CITATION: Kraft v. Ontario (Securities Commission), 2025 ONSC 2266
DIVISIONAL COURT FILE NO.: 433/24
DATE: 20250416

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Sachs, Lococo and Muszynski JJ.

BETWEEN:	)	
	)	
MICHAEL PAUL KRAFT	)	*David A. Hausman, Jonathan Wansbrough* and *Tina Cody*, for the Appellant
Appellant	)	
– **and** –	)	
	)	
ONTARIO SECURITIES COMMISSION and CHIEF EXECUTIVE OFFICER, ONTARIO SECURITIES COMMISSION	)	*Erin Hoult* and *Alvin Qian*, for the Respondents
	)	
Respondents	)	*Ryan Cookson*, for the Intervenor, the Attorney General of Ontario
	)	
	)	**HEARD in Toronto:** February 18, 2025

REASONS FOR JUDGMENT

BY THE COURT

I. Introduction

[1] The appellant Michael Paul Kraft appeals two decisions of the Capital Markets Tribunal (the "Tribunal") in regulatory proceedings brought under the *Securities Act*, R.S.O. 1990, c. S.5 (the "*Securities Act*" or the "*Act*") by the respondents the Ontario Securities Commission (the "OSC") and the Chief Executive Officer of the OSC.

[2] In the "Merits Decision" dated October 20, 2023 (reported at 2023 ONCMT 36), the Tribunal found that Mr. Kraft, the chairman of a publicly traded company, breached the prohibition against "tipping" material non-public information in s. 76(2) of the *Act*.

[3] In the "Sanctions Decision" dated July 2, 2024 (reported at 2024 ONCMT 16), the Tribunal imposed sanctions that included an administrative monetary penalty and market participation bans. The Tribunal also ordered Mr. Kraft to pay costs to the OSC.

[4] Mr. Kraft submits that the Tribunal erred in the Merits Decision, including in determining that Mr. Kraft disclosed the information other than in the necessary course of business. He asks the court to set aside the Merits Decision and dismiss the proceedings against him, or alternatively to remit the matter to another Tribunal panel for a new hearing.

[5] In the alternative, Mr. Kraft submits that the Tribunal erred in the Sanctions Decision by imposing sanctions that were not proportionate to a single instance of impugned disclosure and were punitive in nature rather than remedial and corrective.

[6] For the reasons below, we are dismissing the appeal against both decisions.

II. Background

[7] Mr. Kraft was the chairman and a director of WeedMD Inc. ("WeedMD"), a publicly traded company in the cannabis business. In 2017, WeedMD was considering an "expansion transaction" in anticipation of the liberalization of the cannabis market in Canada. The proposed transaction consisted of (i) the lease of greenhouse space from an outside party, (ii) an option to purchase the other party's property, greenhouse, and infrastructure, and (iii) the other party's agreement to lease back a portion of the property not required for WeedMD's business: Merits Decision, at para. 47.

[8] Mr. Kraft was actively involved in the expansion transaction in his role as WeedMD's chairman, including by acting as a liaison to the other board members. Prior to a board meeting to consider the proposed transaction, Mr. Kraft was provided draft documents, consisting of the lease, the option to purchase, and the leaseback agreement (the "Transaction Documents"). On October 23, 2017, without consulting WeedMD's management, Mr. Kraft provided the draft Transaction Documents by email to Michael Brian Stein, a personal friend and business colleague. Mr. Stein had previously acted as a consultant to WeedMD under a consulting agreement that had expired some years before. By return email, Mr. Stein provided comments on the lease. He also copied WeedMD's chief executive officer and chief financial officer, who forwarded the comments to WeedMD's outside lawyers. A significant change to the draft lease that Mr. Stein suggested was incorporated into the lease.

[9] In a news release dated November 22, 2017, WeedMD announced the expansion transaction. Unknown to Mr. Kraft, Mr. Stein had purchased 25,000 shares of WeedMD the day prior to the news release. Following the announcement, Mr. Stein sold the shares, making a profit of $29,345, a 43 percent return: Merits Decision, paras. 65-66.

A. OSC staff's allegations

[10] In its Statement of Allegations dated October 13, 2021, OSC staff brought regulatory proceedings against Mr. Kraft and Mr. Stein under the *Act*. The OSC staff alleged that Mr. Kraft had engaged in illegal "tipping" of material non-public information ("MNPI") about WeedMD, contrary to s. 76(2) of the *Act*, and that Mr. Stein had engaged in insider trading, contrary to s. 76(1) of the *Act*. Those provisions state:

> **Trading where undisclosed change**
> 76 (1) No person or company in a special relationship with an issuer shall purchase or sell securities of the issuer with the knowledge of a material fact or material change with respect to the issuer that has not been generally disclosed.
>
> **Tipping**
> (2) No issuer and no person or company in a special relationship with an issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the issuer before the material fact or material change has been generally disclosed. [Emphasis added.]

[11] There was no dispute that Mr. Kraft, as chairman and a director of WeedMD, was a person in a special relationship with WeedMD: see *Securities Act*, s. 76(5).

B. Merits Decision

[12] Following a ten-day virtual hearing, the three-member Tribunal panel issued its 97-page Merits Decision on October 20, 2023.

[13] As a preliminary matter, the Tribunal considered whether to admit expert evidence of two eminent corporate and securities lawyers, including with respect to the practical implications from a corporate governance perspective if a regulatory authority, after inquiry, imposed its interpretation of whether the good faith communication of MNPI by a director or officer for the purpose of obtaining advice was "necessary" in the circumstances: Merits Decision, at para. 10. The Tribunal declined to admit the evidence except to a limited extent relating to Mr. Kraft's challenge to s. 76(2) of the *Act* under the *Canadian Charter of Rights and Freedoms*,[1] referred to further below: see Merits Decision, at paras. 12-14, 30, 32, 38-39.

[14] The Tribunal found that both Mr. Kraft and Mr. Stein contravened the *Act*. The Tribunal concluded that Mr. Kraft breached the tipping prohibition in s. 76(2) when he provided the draft Transaction Documents to Mr. Stein on October 23, 2017. The Tribunal found that Mr. Stein engaged in insider trading contrary to s. 76(1) when he traded in WeedMD shares with knowledge of the tipped information: Merits Decision, at para. 335.

[15] In reaching those conclusions, the Tribunal found, at para. 196:

> [T]he planned [expansion] Transaction, including the terms of the Draft Lease and Draft Option to Purchase, constituted a material fact that Kraft selectively disclosed to Stein and that had not been generally disclosed. We also conclude that the fact of and terms of the Draft Lease, considered alone, constituted a material fact that Stein had knowledge of and that had not been generally disclosed at the time he traded.

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[1] *Canadian Charter of Rights and Freedoms, 1982*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[16] Before the Tribunal, Mr. Kraft argued that his disclosure of the draft Transaction Documents to Mr. Stein did not breach s. 76(2) because he did so in the "necessary course of business" (referred to as the "NCOB"). Mr. Kraft said that he made the disclosure to Mr. Stein to obtain his advice on the contents of the draft lease, noting that Mr. Stein had commercial real estate expertise that Mr. Kraft and WeedMD management lacked: Merits Decision, at paras. 219, 305(a).

