

BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418 (GCG and MVS comments)

Citation: Re Patrick Aaron Dunn, 2021 BCSECCOM 476

Date: 20211206

Patrick Aaron Dunn and Viribus Structural Connectors Inc.

Panel	Gordon Johnson George C. Glover, Jr. Marion Shaw	Vice Chair Commissioner Commissioner
Application dates	October 28, 2021 (First Adjournment Application) November 18, 2021 (Second Adjournment Application)	
Submissions completed	November 22, 2021	
Decision date	December 5, 2021	
Appearing		
Beverly Ma	For the Executive Director	
Chilwin Cheng	For Patrick Aaron Dunn and Viribus Structural Connectors Inc. (First Adjournment Application)	
Patrick Aaron Dunn	For Patrick Aaron Dunn and Viribus Structural Connectors Inc. (Second Adjournment Application)	

Ruling

I. Introduction

¶ 1 These are the reasons for decision regarding two applications to adjourn the hearing of the liability portion of this proceeding. As of the date of the first application, the hearing was scheduled to begin on Monday, November 22, 2021. After receipt of the second application, the panel adjourned the start of the hearing until Wednesday, November 24, 2021 and heard submissions from the parties on that adjournment application on Monday, November 22, 2021.

II. Background to the First Adjournment Application

¶ 2 This proceeding was commenced by notice of hearing dated November 4, 2020. The notice of hearing alleges that:

- a) Patrick Aaron Dunn (Dunn) breached an earlier Commission order (2016 BCSECCOM 64) by acting as a director of two companies when he was prohibited from doing so, and
- b) through its failure 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, Viribus Structural Connectors Inc. (Viribus) breached sections 168.1(1)(b) and 50(3)(a) of the *Securities Act*, RSBC 1996, c. 418.

- ¶ 3 The notice of hearing designated February 9, 2021 as the date for an initial appearance at which dates would be set for the hearing of the allegations in the notice of hearing. This set-date hearing proceeded as scheduled and the liability hearing was then set for five days starting November 22, 2021. During the set-date hearing, a hearing management meeting was set for October 22, 2021.
- ¶ 4 On January 29, 2021 a preservation order was issued by the Commission preventing the disposition of funds in an account in the name of Dunn. On February 12, 2021, counsel indicated that he had been retained by Dunn. On March 1, 2021 Dunn applied for the revocation of the preservation order (Revocation Application). The primary grounds asserted in support of revoking the preservation order were that there was no evidentiary basis for the preservation order and that the funds frozen by the preservation order were needed by Dunn to fund his defence to the allegations. Dunn argued that the unavailability of the funds would prevent Dunn from properly defending himself. The Revocation Application was supported by an affidavit of Dunn dated March 1, 2021. That affidavit was very brief and provided some conclusions about Dunn's need for the preserved funds without providing any supporting details.
- ¶ 5 A hearing of the Revocation Application was held on May 3, 2021 and the decision, *Re Patrick Aaron Dunn*, 2021 BCSECCOM 294, was issued on July 20, 2021 (Revocation Decision).
- ¶ 6 The Revocation Decision addressed Dunn's asserted need for the funds as follows:
- 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.
- ¶ 7 On September 29, 2021 the British Columbia Court of Appeal granted leave to appeal the Revocation Decision.
- ¶ 8 During the hearing management meeting held on October 27, 2021 counsel for Dunn asked that the November 22, 2021 hearing date be adjourned. The panel chair asked counsel for Dunn to file a formal application to adjourn the November 22, 2021 hearing and that formal application dated October 28, 2021 (First Adjournment Application) was

filed with the hearing office. The First Adjournment Application was supported by the same affidavit of Dunn as had been delivered in support of the Revocation Application.

