BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Patrick Aaron Dunn, 2022 BCSECCOM 461 Date: 20221124

Patrick Aaron Dunn and Viribus Structural Connectors Inc.

Panel	Gordon Johnson	Vice Chair
	George C. Glover, Jr.	Commissioner
	Marion Shaw	Commissioner
Hearing dates	November 22, 24 and 26, 2021	
Submissions completed	May 20, 2022	
Decision date	November 24, 2022	

Appearing

Beverly Ma	For the Executive Director
Patrick Aaron Dunn	For Patrick Aaron Dunn and Viribus Structural Connectors Inc.

Findings

I. Introduction

[1] This is the liability portion of a hearing under sections 161, 162 and 174 of the *Securities Act*, RSBC, c. 418 (Act).

[2] In this proceeding the executive director alleges that:

1. Patrick Aaron Dunn (Dunn) breached a March 3, 2016 order of the Commission by acting as a director or officer of two companies when he was prohibited from doing so;

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

3. Dunn authorized, permitted or acquiesced in Viribus' contraventions of sections 50(3)(a) and 168.1(1)(b) of the Act and, therefore, Dunn also contravened those sections by operation of section 168.2(1) of the Act.

[3] Two witnesses testified at the liability hearing. A Commission investigator testified and was cross-examined by Dunn. Dunn testified and was cross-examined by counsel for the

executive director.

[4] The liability hearing was followed by written submissions and also, on May 2, 2022, by oral submissions. During oral submissions Dunn advised that he intended to make an application to admit new evidence. Dunn delivered his new evidence application on May 9, 2022. This decision addresses Dunn's new evidence application as well as the merits of the liability hearing.

II. Factual Background

[5] Dunn is a resident of British Columbia.

[6] On March 3, 2016, Dunn entered into a settlement agreement with the executive director (Settlement Agreement). As part of the Settlement Agreement, Dunn agreed to an order (Settlement Order).

[7] In the Settlement Agreement, Dunn admitted to the following misconduct:

1. Dunn engaged in a $50,000 illegal distribution contrary to section 61 of the Act with respect to two investors; and

2. Dunn engaged in unregistered trading contrary to section 34 of the Act with respect to two investors.

[8] The terms of the Settlement Order prohibited Dunn from, among other things, becoming or acting as a director or officer of any issuer or registrant, except that Dunn may become or act as an officer or director of a company all the shares of which are owned by him. The prohibition was in effect from March 3, 2016 to March 3, 2018 (Prohibition Period).

[9] On June 2, 2015, which was before the Prohibition Period, Dunn gave instructions to a third party for the incorporation of a British Columbia corporation (Company S). Dunn was initially the sole director of Company S. At the beginning of the Prohibition Period, Company S filed a notice of change of directors at the BC Corporate Registry removing Dunn as a director and adding Dunn's friend, YQ, and Dunn's wife, QL, as directors. Later, Company S filed a further notice of change of directors, adding Dunn's son-in-law, YZ, as a director.

[10] On July 27, 2016, which was during the Prohibition Period, Company S filed a notice of change of directors at the BC Corporate Registry adding Dunn as a director. Company S filed a further notice of change of directors on March 6, 2017 removing Dunn as a director.

[11] On October 5, 2016, which was during the Prohibition Period, Dunn signed the articles of incorporation for an additional British Columbia corporation (Company I). Dunn was initially listed as a director of Company I. On December 5, 2016, Dunn was removed and YQ was added as a director of Company I by notice of change of directors.

[12] On March 2, 2017, Dunn became the sole shareholder of Company I upon the transfer to Dunn from YQ of the remaining 50% of the shares of Company I which Dunn did not already own. Also on that date, Company I filed a notice of change of directors appointing Dunn as a director and removing all of the other directors. As is noted above, the Settlement Order did not prohibit Dunn from acting as a director of a company of which Dunn was the sole shareholder.

[13] In summary, during the Prohibition Period, Dunn was formally listed by Company S as a director from July 27, 2016 to March 6, 2017 and Dunn was formally listed by Company I as a director from October 5, 2016 to December 5, 2016.

[14] As is discussed in further detail below, Dunn's position is that he was listed as a director for those companies in those time periods by mistake and contrary to his instructions. As is also discussed below, the executive director's position is that, regardless of how Dunn was formally listed, Dunn acted as a *de facto* director or officer during the Prohibition Period for both Company S and Company I.

[15] Viribus is a British Columbia corporation which was incorporated on December 4, 2017. At all relevant times Dunn was the sole director and officer of Viribus.

[16] In 2020, Viribus engaged in two crowdfunding campaigns. Both campaigns were run through Vested.ca. Vested.ca is a start-up crowdfunding portal operated by Vested Technology Corp., which provides companies with a platform on which they can list, promote and secure investments for their projects.

[17] Both crowdfunding campaigns intended to raise capital under the prospectus and registration exemptions found in BC Instrument 45-535, *Start-up Crowdfunding Registration and Prospectus Exemptions* (BCI 45-535).

[18] The first crowdfunding campaign, which launched on March 9, 2020 and closed on June 7, 2020, offered up to 5,000,000 special warrants at $0.05 per unit (First Offering).

[19] The second crowdfunding campaign, which launched on June 16, 2020 and closed on September 13, 2020, offered up to 2,500,000 special warrants at $0.10 per unit (Second Offering).

[20] The special warrants automatically converted into common shares of Viribus, on a one-to-one basis, on the first to occur of (1) the issuance by a Canadian securities regulatory authority of a receipt for a final prospectus qualifying the issuance of common shares upon conversion of the special warrants, and (2) the date that was 18 months from the date of issuance of the special warrants.

[21] Viribus raised $17,300 from 69 investors in the First Offering. The distribution date for the First Offering was June 7, 2020. Viribus' filed exempt distribution report for the First Offering indicated that Viribus issued 346,000 special warrants at a price of $0.05 per unit, for a total of $17,300.

[22] The Second Offering was launched and initially attracted approximately $2,800 in investments but was subsequently terminated and all invested funds were returned to investors.

[23] On June 15, 2020, Viribus filed with the Commission a Form 1, Start-up Crowdfunding – Offering Document, to rely on the crowdfunding exemption for the First Offering under BCI 45-535 (First Offering Document).

