# 2005 BCSECCOM 573

**Decision**

**Global Securities Corporation**

**and**

**TSX Venture Exchange**

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

**Hearing**

| | | |
|---|---|---|
| **Panel** | Douglas M. Hyndman | Chair |
| | Neil Alexander | Commissioner |
| | John Graf | Commissioner |
| **Date of Hearing** | January 20, 2005 | |
| **Date of Decision** | September 8, 2005 | |

**Appearing**

| | |
|---|---|
| Robert W. Taylor<br>Jordan Kinghorn | For Global Securities Corporation |
| Larry J. Jackie | For TSX Venture Exchange |
| C. Paige Leggat | For the Executive Director |

**Introduction**

¶ 1 This decision deals with a preliminary application in a review under section 28 of the *Securities Act*, RSBC 1996, c. 418.

¶ 2 The former Canadian Venture Exchange, now the TSX Venture Exchange, conducted a disciplinary proceeding against Global Securities Corporation and three of its representatives. The Exchange made three allegations against Global. Global admitted two of them and the disciplinary hearing panel dismissed the third. Both the Exchange and the executive director of the commission have applied under section 28 for a review of that decision. Global challenges the standing of the Exchange to make the application and seeks to limit the Exchange's role as a party in the hearing and review.

**Background**

¶ 3 The Exchange is a corporation recognized as an exchange under section 24(b) of the Act. Section 26 and the Exchange's conditions of recognition require it to regulate its members and impose discipline for misconduct.

¶ 4 Global is a registered dealer under the Act and a member firm of the Exchange. On August 15, 2001, the Exchange issued a notice of hearing against Global, the manager of its Ladner branch, and two other representatives in that branch. The notice alleged infractions by Global and the three representatives related to trading in options for a client.

¶ 5 The Exchange alleged that Global

- did not ensure that its designated options principal approved a new client application form,
- failed to ensure that the client had executed an options trading agreement, and
- failed to diligently supervise trading in the client's options account.

¶ 6 Global admitted the first two allegations but denied the third.

¶ 7 An Exchange disciplinary panel heard the matter in January and February 2002 and issued a decision on liability on March 13, 2003. The panel found against the three representatives but dismissed the allegation that Global had failed to supervise.

¶ 8 By letters dated April 11, 2003, both the Exchange and the executive director applied under section 28 of the Act for a hearing and review of the finding that Global was not liable for failure to supervise.

¶ 9 On January 4, 2004, the panel issued a decision on penalty. It fined Global $10,000 for the infractions it had admitted and ordered Global to pay $5,000 toward costs. Global has paid these amounts to the Exchange.

¶ 10 Global says the Exchange has no standing to seek a hearing and review of the decision and that the Exchange's role as a party to the hearing and review should be limited to an explanatory role relating to the record and to submissions on jurisdictional issues.

**Arguments**

¶ 11 The Exchange has applied for a hearing and review of the decision under section 28(1), which reads as follows:

> The executive director or a person directly affected by a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy of … an exchange … may apply by notice to the commission for a hearing and review of the matter under Part 19, and section 165 (3) to (8) applies.

¶ 12 Section 165 sets out the procedure for applying, the commission's powers in a hearing and review, and the standing of various parties. Section 165(8) says that "… an exchange is a party to a hearing and review under this section of its decision."

¶ 13 Global argues that

- a decision of a disciplinary hearing panel is a decision of the Exchange,
- a principle of administrative law precludes the Exchange from arguing the merits of its decision on a review or appeal, and
- an interpretation that the Exchange is "a person directly affected" by the decision is both contrary to that principle and not contemplated by the procedures under either the Act or the Exchange rules.

¶ 14 Global says that it would require a clear statement of legislative intent for the Exchange to have the right to seek a review of its own decision and that no such statement of intent appears in either the Act or the rules of the Exchange.

¶ 15 The Exchange argues that

- it is a person, that it is directly affected by the decision,
- it should have the right to seek a review as one of the parties before an independent adjudicative body, and
- a past commission decision interpreted a predecessor exchange as having the right to seek a hearing and review.

