waheed, for election to the Baffinland Board. RCF believed that these candidates would bring new and very applicable skills and perspectives for moving Baffinland and the Mary River Project forward. Cranswick communicated RCF's position that it was important to diversify from what historically had been a tightly knit group of individuals with long-standing personal relationships. He also stated that:

> … RCF would like to see Jowdat Waheed named Chairman of the revised board. As he is already active in the position and only so much change at a time is good for a management team, RCF sees no reason to change Bo McCloskey's Interim President and CEO role.
>
> Given the company's imminent resumption of discussions with a particular potential strategic partner, RCF would also like to see Mr. Waheed as Chairman of the company's Strategic Committee.

[142] A Baffinland Board meeting was held on March 26, 2010 to discuss the recommendations set out in Cranswick's

probable reserves of 365 million tonnes) and mineral resources for Deposits 1, 2 and 3 (0.4 million tonnes of measured resources, 52 million tonnes of indicated resources and 448 million tonnes of inferred resources).

memorandum. Cranswick was not invited to attend the meeting due to a potential conflict relating to the matters being discussed. RCF's suggestion that Waheed be elected Chairman of the Baffinland Board and of the Strategic Committee was postponed as he was not yet a member of the Baffinland Board. Cranswick testified that he could not recall whether he was aware of the March 26, 2010 Baffinland Board meeting, but that it was not his decision to absent himself from that meeting. Cranswick testified that it was clear to him when he was sent a copy of the minutes of the meeting by McCloskey on April 3, 2010 that the Baffinland Board was not going to be receptive to RCF's proposed changes immediately.

[143] The issue of Waheed's appointment to the Baffinland Board was further discussed at an April 13, 2010 meeting of the Corporate Governance and Nominating Committee, at which it was noted that Waheed had "ruffled feathers" with management, which was not always a bad thing. In further discussions, the Corporate Governance and Nominating Committee suggested that Waheed be appointed to the Baffinland Board.

[144] On or about April 23, 2010, Cranswick advised McCloskey that there had been a recent development; Waheed was reluctant to assume a passive role at Baffinland (i.e. "no Chair, no Strategic Committee"), rather than an active position in which he would have influence. As such, RCF was happy to proceed on a recently outlined path of installing new independent directors and appointing Dimitrov as CEO. Waheed sent an e-mail to Cranswick on April 23, 2010 asking for the opportunity to make a difference with the Mary River Property. He specifically noted that, as Chairman, he would be able to speak on behalf of the Baffinland Board and convince them of key strategic decisions that were long past due and would be happy to be Chairman and CEO for a while, but noted that Baffinland did not need a CEO with Waheed's background permanently. Waheed noted:

> I have no visions of grandeur here. I am a professional hired to get a job done and move on. I can staff this company for you, I can pitch this company for you and I can definitely help finance this company for you. The role that I want to do is that of an "executive" type Chairman with control over development of strategy, balance sheet and responsibility for mentoring the CEO. …

[145] In the following two days, Cranswick and McClements concluded that Waheed would be dropped as a proposed nominee for election to the Baffinland Board given his lack of clarity with respect to his interest in becoming the CEO and McClements's view that he would be too disruptive as the Chairman. Cranswick communicated this in an e-mail to Waheed on April 26, 2010 in which he expressed his hope that Waheed would reconsider joining the Baffinland Board in a non-executive, independent director role. Cranswick wrote:

> … While we understand that we could probably win a proxy contest, particularly with your help, when weighed against the progress we can make on a friendly basis, RCF will go the friendlier route if Bo [McCloskey] and the rest accept what has been proposed in the press release attached. …

[146] Also on April 26, 2010, Dimitrov sent Waheed an e-mail on behalf of McCloskey inviting Waheed to join the Baffinland Board effective April 28, 2010. Waheed declined the invitation and, as noted above, ended his working relationship with Baffinland by the end of April 2010.

[147] On April 30, 2010, Cranswick wrote to Fietz and Simkus, who were appointed to the Baffinland Board as independent directors, that during the nomination process, RCF had to concede a few things, primarily with respect to appointing Waheed as the Chairman. Cranswick acknowledged that Waheed rubbed many at Baffinland the wrong way, but that the loss of Waheed as a director would be a loss for Baffinland as he was a catalyst in helping advance change within the company.

D. Waheed's Post-Consultancy Activities

[148] Following his consultancy, Waheed independently investigated possible transactions that would provide financing for the Trucking Option and that might provide an opportunity for him to act as part of the financing group as a principal or in some other capacity.

[149] On June 5, 2010, Dimitrov sent an e-mail to Waheed to advise him that Baffinland had concluded its internal work on the Trucking Option, that "the numbers look interesting as [Waheed] had expected" and suggesting that they meet for lunch. Waheed testified that he and Dimitrov met for lunch on June 9, 2010 (the "**June 9th Meeting**") and that they discussed the Trucking Option which, Dimitrov informed him, Baffinland had concluded ought to be viable. Waheed further testified that he told Dimitrov that there might be some interesting financing solutions to the Trucking Option and asked her if she would mind if he took a look at the options. Dimitrov replied that he should go ahead.

[150] Waheed also met with McCloskey on June 14, 2010. He testified that he did not recall anything significant about the brief meeting at McCloskey's office on June 14, 2010, but noted that McCloskey's agreement would have been a precursor to any proposal he may have put to Baffinland or Barclays. Earlier in June 2010, Waheed contacted David Ellis ("**Ellis**") of Barclays about possible private equity funding for Baffinland to finance the Trucking Option and, on June 15, 2010, Waheed updated Ellis

about his meeting with McCloskey and Dimitrov the previous day as follows[19]:

> … So I tossed the idea of a farm-in to develop the proposition with PE [private equity] money – in generality without using Barclays at all in the discussion – that would leave him in control of the BIM and picking away at the $4b proposition while enough reserves will be dropped into a JV to raise the necessary funds to develop the early production mine right away.
>
> Needless to say he is all ears. …
>
> … I was tied up today, but I will work tomorrow on an indicative term sheet of a transaction that BIM can accept and that we can live with – if we choose to go along. This will help crystallize my thinking as well as give you a concrete term sheet to work with from a funding standpoint.

[151] Waheed testified that he and McCloskey also met for lunch on June 22, 2010 and had a general discussion that included Waheed's opinion on how the private equity market in New York was evolving and was looking at making investments in resources.

[152] Also in June 2010, Waheed met with Jim MacDonald ("**MacDonald**") of Cormark Securities, whom Waheed knew from his time at Sherritt, to get his opinion about Waheed's attempts to facilitate private equity funding for Baffinland. Waheed testified that MacDonald introduced the concept of merging Sherritt and Baffinland, which Waheed thought made a lot of sense, and explained the concept as follows:

> Sherritt Coal is a business that generates a lot of cash flow but there is no growth in that. Baffinland has an asset which needs capital to develop it which generates tax shelter as well in the process. So if you combine the two, take the cash flow from the coal business and take that into developing Baffinland, you solve a lot of problems very elegantly for both parties.
>
> (Hearing Transcript, February 21, 2013 at page 5569, lines 6-14)

[153] On July 4, 2010, Waheed approached Walter about potentially participating in a possible transaction involving Baffinland. Following this initial meeting, Waheed and Walter met with representatives of Barclays on July 9, 2010 with whom Waheed had been in discussions about possible private equity funding for the Trucking Option as described above.

[154] On July 12, 2010, Baffinland issued a press release entitled "Baffinland Initiates Early Stage Feasibility Study for Road Haulage", in which Baffinland announced that it had commissioned AMEC Americas Limited to complete a definitive feasibility study on the road haulage option. On the same day, Waheed e-mailed McCloskey to enquire about any further developments with respect to the road haulage option:

> … The last we met you were expecting the final numbers on the trucking option to come about soon. If they have, I would love to talk to someone about them and update my sense of capital and operating parameters. (I continue to be covered by the confidentiality agreement.)
>
> In any event, I want to set up a time before July is out to some [*sic*] see you and leave something tangible for you to work with. After which I will plan on talking to Russ [Cranswick].

[155] McCloskey replied that, "Off the top of [his] head", Waheed could use $525 million for capital expenditures and $32.5/tonne for operating expenses and also told Waheed, "We have been very busy with considerable interest from various parties over [*sic*] the couple of weeks. There's some urgency if you intend on making a proposal since we are discussing some intriguing ideas and I'm not sure how much time is left other than ….not much". Waheed replied by presenting two broad options. The first involved a farm-in with the largest bank in the United Kingdom and the largest sovereign fund in the world (identified during the Merits Hearing as Barclays and the Abu Dhabi Investment Authority, respectively), which would permit Baffinland to continue as a viable company without changes and without the need for additional financing. The second involved the merger of Baffinland with blue chip Canadian assets in need of a tax shelter, complete with a mining team and equipment finance (identified during the Merits Hearing as Sherritt) and would have seen Baffinland's equity combined with the foregoing assets to create a blue chip Canadian mining company which would go on to build Canada's largest iron ore mine. Waheed also expressed the view that both options would be considerably superior to anything a consumer sovereign (Chinese or Koreans) or a steel mill, such as ArcelorMittal or ThyssenKrupp, could provide as their interests would inherently be to reduce their input costs.

[156] Following the foregoing e-mail exchange with McCloskey, Waheed arranged to meet with Dimitrov at Baffinland's office

[19] Although there was no evidence to that effect during the Merits Hearing, it appears from Waheed's e-mail to Ellis that Waheed met with both McCloskey and Dimitrov on June 14, 2010.

on July 13, 2010 (the "**July 13th Meeting**"). On the same day, in advance of his meeting with Dimitrov, Waheed met with MacDonald to discuss Waheed's role and a possible role for Cormark Securities. Waheed also e-mailed Ellis about his upcoming meeting with Dimitrov and informed him that Ian Delaney ("**Delaney**"), the President and CEO of Sherritt, had "been sniffing" and wanted to visit with Waheed and then Baffinland. Waheed suggested to Ellis that "Some spectacular deals [could] be put together with [Sherritt's] coal assets, BIM from a tax standpoint and Barclays".

[157] Waheed's and Dimitrov's testimony relating to what they discussed at the July 13th Meeting is reviewed in detail in the analysis below (see paragraphs [285] to [299], below). On the following day, Dimitrov sent Waheed two e-mails attaching (i) a Baffinland document entitled, "Conceptual Study Report – Road Haulage Early Stage Production June 2010" (the Road Haulage Conceptual Study); (ii) a Baffinland presentation entitled "Mary River Project – The Path to Development", which was presented at Baffinland's annual general meeting on June 10, 2010; and (iii) a one-page document entitled, "Trucking – Operations Profile" that included four photographs with the captions, *Ore crushing at site*, *Trucking to Milne Inlet*, *Stockpiling and Vessel Loading*.

[158] Following receipt of the foregoing information from Dimitrov, it appears that Waheed updated the Financial Model to include information from the Road Haulage Conceptual Study relating to capital expenditures. When asked whether he shared this version of the Financial Model with Barclays, Waheed testified that "a number of versions around this time were shared and, in fact, coedited with [Barclays] at that time." He further testified that "One of the reasons why this model was being updated was to allow for the Barclays people to run by their investment committee people whether there would be any interest in providing financing to Baffinland." Waheed also sent an e-mail to Walter on July 19, 2010, to which he attached a copy of the "Investment Considerations" presentation to Barclays, and noted to Walter: "Here are some thoughts … as well as a repopulation of the model with real numbers from the company's recently completed feasibility study and some due diligence on it by Mel Williams … The detailed model is not included."

[159] Dimitrov made no reference to the confidential nature of the materials she sent to Waheed on July 14, 2010, and, when cross-examined by Waheed's counsel, she conceded that she had provided Waheed with an electronic copy of the Road Haulage Conceptual Study, in addition to the hard copy she had provided to him the previous day, knowing that he would likely include the information as part of a presentation he was going to make to Barclays. However, prior to making arrangements for the July 13th Meeting with Waheed by e-mail, Dimitrov was provided with a copy of Waheed's July 12, 2010 e-mail to McCloskey, referred to at paragraph [154] above, in which Waheed noted that "… I continue to be covered by the confidentiality agreement".

[160] On July 20, 2010, Waheed and Dimitrov met with each of Barclays and Sherritt to discuss possible options involving Baffinland (the "**July 20th Meetings**"). They met with Barclays over lunch, during which, according to Waheed's testimony, Ellis did most of the talking, taking Dimitrov through what Barclays would ultimately think about proposing. Later that day, Dimitrov and Waheed met with Delaney for the purpose of introducing him to Dimitrov. Waheed testified that, in terms of the Sherritt proposal, he would only be involved in the event that the deal went ahead and capital was needed, in which case Barclays would be given the opportunity to provide that capital with Waheed acting as a member of the management team. Waheed's and Dimitrov's testimony relating to these meetings is reviewed in detail in the analysis below (see paragraphs [302] to [303] below).

[161] Waheed was in contact with Walter on a number of occasions in July 2010 for the purpose of updating him on the discussions with Barclays and Baffinland and introducing him to Ellis. On July 23, 2010, Waheed sent the following e-mail to Walter with the subject "BNRI" [Barclays]:

> Bruce these guys are now done with their internal documentation. On the assumption that at this stage they are not going to exit stage left, we should think through the course of action next week. August is going to be dead. I also want to take off from the end of the first week for a couple of weeks. For RCF it is much better to go to Denver and to leave them a document that connects the dots on the underlying project (their primary pre-occupation) – i.e. how you capture the underlying NPV of the larger deal.
>
> Their big issue with what we were thinking with AcquireCo would be the risk that we would put the company in play and then not succeed – which, I suspect, they would not want at this time.
>
> …

E. Financing the Take-Over Bid and the Toehold Purchase

[162] On July 27, 2010, Waheed and Walter met with Gula at Davies to discuss a potential transaction involving Baffinland. Gula testified that Davies's role was to advise on legal matters relating to the transaction and to protect the principals involved from any issues that might arise and to ensure that the transaction proceeded in compliance with the law.

[163] In early August 2010, Waheed and Walter were discussing the possibility of a Baffinland transaction with Barclays. At that time, it appeared that Barclays was only willing to commit $100 to $150 million in funding and Walter was of the view that

additional funding would be required. Walter first contacted EMG in connection with a potential transaction regarding Baffinland on August 12, 2010. Walter testified that Calvert had been a friend of his for at least a decade and, although he was also a lawyer, Calvert had spent much of his career as a lead investment banker in the mining sector. Walter said that he and Calvert had had a long-standing discussion about looking for opportunities in which they might be able to work together and that Calvert was a natural person to contact. In addition to their long-standing friendship, Walter was also aware that EMG had had a relationship with Barclays and had worked closely with Ellis in connection with a coal investment that had been sold.

[164] Between August 12 and 20, 2010, Walter was in contact with EMG about the possibility of EMG becoming a funding partner for a potential take-over bid for Baffinland. Discussions initially centered around funding by both Barclays and EMG, but EMG expressed an interest in providing funding of $200 million or more, without the involvement of a third party.

[165] On August 19, 2010, Walter sent an e-mail to Waheed who was in Pakistan for much of the month of August and had not previously spoken to EMG advising him that EMG had a serious interest and the capacity to meet 100% of the financing requirements of a take-over bid and that Calvert had undertaken to read everything on the public file. Walter also indicated that Calvert wanted to organize a conference call with Walter and Waheed to discuss EMG's interest as early as the following day. Later on the same day, Calvert sent an e-mail to Walter indicating that he and his partner, John Raymond, had discussed Baffinland and, subject to due diligence and terms, EMG was prepared to commit $200 million but would want the option to increase their level of investment as the project progressed rather than using third party money. Calvert concluded by noting that he and John Raymond were the managing partners of EMG "and so decisions get made rather quickly." Walter forwarded Calvert's e-mail to Waheed and noted, "As you can see from the attached, I believe that their interest level can be upgraded to extremely serious …"

[166] On August 20, 2010, Waheed and Walter spoke with Calvert and others at EMG by telephone. Walter testified that EMG was prepared to go ahead with a transaction on the basis of Calvert's assessment after reviewing public documents that the Mary River Property had one of the best deposits available and Walter's opinion that it was a good investment. Walter also testified that, during the call, EMG "reiterated, again, the firm's policy that all they do is proceed with publicly available information."

[167] Several e-mails were exchanged between Calvert and Walter later in the day on August 20, 2010, including an e-mail from Walter to Calvert, in response to a question from Calvert, in which Walter indicated that he and Waheed contemplated making an investment in the project in the aggregate amount of $2.5 million. Waheed also sent a lengthy e-mail to Calvert together with a Financial Model (the "**August 20th Model**") which incorporated Waheed's additions following his receipt of the Road Haulage Conceptual Study and a presentation on Baffinland investment considerations that had been prepared for Barclays. The Barclays presentation included information about current reserves, resources and potential resources for Deposits 1 to 5 on the Mary River Property[20], details of a new strategy based on the implementation of the Trucking Option, capital expenditure and operating expense information from the Financial Model and proposals for two potential transactions. The first involved a farm-in financed by Barclays for $450 million and the second involved a Barclays offer to purchase 50% of Baffinland, with Sherritt's Coal Division as a potential partner in the Baffinland take-over. Waheed expressed a high level of comfort with the costs, the reasonableness of their key cost and capital assumptions and the issues relating to permitting. Waheed also stated that:

> Arcelor Mittal has been around the company for a while. Is probably still toiling away to steal the company through a farm in. RCF obviously has had no interest in those types of transactions. Rio has been around several times sniffing. CIBC shopped the larger (and rather silly project) in 2007/8 – got no traction and the financial crash ended all hopes.

[168] On August 23, 2010, Calvert sent Walter a draft term sheet by e-mail for discussion. The draft provided for an EMG commitment of up to $200 million to be used to fund an acquisition company's share of the cost of the initial acquisition of the controlling interest in Baffinland. Later on the same day, Calvert sent Walter by e-mail a suggested agenda for their discussion about the Mary River Project, the strategy for the take-over bid, next steps with Barclay and the term sheet. Shortly thereafter, Walter sent an e-mail to Calvert with a copy to Waheed stating that they had agreed "that EMG should start buying shares of the Target on behalf of our venture as soon as possible up to the 9.9% disclosure limit."

[169] On August 24, 2010, Gula sent Walter what he described as a High Level Checklist by e-mail. Most of the version the Panel reviewed was heavily redacted for privilege. The limited portions of the Checklist that were visible related to the issues arising from Waheed's role as a consultant to Baffinland and whether he had any confidential information. On the same day, Gula sent to Walter by e-mail a memorandum entitled Toe-Hold Issues.

[170] Walter initially contacted GMP on August 5, 2010 about acting as a financial advisor for a possible transaction involving

[20] As previously noted, the Technical Report of the Aker DFS, which was filed on SEDAR, only included data about mineral reserves for Deposit 1 (proven and probable reserves of 365 million tonnes) and mineral resources for Deposits 1, 2 and 3 (0.4 million tonnes of measured resources, 52 million tonnes of indicated resources and 448 million tonnes of inferred resources).

Baffinland and, on August 26, 2010, he sent the following e-mail to Mark Wellings ("**Wellings**"), the head of GMP's mining investment banking group: "Events are moving. I would appreciate if we could speak this evening. Please call me at home …"

[171] Later that night, Walter sent the following e-mail to Calvert with a copy to Waheed:

> I have spoken with Mark Wellings, identified EMG as our funder, and told him that we want to begin toehold purchases tomorrow.
>
> Jowdat and I will have a call or meeting with Mark and their head trader tomorrow morning to discuss the program. We will discuss with them whether trades should go through GMP, JP Morgan or both.
>
> There will likely need to be a GMP trading account opened for the EMG entity that will be buying on behalf of our venture. …

[172] At 9:00 a.m. on August 27, 2010, the Respondents met with Wellings and informed him that they intended to move forward with a toehold acquisition before launching the Take-Over Bid and requested that GMP accumulate a block of 30 million common shares of Baffinland. Waheed informed Wellings that, by the end of the day on August 27, 2010, "EMG [had] already bought 389k at $0.3974".

[173] A trading account was set up in the name of 7635079 Canada Inc.[21], with Waheed, Walter and Calvert named as the principal contacts. Obligations under the account were to be funded by wire transfers from any of Walter, Waheed or EMG as required for settlement.

[174] On August 30, 2010, GMP began executing trades in shares of Baffinland and, on the same morning, Calvert sent the following e-mail to Waheed:

> As I mentioned yesterday, we are working with the devil with GMP and GMP will work us over if they have any room to manoeuvre to make us pay more. GMP needs to know that we are not committed to them and there are no promises – if they can assemble the 30MM share block at 0.45c or less in the next few days – as they have represented – we are happy to talk to them about buying the whole block. This needs to be basically a "fill or kill order" so GMP knows that they cannot string us along and say they can get us (say) 5mm shares at 0.45c and then tell us that it is going to cost us more for the rest of the toe-hold block (which they will try to do). Unfortunately [John Raymond] and I have been through this too many times and these banks all act the same way. I can't recall who Mike is – is he the GMP trader? If so, he needs to understand the rules.

[175] A call was arranged later that day between Waheed, Calvert and Michael Wekerle ("**Wekerle**"), GMP's Head Trader. Following the call, Calvert wrote to Waheed and Walter: "Given our conversation with GMP today, I assume no funding for bidco will be needed until GMP assembles a decent size block that we wish to acquire". Waheed replied:

> …
>
> As to leaving the risk of a busted build-up being for the GMP account we should think it through a bit.
>
> I think once the account docs are past compliance and the commitment letter is in hand, GMP is likely to be very flexible. I think our best position is likely to be that if the block buildup is busted we still pick up the stock assembled to that point and resell it back into the market (if we want) to book the profit but until that point the stock stays on GMP books backed by a commitment letter.

[176] Calvert replied, reiterating that EMG did not want GMP to have any expectation that EMG would pay for anything except the whole block of shares. Waheed advised Walter that he thought this was Calvert's way of pressuring GMP to deliver "… but I am not sure what Mike [Wekerle] will do if we told him that we will only pick up the big block."

[177] The "fill-or-kill" nature of the Toehold Purchase order was communicated to Wellings and Wekerle in a telephone call with Calvert and Waheed on September 2, 2010. After that call, Calvert noted to Waheed: "It seems Mike [Wekerle] and Mark [Wellings] have not been communicating 100% - I thought Mark was going to have a heart attack on the call when we discussed the toe-hold fill or kill terms." Waheed replied to Calvert as follows:

[21] 7635079 Canada Inc. was later renamed Nunavut Iron Ore Acquisition Inc.

> He [Wellings] is ok now. Mike has taken some risks in the recent past that has cost them money so the other partners are a bit concerned about risk … in that Mark's alarm is not unexpected.
>
> …
>
> Where I think this will head is that Mark [Wellings] and his boss, Kevin, are not going to second guess Mike [Wekerle] on him taking principal risk on buying from retail and keeping it for us – only if the bigger part comes together – but rather on how they get compensated for it.

[178] On the morning of September 9, 2010, Wekerle informed Walter that GMP could deliver 30 million Baffinland shares at 63 cents per share and lock-up agreements for 30 million shares for a take-over bid at 80 to 82 cents. That afternoon, Jay Burleson of EMG confirmed that the Toehold Purchase would be acquired by General Investments, LLC[22] and that he was making arrangements for the transfer of the settlement funds. On September 10, 2010, Wekerle gave instructions that the inventory positions be ticketed and moved to the account in the name of 7635079 Canada Inc. Trade confirmations for the Toehold Purchase were sent to Waheed on September 13, 2010. GMP ticketed 20 million shares at $0.60313 and 5 million warrants at $0.135.

[179] On behalf of 7635079 Canada Inc., Waheed directed GMP to register the Baffinland securities that constituted the Toehold Purchase in the name of General Investments, LLC on September 13, 2010. On September 14, 2010, 7635079 Canada Inc. changed its name to Nunavut Iron Ore Acquisition Inc. (previously defined in these Reasons as Nunavut Acquisition).

[180] Waheed testified that 7635079 Canada Inc. was incorporated on August 27, 2010 for the purpose of making the Take-Over Bid and the related Toehold Purchase. Waheed was the President and CEO of 7635079 Canada Inc. and Walter was the Chairman and Secretary. The single share of the company was issued to Waheed as nominee and bare trustee for NGP Midstream & Resources, L.P. and NGP M&R Offshore Holdings, L.P., the beneficial owners of 7635079 Canada Inc., which provided the majority of the equity financing for the Take-Over Bid. In addition to Waheed and Walter, Calvert and John Raymond of EMG were also directors of 7635079 Canada Inc. and all four were authorized and empowered to purchase or sell securities on its behalf.

F. The Take-Over Bid and the Competing and Joint Bids to Acquire Baffinland

1. The Take-Over Bid

[181] On September 22, 2010, Nunavut Acquisition launched the Take-Over Bid, an unsolicited all-cash offer to purchase all of the outstanding common shares of Baffinland for $0.80 per common share. Waheed and Walter advised Baffinland of the Take-Over Bid at a brief meeting with McCloskey and Dimitrov at the Baffinland offices the previous evening.

[182] A Baffinland Board meeting was held on September 22, 2010, at which independent directors Lydall, Ronald Simkus and Grant Edey were appointed as members of a Special Committee to consider and evaluate the Take-Over Bid and any other strategic alternatives.

[183] On October 7, 2010, the Baffinland Board issued a directors' circular recommending that shareholders reject the Take-Over Bid. Nunavut Acquisition extended its offer on October 28, 2010 and again on November 8, 2010.

2. Complaint by Baffinland to the OSC

[184] On October 8, 2010, Stikeman Elliott LLP, Baffinland's counsel ("**Stikeman**"), sent a letter on behalf of Baffinland to the Enforcement and Mergers and Acquisitions (Corporate Finance) Branches of the Commission "to draw [the Commission's] attention to possible breaches of Ontario securities laws by [Nunavut Acquisition] … in connection with its offer to acquire all of the issued and outstanding shares of Baffinland" (the "**Baffinland Complaint Letter**"). The version of the Baffinland Complaint Letter in evidence is stamped as having been received by Corporate Finance, Mergers and Acquisitions of the Commission on October 13, 2010.

[185] The central assertion of the Baffinland Complaint Letter was that Waheed acquired sensitive and confidential information while he was a consultant to Baffinland and thereafter. The Baffinland Complaint Letter makes specific reference to the fact that Waheed was provided with a copy of the Road Haulage Conceptual Study and states that he "was generally aware in July 2010 of the fact that, at that time, Baffinland was in an advanced stage of negotiations with [a potential strategic partner]".

[22] Waheed testified that he did not know what the beneficial ownership of General Investments LLC was as of the time that the Toehold Purchase was made. Waheed represented to GMP that the beneficial ownership was the same as that of the account holder, 7635079 Canada Inc., but that this representation was based on information from an individual at EMG and that the specific beneficial owner(s) was unknown to him.

Stikeman made reference to subsections 76(1) and 76(2) of the Act and expressed concern that Nunavut Acquisition and General Investments, LLC (the company on behalf of which the Toehold Purchase was made) acquired Baffinland securities with possession of undisclosed material information and that Waheed shared such information with others at Nunavut Acquisition.

[186] In the concluding paragraphs of the Baffinland Complaint Letter, Stikeman stated their belief that the Take-Over Bid should be treated as an insider bid for the purposes of Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transaction* ("**MI 61-101**") and that Nunavut Acquisition should be required to comply with the requirements of MI 61-101, including the requirement to obtain a formal valuation. Stikeman also requested that the Commission "commence a review of the trading by [Nunavut Acquisition], its insiders and affiliates in the securities of Baffinland and consider whether a cease trading order is the most appropriate remedy in the circumstances."

[187] On October 18, 2010, one of the Senior Legal Counsel in the Mergers and Acquisitions group of the Corporate Finance Branch of the Commission requested additional arguments from Stikeman on the following issues raised in the Baffinland Complaint Letter:

(1) Why do the alleged breaches of subsections 76(1) and (2) justify cease trading the Offer?

(2) Why should the Offer be treated as an "insider bid" for the purposes of MI 61-101?

(3) Why is the OSC's public interest jurisdiction engaged by Mr. Waheed's breach of the Agreement? Why shouldn't Baffinland be seeking a remedy from the court?

[188] Stikeman responded in a letter to the Commission dated October 20, 2010 that the Commission must take Waheed's possession of confidential information into account in responding to any application from Nunavut Acquisition to cease trade the Baffinland shareholder rights plan. Stikeman further stated that, if the Commission were to allow the Take-Over Bid to proceed:

> … such a process will ultimately disadvantage shareholders and will also run contrary to one of the underlying principles of the take-over regime: to provide a framework within which take-over bids may proceed in an open and even-handed environment, allowing "procedural fairness for all: bidders, potential bidders, existing shareholders, management and those whose business fortune is tied to any one of these groups. The rules of the game should be clear and consistently applied to encourage bidders to come forward."
>
> (Citing *National Policy 62-202 – Take-Over Bids – Defensive Tactics*, s. 1.1(1) and (2) and *Re Cara Operations* (2002), 25 O.S.C.B. 7997 at para. 58)

[189] Stikeman further asserted that the Baffinland Board had determined that the Take-Over Bid was insufficient and coercive. They submitted that the Take-Over Bid should be treated as an insider bid pursuant to MI 61-101 as Waheed had been retained as a strategic consultant to Baffinland in connection with the development of the Mary River Property and as such was given access to all of Baffinland's documents and information as though he was a director and senior officer of the company. Stikeman submitted that this information asymmetry should be taken into account in any response from the Commission to an application by Nunavut Acquisition to cease trade Baffinland's shareholder rights plan. It was further submitted that Staff of the Commission could consider whether a cease trade order is the proper remedy in the circumstances, noting that if there was a contravention of subsections 76(1) and (2) of the Act, there would not need to be a finding that the Take-Over Bid was abusive to invoke the Commission's public interest jurisdiction.

3. The Shareholder Rights Plan Hearing

[190] On November 1, 2010, Nunavut Acquisition made an application to the Commission for an order cease-trading the shareholder rights plan which was established by Baffinland in 2006 and was amended and restated on January 27, 2009. A hearing to consider the application was held before the Commission on November 18, 2010 (the "**Shareholder Rights Plan Hearing**"). Staff took the position that the Take-Over Bid should be permitted to proceed and the Baffinland shareholder rights plan should be cease traded. By the time of the Shareholder Rights Plan Hearing, ArcelorMittal had made a competing bid for Baffinland at a price higher than the Take-Over Bid (see paragraph [192] below).

[191] On November 19, 2010, the Commission issued an order cease-trading Baffinland's shareholder rights plan. The Commission's reasons for its decision were released in *Re Baffinland Iron Mines Corp.* (2010), 33 O.S.C.B. 11385 (the "***Baffinland Shareholder Rights Plan Decision***").

4. Competing Bid by ArcelorMittal and the Joint Bid

[192] On November 8, 2010, ArcelorMittal and Baffinland entered into a support agreement pursuant to which ArcelorMittal agreed to make the ArcelorMittal Bid. On November 11, 2010, the Baffinland Board issued a directors' circular recommending

that shareholders accept the ArcelorMittal Bid and, on November 12, 2010, the ArcelorMittal Bid was launched.

[193] Following the Commission's decision to cease trade the Baffinland shareholder rights plan, both the Take-Over Bid and the ArcelorMittal Bid were extended and varied on a number of occasions in November and December 2010 and in early January 2011. Throughout this period, the Baffinland Board confirmed its recommendation to shareholders that they accept the ArcelorMittal Bid and reject the Take-Over Bid. On December 18, 2010, the Baffinland Board approved the adoption of a new shareholder rights plan. On application by Nunavut Acquisition, on December 22, 2010, the Commission ordered that the new shareholder rights plan be cease-traded effective December 29, 2010.

[194] Following the launch of the Take-Over Bid, Nunavut Acquisition and ArcelorMittal were in contact and, on or about October 1, 2010, representatives of the two companies met in London to discuss the possibility of a joint venture if the Take-Over Bid was successful. Walter testified that term sheets were exchanged throughout October and into early November, when the discussions ended prior to the launch of the ArcelorMittal Bid.

[195] On January 13, 2014, ArcelorMittal and Baffinland entered into an agreement to make a joint bid that, if successful, would result in ArcelorMittal owning 70% and Nunavut Acquisition owning 30% of the outstanding common shares of Baffinland. As a result, on January 14, 2011 the ArcelorMittal Bid was extended and amended to become the Joint Bid by ArcelorMittal and Nunavut Acquisition for $1.50 per common share and $0.10 per warrant. The price achieved for Baffinland shareholders under the Joint Bid had therefore almost doubled from the compensation offered under the original Take-Over Bid, in which Nunavut Acquisition offered $0.80 per common share. In the last week of August 2010, the closing price for Baffinland shares of approximately $0.38 was at its lowest point in 2010.

