



Ontario
Securities
Commission

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Citation: El-Bouji (Re), 2019 ONSEC 33

Date: 2019-10-07

File No. 2018-28

**IN THE MATTER OF
ISSAM EL-BOUJI**

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

Hearing: July 16, August 24 and September 4, 2019

Decision: October 7, 2019

Panel: D. Grant Vingoe Vice-Chair and Chair of the Panel

Appearances: Joseph Groia For Issam El-Bouji
Bethanie Pascutto

Derek Ferris For Staff of the Ontario Securities
Ryan Lapensee Commission

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REASONS AND DECISION

I. OVERVIEW

- [1] This decision considers a motion brought by Issam El-Bouji, who is presently a respondent in a proceeding commenced by Staff of the Commission pursuant to a Statement of Allegations, dated May 24, 2018 (the **Statement of Allegations**). In the current proceeding, Staff alleges that Mr. Bouji is in violation of an Order of the Commission, dated April 16, 2014 (the **Order**), which imposed sanctions agreed to by Mr. Bouji in a Settlement Agreement to which he was a party, dated April 14, 2014 (the **Settlement Agreement**). The Settlement Agreement and the Order relate to a separate prior proceeding in which Mr. Bouji was a named respondent. The Order concerns the approval of the Settlement Agreement and the related terms and conditions on the respondents, including market participation restrictions on Mr. Bouji. Staff now alleges in the Statement of Allegations that, contrary to the market participation restrictions set forth in the Settlement Agreement and the Order, Mr. Bouji subsequently functioned as an officer of Global RESP Corporation (**Global RESP**), another party to the Settlement Agreement, which was also a named respondent in the prior proceeding.
- [2] Mr. Bouji indicates that he intends to raise several defences to the current allegations that he improperly performed the officer role at Global RESP. One such defence is that the Order is not final, since it states that “[t]he Commission will make an order”, and no such further order was issued. Staff argues that, to the contrary, the Order provides a basis for enforcing the prohibition on Mr. Bouji acting as an officer of Global RESP and that the conduct of the parties indicated that they intended to establish an enforceable obligation.
- [3] While this brief description of the disagreement about the interpretation of the Order provides background information, the interpretation of the Order itself is not before the Panel on Mr. Bouji’s current motion. Instead, Mr. Bouji brings the current motion seeking to halt the proceedings against him, in whole or in part, on the basis that the Commission lacks jurisdiction to hear some or all of the allegations. He asserts institutional bias, a breach of natural justice, a breach of fairness and a misuse of the Commission’s public interest jurisdiction as the basis for the Commission’s lack of jurisdiction. Mr. Bouji’s counsel has not separately delineated these grounds, instead making overarching arguments that are subsumed collectively under them, but broadly falling within the category of alleged bias.
- [4] At the heart of all of the grounds for the motion is the argument that it is unfair for the Commission to sit in judgment of its own conduct and Staff’s conduct in this case based on asserted institutional bias. The Staff conduct in question is the drafting of the Order and the decision to use s. 127 of the *Securities Act* (the **Act**)¹ to initiate an enforcement proceeding against Mr. Bouji before the Commission, rather than seeking to enforce the Order in court proceedings under s. 128 of the Act.
- [5] With respect to the Commission’s conduct, Mr. Bouji argues that the continuing involvement of Commissioners in policy and administration of the Commission,

¹ RSO 1990, c S.5.

including board oversight of Staff and involvement in adjudication, establishes that the Order cannot be fairly considered by a panel of Commissioners acting as adjudicators.

