Case Name:

Smolensky (Re)

IN THE MATTER OF The Securities Act, R.S.B.C. 1996, c. 418
AND IN THE MATTER OF Arthur Murray Smolensky
AND IN THE MATTER OF The Canadian Venture Exchange Inc.

2001 LNBCSC 129

[2001] B.C.S.C.D. No. 211

2001 BCSECCOM 205

COR No. 01/032

British Columbia Securities Commission

B.W. Aitken and R. Wares

Heard: January 26, 2001.
Decision: February 6, 2001.

Appearing:

For Arthur Murray Smolensky, Mark L. Skwarok.

For The Canadian Venture Exchange Inc., Douglas R. Eyford.

For Commission Staff, Joseph A. Bernardo.

DECISION OF THE COMMISSION

1 This is a hearing and review under section 28 of the Securities Act, R.S.B.C. 1996, c. 418. Arthur Murray Smolensky is asking that we set aside an order of the Canadian Venture Exchange Inc. requiring that Smolensky provide disclosure to the Exchange in connection with an upcoming hearing. Smolensky argues that the Exchange proceeded on an incorrect principle and erred in law in making the order.

BACKGROUND

2 At all material times, Smolensky held senior executive positions with Global Securities Corporation, a member of the Exchange and its predecessor, the Vancouver Stock Exchange.

Exchange staff alleges in an amended notice of hearing dated March 8, 2000 that Smolensky:

* traded shares of Trooper Technologies Inc. on undisclosed information,
* manipulated the price of Trooper's shares, and
* attempted to mislead Exchange staff,

all contrary to the Rules and Bylaws of the Exchange.

3 The hearing on the merits was set for February 5 through 16, 2001. At Smolensky's request, the Exchange hearing panel held a pre-hearing conference on January 10. At the conclusion of the conference the panel made this oral order:

> "We have been able to come to a conclusion dealing with the concessions and comments of counsel.
>
> "We are particularly concerned that this matter has been set for two weeks and has been set for two weeks for almost a year now. We are particularly concerned that this is an administrative hearing and, yes, although there may be some flexibility in terms of the standard to apply, considering the seriousness of the allegations, there is an interest in having it expeditiously dealt with and fairly dealt with.
>
> "In our view if we do not make an order dealing with these matters we may face the possibility of adjournments and delays during the two weeks that have been set for almost a year.
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> "Accordingly, we have decided that we will make an order that the parties comply with the disclosure requirements in the Katz matter. That is, they are to provide each other with a list of witnesses and a summary of their evidence, as well as a list of the documents on which they intend to rely, by the end of next week.
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> "We also anticipate, as in the Katz case, that there may be some revisions to those that are necessary in the judgment of counsel. If there are updates to that they ought to be providing each other with those updates forthwith.
>
> "Additionally, we are mindful of counsel for the Exchange's comments that he is of the view that he is obliged to provide his friend with a summary of any new information that is arguably relevant and that has not been previously provided which may exculpate or inculpate, whether or not the information source is a person who may not be called as a witness.
>
> "We include that as an expectation in view of the fact that counsel has consented to do that and counsel for the respondent has conceded that he finds that acceptable."

4 The deadline for disclosure as a result of this order was January 19. On January 18 we heard an application under section 165(5) of the Act from Smolensky for a stay of the disclosure order, as against Smolensky only, until this

hearing and review was held and a decision rendered. We granted the stay. The hearing and review was heard on January 26.

5 At the conclusion of the hearing and review, we read the following oral decision:

> "We have considered the record and the submissions of counsel. We find that the Exchange hearing panel did not proceed on an incorrect principle or err in law. The panel's order is therefore confirmed.
>
> "Disclosure was to have been made by January 19. We stayed that pending this decision. We therefore order that Mr. Smolensky comply with the Exchange hearing panel's disclosure order by 4:00 p.m. on Monday, January 29, 2001.
>
> Reasons for our decision will follow."

These are the reasons.

