

ALBERTA SECURITIES COMMISSION

**IN THE MATTER OF *the Securities Act*
R.S.A. 2000, c. S-4**

Citation: Doe, Re, 2007 ABASC 296

Date: 20070514

**IN THE MATTER OF Jane Doe
Application pursuant to ss. 76(3) by Jane Doe
for a hearing in relation to the denial of registration**

Decision of the Executive Director

Introduction

1. This is a continuation of the Decision in relation to the Application by Jane Doe (the “Applicant”) for a hearing before the Executive Director on the issue of refusal to grant the Applicant registration. Attached as Exhibit “1” to this document is the previous decision dated February 9, 2007 (the “Previous Decision”), which should be read as part of this decision. The Previous Decision concluded on the basis that the staff (“Staff”) of the Alberta Securities Commission (“ASC”) should meet with the Applicant and explore the circumstances surrounding her discharge relating to a criminal fraud charge. If after such discussion, Staff was still of the opinion that the Applicant should be denied registration, Staff was to submit further written submissions on the matter.

2. The Applicant was subsequently examined under oath by Staff on March 28, 2007. The Applicant was represented by counsel at such examination. Staff provided written submissions to the Executive Director and to the Applicant on April 11, 2007. The Applicant was advised that she could respond by April 25, 2007 to Staff’s submissions. The Applicant requested that her reply be deferred until May 2, 2007 and submitted her written reply on May 5, 2007.

Submissions

3. Staff asserted that the evidence of the examination revealed that the Applicant had knowingly signed another individual’s name to documents for the purpose of obtaining

funds from a government program. This behaviour resulted in a criminal fraud charge and a subsequent conditional discharge.

4. Staff pointed out the Applicant had been previously sanctioned by another regulator for witnessing a document of a client when she was not present at the time the document was signed.

5. Staff submitted that these two instances of behaviour demonstrate a pattern and that her conduct amounts to the Applicant having questionable integrity. They argued that these actions illustrate the Applicant's disregard for systems put into place to protect the public. Staff characterized the Applicant's behaviour at worst as being dishonest; at best, as constituting a lack of understanding of basic concepts and demonstrating extremely poor judgment. Staff submitted that the decision to proceed with inappropriate behaviour indicates a lack of integrity.

6. Staff concluded that the past behaviour of the Applicant is a relevant consideration for determination of whether the Applicant should be granted registration. Staff submitted that the Applicant's application for registration should be denied as she would not inspire the confidence of investors in the marketplace, nor would it be in the best interests of the marketplace.

7. The Applicant's response to Staff's submissions agreed with the principles set forth in *Re Mithras Management Ltd.*(1990), 13 OSCB 1600. This decision of the Ontario Securities Commission states that past behaviour is relevant when considering whether a person should be prohibited from participation in the marketplace, but that the Commission should not "punish past conduct". Furthermore, the Applicant submits that the precedents referred to by Staff deal with registrants, not people seeking registration, and that a distinction should be drawn.

8. The Applicant submits that she has been upfront throughout the process, and the misdeeds referred to by Staff are all dated. The actions surrounding the fraud charge concluded in 2003, the same year as the sanction imposed against her by the Alberta Insurance Council. The Applicant argues that her conduct since those instances is more relevant to the decision of the Executive Director. The Applicant submits that, at the time of these actions, there were significant factors which created considerable stress in her life.

9. The Applicant also provided ten letters of reference from individuals commenting on their positive experiences with her.

Analysis

10. The Applicant has been involved in the insurance industry for over twenty years. During this time, she was sanctioned once by the Alberta Insurance Council for submitting a form wherein she claimed to have witnessed someone's signature which in fact was not the case. On another occasion, relating to her personal life, she submitted a number of government forms wherein she signed another individual's name. This resulted in a criminal charge against her that was later disposed of by way of a guilty plea and conditional discharge. In the latter case, the benefit accrued by the Applicant was extremely modest. I also suspect that the former case did not provide her with any monetary reward. Had the Applicant chosen to disclose both of these circumstances on her application, it is unlikely that her registration would have been challenged.

