COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mountainstar Gold Inc. v. British Columbia Securities Commission,* 2022 BCCA 406

Date: 20221207
Docket: CA46062

Between:

Mountainstar Gold Inc. and Brent Hugo Johnson

Appellants

And

British Columbia Securities Commission

Respondent

Before: The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Hunter
The Honourable Justice Marchand

On appeal from: Decisions of the Securities Commission, dated October 12, 2018 (*Re Mountainstar Gold Inc.*, 2018 BCSECCOM 317) and April 9, 2019 (*Re Mountainstar Gold Inc.*, 2019 BCSECCOM 123).

Counsel for the Appellants, via videoconference:	R. Galati
Counsel for the Respondent:	S.M. Zolnay B. Ma
Place and Date of Hearing:	Vancouver, British Columbia September 29, 2022
Place and Date of Judgment:	Vancouver, British Columbia December 7, 2022

Written Reasons by:
The Honourable Justice Marchand

Concurred in by:
The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Hunter

Summary:

A panel of the British Columbia Securities Commission found that the appellants contravened the Securities Act by making repeated false and misleading statements in required public filings about certain Chilean mining claims. The panel imposed broad, permanent market prohibitions and other sanctions against the appellants. The appellants challenge the panel's liability and sanctions decisions on procedural fairness grounds. HELD: Appeal dismissed. The panel's liability and sanctions decisions were procedurally fair. The panel did not err: with respect to admitting and assessing expert evidence; by scrutinizing the parties' evidence unevenly; by refusing to grant the appellants an adjournment; by failing to assist the appellants as self-represented parties; in assessing and imposing sanctions; or by failing to give sufficient reasons.

Reasons for Judgment of the Honourable Justice Marchand:

Introduction

[1] On October 12, 2018, a panel of the British Columbia Securities Commission found that the Appellant, Mountainstar Gold Inc. ("Mountainstar"), made repeated false and misleading statements in its required public filings concerning certain Chilean mining claims contrary to s. 168.1(1)(b) of the *Securities Act*, R.S.B.C. 1996, c. 418 [*Act*]. The panel also found that the appellant, Brent Hugo Johnson, an officer and a director of Mountainstar, authorized, permitted or acquiesced in Mountainstar's contraventions and therefore contravened s. 168.2 of the *Act*. The panel's liability decision is indexed at 2018 BCSECCOM 317.

[2] On April 9, 2019, the panel made an order under s. 161(1)(b)(i) of the *Act* that all persons permanently cease trading in, and be prohibited from purchasing, any securities of Mountainstar. Further, the panel made a number of orders against Mr. Johnson under ss. 161 and 162 of the *Act*, including broad, permanent orders prohibiting Mr. Johnson from participating in the securities market. The panel also ordered Mr. Johnson to pay an administrative penalty of $150,000. The panel's sanctions decision is indexed at 2019 BCSECCOM 123.

[3] On September 11, 2020, Mountainstar and Mr. Johnson were granted leave to appeal both the liability and sanctions decisions. The leave decision is indexed at 2020 BCCA 250.

[4] In their liability appeal, Mountainstar and Mr. Johnson submit that they did not receive a fair hearing because the panel:

- qualified Felipe Ossa, a Chilean lawyer called by the Executive Director of the Commission, as an expert in Chilean mining law and relied on his factual and opinion evidence even though he lacked expertise and had no first-hand information;
- improperly rejected the first-hand evidence of their sole witness, Jorge Lopehandia;
- applied different standards to the treatment and assessment of the evidence adduced by them as compared to the evidence adduced by the Commission;
- refused to grant them an adjournment to retain counsel to make oral submissions on their behalf; and
- failed to provide sufficient assistance to them as self-represented parties.

[5] In their sanctions appeal, Mountainstar and Mr. Johnson submit the panel failed to undertake a required proportionality assessment and imposed excessive penalties.

[6] In both appeals, Mountainstar and Mr. Johnson say the panel breached its duty to give sufficient reasons.

[7] The Commission says that Mountainstar and Mr. Johnson received a fair hearing, the sanctions imposed were necessary and appropriate, and the panel gave sufficient reasons.

[8] For the reasons that follow, I would dismiss the appeals.

Background

[9] Mountainstar is a public company whose shares were listed on the Canadian Securities Exchange (“CSE”) until it was delisted in September 2016. Mr. Johnson was, at all material times, the president, CEO and a director of Mountainstar.

[10] In 2011, Mountainstar entered an option agreement to purchase an interest in Mr. Lopehandia's Chilean mining claims (the "Amarillo Claims"). The Amarillo Claims relate to a mineral deposit straddling the Chile-Argentina border known as the "Pascua Lama" deposit. The Chilean portion of the deposit is known as the "Mina Pascua" deposit. The option agreement was Mountainstar's principal asset during the period in issue.

[11] When Mountainstar and Mr. Lopehandia entered the option agreement, they also entered into an underlying rights agreement. The underlying rights agreement purported to set out the history of a legal dispute between Barrick Gold Corporation and Mr. Lopehandia concerning their overlapping claims to the area covered by the Amarillo Claims. It asserted that a 2006 judgment of the 14th Civil Court of Santiago had resolved the dispute in Mr. Lopehandia's favour (the "Villar proceedings") and that, relying on this judgment, the Government of Chile had issued the Amarillo Claims in Mr. Lopehandia's sole name in 2011.

[12] By 2015, Mountainstar had paid Mr. Lopehandia USD 4.6 million under the option agreement. As Mountainstar had no meaningful revenue, Mountainstar raised these funds through investors. Unfortunately, on the evidence adduced at the hearing, the option agreement proved to be worthless. The Amarillo Claims were over a large gold deposit that Barrick already owned through its subsidiary Compania Minera Nevada ("CMN"). CMN's pre-existing underlying claims are known as the "Amarillos 1 to 3000 Mining Claims" and the "Tesoro Mining Claims".

[13] According to the evidence of the Executive Director's expert witness, Mr. Ossa, in 2011, Mr. Lopehandia had simply filed petitions (applications) with the Chilean courts to acquire mining concessions but his petitions were successfully opposed by pre-existing rights-holders or cancelled between 2012 and 2014. In other words, Mr. Lopehandia never actually acquired any mineral exploration or exploitation rights to the areas in issue.

[14] Further, according to the evidence of Mr. Ossa, the 2006 judgment of the 14th Civil Court of Santiago in favour of Mr. Lopehandia was annulled by the Santiago Court of Appeals in 2007. The matter was returned to the Civil Court which dismissed Mr. Lopehandia's claim in full in 2010. Subsequent appeals and/or requests for reconsideration were dismissed by the Court of Appeals and

the Supreme Court of Chile in 2013 and 2014. Mr. Ossa testified that the Supreme Court's dismissal of Mr. Lopehandia's request for reconsideration is final and not reviewable by any other authority in Chile or abroad.

