



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5 AS AMENDED**

- AND -

IN THE MATTER OF DAVID M. O'BRIEN

ORDER

**(Subsection 9(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended
and Rule 8.1 and subrule 5.2(1) of the Commission's *Rules of Procedure*, (2012), 35
OSCB 10071)**

WHEREAS on December 8, 2010, the Secretary of the Ontario Securities Commission (the "Commission") issued a Notice of Hearing, pursuant to sections 37, 127 and 127.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), for a hearing to commence at the offices of the Commission on December 20, 2010 at 10:30 a.m., or as soon thereafter as the hearing could be held;

AND WHEREAS on December 9, 2010, the Respondent David O'Brien ("O'Brien") was served with the Notice of Hearing and Statement of Allegations dated December 7, 2010;

AND WHEREAS the Notice of Hearing provided for the Commission to consider, among other things, whether, in the opinion of the Commission, it is in the public interest, pursuant to section 127 of the Act, to issue temporary orders against O'Brien, as follows:

- (a) O'Brien shall cease trading in any securities for a prescribed period or until the conclusion of the hearing on the merits in this matter;
- (b) O'Brien is prohibited from acquiring securities for a prescribed period or until the conclusion of the hearing on the merits in this matter; and
- (c) Any exemptions contained in Ontario securities law do not apply to O'Brien for a prescribed period or until the conclusion of the hearing on the merits in this matter;

AND WHEREAS on December 20, 2010, Staff of the Commission ("Staff") and O'Brien appeared before the Commission and made submissions and O'Brien advised the

Commission that he was opposed to Staff's request that temporary orders be issued against him and that he wished to cross-examine Lori Toledano, a member of Staff, on her affidavit;

AND WHEREAS on December 20, 2010, the hearing with respect to the issuance of the temporary orders was adjourned until December 23, 2010 at 12:30 p.m.;

AND WHEREAS on December 23, 2010, a hearing with respect to the issuance of the temporary orders was held and the panel of the Commission considered the affidavit of Toledano, the cross-examination of Toledano and the submissions made by Staff and O'Brien;

AND WHEREAS on December 23, 2010, the Commission issued a temporary cease trade order pursuant to section 127 of the Act ordering that:

- (a) O'Brien shall cease trading in any securities;
- (b) O'Brien is prohibited from acquiring any securities; and
- (c) Any exemptions contained in Ontario securities law do not apply to O'Brien (the "Temporary Cease Trade Order");

AND WHEREAS on December 23, 2010, the Commission ordered that the Temporary Cease Trade Order shall expire on April 1, 2011;

AND WHEREAS on December 23, 2010, the Commission ordered that Staff and O'Brien shall consult with the Office of the Secretary and schedule a confidential pre-hearing conference for this matter;

AND WHEREAS a confidential pre-hearing conference was scheduled for February 24, 2011;

AND WHEREAS at the confidential pre-hearing conference on February 24, 2011, Staff and O'Brien appeared and made submissions regarding the disclosure made by Staff, and Staff requested an extension of the Temporary Cease Trade Order;

AND WHEREAS on February 24, 2011, the Commission ordered that:

- a) a hearing to extend the Temporary Cease Trade Order shall take place on March 30, 2011 at 11:30 a.m.;
- b) a motion regarding disclosure shall take place on April 21, 2011 at 10:00 a.m., and in accordance with rule 3.2 of the Commission *Rules of Procedure* (2010), 33 OSCB

8017 (the “*Rules of Procedure*”), O’Brien shall serve and file a motion record, including any affidavits to be relied upon, by April 11, 2011 at 4:30 p.m.; and

- c) a further confidential pre-hearing conference shall take place on May 30, 2011 at 10:00 a.m;

AND WHEREAS on March 30, 2011, a hearing with respect to the extension of the Temporary Cease Trade Order was held, and the panel of the Commission considered the evidence filed and the submissions made by Staff and O’Brien;

AND WHEREAS on March 30, 2011, the Commission ordered that:

- a) the Temporary Cease Trade Order shall be extended to April 26, 2011; and
- b) a further hearing to extend the Temporary Cease Trade Order shall take place on April 21, 2011 at 10:00 a.m.;

AND WHEREAS on April 21, 2011, a hearing with respect to the extension of the Temporary Cease Trade Order was held, and the panel of the Commission considered the evidence filed and the submissions made by Staff and O’Brien;

AND WHEREAS on April 21, 2011, the Commission ordered that:

