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Citation: Canada Cannabis Corporation (Re), 2022 ONSEC 9
Date: 2022-04-28
File Nos.: 2019-34 and 2020-13

IN THE MATTER OF
CANADA CANNABIS CORPORATION, CANADIAN CANNABIS CORPORATION, BENJAMIN WARD, SILVIO SERRANO, and PETER STRANG

REASONS AND DECISION

Hearing:	May 19 and July 5, 2021	
Decision:	April 28, 2022	
Panel:	Cathy Singer	Commissioner and Chair of the Panel
	Mary Anne De Monte-Whelan	Commissioner
	Craig Hayman	Commissioner
Appearances:	Simon Bieber Robert Stellick	For Silvio Serrano
	William Jones	For Canada Cannabis Corporation and Canadian Cannabis Corporation
	Melissa MacKewn Michael Byers	For Benjamin Ward
	James Camp	For Peter Strang
	Frank Addario Lynda Morgan Robert Gain	For Staff of the Commission
	Nader Hasan	For Amicus Curiae

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REASONS AND DECISION

I. OVERVIEW

[1] Silvio Serrano, a respondent in this enforcement proceeding, brought a motion and application before the Commission after he and his co-respondents received disclosure from Staff of the Commission (**Staff**). Staff's disclosure included redacted transcripts of the compelled interview of another respondent, Benjamin Ward, with the redactions labelled "By Confidential Order of the Commission" (the **Confidential Order**).

[2] Serrano seeks, among other things, that he be provided with the Confidential Order and any written decision or reasons (the **Confidential Reasons**) that accompanied the Confidential Order (the **Motion**). To the extent that the Confidential Order precludes the relief sought by Serrano in the Motion, he also seeks a variation or revocation of the Confidential Order to allow for such relief (the **Application**).

[3] A one-member panel consisting of Commissioner Raymond Kindiak presided over all hearings in relation to the Motion and Application that took place prior to May 2021. After Commissioner Kindiak's term as a Commissioner ended on April 18, 2021, the parties were notified that a newly constituted panel would be assigned to consider the merits of the Motion and Application.

[4] Serrano subsequently brought another motion seeking an order that Commissioner Kindiak's term of office be extended until he is able to render a decision on the Motion and Application, and also seeking an order declaring that the new panel is without jurisdiction to hear the Motion and Application or that it is otherwise inappropriate for the new panel to hear the Motion and Application unless the matter is heard *de novo* (the **Panel Composition Motion**).

[5] Upon consideration of the parties' submissions on these issues, we find:

a. the Panel Composition Motion is dismissed, and the new panel is properly constituted to consider the Motion and Application; and

b. the respondents shall be provided with redacted versions of the Confidential Order and its accompanying Confidential Reasons.

III. BACKGROUND

[6] Staff commenced this enforcement proceeding on September 13, 2019, alleging that Canada Cannabis Corporation, Canadian Cannabis Corporation (the **Corporations**), Ward, Serrano and Strang engaged in conduct that they knew or reasonably ought to have known perpetuated a fraud in contravention of the Ontario *Securities Act*[1] (the **Act**).

[7] Staff initially provided disclosure to the respondents in October 2019. The initial tranche of disclosure did not include the transcripts of Staff's compelled interviews with Ward (the **Ward Transcripts**). Serrano requested the Ward Transcripts on November 4, 2019. The Ward Transcripts were disclosed to the respondents in redacted form on April 7, 2020. The redactions to the Ward Transcripts were marked "By Confidential Order of the Commission".

[1] RSO 1990, c S.5

[8] On April 29, 2020, Serrano brought the Motion requesting that the respondents be provided with the following:

a. a copy of the Confidential Order;

b. any written decision or reasons in support of the Confidential Order;

c. materials filed by Staff or any other parties on any motion or application to redact the Ward Transcripts;

d. the statutory basis authorizing Staff and/or the Commission to redact portions of the Ward Transcripts;

e. the statutory basis on which the Confidential Order was sought and made; and

f. all information contained in or related to the Confidential Order that is not directly proscribed by its terms

(together, the **Confidential Information**).

[9] On May 1, 2020, Serrano brought the Application to vary or revoke the Confidential Order to the extent that the terms of the Confidential Order preclude the relief sought in the Motion.

[10] Prior to this panel's involvement, considerable time and focus were placed on how the Motion and Application ought to be heard, given the confidential nature of the Confidential Order and the relief sought by Serrano. On August 5, 2020, the Commission issued a preliminary order (the **August 5 Order**) stating that the hearing of the Motion and Application would proceed in a number of "phases":

a. the "First Non-Confidential Phase" in the presence of all parties and the public;

b. the "Confidential Phase", excluding the public and respondents, with an amicus curiae (**Amicus**) appointed and present to represent the interests of justice; and

c. the "Second Non-Confidential Phase", again in the presence of all parties and the public.

