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Citation: Money Gate Mortgage Investment Corporation (Re), 2017 ONSEC 26
Date: 2017-07-04

**IN THE MATTER OF
MONEY GATE MORTGAGE INVESTMENT CORPORATION,
MONEY GATE CORP., MORTEZA KATEBIAN
and PAYAM KATEBIAN**

**REASONS AND DECISION
(Subsection 127(1) of the *Securities Act*, RSO 1990, c S.5)**

Hearing: May 11 and 29, 2017

Decision: July 4, 2017

Panel:

Timothy Moseley	Commissioner and Chair of the Panel
William Furlong	Commissioner
Mark Sandler	Commissioner

Appearances:

Amanda Heydon	For Staff of the Commission
Kevin Richard	For the Respondents

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REASONS AND DECISION

I. OVERVIEW

- [1] Subsection 127(7) of the *Securities Act* (the "**Act**")¹ authorizes the Commission to extend a temporary order "until the hearing is concluded if a hearing is commenced" within fifteen days of the initial temporary order.
- [2] What does "hearing" mean in that subsection? What "hearing" must have been "commenced" for the subsection to apply? And what "hearing" marks the limit of any extension ("until the hearing is concluded")? More specifically, if a conventional enforcement proceeding has not been commenced following the filing of a Statement of Allegations (an "**Enforcement Proceeding**"), for how long can the Commission extend a temporary order under that subsection?
- [3] It does not appear that these questions have ever been argued before the Commission or the courts. Nonetheless, the Commission has, in the past, issued orders that implicitly assume that there is no time limit to such authority.
- [4] We agree with Staff's submission that "hearing" in subsection 127(7) may mean either an attendance before the Commission at which the Commission considers a discrete request by Staff for an extension of a temporary order (a "**Temporary Order Hearing**"), or it may mean an Enforcement Proceeding that comprises a merits hearing and, if applicable, a sanctions hearing.
- [5] However, for the reasons set out below, we do not accept Staff's submission that "hearing" in subsection 127(7) may also mean a series of attendances at which Staff seeks repeated and discrete extensions of a temporary order. We also reject Staff's alternative submission that the two uses of the word "hearing" in that subsection can mean different things when considered at the same time (specifically, that the Commission may extend a temporary order until the conclusion of an Enforcement Proceeding that might not yet exist, as long as a Temporary Order Hearing has been commenced within fifteen days of the initial temporary order).
- [6] As a result, we find that subsection 127(7) does not authorize the Commission to extend a temporary order beyond the conclusion of the Temporary Order Hearing unless an Enforcement Proceeding has been commenced within fifteen days of the issuance of the initial temporary order.

II. HISTORY OF THIS MATTER

- [7] Staff seeks the extension for three months of a temporary order originally issued on April 27, 2017 against the respondents (the "**April 27 Order**").² The April 27 Order, which by its own terms was to expire on May 12, 2017, provides that all trading in securities of the respondent Money Gate Mortgage Investment Corporation ("**MGMIC**") cease (a "**Cease Trade Order**"), and includes an order

¹ RSO 1990, c S.5.

² (2017), 40 OSCB 4103.

that any exemptions contained in Ontario securities law do not apply to the respondents (a "**Removal of Exemptions Order**").³

- [8] The respondents consented to the issuance of the April 27 Order but asked that the Cease Trade Order not apply to MGMIC's dividend reinvestment program. The respondents reserved their right to contest a subsequent extension, and advised that they intended to file affidavit evidence in response to the extension request. We issued the initial temporary order, but without excluding the dividend reinvestment program as requested by the respondents.
- [9] At the next attendance on May 11, Staff pursued this request for a three-month extension of the temporary order. The parties made submissions but did not have a full opportunity to address all of the questions raised by this panel. We adjourned the matter to May 29, and extended the April 27 Order pending completion of submissions at that later date.⁴
- [10] The matter continued on May 29. The respondents did not oppose an extension, but asked that the extension be limited to two months, and renewed their request that the Cease Trade Order not apply to MGMIC's dividend reinvestment program. We extended the Cease Trade Order for three months without acceding to the respondents' request that the order not apply to the dividend reinvestment program. We reserved our decision regarding Staff's request for a three-month extension of the Removal of Exemptions Order, but we extended that order pending the release of this decision.⁵

