Capital Markets Tribunal | Tribunal des marchés financiers | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue Queen ouest Toronto ON M5H 3S8

Citation: *Daley (Re)*, 2022 ONCMT 10
Date: 2022-05-17
File No. 2019-39

IN THE MATTER OF

SEAN DALEY AND KEVIN WILKERSON

REASONS AND DECISION

(Subsection 127(1) and section 127.1 of the *Securities Act*, RSO 1990, c S.5)

Adjudicators:	M. Cecilia Williams (chair of the panel) Lawrence P. Haber Craig Hayman	
Hearing:	By videoconference, March 4, 2022	
Appearances:	Hanchu Chen	For Staff of the Ontario Securities Commission
	Rebecca Shoom	For Sean Daley
	Sean Daley	On their own behalf
	No one appearing for Kevin Wilkerson	

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REASONS AND DECISION

1. BACKGROUND

[1] In a merits decision dated March 4, 2022 (the **Merits Decision**),[1] the panel found that Sean Daley and Kevin Wilkerson obstructed Staff of the Ontario Securities Commission's investigation into Mr. Daley's and Mr. Wilkerson's raising of funds from the public through Ascension Foundation, by, among other means, encouraging their investors, subscribers and the public not to co-operate with the investigation or comply with the Commission's summonses (**Obstruction Proceeding**). In this regard, the panel found that the behaviour of the respondents engaged the animating principles of the *Securities Act*[2] (the **Act**) and was abusive of the capital markets.

[2] These reasons relate to the sanctions and costs hearing for the Obstruction Proceeding. Staff has requested an order against Mr. Daley and Mr. Wilkerson that imposes permanent market participation bans, reprimands them, and requires Mr. Daley to pay costs of C$155,000 and Mr. Wilkerson to pay costs of C$80,000.

[3] There is a separate but related proceeding in this matter based on an investigation by Staff into Mr. Daley and Mr. Wilkerson which is ongoing. On August 6, 2019, a temporary cease trade order was issued against Sean Daley, Sean Daley carrying on business as the Ascension Foundation, OTO.Money, SilentVault and CryptoWealth, Wealth Distributed Corp., Cybervision MMX Inc., Kevin Wilkerson and Aug Enterprises Inc. (the **TCTO Proceeding**). The temporary cease trade order has been extended a number of times, most recently on October 29, 2021. The current temporary order is set to expire on the public release of these reasons.

[4] Although the TCTO Proceeding is related to this proceeding, including the merits phase, the proceedings have been treated separately by this Panel. The

[1] *Daley (Re),* 2021 ONSEC 27, 44 OSCB 8747 (**Merits Decision**)

[2] RSO 1990, c S.5

sanctions imposed below are related only to the conduct by Mr. Daley and Mr. Wilkerson in the Obstruction Proceeding.

[5] For the reasons that follow, we find that it is in the public interest to order that Mr. Daley and Mr. Wilkerson:

a. be reprimanded;

b. resign immediately from any position they might hold as a director or officer of a registrant or issuer;

c. be banned from acting as a director or officer of a registrant or issuer, or as a registrant or promoter for five years;

d. pay costs in the amount of $184,000, split equally between them.

[6] Mr. Daley was represented in the sanctions hearing by counsel from the Legal Assistance Program. Mr. Wilkerson did not participate in the sanctions hearing, despite having been properly served.

2. ANALYSIS

2.1 Are Lyra / OTO "securities"?

[7] Staff asks that we make a ruling that Lyra / OTO are "securities", as defined in s. 1(1) of the Act, as part of our decision on sanctions and costs. We decline to make such a ruling, for the reasons below.

[8] Staff submits that Mr. Daley has been unequivocal in his intent to resume selling Lyra / OTO as soon as the temporary order in the TCTO Proceeding is lifted, when these reasons are issued. Staff also submits that Daley made frequent requests for the Panel to rule on whether Lyra / OTO are securities, and that the Panel indicated at various points prior to and during the merits hearing that whether Lyra / OTO are securities was a live issue in this matter.

[9] Staff further submits that all the parties, Mr. Wilkerson included, made submissions on this issue and had the opportunity to introduce evidence in support of their submissions. A ruling on this issue, Staff submits, would provide all parties, including the respondents, with regulatory guidance.

