In the Matter of the *Securities Act*, R.S.B.C. 1996, c. 418

Earle Douglas Pasquill

NOTICE OF APPLICATION

APPLICANT: Earle Douglas Pasquill

TO: British Columbia Securities Commission
12th Floor, 701 West Georgia Street
Vancouver, BC V7Y 1L2
Attention: Commission Secretary
Email: commsec@bcsc.bc.ca

ON NOTICE TO: The Executive Director of the British Columbia Securities Commission
12th Floor, 701 West Georgia Street
Vancouver, BC V7Y 1L2
Attention: Laura Bevan, Counsel to the Executive Director
Email: lbevan@lawsonlundell.com

TAKE NOTICE that an application will be made by Earle Douglas Pasquill to the British Columbia Securities Commission (the "Commission") at 701 West Georgia Street, Vancouver, B.C. on a date and time to be determined for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order, pursuant to s. 171 of the *Securities Act*, R.S.B.C. 1996, c. 418 (the "Act"), revoking Commission preservation order COR #2020/028 (the "Preservation Order"); and

2. Such further and other relief Commission panel considers proper or not to be prejudicial to the public interest.

Part 2: FACTUAL BASIS

Introduction

3. On March 16, 2015, the Commission rendered a decision on sanctions (the "Decision") in the matter of *Lathigee, Pasquill, FIC Real Estate, and others,* 2015 BCSECCOM 78. On April 1, 2015, the Commission registered the Decision as a judgment of the Supreme Court of British

Columbia (the "Court"), proceedings No. 1501117, under s. 163 of the Act. Almost five years later, on March 27, 2020, the Executive Director applied to the Commission without notice for a freeze order under s. 164.04 of the Act (the "Preservation Order").

4. The Preservation Order froze the Applicants' two life income fund ("LIF") accounts at Canaccord Genuity (the "LIF Accounts"). The Applicant is 77 years old. The funds frozen by the Preservation Order are the Applicant's sole source of income other than CPP and old age security. The Applicant has no other meaningful assets.

5. LIF accounts are governed by the *Pension Benefits Standards Act,* S.B.C. 2012, c. 30 (the "PBSA") and the *Pension Benefits Standards Regulations*, B.C. Reg 71, 2015 (the "PBSR"). That legislation provides that LIF accounts are exempt from execution, seizure, or attachment. As a result, the Commission cannot execute its judgment against the LIF Accounts.

6. The Preservation Order must be revoked for the reasons that follow. Further or in the alterative, it would not be prejudicial to the public interest to revoke the Preservation Order, for these reasons.

a. The Preservation Order is a form of execution, seizure or attachment. As such, it contravenes the PBSA and PBSR and is therefore illegal;

b. The Executive Director breached obligations of procedural fairness and natural justice by obtaining the Preservation Order without notice to the Applicant;

c. The Commission has no jurisdiction to run, or alternatively is otherwise precluded from running, enforcement proceedings parallel to the Court Proceeding, after having filed its Decision as a Judgment of the Court;

d. Pursuant to the PBSR, the Applicant is only allowed to withdraw a certain amount each year. As a result, even if the Preservation Order is revoked, the Applicant cannot dissipate the LIF Accounts.

The Decision

7. The Applicant was formerly a director and officer of a group of companies called the Freedom Investment Club (the "FIC Group"). A notice of hearing in relation to the FIC Group was issued in relation on March 1, 2012. On July 8, 2014, a panel of the Commission (the "Panel") found that:

a. the Applicant and others had perpetrated a fraud, contrary to section 57(b) of the Act, when they raised $21.7 million from 698 investors without disclosing to them the important fact of FIC Group's financial condition; and

b. the Applicant and others had perpetrated a second fraud, contrary to section 57(b), when they raised $9.9 million from 331 investors in FIC Foreclosure for the purpose of investing in foreclosure properties and instead used most of the funds to make unsecured loans to other FIC Group companies.

8. The Panel permanently banned the Applicant from participating in capital markets and ordered him to pay $36.7 million. The Panel's orders included the following:

a. subject to paragraph 62(d) below, under section 161(1)(g), the Applicant pay to the Commission $21.7 million, being the total amount obtained, directly or indirectly, as a result of his contraventions of the Act; and

b. under section 162, the Applicant pay an administrative penalty of $15 million.

