2002 BCSECCOM 340

COR#02/052

Decision

Harjit Singh Gill

and

Canadian Venture Exchange Inc.

Section 27 of the *Securities Act*, RSBC 1996, c. 418

Hearing and Review

Panel	Joyce C. Maykut, Q.C.	Vice Chair
	Joan L. Brockman	Commissioner
	Roy Wares	Commissioner
Date of Hearing	February 14, 2002	
Date of Decision	April 26, 2002	

Appearing

Georges E. Sourisseau	For Harjit Gill
Douglas R. Eyford	For Canadian Venture Exchange Inc.
Chilwin C. Cheng	For Commission Staff

Decision of the Commission

Introduction

[para 1]

This was an application for a hearing and review under section 28 of the *Securities Act*, RSBC 1996, c. 418, of the Canadian Venture Exchange Inc.'s decision to proceed with disciplinary proceedings against Harjit Singh Gill. Following the hearing on February 15, 2002, counsel for Commission staff advised the Commission and other parties that staff intended to file further written submissions. The parties consented subject to having a right to respond. On March

14, 2002, counsel for Commission staff advised the Secretary to the Commission that staff no longer intended to file further written submissions.

Background

Gill's relevant registration history

[para 2]
On January 8, 1993, Gill completed an application for registration/approval to become a registered representative in British Columbia with Nesbitt Thomson Inc. The application (previously Form 4 now BC Form 31-902) is uniform in every Canadian jurisdiction. The application is used for registration under the Act and for approval by self-regulatory organizations. In the application, Gill identified the British Columbia Securities Commission as the securities commission from which he was seeking registration. He also identified the Investment Dealers Association (IDA), Toronto Stock Exchange and Vancouver Stock Exchange (VSE) as some of the self-regulatory organizations from which he was seeking approval as a registered representative.

[para 3]
On February 1, 1993, the IDA, under authority given to it under the Act, registered Gill as a salesperson with Nesbitt for a period expiring January 31, 1995. At the same time the IDA registered Gill under the Act, it approved Gill as a registered representative under the rules, by-laws and regulations of the self-regulatory organizations of which Gill's sponsoring firm, Nesbitt (subsequently RBC Dominion Securities Inc. and Levesque) was a member. This included the VSE.

[para 4]
On December 16, 1994, Gill applied to renew his registration, on the same terms and conditions as his 1993 application. On February 1, 1995, the IDA renewed Gill's registration for a period expiring on January 31, 1997, on the same terms and conditions as his 1993 application. On April 7, 1995, the IDA transferred Gill's registration (expiry April 6, 1997) to RBC Dominion on the same terms and conditions as his previous applications. On December 4, 1995, Gill applied to transfer his registration to Levesque. On December 14, 1995, the IDA approved Gill's application to transfer his registration (expiry December 13, 1997) to Levesque on the same terms and conditions as his previous applications. On November 13, 1997 Gill applied to renew his registration on the same terms and conditions as his previous applications. On December 14, 1997, the IDA renewed Gill's registration (expiry December 13, 1999) on the same terms and conditions as his previous applications but subject to the outcome of an outstanding VSE investigation. Gill resigned as an employee of Levesque on March 3, 1998 and his registration was terminated on that date.

[para 5]
On September 30, 1998, Gill reapplied to enter the securities industry. He completed a new application for registration/approval to become a registered representative with Merrill Lynch Canada Inc. In a letter dated November 4, 1998 to the IDA, Gill confirmed that as a condition of his registration he consented to be under strict supervision by Merrill Lynch until the outcome of the VSE investigation. On November 12, 1998, Gill was approved as a registered representative, subject to strict supervision of his trading pending the outcome of the VSE's investigation. On May 19, 2000, Merrill Lynch terminated Gill's employment.

