



Ford government's appointment of Heather Zordel as OSC chair prompts resignations

GREG MCARTHUR > SECURITIES REGULATION REPORTER

ANDREW WILLIS >

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Heather Zordel's appointment as the chair of the board of the Ontario Securities Commission has prompted resignations. 'I have chosen to dedicate my time and attention to my work at the commission in the spirit of public service, a concept which I firmly believe in,' Zordel said.

RYAN WALKER/THE GLOBE AND MAIL

The Ford government's appointment of a Bay Street lawyer and Tory fundraiser to chair Ontario's securities regulator has prompted two high-profile resignations, as well as

concerns about her conduct and her dissenting views in her decisions regarding the laws that govern the capital markets.

Heather Zordel, a securities lawyer and a former partner with Gardiner Roberts LLP, was named this March as the new chair of the board of the Ontario Securities Commission, Canada's largest regulator of capital markets.

The regulator has recently undergone a major restructuring, and Ms. Zordel is the first person to chair a new version of the OSC board that will be completely detached from the agency's tribunal, which makes rulings on alleged breaches of law. Under the old system, OSC commissioners served dual roles – adjudicating cases while also overseeing the strategic direction of the agency as members of the board of directors.

What was not explained in the announcement that marked Ms. Zordel's appointment a few months ago, however, was that she had left the OSC a little more than a year earlier after a majority of her peers recommended against her reappointment.

Investor protection experts say the elevation of Ms. Zordel to the top position of corporate governance at the agency is part of a broader pattern of the Ford government putting an anti-regulatory stamp on the OSC.

Ms. Zordel has spent most of her legal career advising entrepreneurs who run junior mining and energy companies, as well as growth-focused technology companies and private businesses, which tend to be riskier investments than large, established corporations.

The commission is also supposed to operate at arm's length from elected officials. Ontario Auditor-General Bonnie Lysyk criticized the Ford government in 2021 for putting the regulator's operational independence at risk, citing the government's decision to veto, publicly, the OSC's plan to ban certain fees on mutual funds.

In that same report, Ms. Lysyk also highlighted as problematic four commissioner appointments she said the government made in 2019 without seeking input from the OSC – a deviation from the typical practice in which the regulator provides recommendations to the government. In her interviews with former and current commissioners, Ms. Lysyk heard complaints that the appointment process had become “significantly politicized,” she wrote.



Ontario Auditor General Bonnie Lysyk in 2016. Lysyk criticized the Ford government in 2021 for putting the OSC's operational independence at risk.

CHRISTOPHER KATSAROV/THE CANADIAN PRESS

One of those 2019 appointments was given to Ms. Zordel, a long-time donor to Tories at provincial and federal levels who was also part of the fundraising team for the federal Conservative leadership campaign of then-MP Kellie Leitch in 2016. In addition, Ms. Zordel served on the seven-member expert panel, convened by then-prime minister Stephen Harper's government, that recommended the creation of a national securities regulator in 2009.

Ms. Zordel's tenure with the OSC from 2019 to 2021 was contentious, a Globe and Mail investigation has found:

- In the months after Ms. Zordel's initial appointment in 2019, she intervened with OSC staff on behalf of a penny stock mining company that was deemed to be in default of its disclosure requirements, two sources said in interviews. The company, Renforth Resources Inc., was a client of Ms. Zordel's law firm, Gardiner Roberts, and, in 2017, Ms. Zordel was a Renforth shareholder, public records show.

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– Two of the part-time commissioners who served with Ms. Zordel between 2019 and 2021 were so disappointed in her appointment as the new OSC board chair that they resigned their positions in protest. One of those commissioners, former OSC lead director Lorie Haber, called her appointment a “disturbing development” and “almost incomprehensible” in his resignation letter, which was obtained by The Globe. Craig Hayman, who had been serving as the chair of the OSC board’s governance and nominating committee, also resigned to protest Ms. Zordel’s appointment.