III. STATUTORY FRAMEWORK

A. Orders available under subsection 127(1) of the Act

- [11] Subsection 127(1) of the Act sets out various orders the Commission may make, if it considers it to be in the public interest to do so. The available orders include the following:
- a. an order such as the Cease Trade Order, made under paragraph 2 of subsection 127(1), ceasing trading in securities or derivatives;
 - b. an order under paragraph 2.1 of subsection 127(1), prohibiting the acquisition of securities (a "**No Acquisition Order**"); and
 - c. an order such as the Removal of Exemptions Order, made under paragraph 3 of subsection 127(1), providing that any exemptions contained in Ontario securities law do not apply to a person or company.
- [12] Often, one or more of those orders are made at the conclusion of an Enforcement Proceeding, after a sanctions hearing. The orders may be permanent, or may be for some other period specified by the Commission.

³ The Removal of Exemptions Order is subject to some qualifications that are not relevant to this decision.

⁴ (2017), 40 OSCB 4440.

⁵ (2017), 40 OSCB 4845.

[13] Subsection 127(4) of the Act provides that no order may be made under section 127 “without a hearing”. When read together with subsection 127(4.1) of the Act⁶ and section 4 of the *Statutory Powers Procedure Act* (the “*SPPA*”),⁷ “hearing” in this context means an opportunity for the parties to be heard. An exception to this requirement appears in subsection 127(5), described below.

B. Enforcement Proceedings

[14] An Enforcement Proceeding, in which Staff seeks final orders under subsection 127(1), is initiated by Staff filing a Statement of Allegations. Once Staff files that document, the Secretary to the Commission formally commences the proceeding by issuing a Notice of Hearing in relation to the Statement of Allegations.

[15] Staff has not filed a Statement of Allegations in this case, and therefore no Enforcement Proceeding has been commenced.

C. Initial issuance of temporary orders

[16] Often, Staff seeks a temporary order at an early stage of an enforcement investigation, without first initiating an Enforcement Proceeding, where Staff believes that there may be ongoing harm or a risk of further harm and that it would be in the public interest for an order to be in effect while the investigation continues. Staff’s investigation can lead to an Enforcement Proceeding, but does not always do so.

[17] Subsection 127(5) of the Act provides that certain orders may be made on a temporary basis “if in the opinion of the Commission the length of time required to conclude a hearing could be prejudicial to the public interest.” That authority applies to the three orders referred to in paragraph [11] above, *i.e.*, a Cease Trade Order, a No Acquisition Order, and a Removal of Exemptions Order.

[18] The subsection provides that a temporary order may be made “[d]espite subsection (4)” (the requirement for a hearing), and that this may be done only if the length of time “to conclude a hearing” could be prejudicial to the public interest. It is therefore clear that the Commission may issue an initial temporary order without a hearing, and without advance notice to the respondents.

[19] In some instances, as in this case, Staff gives notice to the respondents, and makes its initial request for the temporary order at a hearing. Subsection 127(5) neither requires nor precludes this approach, which is therefore in Staff’s discretion.

[20] If the Commission issues the requested temporary order, with or without a hearing, then subsection 127(6) of the Act says that the order is effective for only fifteen days unless the Commission later extends it.

D. Extensions of temporary orders

[21] Section 127 offers two routes by which a temporary order may be extended.

[22] The first is under subsection 127(7), which authorizes the Commission to extend a temporary order “until the hearing is concluded if a hearing is commenced

⁶ Subsection 127(4.1) relates to the filing of records and does not apply to the facts of this case.

⁷ RSO 1990, c S.22. Section 4 of the SPPA permits the waiver of a procedural requirement, with the consent of the parties and the tribunal.

within the fifteen-day period.” The fifteen-day period mentioned is that set out in subsection 127(6) of the Act. The meaning of the word “hearing”, which is used twice in subsection 127(7), is pivotal to resolving the main issue in this application. We will return to that issue in our analysis below.

