

IN THE MATTER OF
The *Securities Act*
S.N.B. 2004, c. S-5.5

- and -

IN THE MATTER OF

LOCATE TECHNOLOGIES INC., TUBTRON CONTROLS CORP.,
BRADLEY CORPORATE SERVICES LTD., 706166 ALBERTA LTD.,
LORNE DREVER, HARRY NILES, MICHAEL CODY AND
DONALD NASON

**REASONS FOR THE DECISION:
Michael Cody and Donald Nason**

Date of Hearing: 2 April 2009

Date of Decision: 3 July 2009

Panel:

Anne La Forest, Panel Chair

Céline Trifts, Panel Member

Denise LeBlanc, Q.C., Panel Member

Representatives:

Mark McElman

For the staff of the New Brunswick
Securities Commission

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**REASONS FOR THE DECISION:
Michael Cody and Donald Nason (Respondents)**

1. INTRODUCTION

Background

[1] On 15 October 2007, the New Brunswick Securities Commission (Commission), in response to a motion filed by Staff of the Commission (Staff), issued a temporary order (Temporary Order) cease trading, *inter alia*, the Respondents Michael Cody (Cody) and Donald Nason (Nason). The Temporary Order provided that it was to expire in six months. On 14 March 2008, Staff filed a Statement of Allegations against, *inter alia*, Cody and Nason and the Temporary Order was extended following a hearing on 10 April 2008. The extension provided that the Temporary Order would remain in force until the Commission reached a final determination in this matter. Subsequent Amended Statements of Allegations against, *inter alia*, Cody and Nason were filed on 2 June 2008 and 23 October 2008.

[2] On 25 August 2008 and 3 November 2008, Settlement Hearings were held wherein the Commission approved Settlement Agreements with the other named respondents in this matter, Locate Technologies Inc. (Locate), Tubtron Controls Corp. (Tubtron), 706166 Alberta Ltd., Lorne Drever (Drever), Harry Niles (Niles) and Bradley Corporate Services (BCS).

[3] On 4 November 2008, a Second Consolidated and Amended Notice of Hearing was issued scheduling a hearing on 20 January 2009 pursuant to sections 184, 185 and 186 of the *Securities Act* (Act) with respect to the remaining Respondents, Cody and Nason.

[4] On 19 January 2009, one day prior to the hearing scheduled for 20 January 2009, Staff and the Respondents Cody and Nason filed an Agreed Statement of Facts dated 14 January 2009 (Agreed Statement of Facts) wherein the Respondents acknowledged violations of New Brunswick securities law. The Respondents were represented by counsel. At the request of the parties, the 20 January 2009 hearing was adjourned to a sanctions hearing on 17 March 2009 to allow the parties time to prepare submission on sanctions. A timeline for filing written submissions on sanctions was provided.

[5] The Respondents, through their counsel, requested and were granted several extensions of time for filing written submissions on sanctions. The final deadline for filing was set as 27 February 2009.

[6] Staff filed written submissions on sanctions on 27 February 2009. On the same day, counsel for the Respondents advised the Commission via email that he had been dismissed by his clients. Counsel confirmed that Cody and Nason were aware of both the 27 February 2009 filing deadline for written submissions and the sanctions hearing date of 17 March 2009.

[7] On 13 March 2009, the Commission received an email from the Respondents requesting an adjournment of the sanctions hearing to allow them time to retain new counsel. The Panel granted this request, and on 17 March 2009 issued an Order

(Adjournment Order) adjourning the sanctions hearing to 2 April 2009. The Adjournment Order also stipulated that no further adjournments would be granted without appearances by Cody, Nason or their counsel, and that if at the 2 April 2009 sanctions hearing the Respondents failed to appear in person or through counsel, the Panel would issue a final decision and order on sanctions without further notice to the Respondents.

Service

[8] Neither Cody nor Nason appeared at the 2 April 2009 hearing nor did counsel appear on their behalf. On 2 April 2009, Staff filed with the Panel two separate affidavits of service detailing the service of the 17 March 2009 Adjournment Order on the Respondents. The first Affidavit of Service is that of Commission Senior Administrative Support Officer Lise Noël, sworn on 26 March 2009 (Noël Affidavit); the second Affidavit of Service is that of Commission Investigator Gordon Fortner, sworn on 27 March 2009 (Fortner Affidavit).

[9] The Noël Affidavit outlines the Commission Secretary's Office's attempts to serve the Adjournment Order on the Respondents via email on 17 March 2009. On 16 March 2009, Nason had instructed the Secretary's Office to serve Cody on his behalf, consequently the Adjournment Order was sent to Cody both on his own behalf and on behalf of the respondent Nason. The Adjournment Order was sent to two separate email addresses, one provided by Cody and one provided by Cody's employer; the first was returned noting that the email system of the recipient was full, the email to the second address was not returned.