[24] Part 4.2 of Form 1 requires the disclosure of information about the issuer's management, including whether any member of management has been convicted of a criminal offence, has been the subject of an order, sanction or penalty imposed by a government agency, or has been the subject of a bankruptcy or insolvency proceeding. Therefore, the First Offering Document required Viribus to disclose whether Dunn was or had been the subject of an order, sanction or penalty imposed by a government agency.

[25] Under Part 4.2 of the First Offering Document, Viribus stated "No" to the following question:

> State whether each person listed in item 4.1 or the issuer, as the case may be:
>
> [..] is or has been the subject of an order (cease trade or otherwise), judgment, decree, sanction, or administrative penalty imposed by a government agency, administrative agency, self-regulatory organization, civil court, or administrative court of Canada or a foreign jurisdiction in the last ten years related to his or her involvement in any type of business, securities, insurance or banking activity.

[26] The person listed in Part 4.1 of the First Offering Document was Dunn.

[27] Dunn signed and certified that the statements in the First Offering Document filed by Viribus were true.

[28] For both the First Offering and the Second Offering, the offering documents posted on Vested.ca required Viribus to disclose whether Dunn was or had been the subject of an order, sanction or penalty imposed by a government agency.

[29] In the online offering documents for the First Offering and the Second Offering that were posted when each campaign launched, Viribus did not provide a response to the following question:

> [..] is or has been the subject of an order (cease trade or otherwise), judgment, decree, sanction, or administrative penalty imposed by a government agency, administrative agency, self-regulatory organization, civil court, or administrative court of Canada or a foreign jurisdiction in the last ten years related to his or her involvement in any type of business, securities, insurance or banking activity.

[30] On July 9, 2020, staff of the Commission contacted Dunn, communicating that the offering documents for Viribus' two rounds of crowdfunding were false or misleading

because the documents did not disclose Dunn's previous regulatory history. Staff advised Dunn that, in both the online and filed versions of the offering document for the First Offering, and the online offering document for the Second Offering, the offering documents failed to disclose Dunn's Settlement Agreement and Settlement Order. Staff requested an explanation from Dunn of why he did not disclose the Settlement Agreement and Settlement Order in the offering documents.

[31] On July 13, 2020, Dunn advised Commission staff that he took the following steps:

- Suspended the Second Offering;
- Contacted all investors by email to provide them with an amended offering document correcting the improper disclosure;
- Contacted all investors of the First Offering and Second Offering to offer a right of withdrawal; and
- Filed amended offering documents with the Commission.

[32] No investor in the First Offering requested a refund.

[33] Viribus filed an amended Form 1 for the First Offering dated July 10, 2020. Viribus uploaded amended offering documents onto Vested.ca for the First Offering and the Second Offering. The amended documents disclosed that Dunn had agreed to a settlement with the Commission in 2016 and provided details of the Settlement Agreement and Settlement Order.

[34] The Notice of Hearing in this proceeding was issued on November 4, 2020.

[35] On January 29, 2021, a preservation order was issued by the Commission preventing the disposition of funds in an account in the name of Dunn (Preservation Order).

[36] On February 9, 2021, the Commission scheduled the liability portion of the hearing related to the allegations in the Notice of Hearing to commence on November 22, 2021.

[37] On March 1, 2021, the Applicant applied to the Commission under section 171 of the Act to revoke the Preservation Order (Revocation Application). The primary grounds asserted in support of the Revocation Application were that there was no evidentiary basis for the Preservation Order and that Dunn needed the funds frozen by the Preservation Order to fund his defence to the allegations. Dunn argued that the unavailability of the funds would prevent him from properly defending himself. The Revocation Application was supported by an affidavit of Dunn dated March 1, 2021. That affidavit, which was very brief, provided some conclusions, but no supporting details, about Dunn's need for the preserved funds.

[38] The Revocation Application was heard by this panel on May 3, 2021. On July 20, 2021, the Commission issued its decision, *Re Patrick Aaron Dunn*, 2021 BCSECCOM 294, dismissing the Revocation Application (Revocation Decision). The Revocation Decision addressed Dunn's asserted need for the funds as follows:

> Based on the record before us, we have no information at all of the Applicant's financial means beyond his bare statement that he requires the funds that are in the account subject to the Preservation Order to pay his legal expenses in this matter. We were not provided with sufficient, or any, details of the assets, income and expenses of the Applicant that we would require in order to consider whether it would not be prejudicial to the public interest to revoke the Preservation Order on the ground that it is causing hardship to the Applicant. As was noted in *Re Pasquill*, 20202 BCSECCOM 457, a simple assertion by an applicant of a need for funds will not be sufficient.

[39] On September 29, 2021, the British Columbia Court of Appeal granted leave to appeal the Revocation Decision.

[40] During the liability hearing management meeting held on October 27, 2021, counsel for Dunn asked that the November 22, 2021 hearing date be adjourned. Counsel for Dunn then submitted a formal application to adjourn the hearing date (First Adjournment Application). The thrust of the First Adjournment Application, which was accompanied by the same affidavit of Dunn as had been delivered in support of the Revocation Application, was that Dunn required counsel to represent him at the liability hearing.

[41] On November 5, 2021, the panel informed the parties that the First Adjournment Application was denied, with reasons to follow. In the course of those reasons, which were issued as 2021 BCSECCOM 476, the panel noted as follows:

> The First Adjournment Application was denied primarily on one of the same grounds which led to the dismissal of the Revocation Application. … The evidence which Dunn chose to provide in his affidavit in support of the Revocation Application was cursory and insufficient. This panel, in the Revocation Decision cited above, explained that deficiency to Dunn in unambiguous language. Dunn's evidence on the point did not address the deficiency in his submission on the First Adjournment Application when Dunn again advanced the identical deficient evidence in support of his argument regarding his lack of funds to pay for legal representation.

[42] Dunn's counsel withdrew on November 18, 2021, shortly before the liability hearing was scheduled to begin. At that point, Dunn applied for an adjournment (Second Adjournment Application) of the liability hearing. The Second Adjournment Application was dismissed, although Dunn was granted a brief adjournment after hearing the opening statement of counsel for the executive director and the evidence in chief against Dunn. Considering how much time was already available to him, this accommodation would allow Dunn a fair opportunity to prepare his case, including any cross-examination and his own evidence.