[17] The Tribunal rejected that submission, finding that Mr. Kraft's communication of the October 2017 email to Mr. Stein was not in the NCOB: Merits Decision, at paras. 221, 330. In doing so, the Tribunal considered two preliminary issues: (i) who bears the onus of establishing whether a communication was in the NCOB, and (ii) what is the test for establishing whether a communication was made in the NCOB: Merits Decision, at para. 222.

[18] Mr. Kraft's position was that it was an element of the tipping offence that the communication was made "other than in the necessary course of business". In his submission, the onus was on the OSC to establish that element of the offence: Merits Decision, at paras. 228-229. The Tribunal disagreed. Adopting the OSC's position, the Tribunal found that disclosure "in the necessary course of business" is an exception to the general rule that MNPI may not be selectively disclosed (referred to in the Merits Decision as the "NCOB exception": see para. 243). Therefore, the onus was on Mr. Kraft to establish that the communication was made in the NCOB: Merits Decision at paras. 232, 235-36.

[19] The Tribunal also accepted the OSC's submission that the test for determining whether disclosure is made in the NCOB is an objective test: Merits Decision, at para. 247. The Tribunal rejected Mr. Kraft's position that the required test is a "subjective/objective test" that required "a subjective belief in the necessity of the disclosure, which subjective belief is objectively reasonable": see Merits Decision, at paras. 245-46.

[20] In making that determination, the Tribunal rejected Mr. Kraft's position that "*Charter* values" required the Tribunal to apply a subjective standard to determine whether disclosure was made in the NCOB. Mr. Kraft argued that the language of s. 76(2) of the *Act* was ambiguous, with the result that the Tribunal was required to apply the NCOB exception in a manner that accords with ss. 2(b) (freedom of expression) and 2(d) (freedom of association) of the *Charter*. The Tribunal rejected that submission, finding that the language of s. 76(2) was not ambiguous: Merits Decision, at paras. 260-63.

[21] Applying the above principles, the Tribunal concluded that Mr. Kraft did not provide the draft Transaction Documents to Mr. Stein in the NCOB and, therefore, the NCOB exception was not available to him: Merits Decision, at para. 279. The Tribunal further stated, at paras. 280-281:

> We have concluded that although Kraft's decision to make selective disclosure to Stein was made for a business reason – namely, his personal desire to have the benefit of his long-time friend and business colleague providing thoughts and input as a second set of eyes – that personal business reason was not equivalent to selective disclosure made in the necessary course of WeedMD's business.

> Furthermore, and despite Kraft's testimony, we find that Kraft did not actually turn his mind to whether his selective disclosure to Stein was made in the necessary course of WeedMD's business prior to making the selective disclosure.

[22] The Tribunal further explained that Mr. Kraft's decision to selectively disclose the draft Transaction Documents to Mr. Klein "was a personal decision, rather than a WeedMD decision", arising out of "his own self-described habit and preference of regularly personally consulting with Stein on business matters and was not made in the necessary course of WeedMD's business or to address any particular business requirement of WeedMD": Merits Decision, at paras. 307-8. The Tribunal also found that his "selective disclosure to Stein was done hastily, on the fly and was careless": Merits Decision, at para. 309.

[23] In the Merits Decision, the Tribunal also addressed Mr. Kraft's conditional challenge to the constitutionality of s. 76(2) of the *Act*, as set out in his Notice of Constitutional Question dated July 29, 2022. Mr. Kraft asserted that if the test for determining whether disclosure is made in the NCOB is an objective test, rather than a subjective/objective basis, Mr. Kraft's right to engage in free expression and association under ss. 2(b) and 2(d) of the *Charter* is infringed: Merits Decision: at paras. 337-38, 340. Mr. Kraft also argued the infringement did not constitute a reasonable limit that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*: Merits Decision, at para. 350.

[24] At para. 356, the Tribunal found that s. 76(2) (including the NCOB exception) infringes s. 2(b) of the *Charter*. However, the Tribunal also found that such infringement is justified under s. 1 of the *Charter*: Merits Decision, at para. 401. In doing so, the Tribunal considered both parties' expert evidence concerning "the impacts or consequences or 'chilling effect' that may flow [from concluding] that the NCOB exception is determined on an 'objective' basis": Merits Decision, at para. 30. However, the Tribunal found that under s. 1 of the *Charter*, it was open to the Legislature to select an objective standard for the NCOB exception, which was more than proportional to the minimal intrusion on the right to freedom of expression in s. 2(b) of the *Charter*: Merits Decision, at paras. 394, 400.

C. Sanctions Decision

[25] Following a virtual hearing and written submissions, the Tribunal issued its Sanctions Decision on July 2, 2024. As summarized further below under "Sanctions", the Tribunal imposed sanctions that included an administrative monetary penalty, director and officer bans, and trading bans. The Tribunal also ordered Mr. Kraft to pay costs to the OSC.

III. Jurisdiction and standard of review

[26] Mr. Kraft appeals the Merits Decision and the Sanctions Appeal. Mr. Stein did not appeal the Tribunal's decisions. The Attorney General of Ontario intervenes on this appeal to address the *Charter* issues that Mr. Kraft raised.

[27] The Divisional Court has jurisdiction to hear this appeal: *Securities Act*, s. 10(1). The appellate standards of review apply, as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2

S.C.R. 235, at paras. 8, 10, 19, 26-37; see also *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 2 S.C.R. 653, at para. 37.

[28] The standard of review is correctness for questions of law, including legal principles extricable from questions of mixed fact and law.

[29] The standard of review is palpable and overriding error for questions of fact and for questions of mixed fact and law (where there is no extricable question of law), including with respect to the application of correct legal principles to the facts.

[30] The standards of review applicable to the Sanctions Decision relating to penalty and costs are addressed later in these reasons under the heading "Sanctions".

IV. Issues to be determined

[31] In this appeal, Mr. Kraft raises the following issues:

a. Onus to establish NCOB: Did the Tribunal err in finding that Mr. Kraft had the onus of establishing that his disclosure to Mr. Stein was made "other than in the necessary course of business"?

b. NCOB test: Did the Tribunal err in finding that the test to establish NCOB was objective rather than subjective/objective?

c. Necessity: Did the Tribunal err in finding that Mr. Kraft's disclosure to Mr. Stein was not "necessary" in this case?

d. Materiality: Did the Tribunal err in finding that the proposed expansion transaction (including the draft Transaction Documents) constituted a material fact?

e. *Charter*: Did the Tribunal err in finding that the infringement of the right to freedom of expression was justified under s. 1 of the *Charter*?

f. Sanctions: Did the Tribunal err in imposing sanctions and costs on Mr. Kraft?

[32] These issues are addressed below.

V. Onus to establish NCOB

[33] Did the Tribunal err in finding that Mr. Kraft had the onus of establishing that his disclosure to Mr. Stein was made "other than in the necessary course of business"?

[34] As outlined above, the question of whose onus it was to establish that Mr. Kraft's disclosure to Mr. Stein was made "other than in the necessary course of business" depends upon whether this was an element of the tipping offence or was an exception to the general rule that MNPI may not be generally disclosed. As the Tribunal found, its caselaw establishes that respondents bear the burden of proving any exceptions they seek to rely upon.

[35] Mr. Kraft argued that the NCOB exception is an element of the tipping offence and, therefore, the OSC had the onus of proving that he did not make the disclosure in the necessary course of business. The Tribunal disagreed, finding that it was an exception to the general rule. Therefore, Mr. Kraft bore the onus of proving that he made the disclosure to Mr. Stein in the ordinary course of business. Mr. Kraft submits that this was an error of law.

