

2007 BCSECCOM 319

Decision

William John Nichols and TSX Venture Exchange

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

Hearing and Review

Panel	Douglas M. Hyndman Marc A. Foreman Robert J. Milbourne Suzanne K. Wiltshire	Chair Commissioner Commissioner Commissioner
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Date of Hearing August 23, 2006

Date of Decision June 7, 2007

Appearing

Ronald N. Pelletier
Tim Goepel

For William John Nichols

Mark L. Skwarok
Stephen M. Zolnay

For the TSX Venture Exchange

J. Douglas MacKay

For the Executive Director

Introduction

¶ 1 This is a hearing and review of a November 17, 2005 decision of the TSX Venture Exchange affecting William John Nichols. The Exchange decided that, until further notice, Nichols

- is unacceptable to perform, directly or indirectly, investor relations activities on behalf of any Exchange listed issuer and
- cannot be an employee, agent or consultant of any Exchange listed issuer, or be engaged by or work on behalf of any Exchange listed issuer, directly or indirectly, unless he obtains prior written approval of the Exchange.

¶ 2 Nichols asks that we set aside the decision and approve him to perform investor relations services for Exchange listed issuers. In the alternative, Nichols asks that we order the Exchange to give him a new hearing.

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Background

- ¶ 3 On September 27, 2005, New Cantech Ventures Inc., a listed company, applied to the Exchange for approval of an investor relations agreement with Nichols. As required, New Cantech provided a copy of Nichols' Personal Information Form (PIF) with the application. Under the agreement, Nichols, through a sole proprietorship called Shadowman Consulting, was to manage New Cantech's investor relations activities for an initial term of 6 months with a potential 6 month renewal. The activities were to include:
- (a) investor communications by phone, e-mail and personal contact;
 - (b) responding to all investor inquiries in a timely manner;
 - (c) in consultation with senior management, disseminating company news and information;
 - (d) disseminating information to investors and potential investors through the necessary mediums;
 - (e) in consultation with the company, creating and implementing an investor relations program that provides investors and interested parties with the company information they seek;
 - (f) in consultation with the company, providing media and advertising services where and when necessary; and
 - (g) maintain strong communications with the company's senior management on a daily basis or as necessary.
- ¶ 4 The Exchange contacted counsel for New Cantech to discuss the application and PIF shortly after receiving it. Counsel responded with a letter dated September 30, 2005, providing additional information about Nichols as well as a cheque, consent to release information, and confirmation that New Cantech wished to continue with Nichols' services. Most of the additional information supplemented Nichols' response to question 6 of the PIF.
- ¶ 5 The Exchange's PIF asks detailed questions about the individual's residential, employment and educational history and any criminal, civil, or regulatory proceedings. The general instructions to the PIF include a statement that "Failure to fully disclose any information required by this PIF or false or misleading disclosures may result in the disqualification of an individual from involvement with the Issuer and/or other issuers." They also include instructions specific to questions 6 to 9:

If your answer to any of questions 6 to 9 is "YES", you must, in an attachment, provide complete details, including the circumstances, relevant dates, names of the parties involved and final disposition, if known. **Any**

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attachment must be initialled by the Notary Public and the person completing this PIF. Responses must consider all time periods.”

