

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

Citation: Re Mesidor, 2020 BCSECCOM 164

Date: 20200520

Application Re Jefferson Franklin Mesidor

Panel	Gordon Johnson Deborah Armour, QC George C. Glover, Jr.	Vice Chair Commissioner Commissioner
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Submissions Completed April 8, 2020

Date of Decision May 20, 2020

Appearing
Chris Cairns For the Executive Director

Investor C Self-represented

Decision

I. Introduction

- [1] In this application Investor C seeks payment under section 15.1 of the *Securities Act*, RSBC 1996, c. 418, out of funds paid to the Commission pursuant to a section 161(1)(g) order (Order) made by the Commission on January 6, 2014 (see *Jefferson Franklin Mesidor (Re)* 2013 BCSECCOMM 460 and *Mesidor (Re)* 2014 BCSECCOMM 6) (Decision).
- [2] The application is supported by the executive director, who has supplemented Investor C’s application with a report, an affidavit (Affidavit) of a Commission staff investigator and a recommendation. The recommendation supports payment to Investor C of all of the funds paid to the Commission as a result of a consumer proposal by Jefferson Franklin Mesidor (Mesidor), plus all accrued interest (Funds).
- [3] The primary issues in this application are whether the requirements under the Act for this application have been met and, if so, how the panel should exercise its discretion in the manner and timing in which the Funds are paid to Investor C, given that there may be another potential claimant for the Funds.

II. Applicable Law

- [4] One of the remedies that can be imposed under section 161 of the Act is an order under subsection (1)(g) that a person who has not complied with the Act “pay to the Commission any amount paid...as a result of the failure to comply...”. Other provisions

of the Act and Regulations address whether and how a person who lost funds as a result of the failure to comply might recover against funds collected under section 161(1)(g).

[5] Section 15.1 of the Act provides:

(1) The commission must notify the public in accordance with the regulations if the commission receives money from an order made under section 155.1(b), 157 (1)(b) or 161(1)(g).

(2) A person may make a claim to money referred to in subsection (1) by submitting an application in accordance with the regulations within 3 years from the date of the first notification made under subsection (1).

(3) If the commission receives an application under subsection (2), the commission may, in accordance with the regulations, pay to the applicant all or a part of the amount claimed.

[6] Part 3 of the Regulations states, in part:

Definitions

7.1 In this Part:

"eligible applicant" means a person who

- (a) suffered pecuniary loss as a direct result of misconduct that resulted in an order for which the commission gave notice under section 7.2,
- (b) did not directly or indirectly engage in the misconduct that resulted in the order, and
- (c) has not been denied a claim under section 7.4 (6);

"order" means an order made under section 155.1 (b), 157 (1) (b) or 161 (1) (g) of the Act.

...

Adjudication of claims

7.4 (1) If the commission determines that an applicant is an eligible applicant in respect of an order, the commission may make a payment to the eligible applicant from money received from the order.

(2) When determining the amount to be paid to an eligible applicant, the commission must consider the following:

- (a) the amount of money received from the order;
- (b) the loss suffered by the eligible applicant;
- (c) the losses suffered by all eligible applicants;
- (d) any other information the commission considers appropriate in the circumstances.

(3) When determining an applicant's loss for the purposes of this section, the

commission must not include any amount claimed by the applicant in respect of a loss of opportunity, including interest on any loss, and must consider the following:

- (a) whether the applicant received or is entitled to receive compensation from other sources for the loss arising from the misconduct that resulted in the order;
 - (b) whether the applicant benefitted from the misconduct that resulted in the order;
 - (c) the results of any hedging or other risk limitation transactions made by the applicant.
- (4) The commission may prorate payments among eligible applicants if, having considered the matters under subsection (2), the commission determines that the money the commission received from the order is insufficient to pay the claims of all eligible applicants.
- (5) A prorated payment made to an eligible applicant must be determined in accordance with the following formula:

$$\frac{A \times B}{C}$$

C

where

A = the amount of money the commission received under the order,

B = the loss suffered by the eligible applicant, and

C = the losses suffered by all eligible applicants.

