

[3] In the “Sanctions Decision” dated April 1, 2021 (*Money Gate Mortgage Investment Corporation (Re)*, 2021 ONSEC 10), the Commission imposed monetary and non-monetary sanctions against the appellants that included disgorgement, administrative penalties, and market participation restrictions. The Commission also ordered them to pay costs.

[4] The appellants submit that they were denied procedural fairness when the Commission (i) refused their request to adjourn the merits hearing, and (ii) in conducting the hearing, otherwise prejudiced their ability to make full answer and defence. They ask the court to set aside the Merits Decision and dismiss the allegations against them or alternatively remit the matter for a new merits hearing.

[5] In the alternative, the appellants submit that the Commission erred in the Sanctions Decision by imposing demonstrably unfit sanctions relating to its interpretation and application of the disgorgement remedy. They ask the court to substitute less onerous sanctions or alternatively remit the matter for a new sanctions hearing.

[6] For the reasons below, I would dismiss the appeal against both decisions.

II. Background

[7] The proceedings before the Commission arose from the sale of preferred shares of Money Gate Mortgage Investment Corporation (“Money Gate” or “MGMIC”) to more than 150 investors.

[8] Money Gate was incorporated in 2014 as an investment vehicle for mortgage financing. The directors were Morteza (Ben) Katebian (“Ben”), his son Payam Katebian (“Payam”) and Ben’s business associate Bitra Ghaffari. Ben was Money Gate’s President and Chief Executive Officer. Payam was its Secretary and later held other officer roles.

[9] Ms. Ghaffari was the principal mortgage broker with Money Gate Corporation (“MGC”), a related mortgage brokerage firm co-owned by Ben and Ms. Ghaffari. MGC acted as the broker for the mortgages advanced by Money Gate and provided related services to Money Gate. Ms. Ghaffari remained the principal broker until 2016, when she left MGC: Merits Decision, at paras. 7, 12.

[10] Beginning in August 2014, Money Gate acted as a private lender, using a pool of funds generated by sales of its preferred shares. Money Gate issued offering memoranda in which it committed to invest the funds in a portfolio of residential and commercial mortgage loans made to borrowers in market segments that were typically underserved by large financial institutions: Merits Decision, at para. 11. Money Gate issued preferred shares to 150 investors in the period August 2014 to April 2017, raising approximately \$11 million: Merits Decision, at para. 147.

III. Procedural history

[11] The Commission’s decisions under appeal arose from allegations by OSC staff that Ben, Payam, Money Gate and MGC (the “defending parties”) breached Ontario securities law in relation to the sale of Money Gate preferred shares. “Ontario securities law” is defined to mean

the *Securities Act*, the regulations under that *Act*, and securities regulatory decisions to which a person or company is subject: *Securities Act*, s. 1(1).

[12] On April 27, 2017, enforcement staff of the OSC (“OSC staff”) obtained a temporary “cease trade” order from the Commission, requiring that all trading in securities of Money Gate cease. That order also temporarily suspended the defending parties’ ability to rely on trading exemptions contained in Ontario securities law. The cease trade order against Money Gate’s securities was subsequently extended on consent and remained in place throughout the subsequent Commission proceeding.

[13] The regulatory proceeding against the defending parties was commenced by Notice of Hearing dated December 21, 2017, which included OSC staff’s Statement of Allegations dated December 19, 2017 (subsequently amended October 31, 2018). The matter was returnable before a panel of the Commission, exercising its adjudicative function.¹

[14] In the Statement of Allegations, OSC staff alleged that the defending parties breached Ontario securities law by (i) engaging in distributions of Money Gate securities without a prospectus or a prospectus exemption, contrary to s. 53(1) of the *Act*, (ii) engaging in the business of trading in securities without registration or a registration exemption, contrary to s. 25(1) of the *Act*, (iii) making untrue or misleading statements in offering documents, contrary to s. 122(1)(b) of the *Act*, (iv) engaging in securities fraud, contrary to s. 126.1(1)(b) of the *Act*; and (v) as corporate directors and officers, authorizing, permitting or acquiescing in such conduct, pursuant to s. 129.2 of the *Act*.

[15] The Statement of Allegations did not include any allegations against Ms. Ghaffari, who was not a defending party in the proceeding. As indicated further below, she was a key witness for OSC staff in their case against the defending parties.

[16] As set out in the Notice of Hearing, the first attendance before the Commission occurred on January 11, 2018. There were subsequent attendances on May 9 and July 6, 2017, at which all four defending parties were represented by the same counsel, Mr. Richard.

[17] By Commission order dated July 6, 2018, the merits hearing was scheduled to commence November 15, 2018 and to continue for 22 days ending in January 2019. By consent order dated September 11, 2018, due to an overlooked scheduling conflict, six hearing dates in November were vacated at the request of Mr. Richard and additional dates in January 2019 were added.

[18] On October 15, 2018, OSC staff served the defending parties with proposed amendments to the Statement of Allegations. At a preliminary attendance before the Commission the following day, the Commission directed that a motion be heard on October 31, 2018, at which the

¹ Since the proceedings below, the Commission’s adjudicative function has been transferred to the Capital Markets Tribunal, a newly-established division of the Commission: see *Securities Commission Act, 2021*, S.O. 2021, c. 8, Sched. 9, ss. 25-31.

