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COR#03/060

Decision

John C. Schnurr and the TSX Venture Exchange

Section 28 of the *Securities Act*, RSBC 1996, c. 418

Hearing and Review

Panel	Joyce C. Maykut, Q.C.	Vice Chair
	Neil Alexander	Commissioner
	Roy Wares	Commissioner

Dates of Hearing February 17 and 18, 2003

Date of Decision March 25, 2003

Appearing

John H. Frank For John C. Schnurr

Mark L. Skwarok For the TSX Venture Exchange
Stephen M. Zolnay

Joyce M. Johner For Commission staff

Introduction

- ¶ 1 This is a hearing and review of a June 19, 2001 decision of the TSX Venture Exchange Inc. against John Charles Schnurr. In a nutshell, the Exchange decided that Schnurr is not acceptable to act as a director, officer, key employee of, or a consultant to, any listed company, or its subsidiaries.

Background

- ¶ 2 Although Schnurr resigned as a director of Exchange listed Alantra Venture Corp. in July 2000, he stayed on as an active member of management and as a “legal advisor” to the company. As a result, in April 2001, the Exchange required Schnurr to file a personal information form. The form, and other documents filed by Schnurr, indicated that he pleaded guilty in 1999 to conspiring to launder drug monies contrary to section 465(1)(c) of the *Criminal Code*.

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- ¶ 3 In a letter dated April 26, 2001, to counsel for Alantra, the Exchange stated that in light of Schnurr's guilty plea and role in Alantra, his acceptability as a director, officer or employee of any listed company was under review. The Exchange invited Schnurr to comment in detail before a final decision was made.
- ¶ 4 The documents Schnurr filed with the Exchange included a transcript of the court proceedings at the plea (the agreed facts and counsel's submissions) and the presiding judge's reasons on sentence. The particulars of Schnurr's offence was that he conspired with others to deal with the proceeds of crime, that he did so with the intent to conceal or convert those proceeds, and that he did so knowing that the proceeds were derived through illegal trading in drugs. A judge of the Ontario Court of Justice sentenced Schnurr to a conditional discharge and ordered him to pay a fine of \$60,000.
- ¶ 5 On June 19, 2001, the Exchange decided, under section 1 of Alantra's listing agreement and section 2.4(m) of Exchange Policy 3.1 and "based on the information contained in the above documents," that Schnurr was not acceptable to act as a director, officer, key employee of, or a consultant to, Alantra or its subsidiaries. The Exchange required Schnurr to resign as Alantra's legal advisor and indicated that any listed company that proposed to employ Schnurr in the future must make a formal filing for prior approval.
- ¶ 6 At the hearing and review, Schnurr introduced copies of his consulting agreements with a subsidiary of Alantra to show that he was working 'with' legal counsel as opposed to acting 'as' legal counsel.
- ¶ 7 In summary, Schnurr argues that the decision should be set aside because the Exchange:
- deprived him of his right to liberty, contrary to Section 7 of the *Canadian Charter of Rights and Freedoms*
 - concluded that he had been convicted of an offence, when in fact, he had been discharged
 - failed to recognize that the *Criminal Records Act* bars the Exchange from considering his discharge
 - overlooked material evidence that shows he was not guilty of the charges
 - acted without jurisdiction.

