Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF MRS SCIENCES INC. (FORMERLY MORNINGSIDE CAPITAL CORP.), AMERICO DEROSA, RONALD SHERMAN, EDWARD EMMONS, IVAN CAVRIC and PRIMEQUEST CAPITAL CORPORATION

REASONS AND DECISION ON A MOTION

Hearing: November 2, 2011

Decision: December 6, 2011

Panel: Mary G. Condon - Vice-Chair and Chair of the Panel
Christopher Portner - Commissioner

Appearances: Peter-Paul E. DuVernet - For MRS Sciences Inc. (formerly Morningside Capital Corp.), Americo Derosa, Ronald Sherman, Edward Emmons and Ivan Cavric

Scott C. Hutchison
Derek J. Ferris - For Staff of the Commission

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REASONS AND DECISION ON A MOTION

I. INTRODUCTION

[1] The Respondents MRS Sciences Inc. (formerly Morningside Capital Corp.), Americo Derosa, Ronald Sherman, Edward Emmons and Ivan Cavric (collectively, the "**Respondents**") brought a motion before the Ontario Securities Commission (the "**Commission**") requesting directions and challenging the jurisdiction of a Panel of Commissioners, neither of whom were on the Panel that made the decision on the merits, to hear and decide the issues of sanctions and costs in this matter.

[2] The central issue in this motion is whether the Secretary to the Commission (the "**Secretary**") is legally entitled to assign a Panel to hear submissions and decide on sanctions in this matter that is composed of Commissioners who are different from those who heard the merits.

[3] Counsel for the Respondents and for Staff of the Commission ("**Staff**") made oral submissions at the motion hearing on November 2, 2011. Prior to the motion hearing, we were provided with written submissions by the Respondents and Staff.

[4] We find that it is within the jurisdiction of the Commission for the Secretary to appoint a Panel of Commissioners who did not participate in the hearing on the merits to preside over the sanctions and costs hearing. These are the reasons for our decision.

A. Background Facts

[5] This proceeding was commenced by a Notice of Hearing issued by the Secretary on November 30, 2007 following Staff's filing of a Statement of Allegations dated November 29, 2007.

[6] On April 14, 2009, Staff filed an Amended Amended Statement of Allegations, and an Amended Notice of Hearing was issued by the Secretary on April 15, 2009.

[7] The merits hearing in this matter was held on 12 days from May 7, 2009 through October 7, 2009 before a Panel consisting of Commissioner LeSage and Commissioner Perry (the "**MRS Merits Panel**"). The Respondents were represented throughout the hearing and three of the individual respondents testified as witnesses at the merits hearing.

[8] The MRS Merits Panel's written Reasons and Decision were issued on February 2, 2011 (*Re MRS Sciences Inc.* (2011), 34 O.S.C.B. 1547) (the "**MRS Merits Decision**"). In the MRS Merits Decision, the MRS Merits Panel made findings against the Respondents of breaches of Ontario securities law and conduct contrary to the public interest. Certain of the allegations against the Respondents were held by the MRS Merits Panel not to have been made out. No findings were made against a sixth respondent, Primequest Capital Corporation, against which Staff had also brought allegations. The MRS Merits Decision instructed the parties that "Staff and the Respondents shall contact the Office of the Secretary to the Commission within ten days to schedule a sanctions and costs hearing" (MRS Merits Decision, *supra* at para. 239).

[9] In accordance with Orders in Council signed by the Lieutenant Governor of Ontario, the terms of office of Commissioners LeSage and Perry as Commissioners of the Ontario Securities Commission expired on February 10, 2011 and February 14, 2011, respectively.

[10] In an email sent to counsel for Staff and counsel for the Respondents on May 5, 2011, the Secretary informed the parties that:

> … the terms of appointment of Commissioners LeSage and Perry have expired. As a result, and consistent with our past practice, the tribunal will not schedule either Commissioner to preside over the sanctions hearing. In the event that any party wishes to challenge the jurisdiction of the panel struck to preside over the sanctions hearing, we would expect such party to file a motion for recusal of the panel complete with legal argument and authority. The jurisdictional challenge motion would be heard by the panel set to preside on the sanctions hearing and would be disposed of by that panel before any sanctions hearing could proceed.

II. THE ISSUES

[11] The Respondents argue that a new Panel that is composed of Commissioners who were not on the MRS Merits Panel does not have jurisdiction to make a determination on sanctions and costs in this matter. The Respondents submit that the MRS Merits Panel members who heard the evidence and made the MRS Merits Decision should continue with the hearing to deal with sanctions.

[12] Addressing this issue involves two main questions:

(i) Does the Secretary have the authority to assign a Panel of Commissioners, none of whom were on the MRS Merits Panel, to hear and make a determination on the issues of sanctions and costs?

(ii) Would proceeding with a sanctions and costs hearing before a new Panel of Commissioners result in procedural unfairness to the Respondents?

III. ANALYSIS

A. Preliminary Matters

[13] As a preliminary matter, the Respondents submit that the burden lies with Staff to demonstrate that there is jurisdiction in the tribunal for Commissioners other than those who made the MRS Merits Decision to make a decision with respect to sanctions and costs. They submit that the burden is on Staff to demonstrate some authority for the conclusion that a sanctions hearing resulting from a Notice of Hearing is discrete from the hearing on the merits.

[14] Staff, on the other hand, submits that the exercise of authority by the Secretary is presumptively proper, and the Respondents bear the burden of displacing that presumption. They submit that the onus is on the Respondents to satisfy us that the decision by the Secretary to constitute the sanctions Panel as he has is somehow beyond the jurisdiction of the Commission.

[15] Although neither party provided authority for their respective positions on where the burden of proof lies on this motion, we are satisfied that the Secretary, on behalf of the Commission, has the authority to determine the composition of the Panel for the hearing on sanctions and costs.