- [23] The second route for an extension is under subsection 127(8), which provides that despite subsection 127(7), the Commission may extend a Cease Trade Order or a No Acquisition Order “for such period as [the Commission] considers necessary if satisfactory information is not provided to the Commission within the fifteen-day period.”
- [24] We highlight several characteristics of subsection 127(8):
- a. it applies “despite” subsection 127(7), and is therefore an exception to it;
 - b. it has no time restriction similar to that in subsection 127(7), in that it allows an extension “for such period as [the Commission] considers necessary”, if the Commission does not receive “satisfactory information”;
 - c. there is no mention of a “hearing” or a “proceeding”; and
 - d. it authorizes the extension only of a Cease Trade Order and/or a No Acquisition Order, and not of a Removal of Exemptions Order.
- [25] If the Commission grants Staff’s request under either or both of subsection 127(7) or subsection 127(8), it must do so by issuing a further, new order. The extension order may be issued only after a hearing, as required by subsection 127(4), because subsection 127(7) and subsection 127(8) do not contain the words “Despite subsection 127(4)”, as subsection 127(5) does.

IV. ISSUES

- [26] The need to interpret “hearing” in subsection 127(7) arises in this case because Staff’s request to extend paragraph 2 of the April 27 Order, which is a Removal of Exemptions Order, can be made only under subsection 127(7). This is so because subsection 127(8) of the Act is explicitly confined to Cease Trade Orders and No Acquisition Orders, and does not authorize the extension of a Removal of Exemptions Order.
- [27] In support of its request that the Commission extend the Removal of Exemptions Order for three months under subsection 127(7), Staff relies principally on its position that “hearing” in that subsection can refer to a series of attendances before a panel of the Commission at which Staff seeks successive extensions of a temporary order. Put another way, Staff says that the first attendance before a panel of the Commission, at which Staff seeks an extension of a temporary order, begins a hearing that continues through later attendances and extensions.
- [28] We must determine whether the words of subsection 127(7) can bear Staff’s suggested interpretation. We must also consider Staff’s alternative submission that the two uses of “hearing” in subsection 127(7) can mean different things at the same time.

V. ANALYSIS

- [29] In considering these issues, we first confirm two uncontroversial interpretations of “hearing”. We then review principles and authorities applicable to questions of interpretation under the Act.

A. Scope of Subsection 127(7)

- [30] “Hearing” in subsection 127(7) can mean either of the following, depending on the scenario:
- a. First, “hearing” may refer to a Temporary Order Hearing (the consideration by the Commission of a discrete request by Staff for extension of a temporary order). In this context, the hearing concludes at the completion of evidence, submissions, and decision relating to that specific request. So, for example, if Staff seeks an extension, but the Commission is unable to conclude the hearing by the end of a day, and the hearing must continue on another day, or the Commission reserves its decision, then the Commission may extend the temporary order on an interim basis while Staff’s request is still being litigated, including up to the time the Commission issues its decision.
 - b. Second, “hearing” may refer to an Enforcement Proceeding.⁸ In this context, if such a proceeding has been commenced within the fifteen days specified in subsections 127(6) and (7), then subsection 127(7) authorizes the Commission to extend the temporary order until the conclusion of the Enforcement Proceeding, *i.e.*, after the Commission has determined what sanctions, if any, will be imposed under subsection 127(1).
- [31] It is well established that the Commission ought to apply a broad and purposive interpretation to the Act’s remedial provisions, including section 127. Doing so is consistent with the purposes of the Act and with the Commission’s mandate, and enables the Commission to use the tools at its disposal to protect investors and to promote fair and efficient capital markets.⁹
- [32] A broad and purposive interpretation accommodates both meanings of “hearing” in the context of the scenarios referred to above. However, this conclusion does not assist Staff in this case, because:
- a. Staff asks that the temporary order be extended beyond the end of this Temporary Order Hearing (including the issuance of this decision), which rules out the first interpretation; and
 - b. the second interpretation is inapplicable, given that Staff has not yet initiated an Enforcement Proceeding.
- [33] We must therefore consider Staff’s primary and alternative positions, described above in paragraph [27] (that “hearing” includes a series of attendances) and paragraph [28] (that the two instances of “hearing” can have different meanings simultaneously).

