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COR#02/062

Decision

Pan Geo Investment Inc. and Gary Hamill

Section 165(4) of the *Securities Act*, RSBC 1996, c. 418

Hearing and Review

Panel	Joyce C. Maykut, Q.C. John K.Graf Roy Wares	Vice Chair Commissioner Commissioner
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Dates of Hearing April 22-24, 2001

Date of Decision May 28, 2002

Appearing

Gary Hamill	For Pan Geo Investment Inc. and himself
Patricia A.A. Taylor C. Paige Leggat	For Commission staff

Decision of the Commission

Introduction

[para 1]

This is a review of the Executive Director's decision not to renew the registrations of Pan Geo Investment Inc. and Gary Hamill under the *Securities Act*, RSBC 1996, c.418.

Background

[para 2]

Pan Geo's business

Pan Geo is located in Vancouver, British Columbia and Hamill is its sole shareholder, director and officer. Pan Geo offers automated securities advice through its website. The advice, generic or custom tailored at the client's option, is generated by Pan Geo's proprietary software, PortfolioInvestor2000. Hamill developed the software program and the database upon which the advice is based. The database includes global securities with a concentration on growth securities. Hamill selects the securities based on his research and analysis.

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[para 3]

PortfolioInvestor2002 provides an interactive advice service driven by the client's menu choices. Clients arrange their own trading. Under the generic service, clients receive the same advice. Under the custom tailored service, clients receive advice based on client specific information, with some variable options and settings controlled by Pan Geo. Custom designed advice is produced from dedicated computer runs when the private portfolio option is chosen.

[para 4]

Hamill testified that PortfolioInvestor2002 has consistently outperformed markets in general and other investment advisers. So far, Pan Geo has no clients, from British Columbia or elsewhere.

[para 5]

Pan Geo's and Hamill's history

Pan Geo applied for registration under the Alberta securities legislation as a securities adviser, with Hamill as its advising director and officer. On May 13, 1999, the Alberta Securities Commission refused to register Pan Geo as a securities adviser stating that Hamill's experience and training was not equivalent to the proficiency requirements under the Alberta legislation.

[para 6]

Pan Geo then applied for registration as a securities adviser in the United States. On April 11, 2000 the United States Securities and Exchange Commission registered Pan Geo as an investment adviser under section 203 of the *Investment Advisers Act of 1940*. In the United States, this category of registration permits Pan Geo and Hamill to provide advice custom tailored to meet the needs of clients.

[para 7]

On October 5, 2000, Pan Geo applied for registration under the Act as a securities adviser, with Hamill as its advising director and officer. Initially, the Executive Director and his staff questioned whether Hamill's education and industry experience met the proficiency requirements for that category of registration.

[para 8]

Hamill testified he provided a full description of his education and experience in his application, which included the following.

[para 9]

He received a Masters of Science (geophysics) from the University of Calgary and a Masters in Business Administration (finance) from the University of Alberta. He completed the Canadian Securities Course, the Canadian Investment Finance Course, Part I and the Canadian Investment Finance Course, Part II. He held the designations of Professional Engineer (British Columbia) from 1987 to 1990 and Professional

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Geophysicist (Alberta) from 1980 to 1985. He testified he practised as a professional in these areas without any client complaints.

[para 10]

He began developing the PortfolioInvestor2000 program in the late 1980s and since 1997 he has been working exclusively on developing a second version of the software. He said he has researched thousands of securities issuers from around the world in the same way as any securities analyst or adviser. As the creator of PortfolioInvestor2000 and its database, he said he developed a wealth of securities research and analytical experience that is equivalent to, or surpasses, that of most securities advisers.

[para 11]

The Executive Director accepted Hamill's education and experience as equivalent to the proficiency requirements in the Commission's registration policy BC Policy 31-601, *Registration Requirements*. On February 16, 2001, the Executive Director registered Pan Geo as a securities adviser for a period expiring December 31, 2001. Hamill was registered as Pan Geo's advising director and officer. Under the registration, Pan Geo and Hamill could provide securities advice provided the advice was not "tailored to the needs of specific clients".

[para 12]

Circumstances precipitating this hearing

Sometime in November 2001, Commission staff reviewed Pan Geo's website. Commission staff considered that Pan Geo was acting outside the scope of its registration because its website offered securities advice "tailored to the needs of specific clients". On November 28, 2001, the Director of Capital Markets Regulation advised Hamill and Pan Geo that he was considering refusing to renew their registration.

