2004 BCSECCOM 378

COR#04/097

Timothy Fernback, Brent Wolverton, Wolverton Securities Ltd. and William Massey

***Securities Act*, RSBC 1996, c. 418**

Hearing

Panel	Brent W. Aitken	Vice Chair
	Joan L. Brockman	Commissioner
	John K. Graf	Commissioner
Date of Hearing	May 18, 2004	
Date of Decision	June 24, 2004	

Appearing

Mark D. Andrews	For Timothy Fernback
Robert S. Anderson	For Brent Wolverton and Wolverton Securities Ltd.
H. Roderick Anderson	For William Massey
Joyce M. Johner	For the Executive Director

Ruling

¶ 1 This is an application by Timothy Fernback, Brent Wolverton, Wolverton Securities Ltd., and William Massey for disclosure of materials in the possession of the Executive Director.

¶ 2 On November 20, 2002 the Executive Director issued a notice of hearing alleging that Fernback, Wolverton, Wolverton Securities, and Massey contravened the *Securities Act*, RSBC 1996, c. 418, the rules under the Act, and other regulatory requirements, and that they have acted contrary to the public interest.

I. **Background**

¶ 3 The allegations in the notice of hearing all relate to a series of trades in the shares of Cinema Internet Networks Inc., a company listed on the Canadian Venture Exchange (CDNX, now the TSX Venture Exchange).

¶ 4 In late 1999 and early 2000, Cinema was planning a financing to be effected by way of a short form offering in which Wolverton Securities would act as agent. On February 1, 2000, just as the offering was to be priced, the Exchange halted trading in the shares of Cinema as a result of an unexplained increase in the trading price. (Cinema stock had been trading generally between $0.20 and $0.40; three trades totalling 5,000 shares moved the stock price to $0.75.) It appears that the increase was a result of premature speculation about a proposed transaction between Cinema and Sprint Canada. At the request of the Exchange, Cinema issued a clarifying news release on February 10, 2000. The Exchange lifted the trading halt the next day, February 11.

¶ 5 While the halt continued, discussions took place among the applicants and Exchange officials David Taylor, Shaun Wylde, and Geir Liland about an acceptable mechanism for pricing the offering. (The original target pricing had been 1.5 million shares at $0.25.) A factor complicating the discussions was that there was very little liquidity in the shares of Cinema as a result of a lack of sellers. Wolverton Securities was concerned that without the presence of sellers, the share price of Cinema would not adjust itself properly once the halt was lifted, even once the facts regarding Sprint Canada were in the market.

¶ 6 The pricing mechanism issue was still unresolved when the Exchange lifted the trading halt. The notice of hearing alleges that the Cinema share price then rose to $1.25.

¶ 7 Wolverton and Cinema then caused a block of shares held by a Cinema employee and shareholder, Anna Menlove, to be sold into the market. The notice of hearing alleges that 87,400 shares were sold in a series of trades executed on February 11 by Nicole Stevens, the trading manager at Wolverton Securities. These trades were processed with the approval of CDNX Control, the group responsible for monitoring trading on the Exchange.

¶ 8 The notice of hearing alleges that upon completion of these trades, the Cinema share price (which had allegedly risen to $1.32) fell to $0.32 just seconds before the close of trading on February 11, a Friday. Before the market opened on the following Monday, Cinema announced a financing of 1.35 million shares at $0.30. The Exchange Listings Committee refused to accept that price and ultimately the financing was priced higher.

¶ 9 The notice of hearing alleges there was an intent to make Menlove whole for providing the block of Cinema stock for sale.

¶ 10 About a month later, the Exchange began an investigation into these events. About two years after that, the Executive Director began the investigation that led to the notice of hearing. The investigation order appointed Michael Pesunti, Jim Hurkett and Bruce Thompson, among others, to carry out the investigation. Pesunti, and apparently Hurkett and Thompson, were involved in the investigation of the matter while at the Exchange and at Regulation Services Inc., which during the relevant period assumed responsibility for market regulation on behalf of the Exchange. At the time of their appointment, the three were employed by the Exchange or RS.

