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

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Patrick Aaron Dunn and Viribus Structural Connectors Inc.

Panel	Gordon Johnson George C. Glover, Jr. Marion Shaw	Vice Chair Commissioner Commissioner
Hearing date	April 17, 2023	
Submissions completed	April 17, 2023	
Decision date	May 18, 2023	

Appearing

Jillian Dean	For the Executive Director
Patrick Aaron Dunn	For Patrick Aaron Dunn and Viribus Structural Connectors Inc.

Decision

I. Introduction

[1] This is the sanctions portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418 (Act). The findings of this panel on liability made on November 24, 2022, reported at 2022 BCSECCOM 461, are part of this decision.

[2] We found that:

(a) with respect to the allegations against Patrick Aaron Dunn (Dunn), Dunn:

i. breached the Settlement Order, which formed part of the March 3, 2016 Settlement Agreement Dunn entered into with the executive director, by acting as a director or officer of two companies when he was prohibited from doing so, and

ii. authorized, permitted, or acquiesced in contraventions by Viribus Structural Connectors Inc. (Viribus) 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

(b) with respect to the allegations against Viribus, 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.

[3] Both the executive director and Dunn made written submissions and oral submissions on the appropriate sanctions in this case.

II. Position of the Parties

A. Position of the Executive Director

[4] The executive director submitted it is in the public interest that we impose the following sanctions:

(a) with respect to Dunn:

i. comprehensive market bans under section 161(1) of the Act, for a period of seven years; and

ii. an $80,000 administrative penalty under section 162 of the Act; and

(b) with respect to Viribus, a $10,000 administrative penalty under section 162 of the Act.

B. Position of the Respondents

[5] Some of the submissions made by Dunn on behalf of himself and Viribus were attempts to re-argue some of the submissions which he asserted unsuccessfully at the liability stage of this proceeding. For example, Dunn sought to challenge our findings that he acted as a *de facto* director of two companies by arguing that although he was listed as a director of one company at the Corporate Registry, that listing was due to an error by his accountant. In another example, Dunn sought to challenge our findings that he was acting as a *de facto* director of those companies by saying he was earning a living and he is "entitled to do so under the Charter of Rights of Canada". Dunn also sought to challenge our conclusion that he had had a fair hearing at the liability stage by reiterating that he had lacked funds to pay for legal representation. The sanctions stage of the proceeding is not an opportunity to re-argue the liability findings and so we do not place any weight on those submissions, all of which he had previously made in the liability stage.

[6] Dunn made several other submissions which were helpful to us.

[7] Dunn noted that there is no suggestion that any investors lost money as a result of his misconduct or that of Viribus. Dunn argues that the absence of investor losses distinguishes his case from some of the precedents referenced by the executive director.

[8] Dunn submits that as soon as the false description of his prior regulatory history in the Viribus disclosure form - Form 1, *Start-up Crowdfunding – Offering Document* - was brought to his attention, he emailed all investors an amended version of the document and offered each investor an opportunity to withdraw any investment made.

[9] Dunn submits that none of the findings made against him involves fraud or other serious misconduct of the type which often comes before panels of the Commission.

[10] Dunn placed considerable emphasis on what he asserts will be potential adverse impacts on Viribus and its investors if the proposed prohibitions were to be imposed on him. These prohibitions would prevent Dunn from acting as a director or officer of Viribus. Dunn asserts that Viribus and its investors have improving prospects. Dunn submits that he currently performs every significant role for Viribus and if he is prohibited from being a director or officer then Viribus' promising business, which Dunn characterizes as a business with multi-million dollar potential, will be destroyed. Dunn emphasizes the disproportionate impact which the prohibitions sought by the executive director would have on him and Viribus when compared to the impact that similar prohibitions would have on other individuals who are not managing a growing business.

[11] While Dunn provided some evidence that Viribus has a viable business with growing sales to major retailers, it was not sufficient to provide a comprehensive picture of the business of Viribus. For example, Dunn did not provide any financial statements, tax returns or contracts.

[12] Dunn noted that he is on the board of directors of a golf club and he suggests that this directorship is a service which creates no risk to the public.

III. Analysis

A. Introduction

[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.

[14] In *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22 at page 24, the Commission provided a non-exhaustive list of factors relevant to making orders under sections 161 and 162 of the Act:

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:

- the seriousness of the respondent's conduct,
- the harm suffered by investors as a result of the respondent's conduct,
- the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
- the extent to which the respondent was enriched,
- factors that mitigate the respondent's conduct,
- the respondent's past conduct,
- the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
- the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
- orders made by the Commission in similar circumstances in the past.

[15] We address the factors which are relevant under the following headings.

B. Seriousness of Conduct

[16] We agree with Dunn that the breaches which were alleged and proven against him and Viribus do not involve the most serious elements of dishonest and harmful conduct which sometimes come before us. For example, no fraud or market manipulation was alleged or proven against the Respondents and there is no suggestion that the Respondents were seeking to obtain funds from investors in order to use those funds for purposes not intended by the investors.