– In the calendar year 2021, Ms. Zordel was the highest paid of all of the OSC’s nine part-time commissioners, earning more than \$186,000. She served in her part-time commissioner role for about six weeks in 2021, and the lion’s share of her compensation was earned after she left her regular duties at OSC on Feb. 13, 2021. That’s because the bulk of the work she performed was spent researching and writing dissenting legal opinions in two cases she adjudicated earlier in her term. Her two dissents, one of which is 88 pages long, have been criticized by investor protection advocates.

The Globe sent Ms. Zordel questions on these matters and several other subjects. She responded to some questions, but not others, including her alleged interventions on behalf of Renforth, the junior mining company, in 2019. In Ms. Zordel’s only response to The Globe, a May 26 letter, she denied having ever acting improperly on behalf of a client with OSC staff while she served as a part-time commissioner. When The Globe followed up with more specific questions about Renforth, she did not respond.

But two sources with knowledge of the incident said that, at some point after her 2019 appointment, Ms. Zordel communicated with OSC staff about Renforth in and around the time the company was found to be in default of its disclosure requirements. The Globe is not identifying the sources because they were not authorized to speak about the matter.

Renforth, a penny stock company traded on the Canadian Securities Exchange, had been told by the OSC to update technical reports for deposits at two of its properties in Quebec. In

a Sept. 20, 2019, news release, the company said the regulator wanted the public to know investors should not rely on Renforth's existing technical reports.

In addition to Gardiner Roberts, her law firm at the time, having acted for Renforth, Ms. Zordel has also been a Renforth shareholder, public records show. In 2017, she participated in a private placement in Renforth and received 400,000 shares for 5 cents each, public records show. It's not known whether she was still a shareholder in 2019 at the time of her alleged communication with OSC staff.

As a part-time commissioner, Ms. Zordel was subject to the OSC's code of conduct, which required her to take "all reasonable steps to avoid being in an actual, apparent or potential conflict of interest." The OSC declined to comment on what, if anything, happened after Ms. Zordel's alleged communication with staff, and how, or if, it was dealt with internally.

The chief executive officer of Renforth, Nicole Brewster, declined to respond to questions from The Globe.

Although Ms. Zordel did not respond to The Globe's questions about the alleged 2019 Renforth incident, she detailed, in a letter, the steps she has taken since being named chair of the regulator's board to avoid conflicts. She has resigned from her partnership at Gardiner Roberts, she said. She also said she has consulted with Ontario's Integrity Commissioner "on all these issues and he has approved of all my conduct and steps taken to avoid any appearance of conflict."

A spokesperson for Premier Doug Ford did not respond to requests for comment for this story. A spokesperson for Finance Minister Peter Bethlenfalvy declined to respond to questions about what, if anything, Mr. Bethlenfalvy knew about the alleged Renforth matter when Ms. Zordel was named chair of the OSC board.

The government has also not provided any explanation for the appointment process, which saw Ms. Zordel leave the OSC in 2021 only to be reappointed and elevated within the organization 13 months later. Ms. Zordel also did not respond to questions about how that unfolded.

The Globe has learned that in the fall of 2020, all of the OSC's nine part-time commissioners were canvassed by Mr. Haber, who was the lead director of the OSC board at the time, about the performance of the four part-time commissioners whose terms were set to expire in the

coming months. The responsibility of the lead director to gather such feedback is mandated by the OSC's Charter of Governance.



Grant Vingoe, then Chair and CEO of the OSC, in April 2020.

MELISSA TAIT/THE GLOBE AND MAIL

In response, five of Ms. Zordel's eight part-time commissioner peers said they did not support her renewal. That feedback was taken to Grant Vingoe, the OSC's then chair and CEO, before he was required to make his recommendation to the government about whether to reappoint Ms. Zordel.

Exactly what Mr. Vingoe advised the government to do, and how it proceeded, is not clear. Shortly before the expiry of Ms. Zordel's term in February, 2021, she told at least one commissioner colleague that she was too busy in her law practice and other professional duties to continue as a commissioner and was stepping down.

But what is clear is that her promotion to chair a little more than a year later was met with frustration by some of her former commissioner peers.

