BRITISH COLUMBIA SECURITIES COMMISSION

Securities Act, RSBC 1996, c. 418

Citation: Re Wong, 2022 BCSECCOM 7 Date: 20220112

Philip Wong

Panel	Gordon Johnson	Vice Chair
	Judith Downes	Commissioner
	Audrey T. Ho	Commissioner
Hearing date	July 29, 2021	
Submissions completed	October 13, 2021	
Decision date	January 12, 2022	

Appearing

Deborah W. Flood	For the Executive Director
Chilwin Cheng	For Philip Wong

Ruling

I. Introduction

[1] The applicant, Philip Wong (Wong), made an application dated October 9, 2019, under section 171 of the Act to revoke or vary the Commission's Reciprocal Order dated January 25, 2010 (the Order). The Order was made following Wong's conviction in the United States for securities fraud. The Order imposed various permanent prohibitions against Wong which prevented Wong from participating in a number of securities related activities in British Columbia.

[2] The basis for Wong's application has evolved to some extent. Wong's initial application was dated October 9, 2019. An updated version of that application was delivered to the hearing office on February 16, 2021. A revised version of the application was delivered to the hearing office on July 16, 2021. Some of Wong's positions evolved further in a reply submission delivered to the hearing office on October 13, 2021.

[3] Wong supported his application with a written statement of facts which attached a number of key documents. Wong also testified in person, supporting the accuracy of the statement of facts, expanding on the facts in certain respects and answering questions under cross examination.

[4] At the hearing the executive director sought leave, without objection by Wong, to deliver after the in-person hearing an exhibit consisting of the materials which had been prepared

for the Commission's hearing panel in support of the granting of the Order. The requested leave was granted and the executive director did subsequently deliver those materials and they were accepted into evidence.

II. Factual Background

[5] Wong was born in Vancouver and has lived in Vancouver almost continuously until now.

[6] Around 1980 Wong obtained a diploma in business administration from BCIT and after that he spent several years working for securities brokerage firms as a registered representative. In the course of his work Wong became familiar with both people who were running or assisting start-up companies and people who had capital, or access to it. Wong decided to leave his former role in the securities industry and focus on advising and arranging financings for early stage companies.

[7] By 2006 Wong was earning his living, at least in part, by assisting early stage development companies in raising capital. At around that time Wong was assisting three companies in particular. Those companies are referenced, for convenience sake, as Secureware, eNotes and Jakes Trucking.

[8] Certain events in the period between 2002 and 2006 led to Wong's arrest, guilty plea, sentencing and imprisonment in the United States. Wong's counsel in the sentencing hearing related to Wong's conviction in the United States provided Wong's interpretation of what happened as follows:

> …two confidential informants, approached Mr. Wong in 2006, they told Mr. Wong, and he believed, that they represented highly sophisticated, successful investors who were sitting on a large amount of cash, were looking to make long-term investments in startup microcap companies. These were dream investors for Mr. Wong. [name redacted], for example, told Mr. Wong that these investors were his friends and his colleagues. They weren't marks for some scheme. Mr. Wong's primary unlawful conduct, that is, his agreement to pay [names redacted] and keep those payments secret from investors, was conduct that he engaged in at the request of [names redacted]. It doesn't mean, of course, that these actions weren't unlawful. Mr. Wong knew that doing so was committing a serious crime. But it's different in kind, your Honor, from the spin on Mr. Wong's actions as set forth by the government in the pre-sentence report.

[9] On October 23 of 2008 the sentencing judge in the criminal proceeding in the United States made the following statements in reaching her decision on sentence:

> … So as far as I am concerned, this is an extremely serious crime. It is of no moment to me, as I consider sentencing in this case, that it was a reverse sting operation or that the government was somehow involved or complicit in creating the loss that drives the guidelines.
>
> The fact is that on two different occasions over a year apart in connection with three separate securities, Mr. Wong was willing to and did participate in a scheme to commit securities fraud. The short answer to the argument that the

> government and its involvement drove the loss is you didn't have to do it. I understand that you made a bad decision. Actually, you made more than one bad decision, because you have three separate incidents here.
>
> You're going to have to pay for it in myriad ways. You have obviously been paying for it since you were arrested. You are going to pay for it in that you're not going to be working in the securities industry again. It appears that the government is [sic] British Columbia is suspending you and likely to revoke whatever licenses you have, and I think that's perfectly appropriate. You may have been in the field for much of your professional life, but you're going to have to go into a new line of work. Given what you have done here, I think that that is perfectly appropriate.

[10] The sentence imposed included incarceration for 21 months followed by two years of supervised release, a forfeiture order of US$197,710 and a special assessment of US$500.