[15] Finally, according to the evidence of Mr. Ossa, in July 2012, Mr. Lopehandia filed a claim in the 1st Civil Court of Vallenar seeking to cancel CMN's Amarillos 1 to 3000 Mining Claims on the basis that CMN had failed to bring an action for annulment of the overlapping Tesoro Claims (the "Vallenar proceedings"). The Civil Court of Vallenar dismissed Mr. Lopehandia's claim in 2013; the Copiapó Court of Appeals dismissed it in 2014; and the Supreme Court of Chile dismissed it in 2015. Mr. Ossa testified that there were no possible appeals from the Supreme Court decision.

[16] Despite having ample opportunity to do so, Mountainstar and Mr. Johnson did not produce any objective evidence at the hearing before the panel to counter Mr. Ossa's evidence. Nor did they seek to introduce such evidence on appeal. They did not give a satisfactory explanation for this obvious shortcoming in their case.

Mountainstar's Statements

[17] As a reporting issuer under the *Act*, Mountainstar was required to file management discussion and analysis ("MD&A") relating to its annual financial statements and required interim financial reports. Mountainstar was also required to file certificates in prescribed forms signed by its CEO and CFO with its annual MD&A and interim financial reports.

[18] The allegedly false or misleading statements made by Mountainstar and certified by Mr. Johnson are set out in the paragraphs that follow.

[19] From December 2012 to December 2015, Mountainstar filed 13 MD&As. Each contained the following descriptions of the Amarillos 1 to 3000 Mining Claims, Tesoro Mining Claims and Amarillo Claims:

> 1. LOS AMARILLOS 1 AL 3000, (acquired 1994 from Lac Minerals, owned by Cia Minera Nevada Limitada, now in the process of cancellation-Chilean Mining Code process).
> 2. TESORO Claims (the "Tesoro Claims["], filed in 1997 and under Court Injunction since 2001, title in the name of "Hecotor Unda

> Llanos", Barrick's mining agent, now in the process of cancellation – Chilean Mining Code process).
>
> 3. AMARILLO SUR and AMARILLO NORTE, (the "2011 Amarillo Claims["], restituted claims filed in 2011, title in the name of "J.R. Lopehandia", Optioned by MSX, 2011)
>
> [Emphasis added.]

[20] From April 2013 to December 2015, each MD&A filed by Mountainstar stated that Mr. Lopehandia was the "registered title holder" of the Tesoro Mining Claims.

[21] From April 2013 to March 2014, each MD&A filed by Mountainstar stated:

> On February 19, 2013, the Company announced in its news release that the Company's lawyer had received clean titles to the Mina Pascua, Chile, mining concessions issued by the Mines Registrar of Vallenar. Mr. Jorge Lopehandia is the registered title holder of the titles which cover the following Mina Pascua project areas in Chile:
>
> 1. Tesoros Uno 1 al 30 through to Tesoros Doce 1 al 5, and
> 2. Amarillos Norte and Amarillos Sud.
>
> [Emphasis added.]

[22] From April 2013 to December 2015, 12 MD&A filed by Mountainstar include the following (or very similar) statements:

> Lopehandia is currently disputing ownership of the property with Barrick Gold Corporation as the latter claims to own the Pascua Lama deposit and thus, the Mina Pascua deposit. The outcome of the dispute and accordingly the ability of the Optionor to convey property rights to the Company are not determinable at this time….
>
> Each of Barrick and Jorge Lopehandia allege to own the Mina Pascua Property and that alleged ownership is the subject of litigation which commenced in Santiago, Chile on March 4, 2001.
>
> [Emphasis added.]

[23] From March to December 2015, seven MD&A filed by Mountainstar made the following statements:

> On January 7, 2015, the Company and Minera Nevada SpA, the Chile subsidiary for Barrick presented written submissions to the Chile Supreme Court which was hearing an appeal in the main litigation that was commenced in March 2001. The main litigation is concerned with who properly owns the mining claims located in Chile forming the Pascua Lama Project. On January 14, 2015, the Company and Minera Nevada SpA presented final oral submissions to the Chile Supreme Court. A written

> decision of the Chile Supreme Court has not been issued as of the date of this report.
>
> [Emphasis added.]

Proceedings Before the Commission

[24] On June 28, 2017, the Executive Director issued a notice of hearing setting out the allegations against Mountainstar and Mr. Johnson. The Executive Director delivered the notice of hearing, a letter of particulars and a disclosure CD containing a May 31, 2017 affidavit of Mr. Ossa to Mountainstar and Mr. Johnson.

[25] On August 22, 2017, the parties attended a set-date hearing. Mr. Johnson appeared for himself and Mountainstar. The panel chair scheduled hearing dates on January 30, 31 and February 1, 2 and 5, 2018.

[26] On November 6, 2017, the parties attended a hearing management meeting. Mr. Johnson attended with corporate counsel for Mountainstar. The Executive Director provided Mountainstar and Mr. Johnson with a list of documents he would be relying on at the hearing and witness will-say statements prior to a December 8, 2017 deadline set by the panel chair. Mr. Johnson agreed to disclose the documents he and Mountainstar intended to rely on at the hearing by December 29, 2017. At Mr. Johnson's request, that deadline was later extended to January 12, 2018. Despite that extension, Mr. Johnson did not disclose any documents prior to the commencement of the hearing.

[27] On January 30, 31 and February 1, 2018, the Executive Director presented his case. He called two witnesses, a staff investigator and Mr. Ossa. Mr. Johnson appeared at the hearing for himself and Mountainstar. After Mr. Johnson's cross-examination of Mr. Ossa, the panel qualified Mr. Ossa as an expert "in Chilean law, including civil litigation and mining rights." During this part of the hearing, Mr. Johnson referred to a Chilean Supreme Court decision in favour of Mr. Lopehandia. The panel chair advised Mr. Johnson that if he intended to rely on any such decision he needed to produce it together with an English-language translation.

[28] On February 2, 2018, Mountainstar and Mr. Johnson were scheduled to present their case. Mr. Johnson provided a bound bundle of documents to counsel for the Executive Director. Mr. Johnson acknowledged that some of the documents

were in Spanish and that some may not be relevant. The panel adjourned the hearing to March 26, 2018 to allow Mr. Johnson time to obtain English-language translations of any documents he intended to rely on at the hearing. He was directed to provide English-language translations to the Executive Director by February 28, 2018. At Mr. Johnson's request, that deadline was later extended to March 5, 2018. Mr. Johnson complied with that deadline.

[29] When the hearing resumed on March 26, 2018, the panel admitted all of the documents Mr. Johnson provided on March 5, 2018. Mr. Johnson did not produce any other documents. Mountainstar and Mr. Johnson then called their only witness, Mr. Lopehandia. During his direct examination, Mr. Lopehandia repeatedly claimed that there is a Chilean Supreme Court decision in his favour. Mr. Johnson confirmed that he had not provided a copy of any such decision to the panel.

[30] At the conclusion of the hearing, the panel set dates for the exchange of written submissions on liability and scheduled June 19, 2018 for the hearing of oral submissions.

[31] As directed by the panel, in April and May 2018, the parties filed their written submissions on liability. Mountainstar's corporate counsel prepared and filed a 30-page submission on behalf of Mountainstar and Mr. Johnson.

