

BRITISH COLUMBIA SECURITIES COMMISSION

Securities Act, RSBC 1996, c. 418

Citation: Re Axion Ventures Inc., 2021 BCSECCOM 161

Date: 20210423

Axion Ventures Inc.

Panel	George C. Glover, Jr.	Commissioner
	James Kershaw	Commissioner
	Marion Shaw	Commissioner

Hearing dates March 18 and 19, 2021

Submissions Completed March 19, 2021

Date of Decision March 30, 2021

Date of Reasons April 23, 2021

Appearing
Jennifer Whately For the Executive Director
Nazma Lee
Gordon Smith

Patrick Sullivan For Axion Ventures Inc.
Edmond Chen
Larry Yen

Andrew McCoomb For John Todd Bonner and the Bonner Affiliates
Felix Boser-Moehm

Reasons for Decision

I. Introduction

- [1] The Executive Director issued two cease-trade orders restricting trading in the shares of Axion Ventures Inc. (Axion) as a result of its failure to make required disclosure filings.
- [2] Axion applied to have the Commission exercise on an expedited basis its discretion under section 171 of the *Securities Act*, RSBC 1996, c. 418 (Act) to grant orders to revoke those cease-trade orders in part:
 - (a) to permit Axion to enter into, and receive an initial tranche of funding under, an investment agreement; and

- (b) to permit John Todd Bonner (Bonner) to take steps to cause several individuals and companies affiliated with him (Bonner Affiliates) to deliver shares of Axion to certain other individuals.
- [3] Axion also applied for orders under section 114 of the Act restricting the right of Bonner and the Bonner Affiliates to vote certain shares of Axion at meetings of shareholders of Axion.
- [4] Bonner asked the Commission to dismiss Axion's applications or, alternatively, to grant Bonner standing to oppose them.

II. Hearing and Decision

- [5] At a hearing on March 18 and 19, 2021, the Commission panel considered written submissions, documentary and oral evidence, and oral submissions from Axion and from Bonner and the Bonner Affiliates with respect to the partial revocation of the cease-trade orders. The Executive Director did not oppose the partial revocations sought by Axion. Bonner was granted standing at the hearing as a director of Axion and on behalf of the Bonner Affiliates, which are significant shareholders of Axion.
- [6] During the hearing, the panel advised the parties that it could not consider the section 114 voting-rights application at that time because it raised complex, disputed evidentiary matters that were not amenable to decision by the panel on an expedited basis.
- [7] The panel reserved its decision on the partial revocation orders application at the end of the oral hearing.
- [8] On March 30, 2021, the panel issued its decision (*Re Axion Ventures Inc.*, 2021 BCSECCOM 118) granting the partial revocation orders set out in Schedule 1 and Schedule 2 to the decision, with reasons to follow.
- [9] These are the reasons for the panel's decision.

III. Background

- [10] The head office of Axion is in Vancouver, British Columbia.
- [11] Axion is a reporting issuer in British Columbia and Alberta. Its shares are listed on the TSX Venture Exchange (Exchange).
- [12] Axion is an investment issuer. It holds majority interests in a number of subsidiaries operating in the technology sector, including several video game development and publishing companies based in Asia.

- [13] Bonner is a director of Axion. Until July 14, 2020, Bonner was also the Chief Executive Officer of Axion. On July 14, 2020, Bonner was dismissed from that position by a resolution of the board of directors of Axion. Bonner's dismissal followed the receipt by Axion's board of a communication from an anonymous "whistleblower" alleging self-dealing and other serious misconduct by Bonner.
- [14] Bonner is not a registered shareholder of Axion. The Bonner Affiliates are Cern One Limited, Uniq Ventures Ltd., a collection of individuals described as Uniq Other Vendors, CC Asia Pacific and Michael Bonner, identified by the parties as Axion shareholders affiliated with Bonner.
- [15] Bonner and Axion are currently engaged in civil proceedings against one another in the Supreme Court of British Columbia (Litigation). Each party to the Litigation alleges misconduct by the other.
- [16] On February 11, 2021, Axion filed notice on SEDAR of its annual and special meeting of shareholders (Meeting), scheduled for April 15, 2021. Axion set March 8, 2021 as the record date for voting at the Meeting. Various matters related to the Meeting are also the subject of dispute between Axion and Bonner in the Litigation.

IV. The Cease-Trade Orders

- [17] On June 16, 2020, the Executive Director issued an order (Management Cease Trade Order) under section 164(1) of the Act that all trading in the securities of Axion by Bonner and another officer of Axion cease until:
- (a) Axion files the required records, completed in accordance with the Act and rules; and
 - (b) the Executive Director revokes the order.
- [18] On August 4, 2020, the Executive Director issued an order (Axion Cease Trade Order) under section 164(1) of the Act that all trading in the securities of Axion cease until Axion has filed the required records, completed in accordance with the Act and rules. The Axion Cease Trade Order contains an exception that is not relevant to this matter.

