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Commission des valeurs mobilières de l'Ontario
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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF
PAUL DONALD

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

Hearing:	March 21 to 25, 2011 March 28 to 30, 2011 April 7, 2011	
Decision:	August 1, 2012	
Panel:	Christopher Portner Paulette L. Kennedy	- Commissioner and Chair of the Panel - Commissioner
Appearances:	Cullen Price Amanda Heydon	- For Staff of the Commission
	Joseph Groia Kevin Richard	- for Paul Donald

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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 May 20, 2010 in relation to a Statement of Allegations issued by Staff of the Commission ("**Staff**") with respect to Paul Donald ("**Donald**") on the same date.

[2] Staff alleges that Donald purchased securities of Certicom Corp. ("**Certicom**") in August and September 2008 while he was a person in a special relationship with Certicom and while he had knowledge of material facts with respect to Certicom that had not been generally disclosed, contrary to subsection 76(1) of the Act.

[3] In 2008, Certicom was a provider of cryptography used by software vendors and wireless device manufacturers, including Research in Motion ("**RIM**"), to provide security in their products. Certicom's technology was based on elliptical curve cryptography ("**ECC**") which provides the most security per bit of any known public-key security technology. Devices using ECC require less storage, power, memory and bandwidth than other technologies. Consequently, the use of ECC technology in hand-held communication devices is important as it provides a high level of security. Prior to its acquisition by RIM in 2009, Certicom was a reporting issuer in Ontario and its common shares were listed on the Toronto Stock Exchange (the "**TSX**"). As of July 14, 2008, Certicom had a market capitalization of $69,449,338.

[4] RIM is a designer, manufacturer and marketer of wireless devices for the mobile communications market. In 2008, RIM incorporated Certicom's ECC technology in its mobile products, notably its BlackBerry devices. RIM has its head office in Waterloo, Ontario and its common shares are listed on the TSX and the NASDAQ Stock Market. As of May 30, 2008, RIM had a market capitalization of $77,556,637,669 and had $984,217,000 in cash and cash equivalents on hand.

[5] Donald commenced working at RIM in May 1999 and held a number of positions over the course of his employment with RIM, which ended in March 2009. During the relevant period of time, Donald was RIM's Vice President for Code Division Multiple Access ("**CDMA**"). In this position, Donald managed RIM's relationships with telecom carriers that used CDMA technology in connection with the sale of RIM's BlackBerry devices in Canada, the United States (the "**U.S.**") and Latin America.

[6] On August 20, 2008, RIM hosted a golf tournament and dinner for its executives (the "**2008 RIM Golf Event**") at the Redtail Golf Course, a private golf course in Port Stanley, Ontario ("**Redtail**"). Following a day of golf, a private dinner was served in Redtail's dining room. During the dinner, Donald had a conversation regarding Certicom with Chris Wormald, RIM's Vice President of Strategic Alliances ("**Wormald**"), one of the other RIM officers who

were seated at the same table. Staff alleges that during this conversation, Donald became aware of material facts relating to Certicom that had not been generally disclosed.

[7] On the following day, August 21, 2008, Donald instructed his broker to purchase $300,000 worth of Certicom shares at a price not to exceed $1.55 per share. Between August 21, 2008 and September 15, 2008, Donald acquired 200,000 shares of Certicom through his broker at a total cost of $305,000.

[8] On December 3, 2008, RIM announced its intention to make an offer to acquire all of Certicom's shares at a price of $1.50 per share. Following a number of intervening events, on February 10, 2009, Certicom announced that it had entered into an arrangement agreement with RIM pursuant to which RIM would acquire all of Certicom's common shares at a price of $3.00 per share. On March 26, 2009, following the implementation of RIM's plan of arrangement, Donald received the proceeds of the sale of his Certicom shares in the amount of $600,000.

[9] This hearing was held on nine days between March 21, 2011 and April 7, 2011. Donald was represented by counsel at the hearing and attended the hearing in person every day.

B. The Allegations

[10] Staff alleges that, at the time of his purchases of Certicom shares, Donald was in a special relationship with Certicom because:

(a) He learned of material facts with respect to Certicom that had not been generally disclosed while he was an insider, officer and employee of RIM, at a time when RIM was a company:

(i) proposing to make a take-over bid for Certicom;

(ii) proposing to become a party to a reorganization, amalgamation, merger or arrangement or similar business combination with Certicom; and/or

(iii) engaging in business with Certicom; and

(b) He learned of material facts with respect to Certicom from Wormald, who was in a special relationship with Certicom, in circumstances where Donald knew or ought reasonably to have known that Wormald was a person in such a relationship.

[11] Staff alleges that, at the time of his purchases of Certicom shares, Donald had knowledge of material facts relating to Certicom that had not been generally disclosed. More specifically, the material facts of which Staff alleges Donald had knowledge were that:

(a) RIM had been in confidential discussions with Certicom relating to a potential acquisition of Certicom by RIM;

(b) RIM was in talks with Scott Vanstone ("**Vanstone**"), Certicom's founder and a former Chief Executive Officer ("**CEO**") and a member of Certicom's board of directors;

(c) RIM had a continuing interest in the acquisition of Certicom; and

(d) Donald understood from Wormald that Certicom's then current share price was dramatically undervalued based on Certicom's licensing agreements;

(collectively, the "**Four Facts**").

[12] Staff alleges that Donald purchased securities of Certicom while in a special relationship with Certicom and with knowledge of material facts about Certicom that had not been generally disclosed, contrary to subsection 76(1) of the Act.

[13] Further, and in any event, Staff alleges that, by purchasing securities of Certicom in the circumstances, Donald acted contrary to the public interest.

C. The Respondent, Paul Donald

[14] Donald joined RIM in May 1999 as a Channel Manager for its operations in the U.S. He was subsequently asked to head RIM's Independent Software Vendors ("**ISV**") Alliances program, working with smaller software companies to create solutions for the BlackBerry device that extended its utility beyond e-mail, contacts and calendar functions. In 2000, Donald was promoted to Vice President, ISV Alliances. In this capacity, Donald established RIM's CDMA business.[1] From 2003 to early 2005, CDMA had become a dominant business for RIM in North America, and Donald focused exclusively on CDMA from that point until he left RIM on March 3, 2009.

[15] Prior to joining RIM, Donald had experience with two other software companies. Donald, who had worked as an electrician, founded Current Network Technologies, a company that supplied Canadian chartered banks with custom computers and managed their networks in the late 1980s. In 1994, Donald started PeerDirect Corporation ("**PeerDirect**"), a company that worked in the field of secure data transmission. Donald was the CEO of PeerDirect from 1994 until he joined RIM in May 1999.

[16] From 1994 to 1999, while he was with PeerDirect, Donald worked closely with Certicom as PeerDirect was a user of Certicom's technology. Donald worked with Certicom's then-CEO, Phil Deck ("**Deck**"), at the time PeerDirect first employed Certicom's technology in its products. Donald worked less closely with Deck once PeerDirect established a purely licensing arrangement with Certicom.

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[1] Donald explained CDMA and his role in developing RIM's CDMA business in his testimony:

"… [CDMA] is an acronym for a technology that Qualcomm in the U.S. – it's a North American standard for wireless operators. Best way for me to describe it is Bell and Telus, up until about two years ago, were CDMA operators, and Rogers was a GSM operator.

So those are the two dominant standards globally and still until this day are. So at this stage, Verizon and Sprint are CDMA operators, and AT&T and T-Mobile are GSM operators. So I established and built out our CDMA business, which was establishing relationships with the number 1 CDMA operator globally, which was Verizon wireless.

I then established relationships with Sprint, Bell Mobility, and Telus, U.S. Cellular, Cellular South. And eventually, that grew to be a multi-billion-dollar business for RIM. And I started that in 2003." (Hearing Transcript, March 28, 2011 at page 46, line 19 to page 47, line 11)

D. Overview of the Evidence

(a) Witness Testimony

[17] We heard from nine witnesses at the hearing as described below.

[18] The following is a brief summary of the background and testimony of five RIM employees who testified on behalf of Staff:

(a) Wormald, RIM's Vice President of Strategic Alliances, and the alleged source of the material facts Donald possessed when he purchased Certicom securities. Wormald testified about the investigatory work relating to Certicom undertaken by RIM's Strategic Alliances group, for which he was responsible (the "**Strategic Alliances Group**"), and his recollection of his discussion with Donald at the 2008 RIM Golf Event.

(b) Herb Little ("**Little**"), RIM's Director of Handheld Application Prototypes, who had previously been RIM's Director of BlackBerry Security. Little's testimony included information regarding Certicom's ECC technology and its importance and value to RIM.

(c) Alex McCallum ("**McCallum**"), RIM's Director of the ISV Alliances program. During the relevant time, McCallum, who was then a Manager in the Strategic Alliances Group reporting to Wormald, was responsible for conducting the due diligence relating to Certicom prior to RIM's eventual bid for Certicom's shares in December 2008.

(d) James Belcher ("**Belcher**"), a Manager in the Strategic Alliances Group, who joined RIM on July 14, 2008. Belcher's role was to look for companies with which RIM could partner to help fill resource gaps in its technology through licensing, investments or mergers and acquisitions activity. Belcher joined McCallum in the review of Certicom on his arrival at RIM. Prior to joining RIM, Belcher worked as a Chartered Accountant at KPMG LLP.

(e) James Yersh ("**Yersh**"), RIM's Vice President and Controller. In that role, and in his role as Senior Vice President and Controller at the time of the hearing, Yersh had accountability for RIM's accounting and oversight of its financial reporting, Sarbanes-Oxley compliance program and certain aspects of its risk management programs, including insurance. Yersh was seated at the same table at the 2008 RIM Golf Event as Donald and Wormald.

[19] Kasei Hinsperger ("**Hinsperger**"), an investment advisor with BMO Nesbitt Burns in Waterloo, Ontario, also testified for Staff. Hinsperger had acted as Donald's investment advisor since 2001 or 2002. Donald instructed Hinsperger to purchase shares of Certicom on August 21, 2008.

[20] Karna Gupta ("**Gupta**"), who was called as a witness by Donald, was the CEO of Certicom from January 2008 to June 2009.

[21] Dr. Robert Comment ("**Dr. Comment**") testified as an expert witness on behalf of Donald. Dr. Comment is a financial economist and a faculty member of the Johns Hopkins University Carey School of Business. Dr. Comment testified and provided a report in the form of an affidavit in which he expressed his opinion as to the materiality of the Four Facts.

[22] Donald also testified on his own behalf.

(b) Documentary Evidence

[23] In addition to the testimony of the witnesses, we also rely on documentary evidence introduced during the hearing, some of which, including a number of e-mail messages, was hearsay evidence.

[24] Subsection 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**"), which governs the procedure of a Commission hearing, permits us to rely on evidence, including hearsay evidence, that may not be otherwise admissible in a court.

[25] The parties also filed a brief Statement of Agreed Facts at the commencement of the hearing.

(c) Expert Evidence

[26] We admitted the testimony of Donald's expert witness, Dr. Comment, who also provided an affidavit setting out his opinion with respect to the materiality of the information concerning Certicom that was provided to Donald at the 2008 RIM Golf Event. We note that Staff did not object to Dr. Comment giving evidence at the hearing, but noted that it was Staff's view that evidence from an expert on the issue of materiality was not required in the circumstances. We agree with Staff's view in this regard.

[27] Dr. Comment is an expert in the field of financial economics, which he describes as being concerned with investor preferences and market prices:

> Financial economics differs from economics I would say principally in that we don't worry too much about supply and demand curves intersecting to give us a price for in financial economics the price is based on information. So a stock price would reflect the information about future prospects of the company or the price of a bond would reflect information about the likelihood that the coupon and interest and principal would be paid.
>
> (Hearing Transcript, March 30, 2011 at page 10, lines 1 to 9)

[28] The Commission is a tribunal that is comprised of members with specialized expertise. Although we considered the expert evidence of Dr. Comment, we note that, as the Panel hearing this matter, we are responsible for the ultimate determination of materiality in this case. As has been previously stated by the Commission:

> Ultimately, materiality is a question of mixed fact and law that falls squarely within the specialized expertise of the Commission. It is for us to determine

> whether the statements made by Biovail were, in a material respect and at the time and in the light of the circumstances under which they were made, misleading or untrue.
>
> (*Re Biovail Corp.* (2010), 33 O.S.C.B. 8914 ("***Biovail***") at para. 213)

[29] As materiality is a question of mixed fact and law to be assessed by the Panel, we must determine, based on the evidence before us, whether Donald had knowledge of a material fact or facts that had not been generally disclosed when he purchased shares of Certicom in August and September 2008. While we admitted Dr. Comment's evidence at the hearing, we did so based on his expertise as a financial economist. We give no weight to his opinion as to the materiality of the Four Facts, which is a question to be decided by the Panel. We did not admit Dr. Comment's evidence with respect to the ultimate issue of materiality, but, erring on the side of caution, we allowed his testimony on the basis that his expert evidence with respect to share price from a financial economist's perspective might be of assistance.

II. PRELIMINARY ISSUES

A. The Standard of Proof

[30] The standard of proof applicable in the hearing is as described by the Supreme Court of Canada in *F.H. v. McDougall*, [2008] 3 S.C.R. 41 ("***McDougall***"). The Court held in *McDougall* that there is one standard of proof in civil proceedings, namely, proof on a balance of probabilities, and that the requirement for evidence that is "clear, convincing and cogent" does not elevate this standard of proof beyond a balance of probabilities:

> … 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 improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.
>
> (*McDougall, supra* at para. 40)

[31] The Supreme Court reaffirmed that "the evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall, supra* at para. 46).

B. The Admissibility of Evidence

[32] During the hearing, we heard submissions from the parties on the admissibility of the transcripts of Donald's compelled examination by Staff and of other documentary evidence.

[33] Under subsection 15(1) of the SPPA, which is set out below, we have the discretion to admit evidence that may otherwise be inadmissible as evidence in a court:

> 15. (1) Subject to subsections (2) and (3), 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.

[34] Staff requested that they be permitted to read excerpts of the transcript of their compelled examination of Donald into the record of the hearing. We determined that as Donald intended to testify on his own behalf, his direct testimony would provide us with the best evidence. We therefore decided that Staff would not be permitted to read in excerpts of their compelled examination of Donald, with the exception that Donald's prior evidence given under oath could be used in cross-examination to impeach his testimony. We also decided that, in the event that Donald chose not to testify, it would be open to Staff to read-in excerpts of the transcript of his compelled examination. Donald did testify as a witness on his own behalf, and Staff did not read-in excerpts from his examination transcript, other than during their cross-examination of Donald.

III. THE 2008 RIM GOLF EVENT AND DONALD'S PURCHASES OF CERTICOM SHARES

A. The 2008 RIM Golf Event

[35] On August 20, 2008, RIM held its annual golf and dinner event for its executives at Redtail. After a day of golf, the 50 to 60 RIM executives in attendance were served dinner in Redtail's dining room. As RIM rented the entire Redtail facility, no club members were in attendance and the only people at Redtail that day who were not RIM employees were employees of Redtail. According to Wormald's testimony, there were no more than a dozen clubhouse staff working at the dinner on August 20, 2008.

[36] At about 6:30 that evening, following the golf and prior to the dinner, Donald and other attendees mingled and had drinks on the patio of the clubhouse. Yersh was introduced to Wormald by Brian Bidulka ("**Bidulka**"), who was RIM's Chief Accounting Officer in 2008 and was the Chief Financial Officer of RIM at the time of the hearing in this matter. Bidulka introduced Wormald as the person with whom Yersh would be dealing when RIM was pursuing acquisitions of other companies, and the three of them discussed past RIM acquisitions as well as Yersh's background in that area. About 15 minutes into their conversation, Donald joined the group on the patio and was introduced to Yersh. It appears from the testimony that Donald and Wormald had previously met at one or more earlier meetings of RIM's Vice Presidents.

[37] Donald testified that he and two others were the last to leave the patio before going inside for dinner at approximately 7:00 p.m. Donald was invited to take a seat beside Bidulka with whom he had golfed earlier in the day. Although there is some uncertainty as to the seating arrangements at dinner that night, it appears that among the other diners at their table were Wormald, Yersh, David Yach ("**Yach**") (Vice President, Software), Roger Witteveen (Vice

President, Taxation) and Ray Dikun (Vice President, Products). It appears from Donald's and Yersh's testimony, that Donald sat between Bidulka and Yersh and that Yersh sat across the table from Wormald. The dinner began at 7:15 or 7:30 p.m. and was served by Redtail staff who also served wine throughout the evening. Donald testified that the RIM executives left Redtail after dinner by bus at approximately 10:00 p.m. and arrived back at RIM's offices at approximately 11:30 p.m.

[38] Wormald, Yersh and Donald testified that the 2008 RIM Golf Event could be characterized as more of a social event amongst colleagues than a formal business meeting. However, some RIM business was discussed during the course of the day. Donald testified that in the four years that he attended this annual event, he was never once engaged in confidential discussions. He testified that: "It was a day to put business aside, relax, and enjoy each other's company" (Hearing Transcript, March 28, 2011 at page 25, lines 12-13). Wormald described the event as being:

> … just a fun, relaxed, enjoyable tradition-type day. You know, a chance to get out and play and enjoy a game of golf with some colleagues on a really beautiful golf course. And the dinner following really just continued that social environment of the day … as an informal discussion and mingling type social opportunity.
>
> (Hearing Transcript, March 21, 2011 at page 107, lines 16 to 24)

[39] During the dinner, RIM's Co-CEO, Jim Balsillie ("**Balsillie**"), 'roasted' at least one of the people in attendance. Conversations during the cocktail and dinner portions of the event were generally about subjects such as friends and family, and were not business discussions of a serious nature.

(a) Wormald's Version of the Certicom Discussion

[40] During the dinner, Wormald and Donald had a discussion in which the topic of Certicom arose. Wormald testified that he had two general conversations with Donald at dinner, one about marathon training (as they were both runners), and the other about Certicom. Wormald's version of the discussion is that Certicom came up in the context of a "what are you working on" type of conversation. Wormald testified:

> … my recollection of it is that I indicated we had some talks with their [Certicom's] management team about buying them and that there was frustration on our side over a lack of progress. They were on their – at that point in time, they were on their third CEO, so I likely made reference to the fact that they are a company in transition. They don't know what they want to be when they grow up, but we've – you know, we've expressed an interest in acquiring them and are really, you know, the key word I would use is frustrated, had been frustrated in our attempts to have a meaningful dialogue with Certicom.
>
> (Hearing Transcript, March 21, 2011 at page 111, lines 4 to 15)

[41] Wormald recalled that Donald knew more about Certicom than Wormald would have expected from someone in Donald's position, and that Donald suggested that Wormald get in

touch with Deck, Certicom's former CEO whom he knew from his previous employment with PeerDirect, who might be able to help RIM in its attempts to work through its frustration with the status of discussions with Certicom at that time. Wormald estimated that their discussion about Certicom lasted about four or five minutes, but, at the time of the hearing, he did not recall all of the specifics of what was discussed:

> I know we talked about Certicom. I know we talked about Phil Deck. I know we talked about being frustrated about – I know I talked about being frustrated about sort of the current status and I know that Mr. Donald indicated more knowledge about Certicom than I expected him to have. So beyond those things, I don't – I can't get much more specific than that.
>
> (Hearing Transcript, March 22, 2011 at page 172, lines 17 to 24)

(b) Donald's Version of the Certicom Discussion

[42] Donald testified that, shortly after he sat down to dinner, he started a conversation with Yach, asking him about running, which they both had in common. Donald testified that Wormald joined this discussion and mentioned that he had recently become interested in running and was training as well. According to Donald, this conversation about running and training led to other discussions around the table, including a discussion of then current market conditions. This topic of conversation then led to a discussion of undervalued companies:

> And from the tech sector, the market had come down quite a ways by then. Little did I [Donald] know that was only the start of the great recession. But there was a discussion around the markets. And then the discussion moved to undervalued companies.
>
> And within the context of undervalued companies, I brought up the company that I felt was a good value, and that some might know around the table called Sandvine, which was a Waterloo-based technology firm.
>
> (Hearing Transcript, March 28, 2011 at page 14, lines 9 to 18)

Donald estimated that he talked about Sandvine for about four or five minutes. Wormald and Yersh, however, did not recall that Sandvine was a topic of conversation at dinner that evening.