[32] On June 12, 2018, a lawyer applied for an adjournment of the oral submissions on behalf of Mountainstar and Mr. Johnson. The lawyer indicated that he expected to be retained by June 30, 2018. The panel adjourned the hearing of oral submissions to July 11, 2018 but the lawyer was never retained.

[33] On July 10, 2018, Mr. Johnson submitted a request to further adjourn the hearing of oral submissions. On July 11, 2018, the panel heard oral submissions from Mr. Johnson regarding his request. Mr. Johnson informed the panel that he needed more time to retain counsel. When the panel asked about when he would have the funds to retain counsel, he acknowledged that he did not have the required funds and could not give any specific assurance as to if or when he would receive those funds. The panel denied Mr. Johnson's adjournment request.

[34] On July 11, 2018, Mr. Johnson also indicated that he wanted to introduce a bound bundle of documents at the hearing of oral submissions on liability. He said this was the same bundle of documents that he handed to counsel for the Executive Director on February 2, 2018 before the adjournment of the hearing. Thirteen of the fifteen documents in the bundle were entirely in Spanish. The documents did not include any decision of the Supreme Court of Chile. After hearing from Mr. Johnson regarding the relevance of the documents, the panel found them to be irrelevant and did not admit them.

[35] On October 12, 2018, the panel issued its liability findings against Mountainstar and Mr. Johnson. The panel set out a schedule for the exchange of written submissions on sanctions.

[36] In November 2018, the Executive Director filed his written submissions on sanctions. Mountainstar and Mr. Johnson did not file written submissions. Instead, Mr. Johnson requested an oral hearing.

[37] On February 22, 2019, the panel heard oral submissions on sanctions. Rather than make submissions on sanctions, Mr. Johnson disputed the panel's liability findings.

[38] On April 9, 2019, the panel issued its decision on sanctions.

The Liability Decision

[39] Mountainstar and Mr. Johnson appeal the liability decision of the Commission on procedural fairness grounds. They do not seek to set it aside on the merits. Nevertheless, I will summarize it to provide helpful context.

[40] The panel began its liability decision by setting out the background of Mountainstar, Mr. Johnson, the mining claims at issue, the option agreement and the underlying rights agreement. The panel then addressed various procedural issues raised by Mountainstar and Mr. Johnson related to their application to adjourn oral submissions and the admission of documentary and expert evidence.

[41] The panel next set out the "applicable law". The panel noted that the standard of proof is the balance of probabilities and set out the requirements of ss. 168.1(1)(b), 168.1(2) and 168.2 of the *Act*. Briefly, s. 168.1(1)(b) prohibits

making a statement in any record required to be filed under the *Act* that is false or misleading in a material respect. Section 168.1(2) provides a "reasonable diligence" defence to contraventions of s. 168.1(1)(b). Section 168.2 provides that an employee, officer, director or agent of a corporate respondent contravenes a provision of the *Act* if that individual "authorizes, permits or acquiesces" in the corporate respondent's contravention of that provision.

[42] The panel outlined the statements in issue in Mountainstar's MD&A and found that each was false or misleading in a material respect. In particular, the panel found:

- the statements that the Amarillos 1 to 3000 Mining Claims were "now in the process of cancellation" were false or misleading in a material respect because they suggested a process where the end result of cancellation was certain when in fact Mr. Lopehandia's civil claim seeking cancellation of the Amarillos 1 to 3000 Mining Claims had been repeatedly dismissed by Chilean courts and finally dismissed by the Supreme Court of Chile;

- the statements that the Tesoro Mining Claims were "now in the process of cancellation" were false or misleading in a material respect for the same reason;

- the various statements suggesting that Mr. Lopehandia held title to the Tesoro Mining Claims and Amarillo Claims were false or misleading in a material respect because he did not hold those titles (or acquire any mineral exploration or exploitation rights to the areas in issue); and

- the statements regarding the Villar proceedings were false or misleading in a material respect because their outcome had been fully and finally determined against Mr. Lopehandia.

[43] The panel dismissed the arguments of Mountainstar and Mr. Johnson that the panel or the Executive Director had breached any duty to assist Mountainstar and Mr. Johnson as self-represented respondents.

[44] The panel also dismissed the due diligence defence raised by Mountainstar and Mr. Johnson. That defence was based on Mountainstar's asserted reasonable reliance on a Spanish-speaking Chilean lawyer who was acting for Mr. Lopehandia.

[45] In the panel's view, the due diligence defence failed because Mountainstar and Mr. Johnson did not obtain independent legal advice regarding Mr. Lopehandia's asserted mining interests and the related legal proceedings. The panel found that the Chilean lawyer had an obvious conflict of interest in providing advice to Mountainstar and Mr. Johnson regarding claims made by his client, Mr. Lopehandia, who had been paid USD 4.6 million for the very rights about which the Chilean lawyer advised Mountainstar and Mr. Johnson. The conflict was exacerbated by the fact that Mr. Lopehandia translated the Chilean lawyer's advice to Mountainstar and Mr. Johnson.

[46] Furthermore, the panel noted that in an interview with Commission staff Mr. Johnson had acknowledged he had been aware the Villar proceedings had been dismissed in full when Mountainstar made the MD&As in issue. He had described the proceedings as "not determinable" because Mountainstar and Mr. Johnson believed the outcome was "completely wrong". In other words, regardless of any advice by the Chilean lawyer, Mr. Johnson knew Mountainstar's statements about the Villar proceedings were false or misleading.

The Sanctions Decision

[47] At the outset of the sanctions decision, the panel noted that Mountainstar and Mr. Johnson did not make any submissions regarding appropriate sanctions. Instead, they disputed the panel's liability findings and asked to stay proceedings pending the resolution of legal proceedings apparently initiated by Mr. Lopehandia in Chile against the Executive Director, the Commission, Barrick and others related to the Chilean mining claims at issue in these proceedings.

[48] The panel declined to stay the proceedings. In the panel's view, Mountainstar and Mr. Johnson had not demonstrated that the Chilean legal proceedings were relevant or that their outcome could have a determinative or substantial impact on the sanctions decision. Given the serious misconduct at

issue and the potential for an indeterminate and potentially substantial delay, the panel also did not consider a stay to be in the public interest.

[49] After setting out the Executive Director's position on sanctions, the panel identified that orders under ss. 161(1) and 162 of the *Act* are "protective and preventative" and are "intended to be exercised to prevent future harm": at para. 15, citing *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37.

[50] To guide its consideration of what sanctions, if any, would be appropriate, at para. 16, the panel set out the following excerpt from *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22 at 24:

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
> - the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
> - the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
> - the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
> - orders made by the Commission in similar circumstances in the past.

[51] The panel then set out its findings with respect to each of the factors identified in *Re Eron Mortgage Corporation*. In the panel's view:

- "Accurate and timely disclosure is fundamental to the operation and integrity of the capital markets." Accordingly, the misconduct was serious and "exacerbated by the repetition of the false or misleading disclosure over a three-year period even, in some instances, in the face of evidence establishing that the disclosure was clearly wrong": at paras. 17–19.