¶ 16 Staff support the position of the Exchange, arguing that

- the commission has previously held that an exchange had standing to apply for a hearing and review under section 28,
- the Exchange is a person directly affected by the decision,
- the administrative law principle cited by Global does not apply here, because the disciplinary panel is a separate entity from the Exchange, and
- the Exchange's right to apply as a person directly affected should not be negated by inconsistencies in the procedural provisions of the legislation.

**Analysis**

¶ 17 The key issue here is whether, in seeking or participating in a review of the decision, the Exchange is in the position of an administrative tribunal attempting to make arguments on appeal about the merits of its own decision. Global raises two issues: does the Exchange have the right to apply for a hearing and review of the decision under section 28(1); and should the Exchange's role as a party in the hearing and review be limited? We will deal with the second question first.

*What is the Exchange's role as a party in the hearing and review?*

¶ 18 The case law is clear that a tribunal cannot, absent clear legislative intent to the contrary, appear as a full party with the right to argue the merits of its decisions. In *Northwestern Utilities Limited v. City of Edmonton,* [1979] 1 S.C.R. 684, the Supreme Court of Canada addressed the role of the Alberta Public Utilities Board on an appeal of its decision. The Board had approved an interim rate increase for Northwestern. The City of Edmonton appealed to the Appellate Division of the Supreme Court of Alberta, which set aside the decision. Northwestern and the Board appealed to the Supreme Court of Canada. The Board had a right under its act "to be heard … upon the argument of any appeal." At page 709, Estey J., for the Court, held that this right was limited:

> The Board has a limited status before the Court, and may not be considered as a party, in the full sense of that term, to an appeal from its own decisions. In my view, this limitation is entirely proper. This limitation was no doubt consciously imposed by the Legislature in order to avoid placing an unfair burden on an appellant who, in the nature of things, must on another day and in another cause again submit itself to the rate fixing activities of the Board. It also recognizes the universal human frailties which are revealed when persons or organizations are placed in such adversarial positions.
>
> This appeal involves an adjudication of the Board's decision on two grounds both of which involve the legality of administrative action. One of the two appellants is the Board itself, which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation

> with one of the principals in the contest before the Board in the first instance.
>
> It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations regarding jurisdiction.
>
> …
>
> … To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions.

¶ 19 In *Pacific International et al v. B.C.S.C.* 2002 BCCA 421, the Court of Appeal for British Columbia considered the same issue in an appeal from this commission. Smith J. for the Court ruled that the commission is governed by the rule in *Northwestern Utilities* and said, at paragraph 47, "To permit the Commission to argue the merits on the question of whether it has failed to afford procedural fairness would be to permit the "spectacle" described by Estey J. in *Northwestern Utilities* at 710." However, the Court went on to say, at paragraph 48, that the commission's executive director can appear on an appeal, as "the appellants' protagonist (sic) in this matter" to argue the merits of the decision.

¶ 20 How does this law apply to the Exchange? Would letting the Exchange make arguments on the merits of the decision create the spectacle that concerned the courts?

¶ 21 Global says that, because the Exchange created the disciplinary panel to carry out functions under the Exchange rules, the panel is merely an agent of the Exchange. Therefore, Global says, the decision of the disciplinary hearing panel is a decision of the Exchange and *Northwestern Utilities* says the Exchange cannot be permitted to make arguments on the merits of its own decision.

¶ 22 Rule E.1.00 of the Exchange provides for the discipline of persons under the jurisdiction of the Exchange. It empowers the Exchange and its staff to conduct investigations and initiate disciplinary proceedings through notices of hearing. The hearing rule (described in the next paragraph) authorizes the Exchange to be represented by counsel in any disciplinary hearing. It is clear from the rules, and from actual practice, that the Exchange staff act as the investigators and prosecutors for disciplinary matters.