Mr. Haber, who had received the feedback about Ms. Zordel's performance when he polled the other part-time commissioners, was preparing to become an adjudicator with Ontario's new Capital Markets Tribunal when he learned, in March, that Ms. Zordel was returning to the regulator as its new chair. The next day, March 10, he submitted his letter of resignation, which he said was effective immediately.

"In light of yesterday's disturbing development, I no longer have the appetite to serve on the Tribunal for any material period of time or serve the Commission in any other capacity," he wrote to Mr. Vingoe. (Mr. Vingoe is now solely the OSC's CEO, as the duties of chair and CEO have been split into a more traditional system in which they are filled by different people.)

Ontario Securities Commission withdraws some charges against former CannTrust leaders at pretrial hearing

Mr. Haber declined to comment.

Craig Hayman, who was chairing the OSC's governance and nominating committee at the time of the announcement, also resigned. He had been preparing to transition into a new role on the board of directors of the reconfigured OSC, but said he could no longer serve because of Ms. Zordel's appointment. He also declined to comment, except to confirm to The Globe that he resigned in protest of Ms. Zordel's appointment as chair.

Although there was friction between Ms. Zordel and some of her fellow commissioners, some market participants say Ms. Zordel will bring an important and often overlooked perspective to the OSC, where leadership positions have been dominated by lawyers who represent, primarily, large corporations.

Ms. Zordel has spent her career advising more aggressive small growth companies. **This background is one of several reasons why she is an inspired choice to chair the board of the regulator, said David S. Brown, a senior partner at WeirFoulds LLP, and a co-founder of the Private Capital Markets Association of Canada.**

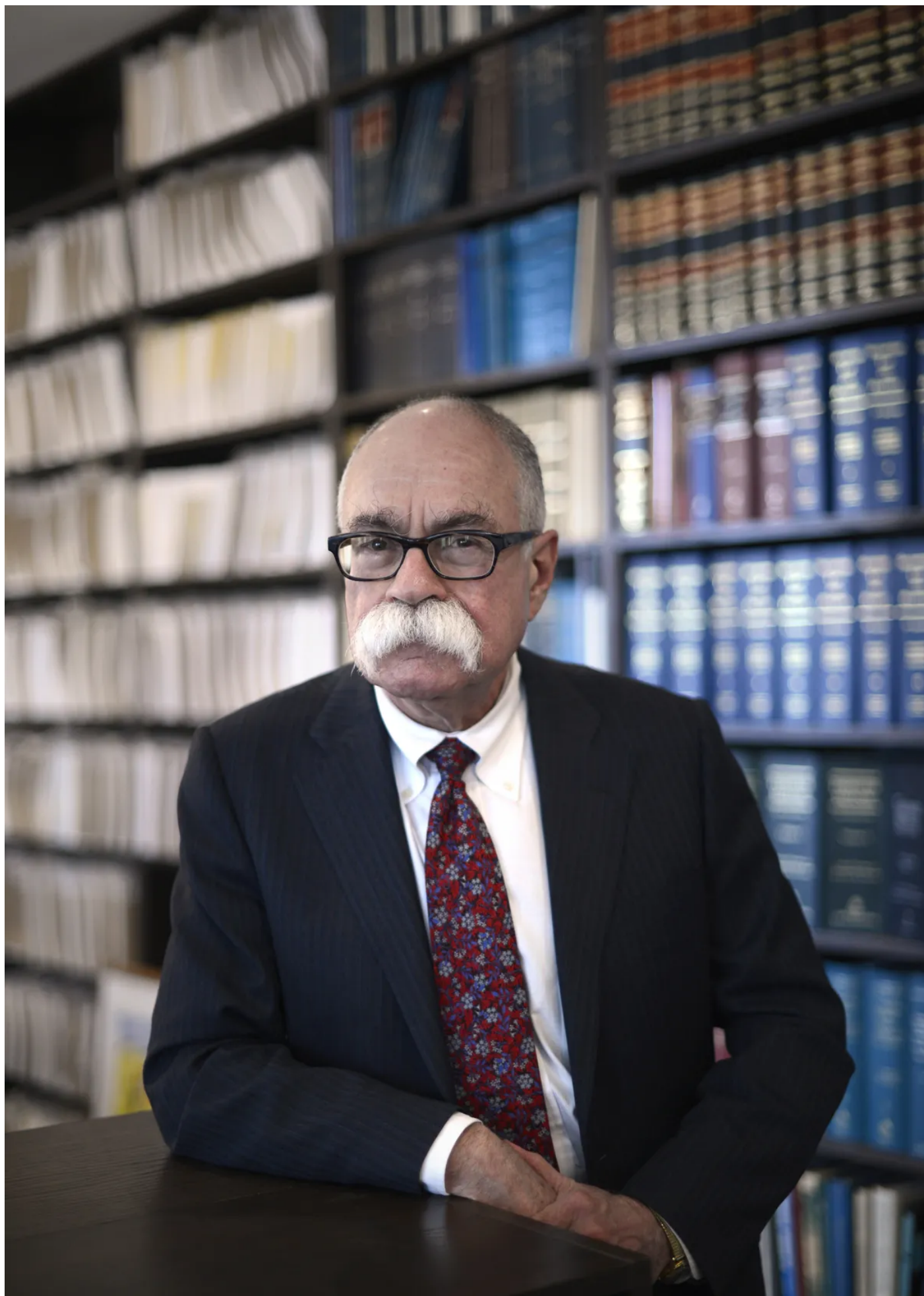
"If I were to hazard a guess, Ms. Zordel has been professionally trained to view the world through the lens of those of her clients and their interests, namely, through the lens of entrepreneurialism, risk-taking, capital formation, job creation and, above all else, a fealty to playing by the rules," Mr. Brown said.