- Mr. Johnson was not fit to serve as a director or officer of a public issuer and his "ongoing participation in our capital markets poses a serious risk to investors and the capital markets." This is because Mr. Johnson: failed to meet the core requirements of "honesty, integrity and an ability to act in the best interests of shareholders"; failed to act with due diligence; failed to obtain independent legal advice; failed to understand and comply with regulatory disclosure requirements; was uncooperative during the Commission investigation; was unwilling to recognize the regulatory authority of the Commission; and did not understand or accept the panel's findings that Mountainstar made false or misleading disclosure about its Chilean mining interests and related legal proceedings: at paras. 21–28.

- It was reasonable to infer that Mountainstar's false or misleading disclosure regarding its key project and principal asset caused harm to investors. Mountainstar had raised over USD 6.4 million from investors from 2011 onward to fund its payments to Mr. Lopehandia. Additionally, Mountainstar's shares traded publicly on the CSE and over-the-counter markets in the United States. From January 2013 to December 2015, the value of trading in the CSE exceeded USD 1 million. It is unlikely that investors would have invested in Mountainstar if its disclosure was not materially false or misleading. Further, although there was no specific evidence of the amount lost by investors, given the "fundamental nature" of Mountainstar's materially false or misleading disclosure, it is reasonably likely that investors suffered significant losses: at paras. 29–32.

- There was no specific evidence that Mountainstar and Mr. Johnson were enriched by their misconduct: at para. 33.

- There were no mitigating factors. Mountainstar and Mr. Johnson's negligent failure to verify the truthfulness of the disclosure in the MD&A was an aggravating factor: at paras. 34–35.

- Aside from Mountainstar's failure to file required disclosure in accordance with an earlier cease trade order, neither Mountainstar nor Mr. Johnson had a past history of regulatory misconduct: at para. 36.

- The sanctions had to be sufficient "to ensure that the respondents and others will be deterred from engaging in similar misconduct." With respect to Mr. Johnson, "a significant measure of specific deterrence" was required because he had "neither admitted to wrongdoing nor understood the seriousness of his misconduct": at paras. 37–38.

- Broad, permanent market prohibitions and a substantial administrative fine against Mr. Johnson, and a permanent cease trade order against Mountainstar, were in line with the sanctions imposed by the Alberta Securities Commission in somewhat similar circumstances in *Re Ironside*, 2007 ABASC 824: at paras. 39–45.

[52] In all of these circumstances, the panel considered it necessary and appropriate to impose broad, permanent market prohibitions and an administrative penalty of $150,000 against Mr. Johnson, and a permanent cease trade order with respect to the securities of Mountainstar: at paras. 53–68.

[53] The Commission delivered a copy of its sanctions decision to Mountainstar and Mr. Johnson by email on April 9, 2019. The email informed Mountainstar and Mr. Johnson of their right to appeal under s. 167 of the *Act* and of the Commission's discretion to revoke or vary a decision (when doing so would not be prejudicial to the public interest) under s. 171 of the *Act*.

Standard of Review

[54] Under s. 167(1) of the *Act*, Mountainstar and Mr. Johnson are, with leave, exercising a statutory right of appeal. As such, appellate standards of review apply.

[55] Questions of law are subject to review on a standard of correctness while questions of fact and questions of mixed fact and law (where the legal principle is not readily extricable) are subject to review on a standard of palpable and overriding error: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 36–37; *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 at paras. 26–29.

[56] A breach of procedural fairness generally renders a decision invalid regardless of whether a fair hearing would likely have resulted in a different outcome: *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, [1985] S.C.J. No. 78 at 661; *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, [1993] S.C.J. No. 23 at 493. This is because "[t]he right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have": *Cardinal* at 661. However, there are exceptions to this rule when the outcome on the merits is legally inevitable or the appellate proceeding has cured the procedural unfairness: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at 228–229; *Taiga Works Wilderness Equipment Ltd., Re*, 2010 BCCA 97 at para. 37; *Canada (Attorney General) v. McBain*, 2017 FCA 204 at paras. 9–10.

[57] Discretionary decisions are reversible where the panel misdirected itself, came to a decision that is so clearly wrong that it amounts to an injustice or gave no or insufficient weight to relevant considerations: *British Columbia (Securities Commission) v. Pioneer Ventures Inc.*, 2021 BCCA 1 at paras. 10, 33 and 37, citing *Friends of the Oldman River v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, [1992] S.C.J. No. 1 at 76–77 and *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27.

Analysis

Was the hearing fair?

[58] Mountainstar and Mr. Johnson allege that they did not receive a fair hearing for a variety of reasons. I will address each of their arguments in turn.

Did the panel err in relying on the Executive Director's expert witness?

[59] Mountainstar and Mr. Johnson submit that the panel erred in relying on the evidence of the Executive Director's expert witness, Mr. Ossa, because he lacked expertise and relevant first-hand knowledge. They complain that the panel cut off Mr. Johnson's objections to Mr. Ossa's qualifications until it was too late. I do not agree.

[60] An administrative tribunal's assessment of an expert's qualifications and the weight it gives to the expert's evidence are questions of fact: *Alberta (Workers' Compensation Board) v. Alberta (Workers' Compensation Board Appeals Commission)*, 2005 ABCA 276 at paras. 67–69. Accordingly, this Court should intervene only if the panel made a palpable and overriding error: *Abrametz* at paras. 26–29; see also *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para. 105. The panel did not make a palpable and overriding error in assessing Mr. Ossa's qualifications or by relying on his evidence.

[61] Mr. Ossa's evidence consisted of his May 31, 2017 affidavit and his hearing testimony. Although Mr. Ossa was qualified as an expert in Chilean law, I agree with the Executive Director that he gave primarily factual evidence. In particular, he accessed, reviewed and described relevant and publicly available decisions of various courts in Chile. He did not need personal knowledge of these decisions to describe their outcomes to the panel any more than counsel for Mountainstar and Mr. Johnson needed personal knowledge of the many authorities he cited to this Court in argument. Mr. Ossa attached copies of the relevant decisions to his affidavit. The Executive Director provided certified translations of these decisions to the panel.

[62] Mr. Ossa also described the process of obtaining a mining concession in Chile and testified that Mr. Lopehandia had only ever applied for, but was never issued any, mining concessions. Again, Mr. Ossa did not need personal knowledge to testify about these topics.

[63] Mr. Ossa was eminently qualified to provide this factual and opinion evidence. He has law degrees from a university in Chile as well as Oxford, lectures abroad at prestigious law schools, has extensive litigation experience in Chile (including cases relating to mining law issues), is a senior partner at a

leading Chilean law firm and has been qualified to provide expert evidence on Chilean law in a number of countries, including the United States, the United Kingdom, Israel and Canada. Mr. Ossa testified that he was aware of his duty not to act as an advocate for any party. Mountainstar and Mr. Johnson did not adduce any evidence to establish that Mr. Ossa had a conflict of interest.

[64] Section 173 of the *Act* empowered the panel to "receive relevant evidence submitted by any person" and the panel was "not bound by the rules of evidence." Without question, Mr. Ossa provided highly relevant factual and opinion evidence and it was open to the panel to receive and accept it.

