IN THE MATTER OF

The *Securities Act*

S.N.B. 2004, c. S-5.5

- and -

IN THE MATTER OF

LOCATE TECHNOLOGIES INC. and TUBTRON CONTROLS CORP.
(RESPONDENTS)

REASONS FOR THE DECISION ON SANCTIONS

Date of Hearing: 23 November 2010

Date of Decision on Sanctions: 21 April 2011

Panel:

Anne W. La Forest, Panel Chair

Céline Trifts, Panel Member

Denise LeBlanc, Q.C., Panel Member

Counsel:

Jake van der Laan and Marc Wagg	For the staff of the New Brunswick Securities Commission
Paul Harquail and Paul Smith	For the Respondents

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REASONS FOR THE DECISION ON SANCTIONS

1. OVERVIEW

[1] On 23 November 2010, the New Brunswick Securities Commission ("Commission") rendered its oral decision on the merits in this matter.

[2] The Commission found that the respondents, Locate Technologies Inc. ("Locate") and Tubtron Controls Corp. ("Tubtron") (collectively "Respondents"), acted contrary to the public interest and contravened New Brunswick securities law by breaching the terms of a settlement agreement dated 15 August 2008 ("Settlement Agreement"), which was approved by an order of the Commission on 25 August 2008.

[3] After rendering the oral decision on the merits on 23 November 2010, the parties were provided the opportunity to present oral submissions on sanctions. The Commission further advised the parties that they had the opportunity to make any further submissions on sanctions in writing within 15 calendar days from the issuance of

the written reasons for the decision on the merits. The written reasons for the decision on the merits were issued on 24 January 2011 ("Merits Decision").

[4] What now follows are the Commission's reasons for the decision on the imposition and quantum of sanctions in regards to the Respondents ("Sanctions Decision"). This Sanctions Decision is to be read in conjunction with the Merits Decision.

2. ANALYSIS AND DECISION

Submissions of Parties

[5] On 3 February 2011, counsel for staff of the Commission ("Staff") filed written submissions on the imposition and quantum of sanctions. In these submissions, Staff relied on their oral submissions from 23 November 2010 and their previous written submissions filed on 19 November 2010.

[6] Staff submitted that it was in the public interest that the Respondents each pay an administrative penalty of no less than $100,000; that Locate disgorge CDN$411,400 and US$15,000, being the total sum of the accepted rescission requests made pursuant to the Settlement Agreement; and that Tubtron disgorge CDN$498,500, being the total sum of the monies improperly obtained from investors as accepted and acknowledged by Tubtron in the Settlement Agreement. Staff submitted that where obligations under a settlement agreement directly affect investors, as is the case in this situation, a failure to meet such obligations is contrary to the public interest.

[7] On 23 November 2010, counsel for the Respondents made oral submissions on sanctions, which relied on the Respondents' previous Pre-Hearing Submission filed on 22 June 2010. Counsel for the Respondents also indicated during the oral submissions that the Respondents would file further written submissions related to sanctions following the issuance of the Merits Decision. However, no such written submissions were filed.

[8] Counsel for the Respondents did not address the imposition or quantum of administrative penalties in relation to either of the Respondents. Although the Respondents' Pre-hearing submission addressed the imposition of an administrative penalty in relation to Lorne Drever, the President and sole director of both Respondents, the submissions were not applicable to either Locate or Tubtron, and will not be considered in this decision. Counsel for the Respondents did address the imposition of an order for disgorgement in relation to the Respondents. The Respondents submitted that the remedy of disgorgement was not appropriate in this case because it would violate the principle against retroactive application and was beyond the jurisdiction of the Commission.

Imposition and Quantum of Sanctions

(a) General

[9] In their 17 March 2010 motion in this matter, Staff sought an order pursuant to subsection 184(2) and/or section 186 of the *Securities Act*, S.N.B. 2004, c. S-5.5, as amended ("Act"). Subsection 184(2) allows the Commission to impose terms and conditions on an order made under section 184. In their 17 March 2010 motion, Staff did not explicitly seek a disgorgement order under paragraph 184(1)(p) and thus, in the Merits Decision, the Commission did not address subsection 184(2).

[10] Section 186 provides the Commission with the power to issue an administrative penalty if the Commission determines that a respondent has contravened New Brunswick securities law and if the Commission is of the opinion that it is in the public interest to do so. In the Merits Decision, the Commission determined that the Respondents contravened New Brunswick securities law by breaching the terms of the Settlement Agreement, and that this breach met the public interest requirement outlined in section 186.

[11] The Commission considers it important to note that in choosing to proceed under section 186, it should not be concluded that the Commission has accepted the

Respondents' submissions with respect to disgorgement orders under paragraph 184(1)(p). Rather, because Staff, in its motion of 17 March 2010, requested an order under section 186 – and not under paragraph 184(1)(p) – the Commission has, in accordance with its Merits Decision, chosen not to address the matter of disgorgement.