IV. THE ISSUES

[196] We will separately consider Staff's allegations of breaches of the Act and its allegations of conduct contrary to the public interest.

[197] With respect to the alleged breaches of the Act, the issues that we will consider are:

(a) With respect to the allegation that Waheed breached subsection 76(1) of the Act, as of the time of the Toehold Purchase:

  (i) Did Waheed have knowledge of the Alleged Material Facts?

  (ii) Were the Alleged Material Facts material?

  (iii) Were the Alleged Material Facts generally disclosed?

  (iv) Was Waheed a person in a special relationship with Baffinland?

  (v) Did Waheed, as the President and CEO of Nunavut Acquisition, authorize, permit or acquiesce in the purchase of the Baffinland securities of which the Toehold Purchase was constituted?

(b) With respect to the allegations that Waheed breached subsection 76(2) of the Act and Walter breached subsection 76(1) of the Act, as of the time of the Toehold Purchase:

  (i) Did Waheed inform Walter of the Alleged Tipped Facts?

  (ii) Were the Alleged Tipped Facts material?

  (iii) Were the Alleged Tipped Facts generally disclosed?

  (iv) Was Walter a person in a special relationship with Baffinland?

  (v) Did Walter, as the Chairman of Nunavut Acquisition, authorize, permit or acquiesce in the purchase of the Baffinland securities of which the Toehold Purchase was constituted?

[198] With respect to Staff's allegations that the Respondents acted contrary to the public interest, the issues that we will consider are:

(a) What is the Commission's jurisdiction to make orders in the public interest?

(b) Did the Respondents act contrary to the public interest by their conduct that Staff has also alleged was

contrary to subsections 76(1) and (2) of the Act?

(c) Did the Respondents act contrary to the public interest by using confidential information relating to Baffinland in making the Toehold Purchase and launching the Take-Over Bid?

(d) Did Waheed act contrary to the public interest by not always acting in Baffinland's best interest?

V. ANALYSIS OF THE ALLEGATIONS OF INSIDER TRADING AND TIPPING

A. Positions of the Parties

1. Staff

[199] Staff's insider trading allegations against Waheed relate to Waheed's alleged knowledge of the status and terms of the negotiations between Baffinland and ArcelorMittal regarding a joint venture during the Consultancy Period and the Post-Consultancy Period. It is further alleged that the status and terms of such negotiations were material facts that had not been generally disclosed to the public. We will consider each of these periods in turn. Staff's allegations against Waheed relating to the Consultancy Period are set out in paragraphs [19 and [20] above and its allegations against Waheed relating to the Post-Consultancy Period are set out in paragraphs [21] and [22] above.

[200] Staff further alleges, as set out in paragraphs [24] and 25] above, that Waheed learned of material facts about Baffinland during the Consultancy and Post-Consultancy Periods from officers and directors of Baffinland and from Baffinland documents and records and informed third parties of such facts before they were generally disclosed. As summarized in paragraphs [26] and [27] above, Staff alleges that Walter learned of such material facts (defined in paragraph [25] above as the Alleged Tipped Facts) from Waheed.

[201] In its closing submissions, Staff describes the allegations against the Respondents much more broadly than in the Statement of Allegations. As noted at paragraph [16] above, we have confined our analysis to the allegations set out in the Statement of Allegations and summarized below.

2. Waheed

(a) Allegations Relating to the Consultancy Period

[202] In response to Staff's allegations relating to the Consultancy Period, Waheed submits that:

(a) None of the information concerning what negotiations may or may not have occurred between February 18, 2010 and April 4, 2010 was ever material and was not material when Nunavut Acquisition purchased shares of Baffinland on September 9, 2012, by which time the information was stale;

(b) At the time he ceased to provide consulting services to Baffinland, ArcelorMittal had not made a proposal that was "remotely acceptable" to Baffinland;

(c) The fact that a senior mining company was playing "hardball" with a junior mining company publicly seeking a joint venture partner is not material; and

(d) The fact that Baffinland was in discussions with "one of the world's largest mining companies" was undoubtedly disclosed to the public.

(b) Allegations Relating to the Post-Consultancy Period

[203] In response to Staff's allegations relating to the Post-Consultancy Period, Waheed submits that:

(a) Staff did not prove the allegations described in paragraphs [21](a), (c) and (e) above[23];

(b) The Statement of Allegations does not suggest that Waheed ever knew of the revised and improved term sheet or saw the Second Exclusivity Agreement;

(c) He was out of the country for most of the month of August 2010, did not speak to anyone at Baffinland after August 4, 2010 and never saw the Second Exclusivity Agreement nor was he advised that it had been

[23] In his submissions, Waheed does not address Staff's allegations summarized in paragraphs 0(b) and (d) above in his description of the evidence pleaded by Staff in support of allegations relating to the Post-Consultancy Period.

executed;

(d) Contrary to the facts alleged by Staff, Waheed did not receive any information concerning ArcelorMittal during his meetings with Dimitrov or from anywhere else after April 2010;

(e) He was provided with the same information that other suitors for Baffinland, such as Rio Tinto, were provided, which was that Waheed needed to proceed with dispatch, failing which Baffinland may not be in a position to carry on discussions;

(f) The evidence does not establish that negotiations between Baffinland and ArcelorMittal were advanced on September 9, 2010, the date on which Staff allege that Nunavut Acquisition purchased shares of Baffinland, and there is no compelling evidence that an agreement would be concluded;

(g) None of the information alleged by Staff to be in Waheed's knowledge was material on September 9, 2010 and the market expected a junior mining company like Baffinland to be negotiating with a senior company like ArcelorMittal; and

(h) The mere fact of negotiations, whether or not advanced, would not affect the share price which would only be influenced by an agreement, and even then, it would depend on the terms of the agreement.

3. Walter

[204] In response to Staff's allegations relating to Waheed during the Post-Consultancy Period, Walter submits that:

(a) Staff's entire insider trading case is predicated on the allegation that Dimitrov conveyed material undisclosed facts regarding Baffinland's joint venture negotiations with ArcelorMittal to Waheed during their meetings on June 9 and July 13, 2010 and at subsequent meetings of Dimitrov and Waheed with each of Barclays and Sherritt on July 20, 2010;

(b) Although Staff never explicitly describe Dimitrov as the "tipper", there is no doubt that she is the only alleged and identified source of Waheed's alleged knowledge of material undisclosed facts; and

(c) The only other employee, director or representative of Baffinland with whom Waheed had any communications in June and July 2010 was McCloskey, and as McCloskey was not called to testify, Waheed's testimony that McCloskey did not convey any information to him regarding Baffinland's negotiations with ArcelorMittal was uncontradicted and unchallenged.

B. Overview of the Law

1. Insider Trading – Statutory Framework

[205] Subsection 76(1) of the Act provides that:

> 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.

[206] The clause "person or company in a special relationship with a reporting issuer" used in subsection 76(1) of the Act is defined in subsection 76(5) of the Act to mean:

(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.

[207] Staff submits that Waheed was in a special relationship with Baffinland under both subsections 76(5)(d) and (e) of the Act. With respect to Walter, Staff submits that he was in a special relationship under subsection 76(5)(e) because he learned of material facts from Waheed in circumstances where he knew or ought reasonably to have known that Waheed was a person in a special relationship with Baffinland.

[208] The term material fact is defined in subsection 1(1) of the Act as follows:

> "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.

[209] Insider trading and insider tipping are among the most serious and consequential breaches of securities laws in Canada. As noted by the Commission in *Re Suman*:

> … insider tipping and insider trading are not only illegal under the Act but also significantly undermine confidence in our capital markets and are manifestly unfair to investors. Insider tipping of an undisclosed material fact is a fundamental misuse of non-public information that gives the tippee an informational advantage over other investors and may result in the tippee trading in securities of the relevant reporting issuer with knowledge of the undisclosed material fact, or tipping others. … Those participating in our capital markets are well aware of the seriousness with which Canadian securities regulators view illegal tipping and illegal insider trading.
>
> (*Re Suman* (2012), 35 O.S.C.B. 2809 at para. 23)

2. Materiality

(a) Material Fact and Assessments of Materiality

[210] As noted by the Commission in *Re Donnini*, an assessment of materiality is fact-specific and will vary with every issuer according to multiple factors (*Re Donnini* (2002), 25 O.S.C.B. 6225 ("***Donnini***"), aff'd (2003), 117 O.A.C. 59 (Div. Ct.) ("***Donnini (Div. Ct.)***"), 76 O.R. (3d) 43 (C.A.) at para. 135).

[211] The Commission confirmed the fact-specific nature of materiality assessments in its decision in *Re Biovail Corp.* (2010), 33 O.S.C.B. 8914 ("***Biovail***"), which states at paragraph 65 that "[i]n general, the concept of "materiality" in the Act is a broad one that varies with the characteristics of the reporting issuer and the particular circumstances involved."

[212] The Commission has also stated previously that materiality often occurs at a much earlier stage for smaller issuers than larger issuers (*Re AiT Advanced Information Technologies Corp.* (2008), 31 O.S.C.B. 712 ("***AiT***") at para. 207).

[213] A determination of materiality is not a science, but is a common sense judgment, made in light of all of the specific circumstances (*Biovail, supra* at para. 81; *Re YBM Magnex International Inc.* (2003), 26 O.S.C.B. 5285 ("***YBM***") at para. 90). National Policy 51-201 – *Disclosure Standards* ("**NP 51-201**") provides guidance as to what information may be considered material. The policy states at section 4.2:

> In making materiality judgments it is necessary to take into account a number of factors that cannot be captured in a simple bright-line standard or test. These include the nature of the information itself, the volatility

> of the company's securities and prevailing market conditions. The materiality of a particular event or piece of information may vary between companies according to their size, the nature of their operations and many other factors. An event that is "significant" or "major" for a smaller company may not be material to a larger company. Companies should avoid taking an overly technical approach to determining materiality. …

[214] In *Biovail*, the Commission considered section 4.2 of NP 51-201 and found that:

> … the assessment of the materiality of a statement is a question of mixed fact and law that requires a contextual determination that takes into account all of the circumstances including the size and nature of the issuer and its business, the nature of the statement and the specific circumstances in which the statement was made.
>
> (*Biovail, supra* at para. 69)

[215] NP 51-201 also includes a list of examples of potentially material information at section 4.3 which were endorsed by the Commission in *Re Donald*. They include:

- changes in share ownership that may affect control of the company
- major reorganizations, amalgamations, or mergers
- take-over bids, issuer bids, or insider bids
- any development that affects the company's resources, technology, products or markets
- significant new contracts, products, patents, or services or significant losses of contracts or business
- the commencement of, or developments in, material legal proceedings or regulatory matters
- significant acquisitions or dispositions of assets, property or joint venture interests

(*Re Donald* (2012), 53 O.S.C.B. 7383 ("***Donald***") at para 200).

[216] The test to be applied when determining whether any fact is a material fact is an objective market impact test set out in the definition of "material fact" in subsection 1(1) of the Act. In the current matter, this would require that we determine if any of the Alleged Material Facts would reasonably be expected to significantly affect the market price or value of Baffinland's securities. As stated in the Commission's decision in *YBM*:

> 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 the securities. The investor is an economic being and materiality must be viewed from the perspective of the trading markets, that is, the buying, selling or holding of securities. Price in an open market normally reflects all available information. …
>
> (*YBM, supra* at para. 91)

[217] Waheed submits that Staff must prove that he had actual or subjective knowledge of undisclosed material facts and that there is no evidence that the Alleged Material Facts were conveyed to him. He further submits that merely having knowledge of "something" is insufficient to form the basis for liability under section 76 of the Act and that a respondent in an insider trading cases must have knowledge of a "fact".

(b) Can a Contingent Event be a Material Fact?

[218] Staff submits that the materiality analysis may also consider whether it was likely that Baffinland and ArcelorMittal would successfully conclude their negotiations and that one may also consider whether a reasonable investor would infer that there was some likelihood that Baffinland and ArcelorMittal would conclude a joint venture to finance the development of the Mary River Project.

[219] In support of its foregoing submission, Staff refers to the decision in *Donnini (Div. Ct.)*, as affirmed by the Court of Appeal, in which the Divisional Court found at paragraph 17 that:

> … It is not possible to delineate with precision a line that divides intention from accomplished fact and each case will undoubtedly depend on its own circumstances and facts. In the case at bar, the evidence suggests that the discussions had gone well beyond expressions of mutual interest and had got down to negotiating the

> very finest of points. The OSC held that the information Donnini held was factual and that his subsequent actions proved it.

[220] Staff also refers to the decisions of (i) the British Columbia Securities Commission (the "**BCSC**") in *Re Bennett*, [1996] 34 B.C.S.C.W.S. 55, in which the BCSC held that mere acquisition discussions and facts regarding negotiations were material facts despite the fact that no firm agreement had been made; and (ii) the Alberta Securities Commission (the "**ASC**") in *Re Holtby* (2013), ABASC 45, in which the ASC held that a proposed acquisition became a material fact on the date that a confidentiality and standstill agreement was entered into by the parties.

[221] The Commission has found that material facts can include contingent or speculative events. The Divisional Court upheld the Commission's decision in *Donnini* and found that:

> … The definition of "material change" includes "a decision to implement such a change made by the board of directors of the issuer or by senior management of the issuer who believe that the confirmation of the decision by the board of directors is probable."… Both definitions refer to events in the future. Some might argue that until a deal has been fully agreed upon, it is not a fact. It is not possible to delineate with precision the line that divides intention from accomplished fact and each case will undoubtedly have to depend upon its own circumstances and facts. …
>
> (*Donnini (Div. Ct.), supra* at para. 17)

(c) Probability/Magnitude Test for Materiality of Contingent Events

[222] Staff submits that, in *Donnini* and *YBM*, the Commission confirmed that the applicable test for the materiality of contingent events is the probability/magnitude test described in the United States Court of Appeals decision in *Securities & Exchange Commission v. Texas Gulf Sulphur Co.* (1968), 401 F.2d 833 (U.S. 2nd Cir. N.Y.) ("***Texas Gulf Sulphur***"). It was held in that case that the existence of materiality in cases of contingent or speculative development depends "[a]t any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity". (*Texas Gulf Sulphur, supra* at 849)

[223] Staff further submits that the magnitude of a potential joint venture to develop the Mary River Project was sufficiently consequential that Baffinland would have been transformed from an exploration company with no operating revenue to an operational mine with adequate equity to construct the required railroad and to generate significant revenue.

[224] Relying on the Commission's decision in *Donnini*, Staff also argues that greater magnitude requires less probability in order to constitute a material fact and that the conclusion of the Ontario Court of Justice in *R. v. Landen*, in which the magnitude of a mere possibility of a short-fall in annual production at the subject gold mine was held to be "so great that it outweighed the lesser degree of possibility." ([2008] O.J. No. 4416 ("***Landen***") at para. 104.)

[225] The Commission found as follows in *Donnini*:

> Since the potential magnitude of the second special warrants financing was highly significant for the value of KCA shares, a lower probability of occurrence than we determined was actually present would still have led us to conclude that each of the financing, the negotiations and the potential price and size of the financing was a material fact.
>
> In *Basic*, in the context of preliminary corporate merger discussions, the United States Supreme Court at 239 explicitly adopted the probability/magnitude test from *Texas Gulf Sulphur*, and endorsed the following approach to the application of that standard:
>
> > Whether merger discussions in any particular case are material therefore depends on the facts. Generally, in order to assess the probability that the event will occur, a factfinder will need to look to indicia of interest in the transaction at the highest corporate levels. Without attempting to catalog all such possible factors, we note by way of example that board resolutions, instructions to investment bankers, and actual negotiations between principals or their intermediaries may serve as indicia of interest …. No particular event or factor short of closing the transaction need be either necessary or sufficient by itself to render merger discussions material.
>
> (*Donnini, supra* at paras. 132-133 citing *Basic Inc. v. Levinson* (1988), 485 U.S. 224, 108 S. Ct. 978 (U.S. Ohio) at 239)

[226] Waheed submits that while the status and terms of negotiations regarding a potential joint venture between two public companies may, in certain circumstances, constitute material facts, that can only be true where those facts would reasonably be

expected to have a significant effect on the market price or value of securities. We agree with Waheed's submission that, while the probability/magnitude test can be an aid to the assessment of materiality, the Commission in *Donald* cautioned that the market impact test still governs (*Donald, supra* at para. 275). The Commission stated previously in the *Coventree* decision:

> Determining whether a change has occurred in an issuer's business, operations or capital is a different question than determining the materiality of a contingent or speculative event. The Commission has in certain decisions applied the "probability/magnitude test" under U.S. securities law in making determinations as to the materiality of contingent or speculative events (see, for instance, *Re Donnini, supra*, at para. 131, and *Re YBM Magnex, supra,* at para. 92). The Commission stated in *Re AiT*, however, that the probability/magnitude test "is not particularly useful in determining whether a change has occurred, which is crucial in this case" (*Re AiT, supra,* at para. 207, *Re Rex Diamond, supra,* at para. 202). The question whether a change had occurred in Coventree's business or operations is the crucial question in this case. Further, in determining materiality in this matter, we are applying a statutory definition that requires a determination whether an event or development would reasonably be expected to have had a significant effect on the market price or value of Coventree shares. …
>
> (*Re Coventree* (2011), 34 O.S.C.B 10209 at paragraph 619 ("***Coventree***"))

[227] In this case, the crucial question is whether or not the Respondents were in possession of material facts at the time of the Toehold Purchase. Although the decision in *Coventree* considers allegations relating to a material change, we note that the excerpt from *Coventree* set out above is equally applicable to our analysis in this case. Following the Commission's approach in previous decisions, in determining materiality in this case, we apply the statutory definition, which requires a determination as to whether the Alleged Material Facts would reasonably be expected to have had a significant effect on the market price or value of Baffinland's shares.

(d) Cumulative Effect of Facts

[228] Staff submits that we may consider the cumulative effect of the Alleged Material Facts in determining whether Waheed was in possession of a material fact when Nunavut Acquisition purchased shares of Baffinland. The Commission has previously found that a number of facts may be material when taken together:

> Materiality is a question of mixed law and fact, i.e. do the facts satisfy the legal test? Some facts are material on their own. When one or more facts do not appear to be material on their own, materiality must also be considered in light of all the facts available to the persons responsible for the assessment.
>
> (*YBM, supra* at para. 94)

[229] Similarly, in *AiT*, which addressed whether a material change had occurred and not whether certain events constituted material facts, the Commission considered whether specific events, either individually or collectively, constituted a material change for AiT:

> The first discussions with Harrold in February 2009, 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.
>
> (*AiT, supra* at para. 229)

C. Communications during the Consultancy and Post-Consultancy Periods

[230] To establish that Waheed contravened subsection 76(1) of the Act, Staff must prove that, on September 9, 2010, the date on which Staff alleges that the Toehold Purchase was made by Nunavut Acquisition, (i) Waheed was in a special relationship with Baffinland; (ii) Baffinland was a reporting issuer; and (iii) Waheed, as the President and CEO and a director of Nunavut Acquisition, authorized, permitted or acquiesced in Nunavut Acquisition's purchase of securities of Baffinland with the knowledge of a material fact relating to Baffinland that had not been generally disclosed. The particulars of Staff's allegations in this regard are summarized in paragraphs [17] to [23] above.

[231] To determine whether the Alleged Material Facts were material and not generally disclosed on September 9, 2010, we will summarize what the evidence disclosed were the relevant communications between Baffinland and ArcelorMittal during the Consultancy and Post-Consultancy Periods and which of such communications involved Waheed or were made available to him as well as other events that related to or had a bearing on Waheed's knowledge. We will then assess the issues of materiality and general disclosure.

1. The Consultancy Period

[232] Although they had met briefly over dinner the prior week, Waheed's initial meeting with Dimitrov to commence the debriefing process took place on February 17, 2010, the day before he formally commenced his consultancy. Dimitrov testified that she had been asked by Cranswick to bring Waheed "up to speed" which Dimitrov testified she understood to mean:

> …to give him an update, to give him whatever information, materials he needed in order to get him up to speed on all of the discussions that had been ongoing since whenever it was, November or December of 2009, relating particularly to the ArcelorMittal transaction. And then I took the, in terms of the rest of the landscape was just generally what was going on in the company.
>
> (Hearing Transcript, January 31, 2013 at page 2714, line 23 to page 2715, line 6)

[233] On February 21, 2010, four days after his arrival at Baffinland, Waheed sent Dimitrov an e-mail to which he attached a draft memorandum, the separate sections of which were entitled *Certain Initial Observations on the Arcelor-Mittal Initiative*, *Some Strategic Considerations for going Forward* and *Draft Indicative Terms for a Revised AM Transaction*. In the opening paragraph, Waheed stated that:

> These observations are based upon a series of debriefing conversations with a number of Directors, the CEO, almost all of the senior management and a CIBC representative in London. I have also reviewed the feasibility study on file, reserve reports, market studies, chronology and development of the term sheet for the Arcelor-Mittal transaction; BIM's cash position and budgets for 2010 and the attendant work program.

[234] Waheed also referred in his draft memorandum to the ArcelorMittal transaction "as currently presented in CIBC documents" which was a reference, at least in part, to a CIBC PowerPoint presentation entitled *Materials for Discussion* dated February 18, 2010 (the "**CIBC Presentation**"). In the Introduction to the CIBC Presentation, CIBC states that the presentation was prepared for the Baffinland Board for the purpose of, among other things, providing the Baffinland Board with an analysis of the financial effects of various transaction structures and an update on Baffinland's negotiations with ArcelorMittal.

[235] Dimitrov sent a copy of the CIBC Presentation to Waheed by e-mail on February 19, 2010 and stated in her covering message that:

> The Board concluded, based on advice received from its financial advisor, that it could not conclude a transaction on terms last proposed by [ArcelorMittal] ie. 9.9% private placement, $200M spent in the ground to get to construction decision at which point [ArcelorMittal] would vest at 50%, each [Joint Venture] party arranges debt/equity financing using its [Joint Venture] interest as security ie. no common financing at the project level and 50/50 marketing company with control thereof by [ArcelorMittal].

[236] On March 4 and 5, 2010, representatives of Baffinland and CIBC met with representatives of ArcelorMittal in London, England to discuss the proposed joint venture. Waheed, who was on a family holiday in Dubai at the time, was not provided with a copy of the detailed report on the meeting which Charter prepared and sent by e-mail to McCloskey, Cranswick, Lydall, McCreary, Dimitrov and CIBC on March 7, 2010.

[237] Although Waheed was not copied on Charter's e-mail concerning the meeting in London, each of Cranswick and Lydall, both of whom were members of the Strategic Committee, provided him with some level of information relating to the status of the negotiations between the parties including the outcome of the meeting in London.

[238] Waheed returned from his family holiday on March 19, 2010. On March 23, 2013, the Baffinland Board met and received an update from McCloskey on behalf of the Strategic Committee. McCloskey reported that general discussions with a third party (subsequently identified as ArcelorMittal) were continuing and that the third party had requested a period of exclusivity so that it could fully disclose certain proposed terms of an agreement to Baffinland. On the recommendation of the Strategic Committee and its financial advisor and external counsel, the Baffinland Board agreed that the third party (ArcelorMittal) would be granted a period of exclusivity of 45 days. With the exception of an update on the operations of Baffinland, the remainder of the matters discussed at the meeting were redacted (for privilege) from the Minutes of the meeting that were introduced into evidence.

[239] Although the Minutes of the meeting of the Baffinland Board held on March 23, 2010 indicate that Waheed was in

attendance, when cross-examined by Staff's counsel, Waheed stated that he and the members of management left the meeting after McCloskey had commenced his update following an objection by a Baffinland Board member who wanted some elements of the update to be discussed by the Baffinland Board *in camera*.

[240] In response to Staff's submission that Waheed's testimony relating to his attendance at the Baffinland Board meeting on March 23, 2010 was contrary to the testimony of each of Dimitrov, Cranswick and Lydall, Waheed submits that none of such witnesses were asked if he had been in attendance throughout the meeting and they were not recalled by Staff to challenge his assertion relating to his attendance. In any event, Waheed acknowledged that he did become aware that Baffinland and ArcelorMittal had entered into the First Exclusivity Agreement.

[241] On March 23, 2010, Baffinland and ArcelorMittal executed a letter agreement (defined in paragraph [19](d) above as the First Exclusivity Agreement) which, among other things, provided for the continued delivery by Baffinland to ArcelorMittal of confidential information for the purpose of evaluating a strategic investment in Baffinland and/or Baffinland's iron ore deposits (defined in the First Exclusivity Agreement as the Permitted Purpose). Baffinland also agreed to provide ArcelorMittal with a period of exclusivity during which Baffinland would not, directly or indirectly, solicit or hold discussions or negotiations for a potential transaction that was similar to the Permitted Purpose with a third party. The period of exclusivity would be operative for a period of 45 days from the date the parties first met to discuss the Permitted Purpose or 60 days, whichever occurred first. The parties also agreed to keep the existence of the First Exclusivity Agreement confidential.

[242] When transmitting the First Exclusivity Agreement to Dimitrov by e-mail, Whittall also provided a revised term sheet which was also dated March 23, 2010. On March 24, 2010, Dimitrov sent an e-mail to McCloskey in his capacity as Chair of the Strategic Committee reporting on the new term sheet and her discussions with Whittall. The unredacted portions of Dimitrov's e-mail to McCloskey indicated that (i) ArcelorMittal had not addressed debt financing at the project level and support from ArcelorMittal in this respect, which had been discussed at the London meeting; (ii) ArcelorMittal recognized that it needed to assist Baffinland to secure financing; and (iii) ArcelorMittal had engaged BNP Paribas ("**BNP**") to assist them in "crafting terms relating to debt financing and what AM's support may look like."

[243] Dimitrov also stated in her e-mail to McCloskey on March 24, 2010 that:

> I have made it clear that Baffinland will not be in a position to agree to any terms in isolation and that discussions can only take place with all positions on the table ie we need to see the position on debt financing and support – Carole [Whittall] said AM understands this.

[244] On March 30, 2010, Dimitrov sent an e-mail to Waheed advising him that management would be putting together a presentation for an anticipated meeting with ArcelorMittal in Toronto. She also advised Waheed that management would meet two days later on April 1, 2010 to discuss the first draft of the presentation and invited Waheed to attend the meeting. On the same day, Waheed sent Dimitrov his comments with respect to strategic objectives, project development priorities, phasing options and the ArcelorMittal initiative.

[245] On March 31, 2010, Waheed sent a lengthy e-mail to Dimitrov and Gareau in which he raised a number of questions relating to structure, leases and accounting to obtain information that would assist in completing the draft presentations to ArcelorMittal as well as a banking presentation to NBF. Dimitrov forwarded a copy of the message to McCloskey. When cross-examined by Walter's counsel with respect to the exchange of e-mails between McCloskey and Dimitrov that ensued, Dimitrov acknowledged that McCloskey had become rude and sarcastic in his references to Waheed and demeaned his efforts to develop a proposal to be made to ArcelorMittal.

[246] On April 2, 2010, Dimitrov sent an e-mail to Whittall in which she summarized Baffinland's concerns with respect to ArcelorMittal's financing proposal. The most consequential of the concerns related to ArcelorMittal's proposal that Baffinland finance its share of both the equity and debt required for the Mary River Project, which Dimitrov stated could have the effect of having Baffinland's "interest in the Project reduced to virtually zero with no compensation to its shareholders – B's Board cannot proceed on this basis."

[247] On April 4, 2010, Whittall responded to Dimitrov's message by providing a revised term sheet of the same date (defined in paragraph [19](e) above as the April 4th Term Sheet). On the following day, April 5, 2010, Dimitrov sent a copy of the revised term sheet to Waheed in response to his request for a copy.

[248] Dimitrov also sent an e-mail to McCloskey in which she appears to be attempting to set up a meeting with McCloskey, Lydall, Cranswick, Waheed and Andy Quinn ("**Quinn**") of CIBC, presumably to discuss the revised term sheet received from ArcelorMittal prior to meeting with them the next day. McCloskey's response was "I don't care where jowdat is. I don't think rehearing hius [*sic*] opinion, never do a deal, would help at this point. ..."

[249] When cross-examined about McCloskey's foregoing e-mail, Dimitrov testified that McCloskey was fully prepared to meet with ArcelorMittal without obtaining Waheed's advice and acknowledged that McCloskey was dismissive of Waheed's

views and opinions. Dimitrov also testified that Waheed had effectively been disinvited to attend the meeting with ArcelorMittal, at least in part because he was not in favour of the proposed ArcelorMittal transaction and because of McCloskey's concern that Waheed was not from the right caste in India to negotiate with the Mittal family.

[250] On April 6, 2014, representatives of Baffinland and ArcelorMittal and their respective financial advisors met in Toronto to discuss the April 4th Term Sheet. As noted above, Waheed was initially invited to attend the meeting with ArcelorMittal but was subsequently excluded and did not attend.

[251] On April 9, 2010, in an e-mail to Dimitrov relating to the draft presentation to NBF that Waheed had prepared, McCloskey made the following comments:

> There are some very stupid and dangerous comments in JWs workup copy. We must make sure that there are no copies of this that anyone will see.

The foregoing message was just one of a number of messages from McCloskey to Dimitrov and Cranswick that were increasingly demeaning and critical of Waheed and his approach.

[252] As a result of the relentless criticism and denigration of Waheed by McCloskey (who also became the acting CEO of Baffinland following McCreary's resignation in March 2010) and the disinclination of both McCloskey and McCreary (prior to the latter's departure) to consider his advice and proposals, Waheed spent less and less time at Baffinland's offices following the April 6, 2010 meeting between Baffinland and ArcelorMittal. By April 30, 2010, Waheed had ceased to attend at Baffinland's offices or provide consulting services to Baffinland.

[253] Staff does not allege, and no evidence was adduced at the Merits Hearing that would establish, that Waheed received any further versions of the term sheet or any other documentation relating to ArcelorMittal after he received a copy of the April 4th Term Sheet. This was confirmed by Dimitrov who, when cross-examined by Waheed's counsel, testified as follows:

> Q. And I can tell you that we have scoured through thousands and thousands of documents produced by the parties by Baffinland and others in respect of this matter, and this[24] is the last document that we have been able to locate where you convey any information to Mr. Waheed concerning Baffinland's discussions with ArcelorMittal. I take it you are not aware of any later-dated document?
>
> A. No.
>
> (Hearing Transcript, February 6, 2013 at page 3520, line 21 to page 3521, line 5)

[254] Dimitrov also confirmed in the same cross-examination that "[b]y April 5 of 2010, there was no proposal on the table from ArcelorMittal that [she] or others at Baffinland had any intention whatsoever of accepting" (Hearing Transcript, February 6, 2013 at page 3521, lines 14-17).

[255] On April 14, 2010, following the meeting of Baffinland and ArcelorMittal in Toronto on April 6, 2010, Whittall sent Dimitrov a further version of the term sheet by e-mail.

[256] On April 27, 2010, Robert Callaghan ("**Callaghan**"), a Director of CIBC's Investment Banking Global Mining Group in the U.K., sent an e-mail to Dimitrov summarizing positive comments and concerns that he and his colleague Quinn had received from Kukielski following a conference call to discuss a Baffinland proposal although it is unclear from the record to which proposal the conversation related. Callaghan described the concerns as follows: (i) that capital expenditures per tonne of annual production for the Mary River Project looked to be approximately double those of alternative projects; (ii) on the basis of such expenditures, the Mary River Project appeared to be a borderline project; (iii) Aditya Mittal[25] would need convincing that ArcelorMittal would be able to handle both Baffinland and its existing Quebec Cartier Mines development in the foreseeable future; and (iv) debt support, and what it would cost, remained the main issue for ArcelorMittal.

[257] On April 30, 2010, Waheed sent his final invoice to Dimitrov by e-mail and indicated in the e-mail that he had prepared a draft report including strategic advice which he would be happy to send to and review with Dimitrov and McCloskey. Dimitrov testified that neither she nor McCloskey responded to the offer or sought any further advice from Waheed.

