

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

Citation: Re Alexander, 2017 BCSECCOM 78

Date: 20170309

Keith Henry Alexander

Panel	Nigel P. Cave Judith Downes Audrey Ho	Vice Chair Commissioner Commissioner
Hearing date	December 9, 2016	
Submissions Completed	January 20, 2017	
Date of Reasons	March 9, 2017	
Appearing		
Maegan Richards	For the Executive Director	
Investor R	For herself	

Reasons for Decision

I. Introduction

- [1] This was an application under section 15.1 of the Act, brought by Investor R, for a payment of \$20,000 out of funds paid to the Commission by the respondent Keith Henry Alexander pursuant to an order under section 161(1)(g) of the Act.
- [2] The only evidence in support of this application was an affidavit of an investigator of the Commission filed by the executive director.
- [3] During the hearing, we asked the executive director for submissions on certain legal questions associated with applications under section 15.1. The panel determined that the answers to those legal questions would not change the outcome of the application and would only impact our reasons. Therefore, we ordered that the submissions from the executive director on these issues could be delivered in writing following the hearing.
- [4] On December 9, 2016, having heard the application, including submissions from Investor R and the executive director, we granted Investor R's application, on the condition that she provide a release of all claims, in a form acceptable to the executive director, in respect of the \$20,000, to 1127477 Alberta Ltd. and 0827213 B.C. Ltd. (Number Co's).

[5] On January 20, 2017, the executive director provided written submissions on the issues we raised during the hearing.

[6] These are our reasons with respect to our decision to grant the application.

II. Background

[7] On July 16, 2014, the executive director issued a notice of hearing against Alexander alleging that he had contravened sections 34 and 61 of the Act with respect to the distributions of securities to six investors for a total of \$395,000.

[8] On August 4, 2015, Alexander entered into a settlement agreement with the executive director, *Re Alexander*, 2015 BCSECCOM 305. In it, Alexander agreed that he had contravened sections 34 and 61 with respect to a distribution of securities to one investor having a total subscription price of \$20,000.

[9] In the settlement agreement, Alexander consented to an order which contained a number of sanctions, including an order, under section 161(1)(g) of the Act, that he pay \$20,000 to the Commission.

[10] Alexander paid that amount to the Commission in compliance with the terms of the order under section 161(1)(g).

[11] On May 11, 2016, the Commission issued a news release and posted on the Commission's public website a notice that it had received \$20,000 from Alexander and that persons who had lost money as a result of Alexander's misconduct identified in the settlement agreement could apply to the Commission, on or before May 11, 2019, for a payment to be made from these funds.

[12] On May 31, 2016, Investor R filed a Form 12-901F with the Commission claiming that she had lost \$20,000 as a result of Alexander's misconduct and applied to have the funds held by the Commission paid out to her.

[13] The affidavit filed by the executive director in connection with Investor R's application sets out that, although not named in the settlement agreement, Investor R was the investor that was the subject of the settlement agreement.

[14] There being only one possible claimant for the funds held by the Commission, Investor R's application for payment of the funds was forwarded to the panel for a determination prior to the expiry of the three year waiting period for applications to be filed (as set out pursuant to the press release of May 11, 2016).

[15] The Form 12-901F filed by Investor R and the affidavit of the Commission investigator, also set out that:

- on July 24, 2008, Investor R paid \$20,000 to the Number Co's and received a promissory note from the Number Co's in return;
- one of the Number Co's provided Investor R with two cheques totaling \$8,000, as partial payment of the promissory note, neither of which could be deposited by Investor R due to insufficient funds;
- Investor R has not received any payment from either of the Number Co's or Alexander in respect of her original investment amount; and
- Investor R did not participate in the misconduct that resulted in the order under section 161(1)(g) against Alexander.

III. Law and Analysis

Law

[16] Section 15.1 of the Act provides:

(1) The commission must notify the public in accordance with the regulations if the commission receives money from an order made under section 155.1(b), 157 (1)(b) or 161(1)(g).

(2) A person may make a claim to money referred to in subsection (1) by submitting an application in accordance with the regulations within 3 years from the date of the first notification made under subsection (1).

(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.

[17] The regulations passed in respect of Section 15.1 provide:

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 7.2,
- (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);

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.

