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

Citation: Re Schiemann, 2020 BCSECCOM 155 Date: 20200521

**Reciprocal Order**

**Donald Robert Schiemann**

**Section 161 of the *Securities Act*, RSBC 1996, c. 418**

## I. Introduction

[1] This is an order under sections 161(1) and 161(6)(d) of the *Securities Act*, RSBC 1996, c. 418 (Act).

[2] By permitting a reciprocal order to be made in certain circumstances, section 161(6) facilitates cooperation between the Commission and other securities regulatory authorities.

[3] The executive director of the Commission has applied for an order reciprocating the market prohibition sanctions agreed to by Donald Robert Schiemann and others on September 11, 2019 in a Settlement Agreement and Undertaking with the Alberta Securities Commission (ASC) cited as *Re Lutheran Church-Canada, the Alberta-British Columbia District*, 2019 ABASC 140 (the Settlement Agreement).

[4] The executive director tendered as evidence the Settlement Agreement and made written submissions to the Commission.

[5] Schiemann was given an opportunity to be heard. Schiemann was represented by counsel and made written submissions to the Commission, but did not tender any evidence.

[6] The Commission makes reciprocal orders under section 161(6) of the Act in the public interest, to protect investors and the capital markets in British Columbia.

## II. Background

[7] In the Settlement Agreement, Schiemann admitted that:

(a) Lutheran Church-Canada, the Alberta-British Columbia District (District) is a corporation and registered charity operating in Alberta. Its purpose is to support congregations in Alberta and British Columbia in advancing the Lutheran Church's religious mission.

(b) The District is controlled by the members of a board of directors (Board).

(c) Lutheran Church-Canada, the Alberta-British Columbia District Investments Ltd. (DIL) is a not-for-profit company formed by the District.

(d) The District established and operated two funds: the Church Extension Fund (CEF Fund) and the District Investment Fund (DIL Fund) (together the Funds).

(e) The tradition underlying the Funds was longstanding within the District and the Lutheran Church generally. The creation of the Funds arose from an intention to enhance the Lutheran Church's ministry by providing loans to fund capital projects for congregations.

(f) The CEF Fund was designed to facilitate investments by individual investors into faith-based developments such as churches and schools. Those investments took the form of savings/investment accounts, term deposits and/or bonds.

(g) The DIL Fund offered investors registered investments.

(h) Investors in both Funds were promised set rates of interest on the invested funds.

(i) The investments in the Funds constituted securities under applicable securities law.

(j) Although most investors were affiliated with congregations within the District, investment in the Funds was not specifically closed to members of the public.

(k) The District and DIL engaged representatives from congregations to market the investments in their respective congregations, using information and resources provided by the District. The promotional materials included, among other things, assurances that the investments were risk-friendly, well-diversified, conservative and prudent. The promotional materials omitted statements that were required to be stated or that were necessary to be stated to make the other statements in the promotional materials not misleading. The omitted statements included, among other things, the fact that most of the Funds were invested in mortgages in a single real estate development that had inadequate financial controls and had defaulted on principal payments to the District.

(l) Schiemann is an ordained Lutheran minister. Between 2000 and 2015, Schiemann was an officer and director of the District and DIL, sat on the Board, and held the title of District President.

(m) From approximately 2000 through 2015, Schiemann, as a consequence of his position, knew about the District's and DIL's operations and how the investments in the Funds were being promoted and sold.

(n) By January 1, 2008, Schiemann ought to have known that the financial situation of the principal underlying asset of the Funds and the practices of the District and DIL accepting investments and/or deposits into the Funds required disclosure to investors.

(o) Subsequent to January 1, 2008, the District and DIL each violated section 92(4.1) of the Securities Act (Alberta) by making statements which they knew or ought to have known did not state all of the facts that were required to be stated or that were necessary to be stated to make the statements not misleading, and which would reasonably be expected to have a significant effect on the market price or value of the investments.

(p) Schiemann, as a consequence of his position on the Board, with the District, and with DIL, authorized, permitted, or acquiesced in the above-noted breaches of Alberta securities laws by the District and DIL.

(q) In January 2015, the Alberta Court of Queen's Bench made an order under the Companies' Creditors Arrangement Act, granting a stay of proceedings (the CCAA Proceedings) against the District, DIL and others, and appointing Deloitte LLP as monitor.

(r) At the outset of the CCAA Proceedings, the total claims of investors into the Funds were $127.4 million. Following the distribution of a significant portion of the claims, and with the CCAA Proceedings still ongoing, it was anticipated at the date of the Settlement Agreement that the Funds may have a shortfall of $27.2 million.

