

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST**

## Of Counsel to the Applicants

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## **I. OVERVIEW**

1. Following August 13, 2007, when the market for non-bank sponsored ABCP (“third-party ABCP”) in Canada froze, the Autorité des marchés financiers (“AMF”), the Ontario Securities Commission (the “Commission” or “OSC”), and the Investment Industry Regulatory Organization of Canada (“IIROC”) cooperatively conducted a joint investigation into the ABCP market freeze and securities regulatory issues arising from it.
2. As a result of this investigation, enforcement staff of the Commission (“Commission Staff”) and of IIROC (“IIROC Enforcement Staff”) entered settlement agreements with five investment dealer organizations (the “Settling Parties”) whose clients had purchased third-party ABCP, under which settlement agreements the Settling Parties agreed to pay specified amounts to the Commission and IIROC, respectively. Two of these settlement agreements were approved by the Commission, which designated the specified amounts to be held for allocation to or for the benefit of third parties, and three were accepted by IIROC hearing panels.

3. The Settling Parties were:
  - (a) the Canadian Imperial Bank of Commerce and CIBC World Markets Inc. (together “CIBC”), which paid the Commission \$21,700,000;
  - (b) HSBC Bank of Canada (“HSBC”), which paid the Commission \$5,925,000;
  - (c) Scotia Capital Inc. (“Scotia”), which paid IIROC \$28,950,000;
  - (d) Canaccord Financial Ltd. (“Canaccord”), which paid IIROC \$3,100,000;  
and
  - (e) Credential Securities Inc. (“Credential”), which paid IIROC \$200,000.
4. Commission Staff and IIROC wish to distribute these funds to certain clients of the Settling Parties who purchased ABCP from them during the periods described in the settlement agreements.
5. The Commission’s and IIROC’s investigation and proceedings and the settlements with the Settling Parties were permitted under the terms of an order dated June 5, 2008, made by the Honourable C. Campbell J. (the “ABCP Order”)

that approved a plan of arrangement under the *Companies Creditors Arrangement Act* restructuring the third-party ABCP market in Canada. In releasing the Settling Parties from, and enjoining, all claims and proceedings relating to their participation in the third-party ABCP market, the ABCP Order expressly permitted the Commission's and IIROC's proceedings and the settlements, provided that the Commission and IIROC did not make "any order or award to compensate or make restitution to an aggrieved person or company or to pay general or punitive damages to any other person or company." The settlements and the orders approving and accepting them resolved regulatory proceedings and were not orders or awards requiring the Settling Parties to compensate, make restitution to or pay damages to any person.

6. The funds that were paid by the Settling Parties in these regulatory proceedings became the property of the Commission and IIROC, respectively, and have been held since their payment by the Commission and IIROC. The distribution by the Commission and IIROC of the funds so received to clients of the Settling Parties will be *ex gratia* payments. The Commission's and IIROC's proposed distributions, therefore, are not precluded by the ABCP Order.
7. The Commission and IIROC have applied to the Court to obtain an order declaring that this is the case, that is, that the proposed distributions are not precluded by the ABCP Order.

## II. FACTS

### A. Background

8. Following August 13, 2007, when the market for third-party ABCP in Canada froze, the OSC, IIROC and the AMF, in cooperation, conducted a joint investigation into the ABCP market freeze and securities regulatory issues arising from it.

Affidavit of Kathryn Daniels affirmed, February 5, 2012, para. 2, Application Record, Tab 2, p. 11 (hereinafter “Daniels Affidavit”)

Affidavit of Jeffrey Kehoe, affirmed, February 15, 2012, para. 2, Application Record, Tab 3, p. 86 (hereinafter “Kehoe Affidavit”)

9. On June 5, 2008, the Honourable C. Campbell J. made the ABCP Order, which released all “ABCP Dealers” and other “Released Parties” (as defined in the ABCP Order) from, and enjoined, all claims and proceedings against them relating to their participation in the third-party ABCP market.

