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

Citation: Re Dunn, 2024 BCSECCOM 279 Date: 20240625

Patrick Aaron Dunn and Viribus Structural Connectors Inc.

Panel	Gordon Johnson	Vice Chair
	Marion Shaw	Commissioner
Submissions completed	May 29, 2024	
Ruling date	June 25, 2024	

Parties

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

Ruling

Background

[1] On November 22, 2022, following a hearing, the Commission concluded in *Re Patrick Aaron Dunn*, 2022 BCSECCOM 491 that Viribus Structural Connectors Inc. (Viribus) and Patrick Aaron Dunn (Dunn), as a director and officer of Viribus, had contravened certain provisions of the *Securities Act,* R.S.B.C. 1996, c. 418 (Act).

[2] On May 18, 2023, the Commission issued sanctions against Dunn and Viribus under sections 161 and 162 of the Act in *Re Patrick Aaron Dunn*, 2023 BCSECCOM 251 (Sanctions Decision).

[3] Among the sanctions issued, the Commission ordered that:

> a) 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; and
>
> b) under section 161(1)(d)(ii), Dunn is prohibited from becoming or acting as a director or officer of any issuer or registrant.
>
> (the Order)

[4] On July 24, 2023, Dunn filed an application for leave to appeal and an application to stay the Order in the British Columbia Court of Appeal.

[5] On July 27, 2023, Dunn applied to the Commission to vary the Order to extend the effective date by 60 days such that Dunn's applications to the Court of Appeal could be heard before the effective date of the Order. The Commission granted Dunn's

application and varied the Order under section 171 of the Act so that the effective date was extended to October 15, 2023.

[6] The Court of Appeal heard Dunn's applications on October 11, 2023 and denied leave to appeal on October 12, 2023 in *Dunn v. British Columbia (Securities Commission)*, 2023 BCCA 451.

[7] On October 16, 2023, Dunn applied to the Commission to vary the Order a second time to extend the effective date of the Order by another 30 days, to allow him time to comply with its terms. The executive director consented to the application. The Commission allowed the application and further varied the Order under section 171 of the Act to extend its effective date by another 30 days to November 14, 2023.

[8] On April 16, 2024, Dunn again applied under section 171 of the Act to vary the Order, this time to vary the terms to allow him to be a director of Viribus under supervision of the Commission. The executive director objected to Dunn's application. The variation application, which was heard in writing, is the subject of this Ruling.

[9] Having considered the submissions of the parties and the evidence before us, we dismiss Dunn's application to vary the Order. These are our reasons.

Test for Variation of Commission Orders

[10] The Commission has the discretion to vary its own orders under the Act. Section 171 states:

> **Discretion to revoke or vary decision**
> **171** If the commission, the executive director or a designated organization considers that to do so would not be prejudicial to the public interest, the commission, executive director or designated organization, as the case may be, may make an order revoking in whole or in part or varying a decision the commission, the executive director or the designated organization, as the case may be, has made under this Act, another enactment or a former enactment, whether or not the decision has been filed under section 163.

[11] The Commission's hearing policy is set out in BC Policy 15-601 – *Hearings*. The relevant section relating to variation applications such as this is found at section 9.10 as follows:

> (a) **Discretion to revoke or vary** – Under section 171 of the Act, the Commission may revoke or vary a decision it has made….
>
> Before the Commission changes a decision, it must consider that it would not be prejudicial to the public interest to do so. If a panel of the Commission is considering its own decision, this usually means that the party must show the Commission new and compelling evidence that was not before the original decision maker, or a significant change in the circumstances since the original decision was made….
>
> A party must apply to the Commission in advance of the hearing and demonstrate why the evidence that was not before the original decision maker is new and compelling, and should be admitted. The Commission will hear submissions from all parties. In some circumstances, the Commission may hear the application to introduce new evidence as part of the hearing to revoke or vary

> a decision. In that case, it will receive the evidence for the purposes of determining if it meets the test to be admitted.

[12] Previous matters before the Commission have long established that an applicant must show new and compelling evidence or a significant change in circumstances that, had it been known to the panel at the time of the original decision, would have resulted in a different decision (see *Re Pyper*, 2004 BCSECCOM 238).