[65] On my review of the record, I can discern no unfairness in the panel's treatment of Mr. Ossa's evidence.

[66] Mountainstar and Mr. Johnson received a copy of Mr. Ossa's affidavit, including the attached decisions of the Chilean courts as well as certified translations of them, at an early stage.

[67] As the panel was not bound by the rules of evidence, it was entitled to accept Mr. Ossa's evidence without formally qualifying him: *Alberta (Workers' Compensation Board)* at paras. 63–64; *Alberta Securities Commission v. Workum*, 2010 ABCA 405 at paras. 82–84.

[68] At no time did the panel "cut off" Mr. Johnson from cross-examining Mr. Ossa on his qualifications. Rather, on two occasions when Mr. Johnson wished to read out objections to Mr. Ossa's affidavit, the panel directed Mr. Johnson as to the appropriate times to: (1) ask Mr. Ossa questions; and (2) make submissions regarding his testimony.

[69] In fact, Mr. Johnson did cross-examine Mr. Ossa, including regarding his alleged partiality. It was only after Mr. Johnson had questioned Mr. Ossa that the panel indicated it was qualifying him as an expert in Chilean law. Mountainstar's corporate counsel subsequently made written liability submissions to the panel, including extensive submissions on Mr. Ossa's alleged partiality and lack of qualifications. The submissions included information and assertions that were not put to Mr. Ossa in cross-examination. It was open to the panel to reject those submissions.

[70] Mountainstar and Mr. Johnson had ample notice of Mr. Ossa's evidence and ample opportunity to challenge it. There was no unfairness or palpable and overriding error in the panel's admission and weighing of his evidence.

[71] I would dismiss this ground of appeal.

Did the panel improperly reject the evidence of Mr. Lopehandia?

[72] Mountainstar and Mr. Johnson submit that the panel erred in its "wholesale rejection" of Mr. Lopehandia's "first-hand, material, relevant, personal" evidence. They complain that the panel did not assess or give Mr. Lopehandia's evidence any weight because it improperly concluded that Mr. Lopehandia had a conflict of interest and was not an expert. At a minimum, they say the panel should have accepted his evidence as "lay expert" evidence. I do not agree.

[73] As already noted, the panel was not bound to follow the strict rules of evidence. Accordingly, it was open to the panel to accept Mr. Lopehandia's factual and opinion evidence on the basis of his first-hand knowledge and purported expertise. By the same token, it was also open to the panel to reject Mr. Lopehandia's evidence and the panel articulated sound reasons for doing so.

[74] As noted by Mountainstar and Mr. Johnson, the panel gave two reasons for rejecting Mr. Lopehandia's evidence — his personal interest in the outcome and his lack of expertise in Chilean law. The record provides ample support for these findings.

[75] Mr. Lopehandia's interest in the outcome is obvious. He has been paid handsomely under the terms of the option agreement for a mining interest that, on the evidence, does not exist. It was clearly in his interest to continue promoting the idea that he has title to valuable mining interests to: (1) insulate himself from liability associated with promoting a fallacy; and (2) perhaps receive further payments. While having an interest in the outcome of the hearing did not disqualify Mr. Lopehandia from testifying, it was certainly a factor for the panel to consider in assessing his evidence. It was for the panel to decide whether his evidence was "sufficiently objective to be relied upon": *The Owners, Strata Plan NES 97 v. Timberline Developments Ltd.*, 2011 BCCA 421 at para. 48.

[76] In terms of expertise, Mr. Lopehandia has experience in the mining industry but is not a lawyer. His formal training in Chilean mining law dates back to 1972 when he graduated as a mining technician.

[77] Despite Mr. Lopehandia's purported expertise, his various assertions about the state of affairs were not supported by objective evidence. For example, he did not produce documentary evidence of his asserted mining rights over the Amarillo Claims or the Supreme Court of Chile decision he maintains was decided in his favour.

[78] In addition, Mr. Lopehandia's evidence often drifted into irrelevant topics. For example, he testified extensively about historic disputes that had nothing to do with whether Mountainstar made false or misleading statements in its MD&A between 2013 and 2015. Regardless of those disputes, on the evidence, Mr. Lopehandia did not hold "title" to any "Mina Pascua project areas in Chile" and Mountainstar was not in the midst of a certain process of cancelling the Amarillos 1 to 3000 and Tesoro Mining Claims.

[79] It was for the panel to assess Mr. Lopehandia's evidence. It could have accepted his testimony and did not reject it out of hand. Mr. Lopehandia's obvious interest in the outcome, lack of recent legal training, failure to provide objective evidence in support of his central assertions and inability to focus on issues of relevance raised serious concerns about his credibility and reliability as both a material witness with first-hand knowledge and a purported expert.

[80] There was no unfairness or palpable and overriding error in the panel's weighing and rejection of Mr. Lopehandia's evidence.

[81] I would dismiss this ground of appeal.

Did the panel err by applying different standards to the treatment and assessment of the evidence adduced by the parties?

[82] Mountainstar and Mr. Johnson submit that the panel erred by placing "different procedural rules on [the] admission of evidence" and applying uneven scrutiny to the evidence of Mr. Ossa and Mr. Lopehandia. I do not agree.

[83] Mountainstar and Mr. Johnson cite *R. v. Awer*, 2017 SCC 2 and *R. v. Phan*, 2013 ONCA 787 for the proposition that it is an error of law to "appl[y] different

standards of treating and assessing evidence, as between parties." There is authority to similar effect in this jurisdiction: *R. v. Roth*, 2020 BCCA 240.

[84] In *Roth*, this Court set out the legal principles underlying "uneven scrutiny" as a ground of appeal at paras. 47–51:

> [47] It is an error of law for a trial judge to subject the evidence of the defence to more rigorous scrutiny than the evidence of the Crown. See, for example: *R. v. Singh et al.*, 2020 MBCA 61 at paras. 31–33; *R. v. Mehari*, 2020 SKCA 37 at para. 29; *R. v. Murray*, 2020 BCCA 42 at para. 82; *R. v. E.H.*, 2020 ONCA 405 at paras. 40–41; *R. v. Willis*, 2019 NSCA 64 at paras. 40–45; *R. v. Wanihadie*, 2019 ABCA 402 at paras. 34–43; *R. v. Kiss*, 2018 ONCA 184 at paras. 82–83; *R. v. Gravesande*, 2015 ONCA 774 at paras. 18–19, 43.
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> [48] The standard of review for this error is correctness: *Mehari* at para. 30; *Willis* at para. 11.
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> [49] This is a notoriously difficult ground of appeal to make out: *Mehari* at para. 31; *R. v. Radcliffe*, 2017 ONCA 176 at paras. 23–26, leave to appeal to SCC ref'd, 37671 (7 December 2017). A trial judge has a unique advantage in hearing and seeing witnesses as they testify: *E.H.* at para. 44. Because of that fact, as well as other considerations, appeal courts afford substantial deference to a trial judge's assessment of credibility, interfering with their credibility findings only in the face of overriding and palpable error: *R. v. Wright*, 2019 BCCA 327 at paras. 23–24; *R. v. Vuradin*, 2013 SCC 38 at para. 11.
>
> [50] Consequently, to obtain a new trial on the ground that the judge applied different standards in the assessment of credibility, an appellant must persuade the appeal court of a demonstrably flawed assessment methodology or reasoning process that affected the credibility determination: see *Wanihadie* at para. 36 and the cases cited therein.
>
> [51] For this reason, successful claims of an unbalanced approach to the assessment of credibility have often involved other identifiable errors, such as a misapprehension of material evidence; speculative reasoning; an overemphasis on demeanour; or a failure to consider testimony in the context of the evidence as a whole. Again, see *Wanihadie* at para. 38 and the cases listed there.