ABCP Order, Exhibit “A” to the Daniels Affidavit, paras. 17 and 18, Application Record, Tab 2A, pp. 25 to 27

10. The ABCP Order excepted from the release and injunction granted to ABCP Dealers and other Released Parties regulatory and self-regulatory investigations and proceedings by the Commission and IIROC and the exercise by them of their powers and remedies, provided that they did not make “any order or award to

compensate or make restitution to an aggrieved person or company or to pay general or punitive damages to any other person or company”.

ABCP Order, para. 19, Application Record, Tab 2A, p. 27

### **B. Regulatory Settlements and Monetary Sanctions**

11. As a result of their investigation, Commission Staff determined to initiate proceedings against CIBC and HSBC, which were settled in accordance with the terms of settlement agreements dated December 16, 2009 with CIBC and HSBC, respectively.

Daniels Affidavit, paras. 4 and 8, Application Record, Tab 2, pp. 11 to 13

12. As a result of the investigation, IIROC Enforcement Staff determined to initiate proceedings against Scotia, Canaccord and Credential, which were settled in accordance with the terms of settlement agreements dated December 17, 2009 with Scotia, Canaccord and Credential, respectively.

Kehoe Affidavit, paras. 4, 8 and 11, Application Record, Tab 3, pp. 86 to 88

13. In its settlement agreement, CIBC admitted that it “engaged in conduct contrary to the public interest by failing to adequately respond to emerging issues in the

third-party ABCP market insofar as it continued to sell third-party ABCP without engaging compliance and other appropriate processes for the assessment of such information and concerns” after July 24, 2007, when it received an email from Coventree Inc. (“Coventree”) containing information about the U.S. subprime exposure in Coventree’s third-party ABCP, and up to August 3, 2007, and agreed to pay to the Commission \$21,700,000 “to be allocated under the [Securities] Act to or for the benefit of third parties”.

Daniels Affidavit, paras. 5 and 6, Application Record, Tab 2, p. 12

14. In its settlement agreement, HSBC admitted that it “engaged in conduct contrary to the public interest by failing to adequately respond to emerging issues in the third-party ABCP market insofar as it continued to sell third-party ABCP without engaging compliance and other appropriate processes for the assessment of such information and concerns” after July 24, 2007, when it received the email from Coventree containing information about the U.S. subprime exposure in Coventree’s third-party ABCP, and up to August 10, 2007, and agreed to pay the Commission \$5,925,000 “to be allocated under the Act to or for the benefit of third parties”.

Daniels Affidavit, paras. 9 and 10, Application Record, Tab 2, p. 13



15. In its settlement agreement, Scotia admitted that between July 25 and August 10, 2007, after it received the July 24, 2007 email from Coventree containing information about the U.S. subprime exposure in Coventree's third-party ABCP, it "failed to adequately respond to emerging issues in the Coventree ABCP market insofar as it continued to sell Coventree ABCP without engaging Compliance and other appropriate processes for the assessment of such emerging issues," contrary to IIROC's rules, and agreed to pay IIROC a fine of \$28,950,000.

Kehoe Affidavit, paras. 5 and 6, Application Record, Tab 3, p. 87

16. In its settlement agreement, Canaccord admitted that in 2006 and 2007, it "did not take steps to adequately ensure its sales staff understood the complexities of the third-party ABCP product it offered for sale to retail clients and the consequent risks (including systemic risks and counterparty risks) related to the product and, in not taking these adequate steps, did not ensure that the purchase of third-party ABCP was appropriately understood by its clients," contrary to IIROC's rules, and agreed to pay IIROC a fine of \$3,100,000.

Kehoe Affidavit, para. 9, Application Record, Tab 3, pp. 87 and 88

17. In its settlement agreement, Credential admitted that in 2006 and 2007, it "did not take adequate steps to ensure that its Approved Persons understood the complexities of the third-party ABCP product made available for purchase by its

retail clients and the consequent risks (including systemic risks and counterparty risks) related to those products and, in not taking these adequate steps, did not ensure that the purchase of third-party ABCP was appropriately understood by its clients,” contrary to IIROC’s rules, and agreed to pay to IIROC a fine of \$200,000.

Kehoe Affidavit, para. 12, Application Record, Tab 3, p. 88

18. On December 21, 2009, the Commission made orders approving the settlement agreements with CIBC and HSBC that designated the funds paid by each of them “to be allocated under section 3.4(2)(b) of the Act to or for the benefit of third parties”.

