



Ontario  
Securities  
Commission

Commission des  
valeurs mobilières  
de l'Ontario

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**IN THE MATTER OF THE *SECURITIES ACT*,  
R.S.O. 1990, c. S.5, AS AMENDED**

**- AND -**

**FUTURE SOLAR DEVELOPMENTS INC.,  
CENITH ENERGY CORPORATION, CENITH AIR INC.,  
ANGEL IMMIGRATION INC. and XUNDONG QIN also known as SAM QIN**

**REASONS AND DECISION  
(Section 126 and Subsection 126(7) of the Act)**

**Hearing:** June 8, 2015

**Decision:** July 14, 2015

**Panel:** Mary G. Condon -Commissioner and Chair of the Panel

**Appearances:** Allan Rouben - For Future Solar Developments Inc.,  
Cenith Energy Corporation, Cenith Air  
Inc., Angel Immigration Inc., and  
Xundong Qin also known as Sam Qin

Christie Johnson - For Staff of the Commission

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## REASONS AND DECISION

### I. INTRODUCTION

- [1] This was an application brought by Future Solar Developments Inc. ("**Future Solar**"), Cenith Energy Corporation, Cenith Air Inc., Angel Immigration Inc. (collectively, the "**Corporate Entities**") and Xundong Qin also known as Sam Qin ("**Qin**" and together, the "**Applicants**") pursuant to subsection 126(7) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"). The Applicants request an order to vary the freeze directions issued on February 17 and 18, 2015, for the payment of legal expenses in the amount of \$250,000 incurred, and to be incurred, by the Applicants (the "**Application**").
- [2] The Ontario Securities Commission (the "**Commission**") heard the Application on June 8, 2015, and the Applicants and Staff of the Commission ("**Staff**") made submissions. Upon hearing oral submissions, I asked the parties to provide supplementary submissions, if any, with respect to *Re Douglas* 2011, ABASC 638. The Applicants filed supplementary submissions dated June 10, 2015, and Staff filed supplementary submissions, in response, dated June 19, 2015. I have considered those submissions in addition to the motion records filed by the parties, and the oral submissions made when the Application was heard on June 8, 2015.

### II. BACKGROUND

- [3] On March 26, 2015, the Commission issued a Notice of Hearing in connection with a Statement of Allegations filed by Staff. Staff makes a number of allegations against the Applicants, including that the Applicants traded without being registered contrary to subsection 25(1) of the Act; that the Applicants engaged in illegal distribution of Future Solar securities contrary to subsection 53(1) of the Act; that Qin as director or officer authorized, permitted or acquiesced in non-compliance with the Act contrary to section 129.2; and that the Applicants acted contrary to the public interest.
- [4] On February 17 and 18, 2015, the Commission issued 11 freeze directions (the "**Freeze Directions**") pursuant to section 126 of the Act. Specifically, the Commission issued:
- (a) eight freeze directions pursuant to clauses (a), (b) and (c) of subsection 126(1) of the Act, directing financial institutions to retain all funds under the control of the Corporate Entities, and directing the Applicants to refrain from withdrawing any funds from the accounts subject to the freeze directions; and
  - (b) three freeze directions with respect to real property pursuant to subsection 126(1) and (4) of the Act
- [5] Staff representing the Commission filed an application to the Ontario Superior Court of Justice (the "**Court**") to continue the Freeze Directions as required by subsection 126(5) of the Act. On March 27, 2015, the Applicants filed a Notice of Motion to the Court requesting, among other things, that the Freeze Directions be varied to allow payment of ordinary business expenses and legal fees from the frozen bank accounts held in the name of the Corporate Entities.