- [6] Mr. Bouji argues that the conflict between the roles of Commissioners acting in their policy capacity and as adjudicators is exacerbated by a third function, in which Commissioners act as a board of directors of the corporation constituting the Commission. He submits that the Commissioners' duties to the Commission as a corporation, especially the board members' duties of financial oversight, would lead to an institutional bias in favour of finding the Order enforceable.
- [7] In advancing the institutional bias argument, Mr. Bouji also takes issue with the process by which the amounts collected for administrative penalties under the Settlement Agreement and the Order were allocated by a quorum of the board for particular uses in accordance with the Act. He argues that the allocation process means that a Commission panel would have a bias in favour of finding the Order enforceable so as to avoid acting in a manner asserted to be contrary to the Commission's financial interests and facing perceived difficulties of dealing with those funds if the Order was subsequently found to have Mr. Bouji's asserted flaw.
- [8] While not bringing a motion for my removal as a panel member, Mr. Bouji alleges that my personal involvement as a board member in the allocation process regarding the funds paid to the Commission pursuant to the Settlement Agreement reinforces the concern of institutional bias. In 2016, almost two years after the Settlement Agreement was entered into and more than three years before Staff's current Statement of Allegations, I was a member of a quorum of the board that communicated with Staff about Staff's recommendations for the allocation of the funds received by the Commission as a result of the Settlement Agreement. Mr. Bouji likens the interaction between a board member and Staff in the allocation process as similar to a pattern of private conversations between a prosecutor and a judge during ongoing proceedings. He argues that the alleged pattern of contact with Staff means that a panel member, and me specifically in this instance, would favour an alleged financial interest of the Commission and gloss over the effect of any error in the Order, finding in favour of Staff's view that the officer ban referred to in the Order constitutes an enforceable ban without the need for a further order.
- [9] Mr. Bouji also argues that institutional bias exists because of a prior decision of the Commission resulting from an application for hearing and review that considered the fitness for registration of Mr. Bouji's daughter as the ultimate designated person of Global RESP. In 2017, in the Reasons and Decision issued in that application for hearing and review, for the purposes of that decision only and without making a finding upon which Staff could rely in the future, the panel in that proceeding found that Mr. Bouji was acting as an officer of Global RESP.² Mr. Bouji asserts that a subsequent panel will have a disqualifying difficulty freeing itself of a preconception because of that prior finding.
- [10] Mr. Bouji's counsel made it clear in his submissions that Mr. Bouji does not contest the enforceability of the Settlement Agreement itself, which he asserts Mr. Bouji has abided by, including by making the payments for disgorgement,

² *Bouji (Re)*, 2017 ONSEC 38, (2017) 40 OSCB 8845 at para 67 (**Hanane Bouji**).

administrative penalties and costs called for by that Agreement. Counsel also made it clear that Mr. Bouji does not object to the appropriateness of Staff pursuing its case based on the circumstances set out in the Settlement Agreement, which he would defend, or seeking a new order that would impose officer and director bans now, with prospective effect, as called for by the Settlement Agreement. However, Mr. Bouji objects to a s. 127 proceeding based on a violation of the Order, which could result in the imposition of an administrative penalty if the allegations are proven and found to be appropriate as a sanction. The risk of an administrative penalty would arise in a s. 127 proceeding alleging breach of the Order since an order of the Commission forms part of "Ontario securities law", as defined in the Act. In contrast, the terms of the Settlement Agreement, unless they are incorporated into an enforceable order, cannot support the imposition of an administrative penalty on its own.

[11] I have determined to dismiss the motion for the reasons given below.

II. ISSUES

[12] Mr. Bouji's motion raises the following issues:

- a. Is the Commission precluded from conducting the merits hearing due to a reasonable apprehension of institutional bias on the part of the Commission?
- b. Does the involvement of a quorum of the Commission in the allocation process related to funds paid under a settlement agreement and pursuant to an order that is later called into question preclude the subsequent involvement of a panel member in a proceeding involving an interpretation of that order? Is such involvement unfair on the ground of bias?
- c. Where there are allegations of bias against the Commission and there is a court procedure that could be pursued in lieu of a Commission proceeding, should the Commission proceeding be stayed or adjourned in favour of the court procedure?

[13] For the purposes of this motion, I need not make any findings about the validity or enforceability of the Order. I have not considered the merits of the parties' positions on the scope and meaning of the Order or whether the Order has been, or is capable of being, breached.

III. STATUTORY BACKGROUND

A. Roles and Authority of the Commission

[14] Commissioners have three overarching roles that are established in the Act:

- a. Board members, with directors' responsibility over the Commission's activities and operations,³
- b. Commission members, to consider policy matters, including the promulgation of rules,⁴ and

³ Act, s 3.1(1).