[10] The Noël Affidavit also outlines the Secretary's Office's attempts, on 25 March 2009, to confirm that the Respondents had received the Adjournment Order. As a result of the difficulties in obtaining this confirmation from the respondent Cody, the Adjournment Order was again served on the Respondents on 26 March 2009, this time through personal service on the respondent Cody by Commission Investigator Gordon Fortner. This service is detailed in the Fortner Affidavit.

[11] The Panel is satisfied that the Respondents Cody and Nason had adequate notice of the 2 April 2009 hearing date, and of the consequences of their failure to appear (either in person or through counsel). The Adjournment Order clearly set out that any further requests for adjournment were to be made in person by the Respondents or through their or each of their counsel. The Adjournment Order also clearly set out that a final order and decision on sanctions would be issued on 2 April 2009 if the Respondents failed to appear.

2. FACTS

[12] As in the Agreed Statement of Facts the Respondents admit to violations of New Brunswick securities law, the only matter addressed by the Panel at the 2 April 2009 hearing was the issue of sanctions applicable to these violations. The sole evidence considered by the Panel in making their decision and order on sanctions are the facts as set out in the Agreed Statement of Facts, and the information contained in the Noël Affidavit and the Fortner Affidavit. As noted, the Agreed Statement of Facts was filed by the parties when the Respondents were represented by counsel, and is signed by both Respondents.

[13] In the Agreed Statement of Facts, the Respondents acknowledge the following violations of New Brunswick *Securities Act* (see paragraphs 36 through 40 of the Agreed Statement of Facts):

- (a) Cody and Nason admit that they violated section 45 of the *Act* by trading in securities or engaging in acts in furtherance of trading, while not registered to do so;
- (b) Cody and Nason admit that they violated section 58 of the *Act* by making prohibited representations to putative investors;
- (c) Cody and Nason admit that they violated sections 58 and 179(2) of the *Act* by making misrepresentations to Staff; and

(d) Cody and Nason admit that they violated the orders of the Court of Queen's Bench issued in February and March of 2004.

[14] In the Agreed Statement of Facts, Cody and Nason also admit that these breaches and violations of the *Act* constitute acts contrary to the public interest.

[15] The Panel will not reiterate the facts as set out in the Agreed Statement of Facts in their entirety. However, to set the context of this proceeding, we summarize some of the background information found in the Agreed Statement of Facts.

[16] In the Agreed Statement of Facts, reference is made to three Alberta companies, Locate, Tubtron and 706166, and Alberta resident Drever, the principal of these Alberta companies. Also referred to in the Agreed Statement of Facts are Fredericton resident Niles, and New Brunswick corporation BCS, of which Niles is the sole director and president.

[17] None of Locate, Tubtron, 706166, Drever, BCS or Niles has ever been registered with the Commission or its predecessor, the Administrator of the Securities Branch of the Department of Justice (Administrator), to trade in securities. None of Locate, Tubtron or 706166 has ever filed or sought to file with, or obtained a receipt for a prospectus from, the Commission or the Administrator.

[18] As early as 2001, Locate, Tubtron, Drever, BCS and Niles engaged in trading in securities with New Brunswick residents which was not in compliance with the applicable securities requirements. After being advised of their non-compliance, they provided undertakings to the Administrator not to trade. However, trading nonetheless occurred; as a result of this trading the Court of Queen's Bench imposed orders in February and March of 2004 prohibiting Locate, Tubtron, Drever, BCS and Niles from trading in securities without first obtaining permission from the Administrator.

[19] As to Cody and Nason, the conduct admitted in the Agreed Statement of Facts that the Panel considers most relevant to the Panel's decision and reasons is as follows:

- (a) Cody is a resident of Fredericton, New Brunswick, and was registered with the Commission as a salesperson from August 2005 to May 2006. He began soliciting New Brunswick residents with respect to the sale of shares in Locate and Tubtron around May 2003.
- (b) Nason, at the times relevant to this matter, was a resident of Tracy, New Brunswick and was registered with the Administrator of the Securities Branch of the Department of Justice and/or the Commission during periods in 1995-2002; 2002-2004; and 2004-2007. He commenced soliciting New Brunswick residents with respect to the sale of shares in Locate and Tubtron around September 2004.
- (c) Nason admitted to soliciting the sale of approximately \$545,000 worth of Locate and Tubtron securities, and was paid \$88,350 by Locate, Tubtron and/or Niles or BCS for his services in promoting the sale of Locate and Tubtron shares.
- (d) Cody admitted to soliciting the sale of approximately \$210,000 worth of Locate and Tubtron securities, and was paid \$31,800 by Locate, Tubtron and/or Niles or BCS for his services in promoting the sale of Locate and Tubtron shares.
- (e) Cody and Nason admitted to making prohibited representations to investors, including statements that the shares would be listed on an exchange, and that the market value of the shares would increase in the future.

