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

Citation: Re Waters, 2022 BCSECCOM 88 Date: 20220321

Robert Waters

Panel	Deborah Armour, Q.C. Gordon Johnson Marion Shaw	Commissioner Vice Chair Commissioner
Submissions Completed	January 21, 2022	
Decision Date	March 21, 2022	

Appearing

Laura L. Bevan	For the executive director
Robert Waters	For himself

Decision

I. Introduction

[1] This is an application by Robert Waters (Applicant) under section 171 of the *Securities Act*, RSBC 1996, c. 418 (Act) to vary the sanctions imposed on him by a panel of the commission in a decision referenced as *Waters,* 2014 BCSECCOM 369 (Sanctions Decision). Those sanctions included an administrative penalty and other restrictions. Although the Applicant's materials are not as clear as they could be, it appears, and for the benefit of the Applicant we have assumed, that he seeks to have the Sanctions Decision varied both to reduce the administrative penalty and to allow him to carry on investor relations work even though he has not paid any portion of the administrative penalty.

II. Background

[2] In its decision dated June 5, 2014, the panel found that the Applicant had contravened sections 34(a) and 61(1) of the Act by trading and distributing securities of Berkeley Coffee & Tea, Inc. (Berkeley) to 45 investors for proceeds of $312,977 without being registered and without filing a prospectus (2014 BCSECCOM 215) (Liability Decision).

[3] Prior to his involvement in the distribution by Berkeley, the Applicant had been registered as an investment advisor in British Columbia for 15 years. He ceased being a registrant in September 1998.

[4] In the Sanctions Decision, the panel found that:

(a) by distributing shares in Berkeley without complying with the registration and prospectus requirements in the Act, the Applicant engaged in serious misconduct as investors were deprived of protections provided in the Act;

(b) the Applicant's misconduct damaged the reputation and integrity of the British Columbia capital markets;

(c) in recognizing that there were issues related to the distribution of shares in Berkeley and failing to resolve those issues, the conduct of the Applicant fell far short of the diligence required by anyone raising funds in British Columbia, particularly a former registrant who should have known better;

(d) the Applicant provided Berkeley with incorrect information regarding the nature of his relationship with some of the investors when he said they were close friends. Based on that information, Berkeley claimed a prospectus exemption for which it was not eligible; and

(e) the Applicant's failure to take the steps necessary to ensure compliance with securities regulatory requirements and his indifference to the truthfulness of the information he provided demonstrated that he posed a significant risk to the capital markets.

[5] The panel highlighted the importance of specific and general deterrence in concluding that the sanctions it imposed needed to be sufficiently severe to ensure that the Applicant and others would be deterred from engaging in similar conduct. The panel ordered that:

(a) the Applicant resign any position he held as a director or officer of any issuer;

(b) until the latest of September 4, 2020, the date on which payment ordered in the Sanctions Decision had been made and the date on which the Applicant successfully completed a course of studies satisfactory to the executive director concerning capital raising in British Columbia, he was prohibited:

(i) from trading in securities, except that he was permitted to trade and purchase securities for his own account through a registrant, if he gave the registrant a copy of the Sanctions Decision;

(ii) from becoming or acting as a promoter or a registrant;

(iii) from acting in a management or consultative capacity in connection with activities in the securities market; and

(iv) from engaging in investor relations activities;

(c) until the latest of September 4, 2020, the date on which payment ordered in the Sanctions Decision had been made and the date on which the Applicant successfully completed a course of studies satisfactory to the executive director

concerning the duties and responsibilities of directors and officers, the Applicant was prohibited from becoming or acting as a director or officer of any issuer or registrant; and

(d) the Applicant pay an administrative penalty of $20,000.

[6] The Applicant did not provide sworn evidence in support of his application.

[7] Based on a certificate signed by the Applicant and a receipt issued by the institution, the executive director is satisfied that the Applicant completed the *Public Companies: Financing, Governance and Compliance* course offered by Simon Fraser University on October 28 - 29, 2021. That course concerns capital raising in British Columbia and the duties and responsibilities of directors and officers.

[8] The Applicant has not paid any amount toward the administrative penalty of $20,000.

III. Applicable law

[9] Section 171 of the Act provides the commission with the discretion to vary or revoke a previous decision of the commission:

> 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.