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Issues and analysis

1. Does the decision violate section 7 of the *Charter of Rights and Freedoms*?

- ¶ 8 Section 7 of the *Charter* provides that persons may not be deprived of the “right to life, liberty and security of the person except in accordance with the principles of fundamental justice”.
- ¶ 9 Schnurr argues that the broad prohibition in the decision compromises his right and freedom to enter into contracts in the business community. He also argues that there was a complete absence of fundamental justice because he was not given any notice that the Exchange might impose a prohibition that was broader than the director and officer prohibition referred to in section 2.4 of Exchange Policy 3.1.
- ¶ 10 Section 8(2) of the *Constitutional Question Act*, RSBC 1996, c. 68, provides that when an application is made for a constitutional remedy under the *Charter of Rights and Freedoms*, the remedy must not be granted until after notice of the application has been served on the Attorney General of Canada and the Attorney General of British Columbia. Section 8(5) states that the notice must be served at least 14 days before the day of argument unless the court authorizes a shorter notice.
- ¶ 11 Schnurr served the Attorneys General with notice 13 days before this application. They have advised that they do not intend to appear. The parties agree that the Commission is a court for the purposes of authorizing a shorter notice period under section 8(5) of the *Constitutional Question Act*. We so order and find that the notice given to the Attorneys General complies with section 8(5).
- ¶ 12 Does the *Charter* apply to the Exchange’s decision? In our view it does not.
- ¶ 13 Section 32 of the *Charter* provides that the *Charter* applies:
- (a) to the Parliament and government of Canada ...; and
 - (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
- ¶ 14 Section 1 of Alantra’s Listing Agreement (now section 4.1 of Form 2D) provides as follows:
- 1.1 The Company acknowledges that this agreement applies to all its subsidiaries.

...

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1.3 The Company shall comply with all Exchange requirements applicable to listed companies, including Exchange By-laws, Rules, Policies and procedural requirements...[which] may be in addition to or in lieu of the provision of this Listing Agreement.

...

1.8 The affairs of the Issuer shall at all times be managed or supervised by at least three directors, all of whom shall:

...

1.8.4 be otherwise acceptable to the Exchange.

For the purposes of this agreement, "Director" includes an individual occupying or performing with respect to a corporation or any other person, a similar position or similar function to a Director. Officers, employees of the Company and others engaged by or working on behalf of the Company, shall at the discretion of the exchange, be subject to clauses 1.8.3 and 1.8.4 above.

¶ 15 Section 2.4 of Exchange Policy 3.1, *Prohibitions on Directors and Officers*, in part, tracks the provisions of the listing agreement. It lists those persons who cannot serve as officers or directors of an issuer. It includes the following:

(k) any person who has been convicted of a criminal offence relating to ...money laundering, or any other offences that might reasonably bring into question that person's integrity and suitability as a director or officer of a public company;

...

(m) any person that the Exchange advises is unacceptable to serve as a director or senior officer of an issuer.

¶ 16 We find that the Exchange's authority, and the exercise of it against Schnurr as a key employee of Alantra, and consultant to any subsidiary, flowed from its listing agreement with Alantra. See: *GHZ Resource Corporation v. Vancouver Stock Exchange*, [1993] B.C.J. No. 3106 (Q.L.) at para. 5 (C.A.) aff'd [1993] B.C.J. No. 2041 (Q.L.) (C.A.). We also find that the Exchange in making its decision was not acting as an agent or delegate of government, nor under any provincial or

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federal statutory authority that would bring it within the ambit of section 32 of the *Charter*.

- ¶ 17 Therefore, based on section 32 of the Charter, we find that the Exchange's decision is not subject to the Charter.
- ¶ 18 Furthermore, even if the Exchange's decision was subject to the *Charter*, the jurisprudence confirms that section 7 of the *Charter* does not protect economic rights. This includes the ability to act as a director, officer, employee or consultant to a listed company. See: *Johnson v. British Columbia (Securities Commission)*, [1999] B.C.J. No. 552 (Q.L) at paras. 56-75 (S.C.) aff.'d on other grounds 2001 BCCA 597.
- ¶ 19 Finally, we find Schnurr's argument, that he was not given any notice that the Exchange might impose a prohibition broader than the director and officer prohibition, is without merit. He was notified on April 26, 2001, that his continued involvement with Alantra as an active member of management, in the capacity of legal advisor following his resignation as a director, was under review. Furthermore, the provisions of Alantra's listing agreement clearly state that Schnurr, as an employee or consultant to the company or its subsidiaries, was subject to the Exchange's jurisdiction and discretion to conclude he was unacceptable to continue in any capacity with the company.

a. Did the Exchange commit any reviewable error that warrants Commission intervention?

