

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

Citation: *Re Zhu*, 2024 BCSECCOM 195

Date: 20240409

Shijun “Clark” Zhu

Panel	Marion Shaw Deborah Armour, KC	Commissioner Commissioner
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Date of Decision	April 9, 2024
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Decision

I. Introduction

- [1] On May 5, 2021, in *Re Zhu*, 2021 BCSECCOM 162 (Settlement Agreement), the executive director and the respondent agreed that Shijun “Clark” Zhu (Zhu) contravened sections 34(a) and 34(b) of the *Securities Act*, RSBC 1996, c. 418 (Act), by being in the business of trading and advising without being registered. Zhu managed investor trading accounts totaling \$532,854.
- [2] On May 5, 2021, in *Re Zhu*, 2021 BCSECCOM 163 (Order), the executive director ordered Zhu to disgorge to the Commission \$38,639.69 that he received in commissions for his unregistered trading and advising, under section 161(1)(g) of the Act.
- [3] The Commission has recovered \$38,639.69 (Funds) in full satisfaction of the disgorgement order made against Zhu.
- [4] On July 25, 2023, the executive director applied to the Commission for approval of a proposed claims process under section 15.1 of the Act relating to the Funds (Claims Process).
- [5] On September 25, 2023, in *Re Zhu*, 2023 BCSECCOM 461, the Commission approved the Claims Process.
- [6] On January 30, 2024, the executive director provided the Commission with his report and recommendations (Report) and an affidavit of a staff member in the Enforcement Division of the Commission.
- [7] Having considered the Report and the additional material described below provided by the executive director, as well as the factors in section 7.4 of the *Securities Regulation*, B.C. Reg. 196/97 (Regulation) relevant to the executive director’s recommendations, we make the payment order below pursuant to section 15.1(3) of the Act.

II. Applicable Law

A. Provisions of the Act and Regulation

- [8] Section 15.1 of the Act provides:

Claim for wrongful benefit

- 15.1** (1) The commission must publish a notice if the commission receives money from an order under section 155.1(b), 157(1)(b) or 161(1)(g).
- (1.1) A notice under subsection (1) must set out a period within which a person may make a claim.
 - (1.2) The period referred to in subsection (1.1) must be at least 3 months from the date the notice is given.
 - (2) A person may make a claim to money referred to in subsection (1) by submitting an application in accordance with the regulation.
 - (3) If the commission receives an application under subsection (2), the commission may, in accordance with the regulations, pay to the applicant all or a part of the amount claimed.
 - (5) The commission may retain any money not payable under subsection (3) after the period referred to in subsection (1.1) expires and after adjudicating all claims in accordance with the regulations.

[9] The Regulation in respect of section 15.1 of the Act provides:

Definitions

7.1 In this Part:

“**eligible applicant**” means a person who

- (a) suffered pecuniary loss as a direct result of misconduct that resulted in an order for which the commission gave notice under section 15.1(1) of the Act,
- (b) did not directly or indirectly engage in the misconduct that resulted in the order, and
- (c) has not been denied a claim under section 7.4(6);

“**order**” means an order made under section 155.1(b), 157(1)(b) or 161(1)(g) of the Act.

Claims application

- 7.3** (2) If a person has made an application under section 15.1 of the Act and the information provided in the application changes in a material respect so that the information provided is false or misleading, the person must report the change to the commission promptly.

Adjudication of claims

- 7.4** (1) If the commission determines that an applicant is an eligible applicant in respect of an order, the commission may make a payment to the eligible applicant from money received from the order.
- (2) When determining the amount to be paid to an eligible applicant, the commission must consider the following:
 - (a) the amount of money received from the order;
 - (b) the loss suffered by the eligible applicant;
 - (c) the losses suffered by all eligible applicants;
 - (d) any other information the commission considers appropriate in the circumstances;
 - (3) When determining an applicant's loss for the purposes of this section, the commission must not include any amount claimed by the applicant in respect of a loss of opportunity, including interest on any loss, and must consider the following:

- (a) whether the applicant received or is entitled to receive compensation from other sources for the loss arising from the misconduct that resulted in the order;
 - (b) whether the applicant benefitted from the misconduct that resulted in the order;
 - (c) the results of any hedging or other risk limitation transactions made by the applicant.
- (4) The commission may prorate payments among eligible applicants if, having considered the matters under subsection (2), the commission determines that the money the commission received from the order is insufficient to pay the claims of all eligible applicants.
- (5) A prorated payment made to an eligible applicant must be determined in accordance with the following formula:

$$\frac{A \times B}{C}$$

where

- A = the amount of money the commission received under the order,
- B = the loss suffered by the eligible applicant, and
- C = the losses suffered by all eligible applicants.

- (6) The commission may deny an applicant's claim if the applicant
- (a) fails to comply with section 7.3 (2), or
 - (b) makes a statement or provides information to the commission that, in a material respect and at the time and in the light of the circumstances in which it is made, is false or misleading, or omits facts from the statement or information necessary to make that statement or information not false or misleading.
- [en. B.C. Reg. 91/2014, Sch. s. 1.]

Opportunity to be heard

7.5 Except for a decision to prorate payments under section 7.4(4), the commission must not deny all or part of a claim without giving the applicant an opportunity to be heard.

B. Applicable principles

[10] In *Re Alexander*, 2017 BCSECCOM 78, at paragraphs 25 to 27, the Commission set out some general principles to consider in determining applications to pay out funds pursuant to section 15.1 of the Act:

- [25] We agree with the submissions of the executive director on these questions, and adopt the following guidelines for future applications under section 15.1 of the Act:
- 1. although a duty of fairness applies in any administrative proceeding, in this case, if the procedural requirements set out in the Act and the regulations are met, the duty of fairness is fulfilled;
 - 2. applications under section 15.1 are not generally determined with a view to the public interest (unlike many other provisions of the Act which expressly

require the Commission to take the public interest into consideration when making an order or taking some other step);

3. a Commission panel considering an application under section 15.1 should apply the test of whether the evidence, on a balance of probabilities, supports granting the application;

...

[26] In general, our role, as a Commission panel, is similar to that of a judge in a bankruptcy proceeding. In that role, we must:

- ensure that the procedural requirements of the Act have been met;
- where there is a substantial number of claimants, ensure that the Commission's administrative procedures for vetting those claims are appropriate;
- provide a forum whereby disputes over claims may be heard; and
- make orders for payments where we are satisfied that the evidence, on a balance of probabilities, warrants such an order.

[27] Similarly, the executive director, who is responsible for administrative oversight of the vetting of applications, plays an important role by making recommendations to the panel (wherever possible) in much the same manner that a trustee in bankruptcy makes a recommendation for payment out of court based on their administrative oversight of the claims process.

[11] The Court of Appeal in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207, at paragraphs 76 to 78, noted that section 15.1 of the Act is an "expeditious" method for victims to receive some money and is not restitution, which restores victims to their original position. Restitution is generally reserved for the courts.

[12] The panel in *Re Mesidor*, 2020 BCSECCOM 164, at paragraph 40, noted that section 15.1 of the Act does not specifically limit payments to money received. The panel concluded that "the language of the Act permits that accrued interest can be ordered to be paid to eligible investors."

III. Background

A. Claims Process

[13] In accordance with the Claims Process, the executive director:

- a) posted a notice about the Claims Process on the Commission's public website on September 29, 2023, with a claim deadline of December 29, 2023; and
- b) emailed the notice of the Claims Process to the known potentially eligible applicants for whom staff had email addresses.

[14] On December 29, 2023, the three-month period set out in the Claims Process expired.

[15] The executive director received applications for the Funds from four individuals, identified below by their initials (Applicants). The Applicants claimed the following amounts under section 15.1:

Investor	Amount Claimed
LQF	\$70,000 USD
HW	\$100,000 USD
ZZ	\$45,000 USD
MLW	\$72,700 USD

[16] The executive director's Report provided details on the Funds, the Claims Process, and the Applicants' applications for compensation.

