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:

Date of Hearing:	23 November 2010
Date of Order:	23 November 2010
Date of Reasons for Decision:	24 January 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	For the Respondents

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

REASONS FOR THE DECISION:

1. OVERVIEW

[1] Locate Technologies Inc. ("Locate") is a corporation incorporated in accordance with the laws of the Province of Alberta on 23 May 2000, and has an office at 3124 Parsons Road, Edmonton, Alberta.

[2] Tubtron Controls Corp. ("Tubtron") is a corporation incorporated in accordance with the laws of the Province of Alberta on 10 April 1997, and has an office at 3124 Parsons Road, Edmonton, Alberta.

[3] On 23 November 2010, a hearing was held before the New Brunswick Securities Commission ("Commission") pursuant to subsection 184(2) and section 186 of the *Securities Act*, S.N.B. 2004, c. S-5.5, as amended ("*Act*"), to consider whether it was in the public interest to make an order against Locate and Tubtron, (collectively "Respondents"), imposing an administrative penalty for failing to comply with New

Brunswick securities law and such terms and conditions as the Commission considered appropriate.

[4] Staff of the Commission ("Staff") alleged that the Respondents failed to comply with 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.

[5] During the period between the date of the Settlement Agreement and the hearing of 23 November 2010 there have been five hearings and five orders issued by the Commission, each order providing timelines and requirements for the Respondents to fulfill their obligations under the Settlement Agreement. During the hearing on the merits on 23 November 2010, we considered evidence and submissions presented by the parties, and issued our decision orally on that day. We concluded that the Respondents breached the Settlement Agreement and that was is in the public interest to issue an order pursuant to section 186 of the Act.

[6] After rendering our decision on 23 November 2010, we provided the parties with an opportunity to present oral submissions on sanctions. We also advised the parties that we would allow them an opportunity to make any further submissions on sanctions in writing within 15 calendar days from the issuance of the written reasons for decision.

2. FACTS

[7] Staff commenced proceedings against the Respondents pursuant to a Statement of Allegations dated 14 March 2008, and an Amended Statement of Allegations dated 3 June 2008. In these documents, Staff indicated that the Respondents had a long history of involvement with the Commission and its predecessor, the Administrator of the Securities Branch of the Department of Justice. Staff alleged that the Respondents repeatedly violated orders of the Court of Queen's Bench of New Brunswick issued against them in February and March of 2004; that the Respondents repeatedly violated section 45 of the *Act* by trading in securities while not registered to do so; and that the

Respondents repeatedly violated section 71 of the *Act* by trading in securities without having filed a prospectus with respect thereto. More specifically, Staff alleged that the Respondents had solicited funds for investment purposes from a significant number of New Brunswick residents.

[8] The proceedings were settled pursuant to the terms of the Settlement Agreement.

[9] These written reasons are to be read in conjunction with the Agreed Statement of Facts from the Settlement Agreement, and as such, the Commission will not reproduce all the facts contained therein within these Reasons for Decision. However, in this section, we provide a review of the relevant section of the Settlement Agreement and a brief summary of the Respondents' failure to fulfill the terms of that section since the parties entered into the Settlement Agreement.

[10] In general terms, under the Settlement Agreement, the Respondents were obliged to provide the New Brunswick residents who had invested in the Respondents the opportunity to rescind their investment based upon full disclosure of the relevant facts. In particular, the Respondents were obligated to seek the expedient preparation of a disclosure document ("Disclosure Document") and an offer of rescission and refund ("Offer of Rescission and Refund") satisfactory to staff of the Regulatory Affairs Division of the Commission.

[11] Section 5 of the Settlement Agreement is entitled "Procedure for Effecting Offer of Rescission" and sets out in detail the procedure for effecting the Offer of Rescission and Refund by the Respondents, as outlined below.

[12] Subsection 5(a) of the Settlement Agreement required that the Respondents seek the expedient preparation, for each of Locate and Tubtron, of a Disclosure Document and an Offer of Rescission and Refund satisfactory to staff of the Regulatory Affairs Division of the Commission. It also required the Disclosure Document to contain audited financial statements for both Respondents.