¶ 11 The Executive Director says that the applicants acted improperly in connection with the sale of the 87,400 shares on February 11. The notice of hearing alleges that these sales resulted in an artificial price for the Cinema securities, in contravention of section 57(a) of the Act. The other allegations in the notice of hearing flow from this alleged conduct.

¶ 12 A key element of the defence will be that the allegations in the notice of hearing are based on a course of conduct followed by the applicants that was consistent with the discussions between Wolverton Securities and the Exchange about how to address the liquidity issue, and that this course of action was implicitly, if not expressly, approved by the Exchange.

II. **The Application**

¶ 13 The Executive Director has provided disclosure to the applicants in two tranches. The first was provided with the notice of hearing and consisted of a compact disc containing 430 documents (the Disclosure CD). The second was provided on May 5, 2004 as a result of this application and the applicants' request for further and better disclosure and consisted of another 9 documents (the Supplemental List). At the hearing, the Executive Director provided one more document.

¶ 14 The applicants have applied for an order that:

> 1. Commission staff produce further and better disclosure including but not limited to:
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> (a) Mr. Pesunti's CDNX/RS investigative file including all notes, memorandums, documents, e-mails, computer created documents and any other documents or materials in that file including but not limited to any document or documents supplied by or relating to

conversations with Mr. Massey, Ms. Vernon-Jarvis, Ms. Menlove, Mr. Liland, Mr. Wylde or Mr. Taylor and notes of all interviews conducted including but not limited to the February 17, 2000 interview of Mr. Fernback (hereinafter referred to as the "Requested Disclosure Materials");

(b) Mr. Thompson's CDNX/RS investigative file including any Requested Disclosure Materials;

(c) Mr. Hurkett's CDNX/RS investigative file including any Requested Disclosure Materials;

(d) The CDNX/RS investigative file including any Requested Disclosure Materials;

(e) Copies of any report prepared by the CDNX investigators including the so called CDNX Investigation Report and any drafts of same;

(f) Mr. Pesunti's Commission investigative file including any Requested Disclosure Materials;

(g) Any other Commission Investigator's investigative file including any Requested Disclosure Materials;

(h) The Commission investigative file including any Requested Disclosure Materials;

(i) Copies of all notes, memorandums, documents, e-mails, computer created documents or other relevant documents or materials in the possession or control of any of Messrs. Liland, Taylor or Wilde or the CDNX, TSX or Commission; and

(j) Tapes of all conversations carried out by CDNX Control on February 11, 2000 whether before or after the conversations referred to in documents number 55 and 120 on the Disclosure CD and whether with Ms. Stevens or anyone else.

2. Wolverton Securities be at liberty to conduct an examination of Mr. Michael Pesunti in connection with matters relevant to this proceeding including, but not limited to the production of all relevant documents and his involvement in the investigation.

¶ 15 The applicants have identified several disclosure issues. Some arise from the facts of the case; others arise from ambiguities surrounding the disclosure so far. The following is a description of some of the issues:

- On February 17, 2000, Pesunti interviewed Fernback. Counsel for Wolverton says the interview continued after the point where the transcript indicates that the tape ended. The applicants want to see the transcript for that part of the interview, if one exists, and Pesunti's notes of that part of the interview.

- Stevens says that she had a number of conversations with CDNX Control about the sale of the Menlove shares into the market on February 11, 2000 and in at least one of those conversations she told CDNX Control that these trades were market orders and had been approved by members of the Exchange's Corporate Finance Department. Document 55 in the Disclosure CD purports to be a transcript of the conversations between Stevens and CDNX Control on February 11, 2000, but Stevens says that she had at least one earlier conversation with them that day that is not reflected in document 55. The applicants want to hear the tapes for that day.

- The applicants say that Pesunti and Massey had a telephone conversation on February 1, 2000, when the Exchange halted trading in the Cinema shares. They want to see Pesunti's notes of that conversation.

- On June 26, 2001, Pesunti interviewed Amber Vernon-Jarvis, a Wolverton Securities employee. During the interview, Pesunti refers to a previous interview or conversation, for which no transcript or notes have been provided. The applicants want to see the transcript of that interview, if one exists, or Pesunti's notes of it.