[11] The reasons for the August 5 Order were issued on May 18, 2021.[2]

[12] Pursuant to the August 5 Order, Nader Hasan of Stockwoods LLP was appointed as Amicus to represent the interests of justice, and, as directed, to assist with the panel's determination of the issues raised in the Motion and Application.

[13] The First Non-Confidential Phase was held on August 28, 2020, providing the parties with the opportunity to make submissions before the commencement of the Confidential Phase. The panel ordered that the Confidential Phase would be held on September 10 and 16, 2020.[3]

[14] The Confidential Phase was not heard at that time due to the identification of a number of procedural issues related to the Motion and Application. The

[2] *Canada Cannabis Corporation (Re),* 2021 ONSEC 13, (2021) 44 OSCB 4569
[3] (2020) 43 OSCB 6897

Confidential Phase was later scheduled to proceed on May 19, 2021. All parties were provided with notice of the change in dates.

[15] On May 4, 2021, approximately two weeks before the May 19 Confidential Phase was scheduled to commence, the parties were advised by the Registrar that the term of Commissioner Kindiak, who had previously presided over hearings related to the Motion and Application, had ended and a three-member panel (the **New Panel**) had been assigned to consider the Motion and Application.

[16] Shortly before the hearing of the May 19 Confidential Phase, Serrano and Strang advised the other parties of their opposition to the change in panel composition. The New Panel was notified of the issue by Amicus at the outset of the Confidential Phase. At that time, the New Panel decided that the Confidential Phase would proceed as scheduled and the respondents would have the opportunity to raise their concerns at the hearing of the Second Non-Confidential Phase.

[17] On June 7, 2021, Serrano brought a motion for a determination that, among other things, the New Panel was without jurisdiction to hear the Motion and Application. The Panel Composition Motion was heard before the New Panel on July 5, 2021, during the Second Non-Confidential Phase, as were any remaining submissions on the Motion and Application.

[18] Given the nature of the Confidential Information and the constraints on Staff and Amicus' ability to make submissions on the public record, at the commencement of the Second Non-Confidential Phase, Staff and Amicus requested, and the New Panel agreed, that an *in-camera* and *ex parte* portion of the Panel Composition Motion be held immediately following the public Second Non-Confidential Phase to allow them to make additional submissions.

[19] Any submissions made in the *in camera* and *ex parte* portions of the Motion and Application (and part of the Panel Composition Motion) shall remain confidential except to the extent we believe that references to them in these reasons do not compromise the interests that the Confidential Order and Confidential Reasons are designed to protect. However, even with the constraints imposed by the confidentiality of certain submissions, we believe that our reasons provide the parties with sufficient information to understand the basis for our decisions.

IV. ANALYSIS

[20] We first address the Panel Composition Motion in our analysis below given that its determination is a prerequisite to the New Panel being able to consider and render a decision on the merits of the Motion and Application.

A. Panel Composition Motion

[21] In respect of the Panel Composition Motion, Serrano seeks the following:

a. an order declaring that Commissioner Kindiak's term of office be extended pursuant to s. 4.3 of the *Statutory Powers Procedure Act*[4] (**SPPA**) until a decision is rendered on the Motion and Application;

b. an order that Commissioner Kindiak remains the panel for the remainder of the Motion and Application; and

[4] RSO 1990, c S.22

c. an order declaring that the New Panel is without jurisdiction to hear the Motion and Application or that it is otherwise inappropriate for the New Panel to hear the Motion and Application unless the matter is reheard *de novo.*

[22] At the outset of the hearing of the Panel Composition Motion, Serrano and the Corporations requested as a preliminary issue that the Second Non-Confidential Phase of the Motion and Application be deferred until such time as the respondents received sufficient information concerning what had transpired during the Confidential Phase of the Motion and Application, so as to be able to fully understand the prejudice, if any, that would be caused by a change in panel composition. They submitted that only at that point would they be able to determine what, if any, submissions they may wish to make in the Second Non-Confidential Phase.

[23] We declined this request. Commissioner Kindiak's preliminary procedural rulings set out the unique process to be followed in the Motion and Application with a view to maximizing fairness to all parties. The process, which was determined following submissions by the parties, included a Confidential Phase and the appointment of Amicus to balance the need to protect the Confidential Information and the rights of the respondents to participate in the Motion and Application. We understand that the respondents do not have the benefit of knowing what transpired in the Confidential Phase, but those are the constraints imposed by the process.