(b) Quantum of Administrative Penalties

[12] The Commission's mandate is to provide protection to New Brunswick investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets in New Brunswick. Section 186 of the Act enhances the Commission's mandate by empowering the Commission to impose administrative penalties if there has been a violation of New Brunswick securities law and if it is in the public interest to do so.

[13] In determining the amount of an administrative penalty, the Commission refers to a number of factors and in this regard, notes its own 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 administrative penalties. These factors have also been cited in decisions from other Canadian securities commissions. 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.

[14] The Commission finds that all of these factors weigh against the Respondents in this matter. The first factor focuses on the seriousness of the Respondents' conduct and whether they recognize the seriousness of their own conduct. The Settlement Agreement, which required the Respondents to provide an offer of rescission and refund, permitted investors who had been wronged in law an opportunity to obtain a refund of their money. The fact that the Respondents have not fulfilled their obligation two years after entering into the Settlement Agreement and that they have failed to provide investors the opportunity to recover their money indicates that the Respondents have not recognized the seriousness of their conduct, nor the fact that a breach of a settlement agreement is a very serious matter.

[15] The second factor the Commission finds to be of particular concern is the harm suffered by investors as a result of the Respondents' conduct. The effect of the breach is significant, as it deprives investors from obtaining a refund of their money. As noted in the Merits Decision, over the past two years numerous orders were issued by the Commission to compel the Respondents to comply with their rescission obligations as set out in the Settlement Agreement. The Respondents have not fully complied with any of these orders or their obligations under the Settlement Agreement. The resulting harm to investors is significant.

[16] The third factor is the damage done to the integrity of the capital markets. The failure of the Respondents to meet their obligations under the Settlement Agreement which they had voluntarily entered into, and which was subsequently approved by an order of the Commission, brings the merit and reliability of such agreements into disrepute, and causes significant harm to the integrity of the capital markets.

[17] The fourth factor is the need to deter others who participate in the capital markets. 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 the imposition of sanctions for violations of law. *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.

[18] It is absolutely critical that other market participants see that the Respondents will derive no benefit from amounts obtained as a result of non-compliance with New Brunswick securities law. A significant administrative penalty which removes any profitability from the Respondents' conduct will act as a specific deterrence for the Respondents and a general deterrence for others in preventing similar misconduct in the future. This point 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. Market participants need to understand that if they enter into a settlement, they must be able to comply with the terms of their settlement agreements. Otherwise, they will be subject to significant sanctions.

[19] The sixth factor is the Respondents' experience, reputation and previous activity in the capital markets, including any sanctions. The Respondents have a long history of involvement with the Commission, having been the subject of several previous orders and sanctions by the Commission as well as its predecessor, the Administrator of the Securities Branch of the Department of Justice. The Respondents have repeatedly violated New Brunswick securities laws.

[20] The seventh *Limelight* factor considers the extent to which the Respondents were enriched. In this particular case, because the Respondents failed to complete the rescission process as outlined in the Settlement Agreement, they remain enriched by

significant sums of money illegally raised from investors in New Brunswick. This is a very significant factor in this case, and the Respondents should not be able to benefit from their illegal distribution.

[21] The eighth factor is the consideration of previous decisions in similar circumstances. The comments of the Ontario Securities Commission in *Re Prydz*, 23 O.S.C.B 3399, 2000 CarswellOnt 1684, at paragraph 21 are particularly relevant to cases involving breaches of settlement agreements:

> We also bear in mind that, in deciding what sanctions are appropriate, we should take into account general deterrence, ie: what is necessary to restrain conduct by others that is likely to be prejudicial to the public interest in having capital markets that are fair and efficient. (See: Dornford, Re (1998), 21 O.S.C.B. 7345 (Ont. Securities Comm.) at 7351.) As we have said, breach by a respondent of obligations voluntarily incurred in a settlement agreement is no light matter, and should be discouraged.

[22] The Ontario Securities Commission went on to issue sanctions for the breach of the settlement agreement which were more severe than the original sanctions imposed in the settlement agreement. This pattern is consistent with other case law referred to the Commission by Staff, such as *Re Hinke*, 2007 CarswellOnt 4383, 30 O.S.C.B. 6269, where the Ontario Securities Commission also imposed sanctions for breaching settlement agreements which were much more severe than the original sanctions imposed upon the parties. This Commission is in agreement that a breach of a settlement agreement is a very serious matter which should result in very serious sanctions. The Commission also feels that it in the public interest to impose significant sanctions on the Respondents in order to send a strong message of deterrence to those who ignore orders and settlement agreements of the Commission.

[23] Finally, the Commission does not find that there were any mitigating factors of a material nature to consider in awarding administrative penalties in this case.

