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Securities
Commission

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**IN THE MATTER OF
SEAN DALEY AND KEVIN WILKERSON**

**REASONS AND DECISION
(Subsection 127(1) of the *Securities Act*, RSO 1990, c S.5)**

Hearing: April 12, 14, 15, 16, 19, 2021
June 15, 2021
July 14, 2021

Decision: October 12, 2021

Panel: M. Cecilia Williams Commissioner and Chair of the Panel
Lawrence P. Haber Commissioner
Garnet Fenn Commissioner

Appearances: Hanchu Chen For Staff of the Commission

Sean Daley For himself

Kevin Wilkerson For himself

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REASONS AND DECISION

I. OVERVIEW

- [1] Staff of the Ontario Securities Commission (**Staff**) alleges that Sean Daley (**Daley**) and Kevin Wilkerson (**Wilkerson**) obstructed Staff's investigation into Daley's and Wilkerson's raising of funds from the public through the Ascension Foundation. Staff submits that this alleged behaviour is conduct contrary to the public interest warranting an order under s. 127 of the *Securities Act*¹ (the **Act**).
- [2] The issues the Panel needs to decide are as follows:
- a. must Staff seek a contempt order under s. 13(1) of the Act;
 - b. are Daley and Wilkerson responsible for the alleged conduct;
 - c. did such conduct obstruct Staff's investigation; and
 - d. if the conduct obstructed Staff's investigation, does it warrant an order under s. 127 of the Act?
- [3] For the reasons set out below the Panel finds that:
- a. Staff is not required to seek a contempt order under s. 13(1) of the Act;
 - b. Daley and Wilkerson are responsible for the alleged conduct; they do not deny that they engaged in such conduct and there was no evidence before us to suggest otherwise;
 - c. as a result of their conduct Staff was unable to proceed with its investigation; and
 - d. the conduct engaged the animating principles of the Act and was abusive of the capital markets thereby warranting a hearing to be held to determine sanctions and costs.

II. BACKGROUND

- [4] Daley is an Ontario resident. Wilkerson is a resident of Colorado, United States of America. Daley and Wilkerson are the two founders of the Ascension Foundation. Daley is the Chief Executive Officer and Wilkerson is the Chief Technology Officer of the Ascension Foundation. Neither Daley nor Wilkerson has ever been registered to trade securities in Ontario. Daley participated throughout the proceeding. Wilkerson did not participate in this proceeding, although having been properly served, other than by submitting written closing submissions following the evidentiary portion of the merits hearing.
- [5] We found most of Wilkerson's submissions unhelpful as they were either unclear or were not relevant to the issue of the alleged obstruction of Staff's investigation, focusing instead on whether a crypto asset that was the subject of the investigation was a security, or dealing with US law not applicable in the circumstances. We considered the one submission that was relevant to the issues before us, which was that Staff must file a motion with the Superior Court of Justice in order to compel compliance with a summons.
- [6] Staff began investigating Daley and Wilkerson in May 2018. On November 9, 2018, the Commission issued an order under s. 11 of the Act appointing named

¹ RSO 1990, c S.5

persons to investigate certain matters relating to the activity of Daley and Wilkerson based on concerns that they were engaged in conduct that violated the registration, prospectus and fraud provisions of the Act (ss. 25(1), 53(1) and 126.1(1)(b), respectively).