ARGUMENTS AND ISSUES

6 Smolensky says that there is no legal support for the proposition that respondents in administrative proceedings are required to make disclosure of their defence. He asks that the Exchange's decision be set aside.

7 The Exchange says that Exchange Rules give hearing panels broad discretion to make procedural orders, and the disclosure order was a proper exercise of that discretion. The Exchange asks that the Exchange's decision be confirmed.

8 Commission staff supports the position of the Exchange.

DISCUSSION

9 The Commission has established in previous decisions that it will generally confirm a decision of the Exchange unless:

> (a) the Exchange has proceeded on an incorrect principle,
> (b) the Exchange has erred in law,
> (c) the Exchange has overlooked some material evidence,
> (d) new and compelling evidence is presented to the Commission that was not presented to the Exchange, or
> (e) the Commission's view of the public interest is different from the view of the Exchange.

The Disclosure Standard

10 Disclosure is a matter of procedural fairness. In Re Cartaway Resources Corporation, [1999] 22 BCSC Weekly Summary 27 the Commission observed (at p. 33) that:

> "Allegations of inadequate disclosure in an administrative context raise the issue of procedural fairness. The Supreme Court of Canada has stated that 'the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case' (Knight v. Indian Head School Division No. 19 of Saskatchewan, [1990] 1 S.C.R. 653, 682 (per L'Heureux-DubÚ J.) and the context to be taken into account therefore consists of the nature and seriousness of the matters in issue, the circumstances, and of course the governing statute."

11 Smolensky argues that criminal law disclosure standards apply to disciplinary proceedings before the Exchange. These are the standards set forth in R. v. Stinchcombe, [1991] 3 S.C.R. 326, a case involving an indictable offence under the Criminal Code (Canada).

12 In Cartaway the Commission considered this argument and rejected it. Smolensky argues that the case of Milner v. Registered Nurses Association of British Columbia (1999), 71 B.C.L.R. (3d) 372, decided since Cartaway, requires the application of the Stinchcombe standard. However, the Commission considered and rejected this argument in Re **Thomas William Cox,** 2001 BCSECCOM 204. Therefore, as the Commission previously found in Re Kevin Patrick O'Neill, [1999] 31 BCSC Weekly Summary 20, the Cartaway disclosure standard applies to proceedings before the Exchange.

13 Stinchcombe was considered in Hammami v. College of Physicians and Surgeons of British Columbia, [1997] 9 W.W.R. 301. As interpreted in Hammami, Stinchcombe may require slightly broader disclosure than Cartaway. Any relevant material gathered in an investigation must be disclosed under both standards. To the extent the two standards differ, the primary distinction is that in addition to "fruits of the investigation", Stinchcombe, at least as interpreted in Hammami, may require disclosure of materials created by staff in connection with the investigation or for the purposes of the hearing, where Cartaway would not.

Disclosure by Respondents

14 Smolensky argues that there is no authority to impose disclosure requirements on respondents. In part his argument is based on analogy to criminal law disclosure standards. Although those standards do not apply to proceedings before the Commission or the Exchange, it is worth pointing out that even in criminal proceedings, where disclosure by an accused is not the general practice, an accused has no absolute right of non-disclosure.

15 Starting with Stinchcombe itself, the court did not rule out the notion of reciprocal disclosure. In discussing the Crown's obligation to disclose, Sopinka J. said (at p. 333):

> "It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this Court in the future but it is not a valid reason for absolving the Crown of its duty."
>
> [emphasis added]

16 Indeed, in some U.S. jurisdictions defendants subject to criminal prosecutions are subject to disclosure requirements.

17 Canadian law already requires or expects disclosure by the defence in criminal matters in some cases. For example:

* notice is required if a party wishes to prove business and other records without a witness: Canada Evidence Act;
* notice is required if a party intends to invoke the Canadian Charter of Rights and Freedoms to challenge the validity of a statute: Constitutional Question Act (British Columbia); and
* the court may draw an adverse inference if an accused fails to disclose an alibi defence to the Crown in advance: R. v. Cleghorn, [1995] 3 S.C.R. No. 73 (Q.L.) (S.C.C.).

