ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Spaetgens, 2017 ABASC 163 **Date: 20171027**

Dwight Victor Spaetgens

Panel:	Maryse Saint-Laurent Ian Beddis
Representation:	Kelli McAllister for Commission Staff Dwight Victor Spaetgens self-represented
Submissions Completed:	September 12, 2017
Decision:	October 27, 2017

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I. INTRODUCTION

[1] Dwight Victor Spaetgens (**Spaetgens**) applies to vary certain orders made against him by the Alberta Securities Commission (the **ASC**) in *Re Spaetgens*, 2017 ABASC 38 (the **Sanctions Decision**) so that he can "conduct trades and purchases in a personal investment portfolio".

[2] Spaetgens provided three letters, dated June 27, August 29 and September 11, 2017, in support of his application. ASC staff (**Staff**) also provided written submissions. We held an in-person hearing on September 12, 2017 to consider Spaetgens' application, in which we received evidence (including testimony from Spaetgens) and heard oral submissions from both Spaetgens and Staff. At the conclusion of the hearing, we reserved our decision and advised that we would issue a written decision in due course. Spaetgens provided an additional authority on September 13, 2017 in support of his application.

[3] Our decision, and the reasons for it, are set out below. In short, we deny Spaetgens' application to vary the Sanctions Decision.

II. BACKGROUND

A. The Sanctions Decision

[4] The Sanctions Decision concluded an enforcement hearing in which it was determined that Spaetgens contravened the *Securities Act* (Alberta) (the **Act**) and acted contrary to the public interest by failing to comply with undertakings not to act as a director or officer of any issuer and not to trade in securities. Based on these findings, the Sanctions Decision panel (the **Panel**) imposed an array of 15-year market-access bans against Spaetgens, including that "he is prohibited from becoming or acting as a director or officer (or both) of any issuer" and that he "cease trading in or purchasing securities or derivatives" (collectively, the **Market-Access Bans**). The Panel also ordered Spaetgens to pay a $40,000 administrative penalty plus $65,000 of the costs of the investigation and hearing.

[5] The Sanctions Decision identified the various principles and factors applicable to the sanctioning analysis, and applied them to Spaetgens and his misconduct. The Panel considered Spaetgens' misconduct to be serious, stating that he "was an experienced capital-market participant" who "appeared to have learned little (if anything)" from his prior conduct. The Panel noted that "[t]hese aspects of Spaetgens' characteristics and history persuade us that, in the absence of protective sanctions – in particular, effective specific deterrence – he presents a continuing danger to the capital market". The Panel also commented that "Spaetgens' air of victimhood demonstrates an absence of the most basic awareness of his responsibility for his own misconduct". The Panel concluded that a combination of market-access bans and a monetary order was appropriate "to achieve the requisite levels of specific and general deterrence" and "to deliver the necessary public protection".

[6] According to the Sanctions Decision, Spaetgens did not appear to dispute that an appropriate sanction order involved "an array of market-access bans and an administrative penalty", subject to carve-outs from the bans for "a family business" and "a not for profit entity", neither of which were identified. The Panel stated that a carve-out is a discretionary order, which may be appropriate depending on the circumstances of the particular case. In light of Spaetgens' history, the Panel determined that "absolute clarity as to what he can and cannot do is essential to avoid yet another contravention". Because Spaetgens was unable to offer sufficient information

and detail to enable the Panel to determine whether a carve-out was justified, the Panel was not prepared to modify "the otherwise appropriate market-access bans". Nonetheless, the Panel commented:

> In the event that Spaetgens in future develops a concrete proposal that is consistent with the ASC's regulatory responsibilities and our sanctioning objectives here, and which he is prepared to support with adequate, specific and verifiable supporting information and a clear argument, he may wish to request that the ASC consider varying one or more of the market-access bans imposed on him here. (Sanctions Decision, at para. 105)

[7] Other notable aspects of the Sanctions Decision included:

- Spaetgens tendered four written character references into evidence, which despite certain weaknesses in form were accepted by the Panel as "indeed written by their claimed authors, that each such referee knew Spaetgens personally, and that the perceptions they conveyed were genuinely held". Such evidence included an unsigned letter from a lawyer who indicated that Spaetgens had declined an "engagement" with a certain company based on "his unease with [that company's] historical lack of securities regulatory compliance". The Panel accepted "as genuine this character referee's perception that Spaetgens declined some sort of opportunity owing to securities-law compliance concerns" but determined that this "fell far short of a compelling predictor of Spaetgens' future behaviour". The Panel also indicated that it was unclear the extent to which the referees appreciated "the simple fact . . . that [Spaetgens] breached his Undertakings and, in so doing, contravened Alberta securities laws and acted contrary to the public interest".
- Spaetgens' state of impecuniosity was considered in assessing the magnitude of any monetary sanction. The Panel stated that "[w]ith a view to ensuring proportionality, particularly in light of Spaetgens' current financial state", they were satisfied "that the necessary public protection can be achieved through a combination of market-access bans at the longer end of the mentioned range, and an administrative penalty closer to the lower end of the indicated range".
- The Panel also stated that Spaetgens' self-portrayal as a disadvantaged "layperson" was "nonsense", and "there was nothing complicated about his misconduct".
- The Panel noted that Spaetgens' lawyer did not direct or condone Spaetgens' conduct at the relevant time, and certain of his interactions with potential investors "went beyond any limits suggested by the lawyer".

B. The Variation Sought

[8] The nature and scope of the variation sought by Spaetgens remained somewhat elusive, largely because his request continually evolved in the course of his written and oral submissions.

[9] Spaetgens' initial written request sought a carve-out from the trading ban to allow him to conduct trades and purchases of securities "in a personal investment portfolio" for himself and family members. He asserted that this was "separate from any possible Director or Officer roles I may request approval for in family or personal businesses or interests in the future". In subsequent correspondence, Spaetgens elaborated on his carve-out request, asking that it also amend the director and officer prohibition so that he could "hold any investments in a corporation, which I might own, and be a Director or Officer in, which could not sell or promote securities to the

public". He also stated that he was "uncertain at this time as well, as to some possible working or business opportunities that might be available to me, and will require some time to see how this unfolds".

[10] In oral submissions, Spaetgens explained that he was not "really too interested in investing in the public markets" but that he wanted to invest in "private unregistered entities . . . through cash or sweat equity". Spaetgens also stated that the ability to hold securities in a company offered "the protection, the risk mitigation that comes with a corporation", and he suggested that this might be in the form of "a holding company . . . or an operating business that does not issue securities to the public".

[11] Spaetgens also expressed a desire to have "some sort of a corporation that I might be a director and/or officer in[,] that would just be for conducting a small business of some kind". Again, he sought the "risk mitigation" offered by a corporation, and suggested that the company "would not be able to issue securities to the public".

[12] Spaetgens told us that he had previously referenced, during the sanctions hearing, a potential "role for me, a director and officer" in "family businesses" and "other possible roles . . . in terms of working with some not-for-profits and humanitarian types of endeavours" but that "those opportunities or options are not in front of me at this point in time, so I'm not making a request".

C. Evidence

[13] Spaetgens submitted two character reference letters, each signed and, as we understand, slightly updated from unsigned versions previously submitted to, and considered by, the Panel in the sanctions hearing. Spaetgens intended for these documents "to be given their appropriate, intended, due and truthful weight". Spaetgens did not indicate whether the authors of these letters (both lawyers that he had previously worked with) might be available to testify and subject to cross-examination. Staff took no position on whether we should consider these character reference letters. Each exhibit was entered into evidence, along with the original (unsigned) letters that had previously been entered into evidence during the sanctions hearing.

[14] Spaetgens' testimony was primarily intended to "speak to the difference, the new information" in the character reference letters and his "recognition and understanding of the Securities Act and the importance of adherence to it". In addressing the differences, Spaetgens reiterated much of the same evidence that was previously considered by the Panel. He stated that he had been working with a securities lawyer – one of the authors of the character reference letters – who was helping with "due diligence" in respect of a third party company. Spaetgens said that he sought assistance in determining "what that company needed to do to become compliant" with Alberta securities laws and whether he should accept a role as the company's chief executive officer. The pertinent character reference letter stated that Spaetgens did not accept such role with the company "due [to] his unease with the historical lack of securities regulatory compliance in the company" and that he "opted instead to provide consulting advice to the company". This, according to Spaetgens, was the "major difference" between the original character reference letter provided during the sanctions hearing and the subsequently revised letter. Spaetgens also professed to having a certain pride in his ability "to recognize that there was a deficiency" with the company and that he was able to refer the company to a lawyer who could advise on "what the deficiencies were".

[15] Other aspects of Spaetgens' testimony largely took issue with factual findings made by the Panel in the Sanctions Decision.