[36] There is no dispute that this issue raises a question of law, subject to the correctness standard. It involves interpreting s. 76(2). For ease of reference, that section is reproduced again:

> 76(2) No issuer and no person or company in a special relationship with an issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the issuer before the material fact or material change has been generally disclosed.

[37] As the Tribunal noted, the guiding approach to statutory interpretation was articulated by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1 S.C.R. 27, at para. 21, where the Court stated "that statutory interpretation cannot be founded on the wording of the legislation alone…. [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

[38] The Tribunal relied on the Court of Appeal's decision in *Finkelstein v. Ontario (Securities Commission)*, 2018 ONCA 61, 139 O.R. (3d) 161[2] for its analysis of the purpose of the tipping prohibition. In *Finkelstein* the Court of Appeal started by setting out the aim of the securities regulation framework as a whole, which is to "protect the investor, promote capital market efficiency, and ensure public confidence in the securities system": at para. 19. According to the Court of Appeal, the tipping prohibition is a significant component of that scheme. It exists for three reasons:

(1) Fairness requires that all investors have access to information about an issuer that would likely affect the market value of the issuer's securities;

(2) Insider trading may undermine investor confidence in the capital markets; and

(3) The efficiency of the capital markets depends upon the full and timely disclosure of all material information: *Finkelstein*, at paras. 23-25.

[39] The fact that the tipping prohibition (which, as the Tribunal points out, is "an enabler of insider trading": Merits Decision, at para. 238) contributes to achieving all of the purposes of the securities regulation framework, is a factor in the Tribunal's conclusion that "s. 76(2) of the Act is properly construed as a broad prohibition against selective disclosure of MNPI by an issuer or person or company in a special relationship with an issuer, subject to the stated narrow exception,

[2] Leave to appeal refused, [2018] S.C.C.A. No. 97 and [2018] S.C.C.A. No. 98.

proviso or carve-out for communications 'in the necessary course of business'": Merits Decision, at para. 235.

[40] Another factor is the words themselves. The Tribunal found that the words "other than" that precede "necessary course of business" signal an exception. In doing so, the Tribunal considered the language in a related section of the *Act*. Section 76(3) reads:

> No person or company that is considering or evaluating whether, or that proposes,
>
> (a) to make a take-over bid, as defined in Part XX, for the securities of an issuer;
>
> (b) to become a party to a reorganization, amalgamation, merger, arrangement or similar business combination with an issuer; or
>
> (c) to acquire a substantial portion of the property of an issuer;
>
> shall inform another person or company of a material fact or material change with respect to the issuer before the material fact or material change has been generally disclosed except where the information is given in the necessary course of business relating to the take-over bid, business combination or acquisition. (emphasis added).

[41] The Tribunal found that in s. 76(3) communications in the necessary course of business are clearly stated to be an exception to the prohibition. In the Tribunal's view, the words "other than" in s. 76(2) "operates as a synonym to 'except'": Merits Decision, para. 241.

[42] Mr. Kraft argues that the Tribunal committed three errors in its analysis of this issue. First, it erred in characterizing the "necessary course of business" carveout as an exception, when other Tribunal cases and criminal proceedings that are brought on the basis of similar behaviour treat it as an essential element of the offence. Second, it erred in finding that the words "other than" signal an exception when there is caselaw in the criminal context that says otherwise. Third, communicating MNPI is done every day and all the time by corporate officials. If that conduct is presumptively unlawful, this will have the effect of discouraging corporate officials from seeking the advice they need in order to properly discharge their duties to their corporations.

[43] With respect to the first argument, Mr. Kraft relied on the Tribunal's decisions in *Roxborough (Re)*, 2022 ONCMT 11 and *Kitmitto (Re)*, 2022 ONCMT 12, aff'd 2024 ONSC 1412 (Div. Ct.). *Kitmitto (Re)* makes no mention of the carveout at issue. *Roxborough (Re)* does state that the carveout is an element of the offence of tipping. However, it does so without analyzing the issue as it was not in dispute in the case. For this reason, the Tribunal gave it little weight. With respect to the criminal cases, they are of limited assistance, since the values underlying the debate in the criminal context are very different than those that exist in the administrative context. Classifying a carveout as an exception has important implications for the presumption of innocence since it forces the accused to testify. The presumption of innocence is a right that is guaranteed by s. 11 of the *Charter*. The Supreme Court of Canada has confirmed that "[s]ection 11 protections are available to those charged with criminal offences, not those subject to administrative

sanctions": *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at para. 44, citing *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at para. 25.

[44] With respect to his second argument, Mr. Kraft relied on *R. v. Liptak*, 2009 ABPC 342, 481 A.R. 116, a decision of the Alberta Provincial Court, where the accused was charged with unlawfully operating a motor vehicle while disqualified from doing so. The offence contains a carveout for people who are registered in an alcohol ignition interlock device program. That carveout is preceded by the words "other than". The court found that the Crown had the onus of proving that the accused was not registered in an alcohol ignition interlock device program. In doing so, the court did focus on the fact that the legislation at issue uses the words "other than" rather than "unless". However, central to its reasoning on this issue was its finding that the carveout at issue in that case did not "refer to facts which are peculiarly in the knowledge of the accused. Whether the accused was 'registered in an alcohol ignition device program' is as much within the knowledge of the Crown (being part of the government which establishes and runs such programmes) as it is within the knowledge of the accused. Proving that the accused is not registered in such a programme will create no real difficulty for the Crown.": *Liptak*, at para. 41, point 2. This is not true for the carveout in this case. Mr. Kraft has more knowledge of the circumstances giving rise to the disclosure at issue than the OSC does.

[45] Of more relevance than *Liptak* is *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, where the Supreme Court found that a statute that contained a prohibition with a carveout introduced by the words "otherwise than" was "structured as a prohibition with a limited exception": para. 32. Further, in *Ontario (Securities Commission) v. Tiffin*, 2020 ONCA 217, 150 O.R. (3d) 714, the Court of Appeal considered the definition of the word "security" in the *Act*, which includes "(e) a bond, debenture, note…other than, (i) a contract of insurance…" (emphasis added). The court had this to say about the wording of the Act, at paras. 28-29:

> I accept that the scheme of the Act is "catch and exclude". In other words, the Act defines key terms very broadly, and thereby captures a great many instruments and activities in its wide regulatory scope, and then provides for many exemptions from the Act's requirements, discussed further below, to tailor this regulatory scope to its purposes.
>
> The term "security" is defined at s. 1(1) of the Act. It consists of a non-exhaustive list of 16 clauses expressed in general terms, evidencing an intention for breadth. The clause most centrally at issue in this case is clause (e), which reads "a bond, debenture, note or other evidence of indebtedness". Section 1 provides for only two explicit exceptions to clause (e):
>
> > (i) a contract of insurance… [Emphasis added].

[46] Thus, contrary to Mr. Kraft's submission, there is ample authority to support the Tribunal's view that the words "other than", which has the same meaning as "otherwise than", denote an exception.