[24] While not a complete solution, the August 5 Order includes a mechanism by which the respondents or Amicus can seek leave to have information provided to the respondents. For the sake of clarity, we would like to correct the record with respect to the Chair's comment during the July 5 hearing that "no requests have been made to the Panel with respect to leave to communicate with the other parties from Amicus". This comment was intended to convey that no such requests had been made that are pending before the New Panel. We understand that Amicus had made requests of the previous panel, which were denied.

[25] There are two main issues before us with respect to the Panel Composition Motion:

a. does s. 4.3 of the SPPA operate to automatically extend Commissioner Kindiak's term as a Member of the Commission until the completion of the Motion and Application? and

b. do the SPPA and the principles of procedural fairness preclude the New Panel from hearing the remainder of the Motion and Application given Commissioner Kindiak's participation in preliminary matters related to the Motion and Application?

[26] We consider each of these issues in turn.

1. Does section 4.3 of the SPPA operate to automatically extend Commissioner Kindiak's term until the completion of the Motion and Application?

[27] The SPPA, which applies to proceedings before the Commission, prescribes a process for the continuation of a hearing after the expiry of the term of a member of the Commission. Specifically, s. 4.3 of the SPPA provides that:

> "If a term of office of a member of a tribunal who has participated in a hearing expires before a decision is given, the term shall be deemed to continue, but only for the purpose of participating in the decision and for no other purpose."

[28] The purpose of s. 4.3 is to enable a panel member who has participated in a hearing to continue if his or her term expires before a decision is given, thus avoiding the necessity of hearing a matter *de novo*.[5]

[29] Serrano submits that the language in s. 4.3 is mandatory as it states that the term of a member who has participated in a hearing "shall" be deemed to continue for the purpose of deciding the hearing.[6]

[30] Serrano submits that the previous panel, comprised of Commissioner Kindiak, plainly participated in the Motion and Application by virtue of his participation in preliminary hearings related to the Motion and Application. Serrano submits that the term "participated" should be interpreted in accordance with its ordinary meaning and does not require the hearing of evidence,[7] though Serrano argues Commissioner Kindiak did review evidence and hear submissions on both the process and the merits of the Motion and Application.

[31] Serrano further submits that the Motion and Application are hearings brought within the larger enforcement proceeding, and every aspect of the Motion and Application must be considered as part of one hearing. Therefore, Commissioner Kindiak's term should have been deemed to be extended solely for the purpose of rendering an ultimate decision on the Motion and Application. If Commissioner Kindiak cannot be brought back to hear the remainder of the Motion and Application, Serrano submits that the New Panel is without jurisdiction to hear the Motion and Application and the Motion and Application must be heard *de novo*.

[32] The Corporations and Strang adopt Serrano's position on the Panel Composition Motion. Strang submits that the New Panel is without jurisdiction to take over the Motion and Application from Commissioner Kindiak unless it can find a statutory justification to do so. Ward takes no position on the Panel Composition Motion.

[33] Staff opposes the Panel Composition Motion on the basis that the relief sought is impractical and unnecessarily costly to the parties. Staff proposes that other less dramatic remedies than those sought by Serrano would meet the dual principles of fairness and efficiency.

[34] Staff submits that s. 4.3 of the SPPA is a permissive and remedial provision (rather than mandatory) and is intended to enable continued involvement and participation of a panel member seized of a matter whose term is expiring if the matter has progressed such that the appointment of a new panel member at that time would cause disruption to the hearing, resulting in undue delay and

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[5] *Piller v Assn. of Land Surveyors (Ontario),* 160 O.A.C. 333, 2002 CarswellOnt 1925 (Ont. C.A.) (***Piller***) at para 50
[6] *Piller* at paras 46-47 and 51
[7] *Piller* at paras 46-47 and 51

expense. Staff points to a number of prior tribunal and court decisions that have treated s. 4.3 as permissive rather than mandatory.[8]

[35] Staff also submits that previous Commission case law has confirmed that the same panel does not need to hear all aspects of a proceeding (i.e., the panel that presides over a preliminary motion hearing need not necessarily be the panel that presides over the hearing on the merits in the same proceeding), including pre-hearing management rulings and orders.[9] However, future panels are expected to remain bound by procedural rulings of previous panels and are not expected to consider issues that have already been dealt with. The submissions put before Commissioner Kindiak during the Motion and Application were primarily focused on the procedural aspects of the hearing, particularly how the Motion and Application ought to be heard given the constraints imposed on Staff by the Confidential Order. It follows that if the New Panel were to find that all of the previous panel's rulings were procedural in nature, the New Panel would be expected to be bound by those procedural rulings.