V. The Partial Revocation Orders Sought by Axion

- [19] On December 31, 2020, Axion applied to the Executive Director for an order under section 171 of the Act that the Axion Cease Trade Order be revoked in part to permit certain trades in connection with a proposed financing. On March 2, 2021, Axion submitted to the Executive Director a letter amending the December 31, 2020 application to seek additional orders. Also on March 2, 2021, the Executive Director referred the matter to the Commission. On March 13, 2021, Axion submitted to the Commission a written Notice of Application seeking partial revocation orders. We have treated those three submissions by Axion as together constituting its application.

A. Application for Order to Permit the Proposed Financing

- [20] Axion sought an order for the partial revocation of the Axion Cease Trade Order to permit Axion to enter into an investment agreement (Investment Agreement) with KUAM (Hong Kong) Investment 01 Ltd. (Investor), and to accept \$8 million in consideration for the issuance of the first tranche of convertible debentures (Debentures) under the Investment Agreement.
- [21] While Axion generates cash flow, it has since inception had negative cash flow from operations and a working capital deficiency. Its working capital deficiency is in excess of \$20 million.
- [22] Axion began trading on the Exchange in May 2016, concurrent with a private placement transaction. Since that time, it has completed six further private placement financings. Its ability to continue as a going concern has been and continues to be contingent on its ability to raise equity capital.
- [23] Axion currently has an urgent need for funding of approximately \$8 million in order to satisfy outstanding debts for rent, filing fees, legal, accounting and audit fees, salaries and benefits at the subsidiary level in Shanghai and Bangkok, part payment of debt securities that were due in 2020, and other expenses.
- [24] Axion has not filed its audited financial statements for the year ended December 31, 2019, or any subsequent interim or annual financial statements. Axion advised the panel that its external auditors have said that they cannot complete the audit of Axion's 2019 annual financial statements or deliver an unqualified audit report unless Axion meets certain conditions including, among other things:
- (a) that Axion settle the significant liabilities incurred by its Asian operations to demonstrate compliance with local laws; and
 - (b) that Axion have the ability to access sufficient funds to address risks related to its working capital deficiency.
- [25] Axion cannot bring the balance of its public filings up to date until after its 2019 audited annual financial statements are completed and filed.
- [26] Yasuyo Yamazaki (Yamazaki) is the President and controlling shareholder of the Investor. In early 2020, Bonner introduced Yamazaki to Axion as a potential source of up to \$30 million in equity financing.
- [27] Axion's most recent financing was completed in April 2020. At that time, the Investor invested \$700,000 in Axion as part of a \$1,138,000 private placement financing. At the same time, on Bonner's recommendation, Yamazaki was appointed Executive Chairman of Axion. He remains in that role.

- [28] Subsequent to the April 2020 financing, both before and after Bonner's termination as Chief Executive Officer in July 2020, Axion actively but unsuccessfully sought further equity financing for its operations.
- [29] Axion's former investment dealer provided affidavit evidence that in his opinion, the existence of the Axion Cease Trade Order makes it virtually impossible for Axion to raise money in the public markets and that, even if the Axion Cease Trade Order were lifted, the ongoing litigation between Axion and Bonner, which is in respect of control and ownership of Axion and its assets, and involves allegations of significant misconduct on both sides, makes it extremely unlikely that any investment dealer would agree to broker a private placement or that members of the public would wish to invest in Axion.
- [30] Bonner says that in the latter part of 2020 and early 2021 he made several proposals, all of which were rebuffed by Axion's management, to provide or arrange financing for Axion or to introduce it to a potential bidder for its shares.
- [31] At the request of Grant Kim (Kim), a director of Axion who was appointed as interim Chief Executive Officer of Axion in place of Bonner, the Investor agreed to provide further funding to Axion if necessary.
- [32] In December 2020, Axion negotiated the Investment Agreement with the Investor.
- [33] The Investment Agreement has the following terms:
- (a) the total amount to be invested will be up to \$20 million by way of the Debentures;
 - (b) investments will be made in tranches;
 - (c) the issuance of each tranche is subject to the approval of the Exchange;
 - (d) the investment in the initial tranche will be \$8,000,000 (Initial Tranche);
 - (e) subject in each case to Exchange approval, the Investor will subscribe for two additional tranches of Debentures in mutually agreeable principal amounts over the offering period stipulated in the Investment Agreement when so requested by Axion; and
 - (f) each Debenture will be convertible to common shares in Axion at the Investor's discretion until maturity at the conversion price that is equal to the higher of \$0.20 per share and the Discounted Market Price (as defined in the policies of the Exchange) at the time when each Debenture is issued.