[para 6]
The 1993 application that Gill and his sponsoring firm signed, included the following:

> The undersigned hereby certify that the foregoing statements are true and correct to the best of our knowledge, information and belief and hereby undertake to notify the self-regulatory organization in writing of any material change therein as prescribed by any by-law or rule of the respective self-regulatory organizations.
>
> We agree that we are conversant with the by-laws, rulings, rules and regulations of the self-regulatory organizations listed in Question 4.
>
> We agree to be bound by and to observe and comply with them as they are from time to time amended or supplemented, and we agree to keep ourselves fully informed about them as so amended and supplemented. We submit to the jurisdiction of the self-regulatory organizations and, wherever applicable, the Governors, Directors and committees thereof, and we agree that any approval granted pursuant to this application may be revoked, terminated or suspended at any time in accordance with the then applicable by-laws, rulings, rules and regulations. In the event of any such revocation or termination, the undersigned Gill agrees forthwith to terminate his association with the undersigned sponsoring firm and thereafter not to accept employment with or perform services of any kind for any member or member house of the self-regulatory organizations or any approved affiliated company or other affiliate of any such member or member house, in each case if and to the extent provided in the then applicable by-laws, rulings, rules and regulations of the self-regulatory organizations. Our obligations above are joint and several.

> We agree to the transfer of this application form, without amendment, to another of the self-regulatory organizations listed in Question 4 of this application form in the event that at some time in the future the undersigned Gill applies to such other self-regulatory organization.

[para 7]
CDNX delivered a settlement proposal to Gill on August 23, 2001 based on allegations that while he was at Levesque, he contravened the rules of the VSE. The settlement proposal alleged that between January 13, 1997 and September 19, 1997, Gill:

1. engaged in manipulative or deceptive methods of trading in the shares of Sargon Resources Ltd. (Rule F.2.17);

2. accepted an undisclosed remuneration from a person other than Levesque (Rule F.2.30);

3. guaranteed returns on client accounts (Rule F.2.22(1));

4. made future price predictions regarding the shares of Sargon (Rule F.2.22(1));

5. exercised discretion in the handling of Levesque accounts (Rule F.2.22(2)); and

6. participated in an off-the-floor trade (Rule C.1.08).

[para 8]
Gill denied the allegations and rejected the settlement proposal. CDNX then informed Gill that it intended to issue a notice of hearing based on the allegations. On November 7, 2001, Gill applied to the Commission for a hearing and review of the CDNX's decision to institute disciplinary proceedings against him.

The Exchange Merger
[para 9]
On March 15, 1999, the VSE, the Alberta Stock Exchange (ASE), the Montreal Exchange and the Toronto Stock Exchange signed a memorandum of understanding to merge some of their operations, assets and liabilities to create a single national junior equities market.

[para 10]
On October 29, 1999, CDNX was incorporated under the Alberta *Business Corporations Act*. Effective November 1, 1999, the VSE, the ASE, CDNX and 852023 Alberta Ltd., agreed under a merger agreement to combine and merge

under a plan of arrangement the businesses, assets and liabilities of each of the VSE and the ASE through a series of transactions into CDNX, which was to operate the Canadian Venture Exchange. The undertaking, operations, assets and liabilities of each of the ASE, the VSE and their successors ASE Inc. and VSE Inc. and Continued VSE Inc. would become the undertaking, operations, assets and liabilities of CDNX.

[para 11]
On November 24, 1999, the Alberta legislature passed the *Alberta Stock Exchange Restructuring Act*, which repealed the *Alberta Stock Exchange Act*, and allowed the ASE to continue as a corporation, ASE Inc., under the Alberta *Business Corporations Act.*

[para 12]
On November 26, 1999 the following occurred.

1. Under section 245 of the British Columbia *Company Act*, the VSE converted from a special Act company to a company called VSE Inc.
2. Under section 188 of the Alberta *Business Corporations Act*, VSE Inc. continued as if it had been incorporated under the laws of Alberta.
3. Under section 193 of the Alberta *Business Corporations Act*, the Court of Queen's Bench of Alberta approved the plan of arrangement, which was the amalgamation of the two companies ASE Inc. and Continued VSE Inc. into CDNX under section 181 of the Alberta *Business Corporations Act.*
4. CDNX registered its amended articles of incorporation under the Alberta *Business Corporations Act* and enacted CDNX By-Law No. 1 relating generally to the transaction of the exchange’s business and affairs.
5. The British Columbia Securities Commission recognized CDNX as an exchange under section 24(2) of the Act, effective November 26, 1999.

