

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-2615

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

LAKE ONTARIO CEMENT, LTD.  
2 Canton Street  
Toronto, Ontario, Canada

File Nos. 2-12579  
81-99-1

Section 12(h) of the Securities Exchange Act of 1934

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW  
AND BRIEF IN SUPPORT THEREOF

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Division of Corporation Finance

## I PRELIMINARY STATEMENT

Pursuant to Rule 16(d) of the Commission's Rules of Practice, 17 CFR 201.16(d), the Division of Corporation Finance (Division) submits the following proposed findings of fact and conclusions of law and brief in support thereof. 1/

## II STATEMENT OF THE CASE

### A. Nature of Proceedings

These proceedings were ordered by the Securities and Exchange Commission (Commission) on September 10, 1970, pursuant to Section 12(h) of the Securities Exchange Act of 1934, as amended, (Exchange Act), 15 U.S.C. 781(h), to determine whether to grant the application of Lake Ontario Cement, Ltd. (Applicant) for an exemption from the requirements of Section 15(d) of the Exchange Act, 15 U.S.C. 78o(d), by reason of its compliance with the provisions of Rule 12(g)3-2(b) of the General Rules and Regulations promulgated under the Exchange Act, 17 CFR 240.12(g)3-2(b). A public hearing was ordered in the matter of the aforementioned application for 10:00 a.m. on October 7, 1970 at the Commission's headquarters office in Washington, D.C. The public hearing was postponed a number of times and cancelled by order of Warren E. Blair, Chief Hearing Examiner on June 1, 1972.

During the period October, 1970 to date, Applicant's representatives have had numerous conferences with the Division concerning the application. 2/ As a result of the discussions, the Division and Applicant entered into a stipulation dated May 31, 1972 which was filed with and admitted into the record by the Chief Hearing Examiner, Warren E. Blair, on June 1, 1972. The stipulation provided, among other matters, that the parties waive the Initial Decision of Hearing Examiner and submit the record of proceedings directly to the Commission. On July 3, 1972, Applicant filed with the Commission an amendment to the application requesting that the Commission issue an order pursuant to Section 12(h) providing: (1) that the filing of certain "Proposed Forms" as defined by and on the terms and conditions set forth by Applicant in its amended application will constitute compliance with the provisions of Section 15(d); and (2) that applicant be exempted from the provisions of Section 15(d) during the period January 1, 1968 to the date of any such order.

### B. Issues in Question

Applicant is a public corporation incorporated under the laws of Canada with its principal offices in Toronto, Ontario. 3/ Applicant is principally engaged in the business of manufacturing and selling cement, commercial aggregate and other related cement products including ready-mixed concrete and concrete blocks. 4/ Applicant became

subject to the reporting requirements of Section 15(d) of the Exchange Act as a result of undertakings contained in registration statements declared effective in 1956 covering the issuance of certain debentures, convertible preferred shares and common shares, and in November 1958 covering the issuance of 671,376 of its warrants and common stock underlying such warrants issued pursuant to a rights offering. 5/

Applicant, in its amended application filed on July 3, 1972, states that it would comply with the reporting provisions of Section 15(d) of the Exchange Act by filing with the Commission certain forms which Applicant refers to as "Proposed Forms" which would contain: (1) all information with Applicant is required to disclose in response to Canadian disclosure requirements; (2) comparative financial statements which applicant is required to file with the Toronto Stock Exchange; (3) as supplemental information, as set forth in Exhibits A to F of Applicant's amended application, the disclosure of information required by Forms 8-K, 10-Q and 10-K for which there are no comparable Canadian requirements; and (4) an index of all material to be filed. Applicant further states in its amended application that it will file the reports within the time periods prescribed by Rules 15d-1, 17 CFR 240.15d-1, applicable to Form 10-K, 15d-11, 17 CFR 240.15d-11, applicable to Form 8-K and 15d-13, 17 CFR 240.15d-13, applicable to Form 10-Q under the Exchange Act. In addition, Applicant states that its "Proposed Forms" would contain the same facing page and be executed in the same manner as prescribed by the General Instructions for Forms 8-K, 17 CFR 249.308, 10-Q, 17 CFR 249.308a and 10-K, 17 CFR 249.310. Moreover, Applicant states that it will include in its "Proposed Forms" any additional information required as a result of future amendments to Forms 10-Q, 10-K or 8-K unless an appropriate exemption is obtained.

