

# 2009 BCSECCOM 749

## Geosam Investments Limited and TSX Venture Exchange Inc.

### Sections 27 and 28 of the *Securities Act*, RSBC 1996, c. 418

<b>Panel</b>	Brent W. Aitken David J. Smith Suzanne K. Wiltshire	Vice Chair Commissioner Commissioner
<b>Date of application</b>	December 7, 2009	
<b>Date of ruling</b>	December 21, 2009	
<b>Appearing</b>		
Michael Donaldson	For Geosam Investments Limited	
Mark Skwarok Melanie Harmer	For TSX Venture Exchange Inc.	
J. Brent MacLean Morgan Burris	For Cordy Oilfield Services Inc.	
John Forstrom	For Lyncorp International Ltd.	
Kristine Mactaggart Wright	For the Executive Director	

## Ruling

### Introduction

- ¶ 1 Geosam Investments Limited is applying for costs under section 27 of the *Securities Act*, RSBC 1996, c. 418 in connection with its October 30, 2009 application for a hearing and review under section 28(1) of the Act. In that application Geosam sought a hearing and review of a decision of the TSX Venture Exchange Inc. approving a private placement by Cordy Oilfield Services Ltd.
- ¶ 2 On November 12 the Commission ruled, among other things, 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. See 2009 BCSECCOM 614 and 695. Later, the Exchange decided not to defend its decision, and Cordy decided to unwind the private placement.

## 2009 BCSECCOM 749

### **The application**

- ¶ 3 Geosam is seeking costs from both the Exchange and Cordy. It says its application stands or falls on whether we have the power to order costs under section 27.
- ¶ 4 Geosam says its reason for seeking costs is not because Geosam is entitled to them, or because it is fair to order costs, or because Geosam needs the money. The reason, says Geosam, is because it is in the public interest that we order costs.
- ¶ 5 Geosam says that the Commission has the power to order costs under section 27 because the section can and should be interpreted broadly, the power to order costs is not excluded from the section, and that it would be in the public interest to order costs.
- ¶ 6 The Exchange, Cordy, Lyncorp International Ltd., and the executive director all say that the Commission does not have the power to order costs under section 27.

### **Analysis**

- ¶ 7 Section 27 says:
- “27(1) If the commission considers it to be in the public interest, the commission may make any decision respecting the following:
- (a) . . . a direction, decision, order or ruling made under a by-law, rule, or other regulatory instrument or policy of . . . an exchange . . .
- (b) the procedures or practices of . . . an exchange . . .
- (c) the manner in which an exchange carries on business . . . .
- ¶ 8 The Commission is an administrative tribunal and as such has only the powers conferred on it by the Act. Case law has established that the power to order costs must be found in the tribunal’s empowering legislation, either expressly or by implication.
- ¶ 9 The courts will imply a power where it is “necessarily or fairly implied or incidental” to a tribunal’s express powers: Rogers, *Law of Canadian Municipal Corporations*, 2d., Vol. 1, para. 63.32. The implied power will be found if the power would be “sufficiently necessary to the effective and efficient performance of the agency’s mandate that it would be reasonable to assume” that the legislature implicitly gave the agency the power in order to perform its mandate: Macaulay

## 2009 BCSECCOM 749

and Sprague, *Practice and Procedure Before Administrative Tribunals*, Vol. 3, p. 29-10.