[13] The Commission in *Re Deyrmenjian*, 2019 BCSECCOM 93 set out the following factors at paragraph 28 that an applicant seeking to vary or revoke an order under section 171 of the Act must establish:

> a) the additional evidence must be
>
> > i. relevant to the allegations in the notice of hearing
> >
> > ii. "new" in that it was not reasonably available for use by the applicants at the time of the hearing
> >
> > iii. "compelling" in that if the panel had been provided with the evidence at the time of the hearing, it would have decided differently; and
>
> b) it would not be prejudicial to the public interest for the panel to revoke their findings.

[14] The panel further explained in *Deyrmenjian* that the "compelling" aspect of the test is more important than the "new" aspect:

> [32] …If a panel finds the additional evidence is not compelling, there is no need to carry on with the analysis to determine if it is "new". It would be prejudicial to the public interest to vary or revoke a decision based on evidence that is not compelling.

Positions of the Parties

[15] In his April 16, 2024 submission, Dunn requested a variation of the Order to allow him to be a director of Viribus. He stated in his application that he believed he would be able to sustain and grow the company, and that without him as a director of the company, Viribus would have no choice but to close and investors would lose their investments.

[16] Dunn's submissions on his April 16, 2024 application consisted of unsupported statements of fact and Dunn's opinion, and did not provide any documentation or other evidence other than bare assertions.

[17] On April 29, 2024, we directed the Hearing Office to respond to the parties, and provided the following general guidance to Dunn as an unrepresented applicant about the type of evidence and submissions a Commission panel would expect to see in support of an application like the one at issue:

> 1. An applicant must support their application with new and compelling evidence that was not before the original decision maker, or significant change in circumstances since the original decision was made.

2. Further, the applicant must demonstrate why the new and compelling evidence was not before the panel in the first instance.

3. Any new evidence must be more than bald assertions of fact – rather it must include documents, records or sworn statements supporting the assertion.

4. In an application like the one currently before the panel, the Commission would expect evidence from the parties including evidence about and from:

    a. The current directors of the relevant issuer,

    b. Why those directors are not capable of performing their role, and

    c. Efforts by the issuer to find suitable alternative management.

    (the Guidance Letter)

[18] The panel provided Dunn the option to either submit further evidence and submissions in support of his previous application, or proceed with his application without providing anything further.

[19] On May 17, 2024, Dunn provided further materials in support of his application to vary the Order. The entirety of the further materials was a one-page notarized statement (Statement) from Dunn. The Statement outlined basic and fundamental corporate requirements applicable to Viribus including making annual filings, having a registered office, paying fees and taxes, complying with applicable laws and reporting obligations, keeping records and engaging in business activities, adding that:

> This needs a director to facilitate these things. Also dialogue and updates to investors is needed.

[20] The Statement further stated as follows:

> Efforts by the issuer to find suitable alternative management.
>
> The company is not in a financial position to hire someone to run the company.

[21] The Statement did not include any exhibits or further evidence. No corporate records, bank records, correspondence or anything else was provided to us in support of the assertions made in the Statement. No evidence of the type or addressing the matters outlined in the Guidance Letter was provided.

[22] The executive director objects to Dunn's application. He expresses concerns that it appears that Dunn is continuing to act as a *de facto* director and officer of Viribus despite the Order. While that issue is not currently before the panel, we remind Dunn that the terms of the Order prohibit him from acting as a director or officer of any issuer.

[23] The executive director argues that the current application is an attempt to relitigate the Sanctions Decision, as the factors set out in this application mirror the considerations discussed by the panel at paragraph 54 of the Sanctions Decision, which states in part:

> …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.

[24] Finally, the executive director submits that Dunn applied for leave to appeal to the British Columbia Court of Appeal on the same grounds, which were later dismissed. The Court of Appeal held that in the Sanction Decision, the panel appropriately weighed investor protection and the fostering of public confidence in the capital markets against the potential adverse impact of prohibiting Dunn from continuing to act as a director of Viribus (*Dunn v. British Columbia, supra*, at para. 39).

[25] The executive director concludes that absent any new evidence, let alone any compelling evidence, it is impossible for Dunn's application to succeed as the panel cannot consider whether it would have reached a different conclusion without something new to consider.

[26] Following the executive director's submissions, Dunn again asked the Commission for more time to further support his application to vary the Order. On May 31, 2024, the panel provided Dunn a second opportunity to provide another set of supplemental submissions in support of his application. The panel stated that if Dunn wanted to make further submissions, he had to do so by no later than June 7, 2024. Dunn did not provide further materials or otherwise communicate with the Commission by the June 7, 2024 deadline, and his subsequent request for even more time was denied by the panel.