[10] Mr. Daley submits that a ruling on whether Lyra / OTO are securities is unnecessary to this Panel's task of determining appropriate sanctions and costs.

Mr. Daley submits that such a ruling is irrelevant to the obstruction conduct that is the subject of this hearing.

[11] Mr. Daley also submits that such a ruling would be a material breach of procedural fairness. The Statement of Allegations in a regulatory proceeding must contain the material facts alleged, in support of the alleged contraventions, so that a respondent has sufficient notice of the case they must meet and be able to make full answer and defence.[3]

[12] Mr. Daley submits that the sole allegation against him in the Statement of Allegations is that he obstructed Staff's investigation. In addition to not making any allegations about Mr. Daley's activities in Lyra / OTO, Mr. Daley submits the Statement of Allegations does not ask for a ruling that Lyra / OTO are securities. Mr. Daley further submits that, having failed to properly raise the issue during the merits phase of this proceeding, Staff cannot now seek to raise it as a new substantive issue in the sanctions phase of this proceeding.

[13] Additionally, Mr. Daley submits that as the investigation underlying the TCTO Proceeding remains open, it cannot reasonably be considered that he has received full disclosure of the matters under investigation and consequently has not been able to make full answer and defence to those issues.

[14] The sole issue before the Panel in the merits hearing was to determine whether Mr. Daley and Mr. Wilkerson obstructed Staff's investigation of their activities, and the activities of a number of companies related to them. During the merits hearing, Staff took the position that s. 11 of the Act broadly permits Staff to investigate any matter considered expedient for the due administration of Ontario securities law or the regulation of the capital markets of Ontario. Staff submitted that there is no requirement of a finding that Lyra / OTO are securities in order to engage the Commission's jurisdiction at the investigation stage.

[15] As set out in the Meris Decision, the Panel accepted these submissions and found it was not necessary, in coming to its decision that Mr. Daley and Mr. Wilkerson obstructed the investigation, to consider the issue of whether Lyra / OTO are securities.

[3] *Eley (Re)*, 2021 ONSEC 19, 44 OSCB 7281 at para 55

[16] The purpose of this hearing is to determine what sanctions are proportionate to the circumstances of the case in order to provide general and specific deterrence, thereby protecting investors and the capital markets. In the circumstances of determining the appropriate sanctions for obstruction of Staff's investigation, a ruling on whether Lyra / OTO are securities would be wholly unrelated to that purpose and therefore inappropriate.

[17] A "sanctions" hearing on the issue of obstruction is not the appropriate forum for determining whether Lyra / OTO are securities. Should Staff wish to pursue the issue, they must do so in the context of a full hearing by way of a Statement of Allegations that identifies the issue(s) for consideration with disclosure and submissions by all relevant parties on the issue(s).

2.2 Legal Framework for Sanctions

[18] The Capital Markets Tribunal may impose sanctions pursuant to s. 127(1) of the Act where it finds that it is in the public interest to do so. The Tribunal must exercise its jurisdiction in a manner that is consistent with the Act's purposes, which include protection of investors from unfair, improper and fraudulent practices, and the fostering of fair and efficient capital markets and confidence in the capital markets.[4]

[19] Sanctions are preventive and protective and are intended to prevent future harm to investors and the capital markets.[5]

[20] A non-exhaustive list of factors to be considered with respect to sanctions generally include the seriousness of the misconduct, whether the misconduct was isolated or recurrent, whether there has been recognition of the seriousness of the misconduct, the need to deter the respondent and other like-minded individuals from engaging in similar abuses of the capital markets in the future, the level of a respondents' activity in the market and the amount of any profit

[4] Act, s 1.1

[5] *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, [2001] 2 SCR 132 at para 36

earned or loss avoided. Sanctions must be proportionate to the respondent's conduct in the circumstances.[6]

2.3 Appropriate Sanctions

[21] Staff seeks permanent market participation bans and a reprimand for both respondents. Staff submits that the respondents' misconduct was serious, deliberate and recurrent. In addition, the respondents have not recognized the seriousness of their misconduct and have shown no remorse. Therefore, Staff submits there is no place for them in the capital markets and the permanent market participation bans are an appropriate specific and general deterrent. A reprimand is appropriate to reinforce the importance of compliance with Staff summonses and cooperation with Staff investigations.

