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**LOM (Holdings) Limited, LOM Securities (Bahamas) Limited,
LOM Securities (Bermuda) Limited, LOM Securities (Cayman) Limited,
Lines Overseas Management Limited, Donald P. Lines, Brian N. Lines,
Scott G. S. Lines, Malcolm Mosely, David McNay, and J. Scott Hill**

Sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418

Hearing

Panel	Brent W. Aitken Robert J. Milbourne Roy Wares	Vice Chair Commissioner Commissioner
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Date of Hearing November 24, 2004

Date of Decision January 12, 2005

Appearing

Nigel Campbell For the respondents
David E. Gruber

James Sasha Angus For the Executive Director
Douglas Muir

Decision

- ¶ 1 This is a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. On May 20, 2004, the Executive Director issued a notice of hearing alleging that LOM (Holdings) Limited, LOM Securities (Bahamas) Limited, LOM Securities (Bermuda) Limited, LOM Securities (Cayman) Limited, Lines Overseas Management Limited, Donald P. Lines, Brian N. Lines, Scott G. S. Lines, Malcolm Mosely, David McNay, and J. Scott Hill failed to comply with a demand made by Commission staff under section 144(1) of the Act, and acted contrary to the public interest.
- ¶ 2 The Executive Director is seeking an order under section 161(1) prohibiting the respondents from trading until they undertake to comply with the Act, and an order for an administrative penalty under section 162 of the Act.

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I Background

Overview

- ¶ 3 Since October 2003 Commission staff has been attempting to investigate a series of trades in shares of San Telmo Energy Inc., a company listed on the TSX Venture Exchange. The trades were made by Lines Overseas Management Limited, which trades through accounts at Canadian investment dealers on behalf of undisclosed beneficial owners.
- ¶ 4 Commission staff issued a demand under section 144(1) of the Act to Lines Overseas and other companies in the LOM group to find out the identities of the beneficial owners and other details relating to the trades. These companies say they are subject to secrecy laws in Bermuda, the Bahamas and the Cayman Islands and cannot comply with the demand without contravening those laws. The respondents have pursued means of getting Commission staff the information it wants in a way, they say, that does not contravene those laws.
- ¶ 5 It is unclear from the evidence how successful those efforts have been. The Executive Director says that this is not relevant and the only thing that matters is that the respondents have failed to comply with the section 144(1) demand and the respondents should therefore be sanctioned (including the individual respondents, all of whom are directors and officers of one or more companies in the LOM group). The respondents say they have complied with the demand but in any event it is inappropriate in the circumstances for the Commission to make the orders sought by the Executive Director.

The LOM group of companies

- ¶ 6 LOM (Holdings) Limited, a public Bermuda company that trades on the Bermuda Stock Exchange, provides investment and wealth management services through four subsidiary companies. These include LOM Securities (Bermuda) Limited, LOM Securities (Bahamas) Limited, and LOM Securities (Cayman) Limited, the brokerage subsidiaries of the LOM group in Bermuda, the Bahamas and the Cayman Islands. LOM Holdings' fourth subsidiary, Lines Overseas, is an investment firm incorporated and located in Bermuda and provides custody, clearing, trading and administrative services to the LOM group of companies.
- ¶ 7 Lines Overseas trades securities in Canada on behalf of its clients through brokerage accounts at Canadian investment dealers, including accounts at dealers in British Columbia. Its clients are very active in Canadian markets. Over the past year, Lines Overseas made about 10,000 trades on their behalf in the Canadian financial markets. These trades totaled over 800 million shares and represented a market value of over \$1.2 billion. This activity represented about 40% of Lines Overseas' revenue during the period.

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¶ 8 In this decision we sometimes use “LOM” to describe all or some of the companies in the LOM group.

The focus of the investigation

¶ 9 Commission staff wants to investigate a series of trades in shares of San Telmo Energy Inc., a company listed on the TSX Venture Exchange, that occurred between September 2002 and March 2003. Investigators at Market Regulation Services Inc., which operates the Exchange’s market regulation function, noticed that during this period:

- trades by Lines Overseas accounted for a significant proportion of purchases and sales of the shares of San Telmo,
- Lines Overseas was both buyer and seller in some trades (using different accounts at different brokers), and
- trades made by Lines Overseas were responsible for 20% of the upticks in the price of San Telmo shares.

¶ 10 Market Regulation Services referred the matter to Commission staff in October 2003.