- [6] On May 5, 2015, the Honourable Justice Pattillo continued the Freeze Directions pursuant to subsections 126(5) and (5.1) of the Act. Justice Pattillo also held that the Court did not have jurisdiction under subsection 126(7) of the Act to vary the Freeze Directions.
- [7] Subsection 126(5) of the Act provides that:
- As soon as practicable, but not later than 10 days after a direction is issued under subsection (1), the Commission shall serve and file a notice of application in the Superior Court of Justice to continue the direction or for such other order as the court considers appropriate.
- [8] Subsection 126(5.1) of the Act provides the grounds to consider in determining whether to continue the freeze directions under subsection 126(5). Specifically:
- An order may be made under subsection (5) if the court is satisfied that the order would be reasonable and expedient in the circumstances, having due regard to the public interest and,
- (a) the due administration of Ontario securities law or the securities laws of another jurisdiction; or
- (b) the regulation of capital markets in Ontario or another jurisdiction.
- [9] In determining to continue the Freeze Directions pursuant to subsections 126(5) and (5.1), Justice Pattillo held that the Commission must establish:
- (a) that there is a serious issue to be tried in respect of the Respondents' [Applicants'] breaches of the Act or other securities laws in another jurisdiction;
- (b) that there is a basis to suspect, suggest or prove a connection between the frozen assets and the conduct at issue; and
- (c) that the Freeze Directions are necessary for the due administration of securities laws or the regulation of capital markets, in Ontario or elsewhere.
- Ontario (Securities Commission) v. Future Solar Developments Inc.*, 2015 ONSC 2334 ("**OSC v. Future Solar**") at para. 31.
- [10] Justice Pattillo found that "the Commission has established there is a serious issue to be tried"; that "the monies raised by the Respondents [Applicants] from investors contrary to the provisions of the Act either remain in the bank accounts now frozen or were used to purchase the property which has been frozen", and that "in freezing the bank accounts and property of the Respondents [Applicants], the Commission seeks to preserve both monies and property for the benefit of investors" (*OSC v. Future Solar, supra* at paras. 37, 39 and 40). Accordingly, Justice Pattillo found that the Freeze Directions are necessary for the due administration of the Act.
- [11] In bringing the present Application, the Applicants seek to vary the Freeze Directions, pursuant to subsection 126(7) of the Act, to allow for the payment of \$250,000 in legal fees. Based on the Affidavit of Qin (the "**Qin Affidavit**"), and the oral submissions made on June 8, 2015, the amount requested consists of legal fees already incurred by counsel, a retainer of counsel, and a potential retainer of another securities lawyer who may or may not be retained.

### **III. POSITION OF THE PARTIES**

- [12] The Applicants submit that counsel is needed to ensure that the Freeze Directions, as a remedy, are utilized in a proper manner, according to law. The Applicants submit that they require the assistance of counsel to litigate a complex legal issue of first impression and that the assistance of counsel is important in ensuring that the Commission carries out its mandate in a proper manner, according to law.
- [13] Staff oppose a variation of the Freeze Directions to allow payment of legal fees on the basis that the primary purpose of obtaining freeze directions is to prevent depletion of assets and to preserve assets for potential recovery by investors. Staff's position is that any variation of the Freeze Directions to allow for release of investor funds for the payment of legal expenses is not in the public interest and would be detrimental to the due administration of Ontario securities laws and the regulation of the capital markets.

### **IV. ISSUE**

- [14] The issue I must determine is whether the Freeze Directions, issued by the Commission and subsequently continued by the Court, should be varied pursuant to subsection 126(7) of the Act to allow for payment of legal fees already incurred, and to be incurred, by the Applicants.

### **V. ANALYSIS**

- [15] The purposes of the Act are set out in section 1.1 which are (a) to provide protection to investors from unfair, improper or fraudulent practices, and (b) to foster fair and efficient capital markets and confidence in those markets.
- [16] Section 126 of the Act sets out various provisions with respect to freeze directions. Subsection 126(1) of the Act provides that:

If the Commission considers it expedient for the due administration of Ontario securities law or the regulation of the capital markets in Ontario or expedient to assist in the due administration of the securities laws or the regulation of the capital markets in another jurisdiction, the Commission may,

- (a) direct a person or company having on deposit or under its control or for safekeeping any funds, securities or property of any person or company to retain those funds, securities or property;
  - (b) direct a person or company to refrain from withdrawing any funds, securities or property from another person or company who has them on deposit, under control or for safekeeping; or
  - (c) direct a person or company to maintain funds, securities or property, and to refrain from disposing of, transferring, dissipating or otherwise dealing with or diminishing the value of those funds, securities or property.
- [17] Subsection 126(7) of the Act provides that "a person or company directly affected by a direction may apply to the Commission for clarification or to have the direction varied or revoked". It appears that there have been no cases where the Commission has dealt with a variation of a freeze direction pursuant to subsection 126(7) of the Act.

[18] In my view, any variation of a freeze direction must be considered in the context of the Act and the objectives sought to be achieved by the Act. It must also be considered in the context of section 126 as a whole. I also recognize that any test for variation of freeze directions must be flexible and respond to the unique circumstances of each case. I consider below the arguments made by the parties, and address each of them in turn.

**A. Source of funds subject to the Freeze Directions**

[19] In considering whether to vary the Freeze Directions, I first address the source of funds subject to the Freeze Directions. Justice Pattillo found that the frozen funds came from monies raised from investors. The Applicants submitted no evidence to the contrary. I agree with the Applicants that preservation of property cannot inevitably trump a variation of a freeze direction because the Act contemplates that a freeze order can be varied. However, the primary purpose of obtaining freeze directions in the first place is to prevent depletion of assets and to preserve those assets for potential recovery by investors. The protection of investors is one of the purposes of the Act. It must be recognized that the source of funds is an important consideration in determining whether to vary a freeze direction.

[20] The Applicants rely on *Re Samji*, 2012 BCSECCOM 238, a decision of the British Columbia Securities Commission ("B.C. Commission"), where the B.C. Commission revoked a freeze order against a Coast Capital savings account to allow the respondent, Patel, to use the funds in the account to pay his living expenses and legal fees to defend himself (para. 5). The Applicants submit that their request for variation of the Freeze Directions is narrower than in *Samji*, as it is only for the purpose of paying legal fees.