The arguments
[para 13]
In summary, Gill argues that:

1. while the VSE had statutory authority to investigate, initiate disciplinary proceedings against him up until November 26, 1999, when the *Vancouver Stock Exchange Act* was repealed, CDNX does not have any statutory authority to investigate or discipline him for any of the allegations in the settlement offer;

2. Gill is not a party to any contract with CDNX by which CDNX obtained contractual rights to investigate or discipline him for the allegations in the

settlement offer because his registration that was issued under the uniform application was issued by the IDA and not the VSE;

3. alternatively, if there is a contract between CDNX and Gill that gives CDNX jurisdiction to investigate and discipline him for the allegations in the settlement offer, the remedies under that contract are limited to revoking, terminating or suspending privileges with CDNX; and

4. to the extent CDNX's discipline rule purports to confer jurisdiction on CDNX to investigate or discipline Gill for the allegations in the settlement offer, it is of no force and effect as being contrary to public policy.

[para 14]
In summary, CDNX argues that:

1. CDNX is not purporting to initiate disciplinary proceedings against Gill under the exercise of a delegated power under the Securities Act;

2. CDNX obtains its jurisdiction over Gill from the uniform application for registration he first signed in 1993, which is a contract in which Gill expressly agreed to submit to the jurisdiction of the VSE and to be bound by and comply with the By-laws, Rules, rulings and regulations of the VSE;

3. the IDA was acting as an agent for the VSE in granting Gill's registration and the IDA's acceptance of Gill's application was an acceptance on behalf of each of the self-regulatory organizations, including the VSE, that subsequently designated Gill as an approved person;

4. CDNX acquired all of the rights of the VSE under the terms of the uniform registration application and is contractually entitled to stand in the shoes of the VSE and initiate disciplinary proceedings against Gill for conduct that occurred when he was an approved person under the VSE's jurisdiction;

5. CDNX has jurisdiction under its by-laws and rules to investigate Gill's conduct and institute disciplinary proceedings against him for violations of the rules and by-laws of the VSE;

6. the merger did not affect the continuing operation of the contract; and

7. the contract is not void as against public policy.

[para 15]
In summary, Commission staff argues that:

1. CDNX's decision to issue a notice of hearing is not a direction, decision, order, or ruling under the Act and therefore Gill's application for a hearing and review is premature and the matter should be referred back to CDNX;

2. the VSE exercised statutory authority delegated under the Securities Act to regulate persons who trade on the exchange and now CDNX as the new exchange, continues with that statutory authority to initiate disciplinary proceedings against Gill for conduct that occurred while the VSE was the operating exchange; and

3. in the alternative, if the Commission concludes that the uniform application for registration is a contract, Commission staff agrees with CDNX' s arguments that the certificate signed by Gill creates an undertaking to the Commission, the IDA, the VSE and other SROs to abide, and be governed, by their rules and any successor organizations.

[para 16]
The issue
Does CDNX have any contractual authority to initiate disciplinary proceedings against Gill for his alleged breaches of VSE Rules in 1997?

Findings and analysis
[para 17]
It is appropriate to deal first with Commission staff's argument that CDNX's decision to issue a notice of hearing is not a decision subject to review under section 28 of the Act.

[para 18]
We agree with Commission staff that CDNX's decision to issue a notice of hearing is not a decision subject to review under section 28 of the Act. However, because the issue concerns the jurisdiction of CDNX to proceed in circumstances that may apply to other cases, we determined that it was in the public interest to exercise our discretion and make a decision on CDNX's jurisdiction under section 27 of the Act.

[para 19]
Because CDNX is relying on its contractual authority, and not on any statutory authority, to initiate disciplinary proceedings against Gill, our analysis focuses only on this issue. It includes two questions:

1. Did Gill's application for registration (the 1993 application, subsequent renewal and transfer to Levesque) create a contractual relationship between Gill and the VSE?

2. If the answer to that is yes, do the accompanying contractual rights and obligations survive the merger to permit CDNX to take disciplinary action against Gill as described in the settlement offer?