¶ 23 Rule E.2.00 of the Exchange creates an elaborate process for the appointment of a "Hearing and Review Chairperson Roster", consisting of lawyers, and a "Disciplinary Hearing Panel Roster", consisting of current or retired representatives of member firms. The rule provides for the appointment for each proceeding of a disciplinary hearing panel, consisting of one person from the chairperson roster and two from the hearing panel roster. The rule authorizes the panel to conduct a hearing, to make a decision to dismiss the allegations or find them proven in whole or in part, and, if appropriate, to impose penalties. It requires the panel to provide its decision and reasons in writing. The panel's decision is final, subject to a review by this commission, except that the panel itself may revoke or vary it.

¶ 24 In *Katz v. Vancouver Stock Exchange* (1995) 14 B.C.L.R. (3d) 66 (B.C.C.A.), aff'd [1996] 3 S.C.R. 405, the Court of Appeal considered a similarly structured hearing panel of the former Vancouver Stock Exchange, a predecessor of the Exchange. Katz alleged that there was a reasonable apprehension of bias because the hearing panel lacked institutional independence from the VSE. In rejecting that assertion, the Court said, at 81, "It cannot be said in this case that there exists a direct connection between the prosecutor and the decision maker."

¶ 25 The clear view of the Court in Katz was that, even though the VSE created the hearing panel, it operated independently from the VSE as an adjudicative body.

¶ 26 Just as in *Katz*, the disciplinary hearing panel established by the Exchange is an independent adjudicative body, separate from the Exchange. The Exchange rules set up a structure under which the disciplinary hearing panel, operating independently of the Exchange, hears and decides on disciplinary matters that the Exchange puts before it. The disciplinary hearing panel is a purely adjudicative body, with no role in directing Exchange staff or setting policy priorities. In this case, it adjudicated a proceeding in which the Exchange was one of the parties. Accordingly, there is nothing untoward in letting the Exchange make arguments before the commission about the merits of the hearing panel's decision. Indeed, it would be inappropriate for the Exchange not to play that role.

*Does the Exchange have standing to apply for a hearing and review?*

¶ 27 We now turn to the second issue. For this matter, it is moot. The executive director has applied for a hearing and review, so there will be one, and the Exchange is a party with the right to argue the merits of the decision. However, the parties have asked us to rule on whether the Exchange can apply for a hearing and review under section 28.

¶ 28 In two previous proceedings of this commission, the Investment Dealers Association has applied under section 28 for reviews of decisions by its hearing

panels. In neither case did the commission rule on whether the IDA had standing to apply for the review. (See *Re Robert Peter Gawthrop*, 2004 BCSECCOM 608, and *Re Carolann Steinhoff* 2004 BCSECCOM 666.) The Ontario Securities Commission accepted a hearing and review application from IDA staff in *Staff of the Investment Dealers Association of Canada v. Dimitrios Boulieris* (2004), 27 O.S.C.B. 1597, under the equivalent provision of the Ontario *Securities Act*. It does not appear from the decision that the question of the IDA staff's standing to bring the application was specifically considered.

¶ 29 Section 28 gives "a person directly affected by a … decision … made under a … rule … of … an exchange" the right to apply for a review of the matter. The decision of the disciplinary hearing panel to dismiss the allegation against Global was a decision made under a rule of the Exchange. Section 1 of the Act defines a "person" to include a "corporation". The Exchange is a corporation and, therefore, a person. Is the Exchange directly affected by the decision?

¶ 30 In *Re Kevin Patrick O'Neill* [1999] B.C.S.C. 18 Weekly Summary 55, the commission reviewed a decision in which a hearing panel ordered the former Vancouver Stock Exchange to disclose some documents to the respondent O'Neill in a disciplinary proceeding. The VSE applied under section 28 for a hearing and review of that decision. The commission heard submissions on whether the VSE had the right to seek a review.