[258] When cross-examined by Walter's counsel with respect to the status of Baffinland's negotiations with ArcelorMittal at the time that Waheed's consulting work ended, Dimitrov acknowledged the concerns that had been expressed by Callaghan (summarized in paragraph [256] above) and that the discussions between Baffinland and ArcelorMittal had not resulted in a transaction that, at that time, "was remotely acceptable to Baffinland" and added that ArcelorMittal's period of exclusivity would

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[24] Referring to the April 4th Term Sheet.

[25] Aditya Mittal was identified during the Merits Hearing as ArcelorMittal's Chief Financial Officer.

expire within the next several weeks (Hearing Transcript, February 6, 2013 at pages 3533, lines 11-16, and 3536, lines 4-8).

2. The Post-Consultancy Period

(a) May 1, 2010 to June 9, 2010

[259] On May 5, 2013, ArcelorMittal sent Baffinland a further version of the term sheet dated the same date which was followed by a conference call of the parties the next day.

[260] On May 10, 2010, ArcelorMittal sent Baffinland a further version of the term sheet dated the same date. In the covering e-mail, Whittall indicated that the revised version was intended to address Baffinland's concerns relating to the risk of the dilution of its interest in the Mary River Project. In response to the term sheet which he sent by e-mail to Dimitrov the same day, McCloskey said "There isn't anything remotely acceptable…"

[261] On May 11, 2010, McCloskey, Dimitrov and Zurowski, representing Baffinland, met with Aditya Mittal, Whittall and Kukielski, representing ArcelorMittal, in Sept Isles, Quebec, with a view to resolving the outstanding matters. The meeting was followed by two days of conference calls involving Dimitrov, Whittall and representatives of CIBC and BNP, the financial advisors to Baffinland and ArcelorMittal, respectively.

[262] On May 16, 2010, Dimitrov sent a lengthy e-mail report to the members of the Strategic Committee providing details of the discussions with ArcelorMittal. In her report, Dimitrov described two major discussion points on which the parties had not agreed, namely, the debt relating to the Mary River Project and the amount that ArcelorMittal would pay to acquire an interest in the proposed joint venture.

[263] On May 19, 2010, Dimitrov sent an e-mail to Whittall in which she indicated that Baffinland was determining its position and, as the period of exclusivity with ArcelorMittal was coming to an end, Baffinland would be "prepared to continue discussions on an exclusive basis to reach a conclusion". Whittall responded the following day that ArcelorMittal appreciated Baffinland's "preparedness to continue with our discussions on an exclusive basis".

[264] On May 28, 2010, the parties spoke by conference call following ArcelorMittal's receipt of a detailed e-mail from Dimitrov the same day outlining Baffinland's position with respect to the outstanding issues. Two days later, on May 30, 2010, Baffinland sent a revised version of the term sheet dated May 28, 2010 to ArcelorMittal for its review.

[265] When cross-examined, Dimitrov acknowledged that neither she nor, to her knowledge, anyone else at Baffinland had been in contact with Waheed during the month of May 2010 and, in particular, there had not been any communication with Waheed with respect to Baffinland's continued engagement and negotiation with ArcelorMittal.

[266] On June 3, 2010, ArcelorMittal's Senior Legal Counsel M&A sent a document entitled "Extension of Exclusivity Period" to Dimitrov for the purpose of formally extending the exclusivity period from May 21 to July 5, 2010 (up to this point, exclusivity had been maintained following the termination of the First Exclusive Agreement on the basis of an informal understanding). It is not clear from the record that the parties ever signed the foregoing document which was confirmed by Dimitrov, who testified that she did not believe that the document was ever signed. In a June 5, 2010 update e-mail to Cranswick, Dimitrov noted that she had declined ArcelorMittal's request for a 45-day extension of exclusivity. Ten days later, on June 15, 2010, Dimitrov sent an e-mail update to the members of the Strategic Committee that included a reference by Dimitrov to the formal request from ArcelorMittal that the First Exclusivity Agreement be extended for an additional 45 days. Dimitrov indicated that Baffinland had responded by indicating that an extension of the First Exclusivity Agreement would not be appropriate until it had received a response from ArcelorMittal with respect to the outstanding issues.

(b) June 9th Meeting between Waheed and Dimitrov

[267] On June 9, 2010, Dimitrov and Waheed met for lunch in Toronto (defined in paragraph [149] above as the June 9th Meeting) at the suggestion of Dimitrov. Although the stated reason for the meeting was to discuss the completion of Baffinland's internal work on trucking (also referred to as the Road Haulage Conceptual Study), Dimitrov testified that she wanted to find out whether Waheed intended to attend Baffinland's annual meeting the following day and, if so, for what purpose.[26]

[268] During his examination-in-chief, Waheed described recounting to Dimitrov that he had been in discussions with Barclays in New York and that there may be interesting financing solutions for the Trucking Option. He asked Dimitrov if she would mind if he took a look at such solutions, to which she agreed.

[26] The unstated issue was the future composition of the Baffinland Board and the role that Waheed might play as a senior officer and/or a director of Baffinland. The issue of Waheed's possible involvement as a director and/or officer of Baffinland occupied a significant amount of time at the Merits Hearing but has no direct bearing on the issue of Waheed's knowledge of the status of the negotiations between Baffinland and ArcelorMittal.

[269] Following the lunch, Waheed prepared brief hand-written notes of the discussion which included references to (i) the option of trucking iron ore; (ii) Baffinland needing $400 to $500 million for capital expenditures; (iii) Waheed being free to purchase shares of Baffinland; and (iv) Baffinland's internal rate of return being greater than 40%. The notes made no reference to ArcelorMittal. Dimitrov did not keep notes of the meeting but agreed when cross-examined that Waheed's notes were generally an accurate reflection of the matters they discussed during the meeting.

[270] When asked during her examination-in-chief by Staff whether she had discussed ArcelorMittal with Waheed at the June 9th Meeting, Dimitrov testified that she had no recollection of discussing the status of the ArcelorMittal negotiations with Waheed and did not believe that they discussed the extension of ArcelorMittal's exclusivity.

[271] When cross-examined about the same issue by Walter's counsel, Dimitrov testified as follows:

> Q. … I am just focusing on ArcelorMittal.
>
> So the panel has this crystal clearly for their notes, there were no discussions during that lunch meeting concerning ArcelorMittal?
>
> A. I believe that's the case.
>
> Q. And of course you would have been fully aware at the time of the lunch meeting that it would have been inappropriate to discuss with Mr. Waheed the existence, status or terms of Baffinland's negotiations with ArcelorMittal and a breach of the confidentiality agreement we just looked at?
>
> A. Yes.
>
> Q. You did no such thing?
>
> A. I'm sorry?
>
> Q. You did no such thing, you did not breach your obligation to Arcelor?
>
> A. I don't believe I did.
>
> [Emphasis added.]
>
> (Hearing Transcript, February 6, 2013 at page 3558, line 10 to page 3559, line 4)

(c) June 10, 2010 to July 13, 2010

[272] In an e-mail sent June 9, 2010, Waheed initiated a meeting with McCloskey to "see how things [were] going". Waheed and McCloskey met at McCloskey's office the following week on June 14, 2010, however, it is unclear from the evidence what they discussed (see paragraph [150] above).

[273] On June 16, 2010, Whittall sent to Dimitrov by e-mail, a revised version of the term sheet dated June 16, 2010 which was an extensively marked-up version of the term sheet that had originally been prepared by Baffinland.[27]

[274] On June 19, 2010, Dimitrov sent her detailed analysis of the marked-up version of the term sheet received from Whittall on June 16, 2010 to McCloskey and Zurowski by e-mail. At the outset of her e-mail, Dimitrov made the following comment:

> My summary of the main proposed changes in order of importance is set out below. As we anticipated, they are playing hardball and although they have accepted the $250M and not tried to renegotiate this, they are coming at it from the other side ie what they get for the completion guarantee (CG).

After his receipt of Dimitrov's message, McCloskey sent an e-mail to McCreary saying "We're done with AM as far as I'm concerned".

[275] Waheed met again with McCloskey for lunch on June 22, 2010. Waheed testified that McCloskey said very little at the meeting and that he (Waheed) spent most of the time providing a "market commentary, world at large, private equity, solutions for resource companies in general…" (Hearing Transcript, February 21, 2014 at page 5552).

[27] During their negotiations in 2010, Baffinland and ArcelorMittal exchanged a number of term sheets. Where a specific term sheet is important to our analysis, we have identified it as such (as with the April 4th Term Sheet, defined in paragraph 0(e) above, and the August 10th Term Sheet, defined in paragraph 0 below).

[276] On June 30, 2010, Dimitrov sent an e-mail to the Strategic Committee indicating that Baffinland had received a revised version of the term sheet from ArcelorMittal and that she and representatives of CIBC had discussed ArcelorMittal's position with Whittall and representatives of BNP. There is little of consequence relating to ArcelorMittal reflected in the copy of the e-mail produced in evidence, which was heavily redacted for privilege, other than Dimitrov's following introductory remarks:

> Carole Whittall followed up towards the end of the week to seek feedback relating to AM's position – [Dimitrov] advised that although [the Strategic] Committee has not met, AM's position is not reasonable and likely not acceptable …
>
> [Emphasis added.]

[277] On July 1, 2010, Dimitrov sent an e-mail update with respect to ArcelorMittal to the members of the Strategic Committee. In her e-mail, Dimitrov stated that "she had relayed to [Whittall] that the [Strategic] Committee has reviewed AM's latest proposal and that a transaction was not achievable based on AM's proposed terms." [Emphasis added.]

[278] On July 9, 2010, Dimitrov sent an e-mail to Whittall confirming that Baffinland was terminating the First Exclusivity Agreement in accordance with its terms. She also enclosed a copy of Baffinland's internal scoping study relating to road haulage otherwise known as the Road Haulage Conceptual Study. In a subsequent e-mail on the same day to the Strategic Committee, Dimitrov indicated that the termination of exclusivity had been directed by the Baffinland Board and that "AM has indicated that it does not wish to be [Baffinland's] Plan B to another preferred party."

[279] Whittall's comment to Dimitrov that ArcelorMittal did not want to be Baffinland's Plan B was either prescient or she was aware that Baffinland was in discussions with multiple parties. The e-mail message from Dimitrov to the Strategic Committee on June 30, 2010 (see paragraph [276] above) indicates that, at the time, Baffinland was in discussions with Rio Tinto, Mount Gibson Iron Limited ("**Mount Gibson**") and CITIC Group Corporation[28]. In fact, Mount Gibson had signed a confidentiality agreement with Baffinland (which included a one year standstill provision) on June 22, 2010 so that it could review Baffinland's confidential information with a view to a possible strategic investment in Baffinland and/or the Mary River Project.

[280] In addition to the foregoing activities to identify alternative investors, on July 7, 2010, Zurowski sent an e-mail to Dimitrov and McCloskey indicating that ROGESA Roheisengesellschaft Saar mbH[29] ("**ROGESA**") had a strong interest in the Mary River Project. On July 12, 2010, McCloskey sent an e-mail to Beddows enquiring about obtaining an offer from Rio Tinto with which he was scheduled to meet and Dimitrov met with Mount Gibson. On July 14, 2010, Fietz, at the time a director of Baffinland, sent an e-mail to POSCO[30] respecting their possible interest.

[281] On July 12, 2010, following a conference call initiated by Kukielski, Whittall sent an e-mail to McCloskey and Dimitrov in which she summarized ArcelorMittal's revised proposal with respect to (i) an additional cash payment of $300 Million to be paid to Baffinland at the time a positive construction decision with respect to the Mary River Project was made; (ii) a completion guarantee; and (iii) a call option. The revised proposal, which was based on ArcelorMittal's June 16, 2010 term sheet[31], was stated by Whittall to be open (for acceptance) for one week from the date of her e-mail, i.e., to July 19, 2010, and would be followed by a further draft of the term sheet reflecting the amendments described in her foregoing e-mail of July 12, 2010.

[282] Also on July 12, 2010, Waheed sent an e-mail to McCloskey (who, at the time, was the Chair, the interim CEO and the Chair of the Strategic Committee) proposing a meeting to discuss the final numbers in the Road Haulage Conceptual Study and to obtain an update on capital and operating expenses. Waheed also indicated that he "continue[d] to be covered by the confidentiality agreement". This contact by Waheed followed his discussions with Dimitrov at the June 9th Meeting about attempting to put together a joint venture proposal to Baffinland on behalf of Barclays with the expectation that he would form part of the management team of the new enterprise. Waheed also testified that he had had preliminary discussions about a financing proposal with MacDonald (of Cormark Securities) and a merger proposal with Delaney (of Sherritt).

[283] McCloskey replied to Waheed as follows:

> Off the top of my head, you can use 525 mil capital and 32.5/tonne. opex. We have been very busy with considerable interest from various parties oveer [*sic*] thge [*sic*] last couple weeks. There's is [*sic*] some urgency if you intend on making a proposal since we are discussing some intriguing ideas and I'm not sure how much time is left other than … not much.

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[28] Mount Gibson Iron Limited is one of Australia's leading independent producers of high quality direct shipping grade iron ore products, and CITIC Group Corporation, formerly the China International Trust and Investment Corporation, is a state-owned investment company of the People's Republic of China.

[29] A producer of hot metals and an operator of blast furnaces.

[30] POSCO is a multinational steelmaking company headquartered in South Korea.

[31] Incorrectly identified in Whittall's e-mail as having been dated June 17, 2010.

[Emphasis added.]

[284] Waheed responded to McCloskey's message by indicating that he had a term sheet which reflected a $400 million amount for capital expenditures and that the amount of operating costs mentioned by McCloskey in his message would be acceptable. He also indicated that he had two broad options he wanted to discuss with McCloskey. The first was a farm-in with what he described as the largest bank in the U.K. (which was later identified as Barclays Bank) and the largest sovereign fund in the world, while the second involved the merger of Baffinland with assets (later described as coal assets) complete with a mining team, equipment finance, etc. which were later identified as belonging to Sherritt. He also noted that he had been working on the matter for three months so the execution risk was quite limited. Waheed concluded his message as follows:

> Both of these options would be considerably superior to anything a consumer sovereign (Chinese or Korean etc.) or a steel mill (Arcelor or Thyssen etc.) can provide – almost by definition – as their interest is inherently in reducing their input costs.

(d) The July 13th Meeting

[285] On July 13, 2010, McCloskey responded to the e-mail from Waheed referred to in paragraph [284] above stating that he was unable to meet with Waheed in person on that day but suggested that Waheed meet with Dimitrov and that he (McCloskey) would participate by telephone. Dimitrov did meet with Waheed that afternoon at Baffinland's offices (defined in paragraph [156] above as the July 13th Meeting), however, McCloskey was unable to connect by telephone.

[286] Shortly after arranging the July 13th Meeting, Waheed sent an e-mail to Ellis (of Barclays), with whom Waheed had been in discussions concerning the possible farm-in arrangement with Baffinland, the first paragraph of which stated as follows:

> David I am going to be with the [Baffinland] chairman and vice-chairman at 3:30 PM today. Bo (chairman) is going to take me through the final feasibility results on the trucking solution and then (I am pretty sure) tell me that he has a proposal that is taking shape from a consumer (a variant of the previous rejected proposal from Arcelor – but I don't know for sure). So, he is going to ask me to give him a reason to wait for whatever I intend to bring him.

[287] Although neither Dimitrov nor Waheed kept notes during the July 13th Meeting, Waheed prepared brief hand-written notes following the meeting which were the subject of extensive testimony by Dimitrov and Waheed during the Merits Hearing and detailed analysis and argument in the closing submissions of the parties. For the purposes of these Reasons, the following three comments by Waheed in his hand-written notes were the most significant:

> May be extending AM exclusivity – next week?!
> - higher offer on table
> - will have out for unsolicited - like before

[288] Given the importance of the July 13th Meeting, we will review the testimony of Dimitrov and Waheed relating to the comments reproduced in paragraph [287] above, i.e., the comments relating to ArcelorMittal, in some detail.

i. Dimitrov's testimony relating to the July 13th Meeting

[289] During her examination-in-chief by Staff, Dimitrov was asked what she communicated to Waheed about ArcelorMittal at the July 13th Meeting. The following is an excerpt from the transcript with respect to the exchange:

> Q. At the July meeting, did you have any discussions with Mr. Waheed about the ArcelorMittal negotiations?
>
> A. I don't believe we had discussions specifically about ArcelorMittal. Again, if you refer to the e-mails that preceded this meeting that start off with Mr. Waheed saying that he wanted to come over, meet with us, get updated information with a view to putting forward two proposals to us, Mr. Waheed talking about a term sheet and Mr. McCloskey indicating that we have been talking to parties and time is, in a sense, of the essence, I did indicate that time was of the essence. [Emphasis added.]
>
> (Hearing Transcript, February 1, 2013 at page 2940, line 15 to page 2941, line 4)

[290] Dimitrov also testified during her examination-in-chief that (i) she did not tell Waheed that there was a better offer on the table but that time was of the essence and it may be that Baffinland may not be able to talk to Waheed in the near future; (ii) she indicated to Waheed "that he would have to better the offer that he would have thought was previously on the table." (Hearing Transcript, February 4, 2013 at page 2969, lines 19-21); and (iii) she did not believe that they discussed any specifics of an exclusivity agreement.

[291] When cross-examined by Waheed's counsel with respect to the July 13th Meeting, Dimitrov testified that (i) she did not believe that she had discussed ArcelorMittal by name with Waheed; (ii) she had conveyed to Waheed that Baffinland might find itself in a position in which it could not talk much longer and agreed with Waheed's counsel that, as a sophisticated business person with a great deal of experience handling commercial transactions, Waheed could infer from those remarks that Baffinland was about to or could be in an exclusivity situation with a potential strategic partner; (iii) she agreed with the suggestion by Waheed's counsel that there had been "some instances when ArcelorMittal had been mooted in the marketplace, a large European steel company, as someone who might be interested in Baffinland…" (Hearing Transcript, February 5, 2013 at page 3403, lines 21-24); and (iv) given the discussions with ArcelorMittal earlier in 2010 of which Waheed would have been aware, it would not be surprising that Waheed would have inferred that Baffinland was about to enter into exclusivity with ArcelorMittal despite the fact that she (Dimitrov) "didn't say anything explicit about ArcelorMittal" (Hearing Transcript, February 5, 2013 at page 3405, lines 3-4).

[292] When cross-examined by Walter's counsel with respect to the July 13th Meeting, Dimitrov testified that (i) she had not made notes of the July 13th Meeting; (ii) she repeated McCloskey's message that time was of the essence and that, if Waheed wanted to make a proposal, he should do so quickly; (iii) she warned Waheed that Baffinland might find itself in a position in which it could no longer speak to him; (iv) any proposal that Waheed might make would have to be better than or superior to other proposals that Baffinland might have available to [it]; and (v) Waheed should make his best proposal.

[293] Dimitrov also testified that (i) she did not believe that she had mentioned ArcelorMittal to Waheed during the course of the July 13th Meeting; (ii) she did not believe that she told Waheed that Baffinland was then engaged in discussions or negotiations with ArcelorMittal; (iii) she "certainly did not" discuss with Waheed any of the terms that were then under discussion with ArcelorMittal (Hearing Transcript, February 7, 2013 at page 3688, lines 7-11); (iv) she did not discuss with Waheed either the status or the anticipated outcome of Baffinland's discussions with ArcelorMittal; (v) she did not discuss with Waheed the fact that Baffinland had received a revised term sheet or proposal from ArcelorMittal after his consultancy came to an end in April; (vi) she did not discuss with Waheed the terms of any exclusivity arrangements that Baffinland might consider entering into in the future; and (vii) she did not discuss with Waheed any of the discussions that were then ongoing with any of the potential strategic partners, including Rio Tinto, POSCO or Mount Gibson.

[294] Under further cross-examination by Walter's counsel, Dimitrov was asked about her earlier testimony that she had provided Waheed with a copy of the Road Haulage Conceptual Study after he had advised McCloskey by e-mail that he continued to be covered by his confidentiality agreement. Dimitrov confirmed that the Study could not be published by Baffinland as it was not in compliance with National Instrument 43-101 – *Standards of Disclosure for Mineral Projects* but Baffinland was not precluded from providing copies to companies from which it was hoping to elicit proposals. She then acknowledged that (i) McCloskey had provided high-level estimates of total capital and operating expenses from the Road Haulage Conceptual Study at Baffinland's annual meeting on June 10, 2010; (ii) information from the Road Haulage Conceptual Study was published by Jennings Capital on June 11, 2010; (iii) Gareau provided excerpts from the Road Haulage Conceptual Study to Endeavour Financial, financial advisors based in the U.K. which specialized in debt financing in the resource industry, on July 20, 2010 with a request that they keep the report confidential; (iv) information from the Road Haulage Conceptual Study was provided to the Canada Pension Plan Investment Board and KfW, a German government-owned development bank, on August 25, 2010; and (v) information from the Road Haulage Conceptual Study was provided to the author of a *Mining Weekly* article on August 31, 2010 (see paragraph [330] below).

[295] Although the event took place after September 9, 2010 (but before the date on which the Take-Over Bid was launched), Dimitrov also confirmed that information from the Road Haulage Conceptual Study was provided to Desjardins Securities on September 15, 2010 (and was published by Desjardins Securities on September 16, 2010).

[296] Although Staff alleges that Waheed learned from Dimitrov at the July 13th Meeting that Baffinland had terminated exclusivity with ArcelorMittal which resulted in ArcelorMittal providing an enhanced offer, and that Baffinland was in an advanced state of negotiations with ArcelorMittal, Staff did not take any steps during its examination-in-chief and its re-examination of Dimitrov to challenge her testimony relating to the foregoing matters, particularly following her cross-examination by each of Waheed's counsel and Walter's counsel (which is summarized in paragraphs [289] to [294] above). More specifically, Staff did not question Dimitrov with respect to her testimony that she did not believe that she had mentioned ArcelorMittal to Waheed or told him that Baffinland was then engaged in discussions or negotiations with ArcelorMittal, she "certainly did not" discuss with Waheed any of the terms that were then under discussion with ArcelorMittal or either the status or the anticipated outcome of Baffinland's discussions with ArcelorMittal, and she did not discuss with Waheed the fact that Baffinland had received a revised term sheet or proposal from ArcelorMittal or the terms of any exclusivity arrangements that Baffinland might consider entering into in the future.

ii. Waheed's testimony relating to the July 13th Meeting

[297] During his examination-in-chief with respect to his notes of the July 13th Meeting, Waheed essentially confirmed the details of Dimitrov's testimony and provided additional details as reflected in the following excerpt from the transcript of his testimony:

> … I think she may have mentioned that, like Mr. McCloskey, 'The company is going to be getting an offer soon and we are expecting something from a senior mining company as well, so I just want to be fair to you', she said, 'That you really have to keep in mind that we have to decide on these things in the time that makes sense for us'.
>
> Q. So go down to the next line below the last one that you have read off to us, which was third from the bottom. There is a dash, what does that say?
>
> A. Yeah, these are sub points for the point I said before, they may be extending. The sub point, the first sub point is "higher offer on table" this a reference to the comment that I just took you through that, 'What we have is higher than what you would have known about'. I knew about what the company had in April in terms of ArcelorMittal. So that is what I am referring to that they have some higher offer on the table, that would be entirely consistent with her saying that they won't be able to talk to us any more in a couple of weeks which effectively means they are going to be in an exclusivity and they normally couldn't get into exclusivity unless they were getting something better than what they had before.
>
> Q. You have described what they had before, was that a surprise to you they were getting something better?
>
> A. No, this is completely logical. She is being completely logical. I think everything that she said made a lot of sense to me.
>
> Q. Go down to last line, what does it say?
>
> A. Hyphen -- again this is a sub point to the above main may-be-extending-exclusivity point, and the point is "will have out for unsolicited - like before".
>
> Q. All right. And what does that mean?
>
> A. This the tail end of our conversation. I think I interrupted her and said 'But, Daniella, I mean, this July something, these things, you know, on my end or going to take a bit of time, it is not realistic for me to be able to put together a term sheet given July very quickly, maybe end of July is realistic not immediately'. And she said once again that, 'Look, I am being very fair to you, we will have to do what we have to do. But if you make a proposal in writing and if it is, in our opinion, better then we will have the ability to talk to you'**.** So this is a reference to the unsolicited out that would very normally be in contracts. And I was aware from the exclusivity arrangements before that this is the kind of an out that they had at that time as well. [Emphasis added.]
>
> (Hearing Transcript, February 21, 2013 at page 5592, line 6 to page 5595, line 15)

[298] Although not directly related to the July 13th Meeting, during his examination-in-chief by Walter's counsel, Waheed was specifically asked whether Dimitrov, McCloskey or anyone else had "in the entire period from the time [his] consultancy came to an end in April 2010 to the time Nunavut's bid was launched in September 2010 … convey[ed] to [him] information concerning Baffinland's discussions or negotiations with ArcelorMittal." Waheed responded "No, they did not" (Hearing Transcript, June 11, 2013 at page 6968, lines 6-13).

[299] When Waheed was cross-examined by Staff, he was not questioned in detail about the July 13th Meeting or his notes of the meeting.

(e) July 13, 2010 to July 20, 2010

[300] On July 13, 2010, following the July 13th Meeting, Whittall sent the following e-mail to McCloskey and Dimitrov:

> Please find attached our revised term sheet, reflecting the amendments discussed yesterday as well as our proposed timing to conclude diligence and definitive agreements. Please also find attached a draft agreement to reinstate our exclusivity arrangement on the basis of our continued discussions.

Attached to Whittall's e-mail was a revised term sheet dated July 13, 2010 (the "**July 13th Term Sheet**")[32] and an Exclusivity Reinstatement Agreement which provided ArcelorMittal with exclusivity for a period of four months unless, prior to the expiry of the four month period, the parties entered into definitive agreements relating to Baffinland and the Mary River Project. Dimitrov sent revised drafts of the July 13th Term Sheet and the Exclusivity Reinstatement Agreement to Whittall by e-mail five days later

[32] The July 13th Term Sheet is the enhanced offer to which reference is initially made in these Reasons in paragraph 0(c) above.

on July 18, 2010.

[301] On July 19, 2010, Waheed sent the following e-mail to Walter and attached a slide deck entitled "BIM – Barclays Deal Options July 20 2010":

> Here are some thoughts – discussion points for my benefit – as well as a repopulation of the model with real numbers from the company's recently completed feasibility study and some due diligence on it by Mel Williams – I will do a calc based upon the compensation term sheet later tonight. … The detailed model is not included.
>
> The company Chairman and Vice Chairman keep telling me that whatever I have to do I must do it quickly as what they have on the table has a time fuse and a tired Board is not likely to wait forever. They have terminated their exclusivity with ArcelorMittal (which apparently prompted them to put a slightly enhanced offer on the table – it is a complicated farm-in for the whole project whereby BIM loses all operating control immediately over the project). There is apparently also an offer from a mining company of sorts. Don't think it is Delaney – but I will know for sure after I see him.
>
> My contract with the company also expired by its terms on Jul 1st. So other than confidentiality, I am no longer tied to them.
>
> …

(f) July 20, 2010 Meetings with Barclays and Sherritt

[302] On July 20, 2010, Dimitrov and Waheed met with Ellis and another representative of Barclays to discuss Barclays' possible interest in making an investment in Baffinland at either the company or asset level. When asked by Staff during her examination-in-chief if she had discussed any other proposals made to Baffinland and the matter of exclusivity, Dimitrov replied that she did not recall discussing any other proposals that Baffinland had at the time but did indicate that timing was of the essence. When asked if she had discussed the fact that Baffinland was going back into exclusivity, Dimitrov said "I don't think I specifically said that, no" (Hearing Transcript, February 4, 2013 at page 2984, line 25 to page 2985, line 1).

[303] Following the meeting with Barclays, Waheed prepared the following hand-written notes:

> 7/20/10 – John Ames/David Ellis/Daniella
>
> – Will entertain proposal - okay with farm-in- carry?!
>
> – need to better AM
>
> – Exclusivity??

Staff alleges that Waheed's foregoing notes reflect his knowledge of the status of the ArcelorMittal negotiations. Waheed testified that Ellis did most of the talking and that no reference was made to ArcelorMittal during the meeting. Waheed's testimony in this regard was confirmed by Dimitrov who denied that Baffinland's discussions and negotiations with ArcelorMittal were discussed at the meeting with Barclays.

[304] In his testimony, Waheed explained his notes as reflecting his understanding of Baffinland's circumstances at the time of the meeting with Barclays based on Dimitrov's prior comments which are summarized above. He also testified as follows:

> It was -- to me it was clear they had multiple options, they said that so many times, I didn't have an issue with that. I also believe that one of the options clearly is ArcelorMittal, they probably have others. And I also believed that there is a timing issue that we have to work towards. I wasn't completely convinced that the timing is all together critical. It is, after all, July and, I mean, Baffin has been trying to do a strategic partner exercise for two years now. So I had my doubts as to how real this time constraint really is.

[305] After meeting with Barclays, Waheed and Dimitrov met with Delaney. The following is an excerpt from Dimitrov's e-mail to Cranswick dated July 24, 2010 in which she reported on her meetings with Barclays and Sherritt:

> I had two further meetings this week with Jowdat and two other parties. He asked Bo to be present as well but he [Bo] was off this week. The following are the highlights:
>
> - met with two guys from Barclays private equity based in NYC and Jowdat – they have placed about $1.48 of their own capital – they say they like to invest in opportunities with "good management teams" – JW indicated

> that the proposal that they were putting forward is on 200 mt of deposit 1 based on trucking – on a capex of $450m they could put in $225m in equity, do a pp in bim for 50m and lend BIM 175m to make its equity contribution – I indicated that the thought of buying into our own deposit and putting debt into BIM rather than the project was not very interest – comments were made that debt could be placed on the project and all their equity could go into the project which in a sense could carry BIM's interest in a trucking operation.
>
> - met with Ian Delaney and Jowdat – was a social meeting – apparently Sherritt has been looking to spin out some coal assets (some coal producing assets, coal royalties and I think some potash assets) – about $1.40 in book value, $800M in debt, $230M in EBITDA – Ian's thought was to combine it all with our asset

[306] Although far more detailed, the foregoing e-mail is consistent with Waheed's testimony relating to the meetings with Barclays and Sherritt. Dimitrov advised Cranswick in a subsequent e-mail on the following day that Barclays was looking for private equity returns in a time horizon that was much shorter than envisaged by RCF and contemplated having a say over the Mary River Project. The foregoing was of no interest to Baffinland and, as a result, there were no further communications between Baffinland and Barclays after July 20, 2010, the date on which the meeting took place.

(g) July 21, 2010 to September 9, 2010

[307] On July 21, 2010, Whittall sent a further draft of the term sheet to Dimitrov by e-mail and suggested an early telephone conversation to discuss it. Later on the same day, Dimitrov sent an e-mail to the members of the Strategic Committee in which she made, among others, the following comments:

> The following is a brief update. Term sheet went to AM on Sunday night.
>
> Lots and lots of back and forth with AM with and without our advisors – hours of daily calls.
>
> I have been moving forward on the basis of negotiating terms as deemed appropriate to go before the Committee and ultimately the Board. I have given some and they have given some with the ball in our court for now and all in all I would say we have made some good progress.

[308] On July 22, 2010, Whittall sent a further draft of what had become described as the Exclusivity Reinstatement and Amendment Agreement which provided for a 75-day period of exclusivity for the parties to complete a transaction. At Dimitrov's request, Whittall also provided details of the due diligence that ArcelorMittal intended to carry out which, although described as confirmatory in nature, was clearly intended to be extensive and included technical diligence, a site visit and management meetings, a tax review and financial and legal diligence. Whittall concluded her message by indicating that, although the transaction was also subject to customary completion conditions, including board approvals and any required regulatory or third party approvals, it would not be subject to shareholder approval, an issue that proved to be contentious given ArcelorMittal's insistence that the approval of Baffinland's shareholders would not be sought.

[309] On July 23, 2010, Dimitrov sent a further draft of the term sheet to Whittall by e-mail followed by a further draft of the Exclusivity and Amendment Agreement on July 25, 2010.

[310] On July 25, 2010, Dimitrov also sent a lengthy message to Cranswick updating him on her discussions with each of Waheed, ArcelorMittal, Rio Tinto and Mount Gibson. In her comments relating to ArcelorMittal, Dimitrov indicated that:

> Things in the last two weeks have been better – some ups and downs – I more or less "walked out of the room" during two calls with the big group after which the positions became more reasonable within hours – I told [Whittall] that I refuse to have calls with her and her banker so if she wants to talk we can talk ourselves but I feel like we are finally working together on some level and I feel that I got more than I gave in the last week …
>
> ….
>
> In terms of getting to an acceptable [joint venture] with [ArcelorMittal], it won't be easy but we will get somewhere – the reality of it it [*sic*] won't be easy with any of the giants based on our negotiating position so we need to keep going with our alternatives and be aware of the lines in the sand…

[311] On July 26, 2010, Waheed sent Walter an e-mail in which he stated as follows:

> The two options for the company are (i) an enhanced offer from ArcelorMittal (enhancement being credit support if and if and if….) and (ii) an inquiry from Rio which may result in an actual offer but there does not appear to be one at the moment.

