

IN THE MATTER OF

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

AND

IN THE MATTER OF

Fundy Minerals Ltd.

DECISION

Hearing date: 31 May 2005

Decision date: 15 July 2005

Panel:	Hugh J. Flemming, Q.C.	Panel Chair
	William D. Aust	Member of the Commission

Counsel:

Jake van der Laan and Christina C. Taylor	for the Staff of the New Brunswick Securities Commission
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John M. Hanson, Q.C.	for Fundy Minerals Ltd.
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DECISION

Background:

Some time during the month of April 2005, Commission staff received a tip from the Ontario Securities Commission to the effect that Fundy Minerals Ltd. ("Fundy" or the Respondent") appeared to have a Web site which promoted the trading of securities and/or a securities distribution. Staff then sought an *ex parte* Temporary Order from the Commission on May 16, 2005.

Commission staff also sought an Investigation Order, which was issued on May 16, 2005.

On May 16, 2005, the New Brunswick Securities Commission (the "Commission") issued a temporary cease trade order in this matter pursuant to sections 184(1)(c) and 184 (5) of the *Securities Act*, S.N.B. 2004, c. S-5.5 (the "Act").

IT IS ORDERED THAT pursuant to sections 184(1)(c) and 184(5) of the Act, all trading in the securities of Fundy Minerals Ltd., shall cease immediately.

On the same day, the Commission also issued a temporary order in this matter pursuant to section 184(1)(f)(ii) of the Act.

IT IS ORDERED THAT pursuant to section 184(1)(f)(ii), Fundy Minerals Ltd. shall immediately cease the publication of any documents and/or information on its website (fundyminerals.com) or by any other means that:

- a. solicit a trade; or
- b. constitute an act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of a trade, in the securities of Fundy Minerals Ltd.

The Commission issued a Notice of Hearing on May 16, 2005 indicating that a hearing would be held on May 31, 2005 setting out that staff of the Commission was seeking the following relief and remedies:

a.) an order pursuant to sections 184(1) (c) and 184(5) of the Act, that the Temporary Order issued in this matter on May 16, 2005, be continued and remain in effect until further order of the Commission;

b.) an order pursuant to section 184(1) (f) (ii), that Fundy continue to cease the publication of any documents and/or information on its website (fundyminerals.com) or by any other means, that solicit a trade or constitute an act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of a trade, in the securities of the Respondent; and

c.) an order pursuant to section 184(1) (d) of the Act that any exemptions contained in New Brunswick securities law do not apply to the Respondent, until further order of the Commission.

Facts:

Fundy is a New Brunswick corporation with its registered office at 205 Woodlawn Lane, New Maryland, New Brunswick, E3C 1J6. It has an office at Beaverbrook Court, Fredericton, New Brunswick. The directors of the Respondent are Jeffrey Michel of Tequesta, Florida, United State; Rob Robertson of Middle Sackville, New Brunswick; David Vanrenen of Le Canon, France and Ken Whaley of Fredericton, New Brunswick.

██████████ A.A. ██████████, who testified on behalf of Fundy at the hearing, is the Chairman of the Board and also the Chief Executive Officer of the Respondent. He described his experience as having worked in the public markets area. He is licensed by the National Association of Securities Dealers to sell securities in the United States. ██████████ A.A. ██████████ testified he was affiliated with Peak Securities, a broker dealer operating out of Largo, Florida, but indicated he did not hold any active accounts with Peak Securities at the time of the hearing. His involvement with Fundy dates back to September 2004.

A.A. testified that B.B. founded Fundy Minerals. B.B. was described as a geologist with considerable experience in prospecting throughout the world. He transferred a number of the New Brunswick mineral staked claims that he held to Fundy in exchange for 6,000,000 shares in Fundy. B.B. was the sole shareholder in Fundy until he sought the assistance of C.C., another geologist.

A.A. testified that B.B. transferred 3,000,000 of the 6,000,000 shares to C.C.. A.A. testified that sometime in 2004 C.C. gifted a number of his shares to friends and family members, prior to A.A. becoming involved with the company.

A.A. described Fundy as a mineral exploration corporation with staked claims in the northern part of New Brunswick and two staked claims in the southern half of New Brunswick. The company has recently acquired a reconnaissance permit in Liberia for 2,000 square kilometers, and owns forty percent of a United Kingdom corporation by the name of Orlake Estates Limited ("Orlake"), which holds a patent in the United Kingdom for a refining process to extract minerals from ore. Fundy also recently acquired Flatlands Limestone Limited, a New Brunswick corporation which has a limestone deposit in the northern part of New Brunswick.