⁸ “Hearing” may refer to an Enforcement Proceeding even though an Enforcement Proceeding may comprise two or more hearings, including a merits hearing and a sanctions hearing, as well as any interlocutory hearings in that proceeding. This reflects the fact that when the language was first enacted, it was not Commission practice to have separate merits and sanctions hearings.

⁹ *Pacific Coast Coin Exchange of Canada v Ontario (Securities Commission)*, [1978] 2 SCR 112 at paras 40, 43, 58; *Wilder v Ontario (Securities Commission)* (2001), 53 OR (3d) 519 (C.A.) at paras 18-23.

B. Statutory, Commission, and judicial definitions of “hearing”

- [34] The word “hearing” is not defined in the Act, but is defined in the SPPA as “a hearing in any proceeding”. The word “proceeding” is defined in the SPPA as “a proceeding to which this Act applies”. The statutory definition of “hearing” does not assist, one way or the other, in resolving the issue raised here.
- [35] The Commission considered the meaning of “hearing” in 2011, in *Re MRS Sciences Inc.* (“**MRS Sciences**”).¹⁰ In that case, the Commission faced the question of whether the merits and sanctions stages of an Enforcement Proceeding constituted separate hearings. The Commission found that “the hearing on sanctions and costs is a separate ‘hearing’ from the hearing on the merits, within the same ‘proceeding’...”.¹¹ This interpretation was later upheld by the Court of Appeal for Ontario.¹²
- [36] In our view, the conclusions in *MRS Sciences* do not dispose of the issue before us. There is an important distinction between *MRS Sciences* and this case; namely, that at the conclusion of a merits hearing in an Enforcement Proceeding, the Commission does not issue an order disposing of Staff’s request for the imposition of sanctions. The Commission merely makes findings that provide a foundation for the sanctions and costs hearing to follow.
- [37] In contrast, each time the Commission extends a temporary order under subsection 127(8) (and under subsection 127(7) if we give effect to Staff’s position), the Commission does so by issuing an order that fully disposes of Staff’s request at that time. The extension may or may not be followed by a later, separate request for a further extension.
- [38] The distinction between *MRS Sciences* (no order is issued at the conclusion of a merits hearing) and the present case (an order is issued every time a temporary order extension is granted) does not defeat Staff’s position. It merely means that the reasoning in *MRS Sciences* does not help to resolve the issue before us.

C. Similar wording in other statutes

1. British Columbia securities legislation

- [39] Staff submits that a similar provision in British Columbia’s *Securities Act* (the “**BC Act**”),¹³ as interpreted by the British Columbia Court of Appeal, supports Staff’s position in this case.
- [40] Section 161 of the BC Act corresponds, in substance, to section 127 of the Act. In particular, a temporary order can be made without a hearing under subsection 161(2) of the BC Act. Such an order is effective “for not longer than 15 days”.
- [41] Subsection 161(3) of the BC Act states:

If the commission or the executive director considers it necessary and in the public interest, the commission or the executive director may, without providing an opportunity to

¹⁰ (2011), 34 OSCB 12288.

¹¹ *MRS Sciences* at para 59.

¹² 2017 ONCA 279 (CanLII).

¹³ RSBC 1996, c 418.

be heard, make an order extending a temporary order until a hearing is held and a decision is rendered.