[10] BC Policy 15-601 - *Hearings* sets out procedures for hearings under the Act. Section 9.10 provides guidance on section 171 applications. It says, in part:

> (a) **Discretion to revoke or vary** – Under section 171 of the Act, the Commission may revoke or vary a decision it has made….
>
> Before the Commission changes a decision, **it must consider that it would not be prejudicial to the public interest to do so**. If a panel of the Commission is considering its own decision, this usually means that **the party must show the Commission new and compelling evidence that was not before the original decision maker, or a significant change in the circumstances since the original decision was made….** [emphasis added]

[11] As stated by the BC Court of Appeal in *Roeder v. British Columbia Securities Commission,* 2005 BCCA 189, a section 171 application is not an appeal or an opportunity for a rehearing. Unlike *Party A v. British Columbia (Securities Commission)*, 2021 BCCA 358, which considered an asset freeze order that had been issued *ex parte*, this application engages longstanding commission jurisprudence for the review of prior decisions. As set out in *Re Deyrmenjian*, 2019 BCSECCOM 93, the commission has consistently applied the threshold stated in the Hearing Policy set out above. For the Applicant to succeed under the test he must establish that:

(i) the fresh evidence is:
  (a) relevant;
  (b) "new" in that it was not reasonably available for use by the applicant at the time of the original application;
  (c) "compelling" in that if the panel had this information at the time of the original application, the panel would have decided the original application differently; and
(ii) it would not be prejudicial to the public interest.

[12] In *Re Keller*, 2022 BCSECCOM 29, the commission confirmed very recently that the *Deyrmenjian* methodology continues to apply to this type of application. At paragraphs 37 and 38 of *Re Keller*, the commission stated:

> The *Deyrmenjian* panel went on to say that the "compelling" aspect of the case is more important than the consideration of whether the additional evidence was "new". If the evidence was not compelling, there was no need to determine whether it was "new". They also said that if the evidence was not compelling, it would be prejudicial to the public interest to vary or revoke the decision.
>
> We adopt the *Deyrmenjian* methodology below. While we adopt the test outlined above, we note that the legislation is clear that the Commission may also vary a decision under section 171 if there has been a "significant change in circumstances".

IV. Position of the parties

A. Executive director

[13] The executive director opposes this application. He submits that the Applicant's submissions do not constitute evidence and, in any event, are neither new nor compelling. The executive director also argues that the Applicant's submissions do not describe a significant change in circumstances.

[14] The executive director submits that a variation of the administrative penalty would be prejudicial to the public interest. He submits that the penalty is already in the low range for similar contraventions and reflected the Applicant's lack of due diligence and his failure to take responsibility for his actions. Further, the executive director submits that the Applicant's failure to appreciate and act on regulatory requirements risked undermining public confidence in the capital markets.

[15] Although he does not dispute that the Applicant took the *Public Companies: Financing, Governance and Compliance* course, the executive director submits that completion of this course more than seven years after the Sanctions Decision is not compelling evidence that demonstrates it would not be prejudicial to the public interest to vary the sanctions.

B. The Applicant

[16] On August 20, 2021, the Applicant provided submissions to the commission to support his application to vary the Sanctions Decision. Under the heading of "New Evidence", the Applicant describes events which took place prior to the events that were the subject of the Liability and Sanctions Decisions. The gist of those submissions is that the

previous events involved a distribution in British Columbia in which he was involved where he was not registered and where there was no prospectus issued. The Applicant says that in that instance, he and the issuer were investigated by the commission but no regulatory action was taken against them.

[17] In his email submissions of December 31, 2021, the Applicant says that the steps taken by the commission in this case "contradict" the "precedent" of the earlier case. For the first time in this application, the Applicant suggests that was why he proceeded without getting the prospectus cleared and without being registered.

[18] The Applicant says that directors of the company he was working with distributed shares to their friends, family and clients without being sanctioned.

[19] He says he was told by directors of the company that the prospectus in question was cleared by the United States Securities and Exchange Commission (SEC) and, therefore, that it did not need to be cleared in British Columbia. He also describes calling the commission's inquiries line and asking whether a prospectus cleared by the SEC needed to be cleared in British Columbia. He says the person he spoke with told him he could not give him any legal advice. The Applicant says that had he been told he needed a prospectus in British Columbia he never would have proceeded without doing so.

[20] While the Applicant did not formally characterize it as such, we understand that the Applicant is offering up his current financial situation as changed circumstances. He says that he has sent out hundreds of resumes but had only two job interviews. He also says he has been living frugally month to month with no gainful employment since the Decisions were issued. He attaches copies of bank statements for a chequing account with Vancity that cover the months June and July and part of August 2021. Those statements show deposits of approximately $1,200 for Old Age Security and $469 for Canada Pension Plan for each of June and July. There are a number of withdrawals but no other deposits indicated in the statements.