> My sense is that management is not particularly in favor of doing anything other than carrying on with their feasibility and advancing the process with ArcelorMittal. However, many board member [*sic*], with John Lydall in particular, are very keen to sign on to what is on the table now (i.e. ArcelorMittal).
>
> RCF, as always, is undecided and their partner on the board is quite involved in nitty gritty.
>
> We should think about me placing a quick call to Russ [Cranswick] before their board meeting tomorrow afternoon.

[312] On July 27, 2010, the Baffinland Board met to consider, among other things, the recommendation of the Strategic Committee that Baffinland enter into an exclusivity agreement with ArcelorMittal for a period of no more than 90 days on the basis of an attached Summary of Terms[33]. The Baffinland Board did not approve the recommendation at that time as a result of unresolved issues relating to monetary matters and exclusivity. Notwithstanding the fact that the Baffinland Board did not approve the exclusivity agreement at its meeting, the due diligence review by ArcelorMittal commenced a day later on July 28, 2010.

[313] On July 30, 2010, Dimitrov sent a further draft exclusivity agreement to Whittall by e-mail and indicated that it was subject to the finalization of the Summary of Terms.

[314] On August 3, 2010, Whittall sent a further draft of the exclusivity agreement to Dimitrov by e-mail and indicated that ArcelorMittal was not in agreement with a provision included by Baffinland to fix a date by which ArcelorMittal's due diligence would be completed. She also requested clarification of Baffinland's position with respect to the basis of the discount rate used in the calculation of an additional payment that would be made by ArcelorMittal to Baffinland once a defined production decision had been made and a debt financing condition had been satisfied (the "**Additional Payment**"). Dimitrov responded by stating that "… it is not a preference for one discount rate vs. another – it is achieving the certainty of the payment."

[315] On August 3, 2010, Dimitrov sent a further draft of the term sheet to Whittall by e-mail and explained that she had moved the provisions relating to the Additional Payment to an appendix to the term sheet (the "**Term Sheet Appendix**") which would permit the parties to settle the term sheet without having to come to an agreement with respect to the Additional Payment. The day before Dimitrov's e-mail to Whittall, McCloskey wrote to Kukielski and advised him that the Additional Payment was critical to support by the Baffinland Board for an agreement with ArcelorMittal and there would be no such support in the absence of a high probability that the Additional Payment would be made by ArcelorMittal.

[316] On August 4, 2010, Dimitrov sent a further draft exclusivity agreement to Whittall by e-mail, indicating that it was subject to the determination of the Additional Payment both internally and by ArcelorMittal and, on the next day, Dimitrov sent Whittall a further draft of the Term Sheet Appendix.

[317] Also on August 4, 2010, Waheed, who was in Pakistan for most of the month of August, spoke to Cranswick by telephone to discuss financing for the Trucking Option. During the conversation, Waheed also raised with Cranswick the possibility of a transaction by which Baffinland would be taken private. Cranswick testified that he neither encouraged nor discouraged Waheed from pursuing such a transaction and never spoke to Waheed again. Waheed submits that he did not speak to anyone at Baffinland after August 4, 2010 with the exception of the brief meeting he and Walter had with McCloskey and Dimitrov on September 21, 2010 to advise them of the Take-Over Bid.

[318] On August 7, 2013, Dimitrov sent further drafts of the Summary of Terms, the Term Sheet Appendix and exclusivity agreement to Whittall by e-mail. On August 8, 2010, Whittall advised Dimitrov that ArcelorMittal would not propose any further changes to the exclusivity agreement but would have comments on the Summary of Terms. Later on the same day, Whittall sent a further draft of the Term Sheet Appendix to Dimitrov by e-mail.

[319] On August 9, 2010, Dimitrov sent what she described as the final versions of the exclusivity agreement and the Summary of Terms (having accepted ArcelorMittal's last requested changes) to Whittall by e-mail and indicated that she and Whittall were "still working through the Appendix". Later on the same day, Dimitrov sent a further draft of the Term Sheet Appendix to Whittall by e-mail.

[320] On August 9, 2010, Dimitrov also sent an e-mail to the members of the Strategic Committee to update them with respect to ArcelorMittal. After summarizing some of the negotiating issues with ArcelorMittal, Dimitrov indicated, among other things, that on the assumption that the last few points could be resolved (i) the exclusivity agreement would be signed on August 9 or 10, 2010 and would provide ArcelorMittal with exclusivity until October 15, 2010; (ii) ArcelorMittal was to complete its due diligence by September 9 or 10, 2010; and (iii) Baffinland and ArcelorMittal would start negotiating the definitive agreements on August 11 or 12, 2010.

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[33] The expression "Summary of Terms" replaced the expression "term sheet" but both expressions refer to the same document as it evolved over time.

[321] On August 10, 2010, after further changes were made, the Second Exclusivity Agreement was signed by Baffinland and ArcelorMittal. On the same day, Baffinland terminated access to its data site for all parties other than ArcelorMittal and the financial, technical and legal advisors to Baffinland and ArcelorMittal, and, in a broadly distributed internal e-mail, Dimitrov indicated that she had informed the Baffinland Board that the data site had been closed. She also indicated that Mount Gibson and its financial advisor would need to be advised that they no longer had access to the data site and that Baffinland was "not in a position to engage in discussions anymore etc." and that Rio Tinto and Hatch[34], which did not have access to the data site, would receive the same message "on next contact."

[322] On August 12, 2010, Hatch was advised "of the exclusivity situation" by Callaghan (of CIBC). On the same day, Dimitrov sent an e-mail to the Senior Vice President and General Counsel of Sherritt in which she advised him, in response to a letter of interest and term sheet received from Sherritt the day before, that "Baffinland is not in a position to respond to [the letter] or to engage in any discussions with Sherritt". She also confirmed to Cranswick by e-mail that Mount Gibson had been advised that access to the data site had been terminated and that Baffinland was no longer in a position to have discussions.

[323] On August 19, 2010, Dimitrov sent an e-mail to Whittall enquiring about the timing for Baffinland's receipt of the first draft of the joint venture agreement between Baffinland and ArcelorMittal (the "**Joint Venture Agreement**"). She also asked Whittall what was being envisioned over the next two weeks in terms of the completion of the due diligence process.

[324] On August 20, 2010, almost one month after the commencement of the due diligence process, ArcelorMittal's counsel sent the first draft of the Joint Venture Agreement to Dimitrov and Baffinland's counsel and, on August 24, 2010, sent them a revised draft. Also on August 20, 2010, Waheed sent copies of the presentation prepared for Barclays and the August 20th Model to Calvert by e-mail. Further copies were also sent to Walter (see paragraph [167] above).

[325] On August 27, 2010, Zurowski sent an e-mail to McCloskey indicating that he had been reprimanded for discussing trucking with Glencore International plc. ("**Glencore**")[35]:

> … Met with Glencore, they remain very interested in funding trucking option. General discussions.
>
> Got knuckles rapped by DD [Dimitrov] as I stated we were in exclusive negotiations and am not allowed to discuss Trucking without AM permission. Oops. Had GG [Gareau] at meeting so she ran to DD [Dimitrov] and misinformed her what went on.

Zurowski's communication with Glencore was not permitted under the terms of the Second Exclusivity Agreement and Zurowski was reprimanded by Dimitrov for the improper disclosure. During cross-examination, Dimitrov disputed that Zurowski mentioned ArcelorMittal by name which is contradicted by the text of Zurowski's e-mail message to McCloskey which is set out above.

[326] On August 27, 2010, Dimitrov sent Whittall an e-mail with a partial but lengthy list of issues arising from Baffinland's review of the draft Joint Venture Agreement for discussion during a conference call scheduled for later that day. On the same day, Baffinland's counsel circulated the first draft of the Subscription Agreement and ArcelorMittal's counsel circulated the first draft of the Technical Services Agreement.

[327] Also on August 27, 2010, Waheed sent an email to Walter with the subject line "FYI…another reason to move faster….." in which he wrote:

> Delaney had called Jim [MacDonald] to tell him that he had contacted BIM (presumably in the last day or so) and was told that they were in an exclusive arrangement and could not talk to him.
>
> This is the second ArcelorMittal exclusive period that we are aware of. I believe it runs for 45 days.
>
> I asked Jim at this stage to stand down with respect to S [Sherritt]. There is a way to help Delaney but involving him now will cause way too many complications. He agreed.

Two days later, on August 29, 2010, in response to concerns Calvert had expressed about Barclays, Waheed wrote to Walter that "I would think that BIM's exclusivity with Arcelor would prevent it from going and structuring an alternate transaction with Barclays anyways".

[328] On September 1, 2010, Dimitrov sent an e-mail to Whittall advising her that Baffinland and its advisors were fully committed to "moving the definitive documents forward on a timely basis" and that Baffinland expected to deliver a revised draft of the Joint Venture Agreement to ArcelorMittal four or five days later.

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[34] Hatch was acting as Rio Tinto's financial adviser at the time but had sought a role on behalf of Baffinland in January 2010.

[35] Glencore is a diversified natural resources group with interests in mining, smelting, refining and processing.

[329] On September 1, 2010, Dimitrov also exchanged e-mails with McCloskey with respect to remarks attributed to him in the August 31, 2010 edition of the publication *Mining Weekly*[36]. In her second of three messages, Dimitrov made the following comments:

> I appreciate that [the reporter from Mining Weekly] may have been confused however, unless he misquoted you, comments to the press that we will have a partner in two to three months are not appropriate for a variety of reasons including the fact that the predecessor has been making them for years, we are subject to confidentiality – in addition, in consultation with counsel, we have the TSX response (which is not what you are telling the press)
>
> [ArcelorMittal] was not very pleased with similar comments made by [McCreary] earlier this year – therefore, similar comments, comments relating to Mitsubishi are not helpful as we are about to go into a negotiating session, ask for further consent etc

[330] McCloskey replied to the foregoing message by stating, among other things, that "All they [ArcelorMittal] have to do is do the deal and stop with the nonsense. I'll be polite to them but they are doing the cake and eat it too!! Not to mention we will have to explain to them the two offers we will be receiving shortly." Dimitrov testified that she did not know what McCloskey was talking about in the foregoing e-mail, but, in her responding e-mail to him, Dimitrov stated "I cannot be having calls, moving things forward if you are doing stuff on the side."

[331] On September 4, 2010, Baffinland's counsel circulated a revised draft of the Joint Venture Agreement, and shortly thereafter, Dimitrov sent a lengthy e-mail to Whittall setting out her comments so that Baffinland's "draft is reviewed within the appropriate context". The comments related to (i) the structure of the transaction; (ii) Baffinland's on-going reporting obligations; (iii) the calculation of the earn-in amount; (iv) the construction period, expansion plans and budgets; (v) ArcelorMittal's vesting rights; (vi) the calculation and timing of the Additional Payment; (vii) changes in partnership interests; (viii) changes to the dispute resolution mechanism; (ix) the Technical Services Agreement; (x) the treatment of confidential information and the need for Baffinland to raise its contributions to the partnership; and (xi) the funding of the Trucking Option and the risk of the dilution of Baffinland's interest.

[332] On September 4, 2010, Baffinland's counsel also circulated a heavily revised draft of the General Partnership Agreement, the initial version of which appears from the evidence to have been circulated by ArcelorMittal's counsel on August 24, 2010. In an e-mail to Baffinland's financial advisors at CIBC advising them of the circulation of the revised General Partnership Agreement, Dimitrov added "It is likely, based on the blacklining, that [ArcelorMittal] may overreact to this."

[333] On September 8, 2010, ArcelorMittal's counsel sent Baffinland's counsel and Dimitrov three pages of high level comments on the draft Partnership Agreement.

[334] On September 9, 2010, ArcelorMittal's counsel circulated the first draft of the Subscription Agreement. On the same day, McCloskey sent an e-mail to Dimitrov enquiring about ArcelorMittal. Dimitrov's reply by e-mail stated "About a 3rd way through. Freakout when I said they shld [*sic*] just pay us the 300m."[37]

D. Analysis of the Allegations of Insider Trading against Waheed

[335] There is no dispute between the parties that Baffinland was a reporting issuer on September 9, 2010 and that certain information relating to the negotiations between Baffinland and ArcelorMittal was communicated to Waheed while he was engaged as a consultant to Baffinland. What is in dispute, among a number of things, is whether, as of September 9, 2010, the date of the Toehold Purchase, Waheed had knowledge of the Alleged Material Facts, whether the Alleged Material Facts were material within the meaning of subsection 76(1) of the Act and, if the Alleged Material Facts were material, whether the Alleged Material Facts had been generally disclosed.

1. Did Waheed have knowledge of the Alleged Material Facts as of September 9, 2010?

(a) The Consultancy Period

[336] It is clear from the evidence that Waheed received extensive briefings from Dimitrov and others at Baffinland with respect to Baffinland's negotiations with ArcelorMittal during the early days of his consultancy with Baffinland. In addition, Waheed received copies of the CIBC Presentation which, as noted in paragraph [234] above, was intended to provide the Baffinland Board with an analysis of the financial effects of various transaction structures and an update on Baffinland's

[36] In the article, to which reference is made in paragraph 0 of these Reasons, McCloskey was quoted as saying, among other things, that Baffinland was hoping to secure a strategic partner for the Mary River Project within the next two to three months and that Mitsubishi Corp. already had a shareholding of less than 5% in Baffinland.

[37] A reference to the Additional Payment.

negotiations with ArcelorMittal.

[337] When providing Waheed with a copy of the CIBC Presentation on February 19, 2010, Dimitrov noted that the Baffinland Board had determined that it could not conclude a transaction with ArcelorMittal on the terms that ArcelorMittal had last proposed. Approximately two weeks later, on March 4, 2010, Charter, Dimitrov and Quinn travelled to London to meet with a large and senior team from ArcelorMittal to discuss the proposed joint venture. Following the meeting, Waheed received some information relating to the status of the negotiations from Cranswick and Lydall but was not provided with a copy of the detailed report on the meeting prepared by Charter and sent to McCloskey.

[338] On March 23, 2010, Waheed attended a meeting of the Baffinland Board at which McCloskey provided an update on behalf of the Strategic Committee. As summarized in paragraphs [238] to [240] above, Waheed testified that he did not attend the entire meeting and that he and the members of management left the meeting after McCloskey had commenced his update after an objection to their attendance was made by another member of the Baffinland Board. Although the veracity of Waheed's testimony concerning his absence for part of the meeting is disputed by Staff, Waheed did acknowledge that he became aware that Baffinland and ArcelorMittal had entered into the First Exclusivity Agreement. He also testified that Dimitrov mentioned to him at some point after the March 23, 2010 meeting that Baffinland had agreed to a 45-day period of exclusivity with ArcelorMittal.

[339] As summarized in paragraph [247] above, on April 5, 2010, Waheed requested and received from Dimitrov a copy of the April 4th Term Sheet that Whittall had sent to Dimitrov. After being invited to attend the ensuing meeting with ArcelorMittal on April 6, 2010, Waheed was excluded from the meeting and the evidence does not disclose any further communications to Waheed by Baffinland with respect to the status of the negotiations with ArcelorMittal during the Consultancy Period. By April 30, 2010, Waheed had ceased to provide consulting services to Baffinland or to appear at Baffinland's offices.

[340] Under the section of the Consulting Agreement entitled "Confidentiality", Waheed agreed that he would not use for his own account or disclose to anyone else, any confidential or proprietary information or material relating to Baffinland's operations or business to which he had access by virtue of his position with Baffinland. (See also in this regard, paragraph [417] below.) Following the launch of the Take-Over Bid, counsel for Baffinland demanded that Waheed return immediately all confidential information of Baffinland. Waheed's counsel responded that Waheed did not possess any confidential information and had left the materials that had been furnished to him in Baffinland's possession when he completed his formal services to Baffinland in April 2010. During the Merits Hearing, it became clear that Waheed had retained copies of the April 22nd Model (the final version prior the end of his consultancy) and the materials that had been prepared for NBF. Waheed's position throughout the Merits Hearing was that the Financial Model belonged to him and not to Baffinland.

[341] On the basis of our review and consideration of the evidence, we have reached the following conclusions with respect to Waheed's knowledge of the Alleged Material Facts during the Consultancy Period which are numbered to correspond to Staff's allegations as summarized in paragraph [19] above:

(a) ***Communications to Waheed shortly after he became a consultant:*** Waheed did receive extensive briefings from Dimitrov and others at Baffinland relating to the negotiations between Baffinland and ArcelorMittal during the early days of his consultancy. Waheed also received copies of materials and proposals relating to such negotiations including the CIBC Presentation.

(b) ***Status of negotiations in March and April 2010:*** Waheed was in Dubai on a family holiday from February 25 to March 19, 2010 and returned to Baffinland's offices during the week of March 22, 2010. During Waheed's absence, McCreary was forced out as the CEO and replaced on an interim basis by McCloskey. By the time Waheed returned to the office, it had become evident that McCloskey had developed a deep dislike for Waheed as reflected by his repeated disparagement of Waheed (see paragraphs [245], [248], [249] and [251] above). McCloskey also demonstrated a lack of confidence in Waheed's approach to developing a strategic plan for Baffinland and found him abrasive and his methodology suspect. As a result, following his return from his holiday, Waheed was not being kept fully apprised of the status of the negotiations between Baffinland and ArcelorMittal nor was he actively involved in discussing and providing advice with respect to Baffinland's strategy in the negotiations. In fact, Waheed was excluded from the meeting between Baffinland and ArcelorMittal in Toronto on April 6, 2010.

    It is clear from the evidence that, in March and April 2010, Waheed was neither kept fully apprised of the status of the negotiations nor was he actively involved in discussing and providing input with respect to Baffinland's strategy in the negotiations with ArcelorMittal.

(c) ***Knowledge in Mid-March 2010:*** Waheed did know in mid-March 2010 that ArcelorMittal had engaged financial and legal advisors, however, the evidence does not establish that ArcelorMittal was very serious about moving forward with a transaction with Baffinland at that time. Although the April 4th Term Sheet was the first formal written proposal to Baffinland from ArcelorMittal, discussions between the parties had been

ongoing since at least November 2009. The April 4th Term Sheet was not acceptable to Baffinland (see paragraph [254] above) and by May 10, 2010 (see paragraph [260] above], June 19, 2010 (see paragraph [274] above) and July 1, 2010 (see paragraph [277] above), Baffinland had not received a proposal from ArcelorMittal that was acceptable to Baffinland. Given the absence of progress in their negotiations, on July 9, 2010, Baffinland terminated the First Exclusivity Agreement with ArcelorMittal so that it could pursue negotiations with other parties (see paragraph [278] above).

It is clear from the evidence that Waheed did not learn in mid-March 2010 that ArcelorMittal was very serious about moving ahead with a transaction with Baffinland because it had retained financial advisors and legal counsel, or otherwise, and to the contrary, the evidence establishes that little progress in the negotiations had been made by that time and for some months thereafter.

(d) ***First Exclusivity Agreement:*** Waheed did attend the meeting of the Baffinland Board on March 23, 2010 although his attendance for the duration of the meeting is disputed by Waheed. That notwithstanding, Waheed did become aware shortly after the meeting that Baffinland and ArcelorMittal had entered into the First Exclusivity Agreement which provided for a period of exclusivity of 45 days.

(e) ***April 4th Term Sheet:*** Waheed did receive and review the April 4th Term Sheet, however, his advice relating to the April 4th Term Sheet was largely ignored.

(b) The Post-Consultancy Period

[342] Staff's allegations relating to the Post-Consultancy Period, which are summarized in paragraph [21] above, are based on (i) meetings that Waheed had with Dimitrov on June 9 and July 13, 2010; (ii) notes that Waheed prepared after his July 13, 2010 meeting with Dimitrov; (iii) notes that Waheed prepared after a meeting that he and Dimitrov had with Barclays on July 20, 2010; and (iv) a general allegation by Staff that Waheed "subsequently learned that Baffinland executed a second exclusivity agreement with ArcelorMittal on August 12, 2010 which was to run until October 15, 2010."

[343] Staff's allegations relating to the June 9th Meeting are limited to the statement that Dimitrov provided information to Waheed about the status of Baffinland's potential joint venture transaction with ArcelorMittal. Although Dimitrov's denials that she had spoken to Waheed about the status of the ArcelorMittal negotiations at their meeting were, for the most part, less than categoric and were based on her recollection and belief, Staff did not take any steps to challenge her testimony notwithstanding the fact that the Statement of Allegations explicitly identifies Dimitrov as the source of Waheed's alleged knowledge. Staff ascribes considerable importance and weight to the hand-written notes prepared by Waheed following the July 13th Meeting and the meeting with Barclays on July 20, 2010 and seeks to have the Panel rely on these notes as a contemporaneous record of the conversations between Waheed and Dimitrov rather than the evidence of their own witness, Dimitrov. In addition, Staff did not cross-examine Waheed with respect to his explanations relating to the notes, notwithstanding the fact that such explanations do not support Staff's view of what transpired at the meetings in question.

[344] With respect to the July 13th Meeting, Waheed testified that, when they met, Dimitrov informed him that Baffinland had started a process to look at other proposals and that Baffinland had lots of options, some of which were better than Waheed would have known about. She also told him that Baffinland would soon be receiving an offer and was also expecting something from a senior mining company and would have to decide which way to go in a relatively short period of time. According to Waheed, when he responded to Dimitrov that it would take time for him to put a term sheet together given the time of year, Dimitrov told him that "if [he] made a proposal in writing and if it is, in our opinion, better then we will have the ability to talk to you" (Hearing Transcript, February 21, 2013 at page 5595, lines 8 to 10). Waheed surmised, on the basis of what would normally be found in similar contracts, that if Baffinland entered into an exclusivity or other agreement with a third party, it would provide for a so-called fiduciary out, i.e., there would be an exception to exclusivity in the event that Baffinland received a superior proposal from a third party.

[345] Each of the parties made submissions with respect to the inferences that should be drawn from Waheed's hand-written notes following the July 13th Meeting and the meeting with Barclays on July 20, 2010. In our view, Staff has not established, on the basis of clear, convincing and cogent evidence, that the hand-written notes that Waheed prepared after the two meetings prove that the status of the negotiations between Baffinland and ArcelorMittal was discussed with or communicated to Waheed by Dimitrov at either of such meetings. We find that Waheed did not learn from Dimitrov at the July 13th Meeting that (i) Baffinland had terminated its exclusivity with ArcelorMittal which resulted in ArcelorMittal providing an enhanced offer to Baffinland; or (ii) Baffinland was in an advanced stage of negotiations with ArcelorMittal,. We find Dimitrov's evidence in this respect to be credible.

[346] It would appear from the evidence, that Waheed was informed of the likely existence of the Second Exclusivity Agreement on or about August 27, 2010 by MacDonald who had heard from Delaney that Sherritt had been advised by Baffinland that they could no longer engage in discussions with Sherritt (see paragraph [327] above). Dimitrov's advice to Sherritt that Baffinland could no longer engage in discussions was clearly a reflection of the fact that Baffinland had either

become subject to an exclusivity agreement or had entered into a definitive agreement with a third party.

[347] On the basis of our review and consideration of the evidence, we have reached the following conclusions with respect to Waheed's knowledge of the Alleged Material Facts relating to the Post-Consultancy Period which correspond to Staff's allegations which are summarized in paragraph [21] above:

(a) ***The June 9th Meeting:*** Staff made a single allegation with respect to the meeting of Dimitrov and Waheed on June 9, 2010, namely, that Dimitrov provided information to Waheed about the status of Baffinland's potential joint venture transaction with ArcelorMittal. Staff's submissions relating to the meeting are almost entirely focused on the testimony of Dimitrov and Waheed with respect to Waheed's ability to purchase Baffinland shares which is not relevant to the specific allegations in this matter and is not addressed in these Reasons.

The evidence reflects that the primary focus of the meeting was the Road Haulage Conceptual Study and Baffinland's annual meeting the following day. Neither the notes prepared by Waheed after the meeting nor any of the other evidence establish that ArcelorMittal was discussed. Dimitrov testified during her examination-in-chief that she did not remember discussing ArcelorMittal and, when cross-examined, Dimitrov stated that she believed that she had not discussed ArcelorMittal with Waheed and did not believe that she had breached her confidentiality obligation to ArcelorMittal by discussing the status and terms of Baffinland's negotiations with ArcelorMittal.

For the reasons summarized above, there is no clear, cogent and convincing evidence that Dimitrov provided Waheed with information about the status of Baffinland's potential joint venture transaction with ArcelorMittal at the June 9th Meeting.

(b) ***July 12, 2010:*** Staff alleges that Waheed contacted McCloskey on July 12, 2010 to request a meeting to discuss the Road Haulage Conceptual Study and that Waheed advised McCloskey that he "continue[d] to be covered by the confidentiality agreement". In written submissions, Staff submits that the July 13th Meeting took place as a result of Waheed's July 12, 2010 e-mail, but makes no allegation that specific information was provided to Waheed by McCloskey. As they have no bearing on the negotiations between Baffinland and ArcelorMittal, and as no material facts are alleged to have been communicated to Waheed by McCloskey, we will not comment further on this aspect of Staff's allegations.

(c) ***The July 13th Meeting:*** Staff's allegations that Waheed learned from Dimitrov at the July 13th Meeting that Baffinland had terminated its exclusivity agreement with ArcelorMittal which resulted in an enhanced offer and that Baffinland was in an advanced state of negotiations with ArcelorMittal are central to Staff's case against the Respondents. In its written submissions, Staff also takes the position that Waheed essentially knew the terms being negotiated by the parties based on the status of the negotiations in April 2010, immediately prior to his departure from Baffinland. It is Staff's position that, in February and March 2010, the main point of contention between the parties was Baffinland's insistence that ArcelorMittal would have to provide credit support including, possibly, a completion guarantee which would permit Baffinland to finance its share of the costs to develop the Mary River Property.

In Staff's submission, ArcelorMittal had conceded in May and June 2010 that it would provide a completion guarantee because, as Whittall testified, ArcelorMittal was "interested in concluding a transaction with Baffinland" and was "willing to make concessions to [its] initial position" (Hearing Transcript, January 28, 2013 at page 2182, lines 7 to 10), and subsequent discussions focused on the mechanics relating to the provision of debt support. The reality of ArcelorMittal's position was, in fact, different as is evident from the following excerpt from Whittall's testimony with respect to ArcelorMittal's proposal as of July 12, 2010:

> Q. And what was Arcelor proposing with respect to a completion guarantee?
>
> A. ArcelorMittal was undertaking to provide, <u>at its discretion</u>, a completion guarantee; however, the protection that was now being offered to Baffinland was that Baffinland would have a call option to the extent that the completion guarantee was the only means of securing project finance at the time of the decision to proceed <u>if ArcelorMittal failed to provide that, then, Baffinland would have a call option to buy the project back, the project interest back.</u> [Emphasis added.]
>
> (Hearing Transcript, January 28, 2013 at page 2185, line 21 to page 2186, line 8)

As Whittall's testimony makes quite clear, as of mid-July 2010, the completion guarantee would only be provided at ArcelorMittal's option and only to the extent that it was the only means of securing project financing. Baffinland's sole remedy in the event that ArcelorMittal declined to provide the guarantee would be to "buy the project back", an entirely illusory right in the circumstances.

In reality, the negotiations between the parties, particularly with respect to financial matters, as reflected in the numerous versions of the term sheet that are summarized in detail above, were lengthy, contentious and, for a protracted period of time, inconclusive. As late as July 25, 2010, Dimitrov sent an e-mail to Cranswick in which she indicated that she had walked out of the discussions on two occasions and that getting to an acceptable agreement with ArcelorMittal "won't be easy" (see paragraph [310] above).

Each of Dimitrov and McCloskey separately made it clear to Waheed that time was of the essence and, if he intended to make a proposal to Baffinland, he would have to do so quickly. They also advised Waheed that Baffinland may not be able to talk much longer. It would have been obvious to Waheed from these comments that Baffinland was not bound by an exclusivity or other agreement at that time but might be in the near future. Given the information that was in the marketplace, to which we refer below, which indicated that there were unlikely to be any other serious suitors for Baffinland, Waheed's submission that it was quite logical for him to conclude that Baffinland was probably in negotiations with ArcelorMittal was quite tenable.

It would also not have escaped ArcelorMittal's attention, as suggested in paragraph [279] above, that Baffinland was in discussions with a number of parties and it was in ArcelorMittal's interest to have Baffinland enter into an exclusivity agreement to preclude further negotiations with third parties. When cross-examined, Whittall conceded that, during the initial period of exclusivity, McCloskey had discussions with Beddows, who was acting as an advisor to Rio Tinto, in direct contravention of Baffinland's agreement with ArcelorMittal. In an e-mail to Beddows on June 12, 2010, McCloskey made the following comments:

> Time is a factor although if RTZ [Rio Tinto] makes a serious step I will be able to convince sufficient Board members to hold back on any commitment elsewhere. However, I'm not sure if there are two weeks??
>
> Rod, on a personal basis I'm much more at ease dealing with mining companies. Any push on timing you can make would be helpful to both our causes. thank you for your efforts

By mid-July 2010, Baffinland had terminated the first period of exclusivity with ArcelorMittal following the Baffinland Board's determination that a transaction with ArcelorMittal was not achievable based on its proposed terms at the time (see paragraphs [276] to [278] above). Following the termination of the First Exclusivity Agreement, Baffinland was heavily engaged in soliciting expressions of interest from other parties (see paragraphs [279] and [280] above). As a result, it cannot be said, and there is no evidence to support Staff's allegation, that Waheed learned that Baffinland was in an advanced state of negotiations with ArcelorMittal in mid-July 2010.

A significant amount of evidence was led by Staff and the Respondents with respect to the matters that Staff alleges were discussed by Dimitrov and Waheed at the July 13th Meeting, allegations that are central to Staff's case. We believe that, in her desire to conclude a successful transaction that would provide for the development of the Mary River Property, Dimitrov may have provided what to her seemed to be innocuous information relating to Baffinland's almost frantic efforts to identify a strategic partner or other source of funding for the Mary River Project. This would have permitted Waheed, given his knowledge of the industry and the information that he had gleaned from sources other than Baffinland, to infer the status of Baffinland's discussions with what he surmised was ArcelorMittal (see paragraph [291](iv) above).

Dimitrov answered certain questions relating to what she told Waheed at the July 13th Meeting when examined by Staff and cross-examined by counsel to each of the Respondents on the basis of her belief. She was, however, categoric in denying that she had discussed with Waheed (i) any of the terms that were then under discussion with ArcelorMittal; (ii) the status or anticipated outcome of such discussions; (iii) the fact that Baffinland had received a revised term sheet after Waheed's consultancy had ended; or (iv) the terms of any exclusivity arrangements that Baffinland might consider (see paragraph [293] above).

Staff has not established that, at the July 13th Meeting, Dimitrov communicated to Waheed that Baffinland had terminated the First Exclusivity Agreement which resulted in an enhanced offer and that Baffinland was in an advanced state of negotiations with ArcelorMittal.

(d) ***Waheed's Notes of July 20, 2010:*** Staff's allegation with respect to the meeting between Dimitrov, Waheed and Barclays on July 20, 2010 is limited to Staff's statement that Waheed's knowledge of the status of the ArcelorMittal negotiations was reflected in the three lines of handwritten notes that Waheed prepared following the meeting. No evidence was introduced by Staff to support this allegation and, as submitted by Waheed, the notes could be viewed as confirmatory of Waheed's knowledge (not obtained from Baffinland) or conjecture that ArcelorMittal was the likely party from which Baffinland was expecting to receive an offer. It was self-evident that any offer made by Barclays would have to be better than the proposal from ArcelorMittal reflected

in the April 4th Term Sheet of which Waheed was aware, and that other proposals would be entertained if exclusivity had been provided based on Waheed's expectation (essentially confirmed by Dimitrov) that a fiduciary out would be included in any agreement. Staff has not established that Waheed learned any information from Dimitrov about the status of the negotiations between Baffinland and ArcelorMittal at the meeting with Barclays on July 20, 2010.

