

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

Citation: Re Leyk, 2018 BCSECCOM 383

Date: 20181205

Robert Joseph Leyk

Panel	Suzanne K. Wiltshire	Commissioner
	George C. Glover	Commissioner
	Audrey T. Ho	Commissioner

Submissions Completed June 29, 2018

Decision date December 5, 2018

Submissions filed by

Robert Leyk	For himself
David Hainey	For the Executive Director

Decision

I. Introduction

- [1] On March 27, 2017, Robert Leyk sent an email to the Commission attaching an application dated March 27, 2017 and an affidavit of the same date asking the Commission for an order “permanently cancelling” the Commission’s Findings (2014 BCSECCOM 318) and Decision (2015 BCSECCOM 96) against him.
- [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] Although Leyk did not specify the provision of the Act under which he was making the application, we have considered his request to be an application under section 171 of the Act. Section 171 of the Act gives the Commission the discretion to vary or revoke one of its decisions.
- [5] The executive director opposed Leyk's application and filed written submissions dated October 30, 2017.

Procedural matters

- [6] Section 171 applications are typically heard in writing. Leyk's March 27, 2017 application was set down at his request for an oral hearing on November 20, 2017. Leyk failed to attend a hearing management meeting on November 3, 2017. He then applied on November 10, 2017 to adjourn the oral hearing. The Commission advised Leyk that his adjournment application would be heard as a preliminary matter at the hearing on November 20, 2017. Leyk did not appear at that hearing and in his absence the panel adjourned the matter generally, set a hearing management meeting for June 6, 2018 to reset the hearing date and advised Leyk he could obtain an earlier hearing date by contacting the Secretary to the Commission. Leyk did not seek an earlier hearing date and did not attend the June 6, 2018 hearing management meeting.
- [7] The Commission advised Leyk on June 8, 2018 that if he wanted his application to be heard orally, he must by June 22, 2018 request that the oral hearing be rescheduled and provide his available dates for a hearing management meeting and the oral hearing of the application. Leyk was also advised that if he failed to do so, his application would proceed as outlined in section 8.10 of *BC Policy 15-601 – Hearings* (the Hearings Policy) as a hearing in writing and the panel would make its decision on the application based on the materials Leyk had filed in March 2017, the response materials filed by the executive director on October 30, 2017 and any reply materials filed by Leyk by June 29, 2018. Leyk did not request the rescheduling of the oral hearing and did not file any reply.
- [8] Accordingly, the hearing of the application proceeded as a hearing in writing. The panel proceeded after June 29, 2018 to consider Leyk's March 27, 2017 application and accompanying affidavit and the executive director's written submissions of October 30, 2017 made in response to that application.

II. Leyk's Application and Affidavit

Application

- [9] The March 27, 2017 application sets out the order Leyk seeks and the grounds for that order. Leyk seeks an order cancelling the liability findings and sanctions against him. The grounds for the order are that the executive director intentionally did not provide notice to Leyk of the proceedings against him, thereby engaging in malicious prosecution and denying him procedural fairness and natural justice, and that intentionally not providing notice is an abuse of process.
- [10] Leyk also asserts that the executive director had ample opportunity to provide notice or at least interview him to hear his side of the story.

[11] Accordingly, Leyk says the proceedings have been irreparably tainted such that an order permanently cancelling the Findings and Decision against him is the only remedy that is fair.

Affidavit

[12] Leyk relies on his sworn affidavit of March 27, 2017 in support of his application. In that affidavit Leyk addresses his whereabouts in relation to the issue of notice raised in the application. His statements in that regard are summarized below.

[13] In the affidavit Leyk also responds to certain of the factual findings set out in the Findings, indicating his agreement with some of those findings and his disagreement with other of those findings. This portion of the affidavit is not relevant to the issue of notice set out in the application and therefore in this decision we do not deal with Leyk's assertions going to the merits of some of those factual findings.

[14] With respect to the matter of notice Leyk states in his affidavit that:

- He went to the Bahamas from February 2011 to May 2011 to get away and relax.
- From June 2011 to July 2012, he had no fixed address, staying with friends in Kamloops, Kelowna, New Westminster and Surrey, British Columbia.
- From July 2012 to September 2013, he moved to Alberta and worked at various oil patch camps in Northern Alberta.
- He had no fixed address while in Alberta, except for July 2012 to September 2012 when he was at #3 Boyce Crescent, White Court, Alberta and "this was to obtain my Alberta driver's license".
- He moved back to British Columbia in September 2013.
- Since "September 2012 [sic]", he has held various jobs and lived at various addresses in the Lower Mainland of British Columbia.
- He found out about the liability decision and sanction orders against him on March 3, 2017.

[15] In his affidavit Leyk also states that he was never interviewed by Commission staff, was never given notice of the proceedings and was not aware the proceedings were going on, although he had been in touch with various departments at the Commission prior to leaving for the Bahamas in 2011.