[22] Mr. Daley's position is that the sanctions should be nominal and include no more than a reprimand. Mr. Daley submits that a permanent market participation ban is disproportionate to and disconnected from the obstruction contravention. The requested sanctions are more related to Mr. Daley's cryptocurrency activities which are the subject of an ongoing investigation and have not been found to violate the Act, Mr. Daley submits.

[23] Mr. Daley also submits that there are mitigating factors that should be considered: the novelty of the obstruction finding under the Act, the isolated nature of Mr. Daley's conduct and the lack of profit arising from the conduct. Mr. Daley submits he could not reasonably have known that his conduct would constitute a violation of the Act and lead to the extensive sanctions sought by Staff.

[24] We apply the sanctioning factors relevant to the circumstances of this matter in turn.

2.3.1 Seriousness of the misconduct

[25] Mr. Daley's and Mr. Wilkerson's obstruction of Staff's investigation is serious misconduct. In the merits stage of this proceeding, we found their conduct to be

[6] *MOAG Copper Gold Resources Inc (Re)*, 2020 ONSEC 29, 43 OSCB 9467 at para 14

"reprehensible", "demonstrated egregious disregard of Staff's investigation" and "undermined the Commission's public interest mandate".[7]

[26] A panel has previously found that "unwillingness to cooperate with Staff" and unforthcoming behaviour "are not what the Commission expects from participants in the capital markets".[8]

[27] To pursue its mandate of protecting investors and ensuring fair, efficient and competitive capital markets, the Commission has a range of investigative tools. The ability to summons is fundamental to the Commission's investigative process.

[28] Mr. Daley refused to comply with his summons. Mr. Daley and Mr. Wilkerson wrote the May 4, 2019 email to investors outlining their case that one need not comply with a Commission summons or cooperate with a Staff investigation (**May 4 Email**). Mr. Daley's and Mr. Wilkerson's behaviour undermined Staff's ability to investigate them by encouraging potential witnesses to ignore lawfully issued summonses. They also potentially undermined future investigations by publicly posting the May 4 Email.

2.3.2 Was the conduct isolated or recurrent

[28] Staff submits that Mr. Daley's conduct was not isolated. He refused to comply with Staff's investigation for three years, including failing to attend the interview required by his summons. In addition, Staff submits that the effect of the May 4 Email was not isolated as it dissuaded three potential witnesses from complying with their summonses and was posted on a public site, potentially reaching a broader audience.

[29] Mr. Daley submits that that his conduct was isolated. It involved two actions (failing to comply with a summons and drafting the May 4 Email), both connected to the same investigation.

[30] We find that Mr. Daley's and Mr. Wilkerson's obstruction of Staff's investigation was not an isolated incident. Mr. Daley refused to comply with the lawfully issued summons. In addition, by drafting and distributing the May 4 Email, Mr. Daley

[7] Merits Decision at paras 64 and 71

[8] *Doulis Re*, 2011 ONSEC 23, 34 OSCB 9597 (***Doulis***) at para 45

and Mr. Wilkerson frustrated Staff's ability to investigate by causing three witnesses not to comply with summonses and have potentially dissuaded others from cooperating with Staff going forward.

2.3.3 Recognition of the seriousness of the misconduct

[31] Staff submits that neither Mr. Daley nor Mr. Wilkerson has shown any remorse or concern for the integrity of the Commission's investigative process. Mr. Daley stated that he wrote the May 4 Email for "good reason" and referred to the investigation as a "hit job". He also consistently took the position that the Commission lacks jurisdiction over his crypto asset activities, thereby frustrating Staff's attempts to investigate and determine the extent to which those activities may be in breach of the Act or otherwise raise public interest concerns about Ontario's capital markets.

[32] Staff submits that Mr. Wilkerson has been consistently disrespectful of the Commission and its mandate. In his submissions at the merits hearing, he referred to the Commission as a "kangaroo court" with "only the most tenuous ties to some ill-specified investing public's poorly defined good". Mr. Wilkerson also stated that he "considered any order concerning [him]" by the Commission "to be null, void, and of no force or effect". Mr. Wilkerson also stated that "if anything I wrote actually frustrated your investigation in some meaningful way, then you lot deserved it, it was the right thing to do, I'm proud of doing it, and would gladly do it again under similar circumstances".

[33] Mr. Daley submits that he took a principled position that the Commission's only recourse for failure to comply with a summons was a contempt order from the court and stuck to that position.

