

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:
Harry Niles and Bradley Corporate Services Ltd.**

Date of Hearing: 3 November 2008

Date of Decision: 10 March 2009

Panel:

Anne La Forest, Panel Chair

Céline Trifts, Panel Member

Denise LeBlanc, Q.C., Panel Member

Representatives:

Jake van der Laan

For the staff of the New Brunswick
Securities Commission

Allison Whitehead, Q.C.

For Harry Niles and Bradley
Corporate Services Ltd.

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1. INTRODUCTION

[1] On 29 October 2008, Staff (Staff) of the New Brunswick Securities Commission (Commission) filed a Settlement Agreement (Agreement) reached between Staff and two of the respondents in this matter, Harry Niles (Niles) and Bradley Corporate Services Ltd. (BCS). A Settlement Hearing was held on 3 November 2008, at which time a Panel of the Commission reviewed the Agreement and heard submissions from both Staff and counsel for Niles and BCS (together the Respondents).

[2] The Panel was asked to approve the Agreement pursuant to section 191 of the *Securities Act (Act)*, and to issue an order containing sanctions as proposed by the parties. The Agreement contains a Statement of Facts (Statement) agreed upon by Staff and the Respondents. The Panel accepts the Statement in the Agreement as the evidence upon which to base its decision in this matter. The content of the Statement and the Agreement was not disputed, and no contrary evidence was provided.

[3] Based on the facts as set out in the Statement, and the joint submissions of the parties, for the reasons set out below the Panel approved the Agreement and issued the order as requested.

2. FACTS

[4] The relevant facts in this matter are set out in the Statement, found in Part II of the Agreement. The Respondents have a long history of involvement with the Commission and its predecessor, the Administrator of the Securities Branch of the Department of Justice (Administrator). The Panel, in these reasons, sets out some key aspects of the Respondents' involvement and actions which have led to the Agreement and the proposed sanctions contained in the Agreement.

[5] BCS is a New Brunswick corporation with its office located in Fredericton. Niles, who resides in Fredericton, is the sole director and president of BCS. Niles and BCS have never been registered with the Commission or the Administrator to trade in securities in New Brunswick.

[6] Beginning in 2000, Niles acted as a promoter for an Alberta company called Locate Technologies Inc. (Locate), and raised money from New Brunswick investors. Locate, along with two other Alberta companies (Tubtron Controls Corp. and 706166 Alberta Ltd.) and Lorne Drever, the principal of the Alberta companies, were permanently cease traded by order of this Commission on 25 August 2008. These parties entered into a Settlement Agreement with Staff, and admitted to violations of various sections of the *Act*, and repeated violations of orders of the Court of Queen's Bench.

[7] Niles was contacted by staff of the Administrator as early as 2001, who advised him that his actions were not in compliance with the then-applicable securities legislation in the province, the *Security Frauds Prevention Act*. At this time Niles undertook not to engage in trading of securities of Locate. In 2002, Niles formally undertook in writing to the Administrator to not trade in securities until properly registered with the Administrator.

[8] Niles continually breached these undertakings throughout 2001, 2002 and 2003. During this time, he was actively involved in trading Locate shares with New Brunswick investors. After becoming aware of Niles's activities, the Administrator made an application to the Court of Queen's Bench in February 2004 to prohibit Niles and BCS (and others involved with Locate) from further trading. An interim order was issued by that Court on 11 February 2004, and extended on 20 February 2004. On 31 March 2004, Niles, BCS and others agreed to a Consent Order issued by the Court which prohibited them from trading in any security without first obtaining from the Administrator a certificate or order authorizing trading.

[9] In contravention of these court orders, Niles continued to be involved in soliciting, effecting or facilitating the sale of Locate and Tubtron Controls Corp. (Tubtron) securities to New Brunswick residents from 2004 through 2006. For his services, Niles received over \$50,000 from Locate.

[10] Many New Brunswick residents solicited by Niles who purchased shares in Locate and/or Tubtron made their cheques payable to BCS. These payments totaled \$160,000, and were made between May 2004 and January 2005. The \$160,000 was not forwarded to Locate or to Tubtron; the full amount was retained and spent by BCS. None of the investors received a share certificate, and none of these transactions appear on the records of Locate or Tubtron.