[17] Our agreement with Dunn that the breaches found against him and Viribus do not fall into the category of the most serious breaches does not mean that the misconduct in question was not serious. There are several elements of Dunn's misconduct which involve a significant degree of seriousness. Specifically:

(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.

[18] Further, given the clarity of the question contained in the start-up crowdfunding offering document which Dunn answered with false information, we do not accept Dunn's submission that he misread the question and that the false information was an innocent mistake.

[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.

C. Harm to investors

[20] We do not find that the breaches proven against the Respondents caused any direct harm to any specific investor. We accept that to the extent that any investor invested in Viribus through the crowdfunding process based on false information about Dunn's regulatory history, that potential for harm was largely cured by the steps Dunn and Viribus took by offering investors the opportunity to obtain their funds back after the Respondents circulated corrected information.

[21] Nevertheless, even when no funds are lost as a result of false statements contained in documents provided to investors, such misconduct harms all investors and the market generally by causing an erosion of trust in the integrity of the market. That type of harm was caused by the misconduct of the Respondents when they included false information in a form used to raise funds from investors and when Dunn breached the Settlement Agreement and Order.

D. Aggravating factors

[22] Dunn was previously registered under the Act as:

(a) a dealing representative restricted to exempt market securities from June 22, 2011 to October 11, 2013 with [a registrant];

(b) a dealing representative restricted to exempt market securities from November 8, 2013 to March 18, 2015 with [a registrant]; and

(c) a dealing representative restricted to exempt market securities from April 1, 2016 to April 30, 2017 with [a registrant].

[23] The Commission has found in *Re FS Financial Strategies*, 2020 BCSECCOM 121 and in *Re Williams*, 2016 BCSECCOM 283 that prior periods of registration under the Act should have made a respondent aware of the requirements of the Act and that past misconduct is an aggravating factor.

[24] Further, the Settlement Agreement and Order arose from serious misconduct admitted by Dunn, including engaging in an unregistered distribution. As has been found in *Re Waters*, 2014 BCSECCOM 369, past misconduct is an aggravating factor.

E. Mitigating factors

[25] There are no mitigating factors.

F. Past misconduct

[26] We have discussed Dunn's past misconduct above under the headings for aggravating factors and seriousness of misconduct of the Respondents.

G. Specific and general deterrence

[27] The purpose of deterrence is to discourage future misconduct specifically by the individual wrongdoer and generally to discourage misconduct by others. Specific and general deterrence are factors for a panel to consider when determining the appropriate sanctions. The panel in *Re Smith*, 2021 BCSECCOM 486, at para. 22, described specific and general deterrence as follows:

> Specific deterrence and general deterrence are related but not identical concepts. Specific deterrence discourages this respondent from participating in future misconduct. General deterrence discourages others from participating in misconduct similar to that in the subject case. Both goals are legitimate in the crafting of a sanction which properly balances all of the factors which are relevant in any particular case.

[28] In *Cartaway Resources Corp. (Re)*, 2004 SCC 26, 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."

[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.

[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.

[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.

[32] In answer to the executive director's recommendation of an administrative penalty in the amount of $80,000 to support the objective of specific and general deterrence, Dunn submits that no significant administrative penalty should be imposed against him because he has nearly no income. Dunn sought to support this submission through evidence in the

form of a spreadsheet of extracts from his bank statement which he asserts records the flows of all income available to him during the period November 29, 2021 through February 28, 2023. As we have noted before in decisions we issued when Dunn sought to vary or revoke the preservation order against him and when Dunn sought to adjourn the liability hearing in order to wait until the preserved funds might become available to fund legal costs, we are not able to make findings about Dunn's lack of resources without a proper evidentiary basis. As we indicated then, unsupported assertions are not helpful. Fragmented and limited disclosure of information is generally no more helpful.

[33] In the present case, Dunn's submissions and limited evidence about his lack of financial resources are not helpful because, if we accept Dunn's submission relating to his bank account evidence at face value, Dunn managed to feed and clothe himself and pay what we know must be other necessities of life for approximately 15 months without spending any funds. The best we can say is that Dunn's submissions and evidence raise more questions than they answer, and we are still in the dark about how Dunn supports himself or what financial assets are available to him.

H. Prior Decisions

[34] The executive director asserted that the following decisions provide some guidance in determining appropriate sanctions for this case.

Re Jardine

[35] In *Re Jardine*, 2016 BCSECCOM 82, the respondent was the subject of a previous enforcement action, which resulted in a 2007 settlement agreement and order of the Commission. As part of that settlement, Jardine agreed to an order prohibiting him from being a director or officer of any issuer for a period of two years.

[36] Jardine later breached that order by acting as a *de facto* director or officer, resulting in further enforcement proceedings and the imposition of sanctions against him.

[37] Jardine admitted liability and, following joint submissions on sanction, the panel banned Jardine from the markets for seven years and ordered him to pay a $40,000 administrative penalty.

[38] Jardine received a credit in his sanctions because his admissions significantly shortened the enforcement proceedings. No such credit is due to Dunn in this case.