- ¶ 6 Question 6 of the PIF asks: “Have you ever pled guilty or been found guilty of an offence?” The instructions to question 6 state: “If you answer “YES” to any item in Question 6, you must provide complete details in an attachment.”
- ¶ 7 In response to question 6 of the PIF, Nichols said “yes” and he provided the following details in an attachment:
- On about December 1976 I was convicted of first degree murder. I was sent to jail and served 18 years. On about August 1993 I was released.
- ¶ 8 In the September 30 letter, counsel for New Cantech advised that Nichols was sentenced to life in prison for the murder conviction he reported in his PIF. Then, after 15 years in prison, he applied and was released under the faint hope clause. Counsel also noted that Nichols’ parole officer advised him that Nichols
- would be on parole until he dies,
 - must report once a month,
 - has not been a problem since his release in 1993,
 - has been assigned a low risk rating, and
 - is subject to higher standards than ordinary citizens.
- ¶ 9 Counsel also indicated that Nichols listed only his most serious conviction in his PIF because he thought that was all he had to provide. In fact, Nichols had many other convictions but none since his release from prison for the murder conviction disclosed in the PIF.
- ¶ 10 On October 12, 2005, the Exchange wrote to Nichols and asked that he immediately resign as the investor relations person for New Cantech and another listed company, Flying A. Petroleum Ltd., given the seriousness of the information disclosed in his PIF and the background searches. The Exchange asked for a copy of the news release disclosing his resignation as evidence that he had complied with the requirement. The Exchange also asked that he provide additional information and answer questions relating to the information he disclosed. A response was requested by October 26, 2005.
- ¶ 11 Counsel for New Cantech subsequently advised the Exchange that New Cantech would be issuing a news release announcing the termination of the investor relations agreement with Nichols as requested.

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¶ 12 Counsel for Nichols then contacted the Exchange and requested that the background searches and other documents on file with the Exchange be provided to him. The Exchange subsequently sent the requested information except the criminal records search, which Nichols needed to obtain directly from the police himself.

¶ 13 The background searches by the Exchange included a report from Market Regulation Services (RS) (including media searches) and a criminal records check. The RS report indicated that:

Media searches indicated that on 12/Mar/76, NICHOLS fatally shot a police officer after he and three other individuals stole \$1,600 from a credit union. During the two day stand off with police that followed the shooting, three hostages were taken and released. On 2/Dec/76, Nichols was convicted of first degree murder and sentenced to life in prison with no parole eligibility for 25 years. He later pled guilty to other crimes related to the Mar/76 incident, including armed robbery, kidnapping, theft, breaking and entering, and mischief.

¶ 14 Nichols' criminal record also included convictions for extortion; possession of stolen property; break, enter and theft; possession of narcotics; robbery; causing bodily harm with intent; possession of a weapon; prison breach; forcible confinement; and armed robbery.

¶ 15 Counsel for Nichols responded to the Exchange's inquiries on October 26, 2005 in a letter. He advised that Nichols has not provided, and does not intend to provide, investor relations services to Flying A Petroleum and wishes only to be permitted to provide investor relations services to New Cantech. He also noted that

Nichols provided investor relations for numerous public companies over the years. At no time has there ever been any suggestion that Mr. Nichols had conducted himself in any untoward manner or contrary to the rules in the performance of those duties.

Our client has advised us that since his release from prison, the performance of investor relations activities has been substantially all that he has done. He states that he loves working with investors and good management of public companies. He states that he thoroughly enjoys working with both for the goal of building successful companies that provide returns to investors and reflect favourably on our capital markets and the Exchange.

¶ 16 Counsel also provided the following information about Nichols' offences:

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Our client advises that he disclosed his conviction for first degree murder in his PIF because he was under the honest but mistaken belief that he was required to disclose the most serious offence, the offence for which he will remain on parole for the rest of his life. Our client advises he understood that disclosure of his first degree murder conviction took precedent over any other convictions.

Please find enclosed for your reference a copy of the criminal record for Mr. Nichols. You will note that Mr. Nichols has not been convicted of offence (sic) since 1977, almost thirty years ago. Please be advised that the convictions entered on April 6, 1977 for kidnapping, armed robbery and Break and Entering relate to the same series of events for which Mr. Nichols was convicted of first degree murder on December 12, 1976. Additionally, the convictions in April 1977 for offences committed in Vancouver, British Columbia were the result of guilty pleas made by Mr. Nichols with respect to offences committed prior to his conviction for first degree murder in 1976. Further, please note that none of the offences for which Mr. Nichols has been convicted related to offences for fraud or breach of trust.