- [7] The activity that concerned Staff was the sale of a crypto asset token, Lyra/OTO (the **Token**), native to the Ascension Foundation, a self-described “robust, borderless, wealth generating, free-market ecosystem”. The Ascension Foundation website linked to CryptoWealth.com (**CryptoWealth**). CryptoWealth acted as the retail sales portal for the Token.
- [8] Daley and Wilkerson each control corporate entities that are of interest to Staff’s investigation. As the only issue before us is with respect to the allegation that Daley and Wilkerson obstructed Staff’s investigation, we do not discuss those entities in these reasons, other than as necessary to understand the obstruction allegation. Nor do we discuss any information related to the preliminary findings of Staff’s investigation.
- [9] In late April and early May 2019, Staff issued summonses under s. 13 of the Act to Daley and LT, an Ontario resident who had purchased Tokens through accounts set up through CryptoWealth, requiring their attendances and their production of various documents.
- [10] On May 4, 2019, Daley and Wilkerson, through CryptoWealth Support, sent a five-page email (the **May 4 Email**) to all CryptoWealth account holders and email list subscribers. Among other things, the May 4 Email questioned the legitimacy of Staff’s investigation and the Commission’s public interest mandate, and the validity of the summonses, and provided guidance that a summons recipient need comply only if ordered to do so by a court. The May 4 Email was also published on a public website.
- [11] In particular, the May 4 Email refers to Staff’s investigation as “a fishing expedition”, looking for “disgruntled buyers” as a “legal pretext for making trouble for everyone”. The email also states that anyone approached by Staff’s investigators is not obliged to answer questions, as “there is absolutely nothing to be gained, ever, by “talking to the police.”” It goes on to refer to Staff’s investigators as “unelected government bureaucrats” with “the ability to require anyone to testify under oath, even against themselves” under a “gag order”. The May 4 Email also describes possible contempt proceedings for failing to comply with a Commission summons as being “much more favorable” than “meekly going into the lion’s den”. In addition, the email poses the question that “whatever abuses” the Commission “might themselves commit must be worth it if the public is being protected” in pursuit of the Commission’s mandate. It also describes the Commission’s “claims to be working for the public interest to be a total sham”. The email concludes by exhorting recipients “don’t get scared by all this. But feel free to get mad.”
- [12] LT refused to appear or produce documents in response to Staff’s summons, citing the May 4 Email and a conversation with Daley as his rationale. Daley also advised that he would not appear or produce documents and referred to the investigation as a “fishing expedition”. Subsequently, Staff issued summonses to four other individuals identified as potential purchasers of the Tokens, none of whom complied with their respective summonses.

- [13] On July 26, 2019, Staff emailed Wilkerson asking if he would be willing to attend a voluntary interview regarding his involvement in the Ascension Foundation and related entities. Wilkerson declined, commenting that “employers in the real economy often regard public sector credentialed professionals as talentless, time-serving hacks”.
- [14] On September 27, 2019, Staff notified Daley and Wilkerson and their respective companies that Staff intended to initiate a regulatory proceeding against them. Wilkerson did not respond. Daley responded confirming his position regarding the summonses and stating that “alerting [their] customers and email list subscribers” in the May 4 Email was an action taken for “good reasons”. Daley refused Staff’s offer to schedule an examination to investigate the claims Daley made in his response.
- [15] Staff alleges that Daley and Wilkerson encouraged their investors, subscribers and the public not to co-operate with the investigation or comply with the Commission’s summonses and that this conduct obstructed the investigation. Staff alleges that Daley’s and Wilkerson’s actions prevented Staff from obtaining further information from them and their investors about the Ascension Foundation, its development process, its finances and use of funds and its technical functions and feasibility. As a result, Staff has been unable to investigate its concerns about Daley and Wilkerson’s activity relating to the Ascension Foundation and its related projects and affiliated websites.

III. PRELIMINARY ISSUE

- [16] On the third day of the hearing, prior to Daley starting his cross-examination of Staff’s investigator witness, Daley made an oral, without notice, motion under s. 24(1) of the *Charter of Rights and Freedoms*² (the **Charter**) seeking a stay of this proceeding on the basis of an alleged breach of ss. 2(b) (freedom of expression) and 8 (freedom against unreasonable search and seizure) of the Charter. Daley sought to have Staff’s examination-in-chief of the witness and Daley’s cross-examination (which had not yet occurred) considered as the evidence in the Charter motion, and for the Panel to hear the motion.
- [17] We denied Daley’s request to have his Charter motion heard. We advised that reasons for that decision would follow and be included in our reasons at the conclusion of the merits hearing. The following are our reasons for denying Daley’s request.
- [18] Daley submits that as an unrepresented respondent he was not able to develop and raise the Charter issue prior to the hearing. Further, Daley submits that hearing the Charter motion will not add any delay to this proceeding as the examination of the witness is already on the record and he anticipates adding approximately ten minutes of questioning on the Charter issues to his cross-examination of the witness (Staff’s investigator).
- [19] In addition, Daley submits that there is no offence of obstruction in the Act and two legislative attempts to add such an offence to the Act have failed. Therefore, Daley submits that Staff’s allegations are an attempt to achieve something through the “back door” that it was unable to achieve directly through a legislative change. Daley further submits that it is his understanding that he is