9. The findings of the Panel are not at issue. However, it is noteworthy that the Panel ordered the Applicant to pay $36.7 million notwithstanding that the amount of funds paid by FIC Group to each individual respondent (including the Applicant) since the acts giving rise to the contraventions of the Act totaled less than $400,000.

The Judgment

10. As noted above, on April 1, 2015, the Executive Director filed the Decision as a judgment of the Court, pursuant to s. 163 of the Act (the "Judgment"), in Supreme Court Action No. L150117 (the "Proceeding").

11. The Executive Director took no steps in the Proceeding for more than four years – not until November 5, 2019 when it required the Applicant to attend an examination in aid of execution. From that examination, the Executive Director knew that the LIF Accounts were the Applicant's sole source of income other than CPP and OAS.

The LIF Accounts

12. The Applicant received a pension from his employment with Eaton's. In 1994, when he left Eaton's, the value of that pension was transferred to Odlum Brown into a locked-in RSP. The locked-in RSP was converted into a LIF, as required, when the Applicant turned 71.

13. The LIF Accounts had $644,951.13 as of April 30, 2020.

14. Section 118 of the PBSR provides that there is a maximum amount that can be withdrawn from a LIF account each year. On November 1, 2019, the BC Financial Services Authority (formerly FICOM) published a formula for calculating that maximum. The formula is complicated and the Applicant relies upon his broker to calculate the maximum that he is entitled to withdraw. There is also a minimum amount that must be withdrawn annually from a LIF account in each calendar year, pursuant to s. 146.3(1) of the *Income Tax Act,* and s. 123 of the PBSR.

15. The Applicant's practice is to withdraw the maximum allowable amount to pay for living expenses. The Applicant receives 12 monthly payments, which are subject to deductions for income tax. With respect to 2020, on March 30, 2020, the Applicant's broker advised that:

a. the maximum amount that can be withdrawn from the LIF Accounts is $75,153.56;

b. the Applicant had withdrawn $18,788.40 of which $6,575.94 had been paid for withholding tax; and

c. the remaining amount that can be withdrawn from the LIF Accounts is $56,365.16 (a portion of which would be withheld for taxes).

16. If the Preservation Order is lifted, the Applicant intends to continue to make withdrawals from the LIF Account for living and legal expenses.

17. As the Commission is aware from the examination in aid of execution in the Proceeding, the Applicant has no meaningful assets other than the LIF. His sole source of income other than the LIF Accounts is CPP and OAS. His income after taxes is approximately $6,000 per month. His basic living expenses are approximately $4,400 per month. In addition to those expenses, the Applicant has significant legal expenses.

The material before the Commission granting the Preservation Order

18. The evidence before the Commission in granting the Preservation Order was the affidavit of Catherine Palmer, Senior Enforcement Officer in the Enforcement Division of the Commission (the "Palmer Affidavit").

19. The Palmer Affidavit contains an overview that notes that the Commission had ordered the Applicant to pay $36.7 million on March 16, 2015 and that the Decision had been registered as a judgment of the Court on April 1, 2015.

20. The Palmer Affidavit then contains a partial procedural history with respect to civil proceedings commenced by the Commission against the Applicant and his wife, Vicki Pasquill, and a company, Vicker Holdings Ltd. ("Vicker"), whose sole shareholder is the Applicant's wife. The Applicant's wife is separately represented in those proceedings, which are highly contested. There was no evidence tendered with respect to the merits of the Commission's claims in those proceedings. In those proceedings, the Commission has filed CPLs on approximately $21 million worth of properties owned by the Applicant's wife and Vicker – notwithstanding the Commission's own finding that the evidence indicated that the Applicant had received less than $400,000.

21. Starting at paragraph 18, the Palmer Affidavit addresses "Pasquill's property at Canaccord." It recognizes that the accounts in question are "LIF investment accounts held on [the Applicant's] behalf at Canaccord". The affidavit then provides details of the amount in the LIF Accounts and the Applicant's withdrawal from that account in 2019. The affidavit attaches a September 2019 balance for that account that had been provided by the Applicant to the Commission in his examination in aid of execution conducted in November 2019.