[24] The Commission has considered the imposition and quantum of administrative penalties requested by Staff in this matter against the background of the above factors and relevant case law. In light of the foregoing, the Commission is of the opinion that the Respondents' actions merit a substantial administrative penalty, and that it is in the public interest to impose administrative penalties in excess of the amounts submitted by Staff. As indicated by the Ontario Securities Commission in its recent decision in *Re. Al-Tar Energy Corp.*, 2011 CarswellOnt 62 at paragraph 43:

> [...] A Commission Panel must make orders under subsection 127(1) of the Act that it determines to be in the public interest. Sometimes this may require a Panel to order more severe sanctions than requested by Staff. [...]

[25] The Commission does not consider the amount of administrative penalties requested by Staff to be sufficient to address the Respondents' misconduct, nor to deter similar conduct in the future. In this case, the overall purpose of the Settlement Agreement was to provide information to investors to allow them a choice as to whether or not to rescind their investment with the Respondents. In entering this Agreement, it was understood that all investors might opt to rescind their investment. In the case of Locate, the rescission offer was made and of the total investment amount of CDN$1,806,400 and US$110,775.75 which was illegally raised according to Schedule B of the Settlement Agreement, rescission requests totaled CDN$411,400 and US$15,000. In the case of Tubtron, the total amount that was illegally raised was CDN$498,500 and they failed to even provide to investors the rescission offer. In our opinion, the Respondents should not be seen to benefit from the breach of the Settlement Agreement nor should they have the advantage of relying on the fact that some investors rejected the rescission offer. In order to act as a deterrent, the amount of the administrative penalty should bear direct relation to the total amount that the Respondents agreed to offer to investors as part of the rescission process, as set out and accepted in Schedule B of the Settlement Agreement. More particularly, in the case of Locate, the Respondent's obligation should not be limited to the actual rescission requests as that amount presupposed the fulfillment of the Settlement Agreement.

[26] As such, the Commission orders, pursuant to subsection 186(1) of the Act, that Locate pay an administrative penalty in the amount of $750,000 and that Tubtron pay an administrative penalty in the amount of $498,500. These penalties are based on the total amount that the Respondents agreed to offer to investors as part of the rescission process, as set out and accepted in Schedule B of the Settlement Agreement, subject to the maximum penalty of $750,000 for Locate as permitted under subsection 186(1) of the Act.

(c) Costs

[27] The Commission may order costs if they are satisfied that a respondent has not complied with New Brunswick securities law, and if the Commission is of the opinion that a respondent has not acted in the public interest. For the reasons set out above in relation to the imposition of sanctions under section 186, the Commission finds it appropriate to issue an order against the Respondents for costs in this matter.

[28] Staff presented a summary of costs within the sworn affidavit of Marc Wagg dated 19 November 2010, which set out the investigative and hearing costs incurred in this matter up to that date in the amount of $12,400.00. Subsequently, Staff requested preparation, attendance and hearing costs for the 23 November 2010 hearing in the amount of $2,350.00. Therefore, Staff's total claim for costs amounts to $14,750.00. The Respondents made no submissions as to costs.

[29] Although the Commission accepts the summary of costs as presented by Staff, the Commission finds that the amount should be restricted somewhat by the fact that Staff acquiesced to the various requests made by the Respondents to delay or postpone fulfilling their obligations under the Settlement Agreement. The Commission indicated in the orders of 11 May 2010, 26 May 2010, 30 June 2010 and 4 November 2010 that if the Commission was not satisfied that the Respondents complied with the orders, the parties were to make submissions respecting the breach of the Settlement Agreement and sanctions related thereto. However, in the interests of achieving the best possible outcome for the investors, Staff made allowances and granted various

extensions to the Respondents after these orders were issued. At the 3 November 2010 hearing, the Commission expressed its concern about the Respondents' continued failure to fulfill their obligations and asked Staff directly whether or not there had been a breach of the Settlement Agreement. Staff acknowledged that they believed the Respondents had in fact breached the terms of the Settlement Agreement, but Staff again acquiesced to the Respondents' request for a delay and failed to make submissions with respect to the breach and the sanctions related thereto. This decision contributed to the continuance of these proceedings until the 23 November 2010. As such, the Commission will only account for costs incurred by Staff up to the hearing date of 3 November 2010. The Commission orders that the Respondents shall jointly and severally pay costs in this matter in the amount of $11,750.00.

3. CONCLUSION

[30] Having considered the reasons as set out above, the Commission finds that it in the public interest to issue the above sanctions in this matter.

Signed by the Panel on 21 April 2011.

"original signed by"

Anne W. La Forest, Panel Chair

"original signed by"

Céline Trifts, Panel Member

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Denise LeBlanc, Q.C., Panel Member

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