- [42] Under subsection 161(4), the British Columbia Securities Commission (“**BCSC**”) must send written notice of every order made under the section to any person directly affected by the order. If such a notice is sent, subsection 161(5) requires that the notice “be accompanied by a notice of hearing.”
- [43] In *Biller v British Columbia (Securities Commission)* (“**Biller**”),¹⁴ the British Columbia Court of Appeal considered these provisions in light of a temporary order that had been issued under subsection 161(2) of the BC Act without a hearing. A document was served on the respondent, purportedly under subsections 161(4) and (5). That document described the reasons for the order, and advised that a hearing would be held before the BCSC at which BCSC Staff would seek an adjournment of the “matter” for 180 days to permit the investigation to be concluded. Staff would also ask that the temporary order be extended “until such time as the Hearing in this matter has been reconvened and a decision rendered on the merits.”¹⁵ The BCSC granted Staff’s request.
- [44] On appeal, the appellant Mr. Biller, who had been the respondent before the BCSC, argued that the requirement in subsection 161(5) referred to a notice of the full merits hearing, rather than of a hearing to extend the temporary order. The notice received by Mr. Biller was the latter.
- [45] Mr. Biller submitted that the BCSC’s interpretation of “hearing” effectively allowed the BCSC to extend the temporary order for an indefinite period. The court rejected that position, holding that:
- a. subsection 161(3) empowers the BCSC to extend a temporary order “for whatever period it considers to be in the public interest”, even without a hearing;
 - b. a hearing before a full panel of the BCSC was convened to consider the requested extension, given that the authority under that subsection to extend indefinitely is “more draconian” than that under subsection 161(2) to make the order in the first place; and
 - c. it is doubtful “that the word ‘hearing’ in s.161(5) is intended to be confined to the final hearing”.¹⁶
- [46] Staff cites *Biller* in support of the argument that “hearing” in the BC Act can include both a Temporary Order Hearing and a merits hearing in an Enforcement Proceeding. We agree with Staff’s submission, but we do not think this conclusion advances Staff’s case. Subsection 161(5) of the BC Act anticipates a hearing at which BCSC Staff will seek an extension of the temporary order, and simply requires that the respondent be given notice of that hearing, so that the respondent can attend and make submissions. In Ontario, subsection 127(9) is similar, requiring that the Commission “give notice of every temporary order... together with a notice of hearing, to any person or company directly affected by the temporary order.”

¹⁴ (1998), 105 BCAC 7.

¹⁵ *Biller* at paras 5-6.

¹⁶ *Biller* at paras 16, 19-20.

- [47] We see nothing in *Biller* that addresses Staff’s position that a single “hearing” under subsection 127(7) can comprise multiple attendances, at each of which Staff makes a new request, often based on new or updated information, for a further extension of an existing temporary order, and bears the burden of persuading the Commission that a further extension is warranted based on the circumstances existing at that time.
- [48] If anything, *Biller* offers a contrary view, in the court’s dismissal of the appellant’s assertion that the temporary order had been extended indefinitely. The court noted that “a further hearing” had been set for a specified date. That language is unambiguous in contemplating that each attendance is a separate hearing. Having said that, we are reluctant to attach much weight to the court’s language, because it does not appear that the point was argued.
- [49] For these reasons, we are not persuaded that the BC Act assists one way or the other in resolving the issue before us. As for *Biller*, while a decision of the British Columbia Court of Appeal may be of persuasive value even though not binding on us, we do not find the decision to be persuasive in this case, because of the limitations described above.

2. Other Ontario statutes

- [50] The phrase “until the hearing is concluded if a hearing is commenced” or similar wording appears in numerous other Ontario statutes.¹⁷ Neither Staff nor the respondents located any judicial or tribunal decisions that interpret that language. With that in mind, we agree with Staff’s written submission that other Ontario legislation does not assist us in resolving the issue at hand.

D. Legislative history of section 127 of the Act

- [51] Staff referred to versions of subsections 127(7) and (8) of the Act that existed prior to the 1994 addition of those provisions. The earlier statutory provisions have both similarities and differences. As Staff notes, the 1994 amendments have been described as having been intended to address “practical and legal deficiencies” in the Act’s enforcement provisions.¹⁸ However, Staff was unable to locate any reference in the legislative debates or elsewhere that directly addresses what are now subsections 127(7) and (8).
- [52] In support of its proposed interpretation of subsection 127(7), Staff submits that notes emanating from the Commission at the time of the proposed amendments indicate that the amendments “would provide the Commission with greater flexibility in tailoring its orders to address more appropriately the nature of the particular breach or public interest concern.”¹⁹ Significantly, however, the full quotation attributes that characteristic specifically to the “addition of several new types of orders”, as opposed to the rewording of existing authority. We therefore

¹⁷ See, for example, *Motor Vehicle Dealers Act*, 2002, SO 2002, c 30 Sched B, s 10(1); *Loan and Trust Corporations Act*, RSO 1990 c L.25, ss 192(1)-(3), 192(6); *Condominium Management Services Act*, 2015, SO 2015 c 27, Sched 2, ss 41(1), (2), (6), 43(3); *Liquor Licence Act*, RSO 1990 c L.19, s 15(6)-(7).