[43] Donald testified that, after his discussion about Sandvine, Wormald brought up Certicom as another company he thought was undervalued at that time:

> After I spoke about Sandvine, Chris Wormald brought up Certicom as a company he felt was undervalued. <u>And he stated – or he said – best of my recollection was that he felt that Certicom was worth about $5 per share. I said, wow, interesting. I know Certicom quite well.</u>
>
> In fact, in my previous company before coming to Research in Motion, my company was PeerDirect. I had a lot of dealings with Certicom. In fact, we were an early licensee of their ECC library. ...

...

> So to make a long story short, I gave Chris a bit of a background of my knowledge of Certicom and acknowledged that they had very valuable technology. And Chris, from that, went on to say that RIM had been interested in acquiring Certicom but that Certicom's board was not interested in engaging in any acquisition talks.
>
> He had also mentioned that he had kept a dialogue open with Mr. Vanstone, Mr. Scott Vanstone. And from that, I said, well, I know Phil Deck. So if you're interested in talking with Phil Deck, let me know. I can give you his contact information. [Emphasis added.]
>
> (Hearing Transcript, March 28, 2011 at page 15, line 24 to page 17, line 20)

[44] During his examination by Staff on June 22, 2009, Donald told Staff that Wormald stated that he felt that Certicom shares would be worth $5.00 per share based on their patents and licence agreements and how important the Company was to any technology providers that required security. In Donald's recollection at the time of his testimony, what stood out to him about Certicom's value was that Wormald thought Certicom's shares were worth $5.00 per share. Wormald told Donald that RIM had been in acquisition discussions with Certicom, and Donald testified that he made the assumption that RIM was still somewhat interested in acquiring Certicom. In his examination by Staff, Donald allowed that, although he did not remember a specific discussion of another company being interested in Certicom, there might have also been a comment that VeriSign, Inc. ("**VeriSign**") or IBM would have been a better partner for Certicom than RIM.

[45] Donald testified that he understood that Wormald was talking with Vanstone, but he did not know that RIM was in discussions with Vanstone.

[46] Donald estimated that his conversation with Wormald about Certicom lasted about four to five minutes, and that he did not discuss the details of the Certicom technology with which he was familiar from his work at PeerDirect:

> Because he's [Wormald's] knowledgeable or I assume that he was knowledgeable, I didn't go into the explanations of ECC or data replication. I just merely stated or talked about that we had used the technology, that we had helped to fine tune their ECC library based on our implementation, and that Certicom's security and their IP [intellectual property] was very valuable. And it was valuable in 1996 and is even more valuable today.
>
> (Hearing Transcript, March 28, 2011 at page 18, lines 8 to 15)

[47] Donald further described his conversation with Wormald regarding Certicom as follows:

> From my discussion with Mr. Wormald, I remember that he had mentioned that RIM had been interested in talking with Certicom about acquiring them. The Certicom board was not interested in acquisition talks. That Mr. Vanstone and

> Chris [Wormald] were still talking or had a dialogue. I don't know the details of that content.
>
> I had talked about my previous knowledge of Certicom. I had mentioned that I knew Phil Deck and that I would be more than happy to put him into contact with Mr. Wormald.
>
> And this is something that I regularly offered up. Any contacts that I had, I made them available to anybody inside of RIM if it could be of assistance. So I was known for having a hand in a lot of different matters and always opening up my contacts to help others. [Emphasis added.]
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> (Hearing Transcript, March 28, 2011 at page 22, line 25 to page 23, line 16)

(c) Yersh's Version of the Certicom Discussion

[48] Yersh, who sat beside Donald and across the table from Wormald at the dinner on August 20, 2008, also testified with respect to his recollection of Donald and Wormald's discussion about Certicom that evening. He testified that the topic arose when Donald asked Wormald what he was working on. Wormald listed a number of projects that he was working on, including Certicom and another acquisition that RIM completed, namely, Alt-N Technologies. Yersh testified that, during this discussion, Wormald gave an overview of the history of "discussions of strategic partnerships or acquisition-type discussions" between RIM and Certicom, and described the status of discussions at that time being "quiet or stalled". Yersh understood that Certicom was already part of RIM's ISV program[2], and that a "strategic partnership" could occur with Certicom moving to a different status within the ISV program or with RIM signing an additional licence agreement with Certicom to use its technology. However, as of August 20, 2008, Yersh was not aware that Wormald's team was looking at additional licence arrangements with Certicom, and Yersh did not recall this topic coming up in discussions over dinner that evening.

[49] Yersh recalled that Wormald mentioned that he was speaking to Certicom's CEO at the time and mentioned Vanstone, Certicom's founder and a former CEO. Yersh also recalled that Donald mentioned another former Certicom CEO who could potentially help Wormald in the discussions.

[50] Yersh testified that Donald and Wormald also talked about the general trend in Certicom's share price, which Yersh characterized as being lower than it had been historically. Yersh also testified that this general trend in Certicom's share price was mentioned as one of the reasons RIM would be interested in pursuing an acquisition or strategic partnership at that time. Yersh recalled some discussion of the potential use of Certicom's ECC technology.

[51] Yersh estimated that the conversation regarding Certicom began about 20 to 30 minutes after they sat down at the table and lasted five to 10 minutes.

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[2] Yersh described his understanding of the ISV (independent software venders) program in his testimony: "It's kind of where RIM affords resources to companies to integrate their products into the BlackBerry or BlackBerry solution" (Hearing Transcript, March 25, 2011 at page 139, lines 5 to 10).

[52] In addition to their discussion about Certicom, Yersh recalled that Donald and Wormald discussed Donald's role within RIM, which included his responsibility for a portfolio of carriers based on CDMA technology, how long Donald had been at RIM and his portfolio of customers, including Sprint.

(d) Finding

[53] It is clear from the evidence that Wormald communicated to Donald that (i) RIM was interested in acquiring Certicom; (ii) Certicom was not at the time demonstrating any interest in dealing with RIM; (iii) Wormald had been speaking to Vanstone; and (iv) Wormald thought that Certicom's share price was undervalued based on its licence agreements. It is also clear from Donald's evidence that Wormald told him that Certicom's shares were worth approximately $5.00 per share, which we note was more than three times the price at which the shares were trading at the time.

B. Donald's Purchases of Certicom Shares

[54] Donald had an understanding of Certicom's ECC technology, and generally how it was implemented by RIM and other companies, prior to his conversation with Wormald at the 2008 RIM Golf Event. Donald had worked with Certicom closely in his previous capacity with PeerDirect and was familiar with ECC technology:

> … we worked very closely, their engineers and my engineers, to hone their ECC library to fit our application.
>
> And Phil Deck and I had several discussions, who was the CEO of Certicom at the time – we had several discussions about how tough it was being a middleware company because your product is built into somebody else's product. And now, you're fully reliant upon their success of selling their whole product. It was a challenging environment.
>
> (Hearing Transcript, March 28, 2011 at page 16, line 24 to page 17, line 8)

[55] Donald also testified that he met Deck for lunch in 2006, at which time the two of them discussed Certicom and ECC technology:

> … we talked about Certicom and talked about the previous management in Certicom and how he certainly wasn't happy with the then CEO and his performance.
>
> And just talked about where ECC technology was going. It was interesting that nearly ten years later, <u>he was still of the opinion, and I was still of the opinion that ECC was the future of security when it comes to computers and wireless</u>. [Emphasis added.]
>
> (Hearing Transcript, March 28, 2011 at page 19, line 23 to page 20, line 14)

[56] According to Donald, his discussion with Wormald on August 20, 2008 reminded him of Certicom but did not form the basis for his decision to place an order to purchase Certicom shares the following day. However, during their cross-examination of Donald, Staff referred him to an answer that he gave during his compelled examination by Staff during their investigation, in which Donald stated:

> At the time I bought Certicom, I was sitting on a fair bit of cash, and I had been pressuring my broker to look for investments to invest in. The market had, I felt – had come down a fair ways. I know as much as it ended up coming down. And it looked like a good investment based on a discussion I had with a gentleman, Chris Wormald. [Emphasis added.]
>
> (Donald's Examination by Staff, June 22, 2009 in Hearing Transcript, March 28, 2011 at page 130, lines 16 to 22)

[57] Donald testified that, on August 21, 2008, the day following the 2008 RIM Golf Event, he got up as usual at 6:00 or 6:30 a.m. and caught up on the previous day's market activities. Donald looked through any news stories on the stocks he owned and looked at other stocks he was following at the time, and noted that the markets were quite volatile.

[58] Donald testified that, after his usual review of market activities, he researched Certicom on-line for one or one-and-a-half hours. Donald testified that he began by looking at Certicom's one and two-year trading histories and looked to see what drove Certicom's stock price:

> If the stock price was going up prior to the company's earnings announcement, then my assumption was this is just speculation, that people are saying its going to be a good earnings call, and I sort of wipe that out and draw a trend line, removing the anomalies.
>
> And from that trend line I drew, the price – current price was around $1.50, which it had been trading at that price the morning I looked, somewhere in the $1.50 range. And having knowledge of Certicom, it was sort of, wow, this company was trading at $100 back in 2000. Their technology is more relevant today than it was then. It was just a big surprise. And I had known it was cheap, but I didn't know it was $1.50.
>
> (Hearing Transcript, March 28, 2011 at page 28, lines 3 to 16).

[59] Donald testified that he then looked through Certicom's press releases, including the press release announcing Gupta as its new CEO. Donald noted that Gupta had come from Comverse, a company he knew well, and was an accomplished individual, well-suited to help monetize Certicom's technology.

[60] Donald further testified that he read Certicom's year-end financial report, which was published in June 2008. Donald noted that Certicom had $38 million in cash on hand and that its market capitalization was only $65 million. Donald expressed his surprise as follows:

> And I found it totally absurd that the company, its IP [intellectual property], and all of its people were only worth around [$]26, $27-million. That was absurd. In the acquisition world, a proper acquisition is probably around at least $1-million to $2-million per person when you have the IP and technology of a company like Certicom. And it was trading at a fraction of that. My assumption would be the company was worth $100-million at a minimum.
>
> (Hearing Transcript, March 28, 2011 at page 29, lines 9 to 17)

[61] Donald noted that, at the time, Certicom was making good progress on two key areas of interest to him. First, it was making excellent progress on its wireless base, an area Donald testified he knew "inside and out". Second, Donald testified that he noted that Certicom was making good progress in smart metering, which Donald explained was the use of wireless technology to transmit data from electrical meters to manage electrical consumption by using electricity in off-peak hours.

[62] Donald did not print copies of any of the materials that he testified to having reviewed on the morning of August 21, 2008 and, accordingly, no such materials were introduced in evidence. Donald did, however, introduce in evidence print-outs of the Yahoo! Finance web pages and the Certicom press releases that he testified to having reviewed on the morning of August 21, 2008, however, such pages were printed on much later dates.

[63] Donald testified that, following this research, he concluded that Certicom was a dramatically undervalued company. Donald called his broker, Hinsperger, at approximately 9:00 a.m. and instructed him to purchase $300,000 worth of Certicom shares at a price of no more than $1.50 per share. After a discussion about Certicom shares being thinly traded, Donald agreed to Hinsperger's suggestion that he move the upper purchase price limit to $1.55 per share. Donald estimated that the telephone conversation with Hinsperger lasted one or two minutes.

[64] Hinsperger testified that he placed a "good-'til-cancelled" order to purchase Certicom shares at prices no higher than $1.55 per share. Donald's purchase order for Certicom shares was filled by September 15, 2008, at which point Donald had purchased 200,000 Certicom shares at a total cost of $305,000.

IV. REVIEW OF THE RELATIONSHIP BETWEEN RIM AND CERTICOM

(a) Prior to August 20, 2008

[65] RIM began licensing Certicom's ECC technology in May 2000. Beginning in February 2002, RIM and Certicom signed a series of non-disclosure agreements in the ordinary course of RIM's business with Certicom.

[66] In February 2007, Balsillie and Mike Lazaridis ("**Lazaridis**"), RIM's President and Co-CEO, met with Vanstone and Ian McKinnon, Certicom's CEO at the time, who had requested the

meeting for the purpose of proposing that RIM purchase Certicom. After the meeting, Wormald told the Senior Director, Corporate Operations, to whom he reported, that Balsillie and Lazaridis "have promised we'll go in and do some high level due diligence".

[67] In 2008, Balsillie instructed Wormald to conduct research relating to Certicom as a potential acquisition for RIM. Yach and Little were also present at the meeting and Wormald participated by telephone. It was Wormald's testimony that he was instructed to:

> … get up to speed and learn what [he] can and dig in and... do some diligence on these guys, and I was referenced by Mr. Balsillie and Mr. Lazaridis as the -- sort of the contact point within RIM for Mr. McKinnon to work through in terms of commencing diligence and getting a good look at the company.
>
> (Hearing Transcript, March 21, 2011 at page 136, lines 14 to 19)

[68] By early March 2007, RIM was in the process of preparing a valuation of Certicom's patents and licence agreements. On July 11, 2007, RIM and Certicom entered into a non-disclosure agreement (the "**2007 NDA**") that included a standstill provision that precluded RIM from making an offer to acquire Certicom for a period of 12 months without the approval of Certicom's board of directors.

[69] In September 2007, Certicom provided RIM with a large package of documents pursuant to the 2007 NDA, which included Certicom's then current business plan, a list of Certicom's patents pending and issued, certain patent licence agreements, a breakdown of Certicom's patent licence revenue information, certain limited patent infringement information and publicly available information concerning litigation that involved Certicom. The information provided was specifically deemed to be confidential information pursuant to the terms of the 2007 NDA.

[70] On November 27 or 28, 2007, Certicom informed RIM that there was going to be a change in its CEO and that substantive discussions about a proposed strategic transaction were terminated. Gupta became Certicom's CEO on January 21, 2008.

[71] Wormald testified that he had a discussion with Vanstone in late 2007 or early 2008 in which Vanstone asked Wormald why RIM had stopped their due diligence work with respect to Certicom. Wormald's response to Vanstone was that "we didn't stop our diligence, we were stopped" by Certicom. Wormald testified that Vanstone expressed surprise and then offered his assistance as follows:

> … Mr. Vanstone, I guess the easiest way to say it is, took matters into his own hands and asked us specifically what kind of information we were continuing to look for in order to continue our diligence process on Certicom. And upon us providing him with that information, the request list we had went away and came back … a couple of weeks later or so with a number of the licence agreements that we knew we were still looking for. It wasn't … all of them, but … I would call it a bigger subset than the initial subset we had received.
>
> (Hearing Transcript, March 21, 2011 at page 148, lines 12 to 23)

On February 6, 2008, Vanstone provided RIM with a summary of certain licences by e-mail, and in March 2008, he provided a memory stick containing some, but not all, of Certicom's licence agreements. The additional licence documents included agreements with Nokia/Intellisync, Motorola and Sony Ericson. RIM and Certicom agreed to treat this information from Vanstone as though it had been provided pursuant to the 2007 NDA.

[72] Balsillie telephoned Gupta on March 19, 2008 and expressed to him an interest in reinstating discussions regarding a potential acquisition of Certicom by RIM. In response, Gupta sent the following e-mail to Balsillie which included his suggestion that he would contact Wormald after a few quarters had passed to give him time to complete his initial mandate as CEO from the Certicom board:

> Further to our discussion, here is the status on the "due diligence" process that was initiated between RIM and Certicom.
>
> * NDA was signed with an effective date of July 11, 2007
> Request for information from RIM was on August 21, 2007
> * A set of documents was sent from Certicom to RIM on Sep 20, 2007
> * Follow-up material request from RIM was on Nov 8, 2007.
> * The discussions were put on hold due to the permanent CEO search process as of Nov 27, 2007 by Bernie Crotty
>
> Subsequently, Scott [Vanstone] did speak with Chris Wormald (in Jan) enquiring on the status, Scott was unaware that the process had been put on hold following Bernie's memo to RIM.
>
> Since my coming on board (end of Jan 2008), my primary focus is to get the business fundamentals fixed and aligned within Certicom; to that end I have a set of deliverables I am working on for the Board.
>
> As I mentioned in my call to you, RIM is extremely important to Certicom and I want to ensure that we stay engaged to support RIM's business needs. This can include several scenarios: (1) continue as a strong business partner; (2) initiate a due diligence process which can lead to several options as to how RIM may want to proceed with respect to investment.
>
> Jim, you asked me what my recommendation is on this file. My suggestion would be that I will contact Chris Wormald after a few quarters; this will give me the time I need to complete my initial mandate from the Board in resolving the business challenges facing Certicom. As well, by then we will know more definitively where we stand on the current litigation process with Sony.
>
> Once the above issues are dealt with, I will also be able to provide the required attention that will be necessary for the "due diligence" process.
>
> Finally to keep the communication flow simple, I will be the focal point in Certicom to initiate the process – I will reach out to Chris [Wormald] and advise him on the spirit of our discussion and this note. I have also advised Scott

> [Vanstone] not to engage in any discussion on "due diligence" at this stage. [Emphasis added.]
>
> (E-mail from Gupta to Balsillie, March 26, 2008)

[73] Balsillie forwarded Gupta's e-mail to Wormald and instructed him to purchase some Certicom shares:

> Hey – let's acquire some shares – it's likely a good investment now.
> We'll decide next steps in a few months.
>
> (E-mail from Balsillie to Wormald, March 26, 2008)

[74] Wormald became involved with Certicom in his capacity as the Vice President of the Strategic Alliances Group. In his testimony, Wormald described the work done by the Strategic Alliances Group in the 2008 time period as follows:

> … it served a corporate development type of function for RIM. So mandate or responsibilities would include things like acquisitions, investments and inbound technology licensing and, you know, responsibilities would include things like looking for or investigating companies to acquire and going out and actually doing deals and overseeing some level of integration into RIM for third party technology that we would license into our products, actually negotiating those deals, and also occasionally but not very frequently making some corporate investments.
>
> There was another piece within the team that also oversaw some of our strategic relationships with companies like Google and Yahoo and Microsoft and AOL and all that.
>
> (Hearing Transcript, March 21, 2011 at page 100, line 23 to page 101, line 13)

[75] On May 21, 2008, Balsillie told Wormald that he wanted to know which investment houses traded Certicom shares and to obtain the biographies of Certicom's board members, a list of Certicom's major shareholders and which investment advisors it had used in the past.

[76] On June 17, 2008, Certicom approached RIM to pursue discussions regarding possible technology partnership agreements, and the two companies entered into a non-disclosure agreement for the purpose of facilitating technical discussions (the "**2008 NDA**"). Unlike the 2007 NDA, the 2008 NDA did not include a standstill provision that prevented RIM from making an offer to acquire Certicom without the approval of Certicom's board of directors.

[77] As requested by Balsillie at their meeting on May 21, 2008, Wormald got in touch with a contact he had at Merrill Lynch & Co. ("**Merrill Lynch**") in California and asked for his assistance in compiling information about Certicom. Wormald testified that he contacted the individual at Merrill Lynch because RIM had a good working relationship with him. Wormald felt that he was the most trustworthy of the investment bankers with whom he had spoken and that he would be willing to provide the requested information without being formally retained.

Merrill Lynch provided Wormald with a slide deck entitled *Research in Motion Regarding Project Cypress* on July 1, 2008.[3] The slide deck included a public market overview of Certicom, a review of Certicom's stock price performance over the previous 12 months, a management and board overview and a shareholder profile which noted Certicom's main institutional holders and insiders.

[78] Although RIM was not in discussions with Certicom about an acquisition in July and August 2008, RIM's Strategic Alliances Group was gathering information regarding Certicom and looking at acquisition options once the standstill provisions of the 2007 NDA expired on July 11, 2008. Abdul Zindani ("**Zindani**"), RIM's Senior Manager, Patent Portfolio Development who was located in Texas, and others who were responsible for intellectual property matters at RIM, had also been involved in valuing Certicom's patent portfolio since RIM's original expression of interest in the Company in 2007. Wormald testified that Zindani reviewed Certicom's licence agreements and that Zindani had specialized skills in the area of assessing patent portfolios for their effective value, which by necessity needed to be combined with an assessment of the licence agreements that licensed the use of the patents by third parties.

[79] By July 24, 2008, Zindani had provided Belcher and McCallum with the information he had compiled through his analysis of Certicom's patents and licensing agreements, including the licence agreements that had been received from Certicom pursuant to the 2007 NDA.