11. In her application the Applicant did not disclose the previous sanction relating to the criminal prosecution. On two occasions Staff brought to the attention of her sponsoring firm that she was to reconsider the criminal disclosure contained within her application. The firm responded saying that the Applicant "is not aware of any criminal items/activity that has not been disclosed". The Applicant stated that she would respond to any questions the ASC had in order to try and clear up the misunderstanding.

12. The tests to be applied have been set out earlier in my decision. They are as follows: proficiency, integrity and solvency. The issue to be dealt with in this matter is integrity. There are three instances herein which reflect that the Applicant either showed bad judgment in her decision-making or chose simply to disregard the rules. Is the Applicant dishonest? There is insufficient evidence before me to come to that conclusion. She has plausible explanations for each of the incidents, although her credibility surrounding the failure to disclose her criminal charge and conditional discharge is more problematic than the other matters.

13. Integrity is broader than dishonesty. It encompasses a certain duty of care in one's work product. One may not be dishonest and yet be reckless or lackadaisical over whether one complies with the rules or requirements of one's industry. The Applicant's behaviour in all three instances reflects a "shortcut" mentality in dealing with what are formal requirements. In one instance, she chose to sign another individual's name to the form because, as she claims, it was at her office. Presumably it was inconvenient for the Applicant to take the form home to have the proper individual sign it. In regards to the Alberta Insurance Council sanction, there is no evidence as to why the Applicant falsely witnessed the insurance form, but the inference is that it would have been inconvenient for someone (possibly the client) to attend and sign. As for her application for registration, the explanation as to why the Applicant failed to comply with the clear wording requiring disclosure of the offence was that she failed to notice the requirement to disclose "even if an absolute or *conditional discharge* has been granted" (emphasis added) because she focused only on the question of whether she had been convicted of a

criminal offence. Notwithstanding having had three separate opportunities to complete the form correctly, two of which involved specific direction to the problematic portion of the form, the Applicant either did not reread the form, or did so in such a careless manner so that she failed to appreciate the requirement to disclose, which requirement is in the same sentence as the requirement to disclose an offence. The Applicant's actions reveal a lack of attention to detail in complying with formal requirements. This, in my mind, reflects either a lack of integrity, based on a reckless or wilful disregard of matters critical to her responsibilities, or a lack of competence, either of which is fatal to her registration application.

14. This has been a very difficult decision. I am cognizant that the Applicant has been employed for over twenty years in a regulated industry and appears not to have been subject to sanctions other than on one occasion in her professional life, and one related to her personal life. The Applicant appears to have provided for her family under arduous circumstances. I am aware that this will deprive the Applicant from pursuing her career as a mutual fund salesperson, and this may cause hardship. It will not prevent her from continuing her insurance business so she is not without means for providing for her family.

15. Based on the circumstances relating to her prior misconduct, it is my view that the Applicant does not possess the necessary integrity and competence in relation to her attention to formal requirements to become a registrant pursuant to the *Securities Act* R.S.A. 2000, c. S-4. Her inability to focus on compliance with regulatory or legal requirements, as demonstrated by her past conduct, could indeed put the investing public at risk.

Finding

16. The Executive Director, having provided the Applicant with an opportunity to be heard, refuses to grant registration to the Applicant.

Dated at the city of Calgary, in the province of Alberta, this 14th day of May, 2007.

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) "original signed by David C. Linder"
) David C. Linder
) Executive Director
) Alberta Securities Commission

EXHIBIT “1”

ALBERTA SECURITIES COMMISSION

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**IN THE MATTER OF Jane Doe
Application pursuant to ss. 76(3) by Jane Doe
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Decision of the Executive Director

Introduction

1. This is an application pursuant to ss. 76(3) of the *Securities Act* R.S.A., c.S-4 (the “Act”) by Jane Doe (the “Applicant”) for a hearing to be conducted before the Executive Director on the issue of refusal to grant the Applicant registration. I direct that this hearing be conducted in camera pursuant to ss. 29(1) of the Act, as it would not be in the public interest to publish the identity of the Applicant and her past sanctions. Once the hearing has been completed, I propose to publish this decision along with any further reasons, replacing the name of the Applicant with “Jane Doe”.

