

# BRITISH COLUMBIA SECURITIES COMMISSION

*Securities Act*, RSBC 1996, c. 418

Citation: Re Leyk, 2019 BCSECCOM 136

Date: 20190418

## Robert Joseph Leyk

<b>Panel</b>	Suzanne K. Wiltshire	Commissioner
	George C. Glover	Commissioner
	Audrey T. Ho	Commissioner

**Submissions completed** February 21, 2019

**Decision date** April 18, 2019

### Submissions filed by

Robert Leyk For himself

David Hainey For the Executive Director

## Decision

### I. Introduction

- [1] On January 28, 2018, Robert Leyk sent an email to the Commission attaching an application dated January 26, 2018 and an affidavit of the same date. In the application, Leyk asks the Commission for: (i) an order for disclosure (the Disclosure Application); and, (ii) an order “permanently cancelling” the Commission’s Findings (2014 BCSECCOM 318) and Decision (2015 BCSECCOM 96) with respect to the liability findings and sanction orders against him (the Cancellation Application).
- [2] In its Findings, the Commission found that Leyk breached section 57(a) of the *Securities Act*, RSBC 1996, c. 418 (the Act), the prohibition against market manipulation, by engaging in, or participating in, conduct that he knew, or reasonably should have known, would result in, or contribute to, a misleading appearance of trading activity in, or an artificial price for, shares in OSE Corp.
- [3] In its Decision, the Commission ordered:
- permanent market bans against Leyk under section 161(1)(b)(ii), (c) and (d)(i), (ii), (iii), (iv) and (v) of the Act;
  - that Leyk pay to the Commission \$7,332,936 under section 161(1)(g); and
  - that Leyk pay an administrative penalty to the Commission of \$3.5 million under section 162.

- [4] The executive director opposed Leyk's application and filed written submissions dated January 30, 2018.
- [5] On February 27, 2018, the Commission advised Leyk that it would not proceed with the January 26, 2018 application until after his earlier March 27, 2017 application (the Notice Application) had been heard and a decision rendered. The decision on the Notice Application was rendered on December 5, 2018 (2018 BCSECCOM 383).
- [6] The Commission advised Leyk on January 30, 2019 that his January 26, 2018 application would proceed as a hearing in writing and provided a schedule for further written submissions, if any, from the parties.
- [7] Leyk responded by email on February 9, 2019, attaching further submissions and a number of documents.
- [8] On February 21, 2019, the executive director advised that he would not be filing further submissions.
- [9] The hearing of Leyk's application then proceeded as a hearing in writing. The panel considered his January 26, 2018 application and affidavit of the same date (including attached documents), the executive director's submissions of January 30, 2018, and Leyk's further submissions of February 9, 2019 and accompanying documents. The following are our decisions and reasons with respect to the Disclosure Application and Cancellation Application.

## **II. Disclosure Application**

- [10] As a preliminary matter, we will deal with the Disclosure Application first.
- [11] In the application, Leyk requested full and complete disclosure of all documents, evidence and material, whether relied upon or not and whether relevant or not. In particular, he requested disclosure of: (i) all documents, evidence and material relied upon to establish the grounds for the liability findings and sanction orders made against him in the Findings and Decision; and, (ii) the grounds for making the investigation order and/or amended investigation orders with respect to those proceedings. In his further submissions of February 9, 2019, Leyk continued to request disclosure.
- [12] Leyk's Disclosure Application is duplicative of the relief that he had sought in earlier applications to the Commission and his email correspondence to the Commission Secretary in 2017.
- [13] On October 31 and November 1, 2017, the Secretary to the Commission electronically transmitted to Leyk the entire hearing record of the liability and sanctions proceedings against Leyk before the Commission that gave rise to the Findings and Decision. On January 18, 2018, the Secretary to the Commission retransmitted copies of certain exhibits from the hearing record that Leyk indicated he had been unable to view.