18 In Stinchcombe, the court reflected on the evolution of disclosure in litigation (at p. 332):

> "Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met."

19 A requirement that a respondent make disclosure in proceedings before the Exchange (or indeed before the Commission) can only stand if it is consistent with the degree of procedural fairness that applies to those proceedings.

20 In Baker v. Minister of Citizenship and Immigration et al. (1999) 174 D.L.R. (4th) 193 the Supreme Court of Canada articulated the factors to consider in determining the degree of procedural fairness that will apply in a given proceeding. L'Heureux-DubÚ J. began by observing that:

> "I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision maker."

21 L'Heureux-DubÚ J. then identified five factors to consider:

1. The nature of the decision being made and the process followed in making it. In describing this factor, L'Heureux-DubÚ J. said:

   > "The more the process provided for, the function of the tribunal, the nature of the decision-making body and the determinations that must be made to reach a decision resemble judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness."

   Applying this test, we find that disciplinary proceedings before the Exchange tend to the judicial end of the spectrum.

2. The nature of the statutory scheme and the terms of the statute under which the tribunal operates. In Cartaway the Commission noted that the primary of objective securities regulation is the regulation of the market and the protection of the public interest and referred to the Supreme Court of Canada decision in Gregory & Co. v. Quebec Securities Commission [1961] S.C.R. 584 in which the court said (at p. 588):

   > "The paramount objective of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by person therein carrying on such business."

The Commission noted (at p. 36):

> "In several subsequent cases where certain provisions of the Act and powers of the Commission were challenged, the Supreme Court of Canada again confirmed the regulatory nature of the Act and the powers given to the Commission to administer it. See Pezim v. British Columbia Securities Commission, [1994] 2 S.C.R. 557 and British Columbia Securities Commission v. Branch, [1995] 2 S.C.R. 3 in which Sopinka J. and Iacobucci J. noted at page 39 that:
>
> "'[T]he Securities Act is essentially a scheme of economic regulation which is designed to discourage detrimental forms of commercial behaviour. The provisions provided by the legislature are pragmatic sanctions designed to induce compliance with the Act.'"

In Pezim, the court said (at p. 589):

> "It is important to note from the outset that the [Securities] Act is regulatory in nature. In fact, it is part of a much larger regulatory framework which regulates the securities industry throughout Canada. . . .
>
> "Within this large framework of securities regulation, there are various government administrative agencies which are responsible for the securities legislation in their respective jurisdictions. . . . Also within this large framework are self-regulatory organizations which possess the power to admit and discipline members and issuers. The VSE [the Exchange's predecessor] falls under this head."

3. The importance of the decision to the individual affected. Generally, Exchange disciplinary proceedings are of significant importance to an approved person. An individual in these proceedings faces fines, suspension and expulsion.
4. The legitimate expectation of the individual with respect to the procedure to be followed. As an approved person, Smolensky would expect the Exchange to follow the procedures in its Rules and By-laws. Exchange Rule E deals with discipline of Exchange members and approved persons. Rule E.2.09 provides for pre-hearing conferences. Paragraph 2 of that Rule reads:

> "2. At a pre-hearing conference, a Hearing Panel may make any procedural order which it deems appropriate, including without limiting the generality of the above an order . . . b) requiring the Exchange or a respondent to produce documents or give particulars."

5. The authority of the tribunal to set its own procedures. The Exchange has the authority to establish its own procedures for hearings.

22 The application of the Baker factors suggest that disciplinary proceedings before the Exchange attract a fairly high

degree of procedural fairness. However, in the field of securities regulation an approach that is both fair and practical is consistent with the decisions of the Supreme Court of Canada that have considered securities regulation directly.

23 In considering matters before it, the Exchange must consider the public interest in the context of securities regulation. This is true whether it is exercising its discretion in substantive or procedural matters. Determining what is in the public interest in the context of a disclosure order may properly include consideration of factors such as the likelihood of avoiding lengthy adjournments and the promotion of an efficient and fair hearing. In addition, it is appropriate to keep in mind the general virtue of ensuring that alleged wrongdoing in the securities markets is dealt with as promptly as fairness and practicality permit.