22. The Palmer Affidavit did not:

a. Explain how the matter related to the issuance of securities or the threat to the public interest that justified the granting of the order sought;

b. Make reference to the PBSR or the *Income Tax Act*. It does not appear that it was brought to the Commission's attention that there is both a minimum, and a maximum, amount that the Applicant may withdraw each year;

c. Make reference to the PBSA. It does not appear that it was brought to the Commission's attention that the accounts in question are exempt from execution, seizure or attachment; or

d. Disclose that the LIF Accounts represented the Applicant's sole source of income other than CPP and OAS.

The Preservation Order

23. In the Preservation Order, Chair Leung and Vice Chair Johnson noted that:

a. the Decision had been made and filed as a judgment of the Court;

b. The Applicant had not paid any part of the Judgment or any interest thereon; and

c. As of September 30, 2019, the Applicant had registered investment account at Canaccord Genuity with a market value of $734,321.91.

24. The Chair and Vice Chair prohibited Canaccord and the Applicant from making any withdrawals from the LIF Accounts.

Part 3: LEGAL BASIS FOR REVOCATION

The LIF Account is immune from execution, seizure or attachment, including through a Preservation Order of the Commission

25. Pursuant to s. 70 of the PBSA, and s. 4(3) of Schedule II to the PBSR, LIF accounts are immune from all forms of execution, seizure, or attachment. In particular, subsection 4(3) of that regulation provides as follows:

> (3)Without limiting subsections (1) and (2) of this section and in accordance with section 70 of the Act, money in this life income fund must not be assigned, charged, alienated or anticipated and is exempt from execution, seizure or attachment.

26. The words used in the PBSA, "execution, seizure or attachment", are very wide words. There is no statutory or policy reason why they should be given a narrow meaning.

K. (C.M.) v. Young, 1996 CarswellBC 1484 (SC), aff'd 1996 CarswellBC 1485

27. As noted by Lord Denning in *Re Overseas Aviation Engineering (G.B.) Ltd.* [1962] 3 All E.R. 12 (C.A.): "Execution" means quite simply, the process for enforcing or giving effect to the judgment of the court: and it is "completed" when the judgment creditor gets the money or other thing awarded to him by the judgment.

28. The Preservation Order is effectively a Mareva injunction. Mareva injunctions have been recognized as a form of execution -- indeed, they are often referred to as an exception to the rule against pre-judgment execution.

Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R 2;
Tracy v. Instaloans Financial, 2008 BCCA 481

29. The Preservation Order is a procedural step taken to enforce a judgment of the Court (albeit a procedurally incorrect one, as outlined below). In particular, the Commission has obtained the Judgment from the Court and has taken the interim step of freezing the LIF Accounts so that they are remain available for execution. Accordingly, the Order is a form of execution, seizure, or attachment and thereby contravenes the PBSA and PBSR. The order must therefore be vacated.

30. The Chair and Vice-Chair were apparently not informed of the illegal nature of the order they were being asked to make. There is no indication that the relevant sections of the PBSA and PBSR were brought to their attention by the Executive Director. However, the Commission is now aware of the illegal nature of the Preservation Order, and thus aware of the need for it to be revoked.

31. Further, or in the alternative, it cannot be prejudicial to the public interest for the Commission to revoke an illegal order. To the contrary, it would be prejudicial to the public interest for the Commission to act in an unlawful fashion.

The Executive Director breached obligations of procedural fairness and natural justice by obtaining the Preservation Order without notice to the Applicant

32. Section 164.05 of the Act provides that the Commission may make a preservation order without notice to any person. The Commission therefore has the discretion to proceed without notice to the Applicant. But it must exercise that discretion judicially, namely, in accordance with proper legal principles and after considering and weighing the relevant circumstances of a particular case.