[11] Wong had limited funds and he says that no effort was made by American authorities to collect funds from him.

[12] Wong gave evidence before us about his whereabouts and materials he received in connection with a temporary order against him issued on March 18, 2008 and extended on April 2, 2008. Asked about where he was during the period March 18, 2008 to December 9, 2008, Wong said he had been in custody awaiting sentencing in the United States. During his testimony to us Wong described what he received as follows: "Prior to my plea agreement, I had received through the mail an original copy, or the first copy of a-- of the order."

[13] Wong also gave evidence before us about his whereabouts and the materials he received in connection with the executive director's application for the Order. Wong testified that he returned to Canada around August 2009. Regarding the application materials for the Order, Wong testified as follows: "…to the best of my recollection I was served with papers at my parents' house with regards to the order." As to efforts he made to participate in those proceedings in January 2010, Wong testified: "I responded by letter giving some description of, you know, the events, some of the things that I talked about here, and advised them that I was not if a financial position to retain counsel. I sent that letter in, and I'm not sure exactly how long after, but it's at some point after that I received a letter saying that, you know, they had put this ban on me, which is the same ban that is here today…"

[14] The affidavit of service from the Commission's enforcement staff which formed a part of the materials delivered in support of the Order included the following paragraphs:

> a) On September 16, 2009, I mailed, via regular mail, an Application for a Reciprocal Order to Philip Wong (the Respondent), attached as Exhibit A to this affidavit, at the following address:
>
> [address redacted]

b) I am informed by [name redacted], a legal assistant at the Commission, and believe that she conducted an inmate locator search at the Federal Bureau of Prisons (FBP) website on March 19, 2008, and found that the Respondent was at that time an inmate at the Metropolitan Correctional Center in New York, USA. On September 15, 2009, I conducted the same search on the FBP website, and found that the Respondent had been released on August 19, 2009. Attached as Exhibit B to this affidavit are true copies of Federal Bureau of Prisons inmate locator searches.

c) I am informed by [name redacted], legal counsel at the Commission, that on September 16, 2009, she telephoned the United States Probation Office for the Southern District of New York, and spoke with [name redacted], a Senior United States Probation Officer. [Name redacted] informed [name redacted] that the Respondent has been deported to Canada.

d) I am informed by [name redacted], an Analyst at the Commission, that he conducted a search of the BC Motor Vehicles Branch database and found that 'Philip Wong' has:

i. an active BC driver's license which expires on [date redacted];
ii. an address on his BC driver's license at [address same as redacted address in paragraph a]; and
iii. a date of birth on his BC driver's licence of [date redacted].

As the birth date for this individual corresponds with the Respondent's known age [age redacted] I believe that the above address is the Respondent's address. Attached as Exhibit C to this Affidavit is a true copy of the search results from the BC Motor Vehicle Branch database.

[15] The affidavit of service which was prepared in advance of the issuance of the Order and would have been filed with the hearing panel that granted the Order included virtually all of the materials before us in this application, including the transcript of proceedings before the sentencing judge which recorded the submissions of Wong's counsel at the time, including those submissions quoted above about how agents of the US government presented "dream investors" to Wong. That transcript also recorded the judge's comments quoted above about how it was a government reverse sting operation that caught Wong.

[16] As noted above, the Order was issued on January 25, 2010. The key terms of the Order are:

3. After providing Wong with an opportunity to be heard, and considering staff's and Wong's submissions, and considering it to be in the public interest, we order: (emphasis added)

1. under section 161(1)(b) of the Act, that Wong cease trading in, and is prohibited from purchasing, securities and exchange contracts permanently, except that Wong may trade and purchase securities through accounts in his name at a registered dealer;

2. under section 161(1)(d)(i) and (ii) of the Act, that Wong resign any position he holds as, and is permanently prohibited from becoming or acting as, a director and officer of any issuer, registrant or investment fund manager;

3. under section 161(1)(d)(iii) of the Act, that Wong is permanently prohibited from becoming or acting as a registrant, investment fund manager or promoter;

4. under section 161(1)(d)(iv) of the Act, that Wong is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market; and

5. under section 161(1(d)(v) of the Act, that Wong is permanently prohibited from engaging in investor relations activities.

[17] After his return to Canada Wong faced financial difficulties and continuing difficulties arising from a custody dispute with his wife. Wong says he faced difficulties finding "suitable" work due to a combination of his criminal record in the United States, restrictions on his ability to travel to the United States and the restrictions in the Order which precluded Wong from securities-related work.