Re Malone

[39] In *Re Malone*, 2016 BCSECCOM 334, the respondent entered into an agreement to settle a previous enforcement proceeding. The resulting 2009 settlement order banned Malone from acting as a director or officer and from engaging in investor relations activities until the later of a period of three years, or until he had completed a course of study concerning the duties and responsibilities of directors and officers.

[40] Malone breached the settlement order by conducting investor relations activities and acting as a *de facto* director/officer of a corporation. He did so deliberately. Knowing that he was prohibited from acting in the capacity of an officer or director, Malone arranged his affairs to obfuscate his involvement and evade regulatory oversight.

[41] Malone was banned from the markets for seven years and ordered to pay a $60,000 administrative penalty.

Alexander (Re)

[42] In *Alexander (Re),* 2007 BCSECCOM 773*,* the respondent had previously been sanctioned for significant misconduct resulting in an administrative penalty of $1,200,000 and a market ban for a period of 20 years.

[43] Alexander breached that previous order by acting as a *de facto* director and officer of seven different companies over a lengthy period of time while also engaging in investor relations activities. The panel noted that his behavior showed "incredible disdain for the order and the regulatory system" and that his breaches of the order were "inexcusable."

[44] Despite the severity of Alexander's misconduct, there was no evidence of any losses or harm to any individual investors. The panel noted that the lack of enrichment was "not for want of trying."

[45] The panel emphasized the apparent insufficiency of earlier sanctions in considering specific deterrence, and the need to "go far enough" to actually deter Alexander from further misconduct. With certain carve-outs, Alexander was permanently banned from the markets and was ordered to pay an administrative penalty of $200,000.

Re ecoTECH

[46] In *Re ecoTECH*, 2019 BCSECCOM 399, the panel considered appropriate sanctions for a breach of a cease trade order and a contravention of section 50(1)(d) of the Act by an issuer respondent and three individual respondents by operation of section 168.2 of the Act.

[47] In the course of investor relations activities, ecoTECH failed to disclose the existence of the cease trade order to investors. The panel found the existence of the order to be a material fact.

[48] The panel imposed a five-year market ban on two of the individual respondents, together with administrative penalties of $20,000. The panel imposed a four-year market ban on the third individual respondent, together with an administrative penalty of $15,000, reflecting his lesser role in the misconduct.

[49] The issuer respondent remained subject to the original cease trade order. No financial penalty was imposed to avoid further harm to investors who had already suffered harm arising from the misconduct being sanctioned.

IV. Conclusions Regarding Appropriate Sanctions

[50] With respect to Viribus, we conclude that it is essential to include a relatively small administrative penalty in order to serve the objective of general and specific deterrence. We recognize that Viribus' breach of the Act is not of the most serious nature, but there is significant seriousness as we describe above. The executive director has recommended an administrative penalty of $10,000 and we find that to be reasonable.

[51] A more detailed analysis is required with respect to Dunn because we are seeking to balance a number of material factors. We begin with a review of the relevant precedents. We note that *Re Alexander* is distinct in that the level of seriousness in that case far exceeds what is present here. The other cases all differ in some respects, but they suggest a range of market bans of five to seven years and a range of administrative penalties of between $15,000 and $80,000.

[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.

[54] Though there are many gaps in our knowledge about the affairs of Viribus due to the limited evidence which was introduced about that company and its operations, 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.

[56] We recognize that at the moment Dunn is the primary decision maker for Viribus. We recognize that based on the terms of our orders, significant decisions will have to be made by Viribus; for example, regarding the appointment of one or more new board members at a shareholders’ meeting that might have to be called, regarding the appointment of one or more new officers and regarding a possible sale of Viribus or its business. Dunn might be the only person in a position to initiate the steps that will need to be taken. Our order should allow for that, and we are crafting the order to do so.

[57] Considering all of the relevant factors, including the significance of the seven-year ban we are imposing, we do not feel that the entire $80,000 administrative penalty recommended by the executive director is required in order to achieve the goals of the sanction process. An appropriate administrative penalty in this case is $60,000.

[58] We agree with Dunn that there is no public interest benefit in prohibiting Dunn from acting as a director of his golf club, provided that the golf club is operated as a not-for-profit entity. Our order creates an exception consistent with our conclusion in that regard.

V. Orders

[59] Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:

Dunn

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;

b) under section 161(1)(d)(iii) of the Act, from becoming or acting as a registrant or promoter;

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;

d) under section 161(1)(d)(v) of the Act, from engaging in promotional activities by or on behalf of

   i an issuer, security holder or party to a derivative, or

   ii another person that is reasonably expected to benefit from the promotional activity;

until the later of:

e) the date that Dunn pays to the Commission the administrative penalty described in paragraph 59(4); or

f) seven years from the date of this order;

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.

May 18, 2023

For the Commission

Gordon Johnson
Vice Chair

George C. Glover, Jr.
Commissioner

Marion Shaw
Commissioner

NOTICE: The orders made against Patrick Aaron Dunn in this matter may automatically take effect against him in other Canadian jurisdictions, without further notice to him.