- [14] In the executive director's January 30, 2018 response to Leyk's January 26, 2018 application, counsel to the executive director stated that: on January 29, 2018 a series of emails had been sent to Leyk containing links to the disclosure file in the matter, with the exception of those portions of the disclosure too large to send electronically; Leyk had been advised the only way the remaining material could be provided was by way of a disclosure CD and had been asked to provide a physical address for delivery of the CD as the Commission had no current physical address on file for him; and, Leyk had been told, alternatively, he could either pick up the disclosure CD or have it picked up by courier at the Commission's offices. In the executive director's January 30, 2018 response, counsel to the executive director also referred to section 2.6 of *BC Policy 15-601 – Hearings* (the Hearings Policy) respecting the disclosure required to be made by the executive director and confirmed the disclosure package contained copies of the investigation order, amended investigation order, further amended investigation order as well as the affidavits made in support of those orders and there were no additional relevant materials relating to the investigation orders to be disclosed to Mr. Leyk.
- [15] The Commission advised Leyk on February 27, 2018 that full disclosure had been made and that the CD containing the remaining material was available to be picked up by him or delivered to him upon his providing an address for physical delivery. The Commission subsequently reminded Leyk, on June 7, 2018 and again on January 30, 2019, that disclosure had been completed and the CD remained available for pick up by him or delivery to him upon his providing an address for delivery.
- [16] Section 2.6 of the Hearings Policy requires the executive director to disclose to each respondent all relevant evidence that is not privileged. In the present context, "relevant" means relevant to the allegations in the Notice of Hearing against Leyk giving rise to the Findings and Decision against him. The executive director's disclosure obligation is based on that articulated by the Supreme Court of Canada in *R v. Stinchcombe*, [1991] 3 SCR 326 (see *Re Fernback* 2004 BCSECCOM 378). However, it is well settled that the executive director is not required to produce what is clearly irrelevant to the issues that will be considered by the Commission (see *Stinchcombe* at p. 339, *Re Canaco Resources* 2012 BCSECCOM 493 at para. 9-12).
- [17] The complete hearing record has been provided to Leyk and the executive director's *Stinchcombe* based level of disclosure with respect to the proceedings has been provided or made available to Leyk. This constitutes all relevant documents, evidence and materials that are not privileged.
- [18] As such, full and complete disclosure of all relevant documents, evidence and materials was made or made available to Leyk more than one year ago and there is no need for an order. If Leyk has chosen not to obtain all of the disclosure made available to him, that is his choice, but this does not mean disclosure has not been made.
- [19] We dismiss the Disclosure Application.

### **III. Cancellation Application**

[20] Leyk seeks an order cancelling the liability findings and sanction orders against him.

[21] Although Leyk did not specify the provision of the Act under which he was making the Cancellation Application, we have considered his request to be an application under section 171 of the Act.

#### ***Law***

[22] Section 171 of the Act states:

If the commission...considers that to do so would not be prejudicial to the public interest, the commission... may make an order revoking in whole or in part or varying a decision the commission... has made under this Act...whether or not the decision has been filed under section 163.

[23] Section 8.10(a) of the Hearings Policy sets out procedures with respect to applications under section 171 of the Act. It states, in part:

...Before the Commission changes a decision, it must consider that it would not be prejudicial to the public interest. This usually means that the party must show the Commission new evidence or a significant change in circumstances.

[24] The Commission has consistently applied the requirement, outlined above, that in order to satisfy that it would not be prejudicial to the public interest to revoke or vary a decision of the Commission, a person must show new evidence or a significant change in circumstances.

[25] In *Pyper (Re)*, 2004 BCSECCOM 238, the respondent applied under section 171 to vary the sanctions imposed upon him. The Commission panel stated:

For an application under section 171 to succeed, the applicant must show us new and compelling evidence or a significant change in the circumstances, such that, had we known them when we issued our sanctions decision, we would have made a different decision.

[26] In *Re Steinhoff*, 2014 BCSECCOM 211, the panel followed *Pyper* and at paragraph 9 adopted the two-prong test used in *Foresight Capital Corporation*, 2006 BCSECCOM 529 and 2006 BCSECCOM 531 to determine whether evidence is “new” evidence:

...first, the evidence must be relevant to the allegations in the notice of hearing; second, the applicant must explain why the evidence was not reasonably available for use at the hearing.

[27] In *Re McIntosh*, 2015 BCSECCOM 162 at paragraph 12 the panel stated:

Section 171 of the Act does not provide an unfettered opportunity for a respondent to re-litigate the liability or sanctions portion of an enforcement hearing. A party seeking a variation must meet the threshold outlined in s. 8.10(a) of BC Policy 15-601, and identify new evidence, or a significant change in circumstances, before the Commission will change a decision.

***Positions of the parties***

[28] Leyk's position is that he never participated in a market manipulation of the shares of OSE Corp.

[29] Leyk sets out a number of "grounds" with respect to his request for cancellation of the Findings and Decision against him, some of them relevant to the original proceedings and some not. Leyk's principal ground appears to be that "[r]epresentatives of the Executive Director, BCSC and the Panel Members acting within their investigative, prosecutorial or enforcement mandate engaged in intentionally breaching their statutory obligation to remain independent, un-biased, and provide a transparent process against [him]".