[para 13]

Hamill confirmed to staff that it was Pan Geo's intent to offer British Columbia residents the generic advice only, while residents in the United States were offered generic advice and custom tailored advice. In a letter dated December 6, 2001, staff recommended to Pan Geo that it add disclaimers to its website to clarify that the custom tailored advice, and the additional know-your-client type of information required to generate it, was directed only to residents of the United States and not to residents of British Columbia. To assist Pan Geo, staff gave Hamill suggested wording for the disclaimers and suggested where they should be inserted on the website to satisfy staff's concerns. Pan Geo complied immediately. Hamill testified that he is willing to make any further changes to Pan Geo's website that will help it comply with the legislation.

[para 14]

On December 20, 2001 staff notified Pan Geo that a jurisdictional issue had been overlooked. The disclaimers would not be sufficient to address the issue of Pan Geo acting outside the scope of its registration. Staff said that Pan Geo's business was located in British Columbia and therefore it was restricted by its category of registration from

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providing any advice custom tailored to meet the needs of specific clients, regardless of where the clients resided.

[para 15]

On December 31, 2001, the Director of Capital Markets Regulation renewed Pan Geo's and Hamill's registrations for one month. On January 16, 2002, the Director of Capital Markets Regulation refused to renew Pan Geo's and Hamill's registrations following their expiry on January 31, 2002. The Director made the decision under section 35(1) of the Act, after giving Pan Geo and Hamill an opportunity to be heard under section 35(3) of the Act. Pan Geo and Hamill requested this hearing and review under section 165(3) of the Act. The Commission stayed the decision until we made our decision on the review and directed that the hearing and review should proceed as a new hearing.

Arguments

[para 16]

In summary, Commission staff argued that it is not in the public interest to renew the registration of Pan Geo and Hamill because:

1. Although Pan Geo changed its website to clarify that its custom tailored advice was available to United States residents only and not to British Columbia residents, Pan Geo is still not suitable for registration because its category of registration prohibits it from providing any advice tailored to meet the needs of specific clients regardless of where the clients reside.
2. Although Hamill meets the "education requirements", he is not suitable for registration because he does not have any of the five years of "experience" described in the "proficiency requirements" for his category of registration.

[para 17]

In response, Pan Geo and Hamill argued that:

1. The public interest is not prejudiced in permitting Pan Geo to offer custom tailored advice to residents of the United States. This is particularly so in light of Pan Geo's SEC registration, which specifically permits this kind of securities advice.
2. Hamill's "experience" is more than equivalent to that required in the policy. Furthermore, the Executive Director already accepted Hamill's "experience" as meeting the "proficiency requirements" when his registration was first granted. To now argue that he does not meet the "proficiency requirements" after a year of being registered is unreasonable and unfair.

[para 18]

Nature of the proceedings

Before dealing with the issues, we want to clarify the nature of these proceedings.

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[para 19]

Commission staff argued that the Commission's direction to proceed by way of a new hearing meant that the Commission could proceed under section 171 of the Act to consider whether Pan Geo should be registered as a securities adviser, with Hamill as advising director and officer, without reference to any of the previous decisions of Commission staff, which they say are irrelevant. We disagree. Under section 171, a decision maker may vary or revoke a previous decision. That is not what is happening here. The Executive Director decided not to renew Pan Geo's and Hamill's registrations under section 35(1) of the Act. Pan Geo and Hamill have asked the Commission to hold a hearing and review of the Executive Director's decision under section 165(3) of the Act. Section 171 does not apply to these proceedings.

[para 20]

As directed, we proceeded by way of a new hearing and considered all of the relevant evidence. This included the Executive Director's initial decision to accept Hamill's experience as sufficient to meet the Commission policy's proficiency requirements and that Pan Geo and Hamill have been registrants under the Act for over a year.

[para 21]

This takes us to the two issues we must decide.

[para 22]

Issues

1. Should we renew Pan Geo's registration as a securities adviser with Hamill as its advising director and officer?
2. Should we exempt Pan Geo from registration as an investment counsel to allow Pan Geo and Hamill to offer custom tailored securities advice to residents of the United States?

[para 23]

First we will describe the relevant legislation.

[para 24]

Applications to grant, renew, reinstate and amend registration are considered under section 35 (1) of the Act, which states, in part, as follows:

35 (1) ... the executive director must grant an applicant ...renewal... of registration..., unless

- (a) the executive director considers that the applicant is not suitable for registration in the capacity applied for, or that the proposed registration is objectionable, or

...

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[para 25]

Pan Geo applied for renewal as a securities adviser and Hamill applied as its advising director and officer.

[para 26]

Under section 8(c) of the Rules a securities adviser is a person that:

engages or holds itself out as engaging in the business of advising others through direct advice or through publications about investing in, or buying or selling, specific securities, exchange contracts or both, not purporting to tailor that advice or publication to the needs of specific clients.