In support of its view, Applicant makes a number of arguments. It first contends that acceptance of its application would be consistent with the purposes of the Exchange Act. Secondly, Applicant argues that it is not in the public interest or the interest of its shareholders to require it to expend additional time and money to specifically meet Exchange Act requirements when its "Proposed Forms" would provide the same information. In addition, Applicant argues that the issuance of the requested order is appropriate in view of its particular circumstances, i.e., the fact that a small number of United States shareholders own its stock and the limited amount of market activity in its securities in the United States. Applicant further contends that it has at all times acted in good faith in its dealings with the Commission's staff.

The Division believes that, with five exceptions, the disclosure that would be provided in Applicant's "Proposed Forms" is substantially the same as the requirements for disclosure contained in Commission's Forms 10-K, 10-Q and 8-K. Accordingly, the Division believes that the issuance of the order requested by Applicant to file the information set forth in "Proposed Forms" under the terms and conditions set forth in its application would be, under the standards set forth in Section 12(h), consistent with the public interest and the protection of investors. However, the Division does not believe that Applicant's application for an order exempting it from the provisions of Section 15(d) of the Exchange Act during the period January 1, 1968 to date of the order should be granted.

The issues involved in this case are:

1. Would it be consistent with the public interest and the protection of investors for the Commission to issue an order requiring Applicant to file information as set forth in Applicant's "Proposed Forms" rather than the information required by Forms 10-K, 10-Q and 8-K in view of the standards set forth in Section 12(h)?
2. Would it be consistent with the public interest and the protection of investors to grant Applicant an exemption from the reporting provisions of Section 15(d) of the Exchange Act for the period January 1, 1968 to date?

### III

#### PROPOSED FINDINGS OF FACT

1. Applicant filed with the Commission a registration statement pursuant to the Securities Act of 1933, as amended (Securities Act), 15 U.S.C. 77a, et. seq. which became effective during 1956 covering a proposed offering of \$6,497,400 in debentures, 232,050 convertible preferred shares all of which to date have been redeemed or converted and 696,150 shares of its \$1.00 par value, common stock (See File No. 2-12579)
2. Applicant filed with the Commission a registration statement pursuant to the Securities Act which was declared effective in November 1958 covering a proposed offering of 671,376 shares of common stock and 671,376 common stock warrants at a subscription price of \$2.25 per share.
3. Both of the aforementioned registration statements contained undertakings that Applicant would comply with the provisions of Section 15(d) of the Exchange Act and the rules and regulations promulgated thereunder. (See File No. 2-12579-2).
4. By reason of the aforementioned undertaking, Applicant has, since January 1957, been required to file periodic reports which are required to be filed pursuant to Section 13(a) of the Exchange Act, 15 U.S.C. 78m(a).
5. Since March 1968, Applicant failed to file its semi-annual reports on Form 9-K for its six-month periods ended June 30, 1968, 1969 and 1970 and quarterly reports on Form 10-Q for three month periods ended March 31, 1971, June 30, 1971, September 30, 1971 and March 31, 1972 pursuant to the requirements of Rule 15d-13 promulgated under the Exchange Act (as in effect both before and after its revision on October 28, 1970).
6. Applicant failed to file an annual report on Form 10-K for its fiscal years ended December 31, 1967, 1968, 1969, 1970 and 1971 pursuant to the requirements of Rule 15d-1 promulgated under the Exchange Act.

