In the Matter of
The Securities Act, 1988

and

In the Matter of
Darcy Lee Bergen

Decision re: Application titled:

"Amended Petition for Revocation of Regulatory Disclosure under the *Securities Act of 1988*, S.S. 1988-89, c S-158(4)"

Motion Heard:	March 10, 2021	
Panel:	Peter Carton	(Chairperson)
	The Honourable Eugene Scheibel	(Panel Member)
	Norman Halldorson	(Panel Member)
Appearances	Grace Hession David (Counsel for Staff of the Financial Consumer Affairs Authority of Saskatchewan ("Staff"))	
	Tad Burton and Erika Binnix, AdvisorLaw, LLC Counsel for Darcy Lee Bergen	
	Darcy Lee Bergen, (Respondent)	
Date of the Decision:	June 17, 2021	

I. INTRODUCTION

1. This is a decision of the Panel appointed pursuant to section 17 of *The Financial and Consumer Authority of Saskatchewan Act*, SS 2012, c F-13.5 to hear an application by Darcy Lee Bergen ("Mr. Bergen") that he titled "Amended Petition for Revocation of Regulatory Disclosure under the *Securities Act of 1988*, S.S. 1988-89, c S-158(4)" (the "Application"). In essence, Mr. Bergen is asking this Panel to revoke or vary decisions made against him in 2000 by the Saskatchewan Securities Commission so that he no longer has to disclose these decisions to his current regulator in the United States.

2. When Mr. Bergen filed his initial Application, it was not clear to the Panel which provision(s) of *The Securities Act, 1988*, SS 1988-89, c S-42.2 [*Securities Act*] he was relying on for his requested relief. However, by the time of oral argument, both Staff and Mr. Bergen focused their arguments on section 158(3) of the *Securities Act*, which provides a Panel with the authority to revoke or vary one of its previous decisions when it is of the opinion that doing so "would not be prejudicial to the public interest."

3. It appears that section 158(3) has yet to be considered by a Panel of the Financial and Consumer Affairs Authority ("FCAA") or its predecessor entity. As such, Mr. Bergen's application raises a novel issue for the Panel to consider. Layered on top of this is the fact that Mr. Bergen eventually, during both the oral hearing on this Application and in his post-hearing submissions, conceded that the merits of the underlying decisions he seeks to have revoked or varied were correctly decided. Indeed, as of the date of the present hearing, Mr. Bergen took the position that he clearly committed breaches of the *Act* in the past and is not downplaying that wrongdoing. Furthermore, Mr. Bergen is not challenging the merits of the underlying decisions. Instead, Mr. Bergen argues that revoking or varying the previous decisions would be in the "equitable tradition" and would not be prejudicial to the public interest because, amongst other things:

- he has learned from his mistakes;
- since the time of the previous decisions, over 20 years ago, he has not been the subject of any regulatory issues (in this jurisdiction or otherwise); and
- he now lives and practices in the United States and has no plans to ever return to or practice in Saskatchewan.

4. As our below review of various cases demonstrates, Mr. Bergen's position is rather novel. The Panel was unable to locate a case that considered a provision similar to section 158(3) of the *Securities Act* where the Applicant conceded that the underlying decisions were correctly decided.

5. In the end, after careful consideration of Mr. Bergen's position, the Panel is unanimous for the

following reasons that Mr. Bergen's application must be dismissed.

II. BACKGROUND

a. History of Securities Proceedings in Saskatchewan regarding Mr. Bergen

6. In the summer of 2000, the Saskatchewan Securities Commission (the "Commission") held a hearing to consider a number of very serious allegations brought by Staff against Mr. Bergen. Mr. Bergen defended against the allegations throughout the proceedings and at that time did not admit any wrongdoing. The hearing lasted four days and the Commission reserved its decision at the end of the hearing.

7. The evidence brought forth in the hearing resulted in numerous important findings being made by the Commission in its September 14, 2000 decision on the merits [*Merits Decision*] and in its October 13, 2000 decision regarding penalties [*Sanctions Decision*]. It is helpful to briefly summarize some of those findings.

- Mr. Bergen was employed as a mutual funds salesperson with The Height of Excellence Financial Planning Group Inc. in Regina and worked his way up to a Branch Manager position. He was also a registrant as required by the *Securities Act*.

- Mr. Bergen advised on sales of various securities. One of these, Platinum Companies ("Platinum"), was sold to numerous investors off-book.

- Mr. Bergen did not properly review or understand the securities he was providing advice on. He did not demonstrate "the requisite knowledge and attitude necessary for the proper fulfillment of his duties as a registrant" (*Merits Decision* at 19).

- Mr. Bergen referred 85 individuals to Platinum. He received approximately $340,000 in commissions and approximately $29,000 for his referrals. (*Merits Decision* at 3)

- Losses suffered by investors totaled millions. Many investors were vulnerable and could not afford to lose such high amounts. One couple alone lost $194,000 investing in Platinum.

- Mr. Bergen had a reckless attitude towards his clients.

- Mr. Bergen refused to take responsibility for his actions and repeatedly tried to deflect blame from himself onto others. In doing so, he failed to appreciate his responsibilities as a registrant as well as the fiduciary duties he owed to his clients.