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11

only the second person to be alleged to have obstructed a Staff investigation, which puts him in an unusual and precarious situation.

- [20] Staff's position is that Daley's motion is frivolous and an attempt to delay the proceeding. Staff also submits that, according to rule 31 of the Commission's *Rules of Procedure and Forms*³ (**Rules**), notice of a constitutional question must be served on the Attorneys General of Canada and Ontario at least 15 days in advance of arguing any such application. Daley did not provide any such notice. Rule 31 aligns with s. 109 of the *Courts of Justice Act*⁴, which requires the same notice. Also, Staff submits, s. 109(2) of the *Courts of Justice Act* provides that failure to give notice as required will result in the law in question not being "adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be."
- [21] In addition, Staff submits that the facts in this case are 3-4 years old and the Statement of Allegations has not changed since it was issued on November 18, 2019, and therefore, Daley has had ample time in advance of the hearing to bring a Charter motion with the required notice. Staff also submits that it would be prejudicial to expand the cross-examination of its witness to include questions of broad, unspecified allegations of a breach of the Charter, particularly when Daley has not introduced any evidence of his own in relation to the motion.
- [22] Staff cites the Divisional Court decision in *Costello Re*⁵ where, on appeal from a Commission decision that he had breached the Act, Costello argued that the Commission had erred in failing to find that restricting his activities by requiring him to be registered, infringed his freedom of expression as guaranteed by s. 2(b) of the Charter.
- [23] The Divisional Court determined that it did not need to consider the standard of review applicable to Commission decisions on the Charter issue because the Commission did not make such a decision. Rather, the Commission refused to do so on the ground that the appellant had failed to comply with the statutory requirement of serving the requisite notice under the *Courts of Justice Act* and there was an insufficient evidentiary record before the Commission to make a decision.⁶
- [24] In addition, the Divisional Court in *Costello* stated that the Commission, in declining to hear the Charter application in the absence of a proper record of evidence, was within the Commission's jurisdiction, subject only to the overriding requirement of natural justice and fairness.⁷
- [25] We declined to hear Daley's Charter motion as the requisite notice to the Attorneys General had not been given. We therefore declined to allow Daley to cross-examine Staff's witness on this constitutional issue, as that issue was not properly before us.
- [26] We do not find any issues of natural justice or unfairness to Daley in these circumstances.
- [27] Daley commented several times that this hearing was inconsequential to him and that he had "infinitesimal bandwidth" to deal with this matter, from the outset,

³ (2019) 42 OSCB 9714

⁴ RSO 1990, c C.43

⁵ (2004), 242 DLR (4th) 301 (**Costello**)

⁶ *Costello* at para 29

⁷ *Costello* at para 30

because of his other work and life obligations. He, therefore, was not able to raise the constitutional issue earlier.

- [28] The Statement of Allegations in this proceeding is dated November 18, 2019 and the hearing on the merits commenced on April 12, 2021. In our view, Daley had ample notice of Staff's allegations against him and there was sufficient time between the issuance of the Statement of Allegations and the Notice of Hearing, and the actual hearing, for Daley to have raised and given notice of a Charter motion in accordance with the *Rules* and the *Courts of Justice Act*. In our view, it was Daley's choice not to devote attention to this matter in the approximately 17 months between the Statement of Allegations and the start of the hearing. This choice does not, in our view, necessitate any leniency on an issue where we, in any event, do not have the authority to act.
- [29] Daley also submitted that Staff and the Panel have a responsibility to ensure that he, as an unrepresented person, is treated fairly in this proceeding. We are sensitive to issues that arise with unrepresented respondents, however, we are not in a position to afford any leeway on a matter not within our authority to act, when the notice requirements for a constitutional question have not been complied with.