3. FINDINGS

[11] Part II of the Agreement contains admissions by the Respondents that their acts constitute repeated violations of the *Act* and court orders. The Panel accepts these admissions, and finds the following:

- (a) The Respondents Niles and BCS violated section 45 of the *Act* by trading in securities and engaging in acts in furtherance of trading, while not registered to do so; and

(b) The Respondents Niles and BCS have violated the orders of the Court of Queen's Bench issued against them in February and March of 2004.

[12] The Respondents Niles and BCS also agree that their breaches and violations as set out in the Statement, as well as their retention of funds provided by investors, constitute acts contrary to the public interest. The Panel accepts these admissions.

4. PROPOSED SANCTIONS

[13] The Agreement contains sanctions which Staff and the Respondents jointly propose be issued against the Respondents. The sanctions are as follows:

- (a) Pursuant to section 184(1)(c) of the *Act*, the Respondents Niles and BCS shall be permanently barred from trading in any securities, other than those beneficially owned directly by Niles.
- (b) Pursuant to section 184(1)(i) of the *Act*, the respondent Niles shall be permanently barred from becoming or acting as a director or officer of any issuer.
- (c) Pursuant to section 186(1) of the *Act*, the Respondents Niles and BCS shall jointly and severally pay an administrative penalty in the amount of sixty thousand dollars (\$60,000.00).
- (d) Pursuant to section 184(1)(p) of the *Act*, the Respondents Niles and BCS shall jointly and severally disgorge the sum of one hundred and sixty thousand dollars (\$160,000.00) to the Commission for repayment to the persons set out in Schedule "B" to the Agreement.
- (e) Pursuant to section 185(1) of the *Act*, the Respondents Niles and BCS shall jointly and severally pay costs of the investigation in the amount of five thousand dollars (\$5,000.00)

[14] The sanctions proposed in the Agreement can be ordered by the Panel pursuant to sections 184 and 185 of the *Act*. To make orders under these sections, the Panel must be satisfied that it is in the public interest to do so.

5. LAW

a. The Panel's role and perspective

[15] The Commission has a dual purpose of providing protection to investors from unfair, improper or fraudulent practices and fostering fair and efficient capital markets in the province. The Panel's decision on whether or not to approve the Agreement and grant the proposed sanctions must be made in consideration of this protective and preventative role.

[16] The Supreme Court of Canada further analyzed the Panel's role in *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672. The Supreme Court confirmed that the Commission is to exercise its jurisdiction to prevent future harm to the capital markets, which includes an element of general deterrence. General deterrence is a necessary consideration in making orders that are both preventative and protective.

[17] The Panel considered the proposed sanctions by taking into account the purpose and role of the Commission, and also by considering potentially relevant factors set out in numerous decisions both of this Commission and others. These factors have been enumerated by the Alberta Securities Commission in two cases: *Re Executive Marketing & Strategies Ltd.*, 2008 ABASC 384, and *Re TSS Management Corp.* 2008 ABASC 215. These two cases were highlighted by the parties in their joint submission. The factors outlined in these decisions include:

- (a) the seriousness of the allegations proved,
- (b) the respondent's past conduct,
- (c) mitigating factors
- (d) the respondent's experience in the capital markets and the respondent's level of activity in the capital markets,
- (e) whether the respondent recognizes the seriousness of the improper activity,
- (f) the harm suffered by investors as a result of the respondent's activities,

- (g) the benefits received by the respondent as a result of the improper activity,
- (h) the risk to investors and the capital markets in the jurisdiction, were the respondent to continue to operate in capital markets in the jurisdiction,
- (i) the damage caused to the integrity of the capital markets in the jurisdiction by the respondent's improper activities,
- (j) the need to deter not only those involved in the case being considered, but also any others who participate in the capital markets, from engaging in similar improper activity,
- (k) the need to alert others to the consequences of inappropriate activities to those who are permitted to participate in the capital markets, and
- (l) previous decisions made in similar circumstances.

