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**Rashida Samji, Arvindbhai Bakorbhai Patel (aka Arvin Patel)
and Samji & Assoc. Holdings Inc.**

Securities Act, RSBC 1996, c. 418

Application

Panel	Brent W. Aitken David J. Smith Shelley C. Williams	Vice Chair Commissioner Commissioner
Hearing	February 17, 2012	
Date of decision	February 20, 2012	
Date reasons issued	March 19, 2012	
Appearing		
Sean K. Boyle Laura Cundari	For Arvin Patel	
Kristine Mactaggart Wright Joyce Johner	For the Executive Director	

Reasons for Decision

I Introduction

- ¶ 1 On January 31, 2012 the Chair of the Commission issued an investigation order under section 142(1) of the *Securities Act*, RSBC 1996, c. 418. Commission staff filed an affidavit in support of its application for the investigation order. The affidavit describes activities of Rashida Samji, Samji & Assoc. Holdings Inc. and Arvindbhai Bakorbhai Patel (aka Arvin Patel) that may contravene the Act. We refer to these activities as the suspected illegal distribution.
- ¶ 2 On January 31, 2012 the Chair of the Commission made an order under section 151(2) of the Act, freezing five accounts at four financial institutions. One of the accounts, in the name of Patel, was the subject of the application. The other accounts were in the names of Samji or Samji Holdings, or both.
- ¶ 3 Paragraph 6 of the freeze order froze the Patel account, an account at a branch of Coast Capital Savings.

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- ¶ 4 On February 2, 2012 the Chair of the Commission gave notices under section 151(5) to the Land Titles Office for registration against the titles of five condominium properties that Patel owns, either solely or jointly with his son. A notice under section 151(5) is similar to a caveat. In a memo supporting staff's request for the letters, counsel for the executive director informed the Chair that:
- staff had not conducted any tracing of funds to determine if any investor money was used for these properties
 - some of the properties were purchased before the time period set out in the investigation order
 - staff had not determined the current equity, if any, that is in the properties
- ¶ 5 On February 14, 2012 Patel applied under section 171 to have the freeze order and the section 151(5) notices revoked, or alternatively, the freeze order varied to allow Patel access to the Coast Capital account to pay his living expenses and to retain counsel.
- ¶ 6 At the hearing, the executive director produced evidence that Patel also has two retirement accounts at Coast Capital and a brokerage account at Mackie Research Capital Corporation. The executive director applied for freeze orders against these accounts.
- ¶ 7 The matter is at an early stage of investigation. No notice of hearing has been issued.
- ¶ 8 On February 20, 2012 we made orders revoking the freeze order made by the Chair of the Commission against the Coast Capital account (subject to Patel's making appropriate undertakings), and issued new freeze orders against retirement savings accounts and brokerage accounts owned by Patel. These are our reasons.

II Issues

- ¶ 9 Patel argued that the conditions required for issuing the January freeze order had not been met, and so the order should be revoked. No doubt Patel has the same criticism of the orders we made on February 20. The basis for Patel's argument on this issue is jurisprudence from the Ontario Court of Appeal.
- ¶ 10 The executive director says that the Ontario jurisprudence is not the law of British Columbia and that the freeze order was properly issued.
- ¶ 11 Patel argued that freezing the Coast Capital account would cause him hardship, as this was his day to day chequing account in which his income is deposited and from which his expenses are paid. If we did not agree to revoke the freeze order,

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Patel urged us to vary it so that he could access the account to pay his living expenses and retain counsel.