IV. ANALYSIS

1. Adverse inference

- [30] Staff asks us to draw a broad adverse inference against Daley and Wilkerson, neither of whom testified at the hearing, without reference to any specific factual issue. A panel may draw an adverse inference against a party who, without sufficient explanation, does not testify.⁸ Staff must first establish a *prima facie* case regarding a particular conclusion, in the face of which the party's failure to testify amounts to an implied admission that the party's evidence would not have been helpful to that party.⁹ We find Staff's request deficient, as Staff has not identified anything particular that would meet this test.
- [31] In addition, Daley and Wilkerson do not contest the facts underlying Staff's obstruction allegation. The issues before us, therefore, are legal in nature. We do not consider the concept of adverse inference relevant where the only issues to be determined are legal rather than factual. We therefore draw no such inference.

2. Must Staff seek a contempt order under s. 13(1) of the Act?

- [32] A person who refuses to comply with a Commission summons exposes themselves to being committed for contempt by the Superior Court of Justice.¹⁰ Wilkerson submits that Staff must proceed under s. 13(1) of the Act and file a motion with the Superior Court of Justice in order to compel compliance with a summons, which then accords the recipient of the summons an opportunity to contest Staff's summons in court.
- [33] Staff submits that this is not a contempt proceeding. Rather, it is about Daley's and Wilkerson's active encouragement of their subscribers and the public to

⁸ *Mega-C Power Corp (Re)*, 2010 ONSEC 19, (2010) 33 OSCB 8290 at paras 275-276; *Hutchinson (Re)*, 2019 ONSEC 36, (2019) 42 OSCB 8543 at para 76 (**Hutchinson**)

⁹ *Hutchinson* at para 64

¹⁰ Act, s. 13(1)

ignore Commission summonses and to discredit and disparage the Commission's public interest mandate.

- [34] In addition, Staff submits that a contempt order would only address one aspect of the impugned behaviour: Daley's own non-compliance with a summons. Daley's and Wilkerson's authorship and distribution of the May 4 Email represents the broader impugned obstructive behaviour that Staff submits cannot be effectively addressed through a contempt proceeding before the Superior Court of Justice. Staff submits that this conduct amounted to obstruction of its investigation as it was unable to proceed with that investigation as a result of Daley's and Wilkerson's actions.
- [35] Staff submits that the Act is a statutory scheme of remedial flexibility that gives the Commission the power to fashion a protective and preventative remedy to address a respondent's obstruction and interference with Staff's investigation.¹¹ The Act does not mandate that a contempt order be pursued for failure to comply with a summons, nor does it prescribe that a contempt order is the only relief for conduct that involves non-compliance with a s. 13 summons. The Act provides the Commission with a variety of enforcement tools, including administrative sanctions from the Commission under its s. 127 public interest jurisdiction.¹²
- [36] In our view, Staff has the discretion to use whatever enforcement tools are available under the Act that best address the alleged conduct in each case. We agree that the Act does not prescribe that Staff must seek a contempt order for failure to comply with a summons. In this instance, a contempt order would not address the allegation that Daley and Wilkerson obstructed Staff's investigation.
- [37] Before determining whether the impugned conduct in this case warrants an order under s. 127 of the Act, we first turn to whether Staff has established that Daley and Wilkerson engaged in the impugned conduct and, if so, whether that conduct obstructed Staff's investigation.