III. THE STATUTORY TEST

[16] Section 214(1) of the Act authorizes the ASC to vary a decision "if [it] considers that it would not be prejudicial to the public interest to do so". This provision is to be used sparingly, typically in circumstances where new facts emerge or a new law is enacted that compels a change to an existing order; it is not an alternative to an appeal nor should it be resorted to in circumstances where there is merely disagreement with the result of a particular case (*Re Kostelecky,* 2017 ABASC 44 at para. 20).

IV. PARTIES' POSITION

A. Spaetgens

[17] Spaetgens submitted that he was of the impression that a personal investment portfolio carve-out "was somewhat of a given in these kinds of matters", and he therefore failed to explicitly request such an order from the Panel. He asserted that he – "an unrepresented layperson in this process" who "lacked the insight into this procedure" and "didn't understand" – failed to realize that he "had to formally ask for that specific kind of a carve-out". Spaetgens speculated that he would have requested a carve-out had he been represented by experienced counsel at the time "and it very well may have been granted".

[18] Spaetgens claimed that the current Market-Access Bans will force him to "try and figure out how to make enough money with hourly pay", which, in combination with other impediments to his earning capacity (he cited such factors as his age, his damaged reputation, impecuniosity and potential ill-health in the future), is "limiting to the point that it is crushing to . . . my prospects going forward". He stated that he was not accustomed to working for an hourly wage, and that he was "an entrepreneur" who, if permitted "to do some kind of business", would increase the potential to improve upon his financial well-being and that of his family, as well as to pay out the monetary orders "levied against me". He also asserted that a carve-out would allow him to "do that without harming anyone else or being a risk to anyone else".

[19] Spaetgens indicated that he was seeking carve-outs with wording similar to other ASC decisions in which a respondent was permitted to have a personal portfolio. He referred to *Re Cadman*, 2015 ABASC 836, *Re Alexander*, 2016 ABASC 56 and *Re Hurst*, 2015 ABASC 574. We note that *Cadman* (which had been referred to extensively in the Sanctions Decision) did not pertain to a trading ban nor a carve-out for a personal portfolio, whereas the carve-outs in *Alexander* and *Hurst* – negotiated through settlements with the ASC's Executive Director – permitted trading through a registrant. Some of the respondents in *Hurst*, an illegal insider trading case, were also permitted to purchase securities of an issuer that are not distributed to the public.

[20] Spaetgens acknowledged not currently having any concrete opportunities, stating that he was "simply trying to be in a position where I know what I can and can't do and go forward, knowing that, and do the best I can". He submitted that he could not be specific on his request "because these are possible future opportunities" and he had "no idea what they could be, what they might be" and that "it's not possible to be specific about what they are other than to have the guidelines or structure within which to position those opportunities and take advantage of them for

the betterment of family and others". He also stated that he did not know "what opportunities might come my way" but that "time is an important element, and . . . if I was to have an opportunity and then . . . ask if I can invest in it, weeks or months could easily pass, and the opportunity could be missed or lost".

[21] Spaetgens also acknowledged that he was not relying on a change in law or new information as the basis for his variation application, although he qualified this with the suggestion that his "case was somewhat . . . diminished by the fact that [he] had spent the last three years working closely with a securities lawyer at creating structures and/or strategies that were totally compliant" with Alberta securities laws. He also asserted that the character reference letters were given "basically zero" weight in the Sanctions Decision because the documents were unsigned and their authors did not testify and could not be cross-examined. He submitted that the revisions to these letters were not significant, but "the implications and the weight given to those letters with those changes . . . should be more significant", particularly in assessing the risk he posed to "the capital market". Spaetgens further acknowledged that he was appealing the Panel's findings (including, we understand, the Sanctions Decision) and that he did not agree "with any of the allegations that have been made against me".

B. Staff

[22] Staff opposed Spaetgens' application on the basis that the requested order was prejudicial to the public interest. Staff argued that allowing the requested variation would "set a very troubling precedent" by permitting a repeat offender to "reargue a sanctions decision . . . and be granted an exemption" without "sufficient supporting evidence", and that it would undermine the carefully-crafted specific and general deterrence effects of the Sanctions Decision.

[23] In oral submissions, Staff stated that "even at its most generous, this is a premature application" and "should not be entertained at this time". Staff asserted that the nature of Spaetgens' request is "speculative and hypothetical" and that the lack of detail precludes any ability to assess whether the variation might be prejudicial to the public interest.

[24] Staff also submitted that Spaetgens' application is "outside of the intended scope and purpose" of s. 214(1) of the Act, given that he does not rely on any new law or change in information. Staff was of the view that Spaetgens simply disagrees with the Sanctions Decisions, and submitted that he should not be permitted to use s. 214(1) to reargue previously-decided issues or to second-guess the Panel's view of the evidence. Staff considered these grievances to be matters for Spaetgens' appeal.