Canada v. Vavilov, 2019 SCC 65 ["*Vavilov*"], at para. 108; *British Columbia v. Worthington (Canada) Inc. et al. (1988)*, 29 B.C.L.R. (2d)

145 (C.A.) per Esson J.A. at 165, Hutcheon J.A. at 162, Lambert J.A. (dissenting in the result) at 154

33. The general principle that the right to be heard underlies the duty of fairness has been stated by the Supreme Court of Canada numerous times, including in *Vavilov* at para. 127, as follows:

> The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard

34. The purpose of the "without notice" aspect of s. 164.05 is to enable the Commission to act in circumstances where the very act of providing notice may negate or harm the effectiveness of the preservation order. It does not authorize, and cannot be reasonably construed as authorizing, an abrogation of natural justice rights in circumstances where notice can be provided without undermining the statutory scheme.

35. There were no circumstances that justified the Executive Director obtaining the Preservation Order without notice to the Applicant. There is no investigation of the Applicant. The Decision was registered as a judgment over five years ago. For five years, the Executive Director allowed the LIF Accounts to continue, unrestrained by any order. Further, as noted above, there are legal limits on the amount the Applicant can withdraw – he could not empty the LIF Accounts in any event. There was no urgency that would justify making the Preservation Order without giving the Applicant an opportunity to be heard.

36. As a result of the Executive Director's failure to provide notice to the Applicant, the Commission was not informed of key considerations that would affect whether the Preservation Order was in the public interest and of the impact of the order on the Applicant. Specifically, the Executive Director did not disclose that:

a. the PBSA and PBSR prohibit execution against LIFs. It appears that the relevant legislative provisions were not even raised with Chair Leung and Vice Chair Johnson, such that they were presumably unaware that they were being asked to act in an unlawful fashion;

b. the information gathered during the examination in aid of execution regarding the limited means of the Applicant or that he relies on withdrawals from the LIF Accounts as his primary source of income; and

c. the Applicant was prohibited from dissipating the LIF Accounts beyond the maximum amount proscribed in the PBSR (and equally must take a minimum amount each year). The highly regulated nature of the LIF Accounts, which make it impossible for the Applicant to empty the accounts, is entirely absent in the Executive Director's evidence.

37. As noted in *Vavilov*, administrative tribunals are required to adopt a "culture of justification, and to demonstrate that its exercise of delegated public power can 'be justified to citizens in terms of rationality and fairness'". The decision of the Commission fails to adopt a culture of justification. The Preservation Order does not justify the rationality or fairness of proceeding without notice to the Applicant. It also does not justify in terms of rationality or fairness the decision to issue the Preservation Order itself. The Chair and Vice Chair do not explain how they concluded that the order was "in the public interest". They do not identify any threat to the public interest. And they do not weigh or consider the consequences of the Preservation Order to the Applicant. All of this was required to grant a preservation order.

Exchange Bank & Trust Inc. v. British Columbia (Securities Commission), 2000 BCCA 389

38. Section 164.05 is a new provision – brought into force the same day the Preservation Order was granted. What has occurred in this case, being the making of an unlawful order, demonstrates the importance of providing notice where it is not prejudicial to the public interest to do so. Revoking the Preservation Order is not prejudicial to the public interest - the LIF Accounts are exempt from execution, seizure, or attachment and, in any event, the Applicant cannot empty them. It is necessary that the Preservation Order be revoked to demonstrate that the Commission will exercise its discretion under s. 164.05 in a proper manner, consistent with principles of fairness and natural justice.

The Commission has no jurisdiction to run, or alternatively is otherwise precluded from running, enforcement proceedings parallel to the Court Proceeding, after having filed its Decision as a Judgment of the Court

39. The Commission has no jurisdiction, or otherwise cannot lawfully run its own enforcement proceedings in parallel with the enforcement Proceeding that it launched in the Court, when it filed the Judgment under s. 163. The Commission was *functus officio* upon filing the Judgment with the Court. Further, the *Act* does not give the Commission any ability to make preservation orders under s. 164.04 after it filed its Decision as a Judgment of the Court under s. 163. That the Legislature has declined to grant such an extraordinary power is not surprising, given that such would be a breach of natural justice.