7. Applicant filed with the Commission its annual report to shareholders for (a) its fiscal year ended December 31, 1967 on February 12, 1968, (b) its fiscal year ended December 31, 1968 on January 15, 1969, (c) its fiscal year ended December 31, 1969 on January 19, 1970, (d) its fiscal year ended December 31, 1970 on January 14, 1971, and (e) its fiscal year ended December 31, 1971 on January 17, 1972. (See File No. 2-12579).
8. Applicant filed with the Commission a notice of annual meeting of shareholders, information circular, and proxy form for (1) its annual shareholders meeting scheduled for January 28, 1970 on January 19, 1970, (2) its annual shareholders meeting scheduled for January 27, 1971 on January 14, 1971 and (3) its annual shareholders meeting scheduled for February 2, 1972 on January 17, 1972. (See File No. 2-12579).
9. Prior to March 31, 1968, Applicant filed the periodic reports required by Section 15(d) of the Exchange Act to be filed. (See File No. 2-12579).
10. Proceedings were ordered by the Commission on September 10, 1970 in this matter and a public hearing scheduled for 10:00 a.m. on October 7, 1970 at the Commission's headquarters office, Washington, D.C. which hearing was postponed a number of times and cancelled by order of the Chief Hearing Examiner, Warren E. Blair, on June 1, 1971 (Administrative Proceeding File No. 3-2615).
11. Applicant and the Division entered into a Stipulation dated May 31, 1972 which stipulation was entered into the record on June 1, 1972 by Order of Chief Hearing Examiner, Warren E. Blair, which Order also ordered that the record be submitted to the Commission without filing of an Initial Decision (Administrative Proceeding File No. 3-2615).
12. Applicant and its subsidiaries are engaged in the manufacture and sale of cement, commercial aggregate and other related cement products including ready-mixed concrete and cement blocks (AA Exhibit B, p. 5).
13. Applicant is incorporated in Canada with its headquarters offices in Toronto, Ontario (File No. 2-12579).
14. Substantially all of the business of Applicant and its subsidiaries is carried on in Canada (AA, Exhibit 5, p. 6).
15. Applicant has issued and outstanding 4,223,461 shares of \$1.00 par value common stock held by 4,983 stockholders as of May 25, 1972 of which 230,650 shares are owned by 1,210 persons residing in the United States (S 3).
16. Applicant has no other equity securities outstanding (S 3).
17. Applicant's aforementioned common stock is listed for trading on the Toronto Stock Exchange in Ontario, Canada (S 3).

18. Applicant's common stock is traded in the over-the-counter market in the United States, but not listed on any securities exchanges (S 3).

19. Applicant's securities are quoted by brokers in the National Daily Quotation Lists ("pink sheets") and during the period January 1 to April 30, 1972 trading in the Applicant's securities in the over-the-counter market in the United States amounted on a monthly basis to about four transactions involving 700 shares (S 3).

20. For the year ended December 31, 1971, 441,700 common shares of Applicant's stock were traded on the Toronto Stock Exchange, with high and low prices of \$3.20 and \$1.85 respectively (S 4).

#### IV

##### PROPOSED CONCLUSIONS OF LAW

1. Applicant should be ordered to file the information set forth in the "Proposed Forms" as defined in and on the terms and conditions set forth in its application dated June 28, 1972.
2. Applicant should not be exempted from the provisions of Section 15(d) during the period January 1, 1968 to date.

#### V

##### THE DIVISION'S ROLE AS A PARTY IN PROCEEDINGS ORDERED PURSUANT TO SECTION 12(h) OF THE EXCHANGE ACT

The Division believes it appropriate to discuss its role as a party in proceedings ordered by the Commission pursuant to Section 12(h) of the Exchange Act. The Division, by delegated authority from the Commission, has been charged with various injunctive and administrative enforcement responsibilities under the Exchange Act. <sup>6/</sup> Among such delegated responsibilities is the "prosecution" of administrative proceedings ordered pursuant to Section 12(h). <sup>7/</sup> The Division, as a party in Section 12(h) hearings is not necessarily an adversary or a "prosecutor" as it is in proceedings ordered by the Commission under other sections of the Exchange Act, i.e., Section 15(c)(4), 15 U.S.C. 78o(c)(4). Section 15(c)(4) of the Exchange Act is a compliance section and by its very nature places the Division in an adversary role. Section 12(h), on the other hand, is a broad and general provision providing for exemptions from the various, disclosure provisions of the Exchange Act based upon certain standards. Application for such exemptions may be, and have been granted where the Commission believes that the granting of an order is warranted and not inconsistent with the public interest or investor protection. <sup>8/</sup>

The Division believes that its role as a party in proceedings ordered under Section 12(h) is twofold. First, it is the party responsible for the development of a factual record upon

which the Commission may make its determination whether to grant or deny an application for an exemption. Such record may be developed in various ways including the use of the Commission's public files, through testimony and affidavits, by means of stipulations and by documentary evidence. Secondly, the Division advises the Commission as to the Division's views in light of the record, initially at the time of the original application for exemption; and, at the conclusion of proceeding, by the submission of findings of fact and conclusions of law.

## VI

### BRIEF IN SUPPORT OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. APPLICANT'S APPLICATION FOR AN ORDER FOR A LIMITED EXEMPTION FROM THE EXCHANGE ACT REPORTING REQUIREMENTS IS NOT INCONSISTENT WITH THE PUBLIC INTEREST AND PROTECTION OF INVESTORS AND MAY BE GRANTED BASED UPON THE STANDARDS SET FORTH IN SECTION 12(h).

