

**IN THE MATTER OF THE SECURITIES ACT  
R.S.O. 1990, c. S.5, AS AMENDED**

**- and -**

**IN THE MATTER OF LIMELIGHT ENTERTAINMENT INC., CARLOS A. DA  
SILVA, DAVID C. CAMPBELL, JACOB MOORE AND JOSEPH DANIELS**

**HEARING HELD PURSUANT TO SECTION 127 OF THE ACT**

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**SETTLEMENT HEARING RE: JACOB MOORE**

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**REASONS AND DECISION REGARDING THE CONFIDENTIALITY OF THE  
SETTLEMENT AGREEMENT BETWEEN JACOB MOORE AND STAFF OF  
THE ONTARIO SECURITIES COMMISSION, APPROVED BY THE  
COMMISSION ON AUGUST 2, 2007**

<b>Hearing:</b>	Thursday, August 2, 2007	
<b>Panel:</b>	Lawrence E. Ritchie Robert L. Shirriff	-Vice-Chair and Chair of the Panel -Commissioner
<b>Counsel:</b>	Derek Ferris  Ian Smith	-for Staff of the Ontario Securities Commission  -for Jacob Moore

**REASONS AND DECISION REGARDING THE CONFIDENTIALITY OF THE  
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**A. Background**

[1] On April 7, 2006, the Ontario Securities Commission (the “Commission”) issued a Notice of Hearing and a Statement of Allegations pursuant to sections 127 and 127(1) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”), in respect of Jacob Moore (“Mr. Moore”), Limelight Entertainment Inc. (“Limelight”), Carlos Da Silva, David C. Campbell, and Joseph Daniels (collectively, without Mr. Moore, the “Other Respondents”). On April 25, 2006, the Commission issued an Amended Notice of Hearing and an Amended Statement of Allegations.

[2] By Notice of Hearing dated July 18, 2007, the Commission announced that it would hold a hearing on August 2, 2007 for Staff of the Commission (“Staff”) and Mr. Moore to seek approval of the Settlement Agreement (the “Settlement Agreement”) between Mr. Moore and Staff in connection with the proceedings *In the Matter of Limelight Entertainment Inc., Carlos A. Da Silva, David C. Campbell, Jacob Moore and Joseph Daniels* (the “Commission Limelight Proceeding”).

[3] On Thursday, August 2, 2007, a hearing to consider the Settlement Agreement was held *in camera* at the request of the parties. At the conclusion of the hearing, the Commission Panel advised the parties that it would approve the Settlement Agreement and signed the relevant Order accordingly.

[4] During the course of the Commission Hearing, it was brought to our attention by counsel for Staff that there is a pending proceeding before the Alberta Securities Commission (the “ASC”) involving some of the same respondents, facts and allegations as in the Commission Limelight Proceeding.

[5] Specifically, we were advised that, on May 28, 29 and 31, 2007, the ASC convened a hearing in the matter of *Limelight Entertainment Inc., David Campbell, Carlos Da Silva, Tim McCarty, Jacob Moore, Ove Simonsen, Eric O’Brien, Hank Ulfan and Rick Clynes* (the “ASC Limelight Proceeding”). We were also advised that the panel hearing the ASC Limelight Proceeding reserved its decision in this matter, and no decision has yet been released.

[6] The respondent, Mr. Moore, is a party to both the Commission Limelight Proceeding and the ASC Limelight Proceeding. The ASC Limelight Proceeding was held in the absence of Mr. Moore and his counsel. However, counsel for Mr. Moore informed us that he notified the ASC that Mr. Moore was attempting to reach a Settlement in the Commission Limelight Proceeding.

[7] As a result of the pending decision in the ASC Limelight Proceeding, an issue arose as to whether the Commission’s decision and order regarding the approval of the Settlement Agreement in the Commission Limelight Proceeding should remain

confidential pending the release of the decision in the ASC Limelight Proceeding. The concern was that the fact of the Settlement, the terms of the Settlement Agreement and the facts to which Mr. Moore has agreed to support it, may have an impact upon the ASC Limelight Proceeding, which could be unfair to Mr. Moore, and/or some of the Other Respondents.