B. Jurisdiction

1. Respondents' Position

[16] The Respondents submit that "there is no authority or jurisdiction for an entirely new Panel, that has heard none of the evidence, to continue the hearing or deal with sanctions". The basis for this argument is that the merits hearing and the sanctions hearing are properly understood as a single hearing; one is simply the continuation of the other and the merits hearing is a necessary precondition for the sanctions hearing.

[17] The Respondents assert two related grounds on which an entirely new Panel would not have jurisdiction to conduct the hearing as to sanctions: (i) they cite the principle that "they who hear must decide", and (ii) they claim there will be a loss of quorum if there is a new Panel.

[18] The Respondents submit that the principle of *audi alteram partem*, which includes the maxim "they who hear must decide", requires that only those Panel members who have heard the evidence can participate in the decision, and that new Panel members have no jurisdiction to hear the sanctions issues. In support of this principle, the Respondents refer to section 4.3 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "**SPPA**"), which they argue contemplates the position they are advocating. Section 4.3 provides that:

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

[19] The Respondents submit that they wanted the MRS Merits Panel members who heard the evidence on the merits to continue with the hearing and deal with sanctions, and accordingly inquired as to whether both or either one of the MRS Merits Panel members would complete the hearing.

[20] In support of their request, the Respondents referred us to a number of cases that consider the principle of *audi alteram partem.* The Respondents submit that the principle of *audi alteram partem* goes to the tribunal's jurisdiction and refer to *Doyle v. Restrictive Trade Practices Commission*, [1985] 1 F.C. 362 (F.C.A.) ("***Doyle***"), in which the Federal Court of Appeal discusses the maxim of *audi alteram partem* at para. 13:

> This maxim expresses a well-known rule according to which, where a tribunal is responsible for hearing and deciding a case, only those members of the tribunal who heard the case may take part in the decision. It has sometimes been said that this rule is a corollary of the audi alteram partem rule. ... This is true to the extent a litigant is not truly "heard" unless he is heard by the person who will be deciding his case. In my view, however, the rule expresses more than that; it is a rule which actually affects the judge's jurisdiction. For that reason its violation

> may be invoked even by a litigant who waived his right to be heard by the court which passed judgment on him. Thus, a defendant who voluntarily declines to attend the hearing thereby waives the right to be heard; he does not, however, waive the right to be judged by a judge who has heard the evidence. ...

[21] In addition, in *Davis v. Toronto (City)*, [2008] O.H.R.T.D. No. 14 ("***Davis***"), the Ontario Human Rights Tribunal applied the principle of *audi alteram partem* in the context of continuation of a quorum. *Davis* describes *audi alteram partem* as a well-settled principle that "requires that the individual (or panel) who hears the evidence must be the individual to decide on the outcome" (*Davis, supra* at para. 34). The Respondents submit that for this principle to be upheld, the MRS Merits Panel must be the Panel to make a decision with respect to sanctions. Further, they submit that this is a case where issues of credibility have been raised, and, as stated in *Davis*:

> Under the paradigm situation of an oral hearing having serious consequences for individual rights or interests in which issues of credibility are raised, this means that the member or members of the tribunal should not only sit at the hearing but also be present and attentive throughout and thereafter reach their own independent decision on the basis of the evidence adduced and arguments presented by the parties.
>
> (*Davis, supra* at para. 36 quoting David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at 293)

[22] The Respondents also directed us to the decision in *Piller v. Association of Ontario Land Surveyors* (2002), CanLII 44996 (Ont. C.A.) ("***Piller***"), in which the Ontario Court of Appeal considered the question of whether a member whose term had expired was entitled to continue to participate in a matter before a disciplinary panel. The member in question had presided over preliminary matters "akin to preliminary motions brought at the outset of trial and heard by the presiding judge" (*Piller, supra* at para. 35). Subsequent to hearing the preliminary matters, the member's term expired. The court found that:

> Understood in the context of an administrative hearing where the sole purpose for which the panel is convened is to deal with matters relevant to the disciplinary matter before it and there is no other forum for preliminary matters to be considered, in my view, the hearing of preliminary motions resulted in the commencement of proceedings.
>
> (*Piller, supra* at para. 37)

[23] The court determined that by presiding over the preliminary matters, the member participated in the hearing and, by virtue of section 4.3 of the SPPA, the member's term was deemed to continue for the purpose of completing the hearing and rendering a decision (*Piller, supra* at para. 53). The Respondents submit that, similarly, the MRS Merits Panel members have jurisdiction to continue to the completion of this hearing.

[24] The Respondents also note that the Notice of Hearing contains language that contemplates that the merits and sanctions would be conducted as one hearing. The original Notice of Hearing in this matter states:

> **TAKE NOTICE** that the Commission will hold a hearing pursuant to section 127 of the *Securities Act*, at its offices at 20 Queen Street West, 17th Floor Hearing Room on Friday, the 21st day of December, 2007 at 10:00 a.m. or as soon thereafter as the hearing can be held:
>
> **TO CONSIDER** whether, pursuant to section 127 and section 127.1 of the *Securities Act*, it is in the public interest for the Commission:
>
> (i) at the conclusion of the hearing, to make an order pursuant to paragraph 2 of subsection 127(1) that trading in the securities of MRS Sciences cease until further order of this Commission;
>
> (ii) at the conclusion of the hearing, to make an order against any or all of the Respondents that:
>
> … [emphasis in original]

[25] The Respondents submit that there is one Notice of Hearing, for one continuous hearing to deal with the merits and sanctions, although it is conducted in two parts. They submit that, based on the language of the Notice of Hearing, the Commission will consider whether "at the conclusion of the hearing, to make an order", the Notice of Hearing contemplates one continuous hearing, at the end of which there is an order.