[36] Both Serrano and Staff point to the Commission's *MRS Sciences*[10] decision in support of their respective positions on the proper application of s. 4.3 of the SPPA.

[37] In *MRS Sciences*, a new panel was appointed by the Secretary of the Commission to preside over the sanctions hearing in an enforcement proceeding when the term of the panel who presided over the merits hearing expired. The respondents argued that the same panel must hear both the merits and sanctions as they are one hearing under s. 4.3 of the SPPA. The Commission adopted Staff's view that each of the merits hearing and the sanctions hearing was a separate hearing within the larger proceeding, as opposed to part of a single hearing. The Commission also concluded that the *audi alteram partem* principle ("he who hears must decide") did not require that the same panel preside over both the merits and sanctions hearings.

[38] The Divisional Court upheld the Commission's decision, determining that there was not one correct answer to be found but rather the standard to be applied was one of reasonableness. On the facts and circumstances of that case, the Court found that "one possible, and reasonable, conclusion is that the merits and sanctions hearings are two stages of a hearing, but that it was not the only reasonable interpretation",[11] ultimately concluding that the Commission's interpretation was a reasonable one as well.[12] The dissent in the Divisional Court decision stated that the Commission's decision was not reasonable and that the merits and sanctions hearings were one hearing. The Court of Appeal concluded that the Commission's interpretation was reasonable, and that there was no procedural unfairness or violation of *audi alteram partem* in the Commission's

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[8] See *Attaran v York University,* 2019 HRTO 642 at paras 42 and 77; *Ontario Securities Commission v MRS Sciences Inc.,* 2015 ONSC 6317 (***MRS Sciences – Div Ct***) at para 25; *Brooks v Ontario Racing Commission*, 2016 ONSC 1136 at para 11 and 59; and *Law Society of Upper Canada v Karen Lea Crozier,* 2004 ONLSAP 4 at para 46

[9] *Cheng (Re),* 2018 ONSEC 1, (2018) 41 OSCB 657 (***Cheng***)

[10] *MRS Sciences Inc (Morningside Capital Corp) (Re)*, 2011 ONSEC 34, (2011) 34 OSCB 12288 (***MRS Sciences***)

[11] *MRS Sciences – Div Ct* at para 40

[12] *MRS Sciences – Div Ct* at para 46

decision to constitute a different sanctions panel after the merits decision was issued.

[39] Serrano submits that *MRS Sciences* is distinguishable from this case as the factors that were outlined in the decision as supporting the idea that merits and sanctions hearings should be separated do not apply to motions. Those factors include:

a. merits and sanctions hearings are regularly heard separately, often months apart, as opposed to motions where there is less concern of having motions extend for many years;

b. the issues before the decision-makers in merits and sanctions hearings are different, and a sanctions panel cannot reopen findings made by a merits panel, whereas a motion is less likely to have multiple "baskets" of relief requested; and

c. merits hearings can be lengthy and it is not uncommon for a Commissioner's term to expire during the hearing or deliberation period, and so requiring the same Panel to sit on a merits *and* sanctions hearing would not be appropriate.[13]

[40] Based on the above, Serrano argues there is no support for the change in composition of the panel before the conclusion of the Motion and Application.

[41] We point to the *MRS Sciences* decision for the proposition that s. 4.3 of the SPPA must be interpreted based on the facts and circumstances of each case to give effect to its purpose. The purpose of the section is to permit a panel member to continue sitting as a panel member following the expiry of his or her term if to do so would prevent a hearing from being unnecessarily disrupted. A hearing would be disrupted if a term expires while the member is hearing a matter, and unfairness would result if the matter had progressed to a point that any new member would not have the benefit of hearing the evidence and arguments by stepping in at a later point in time.

[42] We determine in the circumstances that the New Panel was the only panel hearing submissions and reviewing evidence on the merits of the Motion and Application, separate and distinct from the preliminary procedural matters in which Commissioner Kindiak participated and on which he made rulings.

[43] Commissioner Kindiak's rulings stand on their own. He made his rulings after working through unprecedented procedural items with the parties and setting out a process for reaching and holding a hearing on the merits of the Motion and Application. Even if Commissioner Kindiak received written evidence and submissions on substantive aspects of the Motion and Application while considering procedural matters, he did not rule on them, and no oral evidence was adduced before him. Rather, the merits of the Motion and Application were fully argued before the New Panel at the May 19 and July 5 hearings, where the parties had a full opportunity to make submissions and submit any evidence as they saw fit.