- The conduct in question involved a significant number of people and garnered publicity, which in turn caused "a significant setback to confidence in the Saskatchewan capital Markets" (*Sanctions Decision* at 3)

8. In light of these findings, the Commission handed down a number of sanctions including a 10-year cease trade order, a $50,000 administrative penalty, and an order of costs in the amount of $5,059.75. On November 14, 2000, the Commission ultimately issued an order (the "Sanctions Order") imposing the sanctions set out in the *Sanctions Decision* as follows:

> 1. Pursuant to subsection 134(1) of *The Securities Act, 1998,* Statutes of Saskatchewan 1988, c. S-42.2 (the "Act") for a period of ten years from the date hereof:
>
> a. All of the following exemptions do not apply to Bergen:
> i. the exemptions in sections 39, 39.1, 81, 82 and 102 of the Act;
> ii. the exemptions in *The Securities Regulations,* R.R.S., c. S-42.2 Reg. 1 ("the Regulations"), providing for exemptions fromsections 27, 58, 71 or 104 to 109 of the Act; and
> iii any exemption in any decision of the Commission providing for an exemption from any provision of the Act or the Regulations;
>
> b. Bergen ceases trading in securities, specified securities, exchange contracts or specified exchange contracts;
>
> c. Bergen ceases giving advice respecting securities, specified securities, trades, specified trades, exchange contracts or specified exchange contracts; and
>
> d. Bergen:
> i resigns any position that he holds as a director or officer of an issuer or registrant;
>
> ii is prohibited from becoming or acting as a director or officer of any issuer or registrant; and
>
> iii is prohibited from being employed by any issuer or registrant;
>
> 2. Pursuant to section 135.1 of the Act, Bergen pay an administrative penalty of $50,000.
>
> 3. Pursuant to section 161 of the Act, Bergen pay the costs of or relating to this hearing in the amount of $5,049.75.

9. In respect to the administrative penalty, Mr. Bergen admitted during the hearing and in his post-

hearing submissions that the penalty was never paid and remains outstanding. Although not required to by the Sanctions Order, Mr. Bergen also stated in his testimony that he did not compensate any of the victims for the losses they suffered as a result of his conduct.

b. Nature of Mr. Bergen's Application

10. In general, Mr. Bergen's Application seeks to have this Panel vary or revoke the *Merits Decision*, *Sanctions Decision*, and/or the Sanctions Order (collectively, the "Decisions") with hopes that after the Decisions are revoked or varied, he will no longer be required to disclose the Decisions to his current regulator in the United States. The proceedings in respect to the Application unfolded as follows.

11. On September 17, 2020, the proceedings commenced when Mr. Bergen, through his United States based counsel, filed with the FCAA a document titled "Petition for Revocation of Regulatory Disclosure" (the "Initial Application"). The Initial Application expressly stated that it was being made under section 21.3(1) and (3) of the *Act* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions*.

12. Mr. Bergen amended the Initial Application on January 19, 2021 by filing the Application. The primary amendments to the Initial Application involved reliance on section 158(4) of the *Act* instead of section 21.3. References to the latter were replaced by the former. Beyond that, it appears that most of the content from the Initial Application remained the same.

13. The Panel pauses to note here that the references in the Application to section 158(4) of the *Act* are mistakes. Section 158(4) gives authority to the "Director" to revoke or vary previous decisions of the "Director" when it would not be prejudicial to the public interest. However, this Application concerns previous decisions of the "Commission" and, as such, the applicable provision is section 158(3) which gives authority to the "Commission" to revoke or vary a previous decision made by the "Commission" when it would not be prejudicial to the public interest. By the time of the oral hearing, and due to the correct citation being included in Mr. Bergen's post-hearing submissions, it was clear that the parties were in agreement that section 158(3) was operative provision in the circumstances. Section 158(3) reads in full:

> (3) Where, in the opinion of the Commission, it would not be prejudicial to the public interest, the Commission may, on the application of an interested person or company or on its own motion, make an order on any terms and conditions that it may impose revoking or varying any previous decision made by it.

14. The Application outlines various background facts in support of Mr. Bergen's requested relief. The Application begins by providing some background detail on Mr. Bergen's time as a mutual-fund dealer in Saskatchewan, including some of the circumstances that led to the Decisions. Notably, however, through the Application, Mr. Bergen appears (at least at the time the Application was filed) to continue to not take

full responsibility for his conduct and to blame others. On page 6 of the Application, for example, the Application reads:

> …Not only is the public interest not served by Mr. Bergen's suspension due to him being unaware of his violations to begin with and lied to by his Broker-Dealer, Mr. Bergen's continued suspension and mark on his record no longer serves to alert anyone in the Canadian investment industry, as he no longer practices there.

In addition, the Application describes the "mark on his record" flowing from the Decisions as being "false" in nature (at 6).

15. The Application goes on to describe Mr. Bergen's professional endeavours after the Saskatchewan proceedings were finalized. Beginning in 2003, Mr. Bergen became licensed to sell life insurance in Arizona and also became an annuity agent. Then in September 2015, Mr. Bergen registered as an investment adviser representative with an investment adviser firm that was registered with the Securities and Exchange Commission in Peoria, Arizona.

16. The Application then suggests that as a part of the regulatory filing requirements, Mr. Bergen had to disclose any civil litigation or regulatory action that he had been a part of it. In line with these disclosure requirements, Mr. Bergen disclosed to the Securities and Exchange Commission on his "Form U4" the proceedings that took place before the Saskatchewan Securities Commission in October 2000.

17. The Application then outlines numerous reasons as to why the Mr. Bergen believes it is appropriate to revoke or vary the Decisions. His reasons include:

- The Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 SCR 132 held that public interest jurisdiction "is neither 'remedial nor punitive' but 'protective and preventative' in that it is to be 'exercised to restrain *future* conduct of the *respondent* that is likely to prejudice the public interest in fair and efficient capital markets.'" (at 5) [Mr. Bergen's emphasis]

- Mr. Bergen is no longer practicing in Canada and is instead only practicing in Arizona. As such, Mr. Bergen is no longer any risk to Canadian investors (at 4).

- Mr. Bergen only has a minimum number of contacts in Canada and no longer conducts any business in Canada (at 4).

- Revocation of the Decisions would aid Mr. Bergen in his efforts to no longer be required to disclose the Decisions to his regulator in the United States.

- It would be inequitable for Mr. Bergen to have to continue to disclose the Decisions and to have this "mark on his record" follow him to the United States "due to its false nature, lack of utility in both Canada and the United States, and the fact that the suspension is now 20 years old." The Application cites to numerous United States' cases where United States' courts have held that expungement of public records is an available equitable remedy (at 6).