2. The Applicant made application on May 16, 2006 for registration as a salesperson with a mutual fund dealer (the “Application”). As part of the Application, the Applicant completed Form 33-109F4 entitled “Registration Information for an Individual” (the

“Form”). Item 14 of the Form, which is headed “Criminal disclosure” includes the following language:

With respect to questions (b) and (d) below, if you or your firm have pleaded guilty or been found guilty of an offence, that offence must be reported, even if an absolute or conditional discharge has been granted with respect to that offence.

The Applicant marked the “No” box in answer to b) of Item 14 which states as follows:

Have you, since attaining the age of 18, ever been convicted of, pleaded guilty to or no contest to an offence that was committed in any province, territory, state or country?

The Application was submitted containing, *inter alia*, that information.

3. In conducting its review, staff of the Alberta Securities Commission (“ASC”) (“Staff”) discovered information that caused it to doubt the veracity of the Applicant’s response contained within Item 14(b) of the Form. On June 7, 2006, Staff sent a communication to the Applicant’s sponsoring firm (the “Firm”), asking that they have the Applicant reconsider her response to Item 14. On June 11, 2006, the Firm responded, advising that they had spoken with the Applicant and that she was not aware of any “criminal items/activity” that had not been disclosed. A further communication was provided on June 16, 2006 by the Firm wherein they advised that the Applicant “has reviewed the section but is still coming up ‘empty’”. Staff provided a letter to the Firm dated July 28, 2006 confirming that the Applicant had requested a criminal records check from the RCMP. Staff asked that in the interim the Applicant provide a letter to the Executive Director confirming that she had reviewed Item 14 of the submitted Form and that she had “answered the questions completely, truthfully and to the best of her ability.” On August 10, 2006, a letter addressed to the Executive Director from the Applicant was received, confirming the information requested by Staff. On September 1, 2006, a copy of a Criminal Record Check for the Applicant indicating that “there appears to be no recorded criminal conviction with the Canadian Police Information Centre as of August 29, 2006” was received by Staff from the Firm.

4. By letter dated September 20, 2006, Staff advised the Applicant that the recommendation by Staff would be to deny her application for registration. The letter advised that the application “does not disclose the fact that you were convicted of a fraud-related criminal offence under the *Criminal Code* (Canada) on February 24, 2005.” The Applicant was also advised that she was entitled to a hearing before the Executive Director.

5. On November 8, 2006, the Applicant provided a statutory declaration and written submissions on the issue of registration denial. By letter dated November 13, 2006, the

Executive Director requested further information from the Applicant, which was submitted via statutory declaration dated November 30, 2006. Staff provided submissions and an affidavit of David McKellar C.A. dated December 6, 2006. The Applicant provided further submissions, as well as a supporting affidavit dated January 26, 2007.

Submissions

6. The initial submission of the Applicant advised that she had received a conditional discharge with 18 months probation on February 24, 2005. The Applicant further submitted that a discharge is not a conviction, and that the Criminal Record check submission confirmed that there was no record of a conviction. The Applicant argued that the reason for refusing the Application was an error as there had been no conviction.

7. The submission further advised that the Applicant failed to notice the requirement to disclose the fact that she had pleaded guilty to an offence. Her affidavit averred that her mind was directed elsewhere and it was not her intention to mislead. The Applicant concluded her submission by stating that she was “not ‘not suitable’” for registration. Moreover, the Applicant submitted that registration with terms and conditions could be applied.

8. In the follow-up declaration of the Applicant dated November 30, 2006, the Applicant stated that she focussed her attentions on whether she had been convicted of an offence and thus failed to give thought to the requirement to disclose necessitated by her guilty plea. She acknowledged that her application had been incorrect and was “fully prepared to answer any questions the Alberta Securities Commission may have regarding the circumstances surrounding the absolute discharge”.