[8] Schiemann agreed to pay $175,000 for distribution to the Funds' investors in the CCAA Proceedings and an additional sum to the ASC for costs. He also agreed to the permanent market prohibitions set out in the Settlement Agreement.

[9] The executive director seeks an order reciprocating in British Columbia the market prohibition sanctions that Schiemann agreed to in the Settlement Agreement, but does not seek a monetary penalty.

## III. Applicable Law

[10] The applicable sections of the Act are the following:

> 161(1) If the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing, may order one or more of the following:
>
> 161(1)(b)(ii) the person or persons named in the order cease trading in, or be prohibited from purchasing, any securities or exchange contracts, a specified security or exchange contract or a specified class of securities or class of exchange contracts;
>
> 161(1)(c) that any or all of the exemptions set out in this Act, the regulations or a decision do not apply to a person;
>
> 161(1)(d) that a person
> (i) resign any position that the person holds as a director or officer of an issuer or registrant,
> (ii) is prohibited from becoming or acting as a director or officer of any issuer or registrant,

(iii) is prohibited from becoming or acting as a registrant or promoter,
(iv) is prohibited from acting in a management or a consultative capacity in connection with activities in the securities market, or
(v) is prohibited from engaging in investor related activities;

161(6)(d) The commission or the executive director may, after providing an opportunity to be heard, make an order under subsection (1) in respect of a person if the person has agreed with a securities regulatory authority, a self regulatory body or an exchange, in Canada or elsewhere, to be subject to sanctions, conditions, restrictions or requirements.

## IV. Analysis and Decision

[11] When considering an application for an order under section 161(6)(d), the first issue is whether that section of the Act is engaged in the circumstances. By virtue of the Settlement Agreement, where Schiemann admitted his misconduct and agreed to the sanctions set out there, we find that it is.

[12] The second issue is whether it is in the public interest to make the orders sought by the executive director under section 161(1) of the Act.

[13] Orders under section 161(1) of the Act are protective and preventative, intended to be exercised to prevent future harm. See *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37.

### A. Factors

[14] In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission identified factors relevant to sanction as follows (at page 24):

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
>
> - the seriousness of the respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
> - the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
> - the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,

- the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
- orders made by the Commission in similar circumstances in the past.

## B. Application of the Factors

***Seriousness of the conduct***

[15] We agree with the view expressed by the Commission in *Re Michaels,* 2014 BCSECCOM 457 (para. 8):

> Not far behind fraud, in the scale of seriousness of misconduct, stands misrepresentation. Those who operate and profit in the capital markets by misstating material facts (through commission or omission), undermine the confidence of the public in one of the cornerstones of capital markets regulation, the provision of accurate and complete information for investors to make informed investment decisions.

[16] We find that Schiemann's misconduct was very serious. Investors were denied the protections that underpin the legal requirements stated above. We also find that the seriousness of the misconduct was magnified both by the length of time for which it persisted and by the position of trust occupied by Schiemann as an ordained Lutheran minister.

[17] The executive director submitted that Schiemann's conduct was particularly egregious because it targeted investors who were members of the Lutheran Church and exploited their beliefs and their trust in their religious community. The promotional material included statements that the investment in the Funds was an opportunity for investors to live out their faith, spread God's message, and proclaim the saving gospel of Jesus Christ. We find that particularly in light of Schiemann's role as an ordained minister within the targeted group of investors, his actions in permitting the District and DIL to encourage investment on a religious basis without disclosing critical information about the risks associated with such investment constituted very serious misconduct.

***Harm to investors/capital markets***

[18] The quantum of loss suffered by investors in the Funds is significant. It is expected that there may be a shortfall of $27.2 million to pay investors after all the assets of the Funds are liquidated.

[19] We find that Schiemann's misconduct caused significant harm to identifiable investors and to the integrity of the capital markets.

***Mitigating factors***

[20] Schiemann has not previously been sanctioned by the Commission.

[21] Schiemann cooperated with ASC staff during the investigation and admitted liability for his misconduct.

[22] Schiemann submitted that he had contributed to one or both of the Funds and has lost not only his own investment but also the opportunity to recover any of those funds through a

contemplated representative action. No evidence of the existence or extent of any such losses was contained in the Settlement Agreement or otherwise provided to us.

[23] Schiemann also submitted that it is a mitigating factor that his contraventions were occasioned without malice and grounded in his well-meaning religious intentions. No evidence of Schiemann's intentions was contained in the Settlement Agreement or otherwise provided to us.