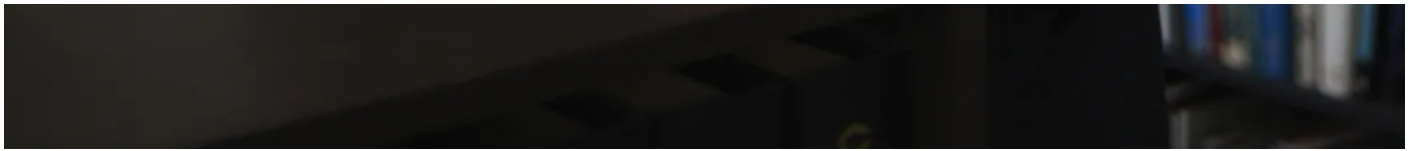
Some of her views on how market participants are to play by the rules, however, have been criticized by investor protection advocates.

In both of the two decisions she worked on after her departure, Ms. Zordel was part of a three-person adjudicative panel. In both cases, she dissented in part from the majority, writing two of only three dissents in OSC enforcement proceedings over the past decade, according to the regulator's records.

In her dissents, Ms. Zordel differed from the other two members of each adjudicative panel on several core issues in securities law. Those issues include what constitutes material, non-public information (MNPI), which can lead to illegal insider trading. She also disagreed with other panelists about how much leeway an investment fund has to deviate from its offering memoranda before its actions become fraudulent.

Although dissents are considered an important part of jurisprudence and allow for an array of opinions, Ms. Zordel's findings have come under fire from investor protection advocates for being too forgiving of questionable conduct and, in other cases, being incorrect in law.





Veteran securities lawyer Philip Anisman in his Toronto office in 2013.

FRED LUM/THE GLOBE AND MAIL

Philip Anisman is a securities lawyer who has a wide range of professional experience, including drafting policy, teaching the law, adjudicating cases as an OSC commissioner and defending clients accused of wrongdoing. He said Ms. Zordel's dissents were well written and thorough, but some of the views she espouses in them would, if enacted in law, set investor protection back between 50 and 100 years.

This is concerning, Mr. Anisman said, because in her new role as chair of the board, Ms. Zordel will have greater influence on the policies and enforcement priorities of the OSC than she did as one voice on an adjudicative panel.

"One has to ask whether the government, in appointing a person who holds these views, itself has an orientation toward securities regulation and investor protection that is inconsistent with the history of securities regulation in this country to date," Mr. Anisman said.

He added: "And for those like me who think that strong investor protection is essential to market confidence in a well-functioning market, that could be quite retrogressive."