[13] Section 5(d) of the Settlement Agreement provided that upon approval of the Disclosure Document and Offer of Rescission and Refund by the Regulatory Affairs Division of the Commission, the law firm of Stewart McKelvey Stirling Scales, counsel to the Respondents, would deliver a copy of the Disclosure Document and Offer of Rescission and Refund to all persons set out in Schedule "B" of the Settlement Agreement.

[14] Section 5(f) of the Settlement Agreement provided that within thirty (30) days after expiry of the deadline for reply to the Offer of Rescission and Refund, the Respondents would provide the law firm of Stewart McKelvey Stirling Scales with sufficient funds to satisfy all replies to the Offer of Rescission and Refund requiring a refund.

[15] After the parties entered into the Settlement Agreement, a significant amount of time passed and the Respondents still had not produced either a Disclosure Document or the Offer of Rescission and Refund.

[16] On 5 October 2009, Staff filed a motion along with a supporting affidavit of Commission Legal Counsel Mark McElman seeking, pursuant to subsection 184(2) of the Act, an order that the Commission impose such terms and conditions as the Commission considered appropriate. Staff based their motion on the ground that the Respondents had failed to fulfill the terms of the Settlement Agreement and that it was in the public interest for the Respondents to do so without further delay.

[17] On 17 November 2009, the parties appeared before the Commission and on 9 December 2009, the Commission issued an order providing, *inter alia*, that the Respondents comply with various timelines for submissions of documents, that Locate submit to the Regulatory Affairs Division of the Commission, on or prior to 29 January 2010, the final form of the Documents pursuant to the Settlement Agreement and that Tubtron submit to the Regulatory Affairs Division of the Commission, on or prior to 15 February 2010, the final form of the documents pursuant to the Settlement Agreement.

[18] On 17 March 2010, Staff filed a new motion and a supporting affidavit of Commission Legal Counsel Marc Wagg seeking, pursuant to subsection 184(2) and/or

section 186 of the Act, an order that, if by the date of the hearing, any conditions under the order dated 9 December 2009 remained outstanding, the Commission should impose such terms and conditions as the Commission considered appropriate and/or impose an administrative penalty for the Respondents' failure to complete their obligations under the Settlement Agreement.

[19] On 11 May 2010, the parties appeared before the Commission at which time the Commission issued a further order requiring that Locate submit to the Commission and to the Regulatory Affairs Division of the Commission, on or before 26 May 2010, the final form of documents, and that Tubtron submit, on or before 26 May 2010, a confirmation of the retainer of an auditor, and audit plan and a timeline for submission of final form of the documents.

[20] The parties appeared before the Commission again on 26 May 2010, 22 June 2010 and 3 November 2010. Following those hearings the Commission issued further orders including timelines for submission of the final form of documents. In addition, the order issued on 4 November 2010 required that the respondent Tubtron provide satisfactory evidence of sufficient funds to satisfy the Tubtron rescission offers.

[21] The orders issued on 11 May 2010, 26 May 2010, 30 June 2010, and 4 November 2010 provided that in the event the Commission was not satisfied that the Respondents complied with the orders, the parties would make submissions respecting the breach of the Settlement Agreement and sanctions related thereto.

[22] On 19 November 2010, Staff filed submissions on sanctions ("Submissions") and the supporting affidavit of Commission Legal Counsel Mark Wagg, alleging that the Respondents breached the Settlement Agreement, and seeking an order for administrative penalties, disgorgement and costs.

[23] As of the date of this hearing on the merits, neither company has fulfilled its obligations under the terms of the Settlement Agreement. In the case of Locate, the company argued that it had experienced continuous delays in the preparation of its

Disclosure Document and Offer of Rescission and Refund. The company eventually completed these documents and mailed them out to investors on 9 June 2010. Numerous investors accepted the offer, which was the purpose of the agreement, but the company was unable to obtain sufficient funds to satisfy the replies to the Offer of Rescission and Refund requiring a refund. Locate indicated in its oral submissions before us that the financing was not available because they were surprised by and not prepared for the degree of takeup of the rescission offer.