[26] According to the Respondents, the merits and sanctions parts of the hearing are temporally separate, but procedurally continuous and connected. Procedurally, they submit, the hearing is bifurcated in accordance with the *Ontario Securities Commission Rules of Procedure* (2010), 33 O.S.C.B. 8017 (the "**OSC Rules**"), but they are two parts of the same hearing. The Respondents submit that this temporal separation does not create a discrete proceeding.

[27] The Respondents further submit that if the sanctions portion is a continuation of the hearing on the merits, and not an entirely discrete hearing, a new Panel would result in the loss of a quorum. They refer to the statement by Sara Blake in *Administrative Law in Canada*, 4th ed. (Markham: LexisNexis Canada Inc., 2006) at 84, cited in *Davis, supra* at para. 29:

> Where a quorum is prescribed by statute or regulation, a hearing by fewer than that number is invalid and a decision is void. If one member is lost, leaving no quorum, the remaining members may not continue the hearing. They cannot continue even if the absent member is replaced, because the replacement has not heard the evidence presented before joining the panel. … Lack of a prescribed quorum cannot be waived by parties because the purpose of the quorum is to serve the public interest through the collective wisdom of a minimum number of members.

[28] The Respondents submit that the quorum that began the merits hearing has been lost, and although a new Panel may be constituted, it is not the Panel that has heard the evidence and therefore the principle of *audi alteram partem* is violated.

2. Staff's Position

[29] Staff submits that the sanctions Panel has been properly constituted in a manner consistent with the Act, the procedures of the Commission, the past practices of the Commission, and consistent with the rules of natural justice as applied by this and other adjudicative bodies.

[30] Staff relies on the definitions of "hearing" and "proceeding" in the SPPA and argues that these terms, which are defined differently, must be taken to mean different things. Staff submits that a "proceeding" is the overall case or matter in respect of which the tribunal is to exercise its ultimate statutory authority, while a "hearing" is an individual step or stage within such a proceeding. Subsection 1(1) of the SPPA defines them as:

> "hearing" means a hearing in any proceeding; ("audience")
>
> …
>
> "proceeding" means a proceeding to which this Act applies; ("instance")

[31] Staff submits that the legislature has been clear in assigning distinct meanings to the words "hearing" and "proceeding". Staff takes the position that a sanctions and costs hearing convened following a merits decision is a discrete "hearing" within a "proceeding" that is commenced by the initial Notice of Hearing. As such, the Secretary must constitute a Panel of current Commission members.

[32] Staff submits that section 4.3 of the SPPA when it refers to "participated in a hearing" only provides jurisdiction for Commissioners to continue their work with respect to *hearings* for which decisions have not been issued, and not the entirety of proceedings which have not been completed by the time Commissioners' terms of office have expired.

[33] Staff notes that in *Piller*, the Court of Appeal referred to both section 4.3 of the SPPA and subsection 26(11) of the *Surveyors Act*, R.S.O. 1990, c. S.29. Section 26(11) of the *Surveyors Act* provides that:

> Where a proceeding is commenced before the Discipline Committee and the term of office in the Council or on the Committee of a member sitting for the hearing expires or is terminated, other than for cause, before the proceeding is disposed of but after evidence has been heard, the member shall be deemed to remain a member of the Discipline Committee *for the purpose of completing the disposition of the proceeding* in the same manner as if the term of office had not expired or been terminated. [emphasis added]
>
> (See *Piller, supra* at para. 30)

[34] Staff points out that the *Surveyors Act* and the SPPA are statutes written by the same legislative body, so it can be assumed that the words have the same meaning in both. Staff submits that when the legislature's intention is to have an extension of a term of office beyond finishing the stage the member was involved in, it expresses itself in one way. By way of contrast, Staff submits that when the legislature intends to only authorize an extension to complete one stage, the hearing, it uses different language – the language of section 4.3 of the SPPA. Staff asserts that the language of section 4.3 of the SPPA, "a member of a tribunal who has participated in a hearing expires before a decision is given" is the only language that applies to the Commission.

[35] Staff further submits that the Commission consistently refers to the merits hearing and the sanctions hearing as being two separate hearings.

[36] Staff referred us to Rule 17.3 of the OSC Rules and submits that it is clear that there shall be a hearing to deal with sanctions and costs that is separate from the hearing on the merits. Rule 17.3 states:

> **17.3 Sanctions Hearing – (1)** Unless the parties to a proceeding agree to the contrary, a separate hearing shall be held to determine the matter of sanctions and costs.
>
> …

[37] Staff also referred us to a number of Commission decisions which refer to the sanctions hearing as having followed the decision on the hearing on the merits.

[38] Staff further submits that the present Panel has been properly constituted to conduct the sanctions hearing through an assignment in the normal course by the Secretary, who was exercising authority delegated to him by the Commission. Staff submits that the Secretary's authority to constitute Panels comes from the Commission's inherent powers as "master of its own house". The Commission has delegated its power to determine when and how a hearing is convened and who among its members will be on the Panel that presides at a hearing. Staff refers to the Commission's *Guidelines for Members and Employees Engaging in Adjudication*, adopted April 1, 2008 and available on the Commission's website (the "***Guidelines***"), which documents this delegation of authority in Article 6.1:

> **Article 6: Secretary, Independent Adjudicative Personnel and Adjudicative Committee**
>
> **6.1 Role of the Secretary**
>
> (1) **Assignment of Panel Members** – The Commission has delegated to the Secretary the authority to manage and administer the assignment of Panel Chairs and other Panel Members subject to the review and direction of the Adjudicative Committee. …

[39] Further, Staff submits that it is clear that the process by which this Panel was appointed has been approved by the Commission's Adjudicative Committee and embraced by the

Guidelines. In support of this, Staff refers to the recent decision in *Xanthoudakis v. Ontario Securities Commission*, 2011 ONSC 4685 (Div. Ct.), where the Divisional Court states at paras. 49 to 50:

> Similarly, the mandate and make-up of the "Adjudicative Committee" of the OSC encourages the separation of the Chair of the OSC from the adjudicative role. The committee was established by resolution of the OSC on May 14, 2002. Its mandate is to review and evaluate the adjudicative procedures and practices of the OSC. As such, it oversees the decision-making function (see: [*Guidelines*], Article 6.3). In this capacity, it makes recommendations to the OSC and the chair of the OSC, but has no independent decision-making authority …
>
> This separation is confirmed by the [*Guidelines*]. … Among other things, it prescribes who has responsibility for selecting the members of panels to hear the various matters the OSC is called upon to adjudicate. Generally, it is the secretary of the OSC, subject to the review and direction of the Adjudicative Committee, who makes the assignment although the OSC may issue directives to the secretary in this regard. The "Guidelines" make it clear that, while the secretary may, in his or her discretion, consult with other members, *no one including the chair of the OSC* shall attempt to influence or participate in the selection of a panel (see: [*Guidelines*], Article 6.1(1) and (3)). [emphasis in original]

[40] The implication of Staff's submissions is that Commissioners whose terms of office as Commissioners expire may complete a hearing, but not a proceeding. Staff argues that the past practice of the Commission supports this contention and cites a number of cases to this effect. In cases where the term of appointment of one Commissioner expired, the other Commissioner(s) who participated in the decision on the merits sat on the sanctions Panel with a different Commissioner (see *Re Al-Tar Energy Corp.* (2011), 34 O.S.C.B. 447, *Re Biovail Corporation* (2011), 34 O.S.C.B. 5452, *Re Goldbridge Financial Inc.* (2011) 34 O.S.C.B. 11113, *Re White* (2010), 33 O.S.C.B. 8893, *Re Rowan* (2009), 33 O.S.C.B. 91 and *Re Xi Biofuels Inc.* (2010), 33 O.S.C.B. 10917).

3. Analysis of the Jurisdiction Arguments

i. *Audi alteram partem*

[41] We accept the argument of Staff that, as a matter of statutory interpretation, the SPPA contemplates that a "proceeding" and a "hearing" are different. The statement by the Court of Appeal in *Piller, supra* at para. 46 that the "proceedings were conducted by way of hearing" is indicative of this distinction between the concepts of "proceeding" and "hearing".

[42] In *Davis*, the Ontario Human Rights Tribunal notes that the principle of *audi alteram partem* is fundamental, but is not inflexible and is dependent on the "overall context":

> Although the principle is fundamental, it is not inflexible. In application, the principle has been adapted to accommodate the variety of forms of decision-making across different administrative tribunals and agencies (see David J. Mullan, *Administrative Law* (Toronto, Irwin Law, 2001), pages 295-6). Whether a

> departure from the principle in a given case meets with the requirements of procedural fairness depends on the overall context …
>
> (*Davis, supra* at para. 35)

[43] We make our findings on this motion in the context of practice in Commission proceedings, where the merits and sanctions portions of the proceeding are regularly heard separately, often months apart.

[44] We do not agree that it is necessary for the Panel that hears evidence and submissions as to the merits of whether the allegations of Staff have been made out to also hear separate submissions as to the appropriate sanctions to be applied. We agree with Staff that separate and distinct issues arise with respect to the appropriate sanctions to be applied. In our view, as long as both parties are provided with the opportunity to lead evidence and make submissions at the sanctions hearing, the requirement of the maxim of *audi alteram partem* will be satisfied. A corollary to this is that a sanctions Panel should not reopen issues that have been disposed of by the merits Panel that heard the relevant evidence as to the merits of Staff's allegations.

[45] The core of the principle of *audi alteram partem* is that litigants have a right to be heard by the decision-maker. The principle of *audi alteram partem* was satisfied in connection with the merits hearing here as the MRS Merits Panel heard the evidence of the Respondents and others and issued its Reasons and Decision on the basis of that evidence. The principle of *audi alteram partem* will be satisfied in connection with the sanctions hearing as the evidence of the Respondents and others will be heard by the Panel adjudicating the matter on the basis of that evidence. The sanctions and costs Panel will not be adjudicating on the merits of Staff's allegations, and, accordingly, does not need to have heard that evidence. The MRS Merits Panel adjudicated on breaches of the Act or conduct contrary to the public interest; the sanctions Panel will adjudicate on the appropriate sanctions *for those breaches or conduct* and the Respondents will be heard by the sanctions Panel on those issues.

[46] With respect to the language used in the Notice of Hearing which refers to orders being sought by Staff "at the conclusion of the hearing", we note that Staff acknowledges an inconsistency of language. We accept the submissions of Staff that, notwithstanding the use of the term "hearing", the Notice of Hearing initiates a proceeding before the Commission.

[47] We also note that although the Notice of Hearing issued in this matter indicates the general type of sanctions that will be sought at the sanctions hearing, it does not indicate the specific amount of an administrative penalty that will be sought by Staff. This will presumably be addressed in submissions at the sanctions and costs hearing.

[48] Merits hearings before the Commission can be lengthy and it is not uncommon for a Commissioner's term to expire during the hearing or deliberation period. The Act sets fixed term limits for Commissioners. Subsection 3(4) of the Act states:

> **3. (4) Appointment** – The members shall be appointed by the Lieutenant Governor in Council for such term of office not exceeding five years as the Lieutenant Governor in Council determines. A member may be reappointed.

[49] In addition, the Act imposes a maximum number of Commissioners in subsection 3(2):

> **3. (2) Composition** – The Commission is composed of at least nine and not more than 15 members.

