NOVA SCOTIA COURT OF APPEAL

Citation: *Rudolph v. Nova Scotia (Attorney General)*, 2023 NSCA 34

Date: 20230509
Docket: CA 507611
Registry: Halifax

Between:

Douglas G. Rudolph

Appellant

v.

The Attorney General of Nova Scotia, The Nova Scotia Securities Commission, The Staff of the Nova Scotia Securities Commission, Peter A.D. Mill, CanGlobe International Capital Inc., and CFG*CN Ltd.

Respondents

Judge:	The Honourable Justice John E. Scanlan
Appeal Heard:	January 17, 2023, in Halifax, Nova Scotia
Subject:	Securities Commission Appeal from decision
Summary:	A Panel found the appellant and others had contravened numerous sections of the securities legislation and sanctioned him. He argued the complaints should be dismissed due to: the limitation period of six years having expired: the Panel not adjourning to allow him time to retain counsel; the delay in proceeding; and that the decision of the Panel should be overturned because the panel improperly relied upon evidence that should not have been admitted. The appellant also appealed the sanctions decision.
Result:	The Panel did not err in refusing an adjournment so the appellant could retain counsel. There was a continuing course of conduct that transcended the limitation period and there were actions related to specific

files that extended the limitation to bring matters within the limitations period.

The delay in starting the hearing was almost entirely the result of the parties not wanting to compromise the appellant in related criminal proceedings. It was in the appellants interest, and with his consent, that the matter was adjourned. Much of the evidence was documentary. The integrity of that evidence was not impacted by the delay, nor were witnesses unavailable because of the delay.

The *Charter - Jordan* principles had no application to this case.

The evidence in proceedings such as this is not governed by the rules of evidence in regular court proceedings. The evidence, including hearsay statements was admissible and consistent with other documentary evidence, including documents authored by the appellant.

The sanctions decision was within the discretion of the Panel and it was reasonable in the circumstances. The Panel did not err in basing the sanction on the amounts taken by the appellant and his associates from investors.

There was one small adjustment of $250.00 to account for one small oversight by the Panel related to an amount recovered by one investor. The amount recovered was $500.00 and the appellant had been ordered to pay one half of that so the adjustment on appeal is $250.00.

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Respondent

Judges:	Bryson, Scanlan, Van den Eynden, JJ.A.
Appeal Heard:	January 17, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed, with costs, per reasons for judgment of Scanlan, J.A.; Bryson and Van den Eynden JJ.A. concurring.
Counsel:	Richard A. Bureau, for the appellant Edward A. Gores, KC, for the respondent, the Attorney General of Nova Scotia (not participating) Douglas Harris, for the respondent, The Nova Scotia Securities Commission Jennie Pick, for the respondent, The Staff of the Nova Scotia Securities Commission Eugene Tan, for the respondent, Peter A.D. Mill Susan Thorne, Director for CanGlobe International Capital Inc. (not participating) John P. Tolley, Director for CFG*CN LTD (not participating)

Reasons for judgment:

Introduction

[1] This is an appeal from two decisions of a Nova Scotia Securities Commission Panel in the matters of *Douglas G. Rudolph, Peter A.D. Mill, CFG*CN Ltd. (also known as CanGlobe Financial Group), and CanGlobe International Capital Inc. (Re),* 2021 NSSEC 3, ("merits decision") and *Douglas G. Rudolph, Peter A.D. Mill, CFG*CN Ltd. (also known as CanGlobe Financial Group), and CanGlobe International Capital Inc. (Re),* 2021 NSSEC 7, ("sanctions decision*"*). The Panel found the appellant (and others who are not a party to this appeal) had violated numerous sections of the *Nova Scotia Securities Act,* RSNS 1989, c.418 (the *"Act"*).

[2] The appellant was found to have: perpetrated frauds upon a number of individuals by engaging in a course of conduct related to the securities of companies; engaged in unfair practice; traded in securities without being registered as a dealer; traded in securities where such trades were distributions of such securities without having filed a prospectus or preliminary prospectus with the Commission; provided undertakings with respect to the future value of securities, with the intention of effecting a trade in those securities; failed to disclose in sufficient detail the risks associated with investing in the securities of the Companies and/or other securities; engaged in unfair practice by making untrue statements that a reasonable investor would consider material in deciding whether to enter into or maintain a trading relationship with any of the respondents; and, made untrue statements an investor would have found material to a witness with the intention of effecting a trade in securities. The Panel additionally found that Mr. Rudolph acted as an adviser without being registered. (See merits decision at para. 336.)

[3] There were sixteen grounds of appeal in relation to the merits decision, but the appellant has combined them into three categories:

1) The panel erred in permitting the matter to proceed. (Grounds 1,3,6,7,8,15,16);

    i) A stay should have been Awarded in Favour of Mr. Rudolph
    ii) The Panel should have found a breach of section 11 of the *Charter*

iii) The Panel should have allowed for an adjournment for Mr. Rudolph's legal counsel application
iv) The matter should not have proceeded in light of the significant delay
v) The panel should not have considered any statue barred allegations

2) The panel erred in referencing documents that it should not have considered (Grounds 2,4,5);

i) The Panel should not have considered certain evidence due to the Collateral Use Rule
ii) The panel should not have considered certain evidence due to the associated breaches

and

3) The panel erred in the interpretation of the Act. (Grounds 3,9,11-14);
i) The Panel failed to follow their general rules of practice and procedure (Rule 15-501)

[4] Below I will deal separately with *Sanctions:* p*enalty, disgorgement* and *costs.*

[5] The process used by the Securities Commission begins through something of a discovery process. Throughout this phase of the process, the appellant refused to comply with three summonses, requiring his attendance. That would have afforded him an opportunity to explain what occurred with the persons he is alleged to have negatively affected. The appellant offered no evidence to contradict, nor, once formal proceedings were commenced against him, did he deny the allegations except to the extent he blamed others.

[6] The evidence before the Commission, and the Commission findings show the appellant repeatedly used friendships and information he obtained through his legitimate tax services, or community friendships and acquaintances, to identify victims for his bogus investment schemes. His business relationships helped him ascertain how much money clients could leverage through loans or redirection of assets, to him or his associates, as part of a supposed investment scheme. His friendships and professional goodwill were used to perpetuate the frauds.

[7] There were thirteen individual victims. The violations of the securities laws began in the late 1990's and continued into the 2010's. The total amounts involved

exceeded $1.4 million. The premises for the fraud included supposedly guaranteed investment schemes in bridge-financing arrangements. As is often the case with fraudulent schemes, the promise guaranteed unrealistically high yields and zero risk. The adage: “if it sounds too good to be true, it probably is” has application here. The appellant was able to leverage his friendship and professional goodwill to lure investors and keep the ruse alive for many years as more victims were identified and lured into the schemes. All of this was disguised as legitimate through the use of a prominent Halifax office space which turned out to be nothing more than a facade to lend credence to the ongoing scheme.