⁴ Act, s 2.2.

c. Adjudicators, to hear administrative proceedings under the Act.⁵

[15] The overlapping nature of these roles is specifically required by the Act. Subsection 3.1(1) provides that “[t]he Commission shall have a board of directors composed of the members of the Commission.” In s. 3.1(2), the board of directors is directed “to oversee the management of the financial and other affairs of the Commission.” The Act states that the Commission is “responsible for the administration of this Act and shall perform the duties assigned to it under this Act and any other Act [in which it is assigned to carry out a role].”⁶

[16] In addition to other specific powers set forth in the Act, including the ability to make specified orders, the Commission, acting in its adjudicative capacity, is authorized to make the enumerated orders set out in s. 127(1) “if in its opinion it is in the public interest to make the order or orders...” Paragraph 9 of s. 127(1) specifically authorizes the Commission to impose the following sanction:

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

[17] Ontario securities law is defined in s. 1(1) of the Act, in relevant part, in respect of a person or company, to include “a decision of the Commission to which the person or company is subject”. A “decision” is defined in the same subsection to include an order made pursuant to a power or right conferred by the Act.

B. Designation of Funds for Allocation or Use

[18] The Commission can designate funds for allocation or for use when it receives administrative penalties or funds arising from disgorgement pursuant to an order under s. 127(1) of the Act or when it receives a payment to settle a proceeding.⁷ In addition to authorizing the collection of the Commission’s costs in connection with a proceeding, s. 3.4(2)(b) of the Act authorizes the Commission to designate funds received “under the terms of an order or settlement”:

- a. for allocation to or for the benefit of third parties, or
- b. for use by the Commission for the purpose of educating investors or promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets.

[19] As set out in s. 3.4(2)(b) of the Act, once funds are designated in a settlement agreement to settle a proceeding commenced by the Commission or pursuant to a requisite order, the funds may only be applied by the Commission for the designated purposes. The Commission cannot apply the funds for general budgetary purposes of the Commission and such funds are subject to the ability of the Minister to direct that surplus funds be transferred to Ontario’s Consolidated Revenue Fund. Subject to this authority of the Minister, the subsequent allocation or use of funds is overseen by the Commission’s board of

⁵ Act, ss 3.5 and 127(1).

⁶ Act, s 3.2(2).

⁷ The introductory paragraph of s. 3.4(2) provides that the Commission shall pay such funds into Ontario’s Consolidated Revenue Fund when received, other than money paid to reimburse the Commission’s costs, or money designated for allocation or use pursuant to the Act.

directors. This responsibility arises because the financial affairs of the Commission are administered by the board as directed in s. 3.1(2) of the Act.

- [20] A settlement agreement becomes an enforceable contract when it is duly authorized, executed and delivered by the parties to it. The separate adjudicative process to consider whether to approve the settlement agreement is completed if and when an order approving the settlement agreement is issued, which may include the designation of funds for purposes of s. 3.4(2)(b).
- [21] It is the power to allocate funds designated for the benefit of third parties in an order or settlement agreement, or both, that authorizes the board, in appropriate cases, to use these funds for purposes that advance the objectives of the Act, including payments to investors (considered to be third parties for this purpose), who have experienced losses resulting from the misconduct giving rise to those administrative penalties, as well as for the specified educational purposes, among other permissible uses.

C. Member Duties

- [22] Section 3.12 of the Act specifically provides that the *Corporations Act*⁸ does not apply to the Commission. If the *Corporations Act* did apply, then the Act would incorporate the provisions applicable to members of the boards of non-share capital corporations, including the standard of care and the duty of loyalty, as formulated in the *Corporations Act*. Those provisions do not currently apply to the Commission.
- [23] The Act itself has certain provisions addressing these subjects, including an obligation for the Chair to be a full-time member,⁹ and for other members, including the Vice-Chairs, to devote the time necessary to fulfill their duties.¹⁰ The Chair and Vice-Chairs are appointed by the Lieutenant-in-Council, each for a maximum term of five years, and may be re-appointed. Two members of the Commission constitute a quorum.¹¹ Subsection 3(9) of the Act, which protects members from liability, imposes a “good faith” standard for the protection to apply to members’ exercise of authority.
- [24] A specific provision addresses the potential conflict that can arise between the adjudicative function and the performance of certain investigative functions implemented through the issuance of investigative orders by the Commission that may give rise to an enforcement proceeding. Specifically, s. 3.5(4) provides:

No member who exercises a power or performs a duty of the Commission under Part VI [Investigations and Examinations] except section 17 [Disclosure by Commission] in respect of a matter under investigation or examination shall sit on a hearing by the Commission that deals with the matter, except with the written consent of the parties to the proceeding.