[85] Recently, in *R. v. G.F.*, 2021 SCC 20, a majority of the Supreme Court of Canada expressed "serious reservations" about whether "uneven scrutiny" is a "helpful analytical tool to demonstrate error in credibility findings." The majority appears to be concerned that "uneven scrutiny" focuses "on methodology and presumes that the testimony of different witnesses necessarily deserves parallel or symmetrical analysis" rather than "on whether there is reversible error in the trial judge's credibility findings". The majority pointed out that appeal decisions that

have accepted uneven scrutiny arguments (including *Roth*) involved specific errors in the trial judge's credibility assessment: *G.F.* at para. 100.

[86] While *Roth* remains binding in this jurisdiction, it "does not stand for the simple proposition that 'uneven scrutiny' is a free-standing ground of appeal": *R. v. S.S.*, 2022 BCCA 392 at para. 74. Further, this Court must take care to observe all of the requirements, cautions and limitations expressed in *Roth*. It is simply not the case that a trier of fact must take an identical approach to assessing the evidence of opposing sides. Much depends on context. For example, a trier of fact may take different approaches to assessing the testimony of witnesses with different testimonial abilities: see for example, *R. v. M.P.H.*, 2022 BCCA 216 at para. 48.

[87] Mountainstar and Mr. Johnson note that the panel allowed the Executive Director to identify and file a list of 143 documents as exhibits at the outset of the hearing whereas they were required to identify and file each of their exhibits individually. Mountainstar and Mr. Johnson also say the panel erred in failing to mark documents it ruled irrelevant and inadmissible for identification purposes. They say the record is now incomplete, precluding appellate review.

[88] I detect no impropriety or unfairness in the panel's approach.

[89] Collectively and efficiently marking large collections of documents as exhibits is not unusual in either trials or administrative hearings. In this case, the Executive Director's documents were organized and disclosed well in advance. The staff investigator called by the Executive Director testified that he had obtained or prepared all of the documents during his investigation or in preparation for the hearing. Moreover, marking the Executive Director's documents *en masse* did not determine their materiality, relevance or probative value.

[90] By contrast, Mountainstar and Mr. Johnson's documents were disorganized and, despite direction and ample opportunity, not disclosed in advance. Many of the documents were in Spanish with no English-language translations and Mr. Johnson himself acknowledged that some may not be relevant. As a result, it was entirely appropriate for the panel to individually examine the documents Mountainstar and Mr. Johnson sought to rely on.

[91] If the panel improperly excluded relevant, credible evidence that could be expected to have affected the result, that evidence would meet the so-called "*Palmer*" criteria for admissibility as fresh evidence on appeal: *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, 1979 CanLII 8. Yet, Mountainstar and Mr. Johnson have not made a fresh evidence application. In these circumstances, I have to conclude that the panel's determinations of relevance and exclusion of certain documents were not problematic.

[92] Mountainstar and Mr. Johnson also submit that the panel continually interfered with Mr. Johnson's, but not the Executive Director's, cross-examination of witnesses and oral submissions. I have reviewed the transcripts of the passages Mountainstar and Mr. Johnson say reflect the panel's improper interference. The transcripts do not support their contention. Rather, they reflect the panel endeavouring to understand Mr. Johnson's position, keep him on track or confine his questions to relevant matters within the particular witness' knowledge or expertise. The number of interruptions reflect Mr. Johnson's poor grasp of the hearing process and the irrelevance of certain of his questions and submissions rather than any impropriety by the panel.

[93] With respect to the testimony of Mr. Ossa and Mr. Lopehandia, the real complaint of Mountainstar and Mr. Johnson is that the panel accepted Mr. Ossa's evidence but not Mr. Lopehandia's.

[94] It was entirely within the panel's purview to assess and weigh the evidence of Mr. Ossa and Mr. Lopehandia as it did. For the reasons already provided, Mountainstar and Mr. Johnson have not demonstrated that the panel's assessment of their evidence was marred by unfairness or palpable and overriding error. It is not reversible error to prefer the evidence of one witness over another for valid reasons: *Franklin v. Cooper*, 2016 BCCA 447 at paras. 9, 13–16*; Ashton Mining of Canada Inc. v. Kwantes*, 2008 BCCA 248 at para. 16; *R. v. Truong*, 2000 BCCA 116 at paras. 9–10.

[95] The panel did not err by applying different procedures or uneven scrutiny to the evidence of the parties.

[96] I would dismiss this ground of appeal.

Did the panel err by refusing to grant Mountainstar and Mr. Johnson an adjournment?

[97] Mountainstar and Mr. Johnson submit the panel erred by "denying [them] a one-week adjournment to obtain counsel for penalty submissions." I do not agree.

[98] The panel's decision to refuse to grant the adjournment was discretionary and is entitled to deference. Accordingly, this Court should not intervene unless the panel misdirected itself, came to a decision that is so clearly wrong that it amounts to an injustice or gave no or insufficient weight to relevant considerations: *Pioneer Ventures Inc.* at paras. 10, 33, 37.

[99] The panel had sound reasons grounded in the evidence for denying Mountainstar and Mr. Johnson's request for an adjournment. The panel summarized these reasons at para. 25 of the liability decision:

- the respondents were previously granted an adjournment in order to retain counsel and were unable to obtain the funds necessary to do so within the one-month adjournment,
- the respondents could provide no reasonable assurance that the funds would be received within the time period stated in their adjournment application or at all,
- the respondents have had ample opportunity to raise funds to engage legal counsel,
- the respondents have had the benefit of legal advice in the review of key evidence and their detailed written submissions on liability were prepared on their behalf by legal counsel, and
- the proceedings are substantially completed[.]

[100] Mountainstar and Mr. Johnson have not established that the panel misdirected itself, came to a decision that is so clearly wrong that it amounts to an injustice or gave no or insufficient weight to relevant considerations.

[101] I would dismiss this ground of appeal.

Did the panel err by failing to provide sufficient assistance to Mountainstar and Mr. Johnson as self-represented parties?

[102] Relying on cases in the criminal law context such as *R. v. Woolsey*, 2021 BCCA 253 at paras. 48–50, Mountainstar and Mr. Johnson submit there was a

"heavy onus" on the panel and the Executive Director to provide sufficient assistance to them as self-represented parties to ensure a fair hearing.