[8] For many victims the results were devastating. In some cases, entire life savings, retirement nest eggs, or homes were lost. Elderly persons who worked hard and saved during their entire adult lives so they could retire had to go back to work or endure a life of poverty.

[9] At no time did the appellant deny what was alleged to have occurred or offer an apology. The closest he got to an explanation was saying he planned to pay the monies back but couldn’t because he was caught up in the equally nefarious Knowledge House case and he too lost money. ‘I lost on my investment and therefore had to defraud innocent persons’ is never a valid defence.

[10] The appellant does not challenge the substantive aspects of the Panel decision, instead, he alleges errors in investigative techniques and hearing procedures. I am satisfied there is no merit to any of the appellant’s objections, except for one minor error in the sanctions decision.

[11] Other than making a small correction in the sanctions aspect of the decisions, I am satisfied the appeal should be dismissed for the reasons below.

Analysis

Standard of Review

[12] This is a statutory appeal under s. 26 of the *Act*, which does not specify a standard of review. Questions of law are reviewed for correctness and questions of fact and mixed law and fact (where the legal principle is not readily extricable) are reviewed for palpable and overriding error (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 37).

[13] I agree with the respondent that the only issues of law attracting the correctness review are:

- The application of the *Charter*
- The decisions denying the adjournment
- Whether an abuse of process resulted from undue delay
- The limits of the Panel's statutory authority to order an administrative penalty and costs under ss. 135 and 135A of the *Act*
- Whether s. 134(1)(da) of the *Act* has retroactive effect

In my consideration of the Panel's decisions on findings of fact or mixed law and fact, deference is owed to the Panel. This includes the decisions on whether there has been an abuse of process, which is a mixed law and fact issue.

[14] On the adjournment requests, the Panel should be given deference absent any error of law. This Court should limit its review to the issue of whether a wrong principle was applied or if the decision gave rise to an injustice: *(Moore v. Economical Mutual Insurance Company,* 1999 NSCA 91, at para. 33). The appellant also complains that the Panel's refusal to grant him adjournments led to an abuse of process. Did the delays in the hearings constitute an abuse of process? That is a question of law on which the Panel must be correct, but underlying that issue are questions of mixed law and fact on which the panel is owed deference. Even if this Court may have granted an adjournment, this Court should not simply substitute its judgment for the Panel decisions: (*Law Society of Saskatchewan v. Abrametz,* 2022 SCC 29, Paras. 26-30, 105) *("Abrametz").* This Court will not intervene absent palpable and overriding error: *Abrametz,* paras. 103-105.

[15] The remaining questions raise issues of fact or mixed law and fact and are reviewed for palpable and overriding error.

Issues Divided into three categories:

1) *Did the panel err in permitting the matter to proceed?*

   Charter considerations:

[16] The RCMP and Staff both investigated the appellant's activities. Criminal charges were laid through the RCMP and separate allegations of securities violations were made under the *Act*. In the criminal proceedings, Justice Boudreau, of the Nova Scotia Supreme Court eventually determined that s. 8 *Charter* rights had been violated when solicitor-client privilege was breached. See *R. v. Rudolph*, 2017 NSSC 334. The *Charter* breach arose when the RCMP investigator interviewed solicitor Mark David and seized a box of materials from the Nova Scotia Bar Society. The *Charter* stay in the criminal proceeding is separate and distinct from the securities proceeding.

[17] This separation is analogous to the situation in *Bennet v. British Columbia (Securities Commission)*, [1992] 5 WWR 481, 69 BCLR (2d) 171 (BCCA) (leave to appeal to SCC refused, August 27, 1992) ("*Bennet*"). Here, as in *Bennet*, the Securities Commission had not been party to the *Charter* violations and consequently was not estopped. Evidence before the Panel showed, and the Panel determined, the Staff's investigation was independent of the RCMP investigation. The Staff received a complaint about the appellant, separate from the RCMP. The Nova Scotia Bar Society files were not reviewed by Staff and Staff did not obtain any documents or information from the RCMP investigation. The wrongs committed in relation to the RCMP investigation were not mirrored in the securities proceedings. The *Charter* violations in the criminal proceeding is not a bar to securities proceedings.

[18] I also find comfort in cases that consider whether the *Charter* applies to the securities proceedings. As noted in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 (SCC) at paras. 23-24, section 11 of the *Charter* applies to proceedings that are criminal by nature or that may result in true penal consequences: imprisonment, or a "fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of the internal discipline within a limited sphere of activity."

[19] I am satisfied the penalty in this case, while large, is proportionate to the deterrence of the harm to investors: *Lavalee v. Alberta Securities Commission*, 2010 ABCA 48, (Leave to appeal to SCC refused, [2010] SCCA No. 119 at paras. 20-25) and *Rowan v. Ontario Securities Commission*, 2012 ONCA 208 at paras. 36-55. In those cases, the courts determined that s. 11 of the *Charter* did not apply to offences that are equivalent to the offences considered in this case. Here, as in *Lavalee* and *Rowan*, no imprisonment is available as a punishment. This is distinct

from *R. v. Williams,* 130 NSR (2d) 8, 1994 CanLII 4493 (N.S.C.A.) referred to by the appellant, where imprisonment was available under s. 129 of the *Act.*

[20] There were no *Charter* rights breached in this securities proceeding.

*Delay in the proceeding**:***

[21] *Jordan* time limits in the criminal context do not apply in the administrative context: *Abrametz* at paras. 45-49.

[22] The allegations against the appellant and others were filed in April 2013. Prior to that, as noted, the appellant had failed to comply with 3 summonses requiring him to attend for examination. For two years following the filing of the allegations, the appellant was unavailable for appearances and refused to cooperate in providing disclosure. A co-accused, Peter Mill requested an adjournment and all parties, including the appellant, consented. A January 22, 2014, hearing was adjourned due to inclement weather. In October 2015, the appellant and others agreed to an adjournment pending the resolution of the criminal proceedings against the appellant. The criminal proceedings were disposed of in late 2017. After Commission staff learned of this, the Commission recommenced its proceedings. Due to a number of adjournments, hearing dates were finally set for November 2020.

[23] Although there had been some disclosure in 2014, it was incomplete and it was updated in February 2020. The appellant did not disclose evidence to support his defence and only disclosed a small, incomplete package of documents in 2015. The witness list for the Staff was disclosed in 2014 and again in February 2020. None was filed by the appellant. Staff's pre-hearing brief was filed on October 1, 2020. None was filed by the appellant. A pre-hearing conference was set for October 14, 2020, and on October 13, 2020, the appellant requested an adjournment to allow him to file three pre-hearing motions in spite of the Panel having set August 7, 2020, as the deadline for filing of pre-hearing motions. The adjournment was denied but the appellant was given permission to file motions during the hearing.