[50] In a context in which merits hearings can take a considerable amount of time to hear and deliberate on, because of the volume of evidence, allegations against a multitude of respondents or procedural motions, it would in many cases be difficult and would impose an inappropriate constraint on the choice of members, to schedule merits hearings if only those Commissioners available to continue sitting from the commencement of the hearing on the merits to the conclusion of the hearing on sanctions would be eligible.

[51] The SPPA is clear in section 4.3 that the term of a member "who has participated in a hearing" and whose term expires before the decision is issued will be deemed to continue "only for the purpose of participating in the decision and for no other purpose". If the current group of Commissioners were to include, as the Respondents submit, those whose terms expired before the release of merits decisions and who then proceeded to sit on the sanctions and costs hearings, over time the number of former Commissioners who would still participate in Panel deliberations could undermine the intention of the Act to maintain a limited number of Commissioners appointed for fixed periods of time.

[52] The context of Commission proceedings can be distinguished from the situation in *Piller* where a member, having participated in preliminary motion-like matters, was found to have commenced a hearing. In this case, the MRS Merits Panel heard the evidence in the hearing on the merits and issued its decision.

[53] Further support for Staff's position is found in the Divisional Court's decision in *Banks v. Ontario (Securities Commission)*, [2005] O.J. No. 5076 ("***Banks***"), where a respondent to a Commission proceeding successfully appealed the Commission's decision on sanctions. The court upheld the Commission's decision as to the merits, but referred the matter back to the Commission for a new hearing on sanctions. In doing so, the court concluded:

> With respect to the issue of the sanctions the Commission imposed, it is common ground that the matter should be remitted back to the Commission to allow the parties to make submissions. The only issue is whether the matter should be remitted to a new panel. We leave that decision to the Commission.
>
> (*Banks, supra* at para. 23)

[54] The Divisional Court's decision in *Banks* accepts that the composition of a Panel is within the discretion of the Commission. It also supports the proposition that the same Panel is not required for both the hearing on the merits and the hearing on sanctions and costs.

[55] In this motion hearing, counsel for the Respondents took the position that if no respondents appeared at a hearing on the merits, there could be more flexibility with respect to the composition of the Panel because the *audi alteram partem* principle would not apply. However, jurisdiction to appoint a Panel in a particular manner cannot depend on whether or not

respondents appear, and this position would in any event be inconsistent with the principle expressed in *Doyle*, above.

ii. Quorum

[56] The Respondents submit that the assignment of a new Panel for the sanctions hearing would result in a loss of quorum.

[57] Subsection 3(11) of the Act specifies that "Two members of the Commission constitute a quorum".

[58] As of May 12, 2011, subsection 3.5(3) of the Act was revised to provide that:

> Despite subsection 3 (11) and subject to subsection (4), any two or more members of the Commission may in writing authorize one member of the Commission to exercise any of the powers and perform any of the duties of the Commission, including the power to conduct contested hearings on the merits, and a decision of the member shall have the same force and effect as if made by the Commission.

[59] Our conclusion on the issue of quorum flows from our finding that the hearing on sanctions and costs is a separate "hearing" from the hearing on the merits, within the same "proceeding", as those terms are defined in the SPPA. If one Commissioner becomes unable to continue a hearing, resulting in a loss of quorum, issues will arise as to whether the remaining members properly constitute a Panel. That is not the situation in this case.

[60] The Respondents make reference to the decision in *Re Seed*, [1992] O.J. No. 392, where the Divisional Court found that there was a loss of quorum in a decision by the Public Accountants Council for the Province of Ontario. The judgment of the court, delivered orally, states in full:

> Apart from the natural justice issue and the diminution of the make up of the panel that presided at the earlier hearing we conclude that *the requirements of a quorum of eight provided for in s. 11 of the Act must relate not just to the commencement of the meeting but that quorum must continue through the penalty determination.* If it were not determined on that basis it would result in the anomaly that one person could make the determination on penalty.
>
> The penalty proceedings were therefore a nullity. As requested by the appellant the issue of penalty will be remitted to the Council to constitute a quorum to properly address the question of penalty. Either party may rely upon the transcript of evidence and either may adduce fresh evidence.
>
> No order as to costs. [emphasis added]

[61] While we do not have the benefit of the full history of the matter in *Re Seed*, it appears that it is distinguishable from the current situation. In this case, the quorum requirements under the Act will have to be met by the newly constituted Panel assigned to the hearing on sanctions and costs. The quorum must continue through the penalty determination of the sanctions hearing,

as in *Re Seed*, but it is not necessary that those same Commissioners who constituted the MRS Merits Panel also be those Commissioners assigned to hear submissions and evidence at the sanctions and costs hearing. The requirement that quorum be maintained from the commencement of a hearing through to issuance of the decision in that hearing is a separate issue from the question of whether the Panel at a merits hearing should be constituted identically to the Panel for the hearing on sanctions and costs.

C. Procedural Fairness

1. Respondents' Position

[62] There are two aspects to the Respondents' general submissions on procedural fairness. First, the Respondents claim it is unfair that the Panel that rejected the more serious allegations against them will not continue and also hear evidence with respect to potential sanctions. They submit that any penalty must be tailored not only to the Respondents, but also to the "factual matrix" which is now lost.

[63] Second, the Respondents submit that there is an appearance of unfairness stemming from the treatment of these Respondents in a manner inconsistent with other cases before the Commission. The Respondents contend that Commissioner LeSage, although described as unavailable to sit on the sanctions Panel in this case, commenced a sanctions hearing in relation to another proceeding (the "**Sulja Bros. Proceeding**") after his term had expired. The sanctions and costs decision in *Re Sulja Bros. Building Supplies Ltd.* (2011), 34 O.S.C.B. 7515 ("**Sulja Bros. Sanctions**") notes at para. 4 that: "On June 2, 2011, following the issuance of the Sulja Nevada Merits Decision, the Panel invited Sulja Nevada, Kore Canada and DeVries to make submissions on sanctions and costs". The Respondents refer to this statement in Sulja Bros. Sanctions in support of their submission that Commissioner LeSage commenced the sanctions hearing in that matter after his term had expired on February 11, 2011.