[18] The Panel, in considering the Agreement, was also cognizant of the fact that their role is not to replace what the parties have agreed to, but rather to ensure that the proposed sanctions are within the parameters of what is reasonable. As stated in *MCJC Holdings Inc., Re* (2002), 25 O.S.C.B. 1133 at para. 4, the Panel must be "satisfied that proposed sanctions are proportionately appropriate with respect to the circumstances facing the particular respondents".

b. Analysis

[19] In terms of the factors to be considered, the Panel finds the first two – seriousness of allegations and past conduct – to be of particular importance in this matter. The Respondents have admitted to serious violations of New Brunswick law, including repeated breaches of undertakings, court orders and section 45 of the *Act*. In the Panel's opinion, these actions warrant serious penalties.

[20] The Respondents' level of activity in relation to soliciting investors for Locate and Tubtron is very high, and it occurred over a number of years. The Respondents completed many unauthorized share transactions; numerous New

Brunswickers were affected and a total amount of \$160,000 of investors' funds was received and spent by the respondent BCS. On top of this money, Niles received a profit of over \$50,000 for his solicitations.

[21] As mitigating factors, the Respondents have recognized the seriousness of their actions and have accepted responsibility for their violations of New Brunswick Securities law. The Respondents have also fully cooperated with Staff's most recent investigation, and the respondent Niles has expressed remorse for his actions.

[22] Staff and counsel for the Respondents have also provided the Panel with numerous decisions from other securities regulators, which involved similar circumstances. The Panel reviewed these decisions and notes, in particular, its reliance on the *Re Executive Marketing & Strategies Ltd.* and *Re TSS Management Corp.* decisions of the ASC, referred to above. The Panel also considered this Commission's decision, issued on 29 October 2008, in *Re Locate Technologies Inc., Tubtron Controls Corp., 706166 Alberta Ltd. and Lorne Drever.*

c. Decision on proposed sanctions

[23] The sanctions proposed against the Respondents in this matter serve several purposes: they remove the Respondents from the capital markets through permanent cease trade orders; they remove all benefit derived by the Respondents through a disgorgement order; and they deter both the Respondents and any prospective participants in the capital markets of New Brunswick through administrative penalties. The Panel is of the opinion that the proposed sanctions are appropriate, reasonable and fit within the parameters of this case.

[24] Of particular importance to the Panel is the disgorgement order proposed by the parties. The Respondents have agreed to disgorge the amount of \$160,000, which was received by BCS from several New Brunswick residents for their share purchases in Locate and/or Tubtron. A fundamental goal of the

Commission is the protection of New Brunswick investors, and the Panel is satisfied that this disgorgement order addresses this particular point. Staff, in their submissions, advised that it is Staff's intention that the disgorged funds be paid back to the investors identified in the Settlement Agreement. The Agreement contains a list of the harmed investors and the amounts they provided to the Respondents (and subsequently lost) as a result of the Respondents' solicitations. Staff advised that the disgorged funds, once received by the Commission, will be paid to these individuals, and the Panel included this qualification in their 4 November 2008 Order in this matter.

[25] The administrative penalty of \$60,000 totals more than payments received by the Respondents from Locate and Tubtron for their illegal solicitations. This, along with the disgorgement order which represents the \$160,000 taken from investors, removes all benefit derived by the Respondents from their illegal activities.

[26] Along with investor protection, the Panel is also concerned about the impact of the Respondents' actions on the province's capital markets. Appropriate registration, filing and disclosure processes within the provinces exist to ensure that New Brunswick has fair and efficient capital markets. The Respondents, by not following the required processes, have harmed public perception of and confidence in our capital markets.

[27] The seriousness of the Respondents' actions, and their past unwillingness to comply with New Brunswick securities law, is addressed through their permanent removal from New Brunswick's capital markets. This penalty alone is severe and sends a strong specific and general deterrent message. In conjunction with the disgorgement order and administrative penalty, the Panel is satisfied that the proposed sanctions are reasonable in that they further the Commission's dual roles of ensuring efficient and fair capital markets, and in protecting investors in the province.

6. CONCLUSION

[28] For the reasons set out above, and in accordance with section 191 of the *Act*, the Panel finds it in the public interest to approve the Settlement Agreement submitted by the parties.

Dated this 10 day of March, 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