[21] There is an important distinction to be drawn between *Samji* and the circumstances in this case. In *Samji*, the funds that were sought to be released were from the respondent's personal accounts. In this case, as evidenced by the Affidavit of Naomi Chak (the "**Chak Affidavit**") and the findings of Justice Pattillo, the funds that are frozen are investor funds held in the Corporate Entities' accounts. Staff obtained confirmation that none of Qin's personal accounts are frozen, save and except the real estate properties held in Qin's name personally, which were purchased using investor funds.

**B. Legal representation**

[22] The Applicants submit that they lack the financial means to be able to fund their legal defence, and that the assistance of counsel is important in ensuring that the Commission carries out its mandate in a proper manner, according to law. The Applicants further submit that there are meritorious defences, and that the proceedings they are facing before the Commission are complex.

[23] I recognize that the Applicants face serious allegations, which will be subject to a hearing on the merits where they will have the opportunity to present evidence and make full answer and defence. However, I am guided by the Supreme Court of Canada's decision in *British Columbia (Attorney General) v. Christie* [2007] 1 S.C.R. 873 where the court makes clear that there is no general right to legal counsel. While it is helpful to the Applicants, and indeed the Commission, to have the assistance of counsel in a proceeding, the Commission is still able to

carry out its mandate according to law in proceedings with unrepresented respondents.

- [24] In *Re Douglas*, 2011 ABASC 638, the Alberta Securities Commission varied a freeze direction for legal fees already incurred, and held that “it is in the public interest, and consistent with principles of fairness and natural justice, that Douglas [the respondent] be able to retain legal counsel to assist in his defence at the Merits Hearing” (para.25). The Applicants submit that the same can be said in this case. The Applicants submit that in *Re Douglas*, \$40,000 was released, representing one-ninth of the property at issue, which is similar to the amount sought by the Applicants in this case (approximately one-seventh of the property at issue).
- [25] In *Re Douglas*, the misconduct alleged against the respondent was insider trading. The Alberta Securities Commission considered, among other things, who were the potential claimants to the frozen funds. In cases alleging insider trading, the harm caused may be to the capital markets, and not against any identifiable individual. In this case, there are known and identifiable potentially wronged parties, the investors, whose funds are frozen. In my view, it would be prejudicial to the public interest to vary the Freeze Directions in order for the Applicants to use those investor funds to fund their legal defence.
- [26] Further, natural justice is intended to guarantee the basic right of citizens to a fair procedure. Natural justice and fairness have not been held to extend to a right to legal representation. In my view, the Commission is able to preserve the principles of natural justice and fairness even in proceedings with unrepresented respondents. The Applicants will have an opportunity to be heard, present evidence and provide full answer and defence to Staff’s allegations.

#### C. **Financial means**

- [27] In *Re Klyties Developments Inc.* 2006 ABASC 1763, the Alberta Securities Commission suggested that it was prepared to reconsider whether the respondents may be provided access to a portion of the frozen funds “only after the Friedmans [respondents] have provided sworn affidavits or statutory declarations as to each of their personal net worth, income and expenses, and provide Staff the ability to cross-examine them on the sworn documents” (para.22).
- [28] In this case, the Applicants did not submit a sufficient evidentiary record to support their submission of a lack of financial means. While the Qin Affidavit indicates that he lacks financial means, there are numerous bank accounts, balances of which are unknown, that are held by Qin as evidenced by the Chak Affidavit, Appendix 1, including various credit lines, RRSP savings, and other accounts.

#### D. **Mareva injunctions**

- [29] The Applicants rely on cases dealing with Mareva injunctions in support of their request to release the frozen funds. However, in *Ontario (Securities Commission) v. New Life Capital Corp.* [2008] O.J. No. 4775 (“**New Life**”), Justice Campbell held that “there is a significant distinction to be made between a Mareva Injunction and a Direction of an appointed body in respect of the public securities market” (para.15).

[30] Freeze directions issued by the Commission, an appointed body in respect of Ontario securities markets, are sought to assist in recovery of funds by investors. This is an example of investor protection which is a fundamental purpose of the Act. It would be prejudicial to the public interest in this case to vary the Freeze Directions to allow for payment of legal expenses incurred, and to be incurred. While there may be circumstances where a variation of a freeze direction may be warranted, this is not such a case.

**VI. CONCLUSION**

[31] The hearing on the merits concerning the allegations against the Applicants has not yet begun, and it would be prejudicial to the public interest at this time to vary the Freeze Directions for payment of legal fees incurred, and to be incurred. For the reasons above, the Application to vary the Freeze Directions is dismissed.

Dated at Toronto this 14<sup>th</sup> day of July, 2015.

*"Mary Condon"*

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Mary G. Condon