⁸ RSO 1990, c C.38.

⁹ Act, s 3(7).

¹⁰ Act, s 3(8).

¹¹ Act, s 3(11).

- [25] In contrast, there is no specific limitation in the Act that would prevent a board member from carrying out board member responsibilities and then sitting on any hearing.
- [26] Unlike other forms of corporations in respect of which other duties apply to directors (such as the duty to act in the best interests of the corporation in the case of many business corporations under applicable statutes), whether acting as a member of the Commission or board member, all Commissioner actions are subject to the overarching purposes of the Act set out in s. 1.1:
- a. to provide protection to investors from unfair, improper or fraudulent practices;
 - b. to foster fair and efficient capital markets and confidence in capital markets; and
 - c. to contribute to the stability of the financial system and the reduction of systemic risk.
- [27] In addition, the Act provides a standard for decisions made in the performance of adjudicative functions, as stated in the provision authorizing the issuance of orders. Subsection 127(1) imposes the standard that an order can be issued by the Commission "if in its opinion it is in the public interest to make the order..." It is well established that the Commission's public interest jurisdiction in issuing such orders is not unlimited and must be viewed in light of the legislated purposes of the Act.¹²
- [28] Unlike the purposes of a business corporation, which include the seeking of profit, the Commission has the public mandates stated in s. 1.1. The financial management responsibility of the board members of the Commission must be assessed in light of the Act's purposes, and in exercising their board responsibilities, the members are required to prudently use the Commission's financial resources to those ends.

IV. ANALYSIS

- [29] Mr. Bouji challenges the ability of the Commission to adjudicate the effect of the Order based on allegations of institutional bias. He cites the principle that no one ought to be a judge in his own cause.
- [30] In *Brosseau v Alberta Securities Commission*, the Supreme Court of Canada expresses the general principle underlying the protections against bias as follows:¹³

The maxim *nemo iudex in causa debet esse* underlies the doctrine of "reasonable apprehension of bias". It translates into the principle that no one ought to be a judge in his own cause. In this case, it is contended that the chairman, in acting as both investigator and adjudicator in the same case, created a reasonable apprehension of bias. As a general principle, this is not permitted in law because the taint of

¹² *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at paras 42-43 and 45.

¹³ [1989] 1 SCR 301 (*Brosseau*) at para 19.

bias would destroy the integrity of proceedings conducted in such a manner.

A. No Bias Arises from the Commission's Structure

- [31] Mr. Bouji makes structural complaints concerning the Commission that he advances to demonstrate institutional bias. I consider those complaints to be completely answered by the reasoning in *Brosseau*. As reflected in the quotation provided above, *Brosseau* considered the possible conflict between the exercise of investigative authority in conjunction with an administrative proceeding. The Supreme Court found, as an exception to the *nemo iudex* principle, that the legislature can statutorily authorize an overlap of functions, assuming the constitutionality of the statute. That exception is equally applicable to the administrative functions involved in board activities. As stated in that case:¹⁴

Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. In establishing such tribunals, the legislator is free to choose the structure of the administrative body. The legislator will determine, among other things, its composition and the particular degrees of formality required in its operations. **In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate.** In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. **If a certain degree of overlapping functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" per se.** (emphasis added)

- [32] As discussed above, the Act confers the right on the Commission to order the designation of funds obtained through administrative penalties for specified purposes. It confers financial management responsibility on the board by which the Commission's assets, including designated funds, must be managed in a manner consistent with the purposes of the Act. The Act stipulates that for specific overlapping investigatory and adjudicative functions, a Commissioner will be prevented from sitting on hearings for proceedings in which the Commissioner has been involved in the issuance of certain investigative orders.¹⁵ In contrast, the Legislature did not enact any exceptions preventing hearings by members who have been involved in the allocation of funds obtained through administrative penalties or settlements.¹⁶

¹⁴ *Brosseau* at para 22.