[24] The appellant applied for a judicial review of the denial of the adjournment, to be heard on November 16, 2020. The appellant discontinued that application. On November 15, 2020, counsel for the appellant advised the Panel he was no longer retained. On November 16, 2020, the appellant appeared before the Commission

and asked again for an adjournment to make an application to the court for funding legal counsel. The request to adjourn was denied.

[25] The hearing commenced November 16, 2020, without the appellant being present for any of the hearing dates, which ended on November 26, 2020. The Panel requested written closing submissions. The same counsel who had been earlier representing the appellant filed written, and presented oral closing submissions.

[26] *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 ("*Blencoe*") refers to two factors to consider when assessing delay in an administrative law context. *First,* whether hearing fairness is compromised by delay (have memories faded, are essential witnesses unavailable or has evidence been lost). In this case, the proceeding relied mostly on documents and business records. The veracity of those records is not diminished by the passage of time. The first branch in *Blencoe* is of little relevance in this case.

[27] *Second,* whether significant prejudice has resulted from the inordinate delay. It is the second branch I consider deserving of a closer look. I look first to the reason for the delay. The longest delay was caused by the laying of criminal charges against the appellant. There was a risk the securities proceedings might compromise the appellant's right to silence and force him to provide self-incriminating evidence that may be used in the criminal proceeding if he was forced to participate in the securities proceeding while the criminal matters were outstanding. The parties all agreed the administrative process should be adjourned, resulting in an adjournment 2015-2019.

[28] When the securities proceeding resumed, it relied substantially on documentary evidence, much of it authored by the appellant or directed to the appellant. This case is not about faded memories. There was no prejudice to the appellant caused by the delay.

[29] The appellant himself was not pursuing an early hearing date, and in fact, when it started he again asked for an indefinite adjournment, saying he wanted to get legal counsel. Not once did he ask that the hearings resume at an earlier date.

[30] It is disingenuous for the appellant to complain in this appeal about how long it took to get the hearing started/completed, and on the other hand complain the Panel erred in not granting an indefinite adjournment requested at the eleventh hour, on the first day of the hearings.

[31] I defer to the Panel's decision on the issue of delay. The evidence supports the finding that the delay was neither prejudicial nor did it compromise procedural fairness.

Denial of adjournment request to retain counsel:

[32] The appellant complains the Panel erred in refusing to grant him an adjournment so he could retain new counsel on the day the hearings were to commence.

[33] Panel decisions on adjournments are discretionary decisions and deserving of a great deal of deference. The appellant argues that while the Panel has highly flexible rules and processes, there are limits. The limits are such that the Panel must act in a way that is fair to the parties. The appellant argues the Panel's decision to proceed with the hearing was unfair to him and it affected the entire hearing process. He argued that if he had counsel at the hearing, the presentation of evidence would have been much different, suggesting the refusal of the adjournment was therefore highly prejudicial. For example, he says legally trained counsel would have objected to some of the evidence that went before the Panel, and without counsel, the appellant lost the opportunity to effectively cross-examine witnesses. That he says, was unfair to him. It is hard to square that argument with the fact the appellant did not even bother to attend the merits hearing once it started.

[34] On the adjournment request the appellant says the Panel was obligated to weigh and balance various factors in deciding whether to adjourn or continue. He now says none of that balancing was done here.

[35] The appellant did not advise how long it would take him to retain alternative counsel and to have that counsel prepare for the extensive hearings which were about to begin. The Panel simply received an email from counsel, Christopher I. Robinson, saying: "I am no longer retained."

[36] This case cries out for a more detailed explanation from the appellant as to why it was that he had no counsel and what was required in terms of delay for him to retain counsel, or if he could retain counsel at all. The appellant was requesting an indefinite adjournment saying only that he could not afford counsel.

[37] The Chair's comments suggest the Chair was skeptical as to the chances of the appellant being able to retain counsel. While the Chair acknowledged the case

was complicated, it is not unusual for parties to proceed without counsel in regulatory proceedings.

[38] Many cases have considered the issue of a request for an adjournment to retain counsel. The decision to grant or deny an adjournment request is discretionary. In *Wagg v. Canada*, 2003 FCA 303, the appellant was appealing a Tax Court decision. The Federal Court of Appeal said:

> [19] There is no presumption that everyone is entitled to an adjournment. The Court will not interfere in the refusal to grant an adjournment unless there are exceptional circumstances
>
> …
>
> Similarly, while it is in both the Court's and the litigant's best interests to have parties represented by counsel, the right to counsel is not absolute

[39] As noted in *re Mountainstar Gold Inc.*, 2018 BCSECCOM 317 ("*Mountainstar*"):

> [24] While the right to counsel is a component of administrative fairness, the power to adjourn is discretionary. A competing interest to the right to counsel is the public interest in having matters heard and decided promptly

[40] In *Mountainstar,* the respondents had previously been unable to get counsel after an adjournment and they were dubious that they would be able to secure funds to retain counsel.

[41] I referred above to the fact that the appellant did not offer any explanation as to why counsel no longer represented him, nor when he could, or even if he could get alternative counsel. In *Re Bezzaz Holdings*, 2019 BCSECCOM 415, the respondent requested an adjournment, but the respondent had not presented evidence as to why counsel had not been procured.

[42] I also reference cases from Ontario, which since 2017, require "exceptional circumstances" before granting an adjournment. That is a higher standard than required in Nova Scotia. *Evgueni Todorov and Niklov v. Ontario Securities Commission,* 2018 ONSC 4503 was a situation where the court was reviewing a decision of the Ontario Security Commission from 2016, which was prior to the enactment of 2017 enactment of the "exceptional circumstances" provision. The court said:

> [34] The decision to permit or deny an adjournment is a discretionary power which is usually accorded deference. Accordingly, "the standard of review [for this issue] is akin to one of reasonableness". The adjournments decision will only be procedurally unfair if "the panel exercised its discretion in an unreasonable or non-judicious fashion". (*Senjule v. Law Society of Upper Canada,* [2013] O.J. No. 2347, 2013, 2013 ONSC 2817 (Div. Ct.), at paras. 22-22).

[43] The appellant also argues the panel failed to conduct a balancing exercise as laid out in *Connors v. Anderson McTague & Associates Ltd.* 2020 NSSC 405 ("*Connors"*).

[44] I am satisfied this Court should defer to the discretionary decision of the Panel to refuse the adjournment request. By the time the appellant made that request for an adjournment there had already been a substantial delay, most of which was to protect the appellant. He had ample time to retain counsel prior to the eve of the scheduled hearing. The lack of explanation, the absence of information as to the time required for the appellant to retain counsel and the lack of information as to the likelihood of him retaining new counsel, all suggest the decision to refuse the adjournment request was reasonable.