[64] Although the Sulja Bros. Sanctions decision notes that the hearing with respect to sanctions and costs occurred on November 30, 2010, the reasons in the merits decision relating to some of the respondents in the Sulja Bros. Proceeding were not released until May 25, 2011. The Respondents submit that the sanctions and costs hearing in the Sulja Bros. Proceeding occurred after the merits decisions with respect to all the respondents were released, on June 2, 2011. In support of their position, the Respondents refer to subrule 17.3(2) of the OSC Rules, which states:

> *Following the issuance of the reasons for the decision on the merits*, the Secretary shall set a date for the sanctions hearing if such a hearing is necessary. [emphasis added]

[65] Similarly, they submit that it is unfair to the Respondents for a new Panel to hear the submissions on sanctions when Commissioner Perry, who was the second member of the MRS Merits Panel, was apparently available for a different sanctions hearing that is currently scheduled to begin later this year. The Respondents refer specifically to a letter sent by the Secretary on June 21, 2011 to the parties in another proceeding (the "**Sextant Proceeding**") against whom findings were made following a merits hearing (*Re Sextant Capital Management Inc.* (2011), 34 O.S.C.B. 5863) (the "**Sextant Letter**"). The Sextant Letter states:

> … Commissioner Carnwath advises me to inform you that it will not be necessary for you to prepare submissions on the proposed substitution of Commissioner Kelly for former Commissioner Perry.
>
> Ms. Perry has consented to continue to sit and hear submissions on sanctions pursuant to s. 4.3 of the *Statutory Powers Procedure Act, R.S.O. 1990,* c.5.22 (the "Act").
>
> She is available on the proposed dates of July 11, 2011 … and July 13, 2011 …

[66] The Respondents submit that both the Sextant Letter and the procedure in the Sulja Bros. Proceeding create an appearance of unfairness with respect to the treatment of the Respondents in this matter.

2. Staff's Position

[67] Staff notes that at the start of the hearing on the merits in this matter, it was recognized that there would be a separate sanctions hearing, at which, Staff submits, evidence relevant to sanctions, but not germane to the merits, would be called. Staff submits that the issues relevant to a sanctions hearing are distinct from the kinds of issues that arise during a merits proceeding. Staff submits that by the time of the sanctions hearing, different issues are engaged, and discrete, factual questions may arise. Although it is not unusual that evidence tendered at the merits hearing is also relevant, there is no relitigation of the issues that were conclusively resolved at the merits hearing.

[68] Staff submits that the sanctions hearing is a different and free-standing inquiry that is forward-looking, whereas the merits hearing is completely retrospective. Staff refers to an example from the criminal law context, from which Staff submits we can draw some parallels regarding the questions of fairness to the Respondents in the current situation. In *R. v. White,* [1997] A.J. No. 255 (Q.B.) ("***White***"), the accused, having been found guilty by a jury, absconded and was extradited to Canada ten years later. By the time he returned to Canada, the trial transcripts had been destroyed and the question the court was faced with was whether it had adequate evidence to fairly sentence the accused (*White, supra* at para. 33). The court found that:

> In order to answer this question, the court must first decide what constitutes adequate evidence of the trial proceedings. As Mr. White acknowledges, the Supreme Court of Canada has decided that it is not in every situation where there is a gap in a trial transcript that the court should order a new trial...
>
> By analogy with the reasoning in that case, I have concluded that the test to be used here is: Is there a serious possibility that the unavailability of a trial transcript deprives Mr. White of a sentencing process that will reflect the trial evidence?
>
> (*White, supra* at paras. 34-35)

Staff submits that we may import this analysis into the current context and ask whether there is any serious possibility that the fact that different Commissioners will deal with the question of

sanctions and costs in this case in any way impairs the Respondents' right to properly address any of the issues that will arise on the sanctions hearing.

[69] In this case, Staff submits that the sanctions and costs Panel can rely on transcripts of the merits hearing, the MRS Merits Decision and on any additional evidence led at the sanctions hearing. Staff submits that the merits hearing addresses the allegations, while the sanctions hearing addresses the order or orders that the Commission should make.

[70] With respect to the alleged differential treatment of the Respondents in this matter as compared to respondents in other matters, Staff allows that the Sextant Letter is a matter of some concern with respect to the consistency of the Commission's practices. However, Staff submits that the language of the Sextant Letter, "Commissioner Carnwath advises me to inform you …" indicates that the situation did not involve the Secretary exercising his discretion to assign a sanctions Panel, but that the Secretary had been advised to take this step by direction from Commissioner Carnwath. Staff notes that the Sextant Letter takes an approach that is different from the approach Staff is advocating in this case. However, Staff submits that it appears to be Commissioner Carnwath's view, without having the benefit of submissions from any party, that the process outlined in the Sextant Letter can be sheltered under sections 4.3 and 4.4 of the SPPA. Staff further submits that if the issue arises in the context of a sanctions hearing in the Sextant Proceeding, Staff will take a consistent position on how it should be addressed and it will be up to the Panel in that matter to determine the issue if and when it arises.

[71] With regard to the Sulja Bros. Sanctions decision, Staff takes a different view of the facts from that of the Respondents. Staff submits that the sanctions hearing in the Sulja Bros. Proceeding commenced on November 30, 2010, before the expiry of Commissioner LeSage's term. Staff submits that an oral decision with respect to the respondents at issue was given following a hearing on September 29, 2010. Staff argues that the Commission held the sanctions hearing with respect to those and other respondents in the Sulja Bros. Proceeding on November 30, 2010 and that on June 2, 2011, the Panel invited written submissions on sanctions and costs from those respondents to whom the merits decision released on May 25, 2011 applied. It is Staff's position that the June 2, 2011 letter did not constitute the commencement of a sanctions and costs hearing.