As discussed in Mr. Finlayson's letter dated September 30, 2005, Mr. Nichols was released on parole prior to his eligibility as a result of a successful "Faint Hope" application. We understand that a member of the Parole Board, who was a former police officer, and two prison guards supported Mr. Nichols' application for parole. It is submitted that Mr. Nichols has taken extraordinary efforts to rehabilitate himself and become a productive member of society. At no time has Mr. Nichols attempted to hide his very serious conviction for first degree murder. It should be noted that the newspaper articles disclosed by the Exchange that refer to Mr. Nichols are in many cases inaccurate and inconsistent with one another with respect to dates and facts.

Also enclosed for your reference is a letter dated October 3, 2005 from Ms. Pat Patterson, Mr. Nichols' parole officer. Ms. Patterson clearly supports Mr. Nichols application for acceptance to the Exchange. Ms. Patterson notes that the Correctional Service of Canada does not consider it a conflict for Mr. Nichols to provide investor relations services. Ms. Patterson confirms that Mr. Nichols is considered a "low risk" individual and that there have been no issues with respect to his behaviour since his release over twelve years ago.

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- ¶ 17 In a letter dated November 17, 2005 to Nichols' counsel, the Exchange conveyed the decision that is the subject of this hearing and review:

The Exchange has determined that, effective immediately and until further notice, Mr. Nichols is currently unacceptable to perform, directly or indirectly, investor relations activities on behalf of any Exchange listed issuer. In addition, Mr. Nichols cannot be an employee, agent or consultant of any Exchange listed issuer, or be engaged by or work on behalf of any Exchange listed issuer, directly or indirectly, unless he obtains the prior written approval of the Compliance & Disclosure department of the Exchange. The Exchange will be contacting New Cantech directly to advise that the Exchange will not approve its application regarding Mr. Nichols' services and that they must take all necessary steps to cancel any existing compensation arrangements, including the termination of any stock options or other remuneration that they may have agreed to pay Mr. Nichols.

Our determination is based upon the following:

Failure to Make Proper Disclosure on PIF

Mr. Nichols failed to answer certain items of his PIF accurately, including information requested in item 7.A "Bankruptcy" and item 6.A "Offences". However, it is Mr. Nichols' failure to properly complete item 6.A "Offences" which has been considered by the Exchange in making its determination regarding Mr. Nichols' suitability to provide investor relations services.

Item 6.A of the PIF requires an individual to disclose whether he has pled guilty to or has been found guilty of an offence. If the answer is "Yes", complete details of all such offences must be provided to the Exchange. Mr. Nichols answered "Yes" to this item and disclosed one offence which stated that, "On about December 1976 I was convicted of first degree murder. I was sent to jail and served 18 years. On about August 1993 I was released." During the course of the Exchange's review, we identified that Mr. Nichols failed to disclose 19 additional offences which span over a six year period in his PIF ...

...

When questioned regarding the inaccurate PIF disclosure, you advised the Exchange that Mr. Nichols disclosed his conviction for first degree murder in his PIF because he was "...under the honest but mistaken belief that he was required to disclose the most serious offence, the offence for which he

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will remain on parole for the rest of his life. Mr. Nichols advises he understood that disclosure of his first degree murder conviction took precedent over any other convictions.”

There is no ambiguity in the PIF regarding the requisite disclosure of criminal offences or the details which must be provided to the Exchange. All 20 of Mr. Nichols’ convictions constitute “offences”, as that term is defined in the PIF. ...

The Exchange finds that there was no reasonable basis upon which Mr. Nichols could assume that only his first degree murder conviction needed to be disclosed to the Exchange.

Mr. Nichols’ failure to properly disclose all required information relating to all of his prior offences, in and of itself, is sufficient for the Exchange to prohibit Mr. Nichols from performing investor relations activities for any Exchange issuer. The Exchange refuses the approval sought on this basis.