[43] During the liability hearing, Dunn was advised by the hearing panel that he should use the opportunity of that hearing to present all of the evidence he wanted to introduce because he should assume he would have no other opportunity to do so. Dunn was given additional time to prepare his cross-examination and his own evidence after Dunn had

heard the case against him. As has been noted, Dunn did both conduct cross-examination of the executive director's witness and provide his own testimony.

[44] After the oral hearing, written submissions were exchanged regarding what findings the panel should make on liability. After those submissions were delivered, the British Columbia Court of Appeal ruled on April 8, 2022 that the Preservation Order should be revoked on the ground that no evidentiary basis to support it had been provided. During the oral submissions on liability which followed, Dunn indicated that there was further evidence which he hoped to rely upon. Dunn was told that he should bring a formal application. He was told that his application should address what evidence was sought to be introduced, why that evidence was unavailable before, why the evidence is compelling and why it should be accepted into evidence.

[45] Dunn's application to introduce new evidence (New Evidence Application) was delivered on May 9, 2022. Dunn's proposed new evidence consisted of his notice of application for leave to appeal to the British Columbia Court of Appeal dated August 6, 2021, the Court of Appeal's decision dated April 8, 2022 and an email from Dunn's former solicitor to the Commission after the Court of Appeal's decision pressing the Commission to move urgently to revoke the Preservation Order against the account holding Dunn's funds. The Commission revoked the Preservation Order one week after the issuance of the Court of Appeal's order.

III. Positions of the Parties on the New Evidence Application

[46] Dunn's submission on the New Evidence Application is very brief regarding the relevance of the new evidence which he applies to admit. Dunn submits:

> I would like the panel to take this evidence into consideration when determining my fate or punishment if there is one as this whole trial has been unfair and **I was not given an opportunity to properly defend myself**. Also the commission made a clear mistake by freezing my personal bank account for over a year. The commission should be accountable for it's (sic) mistakes just like the public is. No one should be above the law and if they have done something unjust which they clearly have then they need to be accountable. (emphasis added)

[47] It is clear enough what Dunn is seeking to establish, even if some elements of his submission are implied and not stated directly. Dunn is submitting that:

1. Dunn lacked the funds to pay his legal counsel to represent Dunn at the liability hearing;

2. if the Preservation Order had never been granted, or if it had been set aside quickly, then Dunn would have used the $10,000 which had been frozen to pay his legal counsel at the liability hearing; and

3. if Dunn had been represented by counsel at the liability hearing, the evidence and arguments presented and the eventual outcome would have been materially different.

[48] The executive director opposes Dunn's application to introduce new evidence. The core of the executive director's submission is as follows:

> While Dunn argues that the hearing was unfair, the New Evidence is not relevant to his argument, as the contents do not concern the conduct of the proceedings. Importantly, Dunn's argument that the hearing was unfair is not supported by any evidence. A Commission hearing is not rendered unfair simply because a party does not have counsel. The hearing was manifestly fair. The Commission panel ensured that Dunn understood the liability proceedings.

[49] The executive director argued that even in criminal proceedings, there is no absolute common law right to counsel. For example, in *R v. Grindlay*, 2010 BCSC 581, the accused brought an application to secure funding for counsel in a criminal proceeding and argued that the denial of counsel amounted to a breach of the right to a fair trial. The Court summarized the issue before it as follows:

> The issue is whether a breach of the right to a fair trial has been demonstrated, because the person simply cannot afford counsel on any type of retainer, limited or otherwise, and the nature of the case is such that without that assistance there will not be a fair trial. That is the inquiry.

[50] In analyzing the issue, the Court stated that the onus rests on the moving party to first establish extraordinary financial circumstances:

> The nature of the applicant's financial circumstances must be extraordinary. There must be evidence of diligent efforts to obtain counsel; what counsel would cost; what can be done by way of personal circumstances, either doing without certain discretionary expenses, calling on family and friends, taking additional employment, seeking more remunerative types of employment, those sorts of efforts. There must also have been a degree of prudence, foresight, planning. Accused must allocate their resources once they know they are going to be criminally charged in such a way that a court can say they have done everything possible to place themselves in a situation of being able to fund counsel but still cannot do so.
>
> If satisfied of those matters, the court goes on to consider the seriousness and complexity of the offence, recognizing that the trial judge will have the responsibility to ensure that the accused understands the proceedings and can participate in them in a meaningful way and distinguishing trial fairness from the obvious desirability of counsel being present in any criminal case.

[51] Ultimately, the application was dismissed because the Court found, after reviewing the accused's salary and expenses, that the accused could have afforded counsel. While *R. v. Grindlay* is a criminal case and not specifically analogous to these administrative proceedings, it supports the proposition that there is no absolute right to counsel, even in judicial proceedings.

[52] The executive director submits that most of the evidence which Dunn seeks to rely upon is available to the panel as a part of the procedural history of this proceeding. The evidence which would not fall into that category is to the effect that after the Court of

Appeal's decision that the Preservation Order should be revoked, the Commission had not yet processed the revocation of the Preservation Order after a couple of business days and Dunn's solicitor followed up in writing. The executive director submits that such evidence does not connect in any way to Dunn's argument that he did not receive a fair hearing regarding liability.

[53] The executive director emphasizes that ultimately the question is whether the Commission met the duty of fairness to Dunn. The executive director submits that it did.

[54] The executive director identifies a number of examples which demonstrate that Dunn was treated fairly as Dunn sought to present his evidence and arguments. The executive director's examples are the following:

1. the panel Chair explained each stage of the hearing process to Dunn;

2. the panel Chair explained that Dunn would have the opportunity to make an opening statement, object to the admissibility of documents, tender evidence, cross-examine the executive director's witness, and to provide submissions;

3. Dunn was given an opportunity to clarify his answers on cross-examination;

4. Dunn did not express confusion or lack of understanding about the hearing process. When Dunn asked questions regarding hearing procedure, he was given answers, and Dunn was able to respond to questions by the panel;

5. The panel Chair explained the concept of solicitor-client privilege to Dunn when the issue arose;

6. All the documents tendered by Dunn were admitted into evidence;

7. On his cross-examination of Christopher Thompson, the executive director's witness, Dunn was able to ask all his questions of the executive director's witness without interruption;

8. The panel provided Dunn with additional time to deliver documents, prepare for cross-examination, and to file submissions;

9. Dunn filed written submissions on liability and oral submissions on liability, and received an extension to file written submissions;

10. During the oral hearing on liability submissions on May 2, 2022, months after Dunn closed his case, the panel explained to Dunn the option to bring an application to introduce fresh evidence and ensured he was aware of the process.