On or about February 22, 2005, Fundy authorized the increase of its share capital from 1 million shares to 100 million shares to be traded without restriction.

Toward the end of 2004, Fundy raised capital through a private placement targeting two accredited investors: D.D. and E.E.. It is Fundy's submission that the only issuance of shares to the public prior to April 5, 2005, (the date of Fundy's listing on OFEX), was through this private placement.

At some point in the early part of 2005 it was decided that Fundy should become a publicly traded corporation. The principals looked at various listing markets around the world, including North America, Bermuda, Europe, Australia and London. For a number of reasons outlined by A.A. at the hearing, Fundy opted to list its shares on the OFEX, a securities market exchange in the United Kingdom. On March 18, 2005, a formal application with OFEX to list Fundy's shares was completed through Fundy's corporate advisor St. Helen's Capital in the United Kingdom. OFEX granted approval to the listing

on March 30, 2005 and Fundy's shares were able to be publicly traded effective April 5, 2005.

On February 17, 2005, Fundy split shares and issued, from treasury to each existing shareholder, two additional shares for each share held. [A.A.] described at the hearing that the reason for this exercise was to ensure that Fundy would look like its peer group on the OFEX. He outlined that United Kingdom corporations on the OFEX typically have a larger number of shares outstanding and trade at lower dollar amounts in comparison to corporations traded on the Toronto Stock Exchange. [A.A.] indicated that the share split did not result in any additional shareholders being added to the list of shareholders.

The Board of Directors of Fundy passed a resolution on April 29th, 2005 to undertake a financing program commencing in May 2005 and to authorize the preparation of an appropriate disclosure memorandum. The company appointed St. Helens Capital plc. to lead the financing. Fundy was to issue shares with respect to the financing program at or near the current market price. [A.A.] stated at the hearing that the financing was going to take place in the United Kingdom with institutional and sophisticated investors. Fundy's intent was to raise 900,000 pounds by placing 10,000,000 shares at 9 pence per share.

[A.A.] testified at the hearing that with the help of St. Helen's, the document was shown to less than 10 institutional investors in the United Kingdom and that no monies were accepted by the corporation or the share registrar, Computer Share, as a result of the offering.

[A.A.] indicated at the hearing that the only issue of treasury shares since Fundy's shares were listed on OFEX on April 5, 2005 was in relation to the Orlake acquisition. As part of the acquisition of shares in Orlake, Fundy issued 100,000 shares to its owner [F.F.]. 150,000 shares were also issued to [G.G.] who joined the advisory board of Fundy. Written communications from the Respondent to staff of the Commission in this regard confirmed that no monies were received for these transfers.

Mr. Ed LeBlanc, Investigator for the New Brunswick Securities Commission ("the Commission") testified on behalf of staff. After reviewing the Fundy Web site and the

records of the Commission, he testified that as of the date of hearing, Fundy was not registered with the Commission in any capacity under the provisions of the Act.

Mr. LeBlanc testified that he reviewed the System for Electronic Document Analysis and Retrieval ("SEDAR") database used by the Canadian Securities Administrators and no documents relating to Fundy had been filed. He also checked the records of the Commission and found no filings by Fundy.

He introduced into evidence two lists of shareholders provided by Fundy in response to his request. The first was a list showing Fundy had 61 shareholders as of March 1, 2005, most of whom resided in New Brunswick. The second list dated May 16, 2005 was a computer printout and showed the addition of shareholders in England. While the second list shows 45 New Brunswick residents, the bulk of the shares were held in a nominee account at TD Waterhouse. [REDACTED] A.A. subsequently described the shareholders' list of March 1, 2005 as a snapshot in time of Fundy's shareholders of record on that day, their respective holdings and the percentage of total shares that each held. He described the printout as of May 16, 2005, as the list of registered shareholders on that date.

These lists of shareholders were offered in evidence as proof of the fact that there were distributions from Fundy's treasury.

Mr. LeBlanc testified that Until May 17, 2005, Fundy posted the following letter (hereinafter referred to as "the investor information") on its website:

Dear Investor,

Over the past few weeks we have been asked many times about how to purchase Fundy stock. Please allow me to shed some light on this topic. All Canadian and US brokerage and discount execution firms can trade on Ofex. To place an order you need to instruct the broker/order taker that you want the international trade desk to place an order on Ofex in the UK. Provide them with:

1. Correct Name: Fundy Minerals Ltd
2. Exchange Name: Ofex
3. Stock Symbol: "FUN"

4. ISIN (International security Identification number): CA3608971022

This should be all they require to locate Fundy and place your trade. There is, as in all markets, a Bid and an Offer (Ask). On Ofex there is also a Mid Price, which is the last trade between Bid and Offer (as quoted at www.ofex.com). You should place your order as you normally would on any market, specifying number of shares, price (or best), and time duration for your order.