[47] This brings us to Mr. Kraft's third argument, which is essentially that treating the carveout as an exception puts too much of a burden on corporate officials who are communicating about MNPI on a daily basis. As the Supreme Court of Canada explained in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at para. 57, "[p]ersons who carry on the business of trading in securities realize that the industry is heavily regulated and for good reason. It is a crucial part of our economy that is at stake." As already discussed, controlling the sharing of MNPI is a key component of the securities regulatory scheme. Therefore, it is not surprising that the Legislature chose to prohibit the behaviour, subject to a narrow exception based on necessity.

[48] For these reasons, we find that the Tribunal correctly placed the onus on Mr. Kraft to establish that his disclosure to Mr. Stein was made in the necessary course of business.

VI. NCOB test

[49] Did the Tribunal err in finding that the test to establish NCOB was objective rather than subjective/objective?

[50] Mr. Kraft takes the position that the Tribunal erred in concluding the NCOB exception under s. 76(2) of the *Act* is determined by reference to an objective test. Mr. Kraft relies on the absence of certain terms in s. 76(2) of the *Act* and offers analogies to similarly worded legislation in support of his argument that s. 76(2) prescribes a subjective/objective test to establish the NCOB exception. Alternatively, Mr. Kraft argues that the section is ambiguous, and a subjective/objective approach is more consistent with *Charter* values and should thus be applied.

[51] According to Mr. Kraft, the subjective/objective or modified test that the Tribunal rejected would have required the Tribunal to:

(a) determine on an objective basis whether the disclosing insider acted in good faith;

(b) determine on an objective basis whether the disclosure was made in a context that would normally involve the communication of MNPI; and

(c) assess on a subjective basis whether the disclosing insider genuinely wanted the advice or input sought in order to carry out their duties.

[52] Whether the NCOB exception is established on an objective test or on a subjective/objective test is an issue of statutory interpretation, which is a question of law, attracting a correctness standard of review.

[53] The Tribunal rejected Mr. Kraft's submission that the absence of the terms "reasonably" or "reasonable" from s. 76(2) of the *Act* implies that the drafters of the legislation did not intend for a purely objective test to be used when considering the applicability of the NCOB exception. While acknowledging that the inclusion of these terms tends to imply an objective standard, the Tribunal identified that the absence of the words "reasonably" or "reasonable" does not automatically mean that a subjective/objective test is required. We agree. The Tribunal correctly noted that the caselaw relied on by Mr. Kraft does not further his point: Merits Decision, at para 251.

[54] The Tribunal identified that language that typically imports a subjective/objective approach is also absent from s. 76(2) of the *Act*. The Tribunal cited s. 76(4) wherein a defence to the tipping prohibition is available if it can be proven that a person or company in a special relationship with the issuer "reasonably believed" that the material fact had already been disclosed. Another instance where the Legislature has expressed itself to indicate that the test to be applied contains a subjective element is in the regulations which provide an exemption from s. 76(2) where a respondent proves they "reasonably believed" that the tippee knew of the MNPI: *General*, R.R.O. 1990, Reg. 1015, s. 175(5). As the Tribunal correctly noted, this demonstrates that when a subjective/objective test is to be applied within the Act, it is plain and obvious: Merits Decision, at para. 255.

[55] In further support of his position, Mr. Kraft claims that where legislation that prescribes that certain actions are permissible if they are determined to be "necessary" but prohibited if they are not, a subjective/objective test is presumptively applied to determine the issue of necessity. Before the Tribunal, Mr. Kraft relied on a single decision of the District Court from 1986, where the court held that the subjective belief of a police officer was relevant to determine whether a demand for a breath sample was "necessary": Merits Decision, at paras 252-53, *R. v. Staples*, 1986 CarswellOnt 37. The Tribunal correctly distinguished *Staples*, as the relevant section of the *Criminal Code*, R.S.C., 1985, c. C-46, expressly referred to necessity as being "in the opinion of the peace officer": Merits Decision, at para. 253.

[56] In this court, Mr. Kraft relies on additional criminal caselaw where a subjective/objective test is used to establish justification for police actions including in circumstances involving forced entry into premises, use of force and arrest powers: see *R. v. Cornell*, 2010 SCC 31, [2010] 2 S.C.R. 142, at para. 23; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 34; and *R. v. Alexson*, 2015 MBCA 5, 315 Man. R. (2d) 70, at para. 20. Once again, Mr. Kraft's attempts to analogize the regulatory scheme of the *Act* to the criminal law falls short. We agree with the submissions of the OSC that the police cases referred to by Mr. Kraft involve consideration of an officer's "reasonable grounds" which necessarily involves the application of a subjective/objective approach and differs from the consideration of whether Mr. Kraft's disclosure to Mr. Stein was necessary in the course of business in the context of s. 76(2) of the *Act*. We reject Mr. Kraft's sweeping claim that a subjective/objective test is presumptive when determining whether certain actions are "necessary" under legislation. In our view, the Tribunal correctly held that the plain language of s. 76(2) of the *Act* provides for an objective test to establish the NCOB exception.

[57] At the Tribunal, Mr. Kraft argued that the ambiguity in the language of s. 76(2) of the *Act*, or in any event, reference to the *Charter* values of freedom of expression and association, favour a subjective element in determining whether the disclosure of MNPI was made in the necessary course of business. For the reasons noted above, in our view, the Tribunal correctly decided that there is no ambiguity in s. 76(2) of the *Act* and whether the NCOB exception applies is determined on a purely objective basis. Further, we are of the view that the Tribunal correctly concluded that *Charter* values should be consulted to aid in statutory interpretation only if there is true ambiguity: Merits Decision, at paras. 261-263; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para 18.

[58] Mr. Kraft raised additional policy reasons why a subjective/objective test should be preferred over an objective test, including that corporate officials would be best placed to determine whether disclosure of MNPI was necessary in the context of the business and affairs of

the issuer and the "chilling effect" that would discourage corporate officials and directors from seeking advice from outside advisors: Merits Decision, at paras. 257-58. The Tribunal rejected these submissions as being contrary to the "Legislature's deliberate, clear and unambiguous choice to make the NCOB exception subject to an objective standard": Merits Decision, at para. 259. In our view, based on the Tribunal's correct findings that s. 76(2) of the *Act* imports an unambiguous, purely objective test for determining whether disclosure was made in the necessary course of business, the Tribunal was correct in refusing to engage in second guessing the Legislative intent based on these policy arguments.

[59] Mr. Kraft also argued that the Tribunal erred in declining to admit opinion evidence about corporate governance issues, which he asserted supports a subjective/objective test. In assessing the admissibility of this evidence, the Tribunal applied the *Mohan* criteria[3] and, with a limited exception having to do with Mr. Kraft's *Charter* challenge, declined to admit that evidence because it was either irrelevant, concerned domestic law and/or opined on the ultimate issue. The Tribunal's admissibility decision discloses no error and is entitled to deference: *R. v DD*, 2000 SCC 43, [2000] 2 S.C.R. 275, at paras. 12-13. In the end, the Tribunal disagreed that corporate governance concerns were relevant to its analysis and found that Mr. Kraft's arguments were an attempt to second guess a clear legislative choice for an objective standard.

[60] An objective test to determine whether the selective disclosure of MNPI is necessary in the course of business is consistent with the Tribunal's narrow interpretation of the NCOB exception and the purpose of securities regulatory framework as a whole. Accordingly, we find that the Tribunal correctly concluded that s. 76(2) requires that the NCOB exception be proven by reference to an objective standard.

VII. Necessity

[61] Did the Tribunal err in finding that Mr. Kraft's disclosure to Mr. Stein was not "necessary" in this case?