[34] We conclude that the respondents' obstruction of Staff's investigation demonstrates a lack of recognition of the essential role the Commission is mandated to perform in protecting the capital markets and how fundamental its powers to investigate are to that role. By failing to comply with a summons and refusing to acknowledge Staff's right to investigate (Mr. Daley), failing to cooperate in any way with Staff and celebrating the frustration of the investigation (Mr. Wilkerson), and by actively and effectively discouraging others from complying and cooperating with the Commission (Mr. Daley and Mr.

Wilkerson by writing, sharing and posting the May 4 Email), the respondents have demonstrated they do not recognize the seriousness of their misconduct.

2.3.4 Activity in the market

[35] Mr. Daley submits that he did not engage in any activity within the scope of the Commission's jurisdiction. Mr. Daley's activity was solely relating to crypto securities and there has been no finding that that is within the Commission's jurisdiction.

[36] Staff submits that Mr. Daley and Mr. Wilkerson impeded an investigation which was squarely within the Commission's jurisdiction.

[37] The misconduct in question is the respondents' obstruction of Staff's investigation, which is fundamental to the Commission's ability to achieve its mandate. The Ontario Court of Appeal has recognized that "[i]t is difficult to imagine anything that could be more important to protecting the integrity of the capital markets than ensuring that those involved in those markets, whether as direct participants or as advisors, provide full and accurate information to the OSC."[9] Through their misconduct the respondents impeded Staff's ability to obtain information from each of them as well as other relevant witnesses, frustrating the investigation and undermining the Commission's ability to protect the capital markets.

2.3.5 Size of any profit gain or loss avoided

[38] Mr. Daley submits that he gained no profit and avoided no loss from his obstructive misconduct. The fact that the investigation remains opens means that Mr. Daley cannot be considered to have yet benefited from his obstruction of that process.

[39] Staff submits that the benefit the respondents achieved was the obstruction of Staff's investigation.

[40] Delay of an investigation can be a benefit – memories fade and contact with potential witnesses may be lost or the witnesses may become otherwise unavailable. In this case, the respondents' obstruction also discouraged three

[9] *Wilder v Ontario Securities Commission*, 2001 CanLII 24072 (ON CA) (***Wilder***) at para 22

witnesses from testifying and there is a possibility that they will continue to not comply with their summonses. We conclude that the respondents' obstruction has benefited them as a result.

2.3.6 Mitigating factor – novelty of the offence

[41] Mr. Daley submits that we should consider the novelty of obstruction being a violation of Ontario securities law as a mitigating factor. He argues that there is no offence of obstruction in the Act and previous attempts to add such an offence have not proceeded. He concludes that he could not, therefore, reasonably have known that his misconduct might constitute a violation of the Act.

[42] Staff submits that the integrity of Staff investigations is not a new concept. The importance of market participants providing full and accurate information to the Commission has been recognized by the Ontario Court of Appeal.[10] Courts and tribunals have previously rebuked persons who seek to impede investigations by securities regulators.[11]

[43] Staff also submits that Mr. Daley, as a trained lawyer, should have known his conduct was inappropriate and that he failed to meet the high standard of professional conduct expected of him. Mr. Daley submits that, regardless of his status as a lawyer, he could not reasonably have known his conduct was inappropriate since obstruction as an offence under the Act is novel. He also submits that there is no basis for the suggestion that his conduct failed to meet the professional standards applicable to him as a lawyer as the Law Society of Ontario was kept apprised of this proceeding and closed its investigations with respect to Mr. Daley.

[44] We do not consider the fact that there is no offence of obstruction a mitigating factor in our analysis. The Tribunal has a broad public interest jurisdiction that can be used to protect the capital markets even in the absence of a breach of the

[10] *Wilder* at para 22

[11] For example, see *Ontario (Securities Commission) v Robinson,* (2009) 99 OR (3d) 739 at para 40; Doulis at para 34; *Fletcher (Re*), 2012 ABASC 222 at paras 120-21; *TransCap Corp (Re)*, 2013 ABASC 201 at paras 135-41 and 155

Act.[12] What misconduct might, in any given situation, engage the Tribunal's public interest jurisdiction does not need to be known for the Tribunal to exercise that jurisdiction.

