COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Dunn v. British Columbia (Securities Commission),* 2023 BCCA 451

Date: 20231012
Docket: CA49151

Between:

Patrick Aaron Dunn

Appellant

And

British Columbia Securities Commission

Respondent

Before: The Honourable Mr. Justice Willcock
(In Chambers)

On appeal from: A decision of the British Columbia Securities Commission, dated May 18, 2023 (*Dunn,* 2023 BCSECCOM 251).

Oral Reasons for Judgment

Counsel for the Appellant:	C.C. Cheng
Counsel for the Respondent:	J.A. Dean
Place and Date of Hearing:	Vancouver, British Columbia October 11, 2023
Place and Date of Judgment:	Vancouver, British Columbia October 12, 2023

Summary:

This is an application for leave to appeal an order of a Panel of the British Columbia Securities Commission. The applicant also seeks, if leave is granted, a stay of the order pending the hearing of the appeal. The order sought to be appealed requires the applicant to resign any position he holds as a director or officer of an issuer or registrant and prevents him from becoming or acting as a director or officer of an issuer or registrant for seven years. If leave is granted, the applicant will argue the Commission improperly imposed a punitive sanction

contrary to the regulatory purposes of the Securities Act and erred in failing to consider principles of proportionality when crafting its enforcement order. Held: Application dismissed. There is no apparent merit in the proposed appeal. There is no reasonable prospect the applicant could establish that, in imposing the sanction, the Panel misdirected itself, came to a decision that is so clearly wrong that it amounts to an injustice or gave no or insufficient weight to relevant considerations. It is therefore not in the interests of justice to grant leave to appeal in this case.

Introduction

[1] **WILLCOCK J.A.:** Mr. Patrick Dunn seeks leave to appeal an order of a Panel of the British Columbia Securities Commission, made for reasons indexed at 2023 BCSECCOM 251, requiring him to resign any position he held as a director or officer of an issuer or registrant, and prohibiting him from becoming or acting as a director or officer of any issuer or registrant for seven years. The order was pronounced on the following terms:

> [59] Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:
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> 1. under section 161 (1)(d)(i) of the Act, Dunn resign any position he holds as a director or officer of an issuer or registrant, except that regarding Viribus Structural Connectors Inc., this order takes effect 90 days after the date of this order;
> 2. except as provided in paragraphs 59(1) and (3), Dunn is prohibited:
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> a) under section 161(1)(d)(ii) of the Act, from becoming or acting as a director or officer of any issuer or registrant;
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> b) under section 161(1)(d)(iii) of the Act, from becoming or acting as a registrant or promoter;
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> c) under section 161(1)(d)(iv) of the Act, from advising or otherwise acting in a management or consultative capacity in connection with activities in the securities or derivatives markets;
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> d) under section 161(1)(d)(v) of the Act, from engaging in promotional activities by or on behalf of
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> i. an issuer, security holder or party to a derivative, or
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> ii. another person that is reasonably expected to benefit from the promotional activity;
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> until the later of:
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> e) the date that Dunn pays to the Commission the administrative penalty described in paragraph 59(4); or
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> f) seven years from the date of this order;
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> 3. notwithstanding paragraphs 59(1) and (2) above, nothing in this order prohibits Dunn from acting as a director of a not-for-profit golf

club;

4. Dunn pay to the Commission an administrative penalty of $60,000 under section 162 of the Act; and

5. Viribus pay to the Commission an administrative penalty of $10,000 under section 162 of the Act.

[2] If leave is granted, he will argue the Commission exceeded its jurisdiction by imposing a sanction inconsistent with the regulatory purposes of the *Securities Act*, R.S.B.C. 1996, c. 418, and erred in law in failing to consider principles of proportionality when it prohibited him from acting as a director or officer of Viribus Structural Connectors Inc. ("Viribus"), an operating company he founded and of which he is the principal operating mind.

[3] While Mr. Dunn's notice of appeal indicates an intention to appeal the duration of the sanctions ordered by the Panel, counsel did not raise these issues in his submissions, and the issues identified in the memorandum of argument relate solely to the effect of the sanctions on the operating company, Viribus.

[4] The impugned order permitted Mr. Dunn to remain a director and officer of Viribus until 90 days after the date of the order. That period has since been extended by consent until October 15, 2023. If leave is granted, the parties agree that the impugned order should be stayed pending the hearing of the appeal so that the appeal does not become moot.

