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

Citation: Re Canada Pacific Consulting, 2020 BCSECCOM 58 Date: 20200219

Canada Pacific Consulting Inc. and Michael Robert Shantz

Panel	Audrey T. Ho	Commissioner
	Marion Shaw	Commissioner
Submissions Completed	January 29, 2020	
Date of Findings	February 19, 2020	
Appearing		
Beverly Ma	For the Executive Director	

Decision and Order

I. Introduction

[1] On December 10, 2019, the executive director forwarded applications (the Applications) under section 15.1 of the *Securities Act*, RSBC 1996, c. 418, to the British Columbia Securities Commission, brought by six claimants (Investors HM, KaW, KlW, PK, FJ and SQ, who is the heir of Investor KS) (collectively, the Applicants), for the payout of funds obtained by the Commission pursuant to an order under section 161(1)(g) of the Act against Canada Pacific Consulting Inc. and Michael Robert Shantz.

[2] With the Applications, the executive director filed his report dated December 10, 2019, recommending distribution of funds to the Applicants on a *pro rata* basis, as well as written submissions and an affidavit of a staff member in the Enforcement Division of the Commission.

[3] After reviewing the executive director's report and recommendations, the panel asked the executive director in writing to clarify certain aspects of the Applications and his recommendations.

[4] On January 29, 2019, the executive director filed supplemental written submissions and a further affidavit of a staff member in the Enforcement Division in response to the panel's questions.

[5] The Applications were dealt with in writing.

[6] These are our decision and order with respect to the Applications.

II. Background

A. The misconduct and disgorgement order

[7] On March 13, 2012, the Commission found that Canada Pacific and Shantz had contravened section 57 of the Act by perpetrating fraud totaling $1.5 million on 11 European investors, and that the respondents had traded securities without being registered, contrary to section 34(1) of the Act (2012 BCSECCOM 86).

[8] On May 22, 2012, the Commission ordered Canada Pacific and Shantz to pay to the Commission the sum of $1,530,004 pursuant to section 161(1)(g) of the Act (the disgorgement order), representing the amount obtained by them from the 11 investors as a result of the fraud perpetrated on those investors (2012 BCSECCOM 195).

[9] The Commission recovered $131,781.34 (the Recovered Funds) in partial satisfaction of the disgorgement order. The executive director indicated that it is unclear if further recovery will be possible.

[10] During the period that the Commission holds the Recovered Funds, interest accrues and is calculated daily. As at December 10, 2019, the amount of accrued interest totalled $9,628.88.

B. The claim process

[11] On March 19, 2015, pursuant to section 7.2(1) of the *Securities Regulation*, B.C. Reg. 196/97 as amended, the Commission issued a press release and posted a notice on its website notifying the public that it had received the Recovered Funds as partial satisfaction of the disgorgement order against Canada Pacific and Shantz, and that investors who had lost money as a result of the respondents' misconduct could file a claim with the Commission in the requisite form, no later than March 19, 2018, for a payment from the Recovered Funds.

[12] On March 19, 2018, the three-year period within which a person may apply to claim monies under a section 161(1)(g) order under section 15.1(2) of the Act expired.

[13] By March 19, 2018, the Commission had received six claims, being the Applications now before us. No other applications for compensation were received within the three-year period.

C. The claims filed under section 15.1

[14] The amounts claimed under the six Applications totaled $755,596.21.

[15] Investor HM filed a Form 12-901F with the Commission dated October 26, 2016. He sought payment of $14,233.80 representing the total amount he invested in Canada Pacific.

[16] Investor KaW filed a Form 12-901F with the Commission dated August 24, 2016. He sought payment of $51,553.63 representing the total amount he invested in Canada Pacific.

[17] Investor KlW filed a Form 12-901F with the Commission dated September 7, 2016. He sought payment of $29,927.07, representing the total amount he invested in Canada Pacific, less a distribution he received from Canada Pacific.

[18] Investor PK filed a Form 12-901F with the Commission dated January 15, 2017. He sought payment of $34,371.56 representing the total amount he invested in Canada Pacific, less a distribution he received from Canada Pacific.