Commission would consider whether the proposed amendments would require an adjournment of the merits hearing.

[19] At the motion hearing on October 31, 2018, OSC staff advised that (i) it had obtained a direction under s. 126(1) of the *Act*, freezing Money Gate's bank account and would apply to the Superior Court of Justice to continue the freeze direction, (ii) it had brought a Superior Court application for appointment of a receiver over Money Gate, and (iii) it was not yet in a position to provide full documentary disclosure to the defending parties relating to the new allegations.

[20] The defending parties did not object to the proposed amendments to the Statement of Allegations. As set out in the Merits Decision, at para. 43,

Counsel for the respondents [Mr. Richard] advised that he had been planning to ask for an adjournment of the hearing on the merits from December 3, 2018, to January 7, 2019, as a result of Staff's amendments to the Statement of Allegations. As he correctly observed, though, he would be unlikely to continue as counsel for MGMIC if Staff were to be successful in having a receiver appointed. In his submission, the uncertainty regarding who would be able to speak on behalf of MGMIC, and the freezing of MGMIC's funds, also warranted an adjournment of the hearing.

[21] After hearing submissions, the Commission ordered that the hearing take place over 25 hearing days from January 7, 2019 to May 10, 2019.

[22] At a further interlocutory attendance on December 3, 2018, the Commission was advised that the Superior Court of Justice had appointed a receiver over Money Gate. The receiver's counsel was present, together with OSC staff and Mr. Richard on behalf of the remaining defending parties (Ben, Payam and MGC). The Commission was advised that, in light of OSC staff's representation that it would not be seeking monetary sanctions or costs against Money Gate, the receiver would not be participating further in the proceeding. OSC staff also advised that it had completed disclosure and was ready to proceed with the hearing on January 7, 2019: see Merits Decision, at paras. 45-46.

[23] OSC staff also advised that it had been notified by Mr. Richard the previous day that his firm may be withdrawing as counsel of record for the remaining defending parties. As set out in the Merits Decision, at para. 47:

In addressing this issue at the interlocutory attendance, Mr. Richard advised that 'we are not retained to do the hearing.' Mr. Richard identified several possible scenarios, one of which was that the Remaining Respondents would be self-represented during the hearing but that some counsel, possibly but not necessarily Mr. Richard's firm, would have a limited retainer to assist with part of the hearing.

[24] On December 5, 2018, the remaining defending parties advised that they no longer had counsel and would be self-represented. However, on December 28, 2018, they advised that they had retained new counsel, and on Thursday, January 3, 2019, filed a motion to adjourn the hearing. In their motion, they requested that the merits hearing begin on February 25, 2019, seven weeks

after its scheduled start on January 7, and conclude in June 2019, rather than in May. In the alternative, the motion requested that the hearing dates scheduled for January 28, 29 and 30 and February 21 and 22 be vacated and rescheduled to later dates.

[25] In bringing the adjournment motion, the appellants cited “the complexity of this matter, the extensive evidentiary record, and the potentially serious consequences.” In Payam’s supporting affidavit, he stated that the requested adjournment would “allow [their] newly retained lawyer time to prepare so that [they] can fairly respond to Staff’s allegations.” Payam also indicated that they had decided as of December 5 to represent themselves, but “in mid-December came to the realization that they required the assistance of legal counsel”: Merits Decision, at para. 51.

[26] The adjournment motion was argued before the Commission on January 7, 2019, the first scheduled date of the merits hearing. After hearing oral submissions, the Commission dismissed the motion to adjourn the commencement of the hearing, with reasons to follow as part of the reasons at the conclusion of the merits hearing. However, the Commission granted the appellants’ alternative request to vacate and reschedule certain dates in January and February 2019. At the Commission’s direction, the merits hearing commenced the same day (January 7), as previously scheduled.

IV. Decisions under appeal

A. Merits Decision

[27] Following a virtual hearing that ran 17 days from January 7 to June 28, 2019 (followed by written closing submissions delivered five weeks later), the three-member Commission panel issued its 48-page Merits Decision on December 17, 2019.

[28] In the Merits Decision, the Commission first provided its reasons for denying the adjournment. The Commission noted that the recently adopted r. 29(1) of the *Ontario Securities Commission Rules of Procedure* (the “*OSC Rules of Procedure*”) provided that every merits hearing shall proceed on the scheduled date unless the party requesting an adjournment “satisfies the Panel that there are exceptional circumstances requiring an adjournment.”² Citing previous Commission decisions, the Commission, at para. 54, interpreted the standard set out in r. 29(1) as follows:

As the Commission has previously held, the new standard is a “high bar” that reflects the important objective set out in current Rule 1, that Commission proceedings be “conducted in a just, expeditious and cost-effective manner.” This objective must be balanced against parties’ ability to participate meaningfully in the hearing and to present their case. A determination as to whether an adjournment should be granted is necessarily fact-based, and will include consideration of,

² Rule 29(1) of the *OSC Rules of Procedure* was replaced by current r. 34(1) of the *Capital Markets Tribunal Rules of Procedure*.

among other things, how the requesting parties have conducted themselves in the case. [Citations omitted.]

