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

Citation: Re Patrick Aaron Dunn, 2021 BCSECCOM 294 Date: 20210720

Patrick Aaron Dunn and Viribus Structural Connectors Inc.

Panel	Gordon Johnson	Vice Chair
	George C. Glover, Jr.	Commissioner
	Marion Shaw	Commissioner
Hearing dates	May 3, 2021	
Submissions Completed	May 3, 2021	
Decision date	July 20, 2021	

Appearing

Beverly Ma	For the Executive Director
Chilwin Cheng Janessa Mason	For Patrick Aaron Dunn

Ruling

I. Introduction

[1] Patrick Aaron Dunn (Applicant) is named as a respondent in the Notice of Hearing, 2020 BCSECCOM 449 (Notice of Hearing) that was issued on November 4, 2020. The Notice of Hearing alleges that certain conduct by the Applicant was in breach of the *Securities Act*, RSBC 1996, c. 418 (Act).

[2] On January 29, 2021, the Commission issued COR#2021/004, an order under section 164.04(4)(a) of the Act that restrains from disposition or transmission property held for the Applicant in one bank account in his name at a major financial institution (Preservation Order).

[3] 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.

[4] On March 1, 2021, the Applicant applied to the Commission under section 171 of the Act to revoke the Preservation Order (Application). This is our ruling on the Application.

II. Positions of the parties

[5] The Applicant sought to revoke the Preservation Order on two grounds. In essence, the Applicant's primary ground was that the Commission cannot properly conclude that the

issuance of a preservation order is in the public interest on the basis of allegations in a notice of hearing without evidence to support either the allegations or the other factors relating to the public interest. The Applicant argued that a decision to issue a preservation order that is not supported by proof of the allegations made is arbitrary and unreasonable. The Applicant's submissions on the second ground focused on the specific circumstances of the Applicant, especially the Applicant's need for funds to pay for legal assistance in this proceeding.

[6] Regarding the alleged requirement for an evidentiary test, the Applicant submitted that the materials provided to the Chair of the Commission prior to the issuance of the Preservation Order and the materials before us now do not include evidence to support the issuance and continuance of the Preservation Order. The Applicant submitted that there is no evidence that the allegations in the Notice of Hearing are true, no evidence that the misconduct alleged to be in breach of the Act is continuing, no evidence connecting the funds which are in the account subject to the Preservation Order to the misconduct alleged in the Notice of Hearing, and no evidence that the funds are being dissipated. The Applicant argued that the absence of such evidence must be fatal to the validity of the Preservation Order. The Applicant asserted that if all the Commission requires to justify a preservation order is the issuance of a notice of hearing and the identification of an asset, there is potential for abuse.

[7] Regarding the circumstances specific to himself, the Applicant filed an affidavit which included the following paragraphs:

> a) I understand that the hearing of the Notice of Hearing will take approximately five days. My lawyer advises me it will cost more than the approximately $20,000 held in the bank account frozen by the Preservation Order to prepare for and defend me at a hearing. My lawyer advises me the cost of legal services includes not only time to pay for labour and expertise, but also out-of-pocket disbursements and applicable taxes.
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> b) I require the funds frozen by the Preservation Order released and paid to my lawyer, Chilwin Cheng, to be held in trust by him for fees and disbursements.
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> c) I agree that the frozen funds can be paid to my lawyer in trust if he undertakes to the Commission he will not use the funds for purpose other than paying his reasonable invoices for services, disbursements, and applicable taxes.

[8] The Applicant referenced various decisions including *Exchange Bank & Trust Inc. v. British Columbia (Securities Commission)*, 2000 BCCA 389 and *Zhu v. British Columbia (Securities Commission)*, 2013 BCCA 248, which, he submitted, indicate that when considering the public interest the Commission must also give consideration to the interests of other parties, including the interests of the Applicant. The Applicant submitted that the ability to obtain legal assistance in order to respond to a proceeding such as this one is an interest which the legal system, including the Commission, should protect.

[9] The Executive Director began by noting that while in this case, the Preservation Order was issued under section 164.04(2)(e) of the Act after the Notice of Hearing was issued, in previous Commission decisions where preservation orders (and their predecessors, freeze orders) were varied, those variations were granted in circumstances where the underlying order had been issued before the issuance of a notice of hearing. As a result, this Application was described as novel.