- (6) The commission may deny an applicant's claim if the applicant
- (a) fails to comply with section 7.3 (2), or
 - (b) makes a statement or provides information to the commission that, in a material respect and at the time and in the light of the circumstances in which it is made, is false or misleading, or omits facts from the statement or information necessary to make that statement or information not false or misleading.

...

Advance payments

7.6 The commission may make a payment to an eligible applicant, including a partial or installment payment, before the period described in section 15.1(5) of the Act has expired.

III. Background Underlying decision

[7] On October 21, 2013, the Commission found that Mesidor was liable for perpetrating fraud on two investors, Investor C and Investor S.

- [8] That Commission panel (Panel) found that Mesidor took \$32,280 in total from Investor C and Investor S. Investor S invested \$17,280 and Investor C invested \$15,000. Investor C and Investor S had been told by Mesidor that he would invest their funds in foreign exchange. Mesidor sent \$16,301 of their investments to Forex Capital Markets, a foreign exchange firm in New York, as he said he would.
- [9] The Panel found that Mesidor fraudulently disbursed the remaining \$16,000 of the investments as follows:
- \$8,000 in cash withdrawals
 - \$2,930 to pay for groceries, restaurants, and credit card payments
 - \$2,500 to his personal bank account
 - \$2,500 to M for “professional consulting services”.
- [10] The Decision acknowledged that Mesidor had repaid \$1,000 to each of Investor C and Investor S.
- [11] In its Decision, the Commission issued the Order to require Mesidor to pay \$16,000 to the Commission pursuant to section 161(1)(g) of the Act.

Results of Collection Efforts

- [12] Commission staff undertook efforts to collect the \$16,000 imposed in the Order against Mesidor. The success of those efforts was limited by a consumer proposal which was filed on behalf of Mesidor.
- [13] Mesidor began the consumer proposal process on January 31, 2014. Mesidor claimed \$129,593 in liabilities and \$0 in assets. The Commission filed a proof of claim for the \$16,000 imposed in the Order.
- [14] On October 6, 2017, Mesidor’s insolvency trustee advised that they received \$14,432.81 of which \$9,632.96 was available to be paid to creditors after disbursements.
- [15] The insolvency trustee paid a total of \$6,029.53 to the Commission in three payments dated June 4, 2015, May 20, 2016 and November 16, 2017. The last of those payments was for \$315.02.

Notice to public regarding receipt of funds

- [16] On November 1, 2017, the Commission posted a notice on its website pursuant to section 7.2(1) of the Regulations, notifying the public that it had received \$5,714.51 and that a claim for the funds could be made by applying to the Commission.
- [17] The Commission subsequently updated its website to add the November 16, 2017 payment of \$315.02 to the notice. We do not know exactly when that update was made, but it is clear that, before that update, potential applicants would not have known that the amount available was \$6,029.53, plus interest.

Responses to the public notice

- [18] The three year notice period provided in section 15.1(2) of the Act began on November 1, 2017.
- [19] On January 31, 2018, the Commission received from Investor C a signed Claim Application Form. Investor C initially claimed only \$5,714.51 (the amount initially stated in the Commission's public notice) but Investor C subsequently clarified that the claim was for \$14,000 representing the full amount which Investor C provided to Mesidor, less the \$1,000 repaid to Investor C by Mesidor.
- [20] According to Letters Probate filed December 12, 2011, Investor S died on August 2, 2011, almost two years before the Commission's liability hearing commenced. MS was the executor (Executor) under the will of Investor S. No claim has been received by the Commission from the Executor or anyone else on behalf of the estate of Investor S.
- [21] The executive director attempted to contact the Executor. A Commission staff member sent an email to the Executor on November 1, 2017. In that email, the Commission staff member:
- advised the Executor that the Commission had received funds and that Investor S's estate may be eligible for a claim on those funds;
 - provided the Executor with links to the Commission's website regarding the notice of receipt of funds and how funds may be returned to investors; and
 - requested that the Executor contact the Commission staff member if the Executor had any questions.
- [22] The Commission staff member also called the Executor's last known phone number in 2017 but did not receive any response. The Commission staff member telephoned the same number on October 8, 2019, but there was no answer and no voicemail available to leave a message.