[19] Investor FJ filed a Form 12-901F with the Commission dated October 31, 2016. He sought payment of $14,206.75 representing the total amount he invested in Canada Pacific, less a distribution he received from Canada Pacific.

[20] SQ filed a Form 12-901F with the Commission dated April 10, 2016. He sought payment of $611,303.40 representing the total amount that Investor KS invested in Canada Pacific prior to his death.

[21] With respect to the claim by SQ, the executive director submitted into evidence a certified English translation of a "Certificate of Inheritance" issued by the Local Court in Betzdorf, certifying (1) the death of an individual known as MKOS in 2014 and (2) that SQ was his sole heir. The executive director also filed affidavit evidence providing confirmation that MKOS was the full legal name of Investor KS. The executive director advised the panel that SQ made his claim in his capacity as a legal representative of the deceased Investor KS and not in SQ's personal capacity.

[22] Each Applicant indicated in his Application that, except with respect to the applicable distributions noted in paragraphs 15-20 above, he:

1. had not received any payment from either respondent on account of his original investment amount,
2. had not received and is not entitled to compensation from other sources for his loss from the misconduct that resulted in the disgorgement order,
3. did not enter into any transactions to hedge or limit his loss, and
4. did not benefit from the misconduct that resulted in the disgorgement order.

[23] Each Applicant also certified that he did not, directly or indirectly, engage in the misconduct that resulted in the disgorgement order.

[24] All of the claim amounts are expressed in this decision in Canadian dollars. Although some of the original investments and some of the claims submitted by the Applicants were in other currencies, the executive director presented the claim amounts in Canadian dollars (based on evidence at the initial hearing into the misconduct) to facilitate administration of the claim process.

D. The executive director's report and recommendations

[25] In his report and recommendations, as supplemented by his supplemental submissions, the executive director outlined the steps he took to administer the section 15.1 claim process, and recommended a *pro rata* distribution of both the Recovered Funds and the accrued interest on the Recovered Funds to the Applicants in accordance with the formula prescribed by section 7.4(5) of the Regulation.

[26] The executive director also set out the basis upon which he is satisfied that:

1. each Applicant is an "eligible applicant", and had filed his Application in the required form and within the required three-year time period, all in accordance with section 15.1 of the Act and the Regulation, and

2. payment (on a *pro rata* basis) in accordance with the Applications and section 7.4(4) of the Regulation is supported by the Applications together with the evidence presented at the initial hearing into the respondents' misconduct.

[27] The executive director asked that the Applications be dealt with in writing. Section 7.5 of the Regulation states that the Commission must not deny all or part of a claim without giving the applicant an opportunity to be heard, except for a decision to prorate payments under section 7.4(4). The executive director submitted that the Applicants are not entitled to be heard under section 7.5 because he recommended approval of all the Applications with a *pro rata* distribution of the Recovered Funds to the Applicants in accordance with section 7.4(4).

III. Law and analysis

A. Law

[28] 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.
>
> (4) [Repealed.]
>
> (5) After 3 years from the date of the first notification made under subsection (1), and after adjudicating all claims in accordance with the regulations, the commission may retain any money not paid or payable under subsection (3).

[29] The regulations passed in respect of section 15.1 of the Act provide:

> 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);
>
> …
>
> 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:

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

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.

…

[30] The Commission set out some general principles to consider in determining applications to pay out funds pursuant to section 15.1 of the Act in *Re Alexander*, 2017 BCSECCOM 78 at paras 25-27:

> 25. We … adopt the following guidelines for future 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.

26. In general, our role, as a Commission panel, is similar to that of a judge in a bankruptcy proceeding. In that role, we must:

- 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.

27. Similarly, the executive director, who is responsible for administrative oversight of the vetting of applications, plays an important role by making recommendations to the panel (wherever possible) in much the same manner that a trustee in bankruptcy makes a recommendation for payment out of court based on their administrative oversight of the claims process.

[31] With respect to the Application on behalf of deceased Investor KS, we also considered the following statutory provisions and case law.