[10] The Executive Director submitted that in considering whether to issue the Preservation Order, the Chair had before her for review the written submissions of the Executive Director, an affidavit from the primary Commission investigator in the matter, and the Notice of Hearing, all of which showed her that the Executive Director had conducted an investigation that had uncovered some evidence of misconduct by the respondents, and that the Executive Director was satisfied that there were credible allegations of misconduct by the respondents, including the Applicant. The Executive Director submitted that the Chair also had before her the specific allegations against the Applicant, namely that the Applicant had breached a previous order of the Commission and authorized, permitted or acquiesced in disclosure violations by the other respondent in the matter.

[11] Regarding the circumstances specific to the Applicant, the Executive Director submitted that some of the issues raised by the Applicant were not relevant. For example, the Executive Director pointed to *Re Samji*, 2012 BCSECCOM 91, which establishes that the lack of a link between the misconduct alleged and the asset preserved is not a basis to refuse to issue a preservation order. Turning specifically to the issue of the Applicant's need for funds to retain counsel, the Executive Director submitted that the Application did not meet the onus on the Applicant to establish that the public interest supports the revocation of the Preservation Order.

III. Analysis

[12] We begin our analysis by explicitly recognizing that the Act provides very significant powers to the Commission to interfere in the lives of British Columbians. The scope of those powers requires a commitment by the Commission to exercise them prudently and fairly in the public interest, having regard to the intention of the Legislature as expressed in the Act.

[13] The legislative authority for the Commission to issue a preservation order is found in Part 18.1 of the Act, titled *Preservation Orders and Additional Collection Remedies*. In particular, section 164.04 of the Act states, in part:

> **Preservation orders**
> 164.04 (1) In the circumstances set out in subsection (2) or (3), the commission may make one or more orders under subsection (4) in relation to
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> (a) the whole or a portion of the interest in property of a person referred to in subsection (2),

(b) the property in which the whole or a portion of the interest in property of a person referred to in subsection (2) is held,

(c) the whole or a portion of the interest in claimable property of a family member or third-party recipient, or

(d) the property in which the whole or a portion of the interest in claimable property of a family member or third-party recipient is held.

(2) The commission may make an order under subsection (4) in respect of a person if any of the following apply:

(a) the commission proposes to order an investigation under section 142 in respect of the person;

(b) an investigation under section 142 or 147 has been ordered in respect of the person;

(c) the commission or the executive director proposes to make or has made an order under section 161, 162 or 162.04 in respect of the person;

(d) the executive director has given a notice under section 162.01 to the person;

(e) criminal proceedings or proceedings in respect of a contravention of this Act or the regulations are about to be or have been commenced against the person, and the commission considers the proceedings to relate to a security or derivative or a matter relating to trading in securities or derivatives, or to relate to any business conducted by the person relating to securities or derivatives;

(f) the person fails or neglects to comply with financial conditions applicable to the person under this Act;

(g) the commission proposes to apply or has applied to the court for an order under section 157 in respect of the person, or the court has made an order under section 155.1 or 157 in respect of the person.

[14] Preservation orders are issued in the public interest to preserve property that may ultimately be required to satisfy claims resulting from breaches of securities law. The purpose is to maintain the *status quo* pending the outcome of a hearing on the merits.

[15] A review of the scheme created by recent amendments to the Act reveals a broad spectrum of circumstances where a preservation order may be issued and a widely expanded scope of persons who can be the subject of a preservation order. Without repeating the entirety of Part 18.1 of the Act, it is apparent from the legislation that preservation orders are a flexible tool with a broad scope, including:

a) **Preservation orders can be issued without notice.** Section 164.05 of the Act is explicit that there may be circumstances where the Executive Director seeks a preservation order without notifying the affected party.

b) **Preservation orders are not dependent on the existence of an underlying investigation order**. It is clearly not the intent of the legislation to limit the issuance of preservation orders to circumstances where a formal investigation is conducted by the Executive Director under the authority of an investigation order. Indeed, there are a number of circumstances where a preservation order can be made without an investigation order, including in section 164.04(2)(a) when the Commission "proposes to order an investigation", in section 164.04(2)(f) where a person "fails or neglects to comply" with specific financial conditions, and in section 164.04(2)(g) when the Commission "proposes to apply" to court for an order under section 157 of the Act.

c) **Preservation orders are not limited to parties named in investigation orders**. Preservation orders may be made under section 164.04(3) in respect of third parties or family members who received claimable property, even where the commission "proposes" to order an investigation or apply to court for remedies under section 157 of the Act.