In her only response to The Globe's questions, Ms. Zordel said it would be inappropriate for her to comment on the criticisms of her dissents given that she was acting in a quasi-judicial role when she wrote them. "Commentators are entitled to their opinions. Lawyers from time to time disagree with the decisions of tribunals," she said.

She added: "I have chosen to dedicate my time and attention to my work at the commission in the spirit of public service, a concept which I firmly believe in."

One of Ms. Zordel's two dissents concerned a mortgage investment company called Paramount Equity Financial Corp. OSC staff alleged Paramount, as well as a number of affiliates, and its three principals, defrauded about 500 investors who had pumped more than \$70-million into Paramount's mortgage funds.

The company promoted itself in marketing material as offering “predictable, steady returns” and likened Paramount to a “high-returning annuity/GIC alternative.” The term sheets issued by one of Paramount’s funds stipulated it would invest in second mortgages on residential properties and the fund’s offering memorandum used similar language.

The offering memorandum also stated that although it was possible Paramount could invest in commercial mortgages, including on land being acquired for residential development, the fund would primarily invest in second mortgages on homes.

Investor funds, however, were deployed differently than advertised. About \$50-million of the \$70-million backed high-risk mortgages on raw, undeveloped land, as well as existing commercial buildings with a view to possibly building multiresidential developments. What’s more, the three men behind Paramount held ownership stakes in a number of the multiresidential projects that borrowed from Paramount.

Two of the three adjudicators on the OSC panel ruled that the assurances provided to Paramount investors were fraudulent misrepresentations. Paramount’s disclosure about the principals’ ownership in the development projects was also insufficient, the majority found.

Ms. Zordel largely disagreed, and found that only one of the three trustees behind Paramount acted fraudulently.

In an 18-page partial dissent, she said she didn’t think the offering memorandum for Paramount’s largest fund was a fraudulent misrepresentation. She described an offering memorandum as “a roadmap” that should not prevent a business from altering course.

“Sometimes plans change and things do not happen as expected. In my view, that does not mean the offering memorandum and related materials are inherently fraudulent,” she wrote. The language in the offering memorandum afforded Paramount “considerable investment latitude,” she also found.

Harold Geller, an Ottawa lawyer who frequently represents investors who sue over investment advice they received, said Ms. Zordel’s views on Paramount’s offering memorandum should be concerning for ordinary investors and their expectations of the OSC.

“From the investor’s point of view, if you’re able to sell me on something and deliver something totally different by way of security, why would I have any faith in the system?”



The Amaya Gaming Group headquarters in Montreal in 2014.

RYAN REMIORZ/THE CANADIAN PRESS

The other dissent Ms. Zordel researched and wrote in 2021 centred around allegations of insider trading in connection with the US\$4.9-billion acquisition of the popular global gambling website PokerStars by Montreal’s relatively small Amaya Gaming Group Inc.

Numerous people were accused of trading and passing on illegal inside information about the deal in the case heard by Ms. Zordel and her fellow adjudicators. Many of those allegations flowed from a meeting at which confidential information was provided to Majd Kitmitto, a senior analyst at Toronto-based Aston Hill Asset Management Inc.

On April 29, 2014, Mr. Kitmitto attended a meeting with Canaccord Genuity and Amaya management about Aston Hill possibly participating in the financing of the deal. Mr.

Kitmitto was required to sign a non-disclosure agreement and told about the planned acquisition.

He was also provided with a slide deck that laid out a proposed purchase price, the companies possibly participating in the financing, as well as the anticipated date for announcing the deal, which was scheduled to take place two weeks after the meeting.

Two of the OSC panel's three adjudicators deemed all of these details to be material, non-public information – inside information that could give an unfair edge when trading and which was not available to the broader investing public. Many jurisdictions bar people from trading on such information – as well as passing it onto friends and clients – in an effort to ensure capital markets are not places where insiders get rich, but the average investor is disadvantaged.

Ms. Zordel disagreed with her peers about the information Mr. Kitmitto received. She found there was too much uncertainty around the deal for the information to have had a material effect on the price of Amaya's stock.