¹⁵ Act, s 3.5(4).

¹⁶ Although not set forth in the Act, s. 5(1) of the Commission's *Adjudication Guideline* specifically provides that: "Members should perform their adjudicative responsibilities independently from their other responsibilities as Members of the Commission, and should make sure that their other responsibilities as Members of the Commission, or otherwise, do not detract from the performance of their adjudicative responsibilities."

B. No Bias Arises from the Designation Process for Funds

- [33] In carrying out the allocation process arising from the designation of funds received pursuant to an order or settlement agreement, it is reasonably necessary for the board, acting through a quorum or otherwise, to interact with Staff members to determine whether it is practicable to distribute funds to harmed investors as third parties to whom an allocation may be made following a designation under s. 3.4(b) of the Act. Staff can reasonably be expected to have information regarding the number of known investors and their losses, or the costs of ascertaining such information and the costs of implementing a potential distribution to harmed investors, based on a variety of means that could be employed to make a distribution.
- [34] Mr. Bouji's counsel submits that this process can be compared to a pattern of discussions between a prosecutor and a judge. He argues that, since there is evidence of communications between Staff and a quorum of the board in this case regarding the allocation decision, the burden should shift to Staff to demonstrate that there is no bias.
- [35] Since Mr. Bouji has not brought a motion for recusal of a panel member on the grounds of individual bias, I take this argument to be a response to language in *Brosseau* that indicates that, if acts are authorized by the statutory scheme, something going further must be found to establish bias:¹⁷
- In order to disqualify the commission from hearing the matter in the present case, some act of the commission going beyond its statutory duties must be found.
- [36] I have concluded that the allocation process that follows from s. 3.4(b) does not go beyond the statutory duties assigned to Commissioners.
- [37] The designation under s. 3.4(b) requires a subsequent allocation or use of funds, which appropriately involves the board's financial management decisions about the possible allocation of the funds to investors, other third parties or for other specified purposes. These are not funds available for the Commission's general expenditure, since they are designated by an order or settlement agreement for specified purposes, taking into account the purposes of the Act set forth in s. 1.1.
- [38] In this case, the allocation of funds was authorized by a quorum of the board on March 29, 2016, almost two years after the Settlement Agreement and the Order and over two years before the Statement of Allegations was issued against Mr. Bouji in the current proceeding. Communications between a quorum of the board and Staff about an allocation of funds after the conclusion of a settlement agreement or issuance of an order are not comparable to *ex-parte* discussions between a prosecutor and a judge during an ongoing proceeding. The allocation discussions occur in support of the quorum's activities as board members. Unlike communications between a judge and a prosecutor during a case, there is no ongoing proceeding at the time of the allocation discussions with Staff and therefore no influence being exerted on a proceeding reasonably within contemplation. There is no evidence that anyone was aware of the alleged

¹⁷ *Brosseau* at para 21.

defect, or the “frailty” in the Order as Mr. Bouji’s counsel termed it, at the time of the allocation decision.