9. Staff’s submission set forth the purpose of registration, quoted from the January 13, 2006, CSA Registration Reform Project *Proposal on Registration Reform*, which declares as follows:

The registration requirement protects investors from unfair, improper or fraudulent practices and enhances capital market integrity and efficiency. The cornerstones of the registration requirements are:

- proficiency -- only qualified persons can deal or advise
- integrity -- registered persons must be honest and of good repute
- solvency -- registered persons must be financially viable

The courts accept that the registration requirement is in the public interest and have framed their approval with reference to protecting the public from persons carrying on a securities business.

The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such business.

10. Staff submitted that the Applicant failed on the grounds of integrity, quoting Borden Ladner Gervais LLP Securities Law and Practice, 3rd edition (Toronto, Carswell), s. 11.2.1(d.2) where the author commenting on equivalent legislation and procedures used by the Ontario Securities Commission (“OSC”), stated:

The Director is concerned with the honesty of the applicant. Accordingly, the furnishing of material false information is usually treated as a reason for refusing registration.

11. Staff further stated that nothing turned on the distinction made by the Applicant between pleading guilty and being convicted. Staff posited that the fact that the Applicant was required to review the question a number of times gave her sufficient opportunity to “direct her mind” to the issue being addressed. They point out that at the time of the aforementioned communications, the Applicant was not “pardoned”, but rather was on probation and her conditions of discharge had not yet been met.

12. Staff raised the fact that the Applicant had been sanctioned by the Alberta Insurance Council as further evidence that she had a history of dishonest behaviour. It is noted that this matter was disclosed by the Applicant in her application.

13. Staff also made reference to two OSC decisions, *Jay Peter Thompson* (1986), 9 O.S.C.B. 6219 and *Wayne Jude Rodrigues* June, 1980 O.S.C.B. 259, wherein individuals were denied registration for failing to disclose criminal records.

14. Staff concluded that the history of the Applicant reflected a pattern of dishonesty, which made her unsuitable for registration.

15. In her rebuttal response to Staff, the Applicant argued that her failure to disclose her conditional discharge was the result of “oversight and not a wilful and deceitful act.” The Applicant maintained that because she was focused on the issue of conviction, this caused her to answer the question in the negative.

16. The Applicant also enclosed a letter from the Firm supporting the Applicant and demonstrating continued support for her registration application.

17. The Applicant submitted that she was not given sufficient opportunity to correct the Item 14 disclosure issue. It is argued that because Staff used the Firm as the intermediary, the Applicant was never informed as to the nature of Staff's concerns. Furthermore, the Applicant maintained that Staff did not assist her because they failed to contact her directly.

18. The Applicant argued that the sole matter at issue is her behaviour regarding her failure to disclose her guilty plea and her subsequent refusal to correct that information. She further submitted that the matters relating to her sanction by the Alberta Insurance Council and the guilty plea to the *Criminal Code* offence should not be considered. This argument is based upon the language in a letter of Staff dated September 20, 2006, wherein the only matter mentioned is the failure to disclose the fraud-related offence.

19. The Applicant sought to distinguish the cases relied upon by Staff on the basis that in both instances the behaviours of the two individuals was aimed towards deception or misleading the OSC. The Applicant submitted that her circumstances amount to error made in honest belief.

20. As authority for her submission, the Applicant relies upon a decision of the British Columbia Securities Commission ("BCSC"), *Bocking (Re)*[2003] B.C.S.C.D. No.1029, wherein an applicant for registration submitted 18 applications, in which he failed to disclose some of his criminal convictions. The panel of the BCSC found the applicant's "dishonesty undermines public confidence in the regulatory system and is contrary to the public interest." Notwithstanding that pronouncement, the panel was not persuaded that the proper regulatory response was to prohibit the renewal of his registration. The panel seemed influenced by the *viva voce* testimony of the applicant and his employer.

Discussion

21. I agree with Staff's submissions that the purpose of registration is as set forth in paragraph 9 above. I also concur that the issue raised in this application is the question of integrity - is the Applicant of sufficient honesty and good repute that the public is protected?