[24] In the case of Tubtron, the company failed to complete the final form of the Disclosure Document and the Offer of Rescission and Refund, and failed to provide any evidence that it had sufficient funds to satisfy its rescission offers.

3. ANALYSIS AND DECISION

[25] As noted in paragraph [3], this hearing was held pursuant to subsection 184(2) and section 186 of the *Act*. Staff allege that the Respondents have breached the Settlement Agreement approved by the Commission pursuant to section 191 of the Act. The relevant provisions of the *Act* are as follows:

> **184**(2)The Commission may impose such terms and conditions as the Commission considers appropriate on an order under this section.
>
> **Administrative penalty**
> **186**(1) The Commission, after a hearing, may order a person to pay an administrative penalty of not more than $750,000 if the Commission
> (*a*) determines that the person has contravened or failed to comply with New Brunswick securities law, and
> (*b*) is of the opinion that it is in the public interest to make the order.
>
> **191**(1) Notwithstanding any other provision of this Act or the regulations, an administrative proceeding conducted by the Commission or the Executive Director under this Act or the regulations may be disposed of by

(*a*) an agreement approved by the Commission or the Executive Director, as the case may be,

(*b*) a written undertaking made by a person to the Commission or the Executive Director that has been accepted by the Commission or Executive Director, as the case may be, or

(*c*) if the parties have waived the hearing or compliance with any requirement of this Act or the regulations, a decision of the Commission or Executive Director, as the case may be, made without a hearing or without compliance with the requirement of this Act or the regulations.

191(2) An agreement, written undertaking or decision made, accepted or approved under subsection (1) may be enforced in the same manner as a decision made by the Commission or the Executive Director under any other provision of this Act or under the regulations.

[26] In this case, the Settlement Agreement was approved pursuant to section 191 of the Act rather than pursuant to section 184 of the Act and as such, we proceed under section 186. Prior to issuing an order pursuant to section 186 of the *Act*, the Commission must be satisfied in respect of two matters: first, that the Respondents contravened or failed to comply with New Brunswick securities law; and second, that the Commission be satisfied that it is in the public interest to make the order.

[27] In this case, the Commission is satisfied that both conditions have been met, as discussed below.

Failure to Comply with New Brunswick Securities Law

[28] We are of the opinion that the evidence in the case demonstrates that there has been a breach of the Settlement Agreement, which was approved by order of this Commission and that such breach constitutes a failure to comply with New Brunswick securities law. Specifically, "New Brunswick securities law" is defined in the *Act* and means the following:

(a) this Act,

(b) the regulations,

(c) in respect of a person, a decision of the Commission or the Executive Director to which the person is subject, and

(d) any extra-provincial securities laws adopted or incorporated by reference under section 195.3.

[29] In relation to the breach, many times during the course of this proceeding, Staff indicated that it believed the agreement was breached, but ultimately Staff made allowances and granted the Respondents extensions in the interests of achieving the best possible outcome for the investors. The Commission also took the view that the preferred course of action would be to see the terms of the Settlement Agreement fulfilled and its orders were directed at trying to ensure that outcome.

[30] At the hearing on 3 November 2010 and in our order of 4 November 2010, the Commission made it very clear to the Respondents that there would be no further extension of its obligations under the order and that a failure to fulfill the terms of the order would result in a hearing on the question of breach of the Settlement Agreement and sanctions. The Respondents again failed to fulfill the terms of the order issued on 4 November 2010. It should come as no surprise at this point that Staff are unwilling to further allow extensions for compliance with the Settlement Agreement, and that it is the Commission's view that there has been a breach of the Settlement Agreement.