Section 12(h) permits the exemption, in whole or part, of any issuer or class of securities by reason of the number of public investors, amount of trading interest in the securities, nature and extent of Applicant's activities including the income or assets of the issuer from the general disclosure requirements of the Exchange Act provided such an exemption is not inconsistent with the public interest and the protection of investors. 9/

Applicant's application for an order pursuant to Section 12(h) that it file the information set forth in "Proposed Forms" on the terms and condition as set forth in its application results in very limited substantive exemption from the Exchange Act Reporting requirements. Applicant's "Proposed Forms" contain all the information which it is required to file in response to Canadian disclosure requirements. 10/ Applicant proposes to supplement such material by filing additional information required by the Commission's forms but not by Canadian authorities. In addition, Applicant has agreed to file the "Proposed Forms" within the time periods prescribed by the rules promulgated under the Exchange Act for the filing of Forms 10-K, 10-Q and 8-K and to file any information required to be filed by any future amendments to the Commission's forms unless an exemption is obtained. 11/ Applicant's principal reason for seeking the exemption is to avoid the additional expenditures of time and money necessary for the preparation of the information required by the Exchange Act and the rules promulgated thereunder in the prescribed manner set forth in the rules. 12/

The Division has reviewed the "Proposed Forms" and concluded that the information to be provided will be substantially the same as that required by the Commission's forms. The major area in which Applicant would not provide disclosures required by the Commission's forms relates to certain items under Item 1, Business, in Form 10-K. Applicant proposes to make all disclosures required by the aforementioned Item with the exception of disclosures relating to backlog of orders [Item 1(b)(1)], sources and availability of essential raw materials (Item 1(b)(2)], expenditures for research and

development [Item 1(b)(5)] , product line sales and profits [Item 1(c)(2)] and sales and revenue information on foreign operations [Item 1(e)]. 13/ Applicant does not desire to disclose the aforementioned information principally because to do so would place Applicant in a competitive disadvantage with other Canadian companies who are not required to make similar disclosures. 14/ With respect to foreign operations, Applicant points out that most of its business is done in Canada. 15/

Applicant also would not disclose the information required by Item 13 of Form 10-K, Remuneration of Directors and Officers, with respect to remuneration, retirement benefits and other remuneration paid to certain directors and officers on an individual basis. 16/ Applicant will make, however, disclosures of such information on an aggregate basis. 17/ In addition, with respect to Item 14, Options Granted to Management to Purchase Securities, Applicant agreed to disclose options granted or exercised by its officers and directors only on an aggregate basis. 18/ Moreover, Applicant refuses to make the disclosures required by Item 11(a) of Form 8-K, Submission of Matters to Vote of Security Holders, regarding the number of affirmative and negative votes cast in matters submitted for vote of security holders. 19/

With respect to financial statements, applicant will substantially meet the Commission's requirements in this regard with the exception of Part B, Capitalization and Stockholders Equity, of Form 10-Q. 20/ However, Applicant's current capitalization has been disclosed in other reports filed with the Commission and it has agreed to file a current report on Form 8-K to cover any changes in capitalization. 21/

In addition to seeking a very limited exemption, the trading interest in Applicant's securities in the United States is minimal, averaging currently four transactions a month. Applicant has no sponsoring broker in the United States and the majority of its securities transactions occur in Canada. In addition, Applicant is a Canadian company with little business activity in the United States.

It is the Division's opinion that in view of the limited exemption requested by Applicant and the limited interest in the securities of Applicant by United States citizens, the Commission, based upon the standards set forth in Section 12(h), should order Applicant to file the information as set forth in its "Proposed Forms." The Commission has, in the past, granted a much broader exemption from the Commission's reporting requirements than the exemption sought here where the amount of securities transactions were small and costs of preparing the information was not commensurate with the benefits to shareholders. 22/

**B. THE PUBLIC INTEREST REQUIRES THAT APPLICANT'S APPLICATION FOR AN ORDER EXEMPTING IT FROM COMPLIANCE WITH THE PROVISIONS OF SECTION 15(d) FOR THE PERIOD JANUARY 1, 1968 TO DATE BE DENIED.**

In its application, Applicant also requested the issuance of an order granting an exempt on from the provisions of Section 15(d) of the Exchange for the period January 1, 1968 to date. Prior to March 1, 1968, Applicant appears to have complied substantially with the



reporting provisions of the Exchange Act by filing the reports required by such provisions. Subsequent to March 1, 1968, Applicant, on the advise of its counsel, ceased filing the required reports and began filing only its annual report to shareholders and proxy material for use in connection with its annual meetings. 23/ Such filings, while falling short of complying with the requirements of the Exchange Act, did provide some disclosure to shareholders including disclosure of financial information. In addition, Applicant in its dealings with the Commission's staff since the filing of its initial application has attempted, in good faith, to develop an acceptable method of satisfying the Exchange Act disclosure requirements. 24/