(e) ***Second Exclusivity Agreement:*** Staff's allegation that Waheed subsequently learned that Baffinland had executed a second exclusivity agreement with ArcelorMittal does not indicate when, in what circumstances and from whom Waheed become aware of that information. As noted in paragraph [346] above, the evidence establishes that Waheed did become aware of the likely existence of a second exclusivity agreement from MacDonald on August 27, 2010.

There is no other evidence to support Staff's inferred allegation that Waheed's knowledge of the Second Exclusivity Agreement came from any officer, director or employee of Baffinland.

[348] Waheed's conversation with MacDonald on August 27, 2010 referred to in paragraph [347](e) above provides a brief glimpse of some of the extensive evidence led by the parties at the Merits Hearing with respect to Waheed's activities during the period from early June to August 2010. In essence, Waheed was acting as a freelance broker, trying to structure a transaction that would provide Baffinland with financing while identifying a role for himself. As noted in paragraph [268] above, Waheed's activities in this regard were undertaken with the knowledge of Dimitrov. It is well known that investment bankers, brokers and other intermediaries in most industries seek to acquire small seemingly innocuous strands of information from multiple sources and weave them together to create an understanding of circumstances and opportunities which can be employed to sell their services. The issue arose during Cranswick's cross-examination by Waheed's counsel as can be seen from the following exchange concerning the activities of Beddows, a representative of Hatch who was not subject to a confidentiality agreement, and his discussions with Quinn who worked for CIBC, Baffinland's financial advisor:

> Q. Now, just because my friend has raised the objection, you, sitting here as a director of Baffinland at the relevant time and having had the opportunity to discuss it with Mr. Beddows about Arcelor's keen interest and knowing he met Mr. Quinn, and when he says you are having discussions with ArcelorMittal, you would have inferred that he is learning about that through Mr. Quinn, your investment banker?
>
> A. Yes, he saw the pieces coming together, interpreted, heard some from inside ArcelorMittal, and like all investment bankers, try and place themselves where they can get paid.
>
> Q. I don't blame him for doing his job, and I actually don't think there is any harm in this. But the point is that insofar as Arcelor may have wanted these discussions, their negotiations to be confidential, it got to Mr. Beddows who is not covered by any confidentiality agreement?
>
> A. Yes, unless he had them with the company that I was unaware of, yes, you are right. (Hearing Transcript, January 25, 2013 at page 1918, line 18 to page 1919, line 17)

As Beddows was never retained by Baffinland, he never signed any form of confidentiality agreement.

[349] Given our conclusions with respect to the Consultancy Period in paragraph [341] above, we find that (i) shortly after joining Baffinland, Waheed did learn of details of the negotiations between Baffinland and ArcelorMittal and received copies of materials and proposals relating to such negotiations; (ii) during March and April 2010, Waheed was neither kept fully apprised of the status of the negotiations nor was he actively involved in discussing and providing input with respect to Baffinland's strategy; (iii) Waheed did not learn in mid-March 2010 that Baffinland was very serious about moving ahead with a transaction; (iv) Waheed did become aware that Baffinland and ArcelorMittal had entered into the First Exclusivity Agreement; and (v) Waheed did receive and review the April 4th Term Sheet. Given our conclusions with respect to the Post-Consultancy Period in paragraph [347] above, we find that Waheed did not learn of any of the Alleged Material Facts that Staff alleges that he learned during the Post-Consultancy Period.

2. Were the Alleged Material Facts material within the meaning of subsection 76(1) of the Act?

[350] The essence of Staff's case in this matter relates to two periods of time. First, during the Consultancy Period, the status and terms of the negotiations between Baffinland and ArcelorMittal regarding a potential joint venture as set out in paragraphs 30 to 34 of the Statement of Allegations were material facts that were not generally disclosed to the public and the fact that ArcelorMittal, the world's largest steel-maker and one of the world's largest mining companies was interested in and engaged in active negotiations with Baffinland, a junior mining company, would reasonably be expected to have a significant effect on the market price or value of Baffinland's securities. Second, during the Post-Consultancy Period, the status and details of the negotiations between Baffinland and ArcelorMittal about a potential joint venture as set out in paragraphs 40 to 44 of the Statement of Allegations were material facts that were not generally disclosed to the public and the fact that Arcelor Mittal was in

advanced negotiations with Baffinland, as evidenced by the revised and improved term sheet, i.e. the July 13th Term Sheet, and the execution by the parties of the Second Exclusivity Agreement, would reasonably be expected to have a significant effect on the market price or value of Baffinland's securities.

[351] We will assess the issue of materiality in the context of Staff's allegations set out in the Statement of Allegations and described in paragraphs [19] to [22] above. The question that the Panel must answer is whether on September 9, 2010, the date on which Staff allege that Nunavut Acquisition made the Toehold Purchase, any of the Alleged Material Facts, or some or all of them taken together, were material facts that would reasonably be expected to have a significant effect on the market price or value of Baffinland securities.

[352] Baffinland and ArcelorMittal commenced their negotiations in November 2009 with a view to establishing a joint venture to develop the Mary River Project. Dimitrov acknowledged during cross-examination that, by the end of the Consultancy Period, discussions with ArcelorMittal had not resulted in a transaction that was remotely acceptable to Baffinland. On July 1, 2010, almost eight months after the negotiations commenced, Dimitrov advised the Strategic Committee that a transaction was not achievable based on ArcelorMittal's proposed terms at that time (see paragraph [277] above). The lack of progress in the negotiations came to a head eight days later when, on July 9, 2010, Baffinland terminated the First Exclusivity Agreement with ArcelorMittal to pursue other alternatives as is evident from the following excerpt from Dimitrov's testimony:

> I believe we terminated exclusivity because we had been in discussions for some time, that although we had made some progress, we had not achieved acceptable terms, and because I think, I think, we wanted to go and explore other alternatives.
>
> (Hearing Transcript, January 30, 2013 at page 2552, lines 13 to 18)

[353] There were, however positive developments during the latter part of July and the beginning of August 2010 and the evidence establishes that Baffinland and ArcelorMittal reached agreement with respect to a substantial number of the outstanding major issues on August 9, 2010 and entered into a second period of exclusivity on the following day. Dimitrov acknowledged when cross-examined by Waheed's counsel that, on September 21, 2010, more than a month later there were still a number of major points outstanding, one of which was substantial, but that both parties were striving to reach agreement on all matters and announce the transaction in Iqaluit on September 30, 2010.

[354] The evidence also establishes that Waheed worked as a consultant to Baffinland from February 18 to April 30, 2010, a period of slightly more than two months. Staff alleges that, during the two-month period and Waheed's subsequent meetings with Dimitrov on June 9 and July 13, 2010 and a further meeting with Dimitrov and two representative of Barclays on July 20, 2010, Dimitrov communicated the status of the negotiations between Baffinland and ArcelorMittal to Waheed. We have summarized our conclusions with respect to the foregoing allegations in paragraphs [341] and [347] above. There is no evidence that any further meetings or communications between Waheed and any officer or director of Baffinland took place until September 21, 2010, after the Toehold Purchase was made, other than Waheed's telephone conversation with Cranswick on August 4, 2010 which is summarized in paragraph [317] above.

[355] We consider in the paragraphs that follow whether Staff has discharged its burden of proving that the Alleged Material Facts were material facts within the meaning of subsection 1(1) of the Act on September 9, 2010.

[356] As noted above, the determination of materiality is not a science but, rather, a common-sense judgment made in light of all of the specific circumstances. Baffinland was a small company with thinly-traded securities that was well-known in the industry to require a major partner to provide or make possible the financing necessary to develop the Mary River Property. Staff submits that the prospect of a joint venture with ArcelorMittal in which ArcelorMittal would control more than 50% of the enterprise constituted a major development. Staff also rely on section 4.2 of NP 51-201 which states, among other things, that the "materiality of a particular event or piece of information may vary between companies according to their size, the nature of their operations and many other factors."

[357] Baffinland was a small company, with essentially no income from its mining operations, which might suggest an earlier rather than later determination of materiality of a contingent event. Relying on *Donnini* and *Landen*, Staff submits that "[G]reater magnitude requires less probability in order to constitute a material fact". Although it is quite likely that the information relating to the negotiations between Baffinland and ArcelorMittal that was provided to Waheed by Dimitrov during the first few days of his consultancy were material facts at that time, it soon became apparent that the negotiations between the parties would likely be lengthy and arduous and the outcome was uncertain. In this regard, it is clear that the parties had been unable to conclude even an agreement in principle more than six months after the execution of the First Exclusivity Agreement. As a result, the probability of the parties concluding an agreement rapidly decreased and the information that was communicated to Waheed by Dimitrov at the beginning of his consultancy would have likely ceased to be material by the end of Waheed's consultancy, i.e., by April 30, 2010, when Baffinland concluded that the April 4th Term Sheet was unacceptable.

[358] Staff provided no details in the Statement of Allegations of the information Dimitrov is alleged to have imparted to

Waheed at the June 9th Meeting. The July 13th Meeting, the allegations relating to which are central to Staff's case, took place four days after the First Exclusivity Agreement between the parties was terminated by Baffinland as a direct consequence of the lack of progress in the negotiations. At exactly the same time, Baffinland was in active discussions with Rio Tinto, Mount Gibson (which had signed a confidentiality agreement) and CITIC Group Corporation and were in touch with POSCO and ROGESA to ascertain their respective levels of interest in Baffinland (see paragraphs [279] and [280]).

[359] Whether or not Baffinland employed the termination of the First Exclusivity Agreement as a negotiation tactic with ArcelorMittal, and there is no evidence before us that they did so, it is quite clear that, on July 13, 2010, the negotiations between Baffinland and ArcelorMittal were not at an advanced state and a transaction between Baffinland and ArcelorMittal was not imminent or, for that matter, even likely given that the parties had been unsuccessful in their attempts to negotiate the terms of an agreement for eight months at that point in time and the agreement providing for the exclusivity of their negotiations had been terminated given the absence of progress in such negotiations.

[360] The last term sheet that was seen by Waheed was the April 4th Term Sheet. The proposed terms were simplistic and unacceptable to Baffinland. The major problem for Baffinland was that the proposal did not include financial support from ArcelorMittal to assist Baffinland to finance its share of the Mary River Project or to arrange for funding at the project level (referred to as debt support). Without debt support from ArcelorMittal, Baffinland would not have been able to fund its share of the Mary River Project given its small size and limited access to funding. ArcelorMittal would have had to provide the funding and would, in all likelihood, have diluted Baffinland's ownership interest, likely to zero. During the period following Baffinland's receipt of the April 4th Term Sheet until its receipt of the version dated August 10, 2010 (the "**August 10th Term Sheet**"), at least 12 versions of the term sheet were exchanged by the parties.

[361] The following is a brief summary of our assessment of the principal differences between the April 4th Term Sheet and the August 10th Term Sheet:

(a) Debt Support: Under the April 4th Term Sheet, each party would fund its proportionate share of all project costs. If one party could not fund, the other could do so and dilute the interest of the non-funding party on a dollar-for-dollar basis. It was clear to Baffinland that it would not be capable of raising the capital required to maintain its interest in the Mary River Project and it believed that its interest would be fully diluted.

The August 10th Term Sheet provided detailed and extensive terms for debt support from ArcelorMittal. ArcelorMittal also acknowledges that it would likely have to provide a completion guarantee, in which event, ArcelorMittal would receive an additional 9.9% interest in the project. The cost overrun facility to be provided by ArcelorMittal (if bank financing could not be obtained) also doubled from $200 to $400 million.

The issue of debt support, on which the Staff's submissions relating to Waheed's knowledge is based in part, was only one of a number of material financial issues. It should also be noted that debt support was always going to be required for the Mary River Project given Baffinland's size and market capitalization and the magnitude of the Mary River Project. Waheed's knowledge of the need for debt support without any of the attendant details of the debt support proposed by ArcelorMittal would have been largely meaningless.

(b) Earn-in: The earn-in mechanism[38] changed substantially. Instead of acquiring a 51% interest for $200 million (valuing Baffinland's contributed assets at $248 million rather than $92 million), ArcelorMittal would receive a 50.1% interest, i.e., control, for $250 million. In addition, the earn-in payments to Baffinland would be made over a three-year period and would commence immediately.

(c) The Additional Payment: The Additional Payment to Baffinland (see paragraph [314] above) of up to $300 million was agreed to, depending on the net present value of the Mary River Project after a bankable feasibility study was completed. No such payment was provided in the April 4th Term Sheet. The detailed appendix to the August 10th Term Sheet was heavily negotiated to ensure, from Baffinland's perspective, that it would receive the payment.

(d) Construction Decision: Under the April 4th Term Sheet, ArcelorMittal was entitled to make the decision to proceed with construction and had three years to do so and four years to exercise its right to acquire its interest in the Mary River Project (the earn-in). Under the August 10th Term Sheet, the construction decision would be made by a management committee with equal representation by Baffinland and ArcelorMittal and Baffinland had a call option to acquire ArcelorMittal's interest if a construction decision had not been made in three years (reduced from seven years).

(e) Royalty: The August 10th Term Sheet provided for the conversion of the interest of either party to a royalty if its

[38] For an investment at the project or asset level, the earn-in was the amount that ArcelorMittal would have had to invest to earn a majority interest in the Mary River Project.

ownership interest fell below 10%.

(f) Shareholder Approval: The August 10th Term Sheet made it clear that Baffinland would not seek a shareholder vote to approve the transaction. There was no mention of this issue in the April 4th Term Sheet and it was the subject of considerable discussion between the parties.

In our view, with the passage of time and as the result of extended and extensive negotiations between the parties, the terms of the proposed agreement between the parties reflected in the April 4th Term Sheet had ceased to be correct or relevant by the date on which the Toehold Purchase was made.

[362] The fact that ArcelorMittal and Baffinland had achieved common ground, as reflected in the August 10th Term Sheet, was consequential. The August 10th Term Sheet resulted in an agreement between the parties to proceed to the negotiation and finalization of definitive agreements and execute the Second Exclusivity Agreement to permit such negotiations without the distraction or risk of competing negotiations with one or more third parties. These factors, combined with the heightened intensity of the negotiations between the parties and the active involvement of their respective counsel in drafting the definitive agreements, significantly increased the probability of a transaction between ArcelorMittal and Baffinland. Accordingly, by September 10, 2009, and applying the principles set out in *Donnini (Div. Ct.)*, the discussions between Baffinland and ArcelorMittal had "gone well beyond expressions of mutual interest" and the parties were in the process of negotiating the "very finest of points". In our view, the circumstances and events summarized in this paragraph [362], when taken together, constituted material facts within the meaning of subsection 1(1) of the Act.

[363] Although we have concluded that the circumstances and events summarized in paragraph [362] above, when taken together, constituted material facts, the evidence does not establish that Waheed was aware of the status of the negotiations with ArcelorMittal, including the provisions of the August 10th Term Sheet, and Dimitrov categorically denied that she had provided such information to him.

[364] On the basis of our review of the evidence, we find as follows:

(a) ***Communications to Waheed shortly after he became a consultant:*** Although the information concerning the negotiations between Baffinland and ArcelorMittal communicated to Waheed in the early days of his consultancy as described in paragraph [341](a) above may have been material facts in February 2010, such information had, by September 9, 2010, ceased to be correct or relevant as a result of the passage of time and supervening events. As a result, the Alleged Material Facts described in paragraph [19](a) above were not, either individually or collectively, material facts within the meaning of subsection 1(1) of the Act as of September 9, 2010.

(b) ***Status of negotiations in March and April 2010:*** As we concluded at paragraph [341](b) above, in March and April 2010, Waheed was not kept fully apprised of the status of the negotiations between Baffinland and ArcelorMittal, was not actively involved in discussing and providing input on Baffinland's strategy in the negotiations and did not assist Baffinland's senior management in preparing a presentation to ArcelorMittal. The status of the negotiations between ArcelorMittal and Baffinland may have been a material fact in March and April 2010, however, as of September 9, 2010, the circumstances had changed significantly and the status of the negotiations more than four months earlier was not a material fact. As a result, the Alleged Material Facts described in paragraph [19](b) above were not material facts within the meaning of subsection 1(1) of the Act as of September 9, 2010.

(c) ***Knowledge in Mid-March 2010:*** As we concluded at paragraph [341](c) above, the evidence does not establish that ArcelorMittal was very serious about moving ahead with a transaction with Baffinland in mid-March 2010. Although Waheed was aware at or about that time that ArcelorMittal had hired financial advisors and legal counsel, that information would not have been material almost six months later given the passage of time and supervening events. As a result, the Alleged Material Facts described in paragraph [19](c) above were not material facts within the meaning of subsection 1(1) of the Act as of September 9, 2010.

(d) ***First Exclusivity Agreement:*** Although Waheed did become aware of the First Exclusivity Agreement, it was terminated by Baffinland on July 9, 2010 given the absence of progress in the negotiations between Baffinland and ArcelorMittal. For this reason alone, the existence of the First Exclusivity Agreement entered into on or about March 23, 2010 could not have been a material fact once the First Exclusivity Agreement had been terminated. As a result, the Alleged Material Facts described in paragraph [19](d) above were not material facts within the meaning of subsection 1(1) of the Act as of September 9, 2010.

(e) ***April 4th Term Sheet:*** Although the existence and contents of the April 4th Term Sheet may have been material facts at the time that it was delivered to Baffinland, the April 4th Term Sheet was rapidly superseded by 12 or more revised versions with progressively more significant changes as described in paragraphs [360]

> and [361] above. As a result, with the passage of time and as the result of extended and extensive negotiations between the parties, the existence and contents of the April 4th Term Sheet ceased to be material. Accordingly, the Alleged Material Facts described in paragraph [19](e) above were not material facts within the meaning of subsection 1(1) of the Act as of September 9, 2010.

[365] Although the fact that ArcelorMittal, the world's largest steelmaker and one of the world's largest mining companies, was interested in and engaged in active negotiations with Baffinland during the Consultancy Period may have been a material fact at that time, the failure of the parties to complete an agreement over a protracted period of time would, in our view, have either totally negated or significantly diminished the importance of the information. As a result, we find that the fact that ArcelorMittal was interested in and engaged in active negotiations with Baffinland during the Consultancy Period ceased to be a material fact with the passage of time and the failure of the parties to complete a transaction. Accordingly, the Alleged Material Fact described in paragraph [20] above was not a material fact within the meaning of subsection 1(1) of the Act as of September 9, 2010.

[366] As we found that Waheed did not learn of the Alleged Material Facts relating to the Post-Consultancy Period as alleged by Staff (see paragraph [347] above), it is unnecessary for us to address the question of their materiality. However, we note the following:

(a) ***The June 9th Meeting:*** As Staff has not established that Dimitrov provided Waheed with information about the status of Baffinland's potential joint venture transaction with ArcelorMittal at the June 9th Meeting, Waheed could not have breached subsection 76(1) of the Act as alleged by Staff.

(b) ***July 12, 2010:*** As Staff has not alleged the communication of material facts to Waheed by McCloskey on July 12, 2010, there is no allegation that could give rise to a breach of subsection 76(1) of the Act.

(c) ***The July 13th Meeting:*** As Staff has not established that, at the July 13th Meeting, Waheed learned from Dimitrov that Baffinland had terminated the First Exclusivity Agreement which resulted in an enhanced offer and that Baffinland was in an advanced state of negotiations with ArcelorMittal, Waheed could not have breached subsection 76(1) of the Act as alleged by Staff.

(d) ***Waheed's Notes of July 20, 2010:*** As Staff has not established that Waheed learned any information from Dimitrov about the status of negotiations between Baffinland and ArcelorMittal on July 20, 2010, Waheed could not have breached subsection 76(1) of the Act as alleged by Staff.

(e) ***Second Exclusivity Agreement:*** As noted in paragraph [347](e) above, the evidence establishes that Waheed became aware of the likely existence of a second exclusivity agreement from MacDonald, and not Baffinland, on August 27, 2010. As the conclusions that Waheed and MacDonald drew about the existence of a second exclusivity agreement appear to have been speculative on their part, the existence of the Second Exclusivity Agreement in late August 2010 could not be considered a fact known by Waheed, let alone a material fact, at that time. Although we have concluded that the events surrounding the execution of the Second Exclusivity Agreement were likely material facts (see paragraph [362]), given the absence of Waheed's knowledge of the Alleged Material Fact described in paragraph [21](e) above, Waheed could not have breached subsection 76(1) of the Act as alleged by Staff.

3. Were the Alleged Material Facts generally disclosed at the time of the Toehold Purchase?

[367] As stated in subsection 3.5(2) of NP 51-201:

> Securities legislation does not define the term "generally disclosed". Insider trading court decisions state that information has been generally disclosed if:
>
> (a) the information has been disseminated in a manner calculated to effectively reach the marketplace; and
>
> (b) public investors have been given a reasonable amount of time to analyze the information.

[368] Subsection 3.5(3) of NP 51-201 states that although securities legislation does not generally require a particular method of disclosure, in determining whether material information has been generally disclosed, all of the relevant facts and circumstances, including the company's traditional practices for publicly disclosing information and how broadly investors and the investment community follow the company, should be taken into consideration. The balance of section 3.5 of NP 51-201 addresses a number of methods by which a company can effectively achieve general disclosure.

[369] In *Re Keith*, the Alberta Securities Commission concluded that, although a deadline for the submission of proposals in response to a process to explore strategic alternatives was not disclosed:

> its essence was in the public domain before any of the impugned trading allegedly made on the basis of illegal tipping – as seen in Wellington's 10 December 2009 commentary, which stated "bids [are] due next week". Thus, the deadline was generally disclosed (albeit approximately) by the time of the trades allegedly made improperly with such knowledge.
>
> (*Re Keith*, 2012 ABASC 382 ("***Keith***") at para. 78.)

[370] In *R. v. Landen*, Madam Justice S.R. Shamai of the Ontario Superior Court of Justice made the following observations:

> The flow of information concerning a publicly traded company emanates from the company, in large measure. Some of that information is required to be disclosed by securities regulation. In the course of complying with disclosure regulations, and apparently quite apart from the requirements, the company makes press releases, holds press conferences, webcasts, teleconferences, conducts mine tours, and attends trade shows. No doubt there are other ways that the company communicates with the public about its business. Obviously these communications are intended not only to accomplish compliance but as well to maintain market confidence in its operations, elicit further investment, and return a profit to the investors. Alongside the release of information to the public there is a business of analysis of the information. As Mr. Embry commented in his testimony, few members of the general public, or even the interested public in terms of investors, attend to the public statements. Primarily, analysts pick up this and other information for the purposes of giving some guidance to investors. They make the information digestible, put it in context, add their own analysis and opinion. They become a gauge of what has become public, and in some ways, assist in measuring materiality.
>
> (*Landen*, *supra* at para. 30.)

Justice Shamai went on to note that "[The] likelihood of missing third quarter production forecast was discussed in the analysts' reports, and as such was within the public discourse" (*Landen, supra* at para. 92).

[371] A number of the witnesses testified that both Baffinland and ArcelorMittal intended that their negotiations would remain confidential. The evidence, however, discloses that Baffinland's history from late 2008 forward is replete with various forms of public disclosure of information that Baffinland formally considered to be confidential or that was confidential under the terms of one or both of the two exclusivity agreements between Baffinland and ArcelorMittal. Notwithstanding our findings in paragraphs [364] and [365] above, we will review whether the Alleged Material Facts were generally disclosed as of September 9, 2010.

[372] In August and September of 2008, Baffinland shipped the Bulk Sample to ArcelorMittal and ThyssenKrupp for testing (see paragraph [105] above). Details of the shipment were publicly disclosed by Baffinland in its press releases dated September 11 and November 6, 2008.

[373] During the same period, both Anglo American and ArcelorMittal made confidential site visits to the Mary River Property and ThyssenKrupp had done so at an earlier stage (see paragraph [111] above.) On December 9, 2008, a month after Baffinland's November 6, 2008 press release concerning the Bulk Sample, McCreary was quoted in *Metal Bulletin*[39] to the effect that Baffinland was "talking to the biggest of the big in steel, mining and metals trading" (see paragraph [113] above).

[374] The evidence established that the universe of the "biggest of the big" in steel and mining was relatively small and well-known in the industry.[40] Both McCreary and Dimitrov testified that ArcelorMittal fit the foregoing description in the steelmaking industry and it had the capacity, financial and otherwise, to become involved in a project having the scale of the Mary River Project.

[375] Van Veelen testified that, by 2008, ThyssenKrupp had experienced problems with other mining projects and did not have the financial capacity to become involved in the Mary River Project. When asked, based on his knowledge of the industry, which companies he considered to be the most likely potential strategic partners at the time he was acting as a consultant to Baffinland, van Veelen testified as follows:

> … In the end, when it became so expensive, really the companies that could afford to develop such project were just a few. And some I don't really talk to, like Rio Tinto, the giant out of Australia, Vale, the reference to Mr. Hitier and the Brazilian biggest iron ore company, and then ArcelorMittal and then -- BXP never showed any interest. So you come to these three and two are eliminated, then a lot of people could conclude, well, there's only one that really can take on this project.

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39 *Metal Bulletin* is described on its website as the premium intelligence service for metals and steel professionals.

40 A Dow Jones *Factiva* article published on October 10, 2007 identified CVRD (RIO), Rio Tinto, BHP Billiton Ltd. and Anglo American as the world's big four iron producers.

(Hearing Transcript, June 14, 2013 at page 7352, lines 12-22.)

[376] Van Veelen was involved in the Bulk Sample program including discussions pertaining to which steel mills would receive samples and negotiating the contracts. He also negotiated off-take agreements with potential buyers and provided marketing advice relating to the preparation of the Aker DFS. He testified that he had a general role in Baffinland's search for a strategic partner to look for opportunities to attract investors. He also testified that he was aware that, from late 2009 to September 2010, Baffinland and ArcelorMittal were discussing a joint transaction, but had no direct involvement during this period of time.

[377] In February 2009, Reuters reported that Baffinland had "about a dozen confidentiality agreements signed with some of the largest mining and steel companies in the world and … some of the intermediaries, the metal trading houses that work in between" (see paragraph [114] above). By late March 2009, it was reported in a *Factiva* article that representatives from 18 banks had visited the Mary River Property (see paragraph [114] above).

[378] In June 2009, Baffinland contacted ArcelorMittal to reinitiate discussions which had lapsed during the early stages of the international financial crisis. ArcelorMittal formally responded in November 2009 with a request for a meeting to discuss its proposal for a direct investment in Baffinland of approximately $150 million (see paragraph [120] above).

[379] On July 23, 2009, a CIBC World Markets Institutional Equity Research report on Baffinland stated that Baffinland would likely form a strategic partnership with a steelmaker which would be dilutive at the project level and that possible acquirers included a steelmaker looking to fully integrate its upstream supply chain or a mining major looking to control the timing of when the project comes online (see paragraph [117] above).

[380] In connection with his efforts to have Baffinland retain Hatch as its financial advisor, on January 19, 2010, Beddows sent an e-mail to McCreary and McCloskey in which he made the following comments:

> I did make contact with Andy Quinn [of CIBC] and had a long conversation about the situation regarding ArcelorMittal especially.
>
> This was extremely useful in bringing us into the picture and focussing our thoughts as to how we can help Baffinland.
>
> I also took the opportunity later to talk with Russ [Cranswick] as RCF's position is critically important.
>
> The result of our deliberations is the attached proposal.

[381] The proposal attached to the e-mail from Beddows dated January 19, 2010 included the following statements:

> Hatch CF understands that discussions are currently underway with ArcelorMittal concerning a potential investment by ArcelorMittal into Baffinland/the Project
>
> - However, no transaction has been concluded and the balance of securing the long term future of Baffinland's assets versus securing an acceptable return for Baffinland's shareholders requires careful consideration

[382] As noted above, neither Beddows nor Hatch were ever retained by Baffinland and were never parties to a confidentiality agreement with Baffinland. Hatch was eventually retained to advise Rio Tinto and, in fact, introduced Rio Tinto to Baffinland. In the absence of any evidence to the contrary, we would conclude that Rio Tinto would have been advised by Beddows of whatever information he possessed concerning the negotiations between Baffinland and ArcelorMittal (see in this regard paragraph [364](c) for a discussion of McCloskey's communications with Beddows on June 12, 2010, in direct contravention of Baffinland's agreement with ArcelorMittal).

[383] When asked what was known in the industry about ArcelorMittal's interest in Baffinland and the ongoing discussions between the parties in the period from the late fall of 2009 to early September 2010, van Veelen testified that "it was fairly quickly a pretty open secret in the market" (Hearing Transcript, June 14, 2013 at page 7321, lines 3-4). He also stated that he had obtained this information from the Director of Purchasing at Salzgitter who, in turn, had been informed by Kukielski in the summer of 2009, when making the rounds of the steel industry in Europe following his appointment as the head of ArcelorMittal's newly-formed mining group, that "Baffinland was a target for him" (Hearing Transcript, June 14, 2013 at pages 7321 and 7322).

[384] On May 10, 2010, Zurowski updated Dimitrov and McCloskey by e-mail on meetings he had while in Europe the previous week. Zurowski noted in his e-mail that he and van Veelen met with Glencore, which remained very interested in the Mary River Project despite some concerns and was willing to sign a confidentiality agreement some time in the future, and

stated:

> Although the 18 mtpa project has them concerned, the trucking option has them intrigued and believe that it is the perfect solution for Baffinland. It is also more attractive for Glencore, after participating in a smaller project to support the expansion of the project beyond the trucking option. We also discussed what happens to trucking after building of the rail line. I mentioned the possibility of Build/Own/Operate/Transfer to the Inuit group companies to convey ownership and real participation in the project. However, this BOOT option would probably be limited to 2 mtpa after the start of the major project.

Van Veelen testified that ArcelorMittal was discussed at this meeting with Glencore and, as noted above, it was clear that Glencore was aware that ArcelorMittal was the prime candidate for taking over or investing in Baffinland.

[385] On May 21 and 25, 2010, Van Veelen spoke with Hans-Joachim Welsch of ROGESA, who had been informed by Zurowski that Baffinland's period of exclusivity would end on May 21, 2010. Van Veelen stated that this individual:

> … made it abundantly clear that he knew it was ArcelorMittal and that it was not in the interest of his company or the German steel industry if ArcelorMittal would take over the Baffinland project and, therefore, … he wanted to talk and bring other people in to provide an alternative.
>
> (Hearing Transcript, June 14, 2013 at page 7334, lines 12-18)

[386] Van Veelen was contacted by the CEO of Saarstahl AG, a leading manufacturer of steel products such as rebar and wire rods, in the summer of 2010, who, according to van Veelen:

> … expressed a strong interest to sit down together with Baffinland as soon as possible to explore possibilities of investing in Baffinland or a takeover. He said he had good contacts who would be in a position to bring up the capital, et cetera, and he was aware of time pressure. He wanted to have these meetings as soon as possible.
>
> …
>
> He was aware who it was because I confirmed that there were discussions without divulging who they were, but he knew who they were and that it was ArcelorMittal.
>
> (Hearing Transcript, June 14, 2013 at page 7344, line 23 to page 7345, line 12)

[387] During conversations that took place at a conference in London at the time that the Take-Over Bid was made, it was clear to van Veelen that Salzgitter, a large European steelmaker, was fully aware that talks were ongoing between ArcelorMittal and Baffinland. Van Veelen testified:

> By that time, it was more than a year since Michael Reuber [of Salzgitter] had mentioned to me that he was aware through Mr. Kukielski that ArcelorMittal was going to target Baffinland. In the meantime, it had become an open secret in the market that these talks were ongoing. So as such, it was no particular surprise that it was mentioned. Specifics, by that time, didn't matter even to me.
>
> (Hearing Transcript, June 14, 2010 at page 7338, line 19 to page 7339, line 2)

[388] When cross-examined, Whittall was taken to e-mails between McCloskey and Beddows in mid-June 2010, prior to the expiry of the First Exclusivity Agreement on July 9, 2010. McCloskey wrote to Beddows that a meeting Beddows had set up between McCloskey and Rio Tinto went quite well and that a confidentiality agreement and exclusivity could be considered in a fortnight's time. Beddows replied positively stating, "They are definitely the best and most qualified partner".

[389] During the period between the two exclusivity agreements, Baffinland had discussions with a number of third parties, as detailed above. In June and July 2010, Baffinland was in discussions with Rio Tinto, Mount Gibson and the CITIC Group Corporation (see paragraph [279]) and later had discussions with Waheed, Barclays and Sherritt (see paragraphs [160] and [302]). Baffinland advised these third parties that the time frame for them to propose a transaction was extremely limited.