22. The conduct of the Applicant is, on its face, troubling. She has been clearly sanctioned, first by the Alberta Insurance Council, which, given the sanction, would seem to be, as stated by the Applicant in her submission, a relatively minor violation. Of greater concern is the *Criminal Code* offence. An admission to fraud (as her guilty plea) is not usually consistent with absolute integrity. The failure to disclose this admission does not bolster the Applicant's position.

23. The explanation of the Applicant regarding her failure to disclose the admission is that she was focused on whether she had a conviction and was so preoccupied with this matter that she failed to read or comprehend the plain English that required her to disclose that she had pleaded guilty “even if an absolute or conditional discharge” had been granted to an offence. She was pointed to this section on at least two occasions after the original submission.

24. The Applicant also stated that she was not given a proper opportunity to understand the nature of Staff’s concerns. She pointed to the fact that all communications were done through her sponsoring firm, and further that Staff, in dealing with the Firm did not identify the specific concern, but refused or chose not to expand on the matter. It may be that this is Staff’s normal practice to deal through the firm and not to specifically identify an issue, with a view to having an applicant come forward with the information without prompting. It would appear in this circumstance, once the Applicant asked to speak with the Staff member involved in the file, Staff should have acceded to the request and put the matter of concern to the Applicant.

25. The case law submitted by Staff and the Applicant are of some interest, but not determinative of this matter. The *Thompson* and *Rodrigues* cases both stand for the proposition that denial of a criminal conviction is a ground for refusing registration, but neither case suggests that finding is a necessary conclusion in every instance. The *Bocking* decision is a curious decision; the BCSC panel found on the one hand that the applicant’s “dishonesty undermines public confidence in the regulatory system and is contrary to the public interest”, and yet decided that such conduct was not sufficient to deny him registration. It would seem that Mr. Bocking’s *viva voce* evidence and other witnesses convinced the panel that he was in fact honest, competent and reliable. As with all cases, the facts are crucial to that determination. I do not find any of the decisions conclusive.

26. The one outstanding issue which has not been explored in relation to the Applicant’s integrity is the circumstances relating to the offence which led to her guilty plea. Nowhere in the material is that information provided and yet it clearly is relevant to the issue. The Applicant’s submission makes reference to the fact that no criminal conviction was entered against her and suggests that fact should not be discounted. I would agree but believe it is necessary to examine the circumstances surrounding the conditional discharge to ensure there is no question as to public protection.

27. The Applicant made the submission that the sole issue to be considered is the failure of the Applicant to disclose her guilty plea. This is based on the argument that the only reason contained within Staff’s letter of September 20, 2006, was this omission. I do not find this reasoning persuasive. Staff’s letter does not state that this was the only reason, nor is there any suggestion that this hearing was limited to the same. The central

issue in this Application is the Applicant's integrity and her previous behaviour is obviously relevant to exploring that issue.

28. The Applicant in her statutory declaration dated and submitted to the ASC on November 30, 2006, stated: "I am fully prepared to answer any questions the Alberta Securities Commission may have regarding the circumstances surrounding the absolute discharge I received." This would appear to be the best solution to address the integrity concerns of the ASC.

Direction

29. This hearing is adjourned and Staff is directed to meet with the Applicant, at a mutually convenient time and date, to explore the circumstances surrounding the Applicant's discharge with a view to satisfying themselves as to the issue of the Applicant's integrity. After such discussion, should Staff still be of the opinion that the Applicant does not meet the standard of integrity, then they are directed to file written submissions to the Executive Director within two week's time of the discussion. To ensure that there is no doubt as to the substance of said discussion, I would further direct that the discussion take place with a court reporter present to record the proceedings. The Applicant is entitled to have counsel present during said discussion.

Dated at the city of Calgary, in the province of Alberta, this 9th day of February, 2007.

) "original signed by David C. Linder"
) David C. Linder
) Executive Director
) Alberta Securities Commission