- [34] The Investment Agreement was approved by the Board of Directors of Axion at a meeting on December 4, 2020, with Yamazaki abstaining. Bonner did not attend that meeting, and says that he was not given notice of it. Axion says that notice was given as required.
- [35] Kim advised the panel that \$8 million would meet Axion's immediate need for funds, but that the maximum investment commitment of \$20 million in the Investment Agreement is intended as a backstop to address the concerns of Axion's auditors about the magnitude of Axion's working capital deficiency. Kim noted that only the Initial Tranche is priced at a conversion price of \$0.20 per share, adding that Axion hopes that once its disclosure filings are brought up to date and the Axion Cease Trade Order is lifted, it will be possible to raise additional financing, either in the market or pursuant to the Investment Agreement, at a higher price per share.
- [36] Axion advised the panel that it will use the funds raised from the completion of the Initial Tranche to:
- (a) prepare and file all overdue periodic filings;
 - (b) pay audit, accounting and legal fees;
 - (c) pay filing fees with the securities commissions and the Exchange;
 - (d) partly repay overdue convertible debentures;
 - (e) pay outstanding salaries, consulting fees and professional fees and other accounts payable; and
 - (f) provide general working capital.
- [37] On completion of the Initial Tranche, assuming that the Investor converts the full amount of the Debenture issuable under the Initial Tranche, Yamazaki would control 14.54% of Axion's issued common shares.
- [38] On March 17, 2020, Bonner offered to invest up to US\$2.24 million in the Initial Tranche on the same terms as are set out in the Investment Agreement, either by himself or on a 50/50 basis with the Investor.

B. Application for Order to Permit Potential Trades

- [39] Axion also sought an order for the partial revocation of both the Axion Cease Trade Order and the Management Cease Trade Order to permit Bonner to engage in any act, conduct or negotiation directly or indirectly to cause the Bonner Affiliates to deliver Axion shares controlled by Bonner and the Bonner Affiliates to Yuki Hirakawa, Sukeyasu Arimoto, Hajime Yamanaka, Takashi Katagiri, Hisayoshi Suzuki, and Crypton

Technologies K.K. (Japanese Shareholders), each of whom claims beneficial ownership of some of those Axion shares.

- [40] Axion tendered affidavit evidence from or on behalf of each of the Japanese Shareholders and made submissions claiming that approximately 32 million Axion shares controlled by Bonner and the Bonner Affiliates are beneficially owned by various of the Japanese Shareholders. Affidavit evidence states these Axion shares should have been delivered to the Japanese Shareholders and that Bonner has told at least some of the Japanese Shareholders that he would arrange to have their shares delivered to them, were he not prevented from doing so by the Axion Cease Trade Order and the Management Cease Trade Order.
- [41] Bonner acknowledged that Cern One Limited holds Axion shares beneficially owned by Sukeyasu Arimoto, Hajime Yamanaka, Takashi Katagiri and Crypton Technologies K.K. Bonner says that he is uncertain based on the documentation he has reviewed whether he or any of the Bonner Affiliates owes any Axion shares to Hisayoshi Suzuki. Bonner denies that he or any of the Bonner Affiliates owes any Axion shares to Yuki Hirakawa, and states that he believes that any claim in that regard can only be resolved through litigation.

VI. Issue

- [42] Section 171 of the Act states:

If the commission...considers that to do so would not be prejudicial to the public interest, the commission...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... .

- [43] The issue before the panel was whether it considered that it would not be prejudicial to the public interest to grant Axion's application for the partial revocation orders.

VII. Analysis

A. The Financing Pursuant to the Investment Agreement

- [44] No party was able to direct us to any prior decisions that were directly relevant to this matter. Axion suggested that two decisions of this Commission relating to private placements in the course of contested take-over bids were informative in the context of the public interest determination to be made under section 171 of the Act. Those decisions are *Hecla Mining, Re*, 2016 BCSECCOM 359 and *Red Eagle Mining, Re*, 2015 BCSECCOM 401.
- [45] Axion relied on those decisions to suggest a framework for considering whether the proposed private placement financing is in the public interest. We agree that certain considerations raised there are relevant here. Does the private placement serve legitimate corporate objectives? Is there a serious and immediate need for funding? Is the size of the

private placement appropriate given the issuer's current liabilities? Does the private placement benefit shareholders, or is it abusive?