[18] Wong achieved some successes in finding work, sometimes as an advisor on business issues with private companies and sometimes assisting companies in obtaining contracts with customers. Some of the work was unpaid, or at least involved work up front with uncertainty about what compensation Wong would earn.

[19] Wong says he has again found himself in a situation where he has trusted contacts with at least one firm which would benefit from his advice and his ability to find investors. Wong says he still has a number of contacts who have access to financing. The opportunities which Wong described to us cannot be pursued without the revocation or variation of the Order.

III. Legal Context

[20] Section 171 of the Act provides a mechanism for a person to apply for a variation or revocation of a decision of the Commission, the executive director or a designated organization.

[21] The Commission has the discretion to make an order revoking or varying a decision under section 171 of the Act if it considers that to do so would not be prejudicial to the public interest:

> **Discretion to revoke or vary decision**
>
> **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. (Emphasis added)

[22] It was the legislature's intention to give the Commission a very broad discretion to determine what is in the public interest: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at paragraph 71.

[23] The Commission's hearing policy, *BC Policy 15-601 - Hearings* states:

> **9.10(a) Discretion to revoke or vary**
>
> …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.

[24] To the extent that fresh evidence is a basis for this application we agree, as the Commission recently noted in *Re Deyrmenjian*, 2019 BCSECCOM 93, that the Commission has consistently applied the threshold stated in the Hearing Policy on section 171 applications.

[25] For the applicant to succeed under the test he must establish that:

i. the fresh evidence is:

   1. relevant;
   2. "new" in that it was not reasonably available for use by the applicant at the time of the original application;
   3. "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.

[26] *Re Deyrmenjian* also confirms that the onus is on the applicant to show that the requested revocation or variation of a Commission order would not be prejudicial to the public interest.

[27] The Hearing Policy states that reciprocal orders made by the Commission are treated differently than other orders on a 171 application.

> **9.10 (b) Variation of orders under section 161(6)**

> …Generally, the Commission will not vary its own reciprocal order issued under section 161(6) of the Act unless the originating jurisdiction or securities regulatory authority has varied the underlying findings, order or agreement upon which the Commission's order is based.

IV. Positions of the Parties

[28] Some of Wong's initial submissions suggest that the Order should be revoked or varied because the initial hearing panel did not have all the essential facts in front of them, especially regarding what was described as the entrapment of Wong by American authorities. Wong's initial submissions also included a focus on whether the Order was inappropriate because the nature of the fraud found in the criminal proceeding in the United States would not justify a finding of fraud under section 57(b) of the Act. However, by the time of the hearing Wong's arguments were primarily focused on the changed circumstances since the date of the Order and the suggestion that the Order, in the current circumstances, is too broad to be in the public interest.

[29] Wong's arguments can be grouped into the following categories:

i. Wong never had a fair opportunity to contest the Order when it was granted as he was in the United States when the Order was granted, with the result that Wong never presented his arguments at the time, including the entrapment argument;

ii. as the period of incarceration and supervised release imposed in the American criminal proceeding have long expired, there is no longer an originating order to reciprocate;

iii. Wong has been a good citizen in the many years since his return to Canada and it would be in the public interest to allow him to contribute more to the economy and to his own and his daughter's well-being by revoking the Order or varying some of the restrictions so he can pursue some general and some specific opportunities; and

iv. the Order can be varied while still protecting the public interest.

[30] The executive director submits that the Order, in common with orders under section 161(6) generally, is protective in nature. He states that when a hearing panel is considering an order under section 161(6), it is appropriate to treat the originating body's findings as facts and to determine what order under section 161(1) is in the public interest in British Columbia. The executive director relies on *Re Pierce,* 2016 BCSECCOM 188 for the proposition that the hearing panel which granted the Order could properly make orders different than the originating body. The executive director submits that, consistent with recent decisions of the Commission in *Re Chieduch*, 2019 BCSECCOM 29 and *Re Mawji*, 2020 BCSECCOM 59, the hearing panel could properly make orders which extend beyond the terms of originating criminal sanctions.

[31] The executive director submits that Wong's circumstances are the natural and expected consequences of the Order.

[32] The executive director submits that there is no new and compelling evidence which justifies the revocation or variation of the Order.

[33] The executive director submits that Wong's arguments about entrapment are collateral attacks on the findings of the court in the United States following Wong's guilty plea.

[34] Wong made a clarification in his reply argument, stating "The Executive Director misconstrues the reason for this Application. He does not attack the validity of the original foreign judgment." Instead, Wong seeks to revoke or vary the Order on the basis that the significant period of Wong's good behavior subsequent to the Order and the expiry of the American probation order are new and compelling evidence. Wong says that together, they mark a significant change in circumstances since the Order was issued.