- On April 9, 2002, Pesunti interviewed Menlove by telephone. During that interview, Pesunti refers to two earlier conversations with Menlove for which no transcript or notes have been provided. The transcript also shows the tape recorder having been turned off, then on again. There is no transcript for that part of the interview. The applicants want to see notes of the earlier conversations, and for the part of the interview, if any, that occurred while the tape recorder was not running.

- In an interview of Wylde by a Commission staff investigator, Wylde was asked to confirm a statement that the investigator read out from the CDNX investigation report. The Disclosure CD does not contain the CDNX investigation file or the related investigation report. The applicants want to see these documents.

- In two letters dated August 9, 2001 from Pesunti to counsel for Wolverton and Wolverton Securities, Pesunti included will say statements from Wylde, Taylor and Liland. Documents 431, 432 and 433 in the Supplemental List appear to be typed versions of the same statements, but include handwritten notes and alterations to the typed text. These documents are undated. The applicants want to know when these documents were created, and the circumstances of the making of the handwritten notes, including when they were made.

- The applicants say that the existence of will say statements of Wylde, Taylor and Liland suggests that Pesunti, Hurkett or Thompson must have interviewed them. They also say that of the 440 documents provided so far, only a handful contain notes made in the course of his investigation, and it is unusual that an investigator would make so few notes in the course of this type of investigation. They want to see any notes kept by Pesunti, Hurkett or Thompson in relation to these interviews. They also want to see all other relevant notes kept by any of Wylde, Taylor or Liland.

- The applicants say that document 440, provided to them at the hearing, suggests that in fact there is more material of this type. Document 440 is headed "Log for Investigative Notes and Correspondence – Note Pad – Fernback's Statement November 17, 2000." They say this suggests that there is a whole volume of material also included in this "Log" and yet none of the other disclosed documents is titled this way. They want to see the complete investigation files.

III. **Discussion and Analysis**

¶ 16 The applicants say that we should grant their application because the information they request is disclosable under the standard established by the Commission in *Re Cartaway*, [1999] 22 BCSC Weekly Summary 27, or, to the extent it is not disclosable under the *Cartaway* standard, we ought to order disclosure under principles of basic fairness or by adopting the standard of disclosure in *R. v Stinchcombe*, [1991] 3 SCR 326.

¶ 17 The Executive Director says that the disclosure standard for proceedings under the Act is set out in *Cartaway*, and that disclosure has been made to that standard in this case, so we ought to refuse the application.

A. **The Disclosure Standard**

1. **Procedural fairness**

¶ 18 Disclosure is an issue that goes to the heart of fairness in proceedings before the Commission. As noted by the Commission in *Cartaway* (at page 5):

> Allegations of inadequate disclosure in an administrative context raise the issue of procedural fairness. The Supreme Court of Canada has stated that 'the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case' (*Knight v. Indian Head School Division No. 19 of Saskatchewan*, [1990] 1 S.C.R. 653, 682 (per L'Heureux-Dube J.) and the context to be taken into account therefore consists of the nature and seriousness of the matters in issue, the circumstances, and of course the governing statute.

¶ 19 In *Baker v. Minister of Citizenship and Immigration et al.*, [1999] 2 S.C.R 817, the Supreme Court of Canada identified five factors to consider in determining the degree of procedural fairness. The Commission applied these factors to the securities regulation context, with disclosure particularly in mind, in *Re Cox*, 2001 BCSECCOM 204 and determined that disciplinary proceedings before the Canadian Venture Exchange (now the TSX Venture Exchange) would attract a high level of procedural fairness. The same is true, perhaps more so, for proceedings before the Commission, which has broader powers, and can impose more serious sanctions, than the Exchange.

