

Ontario Securities Commission

**IN THE MATTER OF
CALDWELL INVESTMENT MANAGEMENT LTD.**

**MOTION
OF CALDWELL INVESTMENT MANAGEMENT LTD.**

(For Disclosure of Documents and Information pursuant to Rules 27 and 28 of the *Ontario Securities Commission Rules of Procedure and Forms*, scheduled for September 27, 2018)

A. ORDER SOUGHT

The Moving Party, Caldwell Investment Management Ltd. (“**CIM**”) requests with notice, that the Ontario Securities Commission (“**Commission**”) make the following order(s):

1. An Order compelling Staff to disclose documents and information in Staff’s possession as to what procedures are followed and what reasonable efforts are typically taken by OSC-regulated advisers to achieve best execution of orders for fixed income securities trades and equities trades when acting for clients, including from Staff:
 - (a) discussions with witnesses or potential witnesses;
 - (b) discussions with experts or potential experts;
 - (c) discussions with other third parties;
 - (d) researching and preparing Concept Paper 23-402 *Best Execution and Soft Dollar Agreements*;
 - (e) researching and preparing OSC Staff Notice 33-748 Annual Summary Report for Dealers, Advisors and Investment Fund Managers (page 63 to 65);

- (f) researching and preparing OSC Staff Notice 33-734 2010 Compliance and Registrant Regulation Branch Annual Report (pages 24 and 25);
- (g) performing compliance reviews of OSC-regulated advisers during the Relevant Period (defined below) (“**Relevant Compliance Reviews**”), redacted to protect the third party’s identity, commercially sensitive information or irrelevant information; and
- (h) responses from OSC-regulated advisers or their representatives to the Relevant Compliance Reviews, redacted to protect the third party’s identity, commercially sensitive information or irrelevant information.

2. An Order compelling Staff to disclose documents and information in Staff’s possession concerning the allegation that CIM charged its clients excess commission rates that were not reasonable compared to more favourable rates available at unaffiliated dealers, including:

- (a) all data or information in Staff’s possession relating to the commissions (commission/share) charged by unaffiliated dealers;
- (b) all data or information collected concerning the bond spreads charged by unaffiliated dealers for bonds; and
- (c) all data or information in Staff’s possession concerning best-execution practices of OSC-regulated advisers including quantitative information, and written policies and procedures, redacted to protect the third party’s identity or commercially sensitive information.

3. If necessary, an Order compelling Staff to provide CIM with a log identifying all documents it believes are not producible. In the log, Staff should identify each document, describe its nature, specify Staff's reason for refusing disclosure and the grounds for that reason, and if privilege is being claimed, provide sufficient particulars to enable the privilege to be challenged so that a decision can be made by the Commission in that regard; and

4. If necessary, an Order compelling Staff to bring the documents identified in the log referenced in paragraph 3 to the hearing of this motion so that the Commission has the opportunity to examine any disputed documents.

B. GROUNDS

The grounds for the motion are:

1. CIM is a registered investment counsel and portfolio manager which during the Relevant Period acted as investment fund manager and portfolio manager for its pooled funds, public mutual funds and for individuals and small institutions through separately managed accounts.

The Allegations

2. On June 14, 2018, Staff of the Commission commenced an enforcement proceeding against CIM by issuing a Statement of Allegations.

3. Among other things, Staff alleges in the Statement of Allegations that between January 1, 2013 to November 15, 2016 inclusive (the "**Relevant Period**"):

(a) CIM breached its best execution obligation under section 4.2 of National Instrument 23-101 *Trading Rules* by placing most of its trades for execution through Caldwell Securities Ltd. ("**CSL**"), a related investment dealer, without

having adequate policies and procedures or an adequate written process in place to ensure that CIM's best execution obligation was being met; and

- (b) CIM had inadequate policies and procedures relating to its best execution obligation contrary to section 11.1 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*.

Correspondence relating to disclosure

- 4. On July 3, 2018, Staff provided CIM with certain disclosure.
- 5. On July 31, 2018, CIM's counsel sought particulars and further disclosure from Staff. Among other things, CIM sought:
 - (a) any material in Staff's possession indicating what practices are actually followed by OSC-regulated advisers in relation to best execution;
 - (b) any material in Staff's possession indicating what charges dealers in Ontario generally require be paid for execution of fixed income securities trades and equity trades and other services provided to advisers or other clients;
 - (c) information known to Staff as to what procedures are followed and what reasonable efforts are typically taken by OSC-regulated advisers to achieve best execution of orders for fixed income securities trades and equities trades when acting for clients; and
 - (d) any materials that OSC Staff has cautioning advisers from sending trade orders to an affiliated dealer for execution or prescribing on what terms such orders can be properly sent.

6. On August 21, 2018, CIM and Staff met to discuss various matters, including disclosure issues. Staff undertook at that meeting to provide CIM with information about fixed income spreads or charges.