III. Positions of the Parties Regarding the First Adjournment Application

- ¶ 9 Dunn advanced three primary arguments in support of the First Adjournment Application. First, referencing the importance of respondents having the benefit of counsel in order to achieve procedural fairness, Dunn argued that the appeal might result in the revocation of the preservation order which in turn would allow Dunn to continue to be represented by counsel at the hearing. As a result, he argued, it was important that the hearing be adjourned until after the outcome of the preservation order appeal.
- ¶ 10 Dunn's second argument was that Dunn's counsel was scheduled to attend a 20-day trial in the British Columbia Supreme Court overlapping the Commission's scheduled liability hearing, leaving Dunn without his counsel for the Commission's liability hearing.
- ¶ 11 Dunn's third argument was that there would be little or no prejudice to the executive director or the investing public in an adjournment but the consequences to Dunn in proceeding would be significant, given the potential that Dunn would prevail on the preservation order appeal and be able to use the funds to pay for representation by his counsel at the Commission liability hearing. Dunn contrasted this to the consequence to him if, as Dunn expected, his counsel withdrew due to the lack of a financial retainer.
- ¶ 12 The executive director opposed the First Adjournment Application, arguing that there is a public interest in having securities enforcement matters proceed expeditiously. The executive director emphasized certain extracts from the policy which applies to hearings before the Commission, BC Policy 15-601, including the following:
- The Commission will generally only grant adjournments if a panel is satisfied based on the evidence filed by the applicant that there are compelling circumstances. Where an adjournment application is based on a party's health, the Commission usually requires sufficient evidence from a medical professional. Where the Commission has previously set dates for a hearing, and a party retains new counsel, the Commission expects the new counsel to be available for those dates.
- ¶ 13 The executive director also emphasized that, just as had been the case in the Revocation Application, Dunn's affidavit does not establish that Dunn's financial situation or the lack of access to the funds preserved by the preservation order will prejudice Dunn's right to a fair hearing.
- ¶ 14 The executive director also referenced submissions which were made by Dunn to the Court of Appeal while seeking leave to appeal the Revocation Decision. The executive director pointed to the following paragraph of Dunn's submission in support of his application for leave to appeal:

The appeal will not unduly hinder the progress of the underlying proceeding. Dunn does not seek a stay of the Preservation Order or the Review Decision. The

underlying enforcement action has not been adjourned to date. The Executive Director did not allege that the Preservation Order was urgently required. If leave was granted, the proposed appeal should not impede the timely progress of the underlying proceeding.

- ¶ 15 Finally, the executive director noted that there is some inconsistency in the positions of counsel for Dunn in that the funds preserved by the preservation order were said to have been required to allow Dunn to retain counsel to attend the liability hearing scheduled to start November 22, 2021 but Dunn's counsel was not in fact available to attend the liability hearing due to another commitment.

IV. Our Conclusion Regarding the First Adjournment Application

- ¶ 16 On November 5, 2021 the panel informed the parties that the First Adjournment Application was denied and reasons would follow.
- ¶ 17 The First Adjournment Application was denied primarily on one of the same grounds which led to the dismissal of the Revocation Application. Evidence which is little more than a statement of conclusion, unsupported by sufficient facts or supporting evidence which might corroborate the stated conclusion is rarely of assistance to Commission panels. The evidence which Dunn chose to provide in his affidavit in support of the Revocation Application was cursory and insufficient. This panel, in the Revocation Decision cited above, explained that deficiency to Dunn in unambiguous language. Dunn's evidence on the point did not address the deficiency in his submissions on the First Adjournment Application when Dunn again advanced the identical deficient evidence in support of his argument regarding his lack of funds to pay for legal representation.
- ¶ 18 We did give consideration to the fact that Dunn's counsel had conflicting commitments at the time of the scheduled liability hearing. However, the issue of counsel's conflicting schedule does not have the significance in this case that it might have in other cases. In general, the expectation after dates for Commission hearings are set is that respondents who retain counsel will choose counsel who can attend the hearing and that counsel who agree to be retained in proceedings where a hearing is set will be able to attend the hearing. There can be appropriate cases for exceptions, but those exceptions should be explained and justified. In this case, we were given no explanation for how counsel, who came on the record in this matter in mid-February of 2021, could be committed to another matter overlapping with the November 22, 2021 hearing date. No notice of a scheduling concern was given until the request for an adjournment was raised in late October of 2021.
- ¶ 19 We recognize that counsel for Dunn was consistent throughout in stating that he did not expect to attend the November liability hearing without a proper financial retainer, which was in turn stated to be dependent on the revocation of the preservation order. However, our decision refusing to revoke the preservation order was issued on July 20, 2021, and both Dunn and his counsel have had sufficient time since then to decide how best to prepare for the liability hearing scheduled for five days commencing November 22, 2021.

