IN THE MATTER OF the *Ontario Energy Board Act, 1998* S.O. 1998, c. 15 (Schedule B) (the "**OEB Act**");

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance against Toronto Hydro-Electric System Limited

AMENDED MOTION MATERIALS

George Vegh

McCarthy Tétrault LLP
Toronto Dominion Bank Tower
Suite 5300, Box 48
Toronto, ON M5K 1E6

gvegh@mccarthy.ca

Tel: (416) 601-7709
Fax: (416) 868-0673

Counsel for Toronto Hydro Electric System Limited

EB-2009-0308

IN THE MATTER OF the *Ontario Energy Board Act, 1998* S.O. 1998, c. 15 (Schedule B) (the "**OEB Act**");

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance against Toronto Hydro-Electric System Limited

***AMENDED* NOTICE OF MOTION**

The Moving Party, Toronto Hydro Electric System Limited ("**THESL**") will bring a motion to the Board at a time and place to be determined by the Board Panel for orders respecting the disclosure and production of documents, a defined process for this proceeding and a schedule for the proceeding.

With respect to disclosure and production, THESL seeks an order requiring the disclosure and production of:

(1) all information that may relate to suite metering or smart metering practices of THESL or third parties, prepared, sent, received or reviewed by or exchanged with any employee of the OEB ("**Board Staff**") who was involved in the review and/or investigation of THESL in relation to THESL's smart-metering of condominium units ("**Compliance Staff**"). This information includes all notes, memoranda or other documentation (including e-mails) that were prepared, sent or received by, or exchanged with any staff member of the Board ("**Board Staff**"), including but not limited to any staff who are or were members of the Office of the Chief Compliance Officer, or the Office of the General Counsel, and any Board member that was involved in the review and/or investigation of THESL in relation to THESL's smart-metering of condominium units (such information is collectively referred to as the "**Compliance Information**"). The Compliance Information also includes all notes, memoranda and other documents disclosed to or shared with Compliance Staff from all of the Complainants identified in the letter from OEB Compliance Staff to THESL dated May 9, 2009 (collectively, the "**Complainants**"), namely:

- Metrogate Inc. Development;
- Residences of Avonshire Inc.;
- Deltera Inc.; and

- Enbridge Electric Connections Inc.

(2) all communications among the Complainants and sub-meterers or condominium developers addressing the terms on which sub-meterers offer to provide sub-metering to condominium developers in the City of Toronto, including all documentation and records of fees paid by sub-meterers to condominium developers in the City of Toronto ("**Complainant Information**");

(3) materials from the members of the Smart Sub-Metering Working Group ("**SSMWG**"). Specifically, that each member of the SSMWG produce all proposals made to, and all contracts made with, condominium developers with respect to the installation and operation of sub-meters for condominiums in the City of Toronto (the "**SSMWG Materials**").

With respect to the process for this proceeding, THESL requests an order

(1) Establishing the process for this proceeding, and in particular, providing direction as to how Board Staff, including any staff who are or were members of the Office of the General Counsel or the Office of the Chief Compliance Officer, who have been in any way engaged in the investigation or who will be prosecuting THESL under the present application ("**Prosecution Staff**"), are to govern themselves in any interactions with other Board Staff, including the Board Panel and other members of Board. Specifically, THESL requests that the following minimum standards be put in place by a procedural order prior to proceeding any further with this application:

(i) That a formal screen be established between the Prosecution Staff and the rest of Board Staff (including members of the Office of the General Counsel who are not participating in the prosecution) and all Board members, including the members of the panel hearing this application. The specific measures used to establish the screen should be set out in a procedural order and circulated to Board Staff;

(ii) That Prosecution Staff be identified in writing to all Board Staff and members. Such notice should include direction and instruction as to how Prosecution Staff are to be segregated through this screen from other Board Staff;

(iii) That Prosecution Staff shall in no material and relevant way interact with Board Staff (including other Board Counsel) or Board members, including the members of the panel hearing this application, other than as required throughout the course of this proceeding in a manner that is on the public record so that the Moving Party is aware of all of the information being exchanged or delivered;

(iv) Confirming that Board panel members hearing this application will only seek the advice of other Board Counsel (who have not participated in the investigation of prosecution of THESL) on questions of procedure, facts or mixed fact and law where such request and advice is on the public record so that the Moving Party is

aware of all of the information being exchanged or delivered and has the opportunity to make submissions on same;

(v) Confirming that, if the Board Panel requires legal advice from Board Staff after the hearing has been concluded, but during its deliberations, it will seek the advice on the public record so that the Moving Party is aware of all of the information being exchanged or delivered and has the opportunity to make submissions on same; and

(vi) That under no circumstances should Board Staff read or comment upon draft reasons for decision or write all or any part of any reasons for decisions.

With respect to a schedule for proceeding with this matter. THESL proposes the following:

Date	Event
September 10	OEB Prosecuting Counsel, Complainants, and SSMWG provide disclosure and production and OEB Prosecuting Counsel serves pre-filed evidence
September 15	THESL serves Interrogatories on pre-filed evidence and disclosure
September 18	OEB Prosecuting Counsel provides responses to Interrogatories
September 23	THESL serves and files defence evidence (if any)
September 24	Hearing Commences

Such further other order that the Moving Party requests and the Board considers appropriate.

The grounds for the order are:

(1) DISCLOSURE

Request for Disclosure of Compliance Information

1. By letters to Board Counsel ("**Prosecuting Counsel**") in these proceedings dated August 21 and August 28, 2009, THESL requested the disclosure of most of the categories of Compliance Information as defined herein.

Letters from Counsel for THESL to OEB Prosecuting Counsel, August 21 and 28, 2009.

2. By note dated September 1, 2009, Prosecuting Counsel provided a small amount of information, consisting largely of correspondence between Compliance Staff and THESL. Prosecuting Counsel failed or refused to provide the remainder of the Compliance Information. It has also not provided the Complainant Information. Prosecuting Counsel also provided a letter dated September 4, 2009. However, it was non-responsive to the requests.

Letters from Prosecuting Counsel to Counsel for THESL and "Disclosure Index of Contents" dated September 1 and 4, 2009.

3. By letter dated August 28, 2009, Counsel for THESL requested that the SSMWG provide the SSMWG Materials. Counsel for SSMWG has refused to do so.

Letter from Counsel for THESL to Counsel for SSMWG dated August 28, 2009.

Letter from Counsel for SSMWG to Counsel for THESL dated August 31, 2009.

4. THESL submits that it is entitled to all of this information and materials requested herein. With respect to the Compliance Information, its entitlement is based on the requirement that Prosecuting Counsel disclose the entirety of its materials. With respect to the Complainant Information and the SSMWG Materials in particular, THESL requires that information to address a specific defence under s. 3.1.1 (a) of the Distribution System Code (the "**DSC**").

Need for and Entitlement to Compliance Information

5. THESL is the subject of a prosecution before the Board, in which the outcome could drastically and negatively affect it. THESL is entitled to full disclosure of the Compliance Information in order to be able to properly defend itself and to ensure a just and fair decision by the Board.

6. This proposition is consistent with (i) the OEB's legislative authority; (ii) the OEB's past practice respecting disclosure of non-OEB applicants; and (iii) case law respecting disclosure in prosecutorial administrative proceedings. Each of these will be addressed in turn.

(i) The Board's Authority

7. The Board has the legislative authority to order broad disclosure including the exchange of documents, the oral or written examination of a party, the exchange of witness statements and reports of expert witnesses, the provision of particulars and any other form of disclosure it deems necessary.

***Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 5.4.**

***OEB Act*, s. 21.**

8. As part of the request for full disclosure, the Moving Party is seeking the disclosure of all documentation that was considered in the investigations that were carried out by Board Staff. Pursuant to the OEB Act, such investigations cannot be excluded from the evidence of a Board proceeding on the grounds of privilege, nor are such investigations deemed confidential.

OEB Act, s. 110(2) and s. 111(1).

(ii) OEB's Practice for Non-OEB Applicants

9. For non-OEB applicants, the Board has ordered broad disclosure when exercising its power as an economic regulator. THESL submits that the OEB should order even broader disclosure in the current adversarial proceeding in which the Moving Party is subject to prosecution.

10. Examples in which the Board has ordered broad disclosure in non-prosecutorial matters in the past include:

(a) EB-2007-0040, concerning the validity of an amendment to the Market Rules by the Independent Electricity System Operator (IESO) relating to the ramp rate assumption used in the market dispatch algorithm within the IESO-administered markets (the "**Amendment**"), in which the Board ordered disclosure of:

(i) material prepared by the IESO in the context of the Day Ahead Commitment Process and/or the Day Ahead Market initiative that directly relates to ramp rate; and

(ii) to the extent that they were prepared by the IESO and related to the Amendment:

- copies of all e-mail exchanges and other written communication between the IESO, stakeholders and their associations in relation to the Amendment or the subject matter of the Amendment; and

- copies of all internal memos, e-mail and other written communication among IESO staff and between staff and the IESO Technical Panel and/or Board of Directors, stakeholders, their respective associations, the OEB, the Ontario Power Authority and the Province of Ontario.

This request for disclosure was later amended by the Board to take into account the practical issues associated with amassing and organizing such material in the short time frame provided, being one week, as well as statutory deadlines. However, in the present proceedings, there are no statutory timelines so disclosure by Board Staff does not have to be restricted or constrained.

EB-2007-0040, Procedural Order No. 3, pp. 2-3.

(b) EB-2007-0930, Hydro One Networks Inc.'s ("**Hydro One**") application to amend its distribution license, in which the Board gave Hydro One less than a month to produce:

"...any and all information it has in its possession related to the impacts that the delay in timelines has on generators waiting to connect to Hydro One's distribution system. This includes, but is not limited to, any and all correspondence and complaints Hydro One has received from generators (both written and transcripts of voice recordings) in relation to Hydro One not meeting its timelines. The information provided does not need to contain the specific name(s) of the person making the complaint."

EB-2007-0930, Procedural Order No. 2, at p. 2.

11. Thus, in non-prosecutorial hearings, the Board has ordered very broad disclosure. This is a *minimum* standard. As discussed below, the standard is higher in prosecutorial administrative proceedings.

(iii) Case Law respecting Disclosure in Prosecutorial Proceedings

12. In addition to statutory requirements and the Board's practice of ordering broad disclosure, the jurisprudence is that administrative tribunals must follow the rules of procedural fairness, which rules call for broad disclosure in prosecutorial proceedings.

13. The highest level of disclosure required is in criminal cases, where the so-called *Stinchcombe* standard is applied.

***R v. Stinchcombe*, [1991] 3 S.C.R. 326.**

14. The *Stinchcombe* standard is a guide to disciplinary administrative proceedings under certain circumstances. As stated in *Milner v. Registered Nurses Assn of British Columbia*:

"In any case, I am satisfied that since Yeung (supra) was decided, the Courts have clearly moved toward requiring administrative disciplinary tribunals to approach, if not meet, the *Stinchcombe* standard."

***Milner v. Registered Nurses Assn of British Columbia*, 71 B.C.L.R. (3d) 372, at par. 8, citing *Yeung v. RNABC* (June 16, 1994) Vancouver Registry No. A934379 (BCSC).**

15. Thus, where an administrative agency is acting in a prosecutorial fashion, it must provide all relevant information, whether inculpatory or exculpatory. As the Ontario Court of Justice stated in *Markandey v. Ontario*:

> "Although the standards of pre-trial disclosure in criminal matters would generally be higher than in administrative matters (See *Biscotti et al. v. Ontario Securities Commission*, supra), tribunals should disclose all information relevant to the conduct of the case, whether it be damaging to or supportive of a respondent's position, in a timely manner unless it is privileged as a matter of law. Minimally, this should include copies of all witness statements and notes of the investigators. The disclosure should be made by counsel to the Board after a diligent review of the course of the investigation. Where information is withheld on the basis of its irrelevance or a claim of legal privilege, counsel should facilitate of review of these decisions, if necessary. The absence of a request for disclosure, whether it be for additional disclosure or otherwise, is of no significance. The obligation to make disclosure is a continuing one. The Board has a positive obligation to ensure the fairness of its own processes. The failure to make proper disclosure impacts significantly on the appearance of justice and the fairness of the hearing itself. Seldom will relief not be granted for a failure to make proper disclosure."
>
> ***Markandey v. Ontario (Board of Opthalmic Dispensers)*, [1994] O.J. No. 484, at par. 43 (emphasis added).**
>
> ***Re Suman*, 32 O.S.C.B. 592, (OSC) at par. 38.**

16. Further, the requirement is to disclose and produce all information, not just information that the prosecution proposes to rely upon. If the prosecution proposes to refuse production of a document within its possession and control, then it must identify that document and justify the grounds for refusal As the Ontario Court of Appeal stated in *Ontario Human Rights Commission* v. *Dofasco*:

> "This interpretation accords with one of the recognized purposes of discovery, which include not only enabling a party to know the case he or she has to meet but, also, to obtain documents 'which may ...enable the party requiring the affidavit [of documents] either to advance his own case or to damage the case of his adversary'"
>
> ***Ontario Human Rights Commission* v. *Dofasco*, 2001 CanLII 2554 (ON. C.A), at 77 (emphasis in the original).**

17. Even in situations where the administrative tribunal is carrying out its adjudicative function in a non-prosecutorial capacity, to which the *Stinchcombe* standard may not apply, courts have confirmed that it is dangerous practice for a tribunal to refrain from disclosing to the parties any information that may ultimately bear directly on the issue upon which the tribunal was called to decide.

> ***Toshiba Corporation v. Canada (Anti-Dumping Tribunal)*, [1984] F.C.J. No. 247, (F.C.A.).**

18. Given that the Board is holding a prosecutorial hearing in which the outcome of the proceeding could have severe consequences for THESL, in order to meet the obligations of procedural fairness imposed on it by jurisprudence, Board Staff should be required to produce the Compliance Information.

Need for and Entitlement to Complainant Information and the SSMWG Materials

19. The test for whether the Board should order disclosure of this information is whether it is "arguably relevant" to an issue in a proceeding. Information is relevant to an issue in a prosecutorial proceeding where it may be relevant to a specific defence. Thus, for example, in the *Dofasco* case, the Court of Appeal held that any information that was "arguably relevant to Dofasco's section 17 [of the *Human Rights Act*] accommodation defence" had to be produced.

> ***Ontario Human Rights Commission* v. *Dofasco*, 2001 CanLII 2554 (ON. C.A) at 25 and 54.**

20. In this proceeding, THESL will make a number of defences to the allegations in the Notice of Proceeding. As THESL advised Prosecuting Counsel,

> "As currently advised, THESL's position is that the Board should not make any order against it under Part VII.1 of the Act because THESL's practice with respect to suite metering of new condominium units:
>
> (i) does not violate any enforceable provision, including those specified in the Board's Notice of Intention;
>
> (ii) is consistent with (a) promoting electricity conservation and demand management consistent with the policies of the Government of Ontario; (b) facilitating the implementation of the smart grid; and (c) promoting the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario; and
>
> (iii) prevents the unauthorized mark up of distribution costs by condominium developers and/or their agents and is therefore also permitted by 3.1.1 (a) of the Distribution System Code, which authorizes the refusal to connect where a customer will contravene the laws of Ontario."
>
> **Letter from Counsel for THESL to OEB Prosecuting Counsel, August 28, 2009.**

21. Information on the financial arrangements between sub-meterers and condominium developers is particularly relevant to issue (iii) above. Specifically, although THESL denies that it refused to connect anyone who requested it to do so, it also relies on the s. 3.1.1 of the DSC which provides that,

"in complying with its obligations under section 28 of the *Electricity Act*, a distributor may consider the following reasons to refuse to connect, or continue to connect, a customer:

(a) contravention of the laws of Canada or the Province of Ontario…"

22. It is currently illegal for unlicenced distributors (or their agents – sub-meterers) to profit from distribution activities. THESL seeks information on the financial arrangements between condominium developers and sub-meterers so that it can address whether either or both of these are seeking to unlawfully profit from distribution activities. As a result, THESL is entitled to the information because it is arguably relevant to THESL's defence under s. 3.1.1 of the DSC.

23. Further, the Board has the power to make this order whether the Complainants or the SSMWG are parties to this proceeding or not. The Board has the power to order the preparation of evidence in s. 21 of the *OEB Act*, and it has indicated in other proceedings that it is prepared to order the preparation of evidence.

OEB Act, s. 21.

See also: *Ontario Human Rights Commission* v. *Dofasco*, 2001 CanLII 2554 (ON. C.A) at 51.

(2) ROLE OF PROSECUTION STAFF

24. The OEB does not have rules of practice to govern the conduct of a compliance proceeding under Part VII.1 of the OEB Act. It also has no precedent for this type of application. As a result, THESL, as the first party to be subject to a contested prosecution at the OEB, has no indication of the procedural rights it will be afforded in the application.

25. By letter dated August 21, 2009 to Prosecuting Counsel, THESL requested Counsel's consent to an appropriate arrangement for the division of staff responsibilities, but Prosecuting Counsel has failed or refused to provide it.

Letter from Counsel for THESL to OEB Prosecuting Counsel, August 21, 2009.

26. It is therefore necessary for the Board to provide this direction in a procedural order.

27. With respect to bias, the test is whether a reasonable person, in possession of all of the relevant facts, after having thought the matter through carefully, concludes that a reasonable apprehension of bias existed in the circumstances in the case.

***Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, per Grandpré.**

28. The OEB as it is currently structured engages in policy-setting, rule-making, investigation, prosecution and adjudication under one statutorily established umbrella. In the absence of clear rules how this prosecution will be carried out, there is a reasonable perception of bias at the level of the OEB's adjudicative function. As the Ontario Court of Appeal stated in *Re Sawyer and Ontario Racing Commission*:

> "In my opinion the Commission misunderstood the function of counsel who presented the case against the appellant before them. He was variously described as counsel to the Commission, counsel for the Commission and counsel for the Commission Administration. But there is no doubt that his role was to prosecute the case against the appellant and he was not present in a role comparable to that of a legal assessor to the Commission as discussed by Schroeder J.A., in *Re Glassman and Council of College of Physicians & Surgeons*, [1966] 2 O.R. 81 at p. 99, 55 D.L.R. (2d) 674 at p. 692. He was counsel for the appellant's adversary in proceedings to determine the appellant's guilt or innocence on the charge against him."

***Re Sawyer and Ontario Racing Commission* (1979), 24 O.R. (2s) 673, (Ont CA), (Lexisnexis Publication, p. 3), emphasis added.**

See also, *A Report with Respect to Decision-Making Processes at the OEB*, September, 2006, pp. 25-29.

29. In order to mitigate a reasonable apprehension of bias in this proceeding, Prosecution Staff should be formally segregated from other Board Staff. One cannot act as both prosecutor and legal advisor to a disciplinary tribunal, lest a reasonable apprehension of bias is created.

***Violette v. Dental Society (New Brunswick)*, 2004 NBCA 1, at p. 25.**

30. The OEB's current structure is analogous to the structure of the administrative tribunal considered by the Supreme Court of Canada in *Régie des alcohols, des courses et des jeux v. 2727-3174 Québec Inc.*, ("***2727-3174 Québec***"). That case involved the decision by the Régie to cancel a liquor permit, which was rendered following a hearing via an investigative process that had been initiated by the Régie. The Supreme Court of Canada found that both in practice and under the governing legislation, employees of the Régie participated in the investigation, the filing of complaints, the presentation of the case to the directors and the decision. In particular, the Court found that a reasonable apprehension of bias existed with respect to the role of the Régie's lawyers:

> "The Act and regulations do not define the duties of these jurists. The Régie's annual report however, and the description of their jobs at the Régie, show that they are called upon to review files in order to advise the Régie on the action to be taken, prepare files, draft notices of summons, present arguments to the directors and draft opinions. The annual report and the silence of the Act and regulations leave open the possibility of the same jurist performing these various

> functions in the same matter. The annual report mentions no measures taken to separate the lawyers involved at different stages of the process. Yet it seems that such measures, the precise limits of which I will deliberately refrain from outlining, are essential in the circumstances.... As I need only note, to dispose of it, that prosecuting counsel must in no circumstances be in a position to participate in the adjudication process."
>
> ***2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at paras. 54, 56.**

31. The Board operates in a manner that is strikingly similar to the structure under which the Régie operated. Like the act governing the Régie, the OEB Act is also silent on the duties and functions of Prosecution Staff. It follows that the Board should not proceed with a prosecution without first formalizing measures to segregate Prosecution Staff from other Board Staff.