As always please be guided first by your respective investment professional's advice especially when considering risk. A purchase of Fundy stock is not a guaranteed investment and you risk losing all principle.

Should you encounter any difficulty please feel free to contact us directly at Fundy. We appreciate your interest in Fundy and will continue to work diligently to enhance shareholder value.

Best Regards,
Your Board of Directors

In addition, Mr. LeBlanc testified that Fundy had a link to OFEX on its Web site.

In cross examination, **A.A.** acknowledged that his Fundy business card listed the web address of OFEX. Counsel for the Commission argued that this also constituted a solicitation.

Findings

Upon reviewing the Notice of Hearing, Statement of Allegations, Pre Hearing Submissions, and upon hearing and reviewing submissions from counsels for the Respondent and for Staff of the Commission, the Commission is of the view that:

Compliance with the *Securities Act*

Staff of the Commission submitted that the material posted on the Respondent's website constituted a breach of Section 45 of the Act in that it was "trading" securities without the benefit of a registration exemption.

Section 45 of the *Securities Act* states as follows:

"45 Unless exempted under this Act or the regulations, no person shall

(a) **trade** in a security or act as an underwriter unless the person is registered as a dealer, or is registered as a salesperson, as a partner or as an officer of a registered dealer and is acting on behalf of the dealer, or

(b) act as an adviser unless the person is registered as an adviser, or is registered as a representative, as a partner or as an officer of a registered adviser and is acting on behalf of the adviser." (emphasis added)

A "trade" is defined in the *Act* as including

(a) a sale or disposition of a security for valuable consideration or an attempt to sell or dispose of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in paragraph (d), a transfer, pledge or encumbrance of securities for the purpose of giving collateral for a debt made in good faith,

(b) participation as a trader in any transaction in a security on or through the facilities of an exchange or quotation and trade reporting system,

(c) the receipt by a registrant of an order to buy or sell a security,

(d) a transfer, pledge or encumbering of securities of an issuer from the holdings of a control person for the purpose of giving collateral for a debt made in good faith, and

(e) **an act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (d).** (emphasis added)

Staff of the Commission maintained that the Respondent's activities constituted a "trade" as defined in the Act, including posting the investor information on Fundy's Web site. **A.A.** contended that the investor information posted on the Web site was intended to inform the brokerage community on the basic mechanics of how to effect a transaction on the OFEX. He claimed it was not intended to be a solicitation or advertisement in furtherance of a trade.

The Commission is of the view that posting solicitation materials on its Web site constituted "an act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of a trade", thereby committing a breach of section 45 of the Act. Whether the Respondent intended to advertise and solicit in furtherance of a trade is not relevant as the Commission believes the posting of the Investor Information fell clearly within the definition of a trade.

While it may be arguable that putting Fundy's trading symbol on business cards is a solicitation to "trade" and that increasing the authorized capital of a corporation falls within the definition of a "trade", we hold that these actions in the circumstances surrounding them, in and of themselves, are not "trades".

Staff for the Commission also contended that a number of activities of the Respondent were in contravention of Section 71 of the Act. Paragraph 1 of this section of the Act provides that:

71(1) Unless exempted under this Act or the regulations, no person shall trade in a security on the person's own account or on behalf of any other person where the trade would be a **distribution** of the security unless

(a) a preliminary prospectus and a prospectus that are in the form prescribed by regulation have been filed with the Executive Director in relation to the security, and

(b) the Executive Director has issued receipts for the preliminary prospectus and prospectus. (emphasis added)

Paragraph 71(2) of the Act provides:

71(2) A preliminary prospectus and a prospectus that are in the form prescribed by regulation may be filed with the Executive Director to enable the issuer to become a reporting issuer, notwithstanding the fact that no distribution is contemplated.

"Distribution" is defined in the Act as follows:

"distribution", where used in relation to trading in securities, means

- (a) a trade in securities of an issuer that have not been previously issued,
- (b) a trade by or on behalf of an issuer in previously issued securities of that issuer that have been redeemed or purchased by or donated to that issuer,
- (c) a trade in previously issued securities of an issuer from the holdings of a control person,
- (d) a trade by or on behalf of an underwriter in securities which were acquired by that underwriter, acting as underwriter, before the commencement of this section, if those securities continued on the commencement of this section to be owned by or for that underwriter, so acting,
- (e) a trade deemed to be a distribution in an order made by the Commission under paragraph 184(1)(o),
- (f) a trade that is a distribution under the regulations, and
- (g) a transaction or series of transactions involving a purchase and sale or a repurchase and resale in the course of or incidental to a distribution.