[80] At the end of July 2008, Belcher also requested information from RIM's Legal Department about the terms of RIM's licensing agreements with Certicom and on July 28, 2008, Belcher sent an e-mail to Zindani asking if he was available to meet "to collectively go through the patent review information you provided to try to ascribe a value to the IP [intellectual property]". During July and August 2008, members of RIM's Strategic Alliances Group also met with members of other departments at RIM to discuss Certicom's technology, including McCallum and Belcher's meeting with Little on July 28, 2008 and Belcher's meeting with Mike Kirkup ("**Kirkup**"), RIM's Manager of Developer Relations, and Michael K. Brown, RIM's Director of Security Product Management, on August 15, 2008.

[81] By the end of July 2008, RIM's Strategic Alliances Group was aware that others at RIM were working on a potential proposal relating to the licensing of Certicom's technology for use by RIM's third party developer community:

> Mike Brown and myself have been working together on a potential proposal for Certicom based on our current platform challenges around their licensing of the public key crypto in our development platform.
>
> …
>
> My understanding is that we licensed access to their APIs [application programming interfaces] for all RIM development but did not purchase the license for the remainder of the development community. The best approach that I have today is to license the API for the development community as a whole with several benefits to RIM and Certicom in this approach:

[3] Project Cypress was the code name for Certicom used in the slide deck.

> 1. It rounds out our platform support and allows people to leverage public key crypto for their applications at no additional cost.
>
> 2. Provides Certicom with a stable and reliable platform leveraging their ECC technology that they can use to spark the mobile market.
>
> 3. No additional testing or effort required by RIM once licensing deal is completed.
>
> (E-mail from Kirkup to Wormald, July 30, 2008)

[82] Throughout July and August 2008, individuals at RIM were in discussions with Certicom regarding the licensing of Certicom's ECC technology for use by RIM's third party developers. Little described his understanding of these discussions in his testimony as follows:

> … when applications developers wrote code for the BlackBerry, they could use the Certicom functionality for free. The problem is if you use a walkie-talkie at one end, you've really got to use -- have another walkie-talkie at the other end. If you are going to crypt on one side, you've got to decrypt it on the other. And a lot of the application developers were hesitant to spend money on their back end even though the device side was free.
>
> And so my understanding is that this initiative was Mike Kirkup who was involved in the, sort of, the third party developer and support organization, … was either trying to arrange access for people to use it on their back end, if they used it on the front end. Basically was trying to arrange on behalf of the third party developers access to the Certicom toolkit.
>
> (Hearing Transcript, March 23, 2011 at page 100, lines 3 to 19)

[83] Project Troy was the code name RIM's Strategic Alliances Group assigned to their work relating to the potential acquisition of Certicom. Belcher testified that they chose the code name Project Troy on or about August 18 or 19, 2008. He also testified that the name Project Troy was chosen given the fact that there had been discussions with Certicom management that had not gone anywhere and that there was a possibility that RIM would have to resort to a hostile bid.

[84] On August 19, 2008, Belcher and McCallum met to discuss what was described in the meeting notice as "Project Troy – Contract review/valuation review". McCallum testified that he and Belcher were looking at licensing contracts that RIM and other companies had with Certicom and at valuing Certicom at that time. McCallum and Belcher had been working on what McCallum referred to as a pitch book entitled *Acquisition opportunity* for *Project Troy* which was a slide deck that included information on Certicom as a possible acquisition by RIM (the "**Pitch Book**"). The Pitch Book was being prepared by the Strategic Alliances Group as the basis for what they expected would be a submission to RIM's senior management that RIM make a take-over bid for the shares of Certicom.

[85] In his testimony, Wormald characterized the status of RIM's interest in Certicom as of August 20, 2008 as "frustrated". RIM had expressed interest in Certicom, but they were not

engaged in ongoing talks at that time, primarily because Certicom was not prepared to do so. RIM was interested, but did not see an immediate path forward to negotiate any kind of agreement with Certicom.

(b) After August 20, 2008

[86] The earliest version of the Pitch Book in evidence was e-mailed by Belcher to Sam Ip ("**Ip**"), another employee in RIM's Strategic Alliances Group, on August 21, 2008. It is dated August 2008 and is noted as being version 1.0. In this version of the Pitch Book, the slide entitled "Valuation" is blank, other than the comment "TBD", i.e., to be discussed or to be determined. McCallum testified that he and Belcher reviewed an earlier version of the Pitch Book at their August 19, 2008 meeting although no evidence with respect to its contents was provided and no copy of an earlier version was introduced in evidence.

[87] On August 22, 2008, Belcher e-mailed McCallum another version of the Pitch Book, also described as version 1.0, which included slides dealing with the valuation of Certicom. The "Valuation" slides suggest an opening bid range of $2.25 to $2.50 per share and ascribe the actual value of Certicom to RIM at $3.25 to $3.90 per share, based on the valuation of Certicom's intellectual property and the cash flow savings to RIM resulting from its acquisition of Certicom. This version of the Pitch Book also includes a number of slides of additional Certicom valuation information as an appendix.

[88] We were presented with evidence of a calendar entry for a meeting between Belcher and Zindani on August 25, 2008 entitled "Project Troy – IP Valuation Review". Belcher testified that he would have reviewed the information in the valuation slides and the appendix of the Pitch Book with Zindani to ensure that the approach and findings in the Pitch Book were, in Zindani's opinion, accurate and fair. From the evidence, it would appear that at least some of the information Belcher used in creating the valuation slides in the Pitch Book was previously provided to him by Zindani on or about July 24, 2008. It would also appear that the valuation of Certicom by RIM was on-going as of August 25, 2008.

[89] Wormald received a version of the Pitch Book at or around the time of his discussion with Belcher and McCallum pertaining to the Pitch Book on August 27, 2008. During his testimony, Wormald went through version 1.1 of the Pitch Book but was not certain whether it was the version he reviewed at the August 27, 2008 meeting. He testified that he had at some point seen an earlier version of the Pitch Book than version 1.1.

[90] At the August 27, 2008 meeting, Wormald suggested that either one or both of McCallum and Belcher sit in on a call that Kirkup was having with Certicom the next day regarding the licensing of Certicom's technology for use by third party developers. McCallum and Belcher were to listen in on the meeting and could be introduced as "new to RIM, here to listen & learn, etc.", with the idea being that they could gain exposure to or insight into the current status or plans of Certicom (E-mail from Belcher to Kirkup, August 27, 2008).

[91] Kirkup had the call with Certicom on August 28, 2008 without Belcher or McCallum as it had been determined that Kirkup would provide them with an update after the call:

> Hi Mike - we're fine with you providing us with an update from the call. We're obviously interested in any insights into how the business is doing, where it's going, how they're executing on their strategy, other customers/partners they're dealing with, etc. This, in addition to an idea as to how much a developer license would cost.
>
> (E-mail from Belcher to Kirkup, August 28, 2008)

[92] Following his August 28, 2008 telephone conversation with Certicom, Kirkup sent his notes from the call to Belcher and McCallum by e-mail.

[93] The first formal list of people who had been apprised of Project Troy (the "**In-the-Know List**") appears to have been created in late November 2008.[4] We have in evidence a copy of a November 20, 2008 e-mail to Wormald from RIM's Legal Counsel, Regulatory and Compliance, S. Grant Gardiner ("**Gardiner**"), that attaches an early draft of the In-the-Know List. In the e-mail, Gardiner asks that the Strategic Alliances Group populate the In-the-Know List and ensure that it remained current. This initial draft of the In-the-Know List names only eight of RIM's personnel, including Balsillie, Wormald, Belcher and Gardiner, and one person from RIM's external legal counsel, McCarthy Tétrault LLP.

[94] RIM's U.S. and Canadian securities lawyers, Skadden, Arps, Slate, Meagher & Flom LLP and Wildeboer Dellelce LLP, respectively, were listed in the In-the-Know List as having become aware of a proposed acquisition of Certicom as of August 28, 2008 when they were consulted about the possibility of purchasing Certicom shares. Wormald testified that he recalled consulting RIM's securities lawyers prior to this time, in the March to May 2008 timeframe, regarding the accumulation of Certicom shares. Wormald testified that, at that time, RIM was advised that the 2007 NDA would prevent such share accumulation. The issue was explored once more, after the expiry of the standstill provision of the 2007 NDA, likely in late August 2008, at which time RIM came to the conclusion that accumulating Certicom shares would not be possible.

[95] On September 3, 2008, Belcher, McCallum and Ip met with Tracy Hoskins of RIM's Human Resources Department to discuss the issues relating to the integration of Certicom's employees in the event of its acquisition by RIM.

[96] In early September 2008, Gupta advised Don Morrison, RIM's Chief Operating Officer – BlackBerry, that Certicom wished to restart discussions with RIM about a proposed strategic transaction. On September 16, 2008, Gupta, Wormald and Belcher met to further discuss possible investment alternatives, including a strategic transaction or acquisition. On September 25, 2008, Belcher corresponded with Gupta concerning the due diligence RIM needed to undertake to properly evaluate Certicom.

[97] The In-the-Know List notes that a partner of PricewaterhouseCoopers was added as of October 1, 2008.

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[4] McCallum testified that in-the-know lists were likely created in 2007, but were definitely in place at the time in 2008 when he began discussing Certicom with Little. Belcher testified that he recalled the In-the-Know List being created in the fall of 2008 and not the summer.

[98] On October 6, 2008, Certicom made a presentation to RIM regarding its intellectual property, including information prepared by Certicom's patent agent. The meeting was attended by Belcher, Robert Kucler, RIM's Senior Licensing Counsel ("**Kucler**"), and Zindani from RIM, and Vanstone and others from Certicom. On October 14, 2008, Belcher, Kucler and Zindani held a conference call with Certicom regarding RIM's due diligence requests. On October 21, 2008, Belcher and Kucler met with Vanstone and others from Certicom at RIM's Mississauga offices. Prior to this meeting, Certicom had provided RIM with extensive information respecting Certicom's patents that included detailed and comprehensive information not previously disclosed to other third parties.

[99] It appears from the evidence that, on October 28, 2008, Balsillie called Gupta to tell him that RIM's board of directors had approved the acquisition of Certicom and that RIM wanted to proceed with a negotiated transaction. Gupta discussed RIM's interest at the meeting of Certicom's board of directors held on the following day. We were not presented with any further evidence regarding Balsillie's communication with Gupta on October 28, 2008, nor with any evidence that RIM's board of directors had considered the acquisition of Certicom on, or at any time prior to, October 28, 2008.

[100] The In-the-Know List indicates that, on November 3, 2008, a member of the law firm McCarthy Tétrault LLP became aware of the Certicom transaction in connection with RIM's process of selecting financial and legal advisors. The same lawyer is one of a few people named in the first draft of the In-the-Know List sent by Gardiner on November 20, 2008. She was the only non-RIM employee to be shown on that version of the list. When questioned about this by Donald's counsel, Belcher did not recall speaking with the law firm McCarthy Tétrault LLP.

[101] Gupta met with Balsillie, Wormald and Belcher on November 7, 2008 and indicated that Certicom's board of directors wanted to further understand RIM's proposed next steps and was open to engaging with RIM in a fair process. Gupta also advised RIM that Certicom was unlikely to be in a position to grant any exclusivity period to RIM as it was in discussions with another third party that was also interested in a possible transaction with Certicom. Gupta confirmed that Certicom would not provide any exclusivity period to RIM during a telephone call with Balsillie on November 9, 2008.

[102] On November 10, 2008, after unsuccessful negotiations with Certicom to conclude an exclusivity agreement with a limited standstill provision, RIM retained Bennett Jones LLP as its Canadian legal advisor in connection with a potential acquisition of Certicom.

[103] On November 19, 2008, members of RIM's board of directors were added to the In-the-Know List in connection with a potential acquisition of Certicom.

[104] Balsillie provided an update to RIM's board of directors on November 24, 2008 relating to three potential acquisitions, including the acquisition of Certicom. At the meeting, RIM's board of directors authorized RIM to pursue the acquisition of Certicom and to make a public offer within a price range discussed by the board. The resolution of the board of directors authorizing the acquisition is recorded in the minutes of the meeting as follows:

> the Corporation is hereby authorized to pursue the acquisition of each of Troy, [REDACTED] and, in the case of Troy, the Corporation is further authorized, at the discretion of the Co-Chief Executive Officers and upon further advising the Board, to make a public offer within the price ranges discussed by the Board and any officer of the Corporation is hereby authorized to execute any preliminary documents necessary to effect such acquisitions, subject to the requirement that Board approval shall be required to execute any definitive agreements in respect of any such acquisitions and any take-over bid documentation.

[105] On November 26, 2008, RIM engaged BMO Capital Markets as its financial advisor in connection with the proposed acquisition of Certicom, and on November 28, 2008, engaged Skadden, Arps, Slate, Meagher & Flom LLP as its U.S. legal advisor.

[106] On November 28, 2008, RIM sent a non-binding expression of interest to Certicom's board of directors, proposing a cash offer of $1.50 per share, and requested a response from Certicom by December 1, 2008 at 5:00 p.m.

[107] On December 1, 2008, Certicom's Chairman, Jeffrey Chisholm ("**Chisholm**"), spoke with and sent a letter to Balsillie indicating that, given the short notice, Certicom's upcoming earnings call on December 4, 2008 and the upcoming meeting of Certicom's board of directors on December 3, 2008, it was not feasible to call a full meeting of the board of directors and adequately consider RIM's proposal by December 1, 2008. Chisholm reiterated that Certicom was not in a position to provide RIM with exclusivity given Certicom's ongoing discussions with a third party, but agreed to have RIM's proposal considered at the meeting of Certicom's board of directors on December 3, 2008 and to provide Balsillie with a detailed response by December 5, 2008.

[108] On December 2, 2008, Gardiner provided RIM's board of directors with an update on RIM's plan to issue a press release announcing its intention to make an offer to acquire Certicom. On December 3, 2008, RIM issued the press release headed "RIM to Offer CAD $1.50 Per Share in Cash for Certicom – Offer Price Represents a Substantial Premium of 76.5% over Certicom's December 2, 2008 Closing Price".

[109] Also on December 2, 2008, a member of the Strategic Alliances Group, Allyson Bly, circulated a draft of the In-the-Know List to all RIM employees who were aware of the offer. Donald was not named in this version of the In-the-Know List.

[110] On December 10, 2008, RIM launched a hostile take-over bid for Certicom, offering to pay $1.50 per common share for all of the common shares of Certicom. RIM issued a press release announcing its formal take-over bid for Certicom and sent its take-over bid circular (the "**December 10 Offer to Purchase**") to Certicom's shareholders. Yersh, who signed the

December 10 Offer to Purchase on behalf of the board of directors, was added to the In-the-Know List as of this date.

[111] On December 19, 2008, the Certicom board issued a directors' circular recommending the rejection of RIM's December 10 Offer to Purchase (the "**Certicom Directors' Circular**").

[112] Certicom applied to the Ontario Superior Court of Justice for an injunction to enjoin RIM's hostile bid on the basis that Certicom had provided confidential information under the 2007 NDA and the 2008 NDA, and on January 19, 2009, the Court released its decision and granted an injunction preventing RIM from proceeding with its take-over bid for Certicom. On January 20, 2009, RIM withdrew its offer.

[113] After an intervening proposed plan of arrangement by VeriSign made on January 23, 2009 for $2.10 per share, RIM and Certicom entered into an arrangement agreement on February 2, 2009, under which RIM agreed to acquire all of Certicom's common shares at a price of $3.00 per share.

[114] On February 10, 2009, Certicom issued a press release announcing that it had entered into an arrangement with RIM pursuant to which RIM would acquire all of Certicom's outstanding shares.

[115] On March 23, 2009, Certicom received final court approval for and completed the plan of arrangement with RIM pursuant to which RIM acquired all of Certicom's common shares at a price of $3.00 per share. Certicom's shares were delisted from the TSX on March 25, 2009.

(c) Summary of the Work Undertaken by the Strategic Alliances Group prior to August 20, 2008

[116] We heard testimony from three members of RIM's Strategic Alliances Group who undertook the research pertaining to Certicom as a potential acquisition by RIM in 2008, namely, Wormald, Belcher and McCallum.

[117] Wormald became involved in considering Certicom as an acquisition opportunity in February 2007 when Certicom approached RIM about the possibility of such an acquisition. Wormald asked McCallum to look at public information relating to Certicom such as the number of Certicom employees and where they were located and Certicom's SEDAR filings. McCallum worked on the matter in February 2007, handed the information over to Tina Lorentz, another member of the Strategic Alliances Group, and did not become re-engaged in the matter until July 2008.

[118] After McCallum transferred his work on Certicom in February 2007, others in the Strategic Alliances Group assumed responsibility for the matter, including Tina Lorentz, as noted above, and Raymond Reddy ("**Reddy**"), at the time, a relatively junior member of the Strategic Alliances Group. Certicom had provided information to RIM pursuant to the 2007 NDA, including the information provided by Vanstone, and by March 2008, Reddy had reviewed some of these agreements and provided a report on the agreements to Wormald. At the same time, Zindani was in contact with Reddy regarding the valuation of Certicom's licences and patents.

[119] In early July 2008, Wormald instructed McCallum to gather and update the information RIM had collected relating to Certicom once again, and to begin looking at options for a potential acquisition. McCallum testified that they discussed all types of acquisitions at that time, from friendly to possibly hostile, in to the context of the expiry of the standstill provisions of the 2007 NDA.

[120] One of Belcher's initial tasks at RIM when he started working there in July 2008 was to replace Reddy who had been involved in the assessment of Certicom prior to his departure from RIM a few weeks after Belcher started working. During July and August 2008, both Belcher and McCallum worked on the assessment of Certicom. Wormald testified with respect to his instructions to Belcher when Belcher joined RIM as follows:

> … Mr. Reddy was leaving or had left or was about to leave employment with RIM and so there was nobody actively managing the Certicom file, and Mr. Belcher was new to RIM, and with any new employee in our team, there's a lot of collaborative effort required. And so I do recall asking him – you know, giving him a history about Certicom in terms of RIM's relations and relationship and sort of the frustrated status of things and asking him to dig into – you know, basically assume control of the file, dig into understanding the company, you know, meet the people who were all, like Mr. Zindani, who were actively working on the, you know, different aspects of Certicom or understanding them. You know, at least partly as an exercise for him to get to know his way within RIM and, you know also because we had a hole with Mr. Reddy leaving and nobody to immediately – well Mr. McCallum, I think, was taking – my recollection was taking sort of a transitory-type of role because of his continuity with the team but needed somebody to be full-time on it.
>
> (Hearing Transcript, March 22, 2011 at page 74, line 20 to page 75, line 15)

Belcher testified that McCallum and Reddy explained the background of RIM's dealings with Certicom, the standstill provisions of the 2007 NDA and that there was continued interest in Certicom. They instructed Belcher to "get up to speed" on what Certicom was and how it could fit within RIM.

[121] McCallum testified that he discussed the information in the Merrill Lynch Project Cypress slide deck with Wormald in mid-July 2008, including Certicom's share performance, and how Certicom's shareholder profile would affect a possible hostile acquisition.

[122] In late July 2008, Belcher and McCallum met with other departments at RIM in relation to their work on Certicom. For example, they met with Little, who had a detailed understanding of the Certicom technology and how RIM had used that technology in the past.

[123] In late July 2008, they also communicated with Zindani and requested his assistance with ascribing a value to Certicom's patent portfolio. Zindani provided Belcher and McCallum with summaries of Certicom's patents and the technologies to which those patents applied on July 24, 2008. Belcher's understanding from this information was that Certicom had strong patent protection with respect to its ECC technology. Belcher testified that Zindani also provided them

with an analysis of the value of Certicom's patents. Although the evidence as to the date on which Zindani provided Certicom valuations is not clear, it appears that some, but possibly not all, of the intellectual property valuation undertaken by Zindani was provided to Belcher on or about July 24, 2008. This information was included in a later version of the Pitch Book which Belcher would have reviewed with Zindani on or about August 24, 2008.