Minimum Conditions Governing this Proceeding

32. Given the above, THESL submits that, prior to proceeding with any disciplinary hearing, the OEB should implement formal rules to govern the actions of Prosecuting Staff. In doing so, the OEB would be following the example of other administrative tribunals that have a similar structure to the OEB's. Such administrative tribunals have undertaken formal reviews of their structure and implemented changes to ensure that, in performing adjudicative functions there is no reasonable apprehension of bias.

> **The Honourable Coulter A. Osborne, Q.C., David Mullan, Bryan Finlay, Q.C., *The Report of the Fairness Committee to David A. Brown, Q.C., Chair of the Ontario Securities Commission*, March 5, 2004, pp. 33 and 48.**

33. Given the clear statement of law on the matter of bias and the practice of other administrative tribunals, THESL proposes that the following minimum standards be put in place by a procedural order prior to proceeding any further with this application, and in particular, providing direction as to how Board Staff, including any staff who are or were members of the Office of the General Counsel or the Office of the Chief Compliance Officer, who have been in any way engaged in the investigation or who will be prosecuting THESL under the present application ("**Prosecution Staff**"), are to govern themselves in any interactions with other Board Staff, including the Board Panel and other members of Board. Specifically, THESL requests that the following minimum standards be put in place by a procedural order prior to proceeding any further with this application:

> (i) That a formal screen be established between the Prosecution Staff and the rest of Board Staff (including members of the Office of the General Counsel who are not participating in the prosecution) and all Board members, including the members of the panel hearing this application. The specific measures used to

establish the screen should be set out in a procedural order and circulated to Board Staff;

(ii) That Prosecution Staff be identified in writing to all Board Staff and members. Such notice should include direction and instruction as to how Prosecution Staff are to be segregated through this screen from other Board Staff;

(iii) That Prosecution Staff shall in no material and relevant way interact with Board Staff (including other Board Counsel) or Board members, including the members of the panel hearing this application, other than as required throughout the course of this proceeding in a manner that is on the public record so that the Moving Party is aware of all of the information being exchanged or delivered;

(iv) Confirming that Board panel members hearing this application will only seek the advice of other Board Counsel (who have not participated in the investigation of prosecution of THESL) on questions of procedure, facts or mixed fact and law where such request and advice is on the public record so that the Moving Party is aware of all of the information being exchanged or delivered and has the opportunity to make submissions on same;

(v) Confirming that, if the Board Panel requires legal advice from Board Staff after the hearing has been concluded, but during its deliberations, it will seek the advice on the public record so that the Moving Party is aware of all of the information being exchanged or delivered and has the opportunity to make submissions on same; and

(vi) That under no circumstances should Board Staff read or comment upon draft reasons for decision or write all or any part of any reasons for decisions.

Schedule for Proceeding

34. By letter dated August 28 to Prosecuting Counsel, THESL requested Prosecuting Counsel's consent to a schedule for this proceeding, but Prosecuting Counsel has failed or refused to provide it. The consequence has been greater uncertainty and delay. In order to bring an orderly approach to this proceeding, THESL proposes the following schedule:

Date	Event
September 10	OEB Prosecuting Counsel, Complainants, and SSMWG provide disclosure and production and OEB Prosecuting Counsel serves pre-filed evidence
September 15	THESL serves Interrogatories on pre-filed evidence and disclosure.

September 18	OEB Prosecuting Counsel provides responses to Interrogatories
September 23	THESL serves and files defence evidence (if any)
September 24	Hearing Commences

Letter from Counsel for THESL to OEB Prosecuting Counsel, August 28, 2009.

(3) CONCLUSION

35. THESL respectfully submits that in order for the hearing to proceed in a manner that is fair, unbiased and efficient, that the Board make the Orders requested in paragraph 1 of this Motion.

Date: September 4, 2009

George Vegh

McCarthy Tétrault LLP

Telephone 416-601-7709

Email: gvegh@mccarthy.ca

Counsel for Toronto Hydro-Electric System Limited

To:

Ontario Energy Board

P.O. Box 2319

2300 Yonge Street, 27th Floor

Toronto, Ontario

M4P 1E4

Attention: Board Secretary

To:

Maureen Helt

Prosecuting Counsel

Ontario Energy Board

P.O. Box 2319

2300 Yonge Street, 27th Floor

Toronto, Ontario

M4P 1E4

To:

Dennis O'Leary

Aird & Berlis

Brookfield Place

181 Bay Street, Suite 1800

Box 754

Toronto, ON

M5J 2T9

To:

Guru Kalyanraman

Electricity Distributors Association

3700 Steeles Ave. W.

Suite 1100

Vaughan, ON

L4L 8K8

To:

Lou Tersigni

Project Manager

Metrogate Inc. Development;

4800 Dufferin Street

Toronto, Ontario

M3H 5S9

To:

Giusèppe Bello

Project Manager

Residences of Avonshire Inc.;

4800 Dufferin Street

Toronto, Ontario

M3H 5S9

To:

Deltera Inc.

4800 Dufferin Street

Toronto, Ontario

M3H 5S9

To:

Enbridge Electric Connections Inc.

Mr. Allen Maclure

Director Administration

Enbridge Electric Connections Inc.

30 Leek Crescent, Suite 103

Richmond Hill, Ontario

L4B 4N4

Table of Contents

Materials to be used at Hearing of the Motion

20. A Report with Respect to Decision-Making Processes at the OEB, September 2006.

21. *Violette v. Dental Society (New Brunswick)*, 2004 NBCA 1, at p. 25, (NBCA).

22. *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, (SCC).

23. The Honourable Coulter A. Osborne, Q.C., David Mullan, Bryan Finlay, Q.C., The Report of the Fairness Committee to David A. Brown, Q.C., Chair of the Ontario Securities Commission, March 5, 2004.

Barristers & Solicitors
Patent & Trade-mark Agents

McCarthy Tétrault

McCarthy Tétrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6
Canada
Telephone: 416 362-1812
Facsimile: 416 868-0673
mccarthy.ca

George Vegh
Direct Line: 416 -601-7709
Direct Fax: 416-868-0673
E-Mail: gvegh@mccarthy.ca

August 21, 2009

Maureen Helt
Counsel
Ontario Energy Board
2300 Yonge Street
Toronto, Ontario
M4P 1E4

Dear Ms. Helt:

Re: Smart Metering and Smart Sub-Metering in New Condominiums
Board File No: EB 2009-0308

We are counsel for Toronto Hydro –Electric System Limited ("THESL") with respect to the above noted matter.

As you are aware, on August 4, 2009, the Board issued a Notice of Intention to make an Order for Compliance as well as any other order it deems appropriate under sections 112.3, 112.4 or 112.5 of the *Ontario Energy Board Act, 1998* (the "*Act*"). THESL provided the Board Secretary with notice requiring the Board to hold a hearing under s. 112.2(4) of the *Act* on August 17, 2009. That notice indicated that THESL will defend itself against the Board's allegations.

As currently advised, THESL's position is that the Board should not make any order against it under Part VII.1 of the *Act* because THESL's practice with respect to suite metering of new condominium units:

(i) does not violate any enforceable provision, including those specified in the Board's Notice of Intention;

(ii) is consistent with (a) promoting electricity conservation and demand management consistent with the policies of the Government of Ontario; (b) facilitating the implementation of the smart grid; and (c) promoting the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario; and

(iii) prevents the unauthorized mark up of distribution costs by condominium developers and/or their agents and is therefore also permitted by 3.1.1 (a) of the Distribution System Code, which authorizes the refusal to connect where a customer will contravene the laws of Ontario.

As I am sure you are aware, the Board's statutory powers of disclosure, its past practice with non-OEB applicants, and the rules of fairness all require the disclosure and production of all information that may be relevant to the issues in a proceeding, whether it is damaging to or supportive of a party's position. THESL therefore expects and requests that, as prosecuting counsel in this case, you will ensure that all material that is within the Board's possession or control that may be relevant to this matter will be made available to THESL. This includes material that will allow THESL to defend itself through making its case as outlined above.

Specifically, I am hereby requesting that you provide me with the disclosure and production of all information that may relate to suite metering or smart metering practices of THESL or third parties, prepared, sent, received or reviewed by or exchanged with any employee of the OEB ("**Board Staff**") who was involved in the review and/or investigation of THESL in relation to THESL's smart-metering of condominium units ("**Compliance Staff**"). This information includes all notes, memoranda or other documentation that was prepared, sent or received by, or exchanged with any staff member of the Board ("**Board Staff**"), including but not limited to any staff who are or were members of the Office of the Chief Compliance Officer, or the Office of the General Counsel, and any Board member that was involved in the review and/or investigation of THESL in relation to THESL's smart-metering of condominium units (such information is collectively referred to as the "**Compliance Information**"). The Compliance Information includes entire contents of Board File C020080066; THESL hereby consents to the disclosure of documents that it provided to Compliance Staff in its investigation pursuant to s. 111(1) (c) of the *Act*.

In addition, and as you are aware, the Board does not have rules of practice to govern the conduct of a compliance proceeding under Part VII.1 of the *Act*. It also has no precedent for this type of application. As a result, THESL, as the first party to be subject to a contested prosecution at the OEB, has no indication of the procedural rights it will be afforded in this prosecution. It is therefore necessary for the Board to provide this direction in a procedural order.

I am therefore requesting that you consent to a procedural order that establishes the process for this prosecution, and in particular, one that provides direction as to how Board Staff, including any staff who are or were members of the Office of the General Counsel or the Office of the Chief Compliance Officer, who have been in any way engaged in the investigation or who will be prosecuting THESL under the present application ("**Prosecution Staff**"), are to govern themselves in any interactions with other Board Staff, including the Board Panel and other members of Board. Specifically, THESL requests that the following minimum standards be put in place by a procedural order prior to proceeding any further with this application, and specifically:

(i) That a formal screen be established between the Prosecution Staff and the rest of Board Staff (including members of the Office of the General Counsel who are not participating in the prosecution) and all Board members, including the members of the panel hearing this application. The specific measures used to establish the screen should be set out in a procedural order and circulated to Board Staff;

(ii) That Prosecution Staff be identified in writing to all Board Staff and members. Such notice should include direction and instruction as to how Prosecution Staff are to be segregated through this screen from other Board Staff;

(iii) That Prosecution Staff shall in no material and relevant way interact with Board Staff (including other Board Counsel) or Board members, including the members of the panel hearing this application, other than as required throughout the course of this proceeding in a manner that is on the public record so that the Moving Party is aware of all of the information being exchanged or delivered;

(iv) Confirming that Board panel members hearing this application will only seek the advice of other Board Counsel (who have not participated in the investigation of prosecution of THESL) on questions of procedure, facts or mixed fact and law where such request and advice is on the public record so that the Moving Party is aware of all of the information being exchanged or delivered and has the opportunity to make submissions on same;

(v) Confirming that, if the Board Panel requires legal advice from Board Staff after the hearing has been concluded, but during its deliberations, it will seek the advice on the public record so that the Moving Party is aware of all of the information being exchanged or delivered and has the opportunity to make submissions on same; and

(vi) That under no circumstances should Board Staff read or comment upon draft reasons for decision or write all or any part of any reasons for decisions.

Thank you for your consideration of this matter and I look forward to hearing from you.

Sincerely,

George Vegh

cc: Colin McLorg

Barristers & Solicitors
Patent & Trade-mark Agents

McCarthy Tétrault

McCarthy Tétrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6
Canada
Telephone: 416 362-1812
Facsimile: 416 868-0673
mccarthy.ca

George Vegh
Direct Line: 416 -601-7709
Direct Fax: 416-868-0673
E-Mail: gvegh@mccarthy.ca

August 28, 2009

Maureen Helt
Counsel
Ontario Energy Board
2300 Yonge Street
Toronto, Ontario
M4P 1E4

Dear Ms. Helt:

Re: Smart Metering and Smart Sub-Metering in New Condominiums
Board File No: EB 2009-0308

We are counsel for Toronto Hydro - Electric System Limited ("THESL") with respect to the above noted matter.

I am writing to express my concern with the lack of progress on obtaining production and disclosure of documents and clarity on the process for this proceeding.

The Board's Notice of Intention was issued on August 4, 2009 – close to four weeks ago. On August 21, 2009, I requested your consent, as prosecuting counsel, to disclose and produce all relevant material within the Board's possession or control and to consent to a process for conducting the prosecution, on the terms requested. Another copy of that letter is enclosed for your reference. On August 26, 2009, I spoke to your co-counsel, Ms. Rosset, and requested a meeting with you to discuss how the prosecution will proceed. I still have not heard back from you.

Despite this lack of a disclosure or a clear process, the Board issued a Notice of Hearing, setting a hearing date of September 24, 2009. In order to conduct a fair prosecution within that time frame, I am requesting that you consent to the schedule set out below. We may then jointly propose a procedural order to the Board that incorporates this schedule.

Date	Event
September 2	OEB Prosecuting Counsel provides disclosure and production and consent to process on terms

	requested by THESL on August 21, 2009
September 4	OEB Prosecuting Counsel serves and files pre-filed evidence
September 11	THESL serves Interrogatories on pre-filed evidence
September 15	OEB Prosecuting Counsel provides responses to Interrogatories
September 22	THESL serves and files defence evidence (if any)
September 24	Hearing Commences

Please provide your consent to this proposal by the end of day on August 31, 2009 so that we may proceed with the next steps as proposed above. I am sending a copy of this letter (with enclosure) to the Board Secretary so that it may be posted on the public record with the other documents in this proceeding.

Thank you for your consideration of this matter and I look forward to hearing from you.

Sincerely,

George Vegh

cc: Colin McLorg (THESL)
OEB Board Secretary

0772JN (12/95)

Ontario

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
27th Floor
Toronto ON M4P 1E4

Commission de l'Énergie de l'Ontario
C.P. 2319
2300, rue Yonge
27e étage
Toronto ON M4P 1E4

Sept 1, 2009

Dear Mr. Vegh:

I apologize for the handwritten note but there is a power outage at our offices and I cannot print a letter. Please find a Hacked Board staff's disclosure with respect to EB 2009-0308

Sincerely

Maureen Helt

Notice of Intention to Make a Compliance Order

Toronto Hydro Electric System Limited
EB-2009-0308

Disclosure
Index of Contents

1. **Stakeholder Complaints to OEB**

- Carma Industries – July 16, 2008
- Toronto Hydro Offer to Connect re Residences of Avonshire Inc., January 29, 2009
- Letter from Avonshire to Toronto Hydro, dated March 6, 2009
- Response from Toronto Hydro, dated April 22, 2009
- Toronto Hydro Offer to Connect re Metrogate Inc., February 2, 2009
- Letter from Metrogate to Toronto Hydro, dated March 10, 2009
- Response from Toronto Hydro, dated April 22, 2009

2. **OEB Staff Correspondence with Toronto Hydro**

- Information Request #1 – July 24, 2008
- Questions relating to Information Request #1 – July 25, 2008
- Toronto Hydro Response to Information Request #1 – July 29, 2008
- Information Request #2 – July 30, 2008
- Toronto Hydro Response to Information Request #2 – August 5, 2008
- Information Request #3 – May 08, 2009 (Letter Dated May 09, 2009)
- Toronto Hydro Response to Information Request #3 – May 20, 2009

3. **Compliance Office Determination Letters and Toronto Hydro's Responses**

- Determination #1 – October 22, 2008
- Toronto Hydro Response to Determination #1 – November 12, 2008
- Determination #2 – January 29, 2009
- Toronto Hydro Response to Determination #2 – February 9, 2009
- Toronto Hydro Letter to Howard Wetston – May 20, 2009

4. **Other Documents**

- Toronto Hydro Conditions of Service, section 2.3.7.1.1
- Proposed Amendment to the Distribution System Code and Creation of the Smart Sub-Metering Code, dated January 8, 2008
- Revised Proposed Amendment to the Distribution System Code and Creation of the Smart Sub-Metering Code, dated June 10, 2008
- Amendment to the Distribution System Code and Issuance of the Smart Sub-Metering Code, dated July 24, 2008
- Smart Sub-Metering Code, dated July 24, 2008

Barristers & Solicitors
Patent & Trade-mark Agents

McCarthy Tétrault

McCarthy Tétrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6
Canada
Telephone: 416 362-1812
Facsimile: 416 868-0673
mccarthy.ca

George Vegh
Direct Line: 416 -601-7709
Direct Fax: 416-868-0673
E-Mail: gvegh@mccarthy.ca

August 28, 2009

Dennis O'Leary
Aird & Berlis
Brookfield Place
181 Bay Street, Suite 1800
Box 754
Toronto, ON
M5J 2T9

Dear Mr. O'Leary:

Re: Smart Metering and Smart Sub-Metering in New Condominiums
Board File No: EB 2009-0308

I confirm receipt of a copy of your letter of today's date to the OEB Board Secretary in the above noted matter. In that letter, you advise that your clients, the Smart Sub-Metering Work Group ("SSMWG") "will likely be directly affected by any Board Order (or lack thereof) arising from this proceeding" and as a result, wish to participate in the proceeding to address what those affects may be.

My client will provide you with its position on your proposed intervention shortly.

In the meantime, in order to clarify the impact of any outcome of this proceeding on your clients, and in order for THESL to defend itself in these proceedings, THESL requires the production of materials from the members of the SSMWG. Specifically, by this letter, THESL is requesting that each member of the SSMWG provide THESL with copies of all proposals made to, and all contracts made with, condominium developers with respect to the installation and operation of sub-meters for condominiums in the City of Toronto.

Given the short time frame that the Board has instituted for this proceeding, and given that you state in your letter that the SSMWG does not intend to add time to the proceeding, please provide these materials by August 31, 2009.

Thank you for your consideration of this matter and I look forward to hearing from you.

Sincerely,

George Vegh

cc: Colin McLorg (THESL)
Maureen Helt (OEB Prosecution Counsel)
OEB Board Secretary

AIRD & BERLIS LLP

Barristers and Solicitors

Dennis M. O'Leary
Direct: 416.865.4711
E-mail: doleary@airdberlis.com

August 31, 2009

Via Email

Mr. George Vegh
McCarthy Tetrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Dear Mr. Vegh:

Re: Notice of Hearing on Order for Compliance against Toronto Hydro-Electric System Limited
Board File: EB-2009-0308

We write in response to your letter of August 28, 2009.

The SSMWG will not be providing the materials requested in your letter.

We await your client's position on the SSMWG's intervention.

Yours very truly,

AIRD & BERLIS LLP

Dennis M. O'Leary

DMO/

cc members of SSMWG
Colin McClorg, THESL
Mauren Helt, OEB Counsel
Kirsten Walli, OEB Secretary

5714437.1

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
27th Floor
Toronto ON M4P 1E4
Telephone: (416) 481-1967
Facsimile: (416) 440-7656
Toll Free : 1-888-632-6273

Commission de l'énergie de l'Ontario
C.P. 2319
2300, rue Yonge
27e étage
Toronto ON M4P 1E4
Téléphone: (416) 481-1967
Télécopieur: (416) 440-7656
Numéro sans frais : 1-888-632-6273

By email only: gvegh@mccarthy.ca

September 4, 2009

Mr. George Vegh
McCarthy Tetrault LLP
Box 48, Suite 5300
Toronto Dominion Bank Centre
Toronto, ON M5K 1E6

Dear Mr. Vegh:

Re: EB 2009-0308

We are in receipt of your letters dated Aug 21 and 28, 2009.