Prior Convictions Relating to Mr. Nichols’ Ability to Perform Investor Relations Services

The Exchange disagrees with Mr. Nichols’ assessment that his first degree murder conviction is the most relevant one when considering his application to be approved to provide investor relations services. In the Exchange’s view, the most relevant of Mr. Nichols’ convictions are robbery, theft and breaking and entering, all of which relate most closely to his intended employment. To ensure the credibility of the capital markets, the performance of investor relations activities must be undertaken with complete candour and honesty. In light of Mr. Nichols’ demonstrated history of dishonesty, we question his ability to do that.

The nature of Mr. Nichols’ prior convictions, in and of itself, is sufficient for the Exchange to prohibit Mr. Nichols from performing investor relations activities for any Exchange issuer. The Exchange refuses the approval sought on this basis.

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Reputation of the Exchange

Finally, in order to foster investor confidence in the Exchange it is prudent for the Exchange to protect its reputation by refusing to be associated with persons having such a serious criminal history as Mr. Nichols does. The Exchange's concern for its reputation in these circumstances is, in and of itself, sufficient for the Exchange to prohibit Mr. Nichols from performing investor relations activities for any Exchange issuer. The Exchange refuses the approval sought on this basis.

Submissions

¶ 18 Nichols submits that the decision should be set aside because:

1. Exchange erred in finding that Nichols' failure to disclose all required information relating to his prior offences was unreasonable.
2. Exchange erred in finding that the nature of Nichols' prior convictions demonstrated a history of dishonesty.
3. Exchange proceeded on an incorrect principle in giving undue consideration to the reputation of the Exchange.
4. Exchange erred by failing to consider material evidence.
5. Exchange exceeded its jurisdiction in making the order.
6. Exchange's view of the public interest is unreasonable.

¶ 19 In response, the Exchange says that:

1. Nichols' failure to properly disclose all required information concerning his prior offences warrants a finding of unsuitability.
2. The Exchange reasonably considered the number and severity of Nichols' criminal offences to reflect adversely on his ability to engage in investor relations.
3. The Exchange did not err in principle by considering the reputation of the Exchange as a basis for finding Nichols unsuitable.
4. The Exchange did not fail to consider any material evidence.
5. The Exchange did not exceed its jurisdiction in making the decision.
6. The decision is not contrary to the public interest.

¶ 20 Commission staff adopt the submissions of the Exchange and submit that the Commission should confirm the decision.

Analysis

¶ 21 Nichols brings this application under section 28(1) of the *Securities Act*, which says:

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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.

¶ 22 Section 165(4) says:

On a hearing and review, the commission may confirm or vary the decision under review or make another decision it considers proper.

¶ 23 In previous decisions, the Commission has adopted a standard for reviewing decisions of the Exchange. It follows the principles set out in the Ontario Securities Commission decision *Re Lafferty, Harwood & Partners Ltd* (1973) OSCB 25, which were approved by the Divisional Court of Ontario in its review of the OSC decision (1975), 8 O.R. (2d) 604. The OSC described the standard of review as follows:

We do not consider it a proper exercise of our jurisdiction (under [the equivalent provisions to sections 28(1) and 165(4)]) to substitute our judgment for that of the Exchange merely because we may disagree with the decision they have come to or because we may have given a different decision. If the Exchange has proceeded on some incorrect principle or has erred in law or has overlooked some material evidence or some new and compelling evidence which was presented to us that was not presented to the Exchange, then we would deem it proper to interfere with the decision of the Exchange. In the absence of such factors, we do not believe it to be a proper exercise of our jurisdiction to so interfere.

¶ 24 The standard of review has evolved somewhat since then and the Commission has codified it in BC Policy 15-601, as follows:

In a hearing and review of a decision of an SRO when the Commission does not proceed by way of a new hearing, the Commission will generally confirm the decision of the SRO unless

- (1) the SRO has erred in law,
- (2) the SRO has overlooked material evidence,
- (3) compelling evidence is presented to the Commission that was not tendered at the original hearing, or

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(4) the Commission's view of the public interest is different from the SRO's.