- a) the Temporary Cease Trade Order shall be extended until the conclusion of the hearing of the merits of this matter; and
- b) O’Brien may, if he wishes to do so, apply to the Commission for an order revoking or varying this Order pursuant to section 144 of the Act;

AND WHEREAS also on April 21, 2011, O’Brien brought a motion regarding disclosure, wherein he sought an order from the Commission requiring Staff to provide him with all additional disclosure materials without requiring him to execute a further undertaking, and the panel of the Commission considered the evidence filed and the submissions made by Staff and O’Brien;

AND WHEREAS on April 21, 2011, the Commission ordered that Staff shall provide further disclosure materials to O’Brien without requiring the signing by him of an undertaking as to the confidentiality of that disclosure. The Commission further ordered that:

- 1) all disclosure materials provided to O'Brien are confidential and may be used by him only for the purpose of making full answer and defence in this proceeding. The use of disclosure materials for any other purpose is strictly prohibited. All disclosure materials provided to O'Brien are subject to the strict confidentiality restrictions imposed by section 16 of the Act;
- 2) O'Brien is also subject to the implied undertaking that all disclosure materials provided to him are subject to the restrictions on use referred to in paragraph (1);
- 3) the Previous Undertaking signed by O'Brien is binding upon him and applies by its terms to all of the disclosure materials provided by Staff to O'Brien, including all disclosure materials provided by Staff to O'Brien in the future; if O'Brien wishes to challenge the validity of the Previous Undertaking he is entitled to bring a motion before the Commission to do so; and
- 4) if O'Brien wishes to use the disclosure materials provided by Staff to him for any purpose other than as provided in paragraph (1), he must make an application to the Commission under section 17 of the Act for an order of the Commission consenting to that use;

AND WHEREAS at the confidential pre-hearing conference on May 30, 2011, Staff and O'Brien appeared and Staff sought to set dates for a hearing on the merits, while O'Brien advised the Commission that he was opposed to Staff's request. The Commission adjourned the hearing to June 20, 2011 at 10:00 a.m., for the purpose of setting the dates for the hearing on the merits;

AND WHEREAS at the confidential pre-hearing conference on June 20, 2011, Staff and O'Brien appeared and scheduling of the hearing on the merits was discussed and the Commission ordered that:

1. the hearing on the merits is to commence on March 12, 2012 at 10:00 a.m. at the offices of the Commission, and shall continue on March 14, 15, 16, 19, 20, 21, 22, 23, 26, and 28, 2012, or such further or other dates as may be agreed upon by the parties and fixed by the Office of the Secretary; and
2. a further confidential pre-hearing conference shall take place on January 11, 2012 at 10:00 a.m.;

AND WHEREAS at the confidential pre-hearing conference on January 11, 2012, Staff appeared and Counsel on behalf of O'Brien appeared, who advised the Commission that he had just been appointed to represent O'Brien in this matter;

AND WHEREAS Counsel for O'Brien requested that the pre-hearing conference be continued in a few weeks time to permit him to address certain matters that had just been brought to his attention. The Commission ordered that a further confidential pre-hearing conference take place on January 31, 2012 at 3:30 p.m.;

AND WHEREAS at the confidential pre-hearing conference on January 31, 2012, Staff and Counsel for O'Brien appeared and Counsel for O'Brien requested an adjournment of the hearing on the merits to permit interim issues to be raised before the Commission. Counsel for O'Brien also requested that the records from both the January 11 and 31, 2012 confidential pre-hearing conferences be sealed and treated as confidential. The Commission ordered that the hearing dates of March 12, 14, 15, 16, 19, 20, 21, 22, 23, 26 and 28, 2012 be vacated, a further confidential pre-hearing conference take place on March 12, 2012 at 10:00 a.m., and that the records from both the January 11 and 31, 2012 confidential pre-hearing conferences be sealed and treated as confidential pursuant to subsection 9(1) of the Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, as amended (the "SPPA") and rule 8.1 and subrule 5.2(1) of the *Rules of Procedure*;

AND WHEREAS at the confidential pre-hearing conference on March 12, 2012, Staff and Counsel for O'Brien appeared and Counsel for O'Brien requested a confidential motion be scheduled to seek an adjournment of the hearing dates. The Commission ordered that a confidential motion take place on April 18, 2012 at 10:00 a.m., for which O'Brien shall serve and file a motion record, including any affidavits to be relied upon, by April 5, 2012 at 4:30 p.m, Staff shall serve and file any responding materials by April 12, 2012, O'Brien shall serve and file a factum by April 13, 2012, and Staff shall file its factum by April 16, 2012, and that the records from the March 12, 2012 confidential pre-hearing conference and from the April 18, 2012 confidential motion shall be sealed and treated as confidential pursuant to subsection 9(1) of the SPPA and rule 8.1 and subrule 5.2(1) of the *Rules of Procedure*;