[8] As stated below, in making our decision, the Panel gave consideration to the goal of this Commission to further transparency in its processes, and the strong impact such transparency has on maintaining and strengthening confidence in the effectiveness of the Commission's efforts to regulate the capital markets and market participants. As well, regard was had to: (i) the interests of, and fairness to, the parties in the ASC Limelight Proceeding (many of whom are respondents in the Commission Limelight Proceeding), (ii) Staff's ongoing disclosure obligations to the Other Respondents, and (iii) the possible impact upon the right of the Other Respondents to make full answer and defence in respect of the Commission Limelight Proceeding, should these disclosure obligations not be fulfilled.

[9] In considering the question of whether confidentiality ought to be maintained, this Panel entertained oral submissions from the parties.

[10] Following submissions, this Panel made an Order (the "Confidentiality Order") that the Settlement Agreement, the Order approving it, and the transcripts of the Settlement Hearing shall remain confidential pending the earlier of the release of the decision in the ASC Limelight Proceeding and the commencement of the Commission Limelight Proceeding, subject to disclosure by Staff of what is necessary for Staff to meet its disclosure obligations to the Other Respondents.

[11] These are our Reasons and Decision regarding the Confidentiality Order.

## **B. Submissions**

[12] Both counsel for Staff and counsel for Mr. Moore made oral submissions.

[13] Counsel for Mr. Moore requested the continued confidentiality of the Settlement Agreement and Settlement hearing transcripts. He took the position that the confidentiality sought is necessary and appropriate to ensure that the ASC would not be influenced by the agreed facts and imposed sanctions in the Settlement Agreement, if they were made public. Counsel for Mr. Moore acknowledged that, as a matter of policy, Commission rulings and orders ought to be made public as quickly as possible so that the public is protected and knows what the Commission is doing. However, counsel for Mr. Moore submitted that public disclosure can and ought to be delayed and/or restricted if necessary to protect against prejudice to an individual or individuals, and to ensure fairness to those persons in a judicial or administrative process. Mr. Moore states that such is the case in the present matter.

[14] Counsel for Staff opposed Mr. Moore's request and submitted that the Settlement Agreement should be made public forthwith. Staff also raised concerns that the extension

of confidentiality may adversely affect Staff's disclosure obligations to the Other Respondents in the Commission Limelight Proceeding.

[15] As well, Staff expressed concern that the ASC might not release its decision prior to the commencement of the Commission Limelight Proceeding. It is Staff's intention to have Mr. Moore testify in the Commission Limelight Proceeding. As such, the Settlement Agreement needs to be provided to the Other Respondents well in advance of the Commission Limelight Proceeding.

[16] In Staff's view, as a matter of policy, the public is also entitled to know the outcome of the Settlement Hearing and what the terms of the Settlement Agreement are at the earliest possible time. For this reason, Staff takes the position that the Settlement Agreement and the reasons of the panel approving it should be made public and posted on the Commission website.

### **C. Analysis and Decision**

[17] Following oral submissions from the parties, we have decided that:

- (1) the fact that Mr. Moore has settled with Staff and that this Commission has approved the Settlement Agreement, shall be made public;
- (2) the terms of the Settlement Agreement and the settlement hearing transcript shall remain confidential, except for what is necessary to satisfy Staff's disclosure obligations to the Other Respondents in the Commission Limelight Proceeding; and
- (3) the confidentiality described in clause (2) above shall remain until the earlier of:
  - i. the public release of the decision of the ASC Limelight Proceeding; and
  - ii. the day of the commencement of the substantive hearing of the Commission Limelight Proceeding.

[18] In coming to this decision, we have considered the submissions of the parties and have taken into account the rights and interests of all affected persons, and conflicting policy considerations of fairness and transparency. In particular, we have attempted to balance all of the factors counsel has urged upon us. We are conscious of and strongly support the Commission's practice of making approved settlements and other proceedings public as soon as practicably possible and the importance of the transparency of its decisions and processes. We are also sensitive to Staff's concern that it fulfill its disclosure obligations to the Other Respondents so that they are able to prepare their full answer and defence.

