

**IN THE MATTER OF
MR. Y**

**CONFIDENTIAL APPLICATION
OF MARK HAMLIN**

**(For Authorization to Disclose Information
Under Section 17 of the *Securities Act*, RSO 1990, c S.5)**

A. ORDER SOUGHT

The Applicant, Mark Hamlin (“**Hamlin**”), requests that the Tribunal make an order (the “**Section 17 Order**”) pursuant to section 17 of the *Securities Act*, RSO 1990 c. S.5 (the “**OSA**” or the “**Act**”) which provides that:

1. Hamlin is authorized to provide deposition testimony in the SDNY Action (as defined below) and make related disclosures to the United States District Court for the Southern District of New York (the “**SDNY Court**”), concerning the following topics:
 - a. the Commission’s investigation order which was issued in relation to this matter on April 2, 2019 pursuant to section 11 of the OSA (the “**Investigation Order**”);
 - b. Hamlin’s compelled testimony given at an examination conducted on May 23, 2019 under section 13 of the OSA (the “**Hamlin Examination**”);
 - c. the transcript of the Hamlin Examination (the “**Hamlin Transcript**”);
 - d. any other document, correspondence, information or evidence relating to the Hamlin Examination and any related interactions with OSC Staff or the Commodity Futures Trading Commission’s Division of Enforcement Staff (“**CFTC Staff**”) that is subject to the confidentiality restrictions set out in section 16 of the OSA or by the Investigation Order;

2. Except as expressly provided for, nothing in the Section 17 Order shall abrogate any of the rights or privileges afforded to Hamlin under:
 - a. the OSA in relation to the information described in paragraph 1 above or any other protections that may otherwise apply to this information pursuant to section 16 of the OSA;
 - b. the Stipulated Protective Order of the Honourable Judge H. Paul Oetken dated July 30, 2020, or the Ontario Court Order (as each are defined below); and
 - c. any other rights and privileges under the laws of Canada, Ontario, and the United States.

3. This application, the Tribunal's decision and the Section 17 Order shall remain confidential and shall not be made available to the public, but this does not prohibit the Tribunal's decision and the Section 17 Order from being disclosed as necessary in the Applicant's deposition in the SDNY Action, to the SDNY Court (redacted or filed under seal, if and as appropriate), or to the parties in the SDNY Action.

B. GROUNDS

The grounds for the request are:

I. Background

4. On April 2, 2019, at the request of CFTC Staff, the Ontario Securities Commission ("**OSC**" or the "**Commission**") issued an order authorizing certain members of the Commission's staff ("**OSC Staff**") and CFTC Staff to investigate and inquire into "possible violations of the United States *Commodity Exchange Act* and CFTC Regulations thereunder

concerning manipulation of certain swap rates involving” a certain U.S. financial institution (the “**Investigation Order**”).

5. On April 15, 2019, pursuant to the Investigation Order, Hamlin was issued a section 13 summons compelling his attendance at the Commission’s offices on May 23, 2019.
6. On May 23, 2019, the Hamlin Examination was conducted by OSC Staff and CFTC Staff at the Commission’s offices in Toronto.
7. On May 31, 2019, OSC Staff sent a letter to Hamlin’s Canadian counsel, Usman Sheikh of Gowling WLG (Canada) LLP (“**Sheikh**”), advising him that OSC Staff had authorized the release of the Hamlin Transcript to Sheikh. Among other things, OSC Staff’s letter excerpted subsection 16(1) of the OSA in its entirety and stated: “[p]lease note that section 16 of the Act prohibits the disclosure of information or evidence obtained under section 11.”

II. The SDNY Action

8. On December 20, 2019, the CFTC commenced an action (the “**SDNY Action**”) against Christophe Rivoire (“**Rivoire**”) in the United States District Court for the Southern District of New York (the “**SDNY Court**”). Hamlin is not a party to the SDNY Action.
9. By Order of the SDNY Court dated May 26, 2022, in the SDNY Action (Docket No. 70), fact discovery in the SDNY Action, including any deposition of Hamlin, must be completed by no later than August 1, 2022.

III. The SDNY Letter of Request

10. On September 24, 2021, Rivoire filed an unopposed motion with the SDNY Court for the issuance of a letter of request to seek the assistance of the Ontario courts in order to compel Hamlin to provide deposition testimony in the SDNY Action.

11. On January 24, 2022, the SDNY Court granted Rivoire's motion pursuant to an order of the Honourable Judge J. Paul Oetken. On February 3, 2022, the SDNY Court signed and issued the Letter of Request (the "**Letter of Request**").
12. On February 9, 2022, with Mr. Hamlin's consent, Rivoire applied to the Ontario Superior Court of Justice (the "**Ontario Superior Court**") to recognize and enforce Judge Oetken's Letter of Request. On March 8, 2022, the Ontario Superior Court issued an Order on consent recognizing the Letter of Request and directing Mr. Hamlin to give deposition testimony in the SDNY Action (the "**Ontario Court Order**").