[29] The Commission went on to consider whether that standard had been met, ultimately concluding, at para. 64, that the remaining defending parties “failed to demonstrate any ‘exceptional circumstances’ that might warrant a further adjournment of the merits hearing.”

[30] In its analysis, the Commission noted that there had been two previous adjournments of the hearing but found those adjournments to be “neutral factors” when considering the request for a further adjournment: Merits Decision, at para. 56.

[31] The Commission then considered the involvement of Mr. Richard’s firm as the defending parties’ counsel of record from the first appearance before the Commission in January 2018. The Commission noted that it was not until December 2018 that there was any suggestion that the firm might not appear for the remaining defending parties at the merits hearing, and that even at the interlocutory attendance on December 3, 2018, Mr. Richard held open the possibility that his firm might appear but in a limited capacity. At para. 58, the Commission went on to state:

The Remaining Respondents have offered no reason for their decision, effected two days later, to appear on their own behalf. Similarly, they have offered no reason for their decision, once they changed their mind and realized they needed legal assistance after all, to retain new counsel instead of reappointing [Mr. Richard’s firm]. While a party’s relationship with its counsel is generally protected by solicitor-client privilege, and while a party is generally entitled to choose its counsel without any obligation to explain its choice, that rule cannot apply when the party seeks to rely on a change of counsel to justify an adjournment request. In those circumstances, the party opens itself to inquiry as to the reason for its choice and as to why that reason constitutes exceptional circumstances.

[32] In the absence of an explanation from the remaining defending parties, the Commission stated that it had no basis to conclude that they were unable to continue with their previous counsel, without the need for an adjournment: Merits Decision, at paras. 59-61.

[33] At para. 62, the Commission also rejected the defence argument that denying them the requested adjournment would prevent them from meaningfully exercising their right to counsel. While acknowledging that their new counsel had less time to prepare for the hearing than they would have preferred, the Commission explained:

They had the counsel of their choosing throughout the proceeding. They appointed new counsel, without explaining why that was necessary, or even if it was necessary. That is their choice, but having made that choice they cannot complain that the cause of their new counsel’s difficulties lies elsewhere.

[34] After providing its reasons for denying the adjournment, the Commission went on to consider the evidence and submissions relating to OSC staff’s allegations against the defending parties. The Commission found that Money Gate, MGC, Ben and Payam had perpetrated frauds on Money Gate’s investors, contrary to s. 126.1(1)(b) of the *Act*. The Commission also found that

Money Gate, Ben and Payam engaged in unregistered trading contrary to s. 25(1) and illegal distributions contrary to s. 53(1).

[35] In making those determinations, the Commission relied on evidence that included the testimony of Ms. Ghaffari, the OSC staff's principal witness, which the Commission noted was corroborated by other evidence. The Commission gave no weight to certain contrary testimony from Payam: see Merits Decision, at paras. 116-32.

B. Sanctions Decision

[36] On April 1, 2021, following a two-day virtual hearing that occurred in July 2020, the Commission issued the Sanctions Decision. As summarized further below under "Sanctions appeal", the Commission imposed monetary and non-monetary sanctions that included administrative penalties and market participation restrictions. The Commission also made a joint and several disgorgement order and a costs order against Ben, Payam and MGC.

V. Jurisdiction and standard of review

[37] By Notice of Appeal dated May 3, 2021, the appellants appeal the Merits Decision and Sanctions Decision.

[38] The Divisional Court has jurisdiction to hear this appeal: *Securities Act*, s. 9(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.

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

[40] 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.

[41] Whether there has been a breach of the duty of procedural fairness is a question of law, subject to correctness review on appeal: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 D.L.R. (4th) 328, at paras. 26-30. The degree of procedural fairness required is determined by reference to all the circumstances of the case, including those set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 21-28; see also *Vavilov*, at para. 77.

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

VI. Issues to be determined

[43] In this appeal, the appellants raise the following issues:

- a. Adjournment decision: Did the Commission deny the appellants procedural fairness by refusing their request to adjourn the merits hearing?
- b. Conduct of the merits hearing: In the conduct of the merits hearing, did the Commission deny the appellants procedural fairness by otherwise prejudicing their ability to make full answer and defence?
- c. Sanctions appeal: In the Sanctions Decision, did the Commission impose demonstrably unfit sanctions, relating to its interpretation and application of the disgorgement remedy?

[44] These issues are addressed below.

VII. Adjournment decision

A. Appellants' position

[45] Did the Commission deny the appellants procedural fairness by refusing their request to adjourn the merits hearing?

[46] The appellants accept that a tribunal's decision on an adjournment request is generally entitled to deference, whether on appeal or judicial review.