2.

- ¶ 20 The Commission has stated, in section 4.6 of *BC Policy 15-601 Commission Hearings* and in several decisions, that a hearing and review of an Exchange decision is not intended to provide parties with a second opinion from the Commission. The policy states we will confirm a decision of the Exchange unless:
- (a) the Exchange has erred in law;
 - (b) the Exchange has overlooked material evidence;
 - (c) compelling evidence is presented to the Commission that was not tendered at the original hearing; or
 - (d) the Commission's view of the public interest is different from that of the Exchange.

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- ¶ 21 We have already found that the Exchange has the jurisdiction under Alantra's listing agreement to make the kind of decision it did and that Schnurr received adequate notice of the Exchange's intention to make it.
- ¶ 22 The remaining issue then is whether the decision is reasonable and has been made in accordance with the law, the evidence and the public interest.
- ¶ 23 Schnurr argues that the decision had no basis in fact because it was based entirely on an erroneous finding that Schnurr had been convicted of a criminal offence. In our view, this argument has no merit.
- ¶ 24 The Exchange was aware that Schnurr was not convicted of a criminal offence but pleaded guilty and that the sentencing judge ordered a conditional discharge and a fine. This is supported by the fact that the Exchange specifically did not rely on paragraph 2.4(k) of Exchange Policy 3.1, which provides that persons who have been "convicted" of an offence cannot serve as directors or officers of an issuer. The decision instead refers only to para. 2.4(m) of that Policy.
- ¶ 25 Furthermore, there is nothing to indicate that the Exchange failed to appreciate the significance of Schnurr's conditional discharge.
- ¶ 26 We disagree with Schnurr that his guilty plea is not evidence that he committed an offence because he received a conditional discharge. Before the presiding judge could order a conditional discharge or impose a fine, Schnurr's guilt had to be established. Section 730(1) of the *Criminal Code* provides that an absolute or conditional discharge may be ordered "where an accused ... pleads guilty to or is found guilty of an offence ...". Section 730(3)(a) of the *Code* provides that, following a discharge, an "offender" may "appeal from the determination of guilt".
- ¶ 27 Section 71 of the *Evidence Act*, RSBC 1996, c. 124, provides that proof of a guilty plea is admissible in evidence to prove that the person committed the offence. Clearly, a guilty plea or a finding of guilt constitutes evidence that a person committed an offence, even if the Court ordered an absolute or conditional discharge.
- ¶ 28 We agree with the Exchange that it is entitled to consider criminal proceedings where the offender pleaded guilty and received a conditional discharge and a fine. See *Houle v. Barreau du Quebec*, [2001] J.Q. no. 612 (Sup. Ct.) aff'd [2002] J.Q. no. 4834 (C.A.) and *Jay v. Hollinger Canadian Newspapers, Limited Partnership*, [2002] B.C.J. No. 57 (Q.L.) (B.C.S.C.) at paras. 22, 24, 25 and 29.

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¶ 29 Finally we disagree with Schnurr's argument that the Exchange overlooked material evidence showing that, despite his guilty plea, he was not guilty on the merits of the case. Firstly, we find that the additional documents filed by Schnurr at this hearing and review, are not material. Secondly, we find that the Exchange is entitled to, and obviously did, consider and weigh the guilty plea, the agreed facts, counsel's submissions and all of the presiding judge's reasons on sentence in coming to its conclusion that Schnurr was not acceptable.

Decision

¶ 30 In summary, we find that the Exchange's decision is reasonable and has been made in accordance with the law, the evidence and the public interest.

¶ 31 Accordingly, we dismiss Schnurr's application and confirm the decision of the Exchange.

¶ 32 March 25, 2003

¶ 33 **For the Commission**

Joyce C. Maykut, Q.C.
Vice Chair

Neil Alexander
Commissioner

Roy Wares
Commissioner