[124] Around this time, Belcher requested copies of RIM's licence agreements with Certicom from RIM's legal department. Rather than release the agreements, RIM's legal department provided the Strategic Alliances Group with a summary of the licence agreements. Belcher testified that his objective in obtaining Certicom's licence agreements with RIM was twofold. First, in valuing Certicom, the Strategic Alliances Group wanted to know the amount of the royalty payments that RIM could save by acquiring Certicom, and second, they wanted "to try to get an understanding overall of whether there would be any risk to … RIM in them being able to withhold or cancel those agreements as a result of us … entering into negotiations with them" (Hearing Transcript, March 24, 2011 at page 61, lines 20 to 24).

[125] Belcher also met with Kirkup and Michael K. Brown ("**Brown**"), who worked with Little, on or about August 12, 2008 to discuss background information on the ECC technology and to discuss a different approach to Certicom on which Kirkup was working that was unrelated to the Strategic Alliances Group's acquisition work and that would provide additional benefit to RIM's ISV developer community. By August 1, 2008, RIM's legal department had provided Belcher with a summary of the licence agreements with Certicom and information regarding termination rights.

[126] During this period of time, Belcher was also tracking Certicom's share price information fairly regularly.

[127] On August 18 or 19, 2008, the code name Project Troy was assigned to the Certicom matter. On August 19, 2008, Belcher and McCallum had a meeting regarding "Project Troy – Contract review/valuation review", at which they discussed the summaries of the RIM-Certicom contracts prepared by RIM's legal department and the work Belcher had completed on the valuation of Certicom. Belcher could not recall the state of the Pitch Book at the time of this meeting, but testified that, to the extent that there was something there, he would have reviewed it with McCallum at that time. Belcher testified that some version of the Pitch Book would have existed before the version sent to Ip on August 21, 2008, and that he would have discussed it with McCallum.

[128] The version of the Pitch Book provided to Ip on August 21, 2008 included slides describing Certicom's relationship with RIM, the background to ECC, Certicom's value proposition to RIM, information on Certicom's financial performance, a list of Certicom customers and contracts, Certicom's intellectual property portfolio, Certicom's trading and market performance over the past year and shareholder information. The Pitch Book also included a number of slides outlining the acquisition strategy and risks, the first of which entitled "Acquisition Strategy" listed the following five strategic options that a take-over bid for Certicom could entail:

1. Acquire minority stake on open market prior to bid

2. Seek block trades with several of Certicom's institutional holders

3. Approach institutional holders prior to tender offer to gain acceptance

4. Approach Certicom BOD [board of directors] with take-over bid

5. Issue take-over bid directly to Certicom shareholders.

For each of the five options, the potential implications and the likelihood of success were listed, with Option 1 having a low likelihood of success, Options 2, 3 and 5 having moderate likelihoods of success and Option 4 having a high likelihood of success.

[129] The second Acquisition Strategy slide outlined a recommended approach which began with an approach to Certicom's largest institutional shareholders to arrange a block trade, and ended with one of (i) a friendly bid; (ii) a hostile bid; or (iii) no bid, if that was determined to be the best course once the risks were re-evaluated. Included at the end of the Pitch Book was a slide entitled "Next Steps", which set out the following:

- Engage Investment bank and legal advice
- Begin preparation of take-over circular
- Begin approaching institutional holders re: block trade
- Complete detailed integration plan
- Approach Certicom BOD

(Pitch Book, v.1.0, e-mailed by Belcher to Ip on August 21, 2008)

[130] As noted above, the "Valuation" slides were blank or missing in the version of the Pitch Book provided to Ip on August 21, 2008. Belcher testified that it is possible that he removed this information from the Pitch Book before sending it to Ip because it was more sensitive in nature.

[131] The version of the Pitch Book sent by Belcher to McCallum on August 22, 2008 included additional valuation information. The Valuation slides in this version included charts describing per share value ranges and equity value ranges and notes the following:

- Opening bid range of $2.25 to $2.50 per share, provides a premium to the 20-day average trading price of 45.1% and 61.3%, respectively. Large premium used to attract support of shareholders.
- Opening bid provides room to increase bid by up to $0.50-$0.75 per share in the case of a bidding war.
- Based on valuation of IP and cash flow savings to RIM, actual value to RIM ranges from $3.25 per share to $3.90 per share.
- Valuation ranges shown below based on:
    - IP and employees – value of market penetration of Certicom IP and acquired employees.

- Discounted cash flow of savings on license fees no longer payable to Certicom and additional cash flows from Certicom license and royalty revenues acquired.
- Comparable transactions and public company trading multiples based on revenues.
- Current trading values of Certicom shares.

(Pitch Book, v.1.0, e-mailed by Belcher to McCallum on August 22, 2008)

[132] Belcher testified that he was drafting the Pitch Book in August 2008 with input from McCallum. When asked whether he recalled portions of the Pitch Book being reviewed with Wormald prior to August 21 or 22, 2008, Belcher testified that "It would be reasonable that certain portions would be shared verbally as far as general updates, as far as what I was looking into, and getting his insight into, you know, what kind of things should go into it, but otherwise, no" (Hearing Transcript, March 24, 2011 at page 81, lines 12 to 17). At the time, they had weekly meetings with Wormald as a group to update him on their activities. Belcher did not recall reviewing the Pitch Book, or specifically reviewing a slide entitled "Value proposition", with Wormald prior to August 21 or 22, 2008. However, McCallum testified that all of the information in the version of the Pitch Book that Belcher sent to him by e-mail on August 22, 2008 would have been discussed with Wormald prior to Belcher and McCallum's August 19, 2008 meeting. He testified that he and Belcher would have had discussions with Wormald about the information that they were gathering and brought him up to date on what they had discovered. According to McCallum, Wormald would have seen an earlier version of the Pitch Book and would have provided them with his comments before they presented the final version to Wormald later in August. Belcher's and McCallum's testimony was consistent with that of Wormald who testified that the valuation range on the Valuation slide would have been prepared primarily by Belcher, possibly with the assistance of McCallum. Wormald noted that there were two components to the valuation, namely, intellectual property and cash flow savings. Wormald assumed that the valuation of the intellectual property component, which would have been the significant component, would have come from Zindani.

[133] Belcher, under what he described as the mentorship of McCallum, and with his input, was the primary person in RIM's Strategic Alliances Group working on the Certicom matter. Belcher and Wormald testified that Belcher and McCallum were working under Wormald's direction and that Wormald was not directly involved in gathering information on Certicom in July and August 2008, and did not necessarily see the information they had collected until he was sent a finalized version of the Pitch Book on or about August 27, 2008. McCallum testified that all of the information that was included in the Pitch Book would have been discussed with Wormald prior to August 19, 2008 and Wormald would have seen an earlier version of the Pitch Book.

[134] A substantial amount of work had been undertaken by the Strategic Alliances Group by August 20, 2008 in preparation for the possible launch of a take-over bid for Certicom. As outlined in the Pitch Book, they had gathered information on the value of Certicom's patents and licence agreements, had completed an analysis of Certicom's value to RIM and had developed a proposed acquisition strategy.

[135] Although the version of the Pitch Book reviewed by Wormald on or about August 27, 2008 included Zindani's valuation of Certicom's intellectual property, the evidence indicates that, on September 25, 2008, Belcher corresponded with Gupta concerning the due diligence RIM needed to undertake to properly evaluate Certicom. This was followed by a presentation by Certicom to Belcher, Zindani and Kucler on October 6, 2008 regarding Certicom's intellectual property.

(d) The Importance of Certicom's ECC Technology to RIM

[136] A substantial part of Certicom's value to RIM was its technology, primarily its patent portfolio and the agreements that licensed the use of the patents by third parties. More specifically, Certicom held patents for the ECC technology which was extremely important to the security of RIM's BlackBerry devices.

[137] We heard testimony from Little, who was responsible for encryption at RIM as Director of BlackBerry Security and as Director of Handheld Application Prototypes. As part of maintaining encryption, RIM utilized ECC technology which Little explained as follows:

> … elliptic curve cryptography uses a branch of mathematics and its primary advantages over the other algorithms that are available are the amount of computation that it takes to arrive at an answer as well as the level of assurance that it provides.
>
> So basically if you want to keep something secret and you really really want to keep it a secret, you want to use bigger keys. The bigger keys you use, the harder it is for an attacker to attack the cryptography. It just means sort of like trying to find a needle in a haystack. If you have a bigger haystack, it's harder to find that one needle.
>
> And so elliptic curve cryptography had benefits to us in that it would work in the small processors that we were using as well as it would meet the assurances of the security conscious customers like the department of defence types.
>
> (Hearing Transcript, March 23, 2011 at page 62, lines 4 to 20)

[138] Little explained the advantages of ECC technology over alternative algorithms, including its speed, its ability to fit well in small processors, such as BlackBerry devices, and that it was beneficial for security conscious customers such as the U.S. government, banks and financial institutions, which Little described as RIM's "marquee customers". Little testified that RIM definitely saw security as a differentiating or special factor.

[139] RIM began using ECC technology in the early 2000s after purchasing a toolkit from Certicom that implemented ECC functions. Little explained that the Certicom toolkit was a piece of software that could be bundled with RIM's software and that RIM could rely on to provide the cryptography. Little testified that the naïve ECC algorithms were not encumbered with patents, but could be utilized freely. Little explained that ECC is just math, but that Certicom had found a number of shortcuts in the math "to get to the answer more quickly". What

RIM purchased from Certicom was its patented method of speeding up the ECC algorithm. Little explained the advantage of the Certicom ECC toolkit to RIM:

> The big thing was that they had an efficient implementation of elliptic curve cryptography. That was their secret sauce. So that they had the fastest implementation of elliptic curve crypto. And also I think theirs worked, so that was certainly a big plus. But it was basically because the processors were so constrained at the time, when you were choosing the technology partner, basically we had to go with them. There was no other [game] in town.
>
> It's sort of safe to say that when we chose them because they would work in a small constrained environment or we chose elliptic curve because we work in a small constrained environment, and what's interesting is elliptic curves work very well with small computers but also with very high assurance levels. So we are sticking with elliptical curves because now it meets the needs of the high assurance – people that were in the high assurance level.
>
> (Hearing Transcript, March 23, 2011 at page 65, line 20 to page 66, line 12)

[140] Little testified that around the time of RIM's hostile bid for Certicom, Wormald contacted him to ask whether RIM could work without Certicom technology, and Little's response was that it would have been very, very hard to use anybody else's. Little described it as being "… what I call an "oh shit" moment. It would have been – from my point of view, it would have been catastrophic" (Hearing Transcript, March 23, 2011 at page 69, lines 8 to 10). Little explained his thinking at that time regarding RIM's use of Certicom's ECC technology as follows:

> … if you stayed with Certicom, great, nothing changes. If you go all the way over here at the other end of the spectrum, it would be, well, you can't use Certicom and you can't use any of their IP. That case is – that's certainly a catastrophic thing, if we lose access to their IP. There's certainly one point in the protocol that we used their IP. If we don't have access to their IP, we would have to essentially change the world, change all the implementations and that would be a huge undertaking.
>
> (Hearing Transcript, March 23, 2011 at page 104, lines 9 to 18)

[141] Although Donald testified that he had not considered the importance, or lack of importance, of Certicom to RIM as of August 20, 2008, he testified that he would not have thought there was ever any risk that RIM would lose access to Certicom's technology:

> … in my humble opinion, there were many organizations like Certicom – for example, our CDMA business was predicated on us maintaining licenses with Qualcomm. Our GSM business was predicated on maintaining our licenses with Motorola, Erickson, Nokia, and a host of other companies.
>
> And I never felt that at any time there was any risk of losing these. Yes, there's patent disputes. They get settled out in court. But I would never have thought that

there was any risk, no matter what happened to Certicom, that they would lose access to that technology.

Because in the industry, there's always cross-licensing, and it's never valuable to any technology organization to isolate themselves, and that's what they would be doing. Certicom held license agreements with hundreds of companies. And for them to isolate RIM in any way just wouldn't make sense.

I didn't see that as – I don't see that as a risk. And again, this is me looking back. In my professional opinion, I didn't see that. The risk of losing access to technology was not staying current with their license agreements, as in paying the fees and paying the maintenance fees to make sure the technology was always there.

(Hearing Transcript, March 28, 2011 at page 50, line 15 to page 51, line 14)

[142] In the early 2000s, RIM made a royalty-free buyout of its licensing agreement with Certicom, which provided them with a perpetual licence to implement version 3.2 of Certicom's toolkit. RIM continued to use version 3.2 of Certicom's toolkit in 2007 and 2008 and Little testified that although it did not have everything that RIM wanted, that version of the toolkit had everything that RIM needed.

[143] Little testified that, in March 2008, it would have been evident to a knowledgeable person in the industry that ECC technology was going to become the standard to remain compatible with other encryption devices in the market. However, the adoption of ECC technology had not been as widespread as would have been anticipated in 2008.

V. THE ISSUES

[144] The issues in this matter are as follows:

(a) Was Donald a person in a special relationship with Certicom when he purchased Certicom shares in August and September 2008?

(b) If the answer to the question set out in paragraph [144](a) above is yes, was Donald in possession of a material fact regarding Certicom when he purchased Certicom shares in August and September 2008?

(c) If the answer to the question set out in paragraph [144](b) above is yes, was the material fact generally disclosed?

(d) If the answers to the questions set out in paragraphs [144](a), (b) and (c) above are yes, did Donald engage in insider trading, contrary to subsection 76(1) of the Act?

(e) Whether or not Donald breached subsection 76(1) of the Act, did his purchases of Certicom shares constitute conduct contrary to the public interest?

VI. ANALYSIS OF THE ALLEGATION OF INSIDER TRADING

A. Submissions of the Parties

1. Staff's Submissions

[145] As outlined above, Staff alleges that, through his conversation with Wormald at the 2008 RIM Golf Event, Donald became aware of the Four Facts as follows:

(a) RIM had been in confidential discussions with Certicom relating to a potential acquisition of Certicom by RIM;

(b) RIM was in talks with Vanstone;

(c) RIM had a continuing interest in the acquisition of Certicom; and

(d) Certicom's then current share price was dramatically undervalued based on Certicom's licensing agreements.

(a) Special Relationship with Certicom

[146] Staff submits that Donald falls under the definition of a person in a special relationship with Certicom in three possible ways.

[147] First, and Staff submits, most compellingly, Donald was in a special relationship pursuant to subsection 76(5)(e) of the Act because he learned of material facts with respect to Certicom from Wormald who was himself in a special relationship with Certicom in circumstances where Donald knew or ought reasonably to have known that Wormald was a person in such a relationship. Staff submits that RIM possessed confidential information about Certicom that was provided to it for the very purpose of assessing the desirability of an acquisition, and that Wormald was the officer in charge of RIM's assessment of Certicom as an acquisition opportunity.

[148] Second, Staff submits that it is also arguable that Donald was in a special relationship under subsection 76(5)(c) of the Act because he learned of material facts with respect to Certicom while he was an insider, officer and employee of RIM when RIM was proposing to make a take-over bid for Certicom (i.e. while RIM was a company described in subsection 76(5)(a)(ii) of the Act). Staff submits that contemplating a hostile bid would be sufficient to constitute "proposing" since to find otherwise would exempt such transactions from the application of subsection 76(5) of the Act which Staff contends is clearly not its intention.

[149] Staff acknowledges there is little guidance as to the boundaries of "proposing"; however, Staff submits that it is clear that we should place a wide and purposive interpretation on the word "proposing" in order to meet the public interest mandate of the Commission. Staff submits that it would be inappropriate to impose a restrictive definition of what proposing means considering the Supreme Court's ruling in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 ("***Asbestos***") on the Commission's jurisdiction in hearings under section 127 of the Act:

> However, 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". …
>
> (*Asbestos, supra* at para. 41)

Staff submits that when interpreting the word "proposing", we must have regard to these two fundamental purposes of the Act.

[150] Staff also refers to the U.S. Supreme Court's decision in *TSC Industries Inc. v. Northway Inc.* 426 U.S. 438 (U.S. Ill. 1976) ("***TSC v. Northway***"), which discusses the boundaries of the definition of the term "materiality" in the U.S. Rules:

> In formulating a standard of materiality under Rule 14a-9, we are guided, of course, by the recognition in *Borak* and *Mills* of the Rule's broad remedial purpose. That purpose is not merely to ensure by judicial means that the transaction, when judged by its real terms, is fair and otherwise adequate, but to ensure disclosures by corporate management in order to enable the shareholders to make an informed choice. … As an abstract proposition, the most desirable role for a court in a suit of this sort, coming after the consummation of the proposed transaction, would perhaps be to determine whether in fact the proposal would have been favored by the shareholders and consummated in the absence of any misstatement or omission. But as we recognized in *Mills*, *supra*, at 382 n. 5, such matters are not subject to determination with certainty. Doubts as to the critical nature of information misstated or omitted will be commonplace. And particularly in view of the prophylactic purpose of the Rule and the fact that the content of the proxy statement is within management's control, it is appropriate that these doubts be resolved in favor of those the statute is designed to protect. …
>
> (*TSC v. Northway, supra* at 448)

Staff submits that the U.S. Supreme Court's proposition with respect to materiality in *TSC v. Northway* applies with equal force in this case in terms of how we should interpret the boundaries of what "proposing" means, such that any doubt should be resolved in favour of protection of investors and confidence in the capital markets.

[151] Staff encourages a purposive reading of "proposing" given the facts of this case, and submits that it is clear that, on August 20, 2008, RIM and Wormald were in possession of highly confidential Certicom licensing agreements given to RIM by Certicom pursuant to the 2007 NDA for the express purpose of permitting RIM to evaluate Certicom's business and propose a take-over or other business combination with Certicom. It is Staff's submission that the foregoing alone provides sufficient grounds to place RIM, and therefore Wormald, within the definition of "proposing".

[152] Although no decision had been made by RIM to acquire Certicom as of August 20, 2008, Staff submits that RIM was still in a special relationship with Certicom. According to Staff's submissions, it was clear that RIM was focused on Certicom as a real target, and a decision does not have to be made for a company to be in a special relationship. Staff points to the facts that RIM was working internally and had various staff members, including lawyers, working on assisting RIM's Strategic Alliances Group with its analysis and that no other company was provided with access to Certicom's highly confidential information that RIM had received for the express purpose of evaluating a transaction. Staff submits that RIM was in a special position vis-à-vis Certicom and vis-à-vis its competitors, which Staff submits is sufficient to establish a special relationship.

[153] Staff compares the facts of this case to those in *Re Donnini* (2002), 25 O.S.C.B. 6225 ("***Donnini***") in which the Commission states at para. 109: "In the case before us, [Kasten Chase Applied Research Limited ("**KCA**")] was a reporting issuer at the material time. As soon as Paterson proposed to Milligan in the morning phone call to do a second financing, [Yorkton Securities Inc. ("**Yorkton**")] was in a special relationship with KCA". Staff notes that, in *Donnini*, when Paterson mentioned the second financing to Milligan, who was the Chief Financial Officer of KCA, he had not discussed it with KCA and had no idea whether KCA was amenable to the idea. It was the suggestion of the possibility that created the special relationship, and Staff submits that, similarly in this case, the notion that RIM and Certicom shared of a potential transaction is sufficient for a special relationship to exist. Therefore, in Staff's submission, the analysis is not whether the transaction was likely, which was unknown in the case of *Donnini*, but once the possibility of the transaction arose, the analysis was how Donnini fit into the definition of a special relationship as an employee of Yorkton.

[154] Finally, Staff submits that Donald may also have been in a special relationship under subsection 76(5)(c) of the Act because he learned of material facts with respect to Certicom while he was an insider, officer and employee of RIM at a time when RIM was a company that was engaging in or proposing to engage in a business or professional activity with or on behalf of the reporting issuer (i.e. while RIM was a company described in subsection 76(5)(b) of the Act). Staff submits that there is no requirement that the business activity referred to in subsection 76(5)(b) relates directly to a potential transaction. Staff also submits that it was sufficient that RIM was engaging in business with Certicom and licensing Certicom's ECC technology for use in the BlackBerry since 2000, which Donald knew. Staff characterizes the relationship between RIM and Certicom as very important, and given the fact that RIM thought it would be of great benefit to acquire Certicom's technology which represents the core marketing niche of the BlackBerry device, the business relationship was sufficient for subsection 76(5)(b) of the Act to apply.

(b) Undisclosed Material Facts

[155] Staff alleges that the Four Facts communicated to Donald by Wormald on August 20, 2008 were material and were not generally disclosed as of that date. Staff submits that, as Donald admitted that he had knowledge of the Four Facts, the only question that remains is whether the Four Facts were material.