[para 20]
Before examining the nature of Gill's application for registration, it is useful to first review the corporate character of the VSE, its regulatory powers and the status of approved persons.

[para 21]
The VSE was incorporated under the *Vancouver Stock Exchange Act*, which provided that the VSE would operate as an exchange in British Columbia. Section 2(1)(b)(iii) of that Act provided that the VSE could also govern and regulate the conduct of the business and affairs of any person under, or formerly under, its jurisdiction concerning conduct that occurred while the person was under its jurisdiction. Under section 2(1.1) this included members and their employees, as well as any person who applied to the VSE for approval as a registered representative.

[para 22]
Section 2(2) provided that the VSE could enact by-laws for any purpose within its powers and objects. VSE By-law 1.00 also defined registered representatives of members as 'approved persons', who in turn were defined as 'persons under the jurisdiction of the VSE'. VSE also enacted Rule D.1.00, which described when the VSE would approve, transfer or refuse a registered representative's employment with a member.

[para 23]
To further promote its self-regulatory objects, the VSE enacted By-law 5.00. By-law 5.00 set out the VSE's discipline process — how it initiated investigations, proceeded with hearings and imposed penalties against persons under its jurisdiction.

[para 24]
It was in this context that Gill applied for registration and approval as a registered representative.

[para 25]
Gill's application for registration had two purposes:

1. Gill would be registered by the Commission under the Securities Act as a securities salesperson, and

2. Gill would be approved as a registered representative by the self-regulatory organizations of which his sponsoring firm was a member (including the IDA, ME, TSE, VSE).

[para 26]
For the first purpose, under authority given to it by the Commission, the IDA, under the *Registration Transfer Rules*, BC Reg. 193/97, registered Gill as a salesperson under section 34 of the Act initially on February 1, 1993 and on subsequent renewal and transfer dates.

[para 27]
For the second purpose, the IDA, on behalf of the self-regulatory organizations from which Gill had sought approval, approved Gill's application to be a registered representative with Nesbitt. Gill also sought this approval when he transferred to Levesque. Gill voluntarily submitted to the VSE's jurisdiction by choosing to be employed with these firms, as all were members of the VSE. He signed the application as a precondition of his approval as a registered representative in British Columbia. He agreed to be bound by the by-laws, rules, rulings and regulations of the VSE, as these instruments may be amended and supplemented from time to time. He agreed to be registered subject to the outcome of an outstanding VSE investigation.

[para 28]
Did Gill's application for registration create a contractual relationship between Gill and the VSE?

[para 29]
In considering this issue, we were referred to the decision of the Quebec Court of Appeal in *Letellier v. The Montreal Exchange* [1999] J.Q. no.5214. Letellier was the president and director of a brokerage firm registered under the Quebec securities legislation. When the firm applied to become a member of the Montreal Exchange, Letellier sought to become an approved person with the Exchange by signing a uniform application for registration and approval. As a consequence, Letellier became an 'approved person' within the meaning of the Exchange's by-laws. The application Letellier signed was substantially the same as Gill's application for registration.

[para 30]

Following financial difficulties, Letellier's firm was put into bankruptcy and expelled from the Exchange. Subsequently, the Exchange filed disciplinary complaints against the firm and against Letellier. The charges cover the period during which Letellier was an approved person. The Exchange argued, among other things, that Letellier's contractual undertaking was not limited in time and must be given effect without reference to its by-law giving it the jurisdiction to initiate disciplinary proceedings for one year after the departure of approved persons.

[para 31]
Letellier challenged the Exchange's jurisdiction to proceed against him arguing that the by-law was *ultra vires*. The lower court agreed and found the by-law to be *ultra vires*. As a consequence, it concluded that the contractual undertaking of Letellier in the uniform application for registration no longer had any effect.

[para 32]
However the Court of Appeal approached the issue differently. It concluded that there was no reason why the issue of the Exchange's contractual jurisdiction had to be connected to the validity of the by-law. Therefore the court assumed, without in any way deciding, that the by-law was *ultra vires* and that Letellier was no longer an approved person at the start of the disciplinary process before moving on to the nature of Letellier's application for registration.