[55] The executive director also submits that there is no evidence that the Preservation Order prevented Dunn from retaining counsel.

IV. Analysis and Ruling Regarding the New Evidence Application

[56] Section 173 of the Act states that the hearing panel must receive all relevant evidence from a person to whom notice has been given and is not bound by the rules of evidence:

> The person presiding at a hearing required or permitted under this Act
>
> (a) has the same power that an investigator appointed under section 142 or 147 has under section 144,
>
> (b) must receive all relevant evidence submitted by a person to whom notice has been given and may receive relevant evidence submitted by any person, and
>
> (c) is not bound by the rules of evidence.

[57] In *Re Application 20210107*, 2021BCSECOMM 394, the panel said this about section 173 of the Act:

> Section 173 of the Act provides for a broad discretion to admit evidence from any party. However, that discretion must be exercised in a principled way. The tests which are referenced above were created to assist decision makers in balancing the benefits of receiving all relevant evidence from respondents who have been provided notice of a hearing under section 161 of the Act (or an accused in a criminal proceeding), against the administrative efficiency and fairness of achieving finality in an enforcement proceeding after receiving and testing the evidence […].

[58] We do not consider it necessary or helpful to address what test is appropriate regarding the admissibility of new evidence in the context of this proceeding. Any test would have to address, to some extent, why the new evidence was unavailable before the hearing and the extent to which the evidence must be compelling before it is admitted. In this instance Dunn's application falls short of even engaging such issues.

[59] When Dunn initially applied to revoke the Preservation Order, he relied on an affidavit which included a bare assertion that he required the funds to pay his legal expenses in this proceeding. The Revocation Decision addressed that evidence very directly and pointed out that "a simple assertion by an applicant of a need for funds will not be sufficient". Dunn was clearly advised in the Revocation Decision that if he wished to establish that the funds from the frozen account were required for his defence it would not be sufficient for him to rely upon his initial affidavit. Dunn was informed that more details of his assets, income and expenses would be required before a lack of funds argument could be properly considered. Despite that, in Dunn's First Adjournment Application, he sought an adjournment of the liability hearing based largely on an argument of lack of funds to pay counsel. Dunn, who was then represented by counsel, elected not to supplement his prior affidavit regarding his financial circumstances. In its ruling on the First Adjournment Application, this hearing panel again pointed out to Dunn that his evidence was not sufficient to establish that he was unable to pay for legal representation at his liability

hearing. Now Dunn is, for a third time, asking us to rely upon the same evidence to support a conclusion that he was unable to afford legal representation. Our conclusion on that issue has not changed, nor has the reasoning we have already provided. Broad assertions of a need for funds are not sufficient to support a conclusion that Dunn could not pay for legal representation at the liability hearing. This conclusion alone is sufficient to dispose of Dunn's New Evidence Application.

[60] We would also dismiss Dunn's New Evidence Application on the basis that he has not shown any prejudice to his right to a fair hearing. He has not demonstrated what additional evidence he might have introduced in the liability hearing had he been represented by counsel or what additional argument he might have put forward. In the absence of that context, we have no basis to determine that the liability hearing was unfair.

[61] Finally, we have looked back at the record of the liability hearing and we accept the submissions made by the executive director regarding the objective factors which establish that Dunn was given a fair hearing. Considerable effort was made by the panel at all stages of the hearing process to ensure that Dunn would know, both before and during the liability hearing, what his rights were and when and how Dunn could exercise his rights. Dunn appeared to understand his rights as the hearing proceeded and Dunn has not suggested that there was any step or opportunity which he did not understand.

[62] Most of the evidence which we rely on in our conclusions regarding liability is in the form of documents for which there is no dispute regarding authenticity as well as statements made by Dunn himself. Dunn does not identify any other evidence which would have been helpful to us in reaching a decision in Dunn's favour. Dunn does not suggest that he has learned of any additional argument which he did not raise when he was asked to do so.

[63] In conclusion, this is not an appropriate case to admit new evidence. Dunn's New Evidence Application is dismissed. We take notice of Dunn's successful application to revoke the Preservation Order at the British Columbia Court of Appeal. However, consideration of that matter does not assist Dunn. Further, we agree with the executive director that, to the extent it took Dunn several days to receive the relief he was entitled to after his success at the Court of Appeal, that had no impact on the fairness of the liability hearing.

V. Burden of Proof

[64] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53 (CanLII), the Supreme Court of Canada held, at paragraph 49:

> In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred…

[65] The Supreme Court of Canada also held that the evidence "must always be sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test. The executive director does not have to prove each evidentiary element on a balance of probabilities. The totality of the evidence must establish that the events at issue are more likely than not to have occurred in order to satisfy the balance of probabilities test.

VI. Positions of the Parties Regarding Breach of Commission Order

[66] The executive director submits that there are two separate bases on which we should find that Dunn was a director or officer of both Company S and Company I during the Prohibition Period. The first basis is that Dunn was listed on the Corporate Registry by those companies as a director during the Prohibition Period. The second basis is that Dunn acted as a *de facto* director or officer during the Prohibition Period.

