



Court File No.

CV-12-9606-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

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

- and -

IN THE MATTER OF A DECLARATION CONCERNING THE INTERPRETATION
OF THE ORDER OF JUNE 5, 2008 MADE BY THE HONOURABLE C. CAMPBELL J.
APPROVING A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING
METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP. *ET AL.*
PURSUANT TO THE COMPANIES CREDITORS ARRANGEMENT ACT, R.S.C.
1985, C. C-36, AS AMENDED

BY: Ontario Securities Commission and
Investment Industry Regulatory Organization of Canada
Applicants

APPLICATION UNDER Rule 14.05(3)(d), (g) and (h) of the *Rules of Civil Procedure*,
R.R.O. 1990, Reg. 194, as amended

NOTICE OF APPLICATION

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim
made by the applicants appears on the following pages.

THIS APPLICATION will come on for a hearing on Tuesday, March 13, 2012, at 330
University Avenue, Toronto.

Date: February 15, 2012

Issued by:.....

Brown
Local registrar

Address
of court
office

330 University Avenue
Toronto
M5G 1R7

TO: There is no respondent

APPLICATION

1. The applicants make application for:
 - (a) an order declaring that notice of this application is not required to be served on any person,
 - (b) an order declaring that the Order dated June 5, 2008 (the “ABCP Order”) made by the Honourable C. Campbell J. does not preclude the applicant, the Ontario Securities Commission (the “Commission”), from distributing to persons who purchased asset-backed commercial paper (“ABCP”) from a “Released Party” (within the meaning of the ABCP Order) funds paid to the Commission by the Released Party pursuant to a settlement agreement relating to a Commission proceeding;
 - (c) an order declaring that the ABCP Order does not preclude the applicant, the Investment Industry Regulatory Organization of Canada (“IIROC”), from distributing to persons who purchased ABCP from a Released Party funds paid to IIROC by the Released Party pursuant to a settlement agreement accepted by an IIROC Hearing Panel;
 - (d) such other order as the applicants may request and the Court thinks fit.
2. The grounds for the application are:
 - (a) the ABCP Order allowed the Commission, IIROC and other regulatory bodies to exercise any powers or remedies and to pursue proceedings or investigations

with respect to Released Parties concerning the Released Parties' involvement in the issue or sale of any Affected ABCP, so long as 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";

- (b) enforcement staff of the Commission ("Commission Staff") and enforcement staff of IIROC ("IIROC Staff") cooperated in investigating the conduct of Released Parties who were ABCP Dealers subject to the Commission's and IIROC's respective regulatory jurisdiction;

Commission Settlements

- (c) on December 21, 2009, the Commission approved a settlement agreement dated December 16, 2009 relating to a proceeding brought by Commission Staff against the Canadian Imperial Bank of Commerce and CIBC World Markets Inc. (together, "CIBC");
- (d) in this 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" and agreed, *inter alia*, to pay to the Commission \$21.7 million to be allocated under section 3.4(2)(b) of the *Securities Act*, R.S.O. 1990, c. S. 5 (the "Act") to or for the benefit of third parties;

- (e) on December 21, 2009, the Commission approved a settlement agreement also dated December 16, 2009, relating to a proceeding brought by Commission Staff against HSBC Bank of Canada (“HSBC”);
- (f) in the settlement agreement with HSBC, 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” and agreed, *inter alia*, to pay to the Commission \$5,925,000 to be allocated under section 3.4(2)(b) of the Act to or for the benefit of third parties;
- (g) CIBC and HSBC have paid the agreed amounts to the Commission;
- (h) the funds received by the Commission from CIBC and HSBC, respectively, were paid voluntarily by CIBC and HSBC to settle Commission proceedings against them and were not paid as a result of “any order or award to compensate or make restitution to an aggrieved person”;
- (i) the Commission is required by section 3.4(2)(b) of the Act to pay to the Consolidated Revenue Fund all money received by it pursuant to an order in an enforcement proceeding or as payment to settle enforcement proceedings, except money that is paid to reimburse the Commission for costs or “that is

designated under the terms of the order or settlement for allocation to or for the benefit of third parties”;

- (j) the funds so received by the Commission are held in a segregated bank account and allocated to such third parties as the Commission may determine;
- (k) Commission Staff have recommended to the Commission that it allocate the funds paid by CIBC and HSBC, respectively, to clients who purchased ABCP from them, respectively, between July 25 and August 10, 2007;
- (l) the allocation of these funds by the Commission will result in an *ex gratia* payment, as no person has any entitlement to receive funds so held by the Commission;

IIROC Settlements

- (m) on December 21, 2009, an IIROC Hearing Panel accepted a settlement agreement dated December 17, 2009 between IIROC Staff and Scotia Capital Inc. (“Scotia”);
- (n) in the settlement agreement with Scotia, Scotia admitted that between July 25 and August 10, 2007, 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 for such emerging issues,” contrary to IIROC’s rules, and agreed, *inter alia*, to pay a fine of \$28,950,000 to IIROC;

- (o) on December 21, 2009, an IIROC Hearing Panel accepted a settlement agreement dated December 17, 2009, between IIROC Staff and Canaccord Financial Ltd. (“Canaccord”), in which 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 ... 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, *inter alia*, to pay a fine of \$3,100,000 to IIROC;
- (p) on December 21, 2009, an IIROC Hearing Panel accepted a settlement agreement dated December 17, 2009 between IIROC Staff and Credential Securities Inc. (“Credential”), in which 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 ... 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, *inter alia*, to pay a fine of \$200,000 to IIROC;
- (q) Scotia, Canaccord and Credential have paid the agreed amounts to IIROC, and the funds have been held by IIROC in a separate externally restricted ABCP fund;

- (r) the funds paid by Scotia, Canaccord and Credential were voluntarily paid to settle proposed IIROC enforcement proceedings and were not paid as a result of “any order or award to compensate or make restitution to an aggrieved person”;
 - (s) IIROC wishes to distribute the funds paid to it by Scotia, Canaccord and Credential, respectively, to clients who purchased ABCP from them, respectively, during the relevant periods;
 - (t) the payment of these funds by IIROC will be an *ex gratia* payment, as no person has any entitlement to receive them;
 - (u) sections 3.4 and 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended;
 - (v) subrules 14.05(3)(d), (g) and (h) of the *Rules of Civil Procedure*; and
 - (w) such other grounds as counsel may advise and the Court may permit.
3. The following documentary evidence will be used at the hearing of the application:
- (a) the Affidavit of Kathryn Daniels, to be affirmed;
 - (b) the Affidavit of Jeffrey Kehoe, to be affirmed; and

(c) such other evidence as counsel may advise and the Court may permit.

February 15, 2012

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L.S.U.C. No. 12234V

Solicitor for the Applicants

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

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Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

NOTICE OF APPLICATION

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