B. The executive director's Report

[17] In his Report, the executive director outlined the steps he took to administer the Claims Process. He recommended that each claim be approved and distributed on a *pro rata* basis from the Funds together with accrued interest, all in accordance with the formula prescribed by section 7.4(5) of the Regulation.

[18] The executive director set out the basis upon which he was satisfied that:

- a) the Commission has complied with all applicable procedural requirements in the Act and Regulation;
- b) each Applicant is an "eligible applicant" who filed their application in the required form and within the required three-month time period, in accordance with section 15.1 of the Act; and
- c) payment (on a *pro rata* basis) in accordance with the applications and section 7.4(4) of the Regulation is supported by the applications.

[19] Section 7.5 of the Regulation provides that except for a decision to prorate claims in accordance with section 7.4(4), the Commission must not deny all or part of a claim without giving the Applicant an opportunity to be heard. The executive director submitted that the Applicants are not entitled to be heard under section 7.5 because he recommended approval of all the applications with a *pro rata* distribution of the Funds to the Applicants.

Issues with the executive director's Report

[20] On February 13, 2024, on behalf of the panel, the hearing office requested the following additional information from counsel for the executive director:

- a) Did the Applicants' claims include commissions paid to Zhu?
- b) If commissions were paid in addition to the Applicants' investments, should those commissions be added to the amounts claimed by the Applicants?
- c) If the executive director advised that the commissions paid to Zhu were appropriately added to the Applicants' claims, then the executive director should provide a new schedule of the Applicants' losses, including those commissions, and their *pro rata* entitlement to the Funds.

- d) The claim by investor HW was for investments and commissions paid by a different investor with the same last name. There was no evidence provided as to why investor HW was entitled to claim for the other investor's loss. We requested that the executive director advise us on what basis investor HW was entitled to claim for the other investor's loss. If investor HW was not entitled to claim for the other investor's loss, we requested the executive director advise us if a new application would be made by the other investor.
- e) The Report had two different amounts for the claim of investor LQF. We requested that the executive director advise us which amount was correct for the claim of investor LQF.

[21] On March 1, 2024, the executive director submitted a supplemental report and recommendations (Supplemental Report). In it, the executive director:

- a) stated that the commissions paid to Zhu were part of the total losses of the Applicants and that the Regulation and the public interest permitted the inclusion of the commissions paid to Zhu when calculating the *pro rata* distributions of the Funds to the Applicants;
- b) stated that even though the Applicants did not include the commissions they paid to Zhu in their applications, section 7.4(2) of the Regulation requires the Commission to consider the losses suffered by the Applicants and "any other information the commission considers appropriate in the circumstances";
- c) clarified the amount claimed by investor LQF;
- d) provided a revised total amount of the losses of the Applicants that included the commissions and an appendix with the Applicants' revised *pro rata* entitlement to the Funds, as follows:

Investor	Loss including commission	<i>Pro rata</i> amount
LQF	CAD\$ 118,849.77	CAD\$ 11,078.65
HW	CAD\$ 133,536.48	CAD\$ 12,447.68
ZZ	CAD\$ 67,150.94	CAD\$ 6,259.51
MLW	CAD\$ 94,982.55	CAD\$ 8,853.85

- e) stated that investor HW was entitled to make the claim on the basis of investor HW's application details and an interview with staff that was not put into evidence.

[22] On March 14, 2024, on behalf of the panel, the hearing office sent an email to counsel for the executive director advising that we:

- a) accepted the executive director's recommendation that the applications include the commissions paid by the investors and the revised amounts;
- b) did not accept the executive director's conclusion that we had sufficient evidence that investor HW is entitled to claim for the other investor's loss;
- c) requested that the executive director contact the other investor, advise them that a claim was being made by investor HW for their loss, and ask the other investor to either

provide authorization that investor HW's claim could be paid or that they submit their own application; and

- d) advised that we expected that the other investor's statement would be independently verified.