Background

[5] On March 3, 2016, Mr. Dunn admitted he had engaged in illegal distribution of securities and unregistered trading in contravention of the *Securities Act*, and entered into a settlement agreement with the Securities Commission's executive director. He consented to an order that prohibited him from becoming or acting as a director or officer of any issuer or registrant, except a company of which he owned all the shares, from March 3, 2016 to March 3, 2018.

[6] On November 4, 2020, a notice of hearing was issued, alleging that both Mr. Dunn and Viribus had contravened the *Securities Act* and that Mr. Dunn had breached the 2016 settlement order (the notice is indexed at 2020 BCSECCOM 449).

[7] The liability portion of the hearing took place in November 2021. The Panel found:

a) Viribus breached ss. 50(3)(a) and 168.1(1)(b) of the *Securities Act* by failing to disclose details of Mr. Dunn's regulatory history in its offering documents while raising capital online in reliance on the start-up crowdfunding exemption to the prospectus requirement;

b) Mr. Dunn authorized, permitted, or acquiesced in Viribus' contraventions and therefore also contravened those same sections by operation of s. 168.2(1) of the *Securities Act*; and

c) Mr. Dunn breached the settlement order by acting as a director or officer of two companies during the prohibition period.

See *Re Patrick Aaron Dunn*, 2022 BCSECCOM 461 at para. 124.

The Sanction

[8] The sanction hearing was held on April 17, 2023. The Panel noted:

> [13] Orders under section 161(1) of the Act are protective and preventive in nature and prospective in orientation. This means that, when it crafts its orders, the Commission aims to protect investors, promote the fairness and efficiency of the capital markets, and preserve public confidence in those markets.

[9] It referred to the factors identified in *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22 at page 24, as those that ought to be considered when making orders under ss. 161 and 162 of the *Securities Act*.

[10] It found (at para. 17):

(a) Dunn's breaches of the Settlement Agreement and Order began almost immediately after he entered into the Settlement Agreement, which resulted from his prior breach of the Act;

(b) Dunn's breach of the Settlement Agreement and Order involved his acting as a *de facto* director and officer while attempting to create the impression that he was complying with the Settlement Agreement and Order by filing on the Corporate Registry in place of his own name the names of new directors of the relevant companies; and

(c) Dunn failed to disclose his prior regulatory history in a document that was used to solicit funds from investors and posted publicly online.

[11] The Panel rejected Mr. Dunn's evidence that the provision of misleading information in the solicitation was an innocent mistake.

[12] The Panel concluded its assessment of the seriousness of the conduct in question as follows:

> [19] To summarize our findings with respect to the seriousness of the misconduct in question, the misconduct here is not comparable to misconduct involving significant dishonesty and investor harm. However, there is significant seriousness to each of the breaches and the repeated nature of the misconduct adds to the seriousness and raises a strong concern about the risk of more misconduct in the future.

[13] The Panel recognized there was no direct harm to a specific investor, and that the potential for such harm was avoided by correction of the information provided to investors and the offer to repay investors, but noted that the misconduct which was established harms all investors and the market generally: at paras. 20–21.

[14] It placed some weight upon the admitted "serious misconduct" that resulted in the March 2016 settlement agreement and consent order as an aggravating factor: at paras. 22–24.

[15] The panel took instruction on its role in imposing a sanction from *Cartaway Resources Corp. (Re)*, 2004 SCC 26, holding as follows:

> [28] In *Cartaway Resources* … at para. 55, the Supreme Court of Canada stated that, in the capital markets, general deterrence "has a proper role to play in determining whether to make orders in the public interest and, if they choose to do so, the severity of those orders."
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> [29] Panels need to balance specific deterrence and general deterrence and consider the effect that the misconduct has on the integrity of the public markets when assessing administrative penalties. The sanctions imposed should be sufficient to deter respondents and others from engaging in similar conduct in the future.
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> [30] Dunn's breaches of the Act are not in any single instance of the most serious nature, but the repeated nature of the breaches over a number of areas of misconduct and in violation of the prior Settlement Agreement and Order lead us to the conclusion that Dunn presents a risk of future breaches. As a result, we also conclude that it is necessary to issue a sanction order which is sufficiently significant to provide both general deterrence to others and specific deterrence to Dunn.
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> [31] When we consider specific deterrence, we must, to the extent we have an evidentiary basis to do so properly, consider the financial circumstances of the Respondents. We know from the limited evidence and submissions provided by the Respondents that Viribus is developing as a

> business and has some reasonable cash flows. We have considerably less clarity about Dunn's ability to pay an administrative penalty.