[45] The fact the Panel did not express the analysis as set out in *Connors* does not mean the balancing exercise was not done. The record supports the decision of the panel to refuse the adjournment request.

2) Evidence before the Panel

[46] The appellant says the Panel erred in not excluding certain evidence. Some of that evidence he says was hearsay or double hearsay, such as the evidence of Ms. Sabine, the Colemans and Mr. Peacock. I will explain who they were and refer to their evidence further below. The appellant argues that even with the *Act*'s flexible rules on the admission of evidence, such evidence should not have been admitted. The appellant further asserts other evidence should be excluded because the investigation offended some exclusionary rules of evidence.

[47] The Staff investigation commenced in May of 2009, after receipt of a complaint from Dilys Sabine. That was independent from the RCMP and NSBS processes, and Staff did not obtain evidence from the RCMP or NSBS, nor did they discover potential sources of information or investigative leads from them. The investigation of the appellant first commenced by staff investigator Scott Peacock ("Mr. Peacock"). It was later continued by staff investigator, William McDonald ("Mr. McDonald") in January of 2010.

[48] Mr. McDonald reviewed files from the courthouse to determine that civil actions had been commenced against the respondents (including the appellant) and he had a number of orders issued to compel witnesses to disclose information. Mr. McDonald summoned witnesses for examination and sent a summons to Toronto Dominion Bank ("TD") as well as Tracy Kempton, an employee of TD. Mr. McDonald also sent a summons to two other banks.

[49] One of the persons involved with the appellant in executing the schemes was a lawyer, Mark David. He became the subject of an investigation and hearing before the Nova Scotia Barristers Society ("NSBS"). The appellant, during advance motions and at the outset of the hearing, argued the Panel should not receive evidence presented in the NSBS proceedings and said the use of that evidence would violate the "implied undertaking rule" as set out in the Nova Scotia *Civil Procedure Rules*.

[50] The respondent says the flexibility afforded to the Panel in terms of evidence, and the process adopted by the Panel were sufficient to ensure the appellant was dealt with fairly. They also submit that all the evidence received was admissible under the rules and no prejudice resulted from the admission of any evidence, including the evidence related to Mark David.

[51] The chronology of events is important as it relates to some of the evidence, to explain why it is admissible. The appellant argues the respondent investigators accessed files from the NSBS and privileged information from the RCMP related to Mark David and inappropriately used that file information. The record does not support that assertion. The record supports the respondent's assertion that the Staff investigation was conducted separately from the RCMP and NSBS.

[52] Mr. MacDonald had spoken with Tracy Kempton and identified her as a witness using a public court file. Ms. Kempton was a TD employee and had been a witness in a civil proceeding commenced by Patricia Johnson against the appellant. The transcript from that proceeding was not used to obtain an investigative order and the transcript was not entered into evidence.

[53] In October 2009, Staff received and reviewed a copy of a transcript of an interview of a Ms. Sabine by a New Brunswick Securities Commission ("NBSC") investigator. NBSC staff were asked to assist because Ms. Sabine lived in New Brunswick. Her statement referenced dealings with the appellant and other parties. The NBSC report would have been hearsay.

[54] I am satisfied the issue to be reviewed is whether the appellant was denied procedural fairness as a result of the evidence admitted by the Panel.

[55] Generally, administrative tribunals can admit hearsay evidence, so long as the admission of that evidence does not violate principles of natural justice (*British Columbia (Securities Commission) v. Alexander*, 2013 BCCA 111 ("*Alexander"*) and *Manikam v. Toronto Community Housing Corp*, 2019 ONSC 2083).

[56] The evidence admitted must meet basic threshold reliability requirements. (*Alexander, Alberta Securities Commission v. Brost*, 2008 ABCA 326, and *Ochnik v. Ontario Securities Commission, [2007] O.J. No. 1730*, 224 OAC 99 (Ont. Div. Ct.) ("*Ochnik*")). The appellant argues there was a lack of sufficient reasons to explain how the evidence was reliable.

[57] The Panel dealt with many parts of the evidence without commenting on the reliability of the evidence. For example, Mr. MacDonald submitted a transcript of an interview with the Colemans, who were investors. That transcript was accompanied by documents received from the Colemans including: copies of sequential correspondence exchanged with the appellant confirming amounts invested, the installment notes for the appellant, a funding program overview of CanGlobe, and a questionnaire filled out by Mr. Coleman. The admission of documentation accompanying the statements rendered that evidence sufficiently reliable and the admission of that evidence did not violate the principles of natural justice in the context of these administrative hearings. The same can be said of the NBSC materials and the statement of Ms. Sabine.

[58] Even where evidence is not under oath and the witness is not cross-examined, hearsay evidence may be admissible in an administrative law setting (*T.A. Miller v. Minister of Housing and Local Government and Another*, [1968] 2 All E.R. 633).

[59] In Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis, 2018), the authors comment on the general rule on the admissibility of hearsay evidence in administrative proceedings, p. 422 – 423:

> I. Administrative Proceedings
>
> 6.511 In proceedings before most administrative tribunals and labour arbitration boards, hearsay evidence is freely admissible and its weight is a matter for the tribunal or board to decide, unless its receipt

> would amount to a clear denial of natural justice. So long as such hearsay evidence is relevant, it can serve as the basis for the decision, whether or not it is supported by other evidence which would be admissible in a court of law.

[60] Admission of the evidence did not result in a denial of natural justice.

[61] On September 28, 2010, Mr. Coleman wrote to Patricia Johnson outlining his interactions with Mr. Rudolph and Mr. Mill. He attached correspondence confirming his investment and the delays and complicated excuses for not repaying the monies invested. Mr. Coleman also provided a transcript of a conversation with Mr. Rudolph and details of a $60,000 loan. There was a questionnaire Mr. Coleman completed for Mr. MacDonald, the transcript of an interview with John and Carol Coleman, and lengthy correspondence between the appellant and the Colemans. There was also an email from Mr. Coleman to the appellant confirming the amounts relayed and a funding program overview of CanGlobe. It is noteworthy that many of the documents referred to were authored by or came from the appellant himself. The hearsay evidence from the Colemans added nothing more than context. The documentary evidence could be considered inherently reliable even in the absence of the Colemans testifying.

[62] The Panel accepted the hearsay saying it presents itself as “sincere and honest”. The hearsay evidence is entirely consistent with the testimony of other witnesses, it repeats the same story of gross breach of faith and trust followed by lies over years, simply to obfuscate and delay any reckoning. As in *Alexander*, the evidence included sequential correspondence. In this case, the evidence was sufficiently reliable because the statements made by investors and the questionnaires confirmed the appellant’s scheme. The shared experiences among investors can be particularly compelling in these types of cases. I reference *Ochnik* and say the Panel’s reference to “consistency” between victims is not an improper consideration when weighing evidence, including hearsay.