Under the aforementioned circumstances, the Division does not recommend that the Commission order Applicant to file amendments to periodic reports or delinquent reports in compliance with the provisions of Section 15(d) for the period January 1, 1968 to date. However, the Division does believe that the Commission should not grant Applicant's application for an order retroactively exempting it to January 1, 1968 from the provisions of Section 15(d). Section 12(h) does not appear to specifically provide for retroactive exemptions from the Exchange Act reporting provisions. In addition, while, in the Division's view, Applicant's application for a prospective exemption is merited, it has not set forth an adequate basis for a blanket retroactive exemption from the Exchange Act reporting provisions. The Division does not believe that limited United States contacts in terms of trading and business operations are a valid basis for the granting of such a broad exemption. Moreover, the granting of a blanket exemption from filing the required reports in the past may prejudice or limit the rights of any shareholders who may want to initiate litigation as a result of any damages which they may have suffered as a result of such failures to file.

## VII CONCLUSION

The Division respectfully requests that:

- 1) Applicant's application for an order of the Commission requiring it to file "Proposed Forms" as defined and on the terms and conditions set forth in its application as constituting compliance with Section 15(d) be granted; and
- 2) Applicant's application for an order of the Commission exempting it from the provisions of Section 15(d) of the Exchange Act for the period January 1, 1968 to date be denied.

Respectfully submitted,

Richard H. Rowe  
John S. Bernas

## CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of July, 1972, I caused to be served by United States mail, postage prepaid, a true copy of the above PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND BRIEF IN SUPPORT THEREOF upon the persons whose names and addresses are hereafter set forth:

Lake Ontario Cement, Ltd.  
By: Denis R.T. White  
2 Carlton Street  
Toronto, Ontario, Canada

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Richard H. Rowe, Assistant Director  
Division of Corporation Finance

1/ The following abbreviations are used herein: AA refers to Applicant's application, and S refers to the stipulation between Applicant and the Division dated May 31, 1972.

2/ See footnote 24 on page 14 for a discussion of disclosure provided to the public by Applicant since the ordering of these proceedings.

3/ See Applicant's annual report to shareholders for its fiscal year ended December 31, 1971 and its annual report on Form 10-K for its fiscal year ended December 31, 1966 in Commission File No. 2-12579.

4/ See AA Exhibit B, p. 5.

5/ See Commission's public file 2-12579.

6/ See 17 CFR 200.18a(5) which lists as one of the duties of the Director of the Division of Corporation Finance

"The institution and prosecution of administrative and injunctive proceedings arising under Sections 12, 13, 15(c)(4) and 15(d) and the determination of whether the available evidence supports the allegations in the proposed complaint."

7/ Id.

8/ See The National Dollar Stores, Ltd., Securities Exchange Act Release No. 8403 (September 1, 1967) Security Savings and Loan, Securities Exchange Act Release No. 9313 (August 25, 1971).

9/ Section 12(h) of the Exchange Act.

10/ See AA p. 5.

11/ See AA p. 6.

12/ See AA p. 4, 6.

13/ See AA, Exhibit B, p. 1 to 8.

14/ See AA, Exhibit B, p. 5 to 7.

15/ See AA, Exhibit B, p. 8.

16/ See AA, Exhibit B, p. 27-28.

17/ Id.

18/ AA, Exhibit B, p. 30-32

19/ See AA, Exhibit C, p. 20-21.

20/ See AA, Exhibit D, p. 7-9.

21/ See Applicant's annual report to shareholders for its fiscal year ended December 31, 1971 in File No. 2-12579 and AA, Exhibit D, page 7-9.

22/ The National Dollar Stores, Ltd., Securities Exchange Act Release No. 8403 (September 1, 1967).

23/ See AA, p. 9-10.

24/ As noted previously, the Division's staff and representatives of Applicant have had numerous discussions regarding Applicant's application. These discussions resulted from the Applicant's filing with the Division of a number of proposals for compliance with the Exchange Act reporting provisions the first of which was submitted shortly after the proceedings were authorized. These proposals were reviewed in detail by the Divisions's staff and both oral and written comments provided the Applicant. In May 1972, subsequent to Applicant making its latest proposal, Applicant and the Division entered into a stipulation providing for submission of the record in the matter directly to the Commission.