[25] In closing, Staff observed that the Market-Access Bans do not preclude Spaetgens from running a small business, but only limit him from doing so through a corporation in which he is an officer and director.

V. ANALYSIS

[26] Spaetgens professed to be a "layperson" who was "unfamiliar with the procedures and the process". Although this was not his first self-represented proceeding before the ASC, we gave him considerable latitude to advance his application. He was encouraged to focus on providing new information relevant to his proposed variation, and he was given brief adjournments to ensure that his submissions were complete and that he was able to say all that he wanted to say.

[27] We also explained to Spaetgens at the outset of the hearing that s. 214(1) of the Act authorizes an ASC panel to vary a previous ASC decision if doing so would not be prejudicial to the public interest, and that this authority is used sparingly and generally requires new information or a change in law. We also indicated that the purpose of his application was not to rehear matters previously decided in the Sanctions Decision or to substitute our views for the findings made by that Panel. Instead, we emphasized the Panel's comments that his variation request should be based on "a concrete proposal that is consistent with the ASC's regulatory responsibilities and our sanctioning objectives", and supported by "adequate, specific and verifiable supporting information and a clear argument".

[28] Spaetgens appeared to construe these comments as pertaining only to the carve-outs previously sought during the sanctions hearing. We do not interpret the Panel's comments so narrowly, particularly as they flowed from the general assessment that "given Spaetgens' history, absolute clarity as to what he can and cannot do is essential to avoid yet another contravention". To be clear, we consider the Panel's comments to be applicable to any proposed variation of the Sanctions Decision.

[29] Spaetgens made repeated attempts to revisit findings made in the Sanctions Decision with which he disagreed – such as the characterization of Spaetgens as "a repeat offender", and the weight given to the guidance offered by his former lawyer. However, it is not our role on a variation application such as this to reconsider the factual findings made by the Panel and substitute our own views based on the limited record before us.

[30] The only potentially "new information" consisted of minor revisions in the updated character reference letters. As mentioned, Spaetgens acknowledged that these changes were not significant but submitted that they should be afforded greater weight. We do not consider it appropriate to reconsider the weight afforded by the Panel to the character reference letters, particularly given that the modifications to the letters were not substantive, and the major difference offered by such letters – that Spaetgens had rejected "some sort of opportunity" with the third party company based on "securities-law compliance concerns" and that he had nevertheless acted in a consultative capacity with the company – was accepted by the Panel and formed part of its analysis in the Sanction Decision. Moreover, the Panel treated the previous letters as having been written by the authors and as reflective of their genuinely-held perceptions as to Spaetgens' character but found none of the letters "helpful in determining the appropriate public-interest response to Spaetgens' misconduct", particularly in light of his history "of declining formal titles while in fact running companies". We therefore do not find any new information or circumstance not considered by the Panel in the Sanctions Decision, nor do we consider the weight given by the Panel to the character reference letters to be a matter that falls within the proper scope of a s. 214(1) application.

[31] We also considered Spaetgens' argument – to the effect that the sanctions are "crushing and/or punishing" to him in the absence of a carve-out – to have been considered by the Panel, in particular when it carefully assessed Spaetgens' personal characteristics, history and financial situation to create an array of sanctions that were proportional in the circumstances. Ultimately, the Panel determined that a meaningful administrative penalty "closer to the lower end of the indicated range" would provide an appropriate level of deterrence and would not be "crushing" to

Spaetgens. The Panel also stated that the market-access bans were "otherwise appropriate" in the absence of carve-outs. Again, s. 214 of the Act is not meant to permit a collateral attack on the sanctions imposed by the Panel.

[32] Without new information and in consideration of Spaetgens' own admission to that effect, we found his variation application to be speculative, premature and unsupported by sufficient detail to permit any assessment of whether it would be prejudicial to the public interest to grant carve-outs to the Market-Access Bans.

[33] In light of Spaetgens' suggestions that he might make a future application to vary the Sanctions Decision, we reiterate that the Panel's comment – that Spaetgens needs to provide a specific and tangible plan that is well-supported by detailed information and a cogent argument demonstrating that his plan is consistent with the ASC's sanctioning objectives – applies to any proposed variation to the Sanctions Decision.

VI. CONCLUSION

[34] We dismiss Spaetgens' variation application.

October 27, 2017

For the Commission:

"original signed by"
Maryse Saint-Laurent

"original signed by"
Ian Beddis