[63] The appellant also suggested that some aspects of the Panel decision did not include reference to all the evidence received, nor did the Panel make clear how much weight was accorded to some of the evidence. The Panel referred to Ms. Sabine’s evidence, noting she did not testify. They were alive to the fact that her evidence was hearsay.

[64] The reasons as set out by the Panel are to be read flexibly (*Clifford v The Ontario Municipal Employees Retirement System,* 2009 ONCA 670 at para. 27). In

an administrative law context, a decision-maker does not have to refer to every piece of evidence or set out every finding or conclusion in the process of delivering a decision. I am satisfied the reasons of the Panel were such that the appellant could ascertain the basis upon which the Panel decided the case, both in terms of the consideration of the evidence presented and the law applied. To the extent that this Court may consider the evidence before the Panel, I am satisfied the record supports the Panel's conclusion that the appellant methodically extracted money from unwitting victims, knowing the false bill of goods he was using to obtain those monies was fictional. This was a fraud perpetuated by lies about how or when the monies were going to be repaid. The scheme saw the appellant creating stories about delays in international bank transfers or whatever else he could dream up to keep the money flowing to him and others, and to keep investors at bay.

3. Limitation periods; did time expire?

[65] There are statutory limitations restricting how much time the Commission had to bring a matter forward. In this case the appellant argues that the Panel should not have considered anything that occurred prior to April 9, 2007. The appellant says the limitation had expired on April 9, 2007. The respondent argues that none of the matters dealt with by the Panel were affected by any limitations.

[66] There were thirteen individual victims of the appellant's schemes who invested more than $1.4 million dollars from the late 1990s to early 2010. The Panel held the appellant shrouded the details of his scheme from investors, luring them in by guaranteeing unrealistically high returns and zero risk. It lasted that long in part because the appellant was able to convince investors that, while there were delays, their money was still safe and there were still guaranteed returns. The pitch was sometimes to investors who met in groups. Such a scheme would have required maintaining confidence of the group or individuals so as to not spook investors (committed and prospective). To that end, there were some far-fetched explanations offered to those who were asking for, or expecting a payout of their investments. Monies were said to be tied up in international bank transfers, but they anticipated transfers to be completed shortly. Sometimes there was reference to European banks at other times Asian institutions.

[67] With the wisdom of hindsight, these were far-fetched excuses, but to investors who trusted the appellant as a friend or trusted advisor, the explanations were enough to buy more time. Forbearance was important so as to allow other victims to be ensnared and perhaps even fend off complaints to authorities.

[68] Section 136(2) of the *Act* requires proceedings before the Commission to be commenced no more than six years from the date of the last occurrence of the last event upon which the proceeding is based. That section explicitly contemplates a proceeding may be based on events older than six years prior to when the proceeding was commenced. Sanctioned activity may extend over a lengthy period of time, and it is only the last occurrence that must fall within the limitation period. An explanation for this is found in the fact that the fraudulent nature of investment schemes may take years to come to light. Take for example instruments or contracts with lengthy maturity dates. A fraudster may well have operated on the basis that monies were obtained fraudulently, but the investor would not be able to detect the fraudulent nature of the scheme until the contracts matured many years later. The Panel determined here that the "delay" tactics and ongoing representations were part of the continuing course of conduct as defined by the *Act*.

[69] There were in fact many activities that occurred before the operative date of April 9, 2007. That said, I am satisfied, as was the Panel, from a legal perspective, the conduct is caught in two different ways so the limitation period is not a defence. First, for the investors as a group, there was a continuing course of conduct which formed a "pattern of conduct composed of a series of acts that occurred over a period of time and evidenced a continuity of purpose" (see *Re Ward*, 2022 ABASC 139, paras. 317-329). As late as 2011, the appellant actively perpetrated fraud and continued to deceive and forestall investors with guarantees and promises of payment. Second, as it relates to individual investors, there was a pattern of deceitful conduct that transcended the time before and after the limitation period. That pattern existed in relation to all the victims.

[70] The appellant asks this Court to exclude consideration of any activities prior to April 9, 2007. Given the ongoing and consistent pattern of the appellant's activities, to do so would be an error. In this case, the "course of conduct" transcended the operative date and the limitation therefore did not end on April 9, 2007.

[71] "Course of conduct" has three elements: i) pattern of conduct composed of a series of acts, ii) over a period of time, iii) evidencing a continuity of purpose. See: *Re Boyle* (2006) 29 OSCB 3365.

[72] It is not a requirement that the conduct be taken in relation to the same victim. The Panel in this case found the "delay" tactics were part of the continuing course of conduct. As noted in *R. v. Aitkens,* 2015 ABPC 21, while the limitation

period provides some certainty for respondents, regulators were able to pursue a course of conduct that extended over a considerable period of time, both before and after the limitation period, saying:

> [41] …(and certainty and finality is not prejudiced) by cutting a continuing course of conduct in two so that events falling before the six year period are not caught.
>
> …
>
> [80] The six year limitation period does not begin to run in respect of any count until the final act of a continuing course of conduct which is the subject of such a charge, is completed.

[73] In *Re Heidary*, [2000] 23 O.S.C.B. 959, the Ontario Securities Commission found that single breaches outside the operative dates were not barred where they were part of the course of conduct. So the issue in cases such as these, is whether the activities in question are part of a continuing course of conduct.

[74] A "continuing course of conduct" has been considered by a number of courts. In *British Columbia (Securities Commission) v. Bapty*, 2006 BCSC 638, the court said:

> [36] … A "continuing contravention", a "continuing violation", a "continuing offence", or a "continuing course of conduct" results in the commission of such an offence not being complete until the conduct has run its course. These terms are most often used to describe a succession of separate illegal acts of the same character which, in their entirety, make up a single continuing transaction….
>
> …
>
> [40] The concept of "a continuing contravention" must be contrasted with the concept of "continuing ill-effects" of a past illegal act. The latter cannot extend a limitation period indefinitely as the limitation period is triggered by the completion of the offence, even though the ongoing effects arising from the original breach may continue…

[75] There is ample evidence in the record to support the Panel's findings that there was continuity in the appellant's "course of conduct", with continuity of purpose continuing well into the limitation period, with his attempts to deceive and gain forbearance. His ongoing scheme depended upon forestalling all victims.