Whatever adjustments and preparation were needed for the liability hearing should have been addressed in the months since July 20, 2021.

¶ 20 We agree with Dunn's position that in every case a balancing of factors is important. We also agree with Dunn's point that in this case there is no urgency beyond the usual public interest in moving matters forward. In this case, we note that the Commission liability hearing has been scheduled for over nine months and arrangements have been made by at least one witness and counsel for the executive director to be ready for the hearing. We have taken all of those factors into account. In all of the circumstances, the balance supported continuing with the liability hearing on the scheduled dates, especially since we once again found the evidence of lack of funds for paying counsel for Dunn's defence to be insufficient.

VI. Background to the Second Adjournment

¶ 21 On November 18, 2021 counsel for Dunn withdrew from the record. That same day Dunn again applied for an adjournment (Second Adjournment Application) of the liability hearing. The reasons stated by Dunn were succinct:

As you know, I am no longer able to afford to have ... represent me as I've exhausted my retainer that I was able to borrow from family and friends. So I will be representing myself moving forward. Because of the fact my funds are frozen and I have no way of having a lawyer represent me, I am seeking an adjournment for the following reasons.

1. To understand and get familiar with the process of the court system.
2. Prepare my defense and request any records or evidence that I need from witnesses, employees and the BCSC.
3. Also run my business as it takes up 7-9 hours a day as I have an obligation to the company and it's shareholders to continue to run it.
4. Prepare a temporary place to live during the hearing as I no longer live in the lower mainland and will take considerable time to travel.
5. Have someone assist in helping with my father who has lung cancer and is going into the hospital for heart surgery.

I believe I will need a minimum of 4 months to prepare but I am a fast learner so I would also recommend checking on my progress in 2 months time as I may be reason to move forward sooner.

¶ 22 We were concerned that Dunn, who was representing himself, might again be failing to support bare assertions stated as fact, and might not be providing adequate foundation for the Second Adjournment Application due to a lack of knowledge of the implications of not supporting his positions. As a result we directed the Hearing Office to write to Dunn. That communication, sent to Dunn at 2:45 p.m. on November 18, 2021, included the following:

Please note that applications for adjournment are subject to section 3.4 of [BC Policy 15-601 – Hearings](#) which states, in part:

3.4 Preliminary Applications

...

Usually, the Commission hears preliminary applications in writing, and expects the party applying to provide compelling evidence in support of its application. Generally, the Commission expects:

- a party making an application to give reasonable notice to the other parties and the Commission Hearing Office
- parties in a complex matter to make written submissions
- parties to provide written submissions to the other parties and the Commission Hearing Office so the parties and panel have a reasonable time to consider them before the application

...

(c) Adjournment Applications – The Commission expects parties to meet scheduled hearing dates. If a party applies for an adjournment, the Commission considers the circumstances, the timing of the application in relation to any hearing date, the fairness to all parties and the public interest in having matters heard and decided efficiently and promptly. The Commission will generally only grant adjournments if a panel is satisfied based on the evidence filed by the applicant that there are compelling circumstances. Where an adjournment application is based on a party's health, the Commission usually requires sufficient evidence from a medical professional. Where the Commission has previously set dates for a hearing, and a party retains new counsel, the Commission expects the new counsel to be available for those dates.

Given the terms of BC Policy 15-601, the Panel Chair notes that adjournments are not available simply by request and that requests to adjourn should be made by formal application supported by relevant evidence and submissions; the bare assertion of conclusions, not supported by the details and documents which should normally be available to substantiate the accuracy of such conclusions, is likely to be insufficient to support an adjournment.

We advise that the Panel will hear your adjournment application at the start of the scheduled hearing dates at 10:00am on Monday, November 22, 2021.

¶ 23 After subsequent input from the parties, the panel directed that the Second Adjournment Application would proceed on Monday, November 22, 2021 and the liability hearing would, subject to the outcome of the Second Adjournment Application, commence on Wednesday November 24, 2021.