24 In our opinion, the degree of procedural fairness that applies to proceedings before the Exchange does not preclude pre-hearing disclosure by respondents as a matter of general principle. The order has to be reasonable in the circumstances and balance fairness to the respondent with other public interest factors.

25 We note that reciprocal disclosure requirements already exist in the realm of securities regulation in Canada. Sections 3.3(1) and 3.5(1) - (3) of the Rules of Practice promulgated under the Statutory Powers Procedure Act (Ontario) for proceedings before the Ontario Securities Commission contain the following reciprocal disclosure requirements:

> "3.3 (1) Each party to a proceeding shall, as soon as is reasonably practicable after service of the notice of hearing, and in any case, at least 10 days before the commencement of the hearing, deliver to every other party copies of all documents that the party intends to produce or enter as evidence at the hearing.
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> "3.5 (1) A party to a proceeding shall, at least 10 days before the commencement of the hearing, provide to every other party and to the Secretary to the Commission a list of the witnesses the party intends to call to testify on the party's behalf at the hearing.
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> "(2) A party to a proceeding shall, at least 10 days before a witness is to testify on the party's behalf at the hearing, provide to every other party a witness statement signed by the witness, or for any witness where such a statement does not exist, statement of the evidence that the witness is expected to give at the hearing.
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> "(3) A witness statement or statement of evidence that the witness is expected to give shall contain,
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> (a) the substance of the evidence of the witness;
> (b) reference to the documents, if any, to which the witness will refer; and
> (c) the witness' name and address or, if the witness' address is not provided, the name and address of a person through whom the witness can be contacted."

26 The Rules of The Toronto Stock Exchange contain essentially identical provisions. Both the OSC and the TSE rules bar the introduction of undisclosed evidence without leave of the tribunal.

The Exchange Disclosure Order

27 In considering whether the Exchange proceeded on an incorrect principle or erred in law we must decide whether

it erred by requiring any disclosure at all from Smolensky, and if not, whether the scope of its order is appropriate in the circumstances.

28 On the basis of the discussion above, we find that the Exchange did not err in law merely by requiring disclosure of Smolensky.

29 As for the scope of its order, it appears that the hearing panel wished to avoid having the period long set for a hearing on the merits taken up with adjournments and interlocutory applications related to disclosure. It is also clear that in the opinion of the hearing panel the allegations against Smolensky are serious and ought to be dealt with during the period set for the hearing. These are all appropriate matters for a hearing panel to consider in these circumstances.

30 The hearing panel's order requires Smolensky to disclose three things: a list of witnesses, a summary of the evidence that those witnesses will give and a list of the documents on which he intends to rely at the hearing. The documents themselves do not need to be produced. In our opinion, the scope of this order is reasonable in the circumstances. If a respondent is to make disclosure, this information would seem to be the minimum that would be required if the disclosure is to be of any use. Indeed, in many cases production of the documents themselves, if not already known to Exchange staff, may be reasonable if disclosure is to fully achieve its purpose. We note that the scope of the order is narrower than would be required in proceedings before the OSC or the TSE.

31 Smolensky argues that the order undermines the privilege attached to his solicitor's brief. There is no evidence before us on that question, but if Smolensky believes that privilege precludes compliance with any part of the Exchange's order, his remedy is to make sufficient disclosure to support his claim of privilege so that the Exchange hearing panel can rule on the issue.

32 We therefore find that the scope of the Exchange's order was reasonable in the circumstances.

DECISION

33 We find that in ordering that Smolensky disclose to Exchange staff a list of witnesses and a summary of their evidence, as well as a list of documents on which he intends to rely, the Exchange did not proceed on an incorrect principle or err in law. The Exchange's order is therefore confirmed.

FOR THE COMMISSION

B.W. AITKEN
R. WARES
Commissioner

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