[76] As I said earlier, even if the panel had erred in finding a "course of conduct" related to the victims as a group, there was conduct with respect to each of the

victims that occurred beyond the operative date of the limitation period. Some examples of conduct that transcended the operative date:

AB	AB and Mr. Rudolph signed a "loan agreement" which was presented on August 24, 2006. Mr. Rudolph wrote to AB on September 22, 2009, promising repayment in exchange for Mr. AB signing a release and confidentiality agreement giving AB a representation that the funds would be available soon.
CD	CD invested in 2003-2004. On August 27, 2007, Mr. Rudolph gave CD letters stating that the CanGlobe Group of Companies would have access to their funds on or before September 15, 2007. On September 25, 2008, Mr. Rudolph wrote to CD with a representation that the funds would be available soon.
EF	EF invested in December 2006. EF's investment principal and return became due on December 14, 2007. Mr. Rudolph gave her a representation on April 1, 2009, that the funds would be available soon.
GH and IJ	GH signed Mr. Rudolph's promissory note in favour of IJ on June 29, 2006, promising to repay on June 30th, 2007. When the note became due, Mr. Rudolph gave various excuses.
KL	KL met with Mr. Rudolph in early January 2007 to invest. KL signed another agreement in February 16, 2007. Mr. Rudolph gave continuous representations, giving KL the impression that he would get his funds back. On August 11, 2008, Mr. Rudolph again wrote KL saying the funds would be released the week of August 25, 2008.
MN and OP	MN and OP transferred funds to Mr. Rudolph in July 2006 for a promissory note due on July 20, 2007. Parties had conversation with Mr. Rudolph about the funds owing, but he always guaranteed repayment and gave excuses.
QR	QR invested in January 1999. In February 2009, Mr. Rudolph gave assurances that the money would flow in March.
UV	UV lent money and Mr. Rudolph signed a promissory note dated April 18, 2007. He signed another promissory note on July 17, 2007.
WX	Mr. Rudolph gave WX a promissory note dated August 15, 2008. Mr. Rudolph emailed WX on September 22, 2009, promising payment in exchange for her signing a release and confidentiality agreement.
YZs	The YZs invested in 1997. They received funds until 2003, when the payments stopped. YZs made another investment in 2002. Mr. Rudolph

	gave assurances. In February 2010, Mr. Rudolph wrote that things had progressed and they were expecting to be paid soon.

[77] I am satisfied this ground of appeal should be dismissed.

Sanctions: penalty, disgorgement and costs

Disgorgement

[78] The appellant argues the Panel erred in imposing sanctions upon him. His complaint is that he did not receive or retain all the monies he was ordered to repay. He says others involved in the scheme received some of the monies and he should not be ordered to repay those amounts. In essence, he says the Panel was required to follow the money trail and only order him to repay the amounts he directly or indirectly obtained.

[79] There is some inconsistency in sanctions cases. In some cases, the sanctions have been limited to monies that can be traced directly or indirectly to the offender; in others, not so. I am satisfied the dichotomy is explained through the regulatory guidelines which are in effect in various jurisdictions. For example in British Columbia, the *British Columbia Securities Act,* R.S.B.C. 1996, c. 418, section 161(1) authorizes disgorgement of "any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention". Based on that provision, in *Poonian v. British Columbia Securities Commission,* 2017 BCCA 207 ("*Poonian*"), the court held that tracing from a contravention into the pocket of a wrongdoer was not required to order a disgorgement amount. However, according to the British Columbia Court of Appeal the amount of disgorgement should be limited to the amount received personally by the contravening party because to exceed that amount would constitute punishment and it was therefore beyond the authority of the regulator. (leave appeal to the Supreme Court of Canada has been granted on a different issue).

[80] *Poonian* did not follow the Ontario case: *Phillips et al. v. Ontario Securities Commission,* 2016 ONSC 7901 ("*Phillips*"). In *Phillips,* the court held the commission did not unreasonably order the appellants to disgorge amounts that were not obtained by them personally. Unlike in British Columbia, the Ontario legislation does not include the terms "directly or indirectly". The approach adopted in *Poonian* places a burden on staff to follow the money trail, negotiating

a path that may be intentionally obfuscated by perpetrators of the fraud. To compel that degree of proof serves nobody but the fraudsters and encourages them to take steps to cover their tracks so the money trail cannot be traced back to them.

[81] The issue has been litigated in Ontario since *Poonian*. The Ontario court continues to say "The issue of whether disgorgement orders should be limited to the amount the fraudsters obtained personally, either directly or indirectly" has been resolved with there being no limitation. There is no need to prove the monies flowed directly or indirectly to the individual being sanctioned. See: *North American Financial Group Inc. v. Ontario (Securities Commission)* 2018 ONSC 136 at para. 217. Like Ontario, Nova Scotia does not have the words "any amounts obtained" modified by the words "directly or indirectly" in the relevant section of the *Act*. For convenience, s. 134(1)(da) states:

> where a person or company has not complied with Nova Scotia securities laws, that the person or company disgorge to the Commission any amounts obtained as a result of the non-compliance;

[82] The Panel did not limit disgorgement amounts to monies they could follow directly into the appellant's hands. The Panel said they would divide responsibility saying:

> [178] The money, we are satisfied, was never "invested", but was immediately, upon the advance, misappropriated to the private use and schemes of Mr. Rudolph and Mr. Mill. The money of several of the witnesses may clearly be traced into Mr. Rudolph's pocket for his own personal use.
>
> …
>
> [180] We conclude that Mr. Mill was an active partner of Mr. Rudolph and an active participant with him in promoting the lies about the destination of the funds the witnesses invested through them and the lies about the failure to honour the promissory notes and investment contracts.
>
> …
>
> [182] Mr. Rudolph dealt continuously and personally with all of the witnesses. Mr. Mill was more in the shadows as the man behind Mr. Rudolph. He never did meet MN and OP, nor EF, nor CD nor ever make written agreements with them or have correspondence with them.

[83] In Nova Scotia, there is no attempt to follow the money trail which may be intentionally obscured. The issue is simply: how much money was taken and by

whom? From a victim's perspective, where it ended up is of little consequence if they are not getting the money back. The Nova Scotia approach would appear to focus on prevention of the wrongful taking in the first place, as opposed to following what may be an intentionally obscured trail of money or giving credit for expenses incurred in perpetrating the fraud.

[84] In this case, the Panel's findings support the determination that both Mr. Mills and Mr. Rudolph had sufficient control over the scheme, they shared responsibility in the taking, and as such, the Panel did not err in ordering the disgorgement as they did.

[85] I would dismiss this ground of appeal.

Administrative penalty

[86] Did the Panel have the authority to order an administrative penalty and was the amount reasonable?

[87] Under s. 135 of the *Act*, the Panel had authority to impose an administrative penalty of up to $1 million per contravention after February 6, 2007. Prior to that, between July 29, 2005, and February 6, 2007, the maximum was $500,000 per contravention. Between 1990 and 2005 the maximum penalty was $100,000 per contravention.