[21] The Applicant suggests a payment plan of $100 per month toward the administrative penalty until he secures an investor relations position and says he has spoken with a TSX Venture Exchange listed company that looks promising. The Applicant says he could pay $2,000 a month if employed by that company.

V. Analysis

[22] The submissions of the Applicant go into considerable detail in describing his life history. There is nothing in his history which is relevant to this application. With the exception of the information regarding his current financial situation, all of the other information provided by the Applicant which might be relevant to this application was available to the Applicant before the original hearings and as such, is not new evidence. In any event, as we address below, the information he has provided is not compelling.

[23] With regard to the Applicant's submissions that he was told by the directors of the issuer that a prospectus cleared by the SEC did not have to be cleared in British Columbia and the information about the Applicant's phone call to the commission, the previous panel

considered that information and noted that the Applicant proceeded with the distribution notwithstanding a lack of clarity around the legal requirements. It was in part that conduct which caused the panel to say that his inquiries fell far short of the due diligence required and showed a failure to take personal responsibility for his actions.

[24] The fact that the Applicant might have previously engaged in similar conduct or the directors of the subject company did so without regulatory repercussions did not negate the Applicant's obligation to ensure that he was proceeding in accordance with securities laws. It is of no consequence in this matter if the executive director chose to refrain in other situations from taking steps against the Applicant, the directors and officers or the subject company.

[25] As for the Applicant's suggestion that his experience in the earlier case explains why he proceeded in this case without the prospectus being cleared and without him being registered, we cannot reconcile that statement with the fact that the Applicant called the commission to get clarification with regard to the need for a prospectus. In any event, it was the Applicant's responsibility to resolve any uncertainty before proceeding as he did.

[26] We note that it was not just the prospectus and registration issues that the original panel considered. The Decisions are also based on the Applicant's lack of truthfulness regarding the information he provided to the company. The Applicant did not provide any information which addressed those concerns of the original panel.

[27] Finally, we note that the Applicant's submissions demonstrate a continued effort to blame others for his misconduct. That unwillingness to accept responsibility for his actions gives us no confidence that an early return to his participation in investor relations activities would be in the public interest.

[28] While information provided by the Applicant regarding his current financial situation could constitute evidence of changed circumstances, there are significant issues with regard to that information. As stated above, this information was not in the form of sworn testimony. Even if it had been, it is not compelling.

[29] The financial information is not complete and raises a number of unanswered questions including how much income the Applicant needs to live and what attempts, if any, he has made to obtain employment outside of the securities industry. We do not know whether the Applicant has other bank accounts or other assets. Other than the statement that he has "no gainful employment", we do not know whether he has had or now has, any employment since the Decisions were issued. He said that he has spoken with a TSX Venture Exchange listed company. We do not know whether he is now retained or employed by that issuer. While changed financial circumstances are a factor which we can take into account in applications of this type, the Applicant's submissions fall far short of satisfying us that his current circumstances merit a reduction in the administrative penalty imposed in the Sanctions Decision.

[30] Another factor which is relevant is that, based on the Applicant's own submissions, his financial situation is the result of his misconduct. He says:

> I’ve had some of the best addresses in Vancouver, driven some of the best cars, enjoyed the best restaurants, and for years had a recreational residence at Whistler…. I’ve also had the benefit of travelling widely. But as of September 4, 2014 with my BCSC decision, this ended.

[31] Finally, we are influenced by the fact that the Applicant has made no payment towards the administrative penalty. Based on the above submissions, it seems likely that, at the time the Sanctions Decision was issued, the Applicant still had assets with which he could have paid all or some of the administrative penalty. He provides no explanation as to why no amounts have been paid.

[32] As the executive director has noted, the original panel did not provide the Applicant with the option of completing the course work in lieu of paying the administrative sanction. The panel imposed both requirements to ensure that the Applicant and others would be deterred from engaging in similar conduct.

[33] For all of the above reasons, we find that it would be prejudicial to the public interest to vary or revoke the Sanctions Decision.

VI. Conclusion

[34] The application to vary or revoke the Sanctions Decision is dismissed.

March 21, 2022

For the Commission

Deborah Armour, Q.C.
Commissioner

Gordon Johnson
Vice Chair

Marion Shaw
Commissioner