With regards to your disclosure request, we couriered documents to you on Sept 1, 2009. Please let us know if you have not received them.

We note that both the EDA and SSMWG have requested intervention status and that, at least insofar as SSMWG is concerned, you have indicated that your client intends to make submissions on SSMWG's intervention request. As you are aware the parties to the proceeding are determined by the Panel. We suggest that we get direction from the Panel before further matters are addressed.

Yours truly,

Original signed by

Maureen Helt
Legal Counsel

(416) 440-7672
c.c. Board Secretary

Français

Statutory Powers Procedure Act

R.S.O. 1990, CHAPTER S.22

Consolidation Period: From July 25, 2007 to the e-Laws currency date.

Last amendment: 2006, c. 21, Sched. F, s. 136 (1).

SKIP TABLE OF CONTENTS

CONTENTS

Application of s. 5.2

(5)Section 5.2 applies to a pre-hearing conference, with necessary modifications. 1997, c. 23, s. 13 (10).

Disclosure

5.4(1)If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,

(a) the exchange of documents;

(b) the oral or written examination of a party;

(c) the exchange of witness statements and reports of expert witnesses;

(d) the provision of particulars;

(e) any other form of disclosure. 1994, c. 27, s. 56 (12); 1997, c. 23, s. 13 (11).

Other Acts and regulations

(1.1)The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding. 1997, c. 23, s. 13 (12).

Exception, privileged information

(2)Subsection (1) does not authorize the making of an order requiring disclosure of privileged information. 1994, c. 27, s. 56 (12).

Notice of hearing

6.(1)The parties to a proceeding shall be given reasonable notice of the hearing by the tribunal. R.S.O. 1990, c. S.22, s. 6 (1).

Statutory authority

(2)A notice of a hearing shall include a reference to the statutory authority under which the hearing will be held.

Oral hearing

(3)A notice of an oral hearing shall include,

(a) a statement of the time, place and purpose of the hearing; and

(b) a statement that if the party notified does not attend at the hearing, the tribunal may proceed in the party's absence and the party will not be entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (13).

Written hearing

(4)A notice of a written hearing shall include,

(a) a statement of the date and purpose of the hearing, and details about the manner in which the hearing will be held;

(b) a statement that the hearing shall not be held as a written hearing if the party satisfies the tribunal that there is good reason for not holding a written hearing (in which case the tribunal is required to hold it as an electronic or oral hearing) and an indication of the procedure to be followed for that purpose;

(c) a statement that if the party notified neither acts under clause (b) nor participates in the hearing in accordance with the notice, the tribunal may proceed without the

Français

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
SCHEDULE B

Consolidation Period: From May 14, 2009 to the e-Laws currency date.

Last amendment: 2009, c. 12, Sched. D.

SKIP TABLE OF CONTENTS

CONTENTS

19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. 1998, c. 15, Sched. B, s. 19 (1).

Order

(2) The Board shall make any determination in a proceeding by order. 1998, c. 15, Sched. B, s. 19 (2); 2001, c. 9, Sched. F, s. 2 (1).

Reference

(3) If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference. 1998, c. 15, Sched. B, s. 19 (3).

Additional powers and duties

(4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application. 1998, c. 15, Sched. B, s. 19 (4).

Exception

(5) Unless specifically provided otherwise, subsection (4) does not apply to any application under the *Electricity Act, 1998* or any other Act. 1998, c. 15, Sched. B, s. 19 (5).

Jurisdiction exclusive

(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. 1998, c. 15, Sched. B, s. 19 (6).

Powers, procedures applicable to all matters

20. Subject to any provision to the contrary in this or any other Act, the powers and procedures of the Board set out in this Part apply to all matters before the Board under this or any other Act. 1998, c. 15, Sched. B, s. 20.

Board's powers, miscellaneous

21. (1) The Board may at any time on its own motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act. 1998, c. 15, Sched. B, s. 21 (1).

Hearing upon notice

(2) Subject to any provision to the contrary in this or any other Act, the Board shall not make an order under this or any other Act until it has held a hearing after giving notice in such manner and to such persons as the Board may direct. 1998, c. 15, Sched. B, s. 21 (2).

(3) Repealed: 2000, c. 26, Sched. D, s. 2 (2).

No hearing

(4) Despite section 4.1 of the *Statutory Powers Procedure Act*, the Board may, in addition to its power under that section, dispose of a proceeding without a hearing if,

(a) no person requests a hearing within a reasonable time set by the Board after the Board gives notice of the right to request a hearing; or

(b) the Board determines that no person, other than the applicant, appellant or licence holder will be adversely affected in a material way by the outcome of the proceeding and the applicant, appellant or licence holder has consented to disposing of a

proceeding without a hearing.

(c) Repealed: 2003, c. 3, s. 20 (1).

1998, c. 15, Sched. B, s. 21 (4); 2002, c. 1, Sched. B, s. 3; 2003, c. 3, s. 20 (1).

Consolidation of proceedings

(5) Despite subsection 9.1 (1) of the *Statutory Powers Procedure Act*, the Board may combine two or more proceedings or any part of them, or hear two or more proceedings at the same time, without the consent of the parties. 2003, c. 3, s. 20 (2).

Non-application

(6) Subsection 9.1 (3) of the *Statutory Powers Procedure Act* does not apply to proceedings before the Board. 1998, c. 15, Sched. B, s. 21 (6).

Use of same evidence

(6.1) Despite subsection 9.1 (5) of the *Statutory Powers Procedure Act*, the Board may treat evidence that is admitted in a proceeding as if it were also admitted in another proceeding that is heard at the same time, without the consent of the parties to the second-named proceeding. 2003, c. 3, s. 20 (3).

Interim orders

(7) The Board may make interim orders pending the final disposition of a matter before it. 1998, c. 15, Sched. B, s. 21 (7).

Hearings under *Consolidated Hearings Act*

22. (1) Despite subsection 4 (4) of the *Consolidated Hearings Act*, the establishing authority under that Act may appoint one or more members of the Board to be members of a joint board holding a hearing under that Act with respect to an undertaking for which, but for the application of the *Consolidated Hearings Act*, a hearing before the Board is or may be required. 1998, c. 15, Sched. B, s. 22 (1).

Where term of member ends

(2) If a joint board commences to hold a hearing under the *Consolidated Hearings Act* and the term of office on the Ontario Energy Board of a member sitting for the joint hearing expires or is terminated before the proceeding is disposed of, the member shall remain a member of the joint board for the purpose of completing the disposition of the proceeding in the same manner as if his or her term of office had not expired or been terminated. 1998, c. 15, Sched. B, s. 22 (2).

Final decision

22.1 (1) The Board shall issue an order that embodies its final decision in a proceeding within 60 days after making the final decision. 2003, c. 3, s. 21.

Validity of decision not affected

(2) Failure to comply with subsection (1) does not affect the validity of the Board's decision. 2003, c. 3, s. 21.

Conditions of orders

23. (1) The Board in making an order may impose such conditions as it considers proper, and an order may be general or particular in its application. 1998, c. 15, Sched. B, s. 23.

(2) Repealed: 2003, c. 3, s. 22.

(11) Upon application without notice by the person named in a warrant, a justice of the peace may, before or after the warrant expires, extend the date on which the warrant expires for an additional period of not more than 15 days. 1998, c. 15, Sched. B, s. 108 (11).

Notifying Board

109. An inspector shall notify the Board of all matters he or she thinks relevant to Board proceedings or possible future Board proceedings. 1998, c. 15, Sched. B, s. 109; 2003, c. 3, s. 72.

Evidence, Board proceedings

Witnesses

110. (1) An inspector may be called as a witness by the Board in any Board proceeding. 1998, c. 15, Sched. B, s. 110 (1); 2003, c. 3, s. 73 (1).

No privilege

(2) No document, record or copy thereof obtained by an inspector under section 107 or 108, and no information obtained by an inspector under section 107, shall be excluded as evidence on the ground of privilege in any Board proceeding. 2003, c. 3, s. 73 (2).

Notice

(3) No document, record or copy thereof obtained by an inspector under section 107 or 108, and no information obtained by an inspector under section 107, shall be introduced in evidence in a Board proceeding unless,

(a) the Board gives the owner of the document or record or the person who provided the information notice that the inspector intends to introduce the evidence; and

(b) the Board gives the owner of the document or record or the person who provided the information an opportunity to make representations with respect to the intended introduction of that evidence. 2003, c. 3, s. 73 (3).

(4) Repealed: 2003, c. 3, s. 73 (3).

Confidentiality

111. (1) All documents and records obtained by an inspector under section 107 or 108, and information obtained by an inspector under section 107, are confidential and shall not be disclosed to any person other than a member of the Board or an employee of the Board except,

(a) as may be required in connection with the administration of this Act or any other Act that gives powers or duties to the Board or in any proceeding under this or any other Act that gives powers or duties to the Board;

(b) to counsel for the Board or an employee of the Board; or

(c) with the consent of the owner of the document or record or the person who provided the information. 2003, c. 3, s. 74.

Same

(2) If any document, record or information obtained by an inspector under section 107 or 108 is admitted in evidence in a proceeding under this Act or any other Act that gives powers or duties to the Board, the Board may rule on whether the document, record or information is to be kept confidential. 2003, c. 3, s. 74.

Evidence

ONTARIO ENERGY BOARD

Rules of Practice and Procedure
(Revised November 16, 2006 and July 14, 2008)

TABLE OF CONTENTS

12.04 The Board may require the whole or any part of a document filed to be verified by affidavit.

13. Written Evidence

13.01 Other than oral evidence given at the hearing, where a party intends to submit evidence, or is required to do so by the Board, the evidence shall be in writing and in a form approved by the Board.

13.02 The written evidence shall include a statement of the qualifications of the person who prepared the evidence or under whose direction or control the evidence was prepared.

13.03 Where a party is unable to submit written evidence as directed by the Board, the party shall:

(a) file such written evidence as is available at that time;

(b) identify the balance of the evidence to be filed; and

(c) state when the balance of the evidence will be filed.

14. Disclosure

14.01 A party who intends to rely on or refer to any document that has not already been filed in a proceeding shall file and serve the document in accordance with the Board's directions.

14.02 Any party who fails to comply with **Rule 14.01** shall not put the document in evidence or use it in the cross-examination of a witness, unless the Board otherwise directs.

14.03 Where the good character, propriety of conduct or competence of a party is an issue in the proceeding, the party is entitled to be furnished with reasonable information of any allegations at least 15 calendar days prior to the hearing.

Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2007-0040

IN THE MATTER OF the *Electricity Act, 1998*, S.O.1998, c.15 (Schedule B);

AND IN THE MATTER OF an Application by the Association of Major Power Consumers in Ontario under section 33 of the *Electricity Act, 1998* for an Order revoking an amendment to the market rules and referring the amendment back to the Independent Electricity System Operator for further consideration, and for an Order staying the operation of the amendment to the market rules pending completion of the Board's review.

PROCEDURAL ORDER NO. 3

On February 9, 2007, the Association of Major Power Consumers in Ontario ("AMPCO") filed with the Ontario Energy Board (the "Board") an Application under section 33(4) of the *Electricity Act, 1998* seeking the review of an amendment to the market rules made by the Independent Electricity System Operator (the "IESO") on January 18, 2007. The Board has assigned file number EB-2007-0040 to the Application.

The amendment that is the subject matter of the Application is identified as MR-00331-R00: "Specify the Ramping Capability in the Market Schedule" and relates to the ramp rate assumption used in the market dispatch algorithm within the IESO-administered markets (the "Amendment").

On February 9, 2007, the Board issued its Notice of Application and Oral Hearing in relation to the Application. By Order dated February 9, 2007, the Board stayed the operation of the Amendment pending completion of the Board's review of the Amendment.

On February 16, 2007, the Board issued its Procedural Order No. 1. Among other things, Procedural Order No. 1 directed the IESO to file materials associated with the development and adoption of the Amendment.
On March 9, 2007, the Board issued its Procedural Order No. 2. Among other things, Procedural Order No. 2 addressed issues relating to the production of materials by the IESO. These issues were raised by AMPCO in a letter filed with the Board on March 2, 2007. In that letter, AMPCO alleged that the IESO's filing in response to Procedural Order No. 1 was deficient in a number of respects. By letter also dated March 2, 2007, the IESO replied to the allegations contained in AMPCO's letter, stating that there was no merit to AMPCO's allegations and that the IESO had produced all of the materials required by the Board's Procedural Order No. 1. The IESO also provided a response with respect to each category of alleged deficiency identified by AMPCO.

In Procedural Order No. 2, the Board ordered the IESO to file with the Board and deliver to all parties, on or before March 16, 2007, a copy of certain further materials that have not been produced to date or to provide written confirmation that no such further materials exist, if that is the case. The further materials that were the subject-matter of the order can be described summarily as follows:

i. material prepared by the IESO in the context of the Day Ahead Commitment Process ("DACP") and/or the Day Ahead Market ("DAM") initiative that directly relates to ramp rate; and

ii. to the extent that they were prepared by the IESO and relate to the development or adoption of the Amendment:

- copies of all e-mail exchanges and other written communication between the IESO, stakeholders and their associations in relation to the Amendment or the subject matter of the Amendment; and

- copies of all internal memos, e-mail and other written communication among IESO staff and between staff and the IESO Technical Panel and/or Board of Directors, stakeholders, their respective associations, the Ontario Energy Board, the Ontario Power Authority and the Province of Ontario.

In ordering the IESO to produce the materials referred to in item (i) above, the Board expressly recognized that the relevance of those materials to the criteria set out in

section 33(9) of the Act, which form the basis of the issues list set out in Procedural Order No. 1, is not clear. Procedural Order No. 2 thus also invited parties to make submissions on the issue of the relevance to this proceeding of those materials, and more specifically to the criteria set out in section 33(9) of the Act and the issues list set out in Procedural Order No. 1, by March 23, 2007.

On March 12, 2007, the IESO filed a letter with the Board in response to Procedural Order No. 2. In that letter, a copy of which is attached as Appendix A to this Procedural Order, the IESO stated that the nature and extent of the task involved in satisfying the document production requirements of Procedural Order No. 2 makes completion of the task within anything even remotely close to the specified timeframe completely impractical. More specifically, the IESO estimated that the task would require tens of staff focusing full-time on the project for a minimum of several weeks. Without waiving any of its rights or accepting the relevance of the materials to this proceeding, the IESO put forward a proposed plan to meet the Board's information requirements within the requisite time frames.

The IESO's proposed plan involves more limited production, including in terms of the time period during which the materials to be produced were created (namely, November 25, 2005 to January 19, 2007). Although not altogether clear from the IESO's proposal, the Board understands and expects that the subject matter of the materials to be produced covers both of the elements of Procedural Order No. 2 referred to above (in other words, included are materials prepared in the context of the DAM and/or DACP initiative that directly relate to ramp rate, as well as the other materials relating to the development or adoption of the Amendment).

The IESO's proposed plan also involves the filing of affidavits from the three key IESO staff members involved in the ramp rate considerations. Those affidavits would attest to belief that every consideration that went before the Board of Directors of the IESO is reflected in the IESO's production and written evidence, as is each and every alternative and consideration in respect of the ramp rate issue of which the IESO is aware. One of those affidavits would also describe, and append a memorandum from IESO technology staff which explains, the IESO's information technology framework, how information is stored and the life-cycle of the data, as well as the estimated time which would be required to search for and collect active data (data that is currently used in day-to-day operations), archival data (data organized and maintained for long-term storage) and

back-up data (data which exists only on back-up systems for disaster recovery) to the extent that it can be electronically reconstituted.

On March 14, 2007, AMPCO filed a letter with the Board expressing its concerns regarding the IESO's proposed plan. AMPCO's concerns relate principally to the scope of the IESO's proposed production in respect of the subject matter and time period to be covered. With respect to subject matter, the concern appears to be based on AMPCO's interpretation of the plan as excluding materials prepared by the IESO in the context of the DAM and/or the DACP initiative that directly relate to ramp rate. As noted above, the Board understands and expects that the IESO's production will include these materials.

With respect to the time period, AMPCO's view is that both the start and end dates of the proposed date range (November 25, 2007 to January 19, 2007) are inappropriate. In terms of the start date, AMPCO notes that, by the IESO's own acknowledgement, the ramp rate review process began in May, 2004. Accordingly, the period for production should commence with May, 2004 at the latest. Based on materials filed to date in this proceeding, it does appear to the Board that discussions regarding the ramp rate issue (including at a May 25, 2004 meeting of the Market Pricing Working Group) pre-date the November 25, 2005 date proposed by the IESO. The Board therefore agrees with AMPCO that the IESO's production should cover the period beginning May 25, 2004.

In terms of the end date, AMPCO stated that material created after January 19, 2007 also pertains to the Amendment, and further stated that AMPCO cannot see any technical impediment to the IESO's ability to produce this material. The Board does not believe that production of materials relating to the period after January 19, 2007 (in other words, after the date on which the Amendment was made) is required.

As in all cases, the Board wishes to have before it the best record possible in making a determination on the merits of the application that is the subject-matter of this proceeding. Nonetheless, the Board is mindful of the 60-day statutory deadline by which it is required to issue a decision in this proceeding, and that as a practical matter such deadline may not in all cases allow the parties to engage in discovery that is as extensive as might be the case in other proceedings. The Board has no reason to question the IESO's assertions regarding the time required to satisfy the requirements of Procedural Order No. 2. The Board also notes that the IESO has offered to have one of its key staff members attest to those assertions by way of affidavit. The Board

believes that, subject to the change in time period referred to above, the document production proposed by the IESO will, together with the other commitments set out in its proposed plan and the evidence filed by the parties, provide the Board with a satisfactory basis upon which to make a determination in this proceeding. The Board therefore accepts the IESO's proposed plan in lieu of the production required by Procedural Order No. 2, subject to the change in time period referred to above.

The Board understands that the IESO is in a position to satisfy the production outlined in its proposed plan by March 16, 2007. The Board will allow the IESO some additional time to produce materials relating to the period May 25, 2004 to November 25, 2005. The brevity of the additional time is driven by the fact that the technical conference for this proceeding is scheduled to commence on March 22, 2007.

The Board considers it necessary to make provision for the following procedural matters. Further procedural orders may be issued from time to time.

THE BOARD ORDERS THAT:

1. That portion of Procedural Order No. 2 dated March 9, 2007 that ordered the Independent Electricity System Operator to file certain further materials with the Board and deliver those materials to all parties is hereby rescinded.

2. The Independent Electricity System Operator shall, on or before **Friday, March 16, 2007**, file with the Board and deliver to all parties any records described in, items (i), (ii) and/or (iii) of section 2 of the Independent Electricity System Operator's proposed plan, and relating to the period November 25, 2005 to January 19, 2007, as set out on page 3 of the letter dated March 12, 2007 attached as Appendix A to this Procedural Order.

3. The Independent Electricity System Operator shall, on or before **Tuesday, March 20, 2007**, file with the Board and deliver to all parties:

    i. any records described in items (i), (ii) and/or (iii) of section 2 of the Independent Electricity System Operator's proposed plan, as set out on page 3 of the letter dated March 12, 2007 attached as Appendix A to this Procedural Order, with the exception that the records shall be those relating to the period May 25, 2004 to November 24, 2005; and

ii. the affidavits referred to in item (iv) of section 2 of the Independent Electricity System Operator's proposed plan, as set out on page 3 of the letter dated March 12, 2007 attached as Appendix A to this Procedural Order, one such affidavit to also be compliant with section 3 of that proposed plan, as set out on pages 3 and 4 of that letter.