[32] "Person" is defined under section 1.1 of the Act to include "an individual, … trust, … and the personal or other legal representative of a person to whom the context can apply according to law".

[33] The Act does not define a "personal representative", but section 29 of the *Interpretation Act*, RSBC 1996, c. 238, s. 29, defines a "personal representative" in an enactment to include "an executor of a will and an administrator with or without will annexed of an estate, and, if a personal representative is also a trustee of part or all of the estate, includes the personal representative and trustee."

[34] The Act also does not define a "legal representative" but the executive director drew our attention to two precedents for defining that term to include an heir.

[35] Firstly, in the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), Part XVII Interpretation, section 248(1) defines a "legal representative" as follows:

> ***Legal representative*** of a taxpayer means a trustee in bankruptcy, an assignee, a liquidator, a curator, a receiver of any kind, a trustee, an heir, an administrator, an executor, a liquidator of a succession, a committee, or any other like person, administering, winding up, controlling or otherwise dealing in a representative or fiduciary capacity with the property that

> belongs or belonged to, or that is or was held for the benefit of, the taxpayer or the taxpayer's estate;

[36] Secondly, in *Johnston Terminals and Storage Ltd. v. Miscellaneous workers Wholesale and Retail Delivery Drivers and Helpers Local Union No. 351*, 1973 CanLII 1702 (BCCA), the British Columbia Court of Appeal considered the meaning of a "legal representative" within the definition of a "person" in a former British Columbia *Interpretation Act*, R.S.B.C. 1960, c. 199, s. 24(1)(ff). At that time, a "person" was defined to include "any corporation, partnership, or party, and the heirs, executors, administrators, or other legal representatives of such person, to whom the context can apply according to law."

[37] In considering the meaning of a "legal representative" in the context of whether an officer of a trade union is a "legal representative" of the trade union for the purpose of allowing him to be examined as a party, that Court said:

> It is obvious that [a "legal representative"] mean[s] a person who by law has become a representative of a person, of the nature of an heir, executor, administrator, trustee or the like.

B. Position of the parties

[38] The Applicants did not make any submissions or request an oral hearing.

[39] The executive director submitted that all the Applicants were "eligible applicants".

[40] With respect to SQ, the executive director submitted that Investor KS is an eligible applicant, SQ is the legal representative of Investor KS, and SQ is eligible to make a claim under section 15.1 in that capacity on behalf of Investor KS. He submitted that since the Act (by virtue of the definition of "person" in section 1(1) and the wording in section 15.1(2) permitting a "person" to make a claim) expressly permits a personal or legal representative to make a claim under section 15.1, a claim can be made on behalf of an applicant who is deceased. Therefore, reason follows that a claim is not barred by the death of an eligible applicant, and the Commission may administer a claim made by a legal representative on behalf of the deceased eligible applicant and pay the estate of the deceased eligible applicant in accordance with section 7.4(1) of the Regulation. The executive director therefore recommended approval of SQ's Application and payment to Investor KS' estate.

[41] With respect to the amount of the loss suffered by each Applicant, the executive director submitted that it was the amount invested by the Applicant less the amount of any repayments the Applicant received from Canada Pacific.

[42] Since the Recovered Funds totaled less than the total amount claimed by the Applicants, the executive director submitted that section 7.4(5) of the Regulation applies and it would be appropriate to make prorated payments to the Applicants in accordance with the formula set forth in that section.

[43] The executive director recommended that the interest accrued on the Recovered Funds during the period that the Commission held the funds be paid to the Applicants on the same prorated basis. The Act and Regulation are silent on how the Commission should distribute interest earned on funds received under a section 161(1)(g) order. Section 7.4(2)(a) of the Regulation requires the Commission to consider "the amount of money received from the order" when determining the amount to be paid to an eligible applicant. The executive director submitted that "the amount received from the order" can be interpreted to include the interest on the funds received by the Commission, and that distributing such interest to eligible applicants is in line with legislative intent.

[44] Since interest will continue to accrue until the Recovered Funds are paid out, the executive director recommended that the interest to be paid to the Applicants be calculated to the date that payment is issued to the Applicants by the Commission (the Payable Interest).