[para 27]

However, if advice is tailored to the needs of specific clients, a person must be registered as investment counsel. Under section 8(b) of the Rules an investment counsel is a person that:

engages or holds itself out as engaging in the business of advising others about investing in or buying or selling specific securities, exchange contracts or both, or that is primarily engaged in giving continuous advice on the investment of funds on the basis of the particular objectives of each client.

[para 28]

Under Section 17.3 of Part 17, BC Policy 31-601, an advising director or officer of a securities adviser must meet the following proficiency requirements. (There are other proficiency requirements for investment counsel.)

To be registered as an advising ...director or officer...of a securities adviser, the applicant must have successfully completed:

(a) ...to advise about securities....,

- the Canadian Securities Course (CSI), and
- the Canadian Investment Management Program (CSI)

and have at least five continuous years of relevant experience in the securities industry performing research involving the financial analysis of investments in securities under the supervision of an adviser [*Rules s. 61(1)*];

Under section 61(1) of the Rules, an individual applying for registration as an advising director or officer must have successfully completed the courses and examinations and have the experience the executive director requires.

[para 29]

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We have registration requirements so that persons providing investment advice and trading services to investors meet established standards of education, experience and ethical conduct and comply with specific ongoing regulatory obligations. However, the Act also gives the Commission and the Executive Director the discretion to vary or waive these requirements in the public interest.

[para 30]

For example, the Commission may, under section 48(1) of the Act, exempt Pan Geo and Hamill from one or more of the registration requirements in Part 5 or the regulations related to Part 5, if it considers that to do so would not be prejudicial to the public interest.

[para 31]

Similarly, under section 17(1) of the Rules, the Executive Director may waive or vary the provisions concerning registrants if to do so would not be prejudicial to the public interest.

[para 32]

Under section 17.5 of BC Policy 31-601, the Executive Director has explained how the section 17(1) power may be used.

The detailed proficiency requirements set out in the preceding section may not apply directly to a particular situation. The Executive Director will assess each application on a case-by-case basis and may limit the types of securities...about which the registrant may advise [*Act s. 36(1), Rules s. 17*]. Accordingly, a person seeking registration as a securities adviser that does not meet the proficiency requirements set out in the preceding sections should, before applying, discuss the details of the proposal with the Director, Capital Markets Regulation.

[para 33]

The Executive Director would have relied on these provisions when concluding that Hamill's education and experience were equivalent to the proficiency requirements for his category of registration. Furthermore, based on the evidence before us, we conclude that Hamill's education and experience is equivalent to the proficiency requirements for his category of registration.

[para 34]

Where does this take us?

[para 35]

Under section 35(1) of the Act, the Executive Director must grant an applicant renewal of registration unless the Executive Director considers the applicant not suitable or the application objectionable. There is nothing in the evidence that leads us to conclude that Pan Geo and Hamill are not suitable registrants or that their registration is objectionable.

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[para 36]

Accordingly, under section 165(4) of the Act, we direct the Executive Director to renew the registration of Pan Geo as securities adviser and the registration of Hamill as its advising director and officer.

[para 37]

However, this is not the end of the matter. We agree with staff that Pan Geo's and Hamill's registrations do not permit them to tailor advice to the needs of specific clients, regardless of where the clients reside. On the other hand, we are satisfied that the public interest will not be prejudiced if Pan Geo and Hamill offer custom tailored advice to clients who are resident in the United States.

[para 38]

In coming to this conclusion we considered:

1. Pan Geo's registration in the United States as an investment adviser specifically authorizes Pan Geo and Hamill to provide advice custom tailored to meet the needs of specific clients. Residents of the United States who chose to subscribe to the advice generated by PortfolioInvestor2000, and Pan Geo in providing that advice, come under the regulatory oversight of the United States Securities and Exchange Commission.
2. Pan Geo's website has been changed to clarify that residents of British Columbia are prohibited from subscribing to PortfolioInvestor2000's custom tailored advice option. Hamill has shown a willingness to make any further changes to Pan Geo's website that will assist it in complying with its regulatory obligations.

[para 39]

Accordingly, under section 48(1) of the Act, we consider that it would not be prejudicial to the public interest to exempt Pan Geo from registration as an investment counsel under the Act where it is advising clients resident in the United States, on the condition that Pan Geo is registered as an investment adviser under the *Investment Advisers Act of 1940*.

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[para 40]

For the Commission

Joyce C. Maykut, Q.C.
Vice Chair

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John K. Graf
Commissioner

Roy Wares
Commissioner