

IN THE MATTER OF THE *SECURITIES ACT*,
S.N.B. 2004, c. S-5.5

AND IN THE MATTER OF

**James A. MacCallum,
Andrew Mitchell Holdings, LLC and
Andrew J. Trites**

(Respondents)

MOTION

1. **The following relief is being sought by staff:**

An order pursuant to section 184(1)(d) of the *Securities Act*, S.N.B. 2004, c. S-5.5, as amended (the "*Securities Act*"), that any exemptions under New Brunswick securities law do not apply to the Respondents until otherwise ordered by the Commission;

An order pursuant to section 184(1)(i) of the *Securities Act*, that James A. MacCallum be prohibited from becoming or acting as an officer or director of any issuer, registrant or mutual fund manager; and

Such other relief as the New Brunswick Securities Commission may determine is in the public interest pursuant to section 184(1) of the *Securities Act*.

2. **The factual and legal grounds for this motion are:**

The Respondents

1. James A. MacCallum ("MacCallum") is an individual resident in Jamestown, New York. MacCallum is originally from the Moncton area of New Brunswick and maintains ties to that area. MacCallum has issued promissory notes to investors in New Brunswick.
2. Andrew Mitchell Holdings, LLC ("AMH") is a corporation controlled by MacCallum. AMH has issued a promissory note to an investor in New Brunswick.
3. Andrew J. Trites ("Trites") is an individual resident in Irishtown, New Brunswick. Trites acted in furtherance of trades involving the promissory notes issued by MacCallum and AMH.

4. None of MacCallum, AMH nor Trites (together the "Respondents") are registered to trade in securities in New Brunswick. As such, they each require a valid exemption to trade in securities, or to act in furtherance of such trades, in New Brunswick.

The 26 October 2009 Promissory Note issued to Prof. Corporation

5. On or about 26 October 2009, AMH issued a promissory note in the amount of \$1,200,000 to "Prof. Corporation", which is resident in New Brunswick. The note purported to pay interest at the rate of 18% per year, for a term of 3 years. MacCallum executed the note on behalf of AMH (the "26 October 2009 Note").
6. Trites acted in furtherance of the issuing of the 26 October 2009 Note and was to be paid a commission of \$10,000.
7. Prof. Corporation advanced \$700,000 to AMH under the 26 October 2009 Note in October or November 2009, with the remaining \$500,000 to be advanced to AMH on 31 January 2010.
8. After the issuing of the 26 October 2009 Note, the principal of Prof. Corporation, "Mr. A.", instructed its financial institution to transfer the funds to AMH. The employees of the institution inquired into the purpose of the transaction, and Mr. A described the loan to AMH under the 26 October 2009 Note.
9. Upon hearing the description, employees of the financial institution detailed their concerns regarding the transaction to Mr. A and warned him against proceeding. Mr. A. proceeded with the transaction.
10. Upon hearing of the concerns expressed by the financial institution Trites, contacted Staff of the New Brunswick Securities Commission ("NBSC" and "Staff") on 18 November 2009. He called to determine whether the trade involving the 26 October 2009 Note, of which he had acted in furtherance, complied with regulatory requirements.
11. At that time, AMH had failed to file a Report of Exempt Distribution and, as such, was in contravention of section 6.1(2) of National Instrument 45-106.

Inquiries by Staff of the NBSC in November 2009

12. Staff of the NBSC spoke with Trites and MacCallum on 19 November 2009. At the time, they represented that the 26 October 2009 Note was the only transaction that had taken place. They acknowledged that another transaction was being contemplated, but had not been completed.

13. In consultation with Staff of the NBSC, it was agreed between the parties that Prof. Corporation would not be required to advance the \$500,000 due on 31 January 2010 under the 26 October 2009 Note.

Discovery of Notes Previously Issued by MacCallum

14. During the interview on 19 November 2009, MacCallum and Trites failed to mention that MacCallum had previously issued similar promissory notes directly to Prof. Corporation and other investors in New Brunswick, including:
 - (a) a \$30,000 promissory note issued to "Mr. B" on 7 January 2009, bearing interest at a rate of 15% per year;
 - (b) a \$75,000 promissory note issued to "Ms. C" on 1 February 2009, bearing interest at a rate of 18% per year;
 - (c) a \$500,000 promissory note issued to Prof. Corporation on 6 February 2009, bearing interest at a rate of 15% per year; and
 - (d) a \$500,000 promissory note to "Mr. D" effective 7 September 2009 and issued on 13 May 2010, bearing interest at a rate of 18% per year.
15. Trites was paid a commission of \$5,000 in respect of each the two \$500,000 notes, for a total of \$10,000.