Exhibit “B” to the Daniels Affidavit, Application Record, Tab 2B, p. 53  
(CIBC approval order)

Exhibit “C” to the Daniels Affidavit, Application Record, Tab 2C, p. 65  
(HSBC approval order)

19. The terms of the settlement agreements with CIBC and HSBC did not address the purposes for which the amounts to be paid by them to the Commission might be allocated, and no such allocation was addressed in the Commission hearings that considered the settlement agreements or in the orders approving them.

Daniels Affidavit, para. 12, Application Record, Tab 2, pp. 13 and 14

Exhibit “B” to the Daniels Affidavit, Application Record, Tab 2B (CIBC approval order and settlement agreement)

Exhibit “C” to the Daniels Affidavit, Application Record, Tab 2C (HSBC approval order and settlement agreement)

20. On December 21, 2009, IIROC Hearing Panels accepted the settlement agreements with Scotia, Canaccord and Credential.

Kehoe Affidavit, paras. 7, 10 and 13, Application Record, Tab 3, pp. 87 and 88

Exhibit “A” to the Kehoe Affidavit, Application Record, Tab 3A (Scotia acceptance decision and settlement agreement)

Exhibit “B” to the Kehoe Affidavit, Application Record, Tab 3B (Canaccord acceptance decision and settlement agreement)

Exhibit “C” to the Kehoe Affidavit, Application Record, Tab 3C (Credential acceptance decision and settlement agreement)

21. The settlements with the five Settling Parties were announced in a joint press release issued by the Commission, IIROC and AMF on December 21, 2009, which said with regard to financial penalties imposed under the settlements, that “a fair and appropriate use for the sanction monies will be determined in accordance with applicable laws, court orders and in the public interest.”

Joint Press Release, December 21, 2009, Exhibit “D” to the Daniels Affidavit, Application Record, Tab 2D, p. 77, and Exhibit “D” to the Kehoe Affidavit, Tab 3D, p. 136

22. All of the settlement agreements were entered into voluntarily by the Settling Parties, and the agreed amounts were paid to the Commission and IIROC, respectively, in December, 2009 and January, 2010.

Daniels Affidavit, para. 14, Application Record, Tab 2, p. 14

Kehoe Affidavit, para. 15, Application Record, Tab 3, p. 89

### **C. Treatment of Monetary Sanctions**

#### **1. Funds Received by the Commission**

23. The Commission is required by subsection 3.4(2) of the *Securities Act* (the “Act”) to pay into the Consolidated Revenue Fund moneys received by it pursuant to an order imposing an administrative penalty or disgorgement in an enforcement proceeding or as a payment to settle enforcement proceedings commenced by Commission Staff, unless the money is “designated under the terms of the order or settlement for allocation to or for the benefit of third parties.”

*Securities Act*, R.S.O. 1990, c. S.5, s. 3.4(2), as amended (hereinafter the “Act”)

24. Funds received by the Commission that are so designated are held in a segregated bank account and allocated as the Commission may determine. The Commission

allocates such funds to uses it determines to be fair and appropriate in accordance with applicable laws, court orders and the public interest.

Daniels Affidavit, para. 15, Application Record, Tab 2, pp. 14 and 15

OSC Annual Report, 2011, Exhibit “E” to the Daniels Affidavit, Application Record, Tab 2E, p. 80

25. The settlement agreements with CIBC and HSBC did not address the uses to which the designated amounts paid under them to the Commission might be allocated, and no such allocation was addressed in the Commission hearings that considered these settlement agreements or in the Commission orders approving them.

Daniels Affidavit, para. 12, Application Record, Tab 2, pp. 13 and 14

26. No person has any entitlement to received designated funds that are held by the Commission in its segregated bank account, including the funds received from CIBC and HSBC. As a result, an allocation of such funds by the Commission constitutes an *ex gratia* payment.

Daniels Affidavit, para. 16, Application Record, Tab 2, p. 15

## **2. Funds Paid to IIROC**

27. IIROC has been recognized by every provincial securities regulator in Canada as a self-regulatory organization, under identical recognition orders issued by each of the recognizing securities regulators (the “Recognition Order”) which limit the uses to which fines received by IIROC after a disciplinary proceeding or under a settlement agreement may be put.