[103] In *Pintea v. Johns*, 2017 SCC 23, the Supreme Court of Canada endorsed the *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) (online) established by the Canadian Judicial Council ("*Statement of Principles*"). The Statement of Principles is designed to promote access to justice to self-represented litigants by, for example, recognizing that "[j]udges, the courts and other participants in the justice system have a responsibility to promote opportunities for all persons to understand and meaningfully present their case, regardless of representation."

[104] Although the Statement of Principles is directed at court proceedings, both courts and administrative tribunals have recognized that it provides helpful guidance in the conduct of administrative proceedings: *Hirtle v. College of Nurses of Ontario*, 2022 ONSC 1479 (Ont. Div. Ct.) at paras. 54–55; *Lum v. British Columbia (Ministry of the Attorney General dba Liquor Distribution Branch) and another*, 2022 BCHRT 48 at para. 40.

[105] I accept that, much like a trial judge dealing with a self-represented litigant, the panel had a duty to offer sufficient assistance to Mountainstar and Mr. Johnson to ensure a fair hearing. The panel had to balance the duty to ensure a fair hearing with the duty to both appear and remain neutral: *Rahman v. Windermere Valley Property Management Ltd.*, 2022 BCCA 258 at para. 34; *Baring v. Grewal*, 2022 BCCA 42 at para. 106; *Hirtle* at para. 60. For the purposes of my analysis, I will assume that the duty to assist a self-represented party extended to the Executive Director.

[106] On my review of the record, the panel and the Executive Director met their duty to ensure a fair hearing by offering an appropriate level of assistance to Mountainstar and Mr. Johnson.

[107] The Executive Director's notices and other written communications with Mountainstar and Mr. Johnson were clear, timely and helpful. The panel chair: outlined the overall process to Mr. Johnson several times; explained specific aspects of the process when necessary and appropriate; re-directed Mr. Johnson

to focus on the issues at hand; and provided reasonable explanations of various rulings throughout the process.

[108] Mountainstar and Mr. Johnson had ample notice of both the allegations against them and the evidence to be adduced by the Executive Director. They had full opportunity to contest the allegations by cross-examining the witnesses called by the Executive Director and by adducing their own evidence. They also had full opportunity to make written and oral submissions.

[109] I would dismiss this ground of appeal.

Did the panel fail to undertake the required proportionality assessment and impose excessive penalties?

[110] Under s. 161 of the *Act*, the Commission has broad discretion to impose sanctions in the public interest. Accordingly, this Court should intervene only if, in assessing and imposing its penalty, the panel misdirected itself, came to a decision that is so clearly wrong that it amounts to an injustice or gave no or insufficient weight to relevant considerations.

[111] Mountainstar and Mr. Johnson submit that the panel failed to undertake the required proportionality assessment and imposed an excessive penalty. I do not agree.

[112] Mountainstar and Mr. Johnson maintain that the permanent market bans against Mr. Johnson were excessive because the panel found that no one was harmed, there was no evidence that Mr. Johnson was enriched, Mr. Johnson was not guilty of fraud, and Mr. Johnson had exercised due diligence. They rely principally on this Court's decision in *Davis v. British Columbia Securities Commission*, 2018 BCCA 149.

[113] In *Davis*,a panel of the Securities Commission found Mr. Davis to have committed fraud by falsely representing to an investor that he owned certain shares he was selling. Mr. Davis used the $7,000 the investor paid him for personal expenses. The sanctions imposed by the panel included permanent market bans. This Court dismissed Mr. Davis' liability appeal but allowed his sanctions appeal.

[114] The Court described the issue in *Davis* in this way:

> [73] Mr. Davis challenges only the permanent market bans. He submits the decision to impose those bans was unreasonable because the panel failed to consider: (a) his previously unblemished record; and (b) the principle of proportionality. We agree.
>
> [74] When the sanctions decision is read in its entirety, it is apparent the panel proceeded on the basis that permanent market bans are appropriate in fraud cases, regardless of the circumstances of the offence or the offender. As we will explain, in our view that approach renders the sanctions decision unreasonable.

[115] After reviewing a number of authorities, the Court said (my emphasis):

> [83] *Rahmani* is indicative of what we consider to be the correct approach; one which reserves the harshest penalties for circumstances in which the Commission considers lesser measures to be inadequate to protect the public interest.
>
> …
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> [85] *Stetler*, *Eron*, and *Rahmani* show it is incumbent upon the tribunal to consider whether measures short of a permanent market ban would protect the investing public where a person's livelihood is at stake. Sections 161 and 162 of the *Securities Act* facilitate this approach by granting the Commission jurisdiction to craft a wide range of remedies tailored to a particular offence and offender. In doing so, principles of proportionality should be considered by the Commission or, put as the Commission did in *Eron*, the harm suffered by the investor and the extent to which the respondent was enriched are factors pertinent to determination of the appropriate sanctions.
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> [86] By virtue of the bans imposed by the panel, Mr. Davis is precluded from earning a living as he has done for many years. In effect, he was "given 'capital punishment' for his transgressions": *Stetler* at para. 38. Although the Commission purported to follow the *Eron* factors, it failed to conduct an individualized assessment.
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> [87] The Commission did not mention the evidence before it of Mr. Davis's personal circumstances. In particular, it did not consider Mr. Davis's long and unblemished career in the securities industry; he testified during the liability hearing that he was 56 and had been working in the industry since his late twenties. The Commission may well have determined that continued participation by Mr. Davis in the market is a risk that could not be ameliorated by a remedy short of a lifetime full market ban, but its reasons for doing so must demonstrate a consideration of individual circumstances and alternative sanctions.
>
> [88] In finding the defects in the Commission's reasoning to be fatal to its decision, we acknowledge that courts must avoid seizing "on one or more mistakes … which do not affect the decision as a whole" when conducting judicial review on a reasonableness standard: *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 56, [2003] 1 S.C.R. 247. We also recognize that the outcome reached by the Commission may ultimately be justified by the seriousness of Mr. Davis's conduct. However, when reviewing for reasonableness, a court must look to both the outcome and the reasons.

[116] In the case at hand, the panel did not cite *Davis*, discuss the need for an individualized assessment, refer to the principal of proportionality or expressly consider whether measures short of permanent market bans would have offered adequate protection to the public. Nevertheless, I am unable to conclude that the panel failed to conduct a proportionality analysis or imposed an excessive penalty.

[117] The Securities Commission is an expert tribunal: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 1994 CanLII 103 at paras. 74, 76, 80; *British Columbia (Securities Commission) v. Alexander*, 2013 BCCA 111 at para. 76. Much like trial judges are presumed to know the law they work with, in my view, the panel must be presumed to know the law in its area of expertise: *R. v. G.F.*, 2021 SCC 20 at para. 74; *North Shore/Squamish Valley Assessor, Area No. 08 v. Western Stevedoring Co.*, 2006 BCSC 509 at para. 58. Even if that were not so, I note that at the outset of the sanctions hearing, counsel for the Executive Director referred the panel to *Davis* to support the proposition that "the [C]ommission has to consider the unique circumstances of this case."