[31] We have referenced earlier in these reasons the number of orders that came to pass in the time since approval of the Settlement Agreement. The Respondents have not fully complied with any of these orders, and the cumulative effect of the non-compliance aggravates the serious nature of the breach. The fundamental reality is that the Settlement Agreement was entered into on 15 August 2008 and more than two years later, during the 23 November 2010 hearing, Locate stated to the Commission that it had insufficient funds to repay those investors who had accepted the offer to rescind their investment. As previously noted, this was an important element of the Settlement

Agreement. The Respondent Tubtron had failed to provide financial statements satisfactory to the Regulatory Affairs Division of the Commission as provided for in the Settlement Agreement. The Respondents' breach of the Settlement Agreement is self-evident. In our view, the breach is serious given the central importance of section 5 of the Settlement Agreement. Indeed, we would go so far as to state that the failure of the Respondent to fulfill its obligation and to act expeditiously in the face of many orders of this Commission constitutes a fundamental breach of the Settlement Agreement.

[32] We find absurd the position taken by Locate that the funding was not there because Locate was surprised that people accepted an offer that was made pursuant to a Settlement Agreement which Locate freely entered into and which was then approved by an order of the Commission. Locate's actions in sending out an offer of rescission, in circumstances where it was doubtful that it could pay all the investors, created further damage to the integrity of New Brunswick's capital markets and harmed individual investors.

[33] In terms of Tubtron, the company did not even begin to conduct the audits until well after a year of entering into the Settlement Agreement. This delay does not demonstrate an expediency on the part of Tubtron. In addition, not only did Tubtron fail to provide satisfactory evidence of sufficient funds to satisfy its rescission offers, it did not even speak to this matter as part of this hearing on the merits. We have no alternative but to find not only that there is a breach of the Settlement Agreement, but a very serious one.

Public Interest

[34] The Commission must now consider whether it is in the public interest to grant the order requested by Staff. As recognized by the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, dispositions referring to the public interest should be assessed by considering the objects of the *Act* described in section 2; namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient

capital markets and confidence in the capital markets." As stated, in part, at paragraph 45 of that decision:

> "... the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally."[1]

[35] We are of the view that a breach of a settlement agreement meets the public interest requirement outlined in section 186 the *Act*. As articulated by the Ontario Securities Commission in *Re Prydz*, 23 O.S.C.B. 3399, 2000 CarswellOnt 1684 (Ontario Securities Commission), at paragraphs 18:

> "... intentional breaches by a respondent party to a settlement agreement, which has been approved by a Commission order, of that party's undertakings in the settlement agreement (which undertakings must be assumed to have been bargained for by Staff as necessary, in its view, for the protection of the public interest) is itself an action contrary to the public interest and shows a lack of regard by the party for his or her obligations under Ontario securities law sufficient to warrant an inquiry as to what, if any, additional sanctions should be imposed by the Commission in order to protect investors in, and the capital markets of, Ontario."[2]

[36] Settlement Agreements are critical to the operation of organizations such as the Securities Commission, because in a sense they afford the parties the opportunity to address expediently and at a lesser cost remedies that effectively do not require a hearing on the merits. A failure to comply with the requirements of the Settlement

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[1] *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 at para. 45.
[2] *Re Prydz*, 23 O.S.C.B. 3399, 2000 CarswellOnt 1684 (Ontario Securities Commission), at para. 18.

Agreement, particularly for a period of two years, is simply not acceptable, and in our view, constitutes a breach of securities law and an action contrary to the public interest.

5. CONCLUSION

[37] The above constitutes the Commission's reasoning for its decision on the merits rendered orally on 23 November 2010, in which the Commission found that the Respondents, Locate and Tubtron, breached the terms of the Settlement Agreement. As indicated in paragraph [6], the parties have an opportunity to provide written submissions on sanctions related to the breach of the Settlement Agreement within 15 calendar days from the issuance of this decision.

Signed by the Commission on 24 January 2011.

"original signed by"

Anne W. La Forest, Panel Chair

"original signed by"

Céline Trifts, Panel Member

"original signed by"

Denise LeBlanc, Q.C., Panel Member

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