

2009 BCSECCOM 695

Geosam Investments Limited and TSX Venture Exchange Inc.

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

Panel	Brent W. Aitken Don Rowlatt David J. Smith	Vice Chair Commissioner Commissioner
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Dates of applications November 3 and 9, 2009

Dates of rulings November 4 and 12, 2009

Date reasons issued December 4, 2009

Appearing

Michael Donaldson For Geosam Investments Limited

Mark Skwarok For TSX Venture Exchange Inc.
Melanie Harmer

J. Brent MacLean For Cordy Oilfield Services Inc.
Morgan Burris

Kristine Mactaggart Wright For the Executive Director
Shawn McColm

Reasons for rulings

- ¶ 1 On October 30, 2009 Geosam Investments Limited applied for a hearing and review under section 28(1) of the *Securities Act*, RSBC 1996, c. 418, of a decision of the TSX Venture Exchange Inc. approving a private placement by Cordy Oilfield Services Ltd. Cordy sold 30 million units under the private placement, each unit consisting of one share and one warrant, at the price of \$0.16 per unit, for proceeds of \$4.8 million. The private placement closed on October 21, 2009.
- ¶ 2 In its application Geosam asked the Commission to stay the decision so that the proceeds of the private placement could be preserved until the disposition of the hearing and review.

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- ¶ 3 On November 3 we heard submissions about whether we had jurisdiction to hear the application, and if so, whether we had the discretion to refuse jurisdiction. On November 4, we ruled that we had jurisdiction, and did not have the discretion to refuse it.
- ¶ 4 On November 9 we heard the stay application. On November 12, we ruled that, until the disposition of the hearing and review, Cordy must deposit an amount equal to the proceeds of the private placement in trust with its legal counsel, and that Cordy must not issue any shares on the exercise of warrants sold under the private placement. We also ruled that the Exchange must not give final approval to the private placement, nor reduce or eliminate the four-month hold period that applies to the sale of securities acquired under the private placement.
- ¶ 5 These are our reasons for the two rulings.

Relevant legislation

- ¶ 6 Section 28(1) of the Act says:
- 28(1) . . . 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.
- ¶ 7 Sections 165(3) to (4) say (with our editorial changes to reflect its application to these circumstances):
- 165(3) Except if otherwise expressly provided, any person directly affected by a decision of [an exchange] may, by a notice in writing sent to the Commission within 30 days after the date on which the [exchange] sent the notice of the decision to the person, request and be entitled to a hearing and a review of the decision of the [exchange].
- (4) On a hearing and review, the commission may confirm or vary the decision under review or make another decision it considers proper.
- (5) The commission may grant a stay of the decision under review until disposition of the hearing and review.

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Ruling on jurisdiction

- ¶ 8 The Exchange and Cordy say that Geosam’s application can, and should, be before the Alberta Securities Commission. In support of this argument, they cite the substantial connection test found in several authorities dealing with the jurisdiction of civil trial courts and the issue of convenient forum and that the Commission applied in *Torudag* 2009 BCSECCOM 9.
- ¶ 9 The matter clearly has a substantial connection to Alberta. Among other factors, Cordy is based in Alberta, all of its officers and all but one of its directors reside there, it is a reporting issuer there, the ASC is its principal regulator under the passport system among Canadian securities regulators, and the ASC oversees the Exchange jointly with the BCSC.
- ¶ 10 Geosam says that although there may be a substantial connection to Alberta, that is not the correct test to apply to applications under section 28(1) (*Torudag*, Geosam points out, was a hearing under section 161(1)). Geosam says that our jurisdiction under section 28(1) is determined solely by the legislation, as is our discretion to decline that jurisdiction.
- ¶ 11 The application falls squarely within the language of section 28(1). The Exchange has made a decision, and Geosam applied for a hearing and review of that decision. There is nothing in the language of section 28(1) that excludes our jurisdiction in those circumstances, assuming that Geosam is a person directly affected by the decision. The parties did not make submissions at the November 3 hearing about whether Geosam is a person directly affected by the Exchange’s decision. We find that it is.
- ¶ 12 The Commission therefore has jurisdiction to hear the application. Does it have the discretion to refuse that jurisdiction?
- ¶ 13 In our opinion, it does not. Section 28(1) invokes the operation of sections 165(3) through (8). Section 165(3) says that, “except if expressly otherwise provided”, any person directly affected by a decision of the Exchange “is entitled to a hearing and review” of that decision, assuming the person meets the notice requirement. The language of entitlement in section 165(3) precludes any exercise of discretion by the Commission to refuse jurisdiction.
- ¶ 14 The Exchange and Cordy say that section 165(4) gives that discretion because it authorizes the Commission on a hearing and review to confirm or vary the decision under review “or make another decision it considers proper.”

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¶ 15 We disagree. That section is not sufficient to vitiate an applicant's entitlement to a hearing and review under section 165(3). Section 165(3) begins with the words, "except if expressly otherwise provided." In our opinion, those words require that any limitation on an applicant's entitlement to a hearing and review be contained in express language to that effect. Section 165(4) does not contain that express language and is therefore not broad enough to give the Commission the discretion to refuse jurisdiction and thereby deny the applicant of its entitlement to a hearing and review under section 165(3).

November 12 ruling

¶ 16 The parties agreed that the tests for granting a stay are that:

- there is a serious question to be tried
- there will be irreparable harm if the stay is not granted
- the balance of convenience favours granting the stay

¶ 17 The private placement involved significant dilution and raised control issues. The Exchange did not require shareholder approval, which Geosam says was required under Exchange rules. Without judging whether the Exchange's decision was appropriate, it is clear that the Geosam application raises serious issues.

¶ 18 In considering irreparable harm and balance of convenience, we must consider the harm to the public interest as well as any harm to Geosam. In this case, the factors relevant to the public interest include the fairness of the private placement to all Cordy shareholders, and the extent to which it affects the integrity of the Exchange.

¶ 19 If on the hearing and review the Commission concludes that it is in the public interest that Cordy obtain shareholder approval for the private placement, then Cordy will have to seek that approval. It would seem to follow that if it is in the public interest that Cordy obtain shareholder approval, and that approval is not obtained, the securities issued on the private placement ought not to remain issued and outstanding. Indeed, Geosam says that on the hearing and review it will seek to have the private placement unwound in those circumstances.

¶ 20 If that is an appropriate remedy, it will be an empty one if Cordy spends the proceeds of the private placement and has insufficient cash to buy back the shares and warrants. Cordy will be incapable of complying with an order intended to compel or facilitate the unwinding of the transaction.

¶ 21 That outcome would, in our opinion, cause irreparable harm to the public interest. Market participants could well conclude that if improper activity is untaken quickly enough, there will be no meaningful remedy.

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¶ 22 Having found it appropriate to grant a stay, the next question was the nature of the orders we should issue to effect the stay. We must ensure that the terms of the stay will be effective to prevent the potential harm to the public interest that could arise in the absence of a stay. In our opinion, the orders Geosam sought are the minimum necessary to achieve that result.

¶ 23 December 4, 2009

¶ 24 **For the Commission**

Brent W. Aitken
Vice Chair

Don Rowlett
Commissioner

David J. Smith
Commissioner