18. Mr. Bergen did not file any affidavits or other evidence in support of the Application. As will be discussed below, the only evidence provided in support of the Application was Mr. Bergen's testimony during the Oral Hearing.

c. Staff's Position on the Application

19. Staff opposes Mr. Bergen's Application. Staff provided written submissions as to why they oppose the Application, and those submissions include:

- Some of the facts outlined by Mr. Bergen in the Application are contrary to findings in the Decisions, including the purported fact that all of the securities the Mr. Bergen sold were approved. The findings in the Decisions show that some of the securities were sold off-book, meaning they were not approved securities. This demonstrates Mr. Bergen still fails to appreciate or accept the full extent of his behaviour and the conduct that led to him being sanctioned.

- At various points in the Application, Mr. Bergen continues to deny responsibility for his conduct and continues to deflect blame onto others. Moreover, Mr. Bergen states that the "mark on his record" resulting from the Decisions is "false [in] nature".

- In respect to Mr. Bergen's suggestions that there is an equitable remedy of expungement available, this is a remedy available in the United States, but it is not a remedy available in Canada. Moreover, even in the United States, expungement is considered an extraordinary remedy and is rarely granted.

- Finally, citing to a number of Canadian authorities, Staff submits that in order for it to be appropriate to revoke or vary a previous decision, the applicant will need to provide new or compelling evidence, or point to new law, which demonstrates the previous decision should no longer stand.

d. The Oral Hearing

20. Mr. Bergen was the only witness to testify in these proceedings and did so at the oral hearing conducted virtually. Overall, the only evidence the Panel received in support of the Application was Mr.

Bergen's testimony. No documents were submitted in support of the Application or to corroborate Mr. Bergen's testimony.

21. In his testimony, Mr. Bergen went over his career as a financial advisor. He stated that when he was 21 years old he began selling life insurance for various life insurance companies. He also mentioned that he was a mutual fund salesperson until 1999.

22. Mr. Bergen then stated that he moved to the United States in 2000 and obtained a licence to sell life insurance in 2003. From 2003 to 2015, he sold life insurance and annuities. Since 2015, he said he became registered as an investment advisor representative with a registered investment advisory firm. In June 2020, he said he switched employers to Simplicity Wealth Management.

23. Mr. Bergen testified that when he obtained is licence to sell insurance, he needed to disclose, and did disclose, the Decisions. He also stated that any company he wanted to be contracted with needed to perform a background check on him and as a part of that process, he needed to disclose the Decisions and did disclose them.

24. Mr. Bergen also provided some testimony in respect to the background that led to the Decisions. He began his testimony by once again stating that at the time he was a young advisor and believed the broker-dealer he worked for at the time had conducted its due diligence in respect to the products he sold and that he had placed his trust in his broker-dealer. He said he was not made aware that the products were not exempt investments and that he never sold the products without his broker-dealer's knowledge. He also testified that all the products he sold were approved for sale.

25. Mr. Bergen also testified that in his view his clients at the time did not understand the risks of the investments just like he did not understand the risks. He also said that he personally invested in the same investments.

26. In respect to why Mr. Bergen felt he was specifically suspended and fined, Mr. Bergen testified that he was the top producer for the broker-dealer he worked for and as a result he was an obvious target. He stated that he did not think this was unjust, but just the reality of things considering he was a top producer.

27. Mr. Bergen also testified that he still believed he was misled at the time. He said he was in his twenties at the time and was only told the positives of the investments and not the negatives. He also claimed he was not properly trained by the broker-dealer and was simply told to sell the investments because they were approved. He said with hindsight he would not have sold the investments, but in the moment they were part of an "overall diversified portfolio" and therefore to his knowledge at the time the investments aligned with the investor's goals.

28. In respect to his current practice, Mr. Bergen testified that he stays away from similar products that

formed the subject matter of the Decisions, and instead just focuses on mutual funds and annuities.

29. In addressing the finding in the Decisions that he did not properly appreciate his duties and responsibilities in advising clients, Mr. Bergen said that he has changed since then. He said he is now 53 years old and that going through the proceedings that led to the Decisions changed him forever in the way he considers investments. He said he is no longer naïve and has changed his due diligence practices by asking the right questions and assessing the downside risks.

30. After this, Mr. Bergen admitted in respect to the conduct underlying the Decisions that he did not do his own proper due diligence prior when giving advice to the various investors. He said he did not ask the right questions and did not even understand what questions should be asked in the circumstances.

31. When asked about the $50,000 administrative penalty, Mr. Bergen admitted that he did not pay the penalty, saying it was his understanding that this penalty only needed to be paid if he ever sought to be licensed again in Saskatchewan. He further indicated that he was open to paying the administrative penalty if the Decisions were revoked or varied.

32. Mr. Bergen also testified that he had no intention of being relicensed in Saskatchewan and that he would sign a waiver agreeing not to seek such a licence.

33. Mr. Bergen also said that he contributed $30,000 to a fund that was meant to compensate investors for their losses. (Mr. Bergen would eventually clarify that these amounts were not paid to the FCAA, but were instead paid to satisfied other civil obligations).

34. Finally, Mr. Bergen expressly admitted in his testimony that he was not trying to undo the underlying events and that he takes responsibility for what happened to the investors. He said he brought this Application as he wanted a second chance and wanted to move on from the events which he called a “nightmare”.

35. In cross-examination, Mr. Bergen further admitted that his being targeted was just and that if he could redo the proceedings that led to the Decisions, he “wouldn’t have fought it”. He felt that the investigation by the Commission at the time was correct and needed to be done. He said that people lost a lot of money and that he regretted his involvement in that. In referring to his approach to the proceedings at the time, Mr. Bergen testified that “At the time, I was fighting for a career and a life and… if I did that over again… I would have just accepted… that wrongdoing was done and… move on…”.