AND WHEREAS at the confidential motion on April 18, 2012, Staff and Counsel for O'Brien appeared and Counsel for O'Brien presented evidence and requested an adjournment of

any hearing dates and that a further confidential pre-hearing conference be scheduled. Staff did not oppose the adjournment request and agreed to the scheduling of a further pre-hearing conference. The Commission ordered that a confidential pre-hearing conference shall take place on July 19, 2012 at 10:00 a.m., for which O'Brien shall deliver any materials relevant to the pre-hearing conference by July 9, 2012, and that the records from the July 19, 2012 confidential pre-hearing conference shall be sealed and treated as confidential pursuant to subsection 9(1) of the SPPA and rule 8.1 and subrule 5.2(1) of the *Rules of Procedure*;

AND WHEREAS at the confidential pre-hearing conference on July 19, 2012, Staff and Counsel for O'Brien appeared and presented evidence and requested that a further confidential pre-hearing conference be scheduled. The Commission ordered that a confidential pre-hearing conference shall take place on September 28, 2012 at 11:00 a.m, for which O'Brien shall deliver any materials relevant to the pre-hearing conference by September 18, 2012, and that the records from the September 28, 2012 confidential pre-hearing conference shall be sealed and treated as confidential pursuant to subsection 9(1) of the SPPA and rule 8.1 and subrule 5.2(1) of the *Rules of Procedure*;

AND WHEREAS at the confidential pre-hearing conference on September 28, 2012, Staff and Counsel for O'Brien appeared and presented evidence as contemplated at the earlier pre-hearing conference. Staff sought to set dates for a hearing on the merits, while counsel for O'Brien requested a further confidential pre-hearing conference before hearing dates are set. The Commission ordered that a confidential pre-hearing conference shall take place on October 25, 2012 at 3:00 p.m, for which O'Brien shall deliver any materials relevant to the pre-hearing conference by October 22, 2012, and that the records from the September 28, 2012 and October 25, 2012 confidential pre-hearing conferences shall be sealed and treated as confidential pursuant to subsection 9(1) of the SPPA and rule 8.1 and subrule 5.2(1) of the *Rules of Procedure*;

AND WHEREAS at the confidential pre-hearing conference on October 25, 2012, Staff and Counsel for O'Brien appeared and presented evidence and Staff did not object to Counsel for O'Brien requesting a further confidential pre-hearing conference. The Commission ordered that a confidential pre-hearing conference shall take place on March 7, 2013 at 10:00 a.m, for which O'Brien shall deliver any materials relevant to the pre-hearing conference by March 1, 2013 and that the records from the October 25, 2012 and March 7, 2013 confidential pre-hearing

conferences shall be sealed and treated as confidential pursuant to subsection 9(1) of the SPPA and rule 8.1 and subrule 5.2(1) of the *Rules of Procedure*;

AND WHEREAS Staff requested an adjournment until March 11, 2013 and Counsel for O'Brien confirmed his availability for March 11, 2013 as an alternate date for the pre-hearing conference. The Commission ordered that the pre-hearing date of March 7, 2013 is vacated, a confidential pre-hearing conference shall take place on March 11, 2013 at 11:00 a.m., and the records of the March 11, 2013 confidential pre-hearing conference shall be sealed and treated as confidential pursuant to subsection 9(1) of the SPPA and rule 8.1 and subrule 5.2(1) of the *Rules of Procedure*, (2012), 35 OSCB 10071;

AND WHEREAS at the confidential pre-hearing conference on March 11, 2013, Staff and Counsel for O'Brien appeared and presented evidence and requested that a further confidential pre-hearing conference be scheduled;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make this order;

IT IS HEREBY ORDERED THAT:

1. a confidential pre-hearing conference shall take place on July 18, 2013 at 10:00 a.m;
2. O'Brien shall deliver any materials relevant to the pre-hearing conference by July 8, 2013; and
3. the records from the March 11, 2013 and July 18, 2013 confidential pre-hearing conferences shall be sealed and treated as confidential pursuant to subsection 9(1) of the SPPA and rule 8.1 and subrule 5.2(1) of the *Rules of Procedure*.

DATED at Toronto this 11th day of March, 2013.

“Mary G. Condon”

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