- (f) Cody and Nason also admitted making misrepresentations to Staff about their involvement with the distribution of Locate and Tubtron shares, including denying any involvement and denying having received any money or consideration from Locate, Tubtron, Niles or BCS.

[20] The Respondents have admitted to serious breaches of the *Securities Act*. The Panel agrees that these breaches are contrary to the public interest. The issues to be resolved at the sanctions hearing, as indicated in Staff's written submissions, are the following:

- (a) Should the Respondents be restricted in the capital markets in New Brunswick and, if so, for what period of time?
- (b) Should the Respondents be ordered to pay an administrative penalty and costs?

[21] In making their decision, the Panel considered the admissions and facts as set out in the Agreed Statement of Facts in conjunction with the provisions of the *Act* and the appropriate jurisprudence that has been decided by this Commission and other securities regulators in Canada, as well as judicial jurisprudence, which sets out the parameters and principles upon which the Panel is to review and decide sanctions.

3. SANCTIONS

Role of the Commission

[22] The purpose and role of the Commission is two-fold: to protect investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in the capital markets in the province. The Commission's public interest jurisdiction under the *Act* is animated by these purposes, as confirmed by the Supreme Court of Canada in *Re Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37.

[23] As set out in the Agreed Statement of Facts, both Cody and Nason were registrants for either all or part of the time relating to the matters being considered by this Panel. And as registrants, their role is critical to the Commission's objective of protecting investors and fostering efficient capital markets as noted above. Registrants, as professionals, have responsibilities under the *Act* to act in accordance with its provisions. Otherwise, investors are at considerable risk because they rely upon the advice and guidance of registrants in engaging in the capital markets. Furthermore, if investors do not have faith in registrants, there is a consequent lack of faith in the capital markets.

Law and factors

[24] The Respondents have admitted to numerous violations of New Brunswick securities law. The Supreme Court of Canada's decision in *Re Cartaway Resources Corp.*, [2004] S.C.J. No. 22, speaks to the Commission's role in terms of imposing sanctions for such violations. *Cartaway* confirmed that the Commission may consider both general and specific deterrence in making orders under its public interest jurisdiction. As indicated at paragraph 52:

Deterrent penalties work on two levels. They may target society generally, including potential wrongdoers, in an effort to demonstrate the negative consequences of wrongdoing. They may also target the individual wrongdoer in an attempt to show the unprofitability of repeated wrongdoing. The first is general deterrence; the second is specific or individual deterrence [. . .]. In both cases deterrence is prospective in orientation and aims at preventing future conduct.

[25] Both of the Respondents were at some point registrants and, therefore, had responsibilities to investors. Accordingly, the Panel feels it needs to consider specific deterrence but also general deterrence so as to demonstrate the consequences of securities law violations to other market participants.

[26] In terms of the specifics of how sanctions are to be imposed, the Panel notes the Commission's decision in *Limelight Capital Management Ltd. et al.*, issued on 17 August 2007. In that decision, the Commission accepted a list of nine factors to

consider when assessing sanctions. These factors have also been cited in decisions from other Canadian securities commissions, specifically British Columbia, Alberta and Ontario. The factors are as follows:

- (a) The seriousness of the respondent's conduct, and whether the respondent recognizes the seriousness of the improper conduct;
- (b) Any harm suffered by investors as a result of the conduct;
- (c) The damage done to the integrity of the markets;
- (d) The need to deter others who participate in the capital markets from engaging in similar conduct;
- (e) The need to demonstrate the consequences of inappropriate conduct to others who participate in the capital markets;
- (f) The respondent's experience, reputation and previous activity in the capital markets, including any sanctions;
- (g) The extent to which the respondent was enriched;
- (h) Previous decisions and similar circumstances; and
- (i) Any mitigating factors.

[27] The Panel finds several of these factors to be of particular importance in this matter. The first is the seriousness of the Respondents' conduct and whether they recognize the seriousness of their own conduct. In that respect, both Cody and Nason admitted to serious breaches of New Brunswick securities law. These breaches include misrepresentations to both investors and Staff.

[28] The representations to investors relate to the nature of the investments the Respondents were promoting. These representations are outlined in paragraphs 23 and 24 of the Agreed Statement of Facts. In particular, Cody and Nason made representations that the securities in question would be listed on a particular exchange. Both Respondents admitted that they represented to specific investors that Locate would be listed on the NASDAQ exchange within weeks.