36. Also in cross-examination, Mr. Bergen admitted that not all the investments were approved. In particular, Mr. Bergen admitted that the Platinum investments were done “off-book for sure” and that he agreed with the Commission’s findings in this regard in the Decisions.

37. Further in cross-examination, Staff confronted Mr. Bergen with aspects of the Decisions where the Commission outlined how Mr. Bergen attempted to blame others for his wrongful conduct. In response, Mr. Bergen said that he now "would take a whole lot more responsibility than – than blaming [others]… I would say that… I should never have referred to Platinum whether… I thought I had inferred release to do so or not, it shouldn't have been done."

38. Mr. Bergen also admitted that, in respect to the Decisions and especially the Sanctions Order, he did not pay any money to the FCAA to satisfy any of the outstanding amounts.

39. Finally, in re-examination, Mr. Bergen admitted again that both the $50,000 administrative penalty and the costs order have yet to be paid and remain outstanding. Mr. Bergen then said that he was agreeable to paying both the administrative penalty and the costs.

40. After Mr. Bergen finished testifying, his counsel and Staff made closing submissions. The submissions largely tracked their written submissions.

e. Mr. Bergen's Post-Hearing Submissions

41. Mr. Bergen filed written submissions after the oral hearing. Again, these written submissions largely tracked previous arguments and positions made by Mr. Bergen, including the various admissions and concessions made by Mr. Bergen during his oral testimony.

III. Issues

42. Mr. Bergen's application raises the following issues:

i. What is the law applicable to an application to revoke or vary a previous decision pursuant to section 158(3) of the *Securities Act*?

ii. Does the Panel have the authority to revoke or vary the Decisions at issue in this matter?

iii. If so, has Mr. Bergen met his onus of demonstrating it would not be prejudicial to the public interest to revoke or vary the Decisions?

IV. Analysis

a. Equitable Remedy of Expungement is Not Known to Canadian Law

43. To begin, the Panel will dispose of Mr. Bergen's submission that we can invoke an equitable remedy of expungement to remove the Decisions from Mr. Bergen's record. Mr. Bergen cited case law from the United States that identifies expungement as being an equitable remedy available in the United States in situations where a formal complaint is brought by a client against a broker and the applicant seeks to have the complaint removed from the public record. A regulatory authority in the United States, the Financial Industry Regulatory Authority, has specific rules that address expungement.

44. In respect to Canadian law, however, Mr. Bergen did not cite any Canadian authority that has identified or applied a similar principle in the present context, nor was the Panel able to find one either. Instead, as just noted, the concept advanced by Mr. Bergen seems to be a product of United States' law. With this in mind, the Panel is of the view that the equitable remedy of expungement argued before us and in the present context is not a concept known to Canadian law and, therefore, the Panel declines to apply it.

45. This does not mean that a previous decision or order cannot be revoked or varied in any way. As will be discussed next, the *Securities Act* provides a mechanism for doing that.

b. Relevant Case Law re Section 158(3) of the *Securities Act*

46. The issues in this case really boil down to consideration of the relevant provision of the *Securities Act*. In general, the Panel's authority and jurisdiction flows from the *Securities Act* and, in the context of this Application, the provision we are concerned with is section 158(3). By the time of oral argument, all parties were seemingly in agreement that section 158(3) was the provision at issue.

47. Section 158(3) gives the Panel discretion to revoke or vary a previous decision when doing so would not be prejudicial to the public interest. The provision reads in full:

> **158**…
>
> (3) Where, in the opinion of the Commission, it would not be prejudicial to the public interest, the Commission may, on the application of an interested person or company or on its own motion, make an order on any terms and conditions that it may impose revoking or varying any previous decision made by it.

48. It appears that section 158(3) has yet to be interpreted by a Panel or by any court in this jurisdiction. That said, there is case law from other jurisdictions in Canada that has interpreted similar provisions. It is

therefore helpful to review some of these cases to better grasp the contours of provisions like section 158(3).

49. We begin with authorities from British Columbia. Section 171 of British Columbia's securities legislation (*Securities Act*, RSBC 1996, c 418) reads, in relevant part, as follows:

> 171 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.

50. In addition, the British Columbia Securities Commission's ("BC Commission") procedural rules (*BC Policy 15*-601) provide guidance as to what is required to demonstrate that revoking or varying a decision would not be prejudicial to the public interest. In general, an applicant must show that there is new and compelling evidence that was not before the original decision maker or a substantial change in the circumstances since the original decision was made. Rule 9.10(a) reads in full:

> **9.10 Post Hearing Applications – applications to vary and appeals of decisions**
>
> ***(a) Discretion to revoke or vary*** – Under section 171 of the Act, the Commission may revoke or vary a decision it has made, or that was made by a single commissioner. A party that is subject to a decision may apply to the Commission for an order revoking or varying the decision. Generally, the Commission conducts these hearings in writing; it considers written submissions and makes its decision.
>
> **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.** If the Commission is considering a decision made by a single commissioner, the Commission may consider other factors.
>
> A party must apply to the Commission in advance of the hearing and demonstrate why the evidence that was not before the original decision maker is new and compelling, and should be admitted. The Commission will hear submissions from all parties. In some circumstances, the Commission may hear the application to introduce new evidence as part of the hearing to revoke or vary a decision. In that case, it will receive the evidence for the purposes of determining if it meets the test to be admitted.

51. Reviewing various cases shows that Rule 9.10 appears to implement various principles found in cases that considered section 171. For example, in *Deyrmenjan (Re)*, 2019 BCSECCOM 93, after the BC Commission handed down its decision on liability in a matter which found the respondent had breached various provisions of BC's securities legislation, the respondent brought an application under section 171 requesting that various findings made against him in the liability decision be revoked or varied. In support of the application, the respondent filed numerous affidavits in an attempt to show that various findings were false.