[67] The executive director supports his position that Dunn was a *de facto* director or officer of both Company S and Company I by identifying a number of senior roles which Dunn performed for those companies. The executive director's summary of the evidence regarding Dunn's roles with Company I is as follows:

> Dunn was integral to the mind and management of Alpha Invoice during the Prohibition Period. During a compelled interview under oath, Dunn gave the following evidence about his role at Alpha Invoice:
>
> (a) Dunn set-up Alpha Invoice;
> (b) Dunn and QL financed Alpha Invoice;
> (c) Dunn, QL and YQ decided who the directors of Alpha Invoice would be;
> (d) Dunn made decisions together with the other directors of Alpha Invoice, namely QL and YQ;
> (e) Profits were divided evenly between Dunn, QL and YQ;
> (f) Dunn had signing authority for Alpha Invoice's bank account together with QL and YQ;
> (g) Dunn determined the suitability of investments for Alpha Invoice together with QL;
> (h) Dunn handled all the paperwork for factoring loans;
> (i) Dunn spent the most amount of time at the offices of Alpha Invoice compared to the other directors of the company;
> (j) Dunn, QL and YQ determined employee salaries.
>
> On public websites, Dunn called himself an officer of Alpha Invoice during the Prohibition Period. In 2017, Dunn stated on his LinkedIn profile that he was the president of Alpha Invoice from February 2015 to the present. In 2020, Dunn stated in Viribus' crowdfunding offering documents that he was Alpha Invoice's "CEO" from 2015 to 2018.
>
> During a compelled interview under oath, YQ gave the following evidence about Dunn's role at Alpha Invoice, which is consistent with Dunn's evidence under oath:
>
> (a) Dunn liked the factoring business and was inspired to start Alpha Invoice;

(b) Dunn set-up the share structure of Alpha Invoice jointly with YQ;
(c) Dunn had signing authority for Alpha Invoice's bank account together with directors YQ and QL;
(d) Dunn and YQ had access to banking statements for the company;
(e) Any two of Dunn, YQ or QL could sign for expenses;
(f) Dunn and YQ worked together to set-up the structure of Alpha Invoice.

[68] The executive director's summary of the evidence regarding Dunn's roles with Company S is as follows:

> Alpha Strategic's [bank] account opening documents from July to August, 2016, show the following:
>
> (a) Any two of the directors of Alpha Strategic, namely Dunn, QL and YQ, have signing authority over Alpha Strategic's bank account;
> (b) Dunn is an authorized signatory;
> (c) Dunn is listed as a director of Alpha Strategic.
>
> The evidence shows that Dunn did not own all the shares of Alpha Strategic during the Prohibition Period. The share structure of Alpha Strategic, as presented to [the bank], was as follows:
>
> (a) On July 22, 2016:
>
> i. Dunn owned 34% of the shares;
> ii. QL owned 33% of the shares;
> iii. YQ owned 33% of the shares.
>
> (b) On August 4, 2016, Dunn owned 31% of the shares.
>
> According to the B.C. corporate registry, the other listed directors of Alpha Strategic during the Prohibition Period were:
>
> (a) QL, as at March 3, 2016 onwards;
> (b) YQ, as at March 3, 2016 until March 6, 2017;
> (c) YZ, from July 27, 2016 to October 1, 2016.

[69] The executive director also pointed to evidence from YQ which suggested Dunn was performing acts for Company S and Company I that are typically performed by an officer or director of a company. In addition, the executive director referred to evidence of various payments to Dunn which the executive director suggested shows Dunn was a *de facto* director or officer.

[70] Dunn submits that he was not a *de facto* director or officer. Dunn asserts that he performed the following roles for Company S and Company I:

- Sales Management
- Treasurer
- Active Investor

- Analyst

[71] Dunn submits that his performance of those roles is not proof that he was acting as a director or officer. The most relevant of Dunn's specific submissions to that effect are:

1. being integral to the mind and management of Company I does not provide proof that I was in breach of my settlement order;

2. helping to form Company I does not provide proof or evidence that I was in breach of my settlement. I was an active investor in the company;

3. being an active investor is not in breach of my settlement order;

4. being a shareholder of a company does not put me in breach of my settlement order.

[72] Dunn contradicted key elements of the evidence of YQ. Dunn suggests that YQ was malicious in providing evidence against Dunn.

[73] Dunn disputed that the evidence of payments to himself or two others established that he was acting as a *de facto* director or officer.

VI. Analysis and Ruling Regarding Breach of Commission Order

[74] The definitions of a director and officer in the Act have not changed since the date of the Settlement Order.

[75] Under the Act, a "director" means "a director of a corporation or an individual performing a similar function or occupying a similar position for a corporation or for any other person."

[76] Under the Act, an "officer" with respect to an issuer or a registrant, means:

1. a chair or vice chair of the board of directors, or a chief executive officer, chief operating officer, chief financial officer, president, vice president, secretary, assistant secretary, treasurer, assistant treasurer or general manager,

2. an individual who is designated as an officer under a bylaw or similar authority of the registrant or issuer,

3. an individual who performs functions similar to those normally performed by an individual referred to [above].

[77] The three most relevant precedents which were identified to us were *Re Alexander*, 2007 BCSECOMM 645, *Re Jardine*, 2016 BCSECCOM 82 and *Re Malone*, 2016 BCSECCOM 257.

[78] In *Re Alexander*, the panel considered the respondent Alexander's involvement in managing a company (Pinewood) to determine whether he had breached a prior order by

acting as a *de facto* director or officer of that company. Pinewood was a public oil and gas company. Generally, the analysis covered two prongs of business "management":

1. management of operational activities, including managing expenditures, organizational structure, contracts, budgets, relationships with governments (for international mineral exploration projects);

2. management of financing activities and soliciting potential investors.

[79] The panel ultimately found that Alexander had been integrally involved in many aspects of Pinewood's operational and financing activities. Among other factors, the panel considered it important that Alexander had control over expenditures (e.g. approving payments) and that Alexander managed key aspects of a major project at Pinewood, including the organizational structure.