[62] This was the first time that the Tribunal was tasked with interpreting the NCOB exception to the tipping prohibition contained in s. 76(2) of the *Act*. There is no definition of the phrase "necessary in the course of business" or a list of factors to take into account when considering whether the NCOB exception applies contained in the *Act*: Merits Decision, at para 265.

[63] After a thorough review of the evidence, the Tribunal ultimately concluded that Mr. Kraft failed to prove that the selective disclosure of MNPI to Mr. Stein was necessary in the course of WeedMD's business. In support of his position that the Tribunal erred in reaching this conclusion, Mr. Kraft firstly reiterates that his subjective intentions should play a role in the analysis. For the reasons noted above, we accept that the Tribunal correctly determined that the NCOB exception should be based on a purely objective test. For this reason, we will not address the subjective factors Mr. Kraft submits should have been considered by the Tribunal, such as lack of evidence of bad faith.

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[3] See *R. v. Mohan*, [1994] 2 S.C.R. 9, at p. 20, cited in the Merits Decision, at para. 17.

[64] Mr. Kraft further submits that the Tribunal erred in grounding its decision on the following factors: that Mr. Kraft made the disclosure for a "personal business reason", was careless in making the disclosure, did not seek prior approval before making the disclosure, and the absence of a confidentiality agreement. Additionally, Mr. Kraft argues that the Tribunal erroneously rejected the evidence of WeedMD's Chief Financial Officer ("CFO") that Mr. Kraft's selective disclosure to Mr. Stein was "necessary".

[65] As this is a question of mixed fact and law, the standard of review is palpable and overriding error.

[66] In determining that Mr. Kraft's selective disclosure to Mr. Stein was not made in the necessary course of business, the Tribunal considered the following:

a. At the time of the disclosure, there was no contractual relationship between Mr. Stein and WeedMD as a prior consulting agreement had expired years earlier. Mr. Stein was not hired by WeedMD to review the draft Transaction Documents nor was he compensated for his review by WeedMD. Mr. Stein's review was done as a favour to Mr. Kraft.

b. Although not required, the fact that Mr. Kraft did not obtain authority from the Board or inform any other Board member that he was reaching out to Mr. Stein for advice in advance supports the inference that he did so for personal reasons rather than out of necessity.

c. Mr. Kraft did not suggest or recommend to any Board member that external commercial real estate expertise was required to finalize the draft Transaction Documents before sending the selective disclosure to Mr. Stein.

d. There was no confidentiality agreement in place between WeedMD and Mr. Stein. While acknowledging that the presence of a confidentiality agreement is not a pre-condition to establishing the NCOB exception, the Tribunal held that it can inform whether the selective disclosure was made in the necessary course of business.

e. The bare-bones instructions contained in the cover email to Mr. Stein attaching the draft Transaction Documents, to "review" and provide "any and all comments", suggest that Mr. Kraft was not seeking commercial real estate expertise, but rather a second set of eyes more generally. This is further supported by the fact that multiple documents were attached to the e-mail to Mr. Stein, not only the draft lease for which Mr. Kraft claims he required Mr. Stein's expertise to review.

f. There was no evidence that Mr. Kraft gave any thought to whether the disclosure was necessary in the course of WeedMD's business before sending the email to Mr. Stein. The implication is that the email was simply forwarded to Mr. Stein without care. Evidence of advance consideration about the necessity of disclosing MNPI is not a precondition for establishing the NCOB exception, but it may be "helpful to establishing after the fact the purpose for which the selective disclosure was made,

and also establishing that such purpose was in the necessary course of business": Merits Decision, at para. 328.

g. The Transaction Documents sent to Mr. Stein were marked "final" and had already been subject to legal review. The Tribunal found that the timing of the selective disclosure was relevant to whether Mr. Stein's expertise was necessary, or whether it reflected Mr. Kraft's personal desire to have Mr. Stein's input.

h. WeedMD's CFO testified that Mr. Stein's review of the documents was necessary because it was important for Mr. Kraft to feel comfortable with the transaction as it would not be approved by the Board without Mr. Kraft's endorsement. The Tribunal concluded that the CFO's opinion about Mr. Kraft's comfort level was relevant, but that it did not displace the remainder of the evidence that suggests that the selective disclosure to Mr. Stein was not necessary in the course of WeedMD's business.

[67] The Tribunal acknowledged that Mr. Stein had commercial real estate expertise, that Mr. Kraft was involved in the pending transaction, and that Mr. Stein's feedback was – to some extent – incorporated into the final version of the lease. However, given the totality of the evidence, the Tribunal was not convinced that Mr. Kraft was seeking "any necessary or otherwise unavailable commercial real estate experience for WeedMD": see Merits Decision, at para. 318.

[68] We are not persuaded by Mr. Kraft's submission that the Tribunal improperly relied on (i) the absence of a confidentiality agreement when none is strictly required and (ii) the fact that Mr. Kraft did not obtain prior authorization from the Board when he has no obligation to do so. It is clear that the Tribunal's conclusion that the selective disclosure of MNPI to Mr. Stein was not necessary in the course of WeedMD's business did not rest on any one factor.

[69] The Tribunal did not accept Mr. Kraft's after-the-fact rationale for disclosing MNPI to Mr. Stein. In our view, it was open to the Tribunal to make this finding. The Tribunal's conclusion that the NCOB exception was not available to Mr. Kraft was made after a thorough review of the factual matrix. The Tribunal drew fair inferences from the evidence which, when viewed cumulatively, support the finding that the disclosure of MNPI to Mr. Stein was not necessary in the course of WeedMD's business. Mr. Kraft has failed to demonstrate that the Tribunal made any palpable or overriding error in this regard.

VIII. Materiality

[70] Did the Tribunal err in finding that the proposed expansion transaction (including the draft Transaction Documents) constituted a material fact?

[71] Section 1(1) of the *Securities Act* defines "material fact", when used in relation to securities, to mean "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities". Whether a fact is a material fact is a question of mixed fact and law, since it requires the application of a legal standard to the facts: see *Donald (Re)*, 2012 ONSEC 26, 35 O.S.C.B. 7383, at paras. 28-29; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35. The standard of review is palpable and overriding

error unless the error relates to an extricable legal principle, which is reviewable on a correctness standard: *Housen*, at paras. 26-37.

[72] At previously noted, the Tribunal found that the planned expansion transaction (including the terms of the draft Transaction Documents) constituted a material fact that Mr. Kraft selectively disclosed to Mr. Stein. The Tribunal also found that "the fact of and terms of the Draft Lease, considered alone, constituted a material fact that … had not been generally disclosed": Merits Decision, at para. 196.

[73] In its analysis of whether the information was a material fact, the Tribunal, at paras. 106-7 of the Merits Decision, stated:

> In determining whether the information would reasonably be expected to have a significant effect on the market price or value of a security, the Tribunal applies an objective "market impact test" and views materiality from the perspective of the trading markets, that is, the buying, selling, or holding of securities.
>
> Materiality is assessed objectively from the perspective of a reasonable investor and prospectively through the lens of expected market impact. [Citations omitted.]

[74] Mr. Kraft submits that the Tribunal erred in determining that the information that Mr. Kraft conveyed to Mr. Stein was a material fact in the absence of any evidence relating to the expected market impact of the information in the draft Transaction Documents.