[44] Commissioner Kindiak's participation in the Motion and Application was limited to his ruling on preliminary procedural matters. He participated in and decided

[13] *MRS Sciences* at paras 34, 44-45 and 50-51; *MRS Sciences – Div Ct* at para 42

those matters prior to the expiry of his term. His term expired before the merits of the Motion and Application was to be heard. In our view, 'participation' must be considered in context, and Commissioner Kindiak's participation in the Motion and Application did not extend to his participating in the merits portion of the Motion and Application. We therefore determine that he did not participate in the Motion and Application to the extent necessary to trigger s. 4.3 of the SPPA.

[45] Consistent with the Commission's practices and prior decisions, we remain bound by Commissioner Kindiak's prior procedural rulings, including the August 5 Order, thereby avoiding the risk of added delay, expense and conflicting decisions, while enabling us to hear and decide on the merits of the Motion and Application.

[46] While we do not have to decide the matter, if we were to have found that Commissioner Kindiak was seized of the Motion and Application following the expiry of his term, it is our view that the New Panel would not have the authority to order that Commissioner Kindiak's term be extended by virtue of s. 4.3 of the SPPA. The authority to assign panels lies with the Secretary to the Commission, and in circumstances where a Commissioner is seized of a matter, the Secretary may determine that their term is deemed to continue for the purposes of continuing with that matter. Individual panels do not make those decisions. Accordingly, the only viable remedy would have been to commence the Motion and Application *de novo.*

[47] Given our above finding, we do not need to consider the additional submissions made by the parties, though we do so in the section below for completeness.

2. Do the SPPA and the principles of procedural fairness preclude the New Panel from hearing the remainder of the Motion and Application given Commissioner Kindiak's previous participation?

[48] The Act, the SPPA and the Commission's *Rules of Procedure and Forms*[14] (the **Rules**) are silent on whether different panels can preside over different aspects of a proceeding before the Commission.

[49] Serrano submits that a change in composition of the panel a year into the Motion and Application and before its completion is a breach of his procedural fairness rights, the reasonable expectations of the parties, and the core principle of *audi alteram partem,* which requires that the individual or panel who hears evidence and submissions in a matter – and only that individual or panel – decide its outcome.[15]

[50] Serrano cites *Piller* for the proposition that "procedural fairness precludes a tribunal member from participating in the making of a decision if the member has not fully heard the matter".[16]

[51] Serrano submits that the New Panel is thus without jurisdiction to hear the remainder of the Motion and Application and the only fair result to him and his co-respondents is to restart the Motion and Application anew.

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[14] (2019), 42 OSCB 9714
[15] *Doyle v Canada (Restrictive Trade Practices Commission)* (Fed CA) (***Doyle***) at para 13
[16] *Piller* at para 52

[52] Staff submits that a *de novo* hearing is too extreme a solution, and that a rehearing in writing is appropriate in the circumstances to regularize the proceedings. Staff proposes that the New Panel order a rehearing of the Motion and Application in its entirety based on the written evidentiary record, subject to the New Panel's discretion to require further evidence be called. Staff argues that this would respect the dual principles of fairness and efficiency in the circumstances.

[53] Amicus does not take issue with Staff's proposal to regularize the proceedings. Amicus acknowledges that the prior orders and rulings made by Commissioner Kindiak were procedural in nature. However, Amicus asserts that Serrano does not have the benefit of knowing what transpired during the confidential portions of the Motion and Application, and so he cannot know whether he has been prejudiced by the change in panel composition.

[54] We are of the view that the same panel need not hear all aspects of a matter to satisfy the principle of *audi alteram partem*, including where one panel presides over and makes pre-hearing management rulings and orders and another panel presides over and decides the merits, depending on the specific facts and circumstances of the case.

[55] In the absence of specific rules laid down by statute or regulation, the Commission is empowered to control its own procedure, subject to the requirements of natural justice and common law. Sections 25.0.1 and 25.1 of the SPPA expressly recognizes the Commission's authority to determine its own procedure, by empowering it to make orders and rules governing practice and procedure before it.

[56] Tribunals are entrusted with ensuring a fair and expeditious hearing that meets the requirements of natural justice. The Federal Court has observed that in every case a tribunal will have to identify the appropriate procedure to be followed, and that procedure must be fair.[17] While the principle of *audi alteram partem* is fundamental, it is not inflexible and is dependent on the overall context.[18]