4. The Independent Electricity System Operator shall make its three key staff members available at the technical conference scheduled for this proceeding as described in section 4 of the Independent Electricity System Operator's proposed plan, as set out on page 4 of the letter dated March 12, 2007 attached as Appendix A to this Procedural Order.

All filings to the Board noted in this Procedural Order must be in the form of 8 hard copies and must be received by the Board Secretary by ***4:45 p.m.*** *on the stated date.* The Board requests that parties also submit an electronic copy of their filings in searchable, accessible Adobe Acrobat (PDF), if available, or MS Word. Electronic copies should be sent to boardsec@gov.on.ca, with a copy to the case manager Harold Thiessen at harold.thiessen@oeb.gov.on.ca.

DATED at Toronto, March 14, 2007.

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Attachment: Letter filed on behalf of the Independent Electricity System Operator dated March 12, 2007

APPENDIX A

to

Procedural Order No. 3
March 14, 2007

Association of Major Power Consumers in Ontario
Review of Market Rules Amendment
EB-2007-0040

Letter filed on behalf of
the Independent Electricity System Operator dated March 12, 2007

(see attached document)

OGILVY RENAULT

LLP / S.E.N.C.R.L., s.r.l.

Direct Dial: (416) 216-2985
Fax: (416) 216-3930
kfriedman@ogilvyrenault.com
File No. 01006736-0071

SENT BY EMAIL & COURIER

March 12, 2007

Ms. E. Kirsten Walli
Board Secretary
Ontario Energy Board
27th Floor
2300 Yonge Street
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

RE: In the matter of application by the Association of Major Power Consumers in Ontario ("AMPCO") under section 33 on the *Electricity Act, 1998*
OEB File No. EB-2007-0040

On behalf of our client, the Independent Electricity System Operator ("IESO"), we write to address paragraph 2 of the Board's Procedural Order No. 2, released on Friday, March 9, 2007.

Paragraph 2 states that on or before Friday, March 16, 2007, the IESO must file, to the extent it exists, any materials not already produced falling into certain categories requested by AMPCO, being:

(ii) Material prepared by the IESO in the context of the DAM and or the DACP initiative that directly relates to the ramp rate;

(iii) Copies of all e-mail and other written communication between the IESO, stakeholders and their associations in relation to the Amendment or the subject matter of the Amendment, to the extent that those materials were prepared by the IESO; and

(iv) Internal memos, e-mail and other written communication among IESO staff and between staff and the IESO Technical Panel and or Boards of Directors, stakeholders, their respective associations, the Ontario Energy Board, the Ontario Power Authority and the Province of Ontario, to the extent that those materials were prepared by the IESO.

Practicability

Upon receipt of the Order on Friday afternoon, the IESO pulled together a team to advise as to the breadth and scope of the work required. As these were identified as the weekend proceeded, it became increasingly clear that the nature and extent of the task makes its completion within anything even remotely close to the specified time completely impracticable. On its face, the Order would require a corporate-wide search for hard and electronic documentation created or received over a several year period, potentially up to four years if the search extends back over earlier DAM investigations. The Order, at its broadest, suggests a search for active data (that which is currently used in day-to-day operations), archival data (data organized and maintained for long-term storage) and back-up data (that which only exists on back-up systems for disaster recovery). To the extent that back-up data can be electronically reconstituted, that task would extend well beyond the time specified for the hearing, leaving aside the review time then required to determine if the data contains any mention of ramp rate considerations relevant to these proceedings as "prepared by the IESO and relat(ing) to the development or adoption of the Amendment", being the Board's description of the ambit of the production required for items (iii) and (iv).

For an organization of the size of the IESO, the document search would entail the creation of specific electronic search protocols and ongoing work by information technology staff in addition to clerical staff, internal and external legal counsel and Market Development staff familiar with the issues. Once protocols were set for the retrieval of information potentially falling into the categories of the Order and documentation is actually located, a review of each document would have to be undertaken in connection with relevance, confidentiality and privilege. It is the IESO's estimate that such an exercise would require tens of staff focusing full-time on the project for a minimum of several weeks. As the IESO's external counsel, we concur with this view based upon our experience with such production undertakings.

Actions Proposed by the IESO

The IESO has given much thought as to how to ensure that the Board's objectives to obtain "insight as to the origins of the Amendment" and have before it "the considerations taken into account by the IESO to advance the Amendment as the preferred outcome" can be met without the IESO embarking on a forensic exercise that cannot be completed within the allotted time frame for the review process specified under the legislation. Over the weekend, as the circumstances outlined above became clearer, several consultations among technology, Market Development, and legal staff took place, and we believe we have arrived at a reasonable plan to meet the Board's information objectives in the requisite time frame:

1. The Stakeholder Advisory Committee meeting at which the focused examination of the ramp rate issue was proposed by a majority of the Committee members, but opposed by the representative for large industrial customers, took place on **November 25, 2005**. It is, therefore,

that date which the IESO proposes to use (and indeed, has already begun to use to initiate the process) as the start date in electronic search protocols in order to retrieve information under this proposal.

2. The three key IESO staff members involved in the ramp rate considerations are **Bruce Campbell**, Vice President, Corporate Relations & Market Development, **Ken Kozlik**, Director, Market Evolution, and **Brian Rivard**, Manager, Economics. These three individuals are also the IESO's proposed witnesses for the IESO staff panel at the Technical Conference and the oral hearing, if necessary. We, therefore, propose that each of these three individuals do the following:

i. Work with technology staff to review their e-mails and other electronic documents which remain as active or archival data on the IESO's computer systems and were created between November 25, 2005 and January 19, 2007 (the date of the IESO Board's decision on the Amendment), and produce documents/correspondence that were exchanged with outside parties. The IESO's present belief is that this is feasible.

ii. Work with technology staff to review e-mail traffic to Board members including any appended electronic documents which remain as active or archival data on the IESO's computer systems and were created between November 25, 2005 and January 19, 2007 as an additional check as to whether there were any additional considerations raised with the IESO Board on the ramp rate which are not otherwise found in the materials and, if so, produce that material.

iii. Search paper files maintained by them for, and produce if not already produced, hard documents falling within categories (i) and (ii) above created between November 25, 2005 and January 19, 2007.

iv. File an affidavit to attest to, *inter alia*,

a. their honest belief that every consideration which went before the decision-maker, the IESO Board, is reflected in the productions and written evidence; and

b. the fact that each and every alternative and consideration in respect of the ramp rate issue of which the IESO is aware is fully reflected in the produced materials and the written evidence.

These individuals have been extensively involved in the matter, and are confident that they are in a position to provide the Board with these assurances.

3. The Affidavit of Bruce Campbell will describe, and will append a memorandum from technology staff which explains, the IT framework within the IESO, how information is stored

and the life-cycle of the data, and the estimated time which would be required to search for and collect active data and archival data, as well as data which might exist in back-up systems, in order that the Board has evidence in respect of the reasonableness of the IESO's production efforts given the time available.

4. Each of Messrs. Campbell, Kozlik and Rivard will be made available at the Technical Conference. As with the rest of their evidence, the other parties to the proceeding would have the opportunity to ask any relevant questions on the above material during their appearances in these proceedings.

The IESO believes that this proposal is both feasible and appropriate in that the Board's and parties' reasonable information needs will be met and, with considerable effort, the task can be accomplished by the Friday, March 16 deadline.

In considering this proposal, the Board will also have the benefit of the opportunity to consider the IESO's evidence, which was filed mid-afternoon on Friday the 9th, just as the Order was being issued. We submit that the evidence of the IESO, in conjunction with the documents previously filed, give a thorough account of the genesis of the Amendment and the reasons for it being proposed.

Consistency with the Legislation

We submit that the proposal set out above is particularly appropriate given the specific legislative framework for the market rule amendment review. The IESO Board is charged with making the market rules and amendments thereto. This Board has no original jurisdiction with respect to market rules and is not empowered to make market rules or amendments, but instead to review the reasonableness of the IESO Board's decision against the statutory criteria set out in section 33 of the *Electricity Act, 1998* (the "Act").

The Act is explicit in providing that the Board's jurisdiction is only engaged if it determines that the specific amendment under review is inconsistent with the Act or unjustly discriminates against or in favour of a market participant or class of market participants, and even then the power of the Board is limited to revoking the amendment and referring the amendment back to the IESO for further consideration. Consistent with this Board's jurisdiction being to review the IESO Board's decision, and not to determine market rules or amendments thereto, the statutory scheme provides a limited, 60-day time period in which this Board's review must take place. Both the limited jurisdiction conferred and the abridged time limit for the review make it clear that the Act does not contemplate the Board undertaking a general review into the history of how and why the proposed amendment was developed.

Rather, it is clear from the statutory scheme that it is the *effect* of the amendment in regard to the Act's objects or by creating unjust discrimination between market participants which is to be the

focus of the hearing, and which therefore must define the scope of relevance for production for the proceeding. In contrast, AMPCO's Application, in large measure, focuses not on the effect of the amendment, but instead on what it says were defects in the stakeholdering process to consider the subject matter of the amendment.

Direction Requested of the Board

Just as this Board was issuing Procedural Order No. 2, the IESO filed its written evidence. That evidence demonstrates, in the IESO's submission, that the amendment is not contrary to the objects of the Act nor unjustly discriminatory. In addition, the written evidence of the IESO responded to the allegations made by AMPCO about its stakeholdering process, not because its stakeholdering process is relevant to the test which determines this Board's jurisdiction in this proceeding, but because it could not allow unfounded allegations made about the stakeholdering process to stand unanswered.

In its Reasons, with respect to categories (iii) and (iv), the Board stated that "these exchanges could provide insight as to the origins of the Amendment and the considerations taken into account by the IESO to advance the Amendment as the preferred outcome". The IESO evidence comprehensively sets out those considerations, and IESO witnesses will be appearing to attest to that fact. In addition, as described above and without waiving its rights in any respect, the IESO has proposed a plan for compliance with Procedural Order No. 2 which is as fulsome as can be undertaken in the time frame available.

If the Board is of the view that the proposal is insufficient, we request an immediate oral hearing for all parties, including third parties whose communications with the IESO are sought, to address this matter.

Yours very truly,

Kelly Friedman

cc. All parties to the Proceeding

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2007-0930

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF an application pursuant to section 74 of the *Ontario Energy Board Act, 1998* by Hydro One Networks Inc. to amend its Electricity Distribution Licence ED-2003-0043.

PROCEDURAL ORDER NO. 2

Hydro One Networks Inc. ("Hydro One" or "Applicant") has filed an application with the Ontario Energy Board (the "Board") under section 74 of the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, Schedule B (the "Act") for an order of the Board to amend Hydro One's distribution licence. Hydro One is requesting a 12-month exemption from the timelines prescribed in sections 6.2.9, 6.2.9.2, 6.2.9.3, 6.2.12 and 6.2.13 of the Distribution System Code (the "DSC").

The above noted sections of the DSC include the timelines within which a distributor is required to:

(a) meet with a person considering applying for the connection of generation facility to the distributor's distribution system;
(b) provide information relating to the distributor's distribution system relevant to the person's generation facility; and
(c) provide connection impact assessments.

The Board assigned the application file number EB 2007-0930 and issued its Notice of Application and Hearing on January 11, 2008. The following three parties intervened in the proceeding: Canadian Wind Energy Association; Ontario Sustainable Energy Association; and Ontario Power Generation Inc. On April 11, 2008, the Board issued

Procedural Order No. 1, which established a schedule for the filing of interrogatories and responses to interrogatories. Procedural Order No. 1 also stated that the application would proceed by way of an oral hearing.

Board staff filed their interrogatories on May 2, 2008. Hydro One filed responses to the Board staff interrogatories on May 16, 2008. No other intervenor filed interrogatories.

The Board considers it necessary to make provision for the following matters related to this proceeding. The Board may amend this procedural order or issue further procedural orders from time to time.

THE BOARD ORDERS THAT:

1. An oral hearing will be convened in Toronto on Friday, June 27, 2008 in the Board's West Hearing Room, 2300 Yonge Street, 25th floor, at 9:30 a.m.

2. The Board directs Hydro One to provide any and all information it has in its possession related to the impacts that the delay in timelines has on generators waiting to connect to Hydro One's distribution system. This includes, but is not limited to, any and all correspondence and complaints Hydro One has received from generators (both written and transcripts of voice recordings) in relation to Hydro One not meeting its timelines. The information provided does not need to contain the specific name(s) of the person making the complaint. This information must be filed with the Board and delivered to all intervenors by **June 20, 2008**.

3. The Board may require the applicant to present evidence at the hearing that the applicant claims is of a confidential nature. Should this occur, and the Board agrees the information is confidential, the Board will hold that part of the hearing *in camera*. Counsel and/or consultants/experts for each registered intervenor participating in the hearing shall be required to execute a Declaration and Undertaking with respect to the confidential information in the form attached as Appendix D to the Board's Practice Direction on Confidential Filings. A copy of the Declaration and Undertaking form will be made available to the parties by the Board for completion on the date of the hearing.

All filings to the Board must quote file number EB-2007-0930, be made through the Board's web portal at www.errr.oeb.gov.on.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.oeb.gov.on.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD or diskette in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

Board's Address

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

E-mail: Boardsec@oeb.gov.on.ca

Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

DATED at Toronto, June 2, 2008

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Indexed as:

R. v. Stinchcombe

William B. Stinchcombe, appellant;
v.
Her Majesty The Queen, respondent.

[1991] 3 S.C.R. 326

[1991] S.C.J. No. 83

File No.: 21904.

Supreme Court of Canada

1991: May 2 / 1991: November 7.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA (41 paras.)

Criminal law -- Evidence -- Crown's obligation to make disclosure to defence -- Witness favourable to accused interviewed by police -- Crown not calling witness and refusing to produce statements obtained -- Whether Crown obliged to disclose statements.

The accused, a lawyer, was charged with breach of trust, theft and fraud. A former secretary of his was a Crown witness at the preliminary inquiry, where she gave evidence apparently favourable to the defence. After the preliminary inquiry but prior to trial, the witness was interviewed by an RCMP officer and a tape-recorded statement was taken. Later, during the course of the trial, the witness was again interviewed by a police officer and a written statement taken. Defence counsel was informed of the existence but not of the content of the statements. His requests for disclosure were refused. During the trial defence counsel learned conclusively that the witness would not be called by the Crown and sought an order that the witness be called or that the Crown disclose the contents of the statements to the defence. The trial judge dismissed the application. The trial proceeded and the accused was convicted of breach of trust and fraud. Conditional stays were entered with respect to the theft counts. The Court of Appeal affirmed the convictions without giving reasons.

Held: The appeal should be allowed and a new trial ordered.

The Crown has a legal duty to disclose all relevant information to the defence. The fruits of the investigation which are in its possession are not the property of [page327] the Crown for use in securing

a conviction but the property of the public to be used to ensure that justice is done. The obligation to disclose is subject to a discretion with respect to the withholding of information and to the timing and manner of disclosure. Crown counsel has a duty to respect the rules of privilege and to protect the identity of informers. A discretion must also be exercised with respect to the relevance of information. The Crown's discretion is reviewable by the trial judge, who should be guided by the general principle that information should not be withheld if there is a reasonable possibility that this will impair the right of the accused to make full answer and defence. The absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure. This privilege is reviewable, however, on the ground that it is not a reasonable limit on the right to make full answer and defence in a particular case.

Counsel for the accused must bring to the trial judge's attention at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. This will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial.

Initial disclosure should occur before the accused is called upon to elect the mode of trial or plead. Subject to the Crown's discretion, all relevant information must be disclosed, both that which the Crown intends to introduce into evidence and that which it does not, and whether the evidence is inculpatory or exculpatory. All statements obtained from persons who have provided relevant information to the authorities should be produced, even if they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced. If there are no notes, all information in the prosecution's possession relating to any relevant evidence the person could give should be supplied.

[page328]

Crown counsel was not justified in refusing disclosure here on the ground that the witness was not worthy of credit: whether the witness is credible is for the trial judge to determine after hearing the evidence. The trial judge ought to have examined the statements. Since the information withheld might have affected the outcome of the trial, the failure to disclose impaired the right to make full answer and defence. There should be a new trial at which the statements are produced.

Cases Cited

Referred to: Cunliffe v. Law Society of British Columbia (1984), 40 C.R. (3d) 67; Savion v. The Queen (1980), 13 C.R. (3d) 259; R. v. Bourget (1987), 56 C.R. (3d) 97; Boucher v. The Queen, [1955] S.C.R. 16; Marks v. Beyfus (1890), 25 Q.B.D. 494; R. v. Scott, [1990] 3 S.C.R. 979; Bisaillon v. Keable, [1983] 2 S.C.R. 60; Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario), [1981] 2 S.C.R. 494; Dersch v. Canada (Attorney General), [1990] 2 S.C.R. 1505; Lemay v. The King, [1952] 1 S.C.R. 232; R. v. C. (M.H.), [1991] 1 S.C.R. 763, aff'g (1988), 46 C.C.C. (3d) 142; Caccamo v. The Queen, [1976] 1 S.C.R. 786; Piché v. The Queen, [1971] S.C.R. 23; Rothman v. The Queen, [1981] 1 S.C.R. 640; McInroy v. The Queen, [1979] 1 S.C.R. 588; R. v. Mannion, [1986] 2 S.C.R. 272.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 7.
Criminal Code, R.S.C. 1970, c. C-34, ss. 294(a), 296, 338(1)(a).
Criminal Code, R.S.C., 1985, c. C-46, ss. 334(a), 336, 380(1)(a), 482, 603.
Criminal Justice Act 1967 (U.K.), 1967, c. 80.

Authors Cited

Bench and Bar Council of Ontario. Special Committee on Preliminary Hearings. Report of the Special Committee on Preliminary Hearings. Toronto: Bench and Bar Council of Ontario, 1982.
Canada. Law Reform Commission. Report 22. Disclosure by the Prosecution. Ottawa: Minister of Supply and Services Canada, 1984.

[page329]

Canada. Law Reform Commission. Working Paper 4. Criminal Procedure: Discovery. Ottawa: Information Canada, 1974.
Nova Scotia. Royal Commission on the Donald Marshall, Jr., Prosecution, Vol. 1, Findings and Recommendations. Halifax: The Commission, 1989.

APPEAL from a judgment of the Alberta Court of Appeal affirming the judgment of Brennan J. sitting without a jury convicting the appellant of breach of trust and fraud. Appeal allowed.

William E. Code, Q.C., and John Kingman Phillips, for the appellant.
Daniel M. McDonald, Q.C., and Bruce R. Fraser, Q.C., for the respondent.

Solicitors for the appellant: Code Hunter, Calgary.
Solicitor for the respondent: The Attorney General for Alberta, Calgary.

The judgment of the Court was delivered by

1 **SOPINKA J.**:-- This appeal raises the issue of the Crown's obligation to make disclosure to the defence. A witness who gave evidence at the preliminary inquiry favourable to the accused was subsequently interviewed by agents for the Crown. Crown counsel decided not to call the witness and would not produce the statements obtained at the interview. The trial judge refused an application by the defence for disclosure on the ground that there was no obligation on the Crown to disclose the statements. The Court of Appeal affirmed the judgment at trial and the case is here with leave of this Court.

1. Facts

2 The appellant was a Calgary lawyer charged with appropriating certain financial instruments from a client, one Jack Abrams. The indictment charged thirteen counts of criminal breach of trust contrary to s. 296 of the Criminal Code, R.S.C. 1970, c. C-34 (now s. 336), thirteen counts of theft contrary to s. 294(a) (now s. 334(a)) of the Code, and one count of fraud contrary to s. 338(1)(a) (now s. 380(1)(a)) of [page330] the Code. The trial in the Alberta Court of Queen's Bench was before Brennan J. without a jury.