[24] Schiemann further submitted that it is a mitigating factor that he acted on the basis of what he believed to be accurate and complete professional legal and financial advice. No evidence of the existence or extent of any professional advice regarding Schiemann's disclosure obligations was contained in the Settlement Agreement or otherwise provided to us.

[25] With no evidence before us on those points, we have rejected Schiemann's submissions above with regard to mitigating factors.

[26] Finally, Schiemann submitted that there is no evidence that he had actual knowledge of the losses being incurred by the Funds. A lack of actual knowledge of the losses incurred by the Funds, even if established, must be weighed against Schiemann's admitted misconduct. In particular, Schiemann was a person who, by virtue of his position of responsibility, admittedly knew how investments of the Funds were promoted and sold. Schiemann admittedly knew or ought to have known that misleading statements in the promotional literature for the Funds were being used, and agreed in the Settlement Agreement that these misleading statements would reasonably be expected to have a significant effect on the market price or value of these investments. In this context, any lack of actual knowledge of the losses being incurred by the Funds, even if established, would not mitigate Schiemann's underlying and admitted conduct or diminish the need for orders under section 161 of the Act.

***Risk to investors and markets/fitness to be a registrant, director or officer***

[27] Compliance with securities laws is essential in order to protect the public and the integrity of the capital markets. Schiemann, by virtue of his roles with the District, DIL and the Board, occupied a position of trust and responsibility. Ensuring compliance with securities laws is a critical responsibility of those making decisions on behalf of an issuer. Schiemann failed to discharge that responsibility.

[28] We find that Schiemann's misconduct demonstrates that he poses a risk to investors and to the capital markets of British Columbia, and that he is not fit to act in future as a registrant or to bear the responsibilities of a director or officer or adviser to any private or public issuer.

***Specific and general deterrence***

[29] The sanctions that we impose must be sufficiently severe to establish that both Schiemann and others will be deterred from misconduct.

[30] Our orders must also be proportionate to Schiemann's misconduct (and the circumstances surrounding it).

***Previous orders***

[31] The executive director cited three decisions involving losses of over $1 million in which the Commission had ordered permanent market bans:

(a) in *Re Michaels*, 2014 BCSECCOM 457, the respondent made misrepresentations to investors that the investments he was selling were guaranteed, better, and safer than shares on the stock market. Relying on those and other representations, the respondent raised over $65 million from investors;

(b) in *Re Manna*, 2009 BCSECCOM 595, the respondents made misrepresentations to investors that the investments they sold were low-risk, safe, secure and had high trading profits. Relying on those misrepresentations, the respondents raised US$16 million from 800 investors; and

(c) in *Re Dominion Grand*, 2019 BCSECCOM 150, the respondents misrepresented to investors that investment funds would be invested in mortgages. Relying on that misrepresentation, the respondents raised over $1 million from 39 investors.

[32] The executive director submitted that although the respondents in each of those decisions were found to have committed the more serious offence of fraud, the panels in each of those cases found that the respondents had misrepresented the investments to investors through their promotional and marketing material.

[33] In *Davis v. British Columbia* (Securities Commission), 2018 BCCA 149, the British Columbia Court of Appeal stated that where a person's livelihood is at stake, it is incumbent upon a tribunal to consider a respondent's individual circumstances when determining whether measures short of permanent prohibitions would be adequate to protect the investing public. No evidence relating to Schiemann's individual circumstances has been provided to us in these proceedings.

## C. Decision

[34] Considering the evidence in this case and the application of the relevant *Eron* factors to the evidence, we find that the permanent market prohibitions sought by the executive director against Schiemann are appropriate and required in the public interest.

## V. Orders

[35] Considering it to be in the public interest, and pursuant to section 161 of the Act, we order that:

1. under section 161(1)(d)(i), Schiemann resign any position he holds as a director or officer of an issuer or registrant;

2. Schiemann is permanently prohibited:

(a) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts, except that he may trade and purchase securities through a registrant if he gives the registrant a copy of this decision;

(b) under section 161(1)(c), from relying on any of the exemptions set out in this Act, the regulations or a decision;

(c) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant;

(d) under section 161(1)(d)(iii), from becoming or acting as a registrant or promoter;

(e) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and

(f) under section 161(1)(d)(v), from engaging in investor relations activities.

May 21, 2020

**For the Commission**

Audrey T. Ho
Commissioner

Marion Shaw
Commissioner