V. Analysis and Conclusions

[35] We will address the substance of Wong's arguments under the following headings.

A. Opportunity to be heard prior to the Order

[36] Wong, in his reply argument, asserts that Wong "never had a fair opportunity to contest the hearing at which the Reciprocal Order was granted as he was in the United States when it was granted".

[37] Wong's submission appears to reference Wong's evidence, quoted above, to the effect that Wong was in custody in the United States awaiting sentencing during the period March 18, 2008 to December 9, 2008. This time period related to the issuance and extension of a temporary order against Wong. This evidence is not particularly helpful with respect to issuance of the Order because, according to the affidavit of service as quoted above, the Commission was seeking to effect service on Wong with respect to the Order during the period in and around September of 2009. The affidavit of service indicates (as did Wong's own testimony) that by then Wong had been deported to Canada. Wong's own evidence, quoted above, confirms that he was given an opportunity to provide submissions in relation to the Order and he in fact responded by sending a letter to the Commission.

[38] Section 180 of the *Securities Act* allows the service of documents such as the application materials in support of the Order to be delivered by mail to a respondent's last known address. The evidence is clear that the Commission did mail the relevant materials to Wong's last known address well in advance of the granting of the Order. The evidence establishes that Wong was in Canada and able to participate and assert his right to be heard; he participated by sending a letter. It is apparent from the affidavit of service, from Wong's testimony before us and from the face of the Order that the panel which granted the Order considered whether (and appropriately came to the conclusion that) Wong had been given an opportunity to be heard. We have before us a finding by a hearing panel over 11 years ago (supported by evidence before us) that Wong was given an opportunity

to be heard. In contrast, we have some very unconvincing evidence and a submission which suggests Wong's opportunity to be heard was not "a fair opportunity".

[39] As for Wong's submission on entrapment, the materials before us are not sufficient to even raise a serious question of whether the evidence regarding the role of US government agents is compelling or whether it is "new evidence" in the sense that it was not available at the time. The evidence was available to Wong and, based on the sentencing transcript attached to the affidavit of service, that evidence was before the original panel which made the Order. We do not consider this submission to assist Wong in meeting the onus that he faces.

B. **Expiry of penalties and terms in originating jurisdiction**

[40] The penalties and terms imposed in the United States were imposed in a particular context. The court there did not have the jurisdiction to restrict Wong's ability to participate in the securities field in British Columbia. The sanctions available to that court were primarily to incarcerate, to create monetary sanctions or to impose certain forms of probation. The sanctions imposed by the criminal court in the United States can properly be characterized as having an intent to penalize Wong.

[41] In contrast, the Commission hearing panel which made the Order imposed various prohibitions not for the purpose of penalizing Wong but for the purpose of protecting the public in British Columbia against the risk of future harm.

[42] The period of incarceration imposed on Wong by the U.S. court was 21 months, followed by a two year period of supervised release. Wong argues that these time periods should either determine the length of the prohibitions applicable under the Order or these time periods should be relevant to an assessment of whether the current terms of the Order should be varied. He also argues that their expiry is a significant change in circumstances.

[43] We have seen no authority suggesting that an order under section 161(6) must be limited to the duration of an originating order. We see no basis for adopting such an interpretation.

[44] The plain wording of section 161(6) does not limit the time period of prohibitions imposed to the time period of an originating decision. The circumstances of this proceeding illustrate why such a limitation would be inconsistent with the legislative purpose of allowing the Commission to rely on findings from certain other bodies to craft prohibitions to protect the public. Prison sentences are often significantly shorter than the time periods during which a respondent might pose a threat to the public. This is a natural consequence which follows from the consideration of different factors in the differing contexts. The factors applied by a criminal court in determining an appropriate period of incarceration are not identical to the public interest factors, such as the protection of the public from future misconduct, which apply to orders under section 161(6). Section 161(6) orders might properly continue for a much longer time.

[45] The following from *Re Pierce* has relevance:

> [20] As the British Columbia Court of Appeal stated in *Lines v. British Columbia (Securities Commission)*, 2012 BCCA 316, at paragraph 31,
>
> > …the Commission must make its own determination of the public interest under s. 161, rather than make an order automatically, based on the order of the foreign jurisdiction.

The panel in *Re Pierce* continues:

> [21] In other words, in a proceeding which relies on section 161(6), in considering whether to make orders under section 161(1), a panel can rely on an order from an originating body, but is not bound to issue the same order. Since orders are made under section 161(1), the panel must always exercise its discretion to determine if orders in the public interest are appropriate.
>
> …
>
> [24] It is clear from reading section 161(6) that the legislature envisioned that a panel could make orders that are different from the orders of the originating body. Section 161(6) refers to orders from many different bodies whose powers are different from those of the Commission. In many circumstances referred to in section 161(6), we could not simply reciprocate an order since we do not have the same powers as the originating body. For example, we could not simply reciprocate a penal sanction for securities related misconduct imposed under the *Offence Act*.