[19] On the other hand, we are also concerned that the disclosure of the Settlement terms, and the admissions made therein, not pose any unfairness or prejudice to any party

to the ASC Limelight Proceeding, regardless of whether they had appeared in those proceedings.

[20] In our view, the maintenance of confidentiality for the anticipated short time frame, with the exception provided to Staff, enables Staff to fulfill any disclosure obligations to the Other Respondents in the Commission Limelight Proceeding, while at the same time it protects Mr. Moore, and the Other Respondents in the ASC Limelight Proceeding.

[21] We consider it appropriate for the confidentiality to expire at the earlier of the release of the decision in the ASC Limelight Proceeding and the commencement of the Commission Limelight Proceeding. We recognize that it is possible that the ASC Limelight Proceeding decision may not be rendered at the time of the commencement of the Commission Limelight Proceeding. However, we consider it appropriate to publicly release the Settlement Agreement and transcript at the commencement of the Commission Limelight Proceeding at the very latest nonetheless as a matter of practicality and fairness. Among other reasons, we are advised that Mr. Moore will be testifying at the Commission Limelight Proceeding. As such, the content of the Settlement Agreement could be relevant to the parties in the Commission Limelight Proceeding, and the Other Respondents should not be unduly restricted in advancing their defence.

[22] We are satisfied that this Panel has jurisdiction to order confidentiality as contemplated, and none of the parties takes issue with this view.

[23] The *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the “SPPA”), applies to Ontario administrative tribunals that exercise a statutory power of decision conferred by legislation where the tribunal by law has to afford the parties to the proceeding an opportunity for a hearing before making a decision (subsection 3(1) of the SPPA). Since the Commission has the power to hold hearings pursuant to subsection 3.5(1) of the Act, the SPPA applies to Commission hearings.

[24] Section 9 of the SPPA authorizes an administrative tribunal to decide whether a hearing or part of a hearing should not be accessible to the public. Specifically, subsections 9(1) and 9(1.1) of the SPPA state:

Hearings to be public, exceptions

9. (1) An oral hearing shall be open to the public except where the tribunal is of the opinion that,
  - (a) matters involving public security may be disclosed; or
  - (b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person

affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,

in which case the tribunal may hold the hearing in the absence of the public.

Written hearings

(1.1) In a written hearing, members of the public are entitled to reasonable access to the documents submitted, unless the tribunal is of the opinion that clause (1) (a) or (b) applies.

[...]

[25] This is also consistent with subsection 7(1) of the *Practice Guidelines – Settlement Procedures in Matters Before the Ontario Securities Commission*. This section states:

**7. Publication of Settlement Agreement–(1) Publication Where Approved**– After a proposed settlement is approved by the Commission, the settlement agreement and any related order will be published in the OSC Bulletin. *Where a respondent, including a non-settling respondent, has reason for not wanting a settlement agreement to be made public for a period of time, the respondent may apply to the Commission for an order to that effect.* The policy of the Commission is to make approved settlement agreements public immediately, in the absence of exceptional circumstances. [emphasis added]

[26] We are of the view that the particular circumstances are unusual and warrant keeping the Settlement Agreement confidential until the earlier of: (1) the release of the decision of the ASC Limelight Proceeding; and (2) the day of the commencement of the substantive hearing of the Commission Limelight Proceeding. We are satisfied that after balancing all the relevant factors, imposing confidentiality for what we anticipate will be a brief period of time, outweighs the desirability of releasing the settlement terms at this time, particularly since the Order permits Staff to fulfill its disclosure obligations to the Other Respondents.

Dated at Toronto, this 13<sup>th</sup> day of August, 2007.

“Lawrence E. Ritchie”

“Robert L. Shirriff”

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Lawrence E. Ritchie

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Robert L. Shirriff