[80] In the appeal of *Re Alexander,* the B.C. Court of Appeal affirmed the panel's decision, finding that Alexander acted as a *de facto* director and officer, and applied the test in *Momentas Corporation* (2006), 29 OSCB 7408 :

> A "de facto" director has been characterized in the case law defined as "one who intermeddles and who assumes office without going through the legal formalities of appointment." (see Canadian Aero Services Ltd. v. O'Malley (1969), 61 C.P.R. 1 (Ont. H.C.) cited in R. v. Boyle, [2001] Carswell Alta. 1143 at para. 99).
>
> The test for determining if a person is a de facto director or officer is "whether, under the particular circumstances, the alleged director is an integral part of the mind and management of the company," taking into consideration the entirety of the alleged director's involvement within the context of the business activities at issue (Re World Stock Exchange (2000), 9 A.S.C.S. 658 at 18).
>
> In World Stock Exchange, the ASC also identified relevant factors for the determination of whether a representative is a de facto director or officer:
>
> a) appointed nominees as directors;
> b) responsible for the supervision, direction, control and operation of the company;
> c) ran the company from their office;
> d) negotiated on behalf of the company;
> e) company's sole representative on a trip organized to solicit investments;
> f) substantially reorganized and managed the company;
> g) selected the name of the company;
> h) arranged a public offering; and or
> i) made all significant business decisions.
>
> A further factor that can be helpful in determining that a person acted as a de facto officer is whether the person acted in a position with similar remuneration and responsibility as an officer within the company (see Canadian Aero Services Ltd. v. O'Malley (1974), 1973 CanLII 23 (SCC), 40 D.L.R. (3d) 371 at para. 22.).

[81] *Re Jardine* involved a respondent who breached a prior order by acting as a *de facto* director or officer. Jardine entered into a settlement with the Commission in 2007, and was prohibited from acting as a director or office of any issuer for two years. Seven months after signing the settlement agreement, Jardine offered an unemployed friend and his brother (with no prior relevant experience) an opportunity to make money by acting as a director. Through these nominee directors, Jardine incorporated a company and ran the business.

[82] In proceedings before the Commission, the parties in *Re Jardine* entered into an agreed statement of facts and made joint sanction submissions before the panel. The panel found that the respondent had acted as a *de facto* director of the company and used nominee directors to conceal his involvement. The facts of *Re Jardine* include several similar aspects to the present case, including:

(a) identifying opportunities integral to its mining business;
(b) managing the company's reorganization and appointed new directors and officers;
(c) contacting, coordinating with, and instructing an agent in British Columbia to prepare incorporation documents, deal with accounting and legal services, and prepare filings;
(d) approving payments by the company, monitoring finances, and overseeing its audit and quotation on the OTC audit;
(e) running the business from home;
(f) investigating business opportunities and negotiating key deals for the company, including soliciting seed shareholders.

[83] Through these nominee directors, Jardine incorporated a company and ran the business.

[84] *Re Malone* concerned the breach of a prior settlement order by a respondent who acted as a *de facto* director or officer. In 2009, Malone entered into a settlement agreement with the executive director and was prohibited from acting as a director or officer of any issuer before the later of: (1) three years from the date of the order; and (2) the date Malone successfully completed a specified course. Despite not completing the course, the respondent Malone incorporated a company, called Lion King. The initial director of Lion King was Malone's son, yet Malone was responsible for aspects of Lion King's operations including:

(a) Malone organized the creation of the Lion King;
(b) Malone was responsible for identifying, visiting, negotiating for and securing rights to Lion King's Chilean property;
(c) Malone had signing authority over bank accounts and his residential address was listed as the address of Lion King;
(d) Malone made most if not all operational decisions of Lion King;
(e) correspondence showed that Malone was integral to the business of Lion King.

[85] In *Re Malone*, the executive director alleged that Malone acted as a *de facto* director or officer, despite never formally being appointed as a director or officer of Lion King. The panel did not conduct an analysis of whether Malone acted in each type of role, finding

that the evidence was clear that Malone was an integral part of Lion King's mind and management viewed through the lens of his being a *de facto* director or officer:

> The legal and practical roles and responsibilities of a director versus an officer of a company are very different. As a consequence, there may be circumstances where there is a need to analyze whether an individual was acting as a de facto director versus acting as a de facto officer. This is not one of those cases. The evidence is clear that Malone was an integral part of Lion King's mind and management, whether viewed through the lens of his being a de facto director or de facto officer.

[86] As we apply the relevant tests, and in particular the "mind and management" test identified by the Court of Appeal in *Re Alexander*, we begin with the proposition that in any company someone, or some group of people, is acting as the mind and management. Whether it is express or otherwise, every company is continuously asking and answering questions such as "what line of business should we participate in", "who will be our target market", "how shall we finance our activities" and "who will be trusted to implement our business plans". The mind and management test focuses in part on identifying whether a specific person is integral to how a company is addressing those types of questions.

[87] Dunn is quite correct when he submits that in many companies, the fact that an individual acts as a sales manager or an analyst or a treasurer does not necessarily indicate that the individual is acting as a *de facto* director or officer. For example, a large public company (and some smaller companies) might have multiple analysts and sales managers who make significant contributions to the organization but are not performing the role of a director or officer. As the Court of Appeal pointed out in *Re Alexander*, it is necessary to take "into account the entirety of the alleged director's involvement within the context of the business activities at issue". In other words, it is not sufficient to look at the roles performed, it is essential to consider those roles in context.

[88] The context for the business activities of Company I and Company S is that they were very small organizations with significant levels of overlap among the individuals who were the owners, the individuals who were the directors, the individuals who were the officers and the individuals who were the employees. In that context, an analysis of whether Dunn was acting at times as a director or officer, as opposed to some other capacity, should focus on both the degree to which the function in question would normally fall within the scope of what a director or officer does as well as the extent to which Dunn was fulfilling his duties under someone else's direction. The greater the extent to which Dunn was exercising his own discretion without the benefit of policy guidance from another director or officer, the greater the extent to which it can be said that Dunn was himself acting in the capacity of a director or officer.

[89] Some of Dunn's evidence from his interview with a Commission investigator is indicative of the context within which he and others worked at Company I:

> Q -- then by all means tell me. So in terms of being a director, let's say after March 2nd of 2017 –

A M'mm-hmm.
Q -- did you have more of a formal role in managing the company or was it still –
A I don't think anything really changed, no.
Q Okay.
A I wouldn't say anything changed. It was just more paperwork I guess you would call it.
Q Okay.
A Yeah. We – we always made – Sabrina and I make decisions together, you know, so we'll look at each, you know, loan and say, does this make sense? And we'll decide together.
Q Okay. And – and so then this was after Trent left?
A Yes.
Q And then before Trent left, it would have been then the three of you asking those same questions?
A Yeah.
Q Is that true?
A. Yeah.