¶ 11 Lines Overseas made its trades through accounts at investment dealers in British Columbia. The account opening forms for these accounts indicate that Lines Overseas is a nominee and trades for undisclosed beneficial owners. Commission staff wants to know the identities of the beneficial owners and to obtain information about the trading by these owners in shares of San Telmo.

Efforts surrounding disclosure of information

¶ 12 Commission staff started its quest for information by contacting the Bermuda Monetary Authority (BMA) in November 2003. On December 1 the BMA passed on the request to LOM. On December 16 LOM responded and the BMA passed the information it obtained from LOM to Commission staff.

¶ 13 The covering letter from the BMA to Commission staff stated that the information was confidential and its public disclosure would be contrary to Bermuda law. The letter went on to say that the information was provided to the British Columbia Securities Commission “solely for the purpose of its regulatory functions” and asked that Commission staff seek the BMA’s consent before disclosing any of the information to a third party.

¶ 14 The information provided fell well short of the information Commission staff requested. Specifically, the information provided by LOM to the BMA did not

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reveal the names of the beneficial owners of the accounts that Lines Overseas had at British Columbia investment dealers. LOM's position was that it was prohibited from providing this information under the Bermuda legislation unless the BMA undertook not to provide it to foreign regulators. The BMA replied that it did not give such undertakings and stated that LOM's failure to comply with the BMA's original information request would be an offence.

- ¶ 15 These exchanges were all in correspondence in December 2003. At the end of that month, Lines Overseas asked the Bermuda courts to determine whether the BMA was authorized under Bermudian law to provide to foreign regulators information such as that requested by Commission staff. It says it did this because it wanted to cooperate with the BMA by providing client-specific information, but it did not want to be exposed to civil liability if the BMA then passed that information to a foreign regulator but was not authorized to do so.
- ¶ 16 On March 4, 2004 Commission staff made a direct request of Lines Overseas to provide the information it had refused to provide to the BMA.
- ¶ 17 On April 23, the Commission issued an investigation order under section 142 and on April 30, Commission staff issued a demand for production under section 144 of the Act against various parties including some of the respondents. The deadline in the demand was May 7, which was later extended to May 12.
- ¶ 18 On May 20, the Executive Director issued the notice of hearing in this matter. On June 2, the Commission set the hearing for October 5. The hearing was later adjourned, by consent, to November 24, when it was held.
- ¶ 19 There were discussions and correspondence over the March through May time frame between Commission staff and LOM counsel about ways that LOM could comply with staff's demand without contravening Bermuda's secrecy legislation. In the meantime, LOM was also working with the authorities in Bermuda to seek an amendment to that legislation that would permit it to provide, through the BMA, the information staff was seeking.
- ¶ 20 One approach suggested by LOM was to seek waivers of confidentiality from the relevant clients. On July 27, LOM provided information about eight beneficial owners of the LOM accounts, all of whom are principals of LOM.
- ¶ 21 On the same day, LOM suggested that it provide all information demanded to the BMA, the Securities Commission of the Bahamas (SCB), and the Cayman Islands Monetary Authority (CIMA) in accordance with the laws of those jurisdictions, and that Commission staff deal with those authorities, "regulator to regulator" to obtain the information.

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- ¶ 22 Meanwhile, amendments to Bermuda's secrecy legislation came into force in August, removing LOM's concern about providing client-specific information to the BMA. On August 24 LOM provided the BMA with what it says is all of the information requested by Commission staff, which the BMA forwarded to staff on September 21. LOM also provided information to the SCB and the CIMA.
- ¶ 23 On August 25, Commission staff told LOM that it would be making information requests to the SCB and the CIMA. LOM alerted these authorities that the request would be coming.
- ¶ 24 Hurricanes Francis, Ivan and Jeanne disrupted business in the Bahamas and the Cayman Islands in September, closing LOM offices for about 2 weeks after each storm. In early October, LOM followed up with Commission staff as to the progress of staff's information requests with these authorities. Two weeks later Commission staff replied to LOM, saying it anticipated cooperation and had provided the authorities with the assurance they sought before releasing the information.
- ¶ 25 The SCB sent information to Commission staff on November 11 and the CMIA sent information to Commission staff on November 18.
- ¶ 26 Commission staff says it does not know whether it has all of the information it demanded. In an affidavit sworn the day before the hearing, Commission staff investigator Alan Costin deposed that he had "recently received information from the BMA, the Cayman Islands Monetary Authority and the Securities Commission of the Bahamas." He also deposed, "I have not yet reviewed all of this information and I am unable to determine whether we have received all information that was requested from the respondents."