With respect to whether there has been a breach of Section 71 of the Act, the evidence is less clear. There is no question that shares were issued from Fundy's treasury prior to the shares being listed on OFEX and that a number of transfers from existing shareholders to alleged friends, family members, and business associates occurred. Fundy maintained that these shares were all issued pursuant to exemptions. There was no specific reference to which exemptions should have applied.

In relation to the share issuances from the Respondent's treasury, the witness for Fundy stated there was no consideration received for those issuances. The Respondent's position was that either these transfers could not constitute a trade or a distribution within the meaning of Sections 45 and 71 of the Act or alternatively, that these issuances were exempted from the requirements of the Act. There is an argument to be made that some of the share issuances as described at the hearing were issued in return for services and/or for the acquisition of property, but the Commission is of the view there were insufficient records or details presented in relation to these issuances to conclude a breach of Sections 45 and 71. Mr. Hanson remarked at the hearing that it is possible Fundy has failed to report to the Commission transactions, which it should have reported. The failure to file such reports does not warrant the severe penalty sought by staff of the Commission.

While there were New Brunswick shareholders listed on both shareholder lists, we are disappointed that neither staff nor the company was able to provide us with the exact number of New Brunswick shareholders. It is not unreasonable to expect that the number of New Brunswick shareholders would be identified. The inability to have complete information leaves us with a deficiency of evidence.

This Commission has been asked to make the temporary cease trade order permanent. A permanent cease trade order has very serious consequences and should be reserved for the most serious offences. Trading in the shares of Fundy has been halted from the date of the cease trade order on May 16, 2005 to this date. We feel that is a significant penalty in its own right.

This Commission has a mandate to both protect investors and foster the capital markets. The purpose of a Commission tribunal is to render relief appropriate to the infraction. The

Commission feels that a permanent cease trade order against a corporation is a severe measure which will impact the corporation's ability to raise capital. This Commission does not wish to cause undue harm to the corporation when full proof of harm to the investing public has not been demonstrated on the basis of the evidence presented and will therefore not order that the cease trade order be made permanent.

In the course of the hearing, there was reference to the trading of restricted shares which are subject to a hold period, prior to resale, where they have been acquired pursuant to an exemption, but no evidence was adduced on this issue and the matter was not the subject of the application for an order. Should staff obtain evidence of such activities or any other violations of the Act or further and definitive evidence related to this hearing, the Commission expects them to be back before us and the matter will be dealt with.

Although there is evidence of a breach of section 45 of the Act, and we have so found, we acknowledge the company's immediate action in removing the investor information from the website and therefore, in the light of Fundy's compliance, we will not make a permanent order pursuant to s.184(f) (ii).

We are not prepared to grant the relief requested pursuant to section 184(1)(d) of the Act to the effect that any exemptions contained in the Act not apply to the Respondent. Such a penalty would outweigh the failure to file the notices required under Local Rule 45-501 *Prospectus and Registration Exemptions*. The Respondent should be able to avail itself of the exemptions under New Brunswick securities laws.

In light of the breach, however, a penalty is warranted and we will order a penalty of a monetary nature.

ORDER

WHEREAS the Commission is of the opinion that it is in the public interest to make this order;

IT IS HEREBY ORDERED that:

1. pursuant to section 186 (1)(a) of the Act, the Respondent pay an administrative penalty of \$5,000 for its failure to comply with section 45 the Act; and
2. pursuant to section 185(2), the Respondent pay the fees and expenses for the costs of or related to the hearing that were incurred by or on behalf of the Commission which in accordance with Local Rule 11-501 *Fee Rule* is assessed as follows:
 - Under paragraph 25(a) \$2000;
 - Under paragraph 25(b) \$750.
3. upon receipt of payment for the administrative penalty, fees and expenses set out in 1 and 2 above, the temporary cease trade order will be lifted.

DATED at the City of Saint John
this 15th day of July, 2005



Hugh J. Flemming, Q.C., Member NBSC

William D. Aust, Member NBSC

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 - Under paragraph 25(b) \$750.
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DATED at the City of Saint John
this 15th day of July, 2005

Hugh J. Flemming, Q.C. Member NBSC

William D. Aust, Member NBSC