52. The BC Commission began by reviewing cases that had considered section 171 applications and summarizing the principles that flowed from those cases. In general, an applicant will have the onus of bringing forward new and compelling evidence relevant to the issues that would have changed the outcome of the decision sought to be revoked or varied. The BC Commission wrote:

> 26 In *Re Pyper*, 2004 BCSECCOM 238, the respondent applied under section 171 to vary the sanctions imposed on 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.
>
> 27 In *Re Steinhoff*, 2014 BCSECCOM 211, the panel followed *Re Pyper* and adopted the two-prong test used in *Foresight Capital Corporation*, 2006 BCSECCOM 529 and 2006 BCSECCOM 531 to determine whether evidence is "new" evidence:
>
> > (a) First, the evidence must be relevant to the allegations in the notice of hearing.
> >
> > (b) Second, the applicant must explain why the evidence was not reasonably available for use at the hearing.
>
> 28 Based on the foregoing, for the applicants to succeed, they had to establish that:
>
> > (i) the additional evidence provided in the Affidavits:
> >
> > > (a) was relevant to the allegations in the notice of hearing,
> > >
> > > (b) was "new" in that it was not reasonably available for use by the applicants at the time of the liability hearing,
> > >
> > > (c) was "compelling" in that if we had been provided with the Affidavits at the time of the liability hearing, we would have decided differently with respect to our liability findings against the applicants; and
> >
> > (ii) it would not be prejudicial to the public interest to revoke our liability findings against the applicants.
>
> 29 In our deliberations, we considered the relative importance of the "new" and "compelling" aspects of the analysis required in a section 171 application.
>
> 30 We are a regulator with a public interest mandate. This is reflected in case law in decisions such as *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 as well as various provisions of the Act.
>
> 31 In this case, under section 171, we can only vary or revoke a decision of the Commission if it is not prejudicial to the public interest.
>
> 32 We are of the view that the "compelling" aspect of the test is the more important as this can be determinative of the outcome of the analysis. If a panel finds the additional evidence is not compelling, there is no need to carry on with the analysis to determine if it is "new". It would be prejudicial to the public interest to vary or revoke a decision based on evidence

that is not compelling.

> 33 If a determination is made that the additional evidence is "compelling", the next question is whether the evidence at issue is "new". Evidence will generally be considered "new" if it was not reasonably available at the time of the liability hearing to the party relying on it. A determination of what is "reasonably available" may include an examination of whether the party seeking to rely on the additional evidence deliberately chose to withhold the evidence in the first instance.
>
> 34 Unlike the "compelling" component of the analysis, a determination of whether additional evidence is "new" is not necessarily determinative.
>
> 35 If the additional evidence is "new," a panel must still consider whether it is prejudicial to the public interest to rely on it to vary or revoke the decision at issue. This assessment may take into consideration, among other things, the potential procedural unfairness and harm to capital markets, including the increase in the number of hearings, unfairness to the parties, and public interest concerns relating to certainty of Commission decisions.
>
> 36 Finally, there may be circumstances in which the additional evidence is not "new" but is "compelling." In these circumstances, the panel may find that it is not prejudicial to the public interest to rely on it to revoke or vary a Commission decision under section 171 of the Act (see *Re Wong*, 2017 BCSECCOM 57, discussed below).

53. The BC Commission ultimately held that the affidavit evidence in the case was neither new or compelling and therefore refused to revoke or vary any findings in the liability decision.

54. A similar statement of the law was made in *EagleMark Ventures, LLC (Re)*, 2018 BCSECCOM 164 [*EagleMark*]. In addition to the above noted principles, the BC Commission in *Eaglemark* made clear that these types of applications are not equivalent to an appeal and that there are only limited circumstances in which the Commission will revoke or vary a decision (at para 22-23). Citing to the earlier decisions of *Pyper (Re)*, 2004 BCSECCOM 238 and *McIntosh (Re)*, 2015 BCSECCOM 162, the BC Commission set out the law as follows:

> 22 A section 171 application is not an opportunity to appeal a decision of the Commission. The process to appeal a Commission decision to the Court of Appeal is outlined in section 167(1) of the Act. …
>
> 23 Numerous previous decisions of the Commission have confirmed the limited circumstances in which the Commission will revoke or vary one of its decisions.
>
> 24 For example, in *Re Pyper*, 2004 BCSECCOM 238, the Commission panel stated that for an application under section 171 to succeed, the applicant must show new and compelling evidence or a significant change in circumstances, such that, had the panel known them at the time of issuing the original decision, they would have made a different decision. Similarly, in *Re McIntosh*, 2015 BCSECCOM 162, the Commission panel stated at paragraph 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.

(see also *Leyk (Re)*, 2019 BCSECCOM 136 and *Steinhoff (Re)*, 2014 BCSECCOM 211)

55. Ontario's securities legislation (*Securities Act*, RSO 1990, c S5) likewise contains a provision similar to Saskatchewan's section 158(3). Ontario's section 144 reads:

> **Revocation or variation of decision**
>
> **144** (1) The Commission may make an order revoking or varying a decision of the Commission, on the application of the Executive Director or a person or company affected by the decision, if in the Commission's opinion the order would not be prejudicial to the public interest.
>
> **Terms and conditions**
>
> (2) The order may be made on such terms and conditions as the Commission may impose.