[para 33]
In considering the nature of Letellier's application for registration and approval, the Court concluded that it, and its acceptance by the Exchange, established a contractual relationship between the parties. Relying on the reasons of Mr. Justice Beetz in *Senez v. Montreal Real Estate Board* [1980] 2 S.C.R. 555, the Quebec Court of Appeal at para. 49 concluded that the Exchange is more like the Real Estate Board in *Senez*, which Mr. Justice Beetz described at page 566 as:

> … more closely resembles the type of voluntarily formed groups which, in English law, is known as "voluntary associations"…but the bylaws of which affect only members and apply only to them [translation]"in a manner based on agreement and of a private nature": *Gagne v. Ouellet* [1958] R.L.102.
>
> In the second volume of the *Traite de Droit du Civil du Quebec*, the author Gerard Trudel, correctly in my opinion, equates the bylaws of such corporations to provisions of a contractual nature.
> …
> It could also be said that a breach by the corporation of its own bylaws equates to a breach of its contractual obligations to its members.

> When an individual decides to join a corporation like the Board [real estate board] he accepts its constitution and the by-laws then in force, and he undertakes an obligation to observe them. In accepting the constitution, he also undertakes in advance to comply with the by-laws that shall subsequently be duly adopted by a majority of members entitled to vote, even if he disagrees with such changes ….in my view the obligation to provide the agreed services and to observe its own by laws with respect to the expulsion of a member as in other respects is similarly of a contractual nature.
> ...
> Relying solely on the enactments and on principle, therefore I conclude that the rules and by laws infringed by the Board are contractual in nature.

[para 34]
Based on this reasoning, the Court in *Letellier* concluded that the Exchange would not have been able to deny Letellier the exercise of his rights and privileges while an approved person. Similarly it concluded that it could not "see for what reason Letellier should, unilaterally for the same period, be able to free himself of all his obligations toward the contracting party".

[para 35]
At para. 52 the Court went on to state that, "Without even invoking any notions of protection of the public, it appears unacceptable to me that a party should unilaterally free himself of his contractual obligations".

[para 36]
As a result, the Court agreed with the Montreal Exchange that Letellier's contractual undertaking was not limited in time and must be given effect without reference to the bylaw. It concluded that the Exchange had jurisdiction to proceed against Letellier based solely on the contractual undertaking of Letellier.

[para 37]
We cannot see why Gill's undertaking in his application for registration and the VSE's consequent approval of him as a registered representative, should be treated any differently. We find that the IDA's acceptance of Gill's application for approval on behalf of the VSE, established a contractual relationship between Gill and the VSE. Gill agreed to be under the jurisdiction of the VSE as an approved person and undertook to be bound by, and comply with, the VSE's by-laws and rules as they may be amended or supplemented. The VSE's approval allowed Gill to exercise his corresponding contractual right to trade securities as an approved registered representative through the facilities of the VSE. Furthermore, we find that Gill's undertaking was a contractual undertaking that gave the VSE

contractual jurisdiction over Gill independent of any statutory jurisdiction flowing from its enabling legislation and by-laws to regulate his conduct.

[para 38]
The next question is whether the accompanying contractual rights and obligations survive the merger to permit CDNX to take disciplinary action against Gill as described in the settlement offer.

[para 39]
To answer this question it is useful to describe some of the legislation involved in the merger process. It is summarized below.

[para 40]
Section 245(1) of the BC *Company Act* provides that a special Act company can convert to a company under the Act. Section 245(2) provides that once the special act corporation is converted into a company under this provision, the substituted memorandum and articles apply to the company in the same manner as if it were a company incorporated under the Act with that memorandum and those articles, and the former charter of the corporations ceases to apply.

[para 41]
Section 246 of the BC *Company Act* provides that a conversion under section 245(2) does not affect any debt, liability, obligation or contract incurred or entered into by, to, with or on behalf of the corporation before the conversion, and legal proceedings in respect of them may be continued or commenced against it in the same manner as if the conversion had not taken place.