[390] Whittall was also asked about her knowledge of discussions Baffinland had with others after the Second Exclusivity Agreement had been signed. She was shown an e-mail from Zurowski to McCloskey on August 27, 2010 in which Zurowski noted that he had had general discussions with Glencore, which remained very interested in funding the Trucking Option. In the e-mail, Zurowski expressed the view that Baffinland "needed to keep door [open] with Glencore in case we fall apart with AM" and also noted that he has been in contact with POSCO.

[391] On August 31, 2010, *Mining Weekly* published an article entitled "Baffinland Iron seeks partner for Nunavut project". The following is an excerpt from the article in which McCloskey was quoted:

> … Baffinland is looking to accelerate production at the project, located in Baffin Island, Nunavut, with first production planned for 2013.
>
> …
>
> The plan now is to start production earlier, and use trucks to haul the ore to the port. While this could cost as much as ten times as much as rail transport, it made sense to get early cash flow while iron-ore prices were high, McCloskey said.
>
> …
>
> McCloskey said Baffinland was currently in talks with potential strategic partners.
>
> "We are talking to large mining companies. We are also talking to European steelmakers," he told *Mining Weekly Online*.
>
> On Tuesday, Reuters quoted Jennings Capital analyst Peter Campbell as saying Baffinland could lead the charge in a new wave of Canadian iron-ore juniors partnering with overseas steelmakers.
>
> "The fact that Baffinland has shipped test cargoes to ArcelorMittal and ThyssenKrupp in Germany makes them the leading candidates," said Campbell.

Whittall testified that the *Mining Weekly* article could have led to speculation that ArcelorMittal may have been a participant in discussions with Baffinland and that Kukielski wrote to McCloskey after the article was published to tell him not to engage in communications of that sort.

[392] We found van Veelen's testimony to be forthright and credible and he had no evident interest in the outcome of the proceedings. We are, however, mindful that much of his testimony was based on comments attributed to third parties and was, therefore, hearsay. As noted in paragraph [62] above, subsection 15(1) of the SPPA entitles us to admit and rely on hearsay evidence that is relevant to the subject matter of a proceeding. In our view, van Veelen's testimony, including that portion of which was hearsay, is relevant to our consideration as it is entirely consistent with other evidence that we heard and provides additional evidence that the existence of the negotiations between Baffinland and ArcelorMittal was well known in the steel industry, particularly in Europe, and that many factors pointed to ArcelorMittal as the likely party to a joint venture with Baffinland to develop the Mary River Property.

[393] It is clear from the evidence that, notwithstanding Dimitrov's stated efforts to keep Baffinland's negotiations with ArcelorMittal confidential during the period from the fall of 2009 to the execution of the Second Exclusivity Agreement, there were many instances in which information relating to the existence of discussions with a party thought to be or identified as ArcelorMittal and information relating to or derived from the Road Haulage Conceptual Study were communicated. These included communications to (i) potential strategic partners such as Rio Tinto, Mount Gibson, CITIC, Glencore, ROGESA, POSCO and Sherritt; (ii) lenders and investors such as KfW, the Canada Pension Plan Investment Board, Endeavour Financial, Cormark and Barclays; (iii) financial advisors such as Hatch; (iv) financial analysts and investment advisors such as Jennings Capital and Desjardins Financial (after Baffinland was advised about the Take-Over Bid but before it was launched); and (v) industry and financial publications such as *Mining Weekly* and *Factiva*. In addition, third parties such as Beddows, who were not subject to confidentiality agreements with Baffinland, were actively soliciting interest in Baffinland and the Mary River Project in the marketplace or communicating what it knew about Baffinland's activities to others in the industry and to possible sources of financing.

[394] The question which we must answer is whether the disclosure described above amounted to the general disclosure of the Alleged Material Facts within the meaning of subsection 76(1) of the Act.

[395] Section 3.5 of NP 51-201 and *Landen* identify the numerous ways in which corporate information can be disseminated to the public including press releases, press conferences, teleconferences with analysts and mine tours. Included in the foregoing would be interviews with publications designed to ensure press coverage. Baffinland engaged in all of these activities for the usual purposes of maintaining market interest in its shares and providing adequate disclosure to ensure the success of its periodic offerings of its securities to the public. Baffinland was a junior exploration company without any source of funding other than the periodic securities offerings to the public mentioned above, which provided the sole source of funding for Baffinland's limited exploration activities. As a result, it would be reasonable for us to assume that analysts' reports and other market information relating to Baffinland's attempts to develop the Mary River Property would be important to Baffinland's shareholders given the limited opportunities for the monetization of their relatively illiquid investments in Baffinland.

[396] Although information relating to the existence of negotiations between Baffinland and ArcelorMittal and, to a lesser extent, some of the contents of the Road Haulage Conceptual Study, had been fairly broadly disseminated as summarized above, the publication of such information by *Mining Weekly*, *Factiva* and Jennings Capital probably constituted effective disclosure of such information to the steel industry and to the universe of sophisticated investors in junior exploration companies in Canada. Such dissemination did not, however, constitute general disclosure as contemplated by NP 51-201 as the information had not "been disseminated in a manner calculated to effectively reach the marketplace" and public investors had not "been given a reasonable amount of time to analyze the information." The other information alleged to have been communicated to or known by Waheed during the Consultancy and Post-Consultancy Periods, e.g., the detailed content and analysis included in the Road Haulage Conceptual Study and the execution of the Second Exclusivity Agreement, were not generally disclosed.

[397] On the basis of our review of the evidence, and subject to our findings in paragraph [364] above, we find that the Alleged Material Facts described in paragraphs [19], [20], [21] and [22] above were not generally disclosed as of September 9, 2010.

4. Was Waheed in a special relationship with Baffinland at the time of the Toehold Purchase?

[398] Staff submits that Waheed was in a special relationship with Baffinland pursuant to subsections 76(5)(d) and (e) of the Act.

[399] With respect to subsection 76(5)(e), Staff submits that:

(a) Waheed was in a special relationship with Baffinland because he learned details of the ongoing confidential negotiations between Baffinland and ArcelorMittal from Baffinland's officers and directors in circumstances where he knew or ought reasonably to have known that the officers and directors were persons in such a relationship;

(b) Waheed learned of the Alleged Material Facts during the Consultancy Period from Dimitrov, an officer of Baffinland who was the lead negotiator in the discussions between Baffinland and ArcelorMittal, and from unnamed directors of Baffinland who were members of the Strategic Committee which was responsible for overseeing such negotiations; and

(c) Waheed also learned of the Alleged Material Facts from Dimitrov and McCloskey, the Chair of the Strategic Committee, in July 2010.

[400] With respect to subsection 76(5)(d), Staff submits that:

(a) Waheed was also in a special relationship with Baffinland because he learned of Alleged Material Facts while he was a person engaged in business with and on behalf of Baffinland;

(b) Waheed was retained as a strategic consultant to Baffinland and, in that capacity, was to provide, among other things (i) strategic advice to the board of directors or its designated committee in respect of potential partnerships, mergers, acquisitions or dispositions in respect of Baffinland's assets; and (ii) strategic advice to the President and CEO and management designated by the CEO in matters related to evaluating potential transactions, capital raising transactions and other matters generally pertaining to the development of the Mary River Property; and

(c) As a strategic consultant, Waheed was provided with and given access to all of Baffinland's confidential corporate information including the intimate details with respect to the status and terms of the negotiations between Baffinland and ArcelorMittal regarding a joint venture and the exclusivity agreements entered into between the parties and Waheed admitted that he had access to all of Baffinland's information, including details about the Baffinland and ArcelorMittal negotiations.

[401] Although it is unnecessary to assess whether Waheed was in a special relationship with Baffinland given our findings with respect to the Alleged Material Facts, we will nonetheless express our views with respect to this element of subsection 76(1) of the Act.

[402] Had we found that Waheed had knowledge of the Alleged Material Facts and that the Alleged Material Facts were material facts within the meaning of subsection 1(1) of the Act as of September 9, 2010, we would have also concluded that Waheed was in a special relationship with Baffinland under subsections 76(5)(d) and (e) of the Act. We base our finding on the fact that Waheed obtained knowledge about Baffinland during the Consultancy Period while he was a person engaged in a business or professional activity with or on behalf of Baffinland and the fact that the directors and officers of Baffinland were persons in a special relationship with Baffinland.

5. The Toehold Purchase

[403] Staff alleges in the Statement of Allegations that the Toehold Purchase was made on September 9, 2010. In its closing submissions, however, Staff alleges that the Toehold Purchase was made by GMP on behalf of Nunavut Acquisition during the period from August 30 to September 9, 2010.

[404] The Respondents contend that the Toehold Purchase was made by GMP for its own account and that Nunavut Acquisition acquired the securities of which the Toehold Purchase was constituted from GMP on September 9, 2010 (see paragraph [177] above). Walter further contends that Nunavut Acquisition acquired such securities as bare trustee for an affiliate of EMG and produced extensive documentation in evidence in support of his contention.

[405] Given our other findings in these Reasons, it is not necessary for us to undertake a detailed assessment of the competing submissions of the parties as to whether the trade which allegedly contravened subsection 76(1) of the Act occurred on September 9, 2010, as alleged by Staff in the Statement of Allegations, or on an earlier date or dates and as to whether GMP or Nunavut Acquisition made the Toehold Purchase. We note in this regard that neither Wekerle, who negotiated the terms of the Toehold Purchase with Walter and Calvert, nor any other senior officer of GMP was called to testify by Staff or the Respondents. As Calvert refused the Respondents' request that he testify, we were left with only the testimony of Minns who took the position that he was only the trader and had no knowledge of the underlying agreement between the parties.

[406] If it had been necessary for us to make any findings with respect to (i) the timing of the Toehold Purchase, and whether the outcome of such a determination could have any effect on Staff's case; and (ii) the identity of the purchaser, we would have likely concluded in the circumstances that Waheed, as the President and CEO of Nunavut Acquisition, authorized, permitted or acquiesced in the purchase of the Baffinland securities of which the Toehold Purchase was constituted, regardless of whether GMP purchased such securities as principal or agent.

E. Analysis of the Allegations of Tipping by Waheed and Insider Trading by Walter

[407] Staff submits that Walter was in a special relationship under subsection 76(5)(e) of the Act because he learned of material facts from Waheed in circumstances where he knew or ought reasonably to have known that Waheed was a person in a special relationship with Baffinland. As the evidence establishes that Walter derived substantially all of the information relating to Baffinland of which he was aware from Waheed, we would have also likely concluded that Walter was in a special relationship with Baffinland.

[408] Consistent with our analysis with respect to Waheed in paragraph [406] above, had it been necessary for us to make findings with respect to the timing of the Toehold Purchase and the identity of its purchaser, we would have likely concluded that Walter, as Chairman of Nunavut Acquisition, authorized, permitted or acquiesced in the purchase of the Baffinland Securities of which the Toehold Purchase was constituted.

[409] Having found above that Waheed did not, as alleged by Staff, have knowledge of material facts with respect to negotiations between Baffinland and ArcelorMittal at the time of the Toehold Purchase, there is no need for us to consider whether he informed Walter of the Alleged Tipped Facts.

[410] On the basis of our foregoing analysis, we find as follows with respect to the Alleged Tipped Facts:

(a) ***July 19, 2010:*** As we concluded at paragraph [347](c), the evidence does not establish that Waheed was aware that Baffinland had terminated exclusivity with ArcelorMittal, which had resulted in an enhanced offer.

(b) ***July 26, 2010:*** Staff alleges that Waheed advised Walter that there were two options for Baffinland: either an enhanced offer from ArcelorMittal or a possible offer from Rio Tinto and informed him that management was in favour of advancing the process with ArcelorMittal and that some Baffinland Board members were keen to sign a deal with ArcelorMittal. The evidence does not establish that Waheed's comments regarding the options for Baffinland in late July 2010 were anything more than speculation. We were not provided with evidence on which we could conclude that Waheed knew the status of Baffinland's negotiations with ArcelorMittal at this time, or that Baffinland had been in discussions with Rio Tinto.

(c) ***August 20, 2010:*** Waheed's comments to Walter and Calvert that ArcelorMittal had been around Baffinland for a while and were probably still toiling away to steal the company through a farm-in do not appear to be founded on any actual knowledge about the status of the Baffinland and ArcelorMittal negotiations during the Post-Consultancy Period. As we concluded above, the information that Waheed had acquired about the status and terms of negotiations during the Consultancy Period had ceased to be accurate or material by the time of the Toehold Purchase.

(d) ***August 29, 2010:*** As the evidence does not support a conclusion that Waheed learned of material facts relating to the status of negotiations between Baffinland and ArcelorMittal from anyone at Baffinland during the

Post-Consultancy Period, we do not find that he became aware of exclusivity discussions between the two companies as alleged by Staff during that period or that he communicated the same to Walter on August 29, 2010.

VI. ALLEGATIONS OF CONDUCT CONTRARY TO THE PUBLIC INTEREST

A. Submissions of the Parties

1. Staff

[411] In its submissions, Staff frames the issues to be considered with respect to the public interest allegations as follows:

1. Did the Respondents have knowledge of the Alleged Confidential Information when the Toehold Purchase was made?

2. Did the Respondents act contrary to the public interest by using the Alleged Confidential Information in permitting, authorizing or acquiescing in the Toehold Purchase and launching the Take-Over Bid?

3. Did Waheed act contrary to the public interest by soliciting, encouraging and/or advising RCF regarding a dissident proxy contest and/or proposing to lead a dissident proxy contest?

[412] With respect to the first question posed above, Staff submits that Waheed, as a full-time consultant and strategic advisor to Baffinland, the Baffinland Board and Baffinland's management, received and acquired knowledge of the Alleged Confidential Information, which Waheed expressly acknowledged and agreed in the Consulting Agreement was confidential. Staff submits that the Alleged Confidential Information was also confidential at common law, and was always considered to be, and was kept, confidential by Baffinland.

[413] Staff submits that Walter also had knowledge of the Alleged Confidential Information because Waheed sent him (i) various e-mails describing his knowledge of the Alleged Material Facts; (ii) the August 20, 2010 version of the Financial Model which included key information from the Road Haulage Conceptual Study and with respect to the QIA royalty rates; and (iii) presentations containing financial analyses and conclusions generated as output from the Financial Model and that Waheed shared confidential financial, geological, management and Baffinland Board information with him.

[414] With respect to the second question posed above, Staff submits that the Respondents, acting jointly in a common venture with EMG and Nunavut Acquisition, used the Alleged Confidential Information in purchasing with EMG, and/or permitting, authorizing or acquiescing in the purchase (for their common venture) of, the Toehold Purchase and launching the Take-Over Bid. Staff submits that the Respondents had an unfair advantage over Baffinland shareholders and potential investors that undermines the transparency, efficiency and integrity of the capital markets.

[415] With respect to the third question posed above, Staff submits that Waheed advised and encouraged RCF to initiate a dissident proxy contest to replace the Baffinland Board. Staff further submits that, when RCF refused to do so, Waheed made plans to commence his own dissident proxy contest, all the while acting as a full-time consultant and strategic advisor to Baffinland and the Baffinland Board. According to Staff, in doing so, Waheed used the Alleged Confidential Information for his own account and to solicit support for replacing Baffinland's directors and acted in breach of the Consulting Agreement and his duties and obligations to Baffinland.

The Law Relating to Confidentiality

[416] Staff submits that the law relating to confidentiality is central to this case and cites it as a basis for its request for a finding that the Respondents acted contrary to the public interest. Staff submits that Waheed's conduct was a clear breach of his Consulting Agreement with Baffinland and his common law confidentiality obligations. Staff submits that the Respondents' knowledge and use of the Alleged Confidential Information gave them a significant and unfair advantage over the market, including all shareholders and potential shareholders.

[417] Staff alleges that Waheed was in breach of his Consulting Agreement, which prohibited him from using for his own account or disclosing to anyone else any confidential information, defined in the Consulting Agreement as:

> … any confidential or proprietary information or material relating to BIM's [*sic*] or operations or business which Consultant had access to by virtue of his position with BIM or obtains from BIM or its directors, officers, employees, agents, suppliers or customers or otherwise by virtue of this agreement or that the Consultant received from BIM on a confidential basis prior to his engagement with BIM.

Under the terms of the Consulting Agreement, information that was or became generally known by or available to the public, other than through unauthorized disclosure, or information that Waheed obtained on a non-confidential basis from a non-

Baffinland source which was not prohibited from disclosing such information, was not considered to be confidential information. The Consulting Agreement required Waheed to use his best efforts to protect and maintain the confidential information for two years following the termination of the agreement.

[418] Citing case law governing civil law disputes between private parties, Staff submits that Waheed breached his confidentiality obligations to Baffinland at common law and relies on the test for breach of confidence set out in the Supreme Court of Canada's decision in *Lac Minerals Ltd. v. International Corona Resources Ltd.* in which the Court stated that "the obligation is on the confidant to show that the use to which he put the information is not a prohibited use" (*Lac Minerals Ltd.* at 24-25). Staff submits that, on the basis of the foregoing case, the Respondents have the onus of proving that they did not use the Alleged Confidential Information.

Access to Information at Baffinland

[419] According to Staff, from the moment Waheed signed the Consulting Agreement, he was given complete, open and unrestricted access to Baffinland's senior management, directors and financial advisors, and to all of Baffinland's documentary and other information, including confidential and undisclosed information.

[420] Staff submits that Waheed received and had knowledge of a wide range of Alleged Confidential Information as summarized below when the Toehold Purchase was made. According to Staff, Waheed's and Walter's possession and knowledge of numerous versions of the Financial Model, the Road Haulage Conceptual Study and other Baffinland financial, geological, management and Baffinland Board information is evidenced by a large number of e-mails and documents and by oral testimony in addition to being admitted by Waheed and not denied or disputed by Walter or any other witness.

The Alleged Material Facts

[421] Staff submits that Waheed and Walter had knowledge of the Alleged Material Facts which were material, never generally disclosed, known or available to the public, were always considered to be, and were always kept, confidential and that Waheed and Walter, together with EMG, used the Alleged Material Facts to make the Toehold Purchase and to launch the Take-Over Bid**.**

Financial Model

[422] Staff submits that all versions of the Financial Model were prepared by or for, and owned by, Baffinland. Furthermore, Staff submits that all of the versions of the Financial Model are defined as confidential information in the Consulting Agreement, and is information over which Waheed acknowledged and agreed that Baffinland would retain "all rights, titles and interests in and to".

[423] Staff alleges that Waheed received and retained electronic copies in Excel format of numerous versions of the Financial Model, including the versions updated by Gareau and Roussel, and the versions dated April 1, 4, 5, 15, 17, 21 and 22, 2010. Furthermore, Staff submits that Waheed admitted that he received and analyzed the versions of the Financial Model updated by Gareau and Roussel.

[424] Staff further alleges that Waheed shared, without Baffinland's consent or authorization, the April 17, 2010 version of the Financial Model, which included capital and operating cost assumptions for the mine, with Mel Williams ("**Williams**"), a friend and former colleague of Waheed's at Sherritt. According to Staff, Waheed admitted that he obtained information from Williams solely in his capacity as a full-time consultant to Baffinland and for its benefit.

[425] Staff submits that none of the versions of the Financial Model were ever generally disclosed or known to the public. According to Staff, they were all confidential information pursuant to the Consulting Agreement and the common law, and were always considered to be, and were always kept, confidential by Baffinland. Staff submits that Waheed's claim that he checked the Financial Model against the public record in July 2010 is not supported by the evidence. Staff submits that, in any case, such an exercise was misguided because he did not prove that he obtained the numbers from a public source, but rather unsuccessfully attempted to demonstrate that such information existed in the public domain.

The Road Haulage Conceptual Study

[426] According to Staff, Waheed admitted that he had possession and knowledge of the Road Haulage Conceptual Study and that the facts establish that it was confidential information under the Consulting Agreement and at common law.

[427] Staff submits that Waheed re-ignited Baffinland's interest in the Trucking Option and caused Baffinland to prepare the Road Haulage Conceptual Study. Staff submits that the Road Haulage Conceptual Study, when finally completed, proved that Waheed's initial assumptions with respect to the mechanics and economics of the Trucking Option from March 2010 were incorrect.

[428] Staff submits that, at the time of the June 9th Meeting at which Dimitrov provided Waheed with estimates with respect to capital expenditures, the internal rate of return and the annual production rate from the Road Haulage Conceptual Study, none of this information was generally known by or available to the public, and Dimitrov communicated such information to Waheed as an insider bound by the confidentiality clause of his Consulting Agreement.

[429] Staff submits that, based on the evidence, the Road Haulage Conceptual Study was never disclosed to the public, was considered confidential and was always kept confidential by Baffinland, which makes it confidential information pursuant to the Consulting Agreement and at common law.

Proposed QIA Royalty Rates

[430] Staff submits that, as of January 2010, the QIA made an offer to Baffinland with respect to the QIA royalty rates, and made a further proposal in June 2010. Staff submits that, since April 4, 2010, the QIA royalty rates were integrated into every version of the Financial Model, and Waheed conceded that it was an important element for the model and that the terms of the negotiations with the QIA were not public. Furthermore, Staff submits that the proposed royalty rates were also included in every version of the Financial Model that was utilized by EMG in making its decision to participate in the venture with Waheed and Walter.

[431] According to Staff, the royalty rates proposed by the QIA were confidential information under the Consulting Agreement and at common law, and by virtue of knowledge and possession of the Financial Model, both Waheed and Walter were aware of such information when the Toehold Purchase and the Take-over Bid were made.

Other Baffinland Financial, Geological, Operational and Management Information

[432] Staff submits that Waheed had possession and knowledge of other Baffinland information which was confidential pursuant to the Consulting Agreement and at common law. Staff submits that Waheed reviewed various confidential documents and used the slides from a presentation he prepared for NBF on behalf of Baffinland in his presentation to EMG to solicit its interest in financing the Take-Over Bid.

Use of Confidential Information

[433] Staff alleges that the April 22, 2010 version of the Financial Model and the Road Haulage Conceptual Study became the springboard that gave the Respondents an unfair advantage over other investors and which they relied on to make the Toehold Purchase and the Take-over Bid. Staff alleges that Waheed used the Road Haulage Conceptual Study to update the inputs to the April 22, 2010 version of the Financial Model and, on July 19, 2010, Waheed sent an e-mail to Walter discussing the outputs derived from the updated Financial Model.

[434] Staff further alleges that Waheed sent the August 20, 2010 version of the Financial Model to EMG and Walter, and provided them with information regarding the proposed QIA royalty rates, details of the Trucking Option, capital and operating cost estimates, and Baffinland's internal problems, which information was not public. Staff alleges that EMG utilized this information in assessing the economics and viability of the Mary River Project and in deciding to make the Toehold Purchase and the Take-over Bid. According to Staff, this demonstrates, unequivocally, the possession, use and misuse of the Alleged Confidential Information by Waheed and EMG, and a breach by Waheed of his Consulting Agreement and his common law confidentiality obligations.

[435] Staff submits that the conduct of the Respondents must be analyzed from the perspective of its impact on capital markets as a whole. Staff submits that investors that sold their shares and warrants into the Toehold Purchase were harmed because they did so without the benefit of knowledge of the confidential information that Waheed and Walter had. Furthermore, according to Staff, Baffinland's long-term shareholders lost the opportunity to profit from the development of the Mary River Project because the Take-Over Bid put Baffinland in play.

[436] Staff submits that equality of information is a foundational principle to the integrity of the capital markets. Relying on the Commission's decision in *Donnini*, Staff argues that the Respondents' conduct fell far below the minimum standards of fairness and business conduct required to maintain the integrity of the capital markets. According to Staff, the Respondents' use of the unfair informational advantage was clearly abusive as it created an informational imbalance where other investors and marketplace participants did not have important information about Baffinland that could have clearly benefited them. Staff submits that permitting a system of unequal information in the market will irreparably undermine and cause harm to the transparency, efficiency and integrity of the capital markets of Ontario.

[437] Staff further submits that the Respondents exploited the market by using their knowledge of the negotiations between Baffinland and ArcelorMittal and the other Alleged Confidential Information to make the Toehold Purchase and launch the Take-over Bid with a perfect hedge against any risk. If a competing bid was made, Nunavut Acquisition could sell its position and make a profit. If no competing bid was made, Waheed and Walter would acquire Baffinland at a significant discount (compared to the CIBC valuation) and would be able to finalize the joint venture negotiations with ArcelorMittal and thereby profit.

Dissident Proxy Contest

[438] Staff submits that Waheed acted contrary to the public interest by soliciting, encouraging and advising RCF regarding a dissident proxy contest and/or proposing to lead a dissident proxy contest. According to Staff, the Baffinland Board and CEO placed a lot of trust in Waheed as their consultant and he exploited that trust by using confidential information to solicit support and proxies for a dissident proxy contest to replace part of the Baffinland Board and ultimately to become the Chair of the Baffinland Board. Staff submits that the unauthorized use and disclosure of confidential information obtained through a full-time consulting relationship to solicit proxies to place oneself as the Chair of a reporting issuer undermines the public interest and the integrity of the capital markets, and is a breach of the Consulting Agreement.

[439] Staff further submits that Waheed also breached the Consulting Agreement and acted contrary to the public interest by not always acting in the best interests of Baffinland and instead often acting on behalf of its major shareholder, RCF, and in his own self-interest.

[440] Staff relies on *Re Sabourin* (2009), 32 OSCB 2707 ("***Re Sabourin***") in support of its submission that the Respondents cannot invoke the defence of reliance on legal advice for an allegation of conduct contrary to the public interest and submits that any advice received by the Respondents from Davies regarding the misuse of confidential information is relevant only for the sanctions hearing.

2. Waheed

[441] Waheed submits that Staff's allegations relate to private law disputes for which Baffinland could have sought a remedy from the courts, but did not, and that the allegations of breach of fiduciary duty and breach of contract are, in the context of this case, unrelated to the Commission's public interest jurisdiction.

Jurisdiction

[442] Waheed submits that the Commission derives its power from explicit statutory authority and does not have inherent jurisdiction. Waheed also submits that, under section 127 of the Act, the Commission has discretion to act in the public interest where the integrity of the capital markets is at stake or some other animating principle of the Act is engaged. Waheed refers to the case of *Re Hudbay Minerals Inc.* 2009 LNONOSC 269 at para 231 in support of his submission that the "Commission's public interest jurisdiction should be exercised sparingly and with great caution, having regard to all relevant policy considerations, underlying circumstances, and interests affected."

[443] Waheed submits that any order must be one that is least intrusive but sufficient to accomplish the Commission's regulatory objectives. Waheed relies on the decision in *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 in support of his submission that, even where there is a breach of the Act, the Commission has the power to conclude that no sanction is necessary if the respondent's conduct was reasonable and in good faith. On the other hand, if there is no technical breach of the Act, Waheed submits that only conduct abusive of capital markets or contrary to the animating or fundamental principles of the Act warrants an order under section 127. Waheed submits that Staff has the burden of proving on the basis of clear, cogent and convincing evidence that the conduct contrary to the public interest actually occurred. Waheed also submits that "although not determinative, the availability of alternative remedies is a relevant consideration in exercising the Commission's public interest jurisdiction."

[445] Waheed submits that, unlike cases involving issues such as failure to disclose accurate information or otherwise misleading investors, which are fundamental threats to the integrity of Ontario's markets, the three allegations of conduct contrary to the public interest in this case are quintessential private law disputes that pose no threat to the investing public nor the integrity of the capital markets, and belong in the Superior Court of Justice.

[446] Waheed submits that Staff's allegations of Waheed acting in RCF's interest or self-interest instead of Baffinland's best interests are in substance corporate law issues governed by the *Ontario Business Corporations Act* (the "**OBCA**") because the cause of action is a breach of fiduciary duty to the corporation. Waheed submits that, on the facts of this case, there is no connection between the alleged breach of fiduciary duties and the Commission's public interest jurisdiction since Waheed's breach, if any, of his contractual duty to Baffinland, would only result in harm to Baffinland and not to the investing public or the integrity of Ontario's capital markets. Waheed further submits that, had Baffinland pursued these claims in court, it would have lost.

[447] Waheed submits that Staff's allegation of Waheed using the Alleged Confidential Information to launch the Take-over Bid is unrelated to the protection of the investing public, the capital markets, and securities law generally. Instead, Waheed argues, this allegation could be grounded in a cause of action for breach of confidence or breach of contract between two private parties. Waheed refers to the decision in *Certicom Corp. v Research in Motion*, 2009 CarswellOnt 331 at paras. 34, 97 (Ont. Sup Ct.) in which the Court stated that "the jurisdiction of the OSC does not extend to enjoining breach of an agreement" and "expressly confirmed that the appropriate forum in which to seek relief from breach of an agreement in the context of a

takeover bid was the Superior Court."

[448] Waheed submits that Staff's investigator, Shahviri, testified that he was not aware that Staff ever received a reply to its request for additional arguments from Stikeman in support of Stikeman's claim on behalf of Baffinland that Waheed's behavior engaged the Commission's public interest jurisdiction (see paragraph [187] above). Waheed submits that the failure to do so did not matter as Baffinland was clearly aware of the contractual issues, was aware that it could go to court, was advised by litigation counsel, Stikeman, and affirmatively decided against pursuing a judicial remedy. Furthermore, Waheed submits that Baffinland intended to bring a cross-application to cease-trade the Take-Over Bid based on 'informational asymmetries' arising out of Waheed's consultancy, but ultimately abandoned that application because it would have lost. Waheed also submits that during the hearing of Nunavut Acquisition's application to cease-trade the Baffinland shareholder rights plan, Staff took the position that the rights plan should be cease traded and that it was in the public interest for the Take-Over Bid to proceed, which, in Waheed's opinion, should be fatal to Staff's public interest allegations.

Waheed was not a fiduciary of Baffinland but acted in Baffinland's best interests in any event

[448] Waheed submits that he did not owe Baffinland a fiduciary duty because the Consulting Agreement did not include a provision making Waheed a fiduciary and because none of the indicia of a fiduciary duty were present in either the contract or in his relationship with Baffinland, i.e., he was an independent contractor and not an agent of Baffinland, he was prohibited from having authority to contract or otherwise bind Baffinland, and he was engaged on a non-exclusive basis.

[449] Waheed submits that his interactions with RCF were in accordance with the Consulting Agreement and in Baffinland's interests. According to Waheed, he was not precluded from reporting to RCF as the reports were sent to Cranswick in his capacity as a Baffinland director and member of the Strategic Committee, and Cranswick was the only Baffinland Board member who represented any continuity or professionalism during Baffinland's internal management and board struggles. Furthermore, Waheed submits that he was engaged on a non-exclusive basis and this means that there was nothing stopping him from reporting to Cranswick or anyone else.

[450] Waheed submits that none of the correspondence with Cranswick was detrimental or in conflict with Baffinland's interest and it was consistent with his advice to others at Baffinland including advocating the Trucking Option as a means by which Baffinland could develop some cash flow and leverage vis-à-vis much larger companies which were seeking to partner with Baffinland to develop the Mary River Property.

[451] Waheed submits that he did not advocate a proxy contest to RCF, but that it was RCF which initiated the discussions of a proxy fight because it had concerns regarding Baffinland's internal affairs. According to Waheed, RCF was seeking to improve Baffinland's corporate governance and thus proposed changes to the composition of the Baffinland Board. Waheed submits that any discussions he had with other shareholders exploring a possible proxy contest and other options to improve corporate governance were at the request, encouragement and knowledge of Cranswick and in the best interests of Baffinland.

[452] Waheed submits that his interactions with Williams were in Baffinland's best interests as well and that he contacted Williams with a view to recruiting him as Baffinland's next CEO as he had considerable expertise relevant to Baffinland's needs. Furthermore, Waheed submits that, prior to sending his own estimates of capital and operating expenses to Baffinland, he forwarded them to Williams for the purpose of having them reviewed for reasonableness by a person who had extensive experience with cold weather mining operations, which was in furtherance of Baffinland's interests.

Waheed had no duty to Baffinland after his consultancy

[453] Waheed submits that, even if he owed a fiduciary duty to Baffinland during his consultancy, there is no basis on which to find that the duty could have extended beyond his consultancy. According to Waheed, after the completion of his consultancy, Dimitrov approached him to obtain information concerning his intentions relating to Baffinland's Annual General Meeting and made references to the road haulage numbers in an effort to entice him to meet with her because she knew that he had 'championed' the Trucking Option when he was a consultant to Baffinland.