2. **The *Cartaway* standard**

¶ 20 Since 1999, the Commission has consistently applied the *Cartaway* standard to enforcement hearings under the Act. It articulated that standard in *Cartaway* as follows:

> In our view, disclosure and the demands for disclosure of materials must have some relevance to the proof or defence of allegations in the section 161(1) notice of hearing. By necessity this means that Commission staff counsel will have to exercise discretion and judgment in determining what materials fit within those parameters. In our view, if Commission staff counsel view materials as 'potentially relevant to the respondents' the materials would fit within the above parameters and should simply be disclosed as relevant materials but materials upon which Commission staff may not rely. In our view, it is not appropriate to permit fishing expeditions into Commission staff files for purposes unrelated to the allegations in the notice of hearing or to simply see what is there. There may be materials in the Commission staff's file that were not gathered in the course of the investigation but rather created by Commission staff in preparation for the hearing. In our view, these kinds of materials are not

> 'fruits of the investigation' as suggested by Johnson and need not be disclosed.
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> . . .
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> In our view, it is appropriate to restate the standard of disclosure that we expect Commission staff counsel to make to all respondents in section 161(1) enforcement hearings. The duty on Commission staff counsel requires disclosure of:
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> 1. the particulars of the case against the respondents; and
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> 2. all relevant material gathered in the investigation relating to the allegations in the notice of hearing, whether Commission staff intend to rely on the material or not, unless there is any special reason why such material should not be disclosed and in those circumstances the special reason should be brought to the attention of the respondents. Of the relevant materials disclosed, Commission staff counsel should continue to distinguish between the materials upon which Commission staff intend to rely and that which they do not.

¶ 21 *Cox* was a review by the Commission of a decision of the Exchange refusing to order Exchange staff to make certain disclosures. In reviewing and applying the *Cartaway* standard, the Commission said:

> Three things are noteworthy about *Cartaway*. First, it significantly expanded the disclosure obligation that was set out in *Re Simon Fraser Resources et al*., [1996] 47 BCSC Weekly Summary 25.
>
> Second, the *Cartaway* standard is not far removed from the *Stinchcombe* standard. Certainly any relevant material gathered in the investigation must be disclosed under both standards. To the extent the two standards differ, the primary distinction is that in addition to 'fruits of the investigation,' *Stinchcombe*, at least as interpreted in *Hammami* [*Hammami v. College of Physicians and Surgeons of British Columbia* (1997), 35 BCLR 17 (B.C. Sup. Ct.)] may require disclosure of materials created by staff in connection with the investigation or for the purposes of the hearing, where *Cartaway* would not.
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> Third, the *Cartaway* standard is consistent with the disclosure mandated for proceedings under the rules applicable to proceedings before the Ontario Securities Commission under the *Securities Act (Ontario)*.

3. **Are there reasons to reconsider *Cartaway*?**

¶ 22 The appropriate degree of procedural fairness is not immutable. What would be considered an adequate degree of fairness in the past may not pass muster today. In considering procedural fairness, the Commission must always consider changes in the circumstances – the regulatory environment, and the evolution of law and practice. The Commission recognized this in *Cartaway*. It said:

> As issues of disclosure continue to arise in [section] 161(1) enforcement hearings and considering that *Hammami* was decided after *Simon Fraser Resource*s, we agree that it may be useful to revisit the issue of what standard of disclosure Commission staff must meet.

¶ 23 Indeed, as noted in *Cox*, the Commission then proceeded to significantly expand the disclosure standard in response to those new circumstances.

¶ 24 We find ourselves in the same position as the panel in *Cartaway*. Disclosure issues continue to arise in connection with enforcement proceedings under the Act, and the circumstances have changed since the Commission's decisions in *Cartaway* and *Cox*. We have identified three reasons why it makes sense to revisit *Cartaway*.

¶ 25 First, despite the Commission's assertion in *Cox* that the *Cartaway* standard is not far removed from the *Stinchcombe* standard, it appears that the interpretation of the one area identified as the main difference – disclosure of materials created in preparation for the hearing – has created, and continues to create, some confusion about what the disclosure obligation covers.