- ¶ 10 The Act is not silent on the subject of costs. Section 174 says “a person presiding at a hearing required or permitted” under the Act may order persons whose affairs are the subject of the hearing to pay “prescribed fees and charges . . . incurred by . . . the commission or the executive director.” The fees and charges are prescribed in section 22 of the *Securities Regulation* BC Reg. 196/97.
- ¶ 11 Sections 13(3), 150 and 160 deal with investigation costs. They provide for cost recovery by the Commission or the executive director from a person subject to administrative or criminal investigations.
- ¶ 12 Sections 141.1(5), 141.2(5) and 141.3(3) provide for cost recovery by the executive director for compliance reviews of exchanges, self-regulatory organizations, and market participants.
- ¶ 13 Section 47 of the *Administrative Tribunals Act*, SBC 2004, c. 45, empowers a “tribunal” to order costs between parties. “Tribunal” is defined in the ATA as a tribunal to which some or all of the provisions of the ATA are made applicable under the tribunal's enabling legislation. In other words, the ATA is general legislation whose provisions are adopted piecemeal by the enabling legislation of each tribunal (in the Commission's case, the *Securities Act*). Section 4.1 of the *Securities Act* makes several sections of the ATA applicable to the Commission. Section 47 is not one of them.
- ¶ 14 These legislative provisions are relevant to the application in these circumstances of the principle of statutory interpretation “*expressio unius est exclusio alterius*.” Applied here, the principle would dictate that the Legislature, by including several costs provisions in the Act, and by not making section 47 of the ATA applicable to the Commission, did not intend the Commission to have the power to order costs, except to the Commission or the executive director.
- ¶ 15 The *expressio unius* principle of statutory interpretation is not determinative; indeed the courts have cautioned against a too-strict application of the principle. The principle is based on the implication that a legislature's failure to mention a matter in one context, that it expressly mentions in another, is intentional. “The force of the implication depends on the strength and legitimacy of the expectation of express reference,” according to *Sullivan on the Construction of Statutes*, 5d., p. 244. “The better the reason for anticipating express reference to a thing, the more telling the silence of the Legislature.”

## 2009 BCSECCOM 749

- ¶ 16 In considering whether the Commission has the power to order costs under section 27, we have considered the legislative framework as a whole.
- ¶ 17 The Act contains seven provisions that deal with costs related to compliance reviews, administrative and criminal investigations, and hearings. This repeated appearance of specific provisions related to costs creates a high expectation of express reference on the subject of costs. This alone would make us very reluctant to find that section 27, broadly worded though it may be, is intended by the Legislature to empower the Commission to make other kinds of costs orders.
- ¶ 18 Neither are we persuaded that the power to order costs as sought by Geosam is included in section 27 by implication. That power is not, in our opinion, sufficiently necessary to the effective and efficient performance of the Commission's mandate that it would be reasonable to assume that the Legislature implicitly gave the Commission that power in the language of section 27.
- ¶ 19 Whatever doubt might remain is extinguished, in our opinion, by the Legislature's failure to include section 47 of the ATA in the list of other ATA sections it applied to the Commission in section 4.1 of the Act. In doing so, the Legislature turned its mind to the question of which provisions of the ATA ought to apply to the Commission, and in doing so determined that section 47 would not be one of them. This outcome is consistent with the fact that all of the costs provisions in the Act provide for the Commission and the executive director to recover costs associated with compliance and enforcement activities. None empowers the Commission to order costs otherwise.
- ¶ 20 Given the several sections in the Act that empower the Commission to make costs orders for the Commission and the executive director, and the Legislature's failure to empower the Commission to order costs for other parties in the face of the clear opportunity to do so, the Legislature's silence on the subject in section 27 is indeed telling. We find that the language of section 27 is not broad enough to empower the Commission to order costs on a hearing under that section.
- ¶ 21 That disposes of Geosam's application, but there are two other matters worth mentioning.
- ¶ 22 First, although Geosam made, and we agreed to hear, its application for costs under section 27, it could have applied under section 28(1). Indeed, in its submissions it referred to section 165(4). That section applies to hearings and reviews under section 28(1) and, in language similarly broad to section 27, empowers the Commission to "confirm or vary the decision under review or make another decision it considers proper." Our decision would have been the same had we been considering the application under sections 28(1) and 165(4).

## 2009 BCSECCOM 749

- ¶ 23 Second, Geosam urged that we could find the power to order costs in the reasoning of the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band* 2003 SCC 71. In that case, the Court endorsed the consideration by courts of the public interest when they make costs orders. Geosam said we ought to apply the same reasoning, for the same rationale, in determining whether we have the power to make costs orders under section 27.
- ¶ 24 *Okanagan* is of no value in determining our powers under section 27. That case is not about the power to order costs – it is about the criteria the courts are to consider when ordering costs. As the Court observed, courts (unlike the Commission) have inherent discretion to order costs arising from their equitable jurisdiction. *Okanagan* does not confer the power to order costs where the power did not previously exist.

### **Ruling**

- ¶ 25 We find the Commission does not have the power under section 27 to order costs on a hearing and review. It is therefore unnecessary to consider the other aspects of the application.
- ¶ 26 December 21, 2009
- ¶ 27 **For the Commission**

Brent W. Aitken  
Vice Chair

David J. Smith  
Commissioner

Suzanne K. Wiltshire  
Commissioner