3. Are Daley and Wilkerson responsible for the alleged conduct?

- [38] We find that Daley and Wilkerson were responsible for the May 4 Email, as is demonstrated conclusively by the following:
- a. it was sent by "The Ascension Team", which consisted of Daley and Wilkerson;
 - b. Daley registered and paid for the Ascension Foundation website domain;
 - c. the May 4 Email was sent from a CryptoWealth address, and Daley and Wilkerson arranged for the hosting and creation of CryptoWealth;
 - d. an earlier communication by The Ascension Foundation Team about its "review of 2018 and Plans for 2019", sent from a CryptoWealth address, listed only Daley as a contact;
 - e. one recipient of the May 4 Email referred to that email as the "email Sean [Daley] sent"; and

¹¹ *Wilder v Ontario Securities Commission*, 2001 CanLII 24072 (ON CA) (**Wilder**) at para 23

¹² *Wilder* at para 23

- f. in his response to Staff's Enforcement Notice, Daley refers to Staff's allegation that he "participated in a scheme to obstruct the investigation by proactively alerting our customers and email list subscribers about the existence of the OSC's investigation, and advising them of the actual stipulation of Ontario law and civil procedure. This action was undertaken for these good reasons: ... We even arranged for the publication of our email ...". On August 29, 2019, Wilkerson wrote a letter to Staff acknowledging his participation in publishing the May 4 Email.

[39] In addition, Daley did not comply with the summons he received.

[40] Neither respondent adduced any evidence to dispute that they were responsible for the impugned conduct, as set out in the Statement of Allegations.

4. Did Daley's and Wilkerson's conduct obstruct Staff's investigation?

[41] We now turn to whether this conduct resulted in obstruction of Staff's investigation. In the May 4 Email, Daley and Wilkerson advised their subscribers and the general public that "contempt proceedings in civil actions" would be "much more favorable" than complying with Commission summonses. They also described the Commission's public interest mandate to be "a total sham" and compared compliance with Commission summonses to "meekly going into the lion's den" to be "squeeze[d]" and "flipped". Daley and Wilkerson went on to describe Staff's investigation as a "fishing expedition" by Staff who were "looking for their 'scratch' to further their careers".

[42] Daley submits that "obstruction" is neither an offence under the Act nor defined in the Act. Daley submits that we should refer to guidance published by the Investment Industry Regulatory Organization of Canada in its notice relating to the approval of amendments to provisions respecting impeding or obstructing a market regulator.¹³ Referring to that notice, Daley submits that his and Wilkerson's conduct would not qualify as obstruction as they did not destroy evidence, provide false or misleading information in an investigation or persuade others to destroy evidence and provide misleading information.

[43] Daley also submits that obstruction is a criminal law concept and therefore the Commission is the incorrect forum for a hearing about obstruction. Daley further submits that what he and Wilkerson did was to publish their researched position that the Commission does not have jurisdiction over the crypto industry and that the Token is not a security, and to advise their subscribers and the public of what to do on receipt of a Commission summons. The latter, Daley submits, was based on his criminal law experience that you "don't talk to the police".¹⁴

[44] Staff submits that the lack of an express prohibition against obstruction does not impact the Panel's ability to exercise its public interest jurisdiction. The Supreme Court of Canada's decision in *Asbestos* made clear that "no breach of the Act is required to trigger s. 127".¹⁵ Staff also submits that Daley's and Wilkerson's acts speak for themselves; it is clear that they sought to interfere with and hinder the

¹³ *RS Market Integrity Notice – Notice of Amendment Approval – Provisions Respecting Impeding or Obstructing a Market Regulator*, No. 2005-008, (2005) 28 OSCB 2574

¹⁴ Hearing Transcript, Daley (Re), July 14, 2021 at 44 lines 9-14

¹⁵ *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 42

investigation and the test is not about the definition of obstruction but rather about whether the acts themselves were contrary to the public interest.¹⁶