Kehoe Affidavit, para. 16, Application Record, Tab 3, pp. 89-90

28. The terms and conditions of IIROC’s Recognition Order provide:

### **Use of Fines and Settlements**

All fines collected by IIROC and all payments made under settlement agreements entered into with IIROC may be used only as follows:

- a. as approved by the Corporate Governance Committee,
  - (i) for the development of systems or other non-recurring capital expenditures that are necessary to address emerging regulatory issues resulting from changing market conditions and are directly related to protecting investors and the integrity of the capital markets;
  - (ii) for the education of securities market participants and members of the public about or research into investing, financial matters or the operation or regulation of securities markets;
  - (iii) to contribute to a non-profit, tax-exempt organization, the purposes of which include protection of investors, or those described in paragraph (a)(ii); or

- b. for reasonable costs associated with the administration of IIROC's hearing panels.

Recognition Order, Appendix A, para. 9, Exhibit "E" to the Kehoe Affidavit, Application Record, Tab 2E, p. 143

- 29. Fines paid to IIROC under an order made by an IIROC hearing panel or under a settlement of an enforcement proceeding are held by IIROC in an "Externally Restricted Fund"; IIROC has created a separate "Externally Restricted ABCP Fund" into which it deposited the fines received from Scotia, Canaccord and Credential.

Kehoe Affidavit, para. 18, Application Record, Tab 3, p. 90

- 30. As a result of the restrictions in its Recognition Order, IIROC is not entitled to distribute funds obtained under a settlement agreement for any purpose other than those specified, and it requires an exemption from each of its recognizing securities regulators to permit it to do so. IIROC has not, to date, ever requested such an exemption.

Kehoe Affidavit, para. 17, Application Record, Tab 3, p. 90

#### **D. Proposed Distributions**

31. Commission Staff and staff of IIROC (“IIROC Staff”) have cooperated in developing a proposal to distribute funds obtained in the ABCP settlements to clients who purchased third-party ABCP from the Settling Parties in a process to be administered jointly by the Commission and IIROC.

Daniels Affidavit, para. 19, Application Record, Tab 2, p. 15

Kehoe Affidavit, paras. 19 and 21, Application Record, Tab 3, pp. 90 to 92

##### **1. Allocation by the Commission**

32. Commission Staff have recommended to the Commission that it allocate the funds paid by CIBC to CIBC clients who purchased third-party ABCP from it between July 25 and August 3, 2007, and who were not aware of the email referred to in paragraph 13, above, or its contents.

Daniels Affidavit, para. 17, Application Record, Tab 2, p. 15

33. Commission Staff have also recommended to the Commission that it allocate the funds paid by HSBC to HSBC clients who purchased third-party ABCP from it



between July 25 and August 10, 2007, and who were not aware of the email referred to in paragraph 14, above, or its contents.

Daniels Affidavit, para. 18, Application Record, Tab 2, p. 15

34. The Commission appointed a committee of three commissioners (the “Committee”) to consider Commission Staff’s recommendations. The Committee requested that Commission Staff apply to the Superior Court for a declaration that the ABCP Order does not preclude the Commission from allocating the funds paid by CIBC and HSBC to clients who purchased ABCP from them during the relevant periods.

Daniels Affidavit, paras. 20 and 21, Application Record, Tab 2, p. 16

## **2. Distribution by IIROC**

35. IIROC Staff recommended to IIROC’s Corporate Governance Committee:
- (a) that the fine paid by Scotia be distributed to Scotia clients who purchased third-party ABCP from it between July 25 and August 10, 2007, and who were not aware of the email referred to in paragraph 15, above, or its contents,

- (b) that the fine paid by Canaccord be distributed to Canaccord clients who purchased third-party ABCP from Canaccord and who continued to hold the purchased ABCP on August 13, 2007, the date on which the ABCP market in Canada froze, and
- (c) that the fine paid by Credential be distributed to Credential clients who purchased third-party ABCP from Credential and who continued to hold the purchased ABCP on August 13, 2007.