[90] Dunn also gave the following evidence during his interview:

Q Okay.
A Trent would – I mean, I think part of the reason why Sabrina and Trent got into an argument; he didn't do much.
Q Okay.
A Yeah. He was kind of – didn't do much. And obviously I would – obviously run everything by Sabrina. It was our money. So we would look – look at deals together and make sure that they were suitable for us. And we never lost any money; so I guess we did that right.
Q What ostensibly was Trent's role? Like, what should he have been doing?
A He should have been getting us more clients.
Q Okay.
A Yeah. But he didn't do much.
Q Was that the – whether or not he actually fulfilled his role, was that his/your collective understanding of his role?
A Yeah, I would say so.
Q Okay. And what about Sabrina?
A So her and I were kind of – well, obviously it was our money, so we were more looking at each deal and make sure that – well, when we lent money for factoring, that they were good deals, that we wouldn't lose – lose our money.
Q Yeah.
A Yeah.
Q Okay. How much time did everyone spend in the office?
A I spent the most. So I was there eight hours a day. Trent would come in a little late, leave a little early. Sabrina would be there quite a bit too.
Q Okay.
A Yeah but I was there the most, for sure.

[91] Putting together Dunn's description of the business context, the senior responsibilities Dunn was exercising and the extent to which Dunn was acting on his own or sharing decision-making with QL, we conclude that Dunn was acting as a *de facto* director or officer of Company I.

[92] We have considered Dunn's arguments that he was not acting as a director or officer by acting as a sales manager, treasurer, active investor or analyst. Dunn's arguments are not compelling. Dunn's arguments might be valid in some situations, depending on the larger context, regarding the roles Dunn fulfilled as sales manager, treasurer or analyst. But we interpret the role of "active investor", as those words are used by Dunn, to confirm that Dunn was at all relevant times taking part in shaping the key policies of Company I and the main economic decisions of that company. That role overlaps quite substantially with the role of director or officer. We find that Dunn's own description of the role he played confirms that he was acting as a *de facto* director or officer of Company I in breach of the Settlement Order.

[93] In the case of Company S, Dunn's evidence regarding what he did, including acting as an active investor, is quite similar to the role Dunn played for Company I. Our conclusions regarding Dunn being a *de facto* director or officer of Company I apply equally for Company S.

[94] We would add, regarding Dunn's role with Company S, that Dunn does not dispute he was, both formally and functionally, a director until the beginning of the Probationary Period. At that point, Dunn could not have complied with the Settlement Order merely by causing Company S to file a notice of change of directors with the Corporate Registry removing Dunn as a listed director. Compliance with the Settlement Order required not merely a change of form, it required a change in the substance of who was directing the business activities of Company S. Despite the filing of the notice of change of directors, the evidence shows that there was no change in the substance of Dunn's role.

VII. Positions of the Parties Regarding False or Misleading Disclosure

[95] Dunn does not dispute that he made the misstatements and omissions alleged in the Notice of Hearing. Dunn asserts that the misstatements arose from mis-readings and misunderstandings of the questions posed in the forms that he completed and submitted. Dunn points out that whatever errors he made were corrected as soon as they were drawn to his attention. Dunn also notes that he offered refunds to investors.

[96] In light of Dunn's acknowledgment of his misstatements and omissions, the executive director focused on the other elements of sections 50(3)(a) and 168.1(1)(b) of the Act which must be established in order to conclude that a breach of those sections occurred.

[97] The executive director submits the following regarding section 50(3)(a) of the Act:

> A plain reading of section 50(3)(a) shows that this provision does not incorporate or reference the definition of a "material fact" or "material change". Section 50(3)(a) is unlike section 50(2), for example, which refers to a

> misrepresentation", which in turn requires a consideration of a "material fact", defined as a fact that "would reasonably be expected to have a significant effect on the market price or value of the security". Additionally, unlike section 50(2), section 50(3)(a) does not require the person who makes the statement to have actual or constructive knowledge of the misrepresentation.

[98] The executive director asserts that we are authorized to, and we should, draw our own inferences about whether a reasonable investor who is provided with false or misleading information or omissions of required information would find accurate and complete information important to a decision whether to invest. Similarly, with respect to alleged false or misleading statements or omissions referenced in section 168.1(1)(b), the executive director asks that we draw our own conclusions, without the need for expert evidence, regarding the issue of materiality.

[99] Section 50(3)(a) of the Act states:

> A person engaged in a promotional activity must not make a statement or provide information
>
> (a) that a reasonable investor would consider important in determining whether to purchase, not purchase, trade or not trade a security if the statement or information, at the time and in light of the circumstances in which the statement is made or the information is provided,
>
> (i) is false or misleading, or
>
> (ii) omits a fact necessary to make the statement or information not false or misleading,…

[100] Section 50(3)(a) of the Act came into force on March 27, 2020. This provision has not been previously considered by a Commission panel. The standard that section 50(3)(a) creates is whether a reasonable investor would find the statement or information important when making an investment decision. This is different from the definitions of "material change" and "material fact" in the Act.

[101] The definition of "security" includes:

> (a) a document, instrument or writing commonly known as a security;
> (c) a document evidencing an option, subscription or other interest in or to a security; …
> (d) a bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription […]

[102] A "trade" is defined as a number of activities, including:

> (a) a disposition of a security for valuable consideration whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or a transfer, pledge, mortgage or other encumbrance

> of a security for the purpose of giving collateral for a debt or other obligation;
> …
>
> (f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (e.2).

[103] A "promotional activity" means:

> any activity, including, for greater certainty, any oral or written communication, that by itself or together with one or more other activities encourages or reasonably could be expected to encourage a person
>
> (a) to purchase, not purchase, trade or not trade a security, or
>
> (b) to trade or not trade a derivative,
>
> but does not include an activity prescribed for the purpose of this definition.

[104] The regulations do not currently prescribe any "activity" to be excluded from this definition.

[105] The defined term, "promotional activity" was added into the Act on March 27, 2020 to replace the definition of "investor relations activities". A comparison of these two definitions shows that a "promotional activity" is broader than "investor relations activities".

[106] Section 168.1(1)(b) of the Act states that a person must not:

> make a statement or provide information in any record filed, provided, delivered or sent under this Act, or in relation to a service provided by the commission, that, in a material respect and at the time and in light of circumstances under which it is made, is false or misleading, or omit facts from the statement or information necessary to make that statement or information not false or misleading.