[47] As recently stated in *Anca International Holding Group Inc. v Zhao*, 2024 ONSC 3397 (Div. Ct.), at para. 15, “[a]bsent an error in principle or a failure to take into account relevant considerations, an appellate court will defer to discretionary adjournment decisions made by tribunals.” As well, in *Kalin v. Ontario College of Teachers* (2005), 75 O.R. (3d) 523 (Div. Ct.), at paras. 30-31, the court stated:

Matters such as scheduling and deciding whether or not to grant an adjournment involve an exercise of discretion. Generally speaking, decisions made in the exercise of discretion are entitled to considerable deference, provided the discretion is exercised judicially and in accordance with principles of fairness and natural justice....

A tribunal is entitled to control its own processes and is not obliged to grant an adjournment merely to accommodate the "convenience" of a party.... However, in exercising its discretion as to whether to grant an adjournment, a tribunal is not permitted to act arbitrarily. The tribunal may take into account the public interest and the interest of the tribunal itself in having matters move expeditiously. But, it must take into account all of the relevant factors, including the reasons for the request and the implications of not granting the request and whether the public interest may be adequately protected by alternate means.... [Citations omitted.]

[48] The appellants submit that in its decision to deny the adjournment request, the Commission (like the tribunal in *Kalin*) acted arbitrarily and denied them procedural fairness by failing to consider relevant factors, which required them to balance the public interest and fairness to the

requesting party: see *Kalin*, at para. 39. The appellants argue that as a result of this denial of procedural fairness (together with evidentiary rulings during the hearing that the appellants say further prejudiced their ability to make full answer and defence, as discussed below), the Merits Decision must be set aside: see *Bryce v. Ontario (Environment and Climate Change)*, 2016 ONSC 4191, 132 O.R. (3d) 767 (Div. Ct.), at para. 123; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at para. 23.

[49] The appellants also rely on the Commission’s decision in *Cheng (Re)*, 2018 ONSEC 13, at paras. 5-6. The appellants submit that in *Cheng*, the Commission recognized that when deciding whether to grant an adjournment, it must balance the objective that Commission proceedings be conducted in a “just, expeditious and cost-effective manner” (as set out in r. 1 of the *OSC Rules of Procedure*) against the defending parties’ ability to participate meaningfully in the hearing and present their case. In *Cheng*, at para. 6, the Commission stated:

The balancing of these objectives is necessarily fact-based and must take into account the circumstances of the parties and the manner in which they have conducted themselves in the proceeding. In determining whether exceptional circumstances require an adjournment, the dominant factor will usually be the requesting respondent’s ability to make full answer and defence in the circumstances. [Emphasis added. Footnote omitted.]

[50] The appellants argue that, unlike in *Cheng*, the Commission did not mention and failed to consider the prejudicial impact on the appellants’ ability to make full answer and defence if the adjournment request was denied. Instead, the Commission relied heavily on the requirement in r. 29(1) that the requesting party demonstrate “exceptional circumstances”, finding it to be a “high bar” for the requesting party, without previous judicial consideration of that provision.

[51] The appellants also submit that the Commission erred in failing to consider other relevant factors favouring adjournment set out in previous caselaw, including consideration of the non-exhaustive list of factors set out in *Igbinosun v. Law Society of Upper Canada*, 2009 ONCA 484, 96 O.R. (3d) 138. In that case, the Law Society’s appeal panel had upheld the decision of its hearing panel to refuse the adjournment of a disciplinary hearing, which resulted in the withdrawal of the licensee’s new counsel. The Divisional Court found that there had been a denial of nature justice in the circumstances of that case, and the Court of Appeal upheld that decision. The appellants argue that like the Law Society tribunal decisions in *Igbinosun*, the Commission’s reasons did not reflect a consideration of the factors required by the circumstances of the case, particularly, the prejudice the appellants would experience if the request was denied: see *Igbinosun*, at para. 38.

[52] As explained below, I have concluded that the Commission did not deny the appellants procedural fairness by refusing their request to adjourn the commencement of the merits hearing.

B. Adjournment decisions require a balancing of the requesting party’s interests with other relevant factors

[53] While the interests of a party requesting an adjournment are important (and in some circumstances paramount), other relevant interests must be considered to meet the objective that Commission proceedings are conducted in a “just, expeditious and cost-effective manner”. As the

Commission observed in *Kitmitto (Re)*, 2020 ONSEC 22, at para. 27, adjournments of merits hearings “disrupt existing plans, consume resources unnecessarily, and/or (and often most significantly) delay the conclusion of the merits hearing. It is an exception when an adjournment effects no appreciable disruption.” There are many interests at stake, including those of witnesses, who often must re-arrange their affairs to attend (for example, Ms. Ghaffari, whose testimony spanned five hearing days, had to take off more than a week of work to attend the hearing, and had to arrange for a colleague to look after her clients) or whose personal circumstances may limit their availability to testify (for example, an investor witness in this case was scheduled to undergo a significant medical procedure later in January 2019 that would involve six to eight weeks of recovery).