[16] Ultimately, the Panel described factors that would support a sanction at the higher and lower end of the range of available sanctions as follows:

> [52] There are several factors which would place the Dunn's conduct at the higher end of the range. The repeated nature of Dunn's misconduct is one such factor. Another such factor is our sense that Dunn's future approach will reflect what we have repeatedly seen from him in the past, which is that he will attempt to appear to be fully compliant while actually having limited respect for the need to fully and carefully comply with the substance of securities regulatory requirements as a condition of soliciting and stewarding funds from investors. Another factor suggesting the need for a sanction order at the high end of the range is that, as a former registrant, Dunn should understand that the requirements of securities law exist to protect the public and that participants in our markets have a duty to understand those requirements and be careful to comply with them. It is not enough to seek to appear to comply.
>
> [53] The factors which would support a sanction order at a lower level are the absence of investor losses resulting from the conduct of Dunn and Dunn's argument that an extended prohibition will cause harm to Dunn, to Viribus and to other investors in Viribus out of proportion to the breaches proven.

[17] The Panel considered the argument that a sanction that precluded Mr. Dunn from serving as an officer or director of Viribus would be disproportionate to the proven misconduct:

> [54] … we accept that the business is growing and has the potential to grow further in the future. We also accept that Dunn plays a crucial role for the business in the sense that he has the sales contacts and he understands how to build the business. However, we did not receive any evidentiary basis to conclude and we are not convinced that the business could not function if it were to appoint an independent board of directors or to hire one or more officers to perform senior managerial functions. If it turns out, as Dunn suggests, that the business cannot continue without Dunn performing the functions of director and officer, that may not be desirable for Viribus or its investors. Perhaps it would become prudent for Viribus or its operations to be sold and for any ongoing management role for Dunn to be eliminated. Recognizing that possibility, but taking into account all of the other factors that we must consider, we conclude that the risk that Viribus or its operations will have to be sold does not outweigh the need to impose appropriate market prohibitions in this case. In addition, we conclude that the investors in Viribus need something other than Dunn's leadership; they need one or more directors and officers in the corporate organization of Viribus who will prioritize compliance. Finally, we conclude that the factors of general and specific deterrence deserve a level of weight here which cannot be properly achieved without including in our order a ban on Dunn's participation in the capital markets for the seven-year period recommended by the executive director.

> [55] Considering all of the factors, we conclude that Dunn cannot continue to be involved as a director or officer of Viribus in the long term. We have crafted an order which allows a transitional period that may facilitate the ongoing business of Viribus and provide an opportunity for investors in Viribus to protect their investments. For example, in the long term, Dunn could lead a sales team or a manufacturing team. But he must be prohibited from acting as a director or officer, in name and *de facto*. And he should be very careful not to breach our order by acting as a *de facto* director or officer while pretending not to do so.
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> [Emphasis added.]

[18] It then imposed a sanction that it characterized as one at the higher end of the range:

> [59] Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:
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> ...
>
> 1. under section 161(1)(d)(i) of the Act, Dunn resign any position he holds as a director or officer of an issuer or registrant, except that regarding Viribus Structural Connectors Inc., this order takes effect 90 days after the date of this order;
> 2. except as provided in paragraphs 59(1) and (3), Dunn is prohibited:
>   a) under section 161(1)(d)(ii) of the Act, from becoming or acting as a director or officer of any issuer or registrant;

Legal Framework

[19] The *Securities Act* provides that, subject to certain exceptions, a person directly affected by a decision of the Commission may appeal to the Court of Appeal with leave: s. 167(1).

[20] In *Smolensky v. British Columbia Securities Commission*, 2006 BCCA 254, and *Party A v. British Columbia (Securities Commission)*, 2020 BCCA 382 (Chambers) [*Party A*], the factors to be considered on an application for leave to appeal from a decision of the Commission under s. 167 are set out. They include, among other considerations, the “standard factors for leave”:

> (1) whether the point on appeal is of significance both to the litigation before the court and to practice in general;
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> (2) whether the appellant has an arguable case of sufficient merit;
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> (3) the benefit to the parties of an appellate decision in practical terms; and,
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> (4) most importantly, whether the appeal will unduly hinder the progress of the action.

The overarching consideration is, of course, the interests of justice: *Party A* at para. 29; *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10.

[21] There is some dispute whether this appeal is of significance to the practice in general. Mr. Cheng, for the applicant, says this is an opportunity to clarify the standard of review from sanction decisions of the Commission after the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]; the Commission says that work has been done in *Mountainstar Gold Inc. v. British Columbia Securities Commission*, 2022 BCCA 406 [*Mountainstar*]. There is no doubt, however, that the decision on appeal is of significance to the underlying litigation, its resolution is of benefit to the parties, and an appeal will not hinder the progress of the action. In short, if there is a meritorious appeal, it is in the interests of justice to grant leave.