[156] Staff proposes a two-stage analysis of materiality because the Four Facts may be seen as either an expression of present facts or as contingent facts.

[157] Staff refers to the specific circumstances in which Donald learned of the Four Facts. Staff submits that the Four Facts were likely communicated by Wormald in the context of RIM business in the discussion about what he was working on, but even if Donald's version of how the topic of Certicom arose is accepted, a less sophisticated business person than Donald would have been alerted to the fact that the discussion was not casual or social, but involved RIM's business affairs. Donald knew that this information was being provided to him by the RIM officer in charge of corporate acquisitions. Staff refers to Wormald's testimony that his conversation with Donald was by its very nature confidential and contends that the nature of the Four Facts provided by Wormald was manifestly RIM business.

[158] With reference to National Policy 51-201 – *Disclosure Standards* (2002), 25 O.S.C.B. 4492 ("**NP 51-201**"), Staff submits that a number of factors must be considered in making materiality judgments, including the nature of the information itself, the volatility of the company's securities and prevailing market conditions. Staff submits that Certicom's share price at the relevant time was volatile with low trading volumes in the weeks preceding August 21, 2008. Accordingly, Staff argues that information related to Certicom did not need to include a high degree of magnitude or probability to affect its share price significantly, and the low volume indicates that the market was relatively disinterested in Certicom's shares. Staff alleges that news of Wormald's opinion that Certicom was dramatically undervalued based on its patents and confidential licensing agreements would have caused Certicom's share price to significantly increase. Staff refers to the Commission's decision in *Re AiT Advanced Information Technologies Corp.* (2008), 31 O.S.C.B. 712 ("***AiT***") as support for the proposition that materiality often occurs at a much earlier stage for smaller issuers, such as Certicom.

[159] Staff encourages the use of "common sense judgment" in making a determination as to materiality, and submits that a common sense interpretation of the Four Facts in the context of Certicom's low liquidity and share price was that its probable future was being the subject of an acquisition. Staff also submits that it is helpful to consider the American reasonable investor test when assessing materiality and argues that, under this test, disclosure of the fact that Wormald held the view that Certicom was dramatically undervalued based on RIM's internal analysis of Certicom's patents and licence agreements would reasonably be expected to have a significant effect on the market price or value of Certicom's securities, and the Four Facts had assumed actual significance for a reasonable investor in deciding whether to buy, sell or hold Certicom shares.

[160] Staff argues that, even if none of the Four Facts was material, taken together, the cumulative effect of the Four Facts can be material. Staff submits that the significance of the Four Facts can be assessed even without analyzing the likelihood of a future transaction because of the context, namely, that Wormald held a view of Certicom's value in the context of past discussions with Certicom about an acquisition that made their way to Certicom's board of directors and/or CEO.

[161] Staff further submits that evidence that information was material can be drawn from the source of the information. Staff submits that Donald's actions in placing an order for Certicom

shares with his broker at 9:00 a.m. the next day and the number of Certicom shares that Donald purchased, which was disproportionately large when compared to market purchases, show the importance he ascribed to the Four Facts and illustrate the fact that Donald was acting differently than the market. Staff argues that the Four Facts provided to him by Wormald assumed actual significance to Donald and, consequently, it is reasonable to conclude that they would have had a similar effect on a reasonable investor in deciding whether to buy, sell or hold Certicom's shares.

[162] Setting aside whether a reasonable investor would have thought Wormald's valuation of Certicom was material, Staff submits that, when assessing materiality, we may also consider whether a reasonable investor would infer that there was some likelihood that RIM would make a bid for Certicom or that Certicom was a likely acquisition in the future. Staff refers to the Commission's decision in *AiT* and the Divisional Court's decision in *Re Donnini* (2003), 177 O.A.C. 59 (Div. Ct.) ("***Donnini (Div. Ct.)***") regarding contingent events as material facts or changes. Staff argues that the American probability/magnitude test from *Securities & Exchange Commission v. Texas Gulf Sulphur Co.* (1968), 401 F.2d 833 (U.S. 2nd Cir. N.Y.) ("***Texas Gulf Sulphur***"), cited by the Commission in *Donnini* and *Re YBM Magnex International Inc.* (2003), 26 O.S.C.B. 5285 ("***YBM***"), is authority for the proposition that the existence of materiality in cases of contingent or speculative developments depends on a balancing of the probability that the event will occur and the anticipated magnitude of the event (*Texas Gulf Sulphur, supra* at 849). Staff submits that a transaction to acquire Certicom would be of great magnitude, which would require a lower probability in order to constitute a material fact. In written submissions, Staff points to 23 facts, which Staff submits constituted significant indicia of a likely future acquisition of Certicom by RIM as of August 20, 2008.

[163] Further, Staff submits that interest in a potential transaction at the highest corporate levels of both RIM and Certicom can be considered in assessing the materiality of the information communicated to Donald by Wormald on August 20, 2008.

2. Donald's Submissions

(a) The Four Facts

[164] Donald disputes Staff's allegations that, through his conversation with Wormald on August 20, 2008, he became aware of materials facts, namely, the Four Facts. Donald submits that the information communicated to Donald by Wormald was so general that, as noted in the U.S. insider trading decision *Securities Exchange Commission v. Monarch Fund*, 608 F.2d 938, 942 (2d Cir. U.S. C.A., 1979) ("***Monarch***"), there was still a risk to Donald that Certicom would prove to be a 'white elephant':

> Then there is the question whether the disclosed information is of a specific or general nature. This determination is important because it directly bears upon the level of risk taken by an investor, certainly the ability of a court to find a violation of the securities laws diminishes in proportion to the extent that the disclosed information is so general that the recipient thereof is still "undertaking a substantial economic risk that his tempting target will prove to be a 'white elephant.' " … Here the information disclosed to Paul, by any standard, lacked the basis elements of specificity. No revelation was made of any underlying facts concerning the contemplated financing. No specific terms were divulged. Nor

were the lenders identified. Nor was the date of the financing indicated, but only that the company "expect(ed) it to be done shortly." . . .

(*Monarch, supra* at 942)

[165] With respect to the allegation that RIM was in confidential discussions with Certicom regarding a potential acquisition, Donald submits that we must look at when these discussions took place and whether any discussions were ongoing. He submits that, as of November 2007, Certicom had told RIM to "go pound salt" and questions the then current validity or meaning of a statement from Wormald that Certicom and RIM were in confidential discussions regarding an acquisition.

[166] Donald disputes the fact that RIM was actually in discussions with Vanstone in August 2008. He submits that there is no evidence that discussions continued after Gupta told Vanstone to stop talking to RIM in March 2008. Donald contends that, if Wormald said anything to Donald, the most he could have said was that he might have been in some discussions with Vanstone, without saying what those discussions were about.

[167] Donald argues that the expression in the Statement of Allegations that "RIM had a continuing interest in an acquisition of Certicom" meant that Certicom was an interesting possibility, based on some facts unknown at the time. Donald submits that this is too speculative and too uncertain.

[168] With respect to the allegation that Donald understood from Wormald that Certicom's share price was dramatically undervalued based on Certicom's licensing agreements, Donald contends that, whatever Wormald's personal view was, this was never RIM's view. In support of his submissions, Donald refers to RIM's offer for Certicom in December 2008 of $1.50 per share and a valuation by RIM in late August 2008 which placed Certicom's actual value to RIM at $3.25 to $3.90 per share.

(b) No Special Relationship

[169] Donald submits that Wormald and Donald were never insiders of Certicom, nor were they in a special relationship with Certicom.

[170] Donald contends that his conversation with Wormald on August 20, 2008 had none of the hallmarks of a "tip"; it did not happen in secret, it was not in a business setting and it was not hushed or hurried. He submits that the information provided was non-specific, conjectural, full of opinion and publicly available.

[171] Donald submits that it is only through a tortured, and over-reaching, interpretation of the Act that one could come to the conclusion that he was in a special relationship with Certicom. He refers to the discussion of "insiders" in *Monarch*, in which the U.S. Court of Appeals stated:

> It is important at the outset to distinguish the roles played by various types of market traders. There are the insiders, who almost by definition have a degree of knowledge that makes them culpable if they trade on inside information. As officers, directors, or employees of a company, they are presumed to know when

> the information is undisclosed. Because of their positions, insiders know when they have the kind of knowledge that is likely to affect the value of stock. …
>
> We may not make the same assumptions with regards to outsiders, however, since the kinds of factual situations in which they acquire their information are innumerable. For example, there is the tippee who knows or ought to know that he is trading on inside information, as against the outsider who has no reason to know he is trading on the basis of such knowledge. … Here, the record is silent as to whether Paul has reason to believe that either of his contacts Waldron or Carton has acted inappropriately. Indeed, if any inference may be drawn, it is the contrary one since neither Waldron nor Carton, when they discussed the possible refinancing with Paul, indicated that there was anything confidential about the information. . . .
>
> In addition, some outsiders, because of a special relationship with an issuing corporation, are privy to its internal affairs, whereas other outsiders have no ready access to the inner workings of a company. … It is not evident from the record, and plaintiff does not claim, that Paul had any special relationship with Bio-Medical.
>
> . . .
>
> Carrying the district court holding to its logical conclusion would mean that all investors, brokers, and investment advisers who are attracted to a particular security on the over-the-counter market and seek to obtain further information about it act at their peril. Indeed, they would have the affirmative duty to verify whether or not their information could be deemed public information, and if failure to do so could subject them to civil and, possibly, criminal proceedings.
>
> (*Monarch, supra* at 941 to 943)

[172] Donald argues that the conversation between Wormald and himself on August 20, 2008 had far below the level of specificity required in *Monarch*.

[173] Donald submits that, whatever RIM may have been *thinking*, it was not *proposing* to make a take-over bid or *proposing* to become party to an arrangement in August or September 2008. Accordingly, Donald was not, therefore, a person in a special relationship with Certicom on August 20, 2008 pursuant to subsections 76(5)(a)(ii) or (iii) of the Act. Donald relies on the finding in *Donnini* that the special relationship in that case began when Yorkton proposed a special warrants financing to the Chief Financial Officer of KCA. In this case, Donald argues that the special relationship began when Balsillie proposed the acquisition of Certicom by RIM to Gupta on October 28, 2008. Donald submits that the evidence falls far short of establishing that RIM had made or even decided on any proposal to make a take-over bid or become a party to a reorganization, amalgamation, merger or arrangement with Certicom as of August 2008.

[174] Donald agrees that the Act makes it abundantly clear that it would be material if RIM were proposing a take-over. However, Donald argues that, until the RIM decision-makers are engaged, i.e., those people at RIM who are in a position to spend $60 million, and have made a

decision to propose a bid, the special relationship requirement is not met. Donald submits that evidence that Belcher or Wormald was proposing a take-over bid is of some interest but does not help us decide what RIM was doing, what RIM was considering and what RIM was proposing, if anything.

[175] Donald further submits that the effect of Staff's allegation that RIM was in a special relationship with Certicom as a result of engaging in business with Certicom (see subsection 76(5)(b) of the Act), and that Donald was also in a special relationship with Certicom as an officer or employee of RIM (see subsection 76(5)(c) of the Act) would be that *any* person or company who or which does business with a reporting issuer would be in a special relationship, which cannot be the case. Donald submits that adopting this interpretation of the meaning of "special relationship" would also prevent any company which proposed to make a take-over from ever acquiring a toe-hold in the reporting issuer if it engaged in any business with the reporting issuer. Donald argues that there must be some clear connection between the business engaged in, or proposed to be engaged in, and the alleged material facts before subsection 76(5)(b) of the Act would result in a person or company being in a special relationship. In this case, Donald submits, there is no such connection.

[176] Donald further submits that, for the same reasons that RIM was not in a special relationship with Certicom, Wormald was not in a special relationship with Certicom, and therefore, subsection 76(5)(e) of the Act cannot be relied on to provide the basis for Donald's special relationship with Certicom.

(c) Materiality

[177] Citing *YBM* as authority, Donald submits that the definition of "material fact" has been considered by the Commission to be a "market impact" test.

[178] Donald submits that materiality must be determined on a case-by-case basis and that the present matter must be considered on the particular facts and proved by clear and cogent evidence.

[179] He further submits that while the American probability/magnitude test is easy to state, its application is difficult as the standard is ambiguous and open to wide variations of interpretation. Donald points to the fact that neither RIM's board of directors nor Certicom's board of directors issued a press release until after RIM's bid was made, which he submits strongly suggests that neither company considered their non-discussions in the Summer of 2008 and the revived discussions in the Fall of 2008 to be material.

[180] Donald refers to the American case of *Basic Inc. v. Levinson* (1988), 485 U.S. 224, 108 S.Ct. 978 (U.S. Ohio) ("***Basic v. Levinson***") which suggests that the probability that an event will occur can be assessed by looking at "indicia of interest in the transaction at the highest corporate levels" (*Basic v. Levinson, supra* at 239), which may include board resolutions, instructions to investment bankers and actual negotiations between principals or their intermediaries. Donald submits that he did not know that RIM was going to acquire Certicom. Rather, the alleged material facts were that discussions had taken place and that RIM was still interested but that Certicom was not interested.

[181] Donald further submits that the evidence demonstrates that, as of August 20, 2008, the probability of an acquisition of Certicom by RIM was practically non-existent because none of the indicia suggested above were present at that time. Donald submits that there was no evidence of Balsillie being involved in any discussions with Certicom in the Summer of 2008 and that Gupta, Certicom's CEO at the time, testified that there were no discussions with RIM about an acquisition of Certicom in the Summer of 2008. Donald submits that, even when discussions between Certicom and RIM were renewed in mid-September 2008, they involved three potential events, namely, a potential licensing arrangement, a potential investment by RIM in Certicom and a potential acquisition, all of which were still being discussed at the end of September 2008.

[182] Donald points to the facts that there were no board resolutions, no formation of special committees by the boards of directors of RIM or Certicom and RIM had not retained legal counsel or financial advisors for the purpose of an acquisition in August 2008, all of which support the conclusion that a RIM acquisition of Certicom was not probable or likely in August 2008. Donald further submits that RIM did not have any serious internal controls with respect to the discussions with Certicom until November 2008, there was no In-the-Know List in place in August 2008 and the "Project Troy" code name was assigned by McCallum and Belcher in August 2008 without instructions to do so from their superiors.

[183] Donald submits that, at the time of the 2008 RIM Golf Event, the probability that an acquisition of Certicom by RIM would occur was very low to non-existent, based on what was actually happening.

[184] Donald further submits that the magnitude of a possible transaction between Certicom and RIM in or around August 2008 cannot be determined with any real level of confidence or accuracy. Donald takes the position that the market reaction to RIM's announcement of its bid for Certicom on December 3, 2008 has no bearing on the materiality of the information conveyed to Donald on August 20, 2008 because RIM had no intention to make an offer at that time, and, moreover, RIM considered that its offer of $1.50 reflected the full value of Certicom, taking into account the growth prospects and potential synergies that would be made possible by a transaction.

[185] Donald contends that, in August 2008, there had been no decision as to what type of transaction with Certicom would be proposed, if one was proposed, and there was no decision as to what RIM would pay Certicom's shareholders in the event of a potential offer as the bid price was first considered by Balsillie and Wormald some time in September or October 2008. Donald submits that, even if the magnitude of a potential RIM-Certicom transaction deserved consideration, it would be outweighed by the negligible probability that an acquisition would occur in August 2008.

[186] Donald submits that he had no actual knowledge of material facts that a reasonable investor would view as important in deciding whether to buy, sell or hold Certicom securities. Although he knew Wormald's position at RIM, Donald submits that it would be unreasonable to conclude that, in the circumstances of this case, the information conveyed by Wormald to Donald was based on undisclosed or confidential information. Donald characterizes these circumstances as follows: (i) a conversation between Donald and Wormald that took place in a casual "public" setting; (ii) the information conveyed was communicated in an informal manner;

(iii) the information lacked any real detail to support Wormald's statements; and (iv) the information was conveyed without any indication from Wormald that it was confidential. Donald submits that his discussion with Wormald was a three or four minute conversation out of a three or four hour dinner after much alcohol had been consumed and after golf had been played and the day was essentially at the point of winding down. Donald argues that anybody having drinks and then wine and dinner is not going to think that they are about to get material undisclosed information, and cites *Monarch* for the proposition that Donald should not have been put to the task of cross-examining Wormald to determine whether the information was somehow confidential. Donald submits that any fault lies with Wormald who had no business talking about confidential information at dinner, and who, if he did discuss confidential information, had an obligation to tell Donald that they were working on a transaction and he should keep it confidential. Further, Donald points out that he was not on the In-the-Know List until March 2009, and Yersh, who heard Wormald and Donald's conversation at dinner on August 20, 2008, was not on the In-the-Know List until November 10, 2008.

[187] Donald submits that Certicom's directors had knowledge of more information about discussions with RIM and Certicom than Donald had but were granted options by Certicom's board in June 2008 and Gupta purchased Certicom shares in July 2008. Donald submits that Staff alleges that the confidential discussions were material to Certicom and yet Gupta, who was on the other end of the telephone call with Balsillie about a RIM acquisition of Certicom in March 2008, felt comfortable buying Certicom shares. Similarly, Donald submits that Gupta was aware of Vanstone's prior discussions with Wormald because he put an end to them and he knew of RIM's continuing interest in Certicom because he told RIM that he would get back to them after a few quarters.

[188] Finally, Donald submits that the information about the possibility of the reengagement of the parties in discussions about a potential acquisition and Certicom's possible value was speculative and surrounded by uncertainties to the degree that Donald was undertaking a substantial risk in making an investment in Certicom based on the information conveyed to him by Wormald on August 20, 2008.

(d) Donald's Trading

[189] Donald submits that there was nothing secretive about his purchases of Certicom shares and that he traded in his own name and in his own account in Kitchener through his usual broker. Donald acquired securities equal in value to 3% of his portfolio, which was consistent with past instances in which he traded 2% to 3% of such value in similar types of investments. Donald submits that it is counterintuitive that he would trade in his own name and with his own broker and in the usual fashion if he was trading based on highly confidential material information.

[190] Similarly, Donald submits that placing an order for Certicom shares below the market price and leaving the order open for almost a month before acquiring 200,000 shares is not behaviour that indicates wrongful trading. Donald notes that the average price that he paid for Certicom shares was $1.52, which was above RIM's initial bid price of $1.50 per share.

[191] Donald submits that his conduct was that of a person who made an honest investment decision and traded in a manner that was entirely consistent with his past trading activity.

Donald submits that his behaviour is in contrast with that of the subjects of past insider trading cases which show a pattern of people who are trading unethically and dishonestly and in a rapacious manner.

B. Overview of the Law

1. Insider Trading

[192] Subsection 76(1) of the Act prohibits trading in securities of an issuer by persons or companies in a special relationship with that issuer. Subsection 76(1) of the Act states:

> 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.

[193] In this case, Staff alleges that Donald was a person in a special relationship with Certicom when he purchased Certicom shares between August 21 and September 15, 2008. "Person or company in a special relationship with a reporting issuer" is defined in subsection 76(5) of the Act as follows:

> For the purposes of this section, "person or company in a special relationship with a reporting issuer" means,
>
> (a) a person or company that is an insider, affiliate or associate of,
>
> (i) the reporting issuer,
>
> (ii) a person or company that is proposing to make a take-over bid, as defined in Part XX, for the securities of the reporting issuer, or
>
> (iii) a person or company that is proposing to become a party to a reorganization, amalgamation, merger or arrangement or similar business combination with the reporting issuer or to acquire a substantial portion of its property;
>
> (b) a person or company that is engaging in or proposes to engage in any business or professional activity with or on behalf of the reporting issuer or with or on behalf of a person or company described in subclause (a)(ii) or (iii);
>
> (c) a person who is a director, officer or employee of the reporting issuer or of a person or company described in subclause (a)(ii) or (iii) or clause (b);
>
> (d) a person or company that learned of the material fact or material change with respect to the reporting issuer while the person or company was a person or company described in clause (a), (b) or (c);

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

[194] The core issue to be determined is therefore whether RIM was a company in a special relationship with Certicom because it was proposing to make a take-over bid for Certicom's shares, was proposing some other business combination with Certicom or was engaging in any business activity with Certicom.