[para 42]
Section 188 of the Alberta *Business Corporations Act* provides that an extra-provincial corporation may continue as a corporation under the *Business Corporations Act* as if it had been incorporated under that Act. Specifically section 188 (7) provides, in part, that when an extra-provincial corporation is continued as a corporation under the *Business Corporations Act*:

(a) the property of the extra-provincial corporation continues to be the property of the corporation; and
(b) the corporation continues to be liable for the obligations of the extra-provincial corporation.

[para 43]
Section 181 of the Alberta *Business Corporations Act* provides that two or more corporations may amalgamate and continue as one corporation. Section 186 of the same Act provides, in part, that on the date of amalgamation;

(a) the amalgamation of the amalgamating corporations and their continuance as one corporation become effective;
(b) the property of each amalgamating corporation continues to be the property of the amalgamated corporation; and
(c) the amalgamated corporation continues to be liable for the obligations of each amalgamating corporation.

[para 44]
Section 193 of the Alberta *Business Corporations Act* provides that a court approved "arrangement" includes, an amalgamation and is binding on the amalgamated corporation and all other persons.

[para 45]
The *Alberta Stock Exchange Restructuring Act* repealed the *Alberta Stock Exchange Act* and provided that the ASE could continue under continuance provisions of the Alberta *Business Corporations Act* as if it were an Alberta company.

[para 46]
Section 1(1) of *Alberta Stock Exchange Restructuring Act* provides that:

(a) acquiring exchange means the corporation that becomes the direct owner of all the assets of the continued exchange on completion of the acquisition transaction;
(b) acquisition transaction means a winding-up, dissolution, liquidation or conveyance, whether occurring independently, concurrently or as part of a plan of arrangement that results in the acquiring exchange becoming the direct owner of all the assets of the continued exchange;
(c) continued exchange means the corporation continued under section 2 [ASE Inc. as continued under the Alberta *Business Corporations Act*];
(d) predecessor means any corporation or body corporate, all of the assets of which become directly owned by the acquiring exchange on the completion of the acquisition transaction, and includes the continued exchange;
(e) property includes incorporeal property;
(f) rights includes contractual rights.

[para 47]
Section 3 of the *Alberta Stock Exchange Restructuring Act* provides, in part, that on completion of the acquisition transaction, the acquiring exchange has all the rights, liabilities and obligations of its predecessors.

[para 48]
These provisions, as they applied to the steps described in paras. 9 to 12 above, make clear, and we find, that the property, rights, obligations and liabilities of each of the VSE and the ASE became the property, rights, obligations and liabilities of the CDNX on November 26, 1999. This included the VSE's business of operating an exchange and self-regulatory organization as well as the contractual rights the VSE had against Gill.

[para 49]
While we based our conclusions primarily on a plain reading of the above legislation, we also considered two decisions that concerned similar issues and similar legislation. The first is the decision of *Sign-O-Lite Signs Ltd. v. Carruthers* 2000 BCSC 104, which in turn referred to the second decision of *R. v. Black & Decker Manufacturing Co. Ltd.*, [1975] 1 S.C.R. 411. These decisions confirmed the two well-established legal principles of corporate continuance and amalgamation that we applied here, namely, that:

1. a company, by continuing in another jurisdiction, can change the law by which it is governed, while retaining its existence and identity, complete with the same assets and liabilities, and

2. any two or more companies may amalgamate and continue as one company so that no new company is created and no old company is extinguished.

[para 50]
Based on the above, we find that CDNX has the authority to exercise contractual rights arising from the contract entered into between Gill and the VSE. Furthermore, we agree with CDNX that, since its jurisdiction over Gill is contractual, it is personal and without territorial limitation. As a consequence, we find that CDNX continues to retain contractual jurisdictional over Gill and may issue a notice of hearing against him relating to his alleged breach of the VSE's rules while he was a registered representative with Levesque in 1997.

[para 51]
Finally, as a result of our findings, we conclude that it is not necessary to deal with the other arguments put forward by Gill and Commission staff.

April 26, 2002

[para 52]
For the Commission

2002 BCSECCOM 340

Joyce C. Maykut, Q.C.
Vice Chair

Joan L. Brockman
Commissioner

Roy Wares
Commissioner