¶ 31 At page 3 of its decision, the commission discussed the interpretation of "directly affected":

> The words 'directly affected' should be interpreted in light of all the relevant circumstances. The Commission must consider:
>
> (a) the nature of the power that was exercised,
> (b) the decision that was made;
> (c) the nature of the complaint being made by the person requesting the hearing and review; and
> (d) the nature of the person's interest in the matter.
>
> See *Re Instinet Corporation* (1995), 12 C.C.L.S. 23 (Ontario Securities Commission) and *In the Matter of Bradstone Equity Partners Inc. et al.* [1998] 23 B.C.S.C. Weekly Summary 15 (British Columbia Securities Commission).

¶ 32 Then at page 5 the commission applied this test to the case before it:

> One of the Exchange's most powerful tools in fulfilling [its] regulatory role is the disciplinary hearing. The decisions of Exchange hearing panels, both interlocutory and final, interpret and apply Exchange rules and by-laws, give direction to the securities industry as to appropriate standards of conduct, serve as precedents for the decisions of future hearing panels and, when they include a penalty, act as deterrents to contraventions of the Exchange's rules and by-laws.
>
> The decision in issue clearly sets an important precedent respecting the disclosure requirements to be met by the Exchange in its disciplinary hearings. Further, the decision actually orders the Exchange to do something, namely to disclose certain documents to O'Neill. In these circumstances, we find that the Exchange is directly affected by the decision, within the meaning of section 28(1) of the Act.

¶ 33 The commission then examined the procedural requirements of section 28, which Global has also pointed out in this case:

> Though we have made that finding, we must also consider the wording of subsections (2) and (3) of section 28. Those subsections appear to be drafted on the assumption that only the Executive Director or the respondent will ever apply for a hearing and review. Specifically, section 28(2), which applies when the applicant is a person other than the Executive Director, does not require that a copy of the notice be sent to the respondent. Thus, it appears that the respondent is the only person other than the Executive Director contemplated as a potential applicant under section 28(1) of the Act.
>
> The apparent inconsistency between the broader wording of the enabling provision in section 28(1) and the narrower wording of the procedural provisions in section 28(2) and (3) does not affect our finding. The Commission has, in the past, found persons other than a party to be directly affected by a decision of the Exchange and permitted them to apply for a hearing and review. See *Bradstone*, supra. As well, to interpret section 28 so as to conclude that the Exchange would not be required to give notice of an application for a hearing and review to a respondent such as O'Neill ignores both the principles of procedural fairness and natural justice which apply to hearings before the Exchange and the circumstances before us, where O'Neill has been given notice. Finally, as we have found that the Exchange has established that they are directly affected by the decision, it would be patently unfair to deny them the right to apply for a hearing and review of that decision solely on the basis that the procedural

requirements in section 28(2) and (3) appear to be inconsistent with that finding.

Therefore, we find that the Exchange may apply to the Commission for a hearing and review of the decision, pursuant to section 28(1) of the Act.

¶ 34 Global says the *O'Neill* decision is wrong and that we should not follow it. Alternatively, Global says, it does not apply here because in *O'Neill* the hearing panel made an order that the Exchange do something, which has not happened here.

¶ 35 Section 28 provides for the commission to review a wide variety of decisions made by recognized exchanges and self-regulatory bodies, which are subordinate agencies in the regulatory system. Some decisions, like the one in this case and the others we have referred to, are made by adjudicative panels following a contested hearing. Others follow a less formal process, like decisions by exchange officers to accept or refuse a listing or to halt or suspend trading. (See, for example, *Re Merlin Resources Inc.*, [1994] 30 B.C.S.C. Weekly Summary 6.)

¶ 36 Section 28 uses the words "directly affected" to limit who has the right to initiate a commission review of a decision. When the person seeking a review was not a party in the process leading to the decision, the commission must consider and decide whether the person is (as in *Bradstone*) or is not (as in *Re the Investment Dealers Association and Ian Scott-Moncrieff*, 2001 BCSECCOM 49) directly affected by the decision. When the person seeking the review *was* a party to a contested proceeding that led to the decision, however, the person's interest in the matter is clear and direct, and we can presume that the person is directly affected by the decision.