- [39] Designated funds do not enhance the Commission’s operational funds, since the Legislature has required that they be allocated for specified purposes. The total amount of such funds is shown as designated funds in the Commission’s annual financial statements. Any actions by Commissioners authorized by the Act, including the allocation of funds, must be performed taking into account the purposes of the Act set out in s. 1.1. Where the Legislature intended to prohibit the carrying out of multiple roles by Commissioners, they chose express prohibitions, as is the case with Commissioners who issue investigative orders being prohibited from sitting on subsequent proceedings, absent consent. There is no such applicable prohibition in the current circumstances.
- [40] The manner in which Commissioners are required to act is defined by the purposes of the Act set out in s. 1.1, the structure of the other provisions of the Act, including the public interest jurisdiction in s. 127, and the Commission’s and courts’ decisions regarding the exercise of these duties. These requirements differ from the responsibilities of directors of private enterprises. There is no incentive on the part of the Commission to retain funds that the Commission is not authorized to retain for the purposes of the Act. There is no reasonable apprehension of bias arising from the allegation that Commissioners will act in a manner contrary to their duties as expressed through the Act.
- [41] Given the statutory provisions, board members are authorized to exercise their authority to make allocations of funds received pursuant to orders or settlement agreements and they are not precluded from participating as adjudicators in a subsequent proceeding in which the enforceability of aspects of the order are in question.
- [42] If there are any legal impediments identified in the past allocation of funds under the Order, then the Commission will have to consider the appropriate treatment and disposition of the amounts in question based on the purposes of the Act and in light of all legal considerations.
- [43] Commissioners are presumed to act fairly and impartially in discharging their adjudicative functions, in the absence of any evidence to the contrary.¹⁸ Given the circumstances of the allocation of the funds that were received pursuant to the Settlement Agreement and the structure and provisions of the Act, I do not find that the evidence submitted on behalf of Mr. Bouji regarding the allocation decision by a quorum of the Commission and the attendant communications with Staff at the time, constitutes sufficient evidence to counter the presumption of impartiality and to shift the burden to Staff. Mr. Bouji’s evidence fails to meet his onus to show that bias or a reasonable apprehension of bias exists such that the Commission, or members of the Commission who participated in the allocation decision, should not participate in a proceeding in which the effect of the Order is at issue.
- [44] The suspicion that the Commission might seek to retain funds received pursuant to a settlement agreement to which it is not entitled and that Commissioners

¹⁸ *Norshield Asset Management (Canada) Ltd (Re)*, 2009 ONSEC 4, (2009) 32 OSCB 1249 at para 64 (**Norshield**), citing *EA Manning v Ontario Securities Commission* (1995), 23 OR (3d) 257 at para 28, leave to appeal to SCC refused.

would skew their interpretation of an order to achieve this result is unwarranted. Such unsupported speculation does not meet the test for challenging institutional impartiality based upon what would be understood by “a reasonable person informed of all the relevant circumstances; that is, a person who is fully informed of any safeguards in place at the Commission.”¹⁹

- [45] Mr. Bouji’s submissions based on studies and reports concerning proposals for the further separation of adjudicative and non-adjudicative functions at the Commission provide context for his arguments.²⁰ But those submissions do not overcome the conclusion that the Commission’s institutional structure is authorized by the Act.
- [46] In addition, submissions concerning governance at the Commission, the size of the designated fund, the use of such funds for particular purposes and the absence of a recent five-year review are political and regulatory commentary and do not change the analysis of the effect of the current structure and operations of the Commission under the Act.

C. No Bias Arises from Prior Proceedings

- [47] Mr. Bouji also submitted that institutional bias arises from a finding that Mr. Bouji acted as an officer of Global RESP made by a different Commission panel solely for the purpose of a hearing and review application involving a decision about the registration of an ultimate designated person (UDP) for Global RESP.²¹ In that case, the Panel was alive to the fact that any finding would necessarily have limited application, stating: ²²

We are mindful of the fact that Mr. Bouji is not a party to the application before us, and that therefore he was not present to challenge any evidence that might implicate him. However, our findings here do not bind him personally.

- [48] That finding was accompanied by a Staff commitment not to rely on the finding for other purposes, undertaking in writing:²³

not [to] take the position in any subsequent proceedings against Mr. Bouji, Global RESP and/or [Global Growth Assets Inc.] alleging a breach of the 2014 Order that findings made by this panel regarding compliance with the 2014 Order are binding on Mr. Bouji, Global RESP and/or [Global Growth Assets Inc.] in any subsequent proceeding brought against them.

- [49] I find Mr. Bouji’s argument unpersuasive. Adjudicators frequently separate their analysis of factual matters from prior findings made by other adjudicators in

¹⁹ *Norshield* at para 68.

²⁰ For instance, Mr. Bouji’s evidence included: *Report of the Fairness Committee to David A. Brown, Q.C. Chair of the Ontario Securities Commission* (5 March 2004); Ontario, Legislative Assembly, *Official Report of Debates (Hansard) of the Standing Committee on Finance and Economic Affairs*, 38-1, (18 August 2004); Ontario, Legislative Assembly, Standing Committee on Finance and Economic Affairs, *Report on the Five Year Review of the Securities Act* (October 2004); and Ontario, Legislative Assembly, Standing Committee on Government Agencies, *Report on Agencies, Boards and Commissions* (March 2010).