Kehoe Affidavit, para. 19, Application Record, Tab 3, pp. 90 and 91

- 36. On October 11, 2011, IIROC's Corporate Governance Committee authorized the distribution of the funds received from Scotia, Canaccord and Credential under the settlement agreements in the manner proposed by IIROC Staff, subject to IIROC obtaining an exemption from each of its recognizing securities regulators to permit it to distribute these funds to such clients. If this application is granted, IIROC intends to apply to each of its recognizing securities regulators for an appropriate exemption.

Kehoe Affidavit, para. 20, Application Record, Tab 3, p. 91

- 37. Until such an exemption is obtained, IIROC is not entitled to distribute the funds received from Scotia, Canaccord and Credential. Accordingly, no person has any

entitlement to receive funds held by IIROC in its Externally Restricted ABCP Fund and any distribution of such funds by IIROC will be an *ex gratia* payment.

38. The Commission and IIROC agreed to announce the filing of this application by publishing a joint press release.

Daniels Affidavit, para. 21, Application Record, Tab 2, p. 16

Kehoe Affidavit, para. 21, Application Record, Tab 3, p. 92

Draft Joint Press Release, Exhibit “F” to the Daniels Affidavit, Application Record, Tab 2F, p. 82, and Exhibit “F” to the Kehoe Affidavit, Application Record, Tab 3F, p. 155

### **III. ISSUES**

39. The issues on this Application are:

- (a) no person is required to be served with notice of this Application; and
- (b) the ABCP Order does not preclude the Commission or IIROC from distributing the funds received from the Settling Parties to persons who purchased ABCP from them.

#### IV. LAW

##### A. Service of Notice of Application

40. As no person is entitled to receive any of the funds proposed to be distributed by the Commission and IIROC, no person has an interest in this application. As a result, the Notice of Application is not required to be served on any person.
41. This is also implicit in the Act. The Act authorizes the Commission to require a person who has not complied with Ontario securities law to pay an administrative penalty of up to \$1,000,000 for each failure to comply and to disgorge to the Commission any amounts received as a result of such non-compliance. Such funds must be paid by the Commission into the Consolidated Revenue Fund, unless the Commission designates the funds for allocation to or for the benefit of third parties. The Act provides, however, that no person is entitled to participate in a proceeding in which such an order may be made “solely on the basis that the person may be entitled to receive any amount paid under the order.” The Act thus makes clear that the purpose of such orders is regulatory and that no person has any entitlement to any funds the Commission may so designate.

Act, ss. 3.4(2), 127(1)9-10 and 127(3.1)

*Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47, Applicants’ Authorities, Tab 2, paras. 46, 62 and 80 (investors had no standing in OSC settlement proceedings)

## B. The ABCP Order

42. The purpose of the ABCP Order was to restructure the ABCP market in Canada in order to restore confidence in Canada's financial system.

*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*,  
2008 CanLII 27820 (S.C.J. – Commercial List), Applicants' Authorities,  
Tab 1, para. 142, affirmed 2008 ONCA 587 (Ont. C.A.), para. 56

43. A significant element of the ABCP Order was the granting of protection against civil liability to ABCP Dealers and other parties involved in the ABCP market. This was accomplished in paragraphs 17 and 18 of the ABCP Order, which granted releases to ABCP Dealers and other Released Parties and enjoined the bringing of any claims or proceedings that would impose such liability on them, for example, through an order requiring a Released Party to compensate or make restitution to an aggrieved person or to pay damages to any person.

ABCP Order, paras. 17 and 18, Exhibit "A" to the Daniels Affidavit,  
Application Record, Tab 2A, pp. 25 to 27

*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*,  
2008 CanLII 27820, Applicants' Authorities, Tab 1, paras. 28-30

44. The ABCP Order did not prevent securities regulatory authorities, including IIROC, from bringing proceedings and exercising statutory or contractual powers with respect to Released Parties; it expressly excepted regulatory proceedings and the exercise of regulatory authority pursuant to them from its release and

injunction, provided that such regulatory proceedings did not have the effect of negating the release and injunction by making an order or award that required a Released Party to compensate,, make restitution or pay damages to any person.