40. Further, or in the alternative, a multiplicity of proceedings in which the Commission acts contrary to natural justice is not in the public interest but, instead, contrary to the public interest.

41. On April 1, 2015, the Commission filed the Decision with the Court, thereby obtaining the Judgment. By so doing, the Commission launched a Court process (i.e., the Proceeding, as defined above) for the purposes of executing on the Decision (now, the Judgment). The Commission is the "Plaintiff / Judgment Creditor" in the Proceeding.

42. Having launched the Proceeding in the Court for the purposes of execution, the Commission is not able to grant further orders for the purposes of assisting its own execution efforts for the following three reasons.

43. First, the Judgment is "final, conclusive, and enforceable", as Ms. Palmer swore in a Declaration filed with the US District Court. Accordingly, the Commission is *functus officio.*

Fishing Lake First Nation v. Paley, 2 F.C. 1448

44. Second, s. 164.04 has no application in circumstances where the Commission's decision has been filed as a judgment of the Court. Section 164.04(2) specifies the circumstances in which the Commission may make an order under s. 164.04(4) – and s. 163 is not included. This is to be contrasted with multiple other provisions of the Act which expressly authorize the Commission to make an order "whether or not the decision has been filed under section 163" (see, e.g., sections 161, 162, and 171 of the Act). *Expressio unius est exclusio alterius.*

45. Third, it is a breach of natural justice for the Commission to grant orders for the purposes of assisting the position of the Commission in the Proceeding.

46. On the application for the Preservation Order, the Commission was required to follow the rules of natural justice and procedural fairness.

Baker v. Canada (Minister of Citizenship & Immigration), [1999] 2 S.C.R. 817
Moreau-Bérubé v. Nouveau-Brunswick, 2002 SCC 11

47. Given the interests at stake for the Applicant, he had a right to an impartial decision-maker. The Commission plainly is not an impartial decision-maker. To the contrary, it is a *party* to the Court Proceeding. It has an interest in enforcing its Judgment. Simply by way of example, if amounts collected by the Commission are not paid to claimants, the Commission becomes entitled to the funds. Accordingly, it is a breach of natural justice and procedural fairness for it to engage in further processes aimed at assisting its own collection efforts. Such applications can, and must, be brought before the Court.

48. While not strictly speaking necessary to this argument, the high-profile nature of this case must be noted. It has been the focus of considerable public attention, and the Commission has been the subject of some media criticism. This further demonstrates why the Commission must not take upon itself the dual roles of party-litigant (in the Court) and decision-maker, as it did in the hearing for the Preservation Order, and in granting the Preservation Order.

The Applicant cannot dissipate the LIF Accounts

49. Moreover, even if he wanted to, the Applicant cannot dissipate the LIF Accounts. Pursuant to the PBSR, the Applicant can withdraw only $56,365.16 during the remainder of 2020.

50. The Applicant is entitled to funds for living expenses and legal fees. And, given the jeopardy he faces, his legal fees are considerable and will continue to be so for the foreseeable future. The Executive Director has advised that they are prepared to consent to a variation order to permit withdrawal monthly amounts for those purposes.

51. The Applicant's entitlement for living expenses and legal fees is sufficient to justify the withdrawal of the entire amount legally permissible from the LIF Accounts. If the Preservation Order is revoked, the Applicant would receive approximately $40,000 during the remainder of 2020 – or approximately $4,500 per month. The Applicant's total monthly income including withdrawals from the LIF Accounts is $6,000. His basic living expenses are $4,400. That leaves only $1,600 per month (or $13,500 for 2020) available for payment of legal fees.

52. In short, if the Commission accepts that the Applicant is entitled to funds for living expenses and living fees (a position that is supported by the Executive Director), the Preservation Order will not preserve much if any assets. It is not contrary to the public interest to revoke an order that has no practical effect.

Part 4: MATERIAL TO BE RELIED UPON

1. The affidavit of Earle Pasquill made May 25, 2020
2. The affidavit of Barbara Olson made May 25, 2020
3. Such further and other material as counsel may advise and the Commission may permit.

DATED: May 25, 2020

Counsel for Applicant, John Sullivan and Daniel Yaverbaum