III. Executive Director's Submissions and Related Evidence

[16] The Temporary Order and Notice of Hearing that commenced the proceedings was issued on August 2, 2012.

[17] In an affidavit entered as an exhibit in the proceedings, a Commission staff member stated that:

- An online search of the database of the Insurance Corporation of British Columbia (ICBC) showed the address on Leyk's BC driver's licence to be 967 Ryder Drive in Kelowna.

- On August 2, 2012, she mailed the Temporary Order and Notice of Hearing to Leyk at 967 Ryder Drive in Kelowna.
- Canada Post online tracking results confirmed delivery to that address on August 7, 2012.
- On August 2, 2012, she also emailed a scanned copy of the Temporary Order and Notice of Hearing to Leyk's latest known email address. She later received an email notification that the email to Leyk "bounced back".

[18] The executive director submits that section 31 of the *Motor Vehicle Act*, RSBC 1996, c. 318 (the Motor Vehicle Act), required Leyk to keep the residential address listed on his driver's licence current and notify ICBC within ten days if he changed it.

[19] The executive director submits that the mailing of the Temporary Order and Notice of Hearing to Leyk on August 2, 2012 complies with the executive director's obligations and constitutes notice of the proceedings against Leyk in accordance with section 2.3 of the Hearings Policy and section 180 of the Act.

[20] The executive director submits that in addition to providing notice as set out above, Commission staff took further steps beyond those required in the Act to locate Leyk and deliver notice of the proceedings to him, including:

- Following land title searches indicating a potential typographical error in the address recorded on Leyk's BC driver's licence, on September 12, 2012 Commission staff mailed notice of the proceedings to 976 Ryder Drive in Kelowna, a property registered to two individuals having the surname Leyk and having the same postal code as the address appearing on Leyk's driver's licence. The mailing was delivered to this address but later returned to sender marked "not at this address".
- On October 31, 2012, a process server attended at the address of Leyk recorded on his Alberta driver's licence, #103 – 100 Mink Creek Road, Whitecourt, Alberta, and left a copy of the Temporary Order and Notice of Hearing at that address.
- On November 21, 2012, a process server attended at the updated address of Leyk recorded on his Alberta driver's licence, #3 Noyes Crescent, Whitecourt, Alberta, and left a copy of the Temporary Order and Notice of Hearing at that address.

[21] The executive director submits that Leyk has not shown any new evidence or change in circumstances demonstrating that the executive director failed to provide notice of the proceedings to Leyk in compliance with section 180 of the Act. With respect to the grounds of failure to provide notice upon which Leyk's application is brought, the executive director submits further that, given the executive director's compliance with his obligations to provide notice under the Act, it would be prejudicial to the public interest to vary or revoke any of the Commission's findings or orders against Leyk.

IV. Law

[22] Section 2.3 of the Hearings Policy states: “The executive director sends a notice of hearing to each respondent in the enforcement proceeding.” As stated in that section, the Commission also publishes notices of hearing on the Commission website.

[23] Section 180 of the Act states (in part):

(1) Unless otherwise provided by this Act, prescribed by the regulations, or ordered by the commission or executive director, a record that under this Act is sent or is required to be sent must be

- (a) personally delivered,
- (b) mailed, or
- (c) transmitted by electronic means

to the person that under this Act is the intended recipient of the record.

(2) A record sent to a person by means referred to in subsection (1) (b) or (c) must be sent to that person

- (a) at the latest address known for that person by the sender of the record,
- (b) at the address for service in British Columbia filed by that person with the commission, or
- (c) at the address of the person's solicitor if the person, or the solicitor, has advised that the solicitor is acting for the person.

(3) ...

(4) A record is deemed to have been received by the person to whom it was sent

- (a) if mailed by ordinary mail, on the seventh day after mailing, or
- (b) if mailed by registered mail, on the earlier of the seventh day after mailing or the day its receipt was acknowledged in writing by the person to whom it was sent or by a person accepting it on that person's behalf.

(5)...

[24] The *Securities Regulation*, B.C. Reg. 196/97 (the Regulation) addresses the question of notice and the interpretation of section 180 of the Act in relation to enforcement proceedings as follows:

Sufficiency of notice

20 Any notice required under this Part is sufficiently given if sent to the required person in accordance with section 180 of the Act or to an address directed by the person presiding.

[25] Section 31 of the Motor Vehicle Act requires the holder of a driver’s licence to notify ICBC of a change in their residential address within 10 days of the change and to provide their new address.

[26] 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.

[27] 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.

[28] 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.

[29] In *Pyper (Re)*, 2004 BCSECCOM 238 (CanLII), 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 circumstances, such that, had we known them when we issued our sanctions decision, we would have made a different decision.

[30] In *Re McIntosh*, the panel stated.