[454] Waheed submits that he was working on bringing proposals to Baffinland, one from Barclays and the other from Sherritt, which culminated in the July 20th Meetings between each of these companies, Dimitrov and Waheed. At the meeting with Barclays, Dimitrov advised Barclays that its proposal to finance the Trucking Option was unattractive to Baffinland and that, if Barclays wanted to make another proposal, it would have to do so soon and in writing. Waheed submits that Barclays was not covered by any confidentiality agreement and Dimitrov did not ask for one. Ultimately, Baffinland did not accept either of Barclays's proposals, but Waheed does not contest that he continued to try to find a way to be involved with the Mary River Project.

[455] Waheed submits that his August 4, 2010 telephone conversation with Cranswick is crucial exculpatory evidence which defeats virtually every allegation made by Staff since Cranswick, a highly sophisticated investor and professional, raised no concerns or objections to Waheed's participation in a take-over bid for Baffinland but rather reacted "very positively". Waheed

submits that his pursuit of financing or a transaction for Baffinland were in Baffinland's best interests.

Waheed did not "use" confidential information belonging to Baffinland

[456] Waheed submits that he did not breach his confidentiality obligations to Baffinland and he did not use any confidential information to make the Take-Over Bid, nor did he act in a manner that portends future harm to the investing public.

Proposed QIA Royalty Rates

[457] Waheed submits that he could not have used the QIA royalty rates for the purpose of the Take-Over Bid because he never knew what they were. Waheed submits that he inquired into the proposed royalty rates for the purpose of inserting them into the Financial Model on which he was working, but never received them. Waheed relies on Gareau's and Dimitrov's evidence that he could not have determined the quantum of the proposed royalties from the March 26, 2010 version of the Financial Model, and that knowing the percentage level of financial participation without knowing how it is to be calculated sheds very little light, if any, on what the proposed royalties are. Furthermore, Waheed submits that it cannot be said that he disclosed to Calvert and Walter confidential information regarding the QIA royalty rates in his August 20, 2010 e-mail because the information he sent was missing most of the details required in order to appreciate the QIA proposal and the few details that Waheed included in his e-mail were incorrect.

Road Haulage Conceptual Study

[458] Waheed submits that he did not receive the Road Haulage Conceptual Study by virtue of his consultancy and thus he did not have any obligation under his contract to keep it confidential, nor did Baffinland instruct him to keep it confidential. According to Waheed, by the time he received a copy of the Road Haulage Conceptual Study from Dimitrov and the operating and capital expense estimates from McCloskey, the Consulting Agreement has expired and the confidentiality tail of two years applied only to information obtained by virtue of his consultancy. Waheed submits that he mistakenly told McCloskey that he continued to be covered by the confidentiality agreement and that he corrected that error when he met with Dimitrov. Furthermore, Waheed relies on Dimitrov's evidence to argue that she imposed no restrictions on how Waheed could use the Road Haulage Conceptual Study, and that she e-mailed him an electronic version of it to make it easier for him to provide it to any third parties he was working with to develop proposals for Baffinland, none of whom had executed confidentiality agreements in favour of Baffinland. Waheed also submits that Dimitrov understood that, during this time, he was not acting as an agent or a representative of Baffinland.

[459] Additionally, Waheed submits that Baffinland disclosed key information contained in the Road Haulage Conceptual Study on numerous occasions, making it public and no longer confidential through disclosures in a July 12, 2010 press release, at the Baffinland Annual General Meeting and in a presentation containing an economic analysis of the Trucking Option and other details of the study that were sent to individuals and firms not covered by confidentiality agreements.

[460] With respect to the Financial Model, Waheed submits that it belonged to him and did not contain any confidential information belonging to Baffinland. Waheed submits that the April 1st Roussel Model was too complicated and unworkable, and that he built the April 15, 2010 version of the Financial Model on his own. Waheed argues that, since he was an independent contractor when he created the Financial Model, he owns the intellectual property in the model and the right to use it as he wishes, and that Baffinland merely had a licence to use it implied by the contract under which it was prepared.

[461] Waheed submits that he used his own estimates as inputs for his model which he did not obtain from Baffinland, nor were they endorsed by Baffinland's management. Additionally, Waheed argues that he did not use any of the information from the Road Haulage Conceptual Study in his model, but even if he did, it would not be a breach of his confidentiality obligations because Baffinland publically disclosed key Road Haulage Conceptual Study metrics and because he did not receive the Study in his capacity as a consultant. Waheed also submits that he was not aware of the presence of the scoping worksheet in the July 19, 2010 version of the Financial Model until the Merits Hearing, nor did he ever have any of the details of the QIA proposal so as to make the royalty rates' percentage a useful piece of information. Finally, Waheed testified that he checked his model against the public record at least three times to ensure that it did not contain confidential information proprietary to Baffinland or material undisclosed information.

Nunavut Acquisition's Bid Did Not Deprive Shareholders of Any Value or Benefit

[462] Waheed submits that his alleged conduct had no bearing on Baffinland's shareholders or the capital markets generally. Waheed takes the position that the Take-Over Bid was in the public interest as it allowed Baffinland's shareholders to exercise their fundamental right to decide for themselves whether to tender their shares and created value for the shareholders in multiple ways.

Staff is Estopped from Taking the Position that Nunavut's Bid was Contrary to the Public Interest

[453] Relying on the decision in *Norsask Forest Products Inc. v. Iron*, [1993] S.J. No. 163 (C.A.), Waheed argues that Staff's

allegations that the Take-Over Bid was contrary to the public interest violates the doctrine of approbation and reprobation which precludes a litigant from adopting diametrically opposed positions on a particular issue. According to Waheed, it was Staff's position, in both written and oral submissions to the Commission during Nunavut Acquisition's application to cease trade the Baffinland shareholders rights plan, that it was in the public interest for the poison pill to be cease traded and for the Take-Over Bid to proceed unimpeded. In Waheed's submission, Staff had now reversed its position by asserting that the Take-Over Bid was contrary to the public interest. Waheed submits that, at the time of the poison pill hearing, Staff was fully aware of Baffinland's allegations that Waheed had knowledge of material undisclosed information and had misused confidential information in breach of his Consulting Agreement in making the Take-Over Bid. Therefore, Waheed argues, based on the doctrine of approbation and reprobation, Staff is estopped from taking the position that the Take-Over Bid was contrary to the public interest.

3. Walter

[464] Walter takes the same position as Waheed on the issue of the Commission's public interest jurisdiction.

[465] In addition to submissions regarding the Commission's lack of jurisdiction over private law matters, Walter submits that the exercise of jurisdiction in this matter would effectively disregard clear legislative choices. Relying on the decision in *Kerr v. Danier*, [2007] S.C.J. No. 44, Walter submits that the Ontario Legislature drew a deliberate, policy-based distinction between undisclosed material information and undisclosed non-material information, such as confidential information. According to Walter, in the case of the insider trading provisions of the Act, trading on the basis of information, other than material undisclosed information, is not prohibited. Walter submits that this includes non-material confidential information or rumours, speculation and suppositions. Walter submits that the Legislature cannot have intended to permit the Commission to punish under section 127 that which is permitted under section 76 of the Act.

[466] Walter also refers to the maxim that there must be no punishment except in accordance with fixed, predetermined law and that a person must be judged only according to the concrete laws in force at the time an act or omission took place.

Walter Did Not Misuse Any Confidential Information Belonging to Baffinland

[467] On the issues of the Financial Model, the QIA royalty rates and the Road Haulage Conceptual Study, Walter takes the same position as Waheed. Walter adds that, in any event, his decisions to invest in Baffinland and to launch the Take-Over Bid were not based on any of the Financial Model, the QIA royalty rates or the Road Haulage Conceptual Study as he did not review them prior to making the Take-Over Bid. Walter also argues that the April 1st Roussel Model is entirely irrelevant to Staff's allegations because it was never functional and Baffinland never signed-off on or adopted it for use, and the amount of QIA financial participation was insignificant to the Take-Over Bid and that, to the day of his submissions, the issue had not been finalized.

[468] Furthermore, Walter submits that, even if the Financial Model did contain Baffinland's confidential information, and even if it had been used by Walter in making the Take-Over Bid, there would still be no basis on which we could exercise our public interest jurisdiction against Walter because he sought and received repeated assurances from Waheed that the Financial Model was created by him and did not contain confidential information belonging to Baffinland. Walter submits that he established a ground rule with Waheed that the transaction involving Baffinland would only proceed on the basis of public information, and in Walter's submission, it was entirely reasonable for him to rely on such assurances.

No Deprivation on the part of Baffinland Shareholders

[469] In response to Staff's allegation that the Take-Over Bid deprived Baffinland's shareholders by denying them the opportunity and ability to benefit from the joint venture with ArcelorMittal, or for any other reason, Walter takes the same position as Waheed.

[470] Walter adds that, as of September 2010, there were many outstanding issues between Baffinland and ArcelorMittal and there was absolutely no certainty that a joint venture agreement would ever be concluded between the two parties. Walter submits that the Take-Over Bid did not disrupt the negotiations between Baffinland and ArcelorMittal and that, ultimately, it was the issue of shareholder approval that proved fatal to a joint venture. Furthermore, according to Walter, there is no evidence to support Staff's position that Baffinland's shareholders would have been better off had the ArcelorMittal joint venture transaction been completed, particularly taking into account ArcelorMittal's financial difficulties since January 2011 and the uncertainties surrounding such a transaction such as changes in global economic conditions, iron ore prices and corporate priorities.

[471] Walter submits that there is nothing sinister about Nunavut Acquisition's acquiring a toehold in Baffinland shares prior to the launch of the Take-Over Bid. According to Walter, it is common in our capital markets and supported by Ontario's securities laws for companies contemplating a take-over bid to accumulate shares of the target company, thereby acquiring the so-called 'toehold' in advance of commencing any such bid. Walter submits that it is clear that the acquisition of toeholds is in the public interest in that they facilitate take-over bids and allow bidders to mitigate the risks and expenses associated with

commencing an unsuccessful bid.

Staff Are Estopped from Taking the Position that Nunavut's Bid was Contrary to the Public Interest

[472] Walter's submissions on the issue of estoppel mirror those made by Waheed. Walter submits that, based on the doctrine of approbation and reprobation, Staff is estopped from talking the position that the Take-Over Bid was contrary to the public interest.

B. The Law with respect to Conduct Contrary to the Public Interest

[473] The Commission's public interest jurisdiction was considered by the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, in which the Court stated at paragraph 41:

> … the public interest jurisdiction of the OSC is not unlimited. Its precise nature and scope should be assessed considering s. 127 in context. Two aspects of the public interest jurisdiction are of particular importance in this regard. First, it is important to keep in mind that the OSC's public interest jurisdiction is animated in part by both of the purposes of the Act described in s. 1.1, namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets". …

[474] In prior cases, the Commission has invoked its public interest jurisdiction to make findings about conduct that, though not contrary to Ontario securities law, was nonetheless contrary to the public interest (*Re Danuke* (1981), 2 O.S.C.B. 31C ("***Danuke***"), *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857 ("***Canadian Tire***"), *Biovail, supra* and *Donald, supra*).

[475] In *Biovail*, the Commission found that:

> … where market conduct engages the animating principles of the Act, the Commission does not have to conclude that an abuse has occurred in order to exercise its public interest jurisdiction.
>
> (*Biovail, supra* at para 382)

[476] Section 2.1 of the Act sets out the principles to which the Commission should have regard in pursuing the purposes of the Act, which include the following:

> The primary means for achieving the purposes of this Act are:
>
> i. requirements for timely, accurate and efficient disclosure of information,
>
> ii. restrictions on fraudulent and unfair market practices and procedures, and
>
> iii. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

[477] In exercising its public interest power to cease trade an abusive offer to purchase 49% of the outstanding common shares of the target corporation, the Commission found in *Canadian Tire, supra* at 34 (WL) that the Commission "… should act to restrain a transaction that is clearly abusive of investors and of the capital markets, whether or not that transaction constitutes a breach of the Act, regulations or a policy statement". The Commission further stated:

> … A transaction such as is proposed here is bound to have an effect on public confidence in the integrity of our capital markets and on public confidence in those who are the controllers of our major corporations. If abusive transactions such as the one in issue here, and this is as grossly abusive a transaction as the Commission has had before it in recent years, are allowed to proceed, confidence in our capital markets will inevitably suffer and individuals will be less willing to place funds in the equity markets. That can only have a deleterious effect on our capital markets and, in that sense, it is in the public interest that this Offer be cease traded …
>
> (*Canadian Tire, supra* at 40 (WL))

[478] In *Donald* and *Danuke*, the Commission considered whether the conduct of market participants (registrants, in the case of *Danuke*) was contrary to the public interest. The Commission stated in *Danuke*:

> It is the Commission's view that all registrants ought to understand that they have a duty not to attempt to profit, directly or indirectly, through the use of insider information that they believe is confidential and know or

should know came from a person having a special relationship with the source of the information.

(*Danuke, supra* at 40C)

[479] In *Donald,* the Commission found that the respondent's purchases of securities of a reporting issuer "directly engage[d] the fundamental principles of securities regulation and the purposes of the Act" (at para. 323). The Commission stated that:

> Donald, who was an officer and employee of RIM, learned of material facts about Certicom in the context of a confidential discussion with another RIM Vice President. Not only did Donald learn the Three Facts on August 20, 2008, but he learned of them directly from Wormald, the RIM officer who was the head of the Strategic Alliances Group. …
>
> Market participants and the officers of public companies, such as Donald, are expected to adhere to a high standard of behaviour. In our view, by purchasing securities with knowledge of material facts which had not been generally disclosed, Donald clearly failed to meet that standard and did so in a manner that impugns the integrity of Ontario's capital markets.
>
> (*Donald, supra* at paras. 318 and 319)

[480] In the *Asbestos* decision, the Supreme Court of Canada emphasized the preventative and prospective nature of orders made by the Commission in the public interest:

> … pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventative in nature and prospective in orientation. Therefore, s. 127 cannot be used merely to remedy Securities Act misconduct alleged to have caused harm to private parties or individuals. [Emphasis added.]
>
> (*Asbestos, supra* at para. 45)

C. Analysis of the Public Interest Allegations against the Respondents

[481] Staff alleges that Waheed's conduct that was contrary to subsections 76(1) and 76(2) of the Act was also contrary to the public interest. Further, and in any event, Staff alleges that Waheed acted contrary to the public interest by informing Walter and others of material facts about Baffinland before they were generally disclosed and by causing Nunavut Acquisition to purchase securities of Baffinland pursuant to the Toehold Purchase.

[482] Staff further alleges that, as a director and the President and CEO of Nunavut Acquisition, Waheed used confidential information belonging to Baffinland and material facts about Baffinland to make the Toehold Purchase and launch the Take-Over Bid.

[483] Staff's allegations of insider trading, which are addressed in detail above, are essentially based on Waheed's alleged knowledge of Baffinland's negotiations with ArcelorMittal. Staff did not include the allegations relating to the Alleged Confidential Information as part of its case relating to insider trading and instead based its allegations against the Respondents with respect to the Alleged Confidential Information on the law relating to confidentiality and breach of contract.

[484] Questions relating to trading while in possession of material facts that have not been generally disclosed directly engage the Commission's public interest jurisdiction as such conduct is governed by section 76 of the Act. However, we agree with the Respondents' submissions that section 76 of the Act does not prohibit trading on the basis of non-material confidential information or rumours, speculation and suppositions. Having found that the Respondents did not have knowledge of material facts relating to the negotiations between Baffinland and ArcelorMittal and therefore did not act contrary to subsections 76(1) and 76(2) of the Act, we do not find it appropriate in the circumstances to find that their conduct in this respect was contrary to the public interest.

[485] Previous Commission decisions relating to conduct contrary to the public interest in the absence of breaches of Ontario securities law have engaged fundamental principles recognized in the Act. We find that the circumstances of this case are distinguishable from those in prior Commission decisions with public interest findings. Unlike the *Donald* and *Danuke* cases, the Respondents were not market participants within the meaning of subsection 1(1) of the Act, i.e., they were not registrants under the Act or officers or directors of a reporting issuer when the Toehold Purchase was made or when the Take-Over Bid was launched. In addition, in Waheed's case, he was a consultant and not an officer or director of Baffinland during the Consultancy Period. Given the circumstances, which are unusual, we do not find that the conduct of the Respondents engages the

Commission's jurisdiction with respect to the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

[486] Having reviewed all of the evidence, including a detailed review of the various versions of the Financial Model in evidence, we find that the April 22nd Model was retained by Waheed following his consultancy and that it included information that was proprietary to Baffinland and had not been generally disclosed. Waheed used the April 22nd Model which he had developed and on which he conducted extensive work as a consultant to Baffinland in his discussions with Walter, Barclays and Calvert, each of whom received a copy of the Financial Model after Waheed had modified it with information derived from the Road Haulage Conceptual Study (see paragraph [301] above). The August 20th Model, which was a modified and updated version of the April 22nd Model that incorporated information from the Road Haulage Conceptual Study, was provided to EMG in connection with its analysis relating to funding of the Toehold Purchase and the eventual Take-Over Bid.

[487] Staff did not allege and, accordingly, we have not considered, whether the information incorporated in the April 22nd Model and the August 20th Model was material. We have also not considered, as it was not necessary that we do so, the Respondents' submissions with respect to the steps that they undertook to ensure that the Toehold Purchase and Take-Over Bid were made with knowledge of only publicly available information or Waheed's own work product.

[488] Waheed's duties under the Consulting Agreement or at common law that Staff alleges that he breached were matters well-known to Baffinland immediately after the Take-Over Bid was launched and were the subject matter of a complaint by Stikeman to the Commission on behalf of Baffinland which is discussed above. When cross-examined by Walter's counsel, Cranswick essentially acknowledged that the Baffinland Board, and, in all likelihood, the Special Committee, would have considered the issue of court and OSC proceedings and concluded in the circumstances that pursing such proceedings was not in Baffinland's best interests and that Baffinland should not interfere with the competing bids for the company. Given that the Baffinland Board chose not to exercise Baffinland's contractual and other remedies after careful deliberation and with the benefit of legal advice, it should not, in our view, now fall to the Commission to deal with matters that should properly be left to the courts.

[489] Similarly, we find that it is beyond the scope of the Commission's jurisdiction to make findings against Waheed with respect to allegations that he did not always act in Baffinland's best interest while a consultant and acted in his own self-interest when he is alleged to have obtained information from Dimitrov and McCloskey in June and July 2010. For the reasons set out above, we see no grounds on which to make a finding against him for the purposes of investor protection or fostering fair and efficient capital markets and confidence in the capital markets.

[490] Staff also alleges that the Respondents' conduct in launching the Take-Over Bid engages the Commission's public interest jurisdiction for reasons of fraudulent or unfair market practices or procedures. Staff alleges that the Respondents' knowledge of the Alleged Confidential Information gave them a significant and unfair advantage over the market, including all shareholders and potential shareholders. Although we do not agree with Staff's position, we also do not agree with the submission of the Respondents that Staff is estopped from raising the issue on the basis of the doctrine of approbation and reprobation because of the position that Staff is alleged to have taken in connection with the proceedings that resulted in the *Baffinland Shareholder Rights Plan Decision* (see paragraph [191] above). In our view, the position that Staff took at the Shareholder Rights Plan Hearing is not dispositive of the allegations in this matter, which is an enforcement proceeding brought pursuant to section 127 of the Act, and not a dispute as to whether it is in the public interest to permit a shareholder rights plan to remain in place.

[491] We note the Commission's statement in *Canadian Tire* that:

> … The Commission's mandate under section 123 [now section 127] is not to interfere in market transactions under some presumed rubric of insuring fairness.
> The Commission was cautious in its wording in [*Re Cablecasting Ltd.*, [1978] O.S.C.B. 37] and we repeat that caution here. To invoke the public interest test of section 123 [now section 127], particularly in the absence of a demonstrated breach of the Act, the regulations or a policy statement, the conduct or transaction must clearly be demonstrated to be abusive of shareholders in particular, and of the capital markets in general. A complaint of unfairness may well be involved in a transaction that is said to be abusive, but they are different tests. Moreover, the abuse must be such that it can be shown to the Commission's satisfaction that a question of the public interest is involved. That almost invariably will mean some showing of a broader impact on the capital markets and their operation.
>
> (*Canadian Tire, supra* at 40-41 (WL))

[492] Although Staff submits that the alleged breaches of Waheed's duties gave the Respondents an unfair advantage over other investors and that his behavior had an impact on the capital markets as a whole, no evidence of any harm suffered by investors or harm to the capital markets was provided.

[493] Staff also alleges that, by using confidential facts and information belonging to Baffinland to make the Toehold

Purchase and launch the Take-Over Bid, Nunavut Acquisition put Baffinland in play knowing that it would disrupt the negotiations between Baffinland and ArcelorMittal. Staff further alleges that, by their actions, the Respondents deprived Baffinland shareholders of the opportunity to benefit from the future development of the Mary River Property as a partner with ArcelorMittal.

[494] By way of response, Waheed submits that his conduct had no bearing on Baffinland's shareholders or the capital markets generally and that there is no evidence to support Staff's allegations. Walter submits that, in September 2010, there was no certainty that a joint venture agreement would ever be concluded between Baffinland and ArcelorMittal and enumerated a number of factors that militated against the success of such negotiations, some of which are discussed in these Reasons. Both of the Respondents deny Staff's allegations that the Take-Over Bid was designed to disrupt the negotiations between Baffinland and ArcelorMittal.

[495] Subsection 1.1(1) of National Policy 62-202 – *Take-Over Bids – Defensive Tactics* states that:

> The Canadian securities regulatory authorities recognize that take-over bids play an important role in the economy by acting as a discipline on corporate management and as a means of reallocating economic resources to their best uses.

The foregoing policy was clearly applicable to Baffinland when the issues relating to its management are considered as well as the failure of the management group to advance the interests of Baffinland and its shareholders over a lengthy period of time notwithstanding the fact that Baffinland had successfully raised $450 million in the capital markets.

[496] The acquisition of toeholds in the context of take-over bids is a well-known and permitted device employed by bidders to obtain some measure of protection for the costs incurred in connection with the bid if a higher, and ultimately successful, competing bid emerges from a third person and to provide them with a voting interest. In addition, subsection 76(3) of the Act provides that no person that proposes to make a take-over bid for a reporting issuer may inform another person or company of a material fact with respect to the reporting issuer before it has been generally disclosed except when the information is given in the necessary course of business to effect the take-over bid.

[497] On October 6, 2010, the Special Committee met to receive the report of CIBC with respect to the fairness of the consideration offered by Nunavut Acquisition under the Take-Over Bid. CIBC expressed the opinion that the consideration of $0.80 for each common share was inadequate from a financial point of view. After deliberation, the Special Committee recommended to the Baffinland Board that the Take-Over Bid be rejected. In its draft written presentation to the Special Committee, CIBC estimated the value of the proposed joint venture with ArcelorMittal, based on a number of assumptions, as being between $0.82 and $1.58 per common share.

[498] During his cross-examination by Walter's counsel, Cranswick was asked if the difference between the $0.82 and $1.58 per common share range represented the $300 million amount of the Additional Payment contemplated by the August 10th Term Sheet (see paragraph [361] above). He replied that he was not certain but agreed that the Additional Payment would have been factored into the amount.

[499] In January 2011, the Joint Bid was accepted by more than 90% of Baffinland's shareholders and provided for a payment of $1.50 per common share. The price represented a premium of over 87% to the price offered to the shareholders under the Take-Over Bid. Given that the price per share accepted by the shareholders was close to the top of the range of values which CIBC estimated that the ArcelorMittal joint venture proposal represented (which itself was highly contingent on a number of uncertain events), we are of the view that the shareholders were not financially disadvantaged in any material way.

[500] We do not find that it is in the public interest to make a finding that the Respondents deprived Baffinland shareholders of the opportunity and ability to benefit from the future development of the Mary River Project as a joint venture partner with ArcelorMittal. We therefore make no finding against the Respondents with respect to their conduct relating to the Toehold Purchase and the Take-Over Bid for reasons of investor protection or ensuring confidence in the capital markets.

VII. CONCLUSION

[501] With respect to the allegation that Waheed's conduct was contrary to subsection 76(1) of the Act, we find that Waheed, as a director, President and CEO of Nunavut Acquisition, did not authorize, permit or acquiesce in the Toehold Purchase while in a special relationship with Baffinland and with knowledge of material facts about Baffinland relating to the status and terms of negotiations between Baffinland and ArcelorMittal regarding a potential joint venture that were not generally disclosed.

[502] With respect to the allegation that Waheed acted contrary to subsection 76(2) of the Act, we find that he did not inform Walter of material facts about the status and details of an advanced state of negotiations between Baffinland and ArcelorMittal relating to a potential joint venture before the material facts were generally disclosed. Consequently, with respect to the allegation that Walter acted contrary to subsection 76(2) of the Act, we find that Walter, as a director and the Chairman of

Nunavut Acquisition, did not authorize, permit or acquiesce in the Toehold Purchase while in a special relationship with Baffinland and with knowledge of material facts about the status and details of an advanced state of negotiations between Baffinland and ArcelorMittal relating to a potential joint venture that were not generally disclosed.

[503] We do not find it appropriate in this case to make any further findings against the Respondents based on our jurisdiction to make orders in the public interest.

[504] We therefore dismiss the allegations against the Respondents.

Dated at Toronto this 26th day of August, 2014.

"Christopher Portner"
Christopher Portner

"Sarah B. Kavanagh"
Sarah B. Kavanagh

"Paulette L. Kennedy"
Paulette L. Kennedy

Chapter 4

Cease Trading Orders

4.1.1 Temporary, Permanent & Rescinding Issuer Cease Trading Orders

Company Name	Date of Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/Revoke
DMD Digital Health Connection Group Inc. (formerly Aptilon Corporation)	9 July 12	20 July 12		28 August 14

4.2.1 Temporary, Permanent & Rescinding Management Cease Trading Orders

Company Name	Date of Order or Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/ Expire	Date of Issuer Temporary Order

4.2.2 Outstanding Management & Insider Cease Trading Orders

Company Name	Date of Order or Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/ Expire	Date of Issuer Temporary Order
Penn West Petroleum Ltd.	8 August 14	20 August 14	20 August 14		

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Chapter 7

Insider Reporting

This chapter is available in the print version of the OSC Bulletin, as well as as in Carswell's internet service SecuritiesSource (see www.carswell.com).

This chapter contains a weekly summary of insider transactions of Ontario reporting issuers in the System for Electronic Disclosure by Insiders (SEDI). The weekly summary contains insider transactions reported during the seven days ending Sunday at 11:59 pm.

To obtain Insider Reporting information, please visit the SEDI website (www.sedi.ca).

Chapter 8

Notice of Exempt Financings

REPORT OF TRADES ON FORM 45-106F1 AND 45-501F1

There are no Reports of Exempt Distribution on Forms 45-106F1 or 45-501F1 (Reports) in this Bulletin.

Reports filed on or after February 19, 2014 must be filed electronically.

As a result of the transition to mandated electronic filings, the OSC is considering the most effective manner to make data about filed Reports available to the public, including whether and how this information should be reflected in the Bulletin. In the meantime, Reports filed with the Commission continue to be available for public inspection during normal business hours.

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Chapter 11

IPOs, New Issues and Secondary Financings

Issuer Name:
BFK Capital Corp.
Principal Regulator - Ontario
Type and Date:
Preliminary CPC Prospectus dated August 27, 2014
NP 11-202 Receipt dated August 27, 2014
Offering Price and Description:
$600,000 - 1,000,000 Common Shares
Price: $0.60 per Common Share
Underwriter(s) or Distributor(s):
Canaccord Genuity Corp.
Promoter(s):
-
Project #2251090

Issuer Name:
Petrowest Corporation
Principal Regulator - Alberta
Type and Date:
Preliminary Short Form Prospectus dated August 28, 2014
NP 11-202 Receipt dated August 28, 2014
Offering Price and Description:
$20,000,000 - 16,000,000 Class A Common Shares
Price: $1.25 per Offered Share
Underwriter(s) or Distributor(s):
Beacon Securities Limited
Canaccord Genuity Corp.
Dundee Securities Ltd.
Mackie Research Capital Corporation
GMP Securiites L.P.
PI Financial Corp.
Cormack Securities Inc.
Promoter(s):
-
Project #2252576

Issuer Name:
Western Forest Products Inc.
Principal Regulator - British Columbia
Type and Date:
Preliminary Short Form Prospectus dated August 26, 2014
NP 11-202 Receipt dated August 26, 2014
Offering Price and Description:
$230,000,000.00 - 92,000,000 Common Shares
Price: $2.50 per Offered Share
Underwriter(s) or Distributor(s):
CIBC WORLD MARKETS INC.
SCOTIA CAPITAL INC.
BROOKFIELD FINANCIAL CORP.
RBC DOMINION SECURITIES INC.
TD SECURITIES INC.
Promoter(s):
-
Project #2247525

Issuer Name:
Whitecap Resources Inc.
Principal Regulator - Alberta
Type and Date:
Preliminary Short Form Prospectus dated August 26, 2014
NP 11-202 Receipt dated August 26, 2014
Offering Price and Description:
7,553,000 Subscription Receipts each representing the right to receive one Common Share
Price $16.55 per Subscription Receipt
Underwriter(s) or Distributor(s):
National Bank Financial Inc.
GMP Securities L.P.
TD Securities Inc.
CIBC World Markets Inc.
RBC Dominion Securities Inc.
Scotia Capital Inc.
FirstEnergy Capital Corp.
Macquarie Capital Merkets Canada Ltd.
Peter & Co. Limited
BMO Nesbitt Burns Inc.
Cormark Securities Inc.
Dundee Securities Ltd.
Promoter(s):
-
Project #2247475

Issuer Name:
Signature Diversified Yield II Fund
(Class A units and Class O units)
Principal Regulator - Ontario
Type and Date:
Amendment #1 dated August 27, 2014 to the Annual Information Form dated July 29, 2014
NP 11-202 Receipt dated August 29, 2014
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
CI Investments Inc.
Project #2219012

Issuer Name:
Brompton Lifeco Split Corp.
Principal Regulator - Ontario
Type and Date:
Final Short Form Prospectus dated August 22, 2014
NP 11-202 Receipt dated August 26, 2014
Offering Price and Description:
Maximum: $50,160,000.00 - 2,850,000 Preferred Shares and 2,850,000 Class A Shares
Prices: $10.05 per Preferred Share and $7.55 per Class A Share
Underwriter(s) or Distributor(s):
RBC Dominion Securities Inc.
CIBC World Markets Inc.
Scotia Capital Inc.
BMO Nesbitt Burns Inc.
National Bank Financial Inc.
GMP Securities L.P.
Raymond James Ltd.
Canaccord Genuity Corp.
Desjardins Securities Inc.
Dundee Securities Ltd.
Industrial Alliance Securities Inc.
Mackie Research Capital Corporation
Manulife Securities Incorporated
Promoter(s):
-
Project #2246099

Issuer Name:
Davis-Rea Balanced Fund
Davis-Rea Equity Fund
Davis-Rea Fixed Income Fund
Type and Date:
Final Simplified Prospectus dated August 28, 2014
Receipted on August 29, 2014
Offering Price and Description:
Class A, Class B, Class F and Class O Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
Davis-Rea Ltd.
Project #2239871

Issuer Name:
Discovery 2014 Flow-Through Limited Partnership
Principal Regulator - Alberta
Type and Date:
Final Long Form Prospectus dated August 28, 2014
NP 11-202 Receipt dated August 28, 2014
Offering Price and Description:
Maximum: $30,000,000 - 1,200,000 Units @ $25.00
Minimum: $5,000,000 - 200,000 Units @ $25.00
Underwriter(s) or Distributor(s):
RBC Dominion Securities Inc.
CIBC World Markets Inc.
Scotia Capital Inc.
BMO Nesbitt Burns Inc.
National Bank Financial Inc.
TD Securities Inc.
GMP Securities L.P.
Manulife Securities Incorporated
Canaccord Genuity Corp.
Middlefield Capital Corporation
Raymond James Ltd.
Promoter(s):
Middlefield Resource Corporation
Project #2241659

Issuer Name:
Family Group Education Savings Plan
Family Single Student Education Savings Plan
Flex First Plan
Principal Regulator - Ontario
Type and Date:
Final Long Form Prospectus dated August 27, 2014
NP 11-202 Receipt dated August 29, 2014
Offering Price and Description:
Scholarship plan units
Underwriter(s) or Distributor(s):
-
Promoter(s):
The Knowledge First Foundation
Project # 2229162, 2229170,2229152