[23] On March 26, 2024, the executive director provided us with an affidavit from the other investor, sworn on March 20, 2024, with accompanying copies of identification, all of which had been translated by a certified translator in Vancouver. The affidavit stated that:

- a) investor HW was a sibling of the other investor;
- b) the investments with Zhu in the other investor's name were investments done by the other investor on behalf of investor HW using investor HW's money; and
- c) the other investor authorized investor HW to receive and accept any funds in the other investor's name from the funds recovered from Zhu.

[24] We are satisfied that the sworn affidavit is a legal document that properly identifies the other investor and their wishes. On that basis, we find that investor HW is an eligible applicant for the Funds.

Currency conversion

[25] As noted at paragraph 15, the Applicants claimed their losses in United States dollars. However, the Funds were received in Canadian dollars. In order to determine the amounts to distribute, the Applicants' claims have to be converted into Canadian dollars.

[26] In his Report, the executive director proposed following the system used in *Re Oei*, 2018 BCSECCOM 231, where United States dollars were converted to Canadian dollars using the Bank of Canada's average annual exchange rates for the relevant period of the investments.

[27] We accept the proposed basis of conversion and the executive director's calculations as set out in his Supplemental Report.

C. Analysis

[28] The executive director's Report and Supplemental Report were made in writing. No party requested an opportunity to make submissions in person. We find that we are able to make an order on the application without an in-person hearing or further submissions.

[29] Mindful of the Commission's guidance in *Re Alexander*, we have reviewed the executive director's Report and Supplemental Report as well as the affidavits provided. Our task is to determine whether the evidence, on a balance of probabilities, supports granting the application.

[30] We are now satisfied that each of the Applicants is an "eligible applicant" under the Act.

[31] We find that the Commission has given the requisite notice to the public with respect to the Funds as required by section 15.1 of the Act.

[32] We find that each of the Applicants properly applied for payment of funds pursuant to section 15.1(2) of the Act, and that the amount of the loss suffered by each Applicant as calculated by

the executive director in the Supplemental Report is appropriate and in accordance with section 7.4 of the Regulation.

- [33] We find that it is appropriate to pay out all of the Funds to the Applicants because the notice period has expired and no other claims were brought during that period.
- [34] Since the funds are insufficient to pay out the full amount of the Applicants' claims, it is appropriate to prorate the payments among the Applicants in accordance with section 7.5(5) of the Regulation, based on the amounts provided in the executive director's Supplemental Report:

Investor	Loss including commission	<i>Pro rata</i> amount
LQF	CAD\$ 118,849.77	CAD\$ 11,078.65
HW	CAD\$ 133,536.48	CAD\$ 12,447.68
ZZ	CAD\$ 67,150.94	CAD\$ 6,259.51
MLW	CAD\$ 94,982.55	CAD\$ 8,853.85

- [35] It is also appropriate to pay out the accrued interest, calculated to the date that payment is issued to the Applicants by the Commission, to the Applicants on the same prorated basis as the Funds.
- [36] Applying the principles laid out in *Re Alexander*, we find that the applicable procedural requirements set out in the Act and Regulation have been met, and that the evidence, on a balance of probabilities, supports granting the Applicants' applications.

IV. Decision and Order

- [37] We grant the Applicants' applications and order under section 15.1(3) of the Act that the executive director pay to them, on a prorated basis in accordance with section 7.4(5) of the Regulation, the Funds and interest accrued on the Funds as follows:
- a) to investor LQF, \$11,078.65, together with a pro rata share of the payable interest;
 - b) to investor HW, \$12,447.68, together with a pro rata share of the payable interest;
 - c) to investor ZZ, \$6,259.51, together with a pro rata share of the payable interest; and
 - d) to investor MLW, \$8,853.85, together with a pro rata share of the payable interest.

April 9, 2024

For the Commission

Marion Shaw
Commissioner

Deborah Armour, KC
Commissioner