[30] The executive director submits that there is no issue for the panel to consider under section 171 because Leyk has not filed any new relevant evidence that was not originally before the panel when it made its Findings and Decision.

***Materials filed by Leyk in support of the Cancellation Application***

[31] Leyk relies on his sworn affidavit of January 26, 2018 in support of the Cancellation Application. In the affidavit, he denies that he participated in the market manipulation of OSE Corp. shares. Additionally, he makes various submissions and a number of allegations against the Commission and staff of the Commission of misfeasance and malicious prosecution.

[32] The documents attached as exhibits to Leyk's affidavit or accompanying Leyk's further submissions of February 9, 2019 consist of:

1. An email chain from October 18, 2017 to October 20, 2017 respecting matters raised by Leyk in response to the Commission's October 16, 2017 letter summarizing the hearing management meeting held on that date which Leyk attended and the executive director's response with respect to the items raised by Leyk.
2. Photocopies of certain documents entered as exhibits in the original proceedings giving rise to the Findings and Decision.
3. A September 4, 2009 email from Leyk to Thal Poonian regarding a broker's refusal to fill requests to buy shares of a company other than OSE Corp.

4. News articles dated January 15, 2018 relating to a U.S. lawsuit against certain banks alleging conspiracy to suppress the Canadian Dollar Offered Rate, and February 8, 2019 relating to QuadrigaCX.
5. Copies of case law referred to by Leyk in his submissions.

### ***Analysis***

[33] We have considered the documents provided by Leyk and summarized in paragraph 32 above and conclude that:

- the documents summarized in items 3 and 4 are not relevant;
- the documents summarized in item 2 were entered into evidence in the original proceedings and are not new evidence; and,
- the correspondence summarized in item 1 and the case law identified in item 5 are not evidence but, to the extent relevant to the Cancellation Application under section 171, have been considered by the panel.

[34] We note that in his submissions of February 9, 2019, Leyk stated he would be entering further new evidence. However, Leyk did not provide any additional evidence with respect to the Cancellation Application despite having had more than one year from the time the remaining relevant disclosure he requested was made available to him.

[35] We find that Leyk has not provided any new and compelling evidence, nor any evidence of a significant change in circumstances, for the panel's consideration under section 171 with respect to the Cancellation Application.

[36] We have considered Leyk's various submissions and allegations, but find them either to be not relevant to the findings of liability and the sanction orders made against Leyk in the Findings and Decision or to be completely unsubstantiated and without merit.

[37] In particular, we note:

1. The issue of notice respecting the original proceedings and Leyk's complaint that he was never interviewed during the course of the investigation have already been dealt with in the Commission's decision respecting the Notice Application (2018 BCSECCOM 383).
2. As we have found above, all relevant disclosure was made to Leyk more than one year ago, making Leyk's ongoing requests for disclosure orders moot.
3. Leyk's argument that panel chair Commissioner Wiltshire was not properly appointed has no merit. Commissioner Wiltshire was successively reappointed as a member of the British Columbia Securities Commission by the Lieutenant Governor-in-Council pursuant to section 3 of the *Administrative Tribunals Act*, SBC 2004, c. 45, the last such appointment expiring December 31, 2018. On December 21, 2018, under section 7(1) of the *Administrative Tribunals Act*, the Chair of the Commission

authorized Commissioner Wiltshire to continue to exercise powers as a member of the Commission in the proceedings over which she had jurisdiction immediately before the end of her term, including these proceedings related to Leyk, until final decisions are made.