IV. Executive Director's Recommendation

- [23] The executive director has provided a chart which tracks each of the detailed requirements of the Act for payment of proceeds obtained through collection of amounts under section 161(1)(g) orders. The executive director submitted that all requirements had been met. The executive director recommends the Commission order that all Funds held be paid to Investor C.

V. Analysis

- [24] This application was made in writing. No one has requested an opportunity to make submissions in person. We find that we are able to make an order on the application without an in person hearing or further submissions.
- [25] We begin by evaluating whether the requirements of the Act have been met.

- [26] The first issue in evaluating whether the requirements of the Act have been met to permit a payment to Investor C is an examination of whether Investor C is an “eligible applicant” as defined in the Regulations. Two of the three requirements in that definition which establish that Investor C is an eligible applicant are evident from the Decision. Investor C is an eligible applicant because Investor C suffered pecuniary loss as a result of Mesidor’s fraud and there is no suggestion in the Decision or otherwise that Investor C participated in the fraudulent conduct. The final requirement in the definition, that Investor C has not been denied a claim under section 7.4(6) of the Regulations, is supported by Investor C’s claim form and not contradicted by any other evidence.
- [27] The second issue is whether the requisite notice has been given. Based upon the Affidavit, we find that the requisite notice has been given.
- [28] We must also evaluate whether Investor C has validly applied for payment from the Funds. Based on the facts summarized above as confirmed in the Affidavit, we find that the application by Investor C is valid. The amount claimed in Investor C’s form 12-901F was initially for a lesser amount than the amount subsequently claimed, but the initial figure given matched the available Funds in the public notice and on the Commission’s website and the written clarification of the amount Investor C now claims was adequate for the purposes of the Regulations.
- [29] Other issues that this panel are required to consider include whether Investor C has received compensation from other sources or any payment reducing the amount of the loss. Investor C received a repayment by Mesidor of \$1,000. However there is nothing to suggest Investor C received any other compensation from Mesidor or from any other sources.
- [30] Based upon the above analysis, we can exercise our discretion to order that all of the Funds be paid to Investor C. The issue which remains is how this panel should exercise its discretion.
- [31] In *Re Alexander*, 2017 BCSECCOM 78, the Commission set out the following guidelines for applications under section 15.1 of the Act:
1. although a duty of fairness applies in any administrative proceeding, in this case, if the procedural requirements set out in the Act and the regulations are met, the duty of fairness is fulfilled;
 2. applications under section 15.1 are not generally determined with a view to the public interest (unlike many other provisions of the Act which expressly require the Commission to take the public interest into consideration when making an order or taking some other step);
 3. a Commission panel considering an application under section 15.1 should apply the test of whether the evidence, on a balance of probabilities, supports granting the application;

4. Commission panels should apply the same test on an application under section 15.1 to release funds prior to the expiry of the three year notice period, although they may take into account additional factors including:
 - a) the number of potential eligible applicants who have not made claims as at the application date;
 - b) the amount of money paid by respondent(s) pursuant to a section 161(1)(g) order, relative to the losses of the potential eligible applicants;
 - c) the amount requested to be paid out in the application (i.e. whether it is a request for a partial or a full payout);
 - d) the amount of time remaining in the three year notice period; and
 - e) any evidence that potential eligible applicants have received notice of the process for application and that they have affirmatively elected not to apply.

[32] The Commission's role when considering applications under section 15.1 is to:

- ensure that the procedural requirements of the Act have been met;
- where there is a substantial number of claimants, ensure that the Commission's administrative procedures for vetting those claims are appropriate;
- provide a forum whereby disputes over claims may be heard; and
- make orders for payments where we are satisfied that the evidence, on a balance of probabilities, warrants such an order.

[33] There is no special factor present here which would lead us to consider deviating from the guidelines expressed in *Re Alexander*. In particular, when an applicant satisfies the requirements for payment under the Act and Regulations, the requisite duty of fairness consideration before granting a payment is fulfilled.

[34] At the same time, we have analyzed the interactions of the provisions of the Act and Regulations outlined above and their implications regarding what consideration we should give to the interests of another potential claimant when the three year notice period has not yet expired. In particular:

- section 15.1(2) of the Act creates the three year notice period and section 15.1(3) allows the Commission to order payment of a part of the funds claimed;
- section 7.4(2) of the Regulations sets out a list of factors that must be considered in granting an order for payment, including the losses suffered by all eligible applicants;
- sections 7.4(4) and 7.4(5) of the Regulations permit the prorating of payments among eligible applicants and provide a formula for proration; and
- section 7.6 of the Regulations permits a payment, including a partial or installment payment, before the notice period has expired.