¶ 26 For example, consider document 440, which appears to contain detailed notes of Pesunti's interview with Fernback. The Executive Director described the disclosure of this document, which was delivered to the applicants the day of the hearing, as a matter of "an abundance of caution." The Executive Director must have concluded that the document falls within the *Cartaway* exclusionary phrase "materials in the Commission staff's file that were not gathered in the course of the investigation but rather created by Commission staff in preparation for the hearing," and that therefore its disclosure is gratuitous rather than required. Yet, this information falls squarely within the *Cartaway* language of "all relevant material gathered in the investigation relating to the allegations in the notice of hearing." Notes of an interview, whether or not the interview is also taped or transcribed, are not materials "created by staff in preparation for the hearing," but rather simply another record of evidence gathered by staff in the investigation. As such, they are "fruits of the investigation" and not excluded from disclosure under the *Cartaway* standard.

¶ 27 At a more fundamental level, the existence of the *Cartaway* standard may be obscuring the issue of procedural fairness. For example, in response to the applicants' argument that we should consider the disclosure issues in front of us on the basis of fairness, counsel for the Executive Director argued as follows:

> So although [counsel for Fernback] has said it's all about fairness in terms of the standard you have to look at today, I'm saying that it's not that. What you have to consider today is whether Commission staff have met the disclosure standard, which has been considered by those before me and it's set out in [BC Policy 15-601 *Commission Hearings*], as well as articulated in *Cartaway*.

¶ 28 We take counsel's point to be that *Cartaway* provides the formula for determining fairness in this context. However, the Commission is not the prisoner of a formula. The fairness of our procedures must always be paramount, regardless of the words used in past decisions to guide parties in determining what is fair.

¶ 29 The second reason to revisit *Cartaway* is that the observation in *Cox* that *Cartaway* is consistent with the practice in proceedings before the OSC is no longer true. In *Re Shambleau* (2002), 25 OCSB 1850, the OSC, in dealing with a disclosure matter in connection with a discipline case before the Toronto Stock Exchange said, citing *Stinchcombe*, "The approach to disclosure by the OSC in the administrative law context is not dissimilar to a criminal trial."

¶ 30 In *Deloitte & Touche LLP v. Ontario Securities Commission*, [2002] O.J. No. 2350 Docket No. C36759 (Ont. C.A.), the court noted that the OSC, in ordering disclosure to the respondent Philip Services Inc. of information about Deloitte & Touche gathered in the OSC's investigation of Philip, applied the *Stinchcombe* standard.

¶ 31 In its factum to the Supreme Court of Canada in *Deloitte & Touche LLP v. Ontario (Securities Commission)*, 2003 SCC 61 (which affirmed the Ontario Court of Appeal decision), the OSC pointed out (at paragraph 46) that "the principles enunciated in *Stinchcombe* should and do apply to the Commission's proceedings," and (at paragraph 70) stated:

> In Ontario, Staff prosecutes administrative proceedings under the Act and also acts as the Crown (as agent for Her Majesty the Queen) in prosecutions of the Act brought under the *Provincial Offences Act*. <u>In both cases</u>, Staff is responsible for making pre-hearing disclosure at first instance and applies a *Stinchcombe* standard of relevance in doing so. [emphasis added]

¶ 32 The third reason to revisit *Cartaway* is that the powers of the Commission have increased since *Cartaway* was decided. At the time of the *Cartaway* decision, the maximum administrative penalty that the Commission could impose under section 162 of the Act was $100,000. Now, the maximum is $250,000 for individuals and $500,000 for non-individuals. The recently-enacted *Securities Act* (S.B.C. 2004, c. 43), increases the maximum penalty again, this time to $1 million per contravention of the legislation, and also confers new enforcement powers on the Commission. This legislation, which has received royal assent but is not yet in force, indicates the legislature's intent that the Commission have appropriate powers for regulating securities markets.

4. **The issue**

¶ 33 The Supreme Court in *Deloitte* did not state that *Stinchcombe* was the required standard of disclosure, but did confirm that the choice of that standard by the OSC was reasonable. This was noted by the British Columbia Court of Appeal in *Smolensky v. British Columbia (Securities Commission),* [2004] BCCA 81:

> 17 . . . [in *Cartaway*] the Commission declined to apply without reservation the relevancy standard in [*Stinchcombe*], noting the difference between indictable offences and administrative enforcement. The Commission has set out the disclosure standards in a policy statement, British Columbia Policy 15-601 . . . .
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> 18 The Commission's *Cartaway* standard and BC Policy 15-601 have not been judicially tested. The Supreme Court in *Deloitte* implicitly approved the *Stinchcombe* standard of relevance, adopted by the Ontario commission, as an appropriate standard for disclosure but it did not consider whether any modification of *Stinchcombe* in regulatory proceedings may be appropriate.