- [45] Staff also submits that this is not a criminal case and that the Supreme Court of Canada has made it clear that, by the very nature of the securities industry, the required information is generally in the hands of private individuals and that compelling evidence may be the only way for Staff to access that information.¹⁷
- [46] In addition, Staff submits that it is settled law that it is not necessary, before commencing a formal investigation pursuant to a s. 11 order, to establish that a security is involved. In *Universal Settlements*,¹⁸ the Divisional Court concluded that even though it was unclear whether the product at issue was a security, the Commission was justified in compelling testimony and documents in aid of an investigation, and there is an obligation for individuals to co-operate with Commission investigations.¹⁹
- [47] We agree that a determination as to whether the Token is a security was not a prerequisite to Staff's ability to exercise its investigatory powers, which include issuing summonses to compel testimony and the production of documents.
- [48] We also agree that the lack of an express statutory prohibition against obstruction of a Commission investigation does not in any way inhibit the exercise of the Commission's public interest jurisdiction. The public interest jurisdiction gives the Commission broad flexibility to impose sanctions in respect of conduct that contravenes the Act, is abusive of the capital markets or engages the animating principles of the Act.
- [49] Even though the Act does not define "obstruction", we find that the following facts demonstrate that Staff's investigation was obstructed, as Daley and Wilkerson intended. The May 4 Email had the impact of dissuading those Ascension Foundation / CryptoWealth subscribers who received summonses from complying with those summonses.
- [50] Two of the five individuals summonsed referred to the May 4 Email as their reason for not complying:
- a. one individual explained that his decision was based on his "understanding of the applicable law as per an analysis [he] received from Cryptowealth.com support"; and
 - b. the other individual, LT:
 - i. forwarded the May 4 Email to Staff and wrote that he would not be complying with the summons issued to him "based on the info received in this email";
 - ii. advised Staff orally that "Daley did not want [him] speaking with [Staff]"; and
- [51] A third individual demanded that Staff summon him to "true court", which appears to be a reference to the guidance in the May 4 Email about a contempt order from a court being preferable to compliance with a Commission summons.

¹⁶ *Biovail Corp (Re)*, 2010 ONSEC 21, (2010) 33 OSCB 8914 (**Biovail**) at paras 374, 381-383 and 389; *Hamilton (Re)*, 2018 BCSECCOM 290 (**Hamilton**) at paras 94 and 149-155

¹⁷ *British Columbia Securities Commission v Branch*, 1995 CanLII 142 (SCC) (**Branch**) at para 91

¹⁸ 2003 CarswellOnt 4089 (Div Ct) (**Universal Settlements**)

¹⁹ *Universal Settlements* at para 27

- [52] Daley himself did not comply with his summons nor provide any oral or documentary evidence to the Commission.
- [53] We conclude that these actions by Daley and Wilkerson interfered with Staff's ability to continue its investigation and therefore obstructed the investigation.
- [54] Having concluded that the impugned conduct did obstruct the investigation, we turn to consider whether that conduct engages one of the animating principles of the Act or was abusive, warranting the exercise of our public interest jurisdiction.

5. Public interest orders

- [55] The phrase "conduct contrary to the public interest" does not appear in the Act. The concept arises from the opening words of s. 127 of the Act, which gives the Commission authority to make "orders if in its opinion it is in the public interest to make the...orders". The Commission has, on occasion, found it to be in the public interest to issue an order under s. 127 of the Act even absent a contravention of Ontario securities law.²⁰ Where it has done so, however, that has been based on findings that the impugned conduct was abusive and/or had engaged the animating principles of the Act.²¹

6. Does the impugned conduct warrant an order under s. 127 of the Act?

(a) Does the impugned conduct engage an animating principle of the Act?

- [56] Staff submits that Daley's and Wilkerson's conduct abused and "violated" the animating principles of the Act, including the integrity of its investigatory process. A s. 13 summons, Staff submits, is one of the Commission's investigatory tools, that compels testimony and the production of documents in "furtherance of a goal which is of substantial public importance, namely, obtaining evidence to regulate the securities industry."²²
- [57] Staff submits that the *Biovail* decision established that where market conduct engages one of the animating principles of the Act, the Commission may exercise its public interest jurisdiction.²³ Staff also submits that the Act emphasizes and the courts have upheld the importance of the integrity of the Commission's investigatory process in the due administration of Ontario securities law and the regulation of the capital markets in Ontario.
- [58] The animating principles that the Commission should consider in pursuing the purposes of the Act are set out in s. 2.1. Staff submits that this case engages the principle that "effective and responsive securities regulation requires timely, open and efficient administration and enforcement" of the Act by the Commission (s. 2.1 3) and that the principles identified in s. 2.1 2 (timely, accurate and efficient disclosure; restrictions on fraudulent and unfair market practices and procedures; and high standards of fitness and conduct) are enhanced through "timely, open and efficient" enforcement.
- [59] Staff submits that the powers of investigation and examination, including the power under s. 13 to issue a summons that requires the recipient to answer