[107] Section 168.1(2) of the Act provides that a person does not contravene subsection (1) if the person:

> (a) did not know, and
> (b) in the exercise of reasonable diligence, could not have known that the statement or information was false or misleading.

[108] We begin our analysis of the applicability of the above provisions by noting that Dunn admits he made the misstatements and omissions alleged. It is beyond dispute that the relevant statements were incorrect either because of what was stated or what was omitted. What we must decide in this proceeding with respect to section 50(3)(a) is whether Dunn was engaging in promotional activity at the time of the statements and omissions and

whether a reasonable investor would consider the statements and the omitted information important when deciding whether or not to participate in the First Offering or the Second Offering.

[109] We agree with the submissions of the executive director that the crowdfunding communications made through a crowdfunding portal are a type of promotional activity under the Act.

[110] A company that is crowdfunding on a portal is trying to raise capital from investors. By participating in crowdfunding, a company is encouraging a person to purchase securities of the company.

[111] In 2020, Viribus engaged in two crowdfunding campaigns, both run through Vested.ca.

[112] A crowdfunding site is not just incidental to the required filings. It is the interface on which a potential investor can learn about the investment, and a promoter can interact with potential or existing investors. The communications that Viribus made in the course of its crowdfunding are a promotional activity under the Act.

[113] Viribus was a person engaged in a promotional activity when it posted offering documents to Vested.ca because Viribus made written communications that encouraged investors to invest in Viribus securities.

[114] We agree with the executive director that it is our role to assess whether a reasonable investor would consider the statements and omissions in question to be important when deciding whether or not to invest in the First Offering or the Second Offering. We find that the statements would be considered important by a reasonable investor. Dunn was the sole director and contact person of Viribus. Reasonable investors would consider Dunn's regulatory history to be important information in deciding whether or not to invest in Viribus. Dunn had been sanctioned based on the facts admitted in the Settlement Agreement. The admitted misconduct included engaging in an unregistered distribution and engaging in an illegal distribution. That serious misconduct in the very similar fundraising activity would have been important to a reasonable investor at the time of considering investing in the First Offering or the Second Offering.

[115] Turning to section 168.1(1)(b), the issues are slightly different from those raised in the analysis of section 50(3)(a). Most of the issues duplicate the issues addressed above. The material differences are that we must consider the potential applicability of section 168.1(2) of the Act, we must make an explicit finding regarding whether the statements or omissions were false or misleading "in a material respect" and we must find that the relevant statements were included in a record "filed, provided, delivered or sent" under the Act.

[116] There is no suggestion that the exception provided in section 168.1(2) applies. Dunn does not suggest he was unaware of the falsity of the statements and omissions in question and he does not rely on a reasonable diligence defence with respect to the statements and omissions in question.

[117] Regarding the issue of materiality, we find that the statements were material on both the test of the extent to which they departed from the truth and the test of the significance of the misinformation that was false or misleading. The degree of departure from the truth is significant because the omissions misled investors to believe that there was no cause for concern about Dunn's regulatory history, when the opposite was true. The significance of the false information and omissions was, for the reasons set out above in our discussion of the section 50(3)(a) test, sufficient to meet the "material respect" requirement.

[118] The final element that must be proven to establish a breach of section 168.1(1)(b) is that the relevant statements were included in a record filed, provided, delivered or sent under the Act. Certificates were admitted into the record confirming that the First Offering Document had been filed with the Commission. Dunn did not dispute that it was filed, and our conclusion is that it was.

[119] The executive director did not point to evidence that documents relating to the Second Offering were "filed, provided, delivered or sent" under the Act and, accordingly, the panel makes no findings regarding the Second Offering under section 168.1(1)(b) of the Act.

VIII. Application and Analysis of Section 168.2(1)

[120] Liability under section 168.2(1) of the Act is established where:

1. a corporate respondent has contravened the Act or regulations, or failed to comply with a decision; and

2. an individual who is an employee, officer, director or agent of the corporate respondent "authorizes, permits or acquiesces" in the contravention.

[121] The executive director submits that Dunn, as the sole director of Viribus, breached the same sections of the Act as did Viribus. As Dunn signed off on the crowdfunding offering documents, the executive director submits that he clearly had the required involvement necessary for a finding of liability under section 168.2(1).

[122] Furthermore, the executive director submits that even though knowledge is not a requirement under section 168.2(1) of the Act, it is clear from the evidence that Dunn knew or should have known that the First Offering Document contained a false or misleading statement because it failed to disclose his own regulatory history.

[123] We agree with the submissions of the executive director. As the sole director of Viribus, Dunn was responsible for ensuring the accuracy of records filed under the Act. Given the findings discussed above, we conclude that Dunn authorized, permitted or acquiesced in Viribus' breaches of sections 168.1(1)(b) and 50(3)(a) of the Act.

IX. Summary of conclusions

[124] We have found:

1. with respect to the allegations against Dunn, that Dunn:

    a. breached the Settlement Order by acting as a director or officer of two companies when he was prohibited from doing so, and

    b. authorized, permitted, or acquiesced in Viribus' contraventions of sections 50(3)(a) and 168.1(1)(b) of the Act and therefore also contravened those sections by operation of section 168.2(1) of the Act; and

2. with respect to the allegations against Viribus, that Viribus breached sections 50(3)(a) and 168.1(1)(b) of the Act by failing to disclose details of Dunn's regulatory history in its offering documents while raising capital in reliance on the start-up crowdfunding exemption to the prospectus requirement.

X. Schedule of submissions regarding sanctions

[125] We direct the executive director and the respondents to make their submissions on sanction as follows:

By December 15, 2022	The executive director delivers submissions to the respondents and the Commission Hearing Office.
By December 30, 2022	The respondents deliver response submissions to the executive director and the Commission Hearing Office. Any party seeking an oral hearing of the issue of sanctions so advises the Commission Hearing Office. The hearing officer will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).
By January 9, 2023	The executive director delivers reply submissions (if any) to the respondents and to the Commission Hearing Office.

November 24, 2022

For the Commission

Gordon Johnson
Vice Chair

George C. Glover, Jr.
Commissioner

Marion Shaw
Commissioner