¶ 25 This standard of review, developed in past cases of the OSC and this Commission and codified in BC Policy 15-601, establishes that a hearing and review is not an opportunity to come to the Commission for a second opinion on a decision of the Exchange but a process to permit the Commission to correct an error in law, evidentiary omission, or divergent view of the public interest. It is not enough for us to conclude that we disagree with the Exchange's decision or would have made a different decision ourselves. We should defer to the judgment of the Exchange unless its decision displays the type of error set out in the policy.

¶ 26 The Exchange argues that each reason it gave for the decision is an independent ground that justified the decision. The decision itself says that each reason is "in and of itself, sufficient" to support the refusal and that the "Exchange refuses the approval sought on this basis." The Exchange therefore argues that to reverse the decision, we would need to reverse all three reasons for its decision. We accept that proposition.

¶ 27 We now turn to Nichols' grounds for review.

Did the Exchange err in finding that Nichols' failure to disclose all required information was unreasonable?

¶ 28 The first ground for the Exchange's decision was Nichols' failure to disclose information relating to all of his prior convictions. Nichols failed to disclose 19 convictions in his PIF and he provided less than complete details of the offence he did disclose, listing only that it was a first degree murder conviction and giving the sentence and the dates of conviction and release.

¶ 29 Nichols argues that he was under the honest but mistaken belief that only the most serious offence need be disclosed. As support for this view, he says

- that the word 'offence' in the PIF is in the singular, not the plural,
- the definition of 'offence' does not include a statement that all details must be provided,
- the most important sentence in the general instructions to questions 6 to 9 was the sentence in bold requiring attachments to be initialled by a notary public and the applicant,
- the PIF did not contain a clear statement that each and every offence must be provided,
- the caution against failure to disclose or providing false or misleading information is not labelled as a caution so Nichols did not understand it.

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- ¶ 30 He also notes that he signed the consent for the Exchange to conduct a criminal records check so he knew the information about the other offences would be provided to the Exchange.
- ¶ 31 Nichols' arguments on this point are not entirely convincing. The PIF generally requires extensive details about the background of the individual and clearly places importance on matters that relate to the individual's character and past conduct. There was no basis for him to conclude that the form required the disclosure of only the most serious offence. It was not for Nichols to judge what might or might not be important to the Exchange. The PIF calls for complete details so the Exchange can make an informed decision.
- ¶ 32 Furthermore, the fact that Nichols consented to the criminal records check does not alleviate his obligation to provide the required information in the PIF. As the Commission previously stated in *Re Ryan*, [1990] BCSC Weekly Summary (December 21, 1990) staff "cannot be expected to look behind the answers to every form to verify their accuracy. The importance of being truthful is emphasized by the caution."
- ¶ 33 Nevertheless, Nichols did disclose his most serious conviction and, as soon as the Exchange asked for more information, he provided through New Cantech's counsel full details about all of his convictions. It is evident that he did not attempt to hide his criminal past.
- ¶ 34 Nichols argues that his failure to fully disclose in the form should not necessarily lead to the conclusion that he is unacceptable to perform investor relations activities. He cites *Re Bocking*, 2003 BCSECCOM 815, in which the Commission set aside a decision of the Director of Capital Markets Regulation to refuse to renew registration of a person who failed to disclose drunk driving convictions in his application form.
- ¶ 35 Although we would agree that the failure to disclose should not necessarily disqualify him, the conclusion in *Bocking* is not directly applicable here. That case was a review of a decision made by the Commission's own staff, not of an Exchange or SRO decision. In that type of review, the Commission feels free to substitute its judgment if it merely disagrees with the staff decision. The panel in *Bocking* concluded that the Director's decision to refuse to renew Bocking's registration was not the appropriate regulatory response to Bocking's misconduct and set it aside.
- ¶ 36 In this case, the Exchange has concluded that Nichols' failure to disclose important information in his PIF should disqualify him from working for a listed

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company. The question for us is not whether we agree with the conclusion but whether, in reaching that conclusion, the Exchange erred in law, overlooked material evidence, or took a view of the public interest that was different from ours.

