

CANADA / JUDGMENT

Dunn v. British Columbia (Securities Commission)

2021 BCCA 431

COURT

British Columbia Court of Appeal

DECIDED

29 September 2021

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2021 BCCA 431 Dunn v. British Columbia (Securities Commission) COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Dunn v. British Columbia (Securities Commission), 2021 BCCA 431 Date: 20210929 Docket: CA47680 Between: Patrick Aaron Dunn and Viribus Structural Connectors Inc. Appellants And British Columbia Securities Commission Respondent Before: The Honourable Madam Justice Griffin (In Chambers) On appeal from: A decision of the British Columbia Securities Commission, dated July 20, 2021 (Re Patrick Aaron Dunn, 2021 BCSECCOM 294). Oral Reasons for Judgment Counsel for the Appellants: C.C. Cheng J. Mason Counsel for the Respondent: B. Ma Place and Date of Hearing: Vancouver, British Columbia September 29, 2021 Place and Date of Judgment: Vancouver, British Columbia September 29, 2021 Summary: The applicant seeks leave to appeal a decision of the BC Securities Commission freezing his bank account. The freeze order was made pursuant to s. 164.04(2)(e) of the Securities Act. The applicant submits that the Commission incorrectly interpreted s. 164.04(2)(e) in finding that no evidence was required to support the freeze order being issued. Held: Leave to appeal granted. This court has not previously considered the proper interpretation of s. 164.04(2)(e) and the issue will be of general importance. As framed the correctness standard of review will apply, and there is some merit to the appeal. GRIFFIN J.A.:

Nature of the Application

- [1] The applicant, Patrick Dunn, seeks leave to appeal a decision of the British Columbia Securities Commission refusing to revoke an order that froze Mr. Dunn's bank account in which was held some approximately \$20,000. The decision, made July 20, 2021, is indexed at 2021 BCSECCOM 294 (the "Reasons").
- [2] The original asset preservation order was made by the Commission on January 29, 2021, pursuant to s. 164.04(2)(e) of the Securities Act, R.S.B.C. 1996, c. 418 [Act], based on an application by the Executive Director that was without notice to Mr. Dunn.

- [3] Section 164.04 is a relatively new section of the Act, brought into force on March 27, 2020. It replaced a predecessor section, s. 151 of the Act, which was repealed. Only a small number of decisions of this Court considered s. 151, and they did not consider a predecessor subsection similar to the one at issue on this application. No decision of this Court has previously considered s. 164.04(2)(e).
- [4] Section 164.04(2)(e) provides:
- (2) The commission may make an order under subsection (4) in respect of a person if any of the following apply:
- (e) criminal proceedings or proceedings in respect of a contravention of this Act or the regulations are about to be or have been commenced against the person, and the commission considers the proceedings to relate to a security or derivative or a matter relating to trading in securities or derivatives, or to relate to any business conducted by the person relating to securities or derivatives;
- [5] The application to revoke the asset preservation order was brought under s. 171 of the Act on March 1, 2021, and was heard in May 2021.
- [6] Section 171 provides: 171 If the commission, the executive director or a designated organization considers that to do so would not be prejudicial to the public interest, the commission, executive director or designated organization, as the case may be, 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, another enactment or a former enactment, whether or not the decision has been filed under section 163.
- [7] Pursuant to s. 167 of the Act, a party may appeal an order made pursuant to s. 171, with leave of a justice of this Court.
- [8] I grant leave for the following reasons. Background Facts
- [9] On November 4, 2020, the Commission issued a notice of hearing: 2020 BCSECCOM 449. The notice of hearing commenced proceedings against Mr. Dunn and a company, Viribus Structural Connectors Inc., under s. 161 of the Act. It gave formal notice that there would be a hearing held by the Commission, at which the executive director would tender evidence, make submissions, and apply for orders against Mr. Dunn and Viribus. The notice of hearing alleged that Mr. Dunn breached a previous order of the Commission by acting as a director of two companies when he was prohibited from doing so. One of those companies, Viribus, was alleged to have engaged in a crowdfund campaign by which it raised \$17,300 from investors. It was alleged that Mr. Dunn signed documents for Viribus that were untrue or misleading to the investors.