[45] We do not consider Mr. Daley's status as a lawyer a relevant factor in our analysis. Mr. Daley was not before us in his capacity as a lawyer and we do not find it appropriate, necessary, nor within our jurisdiction, to apply the Law Society of Ontario's professional standards of conduct in these circumstances.

2.4 Conclusion on appropriate sanctions

[46] We have concluded that the respondents' misconduct was serious and recurrent, they have not recognized its seriousness, they have benefited from a delayed and potentially undermined investigation, and that the alleged novelty of the obstruction offense is not a mitigating factor. In the circumstances, significant sanctions are warranted as a specific deterrent for Mr. Daley and Mr. Wilkerson and as a general deterrent to others who might seek to avoid regulatory oversight by obstructing a Staff investigation.

[47] However, trading bans, in our view, are not warranted in this instance. The misconduct at issue here is obstruction. It is not apparent to us how barring the respondents from being able to trade in Ontario's capital markets, for any period, would prevent them from obstructive behaviour in the future. In the circumstances of this case, trading bans may be a more appropriate outcome after a finding at a merits hearing of unregistered trading in a security and / or trading in a security without a prospectus. The investigation that might, or might not, lead to such a finding remains open.

[48] Sanctions are intended to provide general and specific deterrence, not to punish. Given the loose connection in this instance between the respondents' obstruction of Staff's investigation and trading in the capital markets, trading bans, in our view, lean more toward punishment than deterrence.

[49] We conclude that a five-year ban from acting as a director or officer of a registrant or issuer or as a registrant or promoter, for both Mr. Daley and Mr. Wilkerson, is appropriate in this instance. To protect the capital markets, high

[12] Merits Decision at para 48

standards of behaviour are expected of persons who participate in those markets, particularly of those who occupy leadership roles within market participants. Mr. Daley's and Mr. Wilkerson's lack of recognition of the seriousness of their obstructive behaviour causes us grave concerns about the behaviour they would model as a director or officer of a registrant or issuer, or as a registrant or promoter. The five-year ban is appropriate to send a message to the respondents and others who might seek to obstruct a Staff investigation that there will be serious consequences to such misconduct.

[50] Based on the same reasoning, it is appropriate that Mr. Daley and Mr. Wilkerson resign immediately from any position they hold as a director or officer of a registrant or issuer.

[51] Staff has asked that the respondents be reprimanded. Mr. Daley's and Mr. Wilkerson's conduct was reprehensible and not in keeping with the high standards expected of those who participate in Ontario's capital markets. We conclude that a reprimand of the respondents is appropriate in this instance to "reinforce the importance of compliance" with Staff summonses and cooperation with Staff investigations.[13]

3. COSTS ANALYSIS

3.1 Legal Framework for Costs

[52] We turn now to consider Staff's request that Mr. Daley and Mr. Wilkerson pay some of the costs associated with this matter.

[53] The Tribunal may order a person to pay the costs of an investigation and hearing where that person has acted in a manner that is abusive to the capital markets and which engages the animating principles of the Act. A costs order is not a sanction but a means to recover investigation and hearing costs.

3.2 Staff's Request

[54] Staff submitted evidence supporting total costs and disbursements of the investigation and proceeding in this matter of approximately $320,000, which only reflects the time spent by the lead investigator and the lead litigators until

[13] *Threegold Resources Inc (Re)*, 2021 ONSEC 5, 44 OSCB 1069 at para 14

the issuance of the Merits Decision. The fees for Staff's time are based on hourly rates previously approved by a panel.[14] Staff further reduced the amount sought by 25% to $240,000 and seeks to have this apportioned 65% to Mr. Daley and 35% to Mr. Wilkerson, rounded down to the nearest $5,000 increment, amounting to $155,000 for Mr. Daley and $80,000 for Mr. Wilkerson.