[57] As noted above, the Commission has confirmed that the same panel does not need to hear all aspects of a case. For example, in *Cheng,* the Commission encouraged panels, where appropriate, to make prehearing decisions on discrete issues that do not relate to the allegations on the merits where it is efficient to do so. In that case, Cheng brought a pre-hearing motion seeking a declaration that certain evidence was privileged. Staff sought to defer the privilege issue to the hearing on the merits, questioning whether a differently constituted panel had jurisdiction to make pre-hearing evidentiary rulings. The Commission reviewed analogous criminal and civil cases and concluded that Staff's concern was unfounded. The legislation and the Rules did not require the same panel to hear all aspects of a case, including appropriate pre-hearing management rulings and orders.[19] Judges in criminal and civil courts have similar powers.[20]

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[17] *Canada (Canadian Human Rights Commission*) *v Canada (Attorney General)*, [2013] 4 FCR 545 at paras 148-149

[18] *Hollis v Dow Corning Corp*, [1995] 4 SCR 634 at para 33

[19] *Cheng* at para 13

[20] See, for example *Cheng* at para 12; *Hawley v North Short Mercantile Corp*, 2009 ONCA 679 at paras 25-26; and *R v Victoria*, 2018 ONCA 69 at para 60

[58] For the reasons above, we find that in the circumstances Commissioner Kindiak made discrete preliminary procedural rulings that do not interfere with the New Panel's jurisdiction to hear and render a decision on the merits of the Motion and Application. In our view, the fundamental question is whether having two panels preside over different parts of the Motion and Application, when the previous panel is no longer a Commissioner, is inconsistent with the rules of natural justice and in particular the *audi alteram partem* principle. We say it is not. We find it entirely consistent with the Commission's efforts to conduct proceedings in a just, expeditious and cost-effective manner.

[59] We understand the unique circumstances of this case mean that information is necessarily withheld from certain parties. In addition, the appointment of Amicus and the intricacies that come with conducting a portion of a proceeding *in camera* and *ex parte* have resulted in procedural issues which have caused delay in hearing the merits of the Motion and Application. These issues are beyond the control of any of the participants in the matter and do not change our conclusion that Commissioner Kindiak presided over pre-hearing procedural matters and only made procedural rulings.

[60] As we have decided that Commissioner Kindiak's rulings were limited to procedural issues only, we do not think that a rehearing in writing is necessary to "regularize" the proceedings. We are bound by the procedural rulings of Commissioner Kindiak and followed the process laid it out in the August 5 Order when it came to hearing the Motion and Application.

[61] Additionally, we reviewed all the evidence, and all of the written submissions and transcripts relating to the Motion and Application that were filed prior to our appointment as the New Panel. Given that there was no oral testimony provided on the Motion and Application, we find that there are no concerns about Commissioner Kindiak being better situated than we are to make a decision on the Motion and Application. We have not identified any prejudice or unfairness that would result to the respondents in these circumstances.

[62] We find that a *de novo* hearing, or a rehearing based on a written record, would only serve to add further unnecessary delay and expense, and unfairness to the parties.

3. Conclusion

[63] For the above reasons, we dismiss Serrano's Panel Composition Motion and confirm that the New Panel will consider the merits of the Motion and Application while being bound by the prior procedural rulings of Commissioner Kindiak.

B. Disclosure Motion and Section 144 Application

[64] We now turn to our disposition of the Motion and Application.

[65] As provided in his Notice of Motion dated April 29, 2020, Serrano requests that the respondents be provided with the Confidential Information.

[66] As provided in his Notice of Application dated May 1, 2020, Serrano seeks an order pursuant to s. 144 of the Act varying or revoking the Confidential Order to allow for the respondents to be provided with the Confidential Information if the Confidential Order precludes the relief sought in the Motion.

[67] There are four main issues on the Motion and Application:

a. does the Confidential Order allow for the relief requested in the Motion?

b. does the Commission have the jurisdiction to revoke or vary the Confidential Order pursuant to s. 144 of the Act?

c. should the respondents be provided with a copy of the Confidential Order and related documents and information in Staff's possession, or any part of the Confidential Order or Confidential Information? and

d. should further information regarding the legal basis for the redaction of the Ward Transcripts be disclosed?

[68] We consider each of these issues in turn. The New Panel received both public and confidential submissions on these issues. We find that it is necessary in some instances to refer to confidential submissions so the parties and public have the ability to understand our reasoning. Where we do so, we believe we are in no way compromising the interests the Confidential Order and Confidential Reasons are designed to protect. The confidential submissions themselves shall remain confidential.

1. Does the Confidential Order allow for the relief requested in the Motion?

[69] We must first determine whether the Commission has jurisdiction to grant the relief sought in the Motion or whether it is precluded by the terms of the Confidential Order and therefore a variation under s. 144 of the Act is necessary.

[70] Serrano submits that a s. 144 order is unnecessary as fairness principles require that he be provided with sufficient information to understand and challenge the Confidential Order. He submits that any information must be disclosed if it does not directly compromise the privilege or interest the Confidential Order is designed to protect. Strang supports Serrano's position.