2. Materiality

(a) Material Fact and Assessments of Materiality

[195] Staff alleges that Donald was in possession of a material fact with respect to Certicom, which was not generally disclosed. 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

[196] The Commission noted in *Donnini* that an assessment of materiality is fact-specific and will vary with every issuer according to multiple factors (*Donnini, supra* at para. 135).

[197] The Commission confirmed the fact-specific nature of materiality assessments in its decision in *Biovail*:

> In 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. In National Policy 51-201 of the Canadian Securities Administrators, it is stated that:
>
> > In making materiality judgements, 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 the operations and many other factors.
>
> …
>
> Accordingly, 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 paras. 65 and 69)

[198] The Commission has also stated previously that materiality often occurs at a much earlier stage for smaller issuers than larger issuers (*AiT, supra* at para. 207).

[199] 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; *YBM, supra* at para. 90). 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. …

[200] NP 51-201 also includes a list of examples of potentially material information at section 4.3. 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

[201] The test to be applied in this case when determining whether any fact is a material fact is an objective market impact test, i.e. would any of the Four Facts be reasonably expected to significantly affect the market price or value of Certicom'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)

[202] Subsequent to the hearing in this matter, the Commission released its decision in *Re Coventree Inc.* (2011), 34 O.S.C.B 10209, which includes a discussion of the law on materiality. The panel in *Re Coventree Inc.* made findings with respect to allegations of failures to disclose a material fact in a prospectus and of failure to comply with continuous disclosure obligations with respect to the disclosure of material changes. While we do not discuss that decision in these Reasons, we note that our conclusions as to the law on material fact and materiality are consistent with those in *Re Coventree Inc.*

(b) Cumulative Effect of Facts

[203] Staff submits that we may consider the cumulative effect of the Four Facts, taken together, in determining whether Donald was in possession of a material fact when he purchased Certicom securities. 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)

[204] Similarly, in *AiT*, 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)

We note that *AiT* was addressing whether a material change had occurred and not whether certain events constituted material facts.

(c) Materiality of a Contingent Event

[205] 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)

[206] The Commission has previously referred to the American test for the materiality of contingent events, the probability/magnitude test. In *Donnini*, the Commission made reference to the probability/magnitude test from the U.S. cases *Basic v. Levinson* and *Texas Gulf Sulphur*. 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. [Emphasis added.]
>
> (*Donnini, supra* at paras. 132-133 citing *Basic v. Levinson, supra* at 239)

[207] As stated above, one of the factors we may consider in assessing the probability of a contingent or speculative transaction as noted in *Basic v. Levinson* is whether there are indicia of

interest in the transaction at the highest corporate levels. The Court in *Basic v. Levinson* went on to further state:

> Materiality in the merger context depends on the probability that the transaction will be consummated, and its significance to the issuer of the securities. Materiality depends on the facts and thus is to be determined on a case-by-case basis.
>
> (*Basic v. Levinson, supra* at para. 250)

This case does not, however, turn on the probability that, as of August 21, 2008, RIM would acquire Certicom.

C. Was Donald a person in a special relationship with Certicom when he purchased Certicom securities in August 2008?

[208] Staff alleges that Donald was a person in a special relationship with Certicom because he:

(a) learned of material facts with respect to Certicom while he was an insider, officer and employee of RIM, when RIM was a company:

(i) proposing to make a take-over bid for Certicom;

(ii) proposing to become a party to a reorganization, amalgamation, merger or arrangement or similar business combination with Certicom; and/or

(iii) engaging in business with Certicom; and

(b) learned of material facts with respect to Certicom from Wormald who was in a special relationship with Certicom in circumstances where Donald knew or ought reasonably to have known that Wormald was a person in such a relationship.

[209] A determination of whether Donald was a person in a special relationship with Certicom requires a detailed consideration of the definition of "person or company in a special relationship with a reporting issuer" found in subsection 76(5) of the Act and its application to Donald's circumstances in August 2008.

[210] Staff alleges that Donald was a person in a special relationship with Certicom when he purchased Certicom securities in August 2008 and September 2008 for the following reasons:

(a) Donald was an officer and employee of RIM at the time RIM was a company proposing to make a take-over bid for Certicom's shares (subsections 76(5)(c) and 76(5)(a)(ii) of the Act);

(b) Donald was an officer and employee of RIM at the time RIM was a company proposing to become a party to a reorganization, amalgamation, merger or arrangement or similar business combination with Certicom or to acquire a substantial portion of its property (subsections 76(5)(c) and 76(5)(a)(iii) of the Act);

(c) Donald was an officer and employee of RIM and RIM was engaging in or proposing to engage in any business or professional activity with Certicom (subsections 76(5)(c) and 76(5)(b) of the Act);

(d) Donald learned of a material fact with respect to Certicom from Wormald, who was an officer and employee of RIM at the time RIM was a company proposing to make a take-over bid for Certicom (subsections 76(5)(e), 76(5)(c) and 76(5)(a)(ii) of the Act); and

(e) Donald learned of a material fact with respect to Certicom from Wormald, who was an officer and employee of RIM at the time RIM was a company 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 (subsections 76(5)(e), 76(5)(c) and 76(5)(a)(iii) of the Act).

1. Was RIM proposing to make a take-over bid for the securities of Certicom in August 2008 (subsection 76(5)(a)(ii) of the Act)?

(a) Indicia of Interest at the Highest Corporate Levels of RIM

[211] Although subsection 76(5) of the Act is precise in setting out the circumstances in which a person or company is considered to be in a special relationship with a reporting issuer, we have little guidance as to when or in what circumstances a person or company is proposing to make a take-over bid or enter into a business combination within the meaning of subsections 76(5)(a)(ii) or (iii) of the Act, respectively.

[212] In the Divisional Court's decision on the appeal of *Donnini*, the Court noted:

> … 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. 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.
>
> (*Donnini (Div. Ct.), supra* at para. 17)

[213] The U.S. Supreme Court in *Basic v. Levinson*, when assessing the materiality of merger discussions, stated the following:

> 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. [Emphasis added.]
>
> (*Basic v. Levinson, supra* at 239)

[214] Although the foregoing comments in *Basic v. Levinson* relate to a determination of the materiality of merger discussions, we nonetheless find them helpful in our analysis of whether RIM was proposing to make a take-over bid for Certicom in August 2008. In our view, for RIM to be "proposing" to make a take-over bid for Certicom, there must have been some significant level of involvement and approval of the process at the highest corporate levels at RIM.

[215] Balsillie was involved in discussions with Certicom on a limited number of occasions, the first of which took place when Certicom initially proposed that RIM acquire Certicom in February 2007. After the initial meeting, most of the communication with Certicom was undertaken by Wormald or by other members of the Strategic Alliances Group. Wormald testified that he had regular dialogues with Balsillie, and probably also with Lazaridis, about what his team was working on and what opportunities they were considering. In a March 16, 2008 e-mail to Balsillie with the subject line "Further things that I'm working on", Wormald stated with respect to acquisitions: "We are focused on Certicom and Alt-N (email server) as real targets we are working on. Both should be ready to give you a full briefing on in about 2 weeks".

[216] On March 18, 2008, Reddy e-mailed Balsillie in preparation for a call that Balsillie, Reddy and Wormald were to have with Gupta the following day. In the e-mail, Reddy provided Balsillie with background information on Certicom's patent licenses, its OEM [original equipment manufacturer] licence agreements, ECC's uses and on Gupta, as Certicom's new CEO. Reddy noted specifically:

> Karna [Gupta] is aware that discussions were started a year ago but does NOT know that RIM was provided with specific deal documents from Scott [Vanstone].
>
> We want to re-iterate our potential interest and ask for them to provide the information we need to conduct due diligence.

[217] As previously noted, following the March 19, 2008 call, Gupta advised Balsillie that he would follow-up with Wormald after a few quarters. Upon receiving Gupta's response, Balsillie instructed Wormald in a March 26, 2008 e-mail as follows:

> Hey – let's acquire some shares – it's likely a good investment now.
>
> We'll decide next steps in a few months.

[218] RIM did not purchase any Certicom shares at that time as the result of advice that it received from its Canadian and U.S. legal advisors. RIM's first purchase of Certicom shares took place when it acquired Certicom in 2009.

[219] On May 21, 2008, Wormald advised Reddy by e-mail that he had spoken with Balsillie who wanted additional information regarding Certicom:

> Talked with Jim today. He wants to know:
>
> which investment house trades their stock the bios of their board members distribution of shareholders – who are the major shareholders who they have used for banking in the past.

[220] The information Balsillie requested be obtained by the Strategic Alliances Group was included in the Pitch Book, the first drafts of which were all dated August 2008. Wormald, RIM's Vice President of Strategic Alliances, did not receive a finalized version of the Pitch Book until on or about August 27, 2012. Belcher testified that, although he could not recall exactly when it took place, he had a meeting with Wormald and Balsillie at some time in September or October 2008, at which he presented the valuation portions of the Pitch Book to Balsillie and discussed with him the Certicom share price at the time. It does not appear from the evidence that Balsillie was presented with the information in the Pitch Book until some time after August 20, 2008.

[221] The Certicom Directors' Circular, issued in response to RIM's December 10 Offer to Purchase, notes that Balsillie contacted Gupta on October 28, 2008 to inform him that RIM's board of directors had approved the acquisition of Certicom and that RIM wanted to proceed in a friendly manner.

[222] The members of RIM's board of directors were only added to the In-the-Know List regarding the potential acquisition of Certicom on November 19, 2008 when they were provided with a briefing memorandum entitled "Proposed Acquisition of Certicom Corp. – Briefing Memo" prior to the scheduled meeting of the board of directors on November 24, 2008. Balsillie provided RIM's board of directors with an update relating to three potential acquisitions, including Certicom, at the November 24, 2008 board meeting. At the meeting, RIM's board discussed the proposed acquisition and authorized RIM's officers to pursue the acquisition. On November 28, 2008, RIM sent a non-binding expression of interest to Certicom's board of directors, proposing a cash offer of $1.50 per Certicom share which, as noted above, was rejected by Certicom's board of directors.

(b) RIM's Options with respect to Certicom in August 2008

[223] It would appear from the evidence that, as of August 20, 2008, RIM could have pursued the following three options for the purpose of gaining greater access to Certicom's ECC technology:

(a) RIM could have made a take-over bid to acquire Certicom's shares;

(b) RIM could have acquired all or a portion of Certicom's business on some basis other than a take-over bid, e.g., a negotiated business combination or transaction which Certicom had suggested in 2007; or

(c) RIM could have negotiated a more extensive licensing agreement with Certicom along the lines that Kirkup and Brown had been discussing with Certicom in July and August 2008.

[224] In July and August 2008, work with respect to all of these options was being undertaken by two groups within RIM, namely, those in the Strategic Alliances Group, and those who were dealing with RIM's licensing arrangements for the use of Certicom technology, including Kirkup and Brown.

(c) Findings with respect to Proposing to Make a Take-Over Bid

[225] We agree with Staff's submission that, in reading subsection 76(5)(a)(ii) of the Act, we should do so in light of the purposes of the Act and the public interest mandate of the Commission. However, we must also consider the specific language chosen by the legislature in drafting the provision.

[226] Staff directs us to the U.S. Supreme Court's decision in *TSX v. Northway* for the proposition that any uncertainty regarding the boundaries of "proposing" should be resolved in favour of the Act's purposes of protecting investors and ensuring confidence in the capital markets. Donald refers us to another American decision, *Monarch*, which considers the different positions of "insiders" and "outsiders". Although we may find guidance in some of the American case law on insider trading, we must nevertheless consider the differences between the U.S. laws relating to insider trading and our insider trading legislation. The language of subsection 76(5) of the Act is specific and is limited to prescribed circumstances. We must presume that the drafters of the provision intended the definition of "person or company in a special relationship with a reporting issuer" to be limited to those individuals or companies who or which are specifically caught by the wording.

[227] In August 2008, the Strategic Alliances Group was clearly considering whether to recommend a take-over bid for Certicom and, in the absence of any willingness on the part of Certicom to engage in negotiations relating to such an acquisition, was in the process of preparing the Pitch Book which was essentially a proposal to RIM's senior management that RIM make a take-over bid for the shares of Certicom. At that time, Wormald was the only officer of RIM with any meaningful involvement in the process, however, his involvement in the due diligence process and the subsequent preparation of the Pitch Book was periodic and supervisory in nature. The evidence indicates that, while Balsillie had clearly expressed an interest in Certicom, he only received reports from Wormald about the due diligence process as part of Wormald's routine meetings with Balsillie to update him on the activities of the Strategic Alliances Group. Wormald testified that:

> Regardless of whether I formally reported to him, I would have – I would have regular dialogues, I would say, at least once a month with Mr. Balsillie, and probably it's fair to say with Mr. Lazaridis, who is his other co-CEO, about things that, you know, things we were working on, looking at opportunities that were percolating up or we were working through.
>
> (Hearing Transcript, March 22, 2011 at page 20, lines 5 to 12)

[228] Wormald testified that Balsillie's instructions to him with respect to Certicom were: "… to keep working on it, but … as Mr. Balsillie had indicated back I think a few months before, … he wanted to continue to be consulted and approve on any sort of concrete steps we took before

passing any milestones or crossing any lines", which they had not done at the time the Pitch Book was being prepared (Hearing Transcript, March 22, 2011 at page 117, lines 12 to 17). Balsillie did not, at any time prior to August 21, 2008, advise Wormald that RIM would or should acquire Certicom. Moreover, as the subsequent events made quite clear, Balsillie sought and obtained the approval of RIM's board of directors before he initiated both the failed attempt to negotiate a friendly acquisition of Certicom and the subsequent hostile take-over bid which eventually led to the successful acquisition of Certicom.

[229] In our view, the evidence is clear that, as of the date of the 2008 RIM Golf Event and the day thereafter when Donald placed his order to purchase shares of Certicom, and notwithstanding the considerable amount of due diligence that had been undertaken by the Strategic Alliances Group, RIM's interest in acquiring Certicom had not evolved into a proposal to do so. The evidence does not establish that RIM had made a decision that it should be or would be proposing to make a take-over bid to acquire Certicom within the meaning of subsection 76(5)(a)(ii) of the Act.

[230] In coming to the foregoing conclusion, we take into account the following factors:

(a) Balsillie, the Co-CEO of RIM with the greatest knowledge of and involvement with the matter, had not made a decision to proceed with the acquisition of Certicom or any portion of its business and had made it clear to Wormald that he wished to be consulted and to approve any "concrete steps we took before passing any milestones or crossing any lines" (Hearing Transcript, March 22, 2011 at page 117, lines 13 to 17).

(b) Although the members of the Strategic Alliances Group appear to have been close to completing an analysis of Certicom's patents and licence agreements and a valuation of Certicom based on Certicom's intellectual property and the cash flow savings to RIM in the event of a successful acquisition of Certicom, as of August 21, 2008, neither this information nor the report on the due diligence process, including a recommended bid range, had been seen or reviewed by either Balsillie or RIM's board of directors. In short, as of August 21, 2008, neither RIM's senior management nor its board of directors had expressed an interest in acquiring Certicom or made a decision to do so.

(c) There was no direct communication between Balsillie and Gupta between March 9, 2008 when Balsillie telephoned Gupta to suggest the reinstatement of discussions relating to a potential acquisition of Certicom by RIM and Balsillie's telephone call to Gupta on October 28, 2008 to inform him that RIM's board of directors had approved the acquisition of Certicom and that RIM wanted to proceed in a friendly manner.

(d) As the evidence disclosed that RIM had never previously made a take-over bid for an issuer, it would be reasonable to expect that RIM would seek advice about the process, the legal requirements and the associated risks before agreeing or committing to initiate such a bid. The need to undertake these steps was clearly reflected in the Pitch Book as noted in paragraph [129] above. Speaking about the

likelihood of a hostile bid at the time the Pitch Book was created, Wormald testified: "We just were unaware of all the mechanics behind a hostile offer and, you know, what the requirements were. So, you know, to say – today we were firm in our desire to do it is a little premature because we hadn't really spun up the discussion with investment bankers or lawyers to be sure that it was a path we could take" (Hearing Transcript, March 22, 2011 at page 116, lines 1 to 7).

(e) RIM had not retained external financial or legal advisors, which is typically one of the first steps taken when the acquisition of a publicly-traded company is contemplated, and had not addressed the manner in which any proposed acquisition would be financed.

(f) No trading ban relating to Certicom shares was implemented and no formal In-the-Know List was created until the Strategic Alliances Group was provided with an initial draft by Gardiner, RIM's internal legal counsel, on November 20, 2008. While it might be argued that RIM was unfamiliar with the need for such a List given the lack of prior experience with a take-over bid, the absence of an In-the-Know List suggests that RIM had not received legal advice about the steps that it needed to undertake if a decision was made to proceed with a bid.

We are not saying that each of the factors described above is necessary for the Commission to conclude that a person is proposing to make a take-over bid but rather to give some indication of the factors or developments that the Commission would take into account in coming to such a conclusion.

[231] We note that Donald's order to purchase Certicom shares was filled through purchases made over a period of 13 days, beginning on August 21, 2008 and ending on September 19, 2008. We do not consider the time between Donald's first and last purchases of Certicom shares to be relevant to our analysis as it was not alleged by Staff and we heard no evidence to suggest that Donald received any additional information pertaining to Certicom from RIM personnel after August 20, 2008.

2. Was RIM proposing to become a party to a reorganization, amalgamation, merger or arrangement or similar business combination with Certicom or proposing to acquire a substantial portion of Certicom's property in August 2008 (subsection 76(5)(a)(iii) of the Act)?

[232] On August 20, 2008, there were no active discussions underway between Certicom and RIM with respect to a reorganization, amalgamation, merger or arrangement or similar business combination. Certicom had originally initiated discussions about the possibility of RIM acquiring Certicom in February 2007 and the due diligence process was commenced by Wormald as described above. In March 2008, discussions were "put on hold" after Gupta became Certicom's CEO and he e-mailed Balsillie indicating that he would contact RIM after a few quarters to give him time to complete the initial mandate given to him by Certicom's board of directors. In his March 26, 2008 e-mail to Balsillie, Gupta wrote:

> Since my coming on board (end of Jan 2008), my primary focus is to get the business fundamentals fixed and aligned within Certicom; to that end I have a set of deliverables I am working on for the Board.
>
> As I mentioned in my call, RIM is extremely important to Certicom and I want to ensure that we say engaged to support RIM's business needs. This can include several scenarios: (1) continue as a strong business partner; (2) initiate a due diligence process which can lead to several options as to how RIM may want to proceed with respect to investment.
>
> Jim, you asked me what my recommendation is on this file. My suggestion would be that I will contact Chris Wormald after a few quarters; this will give me the time I need to complete my initial mandate from the Board in resolving the business challenges facing Certicom. As well, by then we will know more definitively where we stand on the current litigation process with Sony. [Emphasis added.]

[233] It was not until early September 2008 that Gupta advised RIM that Certicom wanted to restart discussions about a proposed strategic transaction, and on September 16, 2008, Wormald and Belcher met with Gupta to discuss possible strategic investment alternatives, including a strategic transaction or an acquisition.

[234] Subsections 76(5)(a)(ii) and (iii) of the Act both include the requirement that a person or company be "proposing" a take-over bid or business combination. As a result, and based on the same analysis as set out in paragraph [229] above, we are of the view that RIM must have made a decision to propose a take-over bid or business combination with Certicom for subsection 76(5)(a)(iii) to apply. As of August 20, 2008, neither the senior management nor the board of directors of RIM had made such a decision.

[235] RIM was not at the stage of proposing a reorganization, amalgamation, merger or arrangement of similar business combination with Certicom at the time of the 2008 RIM Golf Event, and was not, therefore, in a special relationship with Certicom by virtue of subsection 76(5)(a)(iii) of the Act.

3. Was RIM engaging in business or proposing to engage in any business or professional activity with Certicom in August 2008 (subsection 76(5)(b) of the Act)?

[236] RIM had an ongoing business relationship with Certicom since May 2000 when RIM first began licensing Certicom's toolkits.

[237] Although RIM and Certicom had engaged in business when discussing the possibility of an acquisition in the period following the initial meeting between Gupta and Balsillie in February 2007, the discussions had been terminated well before the date of the 2008 RIM Golf Event. Prior to August 2008, Certicom had provided RIM with confidential licensing and other information that RIM's Strategic Alliances Group subsequently used in assessing Certicom as a potential acquisition.