56. In *Rankin (Re)* (2011), 34 OSCB 11797 (ONSECCOM) aff'd 2013 ONSC 112, 113 OR (d) 481, the Ontario Securities Commission ("ON Commission") considered whether it had jurisdiction to decide an application to revoke a settlement agreement that it had previously approved. Mr. Rankin argued that Staff failed to disclose to him, prior to his entering into the settlement agreement, certain information relevant to his matter that Staff obtained during another investigation. Staff brought a preliminary application arguing that the ON Commission did not have jurisdiction to consider the application because doing so would amount to an appeal of the decision to approve the settlement agreement. In considering Staff's application, the ON Securities Commission reviewed a number of cases that had interpreted and applied section 144. Notably, the principles articulated through the various cases are similar to those articulated in the cases from British Columbia. In addition, some of the cases stated that the ON Commission's jurisdiction under section 144 should be exercised rarely. The ON Commission wrote:

> 63 In *Re Ultramar PLC* (1991), 14 OSCB 5221 ("*Re Ultramar*"), the Commission dealt with circumstances in which a third party was applying to rescind or vary a discretionary order previously granted to an issuer on an application. The Commission held that its jurisdiction under section 144 to vary or revoke a prior order of the Commission will rarely be exercised:
>
> > After hearing the submissions of all counsel, we concluded that when an application is brought under the provisions of section 140 [now s.144] of the Act, for an Order revoking or varying a decision made by the Commission, and that application is disputed by the part[y] that applied for and received the Order or Ruling, we should, except in the most unusual circumstances, before we consider rescinding or varying the Order or Ruling, find that the original applicant had either misrepresented a fact to the Commission or omitted to state a material fact, or alternatively that there was, unknown to that applicant, a material fact which was not therefore brought to the attention of the original panel. We should also consider whether or not the knowledge of such a material fact by the original panel would in our opinion *have been likely to have affected* the

> Order or Ruling made.
>
> [Emphasis added]
>
> (*Re Ultramar*, *supra*, at para. 4)

The Application is not being made in circumstances comparable to those in *Re Ultramar*.

64 In *Re Universal Settlements International Inc.* (2003), 26 OSCB 2345 ("*Re Universal Settlements*"), the Commission addressed an application under section 144 to challenge the issue of a section 11 investigation order. The Commission held that:

> Section 144 is appropriate to be used to vary or revoke a decision of the Commission when new facts come to light, or new law is enacted, making it desirable to change the decision that has been rendered. *I am not aware of a section 144 proceeding being used to review and second-guess a decision of another panel of the Commission, although there is nothing in section 144 that would prevent us from doing that if we decided it was the right thing to do.*
>
> [Emphasis added]
>
> (*Re Universal Settlements*, *supra*, at p. 2)

Rankin submits that the Application is not being used simply to review or second-guess the Commission's approval of the Rankin Settlement Agreement. Rather, Rankin submits that new facts have come to light, and events have occurred, subsequent to the Rankin Settlement Agreement that permit an application under section 144.

65 In *Re X Inc.* (2010), 33 OSCB 11380 ("*Re X*"), Staff applied to vary a decision made by a hearing panel. The Commission qualified the principle referred to in *Re Universal Settlements* that the Commission can intervene under section 144 if it "decided it was the right thing to do". The Commission stated that:

> With respect, the statement [from *Re Universal Settlements*] on its face is wrong in law. Only if the words "in accordance with applicable law" are added following the words "the right thing to do" can any useful meaning be ascribed to the statement. We do not say there can never be a situation where the Executive Director can apply under s. 144 to revoke or vary a Panel decision that went against Staff. We do say that only in the rarest of circumstances should such an application be considered. If the s. 144 application is, in effect, simply an appeal, it should be rejected as contrary to the intention of the *Act* and contrary to the public interest.
>
> [Emphasis added]
>
> (*Re X*, *supra*, at para. 35)

66 The Commission concluded in *Re X* that Staff was attempting to use section 144 as a means to appeal the decision of a Commission panel. Staff does not have a right of appeal under the Act. As a result, the Commission refused to permit Staff's application under section 144. The Application is not being made by Staff and is not made in circumstances comparable to those in *Re X*.

67 In two cases, applications have been brought under section 144 by a person subject to a Commission sanctions order to revoke or vary that order. In *Re Orsini* (1997), 20 OSCB

6068 ("*Re Orsini*"), a registrant who was the subject of a sanctions order by the Commission with a term lasting many years, applied under section 144 to modify that order. The grounds for doing so were the passage of time, a material change in circumstances and an expression of remorse by the applicant. In rejecting the application, the Commission adopted the following six criteria as appropriate in determining whether a section 144 order should be granted in such a case:

> 1. As a general rule, an order such as the 1991 OSC order is intended to run its course. Varying or rescinding the order should be the exception rather than the rule.
>
> 2. The applicant must show by a sufficient course of conduct he is a person to be trusted.
>
> 3. The applicant must show that his conduct is unimpeached and unimpeachable which can be best established by evidence of trustworthy persons, especially persons with whom the applicant has been associated since the 1991 OSC order.
>
> 4. A sufficient period of time must have elapsed.
>
> 5. The applicant must show by substantial and satisfactory evidence that it is highly unlikely that the applicant will misconduct himself in future if the applicable order is revoked or rescinded.
>
> 6. The applicant must show that his or her past conduct has been entirely purged.
>
> (*Re Orsini*, *supra*, at p. 4)

68 Similarly, in *Re Friesen* (1999), 22 OSCB 2427 ("*Re Friesen*"), the Commission considered an application under section 144 of the Act for an order modifying a sanctions order made by the Commission ten years earlier. The applicant submitted there had been a "material change in circumstances", that he was "remorseful" and had "learned from his previous experience" and, therefore, it would not be prejudicial to the public interest for the Commission to vary one of the terms of the order. Based on the facts and evidence presented, and applying the criteria from *Re Orsini*, the Commission was satisfied that it was appropriate to vary one condition of the Commission's prior order (*Re Friesen*, *supra*.).