[71] Ward's position is that the Commission has already determined that the Confidential Order prohibits the disclosure of the information sought by Serrano and that a s. 144 variation is therefore necessary.

[72] Staff submits that the Commission has jurisdiction over the scope and extent of confidentiality and can grant the relief sought without the need to vary the Confidential Order under s. 144.

[73] The Act, the SPPA, the *Tribunal Adjudicative Records Act, 2019,*[21] and the Rules are silent on what the Commission should do when a party requests access to confidential records. In the absence of any legislative language governing this request, we find that the Commission's inherent authority over its own procedure applies.

[74] We find that the Confidential Order is not a final order of the Commission and therefore an order pursuant to s. 144 of the Act is unnecessary to grant the relief sought by Serrano. We come to this conclusion based on the following.

[75] First, the Confidential Reasons contemplate the possibility that the respondents might move to challenge the non-disclosure of the Confidential Information. The

[21] S.O. 2019, c. 7, Sch 60

panel who issued the Confidential Order clearly envisaged the possibility that the respondents might move to challenge the redactions, leaving open the possibility for future orders, although the panel did not prescribe a procedural mechanism for doing so. This leaves the New Panel with the ability to make a new order.

[76] Second, there is a firmly established principle in civil and criminal proceedings that any person affected by an order of the court, granted on an *ex parte* basis, has the right to seek to have the order set aside once the order comes to their attention.[22] This principle should be equally applicable in this case, and in these circumstances to Serrano.

[77] Despite our finding that a variation is unnecessary, we will also consider whether the Commission has jurisdiction to vary the Confidential Order under s. 144 of the Act.

2. Does the Commission have the jurisdiction to vary or revoke the Confidential Order?

[78] Section 144 of the Act states that the Commission may make an order revoking or varying a decision of the Commission if in the Commission's opinion the order would not be prejudicial to the public interest.

[79] All parties agree that the Commission has the jurisdiction to vary or revoke the Confidential Order pursuant to s. 144 of the Act in the appropriate circumstances, though there is disagreement about whether one is necessary in this case or whether the public interest test is met.

[80] In the past, the Commission has exercised its discretion to vary prior orders in circumstances in which new and material facts came to light following the granting of the initial order, where there was a change in the material circumstances underlying the order or where the prior order was later found to be manifestly unfair to a respondent.[23] An application for a s. 144 variation would not be appropriate where the applicant effectively seeks an appeal from the original order under review.[24]

[81] For the reasons stated above, we find that the Application does not amount to an appeal from the Confidential Order and the Commission has the authority to vary the Confidential Order if necessary.

[82] As we have determined that we have jurisdiction to grant the relief sought by Serrano, regardless of how it is granted, we now turn to consider what specific relief, if anything, ought to be provided to the respondents in the circumstances.

3. Should the respondents be provided with the Confidential Order and related Confidential Information, or any portion of it?

[83] Serrano seeks disclosure of the Confidential Information.

[84] Serrano submits that the public interest requires that the Commission's processes be open, intelligible, and capable of review by the courts in accordance

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[22] *R v Telus Communications Company*, 2015 ONSC 3964 at paras 5-8

[23] *Rankin (Re),* 2011 ONSEC 32 (***Rankin***) aff'd 2013 ONSC 112 at para 71; *Macquarie Capital Markets Canada Ltd (Re)*, 2018 ONSEC 12 at para 14

[24] *Pro-Financial Asset Management Inc. (Re),* 2017 ONSEC 39, at para 18; *X Inc (Re),* (2010) 33 OCSB 11380 at para 35

with administrative law principles. To the extent that the Confidential Order undermines those factors, Serrano submits it is incompatible with the public interest and must be amended to accord with the public interest.

[85] Serrano submits that the Confidential Order is overbroad as it goes further than necessary to protect the interests at stake, which is inconsistent with the duty of procedural fairness. Serrano seeks disclosure of as much information regarding the Confidential Order as he can possibly receive without specifically compromising the interests that are being protected.

[86] Strang and the Corporations adopt the submissions of Serrano. Ward submits that he is not aware of any facts or circumstances that would meet the test for variance under s. 144 of the Act.

[87] Amicus and Staff propose that the respondents be provided with a redacted form of the Confidential Order and Confidential Reasons, which they submit would protect the interests the Commission is seeking to protect while providing the respondents with sufficient information on which to make an informed decision about whether to seek access to remaining confidential materials or seek other relief.

