

**IN THE MATTER OF A CONFIDENTIAL INVESTIGATION INTO CERTAIN
FOREIGN CORPORATIONS (THE “FOREIGN CORPORATIONS”)**

CONFIDENTIAL APPLICATION OF THE FOREIGN CORPORATIONS

For an Order pursuant to ss. 17(1) and 17(4) of the *Securities Act* and Confidentiality Orders pursuant to Rule 22 of the Capital Markets Tribunal Rules of Procedure and Forms, s. 2(2) of *Tribunal Adjudicative Records Act, 2019*, S.O. 2019, c. 7, Sch. 60 and s. 9(1)(b) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22

Under Section 17(1) and 17(4) of the *Securities Act*, R.S.O. 1990, c. S.5, Rules 17(1) and 22 of the Capital Markets Tribunal Rules of Procedure and Forms.

NOTICE OF APPLICATION

(Application for Orders under s. 17 of the Securities Act and Rule 22)

A. ORDER SOUGHT

1. The Foreign Corporations, request that the Tribunal makes the following order(s):
 - (a) Orders pursuant to ss. 17(1) and 17(4) of the *Securities Act*, R.S.O. 1990, c. S. 5 (the “*Act*”) addressing whether, and if so, under what terms and conditions certain confidential information protected by s. 16(1) of the *Act* (the “**Confidential Information**”) may be disclosed (including being filed with the Court) in connection with an application to the Ontario Superior Court of Justice by Enforcement Staff of the Ontario Securities Commission (“**Staff**”) to have the Foreign Corporations found in contempt (the “**Contempt Application**”);
 - (b) Orders pursuant to Rule 22 of the Capital Markets Tribunal Rules of Procedure and Forms that this Application and the material filed in connection therewith be

confidential and not available to the public and that all hearings scheduled in this Application be heard *in camera* (the “**Confidentiality Orders**”); and

- (c) Such further relief as this counsel may advise and this Tribunal may permit.

B. GROUNDS

Background

2. The Foreign Corporations are corporations incorporated outside of Canada and do not carry on business in Ontario. Pursuant to two orders made under section 11 of the *Act*, Staff has been authorized to conduct an investigation into certain matters concerning the Foreign Corporations.

3. Beginning in July 2022, Staff delivered summonses under s. 13 of the *Act* to the general counsel of certain of the Foreign Corporations (the “**Individual Summonses**”). The Individual Summonses were made pursuant to investigation orders made under s. 11 of the *Act*. The General Counsel has his own legal representation.

4. The Foreign Corporations have consistently taken the position that Staff does not have the jurisdiction to compel documents and information from them pursuant to a section 13 summons, and have consistently reserved their rights in that regard. The Foreign Corporations have also consistently denied that the OSC has substantive jurisdiction over the Foreign Corporations, and reserved their rights. Nevertheless, the Foreign Corporations have provided information and documents to Staff.

5. The Confidential Information provided to Staff by the Foreign Corporations includes extremely sensitive business information as well as information pertaining to third-parties and falling within a zone of reasonable expectations of privacy.

6. Based on information provided by Staff, the Foreign Corporations understand that the General Counsel was interviewed pursuant to the Individual Summonses. Counsel to the Foreign Corporations was not permitted to be present at the examination. The General Counsel had his own lawyer, who was present.

7. Following the examination of the General Counsel, on April 28, 2023, Staff sent Summonses (the “**Foreign Corporation Summonses**”) addressed to the Foreign Corporations to the attention of external counsel to the Foreign Corporations. No interview was sought. Rather, the Foreign Corporation Summonses repeated the requests for information and documents that were sought in the Individual Summonses, and purported to require that they be provided by May 5, 2023.

8. The Foreign Corporations wrote to Staff advising them that in their view, the Foreign Corporation Summonses were ineffective, that Staff had no jurisdiction to purport to require foreign corporations to provide information and documents to Staff through a section 13 summons, and inviting Staff to discuss the jurisdictional issues with external counsel. External counsel to the Foreign Corporations advised Staff that it did not have instructions to accept service of the Foreign Corporation Summonses.

9. Copies of the Foreign Corporation Summonses were delivered to the General Counsel on or about May 29, 2023. There was no further communication with Staff with respect to the Foreign Corporation Summonses until September 8, 2023, when Staff wrote to the Foreign Corporations’ external counsel indicating that Staff intended to bring an application in the Superior Court of Justice, for an order finding that the Foreign Corporations are in contempt of the Foreign Corporation Summonses (the “**Contempt Application**”) as early as September 29, 2023.