II Analysis

- ¶ 27 Two issues that the parties addressed in their submissions we can deal with summarily, because the law is clear and they are of only tangential relevance.
- ¶ 28 First, do the secrecy laws of foreign jurisdictions override the investigation and enforcement powers in the Act? Clearly they do not. In *Exchange Bank & Trust Inc v British Columbia (Securities Commission)* 2000 BCCA 389 the court, in upholding a decision of the Commission refusing to vacate a freeze order (see *Re Stephen Sayre et al* [2000] 21 BCSC Weekly Summary 75), quoted this, with approval, from the Commission's decision:

EBT stressed that its ability to present evidence was hampered by the privacy laws of Nevis. That may be so. However, the property subject to

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the Orders is in British Columbia and it is the securities laws of British Columbia, and those of the United States, that are alleged to have been contravened. EBT chose to locate assets outside the jurisdiction of Nevis and must accept that those assets are subject to laws of the jurisdiction in which they are located, in this case British Columbia. It would be an utter abandonment of the public interest if we were to conclude that a party subject to secrecy laws in another jurisdiction could use those laws to shield themselves from the legitimate exercise of powers to enforce securities regulation in British Columbia. In short, the Nevis privacy laws are not relevant.

- ¶ 29 Second, must Commission staff first attempt to obtain information demanded under section 144 through the local regulator in a foreign jurisdiction if the person subject to the demand is located, or has records that are located, in that jurisdiction? Clearly Commission staff need not do so. The Act does not limit the investigative powers of Commission staff in this way. In making a demand under section 144(1) of any person over whom the British Columbia Securities Commission has jurisdiction, Commission staff is free to approach the person directly, to seek to obtain the information with the cooperation of the foreign regulator, or to do both.
- ¶ 30 In any event, these issues are beside the point. This hearing is not about the scope of the investigative powers under the Act. The issue in this hearing is whether, in the circumstances of this case, it is in the public interest to make orders under section 161(1) and 162 for the alleged failure of LOM and its directors and officers to comply with Commission staff's April 30 demand under section 144(1).
- ¶ 31 These are the relevant portions of section 144:

144. Investigator's power at hearing. (1) An investigator appointed under section 142 or 147 has the same power

- (a) to summon and enforce the attendance of witnesses,
- (b) to compel witnesses to give evidence on oath or in any other manner; and
- (c) to compel witnesses to produce records and things and classes of records and things

as the Supreme Court has for the trial of civil actions.

- (2) The failure or refusal of a witness

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- (a) to attend,
- (b) to take an oath,
- (c) to answer questions, or
- (d) to produce the records and things or classes of records and things in the custody, possession or control of the witness

makes the witness, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

¶ 32 In *Re James Nelson McCarney* 2003 BCSECCOM 656, the Commission considered the use of temporary order power under section 161 to compel the production of documents and information. It said this:

38 In reading the powerful provisions of Part 17 and 18 together, it is clear that temporary enforcement orders were not intended to be the regulatory tool to compel compliance in the investigative process. Instead, express powers in Part 17 make clear that the appropriate regulatory tool to deal with non-compliance in the investigative process is an application for contempt to the Supreme Court under section 144(2) of the Act.

...
40 Section 144(2) of the Act provides an appropriate remedy when a witness fails or refuses to attend, take an oath, answer questions, or to produce the records and things. When these circumstances are present staff may apply to the Supreme Court to have the witness committed for contempt as if in breach of an order or judgment of the Supreme Court.

41 Our conclusion that it was not appropriate in these circumstances for staff to issue temporary enforcement orders to compel production of documents and information during the course of an investigation is consistent with the reasoning of the Supreme Court of Ontario (High Court of Justice) in *Ontario (Securities Commission) v. Biscotti* [1988] O.J. No. 1115 and 40 B.L.R. 160. In that case the mere threat of a cease trade order by staff of the Ontario Securities Commission in order to compel a potential respondent to testify, invoked the censure of the Court.

¶ 33 In *McCarney* the Commission was considering the Executive Director's power to make temporary orders under section 161 without a hearing. However, the same reasoning applies in this case. The Commission's point in *McCarney* was that the appropriate means of dealing with a failure to produce information under a demand under section 144(1) is to follow the procedure set out in section 144(2).