[29] The making of these types of prohibited representations by the Respondents, market participants who at one time were registered with the Commission, is a very serious matter. Such representations cloth an investment opportunity with the character of legitimacy and give the investor a sense of security with respect to the investment that is being offered such that they may not properly investigate the investment. Even if a security is in fact to be listed on an exchange, no speculation should be made about an investment opportunity.

[30] The other misrepresentations admitted by both Respondents in this case were made to Staff during the course of an investigation by the Commission. Again, Cody and Nason were registered with the Commission for part of the time of their solicitation and sale of Locate and Tubtron securities. To not act responsibly with respect to an investigation by the Commission is of serious concern.

[31] With respect to the issue of recognition of the seriousness of the improper conduct, the Panel has considered the comments made by Staff in their written submissions regarding the Respondents' cooperation during these proceedings. Staff submitted that the cooperation arose mainly out of the involvement of counsel for the Respondents. The Panel agrees, and finds that Cody and Nason's lack of cooperation subsequent to their counsel being dismissed brings into question whether they recognize the seriousness of their actions.

[32] The second factor the Panel finds to be of particular concern in this matter is the harm suffered by investors as a result of the Respondents' conduct. The harm is outlined

more specifically in paragraphs 18 through 21 of the Agreed Statement of Facts. At issue in this case is a large amount of money which was raised for Locate and Tubtron by the Respondents over an extended period of time. New Brunswick investors purchased in excess of a half of a million dollars of securities from Nason, and over \$200,000 in securities from Cody. The potential harm suffered by the investors, as a result of the admitted conduct of Cody and Nason, is significant.

[33] The third important factor for the Panel in this matter is the damage done to the integrity of the capital markets. Again, what is critical to this Panel is the fact that both Respondents were, at different points during their involvement with Locate and Tubtron, registrants. As registrants, they carried with them the appearance of being accepted by the Commission in terms of the work that they do. And that creates tremendous harm to the capital markets if investors cannot depend on the responsibility of registered individuals in terms of their actions in the market.

[34] The fourth notable factor is the need to deter others who participate in the capital markets. It is absolutely critical that other market participants see that there can be no profit gained by the kind of conduct admitted to by the Respondents. Therefore, any sanction ordered by the Panel must be one that essentially removes any profitability from this conduct. This also ties into the fifth factor outlined in *Limelight*, the need to demonstrate the consequences of inappropriate conduct to others who participate in the capital markets.

[35] The Panel has carefully considered the sanctions requested by Staff in this matter, with regard to the above factors and relevant case law. In terms of the market ban, the Panel agrees with Staff's submission that a permanent ban is an appropriate remedy given the seriousness of the Respondents' conduct in this case.

[36] In terms of the monetary penalty, while Staff indicated that the Panel has a degree of discretion as to what, if any, penalty should be ordered, the Panel has reviewed the jurisprudence relied upon by Staff in their submissions. Staff suggested an

administrative penalty of \$100,000 in respect of the respondent Nason and an administrative penalty of \$50,000 in respect of the respondent Cody.

[37] In the Panel's opinion, it is not sufficient in this matter to simply remove the profits made from illegal activity. In the Panel's view, this is not a significant general or specific deterrent.

[38] With respect to the respondent Nason, who solicited from New Brunswick investors in excess of \$500,000, and who was compensated in excess of \$88,000, the Panel finds that an administrative penalty of \$100,000 is reasonable and appropriate based on the above analysis of the factors set out in paragraph [26]. These administrative penalties are consistent with this Commission's decisions in *Limelight et al.*, noted above at paragraph [26], and *First Global Ventures et al.*, released on 30 May 2008.

[39] With respect to the respondent Cody, the Agreed Statement of Facts sets out that his sale of Locate or Tubtron securities totaled \$210,000, and his remuneration for that activity was \$31,800. Based on the above analysis of the factors set out in paragraph [26], the Panel finds the amount of \$50,000 for an administrative penalty to be appropriate and reasonable with respect to Cody.

[40] The Panel notes that the administrative penalties ordered against both Cody and Nason were those put forth by Staff in their submissions on sanctions filed on 27 February 2009. These submissions were served on both Cody and Nason, along with the Adjournment Order. The Respondents were well aware of the penalties put forth by Staff and the reasoning supporting them.

[41] The Panel also finds that Staff's submission for costs in the amount of \$2,000 is appropriate in the circumstances.

4. CONCLUSION

[42] The above constitutes the Panel's reasoning for its order issued on 3 April 2009, imposing sanctions on the Respondents Michael Cody and Donald Nason.

Signed by the Panel on 3 July 2009.

"original signed by"

Anne La Forest, Panel Chair

"original signed by"

Céline Trifts, Panel Member

"original signed by"

Denise LeBlanc, Q.C., Panel Member

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