Analysis

1. Types of Evidence in a Variation Application

[27] Evidence before a Commission panel can come in various types, including direct testimony from the parties, corroborating statements from witnesses, financial records, corporate records and copies of correspondence. Each statement or record has a different function when submitted as evidence. For example, financial statements can demonstrate the evolving economic circumstances of an issuer, correspondence can record written conversations at a point in time, and witness statements can provide recollections of past events.

[28] In a variation application heard in writing such as this, where an applicant asserts that an issuer has a promising financial future but cannot afford to pay for professional management, a panel would expect that corporate records or other correspondence demonstrating that promising potential, as well as bank records highlighting immediate cash flow shortfalls, would be submitted as evidence. Similarly, if an issuer or its management had made attempts to identify new corporate management to comply with the terms of a Commission order, a panel would expect evidence of communications, correspondence or meetings where those discussions took place, as well as testimony or evidence from the people who attended the meetings or engaged in those conversations.

[29] Evidence such as the types described above, sourced from independent third parties and corroborating the position of a party, is significantly more compelling and convincing than a simple statement by an applicant that something did nor did not occur. In the absence of any type of corroboration, a mere statement about the existence of a state of affairs is not particularly helpful.

[30] Furthermore, variation applications require a panel to consider whether it would not be prejudicial to the public interest to vary or revoke a decision of the Commission. As a result, the panel must consider more than just the interests of the applicant. Generally, it would be helpful for a panel in such circumstances to have before it, through verifiable facts in evidence, whether the existing decision sought to be varied or revoked had been complied with, or, if it had been breached, the explanation for any breach. As well, if the decision at issue has had unintended consequences in the time between its issuance and the application to vary, evidence of those consequences would be relevant to a consideration of the public interest.

[31] We note that these examples are not exhaustive, but are illustrative of types of evidence that a panel would expect to have put before it in an application under section 171 of the Act.

2. Consideration of the Evidence Before Us

[32] Dunn's approach to this application has done him no favours. Indeed, throughout these proceedings, beginning at the liability hearing that led to the sanction at issue, and now in the subsequent application to vary the order, if Dunn had accepted direction from the panel about the inadequacy of bare assertions in establishing facts for some of the propositions Dunn was putting forward, the outcome may have been different.

[33] Regardless, we are faced with an application to vary the Order with no compelling evidence upon which to consider a variation. Dunn has again failed to support bare statements of fact with reliable independent supporting evidence. In this application, the further evidence supplied by Dunn consists of a less than persuasive sworn statement that repeats the bald assertions made in previous submissions, and outlines corporate law requirements of issuers in Canada.

[34] It should have been crystal clear to Dunn after the Sanctions Decision that evidence in support of such statements is required by the Commission. In the Sanctions Decision the panel addressed this issue at paragraph 54, which states in part:

> 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***.
>
> [emphasis added]

[35] If the specific comments on lack of evidence in the Sanctions Decision were not clear enough to explain to Dunn the types of evidence which can be persuasive, the guidance

from this panel about the nature of evidence expected in variation applications generally was spelled out for Dunn in the Guidance Letter which the Hearing Office sent to the parties. Having received the Guidance Letter, Dunn followed up by again providing submissions that failed to support his application with any substantive evidence, and so the evidentiary gaps remain.

[36] That being so, we cannot identify any change in circumstances that the panel did not already consider when it made the Sanctions Decision. It is well-established that a variation application under section 171 of the Act is not an opportunity to relitigate issues that were squarely before the panel in the first instance.

[37] When the significant evidentiary shortcomings in Dunn's further submissions were properly pointed out by the executive director in his response, Dunn requested even more time to bolster his application. That request was granted. However, when Dunn did not comply with the time restrictions placed on that rare third opportunity to submit materials, the panel determined that submissions were closed.

[38] Despite having been told time and again that his bare conclusions have limited value, Dunn has throughout the piece chosen to provide almost no detail about the financial affairs and management of Viribus. We are dismissing this application because the evidence before us is wholly insufficient to support the proposed variation of the Order.

Conclusion

[39] The application is dismissed.

June 25, 2024

For the Commission

Gordon Johnson
Vice Chair

Marion Shaw
Commissioner