"Because of this uncertainty, and the fact there were many conditions yet to be fulfilled and different sources of financing transactions that needed to be completed, and because there was the possibility that parties could walk away given there was no signed agreement for the deal and no shareholder voting support agreements, I find that this did not yet constitute MNPI," Ms. Zordel wrote. She described the information contained in the slide deck as "aspirational," and not yet material.

The problem with that finding, several experts interviewed by The Globe said, is that all inside information about a potential deal has a degree of uncertainty until an agreement is signed – at which point public companies are obligated to disclose the finalization of the agreement. If Ms. Zordel's standard for certainty was applied to all information circulating about deals, it would "completely undermine the protection that insider trading legislation was intended to provide," Mr. Anisman said.

"It's simply incorrect. It's simply inconsistent with the statutory framework. It's wrong in principle. It's wrong in policy," he said.

Mr. Brown, the WeirFoulds lawyer who has been a vocal champion for private capital formation and Canada's exempt markets, said he thought both of Ms. Zordel's dissents were

“exceptionally well written, thoughtful, reasoned, logical and presented detailed cogent arguments.”

He also said that dissents are an important, healthy part of a quasi-judicial system, and the fact that there have been so few of them at the OSC suggests the commission’s old structure had led to a “classic case of ‘group think’ over the last decade.”

As chair of the newly structured board, Ms. Zordel is completely separate from the OSC’s adjudicative wing – which is now called the Capital Markets Tribunal. She will not be hearing cases, or ruling in any way whether someone violated the Ontario Securities Act.

However, her dissents provide a window into how she views the role of the regulator, and how she might shape the future policies of the OSC, experts said. Mr. Geller, the investor protection lawyer from Ottawa, said he views her appointment as a “back door” effort by the Ford government to water down rules that protect regular retail investors, but without the scrutiny that would take place if such reforms were enacted in a transparent way through legislative change.

“If we go back to an unbridled, buyer beware approach, then only the most sophisticated, who can independently investigate the truthfulness of an offering memorandum or a prospectus, for example, should be investing,” he said. “Everyone else should go to the U.S. Everyone else go to international markets. Ontario’s markets are at threat of being unreliable. So, I think that’s really serious.”

The work that Ms. Zordel performed on those two dissents is largely the reason she was paid \$186,000 in 2021, more than any other part-time OSC commissioner.

Although her appointment ended on Feb. 13, 2021, and therefore she was only a part-time commissioner for about six weeks that year, she was still adjudicating both cases and required to rule on them after leaving the commission. Her dissent in the Kitmitto case is 88 pages and in Paramount her dissent was 18 pages.

Besides a modest annual retainer of a few thousand dollars, part-time commissioners are compensated on a per diem basis. The maximum a part-time commissioner could bill, at that time, for work over a 24-hour period is \$1,500, according to guidelines set out by the OSC.

In Ms. Zordel's only response to The Globe's questions, she said about her compensation: "The fact is that I worked every hour that I billed and many that I did not bill on behalf of the OSC."

Heather Zordel at a glance

New Ontario Securities Commission chair Heather Zordel has spent her career advising entrepreneurs and as a political appointee to boards.

POLITICAL APPOINTMENTS

- OSC chair: March, 2022 – present
- OSC commissioner: 2019 – 2021
- Chair, Condominium Authority of Ontario: 2018 – present
- Member, federal finance Minister Jim Flaherty's panel on securities regulation: 2008

OTHER BOARD MEMBERSHIPS

- Toronto Hydro board: 2015 – present (Toronto Hydro is owned by the City of Toronto)

NON-POLITICAL ROLES IN LAW

- Partner, law firm Gardiner Roberts LLP: 2016 – 2022
- Lawyer, Cassels Brock & Blackwell LLP: 2006 – 2016
- Partner, Fraser Milner Casgrain LLP (now part of Dentons Canada LLP): 1999 – 2006
- Lawyer, Smith Lyons (now part of Gowling WLG): 1997 – 1998
- Corporate counsel, Toronto Stock Exchange: 1990 – 1996

Sources: *Gardiner Roberts LLP, Ontario Securities Commission, LinkedIn*