3. Analysis of the Procedural Fairness Arguments

i. Panel hearing merits is different from Panel hearing sanctions

[72] We do not find any unfairness or perceived unfairness to the Respondents in holding the sanctions and costs hearing before a Panel constituted differently from the MRS Merits Panel. As we noted in our analysis with respect to the arguments on jurisdiction, it is not open to the sanctions and costs Panel to reconsider the merits decision because it is presiding over a separate hearing. The transcript of the merits hearing will be available to the sanctions and costs Panel and the Panel will have the benefit of the written reasons in the MRS Merits Decision.

[73] In dismissing an appeal of a conviction that was brought on the basis that the accused was entitled to be sentenced by the judge who presided at his trial, the Supreme Court in *R. v. Skalbania*, [1997] 3 S.C.R. 995 noted at para. 15:

> … Section 686(4)(b)(ii) [of the Criminal Code] provides that the case be remitted to the "trial court", not the "trial judge". … We note, without prejudice to any outstanding proceedings in relation to sentence, that transcripts of the trial were available and the hearing occupied three days.

[74] Although *R. v. Skalbania* was decided in the context of criminal legislation, the Court's observation that transcripts of the trial were available to the sentencing judge is noteworthy. While we acknowledge that specific saving clauses appear in the *Criminal Code* to facilitate a sentencing judge being different from the trial judge, the point of relevance to us is the latitude afforded to the sentencing judge concerning the materials that may be relied on for sentencing purposes.

[75] The sanctions and costs hearing in this matter will afford adequate opportunity to all parties to provide evidence relevant to sanctions and costs. In *Sussman Mortgage Funding Inc. v. Ontario (Superintendent of Financial Services*), [2005] O.J. No. 4806 at para. 3, the Ontario Court of Appeal found that the panel making the determination as to penalty would base it on the earlier reasons of the tribunal, but could hear additional evidence relevant to penalty:

> The assessment of penalty will proceed before a differently constituted Tribunal. Penalty will be determined based on the findings made by the Tribunal in its reasons of August 8, 2002, in so far as those findings describe Sussman's conduct. *The Tribunal is at liberty to hear any evidence relevant to penalty, including evidence of events that arose after August 8, 2002*. [emphasis added]

[76] The exercise of determining appropriate sanctions is separate from the analysis of whether Staff's allegations on the merits are proven. Commission decisions on sanctions frequently make reference to a list of factors that may be considered by sanctions Panels, which are set out in *Re M.C.J.C. Holdings Inc.* (2002), 25 O.S.C.B. 1133 at 1135 and *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746:

> (a) the seriousness of the allegations;
>
> (b) the respondent's experience in the marketplace;
>
> (c) the level of a respondent's activity in the marketplace;
>
> (d) whether or not there has been a recognition of the seriousness of the improprieties;
>
> (e) the need to deter a respondent, and other like-minded individuals from engaging in similar abuses of the capital markets in the future;
>
> (f) whether the violations are isolated or recurrent;
>
> (g) the size of any profit or loss avoided from the illegal conduct;
>
> (h) any mitigating factors, including the remorse of the respondent;
>
> (i) the effect any sanction might have on the livelihood of the respondent;

(j) the effect any sanction might have on the ability of a respondent to participate without check in the capital markets;

(k) the reputation and prestige of the respondent;

(l) the size of any other financial sanctions imposed or any voluntary payment made by the respondent; and

(m) the shame or financial pain that any sanction would reasonably cause to the respondent.

(See for example *Re Al-Tar Energy Corp., supra* at para. 24; *Re Borealis International Inc.* (2011), 34 O.S.C.B. 5261 at para. 18, *Re Goldbridge Financial Inc., supra* at para. 20 and *Re Rowan, supra* at para. 104)

[77] The sanctions Panel will be in a position to receive submissions with respect to all of these issues at the sanctions hearing. We note that some of the factors typically considered on sanctions can raise different credibility issues than would arise with respect to a hearing on the merits, including, for example, the shame or financial pain a sanction would cause to a respondent, or the remorse of a respondent.

[78] We accept Staff's contention that the assessment to be made at a sanctions hearing is forward-looking, rather than the retrospective process of determining whether misconduct has occurred, which is the task of the hearing on the merits.

[79] All this leads us to conclude that an appropriate level of procedural fairness can be provided by a newly constituted sanctions and costs Panel in this case.

ii. The treatment of respondents in this case and in other cases

[80] The most troubling of the Respondents' submissions is the suggestion of inconsistent treatment as compared to respondents in other proceedings. As indicated above, the Respondents cite two examples of such inconsistent treatment.

[81] We considered these examples closely and are ultimately satisfied that they do not support the claim by the Respondents in this case that they are being treated inconsistently and unfairly by the Secretary or the Commission.

[82] In the first case, Staff draws to our attention the fact that while the Sextant Letter is a letter from the Secretary concerning the sanctions Panel in the Sextant Proceeding, it is described as being provided on the advice of the Commissioner who acted as Chair of the merits Panel, without the benefit of submissions from the parties as to the appropriate way to proceed, and in the absence of any such sanctions hearing having been held to date. In other words, any departure from the tribunal's otherwise consistent practice has not yet occurred. Staff provided us with a chart of cases that demonstrates the Commission's consistent practice of assigning different Commissioners to sanctions hearings in the event that a Commissioner's term of office expired after participating in a merits hearing but before the sanctions hearing.