²⁰ *Biovail* at paras 381-382

²¹ *Biovail* at para 382; *Hamilton* at para 94

²² *Branch* at para 35

²³ *Biovail* at para 382

Staff's questions, help to achieve the Act's purposes and principles.²⁴ As the Superior Court held in the *Matter of B*, "the integrity of the OSC's investigatory process, including compelled production of documents and evidence from witnesses, is important to" the Commission's public interest role.²⁵

- [60] In Staff's submission, these investigatory powers must be protected as they are an essential tool for the Commission "in the due administration of Ontario securities law and the regulation of [the] capital markets in Ontario".²⁶
- [61] Staff goes on to cite two specific sections of the Act that have the effect of condemning acts that hinder or harm the investigatory process: refusal to comply with a s. 13 summons exposes a person to a court finding of contempt; and s. 122(1) creates an offence of making an untrue or misleading statement to an investigator. In addition, Staff refers to the decisions of various Canadian courts and tribunals that rebuked persons who impeded the investigations of securities regulators. Most of these cases involved respondents who refused to answer questions, concealed or withheld information, or misled Staff during the course of an investigation. Staff submits that these cases support the proposition that conduct that seeks to impede an investigation is conduct contrary to the public interest.
- [62] In one of those cases, *TransCap Corp., Re*²⁷, the Alberta Securities Commission stated that "[g]iven the importance of effective enforcement to the fair and efficient operation of [the] capital market, and investor confidence therein, it is self-evident that an effort to frustrate that process by impeding an investigation is inconsistent with the public interest."²⁸ That is because "[p]ersons who attempt to conceal or withhold information from Staff conducting investigations into suspected capital market wrongdoing can frustrate Staff's activities in pursuit of the Commission's statutory mandate and impede Staff's oversight function, thereby putting the public interest at risk."²⁹
- [63] Daley submitted that the cases cited by Staff, on whether the conduct engaged an animating principle of the Act, were all distinguishable. He did not, however, give us any basis for not considering them.
- [64] We agree with Staff that Daley's and Wilkerson's conduct in obstructing Staff's investigation engages an animating principle of the Act. The conduct, including drafting, distributing and publicly posting the May 4 Email that undermined the Commission's public interest mandate, contained disparaging comments about the intention of Staff's investigators and advised their subscribers not to comply with Staff's summonses, and Daley's non-compliance with his summons obstructed Staff's investigation.
- [65] The result of their actions was that no one summonsed by Staff in the investigation complied with the summons and Staff was unable to obtain necessary information from Daley or Wilkerson about their own activities, the Token or the Ascension Foundation. Staff was therefore unable to conduct a timely and effective investigation of its concerns. By publishing the May 4 Email

²⁴ *In the Matter of B*, 2020 ONSC 7563 (**Matter of B**) at para 40

²⁵ *Matter of B* at para 35

²⁶ *Ontario (Securities Commission) v Robinson* (2009), 99 OR (3d) 739 at para 38

²⁷ 2013 ABASC 201 (**TransCap**)

²⁸ *TransCap* at para 141

²⁹ *Fletcher (Re)*, 2012 ABASC 222 at para 121

on a public website, Daley and Wilkerson have also potentially undermined the effectiveness of Staff's power to summons individuals in other or future matters.