¶ 34 The real issue before us is this: Is there a sound public interest purpose in adopting a disclosure standard that falls short of the standard in *Stinchcombe* for enforcement hearings under the Act, having regard to the procedural fairness context referred to in *Knight* (cited above)?

¶ 35 In considering this issue, we considered the following:

1. In its factum to the Supreme Court of Canada in *Deloitte*, the OSC articulated several compelling reasons in favour of *Stinchcombe* as the appropriate standard:

> 95. . . . In *Stinchcombe*, this Court carefully considered the arguments for and against providing full disclosure and concluded that 'The principle

has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material.' [*Stinchcombe*, at page 335].

96. . . . This court observed in *Stinchcombe* that providing full disclosure, in addition to protecting the overriding concern of the right to make full answer and defence, has significant practical advantages which contribute to the more efficient administration and operation of the justice system. Full disclosure eliminates the element of surprise, reduces the number of delays due to disputes over the extent of the disclosure obligation, reduces the additional time required by counsel to prepare once further disclosure is received, and reduces the additional time taken at trial by counsel who are unprepared by virtue of having not received full disclosure. . . . all of these considerations are equally applicable to proceedings before the Commission.

97. . . . full disclosure plays [an important role] in maintaining the public's trust and confidence in the judicial process, a concern similar to the Commission's mandate to maintain confidence in the integrity of the capital markets. . . .

98. In *Stinchcombe*, Justice Sopinka stated 'In my opinion, there is a wholly natural evolution of the law in favour of full disclosure by the Crown of all relevant material.' . . . the 'wholly natural evolution of the law' to which he referred has continued. *Stinchcombe* is now applied in prosecutions of summary conviction offences and provincial offences, as well in many types of administrative proceedings.

99. In the administrative law context, the principles enunciated by this Court in *Stinchcombe* have been viewed as so fundamental to the concepts of fairness and natural justice that many tribunals which perform quasi-judicial functions, such as the Commission, have adopted them. The courts which review those tribunals have endorsed their application of *Stinchcombe* as well. . . .

100. Mr. Justice Laskin of the Court of Appeal for Ontario, [referring to summary conviction offences and provincial offences], stated that 'it is but a short step from these proceedings to administrative proceedings. After all, for some individuals the consequences of an administrative decision may be more serious than a criminal conviction.'

101. . . . the significance of *Stinchcombe* lies in its clear and easily applied articulation of what constitutes 'full disclosure' . . . .

> 102. Justice Laskin set out the principles in support of the application of *Stinchcombe* to administrative proceedings in his dissenting judgement in *Howe v. Institute of Chartered Accountants of Ontario* (1994), 118 D.L.R. (4d) 129. . . . Justice Laskin's dissenting opinion has since been frequently relied upon by other courts and tribunals (including the Commission in this case) in support of the application of *Stinchcombe* to their proceedings. . . .
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> 103. In *Howe*, Justice Laskin conceded that while, 'literally', *Stinchcombe* was a criminal law case and in that sense did not apply to administrative proceedings, 'several of the observations made by Sopinka J. in that case seem apt to determine the content of the fairness obligations of administrative tribunals. Thus, it is hardly surprising that many courts have already applied a number of principles underlying the decision in *Stinchcombe* to administrative proceedings.'

2. In considering the elements of procedural fairness that we establish for proceedings under the Act, we must be mindful of the need to maintain a system of enforcement that can deal efficiently with market misconduct. However, whatever concerns the Commission may have had in the past about the impact of *Stinchcombe* on administrative efficiency can be laid to rest, given that the OSC has been applying *Stinchcombe* for some time and, judging by the arguments in its *Deloitte* factum, considers it to be an appropriate and efficient standard. In any event, whatever efficiencies the Commission hoped to preserve by adopting a standard of disclosure distinct from *Stinchcombe* have been offset by disputes arising from differing interpretations of the Executive Director and respondents about what is not disclosable under *Cartaway* that would otherwise be disclosable under *Stinchcombe*.