[54] Such considerations were reflected in the *OSC Rules Procedure*, which the Commission adopted pursuant to s. 25.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. In r. 29(1), the Commission addressed adjournments specifically, stating that every merits hearing shall proceed on the scheduled date unless the requesting party “satisfies the panel that there are exceptional circumstances requiring an adjournment.” In promulgating r. 29(1), the Commission provided notice to parties that adjournments would not be granted as a matter of routine, but that the requesting party would have to establish why the Commission should not proceed as scheduled.

[55] In allowing for adjournments in exceptional circumstances, r. 29(1) recognized that in some cases, the interests of the party requesting the adjournment and other factors may be so significant as to justify the disruption caused by an adjournment. However, this recognition does not mean that the interests of the requesting party automatically trump all other considerations.

[56] Decisions of the Commission (and later the Capital Market Tribunal) have consistently referred to adjournment determinations as an exercise in balancing the objective of proceeding in a “just, cost effective and expeditious manner” (set out in r. 1 of the *OSC Rules of Procedure*) against “the parties' ability to participate meaningfully in hearings and present their case”: see *Becksley Capital Inc (Re)*, 2021 ONSEC 16, at para. 6; *First Global Data Ltd (Re)*, 2022 ONCMT 25, at para. 75; *Go-To Developments Holdings Inc (Re)*, 2023 ONCMT 35, at para. 18; *Odorico (Re)*, 2023 ONCMT 34, at para. 26. The Commission panel in this case acknowledged and made specific reference to this balancing exercise: Merits Decision, at para. 54.

[57] So did the panel in *Cheng*, at para. 6, which (unlike in other tribunal decisions) went on to state that in determining whether exceptional circumstances require an adjournment, “the dominant factor will usually be the requesting respondent’s ability to make full answer and defence in the circumstances” (emphasis added). There is no doubt a defending party’s ability to make full answer and defence in the circumstances of a particular case would be an important consideration. However, as indicated further below, I do not consider the panel’s failure to make specific reference to that consideration in this case to be indicative of procedural unfairness, as the appellants appear to suggest.

C. The Commission considered the relevant factors and the circumstances of the case

[58] Contrary to the appellants’ submission, the Commission considered the alleged prejudice to the appellants in not granting the adjournment. At para. 51, the Commission noted that the

appellants cited the complexity of the matter, the extensive evidentiary record, and the potentially serious consequences as among the grounds for the adjournment motion. At para. 62, the Commission accepted that because of the timing of their new counsel's retainer, he found himself in a difficult situation, and had less time to prepare for the hearing than he and the appellants would have preferred.

[59] As it was entitled to do, however, the Commission also considered and weighed the appellants' reasons for being unable to proceed on the scheduled date: see *Igbinosun*, at para. 37. The Commission was clearly skeptical as to why the appellants and their new counsel were in the situation they were in. The Commission noted that: (i) the appellants had been represented throughout, and their original counsel did not advise OSC staff or the Commission until the final interlocutory attendance that he might not appear for them at the hearing; (ii) the appellants gave notice two days later that they intended to appear on their behalf, but offered no reason for this decision; and (iii) two weeks later, they changed their position and decided to be represented, whereupon they retained new counsel rather than reappointing their original counsel, but again offered no reason for doing so. It is clear from the Commission's reasons that it did not find the reason for the adjournment request to be compelling on the evidence the appellants provided. That assessment was well within the Commission's discretion.

[60] In summary, the Commission did not accept that the appellants had established that the alleged prejudice should, in the context and circumstances of the case, outweigh the public interest in advancing the proceeding expeditiously.

[61] I am satisfied that the Commission did not commit any error in principle in coming to that conclusion. The Commission's consideration of the factual context and its decision regarding how to balance the appellants' interest and the public interest were matters squarely within the Commission's discretion and warrant deference on appeal.

D. The adjournment decision did not render the merits hearing procedurally unfair

[62] Whether a decision renders a hearing unfair is a fact-specific inquiry. The effect of the Commission's decision to grant the appellants' alternative relief was to provide a break of almost six weeks to prepare for the remainder of the hearing, including the entire presentation of the appellants' case in chief. Further, unlike the situation in *Igbinosun*, the appellants remained represented throughout the hearing.

[63] In this case, the consequence of the Commission's adjournment decision for the appellants was limited to any effect it would have on their counsel's ability to cross-examine the witnesses called on the first set of dates before the lengthy break in the hearing. The appellants have not identified any demonstrable resulting prejudice to their ability to make full answer and defence.

[64] Of the six witnesses that OSC staff called over these dates, four were investors, whose evidence was not controversial. That evidence related primarily to their investments in Money Gate, and to whether or not they had met Ben or Payam before investing: see Merits Decision, at paras. 109-15, 186. The appellants did not challenge or contradict this evidence: Merits Decision, at paras. 114, 186.

[65] Appellants' counsel was not required to begin his cross-examination of Ms. Ghaffari until three full days after her testimony began (one of which was a non-sitting day). He did not complete the cross-examination until the following Monday.

[66] OSC staff's last witness on these initial dates was an OSC investigator (much of whose testimony involved the identification and marking of exhibits). Appellants' counsel's cross-examination did not begin until the second day of her testimony. The Commission panel indicated it was prepared to consider re-opening her cross-examination upon the resumption of the hearing after the six-week break if that turned out to be necessary in the interests of fairness. On the resumption of the hearing, the appellants did not make that request.