3 The Crown alleged that the appellant had wrongfully appropriated property which he held in trust

for Abrams. The defence did not contest the receipt of funds by the appellant. The defence did contend, however, that despite Stinchcombe's formal status as trustee of the property, Abrams had in fact made Stinchcombe his business partner. Under this theory, Stinchcombe had acted as he was legally entitled to act. At issue therefore was the actual, as opposed to the formal, nature of the relationship between the two men.

4 Patricia Lineham is a former secretary of Mr. Stinchcombe. She was a Crown witness at the preliminary inquiry. There, she gave evidence which was, apparently, very favourable to the defence regarding the conduct of Abrams. The precise content of this testimony was not before the trial judge and is not in the record. Lineham was not listed on the indictment, but was subpoenaed by the Crown.

5 After the preliminary inquiry but prior to the trial, Lineham was interviewed by an RCMP officer. A tape-recorded statement was taken. Crown counsel informed defence counsel of the existence but not the content of this statement. A request for disclosure was refused. Later, during the course of the trial, Lineham was again interviewed by a police officer and a written statement taken. Again, though defence counsel was advised of the existence of the statement, a request for disclosure was refused. Crown counsel also indicated that he would not be calling Lineham as she was not worthy of credit.

6 It was not until the third day of the trial that defence counsel learned conclusively that Lineham would not be called by the Crown. At this time, he moved before the trial judge for an order that (i) the Crown call the witness, or (ii) the Court call the witness, or (iii) the Crown disclose the contents of the statements to the defence. A review of the record [page331] makes it clear that defence counsel was pressing for access to, or production of, both the tape-recorded and written statements and was not pressing the alternative requests. In support of this motion, counsel for the defendant indicated that Ms. Lineham refused to speak to him or his staff when they attempted to interview her about the contents of the statements. Crown counsel did not provide any basis for resisting production other than to say that in his view the potential witness was not worthy of credit.

7 The trial judge dismissed the application. Brennan J. ruled that under the circumstances there was no obligation on the Crown to call the witness and that there was no obligation on the Crown to disclose the contents of the statements. The trial proceeded, and the accused was found guilty of all twenty-seven counts charged. A conditional stay was entered with respect to the thirteen theft counts. The Alberta Court of Appeal dismissed the appeal from conviction without issuing reasons. Leave to appeal to this Court was granted on the disclosure issue.

8 During argument before this Court, an application was made by the Crown to adduce the statements and the tape as fresh evidence. This application was rejected. The principal basis for the rejection was that at this stage it would be impossible to determine whether the statements would have been material to the defence if produced at trial.

2. Crown's Obligation to Disclose

9 The circumstances which give rise to this case are testimony to the fact that the law with respect to the duty of the Crown to disclose is not settled. A number of cases have addressed some aspects of the subject. See, for example, Cunliffe v. Law Society of British Columbia (1984), 40 C.R. (3d) 67 (B.C.C.A.); Savion v. The Queen (1980), 13 C.R. (3d) 259 (Ont. C.A.); R. v. Bourget (1987), 56 C.R. (3d) 97 (Sask. C.A.). No case in this Court has made a comprehensive [page332] examination of the subject. The Law Reform Commission of Canada, in a 1974 working paper titled Criminal Procedure: Discovery (the "1974 Working Paper") and a 1984 report titled Disclosure by the Prosecution (the "1984 Report"), recommended comprehensive schemes regulating disclosure by the Crown but no legislative

action has been taken implementing the proposals. Apart from the limited legislative response contained in s. 603 of the Criminal Code, R.S.C., 1985, c. C-46, enacted in the 1953-54 overhaul of the Code (which itself condensed pre-existing provisions), legislators have been content to leave the development of the law in this area to the courts.

10 Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. Surprisingly, in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system has lingered on. While the prosecution bar has generally co-operated in making disclosure on a voluntary basis, there has been considerable resistance to the enactment of comprehensive rules which would make the practice mandatory. This may be attributed to the fact that proposals for reform in this regard do not provide for reciprocal disclosure by the defence (see 1974 Working Paper at pp. 29-31; 1984 Report [page333] at pp. 13-15; Marshall Commission Report, infra, Vol. 1, at pp. 242-44).

11 It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this Court in the future but is not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the fundamental difference in the respective roles of the prosecution and the defence. In Boucher v. The Queen, [1955] S.C.R. 16, Rand J. states, at pp. 23-24:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

12 I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role.

[page334]

13 Other grounds advanced by advocates of the absence of a general duty to disclose all relevant

information are that it would impose onerous new obligations on the Crown prosecutors resulting in increased delays in bringing accused persons to trial. This ground is not supported by the material in the record. As I have already observed, disclosure is presently being made on a voluntary basis. The extent of disclosure varies from province to province, from jurisdiction to jurisdiction and from prosecutor to prosecutor. The adoption of uniform, comprehensive rules for disclosure by the Crown would add to the work-load of some Crown counsel but this would be offset by the time saved which is now spent resolving disputes such as this one surrounding the extent of the Crown's obligation and dealing with matters that take the defence by surprise. In the latter case an adjournment is frequently the result of non-disclosure or more time is taken by a defence counsel who is not prepared. There is also compelling evidence that much time would be saved and therefore delays reduced by reason of the increase in guilty pleas, withdrawal of charges and shortening or waiver of preliminary hearings. The 1984 Report (at pp. 6-9) refers to several experimental projects which were established after the publication of the 1974 Working Paper in order to test the viability of pre-trial disclosure. The result of these experiments, and in particular the Montreal experiment, which was the most exhaustively evaluated, was that there was a significant increase in the number of cases settled and pleas of guilty entered or charges withdrawn.

14 In England, under the provisions of the Criminal Justice Act 1967 (U.K.), 1967, c. 80, a "packet" of material is furnished to defence counsel. The provision of such material has led to a reduction in the length and number of preliminary hearings in that jurisdiction: Report of the Special Committee on Preliminary Hearings, Bench and Bar Council of Ontario (1982), at pp. 12-15.

[page335]

15 Refusal to disclose is also justified on the ground that the material will be used to enable the defence to tailor its evidence to conform with information in the Crown's possession. For example, a witness may change his or her testimony to conform with a previous statement given to the police or counsel for the Crown. I am not impressed with this submission. All forms of discovery are subject to this criticism. There is surely nothing wrong in a witness refreshing his or her memory from a previous statement or document. The witness may even change his or her evidence as a result. This may rob the cross-examiner of a substantial advantage but fairness to the witness may require that a trap not be laid by allowing the witness to testify without the benefit of seeing contradictory writings which the prosecutor holds close to the vest. The principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material.

16 Finally, it is suggested that disclosure may put at risk the security and safety of persons who have provided the prosecution with information. No doubt measures must occasionally be taken to protect the identity of witnesses and informers. Protection of the identity of informers is covered by the rules relating to informer privilege and exceptions thereto (see Marks v. Beyfus (1890), 25 Q.B.D. 494 (C.A.); R. v. Scott, [1990] 3 S.C.R. 979), and any rules with respect to disclosure would be subject to this and other rules of privilege. With respect to witnesses, persons who have information that may be evidence favourable to the accused will have to have their identity disclosed sooner or later. Even the identity of an informer is subject to this fact of life by virtue of the "innocence exception" to the informer privilege rule (Marks v. Beyfus, supra, at pp. 498-99; R. v. Scott, supra, at p. 996; Bisaillon v. Keable, [1983] 2 S.C.R. 60, at p. 93; Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario), [1981] 2 S.C.R. 494). It will, therefore, be a matter of the timing of the disclosure rather than whether disclosure should be made at all. The prosecutor must retain a degree of discretion in respect of [page336] these matters. The discretion, which will be subject to review, should extend to such matters as excluding what is clearly irrelevant, withholding the identity of persons to protect them from

harassment or injury, or to enforce the privilege relating to informers. The discretion would also extend to the timing of disclosure in order to complete an investigation. I shall return to this subject later in these reasons.

17 This review of the pros and cons with respect to disclosure by the Crown shows that there is no valid practical reason to support the position of the opponents of a broad duty of disclosure. Apart from the practical advantages to which I have referred, there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the Canadian Charter of Rights and Freedoms as one of the principles of fundamental justice. (See Dersch v. Canada (Attorney General), [1990] 2 S.C.R. 1505, at p. 1514.) The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person. In the Royal Commission on the Donald Marshall, Jr., Prosecution, Vol. 1: Findings and Recommendations (1989) (the "Marshall Commission Report"), the Commissioners found that prior inconsistent statements were not disclosed to the defence. This was an important contributing factor in the miscarriage of justice which occurred and led the Commission to state that "anything less than complete disclosure by the Crown falls short of decency and fair play" (Vol. 1 at p. 238). The Commission recommended an extensive [page337] regime of disclosure of which the key provisions are as follows (Vol. 1 at p. 243):

> 2(1) Without request, the accused is entitled, before being called upon to elect the mode of trial or to plead to the charge of an indictable offence, whichever comes first, and thereafter:
>
> (a) to receive a copy of his criminal record;
> (b) to receive a copy of any statement made by him to a person in authority and recorded in writing or to inspect such a statement if it has been recorded by electronic means; and to be informed of the nature and content of any verbal statement alleged to have been made by the accused to a person in authority and to be supplied with any memoranda in existence pertaining thereto;
> (c) to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, receive copies thereof;
> (d) to receive a copy of any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness, and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness, or anyone who may be called as a witness;
> (e) to receive any other material or information known to the Crown and which tends to mitigate or negate the defendant's guilt as to the offence charged, or which would tend to reduce his punishment therefor, notwithstanding that the Crown does not intend to introduce such material or information as evidence;
> (f) to inspect the electronic recording of any statement made by a person whom the prosecutor proposes to call as a witness;
> (g) to receive a copy of the criminal record of any proposed witness; and
> (h) to receive, where not protected from disclosure by the law, the

> name and address of any other person who may have information useful to the accused, or other details enabling that person to be identified.
>
> 2(2) The disclosure contemplated in subsection (1), paragraphs (d), (e) and (h) shall be provided by the [page338] Crown and may be limited only where, upon an inter partes application by the prosecutor, supported by evidence showing a likelihood that such disclosure will endanger the life or safety of such person or interfere with the administration of justice, a justice having jurisdiction in the matter deems it just and proper.

18 In my opinion there is a wholly natural evolution of the law in favour of disclosure by the Crown of all relevant material. As long ago as 1951, Cartwright J. stated in Lemay v. The King, [1952] 1 S.C.R. 232, at p. 257:

> I wish to make it perfectly clear that I do not intend to say anything which might be regarded as lessening the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise .... [Emphasis added.]

This statement may have been in reference to the obligation resting on counsel for the Crown to call evidence rather than to disclose the material to the defence, but I see no reason why this obligation should not be discharged by disclosing the material to the defence rather than obliging the Crown to make it part of the Crown's case. Indeed, some of the information will be in a form that cannot be put in evidence by the Crown but can be used by the defence in cross-examination or otherwise. Production to the defence is then the only way in which the injunction of Cartwright J. can be obeyed.

19 In R. v. C. (M.H.) (1988), 46 C.C.C. (3d) 142 (B.C.C.A.), at p. 155, McEachern C.J.B.C. after a review of the authorities stated what I respectfully accept as a correct statement of the law. He said that: "there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it". This passage was cited with approval by McLachlin J. in her reasons on behalf of the Court ([1991] 1 S.C.R. 763). She went on to add: "This Court has previously stated that the Crown is under a duty at common law to disclose to the defence all material [page339] evidence whether favourable to the accused or not" (p. 774).

20 As indicated earlier, however, this obligation to disclose is not absolute. It is subject to the discretion of counsel for the Crown. This discretion extends both to the withholding of information and to the timing of disclosure. For example, counsel for the Crown has a duty to respect the rules of privilege. In the case of informers the Crown has a duty to protect their identity. In some cases serious prejudice or even harm may result to a person who has supplied evidence or information to the investigation. While it is a harsh reality of justice that ultimately any person with relevant evidence must appear to testify, the discretion extends to the timing and manner of disclosure in such circumstances. A discretion must also be exercised with respect to the relevance of information. While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant. The experience to be gained from the civil side of the practice is that counsel, as officers of the court and acting responsibly, can be relied upon not to withhold pertinent information. Transgressions with respect to this duty constitute a very serious breach of legal ethics. The initial obligation to separate "the wheat from the chaff" must therefore rest with Crown counsel. There may also be situations in which early disclosure may impede completion

of an investigation. Delayed disclosure on this account is not to be encouraged and should be rare. Completion of the investigation before proceeding with the prosecution of a charge or charges is very much within the control of the Crown. Nevertheless, it is not always possible to predict events which may require an investigation to be re-opened and the Crown must have [page340] some discretion to delay disclosure in these circumstances.

21 The discretion of Crown counsel is, however, reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule.

22 The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege. The trial judge may also review the decision of the Crown to withhold or delay production of information by reason of concern for the security or safety of witnesses or persons who have supplied information to the investigation. In such circumstances, while much leeway must be accorded to the exercise of the discretion of the counsel for the Crown with respect to the manner and timing of the disclosure, the absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure.

23 The trial judge may also review the Crown's exercise of discretion as to relevance and interference with the investigation to ensure that the right to make full answer and defence is not violated. I am confident that disputes over disclosure will arise infrequently when it is made clear that counsel for the Crown is under a general duty to disclose all relevant [page341] information. The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high. Given this fact, and the obligation on defence counsel as officers of the court to act responsibly, these matters will usually be resolved without the intervention of the trial judge. When they do arise, the trial judge must resolve them. This may require not only submissions but the inspection of statements and other documents and indeed, in some cases, viva voce evidence. A voir dire will frequently be the appropriate procedure in which to deal with these matters.

24 Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial. See Caccamo v. The Queen, [1976] 1 S.C.R. 786. Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.

25 These are the general principles that govern the duty of the Crown to make disclosure to the defence. There are many details with respect to their application that remain to be worked out in the context of concrete situations. It would be neither possible nor appropriate to attempt to lay down precise rules here. Although the basic principles of disclosure will apply across the country, the details may vary from province to province and even within a province by reason of special local conditions and practices. It would, therefore, be useful if the under-utilized power conferred by s. 482 of the Criminal Code which empowers superior courts and courts of criminal jurisdiction to enact rules were employed to provide [page342] further details with respect to the procedural aspects of disclosure.

26 The general principles referred to herein arise in the context of indictable offences. While it may be argued that the duty of disclosure extends to all offences, many of the factors which I have canvassed may not apply at all or may apply with less impact in summary conviction offences. Moreover, the content of the right to make full answer and defence entrenched in s. 7 of the Charter may be of a more limited nature. A decision as to the extent to which the general principles of disclosure extend to summary conviction offences should be left to a case in which the issue arises in such proceedings. In view of the number and variety of statutes which create such offences, consideration would have to be given as to where to draw the line. Pending a decision on that issue, the voluntary disclosure which has been taking place through the co-operation of Crown counsel will no doubt continue. Continuation and extension of this practice may eliminate the necessity for a decision on the issue by this Court.

27 There are, however, two additional matters which require further elaboration of the general principles of disclosure outlined above. They are: (1) the timing of disclosure, and (2) what should be disclosed. Some detail with respect to these issues is essential if the duty to disclose is to be meaningful. Moreover, with respect to the second matter, resolution of the dispute over disclosure in this case requires a closer examination of the issue.

28 With respect to timing, I agree with the recommendation of the Law Reform Commission of Canada in both of its reports that initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead. These are crucial steps which the accused must take which affect his or her rights in a fundamental way. It will be of great assistance to the accused to know what are the strengths and weaknesses [page343] of the Crown's case before committing on these issues. As I have pointed out above, the system will also profit from early disclosure as it will foster the resolution of many charges without trial, through increased numbers of withdrawals and pleas of guilty. The obligation to disclose will be triggered by a request by or on behalf of the accused. Such a request may be made at any time after the charge. Provided the request for disclosure has been timely, it should be complied with so as to enable the accused sufficient time before election or plea to consider the information. In the rare cases in which the accused is unrepresented, Crown counsel should advise the accused of the right to disclosure and a plea should not be taken unless the trial judge is satisfied that this has been done. At this stage, the Crown's brief will often not be complete and disclosure will be limited by this fact. Nevertheless, the obligation to disclose is a continuing one and disclosure must be completed when additional information is received.

29 With respect to what should be disclosed, the general principle to which I have referred is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence. The attempt to make this distinction in connection with the confession rule proved to be unworkable and was eventually discarded by this Court. See Piché v. The Queen, [1971] S.C.R. 23, at p. 36; Rothman v. The Queen, [1981] 1 S.C.R. 640, at p. 645. To re-introduce the distinction here would lead to interminable controversy at trial that should be avoided. The Crown must, therefore, [page344] disclose relevant material whether it is inculpatory or exculpatory.

30 A special problem arises in respect to witness statements and is specifically raised in this case. There is virtually no disagreement that statements in the possession of the Crown obtained from witnesses it proposes to call should be produced. In some cases the statement will simply be recorded in notes taken by an investigator, usually a police officer. The notes or copies should be produced. If notes do not exist then a "will say" statement, summarizing the anticipated evidence of the witness, should be produced based on the information in the Crown's possession. A more difficult issue is posed with respect to witnesses and other persons whom the Crown does not propose to call. In its 1974 Working

Paper, the Law Reform Commission of Canada recommended disclosure of not only the names, addresses and occupations of all "persons who have provided information to investigation or prosecution authorities" (p. 41), but the statements obtained or, if these did not exist, "a summary of the information provided by those persons not intended to be called at trial, along with a statement of the manner in which the information in each summary has been obtained ..." (p. 41). In its 1984 Report, the Commission seemed to have changed its mind. It stated (at pp. 27-28):

> With respect to potential witnesses we do not recommend, on a mandatory basis, the type of thorough disclosure that we recommend with respect to proposed witnesses. Complete disclosure would entail not only the identification of such persons, but the disclosure of any statement they made and in some cases their criminal records. In our view a recommendation to this effect would be excessive and disproportionate to the needs of the defence. In many instances these people are of no use, or of marginal use, to the case for either side. Their statements are not evidence, although they may be effectively used by the prosecution for purposes of impeachment in cross-examination in the event the witness is called by the accused. Prosecutors are understandably reluctant to disclose these statements because to do so [page345] would imperil their principal utility. It is our view that the interests of the defence are adequately served by the mandatory disclosure of the identity of such persons, although we would not wish our comments to discourage prosecutors from disclosing statements and other relevant information on a voluntary basis.

31 The Marshall Commission Report recommended disclosure of "any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness". Although not entirely clear, this recommendation appears to extend to anyone who has relevant information and who is either compellable or prepared to testify whether proposed to be called by the Crown or not.

32 This Court, in R. v. C. (M.H.), supra, dealt with the failure to disclose either the identity or statement of a person who provided relevant information to the police but who was not called as a witness. McLachlin J., speaking for the Court, indicated that failure to disclose in such cases could impair the fairness of the trial.

33 I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied. I do not find the comments of the Commission in its 1984 Report persuasive. If the information is of no use then presumably it is irrelevant and will be excluded in the exercise of the discretion of the Crown. If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecutor. [page346] Moreover, I do not understand the Commission's statement that "[t]heir statements are not evidence". That is true of all witness statements. They themselves are not evidence but are produced not because they will be put in evidence in that form but will enable the evidence to be called viva voce. That prosecutors are reluctant to disclose statements because use of them in cross-examination is thereby rendered less effective is understandable. That is an objection to all forms of discovery and disclosure. Tactical advantage must be sacrificed in the interests of fairness and the ascertainment of the true facts of the case.

3. Application to This Case

34 No request was made in this case for disclosure prior to pleading or electing the mode of trial and this issue does not, therefore, arise. A request for disclosure was made during the trial for the disclosure of two statements taken subsequent to the preliminary hearing. An application for disclosure was dismissed by the trial judge on the ground that there was no obligation on the Crown to disclose the statements.