70 In *AiT Advanced Information Technologies Corporation* (2008) 31 OSCB 10027 ("*Re AiT*"), the Commission dealt with rather unique circumstances. The Commission had approved settlement agreements with certain respondents on the basis that they were parties to a breach of section 75 of the *Act* by the issuer. The Commission issued sanctions orders under those settlement agreements. One of the respondents proceeded to a hearing on the merits. A panel of the Commission concluded that there had been no breach of section 75 of the *Act* by the issuer. An application was then brought by Staff under section 144 to revoke the sanctions orders issued under the settlements on the basis that they were inconsistent with the Commission decision on the merits. The Commission revoked the orders on the following grounds:

> Logic and fairness certainly dictates that the settlement agreements entered into ... ought to be revoked pursuant to section 144 of the Act. ... The learned tribunal, having heard all of [*sic*] competing arguments on the issue, has determined there was no violation of the *Act*. Mr. Ashe therefore could not be a party to AiT's being in violation of the *Act* because there was no violation of the *Act*.

(*Re AiT*, *supra*, at paras. 3 and 4)

57. There are also authorities from Alberta that are instructive. Alberta's securities legislation (*Securities Act*, RSA 2000, c S-4) contains a provision similar to section 158(3) of the *Securities Act*. Section 214(1) of Alberta's legislation reads:

> 214(1) The Commission may, if the Commission considers that it would not be prejudicial to the public interest to do so, make an order revoking or varying any decisions made by the Commission under this Act or the regulations or any former Securities Act or regulations.

58. Cases that have interpreted and applied section 214(1) set forth similar considerations as the British Columbia and Ontario cases. The cases also note that the provision should only be used sparingly.

59. For example, in *Kostelecky (Re)*, 2017 ABASC 44, a third party applied to revoke a decision of the Alberta Securities Commission ("AB Commission") that temporarily restricted public access to various exhibits that were entered into evidence in a hearing. The application was dismissed as an attempt to appeal (see also *Breitkreutz (Re)*, 2019 ABASC 38). In its analysis, the AB Commission relied on *Rankin (Re)* from Ontario discussed above, and stated in respect to section 214(1):

> 20 Section 214(1) is typically used in circumstances where new facts emerge or a new law is enacted that compels a change to an existing order; see for example *Re Juniper Fund Management Corp*. (2011), 34 O.S.C.B. 12103 at para. 33. The provision should be used sparingly, and not resorted to as an alternative to an appeal or to retry a case where there is disagreement with the result.

60. A similar statement of the law was articulated in *Spaetgens (Re)*, 2017 ABASC 163. There, the applicant applied to vary a sanctions order made against him in the same year. Part of the sanctions order were various 15-year market access bans. The applicant wanted some exceptions carved out so that he could pursue some investing opportunities. Staff opposed the application, arguing in part that the application was outside the scope of section 214(1) because the applicant did not provide any new or compelling evidence. Staff also argued the application, even taken in the most generous light, was premature. The AB Commission dismissed the application and set out the test as follows:

> 16 Section 214(1) of the Act authorizes the ASC to vary a decision "if [it] considers that it would not be prejudicial to the public interest to do so". This provision is to be used sparingly, typically in circumstances where new facts emerge or a new law is enacted that compels a change to an existing order; it is not an alternative to an appeal nor should it be resorted to in circumstances where there is merely disagreement with the result of a particular case (*Re Kostelecky*, 2017 ABASC 44 at para. 20).

61. The Panel considers the above authorities helpful and instructive in interpreting and applying

section 158(3) of the *Securities Act*. While the provision can apply to a spectrum of decisions made by Panels of the FCAA (and its predecessor entity, the Commission), the authorities cited make clear that it should be used sparingly and in limited circumstances.

62. Generally, when a party discovers new evidence after a hearing that was not reasonably available at the time of a hearing, and that new evidence is compelling in the sense that it would have changed the result of the decision, then that party can apply pursuant to section 158(3) to have a Panel of the FCAA revoke or vary the decision. In a similar fashion, if there comes to exist new law, be it legislative or jurisprudence based, that would undermine the legitimacy of a previous decision, then a section 158(3) application can be made.

63. In addition, if there is a significant change in circumstances based on compelling evidence such that a Panel can be persuaded to revoke or vary aspects of a previous decision then a section 158(3) application can be made.

64. A section 158(3) application, however, is not an appeal and parties should take care not to invoke it in an attempt to appeal a previous decision. The provision should not be used as an attempt to relitigate or retry matters that have already been decided. Again, the provision should be used sparingly and in limited circumstances, such as the ones set out in the case law above.

c. No Authority to Grant the Type of Relief in the Circumstances

65. Having analyzed the applicable law pertaining to section 158(3) applications, we turn now to the merits of Mr. Bergen's Application. Presenting some difficulty is the fact that the Application does not directly identify the decision or decisions Mr. Bergen wants us to revoke or vary, does not clearly set out how the decision(s) should be varied if a variation is proper, and in part relies on a mistaken or confused understanding of the applicable law and available relief. That said, at its core the Application seems to seek revocation or variation of the Decisions outlined above with hopes that after they are revoked or in some way varied, Mr. Bergen's current regulator will no longer require him to disclose the Decisions and their details.

66. Of key importance, the Application seeks to revoke or vary the Decisions in a situation where Mr. Bergen *has conceded that he is not challenging the merits of the Decisions*. Mr. Bergen suggests that the Decisions, correct as they are, should nevertheless be revoked based in part on his good behaviour since those Decisions were handed down and based on the fact that he no longer resides in Canada and is therefore no longer of risk to investors in Canada. He says the revocation will help him move on with his life. In light of the law, Mr. Bergen's submissions are not relevant considerations in these circumstances. Fundamentally, the submissions do not address the critical fact that the underlying conduct occurred and the Commission's Decisions in respect to that conduct are correct and unchallenged. No precedent was

provided to us where section 158(3) or an equivalent provision was interpreted to apply in this type of situation. In the Panel's view, and based on the authorities cited above, section 158(3) is not intended to be utilized in this fashion. This is not one of the limited circumstances that section 158(3) was meant to address.

67. It is also important to note that in respect to the Sanctions Order, the various 10-year cease trade orders have long expired. There is nothing in this regard to either revoke or vary. And, in respect to the administrative penalty and costs orders, Mr. Bergen has admitted that these amounts remain unpaid and outstanding, and that he is willing to pay them. As such, Mr. Bergen is not asking us to revoke or vary any aspect of the Sanctions Order either.