[16] While the circumstances in which a preservation order may be issued and the scope of a preservation order are delineated with precision, the Act does not provide for or impose on the Commission any specific criteria to support the exercise of its discretion to issue a preservation order. No evidentiary test has been prescribed by the Legislature, which has instead chosen to rely on the Commission, as an expert regulator with a public interest mandate, to use its best judgement in all the circumstances. The Commission's jurisdiction must be exercised in the public interest. It follows necessarily that the decision-maker must have a reasonable basis to determine whether the issuance of a preservation order is in the public interest.

[17] The nature of the Commission's discretion has been considered in a number of prior decisions. In *In the matter of Amswiss Securities Inc.,* [1992] 7 BCSCWS 12, the panel said this about what the Commission needs to consider in issuing a freeze order:

> Although there is no specific reference to the public interest in section 135, in our view, the Commission may only exercise the powers under this section where it considers that there is some connection to trading in securities and that an order is in the public interest.

[18] The Commission elaborated on the purpose of and requirements for freeze orders in *Re Samji*, stating:

> There is nothing in *Amswiss* or *Exchange Bank & Trust* to suggest that before the Commission makes a freeze order there must be evidence that the property to be frozen is closely involved with the alleged wrongdoing under the Act, or that the person whose assets would be subject to the freeze order is or has been dissipating, removing or disposing of assets.
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> In our opinion, such requirements would be inconsistent with the Commission's mandate to protect the public interest.
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> The potential statutory claims referred to by the *Amswiss* panel that warrant the protection of a freeze order include not just those arising out of rights of rescission and damages (the example given by the panel) but also those arising out of orders made by the Commission under sections 161(1)(g) (disgorgement of ill-gotten gains) or 162 (administrative penalty), or made by the court under section 157 (compliance). It is manifestly in the public interest that wrongdoers' assets be preserved to satisfy potential claims arising from all of those sources, not to mention common law claims.
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> None of these claims is limited to assets connected to the wrongdoing. Once it is found that a person has contravened the Act or acted contrary to the public interest, all of the person's assets are subject to the execution of the orders that ensue. It follows that there is no public interest basis for requiring that there be a connection between the frozen property and the wrongdoing.
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> Similarly, to require that a freeze order could not be issued until the dissipation or destruction of the assets is already underway would ignore the aims of the legislation as described in *Amswiss* and *Exchange Bank & Trust*. It would also be utterly inconsistent with the Commission's mandate to protect the public interest.

[19] The Commission need not wait until there is evidence that a dissipation of assets has begun before issuing a preservation order. Nor does there need to be a connection between the assets preserved and the alleged wrongdoing. Any such requirements would undermine the Commission's ability to take action at the appropriate time to protect the public interest. As noted by the Court of Appeal in *Zhu*, assets can be lost in an instant in the absence of a freeze order or once a freeze order is lifted.

[20] Given the vastly different circumstances that can give rise to the issuance of a preservation order under the Act, what will constitute a reasonable basis for the exercise of the discretion to issue such an order will in each instance be fact-specific. Factors such as:

- the stage of the Commission's involvement (from considering seeking an investigation order through a notice of hearing having been issued to after findings of liability and imposition of sanctions);
- the magnitude and seriousness of alleged or proven misconduct; and
- the number and circumstances of persons against whom preservation orders may be sought and third parties affected

make the imposition of evidentiary requirements or guidelines of general application both inappropriate and contrary to the intention of the Act to give the Commission wide scope to preserve assets for the benefit of possible victims of securities misconduct and in the public interest. Each application for revocation or variation must be analyzed individually, based on the specific circumstances of that application.

[21] In this case, unlike preservation orders issued either before an investigation has been commenced or in the initial stages of an investigation, the Preservation Order was issued after the underlying investigation was substantially complete, the alleged wrongdoers had been identified, and the alleged misconduct had been crystallized. The Commission Chair knew the specific allegations against the Applicant and was in a position to assess for herself their seriousness and the likelihood that, if proved, they would result in monetary sanctions against the Applicant.