¶ 37 The commission made this point in *Re RMS Medical Systems Inc. et al* [1999] B.C.S.C. 18 Weekly Summary 62, at page 68:

> Section 28(1) does not require a person who seeks a hearing and review merely to be 'affected' by the decision, but to be 'directly affected'. By including the word 'directly' the legislature must have intended a narrowing of the word 'affected' and indeed the authorities have tended to agree.

¶ 38 After a review of the case law, the commission concluded at page 70:

> These cases establish that a person directly affected has to be someone who is affected by the terms of the order or decision, not just the incidental effects of the decision. These decisions suggest that this is someone *who is*

> *a party to the proceedings that lead to the decision* or someone to whom the terms of the order or decision relate. (Emphasis added.)

¶ 39 The Exchange was a party, adverse in interest to Global, in the disciplinary hearing panel's hearing. We find that the Exchange is directly affected by the decision of the disciplinary hearing panel to dismiss the allegation against Global.

¶ 40 Is there any basis in statutory interpretation or public policy that would lead us to conclude that the Exchange should nevertheless not have standing to apply for a review under section 28?

¶ 41 Global says that the procedural provisions in section 28(2) and (3) do not provide for the circumstances of an exchange applying for a review and therefore indicate that the Legislature did not intend the Exchange to have the right under section 28(1) to apply for a review. The commission considered and rejected this argument in *O'Neill* (see the passage quoted above) and we agree with that conclusion.

¶ 42 In the hearing, we asked the parties to comment on how the circumstances of the Exchange under section 28(1) compare with the circumstances of the executive director under section 167(1), which gives a person directly affected by a commission decision the right to seek leave to appeal the decision to the Court of Appeal. Since the executive director is a party in all hearings before the commission, the analysis above suggests that the executive director would have the right under section 167(1) to seek leave to appeal a commission decision. However, the commission has taken the view that the executive director should not, as a matter of policy, appeal a commission decision. That view is based not on whether the executive director is directly affected by the decision but on the fact that our decisions are made by commissioners who are responsible for setting the policy that the executive director is bound to follow.

¶ 43 The Exchange is in a very different circumstance. The disciplinary hearing panel is a purely adjudicative body. It interprets the Exchange's rules but otherwise has no role in setting policy. Neither the Exchange nor any of its staff are under the panel's direction. There is no reason in policy why the Exchange should not be permitted to apply for a hearing and review of the decision.

¶ 44 Finally, we must consider the wording of the Exchange's rule E.2.12[B]. It says

> 1. Subject to Rule E.2.12[B] below, the decision of the Disciplinary Hearing Panel shall be final, subject to the right of hearing and review and appeal provided for by any applicable securities legislation.

2. The Disciplinary Hearing Panel may revoke in whole or in part or vary any decision made by them.

¶ 45 Does the statement that the decision is final preclude the Exchange from exercising its right under section 28 to seek a review of the decision? In our view that is not what the rule means by saying the decision is final. Although the rule is not perfectly clear, we interpret it to say that there is no right to have the decision reviewed within the Exchange's structure. If a party is dissatisfied with a decision of a hearing panel, its recourse is to ask the panel to change the decision or to apply to the commission under section 28.

¶ 46 The Exchange could tie its own hands so that it could not seek a review by the commission but the words of section E.2.12[B] do not do that. To achieve that outcome, the rule would have to say that the decision is final subject to the *respondent's* right to seek a review from the commission and, preferably, to say explicitly that the Exchange is not permitted to seek a review. A plain reading of section 28 gives the Exchange the right to apply for a review. Section E.2.12[B] of the Exchange rules does not clearly deny the Exchange the option of pursuing this right.

**Decision**

¶ 47 Accordingly, we dismiss Global's challenge to the Exchange's standing to apply for a hearing and review and its request that we limit the Exchange's role as a party in the hearing and review.

¶ 48 September 8, 2005

¶ 49 **For the Commission**

Douglas M. Hyndman
Chair

Neil Alexander
Commissioner

2005 BCSECCOM 573

John Graf
Commissioner