7. On August 24, 2018, Staff responded to CIM's letter dated July 31, 2018 (and the items identified in paragraph 5a-d herein) by providing material that was mostly publicly available. Staff refused to provide further disclosure on the basis that the information sought was not "directly relevant", "overly broad" and/or "confidential". Staff did not take the position that it did not have the information and documents sought by CIM.

8. On August 30, 2018, Staff informed CIM that "Staff plan to call an expert(s) to testify concerning best execution processes and appropriate commission rates and bonds spreads that should have been paid by CIM clients." In the same email, Staff also informed CIM that "[a]ny information which Staff has obtained to date from third parties concerning commission rates and bond spreads is privileged and falls outside of Staff's disclosure obligation."

9. In follow-up email exchanges, Staff explained that it had discussions with experts and potential experts and viewed these notes as subject to a claim of litigation privilege. Moreover, despite speaking to these potential experts about *this matter*, Staff asserted that their notes "are irrelevant to Staff's allegations."

CIM requires the disclosure sought to make full answer and defence

10. CIM is entitled to all information in Staff's possession obtained from persons who have provided Staff with relevant information notwithstanding that they are not proposed

as Staff witnesses. To be clear, CIM is not seeking Staff's views, opinions and analysis about the merits of the allegations against CIM.

11. Staff must take a generous view of relevance. Relevant material includes material in Staff's possession which has a reasonable possibility of being relevant to CIM's ability to make full answer and defence to Staff's allegations. This includes material that CIM could use to rebut the case presented by Staff, material CIM could use to advance a defence and material that may assist CIM in making tactical decisions.

CIM is seeking relevant information

12. CIM is seeking relevant information.

(a) CIM is seeking information that will assist CIM in establishing that during the Relevant Period:

- (i) CIM's conduct was consistent with the practices of other OSC-regulated advisers; and
- (ii) Staff viewed conduct similar to CIM's conduct as not requiring enforcement action.

(b) Even if industry practice is not determinative of the ultimate issue, it will be one factor that the Commission may consider at a hearing on the merits and, if applicable, at a penalty hearing.

(c) Staff's allegations against CIM are matters of first impression even though the allegations create the impression that the best execution standard applicable to CIM during the Relevant Period was much more precise, detailed and well-

understood than the actual rules are that govern best execution. This is relevant to any penalty that the Commission may impose on CIM.

- (d) CIM is also seeking data and information on Staff's allegations that CIM charged its clients excess commission rates compared to more favourable rates available at unaffiliated dealers. Staff surely has such data because its Statement of Allegations refer to commission rates and spreads used by unaffiliated dealers. Without this information, CIM is limited in its ability to contest Staff's allegation that CIM overcharged its clients compared to other dealers' rates.

13. The relevance of the material must be determined on a document-by-document basis, not as a whole. Documents in isolation may not have relevance to Staff but might well have considerable relevance to CIM when studied in light of other information possessed by CIM.

CIM will respect third parties' confidentiality

14. The confidentiality of the material is not a compelling basis for resisting its disclosure. CIM's interests in obtaining relevant information outweighs any privacy interests of third parties.

15. In any event, third parties' privacy interests can be protected. CIM is prepared to sign an appropriate undertaking that CIM and its counsel will not use the material from third parties for any purpose other than making full answer and defence to the allegations in this proceeding and will maintain custody and control over the material so that copies of it will not be improperly disseminated.

16. CIM is also prepared to receive documents that are redacted to protect third parties' identities, commercially sensitive information or irrelevant information.

Staff has not provided sufficient particulars to assess its claim of privilege

17. Staff has asserted litigation privilege without providing CIM or the Commission with sufficient particulars for an appropriate determination of the issue.

18. Litigation privilege does not readily lend itself to simple demarcations. Identifying where it applies requires an appreciation of the circumstances surrounding the creation of a particular work product. For instance, if material for which litigation privilege is claimed contains material inconsistencies or additional facts not already disclosed to CIM, then it must be disclosed. Similarly, if Staff's notes with potential experts contain facts and opinions of the expert concerning the industry's standards or practises around an advisor's best execution obligations, then those notes are disclosable.

19. Staff should produce a log identifying all documents it believes are not producible. In the log, Staff should identify each document, describe its nature, specify Staff's reason for refusing disclosure and the grounds for that reason, and if privilege is being claimed, provide sufficient particulars to enable the privilege to be challenged so that a decision can be made by the Commission in that regard. Staff should also bring the documents identified in the log to the hearing so that the Commission has the opportunity to examine any disputed documents.

20. Staff's notes can be redacted to ensure it does not reveal Staff's observations, thoughts and opinions.

C. EVIDENCE

The Moving Party intends to rely on the following evidence for the motion:

1. Affidavit of Katherine Stubits, sworn September 17, 2018.

September 17, 2018

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(Confidential conference under section 20 of the
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and Forms* scheduled for July 27, 2018)

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