[83] With respect to the second example, we requested further submissions on this issue from Staff and the Respondents following the motion hearing. The timeline of the Sulja Bros. Proceeding is complicated by the fact that there were three groups of respondents in the same matter (two groups of non-contesting respondents and a third group of non-attending, contesting respondents [Sulja Bros. Building Supplies, Ltd., Kore International Management Inc. and Andrew DeVries]), with three separate merits decisions issued, two on October 28, 2010 with respect to the two groups of non-contesting respondents, and one on May 25, 2011 with respect to the non-appearing, contesting respondents. However, it is clear from the Sulja Bros. Sanctions decision itself and the transcript of that hearing that it began against *all* of the respondents in November 2010 during the period of Commissioner LeSage's appointment. At the conclusion of the oral hearing as to sanctions and costs, Commissioner LeSage stated:

> We'll reserve our decision on sanctions. We've heard a lot of information today and we'll take it under consideration and in due course, which I don't think will be too long, we will give our ruling on the sanctions. …
>
> (Transcript of the sanctions and costs hearing *In the matter of Sulja Bros. Building Supplies, Ltd. et al.*, November 30, 2010, p. 85)

[84] In their follow-up submissions to us on the Sulja Bros. Proceeding, the Respondents argued that Rule 17.3 of the OSC Rules ("**Rule 17.3**") would not have allowed the sanctions hearing with respect to the third group of respondents to commence until after May 25, 2011 when the written reasons on the merits with respect to them were issued. As noted above, Rule 17.3 sets out the rules with respect to sanctions hearings as follows:

> **17.3 Sanctions Hearing – (1)** Unless the parties to a proceeding agree to the contrary, a separate hearing shall be held to determine the matter of sanctions and costs.
>
> **(2)** Following the issuance of the reasons for the decision on the merits, the Secretary shall set a date for the sanctions hearing if such a hearing is necessary.
>
> …

[85] We disagree with the Respondents' interpretation of Rule 17.3 and its application to the Sulja Bros. Proceeding. The transcript of the November 10, 2010 hearing in the Sulja Bros. Proceeding clearly indicates that it was a sanctions and costs hearing with respect to all of the respondents, including the third group of non-appearing, contesting respondents.

[86] In the sanctions and costs hearing for the Sulja Bros. Proceeding, Staff counsel described the evidence that Staff would be relying on at the hearing on November 30, 2010 with respect to the various respondents as follows:

> One final point, for the purposes of our submissions on sanctions, and with respect to Mr. Vucicevich, Ms. Banumas, Mr. Shah, as well as both of the Sulja brothers, Sam Sulja and Steven Sulja, staff will be relying upon the findings of this Commission as set out in its decision on October 28th. *And for the purposes of the remaining respondents, being Mr. DeVries, as well as the two corporate*

> *respondents, we will be relying upon the evidence tendered by staff at the hearing all of which was uncontested.* [emphasis added]
>
> (Transcript of the sanctions and costs hearing *In the matter of Sulja Bros. Building Supplies, Ltd. et al.*, November 30, 2010, p. 9)

[87] The November 30, 2010 hearing was a sanctions and costs hearing that included the group of non-appearing, contesting respondents who did not appear at the merits hearing. It appears that the sanctions Panel relied on their oral ruling against these respondents issued on September 29, 2010. The merits decision with respect to the non-appearing, contesting respondents states:

> Our reasons and decisions with respect to the Non-Contesting Respondents were issued on October 28, 2010 …
>
> …. The hearing concluded on September 29, 2010, when we gave an oral ruling making summary findings against the Contested Proceeding Respondents with the understanding that more complete reasons would follow. These are those reasons.
>
> (*Re Sulja Bros. Building Supplies, Ltd.* (2011), 34 O.S.C.B 6356 at paras. 3-4)

[88] As subrule 17.3(2) does not require the reasons for decision to be in writing, the subsection must be read to permit the issuance of oral decisions. The sanctions and costs Panel in the Sulja Bros. Proceeding relied on the oral summary findings and the evidence submitted at the merits hearing for the sanctions and costs hearing. In our view, there can be no doubt that the sanctions and costs hearing against the non-attending, contesting respondents commenced in November 2010, during Commissioner LeSage's term of office.

[89] The circumstances of the Sulja Bros. Proceeding were unusual and have little, if any, bearing on our disposition of this matter, even if we agreed with the Respondents' submissions relating to the application of Rule 17.3 to the Sulja Bros. Proceeding. It should also be noted that the OSC Rules are rules made by the Commission pursuant to the SPPA. Panels can, and sometimes do, make orders or directions that have the effect of varying those rules within the context of proceedings, for instance to abbreviate time limits set out in the OSC Rules. Rule 1.4 states in part that:

> **(2)** A Panel may issue procedural directions or orders with respect to the application of the Rules in respect of any proceeding before it, and may impose any conditions in the direction or order as it considers appropriate.
>
> **(3)** A Panel may waive or vary any of the Rules in respect of any proceeding before it, if it is of the opinion that to do so would be in the public interest or that it would otherwise be advisable to secure the just and expeditious determination of the matters in issue.

[90] It was open to the Panel in the Sulja Bros. Proceeding to vary the procedure used in that matter. If in fact it did not follow the general procedure when setting sanctions and costs

hearings, as set out in Rule 17.3, we do not find that this affects our assessment of the treatment of the Respondents in the present matter.

[91] The Respondents also cited to us sanctions decisions in which Commissioner LeSage was involved that were released after his term ended. We do not find these submissions persuasive. It is clear from the wording of section 4.3 of the SPPA that Commissioners whose terms have expired are permitted to continue for the purpose of making a determination with respect to a hearing in which they have participated.

IV. CONCLUSION

[92] We therefore dismiss the Respondents' motion and direct the parties to contact the Office of the Secretary within 10 days to schedule a hearing with respect to sanctions and costs.

Dated at Toronto this 6th day of December, 2011.

"Mary G. Condon"	*"Christopher Portner"*
Mary G. Condon	Christopher Portner