[67] In summary, appellants' counsel had a meaningful opportunity to respond to the evidence presented on these dates. In these circumstances, I am satisfied that the Commission's decision to deny the primary relief on the adjournment motion (and instead grant the secondary requested relief) did not result in procedural unfairness to the appellants.

VIII. Conduct of the merits hearing

[68] In the conduct of the merits hearing, did the Commission deny the appellants procedural fairness by otherwise prejudicing their ability to make full answer and defence?

[69] In further support of their position that they were denied procedural fairness, the appellants submit that in addition to the adjournment refusal, the Commission compounded its infringement of their ability to make full answer and defence by (i) improperly interfering with the appellants' right to cross-examine prosecution witnesses, and (ii) improperly interfering with the appellants' right to call evidence in their own defence by affording no weight to Payam's evidence on important issues.

[70] On the alleged right to cross-examination infringement, the appellants rely on criminal caselaw, including *R. v. Evans*, 2019 ONCA 715, 147 O.R. (3d) 577, at para. 98, where the Court of Appeal described the right to cross-examine as "an essential component of the common law and the constitutional right to make full answer and defence" under s. 7 of the *Charter*.³ The appellants submit that the Commission interfered with that right in the cross-examination of a key witness (Ms. Ghaffari) on a document she signed relating to an impugned transaction, which the appellants say was essential to their defence such that the fairness of the merits hearing was impinged. During Ms. Ghaffari's cross-examination, the Commission did not allow appellants' counsel to put the document to Ms. Ghaffari or ask her questions about it on the basis that the document was not included in OSC staff's disclosure or provided by the appellants prior to the hearing, as required by the Commission procedural rules.

[71] The appellants submit that cross-examination of Ms. Ghaffari concerning the document in question would have permitted their counsel to explore her role in its creation, her knowledge and approval of certain aspects of the transaction, as well as to explore her credibility as a witness.

³ *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.

They say that the latter consideration was important, since the Commission's decision turned on credibility, favouring Ms. Ghaffari's evidence over that of Payam.

[72] On the second alleged infringement (relating to the appellants' right to call evidence in their own defence), the appellants again rely on criminal caselaw, including *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 2, where the Supreme Court stated that "an accused does have a constitutional right to answer whatever is put against him by the Crown, whether in evidence or in argument."

[73] The appellants submit that the Commission interfered with that right by affording no weight to Payam's evidence on important issues, including his evidence regarding what Payam said was a pre-existing relationship between Ms. Ghaffari and an alleged "undisclosed principal" of Money Gate. The appellants submit that the Commission's findings significantly impacted the appellants' ability to call responding evidence, infringing their right to call evidence in their defence.

[74] I see no merit to the appellants' submissions on these issues.

[75] Criminal caselaw regarding the constitutional right to make full answer and defence (including the right to cross-examine prosecution witnesses) that is applicable to accused persons in criminal proceedings is of limited utility in the administrative law context. The function of administrative tribunals is regulatory, not penal, in nature. Instead, the appropriate framework for examining an administrative tribunal's rulings relating to the conduct of the hearing, including rulings made in the course of cross-examination, is that of procedural fairness. Where such rulings involve an exercise of discretion, they are entitled to deference on appeal as long as they do not involve an extricable error of law.

[76] The appellants complain that the Commission improperly curtailed the cross-examination of OSC staff's key witness, but cite a single ruling, made in the course of a cross-examination that took the better part of two days, spanning almost 300 pages of transcript. I see no basis for concluding that this ruling, regarding one document in a hearing with 258 exhibits, amounted to an unfair curtailment of the cross-examination. Ultimately, the Commission permitted the document in question to be admitted into evidence during Payam's examination in chief.

[77] In the end, the Commission simply did not accept Payam's testimony that Ms. Ghaffari was fully involved in the impugned transaction, taking into consideration the evidence as a whole, including Ben and Payam's prior statements, in which they indicated that she did not have an active role: Merits Decision, at paras. 82-83, 96. The appellants have not established that using the document in question to "explore Ms. Ghaffari's credibility" would have assisted them in overcoming their own prior statements on this point.

[78] Similarly, I agree with the Commission's counsel that the appellants have not established that there was any procedural unfairness in the Commission's findings that afforded no weight to Payam's evidence and preferred Ms. Ghaffari's evidence to his. Those findings disclose no error in principle and do not warrant the court's interference on appeal.

[79] For the reasons above, I would dismiss the appeal of the Merits Decision.

IX. Sanctions appeal

A. Introduction

[80] Following a two-day virtual hearing in July 2020, the Commission issued its Sanctions Decision on April 1, 2021. At para. 3, the Commission found that it was in the public interest to impose the following sanctions and costs on Ben, Payam and MGC:

- a. They each pay an administrative penalty of \$1 million;
- b. They jointly and severally disgorge to the Commission \$8,711,138; and
- c. They jointly and severally pay costs to the Commission of \$597,122.58.