IV. The CFTC's Disclosure of the Hamlin Examination to Rivoire's U.S. Counsel

13. During the pre-trial discovery phase of the SDNY Action, the Applicant learned that CFTC Staff had produced a copy of the Hamlin Transcript to Rivoire's US counsel during pre-trial discovery in the SDNY Action.
14. CFTC Staff did not request that the OSC issue an order under Section 17 of the OSA to disclose the Hamlin Transcript to Rivoire's counsel, and took the position that a Section 17 order was not required. Furthermore, CFTC Staff advised the Applicant that they intended to elicit deposition testimony from Hamlin concerning the Hamlin Examination and the Hamlin Transcript. Both the Hamlin Examination and Hamlin Transcript are subject to the confidentiality restrictions set out in section 16 of the OSA.
15. In March and April 2022, Hamlin's counsel requested guidance from OSC Staff as to whether answering questions concerning his prior testimony at the Hamlin Examination would be construed as a violation of the OSA. OSC Staff did not answer this question directly, but advised the Applicant that they did not believe it would be in the public interest to bring a proceeding against Hamlin for a breach of section 16 of the OSA in the circumstances. OSC Staff declined to provide further guidance and simply stated that

Hamlin “may seek an order under subsection 17(1) of the [*Ontario Securities*] Act” and that, “if your client decides to bring a section 17 application, we expect that Staff would consent to an order permitting him to testify in the U.S. CFTC’s proceeding.”

16. Hamlin’s deposition in the SDNY Action is currently scheduled for July 20, 2022.

17. As a current registrant who takes his obligations under Ontario securities laws seriously, Hamlin will not answer questions about his prior testimony during the Hamlin Examination without express authorization from the Commission to do so.

18. On June 15, 2022, the Applicant’s US counsel provided CFTC Staff with a copy of his draft materials in support of this Application. On June 17, 2022, CFTC Staff advised Applicant’s US counsel that CFTC Staff consented to the relief requested herein (though not to the factual or legal assertions set forth herein).

19. On June 17, 2022, Mr. Sheikh emailed a copy of the draft application materials to OSC Staff for their consent.

20. On June 29, 2022, OSC Staff contacted Mr. Sheikh in response to his request for their consent. Instead of providing their consent, OSC Staff asserted its view that a section 17 Order “may not be required in relation to at least some of the relief being sought by Mr. Hamlin”. OSC Staff further indicated that they would respond to Hamlin’s application “in the ordinary course” rather than provide advanced consent as previously suggested.

21. In subsequent correspondence with OSC Staff on June 29 and 30, 2022, OSC Staff provided no further meaningful insight as to their apparent change in position.

V. Legal Basis For Order Sought

22. Subsection 11(1) of the OSA empowers the Commission to issue an order appointing one or more persons to investigate a matter “for the due administration of Ontario securities law or the regulation of the capital markets in Ontario” and also “to assist in the due administration of the securities or derivatives laws or the regulation of the capital markets in another jurisdiction”.

23. Section 13 of the OSA permits persons appointed under section 11 of the OSA to summons and compel a person to produce documents and/or provide testimony. That evidence is then protected by subsection 16(1)(b) of the OSA which provides that, except in accordance with section 17, no person shall disclose, except to his/her counsel:

...the name of any person examined or sought to be examined under section 13, any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13.

24. Subsection 17(1) of the OSA empowers the Commission to authorize the disclosure of information protected by section 16 if such authorization is in the “public interest”.

25. In this proceeding, the Applicant submits that it is in the public interest to authorize Hamlin to answer questions related to his prior evidence given at the Hamlin Examination (and in relation to any correspondence with OSC Staff and CFTC Staff concerning the Hamlin Examination that may be protected by section 16 or the Investigation Order) for a number of reasons, including:

- a. it would allow Hamlin to provide full testimony under the Ontario Court Order and attend the deposition for the SDNY Action without being put in a position of

breaching Ontario securities laws. Put simply, it is not in the public interest to put the Applicant in the position of being forced to choose between seeking a protective order from the SDNY Court enforcing the confidentiality restrictions of section 16 of the OSA and violating section 16 of the OSA by answering deposition questions about the Hamlin Examination in the presence of third-party counsel for Rivoire;

- b. it would allow Hamlin to attend the deposition and, thus, give effect to the Letter of Request from the SDNY Court. It is in the public interest to facilitate cooperation with foreign courts where appropriate, taking into consideration principles of comity, public policy and sovereignty;
- c. the Ontario Court Order sufficiently protects the interests of Hamlin by permitting him to rely on any rights contained within the Ontario and Canada *Evidence Acts*, the *Charter of Rights and Freedoms*, as well as the protections in the Stipulated Protective Order issued by Judge J. Paul Oetken of the SDNY Court dated July 30, 2020 (the “**US Protective Order**”) and other protections under U.S. law. Under the Ontario Court Order, Hamlin may also assert any of the protections that would have otherwise been available to a party examined in a case pending in an Ontario court; and
- d. CFTC Staff has consented to the relief sought in this application.

26. For all of these reasons, it is in the public interest for the Tribunal to grant the relief sought in this application.

27. Rules 12(1), 12(2) and 23 of the Capital Markets Tribunal *Rules of Procedure and Forms*.

28. Sections 11, 13, 16 and 17 of the OSA.

C. EVIDENCE

The Applicant intends to rely on the following evidence at the hearing:

29. The affidavit of Matthew Coogan sworn July 8, 2022;

30. Such further other evidence as counsel may advise and this Tribunal may permit.

DATED this 8th day of July, 2022

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