- [46] It was undisputed that Axion must raise more working capital or it will not be able to meet its existing debt obligations, file the disclosures required of a reporting issuer or carry on as a going concern. If Axion is not able to raise sufficient working capital, the shareholders of Axion stand to lose the value of their investments in its shares.
- [47] Axion provided evidence that the funds to be raised in the Initial Tranche will allow it to significantly reduce its debt, continue with its operations and seek full revocation of the Axion Cease Trade Order and the resumption of trading of Axion shares on the Exchange.
- [48] Full, accurate and timely disclosure of a reporting issuer's financial and other affairs is the cornerstone of our securities regulatory system. The revocation in part of the Axion Cease Trade Order to permit the proposed financing is tied directly to the resolution of the issue that gave rise to the Axion Cease Trade Order - the failure to file required financial disclosure. Without access to the funds expected to be provided through the Initial Tranche, the disclosure deficiencies cannot be remedied.
- [49] Bonner expressed doubts about the sufficiency of the Investment Agreement to satisfy the concerns raised by Axion's auditors about Axion's significant working capital deficiency and, indeed, there was no guarantee that receipt of the Initial Tranche would allow Axion to obtain an unqualified audit report on its 2019 financial statements. However, it is clear that in the absence of the proposed financing, it would be impossible to do so.
- [50] Bonner also suggested that the proposed financing is an attempt on the part of Axion management to entrench themselves in their positions. We need not speculate on that. There is ample evidence of Axion's need for the financing, which appears to be in keeping with Axion's usual business strategy and practice and no larger than necessary. In any event, we note that because the record date for the Meeting has passed, the Investor would not be entitled to vote at the Meeting any shares obtained prior to the Meeting on conversion of the Debentures issued on the Initial Tranche.
- [51] In the course of the hearing, we heard a considerable amount of conflicting evidence from the parties about their actions and intentions over the course of the past year. Most of that evidence was irrelevant to the panel's decision on the issues before it.
- [52] Since it is common ground that Axion urgently needs financing, it appears that issues of control of Axion and its assets are at the root of Bonner's objection to the partial revocation of the Axion Cease Trade Order to permit the financing contemplated by the Investment Agreement. In this expedited and focused hearing, the panel did not make decisions with respect to those issues or with respect to the dispute as to the propriety of the conduct and the good faith of the actors on both sides.

- [53] The Axion Cease Trade Order was intended to prevent a situation where the public could be harmed by trading in Axion's shares without the benefit of the required disclosure about its financial affairs. In this case, the proposed Investment Agreement with a company controlled by Axion's Executive Chairman and the issuance of the Initial Tranche contemplated by it pose no such risks.
- [54] The Executive Director took the position that the partial revocation of the Axion Cease Trade Order to permit the proposed financing was not prejudicial to the public interest.
- [55] The board of directors of Axion has approved the Investment Agreement, which is subject to approval by the Exchange in accordance with its own policies and procedures.
- [56] We concluded that it was not prejudicial to the public interest to allow Axion's board of directors and the Exchange, within their separate spheres of authority, to carry out their respective functions on the Investment Agreement, free of the impediment posed by the Axion Cease Trade Order.

B. The Transfer of Shares to the Japanese Shareholders

- [57] We were presented with incomplete and conflicting evidence regarding the entitlement of the Japanese Shareholders to Axion shares now held by the Bonner Affiliates. We were not in a position, and did not need, to make a determination on those claims.
- [58] As noted above, the Axion Cease Trade Order was intended to prevent a situation where the investing public could be harmed by trading in Axion's shares without the benefit of the required disclosure about its financial affairs. Similarly, the Management Cease Trade Order was intended to prevent the insiders named in the order from profiting at the expense of the public by making use of material information about Axion that was known to the insiders but had not been generally disclosed. Neither such risk arises from the potential transfer of Axion shares from Bonner and the Bonner Affiliates to the Japanese Shareholders.
- [59] The cease-trade orders were not intended to interfere with rights under private contract, and should not function as an excuse for non-performance.
- [60] The issue before the panel was simply whether we found it not to be prejudicial to the public interest to remove the twin impediments posed by the Axion Cease Trade Order and the Management Cease Trade Order, with the result that Bonner and the Bonner Affiliates are permitted to take all such actions to deliver Axion shares to the Japanese Shareholders as they may either agree or be ordered by a court of competent jurisdiction to do. We found that it was not prejudicial to the public interest to do so.

VIII. Conclusion

- [61] For the foregoing reasons, we issued the partial revocation orders attached as Schedule 1 and Schedule 2 to our decision dated March 30, 2021.

April 23, 2021

For the Commission

George C. Glover, Jr.
Commissioner

Marion Shaw
Commissioner

James Kershaw
Commissioner