ABCP Order, para. 19, Exhibit “A” to the Daniels Affidavit, Tab 2A, p. 27

45. The ABCP Order thus permitted the Commission and IIROC to require payment of a monetary penalty or disgorgement in a regulatory proceeding or payments under the terms of a settlement of such a proceeding. This is what occurred with respect to the Settling Parties.

See paras. 11 to 22, above

### **C. Allocation by the Commission**

46. Under their settlement agreements, CIBC and HSBC voluntarily made payments to the Commission to settle regulatory proceedings against them. These payments were thus not compensation, restitution or damages, the types of payment contemplated by the release and injunction in the ABCP Order. As the funds paid by CIBC and HSBC were designated for allocation to or for the benefit of third parties, they became the property of the Commission to be used for the designated purposes.

*Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47, Applicants' Authorities, Tab 2, paras. 46, 52 and 80 ("purely regulatory function served by the OSC proceedings")

47. The designations in CIBC's and HSBC's settlement agreements and in the Commission's orders approving them did not alter the nature of the payments they made. Rather, the effect of the designation was to enable the Commission to retain the funds, and dispose of them for uses determined by it, in its discretion, to be in the public interest.

*Cf. Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47, Applicants' Authorities, Tab 2, para. 55

48. This discretion is clear from the Act, which authorizes the designation of such funds for allocation *to, or for the benefit of*, third parties. The Commission thus has a discretion to decide whether the funds will be paid to such specific third parties or otherwise used for the benefit of such third parties as it determines.

Act, s. 3.4(2)(b)

49. Concomitantly, as the designation leaves the allocation of the funds to the Commission's discretion, both with respect to the identification of potential recipients and other uses to which the funds may be put, no person has a right or entitlement of any nature to receive them. The Act expressly provides that no person is entitled to appear in a Commission proceeding "solely on the basis that the person ... may be entitled to receive any amount paid" to the Commission. It

is clear, therefore, that the distribution of the funds by the Commission to clients of CIBC and HSBC will constitute an *ex gratia* payment.

Act, s. 127(3.1)

50. Such payments by the Commission, over two years after the settlements were approved, would not constitute orders or awards requiring CIBC or HSBC to pay compensation, restitution or damages. The ABCP Order does not in any way limit the Commission's discretion to distribute the funds in question in a manner it considers appropriate and in the public interest.

#### **D. Distribution by IIROC**

51. This is also the case with respect to IIROC's proposed distribution. Scotia, Canaccord and Credential paid fines to IIROC under their settlement agreements. These fines were expressly permitted by the ABCP Order. They were not compensation, restitution or damages.
52. The fines so paid became the property of IIROC for uses it may determine, subject to the restrictions in its Recognition Order. These restrictions preclude IIROC from making the distribution it now proposes and for which it intends to request exemptions from its recognizing securities regulators.



53. Once it obtains these exemptions, IIROC will have full discretion to distribute the funds in accordance with the decision of its Corporate Governance Committee and the terms of any exemption order that is granted. These distributions, too, will be *ex gratia* payments and will not constitute orders or awards requiring Scotia, Canaccord or Credential to pay compensation, restitution or damages. Accordingly, they too, are not precluded by the ABCP Order.

**V. ORDER REQUESTED**

54. The Applicants therefore request:
- (a) an order declaring *nunc pro tunc* that notice of this application is not required to be served on any person,
  - (b) an order declaring that the ABCP Order does not preclude the Commission from allocating and distributing funds paid to it by CIBC and HSBC pursuant to their settlement agreements to persons who purchased ABCP from them, and
  - (c) an order declaring that the ABCP Order does not preclude IIROC from distributing funds paid to it as fines by Scotia, Canaccord and Credential to persons who purchased ABCP from them.

All of which is respectfully submitted

*"Philip Anisman"*

February 15, 2012

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Philip Anisman  
Of Counsel to the Applicants

**TABLE OF AUTHORITIES**

1. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CanLII 27820 (S.C.J. – Commercial List), affirmed 2008 ONCA 587 (Ont. C.A.)
2. *Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47 (Ont. C.A.)

## LEGISLATION

### *Securities Act, R.S.O. 1990, c. S.5, as amended*

#### **Fees**

[3.4 \(0.1\)](#) The Commission may collect and enforce the payment of such fees as may be prescribed by the regulations. 2009, c. 18, Sched. 26, s. 3.