[88] The proposed redacted Confidential Order and Confidential Reasons would provide the respondents with the following information:

a. the date of the Confidential Order;

b. the panel that issued the Confidential Order;

c. the statutory basis for the Confidential Order;

d. partial disclosure of para 1 and a summary of paras 2-4 of the Confidential Order; and

e. a summary of the content of the Confidential Reasons.

[89] The proposed redactions would not reveal any information that could be seen to compromise the interests the Confidential Order seeks to protect.

[90] We find that the respondents, and by extension the public, should be provided with as much information as possible without jeopardizing the interests that the Confidential Order seeks to protect. In that vein, we agree with Amicus and Staff that providing the respondents with a redacted copy of the Confidential Order and Confidential Reasons as proposed would achieve the appropriate balance in the circumstances. The redactions address most of the relief requested by Serrano and redact only those aspects of the Confidential Order and Confidential Reasons that we believe are necessary to protect the interests that the Confidential Order seeks to protect. We find that such an approach affords the appropriate amount of procedural fairness to the respondents in the unique circumstances of this case.

4. Should the legal basis for the Confidential Order be provided to the respondents?

[91] As part of the Motion, Serrano seeks an order requiring Staff and/or the Commission to provide the legal basis or bases authorizing the redactions to the Ward Transcripts. Serrano submits that where Staff refuses to disclose all or part of any relevant document, the principles of natural justice require that Staff

identify to the respondents the legal basis on which they have refused to make disclosure.

[92] The Confidential Order provides that the Ward Transcripts be marked "By Confidential Order of the Commission". Staff submits that "By Confidential Order of the Commission" is the legal basis for the redactions.

[93] Staff and Amicus are generally in agreement that the respondents can be provided with additional information regarding the legal bases upon which Staff have withheld the Confidential Information. However, Staff and Amicus have submitted slightly differing versions of what should properly be disclosed with respect to the legal basis or bases for the Confidential Order.

[94] First, we confirm that the legal basis for the redactions to the Ward Transcripts is the Confidential Order.

[95] We agree that in the interests of fairness, the respondents should be provided with additional information respecting the legal basis for the redactions to the Ward Transcripts, aside from the Confidential Order itself.

[96] The Confidential Order resulted from the panel's attempt to balance the interests of full disclosure against certain underlying concerns. Serrano, who was not given notice of and was not party to the motion that led to the Confidential Order, is seeking disclosure of the Confidential Information as a matter of procedural fairness. We find that the information we've outlined below with respect to the legal basis for the Confidential Order can be provided to the respondents while still protecting the interests that led to the Confidential Order and Confidential Reasons, and that it would be unfair to the respondents to not provide it to them.

[97] The Confidential Reasons do not identify privilege over any of the redacted portions of the Ward Transcripts, and no assertion of privilege was made in the *ex parte* motion before the panel who made the Confidential Order. We find the fact that the redactions to the Ward Transcripts were not made on the basis of privilege can and should be provided to the respondents.

[98] The question of relevance was raised in the Confidential Reasons where the panel states that the Confidential Order does not in any way alleviate Staff of its disclosure obligations to the respondents. The panel was clear in the Confidential Reasons that Staff would need to decide whether to provide the respondents with the Ward Transcripts, that the panel was not in any way derogating from Staff's duty of disclosure,[25] and that it was for Staff to decide whether providing the redacted transcripts fulfilled its responsibilities. Staff provided the redacted transcripts to the respondents and cited the Confidential Order as the basis for not disclosing the redacted portions of the Ward Transcripts.

[25] Rule 27(1)(a) of the Rules requires Staff to provide to every other party "copies of all non-privileged documents in Staff's possession that are relevant to an allegation". We note that the issue of relevance of the Confidential Information was not before the New Panel and we decline to make any finding to that effect.

5. Conclusion

[99] We find that it is in the public interest for the respondents to be provided with the redacted versions of the Confidential Order and Reasons proposed by Amicus and Staff, as described in paragraph 88 above.

[100] We also find that it is appropriate for the respondents to be provided with additional information respecting the legal basis for the redactions to the Ward Transcripts. We have provided information to that effect in paragraphs 94-98 above.

V. CONCLUSION AND ORDER

[101] For the reasons set out above, we conclude and will order that:

a. the Panel Composition Motion is dismissed;

b. the respondents shall be provided with a redacted version of the Confidential Order, attached as "Appendix A" to the order; and

c. the respondents shall be provided with a redacted version of the Confidential Reasons, attached as "Appendix B" to the order.

Dated at Toronto this 28th day of April, 2022.

"Cathy Singer"
Cathy Singer

"Mary Anne De Monte-Whelan"
Mary Anne De Monte-Whelan

"Craig Hayman"
Craig Hayman