¹⁸ Five Year Committee Final Report – *Reviewing the Securities Act (Ontario)*, March 21, 2003, pp 208-209.

¹⁹ *Proposals to Amend the Enforcement Provisions of the Securities Act*, (1991) 14 OSCB 1907 at 1908.

cannot accept the submission that this comment assists in interpreting subsection 127(7).

- [53] As a result, we find nothing persuasive in either the legislative history or the contemporaneous guidance.

E. Previous Commission decisions extending temporary orders

- [54] Staff correctly points out that the Commission has on numerous occasions:
- a. extended for a defined period of time a temporary order that included a Removal of Exemptions Order, even though an Enforcement Proceeding had not been commenced; and
 - b. included as part of an extension order a provision that refers to the hearing or proceeding being adjourned to a date typically one or two days before the new expiry date of the temporary order, the implication being that the same hearing or proceeding is continuing.
- [55] As Staff fairly concedes, however, in none of these cases does it appear that the issue before us was addressed. In our view, therefore, those cases are of limited value.
- [56] Because neither the legislative history nor previous Commission decisions dispose of the issue before us, we next analyze Staff's primary submission in light of the nature of a temporary order and given the general principles of interpretation discussed above.

F. The nature of a temporary order

- [57] In *Re Shallow Oil & Gas Inc.* ("**Shallow Oil**"), the Commission described a temporary order issued in anticipation of an Enforcement Proceeding as being "interlocutory",²⁰ which in that context (and in the context of this case) we would describe as "interim". That characterization is consistent with the fact that a temporary order is typically issued as an interim protective measure pending an Enforcement Proceeding that is based on substantially the same alleged misconduct as Staff relied on in seeking the temporary order.
- [58] Staff points out that in some instances, the Commission has issued and extended a temporary order, and Staff did not subsequently initiate an Enforcement Proceeding.²¹ We see no inconsistency between that outcome and calling the temporary orders "interim". Staff does not suggest, nor would it be appropriate to suggest, that having requested and obtained an interim temporary order, Staff must later commence an Enforcement Proceeding whether to do so would be in the public interest or not.
- [59] Staff also refers us to *Re Valentine* ("**Valentine**"), in which the Commission stated that the authority to extend a temporary order before Staff completes its investigation "enhances the Commission's capacity to protect the capital markets by allowing it to take preventative action".²² We agree.

²⁰ *Re Shallow Oil & Gas Inc.* (2008), 31 OSCB 2007 at para 23.

²¹ See, e.g., *Re Knowledge First Financial Inc.* (2013), 36 OSCB 10456 and (2014) 37 OSCB 2638.

²² *Re Valentine* (2002), 25 OSCB 5329 at para 24, citing *Canadian Tire Corp. v. C.T.C. Dealer Holdings Ltd.* (1987), 10 OSCB 857.

- [60] However, neither decision assists in resolving the specific issue in this case. The interim nature of a temporary order, described in *Shallow Oil*, is consistent both with Staff's suggested interpretation of "hearing", and with the opposite conclusion. In *Valentine*, the panel remarked on the difference between subsections 127(7) and 127(8),²³ but did not have to consider the meaning of "hearing" in subsection 127(7), since Staff had already filed a Statement of Allegations at the time of the extension, and there was therefore both an Enforcement Proceeding and a Temporary Order Hearing underway.²⁴
- [61] As noted above in paragraph [37], each extension request by Staff stands on its own. This is the case both because circumstances change in between requests, and because the considerations applicable to the Commission's decision (e.g., the public interest in the expeditious disposition of matters before the Commission, or the information in Staff's possession as a result of its investigation) change over time.²⁵ In our view, this characteristic of a temporary order extension request underscores the fact that consideration of each such request is concluded at a hearing, as opposed to being a stage of an unfinished hearing.