[81] The Commission also ordered that Ben and Payam each be subject to permanent director and officer bans and (together with MGC and Money Gate) trading, acquisition and exemption bans.

[82] The appellants submit that the Commission erred in the Sanctions Decision by imposing demonstrably unfit sanctions relating to the interpretation and application of the disgorgement remedy. They ask the court to substitute less onerous sanctions or alternatively remit the matter for a new sanctions hearing.

[83] As explained below, I have concluded that the Commission did not make any reversible errors that would justify interfering with the Sanctions Decision.

B. Legal framework

[84] After a hearing, it was open to the Commission to make “public interest” orders 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 Commission was also authorized to make a costs order: *Securities Act*, s. 127.1.

[85] Two of the public interest orders that the Commission was authorized to make under s. 127(1) would require the payment of monetary amounts to the Commission:

Orders in the public interest

127 (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:

...

9. If a person or company has not complied with Ontario securities law, an order requiring the person or company to pay an administrative penalty of not more than \$1 million for each failure to comply.

10. If a person or company has not complied with Ontario securities law, an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance.

[86] The Commission had “very wide discretion” to intervene in the public interest under s. 127(1), including when imposing sanctions: see *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132 (“*Asbestos*”), at para. 39; see also *Cartaway Resources Corp (Re)*, 2004 SCC 26, [2004] 1 S.C.R. 672, at paras. 45, 63. The discretionary nature of the Commission’s authority is evident from the opening wording of s. 127(1), authorizing the Commission to make orders “if in its opinion it is in the public interest” to do so (emphasis added). The Commission’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.

[87] The Commission 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 Commission’s discretion. No one factor should be considered in isolation “because to do so would skew the textured and nuanced evaluation conducted by the Commission in crafting an order in the public interest”: *Cartaway*, at para. 64.

[88] Appeal courts have afforded the Commission’s decisions on sanctions considerable deference, given their discretionary and fact-intensive nature and recognizing the Commission’s subject matter expertise: see *Cartaway*, at para. 45. 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; *Quadrex Hedge Capital, Management Ltd. v. Ontario (Securities Commission)*, 2020 ONSC 4392, 151 O.R. (3d) 709, at para. 125. 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.

C. Appellants’ position

[89] The appellants submit that in Sanctions Decision, the Commission erred in making a joint and several disgorgement order against them.

[90] The appellants accept the Commission’s authority to make a disgorgement order under s. 127(1)10 of the *Act*, and, in appropriate circumstances, to make such an order jointly and severally. However, they submit such an order must be consistent with the text and legislative purpose of that provision, which they say was not the case in the Sanctions Decision.

[91] The appellants argue that the primary objective of the disgorgement remedy is to “deprive a wrongdoer of ill-gotten gains”, as opposed to compensating victims or punishing wrongdoers: see Five Year Review Committee, *Reviewing the Securities Act (Ontario)* (Toronto: Publications Ontario, 2003), p. 218 (which recommended amending the *Act* to include the disgorgement

remedy). Consistent with that objective, the Commission’s authority to make a disgorgement order under s. 127(1)10 was limited to “any amounts obtained as a result of the non-compliance” (emphasis added).

[92] The appellants submit that the joint and several disgorgement order in the Sanctions Decision goes beyond the Commission’s authority under s. 127(1)10. They say that order was demonstrably unfit and based on an error in principle since it was made without any differentiation or analysis as to how the individual appellants benefitted financially and in the absence of evidence that any amounts were obtained by Payam.

[93] In support of their position, the appellants rely on recent caselaw in British Columbia and the United States. They urge the court to adopt the reasoning of the British Columbia Court of Appeal in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207, 413 D.L.R. (4th) 594, as to the scope of the disgorgement remedy in the B.C. legislation, where the court emphasized that the “amount obtained” must be obtained by “that respondent” (against whom a disgorgement order is sought) as a result of the contravention: *Poonian*, at para. 143. The appellants also note that in *Liu v. Securities and Exchange Commission*, 591 U.S. 71 (2020), the Supreme Court of the United States, when considering the equitable principles underlying disgorgement, emphasized the general principle of “individual liability for wrongful profits”: *Liu*, at p. 17.

D. The Commission did not err in ordering joint and several disgorgement

[94] As explained below, I have concluded that the Commission did not err in making a joint and several disgorgement order against the appellants.

[95] In deciding to order joint and several disgorgement, the Commission began its analysis with its finding that Money Gate raised approximately \$11 million through the distribution of its preferred shares, in contravention of the *Act*. Therefore, the Commission concluded that Money Gate had “obtained” the full \$11 million within the meaning of s. 127(1)10, and further determined that it could order disgorgement of the full \$11 million. However, the Commission exercised its discretion, in the appellants’ favour, to order disgorgement of approximately \$8.7 million, subtracting the funds loaned by Money Gate in conformance with the promises made to investors: see Sanctions Decision, at paras. 51-58.

[96] In interpreting the phrase “obtained as a result of the non-compliance” in s. 127(1)10, the Commission determined that the statute supported the imposition of a joint and several disgorgement order on MGC, Ben and Payam, finding that they “were inextricably wound up in all of [Money Gate’s] frauds”: Sanctions Decision, at para. 50, quoting Merits Decision, at para. 309.