[118] In *Davis*, the panel proceeded on the basis that permanent bans are appropriate in all cases involving fraud "regardless of the circumstances of the offence or the offender." By contrast, in this case, the panel did not ignore the circumstances of "the offence or the offender." Rather, the panel considered a broad range of individualized factors before concluding that broad, permanent market bans against Mr. Johnson were "necessary and appropriate."

[119] The panel considered all of the sanctions imposed, including the permanent market bans on Mr. Johnson, to be proportionate to the seriousness of the conduct at issue, the circumstances of Mountainstar and Mr. Johnson, and the need for specific and general deterrence. Further, given the panel's presumed familiarity with the relevant law, its conclusion that the permanent market bans were "necessary and appropriate" must be taken to demonstrate that, in its view, no measure short of permanent market bans would adequately protect the public in the particular circumstances of this case.

[120] The panel was well aware that Mr. Johnson was not alleged or found to have engaged in fraudulent activity. The panel noted there was no evidence that investors suffered specific harm or that Mr. Johnson was enriched. The panel also noted that Mr. Johnson had no meaningful history of regulatory misconduct. But,

the panel expressed valid reasons for concluding that Mr. Johnson's participation in the markets posed an unacceptable risk to investors that could only be addressed by permanent market bans. These include:

- the importance of accurate and timely disclosure to the operation and integrity of the capital markets;
- the seriousness of providing false and misleading disclosure, particularly in the face of evidence that it was clearly wrong;
- the repetition of false and misleading disclosure over a three-year period;
- Mr. Johnson's lack of honesty, lack of integrity and inability to act in the best interests of shareholders;
- Mr. Johnson's failure to exercise due diligence;
- Mr. Johnson's inability to understand and comply with regulatory disclosure requirements;
- Mr. Johnson's failure to cooperate with the Commission's investigation;
- Mr. Johnson's unwillingness to recognize or inability to understand the regulatory authority of the Securities Commission;
- Mr. Johnson's failure to accept the panel's findings or understand the seriousness of his misconduct;
- the reasonable inference that investors were harmed (even if the level of harm could not be specifically established); and
- the need for both specific and general deterrence.

[121] Further, although not noted by the panel, unlike *Davis*, there was no evidence that Mr. Johnson's livelihood was at stake.

[122] Finally, the panel had good reason to reject Mr. Johnson's due diligence defence. Mountainstar's reliance on a Spanish-speaking Chilean lawyer who was acting for Mr. Lopehandia was not reasonable due to that lawyer's obvious conflict of interest. The lawyer's duty was to Mr. Lopehandia, not Mountainstar or Mr. Johnson, and Mr. Lopehandia's interest was to promote the view that he owned valuable mining interests, not to independently verify whether that was so. This conflict of interest was exacerbated by the fact that Mr. Lopehandia's lawyer's advice was translated (and therefore at risk of manipulation) by Mr. Lopehandia.

[123] For these reasons, Mountainstar and Mr. Johnson have not established that, in assessing and imposing penalties, the panel misdirected itself, came to a decision that was so clearly wrong that it amounts to an injustice or gave no or insufficient weight to relevant considerations. Accordingly, I would defer to the panel's assessment and imposition of sanctions.

[124] I would dismiss this ground of appeal.

Did the panel fail to provide sufficient reasons?

[125] Mountainstar and Mr. Johnson submit the panel breached its duty to provide reasons that were responsive to the live issues in both the liability and sanctions decisions. I do not agree.

[126] Reasons for judgment are important to the administration of justice. They justify and explain the result, tell the losing party why they lost, provide for an informed consideration of possible grounds of appeal and satisfy the public and the parties that justice has been done: *F.H. v. McDougall*, 2008 SCC 53 at para. 98, citing *R. v. Walker*, 2008 SCC 34 at para. 19; see also *R. v. G.F.* at para. 68.

[127] The need for and extent of reasons provided by administrative tribunals varies with the context in which their decisions are made: *British Columbia (Securities Commission) v. McLean*, 2011 BCCA 455 at para. 26. While a failure to give adequate reasons does not provide a free-standing basis for appeal, it can amount to an error of law, for example when no reasons are given: *McLean* at para. 26; *R. v. Sheppard*, 2002 SCC 26 at para. 1.

[128] Reasons are to be read functionally and contextually. That means they must be read as a whole and in the context of the live issues at trial, informed by the

positions of the parties: *G.F.* at para. 69; *R. v. Pastro*, 2021 BCCA 149 at para. 53. In reviewing reasons, it is therefore critical to review the record. Even if the trial reasons do not explain the "what" and the "why", there will be no reviewable error where those answers are clear from the record: *G.F.* at para. 70; *McLean* at para. 26.

[129] With respect to the liability decision, Mountainstar and Mr. Johnson submit the panel completely ignored the submissions of Mountainstar's corporate counsel and did not explain why it considered Mr. Lopehandia to have a conflict of interest.

[130] I accept that the panel was obliged to provide reasons that were responsive to the issues raised by the parties: *Baker v. Canada (Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817, 1999 CanLII 699. It is simply untrue, however, that the panel ignored the submissions of Mountainstar's corporate counsel and did not explain why it considered Mr. Lopehandia to have an interest in the outcome.

[131] Even a cursory review of the liability decision demonstrates that the panel articulated its understanding of the positions Mountainstar and Mr. Johnson took on each issue of note – and certainly on each issue raised on appeal. The panel may not have specifically addressed each and every point raised by Mountainstar's corporate counsel, but it was not obliged to: *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para. 139, citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*N.L.N.U.*] at para. 16.

[132] Further, at paras. 68–69 of the liability decision, the panel identified that Mr. Lopehandia's rights to the Amarillo Claims were a central issue in the hearing and that Mr. Lopehandia therefore had a personal interest in advancing the position of Mountainstar and Mr. Johnson. The panel could have said more but, again, it was not required to do so. For reasons I have already articulated, Mr. Lopehandia's lack of objectivity was patent.

[133] With respect to the sanctions decision, Mountainstar and Mr. Johnson submit that the panel's reasons were inadequate because the panel failed to conduct the required proportionality assessment.

[134] It would have been good practice and helpful for the panel to cite *Davis*, discuss the need for an individualized assessment, refer to the principal of proportionality and expressly consider whether measures short of permanent market bans would have protected the public adequately. But, the panel was not obliged to "expound on features of [the] law that [were] not controversial in the case before them": *G.F.* at para. 74; *N.L.N.U.* at para. 16. In any event, as set out above, the panel undertook an individualized assessment before imposing sanctions that it considered proportionate to the seriousness of the conduct at issue, the circumstances of Mountainstar and Mr. Johnson, and the need for specific and general deterrence.

[135] In my view, the panel's liability and sanctions decisions were more than sufficient and disclose no error of law. They: (1) comprehensively addressed the live issues; and (2) explained what the panel decided and why in a manner that permitted effective appellate review: *G.F.* at paras. 68–69; *Ktunaxa Nation* at para. 140.

[136] I would dismiss this ground of appeal.

Disposition

[137] For all of these reasons, I would dismiss the appeal.

"The Honourable Justice Marchand"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"

I AGREE:

"The Honourable Mr. Justice Hunter"