[35] Considering the Act and the Regulations as a whole, we conclude that it is appropriate to exercise caution in ordering a payment within the notice period where such a payment may materially preclude a subsequent claim by another potential eligible applicant. There may be many circumstances where such a payment would be appropriate. However, the benefit of a payment before the expiry of the notice period to one eligible applicant must

be balanced against the resulting consequences to another potential eligible applicant who may yet file a claim and meet the requirements of the Act.

- [36] Given that the original notice was publicized over 2.5 years ago and neither that nor the contact efforts of Commission staff have resulted in any response by the Executor, we could conclude that it is unlikely there will be an additional application on behalf of Investor S for the Funds. We understand that reasoning and we also understand that a payment of the Funds to Investor C would benefit Investor C by leading to an immediate payout of all of the Funds. However, the Act and Regulations allow us the alternative approach of ordering a partial payment now and creating a mechanism which allows the payment of the balance to Investor C in a few months if the Executor does not submit an application by that time. If we take that alternative approach, the harm to Investor C in having to wait a few months for a portion of the Funds is not significant. However, this alternative approach protects against the possibility that the Executor does apply before the end of the notice period and does establish a proper entitlement.
- [37] We consider it appropriate to adopt this alternative approach.
- [38] There are two other issues which we should address before turning to our conclusions. First, there is the issue of how much is appropriate to “hold back” to protect against that risk that a claim might be filed on behalf of Investor S. Under section 7.4(2) of the Regulations, the loss by each eligible investor (which is the amount subject to proration) must be considered by reference to a number of factors which are noted above. We are not determining whether a claim on behalf of Investor S would be valid, but we are ordering that a portion of the Funds be held back in an amount which assumes such a claim will be made and will be valid in full.
- [39] Investor S paid \$17,280 to Mesidor and was repaid \$1,000. Investor C paid \$15,000 and was repaid \$1,000. We are not aware of any differences between what portion of Investor C’s payments and Investor S’s payments to Mesidor were actually invested in Forex Capital Markets. We assume that the investments actually made by Mesidor in foreign exchange were made with the payments of Investor C and Investor S pro rata. Accordingly, we assume that the amounts defrauded by Mesidor were also pro rata. As a result, the potential pro-rated claim on behalf of Investor S is 53.76% of the total available (the amount paid by Investor S after deducting the \$1,000 repaid to Investor S is \$16,280, that figure is 53.76% of the total paid by the two investors, net of the \$1,000 repaid to Investor C and the \$1,000 repaid to Investor S).
- [40] The second of the two issues to be resolved is what to do with the interest earned on the amounts received by the Commission. The Act and Regulations use different language in reference to this issue. Section 15.1(1) of the Act references money received from an order under various sections of the Act, including section 161. Section 15.1(3) permits payment by reference to the amount claimed. It is not specified that only amounts received under an order can be paid. Given the more general purpose of these provisions, which includes the enabling of recovery by eligible investors against amounts collected

under a section 161(1)(g) order, we conclude that the language of the Act permits that accrued interest can be ordered to be paid to eligible investors.

VI. Conclusions, Order and Direction

- [41] We order that 46.24% of the Funds held by the Commission from the Order, including an equal percentage of the accrued interest, be paid to Investor C.
- [42] We direct the executive director to mail or email a copy of this decision and order to the Executor at the last known mailing or email address of the Executor.
- [43] We direct the executive director to provide us with a supplementary report promptly after November 1, 2020 which updates us on any relevant information that has come to the attention of the executive director by the date of the supplementary report, including whether a claim has been submitted on behalf of Investor S before the expiry of the notice period.
- [44] We adjourn the balance of this proceeding pending receipt of the executive director's supplementary report.

May 20, 2020

For the Commission

Gordon Johnson
Vice Chair

Deborah Armour, QC
Commissioner

George C. Glover, Jr.
Commissioner