35 Applying the above principles, I conclude that the following errors were committed:

(1) Counsel for the Crown misconceived his obligation to disclose the statements;
(2) The explanation for refusal that the witness was not worthy of credit was completely inadequate to support the exercise of this discretion on the ground of irrelevance. Whether the witness is credible is for the trial judge to determine after hearing the evidence;
(3) The trial judge ought to have examined the statements. The suggestion that this would have prejudiced the trial judge is without [page347] merit. Trial judges are frequently apprised of evidence which is ruled inadmissible. One example is a confession that fails to meet the test of voluntariness. No one would suggest that knowledge of such evidence prejudices the trial judge. We operate on the principle that a judge trained to screen out inadmissible evidence will disabuse himself or herself of such evidence;
(4) The trial judge erred in his statement of the duty to disclose on the part of the Crown.

36 It was submitted that the appellant was not deprived of the opportunity to make full answer and defence because he could have:

(a) interviewed the witness and obtained his own statement;
(b) called the witness, and if her evidence proved adverse, cross-examined on the basis of the preliminary hearing transcript.

37 With respect to (a), counsel for the appellant pointed out that the witness refused to be interviewed. In any event, even if such an interview took place, what the witness said on two prior occasions could be very material to the defence.

38 As for (b), counsel for the defence is entitled to know whether the witness he/she is calling will give evidence that will assist the defence or whether the witness will be adverse and necessitate an application to cross-examine on the basis of a prior inconsistent statement. The latter usually creates an undesirable atmosphere at the trial and the most that can be achieved is to impeach or destroy the credibility of the witness. See McInroy v. The Queen, [1979] 1 S.C.R. 588, and R. v. Mannion, [1986] 2 S.C.R. 272, at pp. 277-78. Most counsel faced with this prospect would likely opt not to call the witness, a matter which bears on the right to make full answer and defence.

[page348]

39 What are the legal consequences flowing from the failure to disclose? In my opinion, when a court of appeal is called upon to review a failure to disclose, it must consider whether such failure impaired the right to make full answer and defence. This in turn depends on the nature of the information withheld and whether it might have affected the outcome. As McLachlin J. put it in R. v. C. (M.H.), supra, at. p. 776:

> Had counsel for the appellant been aware of this statement, he might well have decided to use it in support of the defence that the evidence of the complainant was a fabrication. In my view, that evidence could conceivably have affected the jury's conclusions on the only real issue, the respective credibility of the complainant and the appellant.

40 In this case, we are told that the witness gave evidence at the preliminary hearing favourable to the defence. The subsequent statements were not produced and therefore we have no indication from the trial judge as to whether they were favourable or unfavourable. Examination of the statements, which were tendered as fresh evidence in this Court, should be carried out at trial so that counsel for the defence, in the context of the issues in the case and the other evidence, can explain what use might be made of them by the defence. In the circumstances, we must assume that non-production of the statements was an important factor in the decision not to call the witness. The absence of this evidence might very well have affected the outcome.

41 Accordingly, I would allow the appeal and direct a new trial at which the statements should be produced.

qp/i/qlcvd

Indexed as:

Milner v. Registered Nurses Assn. of British Columbia

Between
Cynthia Milner, appellant, and
Registered Nurses Association of British Columbia, respondents

[1999] B.C.J. No. 2743

71 B.C.L.R. (3d) 372

20 Admin. L.R. (3d) 71

93 A.C.W.S. (3d) 374

25 B.C.T.C. 241

Vancouver Registry No. A972468

British Columbia Supreme Court
Vancouver, British Columbia

Boyd J.
(In Chambers)

Heard: June 23 - 25, 29 and July 23, 1999.
Judgment: December 3, 1999.

(112 paras.)

Administrative law -- The hearing and decision -- Disclosure by the tribunal -- Of investigative results -- Natural justice -- Effect of denial of natural justice -- Judicial review.

This was an application by the member, Milner, for judicial review of the decision finding her guilty of incompetence and terminating her membership in the Registered Nurses Association. Based on Rule 7.12 of the Members' Act Rules, the committee had taken the position that it was bound not to disclose the investigator's notes of interviews and the investigator's report, as well as other documents. It eventually released a number of the documents, although it was very late in the hearing process. Milner claimed that the Association's professional conduct committee had breached the rules of natural justice in failing to disclose all material documents and witnesses in advance. She argued that her right to a fair hearing was denied. She further argued that there was no evidence to support the findings of fact made by the committee. The Association argued that Milner had not discharged her burden of showing there was a reasonable possibility that the non-disclosure had affected either the outcome of the disciplinary hearing

or the overall fairness of the disciplinary hearing.

HELD: Application allowed. The matter was referred back to the Association to assemble a panel for a new hearing. Milner had established that there was a reasonable possibility that, had the information been disclosed or disclosed in a more timely fashion, her counsel could have pursued lines of inquiry or opportunities to garner additional evidence and that those efforts might have produced a different result. Cumulatively, the late disclosure or non-disclosure had a significant effect on the overall conduct of Milner's defence, particularly with respect to cross-examination of the Association's witnesses. However, Milner's ability to make full answer and defence had not been irreparably impaired. Rule 7.12 was contrary to the rules of natural justice. The Act did not contain the clear and express statutory language sufficient to permit the Association the power to abridge the common law rules of natural justice.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7.

Members' Act Rules, s. 7.3(3), 7.12, 7.12(1), 7.12(3).

Registered Members Act, ss. 9(1), 41(3), 45, 45(9)(a), 52.

Counsel:

Cynthia Milner appeared on her own behalf.
Michael Carroll, Q.C., and Kathryn Denhoff, for the respondents.
Chris Buchanan, for the intervenor, British Columbia Nurses' Union.

BOYD J.:--

1.0 INTRODUCTION

1 On February 19, 1996, following a lengthy disciplinary hearing, the Professional Conduct Committee of the Registered Nurses Association of British Columbia ("RNABC") found the appellant, Cynthia Milner ("the Member") guilty of incompetence and having acted contrary to the ethical standards of the nursing profession and in breach of the Registered Nurses Act (" the Act"). On December 23, 1996, following a sentencing hearing, the Professional Conduct Committee terminated her membership in the RNABC. The decisions were the subject of an appeal heard by the Board of Directors of the RNABC. By way of decision dated August 28, 1997, the Board of Directors upheld the findings of the Professional Conduct Committee. This proceeding is a judicial review of those decisions brought pursuant to s. 45 of the Act.

2 There are two main grounds of appeal:

1. That by virtue of failing to make full disclosure of all material documents and witnesses, in advance of and during the course of the disciplinary hearing, the RNABC has either breached the rules of natural justice or the Member's constitutional right, under s. 7 of the Charter, to make full answer and defence; and

2. That there is no evidence on the face of the record to support the findings of fact made by the Professional Conduct Committee.

2.0 Chronological Review of Events:

2a December 23, 1994 - RNABC issues Citation alleging professional misconduct in the treatment of two patients, A and B ("Patient A" and "Patient B").

2b January 5, 1995 - By letter, Member's counsel requests full particulars of Member's conduct (including any complaints not set out in the Citation), a list of witnesses, summaries of their expected testimony and any exhibits the RNABC plans to tender at the hearing.

2c February 3, 1995 - RNABC provides Member's counsel with statements of expert evidence of Margaret Lee and Dr. Roger Goodall. Counsel for RNABC advises that witness interviews had begun and that particulars would be provided the following week.

2d February 8, 1995 - RNABC counsel provides Member's counsel with written particulars of the allegations contained in the Citation. In the letter, the RNABC counsel advises that "the R.N.A.B.C. will be relying on the allegations contained in these particulars and documents, as well as the allegations contained in the Citation".

2e February 23, 1995 - RNABC counsel provides Member's counsel with a tentative schedule of witnesses for the s. 26 hearing (While the schedule does not mention Mr. Renaud, the letter does indicate that he will be called as a witness on March 7, 1995)

2f February 27, 1995 - RNABC counsel discloses to Member's counsel by telephone that Patient B had delivered three cassette tapes of a conversation between Patient B and two individuals present at the home labour of Patient B.

2g February 28, 1995 - Under cover of a letter RNABC counsel delivers a typed transcript of tapes to the Member's counsel, which transcript had been typed by various secretaries in the offices of the RNABC counsel. The letter cautions that there are several gaps in the typed transcript representing portions of conversation which are inaudible. Counsel extends an invitation to the Member's counsel to listen to the tapes in person at the office of the RNABC counsel.

2h March 1, 1995 - Member's counsel suggests the s. 26 hearing be adjourned since one of the RNABC witnesses would be unavailable during the week of March 6, 1995. RNABC counsel does not consent to the adjournment since the s. 26 hearing would have to be continued at a later date in any event.

2i March 3, 1995 - At request of Member's counsel, RNABC counsel delivers original cassette tapes by courier.

2j March 3, 1995 - Member's counsel requests that he be released from an undertaking not to release the original tapes to any other person, in order to allow him to send the tapes to his client to listen to. RNABC agrees the original tapes can be provided to the Member.

2k March 6, 1995 - First date of s. 26 hearing before the Panel. Member's counsel makes eight preliminary objections:

(a) an application for the Panel for an order that an official reporter

transcribe the three cassette tapes provided by RNABC counsel and that the hearing be adjourned pending preparation of same;

(b) an objection to the RNABC holding the s. 26 hearing, as the conduct being reviewed was the conduct of a midwife, to whom different standards and a different jurisdiction apply;

(c) an application for an adjournment as the RNABC did not have jurisdiction over the Member since she was not a Member of the RNABC at the time of the incident concerning Patient B, her membership having lapsed a number of weeks earlier;

(d) an objection to the s. 26 hearing proceeding on the grounds the Panel may not be impartial since the RNABC recently made an application to the Health Professions Council to have midwifery brought into being as a speciality of nursing requiring dual licencing. The Member's counsel requests an adjournment until a Midwives' Association is brought into being by the Legislature;

(e) an application for an adjournment in order to look into case law relied upon by the RNABC's counsel in response to the member's preliminary objection regarding the jurisdiction of the Panel;

(f) an objection to the s. 26 hearing proceeding as the Citation was signed by an individual not lawfully authorized the Executive Director of the RNABC to sign the Citation;

(g) an application for particulars of the various endorsements on the Citation. The Member's counsel made the application for particulars just before 3:00 p.m. after the previous six applications and/or objections had failed;

(h) an objection to the s. 26 hearing proceeding with respect to Count 1 of the Citation as the allegation had been adjudicated on by the Midwives Association of British Columbia and the Member already disciplined.

The preliminary objections were all dismissed. Regarding the objection concerning the lack of particulars (g), the Chairperson held:

> I am satisfied that the Citation was issued sometime ago, that particulars were provided. Whether they were in a form understandable or not, I think there was time to discuss it, and I would suggest we proceed. (Volume 1, p. 85, line 10-14)

2l March 7, 1995 - Member's counsel requests an adjournment to obtain particulars of the evidence of Ludovic Renaud. The application is refused since counsel had earlier been delivered particulars of evidence by telephone and there had been no complaint from him to that point concerning insufficient particulars.

2m March 8, 1995 - Hearing: RNABC expert witness, Ms. Margaret Lee provides evidence in chief and in cross-examination.

2n March 9, 1995 - Hearing: Continued cross-examination of Ms. Lee. Ms. Irene Callander, Lions Gate Hospital obstetrical nurse, provides evidence in chief and in cross-examination.

2o March 10, 1995 - Hearing: Continued cross-examination of Ms. Callander. Member's counsel requests production of "Paulette letter". Ms. Alison Lang provides evidence in chief.

2p March 31, 1998 - RNABC counsel produces "Paulette letter".

2q April 11, 1995 - Member appears on her own behalf to request an adjournment of the s. 26 hearing due to her counsel's illness. Adjournment granted to May 1, 1995.

2r April 24, 1995 - Articled student to Member's counsel requests further adjournment of the hearing due to another commitment of the Member's counsel. Adjournment granted to May 18, 1995.

2s May 18, 1995 - Hearing: Continued cross-examination of Ms. Lang.

2t July 25, 1995 - Articled student to Member's counsel writes to RNABC counsel proposing a further adjournment of the s. 26 hearing dates of October 2-5, 1995 and October 30-November 3, 1995 due to the unavailability of one of the Member's witnesses. RNABC counsel refuses to consent to the adjournment since other evidence could be presented on the scheduled hearing date. Member's counsel makes no application to Chairperson for an adjournment.

2u September 2, 1995 - Member's counsel requests an adjournment of the s. 26 hearing dates in October and November 1995 due to death of Member's parents in July and August 1995.

2v September 8, 1995 - RNABC Hearing Co-ordinator writes to the Member's counsel outlining the Chair's request for a medical report regarding Member's inability to proceed with s. 26 hearing in October and November 1995. Member does not provide information requested and s. 26 hearing resumes on October 12, 1995.

2w October 10, 1995 - Member's counsel requests a further adjournment of the s. 26 hearing to January 8, 1996 due to unavailability of one of the Member's witnesses.

2x October 24, 1995 - RNABC Hearing Co-ordinator confirms adjournment of s. 26 hearing to January 8, 1996.

2y January 8, 9 and 10, 1996 - Hearing Dates.

2z February 19, 1996 - Professional Conduct Committee issues its decision and reasons. Member is found to be guilty of incompetence and having acted contrary to the ethical standards of the nursing profession as well as in breach of the Act.

2aa December 9, 1996 - S. 27 sentencing hearing.

2bb December 23, 1996 - Professional Conduct Committee delivers decision terminating the Member's membership in the RNABC.

2cc July 18, 1997 - Appeal heard by the Board of Directors of the RNABC pursuant to s. 44 of the Act.

2dd August 28, 1997 - Decisions and reasons of the Board of Directors are delivered, upholding the findings of the Professional Conduct Committee.

2ee September 22, 1997 - Member files Notice of Appeal in the Supreme Court of British Columbia pursuant to s. 45 of the Act.

2ff October 26, 1998 - Respondent RNABC applies for further Directions.

2gg November-December, 1998 - Application for tendering of fresh evidence heard by Boyd J.

2hh December 10, 1998 - Order for production made by Boyd J.

2ii February 2, 1999 - Order for Directions made by Boyd J.

[Paragraph numbers 2a - 2ii were assigned by Quicklaw.]

3.0 First Ground of Appeal: Material Non-disclosure

3 Throughout these proceedings and until my order made on December 10, 1998, the RNABC took the position it was not required and indeed was obliged not to disclose the Investigator's Notes of Interviews and the Investigator's Report, as prescribed by Rule 7.12(1) of the Nurses' Act Rules ("the Rules"). The appellant complains that by virtue of the RNABC's failure to disclose the investigator's notes of interviews and report, as well as other documents, either at all or with sufficient notice prior to the Panel hearing, she was unable to make full answer and defence and was thereby prejudiced. She submits that the legislation authorizing the RNABC to withhold the Investigator's report and notes (Rule 7.12) is ultra vires in that the Rule is contrary to both the rules of natural justice and s. 7 of the Charter. Since the RNABC takes the position that the Act specifically precludes production of the first group of documents, I will address the ramifications of those statutory provisions separately.

4 The RNABC defends the limited disclosure in this case on several grounds:

(i) Throughout, the RNABC's counsel was bound by the provisions of Rule 7.12 not to disclose the Investigator's report or investigator's notes;

(ii) As to the balance of the documents, the appellant failed to challenge the non-disclosure of the documents at the outset of and during the course of the hearing and accordingly, cannot now complain of any breach of the rules of natural justice (Said v. Canada (Secretary of State) (1996), 206 N.R. 127 (F.C.A.));

(iii) In the alternative, in the event the Court finds there ought to have been disclosure, the appellant has not demonstrated, on a balance of probabilities, that her right to make full answer and defence has been denied, i.e. that there is a reasonable possibility the non-disclosure affected the outcome of the hearing or the overall fairness of the process. (R. v. McQuaid (sub nom R. v. Dixon), [1998] 1 S.C.R. 244 (SCC)).

5 It is acknowledged that in the case of professional disciplinary proceedings, the courts have held that such tribunals must adhere to a high standard of natural justice.

3.1 Disclosure in Disciplinary Proceedings:

6 The RNABC submits that since the consequences of a nursing disciplinary tribunal are not "truly penal consequences", disclosure ought not to be in accordance with the criminal model established in R. v. Stinchcombe (No.1) [1992] 1 WWR 97 (SCC), but rather in accordance with the narrower administrative law model exemplified in Biscotti v. Ontario Securities Commission (1991) 1 O.R. (3d) 409 (Ont. C.A.), Markandey (supra); Knutson v. Saskatchewan Registered Nurses' Association [1991] 2 WWR 327 (Sask C.A.); Yeung v. RNABC (June 16, 1994) Vancouver Registry No. A934379 (BCSC): and Nuosci v. RCMP [1994] 1 F.C. 353 (FCA). In other words, the RNABC submits it need only make

such disclosure "as is necessary to make full answer and defence". (See Biscotti, Ont. H.Ct. Justice, p. 123).

7 In Yeung (supra), Tysoe J. rejected the criminal model and held that the degree of disclosure required in Stinchcombe (supra) did not apply in the case of a disciplinary hearing under the Act. However, I note that in Yeung (supra), the issue arose in the context of whether the RNABC's failure to disclose the investigator's notes violated the member's right to full cross-examination as set out in s. 43 of the Act. The general application of Stinchcombe to the RNABC's disciplinary proceedings was raised as no more than a secondary issue. Further I note that the only authority relied upon to support the proposition was Nuosci (supra).

8 In any case, I am satisfied that since Yeung (supra) was decided, the Courts have clearly moved toward requiring administrative disciplinary tribunals to approach, if not meet, the Stinchcombe standard.

9 In Hannos v. Registered Nurses Association of British Columbia (1996) B.C.J. No. 138 (BCSC) Allan J. held that even in a case involving an interim suspension of a nurse pending a hearing, the tribunal was only permitted to abridge the rules of natural justice in so far as the urgency of the situation required the overriding of such a procedural safeguard. She notes at para. 36 that:

> I discern a trend in the reported cases towards ensuring that professional bodies fulfill their duty to act fairly to their members when exercising their statutory powers to impose conditions or suspend registration.

10 In 1997 in Hammami v. College of Physicians & Surgeons (B.C.), 36 B.C.L.R. (3d) 17 (B.C.S.C.) Williams C.J.S.C. held that the principle of full disclosure enunciated in Stinchcombe ought to be applied in the case of an appeal from the decision of the College of Physician and Surgeons in which the member alleged the College had wrongfully refused full disclosure of its file. On a review of the case law authorities, Williams C.J.S.C. summarized the law of disclosure relating to disciplinary tribunals, at least in part, in the following manner at para. 75:

> It seems to me the following principles can be gleaned from the above cases:
>
> 1. The Stinchcombe case itself arose in the criminal context and held that full disclosure must be made in indictable offenses, and that it may be applicable in other offenses as well.
> 2. That in cases arising from the administrative law context where the decision of an administrative tribunal might terminate or restrict the 'accused's' right to practice or pursue that career or seriously impact on a professional reputation then the principles in Stinchcombe, in respect of disclosure may well apply.
> 3. In appropriate cases the court's approach should be as outlined by the Court of Appeal in G.(J.P.) v. British Columbia (Superintendent of Family & Child Services and that is where the disclosure 'might have been useful' then disclosure should be made by the Crown (or tribunal) unless there is 'any special reason why such material should not be disclosed' and in those circumstances the special reason should be brought to the attention of the judge or tribunal.

....

Williams C.J.S.C. concluded the Stinchcombe principles did apply. Accordingly he ordered that subject to any claims of privilege or of confidentiality, the College was required to disclose the appellant's file.