[97] I see no error in these determinations.

[98] The Supreme Court of Canada has recognized that, in determining an appropriate remedial preventive order in a case before it, the Commission had “very wide discretion” to intervene in the public interest, including by imposing sanctions to prevent likely future harm to Ontario’s capital markets: *Asbestos*, at paras. 39-42. In the exercise of that discretion in the Sanctions Decision, the

Commission imposed a joint and several disgorgement order against the appellants under s. 127(1)10.

[99] A broad interpretation of s. 127(1)10 affords the Commission the latitude to craft regulatory disgorgement orders tailored to the complexities of each case. This is consistent with the Supreme Court pronouncement that, as remedial legislation, the *Act* is to be given a broad interpretation: see *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331, at para. 32. It also respects the Legislature’s choice to delegate authority to a specialized tribunal: see *Vavilov*, at para. 36.

[100] It is well settled in Divisional Court decisions that the disgorgement remedy is broad enough to support disgorgement of amounts beyond what a wrongdoer obtained personally. In *Phillips v. Ontario (Securities Commission)*, 2016 ONSC 7901, 135 O.R. (3d) 771 (Div. Ct.), at para. 71, the court observed that “[o]n its face, the wording of [s. 127(1)10] is broad” and supports the conclusion that disgorgement can be ordered of “any amounts obtained.” The court rejected the submission that it was unreasonable for the Commission to have ordered the appellants in that case to disgorge amounts that were not obtained by them personally. It upheld the disgorgement order against Mr. Phillips, the directing mind of the fraudulent scheme, which represented the full amounts raised by him and others under his supervision and direction: *Phillips*, at paras. 29, 79.

[101] In *North American Financial Group Inc. v. Ontario (Securities Commission)*, 2018 ONSC 136 (Div. Ct.), at para. 217, the court stated that the “issue of whether disgorgement orders should be limited to the amount that the fraudsters obtained personally, either directly or indirectly, has been litigated and lost”.

[102] In *Quaadrex*, at para. 134, the Divisional Court upheld a joint and several disgorgement order against the appellants. In holding that the Commission’s sanctions decision was “consistent with applicable principles”, the court quoted with approval the tribunal’s reasons, which included that “Staff need not show that the funds received by QAM were personally obtained by [the appellants]”: *Quaadrex*, at paras. 133, 137.

[103] Most recently, in *Aziz v. Ontario (Securities Commission, Chief Executive Officer)*, 2024 ONSC 4691 (Div. Ct.), at paras. 82-84, the court upheld joint and several disgorgement orders in a case where the Capital Markets Tribunal followed the principles in *Phillips* and *North American Financial*. In *Aziz*, at para. 84, the court observed that the tribunal’s decision formulating a disgorgement order “is ultimately a discretionary and fact-intensive exercise deserving of deference.”

[104] In *Aziz*, the court considered the B.C. Court of Appeal’s decision in *Poonian* but found (at para. 94) that it did not assist the appellants in the circumstances of that case. The decision of the U.S. Supreme Court in *Liu* was not considered in *Aziz*, but I agree with OSC staff counsel that *Liu* is of no assistance in interpreting s. 127(1)10, since the question before the court was the availability and scope of disgorgement as “equitable relief” available to courts, not how an administrative tribunal should craft regulatory sanctions in the public interest: *Liu*, at paras. 75-78.

[105] In summary, the Divisional Court to date has declined to interfere with tribunal decisions that found that the amount of a disgorgement order under s. 127(1)10 is not restricted to the amount the person obtained as a result of non-compliance with Ontario securities law.

[106] I note, however, the Court of Appeal for Ontario recently granted leave to appeal the Divisional Court decision in *Aziz*, only on the issue of interpretation of the disgorgement remedy under s. 127(1)10 of the *Act*: see 24-OM-0305/0347 (February 19, 2025). While the Court of Appeal's decision in *Aziz* may clarify the scope of the disgorgement remedy, the Ontario caselaw at this time supports the Sanctions Decision in this case.

[107] Accordingly, I would dismiss the sanctions appeal.

X. Disposition

[108] For the above reasons, I would dismiss the appeal against both decisions.

[109] I would also order the appellants to pay costs to the OSC, the successful party in the appeal, in the requested amount of \$15,000, which is a reasonable amount in the circumstances.

Lococo J.

I agree: _____
Backhouse J.

I agree: _____
Mew J.

Date: June 3, 2025

CITATION: Katebian v. Ontario (Securities Commission), 2025 ONSC 3249
DIVISIONAL COURT FILE NO.: 351/21
DATE: 20240603

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
Backhouse, Lococo and Mew JJ.

2025 ONSC 3249 (CanLII)

BETWEEN:

MORTEZA KATEBIAN and PAYAM
KATEBIAN

Appellants

– and –

ONTARIO SECURITIES COMMISSION

Respondent

REASONS FOR JUDGMENT

R. A. LOCOCO J.

Date: June 3, 2025