7.6 The commission may make a payment to an eligible applicant, including a partial or installment payment, before the period described in section 15.1 (5) of the Act has expired.

Position of the Parties

[18] Investor R's application under section 15.1(2) sets out that she is an "eligible applicant", has not otherwise recovered any of her losses arising from the respondent's misconduct and did not participate, directly or indirectly, in the misconduct.

[19] The executive director did not oppose Investor R's application.

Analysis

[20] This application was straightforward, apart from one exception which we deal with below:

- the Commission had complied with the public notice requirements of section 15.1(1);
- the claimant had properly applied for payment of the funds pursuant to section 15.1(2);
- there was only one claimant for the disgorged funds and that claimant qualified as an "eligible applicant";
- the eligible applicant's loss, for the purposes of section 7.4(2) and (3) of the regulations, was easy to determine in that the evidence clearly established the amount that she invested as a result of the respondent's misconduct;

- the evidence further established that the applicant had had none of that amount returned to her; and
- the amount that the applicant claimed was limited to the amount invested only (i.e. there was no claim for any amount of loss over and above the amount invested).

[21] Therefore, under section 7.6 of the regulations, we were satisfied that we were able to grant Investor R's application to pay out the \$20,000 to her prior to the expiry of the three year notice period contemplated by section 15.1(5) of the Act.

[22] However, as described above, Investor R's original investment was made under a promissory note of the Number Co's, but the amount paid to the Commission under the section 161(1)(g) order came from the individual respondent, Alexander. As awards under section 15.1 are meant to be compensatory in nature, we did not want to sanction a payment under section 15.1 that did not serve to extinguish the investor's claims to a return of her invested funds from the Number Co's. We had this concern as section 7.4(3)(a) of the regulations requires us to consider the applicant's ability to be compensated from other sources (i.e. in this case, a legal claim against the Number Co's). As a consequence, we made our order conditional upon Investor R providing a release, in a form acceptable to the executive director, of the Number Co's obligations under the July 24, 2008 promissory note.

[23] Notwithstanding that we were able to grant the applicant's request to release the \$20,000 to her, we are cognizant that future applications under section 15.1 might be more difficult where there are a significant number of "eligible applicants" and/or there is a request to make a payment (instalment or full) earlier than the expiry of the three year notice period.

[24] These considerations led us to ask for submissions from the executive director on several questions, the answers to which will serve as useful guidance to the Commission and future applicants under section 15.1 of the Act. Those questions were:

- what is the test for a panel to apply when considering whether to grant an application under section 15.1? Is it one based on procedural fairness, the public interest, correctness or some combination thereof?
- should a different test apply if the application is to release funds before the three year notice period has expired pursuant to section 15.1(5), rather than following this three year period?

[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;
4. Commission panels should apply the same test on an application under section 15.1 to release funds prior to the expiry of the three year notice period, although they may take into account additional factors including:
 - a) the number of potential eligible applicants who have not made claims as at the application date;
 - b) the amount of money paid by respondent(s) pursuant to a section 161(1)(g) order, relative to the losses of the potential eligible applicants;
 - c) the amount requested to be paid out in the application (i.e. whether it is a request for a partial or a full payout);
 - d) the amount of time remaining in the three year notice period; and
 - e) any evidence that potential eligible applicants have received notice of the process for application and that they have affirmatively elected not to apply.

[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.

[28] Applying all of the above, to the circumstances of Investor R's application:

- all of the procedural aspects of the Act and the regulations were complied with by the Commission and by Investor R;
- there was only one possible claimant in this case and that claimant was an eligible applicant;
- as there was only one eligible applicant and her request was for the entirety of the funds held by the Commission, we did not need to balance the interests of existing claimants against those of possible future claimants and we were therefore able to make an order for payment prior to the expiry of the three year notice period; and
- the evidence, on a balance of probabilities, established the losses of the eligible applicant, her non-participation in the misconduct and her lack of having been compensated for her losses in any other manner.

[29] As a consequence, we ordered that Investor R be paid \$20,000 in the manner described above.

March 9, 2017

For the Commission

Nigel P. Cave
Vice Chair

Judith Downes
Commissioner

Audrey Ho
Commissioner