III Analysis

A Test for issuance of a freeze order

- ¶ 12 Patel argued that the law governing the issuance of a freeze order is, or at least ought to be, that established in Ontario, beginning with *Ontario Securities Commission v RBC Dominion Securities Inc.*, 2001 Canlii 27979, which the Ontario Court of Appeal confirmed in *Ontario Securities Commission v Sextant Capital Management Inc.*, 2010 ONCA 228.
- ¶ 13 The Ontario decisions considered section 126(1) of the *Securities Act (Ontario)*, which authorizes the Ontario Securities Commission to make a freeze order if it “considers it to be expedient for the due administration of Ontario securities law or the regulation of the capital markets in Ontario.”
- ¶ 14 Section 126(1) of the Ontario Act also required the OSC “as soon as practicable but not later than seven days after making the order” to apply to the Ontario Superior Court of Justice to continue the order or to make “such other order as the court considers appropriate.”
- ¶ 15 In *RBC*, the Ontario Superior Court of Justice applied a test for the continuation of a freeze order similar to that applied to Mareva injunctions in criminal law. The test included three criteria:
- a strong *prima facie* case or a serious issue to be tried, as to whether there has been a contravention of the Act
 - evidence that the assets sought to be frozen should be closely involved with the alleged wrongdoing under the Act
 - evidence that the person whose assets are subject to the freeze order is or has been dissipating, removing or disposing of assets for the improper purpose of making them unavailable to pay a fine in the event of a finding of liability
- ¶ 16 In *Sextant*, the Ontario Court of Appeal affirmed the application of the *RBC* test for the use of the Ontario courts in determining whether to continue a freeze order issued by the OSC. In doing so, it said:

“28 The intent of s. 126(1)(a) is to give the Commission the power to act quickly to preserve property as soon as it has concerns about the possible dissipation of that property out of Ontario, and to do so based on a standard of expediency Clearly the standard of proof for the Commission to issue freeze directions is very low, as it is anticipated that the Commission

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staff may only be commencing an investigation when they believe a direction is necessary. However, having acted with expedience, the Commission must then seek a court order within seven days, to continue the freeze and to be able to complete the investigation.

. . .

36 In my view, although the jurisprudence under this section is limited, the *RBC* test that has been articulated and applied is cogent, fair and effective. It sets out a standard against which a court may test the evidence presented to it and based on which the court is asked to impose a very onerous order that freezes assets of a corporation operating in the financial markets of Ontario.

37 Contrary to the submission of the Commission, the court is not being asked to approve the Commission's Offshore Directions or to review them to determine whether it was expedient for the Commission to make them in the first instance. Instead, the court is asked to make an order to continue the temporary Offshore Directions into the future, based on the record before it. Clearly a court needs criteria to apply in order to determine whether to make any order, and the affected parties also need to know the factors that will affect their position. This is quite different from the original directions of the Commission that can be made without notice and served on the affected parties thereafter

38 In my view, the *RBC* three-part test provides appropriate criteria for a court to consider when determining whether to continue freeze directions This would include not only the *prima facie* case or serious issue to be tried of breach of the Act, but also the link between the wrongdoing and the targeted fund. This is also the approach taken under the British Columbia and Alberta legislation, which provide a different procedure but seek to accomplish the same objective: see, for example, *Klytie's Development Inc. (Re)*, 2006 ABASC 1763; *Workum (Re)*, 2005 ABASC 425.”

- ¶ 17 Patel acknowledged, for the purposes of his application, that the matter of Patel's conduct is a serious issue under investigation. As noted above, staff made no attempt to trace the assets to be frozen to the suspected illegal distribution, and there was no evidence presented to the Chair or to us that Patel had been dissipating, removing or disposing of the assets subject to the freeze order.