#### **Authority re income**

[\(1\)](#) Despite the *Financial Administration Act*, the fees payable to the Commission under this or any other Act, the revenue from the exercise of a power conferred or the discharge of a duty imposed on the Commission under this or any other Act, and the investments held by the Commission do not form part of the Consolidated Revenue Fund and, subject to this section, shall be applied to carrying out the powers conferred and duties imposed on the Commission under this or any other Act. 1997, c. 10, s. 37.

#### **Exceptions**

[\(2\)](#) The Commission shall pay into the Consolidated Revenue Fund money received by the Commission pursuant to an order under paragraph 9 or 10 of subsection 127 (1) of this Act or paragraph 9 or 10 of subsection 60 (1) of the *Commodity Futures Act* or as a payment to settle enforcement proceedings commenced by the Commission, other than money,

- (a) to reimburse the Commission for costs incurred or to be incurred by it; or
- (b) that is designated under the terms of the order or settlement for allocation to or for the benefit of third parties. 2002, c. 22, s. 178; 2004, c. 31, Sched. 34, s. 2 (1).

#### **Same**

[\(2.1\)](#) The Minister may establish guidelines respecting the allocation of money received by the Commission pursuant to an order described in subsection (2) or money received by the Commission as a payment to settle enforcement proceedings commenced by the Commission. 2004, c. 31, Sched. 34, s. 2 (2).

#### **Surplus**

[\(3\)](#) When ordered to do so by the Minister, the Commission shall pay into the Consolidated Revenue Fund such of its surplus funds as are determined by the Minister. 1997, c. 10, s. 37.

#### **Same**

[\(4\)](#) In determining the amount of a payment to be made under subsection (3), the Minister shall allow such reserves for the future needs of the Commission as he or she considers appropriate, and shall ensure that the payment will not impair the Commission's ability to pay its liabilities, to meet its obligations as they become due or to fulfil its contractual commitments. 1997, c. 10, s. 37.

### **Orders in the public interest**

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

1. An order that the registration or recognition granted to a person or company under Ontario securities law be suspended or restricted for such period as is specified in the order or be terminated, or that terms and conditions be imposed on the registration or recognition.
2. An order that trading in any securities by or of a person or company or that trading in any derivatives by a person or company cease permanently or for such period as is specified in the order.
- 2.1 An order that the acquisition of any securities by a particular person or company is prohibited permanently or for the period specified in the order.
3. An order that any exemptions contained in Ontario securities law do not apply to a person or company permanently or for such period as is specified in the order.
4. An order that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Commission.
5. If the Commission is satisfied that Ontario securities law has not been complied with, an order that a release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular, offering memorandum, proxy solicitation or any other document described in the order,
  - i. be provided by a market participant to a person or company,
  - ii. not be provided by a market participant to a person or company, or
  - iii. be amended by a market participant to the extent that amendment is practicable.
6. An order that a person or company be reprimanded.
7. An order that a person resign one or more positions that the person holds as a director or officer of an issuer.
8. An order that a person is prohibited from becoming or acting as a director or officer of any issuer.
- 8.1 An order that a person resign one or more positions that the persons holds as a director or officer of a registrant.
- 8.2 An order that a person is prohibited from becoming or acting as a director or officer of a registrant.
- 8.3 An order that a person resign one or more positions that the person holds as a director or officer of an investment fund manager.
- 8.4 An order that a person is prohibited from becoming or acting as a director or officer of an investment fund manager.

- 8.5 An order that a person or company is prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter.
9. If a person or company has not complied with Ontario securities law, an order requiring the person or company to pay an administrative penalty of not more than \$1 million for each failure to comply.
10. If a person or company has not complied with Ontario securities law, an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance. 1994, c. 11, s. 375; 1999, c. 9, s. 215; 2002, c. 22, s. 183 (1); 2005, c. 31, Sched. 20, s. 8; 2010, c. 26, Sched. 18, s. 35 (1).

### **Terms and conditions**

(2) An order under this section may be subject to such terms and conditions as the Commission may impose. 1994, c. 11, s. 375.