[55] The Tribunal considers a number of factors in making a cost order, including:

a. whether Staff provided early notice of an intention to seek costs;

b. the reasonableness of the requested costs;

c. the seriousness of the allegations and the respondents' conduct;

d. the importance of the issues;

e. whether the respondents contributed to a shorter, more efficient and effective proceeding or whether the respondents' conduct unnecessarily lengthened the proceeding; and

f. whether the respondents denied or refused to admit something that should have been admitted.[15]

[56] Staff submits that its request for costs, and the proposed allocation between the respondents is appropriate because:

a. both Mr. Daley and Mr. Wilkerson contested the Commission's jurisdiction to investigate them, which position was rejected in the Merits Decision;

b. both engaged in the egregious and reprehensible conduct;

c. neither conceded a single fact in the Statement of Allegations; and

d. Mr. Daley contributed to the length of the proceeding, including by:

i. making a disclosure motion containing 23 requests, many of which were frivolous and all of which were denied;

[14] *Moncasa Capital Corp (Re),* 2013 ONSEC 49, 37 OSCB 229 at paras 53-55

[15] *Bradon Technologies Ltd.(Re)*, 2016 ONSEC 9, 39 OSCB 4907 at para 115

ii. his "choice not to devote any attention to this matter in the approximately 17 months between the Statement of Allegations and the start of the [merits hearing]"[16];

iii. making two last-minute requests to adjourn the merits hearing, both of which were denied;

iv. making an "oral, without notice" motion pursuant to the *Canadian Charter of Rights and Freedoms*[17] during the merits hearing to stay the proceeding, which was denied; and

v. conducting an abusive cross-examination, including repetitive and irrelevant questions and suggesting without basis and on multiple occasions that Staff intentionally misinterpreted evidence to further Staff's own careers.

[57] Mr. Daley submits that the costs sought are disproportionate and excessive in the circumstances. Mr. Daley cites the panel's decision in *Miner Edge Inc. (Re)*[18] as a recent example of a panel finding Staff's cost request excessive despite a substantial discount having been included.

[58] Mr. Daley submits that his conduct warrants a further reduction of costs because:

a. he initiated discussions about a potential agreed statement of facts in March 2021, although no agreement was reached;

b. while he didn't concede the facts in the Statement of Allegations, he did not contest the facts underlying Staff's obstruction allegation, with the result being that only the legal issues needed to be determined at the merits hearing;

c. he participated in the Legal Assistance Program for the merits hearing and for this sanctions and cost hearing, contributing to the efficiency of those stages of the proceeding.

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[16] Merits Decision at para 28

[17] Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982 (UK),* 1982, c 11 (the ***Charter***)

[18] 2021 ONSEC 31, 44 OSCB 8745 (***Miner Edge***)

[59] With respect to Staff's submission that Mr. Daley contributed to the proceeding's length by bringing motions, he submits that as a respondent he is entitled to bring motions and the fact they were denied does not make them unreasonable.

[60] On the apportionment of 65% of the costs to him, Mr. Daley submits this effectively punishes him for participating in the proceeding and will incent others, such as Mr. Wilkerson, to refuse to engage with Staff in any way.

3.3 Appropriate Costs

[61] We conclude that an award of costs is warranted given the seriousness of the obstruction allegation and the importance of the issue of ensuring the respondents and others are aware that frustrating a Staff investigation can have serious consequences.

[62] However, as we discuss below, there has been a conflating of costs associated with the underlying investigation that was obstructed and this proceeding about the obstruction conduct itself that warrants a further reduction of the costs Staff is seeking.

[63] We do not agree with Staff that Mr. Daley contributed to the length of the proceeding. As a respondent Mr. Daley was well within his rights to bring a disclosure motion and seek adjournments. His lack of success with those motions does not, in itself, make them unreasonable. Mr. Daley's motion under the *Charter* was dealt with at the time it was raised during the merits hearing and did not result in a significant delay.

[64] We also do not agree with Mr. Daley that his actions warrant a further reduction. Discussions among parties to come to an agreed statement of facts are encouraged and normal in Tribunal proceedings and may be initiated by either party. Also "not contesting the facts underlying the obstruction allegation" is not equivalent to conceding any of the facts. In the absence of any concession on the facts, Staff still had to prepare its case assuming all of the facts were in contention. We appreciate the participation of counsel in the Legal Assistance Program and recognize the benefits they bring to a proceeding.

[65] We reject Mr. Daley's submission that the decision in *Miner Edge* assists his position for a further discount of costs. In that case the respondents conceded

"all the alleged contraventions" and "the related necessary facts", "acknowledged their misconduct and substantially reduced [the] sic hearing to less than one full hearing day."[19] This is not the case here.

[66] A reduction in Staff's claim for costs is warranted by the fact that Staff appears, as we discuss below, to have conflated this Obstruction Proceeding with the TCTO Proceeding.