[75] Mr. Kraft says that the Tribunal correctly stated that in considering whether the information was material, the Tribunal was unable to rely on the market price reaction when the transaction was later announced, since it was impossible to isolate the information contained in the Transaction Documents from other information in the news release: Merits Decision, at paras. 125-26. He also points out that there was already publicly available information about WeedMD's expansion plan, given prior new releases, which stated that WeedMD was "advancing a very compelling expansion plan" and later that it had raised $15 million to be used for "working capital and for production capacity expansion", with little effect on the market price of its shares: see Merits Decision, at paras. 144, 189(c)(i).

[76] In these circumstances, Mr. Kraft submits that it was incumbent on the OSC to provide other market impact evidence to establish the materiality of the information that Mr. Kraft provided to Mr. Stein. To this end, Mr. Kraft suggests that the OSC should have called an expert (or at least an industry fact witness) with real estate knowledge to demonstrate that the terms of the Transaction Documents were sufficiently significant that they were materially accretive to the total mix of information already in the public domain. He also submits that the Tribunal erred in relying on previous caselaw suggesting that the materiality can be determined from "common sense inferences" in the absence of direct market impact evidence: see Merits Decision, at paras. 108-9; *Cornish v. Ontario (Securities Commission)*, 2013 ONSC 1310, 306 O.A.C. 197 (Div. Ct.), at para. 99; *Sharbern Holding Inc. v. Vancouver Airport Centre*, 2011 SCC 23, [2011] 2 S.C.R. 175, at paras. 52, 61.

[77] We do not agree that the Tribunal found materiality without evidence, as Mr. Kraft in substance suggests.

[78] The Tribunal found that there was ample evidence to support its ultimate findings that the planned expansion transaction (including the terms of the draft lease standing on its own) was material. In the Merits Decision, the Tribunal described at length the evidence supporting its conclusion that Mr. Kraft conveyed a material fact to Mr. Stein, including evidence relating to (a) developments in the cannabis industry, (b) the size and nature of WeedMD's business and operations, (c) details of the draft lease and draft option to purchase and (d) the likelihood that the expansion transaction would close: see Merits Decision, at paras. 137-82. The Tribunal also noted that WeedMD itself acknowledged that the final lease agreement and final option agreement (which did not differ materially from the draft documents) were material, being identified as material contracts in WeedMD's Material Change Report relating to the expansion transaction filed with the OSC: see Merits Decision, at paras. 147, 151, 152, 154.

[79] In its analysis, the Tribunal recognized that before Mr. Kraft sent the draft Transaction Documents to Mr. Stein, WeedMD (like other companies in the cannabis business) wanted to expand its operational capacity to take advantage of opportunities arising from legalization of recreational cannabis use but it did not have a concrete plan to do so. The draft Transaction Documents revealed both that WeedMD was at an advanced stage of negotiating an actual strategic transaction to allow for expansion and provided significant details of the anticipated transaction. The Tribunal determined that such a "significant new contract and material development in relation to WeedMD's resources and capacity" was plainly something that would reasonably be expected to have a significant effect on the price or value of shares: see Merits Decision, at para. 150. We agree with the OSC that it was open to the Tribunal to reach that conclusion without additional evidence relating to the proposed transaction's impact on WeedMD's share price.

[80] We see no palpable and overriding error in the Tribunal's conclusion that the information Mr. Kraft conveyed to Mr. Stein constituted a material fact, a finding of mixed fact and law that is entitled to deference. We also find no extricable error of law in the Tribunal's analysis.

IX. *Charter*

[81] Mr. Kraft argued before the Tribunal that if it accepted that the test for establishing the NCOB exception in s. 76(2) was an objective one, then the section violated the *Charter*.

[82] Given its conclusion that the NCOB exception is objective, the Tribunal considered Mr. Kraft's constitutional challenge to s. 76(2). As outlined above, the Tribunal found that s. 76(2) is a *prima facie* infringement of the freedom of expression right guaranteed by s. 2(b) of the *Charter*, but that it was a reasonable limit under s. 1 of the *Charter*.

[83] Section 1 of the *Charter* makes the rights it guarantees "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The Merits Decision correctly described the components of the s. 1 analysis as follows:

> [360] The structure of the s. 1 analysis is well settled. In order to be justified under s. 1 of the *Charter*, the limitation must:

a. be prescribed by law;

b. address a pressing and substantial governmental objective; and

c. be proportional to that objective.

[361] The proportionality test itself comprises three elements;

a. the limitation must be rationally connected to the legislative objective;

b. the limitation must infringe the subject *Charter* right no more than reasonably necessary (also referred to as "minimal impairment"); and

c. the salutary effects of the legislation must not exceed the deleterious effects on the protected right.

[84] The Tribunal began its analysis on s. 1 by agreeing with the OSC that the infringement at issue involved economic speech "that is at the outer edges of constitutional protection and also that the infringement in question is not serious. The prohibition on expression is only partial and the impacted expression involves the selective disclosure to a single or few persons of only a narrow category of business information (MNPI) in circumstances where such disclosure is not in the necessary course of business": Merits Decision, at para. 366.

[85] With respect to the specific elements of the s. 1 analysis, the Tribunal accepted that the limitation on freedom of expression was prescribed by law. In doing so, it also accepted that "objective necessity in the NCOB exception provides an intelligible standard and thus is not vague": Merits Decision at para. 368.

[86] The Tribunal correctly found that there was no dispute that the limitation in s. 76(2) addresses a pressing and substantial objective.

[87] With respect to proportionality, the Tribunal found that the limitation in s. 76(2) was rationally connected to its legislative objective, which was broader than merely seeking to prevent intentional or morally culpable tipping activity. On the issue of minimal impairment, the Tribunal accepted the OSC's position that at this stage of the analysis the Legislature's choices are to be given some deference; it is not to be held to a standard of perfection. This is particularly true with respect to s. 76(2) since the speech at issue is economic speech and the limitation only places a partial restriction on a narrow class of speech. The Tribunal also accepted the OSC's argument that "the objective standard to establish the NCOB exception is a feature of the legislation intended to ensure that individuals are cautious before they make selective disclosure of MNPI and that the Legislature was deliberate about this for good reason": Merits Decision, at para. 392. The Tribunal rejected Mr. Kraft's expert evidence that an objective/subjective standard would equally achieve the legislative objective and found that his expert's opinion as to the chilling effects of an objective standard for necessity was overstated. In this regard, the Tribunal preferred the evidence of the OSC's expert because it was "more in keeping with common sense", there is helpful guidance available to market participants about the NCOB exception and there was no evidence before it that s. 76(2) "is actually having or has actually had a chilling effect on corporate insiders'

willingness to seek external advice or willingness to serve as directors": Merits Decision, at paras. 396-97. Given these findings, the Tribunal concluded that "what is accomplished by s. 76(2) is more than proportional to the minimal intrusion": Merits Decision, para. 400. Therefore, it dismissed Mr. Kraft's *Charter* challenge.

[88] Mr. Kraft submits that the Tribunal erred in finding that s. 76(2) was saved under s. 1 of the *Charter*. First, he argues that the Tribunal erred in concluding that the expression at issue was on the "outer edges of constitutional protection" and that the infringement in question was not serious. With respect to the test under s. 1, while he accepts that the infringement of his right to free expression was prescribed by law and addresses a pressing and substantial objective, he argues that a purely objective test fails the minimal impairment branch of the proportionality analysis.