[238] We have also addressed the business relationship between RIM's ISV Alliances group and Certicom in July and August 2008 regarding potential licensing arrangements for RIM's third-party software developers. Although Wormald's team was in contact with Kirkup and Brown regarding their work on this initiative, the ISV Alliances group's work was not related to the work the Strategic Alliances Group was doing at that time.

[239] Staff submits that there is no requirement that the business activity referred to in subsection 76(5)(b) of the Act relate directly to a potential transaction. In our view, the fact that RIM had been licensing Certicom's ECC technology since 2000 is not a sufficient basis on which to conclude that Donald was in a special relationship with Certicom. We agree with Donald's submission that there must be a more clear connection than exists in this case between the business engaged in or proposed to be engaged in and the alleged material facts in order for a person or company to be in a special relationship with an issuer for the purposes of subsection 76(5)(b) of the Act. The core of Staff's allegations in this case is that RIM was proposing a take-over bid for Certicom or proposing to enter into a business combination with Certicom and its submissions relating to subsection 76(5)(b) of the Act are of secondary importance.

4. Was Donald in a special relationship with Certicom as a result of his position as an officer or employee of RIM in August 2008 (subsection 76(5)(c) of the Act)?

[240] Donald was a Vice President of RIM when he discussed Certicom with Wormald at the 2008 RIM Golf Event. As such, he was an officer or employee of RIM within the meaning of subsection 76(5)(c) of the Act. Had we found that RIM was proposing to make a take-over bid for Certicom or proposing to enter into some other business relationship with Certicom, we would have concluded that Donald, as an officer and employee of RIM, was in a special relationship with Certicom. As we have concluded that RIM was not in a special relationship with Certicom, we cannot conclude that Donald was in a special relationship with Certicom in his capacity as an officer or employee of RIM.

5. Did Donald learn of a material fact from a person in a special relationship with Certicom (subsection 76(5)(e) of the Act)?

[241] Our analysis of the materiality of what Wormald communicated to Donald at the 2008 RIM Golf Event is addressed below.

[242] For the same reasons that we could not find that Donald was in a special relationship with Certicom, we cannot find that Wormald was in a special relationship with Certicom.

[243] Wormald was the most senior RIM officer directly involved in considering Certicom as a potential acquisition. As discussed below, we find that Donald learned of material facts with respect to Certicom from Wormald during their discussion at the 2008 RIM Golf Event. Had we found that RIM or Wormald was in a special relationship with Certicom, we would have concluded that Donald was also in a special relationship with Certicom by reason of the application of subsection 76(5)(e) of the Act.

D. Was Donald in possession of a material fact with respect to Certicom when he purchased Certicom securities in August 2008?

(a) Did Donald learn of the Four Facts from Wormald on August 20, 2008?

[244] The Four Facts that Staff alleges Donald learned of from Wormald during the 2008 RIM Golf event are, once again, that:

(a) RIM had been in confidential discussions with Certicom relating to a potential acquisition of Certicom by RIM;

(b) RIM was in talks with Vanstone, Certicom's founder and a former CEO and a member of Certicom's board of directors;

(c) RIM had a continuing interest in the acquisition of Certicom; and

(d) Donald understood from Wormald that Certicom's current share price was dramatically undervalued based on Certicom's licensing agreements.

[245] With respect to paragraph [244](a), it is clear from the evidence that RIM was not engaged in confidential discussions with Certicom as of August 20, 2008, although it had been in the past.

[246] With respect to paragraph [244](b), we find that the statement was not true as of August 20, 2008. The evidence shows that RIM had been in contact with Vanstone in 2007 and earlier in 2008, but that, by the Summer of 2008, this was no longer the case. We were presented with e-mails between Vanstone and Wormald and Reddy in early to mid-March 2008 in which they discussed information about Certicom that RIM was attempting to obtain. We do not have evidence of any communications between Vanstone and RIM subsequent to Gupta's March 26, 2008 e-mail to Balsillie, in which Gupta indicated that the "due diligence" process with RIM would be put on hold for a few quarters, stating specifically that: "I have also advised Scott [Vanstone] not to engage in any discussion on "due diligence" at this stage". Wormald testified that Gupta effectively shut down any discussions with Vanstone in March 2008, stating that there were "[n]o further substantive discussions around an acquisition between us [RIM] and Certicom" from March 2008 until mid-September 2008 (Hearing Transcript, March 22, 2011 at page 146, lines 17 to 22). Although Vanstone provided RIM with information relating to Certicom's licence agreements that RIM had not previously received at the time of the 2008 RIM Golf Event, communication between RIM and Vanstone had ceased.

[247] With respect to paragraph [244](c), it is clear from the evidence and as noted in paragraph [229] above that, as of August 20, 2008, RIM had a continuing interest in acquiring Certicom. However, as concluded in paragraphs [229] and [234] above, we have found that, at that time, RIM was not proposing to make a take-over bid for Certicom or enter into a business combination with Certicom.

[248] With respect to paragraph [244](d), the evidence of Donald and Wormald as to how the topic of Certicom arose at the 2008 RIM Golf Event is not consistent. Wormald testified that Certicom came up in a "what are you working on" type of discussion, while Donald testified that

Certicom came up in the context of a discussion about undervalued companies. However the topic did arise, the conversation included a discussion about Wormald's work relating to Certicom as a potential acquisition by RIM.

[249] Wormald told Donald that RIM had been in acquisition talks with Certicom, but that Certicom's board of directors was not interested in such discussions at the time. At the time of the hearing, Wormald remembered mentioning the frustration around the status of discussions with Certicom, but did not recall much additional detail about what he had said concerning RIM's work relating to Certicom. Donald testified that he understood that Wormald was in discussions with Vanstone, but that he did not know that any one else at RIM was in discussions with Vanstone.

[250] At the time of the hearing, Donald seemed to recall that Wormald placed Certicom's value at about $5.00 per share in their discussion at the 2008 RIM Golf Event. Donald did not recall in testimony, as he had in his compelled examination by Staff during its investigation of this matter, that Wormald believed Certicom was undervalued based on its patents, licensing agreements and its importance to technology providers which required security. In his examination by Staff, Donald stated the following:

> … The discussion came up. I can't remember how the discussion came up. But we were talking about undervalued companies.
>
> …
>
> Chris [Wormald] offered up that he felt that Certicom was an undervalued company, that he felt that, you know, it would be worth $5 based on their patent [*sic*], based on their licensing agreements and, you know, based on how important the company was …
>
> (Hearing Transcript, March 28, 2011 at page 118, line 19 to page 119, line 3)

[251] Donald's position is that Certicom was brought up in a general discussion about undervalued companies. Donald was aware of Wormald's position as Vice President, Strategic Alliances when they spoke, and he became aware through the conversation that RIM was interested in Certicom as an acquisition, however frustrated it was at the time with the progress of discussions with Certicom. Our conclusion that Donald understood that their discussion related to the work at RIM respecting the acquisition of Certicom is supported by Donald's offer to assist Wormald by putting him in contact with Deck, a former CEO of Certicom.

[252] Based on the evidence, we find that Donald learned of the following facts from Wormald during their dinner conversation at the 2008 RIM Golf Event:

(a) RIM had been, but was not then currently, engaged in confidential discussions with Certicom relating to a potential acquisition of Certicom by RIM;

(b) RIM had an ongoing interest in acquiring Certicom; and

(c) Certicom's then current share price was undervalued based on Certicom's licensing agreements;

(collectively, the "**Three Facts**").

[253] In light of the foregoing conclusions, we turn to the materiality of the Three Facts at the time Donald purchased Certicom shares.

(b) RIM's Interest in Certicom

[254] The Commission noted in *AiT* that specifics with respect to a merger transaction may be material for the purposes of insider trading before disclosure of a material change is required:

> … For example, in a negotiation for a merger transaction, such negotiations may be material at a very early stage and for the purpose of insider trading laws, persons aware of such "material facts" should be prohibited from trading on this information. However, this may be well before the negotiations have reached a point of commitment to be characterized as a change in the issuer's business, operations or capital, and therefore, before public disclosure of the information would be appropriate.
>
> (*AiT, supra* at para. 210)

[255] As of August 21, 2008, RIM personnel were actively engaged in considering Certicom as a potential acquisition even though Certicom was not engaged in discussions with RIM about an acquisition at that time. RIM had received confidential documents pursuant to the 2007 NDA and the Strategic Alliances Group had obtained RIM's internal valuations of Certicom's intellectual property from Zindani.

(c) Source of Information and Importance Attached to Information

[256] *Donnini* refers to the case of *Securities and Exchange Commission v. Mayhew*, 121 F.3d 44 (2d Cir. 1997) ("***Mayhew***") in connection with the importance of the information relied on as a factor in determining materiality:

> … the court [in *Mayhew*] noted, at 52, that "a major factor in determining whether information was material is the importance attached to it by those who knew about it." *Mayhew* concerned a securities trader who had received inside information in respective [*sic*] of a potential merger and traded on the basis of that information. Based on the facts, the court employed a contextual approach and held, at 52, that, "Although Mayhew was not given the specific details of the merger, a lesser level of specificity is required because he knew the information came from an insider and that the merger discussions were actual and serious." Accordingly, the Court concluded that the information at issue was material. In our case, Donnini may not have been aware of all the specifics of the negotiation but he knew it was being undertaken at the highest level at Yorkton and KCA and

> that Paterson was keen, while KCA was in need of further financing and interested: he knew that the negotiations were actual and serious.
>
> (*Donnini, supra* at para. 152)

[257] Although Donald may not have known the specifics of the work being undertaken with respect to Certicom by the Strategic Alliances Group, the fact that he learned the Three Facts from Wormald, who was responsible for the Group, is an important factor to be considered. What Donald did after learning of the Three Facts, namely, placing an order to purchase Certicom shares prior to the opening of the markets the next day, provides a further indication of the importance he ascribed to those facts, notwithstanding his protestations to the contrary.

[258] In *Re Danuke* (1981), 2 O.S.C.B. 31C ("***Danuke***"), one of the respondents, a Ms. Danuke, became aware that The Toronto-Dominion Bank was about to announce its intention to offer to purchase TD Realty Investments at $24.00 per unit. On the same day, she and others purchased units in the target company at prices at and below $21.00 per unit (*Danuke, supra* at 32C-33C). In its decision, the Commission stated:

> … The evidence of Danuke and the former T.D. officer was not clear as to what he told Danuke but the fact is that immediately following that conversation she informed the other members of the sales group of her belief that that afternoon T.D. would announce its intention to purchase the TDRI trust units for $24.00 per unit. Danuke gave the other members of the sales group to understand that this information had come from an officer of T.D.
>
> (*Danuke, supra* at 34C)

[259] The Panel in *Danuke* concluded that the conduct of the respondents refuted their suggestion that the information they had was only "rumour":

> The information possessed by the T.D. officer that his employer intended to announce its intention to offer to purchase all of the outstanding units of TDRI at $24.00 per unit following the close of trading that day was a "material fact" …. While, as we have noted, the other sales persons were not told specifically that specific information had been obtained from a T.D. officer nonetheless Danuke led them correctly to believe that she had been talking to a T.D. officer. Scott and MacDonald acted upon what they were led to believe was inside information and what Danuke knew to be inside information. <u>While they and their counsel insist on styling the information to be a "rumour" their subsequent conduct refutes this suggestion</u>. [Emphasis added.]
>
> (*Danuke, supra* at 39C)

[260] We also considered the U.S. case of *Texas Gulf Sulphur*, in which the court found that the importance of the information to those who had received it could be taken into account in determining materiality:

> … a major factor in determining whether the K-55-1 discovery was a material fact is the importance attached to the drilling results by those who knew about it. In view of other unrelated recent developments favorably affecting TGS, participation by an informed person in a regular stock-purchase program, or even sporadic trading by an informed person, might lend only nominal support to the inference of the materiality of the K-55-1 discovery; nevertheless, the timing by those who knew of it of their stock purchases in some cases by individuals who had never before purchased calls or even TGS stock- virtually compels the inference that the insiders were influenced by the drilling results. This insider trading activity, which surely constitutes highly pertinent evidence and the only truly objective evidence of the materiality of the K-55-1 discovery, was apparently disregarded by the court below in favor of the testimony of defendants' expert witnesses, all of whom 'agreed that one drill core does not establish an ore body, much less a mine. [Emphasis added.]
>
> (*Texas Gulf Sulphur, supra* at 851)

[261] Although Donald had been familiar with Certicom for years, he had never before purchased Certicom securities. Within hours of becoming aware of the Three Facts, Donald placed an order with his broker to purchase $300,000 worth of Certicom shares. Donald submits that the discussion of Certicom reminded him of Certicom, and that he did his own internet-based research relating to Certicom, looking at its trading history, the trends of its share price and reading its press releases, the following morning prior to placing his purchase order. We were not presented with any additional evidence in support of Donald's testimony that he researched Certicom on the morning of August 21, 2008 before placing a call to his broker, Hinsperger, at about 9:00 a.m. Notwithstanding Donald's testimony, the timing of his purchases of Certicom shares, in the words of the court in *Texas Gulf Sulphur*, virtually compels the inference that he was motivated to purchase the shares, at least in part, on learning of the Three Facts from Wormald the previous evening. We note, however, that there is no legal requirement that Staff prove that Donald made use of that information in purchasing the shares of Certicom. The legal requirement is that Donald had knowledge of that information when he traded.

(d) Dr. Comment's Expert Evidence with respect to Materiality

[262] Dr. Comment provided his opinion as to the effect that the Four Facts, as alleged by Staff, would have had on the price of Certicom securities had they been generally disclosed. Based on his analysis, Dr. Comment concluded that the information conveyed to Donald at the 2008 RIM Golf Event was not material non-public information. In his analysis, Dr. Comment considered whether the Four Facts "would reasonably be expected" to have a significant effect on Certicom's share price had they been made public in a hypothetical disclosure to the market by RIM at around the time of the 2008 RIM Golf Event.

[263] Dr. Comment provided the following four bases for his conclusion:

(a) RIM did not include Donald on an In-the-Know List at the relevant time.

(b) Merger-related discussions between RIM and Certicom before the 2008 RIM Golf Event were negligible, and would have been immaterial to the investing public.

(c) The fact of RIM's continuing interest in Certicom was not news in the sense that it was already in the mix of public information at the time of the 2008 RIM Golf Event, and would not therefore have moved the stock price had it been disclosed at that time.

(d) Wormald's "valuation opinion" that Certicom was worth $5.00 per share was not delivered at the 2008 RIM Golf Event with a specificity sufficient to make it material. This was Wormald's opinion and not necessarily a fact. For this information to be material, there would need to be a level of specificity or detail as to why Wormald believed what he did, which was not provided at the 2008 RIM Golf Event. Wormald's naked opinion that Certicom was worth $5.00 per share was not, therefore, material.

[264] Dr. Comment's opinion is that if RIM had issued a press release that included the information Donald learned from Wormald at the 2008 RIM Golf Event, it would not have significantly changed Certicom's stock price, i.e. a hypothetical press release from RIM on August 21, 2008 would essentially be a nullity conveying no material information.

[265] Dr. Comment concluded that insufficient information was communicated to Donald with regard to the likelihood of a transaction between RIM and Certicom to make Wormald's communications to Donald at the 2008 RIM Golf Event material. Dr. Comment stated in his expert report:

> … note the lack of specificity of the information conveyed during the golf dinner, where a lack of specificity weighs against any finding that information regarding an uncertain future transaction is material. At the time of the golf dinner, the missing markers of a likely future transaction included: (1) current interest in the transaction at the highest corporate levels, (2) a board resolution or the formation of a special committee, (3) retention of investment bankers, (4) retention of outside counsel, (5) serious merger talks between principals or their intermediaries, (6) due diligence visits, (7) plans to solicit additional bidders, (8) integration planning and (9) internal controls such as a blackout list.
>
> In my opinion, any finding of materiality here would have to be based on the sheer identity of the source, Chris Wormald, on the theory that his job description made any mention by him of a possible transaction inherently authoritative to the point of materiality. This is too speculative to support an expert opinion favoring materiality, however, and I see no additional supporting basis.
>
> (Affidavit of Dr. Comment, sworn December 15, 2010 at paras. 35-36)

[266] Dr. Comment noted that he had a low opinion of Wormald's valuation of Certicom at $5.00 per share because it was not "conveyed with a basis other than perhaps some implied-in basis, but no express basis" (Hearing Transcript, March 30, 2011 at page 142, lines 4 to 6). Dr. Comment testified that any opinion about the value of Certicom was necessarily an opinion

about the value of its patents, so he did not see any substantive basis for Wormald's opinion that would have led him to conclude that it was material. Dr. Comment noted that "[t]he quality, the weight one would attach to the opinion really flows from the basis, not from the opinion" (Hearing Transcript, March 30, 2011 at page 142, lines 1 to 3).

[267] In our view, Dr. Comment has overstated the importance of the matter described in paragraph [263](a) above and understated the importance of the matters described in paragraphs [263](b), (c) and (d) above. We do not agree that the fact of RIM's continuing interest in Certicom was already in the mix of public information at the time of the 2008 RIM Golf Event. In addition, Donald would have considered Wormald's analysis of Certicom's value and the possibility of a transaction to be, in the words of Dr. Comment in his evidence, "inherently authoritative to the point of materiality" given Wormald's responsibilities at RIM, RIM's internal valuation of Certicom's licensing agreements and Donald's knowledge of the importance of Certicom's ECC technology to RIM and to the industry and, therefore, to other potential buyers. Accordingly, we do not accept the opinion of Dr. Comment. Ultimately, as noted earlier in our Decision, materiality is an issue for the Panel to determine.

(e) Were the Three Facts Material?

[268] Donald submits that there was nothing in Wormald's conversation with Donald to "tip". He submits that no decision to proceed with a Certicom acquisition had yet been made by RIM, and RIM had not taken the step of engaging investment bankers or lawyers to work on the transaction as of the date of the 2008 RIM Golf Event.

[269] Although we found above that RIM was not proposing to make a take-over bid for Certicom in August 2008, that is not to say that the information provided to Donald regarding the status of RIM's consideration of a potential acquisition of Certicom was not material. Assessing the materiality of information is a separate analysis from the analysis of subsection 76(5)(a)(ii) of the Act.

[270] In determining whether Donald was in possession of any material facts after his August 20, 2008 conversation with Wormald, we apply an objective market impact test, as set out in the Act and applied previously by the Commission. The question to be asked is whether Donald was in possession of a fact that, at the time he placed his order to purchase Certicom shares on August 21, 2008, would reasonably be expected to have had a significant effect on the market price or value of Certicom securities if generally disclosed.

[271] Given that the Three Facts were communicated by Wormald to Donald as part of the same conversation, we do not consider it useful to undertake a separate analysis of each of the Three Facts to determine if each of them was material. In addition, it has been established in previous cases that the cumulative effect of a number of facts may be considered together in determining materiality. In our view, the Three Facts, taken together, would, if generally disclosed on the day following the 2008 RIM Golf Event, reasonably be expected to have significantly affected the market price or value of Certicom's securities, and would therefore be a material fact.

[272] We reiterate a statement that has been made in past Commission decisions; a determination of materiality is not a bright-line test, but is a common-sense judgment that must take into account the specific circumstances. NP 51-201 provides that materiality will vary between companies based on many factors, including the nature of the information communicated, the volatility of the securities, the size of the company and the nature of the company's operations (NP 51-201, *supra* at s. 4.2).

[273] Taking into account that (i) Certicom had provided RIM with confidential information pursuant to the 2007 NDA; (ii) RIM had used the confidential information in connection with its valuation of Certicom; (iii) Wormald was the officer overseeing RIM's analysis with respect to Certicom and was the person who communicated the Three Facts to Donald; and (iv) none of the Three Facts had been generally disclosed, we are of the view that the Three Facts communicated to Donald together constituted material facts.

[274] Our finding is also supported by the application, by analogy, of the American reasonable investor test. Given the substance of the Three Facts and the context in which they were communicated to Donald, we find it substantially likely that a reasonable investor would consider the Three Facts important in deciding whether to purchase or sell Certicom securities. Certicom's ECC technology was valuable to RIM and others in an industry in which RIM was a large participant with the resources to acquire Certicom. A reasonable investor, knowing that the officer at RIM who was overseeing the analysis of Certicom as a potential acquisition thought the company was undervalued, would be expected to take this information into account when making investment decisions with respect to Certicom.