[46] In this instance we also do not find the expiry of the periods of incarceration or supervised release contained in the originating order to be a significant change of circumstances. It is clear from the materials before the hearing panel that issued the Order that they knew of the duration of the terms of the originating order, so the hearing panel that imposed permanent prohibitions knew that the terms in the United States would likely expire before long. In fact it would have been apparent that Wong's incarceration had ended by the date of the Order, since that fact was established by the affidavit of service.

[47] In addition, we refer again to the comments of the sentencing judge recognizing that authorities in British Columbia were taking steps against Wong's ability to continue his former career. The judge, while pronouncing the originating order, felt that Wong would need to find "a new line of work" and that this was perfectly appropriate.

[48] In this case, the expiry of the terms of the originating order is not a compelling factor in support of revoking or varying the Order.

C. **Wong's good behavior and opportunity to seek work**

[49] Wong's evidence of his good behavior begins with some evidence characterizing the nature of his misconduct which led to his guilty plea in the United States. While

admitting that what he did was wrong and stating his regret at his own conduct, Wong also made two points about his conduct. First, Wong notes that he did not seek out the opportunity to access financing by agreeing to pay a secret commission, that opportunity was placed in front of him by agents of the government. Secondly, Wong states that he was intending to inform the investors about the commissions in question but he was arrested before the opportunity arose.

[50] The fact that the opportunities in question were placed before Wong as he described is not disputed. There was no evidence contradicting Wong's description of his private intention. However, the hearing panel which granted the Order was entitled and expected to base its decision on the findings of the court which made the originating order and we are in the same position. Those findings, as quoted above, confirm very serious misconduct.

[51] Turning to more recent events, Wong described to us what he has been doing since 2010. It is clear he has struggled hard to build a new career, although the evidence presented by Wong did not suggest a focus on re-training himself for work outside of the financial sector, the business development field or the marketing field. Wong states that he has avoided any regulatory issues. There is no suggestion otherwise. Similarly, there is no suggestion that Wong has violated the terms of the Order.

[52] The opportunity which Wong described to us requires that he be free to advise companies about their capital needs and use his network of contacts to match capital with investment opportunities in small companies. We understand why it is in Wong's interest to be able to pursue those opportunities. We agree that there is a benefit, both to Wong and to the public generally, in having Wong support himself and contribute to the support of his daughter.

D. **Scope of restrictions that are in the public interest**

[53] The judge who made the originating order found that Wong's conduct was serious because he participated in multiple securities frauds on occasions about a year apart and involving three different securities. We agree that the misconduct was very serious.

[54] Having stated our conclusion that the misconduct in question was very serious, we do not want to overstate that conclusion. Even within the category of "very serious" misconduct there is a range of culpability which includes operating significant schemes to repeatedly lying to the public in order to defraud multiple investors. Wong's misconduct does not rise to that level. However, given the underlying findings that the repeated conduct by Wong was spread out over a considerable period of time we cannot conclude that Wong gave in to a single, sudden impulse.

[55] Wong's misconduct occurred in a context where Wong had significant independence to use his connections to match investors to early stage companies. In that business context Wong would have been subject to very limited supervision and there would likely have been times when Wong would owe duties to both investors and to start up business ventures who were seeking funds. That environment is one that creates risks to the public,

even before considering the risk presented by a participant such as Wong who was willing to commit a serious crime when presented with people he considered to be "dream investors".

[56] The variation to the Order which Wong is seeking is one which would place Wong back in the very unstructured, unsupervised context which enabled Wong's misconduct the last time he was in that situation. We see that as creating a risk to the public which is not appropriate, even when balanced against the benefits of giving Wong the ability to pursue a higher income.

[57] We find that, because the conduct Wong wishes to pursue is so unsupervised, so open to abuse and so similar to the role which he was performing at the time of his prior misconduct there is a high risk to the public in revoking or varying the Order.

[58] Under section 171 we may revoke or vary the Order if we consider that to do so "would not be prejudicial to the public interest". For all of the reasons summarized above, Wong has not met the onus on him to show that it will not be prejudicial to the public interest to revoke or vary the Order. As a result, this application is dismissed.

January 12, 2022

For the Commission

Gordon Johnson
Vice Chair

Judith Downes
Commissioner

Audrey T. Ho
Commissioner