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- ¶ 18 However, none of that matters, because the law of Ontario as articulated in *RBC* and *Sextant* is not the law in British Columbia.
- ¶ 19 Section 151(1)(a) of the Act authorizes the Commission to make a freeze order under section 151(2) if the Commission “proposes to order an investigation in respect of a person under section 142 or during or after an investigation in respect of a person under section 142” Under the Ontario Act, the OSC can make an order if it is expedient to do so for the administration of that legislation or the regulation of the capital markets.
- ¶ 20 Nothing turns on this difference in language. Even if the grounds in section 151(1) were expressed in terms of expediency similar to those in the Ontario Act, the law in British Columbia is not consistent with the criteria in *RBC* and *Sextant*.
- ¶ 21 The significant difference lies in the nature of the freeze order regimes in Ontario and British Columbia. In Ontario, a commission-issued freeze order expires in (now 10) days unless continued by the court. In British Columbia, there is no requirement to obtain court approval to continue a freeze order.
- ¶ 22 The significance of this difference is apparent when one considers the statements of the Ontario Court of Appeal in *Sextant* and of the British Columbia Court of Appeal in *Exchange Bank & Trust Inc. v British Columbia Securities Commission*, 2000 BCCA 389 and 2000 BCCA 549.
- ¶ 23 In *Sextant*, the court noted that the intent of s. 126(1)(a) of the Ontario Act is “to give the Commission the power to act quickly to preserve property as soon as it has concerns about the possible dissipation of that property out of Ontario, and to do so based on a standard of expediency” and that “the standard of proof for the Commission to issue freeze directions is very low.”
- ¶ 24 The court went on to say that the *RBC* test is not the test for determining whether the OSC properly exercised its jurisdiction in issuing a freeze order in the first place, but rather the test for the court to use when it comes time for it to consider whether to continue the order.
- ¶ 25 It follows that *RBC* and *Sextant* do not stand for the proposition that the OSC must apply those criteria in making a freeze order under the Ontario Act, much less the proposition that they apply to this Commission’s decision to do so under section 151(2).
- ¶ 26 Neither are the criteria in *RBC* and *Sextant* relevant to this Commission’s consideration of a variation or revocation of a freeze order.

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- ¶ 27 In *Amswiss* [1992] 7 BCSC Weekly Summary 12, a panel of the Commission said this about the purpose of freeze orders issued under section 151 (at page 32):

“In our view, the purpose of section [151(1)] is to preserve property for persons who may have common law or statutory claims to or interests in it, for example by way of rescission or damages under . . . the Act.

. . .

The immediate effect of a freeze order is to maintain the status quo, ensuring that the frozen property is not dissipated or destroyed before the Commission is in a position to determine what, if any, further steps or orders in the public interest should be made under the Act.

. . .

Like a section [161(2)] temporary cease trade order or a section [89] halt order, a freeze order enables the Commission to respond immediately to information that, in its opinion, warrants regulatory intervention to prevent or minimize prejudice to the public interest. Often it is necessary to take these steps before any investigation is commenced or concluded. The ability of the Commission to act in this fashion is necessary to instill and maintain public confidence in the integrity of the capital markets.”

- ¶ 28 The panel in *Amswiss* said this about what the Commission needs to consider in making a freeze order:

“Although there is no specific reference to the public interest in section [151], in our view, the Commission may only exercise the powers under this section where it considers that there is some connection to trading in securities and that an order is in the public interest.

- ¶ 29 The court in *Exchange Bank & Trust*, 2000 BCCA 389 cited with approval these passages from *Amswiss*.

- ¶ 30 In *Exchange Bank & Trust*, 2000 BCCA 549 the British Columbia Court of Appeal, in refusing leave to appeal from a decision of a panel of this Commission to revoke or vary a freeze order, said this about the Commission’s power to make freeze orders:

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“9 I see nothing, however, that rises to the level of a breach of natural justice in this case. The fact is . . . that EBT is itself under investigation at the present time. The Act entitles the Commission to compel the production of documents and witnesses in the course of an investigation. It imposes no time limit on freeze orders (as does the Ontario Act) and it exempts the Commission from the usual rules of evidence. It evinces an intention on the part of the Legislature to give the Commission all the powers necessary to investigate and prosecute breaches of securities laws in a sophisticated and fast-moving market.”