11 In 1998 in Bailey v. R.N.A. (Sask.) [1998] 10 W.W.R. 536 (Sask. Q.B.), the Saskatchewan Queen's Bench applied the Stinchcombe principles to professional disciplinary proceedings involving the nursing profession. Indeed, at pages 576-7 of the decision, the Court adopted the statement of the learned author James T. Casey in The Regulation of Professions in Canada (supra), at pp. 8-23 and 8-24 under the heading "Disclosure of Exculpatory Information":

> What is the duty of disclosure in the context of a disciplinary hearing for professionals? Certainly there is a duty on the prosecutor to disclose sufficient information so that the member knows the case to be met.... Professional organizations fulfill important public functions in the regulation of professions and should not be viewed as adversaries engaging in a form of civil litigation. Like a criminal prosecution, the purpose of a disciplinary hearing should not be to obtain a conviction, it should be to present all relevant information to the *Discipline Committee to determine whether professional misconduct has* occurred.... A finding for a professional misconduct can have grave and permanent consequences for a professional. In some cases, the consequences are more severe than a criminal conviction. Therefore, the policy reasons for full disclosure of all ... material should apply equally to professional discipline hearings. In fact, it is interesting, to note the comments of the Ontario Divisional Court in response to a complaint regarding a disciplinary hearing that a potentially important witness interview memorandum was not produced. The Court stated that there was '...no reason to believe that the memorandum in question would not have been produced to the defence in response to a standard **Stinchcombe** letter.'
>
> . . . .
>
> (emphasis mine)
>
> In Howe v. Institute of Chartered Accountants (Ontario) [(1994), 19 O.R. (3d) 483 (C.A.) leave to appeal to S.C.C. refused (February 2, 1995)...] the Ontario Court of Appeal dismissed an application to compel production of a report ... Laskin, J.A. in a strong dissent found that several of the observations made by Sopinka J. in Stinchcombe seemed apt to determine the content of the fairness obligations of administrative tribunals and would have ordered production of the report.

12 Further, at paragraph 144 of the Bailey decision, the Court adopted the following statement at pp. 8-24 and 8.24.1 of the same text, as follows:

> The standard of disclosure for a disciplinary tribunal has been described by one Court as follows:
>
> > The importance of full disclosure to the fairness of the disciplinary proceedings before the Board cannot be overstated. Although the

> standards of pre-trial disclosure in criminal matters would generally be higher than in administrative matters (see Biscotti et al. v. Ontario Securities Commission, supra), tribunals should disclose all information relevant to the conduct of the case, whether it be damaging to or supportive of a respondent's position, in a timely manner unless it is privileged as a matter of law. Minimally, this should include copies of all witness statements and notes of investigators.... The absence of a request for disclosure, whether it be for additional disclosure or otherwise, is of no significance. The obligation to make disclosure is a continuing one. The Board has a positive obligation to ensure the fairness of its own processes. The failure to make proper disclosure impacts significantly on the appearances of justice and the fairness of the hearing itself. Seldom will relief not be granted for a failure to make proper disclosure. Markandey v. Board of Ophthalmic Dispensers (Ontario), supra.

13 On a review of all the case authorities, it appears clear that more recently the standard of disclosure in the case of professional disciplinary tribunals has been expanded far beyond the narrow administrative law model. Professor Casey's remarks succinctly and eloquently articulate the standard of disclosure. The Courts have repeatedly and properly acknowledged that in disciplinary proceedings, the individual professional's ability to pursue her livelihood, as well as her professional and personal reputation are often at stake. In these circumstances, a high standard of proof must apply to the charges alleged, with a concomitant standard of disclosure. In my view, the narrow issue here is whether by virtue of the express statutory language contained in the Rules, the RNABC is entitled to abridge a nurse's common law right to such disclosure.

3.3 Rule 7.12:

14 Section 9(1) of the Act provides:

> For the better administration of this Act and the affairs of the association, the board of directors may make rules.

15 Rule 7.12 provides:

> (1) As soon as practicable after delivery of the citation, there shall be provided to the member particulars known to the association of the member's conduct to be inquired into, including proposed exhibits, a list of witnesses expected to be called by the association, and summaries of their expected testimony.
> (2) The panel conducting the inquiry may permit the association to introduce exhibits, witnesses, or other evidence not included in the particulars if satisfied that the member has received reasonable notice of such evidence or will otherwise not be unduly prejudiced.
> (3) The complaint, the investigator's notes of interviews and the investigator's report to the chair shall not be included in the particulars, and shall not be evidence at the inquiry unless the panel conducting the inquiry requires the admission of any part thereof after giving due regard to any assurances of confidentiality given to the complainant or persons interviewed.

16 Since the Rule raises the issue of confidentiality, I must note that s. 52 of the Act provides as follows:

> A person who, in the course of carrying out the person's duties under this Act, obtains information, files or records that are submitted in accordance with a request or obligation under this Act, must not disclose the information, files or records to any person other than for the purposes of carrying out the person's duties under this Act, the constitution and bylaws or the rules or if required by law.

17 While the RNABC acknowledges its common law duty to inform the person subject to disciplinary proceedings of the case which she must meet before the commencement of the hearing, it submits the Rules enacted under the Act modify that common law duty. Under the authority of s. 9(1) of the Act, it submits the Legislature has delegated to the RNABC's Board of Directors the power to "make rules" "(f)or the better administration of this Act and the affairs of the association" and accordingly to enact Rule 7.12.

18 Rules 7.12 (1) and (3) define the scope of particulars which the RNABC must provide to a member. Rule 7.12 (1) provides a non-exhaustive definition of particulars. The particulars must include proposed exhibits, a list of witnesses expected to be called and summaries of their expected testimony. The information disclosed shall not include "the complaint, the investigator's notes of interviews and the investigator's report". Rule 7.3(3) expressly prohibits the RNABC from disclosing the identity of a complainant to a member prior to hearing.

19 While the Courts have held that a person subject to disciplinary proceedings may be entitled to disclosure of the investigator's reports and notes prior to a hearing, the RNABC submits those authorities are distinguishable since, in each of those cases, the governing statutory regime did not specifically prohibit pre-hearing disclosure and accordingly it submits the common law duty was not expressly modified by statute. (See Markandey v. Board of Ophthalmic Dispensers (Ontario) (1944) O.J. No. 484 (Ont. C.J. Gen. Div.) and Hammami C. College of Physicians and Surgeons (B.C.) (1997), 36 BCLR (3d) 17 (BCSC)).

20 I agree with the Intervenor that while s. 9(1) provides the Board of Directors with statutory power to adopt rules for the "better administration of (the Act) and the affairs of the Association", that power cannot be extended to include the adoption of rules which are either expressly or implied inconsistent with the common law rules of natural justice. As the Intervenor notes, in the only instance in which the Legislature has authorized the modification of the common rules of natural justice (s. 41(3) of the Act), it has done so expressly, in the body of the Act, and without any delegation of that right to the RNABC. Section 41(3) provides:

> If the person whose conduct is the subject of inquiry does not attend the hearing, the professional conduct committee may, on proof, by affidavit or otherwise, of service of the citation under section 33, proceed with the inquiry in the absence of the person whose conduct is the subject of inquiry and, without further notice to that person, take any action it is authorized to take under this Act.

21 In my view, on its face, Rule 7.12 does indeed abrogate the rules of natural justice. I reject the notion that the Rule merely represents the Legislature's desire to balance the interests of the complainant, who seeks both confidentiality and protection in the event of further medical and nursing

treatment, and those of the member, who seeks to understand the case he or she must meet. As the learned author Blake notes in Administrative Law in Canada, Buttersworth, pp. 36-7, concerns regarding confidentiality must be closely scrutinized where such concerns form the underlying rationale for non-disclosure:

> There are a number of exceptions to the disclosure requirements. Lack of full disclosure by a tribunal acting in an emergency may be excused. A tribunal may not be expected to disclose confidential information such as information involving national security, prison security, the identity of informers, business secrets, medical files of psychiatric patients or privileged communications. However, information may not be withheld solely because it is a type of information that is generally regarded as confidential. Specific information should be protected only if harm would be caused by disclosure of its contents and only to the extent necessary to avoid the harm. Information may be revealed without disclosing the names of informers. As confidentiality is an exception to the general rule requiring disclosure, it should be cautiously considered. The general rule of full disclosure should be followed as far as possible. Statutory provisions that expressly exempt information from being disclosed are strictly construed.
>
> The argument that persons, such as doctors, who furnish information to investigators will be less frank if confidentiality is not guaranteed has been rejected. In particular, this reasoning glosses over the valid contrary view that persons preparing reports, which they know will be open to scrutiny, will prepare them with greater care and diligence, and, more important, that fairness requires that the original reports be disclosed in order that the party can effectively answer the case against him or her.

22 In any case, as the Intervenor has submitted, before relying on confidentiality as a special reason justifying non-disclosure, a disciplinary tribunal must first establish that alternative forms of disclosure are impossible. For example, editing the information or disclosing the information to the member or counsel representing the member, on an undertaking not to disclose any information to the member and to use the information only for the purpose of the proceedings, may provide sufficient protection to the complainant such as to allow the disclosure of the confidential information.

23 As I understand it, the RNABC submits that Rule 7.12 ultimately complies with the rules of natural justice since Rule 7.12(3) authorizes the RNABC to disclose the complaint, the investigator's report and the investigator's notes to a member, on application by the member or member's counsel either at the outset of or during the course of the disciplinary hearing. Similarly, Rule 7.3(3) authorizes the RNABC to disclose the identity of a complainant to a member, on application by the member or member's counsel. Accordingly, the RNABC says the onus is on the member to seek disclosure and the member cannot complain of a breach of natural justice as a result of her own failure to seek disclosure of the investigator's notes at the outset of or during the hearing.

24 On a review of the transcript of the hearing, I find this submission of little substance. In response to the appellant's counsel's complaints concerning inadequate disclosure made early in the hearing, the RNABC's counsel alluded to and relied upon the authority of the Rules to justify the limits of disclosure and that position was upheld by the Panel. In my view, it is circuitous to argue that a Rule which clearly offends the principles of natural justice and which creates a situation in which there is limited disclosure as at the commencement of a disciplinary hearing, can be said not to offend such principles since it

offers the member an opportunity to apply for further disclosure at the outset of the hearing. One asks oneself, within the framework of the Rules, what principles of disclosure would be brought to bear on a revisiting of the issue of non-disclosure which to that point was specifically supported by the language of the Rules?

25 If the application was limited to a challenge of non-disclosure allegedly founded on confidentiality or privilege or some other ground, Rule 7.13(3) might shed a different light on the Rules, but that is not the case here.

26 In the final result, I conclude that Rule 7.12 is contrary to the rules of natural justice. Here, the Act does not contain the clear and express statutory language sufficient to permit the RNABC Board of Directors the power to abridge the common law rules of natural justice (Université du Québec à Trois-Rivières v. Larocque, 101 D.L.R. (4th) 494 (S.C.C.); Consolidated-Bathurst Packaging Ltd. v. I.W.A. 2-69 et al., 68 D.L.R. (4th) 524 (S.C.C.), at p. 542; A.G. (Canada) v. Public Service Staff Relations Board, 74 D.L.R. (3d) 307 (F.C.A.); Circosta et al. v. Lilly, 61 D.L.R. (2d) 12 (Ont. C.A.)).

3.4 Has Member's right to make full answer and defence being denied?

27 The Member submits that the investigator's notes and reports as well as a number of other documents were either never disclosed at all or were not disclosed in a timely fashion during the disciplinary hearing. She submits that since her right to natural justice and a fair hearing has thereby been violated, the appropriate remedy is to render the decision invalid. In other words, she seeks an order pursuant to s. 45(9)(a) reversing the decision appealed from and granting a stay of proceedings. In fact, the actual order sought would be a writ of prohibition preventing the RNABC from proceeding anew with the complaint originally filed against the Member.

28 The RNABC has submitted that even if the court finds there has been insufficient disclosure and that the appellant's rights to a fair hearing have been violated, it does not automatically follow that there has been a violation of her right to make full answer and defence or that there is sufficient foundation for the relief sought.

29 The RNABC relies heavily on the recent decision of the Supreme Court of Canada in R. v. Dixon [1998] 1 S.C.R. 244 (S.C.C.). There the court considered at great length the ramifications of a violation of an accused person's right to disclosure.

30 The court held that the right to disclosure is one component of the Charter right to make full answer and defence. However it held that violation of the former did not automatically entail a violation of the latter. Furthermore, it held that different principles and standards applied in determining whether disclosure should be made before conviction and in determining the effect of a failure to disclosure after conviction. In either case, the defendant must prove on the balance of probabilities that the right to make full answer and defence was infringed or denied. (R. v. Dixon (supra) p. 262, paras. 31-32).

31 The evidence required to meet this burden and the factors to be considered will differ according to the stage of the proceedings and the remedy sought. At trial, the accused must demonstrate that the undisclosed information meets the Stinchcombe threshold, namely that it is sufficient to satisfy the burden of establishing a violation of the Charter right to disclosure. The appropriate remedy, at trial, will be in order for production or an adjournment (R. v. Dixon (supra) p. 263, para. 33).

32 However, after conviction, the accused must meet a two-fold test namely (i) demonstrate that the undisclosed information meets the Stinchcombe threshold and (ii) that, on a balance of probabilities, the right to make full answer and defence was impaired as a result of the failure to disclose. In such case, the

appropriate remedy would either be a new trial or a stay of proceedings, depending on the degree of impairment of or prejudice to the right to make full answer and defence (R. v. Dixon (supra) p. 258, paras. 23-24, p. 265, para. 35).

33 To obtain a new trial, the accused must demonstrate a reasonable probability that the failure to disclosure affected the outcome of the trial or the overall fairness of the trial process.

34 In order to obtain a stay, the accused must establish on a balance of probabilities that the right to make full answer and defence was impaired as well as demonstrate an irreparable prejudice to the right to make full answer and defence.

35 The RNABC submits that in the case at bar the Member has not met the burden of demonstrating the RNABC's failure to disclose has impaired her right to make full answer and defence. In other words, the RNABC says that the Member has not discharge her burden of showing there is a reasonable possibility that the non-disclosure has affected either the outcome of the disciplinary hearing or the overall fairness of the disciplinary hearing.

36 The Member submits that she has indeed met this test.

37 As the court notes in Dixon (supra) in determining whether a failure of disclosure has impaired the right to make full answer and defence, the court must conduct a two-step analysis:

> First, in order to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict... If at the first stage an appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction, a new trial should be ordered. Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiries with witnesses or the opportunities to garner an additional evidence that could have been available to the defence if the relevant information had been disclosed. In short, the reasonable possibility that the undisclosed information impaired the right to full answer and defence relates not only to the content of the information itself, but also to the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence.
>
> (R v. Dixon (supra) p. 264-265, para 36)

38 The court notes however that in considering the overall fairness of the trial process, the court will consider the role of defence counsel in pursuing disclosure. Cory J. comments on p. 265:

> In considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process.
>
> ...

> The fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure.

39 And further at p. 266:

> As officers of the court, defence counsel have an obligation to pursue disclosure diligently. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure.
>
> ...
>
> Whether a new trial should be ordered on the basis that the Crown's non-disclosure rendered the trial process unfair involves a process of weighing and balancing. If defence counsel knew or ought to have known on the basis of other disclosures that the Crown through inadvertence had failed to disclose information yet remained passive as a result of a tactical decision or lack of due diligence it would be difficult to accept a submission that the failure to disclose affected the fairness of the trial.

40 In assessing whether the non-disclosure rendered the trial process unfair, the court will not only consider the role of defence counsel but will also consider the overall materiality of the undisclosed evidence. As Cory J. notes at p. 267:

> In situations where the materiality of the undisclosed evidence, on its face, very high, a new trial should be ordered on this basis alone. In these circumstances, it will not be necessary to consider the impact of lost opportunities to garner additional evidence flowing from the failure to disclose. However, where the materiality of the undisclosed information is relatively low, an appellant court will have to determine whether any realistic opportunities were lost to the defence. To that end, the due diligence or lack of due diligence of defence counsel in pursuing disclosure will be a very significant factor in deciding to order a new trial. This balancing process must now be applied to this appeal.

41 With these principles in mind, I will consider the ramifications of the non-disclosure or late disclosure in the case at bar.

Analysis:

42 The appellant has submitted that had there been earlier disclosure of the Investigator's report and notes and the various other documents, her counsel would have been in a position to make full answer and defence in the course of the disciplinary hearing. While there are numerous documents which have been the subject of this complaint, many of those documents are of no particular relevance whatever - for example the many telephone messages received and returned by the RNABC during the investigation period. However certain key documents have attracted the focus of the Court and must be addressed separately:

Category 1 Documents: Investigator's Report and Notes:

43 The RNABC investigator interviewed a number of witnesses prior to the disciplinary hearing. The member says that had each of those witness' interview notes been disclosed prior to the hearing, her counsel would have been in a position to either elicit certain evidence from those witnesses or to have more effectively cross-examined those witnesses by challenging them with their previous inconsistent statements. I will address each witness in turn:

(i) Interview Notes- Sandrine Renaud (Patient B):

44 The member has focused on a certain inconsistency contained in the notes of Ms. Renaud's interview. At one point Ms. Renaud notes she met the member in February 1994. However at a later point in the same interview, she indicates she met the member in March. In February 1994, the member was still registered as a nurse with the RNABC. In March she allowed her membership to lapse. The member's contention is that if the representation was made in February, it was indeed true and that accordingly, there had been no misrepresentation of her status to the patient.

45 I agree with the respondent's counsel that nothing turns on this contradiction. If the introduction occurred in February, then there was a misrepresentation in March when the member allowed the patient to continue to believe that she was a registered nurse. If the introduction occurred in March then there was a definite misrepresentation when she presented herself to Ms. Renaud as a registered nurse at a time when she was not registered as same.

46 In any case, I note that Ms. Renaud's evidence at the hearing was to the effect she met the Member either in late February or early March. In my view, little turns on the matter.

47 Next, the member submits the interview notes support the contention that according to Ms. Renaud it was not the Member but rather a student midwife, attending one of the midwifery classes, who represented to Ms. Renaud that the member was a registered nurse.

48 I note that in those same interview notes Ms. Renaud specifically states that after meeting the member, the member specifically represented to her that she was a registered nurse and gave her a business card which "definitely said RN, Midwife".

49 Finally the member notes that at several points in the Interview Notes, the patient refers to the member as a midwife and essentially describes her as a midwife. I agree with the respondent that there is no question the member identified herself to Ms. Renaud as a midwife and was apparently considered by her to be a midwife. I am satisfied that that state of affairs was clearly before the Panel. The issue however was whether she held herself out to the patient as a registered nurse when she accepted the patient as a midwifery client. The interview notes resolve that issue against the member.

50 The member further contends that a certain statement in the notes of Ms. Renaud's interview supports the member's position that she believed the fluid discharged by the patient on May 15, 1994 was semen and not amniotic fluid. I note that in those same interview notes, while Ms. Renaud stated the student (Alison Lang) believed the substance might be semen, when the member later attended and tested the discharge, it was confirmed by the member that the substance was amniotic fluid. Ms. Renaud gave that identical evidence at the disciplinary hearing.

51 In the interview notes, Ms. Renaud states $600 was to be paid for the home delivery, $200 of which would be paid to the member to supervise the student. In the Statement of Particulars provided before the hearing, it is noted that the patient entered into a contract with the member pursuant to which the patient was to pay $600 for the home birth, of which $400 would be paid to Ms. Lang and $200 to

the member. The Particulars mistakenly refer to the fact that Ms. Milner made out two post-dated cheques and provided them to Ms. Lang.

52 In my view, nothing significant turns on this error. It is clear that it was the patient who prepared the two post-dated cheques. In essence, the interview notes are consistent with the particulars of evidence provided by the RNABC's counsel.

53 In the interview notes Ms. Renaud is recorded as saying that she did not see the member make any notes. The member says had this been drawn to the attention of the Panel, the member would not likely have been criticized by the Panel for failing to send her notes to the hospital at the time the patient was transported to hospital.