- [10] On January 29, 2021, pursuant to the Executive Director's application, the Commission issued the preservation order to restrain disposition or transmission of property from one bank account in Mr. Dunn's name. To support its application, the Executive Director filed one affidavit attaching the notice of hearing and evidence that Mr. Dunn had the bank account that was the subject of the order.
- [11] On the subsequent application pursuant to s. 171 to revoke the asset freeze order, Mr. Dunn primarily argued that there was no evidence to support the order, simply allegations in the notice of hearing, which is akin to pleadings in a civil claim or an indictment. He argued that the Commission cannot conclude that a preservation order is in the public interest without some evidence to support the allegations in a notice of hearing, because such a decision would be arbitrary and unreasonable (at para. 6). There were other arguments advanced as well but the present application centres on this argument.
- [12] The fact that a notice of hearing was issued was of significance to the Executive Director, who sought the order and who described this circumstance as novel.
- [13] The Commission found that a review of the scheme created by the recent amendments to the Act reveals that preservation orders are "a flexible tool with a broad scope" (at para. 15). The Commission noted that, unlike other cases where preservation orders were issued before or at the initial stages of an investigation, here the preservation order was issued "after the underlying investigation was substantially complete, the alleged wrongdoers had been identified, and the alleged misconduct had been crystallized" (at para. 21).
- [14] The Commission interpreted a previous decision of this Court, *British Columbia (Securities Commission) v. Pioneer Ventures Inc.*, 2021 BCCA 1, as support for the proposition that no evidence was needed to support a preservation order, simply allegations (at para. 22).
- [15] The Commission held, at para. 23, that: The structure of the Act generally, and section 164.04(2)(e) specifically, allows the Executive Director to seek a preservation order after issuing a notice of hearing without having to prove the allegations first for the purpose of a preservation order, and then again in the context of the liability hearing - thereby avoiding duplicative proceedings. [Emphasis added]
- [16] The Commission found that the amount preserved by the order was proportionate to the potential adverse financial consequences if the allegations in the notice of hearing were ultimately proven, did not adversely affect innocent third parties, and there had been no delay in the proceedings (at paras. 27-28).
- [17] The Commission considered the applicant's request to revoke the preservation order in order to allow him to fund his legal fees in respect of the proceeding. The Commission stated that the onus was on the applicant, pursuant to s. 171, and his evidence was insufficient to meet the onus (at para. 31).

- [18] Accordingly, the Commission dismissed Mr. Dunn's application to revoke the preservation order. Law
- [19] Two recent chambers decisions by Justice Bennett have considered the proper approach for leave to appeal from a decision of the Commission: *British Columbia (Securities Commission) v. Liu*, 2020 BCCA 338, and *Party A v. British Columbia (Securities Commission)*, 2020 BCCA 382. Both of these decisions dealt with asset freeze orders made under the predecessor to s. 164.04, namely, s. 151. The parties agree that these decisions correctly summarize the test on this leave application.
- [20] This test was set out in the *Party A* leave decision, at paras. 26-27:
- [26] The governing authority on leave applications from statutory tribunals is *Queens Plate Development Ltd. v. Vancouver Assessor, Area 09* (1987), 16 B.C.L.R. (2d) 104, 22 C.P.C. (2d) 265 at 109-110; see also *British Columbia Securities Commission v. McLean*, 2010 BCCA 454 at para. 4. In *Queens Plate*, Taggart J.A. (in Chambers) outlined the following factors which may be considered in determining leave in statutory appeals:
- (a) whether the proposed appeal raises a question of general importance as to the extent of jurisdiction of the tribunal appealed from ;
 - (b) whether the appeal is limited to questions of law involving:
 - (i) the application of statutory provisions ...; (ii) a statutory interpretation that was particularly important to the litigant ...; or, (iii) interpretation of standard wording which appears in many statutes ;
 - (c) whether there was a marked difference of opinion in the decisions below and sufficient merit in the issue put forward ...;
 - (d) whether there is some prospect of the appeal succeeding on its merits ... although there is no need for a justice before whom leave is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued;
 - (e) whether there is any clear benefit to be derived from the appeal ...; and
 - (f) whether the issue on appeal has been considered by a number of appellate bodies [Internal citations omitted.]
- [27] In *Smolensky v. British Columbia Securities Commission*, 2006 BCCA 254 at para. 9, Finch C.J.B.C. added that leave applications from statutory tribunals also engage the standard factors for leave, as articulated in *Hockin v. Bank of British Columbia* (1989), 37 B.C.L.R. (2d) 139 at 143:
- (1) whether the point on appeal is of significance both to the litigation before the court and to practice in general;
 - (2) whether the appellant has an arguable case of sufficient merit;