4. The emails relating to decisions of two securities dealers not to accept buy orders for stock of OSE Corp. and other entities do not substantiate Leyk's allegation that it was the Commission and IIROC who were somehow manipulating the market. These emails were previously entered as exhibits and before the panel in the original proceedings. They are not new evidence. Further we do not find them relevant to this section 171 application.
5. Leyk referred to copies of certain cheques and a deposit slip, evidencing payments to Leyk's company and another respondent's company, to support his argument that he had never paid commissions to the Phoenix Group. Leyk's argument appears to be that since the monies were paid back to him, that means he had never paid commissions to the Phoenix Group. Firstly, the copies of cheques and a deposit slip relied on by Leyk were previously entered as exhibits and therefore before the panel in the original proceedings. They are not new evidence. Furthermore, Leyk does not dispute that he made those payments in the first place. The fact that monies were later paid back to him by the Phoenix Group, even if true, does not change the nature of the initial payments, nor does it negate or otherwise impact our findings with respect to Leyk set out at paragraphs 114 and 163 of the Findings, in particular the findings relating to Leyk's payment of commissions to the Phoenix Group for referring Phoenix clients to purchase OSE Corp. shares. The market manipulation of OSE Corp. shares involved various flows of funds among the respondents, the Secondary Participants and the Phoenix Group as set out in the Findings, in part facilitated by Leyk. In light of these flows of funds, the fact that during the same time period, Leyk's company also received funds from the Phoenix Group is not persuasive evidence that Leyk signed cheques to the Phoenix Group for a purpose other than paying commissions to the Phoenix Group for inducing Phoenix clients to purchase OSE Corp. shares.
6. The submissions and news articles relating to (i) the alleged actions of certain banks in the setting of the Canadian Dollar Offered Rate and (ii) issues concerning QuadrigaCX are clearly not relevant to the Findings or the sanctions set out in the Decision and therefore not relevant for the purposes of the Cancellation Application.
7. OSE Corp. ownership of oil and gas leases was not in issue in the original proceedings and is therefore not relevant for the purposes of the Cancellation Application.
8. Leyk's allegations of procedural unfairness and abuse of power are unfounded. In its decision respecting the Notice Application, the Commission found Leyk was given notice in respect of the original proceedings giving rise to the findings and sanctions against him. No evidence was adduced by Leyk to support his allegations of lack of

independence and bias. As we have found above, all relevant disclosure was provided to Leyk.

9. Leyk was a named respondent in the original proceedings and as such the oral reasons for judgment given in the matter of *B.P. v. British Columbia Securities Commission*, [2016] B.C.J. No. 2845 (C.A.) are distinguishable and not relevant.
10. The panel recognizes that Leyk is self-represented but this does not give him a right to deference. However, the Commission, to the extent appropriate, has endeavored to assist Leyk, throughout this application and his earlier applications, in respect of procedural matters by repeatedly providing directions and explanations, granting a lengthy adjournment, arranging for all relevant disclosure to be provided to him and scheduling multiple hearing management meetings. Unfortunately, Leyk has mostly ignored or failed to avail himself of the opportunities so offered to him.

[38] We find Leyk has not provided any new and compelling evidence or demonstrated a significant change in circumstances relevant to his Cancellation Application under section 171. Leyk's allegations of procedural unfairness, abuse of power, misfeasance and malicious prosecution are completely unsubstantiated and without merit. There is no basis to revoke or vary the liability findings or the sanction orders made against him in the Findings and Decision.

[39] Under section 171, we can only vary or revoke a decision of the Commission if it is not prejudicial to the public interest.

[40] We find it would be prejudicial to the public interest to vary or revoke any of the Findings or the sanction orders against Leyk pursuant to the Cancellation Application.

[41] The Cancellation Application under section 171 is dismissed.

#### **IV. Conclusion and Related Variation Order**

[42] Leyk's application dated January 26, 2018 is dismissed in its entirety.

[43] In the sanctions set out in the Decision, the Commission ordered under section 161(1)(g) that Leyk pay the Commission \$7,332,936 on a joint and several basis with four other respondents in the original proceedings.

[44] On May 31, 2017, the Court of Appeal directed the Commission in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207 (*Poonian*), to reconsider the sanctions ordered under section 161(1)(g) of the Act against the four other respondents in the original proceedings.



- [45] On October 16, 2017, Leyk participated in the hearing management meeting respecting the reconsideration of the section 161(1)(g) orders. At that meeting, the panel chair offered Leyk the opportunity to join in the reconsideration proceeding, if he made an application under section 171 of the Act to vary or revoke the section 161(1)(g) order against him. He did not make an application to join in that proceeding, although he was made aware of the *Poonian* decision.
- [46] The section 161(1)(g) orders against the other four respondents were subsequently varied in the reconsideration decision of the Commission (2018 BCSECCOM 160). Leyk has not, to date, applied for a revocation or variation of the section 161(1)(g) order against him on the basis of *Poonian*.
- [47] It is in the public interest that a section 161(1)(g) order that may be affected by the judgment in *Poonian* be stayed until a party makes an application to the Commission under section 171 to lift the stay or to vary or revoke the order. At that time, the Commission will consider whether the order is consistent with the judgment in *Poonian*.
- [48] Considering that it would not be prejudicial to the public interest to do so, under section 171 of the Act, subsection 96(8) of the Decision (2015 BCSECCOM 96) is varied by staying the 161(1)(g) order against Leyk.

April 18, 2019

**For the Commission**

Suzanne K. Wiltshire  
Commissioner

George C. Glover  
Commissioner

Audrey T. Ho  
Commissioner