[22] The Applicant submitted that it was improper for the Commission to issue the Preservation Order based solely on the Notice of Hearing, as such an order would be founded on untested allegations. However, as outlined by the Court of Appeal in *British Columbia (Securities Commission) v. Pioneer Ventures Inc*., 2021 BCCA 1, preservation orders, while onerous, are necessary to ensure wrongdoers do not avoid or circumvent the monetary sanctions the Commission may ultimately impose after a hearing. Contrary to the position of the Applicant, the Court of Appeal in *Pioneer* further states at paragraph 32 that the existence of allegations can support preservation orders:

> In most situations, I would suggest that **the existence of allegations that if proven would constitute non-trivial contraventions of the Act and that could result in adverse financial consequences (be they penalties, damages or restitutionary orders of some kind) to the alleged wrongdoers would justify the issuance of a freeze order**. As the Commission acknowledged at para. 33 of its December reasons (quoted *supra*), Commission staff is expected to monitor the status of freeze orders and if appropriate, apply to have them revoked or varied. If it becomes apparent the complaining party is not to be believed (as was argued unsuccessfully by Pioneer in this case) or that the freeze order is causing serious harm to innocent members of the public, the onus under s. 171 might well be met. Or the concerns underlying a freeze order might be addressed by proof of financial means of the alleged wrongdoer. None of the foregoing situations existed in this case; nor had a long delay in the bringing of charges against the subjects of the investigation occurred.
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> [emphasis added]

[23] At this stage of the proceedings, the Commission is not called upon to assess the merits of the allegations set out in the Notice of Hearing. Rather, our determination under section 171 requires a consideration of whether or not revoking the Preservation Order would be prejudicial to the public interest. In making that determination, we can consider whether allegations have been made by the Executive Director following an investigation, whether the statutory requisites have been met, whether there was a reasonable basis for the Chair to exercise her discretion, and of course whether the requested order is in the public interest. The structure of the Act generally, and section

164.04(2)(e) specifically, allows the Executive Director to seek a preservation order after issuing a notice of hearing without having to prove the allegations first for the purpose of a preservation order, and then again in the context of the liability hearing – thereby avoiding duplicative proceedings.

[24] The Commission's investigative procedures that result in the issuance of a notice of hearing are thorough and robust. While ultimately it will be up to a Commission panel to determine whether the allegations in a notice of hearing have been proved, a notice of hearing will inform a respondent of the alleged misconduct and the remedies being sought by the Commission and provide a solid foundation for consideration of the issuance of a preservation order in the public interest.

[25] It is open to the persons affected by a preservation order to seek revocation or variation of a preservation order if the public interest requires such revocation or variance. Again, there is a wide range of circumstances which would justify such revocation or variance, including submission of new information and changes in circumstances.

[26] We find that by issuing the Preservation Order after the issuance of the Notice of Hearing, there is less prejudice to the Applicant than there would have been had the Preservation Order been issued at the outset of the investigation. That is a relevant factor in this case. Unlike initial stages of an investigation where the time to completion of the matter is unknown, in this matter the hearing on the merits of the allegations in the Notice of Hearing is scheduled to commence in approximately four months. The Applicant knows the allegations against him and the conduct that provides the basis of those allegations, and he has been afforded the opportunity to review the Executive Director's disclosure of the relevant evidence gathered during the course of the investigation. Progress towards the final outcome of the enforcement proceedings is achievable in a reasonably predictable and controllable timeframe.

[27] A further public interest factor which supports the issuance and continuance of the Preservation Order in this proceeding is that the Preservation Order preserves approximately $20,000 in one financial institution. While not inconsiderable, the amount preserved is proportionate to the allegations in the Notice of Hearing and commensurate with potential "adverse financial consequences" as described in *Pioneer*, if the contraventions of the Act are proved at the liability portion of the hearing.

[28] Contrary to the submissions of the Applicant, we find that the issuance of the Preservation Order was not arbitrary and unreasonable. The manner in which it was issued fits squarely within the plain language of the Act, and the Preservation Order is not so broad as to be unnecessarily onerous. It does not adversely affect innocent third parties, and there has been no identifiable delay at any juncture of the proceedings.

[29] We do not accept the submissions of the Applicant that the Preservation Order should be revoked on the grounds that there was no evidentiary basis to support it.

[30] We turn now to the submissions of the Applicant that the Preservation Order should be revoked to allow the preserved funds to be used to pay for his legal costs in these proceedings.

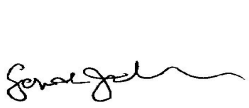
[31] The onus is on the Applicant to show that the requested revocation of the Preservation Order would not be prejudicial to the public interest. Based on the record before us, we have no information at all of the Applicant's financial means beyond his bare statement that he requires the funds that 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*, 2020 BCSECCOM 457, a simple assertion by an applicant of a need for funds will not be sufficient.

[32] As a result, we do not accept the submissions of the Applicant that the Preservation Order should be revoked to permit the preserved funds to be used by the Applicant to pay for his legal costs in these proceedings.

[33] Accordingly, we dismiss the Application.

July 20, 2021

For the Commission



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