[67] Staff's claim for costs includes Staff time spent investigating from July 3, 2018 to August 15, 2019. While we appreciate that there had to be an investigation for the respondents to obstruct for this proceeding to take place, we do not agree that the costs of that investigation should be awarded in the Obstruction Proceeding. To the best of our knowledge, the investigation remains open. Should that investigation lead to a Statement of Allegations and proceed through to a merits decision in Staff's favour, it would be open to Staff to claim their investigation costs at that time. We remove from the claim for costs time spent during the investigative phase.

[68] Mr. Chen confirmed during the sanctions hearing that Staff continued to investigate while the obstruction allegation was being litigated. The exhibits to Ms. Spain's affidavit regarding the costs claim, dated January 7, 2022, have defined periods for the investigation phase and the litigation phase, with the former ending on August 15, 2019. The exhibits do not provide any breakdown of what, if any, time was claimed for the ongoing investigative work during the litigation phase. Given Mr. Chen's comment and the absence of any claim for investigation time after August 15, 2019, we must conclude that the time claimed during the litigation phase includes time spent on the investigation. We do not know how much time was spent during that period.

[69] The litigation period, for which Staff is claiming their time spent, commences on August 16, 2019 and ends with the date of the merits decision on October 21, 2021. August 16, 2019 was the date of the first extension hearing in the TCTO Proceeding. The Obstruction Proceeding commenced on November 18, 2019. The TCTO Proceeding is a separate matter. It is not appropriate to claim as a cost of

[19] *Miner Edge* at paras 107-108

this Obstruction Proceeding the time spent during the three months between the first hearing date in that other matter and the start of this proceeding. We do not know how much, if any, of the costs Staff is seeking includes time spent during that three-month period on the TCTO Proceeding.

[70] As it is impossible to determine with any precision how much time was spent on the underlying investigation during the litigation phase of this Obstruction Proceeding and if any of the time spent during the three months prior to the start of this proceeding was with respect to the TCTO Proceeding, we apply a further 20% discount to Staff's claim for costs.

[71] Staff also claims reimbursement of out-of-pocket costs for interview transcription services. The invoices for those services are from 2018 and 2019 and relate to interviews conducted by Staff during the investigation of the underlying conduct, and cancellation fees for scheduled interviews that did not proceed. As with the investigative costs, these disbursements are more appropriately the subject of a claim for costs should the TCTO Proceeding proceed.

[72] We award Staff costs in the amount of $184,000 calculated as follows:

Investigative phase	$0.0
Litigation phase	$229,918.75 x 20% discount = $183,935
Expenses	$0.0
Total	$183,935 (rounded up to $184,000)

This amounts to an approximate 57% discount of Staff's costs incurred of $422,385.62 or a further approximate 24% discount of Staff's claimed costs.

[73] We reject Staff's proposed apportioning of the costs 65% to Mr. Daley and 35% to Mr. Wilkerson. Both respondents were equally responsible for the obstructive conduct that is the subject of this matter and should, therefore, equally bear 50% of the costs.

4. CONCLUSION

[74] For the reasons above we will issue an order that provides that:

a. pursuant to paragraph 6 of subsection 127(1) of the Act, Mr. Daley and Mr. Wilkerson are reprimanded;

b. pursuant to paragraphs 7 and 8.1 of subsection 127(1) of the Act, Mr. Daley and Mr. Wilkerson immediately resign from any position they hold as a director or officer of an issuer or registrant;

c. pursuant to paragraphs 8 and 8.2 of subsection 127(1) of the Act, Mr. Daley and Mr. Wilkerson are prohibited from acting as a director or officer of any issuer or registrant for a period of five years;

d. pursuant to paragraph 8.5 of subsection 127(1) of the Act, Mr. Daley and Mr. Wilkerson are prohibited from becoming or acting as a registrant or promoter for a period of five years; and

e. pursuant to section 127.1 of the Act, the Respondents shall pay costs to the Commission of $184,000, as follows:

i. Mr. Daley shall pay costs to the Commission of $92,000; and

ii. Mr. Wilkerson shall pay costs to the Commission of $92,000.

Dated at Toronto this 17th day of May, 2022.

"M. Cecilia Williams"

M. Cecilia Williams

"Lawrence P. Haber"

Lawrence P. Haber

"Craig Hayman"

Craig Hayman