[12] 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.

V. Analysis and Decision

[31] The Motor Vehicle Act requires a driver to keep the address on their driver's licence current and to give ICBC notice within 10 days of any change in address. It is the driver's responsibility to ensure the address provided is accurate and current. It is therefore appropriate for the executive director to rely on the address recorded with ICBC as the latest known address for the purpose of complying with section 180 of the Act.

[32] The evidence establishes that Commission staff mailed the Temporary Order and Notice of Hearing issued August 2, 2012 on the same date to Leyk at the address appearing as his residential address on his BC driver's licence – 967 Ryder Drive in Kelowna.

[33] Leyk, in his affidavit, states that he moved to Alberta in July 2012 and prior to that time he had “no fixed address” in British Columbia. He does not identify the names of the friends or the addresses of the locations he purportedly stayed at in British Columbia while he had no fixed address, nor explain why his BC driver's licence still showed his residential address as 967 Ryder Drive, Kelowna, BC. Leyk further states that he had “no fixed address” but worked at “various oil patch camps” while he was in Alberta except for July 2012 to September 2012 when he was at #3 Boyce Crescent in White Court, Alberta “to obtain my Alberta driver's license”. He indicates these camps included

“Peace River, Spirit River, Etc (sic)”); however, he does not identify the name or location of his employer(s), or where he was purportedly working. In contrast, evidence provided by the executive director establishes that from October 2012 into November 2012 records with respect to Leyk’s Alberta driver’s licence showed two residential addresses in Alberta for him, neither of which is the address Leyk claims to have resided at for purposes of obtaining his Alberta driver’s licence after moving to Alberta and neither of which Leyk refers to in his affidavit. Further, Leyk does not provide any documentary evidence to support any of the statements in his affidavit.

- [34] We give Leyk’s statements as to his whereabouts during the relevant period little weight.
- [35] Leyk has not provided any new and compelling evidence or shown a significant change in circumstances relevant to the alleged grounds that the executive director intentionally failed to provide notice to Leyk of the proceedings against him.
- [36] Section 180 of the Act and section 20 of the Regulation create a method of providing notice to respondents of enforcement proceedings against them. The executive director must be able to rely on these provisions in order to protect the investing public and the capital markets of British Columbia by having the ability to bring timely enforcement proceedings against respondents.
- [37] We find the mailing of the Temporary Order and Notice of Hearing to Leyk at 967 Ryder Drive in Kelowna on August 2, 2012 constituted mailing of the notice of the proceedings to Leyk at his latest known address in accordance with section 180(1) and (2) of the Act. The delivery of that mailing was confirmed by Canada Post’s tracking service and the mailing was not returned. Pursuant to section 180(4) of the Act, the Temporary Order and Notice of Hearing which commenced the proceedings against Leyk is deemed to have been received by Leyk on the seventh day after mailing. As outlined in section 20 of the Regulation, notice was sufficiently given to Leyk in early August 2012.
- [38] Leyk’s allegation that the executive director intentionally did not provide notice of the proceedings to him is completely unsubstantiated and without merit.
- [39] As we have found, notice was given and deemed received by Leyk in accordance with section 180 of the Act within days after the proceedings against him were commenced. This is all the executive director was required to do. However, we find that the executive director exceeded the requirements outlined in the Act and took further steps to ensure Leyk had notice of the proceedings, as set out above.
- [40] Leyk also alleges that the executive director had the opportunity to provide notice of the proceedings to him or at least to interview him but failed to do so. First, as we have found, the executive director gave notice of the proceedings to Leyk at the earliest opportunity which was August 2, 2012 when the Temporary Order and Notice of Hearing was issued. Secondly, there is no requirement that the executive director interview respondents before commencing proceedings against them. The conduct of an investigation is at the discretion of the executive director and persons who are named as

respondents in a proceeding may or may not be interviewed by Commission staff in the course of an investigation.

- [41] Having determined that notice of the proceedings was given to Leyk in accordance with the Act and that Leyk's allegations of an intentional failure to give notice are without merit, Leyk's further allegations of malicious prosecution, denial of procedural fairness and natural justice, and abuse of process (all of which are based on his allegations of an intentional failure to give notice) must also fail.
- [42] We therefore find no basis to set aside the Findings and Decision on the grounds of failure to provide notice of the proceedings to Leyk.
- [43] It would be prejudicial to the public interest to set aside or vary a decision of the Commission where, as here, the executive director has pursued enforcement proceedings against a respondent in order to protect the investing public and the capital markets by giving notice of such proceedings to the respondent at their latest known address in accordance with the Act and the Regulation.
- [44] Leyk's application of March 27, 2017 is dismissed.

December 5, 2018

For the Commission

Suzanne K. Wiltshire
Commissioner

George C. Glover
Commissioner

Audrey T. Ho
Commissioner