Position of the Parties

[22] The merits threshold on an application for leave to appeal has been described as "relatively low": *Bartram v. Glaxosmithkline Inc.*, 2011 BCCA 539 at para. 16. As explained by Justice Taggart in *Queens Plate Development Ltd. v. Vancouver Assessor, Area 09* (1987), 16 B.C.L.R. (2d) 104, 1987 CanLII 2626 (B.C.C.A.), what is required is that the proposed appeal have some prospect of success on the merits.

[23] The applicable standard of review bears on the prospect of success. This is a statutory appeal subject to the appellate standards of review, as has been held in *Vavilov* and repeated in *Mountainstar*. The parties accept that if leave is granted, the exercise of the Panel's discretion in fashioning an appropriate sanction will be reviewed on the standard described as follows by Justice Marchand in *Mountainstar*:

> [110] Under s. 161 of the *Act*, the Commission has broad discretion to impose sanctions in the public interest. Accordingly, this Court should intervene only if, in assessing and imposing its penalty, the panel misdirected itself, came to a decision that is so clearly wrong that it amounts to an injustice or gave no or insufficient weight to relevant considerations.

[24] Mr. Dunn says the proposed appeal has merit. He says the Commission exercised its discretion under s. 161 of the *Securities Act* unreasonably and arbitrarily "when it issued orders for purposes outside the remedial goals of the

[*Securities Act*], having primary effects outside the regulatory scope of its statute, and failing to consider principles of proportionality."

[25] More specifically, he says:

a) The Commission's discretionary authority under s. 161 has to be exercised with a protective and preventative purpose, not a punitive one, and the sanction imposed here was punitive. The order exceeded the purposes of the *Securities Act* and strayed into general economic and corporate regulation; and

b) The Commission acted disproportionately, arbitrarily and unreasonably by making an order which would force him to cease acting as a director or officer of Viribus when the Commission was well aware that such an order might force Mr. Dunn to sell Viribus or its operations, and principles of deterrence could have been further emphasized through increased administrative or other penalties.

[26] The Commission submits there is no reasonable prospect a division of this Court will interfere with the Panel's decision. Specifically, the Commission says the Panel:

a) considered a broad range of individualized factors, including the fact that Mr. Dunn's misconduct was serious because it was deliberate, repeated and prolonged; concluded it was necessary to issue a sanctions order of sufficient significance to address the risk of future misconduct through specific deterrence; and concluded Mr. Dunn "cannot continue to be involved as a director or officer of Viribus in the long term";

b) considered whether the sanctions imposed, including the order prohibiting Mr. Dunn from acting as a director of Viribus, was proportionate to the seriousness of the conduct at issue, the circumstances of the applicant, and the need for general and specific deterrence;

c) noted that Mr. Dunn's decision to introduce limited evidence about Viribus left it without "any evidentiary basis" to conclude the business could not function absent Mr. Dunn's involvement as a director or officer;

d) acknowledged and considered the absence of any evidence of harm to any specific investors; and,

e) made an order that was not out of line with the precedents cited to it by the parties.

[27] It argues that these factors, taken together with Mr. Dunn's history of misconduct preceding the consent order, support the Panel's conclusion that Mr. Dunn's continued participation in the market as a director or officer of Viribus poses an unacceptable risk to investors which could only be addressed by the order which prohibited him from acting in that capacity.

Analysis

Misdirection

[28] Mr. Dunn says the Commission's public interest jurisdiction to make enforcement orders pursuant to s. 161 of the *Securities Act* is well settled: the scope of the Commission's public interest jurisdiction is not unlimited, it is a regulatory provision the purpose of which is neither remedial nor punitive; rather, it is protective and preventive, intended to be exercised to prevent likely future harm to the capital markets: *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 41–42. He argues the Commission misdirected itself by imposing a penalty that served a punitive rather than a regulatory purpose.

[29] In my view, there is no reasonable prospect Mr. Dunn can establish the Panel imposed a sanction intended to have punitive rather than protective or preventive effect, thereby misdirecting itself.

[30] There is no apparent misdirection. The Panel was alive to the purpose and scope of its public interest jurisdiction, as is apparent from the passages from the reasons I have cited above (in particular, at para. 13).

[31] As I have noted, the Panel engaged with factors relevant to making enforcement orders under ss. 161 and 162, and weighed the factors which would militate in favour of greater or lesser sanction against each other: at paras. 52–53.