VII. Positions of the Parties Regarding the Second Adjournment Application

¶ 24 Despite the communication sent to him by the panel, Dunn did not provide any significant new information in advance of the deadline for further submissions from him.

After delivery of the executive director's reply, Dunn provided some additional comments, and during his oral argument Dunn provided some further details regarding the brief reasons he had provided in his Second Adjournment Application. Dunn noted that he now lives on Vancouver Island and can travel to the hearing, although he would prefer to participate in the hearing by video link. Dunn explained that the medical condition of his father was significant and there had been an appointment for his father to have a medical procedure that day (November 22, 2021), but that procedure was no longer scheduled for the week of the liability hearing.

¶ 25 Regarding his ability to prepare, Dunn emphasized that he was unprepared. Dunn explained that the reason he was unprepared was that he had assumed the matter would be settled. Despite the panel explaining that settlement discussions are privileged, and being cautioned about some potential disadvantages of waiving privilege by revealing those discussions, Dunn disclosed some comments from his former counsel which had given him confidence the matter would be settled and there would ultimately be no need for a liability hearing.

¶ 26 The executive director's submissions consisted primarily of references to the public interest in having scheduled hearings proceed without delay and the length of time since the scheduling of the liability hearing. It was noted that Dunn himself had attended the hearing management meeting at which the November liability hearing dates were set. The executive director also reviewed the nature of the allegations made in the notice of hearing and the scope of documentary disclosure which had been provided to Dunn. The executive director argued that the factual issues in this case are relatively straightforward and that the facts which are important are generally within Dunn's personal knowledge. It was submitted that Dunn had been given access to the key documents many months before and he was the author of many of them, so it would not be hard for Dunn to prepare to meet the allegations against him.

¶ 27 The executive director did not oppose Dunn's application to appear at the hearing by video link.

VII. Our Conclusions Regarding the Second Adjournment Application

¶ 28 We have not seen the various documents which the executive director proposes to introduce as evidence in the liability hearing. However, we have considered the summary of those documents provided to us by counsel for the executive director and we conclude that the volume of documents is less than we would normally see in a hearing of this type. We also accept the statements of the executive director to the effect that the documents to be introduced were disclosed to Dunn long ago and that many of the documents were prepared by him, or at least were seen by him before the commencement of this proceeding.

¶ 29 We can see from the notice of hearing that the allegations are relatively discrete and not overly complex. In general the allegations appear to relate to issues of which Dunn would have personal knowledge. We note that Dunn did not contradict the executive director's submissions to that effect.

- ¶ 30 Our expectation as of the time of the Second Adjournment Application was that the presentation of the case of the executive director on the allegations, including an opening statement, the direct examination of the sole witness to be called by the executive director and whatever cross-examination would normally be expected, would require at most one day. As of the date of the Second Adjournment Application it was our expectation that we would be able to offer Dunn an adjournment of at least one day during the course of the hearing. This would allow Dunn to hear the case against him, reflect on it and prepare his cross-examination of the witness and any evidence of his own in a very efficient manner.
- ¶ 31 We find that Dunn has the opportunity to fairly respond to the allegations against him. This is especially true because our process is only at the evidentiary phase. After the evidentiary phase, Dunn will have considerable time to prepare his submissions regarding the conclusions to be drawn from the evidence adduced, prior to this panel making findings of fact and liability.
- ¶ 32 We balanced against this the public interest in having our hearings proceed efficiently, as scheduled. We also considered the fact that Dunn has had ample opportunity to prepare himself. He chose not to do so based on a calculation he and his counsel made about the likelihood of settlement. A strategic decision to not prepare for a hearing does not support an adjournment application after it becomes clear the strategy was unsuccessful.
- ¶ 33 We dismissed the Second Adjournment Application. We granted Dunn leave to participate in the liability hearing by video connection. We gave notice to Dunn that the liability hearing will, as much as is reasonably possible, be organized to allow him preparation time after he hears the executive director's opening statement and the evidence of the sole witness for the executive director.
- ¶ 34 We indicated that written reasons would follow. This decision records those reasons.

December 6, 2021

For the Commission

Gordon Johnson
Vice Chair

George C. Glover, Jr.
Commissioner

Marion Shaw
Commissioner