- ¶ 31 The court’s decision in *Exchange Bank & Trust* shows that the approach in British Columbia is not, as is suggested in *Sextant*, the same as that in Ontario.
- ¶ 32 More importantly, *Exchange Bank & Trust* is consistent with the Commission’s legislative mandate to regulate in the public interest activities relating to the trading of securities.
- ¶ 33 There is nothing in *Amswiss* or *Exchange Bank & Trust* to suggest that before the Commission makes a freeze order there must be evidence that the property to be frozen is closely involved with the alleged wrongdoing under the Act, or that the person whose assets would be subject to the freeze order is or has been dissipating, removing or disposing of assets.
- ¶ 34 In our opinion, such requirements would be inconsistent with the Commission’s mandate to protect the public interest.
- ¶ 35 The potential statutory claims referred to by the *Amswiss* panel that warrant the protection of a freeze order include not just those arising out of rights of rescission and damages (the example given by the panel) but also those arising out of orders made by the Commission under sections 161(1)(g) (disgorgement of ill-gotten gains) or 162 (administrative penalty), or made by the court under section 157 (compliance). It is manifestly in the public interest that wrongdoers’ assets be preserved to satisfy potential claims arising from all of those sources, not to mention common law claims.
- ¶ 36 None of these claims is limited to assets connected to the wrongdoing. Once it is found that a person has contravened the Act or acted contrary to the public interest, all of the person’s assets are subject to the execution of the orders that ensue. It follows that there is no public interest basis for requiring that there be a connection between the frozen property and the wrongdoing.

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¶ 37 Similarly, to require that a freeze order could not be issued until the dissipation or destruction of the assets is already underway would ignore the aims of the legislation as described in *Amswiss* and *Exchange Bank & Trust*. It would also be utterly inconsistent with the Commission's mandate to protect the public interest.

¶ 38 The criteria for the Commission to consider in making a freeze order in British Columbia remain those articulated by the Commission in *Amswiss*.

B Disposition of application

¶ 39 The Coast Capital account had a balance of about \$88,000. The executive director agreed that Patel ought to have access to this account to cover his monthly expenses and to retain counsel. In doing so, the executive director implicitly accepted Patel's affidavit evidence as to the nature and quantum of his monthly expenses (\$17,000), and as to his estimate of the cost of retaining counsel (\$50,000).

¶ 40 Patel deposed that his monthly income, consisting of income from rental properties, was about \$6,500.

¶ 41 The practical effect of all of this is that there was no point in continuing the freeze order on the Coast Capital account. His monthly expenses (net of rental income) and counsel costs would consume the balance in the account in a little over three months.

¶ 42 Patel deposed in his affidavit that a significant portion of his expenses comprised mortgage payments and strata fees associated with his rental properties, as well as his personal residence.

¶ 43 In these circumstances we considered it appropriate, in revoking the freeze order over the Coast Capital account, that Patel undertake to continue to deposit his income from rental properties into the account and that he keep up his mortgage and strata fee payments on his rental properties. We also considered it appropriate that he undertake to use not less than \$50,000 of the funds in the account to retain counsel in connection with the suspected illegal distribution.

¶ 44 Patel filed the undertaking on February 21.

¶ 45 We did not order the revocation of the notices to the Land Titles Office. Those notices are not imposing any immediate hardship on Patel.

¶ 46 We then considered the executive director's application to freeze the assets found after the issuance of the freeze order, namely, Patel's retirement savings accounts at Coast Capital and his brokerage account at Mackie Research.

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- ¶ 47 There was no question of our authority to issue the order. The Commission is authorized under section 151(1)(a) to do so if, as in this case, the person whose assets are affected by the order is under investigation under section 142.
- ¶ 48 We considered it in the public interest to freeze Patel's retirement accounts and his brokerage account. Although the investigation is in its earliest stage, Commission staff has established (as Patel acknowledged for the purposes of his application) that the matter of Patel's conduct is a serious issue under investigation. If it were to turn out that Patel's conduct is culpable, the Commission would likely make orders under some or all of the sections of the Act cited above that have financial consequences. In that case, it would be in the public interest that his assets be preserved for the execution of those orders.
- ¶ 49 Because the investigation is in its earliest stage, we asked the parties to appear before us on April 2 (since changed to April 4) so that, among other things, the executive director could update us on the status of the investigation. We also included the observation that Patel was free to seek further variations or revocations at any time.
- ¶ 50 March 19, 2012
- ¶ 51 **For the Commission**

Brent W. Aitken
Vice Chair

David J. Smith
Commissioner

Shelley C. Williams
Commissioner