The Single Report of Exempt Distribution

16. At Staff's request, AMH filed a Report of Exempt Distribution concerning the 26 October 2009 Note issued to Prof. Corporation. This Report of Exempt Distribution was filed on 22 December 2009. MacCallum made the arrangements for the filing of this report and, as such, would have been aware of the requirement to do so under New Brunswick securities law.
17. The Report of Exempt Distribution filed states that Trites was to be paid a commission of \$10,000 with respect to the 26 October 2009 Note. Trites has stated that he was in fact only paid \$5,000 in commissions relating to the actual advance of \$700,000 under the note.
18. Despite his knowledge of the legal requirement to file a Report of Exempt Distribution, MacCallum failed to file any Report of Exempt Distribution in respect of any of the promissory notes described in paragraph 14, above. As such, Staff alleges that MacCallum breached section 6.1 of National Instrument 45-106 and sections 45 and 71(1) of the *Securities Act*.

19. It is not apparent that any registration or prospectus exemption would apply in respect of the notes issued to Mr. B and Ms. C. As such, Staff alleges that MacCallum and Trites have breached sections 45 and 71(1) of the *Securities Act* in respect of the distribution of these notes.

Conduct after Staff's Initial Inquiries

20. In January of 2010, Staff of the NBSC was aware of the 26 October 2009 Note, under which Prof. Corporation had advanced \$700,000. This trade was exempt from the registration and prospectus requirements under New Brunswick securities law. Staff concluded the file with a warning to MacCallum that any further trades or advances ought to be conducted through a registered Exempt Market Dealer.
21. On 1 February 2010, legal counsel to MacCallum and AMH confirmed to Staff of the NBSC that his client would discontinue raising capital in New Brunswick until a registered Exempt Market Dealer was in place to conduct the trades.
22. The \$500,000 promissory note dated 6 February 2009, from MacCallum to Prof. Corporation, matured in 2010. Instead of repaying the outstanding principal, MacCallum persuaded Mr. A. to reinvest the funds under the 26 October 2009 Note. The intent was to have it take the place of the \$500,000 advance due on 31 January 2010, which AMH had waived at the urging of Staff of the NBSC.
23. As such, AMH notionally raised \$500,000 from Prof. Corporation, in breach of the representations made to Staff of the NBSC in February 2010.

Performance of the Promissory Notes

24. The 26 October 2009 Note is presently in default. Interest is in arrears since March of 2010. Interest due in March 2010 was paid late.
25. MacCallum failed to redeem the promissory note in the amount of \$500,000 to Mr. D. at maturity, and it is presently in default. Interest is in arrears since March of 2010. Interest due in March 2010 was paid late.
26. Trites paid-out the \$30,000 promissory note to Mr. B. due to a dispute over the maturity date. Trites was concerned the dispute might affect him professionally.
27. MacCallum failed to redeem the promissory note in the amount of \$75,000 to Ms. C. at maturity, and it is presently in default. Trites has reimbursed her for certain of the early missed interest payments, but

others remain unpaid.

Re-opening of the Investigation

28. Staff of the NBSC re-opened its investigation in January 2011 when Mr. A. advised that:
 - (a) AMH was in default of interest payments on its promissory note to Prof. Corporation; and
 - (b) there were similar notes issued in New Brunswick to Mr. D and Ms. C.
29. Staff of the NBSC then spoke to Trites and confronted him with the information concerning the two other investors, which he had failed to mention during the interview on 19 November of 2009.
30. Trites stated that he had not mislead Staff in November of 2009 because he had only been asked if there were other loans that were secured in a similar fashion to the 26 October 2009 Note.
31. Staff alleges that the failure of Trites and MacCallum to disclose the other loans during the interview was contrary to the public interest.

New Capital being used to Pay Existing Investors

32. In January of 2009, Mr. A. was considering advancing additional funds to MacCallum. Before doing so, he wished to have a previous loan paid-out.
33. MacCallum was able to pay-out the existing loan, but only by soliciting the investments from Mr. B and Ms. C.
34. Trites acted in furtherance of these three trades and was aware of the surrounding circumstances. The conduct of MacCallum and Trites in this regard was contrary to the public interest.

The Status of the Investigation

35. The NBSC issued an Investigation Order, pursuant to section 170(2) of the *Securities Act*, against the Respondents on 17 March 2011. The investigation is ongoing.

Conclusion

36. The conduct of the Respondents warrants that they be removed from the capital markets in New Brunswick until such time as the investigation is complete and any Statement of Allegations filed is determined, or until otherwise ordered by the NBSC. This relief is sought in the public interest pursuant to section 184(1) of the *Securities Act*.

3. **Evidence being relied on:**

1. The affidavit of Ed LeBlanc, Senior Investigator, sworn the 6th day of July, 2011; and
2. Such further and other evidence as Staff may adduce and the Commission permit, in support of this motion for an interim Order.

DATED at the City of Saint John this 6th day of July 2011.

"original signed by"

Mark McElman
Counsel to Staff of the Commission

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