Issuer Name:
First Asset U.S. & Canada Lifeco Income ETF
Principal Regulator - Ontario
Type and Date:
Final Long Form Prospectus dated August 25, 2014
NP 11-202 Receipt dated August 26, 2014
Offering Price and Description:
Common units and Advisor Class units @ net asset value
Underwriter(s) or Distributor(s):
-
Promoter(s):
First Asset Investment Management Inc.
Project #2234920

Issuer Name:
Horizons Cdn Select Universe Bond ETF
Horizons S&P 500® Index ETF
Horizons S&P/TSX 60 Index ETF
Horizons S&P/TSX Capped Energy Index ETF
Horizons S&P/TSX Capped Financials Index ETF
Principal Regulator - Ontario
Type and Date:
Final Long Form Prospectus dated August 26, 2014
NP 11-202 Receipt dated August 27, 2014
Offering Price and Description:
Class A Units @ Net Asset Value
Underwriter(s) or Distributor(s):
-
Promoter(s):
HORIZONS ETFs MANAGEMENT (CANADA) INC.
Project #2236853

Issuer Name:
Horizons Seasonal Rotation ETF
Principal Regulator - Ontario
Type and Date:
Final Long Form Prospectus dated August 25, 2014
NP 11-202 Receipt dated August 27, 2014
Offering Price and Description:
Class E Units and Advisor Class Units @ Net Asset Value
Underwriter(s) or Distributor(s):
-
Promoter(s):
ALPHAPRO MANAGEMENT INC.
Project #2234892

Issuer Name:
John Deere Canada Funding Inc.
Principal Regulator - Ontario
Type and Date:
Final Base Shelf Prospectus dated August 26, 2014
NP 11-202 Receipt dated August 26, 2014
Offering Price and Description:
$3,500,000,000.00 - Medium Term Notes (Unsecured)
Underwriter(s) or Distributor(s):
RBC DOMINION SECURITIES INC.
TD SECURITIES INC.
MERRILL LYNCH CANADA INC.
Promoter(s):
-
Project #2243292

Issuer Name:
Milestone Apartments Real Estate Investment Trust
Principal Regulator - Ontario
Type and Date:
Final Base Shelf Prospectus dated August 27, 2014
NP 11-202 Receipt dated August 27, 2014
Offering Price and Description:
C$650,000,000.00
Units
Debt Securities
Warrants
Subscription Receipts
Underwriter(s) or Distributor(s):
-
Promoter(s):
MST INVESTORS, LLC
Project #2247068

Issuer Name:
Return On Innovation Fund Inc.
Class A Shares, Series I
Class A Shares, Series II
Class A Shares, Series III
and
Class A Shares, Series IV – Private Placements
Type and Date:
Final Long Form Prospectus dated August 28, 2014
Receipted on August 29, 2014
Offering Price and Description:
CLASS A SHARES
Continuous Offering Price − Net Asset Value per Class A Share
Minimum Subscription − $500 initially and $50 subsequently
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #2236363

Issuer Name:
Stone & Co. Dividend Growth Class Canada
(Series A, B, C, F, L, T8A, T8B and T8C)
Stone & Co. Resource Plus Class
(Series A, B, C, F and L)
(Classes of Mutual Fund Shares of Stone & Co. Corporate Funds Limited)
Stone & Co. Flagship Growth & Income Fund Canada
(Series L, AA, BB, CC, FF, T8A, T8B and T8C)
Stone & Co. Flagship Stock Fund Canada
(Series A, B, C, F, L, T8A, T8B and T8C)
Stone & Co. Flagship Global Growth Fund
(Series A, B, C, F, L, T8A, T8B and T8C)
Stone & Co. Growth Industries Fund
(Series A, B, C, F and L)
Stone & Co. Flagship Money Market Fund Canada
(Series A, B, C and L)
Stone & Co. Europlus Dividend Growth Fund
(Series A, B, C, F, L, T8A, and T8B)
Principal Regulator - Ontario
Type and Date:
Final Simplified Prospectuses dated August 28, 2014
NP 11-202 Receipt dated August 29, 2014
Offering Price and Description:
Series A, Series B, Series C, Series F, Series L, Series AA, Series BB, Series CC, Series FF, Series T8A, Series T8B and Series T8C
Underwriter(s) or Distributor(s):
-
Promoter(s):
Stone Asset Management Limited
Stone & Co. Corporate Funds Limited
Stone & Co. Limited
Project #2236442

Issuer Name:
Series A, Series AH, Series T5, Series T8, Series D, Series E,
Series F, Series I and Series O Units (as indicated) of
Sun Life MFS Global Growth Fund (Series A, D, T5, T8, E, F, I and O Units)
Sun Life MFS Global Value Fund (Series A, T5, T8, E, F, I and O Units)
Sun Life MFS U.S. Growth Fund (Series A, AH, T5, T8, E, F, I and O Units)
Sun Life MFS U.S. Value Fund (Series A, AH, T5, T8, E, F, I and O Units)
Sun Life MFS International Growth Fund (Series A, D, T5, T8, E, F, I and O Units)
Sun Life MFS International Value Fund (Series A, T5, T8, E, F, I and O Units)
Sun Life Schroder Emerging Markets Fund (Series A, E, F, I and O Units)
Sun Life MFS Global Total Return Fund (Series A, T5, E, F, I and O Units)
Sun Life Milestone 2020 Fund (Series A and E Units)
Sun Life Milestone 2025 Fund (Series A and E Units)
Sun Life Milestone 2030 Fund (Series A and E Units)
Sun Life Milestone 2035 Fund (Series A and E Units)
Sun Life Beutel Goodman Canadian Bond Fund (Series A, E, F, I and O Units)
Sun Life MFS Monthly Income Fund (Series A, T5, E, F, I and O Units)
Sun Life Money Market Fund (Series A, D, E, F, I and O Units)
Principal Regulator - Ontario
Type and Date:
Final Simplified Prospectuses dated August 28, 2014
NP 11-202 Receipt dated August 29, 2014
Offering Price and Description:
Series A, Series AH, Series T5, Series T8, Series D, Series E, Series F, Series I and Series O units @ Net Asset Value
Underwriter(s) or Distributor(s):
-
Promoter(s):
Sun Life Global Investments (Canada) Inc.
Project #2237028

Issuer Name:
TDb Split Corp.
Principal Regulator - Ontario
Type and Date:
Final Short Form Prospectus dated August 26, 2014
NP 11-202 Receipt dated August 27, 2014
Offering Price and Description:
$24,450,000 - 1,500,000 Priority Equity Shares and 1,500,000 Class A Shares
Prices: $10.20 per Priority Equity Share
$6.10 per Class A Share
Underwriter(s) or Distributor(s):
National Bank Financial Inc.
CIBC World Markets Inc.
RBC Dominion Securities Inc.
Scotia Capital Inc.
TD Securities Inc.
BMO Nesbitt Burns Inc.
GMP Securities L.P.
Canaccord Genuity Corp.
Raymond James Ltd.
Promoter(s):
-
Project #2246194

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Chapter 12

Registrations

12.1.1 Registrants

Type	Company	Category of Registration	Effective Date
Change in Registration Category	Gestion Ferique	From: Investment Fund Manager To: Investment Fund Manager and Portfolio Manager	August 26, 2014

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Chapter 13

SROs, Marketplaces, Clearing Agencies and Trade Repositories

13.2 Marketplaces

13.2.1 Toronto Stock Exchange – Notice of Approval Amendments to Parts III, VI and VII of the Toronto Stock Exchange Company Manual and to Parts 2 and 7 of The Toronto Stock Exchange Rule Book

TORONTO STOCK EXCHANGE

NOTICE OF APPROVAL AMENDMENTS TO PARTS III, VI AND VII OF THE TORONTO STOCK EXCHANGE COMPANY MANUAL AND TO PARTS 2 AND 7 OF THE TORONTO STOCK EXCHANGE RULE BOOK

Introduction

In accordance with the Process for the Review and Approval of Rules and the Information contained in Form 21-101F1 and the Exhibits thereto (the "Protocol"), Toronto Stock Exchange ("TSX") has adopted, and the OSC has approved, amendments (the "Amendments") to Part III, VI and Part VII of the TSX Company Manual (the "Manual") and to Parts 2 and 7 of the Toronto Stock Exchange Rule Book (the "TSX Rules"). The Amendments are public interest amendments to the Manual. The Amendments were published for public comment in a request for comments on October 11, 2012 ("Request for Comments").

Reasons for the Amendments

In accordance with Section 35 of the OSC Recognition Order recognizing TSX as an exchange (the "Recognition Order"), TSX must provide due process, ensuring that the requirements of TSX in relation to access to the trading and listing facilities of TSX, the imposition of limitations or conditions on access and denial of access are fair and reasonable, including in respect of the provisions for appeals. Pursuant to the Recognition Order, TSX must establish written procedural requirements governing the process for appeals or review of exchange decisions. TSX is in compliance with these Recognition Order requirements, however the Amendments clarify and provide transparency for certain appeal related matters in the Manual and the TSX Rules.

Summary of the Final Amendments

TSX received two comment letters in response to the Request for Comments. A summary of the comments submitted, together with TSX's responses, is attached as **Appendix A.**

TSX respects the public comment process and appreciates the value such public input provides. TSX thanks the commenters for their submissions.

TSX is making some drafting changes to the Amendments which do not represent a substantive change to the Amendments. In addition to clarifying certain drafting, the revisions to the Amendments clarify that the senior officer(s) of TSX hearing an appeal from an original decision were not participants in making the original decision. Further, the Amendments will specify a 30-day time limit to appeal the senior officer(s)' decision to TSX's Board of Directors. A blackline to the Amendments showing changes made since the Request for Comments is attached as **Appendix B.**

The Amendments will be finalized in the form provided in **Appendix C.**

Text of the Amendments

The Amendments are attached as **Appendix C** and a blackline to the Amendments showing changes made since the Request for Comments is attached as **Appendix B.**

Effective Date

The Amendments will become effective today, September 4, 2014.

APPENDIX A

SUMMARY OF COMMENTS AND RESPONSES

List of Commenters:

1. Canadian Foundation for Advancement of Investor Rights (FAIR)

2. Stikeman Elliott LLP (Stikeman)

Capitalized terms used and not otherwise defined shall have the meaning given in the Request for Comments for public interest amendments to amend the TSX Company Manual and the TSX Rule Book published in the OSC Bulletin on October 11, 2012.

Summarized Comments Received	*TSX Response*
A comment was received that it is unrealistic to expect a Participating Organization to give "prompt written notice" of non-compliance with the requirements of a self-regulatory organization (Rule 2-304(2)). The comment suggests that the rule instead require notice to be provided of any proceedings instituted, or determination made, by a self-regulatory organization regarding non-compliance. (Stikeman)	While TSX understands the commenter's potential concern, TSX believes it is not an unduly onerous requirement. In TSX's view, it is not sufficient to only be notified when proceedings are instituted or a determination is made, as monitoring or other actions may be required by TSX before formal proceedings are initiated or determinations are made.
A comment was received that the Request for Comments contains insufficient detail for stakeholders and shareholders to provide constructive comments. For example, the research conducted of practices at other major international stock exchanges should have been disclosed. (FAIR)	TSX has always provided for due process including appeals of its decisions. The Request for Comments clarifies and provides transparency with respect to certain appeal related matters in the Manual and the TSX Rules. TSX is therefore of the view that the Request for Comments contains the appropriate level of detail to engage constructive comments in line with the nature of the Proposed Amendments. TSX also believes that it has provided the relevant information from its analysis of appeal practices at other exchanges in line with the context of the Proposed Amendments.
A comment was received that a 30-day consultation period is too short. (FAIR)	The 30-day period is standard for exchange rule amendments. Accommodation for comments to be submitted after the comment period has ended may be provided upon request in appropriate circumstances.
A comment was received concerning conflicts of interest in listing regulation at the exchange, submitting that the appeals process and Proposed Amendments are therefore necessarily flawed and not in line with international "best practice" standards. (FAIR)	This comment is outside of the scope of the Proposed Amendments. TSX is of the view that it meets all relevant standards with respect to due process and appeals of exchange decisions, and that any perceived potential conflicts of interest in listing regulation at the exchange are appropriately managed and comply with applicable regulatory requirements.

Summarized Comments Received	*TSX Response*
A comment was submitted that appeals of listing regulatory decisions are not made to any type of independent listing committee. The same commenter recommends TSX consider a process for review of decisions which is independent of business development concerns and further suggests that appeals be made to the Regulatory Oversight Committee. (FAIR)	The Proposed Amendments provide applicants for listing and listed issuers with the opportunity to have decisions of the listing committee reviewed by a minimum of one and a maximum of three senior officer(s) of TSX, depending of the complexity of the matter. The Manual also provides for a further appeal to a three person panel of the TSX Board of Directors should the applicant for listing or listed issuer remain dissatisfied with the decision of the senior officer(s) of TSX. Finally, applicants for listing, listed issuers, and others have rights of review of TSX decisions before the OSC. TSX is of the view that these three levels of appeal, in the Manual and now in the TSX Rules, thoroughly provide ample opportunities for review of listing and trading regulatory decisions, providing an appropriate balance between timeliness, formality, knowledge, expertise, independence, and fairness.
A comment was received recommending the members of the exchange Listing Advisory Committee be expanded beyond securities industry professionals to institutional and retail investor advocates and academics who are experts in the capital markets. It was also suggested that the committee could be given a broader role “in accordance with international best practice”. (FAIR)	This comment is outside of the scope of the Proposed Amendments. Although we are of the view that the composition of the committee is appropriate given the role and mandate of the committee, we have noted this comment for consideration when the membership of the committee is being considered.

APPENDIX B

BLACKLINE OF THE FINAL AMENDMENTS TEXT OF PROPOSED AMENDMENTS TO THE TSX COMPANY MANUAL

Sec. 354.1.

~~If~~Decisions in respect of the application of Part III are made by the Listings Committee ~~does not approve the applicant's securities for listing~~or its delegates. If an applicant is dissatisfied with a decision under Part III, the applicant may, within 30 calendar days of the original decision by Listings Committee, request an appeal of such decision. The matter will be considered by a minimum of one and a maximum of three senior officer(s) of ~~Toronto Stock Exchange~~TSX who were not participants in making the original decision, as determined by the Exchange~~, who~~. The senior officer(s) may uphold the original decision or may render a new decision. Applicants must request the appeal in writing and make written submissions in support of an appeal under this section. If after being heard, the applicant remains dissatisfied with the decision, the applicant may, within 30 calendar days of the appeal decision by the senior officer(s) of TSX, appeal the decision to a three-person panel of ~~the Toronto Stock Exchange~~TSX's Board of Directors. Applicants must request the appeal in writing and make written submissions in support of an appeal to TSX's Board of Directors.

Sec. 642.

Decisions in respect of the application of Part V and this Part VI are made by the Listings Committee or its delegates. If ~~notice of a transaction submitted~~an issuer is dissatisfied with a decision under Part V or Part VI ~~is not accepted~~, the issuer may, within 30 calendar days of the original decision, request an appeal of such decision. The matter will be considered by a minimum of one and a maximum of three senior officer(s) of ~~Toronto Stock Exchange~~TSX who were not participants in making the original decision, as determined by the Exchange~~, who~~. The senior officer(s) may uphold the original decision or may render a new decision. Issuers must request the appeal in writing and make written submissions in support of an appeal under this section. If after being heard, the issuer remains dissatisfied with the decision, the issuer may, within 30 calendar days of the appeal decision by the senior officer(s) of TSX, appeal the decision to a three-person panel of TSX's Board of Directors ~~of TSX Inc.~~. Issuers must request the appeal in writing and make written submissions in support of an appeal to TSX's Board of Directors.

Sec. 719.

Decisions in respect of the application of Part VII are made by the Continued Listing Committee, which is a subset of the Listing Committee, or its delegates. If an issuer ~~remains~~is dissatisfied with a decision under this Part VII, after having been given an opportunity to be heard~~.~~, the issuer may, within 30 calendar days of the original decision, request an appeal of such decision. However, requests to appeal delisting decisions under Section 707 must be submitted within 5 business days of the decision to ensure the appeal can be dealt with in the 30-day delisting period. The matter will be considered by a minimum of one and a maximum of three senior officer(s) of ~~Toronto Stock Exchange~~TSX, who were not participants in making the original decision, as determined by the Exchange~~, who~~. The senior officer(s) may uphold the original decision or may render a new decision. Issuers must request the appeal in writing and make written and/or oral submissions in support of an appeal under this section. If after being heard, the ~~listed~~ issuer remains dissatisfied with the decision, the ~~listed~~ issuer may, within 30 calendar days of the appeal decision by the senior officer(s) of TSX, appeal the decision to a three-person panel of ~~TSX's Board.~~TSX's Board of Directors. Issuers must request the appeal in writing and make written submissions in support of an appeal to TSX's Board of Directors.

TEXT OF PROPOSED AMENDMENTS TO THE TSX RULES

2-105 Rights of Applicant (sub(b) Repealed)

If the Exchange proposes to accept an applicant subject to terms and conditions pursuant to Rule 2-104(b) or to refuse an applicant pursuant to Rule 2-104(c), the applicant shall be:

(a) provided with a statement of the grounds upon which the Exchange proposes to accept the applicant subject to terms and conditions or to reject an applicant with the particulars of those grounds; and

(b) Repealed (September 4, ~~2012~~2014).

DIVISION 2 – INTERESTS AND OWNERSHIP

2-201 Change in Control (Sub (3) and Sub (5)(b) Repealed)

(1) For the purposes of this Rule, the acquisition of, directly or indirectly, or obtaining the ability to exercise control over, a significant equity interest in a Participating Organization shall, in the absence of evidence to the contrary, be deemed to be a change in control of the Participating Organization.

(2) A Participating Organization shall apply, in such form and with such information as the Exchange may require, to the Exchange for prior approval of a change in control of the Participating Organization.

(3) Repealed (October 20, 2000).

(4) The Exchange may:

(a) approve a change in control unconditionally;

(b) approve a change in control subject to such terms and conditions as may be considered appropriate or necessary to ensure continued compliance with Exchange Requirements by the Participating Organization;

(c) refuse to approve a change in control if, after having regard to such factors as the Exchange may consider relevant including, without limitation, the past or present conduct, business or condition of the proposed controlling person or persons, the Exchange is of the opinion that:

(i) the Participating Organization will not comply with Exchange Requirements after the change in control,

(ii) the proposed controlling person is not qualified by reason of integrity, or

(iii) such approval is otherwise not in the public interest.

(5) If the Exchange proposes to approve a change in control subject to terms and conditions pursuant to Rule 2-201(4)(b) or to refuse to approve a change in control pursuant to Rule 2-201(4)(c), the applicant shall be:

(a) provided with a statement of the grounds upon which the Exchange proposes to approve the change in control subject to terms and conditions or to refuse to approve the change in control with the particulars of those grounds.

(b) Repealed (September 4, ~~2012~~2014).

DIVISION 3 – CONTINUING QUALIFICATIONS

2-301 Membership in SRO

(1) If a Participating Organization ceases to be a member of a recognized self-regulatory organization, its status with the Exchange shall be terminated automatically.

(2) If a Participating Organization's status with a recognized self-regulatory organization has been suspended or if the Exchange determines that a Participating Organization is in non-compliance with the requirements of a recognized self-regulatory organization of which the Participating Organization is a member, the Exchange may impose such terms and conditions on the Participating Organization as the Exchange deems appropriate in the circumstances, including suspension and termination of its status.

2-304 Notifications

(1) A Participating Organization shall give the Exchange prior written notice of:

(a) a change in its name or the name under which it carries on business; and

(b) a change in the address of its head office.

(2) A Participating Organization shall give the Exchange prompt written notice of:

(a) securities of it or its holding company being held contrary to the provisions of Division 2 of this Part;

(b) the death, retirement, resignation or termination of employment or association of a partner, director or officer of the Participating Organization or its holding company;

(c) any non-compliance with the provisions of Division 3 of this Part as they apply to the Participating Organization, its directors, shareholders, officers and employees;

(d) any non-compliance with the requirements of a recognized self-regulatory organization of which the Participating Organization is a member; and

(e) a termination or suspension of the Participation Organization's status as a member of a recognized self-regulatory organization.

DIVISION 6 SUSPENSION AND TERMINATION

2-602 Termination

(1) A Participating Organization may terminate its status as such by giving not less than 3 months' written notice to the Exchange.

(2) The Exchange may postpone the effective date of termination until it is satisfied that the Participating Organization has:

(a) complied with Exchange Requirements; and

(b) obtained the necessary consents from the recognized self-regulatory organization of which it is a member.

(3) The Exchange may terminate a Participating Organization's status as a Participating Organization, if it determines that a Participating Organization has:

(a) contravened or is not in compliance with an Exchange Requirement; or

(b) engaged in conduct, business or affairs that is unbecoming, inconsistent with just and equitable principles of trade or detrimental to the interests of the Exchange or the public.

PART 7– APPEAL PROCEDURE

7-101 Appeal Right

(1) A Participating Organization may appeal a decision of the Exchange within 30 days from the date of such decision, by submitting a request in writing.

(2) The Participating Organization must make written submissions in support of an appeal under this section.

(3) The matter will be considered by a minimum of one and a maximum of three senior officer(s) of ~~Toronto Stock~~the Exchange who were not participants in making the original decision, as determined by the Exchange~~, who~~. The senior officer(s) may uphold the original decision or may render a new decision.

(4) If after being heard ~~in the manner contemplated by subsection (3) above, a~~, the Participating Organization remains dissatisfied with the decision, the Participating Organization may, within 30 calendar days of the appeal decision by the senior officers of the Exchange, appeal the decision to a three-person panel of the Exchange's Board of Directors ~~of the Exchange~~. Participating Organizations must request the appeal in writing and make written submissions in support of an appeal to the Exchange's Board of Directors.

APPENDIX C

THE FINAL AMENDMENTS TEXT OF PROPOSED AMENDMENTS TO THE TSX COMPANY MANUAL

Sec. 354.1.

Decisions in respect of the application of Part III are made by the Listings Committee or its delegates. If an applicant is dissatisfied with a decision under Part III, the applicant may, within 30 calendar days of the original decision by Listings Committee, request an appeal of such decision. The matter will be considered by a minimum of one and a maximum of three senior officer(s) of TSX who were not participants in making the original decision, as determined by the Exchange. The senior officer(s) may uphold the original decision or may render a new decision. Applicants must request the appeal in writing and make written submissions in support of an appeal under this section. If after being heard, the applicant remains dissatisfied with the decision, the applicant may, within 30 calendar days of the appeal decision by the senior officer(s) of TSX, appeal the decision to a three-person panel of TSX's Board of Directors. Applicants must request the appeal in writing and make written submissions in support of an appeal to TSX's Board of Directors.

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Decisions in respect of the application of Part V and this Part VI are made by the Listings Committee or its delegates. If an issuer is dissatisfied with a decision under Part V or Part VI, the issuer may, within 30 calendar days of the original decision, request an appeal of such decision. The matter will be considered by a minimum of one and a maximum of three senior officer(s) of TSX who were not participants in making the original decision, as determined by the Exchange. The senior officer(s) may uphold the original decision or may render a new decision. Issuers must request the appeal in writing and make written submissions in support of an appeal under this section. If after being heard, the issuer remains dissatisfied with the decision, the issuer may, within 30 calendar days of the appeal decision by the senior officer(s) of TSX, appeal the decision to a three-person panel of TSX's Board of Directors. Issuers must request the appeal in writing and make written submissions in support of an appeal to TSX's Board of Directors.

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If the Exchange proposes to accept an applicant subject to terms and conditions pursuant to Rule 2-104(b) or to refuse an applicant pursuant to Rule 2-104(c), the applicant shall be:

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(b) Repealed (September 4, 2014).

DIVISION 2 – INTERESTS AND OWNERSHIP

2-201 Change in Control (Sub (3) and Sub (5)(b) Repealed)

(1) For the purposes of this Rule, the acquisition of, directly or indirectly, or obtaining the ability to exercise control over, a significant equity interest in a Participating Organization shall, in the absence of evidence to the contrary, be deemed to be a change in control of the Participating Organization.

(2) A Participating Organization shall apply, in such form and with such information as the Exchange may require, to the Exchange for prior approval of a change in control of the Participating Organization.

(3) Repealed (October 20, 2000).

(4) The Exchange may:

(a) approve a change in control unconditionally;

(b) approve a change in control subject to such terms and conditions as may be considered appropriate or necessary to ensure continued compliance with Exchange Requirements by the Participating Organization;

(c) refuse to approve a change in control if, after having regard to such factors as the Exchange may consider relevant including, without limitation, the past or present conduct, business or condition of the proposed controlling person or persons, the Exchange is of the opinion that:

(i) the Participating Organization will not comply with Exchange Requirements after the change in control,

(ii) the proposed controlling person is not qualified by reason of integrity, or

(iii) such approval is otherwise not in the public interest.

(5) If the Exchange proposes to approve a change in control subject to terms and conditions pursuant to Rule 2-201(4)(b) or to refuse to approve a change in control pursuant to Rule 2-201(4)(c), the applicant shall be:

(a) provided with a statement of the grounds upon which the Exchange proposes to approve the change in control subject to terms and conditions or to refuse to approve the change in control with the particulars of those grounds.

(b) Repealed (September 4, 2014).

DIVISION 3 – CONTINUING QUALIFICATIONS

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(1) If a Participating Organization ceases to be a member of a recognized self-regulatory organization, its status with the Exchange shall be terminated automatically.

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conditions on the Participating Organization as the Exchange deems appropriate in the circumstances, including suspension and termination of its status.

2-304 Notifications

(1) A Participating Organization shall give the Exchange prior written notice of:

(a) a change in its name or the name under which it carries on business; and

(b) a change in the address of its head office.

(2) A Participating Organization shall give the Exchange prompt written notice of:

(a) securities of it or its holding company being held contrary to the provisions of Division 2 of this Part;

(b) the death, retirement, resignation or termination of employment or association of a partner, director or officer of the Participating Organization or its holding company;

(c) any non-compliance with the provisions of Division 3 of this Part as they apply to the Participating Organization, its directors, shareholders, officers and employees;

(d) any non-compliance with the requirements of a recognized self-regulatory organization of which the Participating Organization is a member; and

(e) a termination or suspension of the Participation Organization's status as a member of a recognized self-regulatory organization.

DIVISION 6 SUSPENSION AND TERMINATION

2-602 Termination

(1) A Participating Organization may terminate its status as such by giving not less than 3 months' written notice to the Exchange.

(2) The Exchange may postpone the effective date of termination until it is satisfied that the Participating Organization has:

(a) complied with Exchange Requirements; and

(b) obtained the necessary consents from the recognized self-regulatory organization of which it is a member.

(3) The Exchange may terminate a Participating Organization's status as a Participating Organization, if it determines that a Participating Organization has:

(a) contravened or is not in compliance with an Exchange Requirement; or

(b) engaged in conduct, business or affairs that is unbecoming, inconsistent with just and equitable principles of trade or detrimental to the interests of the Exchange or the public.

PART 7– APPEAL PROCEDURE

7-101 Appeal Right

(1) A Participating Organization may appeal a decision of the Exchange within 30 days from the date of such decision, by submitting a request in writing.

(2) The Participating Organization must make written submissions in support of an appeal under this section.

(3) The matter will be considered by a minimum of one and a maximum of three senior officer(s) of the Exchange who were not participants in making the original decision, as determined by the Exchange. The senior officer(s) may uphold the original decision or may render a new decision.

(4) If after being heard, the Participating Organization remains dissatisfied with the decision, the Participating Organization may, within 30 calendar days of the appeal decision by the senior officers of the Exchange, appeal the decision to a

three-person panel of the Exchange's Board of Directors Participating Organizations must request the appeal in writing and make written submissions in support of an appeal to the Exchange's Board of Directors.

13.2.2 Canadian Securities Exchange – Notice 2014-005 – Notice & Request for Comments – Changes To Odd Lot Matching

CANADIAN SECURITIES EXCHANGE – NOTICE 2014-005
NOTICE & REQUEST FOR COMMENTS
CHANGES TO ODD LOT MATCHING

September 4, 2014

The Canadian Securities Exchange (the "CSE" or the "Exchange") is proposing changes to the matching algorithm for orders less than a Standard Trading Unit (i.e., odd lots) that would result in odd lots trading any-part rather than all-or-none. The proposed change would be introduced along with the previously announced amendments to Rule 4 that provide for the Guaranteed Fill functionality for client orders and automatic execution for odd lot orders against Market Makers. The Exchange is publishing this Notice in accordance with the process for the Review and Approval of Rules and the Information Contained in Form 21-101F1 and the Exhibits Thereto attached as Appendix B to the Exchange's recognition order.

Comments may be provided no later than October 6, 2014 and should be addressed to:

Mark Faulkner
Vice President, Listings and Regulation
CNSX Markets Inc.
220 Bay Street, 9th Floor
Toronto, ON, M5J 2W4
Fax: 416.572.4160
Email: Mark.Faulkner@thecse.com

A copy should be provided to:

Susan Greenglass
Director, Market Regulation
Ontario Securities Commission
22nd Floor
20 Queen Street West
Toronto, ON, M5H 3S8
Fax: 416.595.8940
Email: Marketregulation@osc.gov.on.ca

Terms not defined in this Notice are defined in the CNSX Rules.

Description of the Changes

Odd Lot orders are orders for a volume less than a Standard Trading Unit (UMIR) or "boardlot" (CSE) and are considered Special Terms Orders. In the CSE trading engine odd lots are currently matched on an all-or-none basis, and may trade outside the context of the current bid/ask. The Exchange is proposing to change the matching algorithm to allow odd lots to trade on an "any-part" basis, subject to price and time priority. Due to the all-or-none nature of Fill-or-kill orders, odd lots designated as FOK would no longer be accepted.

Incoming odd lots will match with any odd lot orders in the book. For securities with a Market Maker, the incoming order will trade with any booked odd lot orders at a price better or equal to the existing bid/ask. Any balance will then be filled automatically by the Market Maker. For securities without a Market Maker, incoming odd lot orders will match with any orders in the book, based on the price/time priority.

Expected Implementation Date: The change will be implemented with the introduction of the Guaranteed Fill facility, anticipated on or about October 24, 2014.

Rationale and Analysis

On July 25, 2014, the Ontario Securities Commission approved the proposed amendments to Rule 4 to facilitate the introduction of the Guaranteed Fill facility and odd lot automatic execution against a Market Maker. By implementing this significant change our dealers will benefit from better-priced and timelier odd lot trading, easing the burden associated with this type of trading and providing better fills for retail clients attempting to trade odd and mixed lots. For securities without a Market Maker, however, the existing all-or-none matching would result in a disparity in the treatment of odd lot orders. The adoption of any-part trading for odd lots will reduce the disparity and improve the quality of fills on all securities, with or without Market Makers.

Expected Impact

None of the changes should introduce any additional costs to dealers. The change to the odd lot matching algorithm should result in improved fill quality on both odd lot only and mixed lot trades. As with any order that trades against multiple orders or at multiple prices, there is the potential for additional administrative charges, With this change, odd lot orders will have the potential to interact with more orders, which could result in an increased number of trades and in turn result in a slight increase in ticket costs. The potential to interact with more orders, however, also provides significantly better opportunity for fills for odd lot orders.

Compliance with Ontario Securities Law

There will be no impact on the Exchange's compliance with Ontario securities law. The changes do not alter any requirements for fair access and if anything, further assist with the maintenance of fair and orderly markets.

Consultation

It is the opinion of some Dealers that this change to odd lot matching engine was fairly minor and should be made. The most significant feedback provided described engine performance as a top priority. Odd lot trading has been and continues to be a significant part of the trading business, so it must be accommodated. CSE dealers recognize the potential for an increased number of trades which may result in a slight increase in ticket costs, which comes with the opportunity of better odd lot executions.

Technology Changes

For CSE Dealers and technology vendors this modification will be minor. The bulk of the expense with respect to technology would be the responsibility of the CSE. The expectation is that no changes will be required with respect to order entry or routing.

Other Markets or Jurisdictions

Marketplaces generally offer either trade any part or all or none. Currently both matching algorithms exist in Canadian market structure.

Questions

Questions or comments about this notice or the amendments to Rule 4 may be directed to:

Mark Faulkner
Vice President, Listings & Regulation
416.367.7341 or Mark.Faulkner@thecse.com

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