[89] All parties accept that this issue raises a question of law that must be reviewed on the correctness standard.

[90] According to Mr. Kraft, the Tribunal's devaluation of commercial or economic expression is inconsistent with Supreme Court of Canada jurisprudence, particularly *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, in which the court states, at para. 59:

> In our view, the commercial element does not have this effect. Given the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the Canadian *Charter* should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the *Charter*. It is worth noting that the courts below applied a similar generous and broad interpretation to include commercial expression within the protection of freedom of expression contained in s. 3 of the Quebec *Charter*. Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy. The Court accordingly rejects the view that commercial expression serves no individual or societal value in a free and democratic society and for this reason is undeserving of any constitutional protection.

[91] According to Mr. Kraft, he disclosed information to Mr. Stein for the purpose of enabling WeedMD to make a more informed economic choice. Far from being "on the outer edges", *Ford* makes it clear that this was "an important aspect of individual self-fulfillment and personal autonomy."

[92] While *Ford* clearly recognizes the value of commercial speech, it does so to find that it is the type of speech that is worthy of constitutional protection. In *Rocket v. Royal College of Dental Surgeons (Ontario)*, [1990] 2 S.C.R. 232, at pp. 246-47 McLachlin J. (as she then was) emphasized the importance of evaluating the nature of the expression under s. 1, and stated the following regarding commercial expression:

> While the Canadian approach does not apply special tests to restrictions on commercial expression, our method of analysis does permit a sensitive, case-oriented approach to the determination of their constitutionality. Placing the conflicting values in their factual and social context when performing the s. 1 analysis permits the courts to have regard to special features of the expression in question. As Wilson J. notes in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious.

[93] As *Rocket* recognizes, the aim of commercial expression is economic – to increase profit. Mr. Kraft's desire to communicate MNPI was driven by his view that he wished Mr. Stein's input on whether the lease deal at issue was a good one for WeedMD, that is, would it make WeedMD more profitable. The core values of free expression are "(1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed ": *Irwin Toy Ltd. V. Quebec(Attorney General)*, [1989] 1 S.C.R. 927 at 976. As *Rocket* points out at p. 476, restricting communication where the risk is loss of profit "might be easier to justify" than restrictions where there is a "loss of opportunity to participate in the political process or the 'marketplace of ideas', or to realize one's spiritual or artistic self-fulfillment."

[94] In *R. v. Keegstra*, [1990] 3 S.C.R. 697, the Supreme Court confirmed that the nature of the expressive activity at issue should be considered in the s. 1 analysis. As put by the Court at pp. 759-60:

> [T]he interpretation of s. 2(b) … gives protection to a very wide range of expression. Content is irrelevant to this interpretation, the result of a high value being placed upon freedom of expression in the abstract. This approach to s. 2(b) often operates to leave unexamined the extent to which the expression <u>at stake in a particular case</u> promotes freedom of expression principles. *In my opinion, however, the s. 1 analysis of a limit upon s. 2(b) cannot ignore the nature of the expressive activity which the state seeks to restrict.* While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(b). [Underline in original, italics added].

[95] In *3510395 Canada Inc. v. Canada (Attorney General)*, 2020 FCA 103, [2021] 1 F.C.R. 615, at para. 197, the Federal Court of Appeal held that "the Supreme Court's discussion of commercial expression in both *Keegstra* and *Rocket* leaves no doubt that this form of expression lies some distance from the core of s. 2(b)". Similarly, in *College of Midwives of British Columbia v. MaryMoon*, 2020 BCCA 224, 40 B.C.L.R. (6th) 151, the British Columbia Court of Appeal found at para. 106 that "[l]imiting commercial expression is generally easier to justify because of the tenuous connection of commercial expression to the values underlying s. 2(b)".

[96] Thus, contrary to the submissions of Mr. Kraft, the jurisprudence is clear that the Tribunal was correct when it found that commercial expression is considered of "less value" than other forms of expressive activity that are more closely connected to the core values that underlie the s. 2(b) right.

[97] The suggestion that the Tribunal erred in its analysis of the seriousness of the impairment also has no merit. Assessing proportionality requires looking at the extent to which the impugned provision actually impairs expression. The Tribunal was correct when it found that "[t]he prohibition on expression is only partial and the impacted expression involves the selective disclosure to a single or few persons of only a narrow category of business information (MNPI) in circumstances where such disclosure is not in the necessary course of business." Section 76(2) only applies to people who are in a special relationship with the issuer; it only prohibits the disclosure of a limited category of information (MNPI); the limitation is time limited as once public disclosure has occurred the prohibition ceases to apply and the general prohibition is subject to the NCOB exception. In *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, at pp. 1105-6, the Supreme Court confirmed that a "time, place or manner restriction" on expression is easier to justify under s. 1 than a "complete ban" on expression.

[98] Mr. Kraft's argument that the Tribunal erred in its minimal impairment analysis is essentially an argument that the Tribunal should have accepted that the test for the NCOB exception was a subjective/objective one as this would impair the right to free expression less than the purely objective test. The problem with this submission is that the legislature "is not required to search out and to adopt the absolutely least intrusive means of attaining its objective": *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at 1341. As long as the means chosen falls within a range of reasonable alternatives, deference is owed to the legislature's choice. The standard is not one of perfection: *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199, at para. 160. Further, a higher degree of deference is owed where, as here, the challenged law is part of a regulatory response to a complex social problem. As put by the Supreme Court in *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 37:

> Where a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s. 1 analysis than they will when the impugned measure is a penal statute directly threatening the liberty of the accused…. The bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems would be threatened. A degree of deference is therefore appropriate.

[99] In this case, the complex contextual factors support a more deferential approach to minimal impairment. Section 76(2) is part of a regulatory scheme designed to address multiple policy objectives. How to foster these objectives involves choosing among a number of different solutions without being able to be certain as to which will be the most effective. While expert evidence can assist in assessing the impact of s. 76(2), the harms of insider tipping are not capable of precise demonstration. Providing the legislature with a margin of appreciation under s. 1 recognizes that there may be more than one way to address the harms of insider tipping in the manner that complies with the *Charter*.

[100] For these reasons we find that the Tribunal did not err when it rejected Mr. Kraft's *Charter* argument.

X. Sanctions

[101] Following a virtual hearing and written submissions in March 2024, the Tribunal issued its 32-page (141-paragraph) Sanctions Decision on July 2, 2024.

[102] In the Sanctions Decision, at para. 4, the Tribunal found that it was in the public interest to impose the sanctions and costs against Mr. Kraft and Mr. Stein. The Tribunal imposed

a. director and officer bans (four years for Mr. Kraft, three years for Mr. Stein),

b. trading bans, with certain carve-outs (three years for Mr. Kraft, four years for Mr. Stein),

c. an administrative penalty ($200,000 for Mr. Kraft, $150,000 for Mr. Stein), and

d. costs ($150,000 for Mr. Kraft, $50,000 for Mr. Stein).

[103] The Tribunal also made a trading profit disgorgement order of $29,345 against Mr. Stein only: Sanctions Decision, at para. 4(a)(iv).

[104] Mr. Kraft submits that the Tribunal made reversible errors in the Sanctions Decision, including by imposing sanctions on him that were entirely disproportionate to his impugned conduct. He asks the court to set aside the Sanctions Decision as it applies to him or vary the sanctions order to impose less serious sanctions that do not include trading or director and officer bans.