### **Cease trading order**

(3) The Commission may make an order under paragraph 2 of subsection (1) despite the delivery of a report to it under subsection 75 (3). 1994, c. 11, s. 375.

### **Exception**

(3.1) A person or company is not entitled to participate in a proceeding in which an order may be made under paragraph 9 or 10 of subsection (1) solely on the basis that the person or company may be entitled to receive any amount paid under the order. 2004, c. 31, Sched. 34, s. 5.

### **Hearing requirement**

(4) No order shall be made under this section without a hearing, subject to section 4 of the *Statutory Powers Procedure Act*. 1994, c. 11, s. 375.

### **Temporary orders**

(5) Despite subsection (4), if in the opinion of the Commission the length of time required to conclude a hearing could be prejudicial to the public interest, the Commission may make a temporary order under paragraph 1, 2 or 3 of subsection (1) or subparagraph ii of paragraph 5 of subsection (1). 1994, c. 11, s. 375.

### **Period of temporary order**

(6) The temporary order shall take effect immediately and shall expire on the fifteenth day after its making unless extended by the Commission. 1994, c. 11, s. 375.

### **Extension of temporary order**

(7) The Commission may extend a temporary order until the hearing is concluded if a hearing is commenced within the fifteen-day period. 1994, c. 11, s. 375.

### **Same**

(8) Despite subsection (7), the Commission may extend a temporary order under paragraph 2 of subsection (1) for such period as it considers necessary if satisfactory information is not provided to the Commission within the fifteen-day period. 1994, c. 11, s. 375.

**Notice of temporary order**

[\(9\)](#) The Commission shall give written notice of every temporary order made under subsection (5), together with a notice of hearing, to any person or company directly affected by the temporary order. 1994, c. 11, s. 375.

**Inter-jurisdictional enforcement**

[\(10\)](#) Without limiting the generality of subsections (1) and (5), an order may be made under subsection (1) or (5) in respect of a person or company if any of the following circumstances exist:

1. The person or company has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities or derivatives.
2. The person or company has been convicted in any jurisdiction of an offence under a law respecting the buying or selling of securities or derivatives.
3. The person or company has been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities or derivatives.
4. The person or company is subject to an order made by a securities regulatory authority, derivatives regulatory authority or financial regulatory authority, in any jurisdiction, that imposes sanctions, conditions, restrictions or requirements on the person or company.
5. The person or company has agreed with a securities regulatory authority, derivatives regulatory authority or financial regulatory authority, in any jurisdiction, to be made subject to sanctions, conditions, restrictions or requirements. 2008, c. 19, Sched. R, s. 1; 2010, c. 26, Sched. 18, s. 35 (3-6).

***Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended***

**APPLICATIONS — BY NOTICE OF APPLICATION**

***Notice of Application***

**14.05 (1)** The originating process for the commencement of an application is a notice of application (Form 14E, 68A or 73A) or an application for a certificate of appointment of an estate trustee (Form 74.4, 74.5, 74.14, 74.15, 74.21, 74.24, 74.27 or 74.30). R.R.O. 1990, Reg. 194, r. 14.05 (1); O. Reg. 484/94, s. 5.

***Information for Court Use***

**(1.1)** Form 14F (Information for court use) shall be filed together with a notice of application in Form 14E, 68A or 73A. O. Reg. 260/05, s. 2.

***Application under Statute***

**(2)** A proceeding may be commenced by an application to the Superior Court of Justice or to a judge of that court, if a statute so authorizes. R.R.O. 1990, Reg. 194, r. 14.05 (2); O. Reg. 292/99, s. 1 (2).

***Application under Rules***

**(3)** A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

- (a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;
- (b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;
- (c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;
- (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;
- (f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;
- (g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;
- (g.1) for a remedy under the *Canadian Charter of Rights and Freedoms*; or
- (h) in respect of any matter where it is unlikely that there will be any material facts in dispute. R.R.O. 1990, Reg. 194, r. 14.05 (3); O. Reg. 396/91, s. 3.

**IN THE MATTER OF THE ONTARIO SECURITIES COMMISSION AND  
THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA**

Court File No.: CV-12-9606-00CL

**Applicants**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at TORONTO

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