10. On October 2, 2023, Staff provided external counsel to the Foreign Corporations with a draft Notice of Application in the Contempt Application, which has not yet been filed with the Ontario Superior Court of Justice. The Notice of Application indicates that Staff will rely on an affidavit, yet to be sworn, at the hearing of the Contempt Application. The Notice of Application discloses (and, inevitably, the Affidavit will disclose) almost every category of information subject to confidentiality protections under s. 16(1) of the *Act*: the nature and content of the section 11 orders; the names of persons examined or sought to be examined; testimony given; questions asked; the nature and content of demands for production and what has and has not been provided to Staff (the “**Section 16 Information**”).

11. The disclosure of the Section 16 Information through the Contempt Application would injure the Foreign Corporations and other parties that may be affected, including individuals.

12. Staff has informed the Foreign Corporations that it takes the position that the Contempt Application is a proceeding to which section 17(6) applies and, as such, they have an untrammelled right to publicly disclose the Section 16 Information in the Contempt Application. Staff has advised the Foreign Corporations that in Staff’s view, they do not require a section 17(1) order from the Tribunal prior to disclosing the Section 16 Information.

13. The Foreign Corporations’ position is that:

- (a) Staff requires a subsection 17(1) order before disclosing Section 16 Information in the Contempt Application, including filing such information with the Court;
- (b) Subsection 17(6), even if it applies, would only apply to Staff, so to the extent that Staff brings the Contempt Application, the Foreign Corporations will require a subsection 17(1) order so that they can respond to the Contempt Application; and

- (c) The Tribunal should make such orders as are necessary under subsection 17(1) regarding disclosure by both Staff and the Foreign Corporations, as well as setting out terms and conditions for such disclosure pursuant to subsection 17(4).

A Rule 22 Order is Required

14. Section 16(1) of the *Act* achieves the important purpose of protecting the confidentiality of investigation orders and of information obtained, or sought to be obtained, pursuant to those orders. Unless the Tribunal makes an order pursuant to Rule 22, the confidentiality interests of the Foreign Corporations and third-parties will be defeated, and the relief sought at the heart of this application will be rendered moot. These factors outweigh any interest in holding public hearings.

A Section 17(1) Order Is Required

15. The Tribunal has the exclusive authority to make orders permitting the disclosure of the Section 16 Information pursuant to s. 17(1) of the *Act*. The Tribunal should make such an Order only after affected parties are provided with notice and the opportunity to be heard and then only if Staff satisfies the Tribunal that the Order is in the public interest.

16. If a s. 17(1) Order is made, it should be made on terms and conditions pursuant to s. 17(4) of the *Act*. These terms and conditions should provide, *inter alia*:

- (a) That the Foreign Corporations and any other affected parties be provided the opportunity to review materials containing Section 16 Information before the information is disclosed;
- (b) After this review, the Foreign Corporations and any other affected parties should be provided the opportunity to make submissions as to whether the scope of the

disclosure ought to be limited, including by editing out irrelevant or privileged material;

- (c) To the extent necessary, Staff should provide the Foreign Corporations such additional information gathered by it so as to permit the Foreign Corporations and any other affected party to make a full answer and defence to the Contempt Application;
- (d) To the extent necessary, orders under section 17(1) permitting other affected parties to share information and materials obtained by Staff with the Foreign Corporations so as to enable all affected parties the opportunity to make full answer and defence to the Contempt Application; and
- (e) Before filing the Contempt Application, Staff should be required to seek an order, from the Ontario Superior Court of Justice providing for confidentiality protections, including a sealing order.

17. The Foreign Corporations pleads and relies on:

- (a) Rules 17(1), 22(2), and 22(4) of the Capital Markets Tribunal Rules of Procedure and Forms;
- (b) Section 9(1)(b) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22;
- (c) Section 2(2) of the *Tribunal Adjudicative Records Act, 2019*, S.O. 2019, c. 7, Sched. 60.
- (d) Section 17 of the *Securities Act*, R.S.O. 1990, c. S.5.

(e) Such further and other grounds as counsel may advise and the Tribunal may permit.

C. THE FOLLOWING EVIDENCE will be used at the hearing of the Application:

(f) Such evidence as counsel may advise and this Tribunal may permit.

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