68. In the end, based on the applicable law, the Panel is of the view that there is no basis in fact or authority in law to revoke or vary any of the Decisions in the circumstances. Mr. Bergen's application misapprehends the nature of section 158(3) and the authority of this Panel to provide him with the relief he requests. In addition, it is the Panel's view that revoking or varying the Decisions would be prejudicial to the public interest. Mr. Bergen's conduct as outlined in the Decisions was serious and had significantly detrimental consequences for many investors in Saskatchewan. While Mr. Bergen has testified that he has since changed his behaviours and has learned from his wrongdoings, this in no way undermines the Decisions or changes the circumstances accurately captured by the Decisions.

d. The Application Would Fail in Any Event

69. In the event the Panel is incorrect in its conclusion that it does not have authority pursuant to section 158(3) to revoke or vary the Decisions in the circumstances, the Panel would nevertheless decline to exercise its discretion to do so.

70. Of all the situations cited in the above authorities, perhaps the line of cases that is closest to the present situation would be of the kind found in *Orsini (Re)* (1997), 20 OSCB 6068 [*Orsini (Re)*] and *Friesen (Re)* (1999), 22 OSCB 2427. In these cases, individuals subject to sanctions orders brought applications to vary the sanctions orders in ways that would bring them more flexibility in pursuing livelihoods. A key distinction in the cited cases from the present case is that the applicants in the cited cases were still subject to sanctions that prohibited them from, amongst other things, trading in securities for a certain period of time. As already noted, Mr. Bergen is no longer subject to a cease trade order.

71. As cited above, in *Orsini (Re)*, the ON Commission reiterated seven criteria to consider in respect to such an application:

> 1. As a general rule, [a sanctions order] is intended to run its course. Varying or rescinding the order should be the exception rather than the rule.

2. The applicant must show by a sufficient course of conduct he is a person to be trusted.

3. The applicant must show that his conduct is unimpeached and unimpeachable which can best be established by evidence of trustworthy persons, especially persons with whom the applicant has been associated since [the sanctions order].

4. A sufficient period of time must have elapsed before an application for readmission will be granted.

5. The applicant must show by substantial and satisfactory evidence that it is highly unlikely that the applicant will misconduct himself in future if the applicable order is revoked or rescinded.

6. The applicant must show that his or her past conduct has been entirely purged.

[7. The applicant's professional accreditations, if any, remain current]

72. In considering the criteria, it is clear that Mr. Bergen's Application is wanting. For example, the only evidence provided in support of the Application was testimony from Mr. Bergen himself. Mr. Bergen did not provide evidence from any trustworthy persons, including those he has been associated with since the time of the Decisions, to help show that he has an unblemished record since the Decisions. He called no other witnesses, nor did he provide any affidavit evidence of any other person in support of the Application. He did not provide other evidence or documentation, such as letters of support or evidence from his current regulator that would help demonstrate that his conduct since the time of the Decisions is unimpeached and unimpeachable. In short, Mr. Bergen did not provide the type of substantial and satisfactory evidence necessary to establish that he will not commit misconduct in the future such that the Panel could find it would not be prejudicial to the public interest to revoke or vary the Decisions.

73. In addition, the Panel is not convinced from Mr. Bergen's Application and testimony that he has taken full responsibility for his actions or fully appreciates the gravity of his conduct. Mr. Bergen's Application continued to attempt to deflect blame for his wrongdoing from himself to others. Similarly, in his examination-in-chief, he attempted to deflect blame and present facts that were counter to the findings in the Decision. For example, Mr. Bergen minimized his conduct by suggesting that all the investments he provided advice on were approved by his employer, even though the findings in the Decisions stated that some of the investments were not approved and he sold them off-book. It was only in cross-examination that Mr. Bergen began to make more complete admissions and concessions on these points. This is all very concerning to the Panel and weighs heavily against granting any relief.

74. Finally, Mr. Bergen has not shown that his past conduct has been entirely purged. Mr. Bergen still owes $50,000 as an administrative penalty and over $5,000 in costs. In over 20 years since the Decisions were handed down, Mr. Bergen made the choice not to pay any money whatsoever towards these outstanding amounts and provided no good reason why the amounts have not been paid. Mr. Bergen

eventually admitted these amounts were outstanding, but only after Staff raised this fact in Staff's written submissions. The Application itself was silent on this point. This all tends to provide further evidence of the fact that Mr. Bergen has not taken full responsibility for his actions and does not appreciate the gravity of his actions.

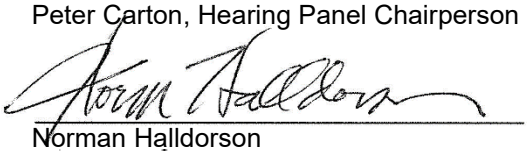
75. Mr. Bergen did testify that he provided $30,000 to a fund that was to compensate some of the investors as a part of a civil action, but in cross-examination he conceded that he did not provide any documentary evidence to prove this was the case.

76. In the end, considering the nature of Mr. Bergen's Application, including the evidence he provided (as well as did not provide), the Panel is of the view that it would be prejudicial to the public interest to grant the Application. The onus was on Mr. Bergen to establish by evidence that he is entitled to the relief sought; however, he has failed meet that onus. The Panel, therefore, will not exercise its discretion to revoke or vary the Decisions.

77. This is a unanimous decision of the Hearing Panel.

Dated at Regina this 17th day of June, 2021.

Peter Carton, Hearing Panel Chairperson



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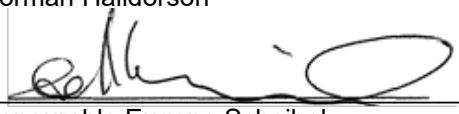

Honourable Eugene Scheibel