²¹ *Hanane Bouji*

²² *Hanane Bouji* at para 61.

²³ *Hanane Bouji* at para 61.

other proceedings before the same or other tribunals. Adjudicators are expected to approach their tasks with a fresh perspective and open mind, and there is no reason why this case is different. This is codified in s. 2(1) of the Commission's *Adjudicative Guideline*, which states that "Panel Members have a duty to conduct hearings and render decisions in a fair and impartial manner."

- [50] In the same category of argument was Mr. Bouji's counsel's submission that there was a "home court" advantage favouring Staff, based on a simple wins and losses tally of my own record in Commission proceedings. Each decision must be considered on its own, and I found this argument to be lacking rigorous analysis, evidentiary support or any basis for comparison. The lack of rigor was demonstrated by counsel's failure to exclude applications for settlement approval, including no-contest settlements, or proceedings seeking to reciprocate non-monetary extra-territorial court and agency decisions to protect Ontario residents where the matters had been adjudicated by other commissions and by courts.²⁴ Mr. Bouji's counsel did not formulate an argument as to why it was appropriate to include such proceedings in the analysis of Staff's and Respondents' outcomes in the matters that I participated in adjudicating. These submissions are insufficient to call into question the fairness or impartiality of the adjudicative process at the Commission, including the decisions I have rendered or participated in as a Commissioner.

D. Staff Chooses the Venue

- [51] Mr. Bouji also seeks an order dismissing the s. 127 proceeding on the basis that a s. 128 proceeding to enforce the Order in Court is the preferable approach, since it avoids the institutional bias arguments he advances. I reject this argument. If the institutional bias arguments Mr. Bouji advances fail, as they now have, it is solely within Staff's authority to pursue the avenue it chooses to enforce the Order and it is not appropriate for the Panel to limit Staff's options.
- [52] As stated by the Commission in *Techocan International Co Ltd (Re)*, citing the Supreme Court's decision in *R v T(V)*, the "functions of prosecutors and of judges must not be blurred", and the Commission should "be loath" to inquire into Staff's exercise of discretion absent evidence of abuse of the discretion.²⁵
- [53] In light of my rejection of Mr. Bouji's allegations of bias, it would be inappropriate for me to question Staff's decision as to the manner or venue in which it seeks to proceed in this case.

V. CONCLUSION

- [54] Mr. Bouji brought the motion under consideration to halt the proceeding against him, in whole or in part, on the basis that the Commission lacks jurisdiction to hear the matter as a result of institutional bias, a breach of natural justice, a breach of fairness and a misuse of the Commission's public interest jurisdiction. These grounds were all broadly subsumed under his arguments concerning institutional bias. I have rejected these arguments.
- [55] The Act expressly establishes the overlapping functions of Commissioners as policy-makers, adjudicators and board members. Based on *Brosseau*, the existence of such overlapping functions in the statutory structure overcomes

²⁴ Such inter-jurisdictional enforcement orders are made pursuant to s 127(10) of the Act.

²⁵ *Techocan International Co Ltd (Re)*, 2017 ONSEC 44, (2017) 40 OSCB 10123 at para 53.

concerns of institutional bias, absent something going beyond what was authorized by the Act. I find that the circumstances of the allocation of the funds received pursuant to the Settlement Agreement are consistent with the responsibilities assigned to Commissioners under the Act. The evidence did not shift the onus to Staff or enable Mr. Bouji to establish bias. Given the purposes of the Act and the duties of Commissioners, there is no incentive on the part of Commissioners to seek to inappropriately retain or apply funds to enhance the financial position of the Commission. Mr. Bouji has not submitted evidence that overcomes the presumption of impartiality applicable to Commissioners. Mr. Bouji has also not established a basis to believe that a panel, including members of the Commission who participated in the allocation process, cannot approach the interpretation of the Order fairly and with an open mind. Nor has Mr. Bouji established a reasonable basis for me to interfere with Staff's exercise of discretion in determining the manner or venue in which this matter should proceed.

[56] For the reasons given above, I dismiss Mr. Bouji's motion.

Dated at Toronto this 7th day of October 2019.

"D. Grant Vingoe"

D. Grant Vingoe