- [66] If Staff is unable to effectively investigate concerns related to fraudulent and unfair market practices in a timely and efficient manner, then its ability to protect investors and to create confidence in the capital markets is undermined. We find that by obstructing Staff's investigation, Daley's and Wilkerson's conduct engaged the animating principles of the Act and was therefore inconsistent with the public interest.

(b) Was the impugned conduct abusive of the capital markets?

- [67] Staff submits that Daley's and Wilkerson's conduct was abusive of the capital markets. Staff refers to the decision of the British Columbia Securities Commission in *Hamilton*, where the panel found that Hamilton engaged in a "scheme to deceive securities regulatory authorities...about the true nature of ownership and control of a public company."³⁰ In finding that conduct to be abusive and warranting an order in the public interest, the panel explained that the "abusive to the capital markets" standard involved at least the following:

- a. "serious behaviour that is outside the ordinary course of conduct in the capital markets", and
- b. "either risk, or actual harm, to the capital markets arising from the conduct."³¹

- [68] Staff submits that Daley and Wilkerson sought to interfere with and frustrate Staff's investigation by imploring others to ignore and hinder the investigation through the May 4 Email. Staff refers in particular to the following from the May 4 Email:

- a. its description of the investigation as a "fishing expedition" designed to "supply a legal pretext for making trouble for everyone";
- b. its description of the Commission's public interest mandate as "a total sham";
- c. its comparison of compliance with a summons to "meekly going into the lion's den" to be "squeeze[d]" and "flip[ped]" by Staff "looking for their 'scratch' to further their careers"; and
- d. its urging of readers to consider contempt proceedings in civil actions as "much more favorable" than complying with a s. 13 summons.

- [69] Staff submits that by urging non-compliance with s. 13 summonses and non-cooperation with an investigation, Daley and Wilkerson engaged in behaviour that was outside the ordinary course of conduct in the capital markets and placed the Commission's purpose of "effective and responsive securities regulation" in Ontario at risk.

- [70] Staff submits that Daley also sought to interfere with Staff's investigation by not complying with the summons served on him and by subsequently refusing a further opportunity to comply with the summons.

³⁰ *Hamilton* at para 161

³¹ *Hamilton* at para 154

- [71] We find that Daley's and Wilkerson's conduct, including drafting, distributing and posting the May 4 Email with the inflammatory and inaccurate language about the Commission, its mandate and the purpose of Staff's investigation, encouraging others not to comply with Staff's investigation, including urging them to ignore lawful summonses, and Daley's conduct in not complying with his summons, demonstrated egregious disregard for Staff's investigation and was reprehensible.
- [72] Such conduct is, in our view, outside of the ordinary course of conduct in Ontario's capital markets and effectively impeded Staff's investigation. Their actions put the capital markets at risk as Staff has, as a result of their conduct, been unable to complete its investigation. We conclude that this conduct is abusive of the capital markets.
- [73] Although we have found Daley's and Wilkerson's conduct to both engage an animating principle of the Act and be abusive, either finding would have been sufficient to warrant a conclusion that a sanctions and costs hearing was warranted.

V. CONCLUSION

- [74] We conclude that Staff is not required to seek a contempt order under s. 13(1) of the Act, and Daley's and Wilkerson's conduct obstructed Staff's investigation, engages the animating principles of the Act and was abusive of the capital markets. Therefore, a sanctions and costs hearing under s. 127 of the Act is warranted.
- [75] We therefore require that the parties contact the Registrar on or before November 2, 2021, to arrange an attendance for a hearing regarding sanctions and costs. That attendance is to take place on a date that is mutually convenient, that is fixed by the Secretary, and that is no later than November 23, 2021.
- [76] If the parties are unable to present a mutually convenient date to the Registrar, then each party may submit to the Registrar, for consideration by a panel of the Commission, a one-page written submission regarding a date for an attendance. Any such submission shall be submitted by 4:30 pm on November 2, 2021.

Dated at Toronto this 12th day of October, 2021.

"M. Cecilia Williams"
M. Cecilia Williams

"Lawrence P. Haber"
Lawrence P. Haber

"Garnet Fenn"
Garnet Fenn