- ¶ 37 In its analysis of this question, the Exchange focused solely on Nichols' answer to the question in the form. It gave no consideration to the fact that he made no attempt to conceal his first degree murder conviction and promptly provided full information about all of his convictions when the Exchange requested more information. This broader context is relevant to whether Nichols was dishonest or sloppy in completing the form and, therefore, to whether his failure to provide a complete answer should lead to a full and permanent disqualification. In our view, in ignoring this information, the Exchange overlooked material evidence. On that basis, we would set aside this ground for the Exchange's decision.

Did the Exchange err in finding that the nature of Nichols' prior convictions demonstrated a history of dishonesty?

- ¶ 38 The second ground for the Exchange's decision was that the nature of Nichols' prior convictions demonstrated a history of dishonesty that was a sufficient basis for the Exchange to prohibit him from performing investor relations activities.
- ¶ 39 Nichols argues that his convictions were for violent crimes not involving fraud or deceit and that the Exchange erred in concluding that they demonstrated a history of dishonesty. Also, he argues that the Exchange did not consider that the crimes took place 30 years prior to the application.
- ¶ 40 Nichols further argues that, in concluding that he was unsuitable to perform investor relations activities, the Exchange failed to consider material evidence, namely his release under the 'faint hope' clause, the opinion of his parole officer that he is suitable, the passage of time and evidence of rehabilitation since his conviction, and the past work he has done for listed companies with no problems.
- ¶ 41 In effect, the Exchange took the nature of Nichols' convictions, regardless of what has happened since, as evidence that he might act dishonestly in performing future investor relations activities. Nichols' crimes were clearly odious, but was it reasonable for the Exchange to conclude that the violent offences that he committed more than 30 years ago demonstrate a "history of dishonesty?" The parties presented to us numerous cases in which prior convictions either had or had not been found to disqualify persons from professions or licensed occupations. The outcome of these cases rested very much on the decision makers' interpretation of the factual circumstances in each case.

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- ¶ 42 In this case, the Exchange appears to have given no consideration to Nichols' release under the 'faint hope' clause, the passage of time and evidence of rehabilitation since his conviction for murder, or his past work for listed companies. We find that this is material and relevant evidence that the Exchange ought to have considered in assessing whether Nichols presents a risk to the market.
- ¶ 43 The Exchange did consider the letter from Nichols' parole officer, but it concluded that she was not qualified to opine on whether Nichols is suitable to perform investor relations activities. In our view, the parole officer did not purport to opine on Nichols' suitability for investor relations activities but merely provided information on his status and advised that she did not consider investor relations activities as conflicting with the terms of his parole. Since the Exchange apparently misinterpreted the nature of the letter, we find that it did not give the letter due weight in reaching its conclusion.
- ¶ 44 On the basis of these findings, we would set aside this ground for the Exchange's decision.
- Did the Exchange proceed on an incorrect principle in giving undue consideration to the reputation of the Exchange?***
- ¶ 45 The third ground for the Exchange's decision was that it was prudent for the Exchange to protect its reputation by refusing to be associated with persons having such a serious criminal history as Nichols'.
- ¶ 46 Nichols argues that the Exchange proceeded on an incorrect principle in reaching this conclusion because there is no evidence that his criminal record raises a concern about his future conduct nor can it be reasonably inferred. He also says there is no evidence to support the Exchange's assertion that approval of Nichols will bring the Exchange into disrepute. He argues that the Exchange should concern itself only with whether Nichols is a future threat to investors and that the reputation of the Exchange is not a relevant consideration in determining that question.
- ¶ 47 The Exchange operates a market for trading securities and depends on public confidence for its existence. The good reputation of the market and of the persons authorized to work for brokers and listed companies is critical to public confidence and to the long term viability of the market.
- ¶ 48 The Exchange's authority to disqualify a person from working for a listed company is derived from its listing agreement with each company.
- ¶ 49 Paragraph 4.1 of the Exchange's listing agreement says:

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

- (a) be individuals qualified to act as directors under the Issuer's incorporating statute and Exchange Requirements;
- (b) act honestly and in good faith and in the best interests of the Issuer;
- (c) exercise the care, diligence and skill of a reasonably prudent person in the exercise of their duties as directors;
- (d) not be personally indebted to or subject to an unsatisfied or incomplete term of a sanction of the Exchange or any securities regulatory body; and
- (e) be otherwise acceptable to the Exchange.

Officers, employees, agents and consultants of the Issuer, and others engaged by or working on behalf of the Issuer, shall be subject to all other specified Exchange Requirements and, at the discretion of the Exchange, shall be subject to clauses 4.1(d) and 4.1(e) above.

- ¶ 50 Although it did not say so explicitly, the Exchange must have relied on clause 4.1(e) to prohibit Nichols from performing investor relations activities or from working for any listed company without prior approval.
- ¶ 51 On its face, clause 4.1(e) appears to give the Exchange authority to disqualify any person arbitrarily. However, the Exchange has a duty to act fairly in exercising its regulatory authority. It can disqualify a person only if it has reason to do so. In assessing the likely effect on the Exchange's reputation of a person's background, the Exchange must reasonably consider the full context.
- ¶ 52 In this case, the reason given is that "in order to foster investor confidence in the Exchange it is prudent for the Exchange to protect its reputation by refusing to be associated with persons having such a serious criminal history as Mr. Nichols does." Again, the Exchange gave no consideration in reaching this conclusion to Nichols' release under the 'faint hope' clause or the passage of time and evidence of rehabilitation since his conviction. It ought to have considered whether, in light of this evidence, Nichols' working for a listed company would really threaten the reputation of the Exchange. In our view, if the Exchange had considered all of the evidence, it could not have reasonably concluded that Nichols' involvement with listed companies would threaten its reputation.
- ¶ 53 We therefore set aside this ground for the Exchange's decision.

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Did the Exchange exceed its jurisdiction in making the order?

- ¶ 54 Nichols argues that the Exchange exceeded its jurisdiction in making an order that “Nichols cannot be an employee, agent or consultant of any Exchange listed issuer, or be engaged on behalf of any Exchange listed issuer, directly or indirectly, unless he obtains the prior approval of the Compliance & Disclosure department of the Exchange.” He says that this goes far beyond preventing him from dealing with investors or financial matters and would prevent him, for example, from being employed by a listed company to water plants.
- ¶ 55 Since we have set aside all of the grounds for the Exchange’s decision, the order cannot stand and this point is moot. However, it is worth commenting on it for future reference.
- ¶ 56 Clause 4.1(e) of the listing agreement clearly gives the Exchange the discretion to restrict a listed company from employing or retaining an individual in any capacity. The Exchange says this broad discretion is necessary because most of its listed companies are small businesses with few employees, and that an individual’s title might not accurately describe his or her actual role with the company. The Exchange also notes that its decision is not an outright prohibition, but simply requires a company to obtain prior approval before hiring or retaining Nichols.
- ¶ 57 Nichols is right that the Exchange’s decision is very broad but we find that, had it been properly grounded, it would clearly have been within the jurisdiction of the Exchange.

Decision

- ¶ 58 We have set aside the Exchange’s three grounds for its decision. In the circumstances of this case, we find that the Exchange could not reasonably conclude, based on the evidence before us, that it should disqualify Nichols from performing investor relations activities for listed companies.
- ¶ 59 We therefore set aside the decision of the Exchange.
- ¶ 60 **For the Commission**

Douglas M. Hyndman
Chair

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Marc A. Foreman
Commissioner

Robert J. Milbourne
Commissioner

Suzanne K. Wiltshire
Commissioner