[88] The appellant's conduct spanned all three periods mentioned above. The penalty imposed was $600,000 and, based on the number of contraventions, was well within the limits no matter which version of the *Act* applied. Given the fact that the contraventions extended beyond 2010, the Panel had authority to impose penalties totalling millions of dollars had they seen fit. The $600,000 is well within the discretion of the Panel (see *Quadrexx Hedge Capital Management Ltd. Ontario Securities Commission*, 2020 ONSC 4392; Re *Electronic Benefits Inc.*, 2008 CSLR para 900-256 aff'd 2009 NSCA 6).

Factually, was the disgorgement amount correct?

[89] In this case, for disgorgement amounts, the Panel accepted the calculations from Enforcement in finding the following in its sanctions decision:

> [39] Thus, we will order Mr. Rudolph and Mr. Mill, each to pay one-half of the net amounts they inveigled from the witnesses. We accept the figure of $870,410 as calculated by Enforcement. Mr. Rudolph and Mr. Mill actually managed to

> extract slightly more than $1,400,000, but one witness had obtained security for his investment and was repaid his principal in full. Many other witnesses received small repayments over time. Each of Mr. Rudolph and Mr. Mill will be ordered to disgorge $435,205 to the Commission.

[90] Enforcement laid out the calculation as follows:

> Both Mill and Rudolph were enriched by their scheme. They raised at least $1,401,810 from AB ($220,000), CD ($360,000), EF ($100,000), GH and IJ ($200,000), KL ($50,000), MN and OP ($25,000), QR ($59,310), UV ($92,000), WX ($37,500), and YZ ($258,000). This amount does not reflect the additional funds raised from AB over the years which are not specifically quantified in the evidence or Decision.
>
> Of this $1.4M, only CD recovered his principal investment. Otherwise, some small payments were made to the witnesses as part of the deception promulgated by the Respondents: YZ received 6 payments of $23,750 over a period of several years (a recovery of $142,500 from an investment of $258,000); WX received an up front payment of $2,000 at the time of her $37,500 investment; EF received an up front payment of $8,000 at the time of her investment; QR received a total of $7,000 in 3 small payments after her initial investment; and GH and IJ received an up front payment of $12,000 at the time of their investment. Taking these amounts into account, $870,310 was not recovered by the witnesses.

[91] The following amounts are disputed. According to the appellant GH/Mr. Johnson actually recovered an additional $45,000. The respondent submits that this amount was for a fraudulent conveyance action, as such it does not apply. The appellant also argued that KL/Mr. Croft got an additional $21,333 from the Barristers' Society, which should have been deducted. Finally, the appellant argues that WX/Ms. Gallant received $2,500 back in cash. The respondent argued that even if the amount should have been deducted, it is inconsequential since the panel didn't include the additional $20,000 Ms. Gallant gave to Mr. Rudolph.

[92] The $45,000 amount received by Mr. Johnson was from a civil litigation settlement. The $21,333 amount received by Mr. Croft was from the Barristers' Society. These amounts were not returned by the appellant from the funds obtained. As such, the Panel did not err by not making these deductions. The Panel based their decision on a calculation that $2,000 had been advanced to WX when she gave Mr. Rudolph $37,500. However, her evidence suggests that she was actually given a $2,500 advance. The disgorgement amount Mr. Rudolph is

ordered to repay shall be reduced by $250, representing his half of the funds owing.

Overlapping Offences

[93] The appellant submitted the panel erred in providing the "myriad" of penalties against Mr. Rudolph based on multiple alleged breaches. The appellant argued that this runs contrary to the principle in *R. v. Kienapple*, [1975] 1 SCR 729 ("*Kienapple*") which applies in the securities setting according to *Natural Bee Works Apiaries Inc (Re)*, 2019 ONSEC 23 ("*Natural Bee Works*"). *Kienapple* prevents multiple convictions or punishment for the same delict. The appellant submitted the animating principle in *Kienapple* is proportionality, citing *R. v. Omik*, 2019 NUCJ 1 at para. 65. This, the appellant submits, was violated, such that the panel committed a palpable and overriding error in ordering the sanctioned amount. The respondent submits *Kienapple* is inapplicable because the panel did not order a disproportionate sanction based on each offence. Rather, they utilized a holistic approach in crafting an appropriate penalty.

[94] In *R. v. Prince* [1986] 2 SCR 480, the Court described the factual nexus requirement for *Kienapple* as follows:

> [24] In most cases, I believe, the factual nexus requirement will be satisfied by an affirmative answer to the question: Does the same act of the accused ground each of the charges? As *Côté* demonstrates, however, it will not always be easy to define when one act ends and another begins. Not only are there peculiar problems associated with continuing offences, but there exists the possibility of achieving different answers to this question according to the degree of generality at which an act is defined: see Dennis R. Klinck at p. 292, H. Leonoff and D. Deutscher at p. 261, and A.F. Sheppard at p. 638. Such difficulties will have to be resolved on an individual basis as cases arise, having regard to factors such as the remoteness or proximity of the events in time and place, the presence or absence of relevant intervening events (such as the robbery conviction in *Côté*), and whether the accused's actions were related to each other by a common objective. In the meantime, it would be a mistake to emphasize the difficulties. In many cases, including the present appeal, it will be clear whether or not the charges are founded upon the same act.

[95] The Court described the legal nexus required between the offences as follows:

> [27] In my opinion, the weight of authority since *Kienapple* also supports the proposition that there must be sufficient nexus between the offences charged to

> sustain the rule against multiple convictions. In a unanimous judgment in McKinney v. R., [1980] 1 S.C.R. 401, [1981] 1 W.W.R. 448, 50 C.C.C. (2d) 576, 106 D.L.R. (3d) 494, 2 Man. R. (2d) 400, 31 N.R. 564, delivered orally by Laskin C.J.C., the court saw no reason for interfering with a decision of the Manitoba Court of Appeal reported at [1979] 2 W.W.R. 545, 46 C.C.C. (2d) 566, 98 D.L.R. (3d) 369, 2 Man. R. (2d) 403, 31 N.R. 567. Although *Kienapple* was not referred to in the reasons of this court, it had been argued in the Court of Appeal. McKinney and others were charged and convicted of hunting out of season and hunting at night with lights contrary to ss. 16(1) and 19(1), respectively, of the Wildlife Act, R.S.M. 1970, c. W140. Both charges arose out of the same hunting incident. O'Sullivan J.A. for the majority held that the case involved two "delicts". Monnin J.A., dissenting on another issue, said that hunting out of season and hunting with lights were two different "matters", totally separate one from the other and not alternative one to the other. The judges of the Court of Appeal all agreed that *Kienapple* was inapplicable. Thus, notwithstanding there was but a single act of hunting, there were distinct delicts, causes or matters which would sustain separate convictions.
>
> …
>
> [36] I conclude, therefore, that the requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle.
>
> [37] There is, however, a corollary to this conclusion. Where the offences are of unequal gravity, *Kienapple* may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence. For example, in *R. v. Loyer*, [1978] 2 S.C.R. 631, 3 C.R. (3d) 105, 40 C.C.C. (2d) 291, 85 D.L.R. (3d) 101, 21 N.R. 181 [Que.], *Kienapple* was applied to bar convictions for possession of a weapon for the purpose of committing an offence when convictions were entered for the more serious offence of attempted armed robbery by use of a knife. Although the robbery charges contained the element of theft which distinguished them from the weapons charges, there were no elements in the weapons charges which were additional to or distinct from those in the robbery charges. Accordingly, it was appropriate for the court to apply *Kienapple* to bar convictions on the lesser weapons charges rather than on the robbery charges.
>
> [emphasis added]