[32] The reasons as a whole reflect the Panel's concern to impose a sanction that it considered necessary to protect the public interest.

[33] The Panel expressly stated that it was exercising its discretion so as to prevent likely future harm to the capital markets which could result from Mr. Dunn continuing to participate in those markets in the capacity as a director or officer of a regulated issuer. Its reasoning does not reflect an intention to impose a punitive order. In my view, there is no reasonable prospect that the applicant can establish that the effect of the order transforms what was intended to be a protective and preventive order into a punitive one.

Injustice

[34] Nor is there, in my view, any prospect Mr. Dunn can establish that by ignoring the principle of proportionality the Panel came to a decision that is so clearly wrong that it amounts to an injustice.

[35] In my view, there is no reasonable prospect the applicant will be able to establish, on the facts of this case, that it amounts to an injustice to impose a sanction that may have the effect of terminating the operation of an issuer with an operating business outside the banking and securities industry, as is suggested by counsel for the applicant.

[36] The Panel was cognizant of the effect this order would have on Viribus, and in doing so it directly expressed proportionality as follows:

> [53] The factors which would support a sanction order at a lower level are the absence of investor losses resulting from the conduct of Dunn and Dunn's argument that an extended prohibition will cause harm to Dunn, to Viribus and to other investors in Viribus out of proportion to the breaches proven.

[37] It concluded the potential impact did "not outweigh the need to impose appropriate market prohibitions": at para. 54. The Panel reasoned that "[c]onsidering all of the factors" (i.e., the factors recognized in the case law relating to investor protection and the promotion of public confidence in the capital markets), it had reached a conclusion that Mr. Dunn "could not continue as a director or officer of Viribus": at para. 55.

[38] The Panel did not, as counsel for Mr. Dunn submits, stray "into general economic and corporate regulation" when it noted, at para. 54:

> … If it turns out, as Dunn suggests, that the business cannot continue without Dunn performing the functions of director and officer, that may not be desirable for Viribus or its investors. Perhaps it would become prudent for Viribus or its operations to be sold and for any ongoing management role for Dunn to be eliminated. Recognizing that possibility, but taking into account all of the other factors that we must consider, we conclude that the risk that Viribus or its operations will have to be sold does not outweigh the need to impose appropriate market prohibitions in this case. In addition, we conclude that the investors in Viribus need something other than Dunn's leadership; they need one or more directors and officers in the corporate organization of Viribus who will prioritize compliance.
>
> [Emphasis added.]

[39] In engaging in this discussion, the Panel was addressing Mr. Dunn's argument that the proposed sanction would amount to an injustice. The Panel was appropriately weighing investor protection and the fostering of public confidence in the capital markets against the potential adverse impact of the proposed sanction.

[40] Counsel for the applicant submits that the Panel might have imposed other, less severe sanctions. However, the Panel expressly concluded that general and specific deterrence could not be properly achieved without banning Mr. Dunn's participation in public markets, and that decision was made in light of Mr. Dunn's breach of a less complete ban in the form of the consent order.

[41] The Panel found that Mr. Dunn breached the consent order almost immediately after he entered into it. It reasoned that the repeat nature of his misconduct rendered his actions more serious, and that a complete ban on his participation in the capital markets was necessary to achieve specific deterrence and protect the public by protecting confidence in the markets.

[42] Leave cannot be granted for the purpose of inviting this Court to overrule the Commission on the ground that its statutory objectives might be achieved through increased monetary penalties or some other sanctions, none of which were proposed to the Panel. Leave cannot be granted to a party who, in substance, asks this Court to usurp the Commission's discretion to craft appropriate orders, a discretion the Legislature has delegated to the Commission.

[43] The Court cannot intervene simply because it would have exercised its discretion to craft a public interest order differently. I see no reasonable prospect of the applicant establishing that the ban ordered, after the breach of a partial ban, in the circumstances of this case, amounts to an injustice.

Inappropriate Weighing

[44] Nor is there any prospect Mr. Dunn can establish that the Panel gave no or insufficient weight to relevant considerations.

[45] The central factors which Mr. Dunn says render the order disproportionate (that no investors were harmed, and that Mr. Dunn took curative measures to rectify the misleading disclosure), were all squarely addressed by the Panel, as the Commission notes in its submissions.

Conclusion

[46] For those reasons, I am of the view that there is no apparent merit in the appeal, and I dismiss the application for leave and the application for a stay of the Commission's order.

"The Honourable Mr. Justice Willcock"