G. Jurisdictional implications of Staff's position

- [62] Staff's position that "hearing" includes a series of appearances to extend a temporary order raises the question of when that hearing ends. Staff submits that a hearing commenced in this way terminates at either of the following times:
- a. when the temporary order expires on its own terms, in a case where Staff has not sought a further extension; or
 - b. when the temporary order is replaced by a final sanctions order, at the end of an Enforcement Proceeding.
- [63] That view results in there being effectively no jurisdictional limits on the Commission's ability to extend orders under subsection 127(7). The effect of Staff's position is that Staff can seek extensions at will, because as long as Staff continues to seek extensions, the hearing continues. The legislature's intended limit, "until the hearing is concluded", evaporates in the face of Staff's unfettered ability to define the end of the hearing by its choice as to whether to seek a further extension.
- [64] It is of course true that subsection 127(8) contains no temporal limit for the extension of a temporary order, since under that subsection the Commission may extend the order "for such period as it considers necessary". It is unsurprising that this more liberal authority as to time is subject to the constraint of being available with respect to a more limited range of orders, i.e., a Cease Trade Order and a Cease Acquisition Order.
- [65] Staff's position also invites consideration of the meaning or usefulness of subsection 127(8) if we were to adopt Staff's proposed interpretation of 127(7). In other words, if subsection 127(7) allows Staff to request, and the Commission

²³ *Valentine* at para 21.

²⁴ *Valentine* at para 5.

²⁵ *Re Kotton* (2016), 39 OSCB 10171.

to issue, a temporary order that lasts for an indefinite period of time or an extended but specified period of time, and if that extended temporary order could include a Removal of Exemptions Order, why would Staff ever resort to subsection 127(8)? Would that subsection be rendered meaningless, a conclusion that must be avoided absent compelling circumstances?

- [66] Staff responds by submitting that subsection 127(8) contains a form of reverse onus, in that the Commission may extend a Cease Trade Order and a Cease Acquisition Order if the respondent fails to produce “satisfactory information”.²⁶ While this difference clearly exists, it does not assist in resolving the interpretation issue. It is difficult to imagine circumstances where a respondent produces “satisfactory information” within the meaning of subsection 127(8), thereby satisfying the reverse onus, but the Commission still considers it to be in the public interest to extend a temporary order under subsection 127(7). In light of that, our concern persists that Staff’s position eviscerates subsection 127(8).

H. Other submissions by Staff

1. Co-existing “reasonable” interpretations

- [67] Staff offered additional authorities in support of its submission that there may be multiple “reasonable” interpretations of the Act’s provisions.²⁷ In other words, the fact that “hearing” in subsection 127(7) can have two different meanings depending on the scenario (as discussed above) lends support to Staff’s position that the alternative meaning it proposes is also permissible.
- [68] However, the authorities cited and submissions made by Staff on this point are inextricably bound up with the degree of deference that appellate courts show expert tribunals, and the question of reasonableness. We did not, therefore, find the authorities to be helpful in this case, and we continue to face the central question of whether the words in subsection 127(7) can support Staff’s proposed interpretation.

2. Two instances of “hearing” in subsection 127(7)

- [69] As noted above, Staff submits that the two instances of “hearing” in subsection 127(7) need not bear the same meaning even when they are considered by the Commission at the same time.
- [70] Staff’s contends that the phrase “until the hearing is concluded if a hearing is commenced” leaves open a scenario in which one type of hearing is commenced within fifteen days (*e.g.*, a Temporary Order Hearing), and that once such a hearing begins, the Commission may continue to consider and grant extensions until the end of another kind of hearing (*e.g.*, a sanctions hearing).
- [71] We consider that interpretation to be untenable. As already noted, a broad and purposive interpretation of subsection 127(7) accommodates its application to two scenarios (first, where “hearing” means a Temporary Order Hearing until the subject request has been decided; and second, where an Enforcement Proceeding has been commenced, until its conclusion). Sensibly, both scenarios give “hearing” the same meaning at the same time. We do not agree with Staff’s

²⁶ *Shallow Oil* at paras 34-36.