[96] *Kienapple* has been applied in administrative proceedings. In *K.C. v. College of Physical Therapists of Alberta*, 1999 ABCA 253, [1999] AJ No 973, the Alberta Court of Appeal considered charges of professional misconduct. The court found for the *Kienapple* to apply, “there must be both a legal nexus, that is no additional

or distinguishing elements in the second offence, and a factual nexus, that is the same act must ground each of the charges." (at para. 63).

[97] In *Danyluik v. Alberta (Institute of Chartered Accountants, Complaints Inquiry Committee)*, 2014 ABCA 78, the Alberta Court of Appeal also followed *Kienapple* – "Clearly, the *Kienapple* principle can be applied to disciplinary proceedings before professional bodies" (at para. 20). Ultimately, the court found that while the two convictions had a sufficient factual nexus, they did not involve the same legal elements.

[98] Similarly in *Carruthers v. College of Nurses of Ontario*, [1996] OJ No 4275, the Ontario Divisional Court applied *Kienapple* in an administrative disciplinary proceeding.

[99] I am satisfied *Kienapple* applies in the context of securities proceedings. In *Natural Bee Works,* the Ontario Securities Commission considered whether the respondents had made prohibited representations, violating s. 38(3) of their *Securities Act*. Staff alleged that there was a misrepresentation of a U.S. listing, which also constituted a fraudulent misrepresentation. The panel found that the fraud had been made out by staff such that they did not make a finding regarding the misrepresentation. To do so would violate principles outlined in *Kienapple.*

[100] In *Re Irwin Boock*, 2013 LNONOSC 708, the Ontario Securities Commission also refused to find the respondents had breached the market manipulation provision, after having found that the respondents had engaged in fraud (at para. 108). The panel cited *Kienapple* in making this finding.

[101] In this case, the panel lists the offences at paragraph 336 of the Merits Decision. The panel summarizes the offences in the sanctions decision as follows:

> [2] Following a hearing on the merits, we found in our decision dated May 28, 2021 (the "Liability Decision") that the Respondents breached the Act by perpetrating fraud against the witnesses, engaging in unfair practices, engaging in unauthorized trading, failing to file a prospectus where required, providing undertakings with respect to the future value of a security, and making untrue statements an investor would have found material to one of the witnesses with the intention of effecting a trade in securities.

[102] The appellant did not explicitly lay out which elements of which offences he took to be overlapping. He stated broadly that the alleged actions could be covered under s. 132A and B.

[103] Several offences in this case clearly do not have a sufficient factual nexus with another offence to engage *Kienapple*. There is accordingly no violation of the *Kienapple* for the following*:*

- The findings of fraud and the "unfair practices." The panel views these differently, as evidenced in paragraph 193 of the merits decision.

- The finding of fraud under s. 132A and under the previous versions of the *Act* and National Instrument. The proceeding was complicated by the fact that conduct against certain witnesses would be prohibited under different versions of the *Securities Act* and the National Instrument, depending on when the conduct took place. Section 132A can only be applied to WX given the timing of when the conduct took place (at para. 172 of the merits decision). Given that these are separate witnesses, the factual nexus is not made out.

- The registration and prospectus offences. The respondent correctly points out that in *Natural Bee Works*, even where the misrepresentation offence was dropped following a fraud finding, the panel nevertheless considered the registration and prospectus offences as separate and non-overlapping.

[104] The most likely overlapping offences are the untrue statements an investor would have found material and the fraud. At paragraph 173 of the merits decision, the panel commented that the appellant violated these provisions with respect to WX. The relevant question is whether the misrepresentation and the fraud offences had any additional or distinguishing elements. In *Natural Bee Works*, the panel refused to look at the offence of misrepresentation after already finding that fraud was made out. This is comparable to the case at hand.

[105] However, this case is different from *Natural Bee Works*. Even though there were some overlapping factual and legal elements, the panel did not sanction each offence separately. In *Kienapple* the court noted that where there are multiple convictions but one sentence; there was "'no substantial wrong' because only one sentence was imposed". The court did, however, in the criminal law context, comment that the better practice would be separate convictions.

[106] In this case, the Panel refused to do a "straight calculation totalling the maximum administrative penalty for each offence during each of the timeframes." (sanctions decision at para. 19). The Panel imposed a penalty that was sufficiently

high to act as a deterrent for similar activities in the future, proportionate to the offences in question and fit proper for each of the respondents (sanctions decision at para. 20). The Panel found the respondents each raised comparable amounts and had also committed serious breaches over a prolonged period of time. The Panel considered the difference between Mr. Mill and Mr. Rudolph in ordering the amount. The appellant was not "punished" multiple times for the same delict.

Costs before the Panel

[107] The appellant and co-accused Mr. Mill were ordered to jointly and severally pay $70,000 in costs. These amounts were well within the discretion of the Panel in relation to the convictions pursuant to ss. 133, 134 or 135 of the *Act*. Staff was able to submit time sheets showing over $90,000 in claimable costs. This amount was discounted by Staff to account for staff changes over the course of the proceedings. The appellant made no submission to the Panel on costs. The highly discretionary decision on costs (*Electronic Benefits* paras 53-54) is appropriate. The offences were serious and the appellant was uncooperative during the investigation and the proceedings.

Costs on appeal

[108] *Nova Scotia Civil Procedures Rule 90.51* provides that costs are presumptively not available in a tribunal appeal. The respondent says there is no reason to depart from this rule. There are no costs awarded to any party on this appeal.

Disposition

[109] The disgorgement amount Mr. Rudolph had been ordered to pay should be reduced by $250.00. Aside from that one adjustment, I would dismiss the appeal.

Scanlan, J.A.

Concurred in:

Bryson, J.A.

Van den Eynden, J.A.