[105] As explained below, we have concluded that the Tribunal did not make any reversible errors that would justify interfering with the Sanctions Decision.

A. Legal framework – sanctions and costs

[106] After a hearing, the Tribunal may make orders falling into one or more of 16 categories, which may include imposing monetary and non-monetary sanctions on capital markets participants "if in its opinion it is in the public interest" to do so: *Securities Act*, s. 127(1). The Tribunal is also authorized to make a costs order: *Securities Act*, s. 127.1.

[107] The Tribunal has "very wide discretion" to intervene in the public interest under s. 127(1): see *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132, at para. 39. The discretionary nature of the Tribunal's authority is evident from the opening wording of s. 127(1), authorizing the Tribunal to make orders "if in its opinion it is in the public interest" to do so (emphasis added). The Tribunal's public interest jurisdiction "is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets": *Asbestos*, at

para. 42; see also *Cartaway Resources Corp. (Re)*, 2004 SCC 26, [2004] 1 S.C.R. 672 at para. 58; *Mithras Management Ltd. (Re)*, 1990 LNONOSC 119, 13 O.S.C.B. 1600, at para. 12.

[108] The Tribunal weighs many factors in determining appropriate sanctions, in a process that is generally fact intensive. The weight given to any individual sanctioning factor will vary from case to case and falls within the Tribunal's discretion. No one factor should be considered in isolation "because to do so would skew the textured and nuanced evaluation conducted by the [tribunal] in crafting an order in the public interest": *Cartaway*, at para. 64.

[109] Appeal courts have afforded the Tribunal's decisions on sanctions considerable deference. An appeal court will interfere with a tribunal's decision on sanctions only if the tribunal made an error in principle or the sanction is clearly unfit: *College of Physicians and Surgeons of Ontario v. Peirovy*, 2018 ONCA 420, 143 O.R. (3d) 596, at para. 38; *Kitmitto v. Ontario (Securities Commission)*, 2024 ONSC 1412 (Div. Ct.), at para. 169.

[110] As well, an appeal court will interfere with a tribunal's costs award only if the tribunal made an error in principle or was plainly wrong: *Kennedy v. College of Veterinarians*, 2018 ONSC 3603 (Div. Ct.), at para. 24, citing *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27: see also *Kitmitto* (Div. Ct.), at para. 170.

B. Analysis

[111] Mr. Kraft submits that the sanctions imposed on him are entirely disproportionate to his impugned conduct, namely, the single disclosure of the undisclosed information for the business reason of obtaining input from a professional colleague. Mr. Kraft also says that the sanctions imposed were at odds with the principle that sanctions under s. 127(1) of the *Act* cannot be punitive and may only seek to achieve prospective, remedial and corrective objectives having regard to specific and general deterrence, citing *Mithras* and *Cartaway*. Mr. Kraft further argues that the Tribunal erred in applying a formulaic approach and imposing effectively the same sanctions ordered against other respondents found to have engaged in tipping without regard to the seriousness of the conduct in those other cases: see *Azeff (Re)*, 2015 ONSEC 29, 38 O.S.C.B. 7382, at para. 10, aff'd 2016 ONSC 7508, 135 O.R. (3d) 590 (Div. Ct.).

[112] Among other things, Mr. Kraft submits that the Tribunal erred in relying on judicial commentary that emphasized the seriousness (from a capital markets perspective) of tipping generally while ignoring the Tribunal's own findings about Mr. Kraft's conduct, including that while he breached the tipping prohibition, he did so for a "business reason" and had not breached his position of trust: Merits Decision, at para. 280; Sanctions Decision, at para. 119. He therefore argues that the sanctions imposed were unconnected to specific deterrence and could not be justified by general deterrence, which "does not warrant imposing a crushing or unfit sanction on any individual appellant": *Walton v Alberta (Securities Commission)*, 2014 ABCA 273, 376 D.L.R. (4th) 448, at para. 154.

[113] Taking his individual circumstances into account, Mr. Kraft argues that it would have been more appropriate for the Tribunal to impose a modest monetary administrative penalty, without any trading or director and officer bans.

[114] We see no merit in Mr. Kraft's submissions on sanctions.

[115] Contrary to Mr. Kraft's submissions, we are satisfied that the sanctions imposed on him were responsive to his misconduct. At para. 34, the Tribunal recognized that his misconduct (unlike some other cases) involved a single act of tipping and was not motivated by personal or professional advantage. The Tribunal imposed market bans that were shorter than the OSC sought, in part because Mr. Kraft's misconduct was not "inherently unethical or based on moral turpitude": Sanctions Decision, at para. 85. The Tribunal also considered other important factors in crafting its order, which favoured significant sanctions, including:

a. Mr. Kraft's extensive experience in the capital markets: Sanctions Decision, at paras. 38-39, 43-44;

b. Mr. Kraft received the undisclosed information through his position as Chairman of WeedMD: at para. 119;

c. Insider trading is "one of the most serious diseases our capital markets face" and tipping is "equally reprehensible": at para. 26;

d. Specific deterrence: the need to deter Mr. Kraft given his failure to acknowledge the seriousness of his conduct when given the opportunity and given his statement that there is little here for him to be contrite about: at paras. 72-74; and

e. General deterrence: the need to send a "message for the street" that directors and officers must turn their mind to necessity before they selectively disclose MNPI, particularly given Mr. Kraft's submissions that careless sharing of MNPI happens every day: at para. 77.

[116] In these circumstances, we are not satisfied that Mr. Kraft has met the high bar for appellate intervention with sanctions. Contrary to Mr. Kraft's submissions, we do not agree that the sanctions imposed were punitive in nature. Significant monetary sanctions and market bans have been imposed (and upheld on appeal) in other insider tipping and trading cases: see *Kitmitto (Re)*, 2023 ONCMT 4, at para. 93, aff'd *Kitmitto* (Div. Ct.); *Azeff (Re)*, at para. 50, aff'd *Azeff* (Div. Ct.); *Agueci (Re)*, 2015 ONSEC 19, 38 O.S.C.B. 5995, at para. 87, aff'd 2016 ONSC 6559, 133 O.R. (3d) 81 (Div. Ct.); *Suman (Re)*, 2012 ONSEC 29, at para. 67. In comparison, the sanctions imposed against Mr. Kraft appear modest. We see no error in principle in the Tribunal's reasoning or any indication that the sanctions imposed were clearly unfit.

[117] We conclude that there is no basis for interfering with the Sanctions Decision.

XI. Disposition

[118] Accordingly, the appeal against both decisions is dismissed. Mr. Kraft is ordered to pay costs to the respondents in the agreed amount of $15,000. There is no costs order for or against the Intervenor.

Sachs J.

Lococo J.

Muszynski J.

Date: April 16, 2025

CITATION: Kraft v Ontario (Securities Commission), 2025 ONSC 2266
DIVISIONAL COURT FILE NO.: 433/24
DATE: 20250416

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, Lococo and Muszynksi JJ.

BETWEEN:

MICHAEL PAUL KRAFT

Appellant

– **and** –

ONTARIO SECURITIES COMMISSION and CHIEF EXECUTIVE OFFICER, ONTARIO SECURITIES COMMISSION

Respondents

REASONS FOR JUDGMENT

BY THE COURT

Date: April 16, 2025