- (3) the benefit to the parties of an appellate decision in practical terms; and,
 - (4) most importantly, whether the appeal will unduly hinder the progress of the action.
- [21] The overriding factor is the interests of justice: Party A at para. 29; *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Chambers); *Hanlon v. Nanaimo (Regional District)*, 2007 BCCA 538 at para. 2 (Chambers).
- [22] It must also be kept in mind that the standard of review on a statutory appeal such as this was clarified in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 36. This standard of review recognizes that the statutory appeal mechanism in the Act subjects the decisions of the Commission to appellate oversight applying the traditional appellate standards of review. Positions of the Parties Applicant
- [23] Mr. Dunn submits that leave to appeal should be granted. The proposed appeal raises questions of the proper statutory interpretation of s. 164.04(2)(e) and the correct principles that apply to the exercise of the Commission's discretion to freeze assets. These are questions of general importance.
- [24] Mr. Dunn submits that the Commission erred in refusing to revoke the asset preservation order, given that there was no evidence in support of the order. Respondent
- [25] The Commission submits that the notice of hearing provided a sufficient foundation for the Commission to consider whether it was in the public interest to issue the preservation order against Mr. Dunn. The Commission submits that the Executive Director does not have to prove the allegations in order to support the issuance of an asset preservation order. Accordingly, there is no merit to the proposed appeal, and leave should be denied.

Analysis

Significance of Issues to the Practice and Parties

- [26] I agree with Justice Bennett's analysis in analogous circumstances that a question of law regarding the interpretation of a statute, particularly one as important as the Act, is of importance to the practice: *Liu* at para. 66.
- [27] As mentioned, there is at present no decision of this Court addressing the evidentiary burden to be met for preservation orders made after a notice of hearing, and under s. 164.04(2)(e).
- [28] The Commission submits that the issue on appeal has already been considered by the Court in *Pioneer Ventures*. The Commission submits that *Pioneer Ventures* stated, at para. 32, that the issuance of a freeze order would be justified by the existence of allegations that if proven would constitute contraventions of the Act and could result in adverse financial consequences.

- [29] I note that although Pioneer Ventures discussed the evidentiary burden to be met for asset freeze orders, Pioneer Ventures was decided under the now repealed s. 151 and dealt with freeze orders issued at the stage of a formal investigation, not after a notice of hearing has been issued.
- [30] Further, I am not in agreement with the Commission's reading of Pioneer Ventures. That case was not premised on there being no evidence before the Commission at the time of the issuance of the asset freeze order. To the contrary, the Executive Director submitted there was evidence in the form of two investigation order memoranda prepared by staff: see paras. 21-24. The Commission in that case argued that the evidentiary burden was not onerous, not that there was no evidentiary burden. This Court accepted this, and found that the fact the evidence did not comply with the rules of evidence was not fatal (at paras.30, 42). It was because the evidence was gathered at an investigatory stage, before any determination that wrongdoing had in fact occurred, that the Court referred to the existence of "allegations if proven" (at para. 32). This was not a conclusion by the Court that mere allegations will suffice to support an asset freeze order.
- [31] In the present case there was no known investigation order and no known investigation order memoranda disclosed to Mr. Dunn or referred to by the Commission in its decision. The s. 171 application proceeded on the basis that the only material relied upon in issuing the asset preservation order was the notice of hearing advancing allegations against Mr. Dunn, as well as evidence that he had the bank account that was the subject of the order.
- [32] The premise of Mr. Dunn's appeal is not as framed by the Commission. Mr. Dunn does not submit that the allegations in a notice of hearing must be proven before an asset preservation order can be issued. Rather, he submits there must be some evidence in support of the allegations, otherwise there is nothing to inform the exercise of the Commission's discretion to issue the order.
- [33] I accept that whether s. 164.04(2)(e) does or does not impose an evidentiary burden requiring some evidence on the part of the Executive Director is an issue that has yet to be determined by this Court and is of importance to the parties and others impacted by securities law. Merits of the Appeal
- [34] The proposed appeal raises new questions of law regarding the proper interpretation of s. 164.04(2)(e). Thus, as framed, the Commission's decision would be reviewed on a correctness standard: Vavilov at para. 37; Pioneer Ventures at para. 9. The applicant has clearly met the threshold for showing there is merit to the argument that the Commission has incorrectly interpreted s. 164.04(2)(e). Whether the Appeal would Unduly Hinder the Action
- [35] There was no evidence, nor was there any argument by the Commission, that the proposed appeal would interfere with the investigation or the enforcement proceeding. Interests of Justice

[36] Given the significance of the issues and possible merit of the proposed appeal, it is in the interests of justice to grant leave to appeal.

Conclusion

[37] Accordingly, the application for leave to appeal is granted. "The Honourable Madam Justice Griffin"

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Prepared on 27 October 2026 · Esheria