C. Analysis

a) Eligible applicants

[45] With respect to the Applicants other than SQ on behalf of Investor KS, no issue was raised and we are satisfied that they are "eligible applicants" under the Act.

[46] With respect to SQ, we agree with the executive director that the Act permits a personal or legal representative of a deceased person to make a claim under section 15.1 on behalf of the deceased, and section 15.1(3) permits the Commission to pay out to an applicant who is the personal or legal representative of a deceased person. We also agree that Investor KS was an "eligible applicant" as defined.

[47] However, we need to contend with the wording in section 7.4(1) of the Regulation, which authorizes the Commission to make payment to the eligible applicant only "if the Commission determines that an applicant is an eligible applicant" (emphasis added). Does that bar payment to the estate of an eligible applicant if the eligible applicant himself did not file a claim with the Commission as the applicant before his death?

[48] We agree with the executive director that the death of an eligible applicant does not and should not bar payment to their estate. The legislation does not specify such intent. To the contrary, on a plain reading of the legislation, section 15.1 of the Act, combined with the definition of "person" in section 1(1), clearly contemplates that the personal or legal representative of an eligible applicant can make a claim and receive payment. We agree with the executive director's submission that "other legal representative", though not defined in the Act, includes a person's sole heir. Indeed, there is no policy rationale for barring a payment if an eligible applicant died before making a claim and the claim was made by his personal or legal representative on his behalf. The wording in section 7.4(1) is meant to bar payment to an applicant who does not meet the three conditions necessary to qualify as an eligible applicant, and not to bar payment to the legal representative or estate of an otherwise eligible applicant.

[49] Accordingly, we find that the Application by SQ as the legal representative of Investor KS may proceed.

b) Procedural requirements

[50] We find that the Commission has given the requisite notice to the public with respect to the Recovered Funds as required by section 15.1(1) of the Act.

[51] We further find that each of the Applicants had properly applied for payment of funds pursuant to section 15.1(2) of the Act, and that the amount of the loss suffered by each Applicant as calculated by the executive director is appropriate and in accordance with section 7.4 of the Regulation.

[52] Given that the three-year period for making a claim has expired, and the remaining five investors who were defrauded had not made a claim within that time period, it is appropriate to pay out all of the Recovered Funds to the Applicants.

[53] Since the Recovered Funds are insufficient to pay out in full the claims made by the Applicants, it is appropriate to prorate payments among the Applicants as recommended by the executive director and calculated in accordance with section 7.4(5) of the Regulation.

[54] The executive director's recommendation with respect to the payment of accrued interest to the Applicants on the same prorated basis, and the method of calculating the amount of interest payable, is appropriate in the circumstances and we will make that order.

D. Conclusion

[55] Applying the principles laid out in *Re Alexander*, we find that the procedural requirements set out in the Act and Regulation were met, and that the evidence, on a balance of probabilities, supports granting the Applications.

IV. Decision and Order

[56] As a consequence, we grant the Applications, in part, by Investors HM, KaW, KlW, PK, FJ and SQ as the legal representative of Investor KS, and order under section 15.1(3) of the Act that the executive director pay to them, on a prorated basis in accordance with section 7.4(5) of the Regulation, the Recovered Funds and interest accrued on the Recovered Funds, as follows:

a) to Investor HM, a payment of $2,482.48, together with a *pro rata* share of the Payable Interest;

b) to Investor KaW, a payment of $8,991.32, together with a *pro rata* share of the Payable Interest;

c) to Investor KlW, a payment of $5,219.49, together with a *pro rata* share of the Payable Interest;

d) to Investor PK, a payment of $5,994.64, together with a *pro rata* share of the Payable Interest;

e) to Investor FJ, a payment of $2,477.76, together with a *pro rata* share of the Payable Interest; and

f) to the Estate of Investor KS, a payment of $106,615.65, together with a *pro rata* share of the Payable Interest.

February 19, 2020

For the Commission

Audrey T. Ho
Commissioner

Marion Shaw
Commissioner