3. In the context of pre-hearing disclosure, it is appropriate that a broad view of relevance be adopted, because the comeliness of the disclosure lies much in the eye of the beholder, as noted by the OSC at paragraph 75 of its *Deloitte* factum:

> At the outset of a proceeding, the facts and issues which will ultimately be contested by the parties, including any issues regarding the credibility or reliability of information, have yet to crystallize, necessitating that relevance be construed broadly. A respondent is under no obligation to disclose its defence(s) and, in any event, is not typically afforded an opportunity to be heard when disclosure is made at first instance. A respondent's view of what materials may be relevant or necessary for the purposes of defending allegations is often substantially different from the tribunal counsel's view of what is relevant or necessary to prove the allegations.

4. Today's markets are largely national, with registered firms carrying on regulated activity across the country. Regulators are seeking to cooperate more closely in enforcement matters, and it makes sense that the disclosure obligations of one regulator arising out of the same set of facts match those of other regulators.

¶ 36 For these reasons, we conclude that it is time for this Commission to apply the *Stinchcombe* disclosure standard in connection with enforcement hearings under the Act.

5. **The Stinchcombe standard**

¶ 37 Having concluded that *Stinchcombe* is the appropriate standard, it is worthwhile to reiterate that standard.

¶ 38 Sopinka J., in delivering the judgment of the Court in *Stinchcombe*, first noted (at paragraph 19):

> there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it.

¶ 39 Sopinka J. then went on to say (at paragraph 20) that the obligation to disclose is not absolute, but is subject to discretion of counsel for the Crown, both as to content and timing of disclosure. This is so that Crown can consider matters such as legal privilege, the safety of informants, and the exclusion of the "truly irrelevant". He then said:

> 21. The discretion of Crown counsel is, however, reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review, the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule.
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> 22. The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of the information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. . . .

¶ 40 In *R. Taillefer*, [2003] 3 S.C.R. 307 the Supreme Court of Canada summarized the *Stinchcombe* standard as originally enunciated by the Court and as interpreted in subsequent decisions as follows (at page 334):

> 59 After a period during which the rules governing the Crown's duty to disclose evidence were gradually developed by the provincial appeal courts in recent decades, those rules were clarified and consolidated by this Court in *Stinchcombe*. The rules may be summarized in a few statements. The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly irrelevant. Relevance must be assessed in relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea (p. 343). Moreover, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses (p. 345). This Court has also defined the concept of "relevance" broadly, in *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 467:
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> > One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed — *Stinchcombe* [at page 345]. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.
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> 60 As the courts have defined it, the concept of relevance favours the disclosure of evidence. Little information will be exempt from the duty that is imposed on the prosecution to disclose evidence. As this Court said in [*R. v. Dixon*, [1998] 1 S.C.R. 244], 'the threshold requirement for disclosure is set quite low. . . . The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence.' (para. 21; see also *R. v. Chaplin*, [1995] 1 S.C.R. 727, at paras. 26-27). 'While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant' (*Stinchcombe* [at page 339]).

B. **The Disclosure Requested**

¶ 41 As a result of the order below, we expect the Executive Director to disclose to the applicants all relevant information that is not privileged. It is therefore not necessary to deal with the specific disclosure requests in paragraph 1 of the application.

¶ 42 In paragraph 2 of the application, the applicants ask us to order that Commission staff produce Pesunti to be examined on matters relevant to this proceeding including, but not limited to, the production of all relevant documents. In light of the order below, we do not think it is necessary to deal with this aspect of the application. After the Executive Director discloses as ordered, we will hear further disclosure-related applications if any are made.

IV. **Order**

¶ 43 We therefore order that the Executive Director disclose to the applicants all materials required to be disclosed under the *Stinchcombe* standard.

June 24, 2004

Brent W. Aitken
Vice Chair

Joan L. Brockman
Commissioner

John K. Graf
Commissioner