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- ¶ 34 *McCarney* therefore disposes of the issue, but even in the absence of *McCarney* we do not think it would in the public interest to make orders under section 161 and 162 to enforce section 144 in these circumstances.
- ¶ 35 First, LOM has been cooperative throughout the process. The evidence shows that LOM not only responded promptly at every stage of the way, it took the initiative in following up with Commission staff and with its local authorities to try to move things along.
- ¶ 36 Second, although the Executive Director now expresses significant reservations in the hearing about the “regulator to regulator” approach, that is the approach Commission staff took in obtaining the information. It does not lie well upon the Executive Director to ask us for orders under sections 161 and 162 based on LOM’s failure to supply information directly when Commission staff itself chose to proceed on a regulator to regulator basis.
- ¶ 37 Third, the staff investigator – who has had the BMA information since September – deposed the day before the hearing that he has “not yet reviewed all of this information” and is therefore “unable to determine whether [Commission staff] have received all information . . . requested”. The Executive Director says this is not relevant, but we disagree. Whether Commission staff is now in possession of the information it sought (be it directly or otherwise) is a highly relevant factor in considering whether it is in the public interest to make orders under section 161 and 162 against LOM and its directors and officers.

III Decision

- ¶ 38 We therefore dismiss the Executive Director’s application.

IV Additional Issue Arising from the Evidence

- ¶ 39 The evidence before us included the following account opening forms for Lines Overseas’ accounts at British Columbia investment dealers:
1. An undated Haywood Securities Inc. form provided to Commission staff by Bolder Investment Partners. Item 6 of this form asks whether any other persons will have trading authorization or have a financial interest in the account. The form provides a box for a yes or no answer to each of these questions. All of the boxes are blank.
 2. A December 12, 1997 Georgia Pacific Securities Corporation form provided to Commission staff by Northern Securities Inc. Item 9 of this form asks whether any person other than the named account holder has any authority over or any financial interest in the account. The box labeled “Yes” beside this question has been ticked. The form requires, for any “yes” answer, that

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“necessary documentation” be attached. No other documentation appears in the evidence before us.

3. A May 23, 2001 Raymond James Ltd. form. Under the heading “Account and Client Status, the form asks whether any other person will have trading authorization or have a financial interest in the account. The box labeled “No” beside the trading authorization question has been ticked. The box labeled “Yes” beside the financial interest question has been ticked. The form requires, for any “yes” answer, that details be provided, with “attachments if necessary”. No other details or documentation appears in the evidence before us.
 4. A September 9, 1996 Union Securities form. This form asks no questions about whether others are authorized to trade or have a financial interest in the account.
 5. A November 26, 2002 Research Capital form. This form has questions about whether others are authorized to trade or have a financial interest in the account. The box labeled “No” beside the trading authorization question has been ticked. The box labeled “Yes” beside the financial interest question has been ticked. The form requires, for any “yes” answer, that details be provided. An arrow has been drawn on the form from the ticked “Yes” box to these words: “clients have beneficial ownership”.
- ¶ 40 There is also an undated new client application form from Desjardins Securities showing a “yes” answer to the financial interest question with the word “clients” written next to it.
- ¶ 41 As noted in the background above, LOM is very active in Canadian markets – over 10,000 trades over the past year totaling over 800 million shares with a market value of over \$1.2 billion. The more significant issue surrounding LOM, it seems to us, arises from the account opening forms described above, which appear to show that at least some of this trading is being done by LOM on behalf of undisclosed beneficial owners. If so, this trading is being carried on without the dealers involved requiring or possessing the appropriate “know-your-client” information.
- ¶ 42 This issue was not before us, but we cannot turn a blind eye to the evidence. We believe LOM should show cause why it would not be in the public interest for the Commission, under section 161, to order that LOM cease trading securities in British Columbia until it provides all dealers in British Columbia having accounts for LOM the appropriate know-your-client information about those having a financial interest in those accounts.

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¶ 43 We therefore direct the parties to file with the Secretary to the Commission written submissions on this issue by the close of business on January 31. Any party who wants to lead evidence or make oral submissions should so advise the Secretary when filing its submissions.

¶ 44 January 12, 2005

¶ 45 **For the Commission**

Brent W. Aitken
Vice Chair

Robert J. Milbourne
Commissioner

Roy Wares
Commissioner