[275] We have found that, at the time of the 2008 RIM Golf Event, RIM was not proposing to make a take-over bid for Certicom, nor was it proposing any other form of business combination. We heard arguments from the parties with respect to the application of the American probability/magnitude test in this case. In our view, the question is not whether in applying the American probability/magnitude test there was a substantial likelihood that RIM would acquire Certicom. The question is whether the Three Facts, if disclosed, would have significantly affected the market price or value of Certicom's shares.

[276] We find that the Three Facts taken together would reasonably be expected to have had a significant effect on the market price or value of Certicom shares if generally disclosed on August 21, 2008, the date on which Donald placed his order to purchase Certicom shares. Accordingly, the Three Facts taken together constitute material facts within the meaning of the Act.

E. Was Donald in possession of a material fact that was not generally disclosed when he purchased Certicom securities in August 2008?

[277] Donald submits that the information provided by Wormald at the 2008 RIM Golf Event was non-specific, conjectural, full of opinion and publicly available. Donald refers to the fact that the conversation did not take place in secret and that it was not hushed or hurried, and submits that it took place in a public setting.

[278] It does not appear that Wormald discussed the specifics of the work being done in the Strategic Alliances Group in any great detail when he spoke with Donald. However, the Three

Facts had not been generally disclosed and were of sufficient specificity for us to conclude that they were material. The conversation may not have taken place "in secret", as Donald submits, but that is not to say that it was not confidential in nature.

[279] Although there were some Redtail staff present during the dinner, the 2008 RIM Golf Event was a private event, attended exclusively by RIM's officers. Donald's conversation with Wormald, at a table of RIM Vice Presidents and at a private venue, was not comparable to a conversation in a public restaurant and, in any event, would not have constituted general disclosure.

[280] Section 3.5 of NP 51-201 provides further guidance on the term "generally disclosed":

> 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.
>
> (NP 51-201, *supra* at s. 3.5(2))

[281] The Three Facts communicated by Wormald to Donald at the 2008 RIM Golf Event had not been generally disclosed and the valuation information, which was a confidential internal RIM valuation, was based, in part, on confidential information relating to Certicom's licence agreements provided by Certicom pursuant to the 2007 NDA.

[282] Dr. Comment's opinion was that RIM's interest in Certicom was already reflected in Certicom's share price at the time of the 2008 RIM Golf Event:

> The upshot of my review of RIM's acquisition policy and practice is that the mix of public information regarding Certicom would have included the fact that it would be unexceptional for RIM to acquire Certicom.
>
> (Affidavit of Dr. Comment, sworn December 15, 2010 at para. 24)

[283] Dr. Comment further stated:

> … the mix of public information included the fact that no other Canadian company could have (justifiably) outbid RIM in a contest to acquire Certicom. RIM was an obvious buyer of Certicom and probably the dominant candidate, worldwide, for that role.
>
> …
>
> … Certicom was an obvious acquisition candidate due to a large bonus payout for shareholders if Certicom were to be acquired by a profitable Canadian company.

> RIM was an obvious acquirer for Certicom because Certicom's skills and intellectual property were more relevant to RIM's business than to that of all but a few companies worldwide. In my opinion, the existing mix of information at the time of the golf dinner included the fact that RIM would have to be crazy not to have a continuing interest in acquiring Certicom. Accordingly, the third piece of information … delivered to Paul Donald and alleged by the staff of the OSC to be material was not actually material because it was not new information when conveyed.
>
> (Affidavit of Dr. Comment, sworn December 15, 2010 at paras. 27 and 29)

[284] At the time of the 2008 RIM Golf Event, RIM had information about Certicom that was not generally disclosed. Although the patent information was publicly available, the valuation work RIM was undertaking with respect to Certicom was not. The work being done by the Strategic Alliances Group in preparing valuations for Certicom in 2008 was confidential, as were the discussions RIM and Certicom had had earlier in 2008 and Balsillie's instructions to Wormald to look into Certicom. Mention of the Three Facts at the 2008 RIM Golf Event did not constitute general disclosure.

[285] Given RIM's reliance on Certicom's technology, it would follow that Certicom would be a likely acquisition for RIM. However, the information provided to Donald by Wormald on August 20, 2008 went further than the information that was publicly available and to which Certicom shareholders had access on August 20, 2008.

F. Findings

[286] We find that (i) Donald was in possession of material facts that were not generally disclosed when he purchased Certicom shares in August and September 2008; (ii) RIM had been interested in acquiring Certicom, but Certicom was not interested in pursuing a transaction at that time; (iii) RIM personnel were in the process of recommending to RIM's senior management that RIM take steps to acquire Certicom; and (iv) Certicom was undervalued based on RIM's valuation of its patents and licensing agreements and how important Certicom's ECC technology was to technology providers that required security for their electronic devices, including RIM.

[287] We cannot, however, find that Donald was a person in a special relationship with Certicom at the time that he purchased Certicom shares. To reach such a conclusion, RIM would have to have been proposing to make a take-over bid for Certicom, or proposing some other arrangement or business combination with Certicom as of August 21, 2008. Although RIM's acquisition of Certicom was a serious possibility as of August 21, 2008, RIM had not at that time reached the stage of proposing to make a bid to acquire Certicom securities.

[288] We must therefore conclude that Donald did not breach subsection 76(1) of the Act when he purchased Certicom shares in August and September 2008.

VII. ANALYSIS OF THE ALLEGATION OF CONDUCT CONTRARY TO THE PUBLIC INTEREST

A. Submissions of the Parties

1. Staff's Submissions

[289] Staff submits that the Commission's public interest jurisdiction allows us to make an order under section 127 of the Act regardless of whether there has been a breach of the Act, citing *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857 ("***Canadian Tire***") and *Biovail* as authority. Staff bases its submission on this point on the principle that market participants should conduct themselves ethically and honestly. Staff refers to National Policy 58-201 – *Corporate Governance Guidelines* (2005), 28 O.S.C.B. 5383 ("**NP 58-201**") which requires high standards of business conduct to ensure honest and responsible conduct by market participants.

[290] Staff refers to the case of *Danuke* in which the Commission held that insider trading that did not fall within the scope of the predecessor to section 76 of the Act, was contrary to the public interest. In *Danuke*, the Commission imposed sanctions pursuant to its public interest mandate. Staff also notes *Re Seto*, 2003 LNABASC 81 ("***Seto***"), a case in which the Alberta Securities Commission concluded that conduct contrary to the public interest was amply established despite the fact that there was no liability under the insider trading provision.

[291] In this case, Staff submits that Donald's behaviour was contrary to the public interest.

[292] Staff submits that, as an officer of RIM, and therefore a "market participant" as defined in subsection 1(1) of the Act, the standard of behaviour expected of Donald was high. Staff submits that Donald failed to adhere to this high standard by using confidential information obtained while employed by RIM to make purchases of Certicom shares.

[293] Staff further submits that Donald did not comply with RIM's *Business Standards and Principles*, which prohibit unethical behaviour and, in particular, profiting from the unauthorized use of confidential information. Staff submits that "confidential information" is defined very broadly in RIM's *Code of Ethics* and *Employee/Consultant Confidentiality and Intellectual Property Agreement*, and would include the Four Facts communicated to Donald by Wormald. Staff submits that Donald's use of this confidential information for profit is evident in that, at a minimum, it caused him to consider investing in Certicom. Staff submits that the provisions of the *Code of Ethics* are not just RIM's requirement but are also a requirement of the Commission. Staff refers to section 3.8 of NP 58-201 which sets out the following requirement:

> The board should adopt a written code of business conduct and ethics (a code). The code should be applicable to directors, officers, and employees of the issuer. The code should constitute written standards that are reasonably designed to promote integrity and to deter wrongdoing. In particular, it should address the following issues:
>
> (a) Conflicts of interest, including transactions and agreements in respect of which a director or executive officer has a material interest;

(b) Protection and proper use of corporate assets and opportunities;

(c) Confidentiality of corporate information;

(d) Fair dealing with the issuer's security holders, customers, suppliers, competitors and employees;

(e) Compliance with laws, rules and regulations; and

(f) Reporting of any illegal or unethical behaviour.

[294] Staff contends that, in using RIM's confidential information to make the purchases of Certicom shares, Donald, in addition to enriching himself, caused potential harm to RIM, including the risk of a breach of RIM's confidentiality agreement(s) with Certicom, the risk of prejudicing a transaction with Certicom and the risk of harm to RIM's reputation and integrity and the market integrity of RIM's securities and investor confidence in that market.

[295] Staff further submits that Donald's purchases of Certicom shares caused harm to the integrity of the Ontario capital markets in general because he was an officer of a reporting issuer and a market participant who knew or should have known not to purchase Certicom shares in the circumstances.

[296] Staff submits that Donald's purchases of Certicom shares was also in breach of RIM's *Insider Trading Policy*, which stipulates that a RIM insider (which includes officers and employees of RIM):

> [M]ay not buy or sell securities of another public company while in possession of material, non-public information regarding that company, which knowledge was gained in the course of the Insider's work at, or affiliation with, RIM.

[297] Staff submits Donald's behaviour violated the very principles he promised to uphold and was far below the standard of ethical behaviour required of market participants.

[298] Staff argues that Donald's trading, whether with knowledge of material facts or not, appears to be unfair to the public for the very reason that Donald was an insider of RIM, and, but for his discussion with Wormald, he would not have purchased Certicom shares. Staff submits that Donald made these purchases when he had information that the market did not have and his conduct accordingly lessened the confidence of the investing public in the marketplace, and is therefore a matter of public concern.

2. Donald's Submissions

[299] Donald submits that this case is distinguishable from other public interest cases because Donald was not aware that the information conveyed to him by Wormald, during what he asserts was a casual conversation, was or could have been confidential.

[300] Donald acknowledges that the integrity of the capital markets requires insiders to adhere to the highest ethical and professional standards of conduct when dealing with confidential

information, and submits that he understood and always complied with RIM's corporate policies on confidentiality and insider trading and its *Code of Ethics*.

[301] Donald submits that he did not use the information conveyed to him by Wormald to make his purchases and did not breach RIM's policies. Donald contends that it can be safely concluded that, if RIM believed Donald had used RIM's confidential information for his own advantage or profit in breach of RIM's policies, it would not have paid him $3.00 per share for his Certicom securities in March 2009 when RIM successfully completed its acquisition of Certicom. Further, Donald submits that we are now being asked to second-guess RIM's conclusion and enter into the fray of potential employment-related matters between an employer and an employee. He takes the position that an alleged breach of a company's internal policies by an employee does not engage a fundamental principle recognized in the Act.

[302] Donald points out that NP 58-201, which recommends that boards adopt a code of ethics, is a suggested guideline, not a mandatory requirement. Further, Donald submits that a finding that his conduct was contrary to the public interest predicated on a breach of a RIM policy with respect to confidential information would be a movement away from the Act's requirements with respect to insider trading, and towards policing the employment contract between Donald and RIM.

[303] Donald submits that it would be contrary to the free flow of public discussion and discourse and damaging to the capital markets to find that Donald acted contrary to the public interest in circumstances where he contends that (i) it is unclear whether he was ever in a special relationship with Certicom; (ii) the information provided had no hallmarks of a "tip"; (iii) the trades had no suspicious elements to them; and (iv) he had clearly stated his rationale for the trades.

B. The Law relating to the Commission's Public Interest Jurisdiction

[304] The Supreme Court clarified the scope of the Commission's public interest jurisdiction under section 127 of the Act in the *Asbestos* case, cited earlier in these Reasons:

> … 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". …
>
> (*Asbestos, supra* at para. 41)

[305] Although a Panel may not find a technical breach of the provisions of the Act, it may still consider whether the conduct of a respondent warrants a finding that such conduct was contrary to the public interest. The Commission has stated in *Canadian Tire, supra* at 28 (QL):

> Equally clearly in our view, 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.

[306] As stated in *Biovail*, another decision in which the Commission found that the respondent's conduct was contrary to the public interest even though it did not contravene Ontario securities law:

> … 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)

In *Biovail*, the Commission considered its public interest jurisdiction in the context of allegations regarding inaccurate or misleading disclosure and concluded that:

> We should not interpret or constrain our public interest jurisdiction in a manner that condones inaccurate, misleading or untrue public disclosure regardless of whether that disclosure contravenes Ontario securities law. The issues raised by this matter directly engage the fundamental principle recognised in the Act for timely, accurate and efficient disclosure.
>
> (*Biovail, supra* at para. 382)

[307] In dealing with cases involving allegations of trading while in possession of undisclosed information in the past, the Commission has also found that, although the conduct of a respondent was not in breach of a particular provision of Ontario's securities law, the respondent's conduct was nonetheless contrary to the public interest. In *Seto*, the Alberta Securities Commission considered whether the conduct of Mr. Seto with respect to the granting of options was in breach of the insider trading prohibition in the *Securities Act* (Alberta), R.S.A. 2000, c. S-4. The panel concluded that a "technical gap in the legislation" prevented them from making a finding that his conduct was in breach of the insider trading provisions, but found that the facts amply established conduct contrary to the public interest, noting that "the Respondent used his position as CEO and a director of Inter-Tech to exploit material information that had not been generally disclosed" (*Seto, supra* at para. 52). The panel in *Seto* also stated that:

> Public confidence in the fairness of securities markets is damaged when directors and officers of reporting issuers are seen to benefit from securities trading using information obtained as a result of their position or relationship with a reporting issuer that has not been made available to the market as a whole. The Respondent's conduct, if not addressed, is bound to undermine public confidence in those who lead public companies and to call into immediate question the very integrity of our capital markets.
>
> (*Seto, supra* at para. 53)

[308] In *Danuke*, one of the respondents, a Ms. Danuke, became aware through a conversation with an officer of The Toronto-Dominion Bank that it was about to announce its intention to purchase all of the assets of TD Realty Investments. Ms. Danuke communicated this information to the other respondents, and the respondents subsequently purchased securities in TD Realty Investments for their own accounts. The Commission found that the conduct of the respondents was contrary to the public interest and stated:

> 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)

C. Did Donald's purchases of Certicom shares constitute conduct contrary to the public interest?

[309] We now consider whether Donald's conduct, in light of the facts set out above, was contrary to the public interest.

(a) Donald's Knowledge

[310] Donald refers us to the statement in *Re ATI Technologies Inc.* (2005), 28 O.S.C.B. 8558 at para. 73:

> To establish, for the purposes of subsection 76(1) of the Act, that a respondent knew an undisclosed material fact at the time of the disposition of shares, it must be shown that the respondent had subjective or actual knowledge of that alleged fact at the time.

[311] As we concluded above, Donald was in possession of undisclosed material facts when he placed his order to purchase Certicom shares on August 21, 2008. He had subjective and actual knowledge of the material facts communicated to him by Wormald the previous evening when he placed an order to purchase Certicom shares at approximately 9:00 a.m. on the day following the 2008 RIM Golf Event. Given the evidence that Donald and his colleagues returned to RIM's offices from the 2008 RIM Golf Event at approximately 11:30 p.m., it is simply not credible for Donald to suggest that his decision to purchase Certicom shares was based solely on his independent analysis of Certicom undertaken immediately prior to placing his purchase order. In our view, Donald should not have traded in Certicom shares with knowledge of those material facts.

(b) Donald's Purchases of Certicom Shares

[312] It is true that Donald did not attempt to hide his purchases of Certicom shares, but traded in his customary manner, including placing the order for his Certicom purchases through his usual investment advisor. He placed a purchase order for $300,000 worth of Certicom shares at prices no higher than $1.55 per share. It took until September 15, 2008 for his share purchases to be completed, at which point he had acquired 200,000 Certicom shares at a total cost of

$305,000. Donald did not attempt to conceal the purchases from RIM later in 2008 and disclosed them when RIM announced its intention to make an offer for Certicom in December 2009.

[313] The value of Certicom shares purchased by Donald, although high at $305,000, was not inconsistent with his previous trading patterns. It was by no means an insignificant investment, but we do note that the value of Donald's portfolio at the time exceeded $10 million. It may be that Donald did not consider that his trading was improper, however, we have come to a different conclusion.

D. Findings

[314] Donald was an officer of RIM at the time he learned from Wormald, another RIM Vice President who, to his knowledge, was responsible for assessing possible acquisitions by RIM, of RIM's interest in acquiring Certicom and the other elements of the Three Facts. In our view, Donald had to have known that (i) the information he received from Wormald was confidential and had not been made public; (ii) if the information had been generally disclosed, it would have had a significant effect on the market price or value of Certicom shares; and (iii) the information was provided to him on a confidential basis in the expectation that he would not use the information for personal gain.

[315] The 2008 RIM Golf Event was a private event attended only by RIM officers. Donald's discussion with Wormald about Certicom that evening was clearly about RIM's business, was clearly about information that had not been generally disclosed and that information was clearly confidential. We do not agree with Donald's assertion that Wormald should have informed him that the discussion concerning Certicom should be treated as confidential.

[316] We should note that our conclusion that Donald did not breach subsection 76(1) of the Act is based on our determination that, on August 21, 2008, RIM had not yet reached the stage of proposing to acquire Certicom. RIM was, however, actively considering a potential transaction and that consideration gave rise to a proposal a relatively short time after Donald's purchases.

[317] The facts of this matter are very unusual. We concluded that RIM was not, on the day following the 2008 RIM Golf Event, proposing to make a take-over bid or other business combination or arrangement involving Certicom, however, RIM, and more specifically, the Strategic Alliances Group, was in possession of information about Certicom only acquired by RIM through its due diligence activities relating to Certicom. We heard evidence that RIM determined it should not purchase Certicom shares, both before and after the expiry of the 2007 NDA (along with the standstill provision contained therein). Wormald testified in this respect:

> … my recollection is there was a discussion with securities lawyers, and I don't remember who and which, there was a discussion with securities lawyers back in, you know, I'll call it March, April, May-type time frame about accumulating shares that, you know, where we were given the advice that the standstill that was in place at the time prevented us from effectively doing that.
>
> I recall a conversation after that standstill-based NDA expired with some securities lawyers, it may not have been all of them, it might have been a subset of

> them, that, you know, explored the issue a little bit more and left us with the conclusion that it just wouldn't really be very workable.
>
> (Hearing Transcript, March 22, 2011 at page 122, line 22 to page 123, line 11)

[318] 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. Donald was an experienced investor who had sophisticated knowledge of the wireless industry.

[319] 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.

[320] We share the view of the Alberta Securities Commission expressed in *Seto* that the failure of the Commission to address trades that are based on information obtained as a result of a person's position or relationship that has not been made available to the market calls into question the very integrity of our capital markets.

[321] The Commission stated in *Donnini* that:

> … we did not need to find that Donnini used undisclosed material facts, or that he benefited personally from the misuse of inside information. We needed only to find that he traded while in possession of undisclosed material facts.
>
> (*Donnini, supra* at para. 113)

[322] In this case, Donald had knowledge of confidential material facts about Certicom that were communicated to him as an officer of RIM when he purchased Certicom shares. Donald benefited personally from these purchases of Certicom shares, receiving proceeds of $600,000 from RIM when RIM acquired all of the shares of Certicom in March 2009. His gross profit was $295,000.

[323] Although we do not find any technical breach of subsection 76(1) of the Act, we find that Donald's purchases of Certicom shares directly engage the fundamental principles of securities regulation and the purposes of the Act. The unusual circumstances of this matter warrant a finding that Donald's conduct was contrary to the public interest.

[324] We find that Donald's purchases of Certicom shares in August and September 2008, while he was in possession of undisclosed material facts regarding RIM's interest in Certicom, constituted conduct contrary to the public interest. We find that Donald's conduct was abusive of the capital markets and to confidence in the capital markets.

VIII. CONCLUSION

[325] For the reasons set out above, we find that Donald did not breach subsection 76(1) of the Act but that his conduct was contrary to the public interest.

[326] We have also issued an order dated August 1, 2012 which sets down the date for the hearing with respect to sanctions and costs in this matter.

Dated at Toronto this 1st day of August, 2012.

"Christopher Portner"	*"Paulette L. Kennedy"*
Christopher Portner	Paulette L. Kennedy