²⁷ For example, *British Columbia (Securities Commission) v McLean*, 2013 SCC 67.

submission that a broad and purposive interpretation supports “hearing” meaning two different things at the same time in the same sentence. In our view, this conclusion would depart from a natural reading of the words, and we should not reach that conclusion absent explicit statutory language to that effect. We are not persuaded by Staff’s submission that the use of “the” and “a” preceding the two instances of “hearing” are intended to lead to that conclusion.

- [72] Further, Staff’s proposed interpretation would enable the Commission to grant an extension of a temporary order that, on its own terms, does not expire until the conclusion of an Enforcement Proceeding that has not been commenced and may never ultimately be commenced. We consider that interpretation to be an unsound and unsupportable enlargement of the Commission’s authority.
- [73] A related concern is that the order that is meant to be temporary may effectively operate as a final and permanent order. When such an order is made outside an Enforcement Proceeding, a respondent does not have the same protections available as of right in Enforcement Proceedings, including disclosure and the opportunity to push for a speedy resolution of outstanding allegations. In our view, such a result could be justified only if supported by explicit statutory language, such as that found in subsection 127(8) (“for such period as [the Commission] considers necessary”). The language of subsection 127(7) does not meet that standard.

3. Implications of denying the request to extend the Removal of Exemptions Order

- [74] Staff is concerned that if we find that subsection 127(7) does not provide the authority to extend a temporary order under these circumstances, this will have the detrimental effect of precluding the Commission from imposing terms and conditions on a registrant when serious concerns regarding the registrant’s conduct are brought forward before Staff has completed its investigation. Like the authority to issue a Removal of Exemptions Order, the authority given to the Commission under subsection 127(1) to suspend or terminate a registration, or to impose terms and conditions on it, can be the subject of a temporary order but is not referred to in subsection 127(8).
- [75] As a result, if we reject Staff’s interpretation of “hearing” in subsection 127(7), that portion of a temporary order that affects a registration would expire on the fifteenth day after the date of the order, unless extended to the end of a Temporary Order Hearing.
- [76] We are sympathetic to Staff’s concern but we do not accept the submission that such an interpretation would render the Commission powerless. Staff has other avenues available to it, including the Director’s authority under clause 28(a) of the Act to suspend or impose terms and conditions on a registration, if it appears to the Director that the registrant has failed to comply with Ontario securities law.

4. Rules of Procedure and practice guidelines

- [77] Staff refers to various provisions in the Commission’s *Rules of Procedure* and in practice guidelines issued by the Commission with respect to adjudicative matters.

[78] In the circumstances of this case, we do not rely on those documents. There is questionable value in relying on rules and guidelines promulgated by the Commission to assist in interpreting an act of the legislature.

VI. CONCLUSION

[79] Before summarizing our conclusions with respect to this matter, we note that this decision relates only to the interpretation of subsection 127(7) in the context of extensions of temporary orders in enforcement-related matters. Our decision does not relate to, for example, proceedings under section 104 of the Act, which typically arise out of mergers, acquisitions, and similar transactions. In a matter under section 104 with respect to which a temporary order is issued under subsection 127(5), and where a request is made under subsection 127(7) to extend that temporary order, the word "hearing" might accommodate an additional meaning. That question did not arise in this case and was not argued before us, and we therefore expressly decline to consider it.

[80] For the reasons set out above, we conclude that a broad and purposive interpretation of subsection 127(7) of the Act enables it to apply to more than one scenario. The subsection cannot, though, bear the interpretations sought by Staff, however helpful that might be in enforcing the Act. The legislature chose not to include Removal of Exemptions Orders in subsection 127(8). We cannot stretch the meaning of subsection (7) to allow Staff to seek to extend, on a similar basis, such orders without jurisdictional limitation. The gap, if there is one, must be addressed through legislative amendment.

[81] Finally, we wish to acknowledge the able submissions of counsel on a difficult issue and we thank them for their valuable assistance.

Dated at Toronto this 4th day of July, 2017.

"Timothy Moseley"
Timothy Moseley

"William Furlong"
William Furlong

"Mark Sandler"
Mark Sandler