54 I agree with the respondent's counsel that little turns on the failure to deliver up the interview notes on this issue. Prior to the hearing, the RNABC disclosed three cassette tapes of a conversation between Ms. Renaud, Ms. Lang and a Ms. Duminuco where Ms. Renaud states she did not believe the member took any notes at the home delivery. Accordingly, this evidence was available to be elicited at the hearing in any event. That evidence would ultimately be contrasted with that of Ms. Lang who testified that after the patient emerged from the birthing tub, she told the member she was not making notes and that the member reassured her she would be taking notes. Accordingly, in my view, nothing significant turns on this failure to deliver up the interview notes.

55 The Member says that there is a variation between the RNABC's description of Ms. Renaud's evidence of the threat made by the member and Ms. Renaud's own description of that threat in her notes taken of her interview. On a review, I find there is no significant variance between the two versions which calls for any action here.

56 Finally, the member points out that in the interview notes, Ms. Renaud states that her sister, Dr. Leroyer, arrived in the Lower Mainland on the Friday before the home labour. Accordingly, she submits it is possible Dr. Leroyer may have been aware of the alleged breaking of the membranes on May 15th. The member says that had she been aware of this fact her counsel could have taken steps to interview Dr. Leroyer and/or ensure she was available as a witness at the disciplinary hearing. The respondent submits that the member must have been aware the patient's sister was visiting from Montreal during the relevant period and that in any case, there was no issue as to whether the membranes had broken on May 15th. Rather the respondent submits the issue was the member's delivery of care after that point.

(ii) Interview Notes of Alison Lang:

57 I do not accept that the timing of the rupturing of the membranes was not in issue in these proceedings. The thrust of the respondent's case was that the membranes had ruptured on May 15th, well before the birth in the early morning hours of May 17th. The respondent contended that on May 16th the Member had falsely advised Dr. Immega that the membranes had not ruptured on May 15th, although on nitrazine testing, the fluid had indeed tested positively for the presence of amniotic fluid. Relying on the evidence of Ms. O'Dell, the mid-wifery student who attended upon Ms. Renaud with the Member on May 16th, the member contended the original nitrazine test was negative and that it was not until later in the afternoon on May 16th that testing confirmed the presence of amniotic fluid.

58 The respondent's case rested in part on the Member's alleged misleading of the patient's physician on May 16th, as well as her failure to closely monitor the patient following the rupture of the membranes on May 15th.

59 Had Dr. Leroyer's presence at the earlier point in time been known, the member's counsel may well have pursued this avenue of investigation before the hearing.

60 The member says Ms. Lang's interview notes verify that at least from Ms. Lang's point of view, the member never threatened Ms. Renaud. The respondent agrees that is the case and indeed that Ms. Lang gave clear evidence to that effect to the Panel. Nevertheless the Panel adopted Ms. Renaud's and her husband's perception of what had occurred as amounting to a threat and a situation in which the member had treated a patient in a harsh and controlling fashion. I agree with the respondent that no prejudice resulted to the member by virtue of the failure to produce Ms. Lang's evidence on that issue. Ms. Lang's evidence had been fully aired before the Panel months before Ms. Renaud testified.

61 The member stresses that in her interview notes, Ms. Lang had no clear recollection of the member actually presenting herself to Lang as a registered nurse. I agree with the respondent that whether or not she did is irrelevant to how she presented herself to Ms. Renaud and that accordingly the failure to produce this note is of no prejudice to the member.

62 The member focuses on one short statement in the interview notes in which Ms. Lang agreed with the statement that the member was "your back up - your supervisor". While that is so, the thrust of the evidence on the cassette tapes and the transcript is to the effect that Ms. Lang had no midwifery experience and accordingly needed the member to be there to supervise the home birth. Clearly, prior to the hearing, the member was aware that the patient considered her to be the supervising midwife and not simply a back-up for Ms. Lang.

(iii) Interview Notes of Alison Sheppard:

63 Ms. Sheppard is the Patient A referred to in the Citation. The member says that in the interview notes, there is no indication Ms. Sheppard knew the member was a nurse. This is in contrast to the particulars of Ms. Sheppard's evidence provided by the RNABC in which Ms. Sheppard asserts such knowledge. While that is so, it is significant that prior to the hearing, the member's counsel was provided with both a copy of a letter from Ms. Sheppard to the member as well as her computer notes detailing their relationship and the incident. Again neither in the letter nor in the computer notes does Ms. Sheppard refer to the fact the member is a nurse. Those documents were available for defence counsel to use in the cross examination of Ms. Sheppard had he chosen to use those documents to that end. In any case, in cross examination, Ms. Sheppard agreed with the member's counsel's suggestion that she had set out to hire a midwife, rather than a nurse, and she had done just that when she retained the member.

64 Again, I find that by virtue of the disclosure of the letter and the computer notes, the member had disclosure of Ms. Sheppard's evidence in this regard. Further, that position was squarely before the Panel.

65 Further, the member submits that had she had notice of Ms. Sheppard's interview notes, she would have been able to point out that Ms. Sheppard spoke in a complimentary way about the member. Again, I note that precisely that evidence was disclosed to the member by virtue of the disclosure of the computer notes referred to earlier.

66 Finally, the member says that Ms. Sheppard's notes support the conclusion that the member never prevented her from attending hospital when she voiced that desire. Indeed at the disciplinary hearing, Ms. Sheppard provided identical evidence on her cross examination by the member's counsel.

67 Accordingly, I find that there was no prejudice to the member by virtue of the fact these interview

notes were not disclosed earlier.

(iv) Interview Notes of Dr. Madill:

68 While the Member relies on a particular statement made by Dr. Madill, on a review of both that statement and the balance of the comments contained in the rest of that interview, I find that Dr. Madill was indeed highly critical of the care provided by the member. I reject the notion that the disclosure of those interview notes would have assisted the member at the hearing.

69 The member submits that had these interview notes been disclosed earlier, she would have learned that a nurse in the Emergency Dept. had written a letter (what has come to be known as the "Paulette letter") and therefore would have been in a position to verify her contention that she had telephoned Lions Gate Hospital to advise of Ms. Renaud's imminent arrival at hospital by ambulance.

70 While this is so, it remains the case that by virtue of the disclosure of the three cassette tapes and transcripts, the member either was or could have been aware of the letter one week before the commencement of the hearing. In any case, the hearing was eventually adjourned and during the period between March and May 1995 a full transcript of the tapes was prepared by a court reporter at the request of the member's counsel. The Member's Counsel digested this evidence and on March 10, 1995 requested disclosure of the letter. The letter was in fact produced on March 31, 1995.

71 The issue is whether this late disclosure of the "Paulette letter" prejudiced the ability of the Member to make full answer and defence. In the letter a nurse named "Paulette" in the Emergency Department confirms receipt of a telephone call from an unidentified caller advising that a woman was in labour with fetal distress, that an ambulance had been called and that an obstetrician ought to be on standby at the hospital. This nurse relayed this message to the Case Room. A delivery pack was assembled. According to the letter, "[A]fter considerable time had passed," with no patient arriving at the hospital, a call was placed to Ambulance Dispatch. The hospital was advised the ambulance attendants were on the scene "delivering the baby". "A while later", the patient arrived via ambulance and was taken to the Case Room.

72 Had the member's counsel known of the "Paulette's letter" in advance of the hearing, he would no doubt have been on somewhat stronger ground in his cross-examination of Ms. Callander on March 9 and 10, 1995. In her evidence Ms. Callander stated the Case Room had received a telephone call from the Emergency Department advising that Ms. Renaud had arrived at hospital. She denied the hospital was provided with any earlier notice of the patient's imminent arrival. Further, I expect that had the member's counsel been aware of the letter, he may have conducted interviews of the Emergency nurse as well as Dr. Warner, the Emergency physician, prior to the commencement of the hearing to more fully comprehend the timing and the contents of the unidentified caller's call to the hospital.

73 The member submits the interview notes of Dr. Madill disclose that someone at the hospital may have heard a fetal heart rate 10 minutes after Ms. Renaud arrived at the hospital. I find that nothing turns on this excerpt from the notes. First, prior to the hearing, the member's counsel had received a copy of the hospital record in which it is noted that a fetal heart rate of less than 100 was heard at 7:00 am, just after Ms. Renaud's arrival at hospital. The transcript of the three tapes refers to the same fact. Additionally, the member's counsel put this fact to Ms. Callander on her cross examination. I find that the member was not prejudiced by virtue of the failure to disclose the notes on this account.

Category 2 Documents:

(i) Voice mail message Lynette Best:

74 This is a transcript of a voice mail message left by Ms. Best of Lions Gate Hospital with the RNABC on May 30, 1994. She confirms the Hospital's desire to pursue a review of the incident, which review she suggested could be advanced together with that of the College of Physicians and Surgeons "in some sort of collaborative way".

75 The member submits that had her counsel known of the transcript of the voice mail from Lynette Best, she would have been able to prove the hospital had made a formal complaint to both the RNABC and the College of Physicians and Surgeons and that the hospital's complaint was at heart, an attempt to shift blame for the incident.

76 There is no indication the failure to disclose the identity of the complainant stemmed from anything more than the Rule which prohibited the Association from disclosing the identity of the complainant. The respondent submits that in any case, it is clear on a review of the cross examination of Ms. Renaud, that the issue of whether the hospital was attempting to shift blame for the incident was fully explored with her.

77 On her cross-examination, Ms. Renaud admitted that within approximately a day of the incident, various hospital personnel attended and persuaded her to authorize the release of her records to the College of Physicians and Surgeons.

78 I am not persuaded that Ms. Renaud's cross-examination allowed for a full airing of this issue. While Ms. Renaud could provide evidence as to her understanding of the hospital's motives for its request that she release her records, she would be unable to articulate the Hospital's actual concerns nor its administration's motives in pursuing the complaint. Nor could she comment on the manner in which the hospital itself had responded to the emergency which was presented at hospital on the morning of May 17, 1994.

(ii) Sandrine Renaud's Diary:

79 The member complains it was not until April 20, 1999 that a legible copy of the diary was provided. The existence of the diary was disclosed during the hearing and an offer made to provide it to the panel for examination as to relevance. The member's counsel did not pursue the disclosure of the diary. It is not entirely clear to me why this matter was not pursued. In any case, I am satisfied that little turns on this lack of disclosure. The diary focuses for the most part on events which followed the home birth and sheds little or no light on the events which were the focus of the hearing.

80 While the member complains that the diary would have disclosed that Ms. Renaud's mother was at the hospital, that very fact is mentioned in Ms. Lang's computer notes which were disclosed prior to the hearing.

81 Further, the diary confirms the time the ambulance arrived at hospital. But, so too, that fact was set out in the ambulance care report which was disclosed to counsel as part of Ms. Renaud's hospital record. Further, I note that while the member's counsel asked the Panel to issue a subpoena for the ambulance drivers to testify, he later chose not to call them as witnesses.

82 Finally, the member says that the "Paulette Letter" is referred to in the diary. But again, as I noted earlier, the existence of the letter was disclosed in the transcript of the three cassette tapes.

(iii) Ms. Renaud's letter of complaint dated October 1, 1999:

83 The member complains there was no disclosure of the letter of complaint. Again, that was not disclosed by virtue of the Rule which prohibited same. In any case, I am satisfied that the letter contains no other relevant information which may have been of any use to the member which was not otherwise disclosed to her.

(iv) Ms. Himbeault's memorandum to file dated October 12, 1994:

84 The member complains that it would have been useful to her had the respondent disclosed the note to file made by Ms. Vivian Himbeault on October 12, 1994 since that note refers to the Seattle midwifery school's advice that it would grant the member a midwifery licence in the future if the school decided not to review the appellant's practice.

85 I do not see that this note assists the member in any way. Ms. Renaud testified that the member informed her she was a licenced midwife in the State of Washington at the time of the events - a fact which was not true. In the broader sense, the evidence was damaging to the member and would not have advanced her position at the disciplinary hearing.

(v) Letter from Dr. Immega dated January 22, 1995:

86 Dr. Immega's letter dated January 22, 1995 was not disclosed prior to or during the disciplinary hearing. It reads as follows:

> 1. On May 16, 1994, I made a note concerning a telephone conversation I had on that day with Cindy Milner regarding Sandrine Renaud. The details given by Ms. Milner suggested that Ms. Renaud's membranes had not ruptured; she stated that Ms. Renaud had experienced a gush of milky fluid after intercourse on May 15th, that this fluid was negative to nitrazine testing, and that no further fluid loss had occurred. Ms. Milner further related that Ms. Renaud felt well and was experiencing 'some cramps', that she had no sign of infection, and that the fetal heart rate was normal. This history suggested to me that rupture of membranes had not occurred.
> 2. And 3. The existence of the multi-centre "Premature Rupture of Membranes" Study currently in progress at British Columbia Women's Hospital, and at other prenatal centres, suggests that it is unclear how best to manage spontaneous rupture of membranes at term without spontaneous labour. In this study, half of the enrolled women are left with ruptured membranes, without intervention except for care not to promote infection, and careful observation to discern infection early should it occur.

87 The member says that nowhere in the Citation is it noted that the member specifically misled Dr. Immega and that accordingly, the failure to disclose this document was significant. I agree with the respondent that this lack of disclosure was not prejudicial since this information was provided to the member's counsel both in the form of the particulars as well as in a copy of Dr. Immega's clinical records.

88 As to the matters referred to at paras. 2 and 3 of Dr. Immega's letter, the member submits that the

lack of disclosure has indeed been prejudicial. The respondent submits that it had originally questioned Dr. Immega as to whether the member should have encouraged Ms. Renaud to go to the hospital to be induced 14 hours after her membranes broke. Since it appeared there were different schools of thought as to whether a woman should be induced when her membranes rupture spontaneously at term, the RNABC did not pursue any allegation that Ms Renaud ought to have been referred to hospital for induction. However, it was alleged at the hearing that Ms. Renaud ought to have been monitored more closely due to a number of different factors, one being that the membranes had ruptured more than 24 hours earlier.

89 In any case, the Association submits that in her own evidence, Ms. Margaret Lee, the nursing expert, confirmed that there was no consensus in the international community regarding the treatment of patients who experience a spontaneous rupture of the membranes. In this sense, the Association appears to submit that even if the member had received disclosure of Dr. Immega's letter, she would have been no further ahead, since the helpful admission had been made by Ms. Lee in any event.

90 I have some difficulty with this position. Had Dr. Immega's letter been disclosed, the member would have been fully aware that the entire issue of how best to manage spontaneous rupture of membranes at term was the subject of some considerable debate in the medical community. Further, the member's counsel would have realized that although the respondent was not pursuing the position that Ms. Renaud's pregnancy was high risk, it was nevertheless alleging that Ms. Renaud should have been monitored more closely due to a number of different factors, one being that the membranes had ruptured more than 24 hours earlier.

91 Hearing such an admission from Ms. Lee, the nursing expert, in the course of her evidence falls considerably short of the full advantage of both receiving and analyzing such a medical opinion before the commencement of the hearing. Ms. Lee might well have been cross-examined more vigorously. Dr. Immega may have been subpoenaed and cross examined on this issue.

(vi) Vial containing homeopathic drugs:

92 Throughout these proceedings the respondent's counsel has had possession of one or more vials of certain substances - allegedly homeopathic medications which the member was ultimately found to have provided to Ms. Renaud to induce labour. Ms. Renaud testified (corroborated by Ms. Lang) that Ms. Milner administered two homeopathic substances to induce labour - blue cohosh and caulphyllum. Ms. O'Dell, the student midwife, who attended the homebirth and testified on behalf of the Member, denied seeing any such homeopathic remedies being administered.

93 Ms. Lee, the nursing expert, admitted that she was unfamiliar with the homeopathic remedies allegedly administered. In any case she testified that the precise nature of those substances was irrelevant. In her opinion, so long as such substances or medications were used with the intention of inducing or augmenting labour in a home setting, they were used inappropriately.

94 Relying on this evidence, the Association submits its non-disclosure of the vials and their contents to the member did not prejudice her ability to make full answer and defence.

95 I have difficulty with this submission. At the hearing ,the member's position was that she had not rendered any homeopathic substance to the patient and that whatever was administered was not a medication. Her position was essentially corroborated by Ms. O'Dell, whose evidence was not accepted by the Panel.

96 Quite obviously, had the substances contained in the vial or vials been tested in advance and had it been verified that such substances could not possibly have induced labour, the foundation for this arm of the Citation and the respondent's expert evidence would have been undermined. Indeed, I doubt the allegation would have been pursued at all. Further, the groundwork for some stronger challenge of Ms. Renaud's and Ms. Lang's evidence would have been laid.

97 It is perhaps reasonable to infer that an individual administers a substance with the intention of inducing labour when the substance is identified and there is evidence that it indeed has that effect. However it seems to me entirely unreasonable to draw that inference when, to the knowledge of the individual who administered the substance, the administration of the substance has no such effect. For the respondent to submit that it matters not what the substance is and that the Panel was correct in focusing its findings on the issue of what the Member's intention was - seems, with all due respect, to miss the point.

CONCLUSION:

98 I have ignored or not touched upon many of the areas of dispute raised by the Member since, in my view, they have little bearing on the outcome here. For example, I accept Ms. Himbeault's evidence concerning the manner in which she prepared the transcripts of the witnesses' interviews which she conducted. I also accept Ms. Denhoff's explanation of how it was that Ms. Lang's interview notes were not disclosed in the first instance following my Order for disclosure of the Investigator's notes. I am entirely satisfied that there has been no misconduct on the part of the respondent or its counsel. To the contrary, I am satisfied that the respondent and its counsel have made every effort to diligently search out and retrieve every possible document which might bear on this case.

99 In the end result, however, there are various matters which do squarely raise the issue of whether the late disclosure or non-disclosure of various documents have prejudiced the Member's ability to make full answer and defence. I have addressed various individual items and I have found that in several cases the disclosure or more timely disclosure of those items would indeed have allowed the Member's counsel to approach the hearing before the Panel far differently. Individually, the items may not appear to have any great significance. However, cumulatively, I believe the late disclosure or non-disclosure of these items has indeed had a significant effect on the overall conduct of the Member's defence to the Citation.

100 For example, while preliminary transcripts of the taped conversation between Renaud, Lang and Dominuco were produced approximately one week before the commencement of the Panel hearing, a reliable transcript was not available as at the commencement of the hearing. The Member's counsel's request for an adjournment was refused by the Panel on the understanding that the evidence contained in the transcripts would not be adduced in evidence. In my view, that decision was flawed. Whether or not any particular passage contained in the transcripts would be put in evidence, a clear understanding of the recorded conversation and the respective positions and recollections articulated by some of the key players in the home birth, was essential to the Member's counsel's planning and organization of the defence. In my view, that opportunity was not afforded to the Member's counsel. It was equally unrealistic to then expect the Member's counsel, at the very outset of the hearing, to conduct an effective cross-examination of the respondent's nursing expert, Ms. Margaret Lee.

101 As I noted earlier, the production of the transcript pointed to the existence of the "Paulette letter". That letter was not produced until the end of March, after both the nursing expert and the Emergency Nurse had testified. Had the letter been produced earlier, the ramifications of the call to hospital would have no doubt been explored at greater length in the cross examinations of those witnesses. I acknowledge that it was nevertheless still open to the Member's counsel to interview and call other

witnesses (ie. the Emergency Room Nurse or Dr. Warner) or perhaps even to recall other witnesses (ie. Nurse Callander) as a result of the late production of the letter. However, in the circumstances, particularly where the Hospital had participated in the complaint brought against the Member, counsel may have been understandably reluctant to call those witnesses.

102 The failure to produce Dr. Immega's letter is also significant. While the particulars produced at the outset underscored the fact that the Member had led Dr. Immega to understand there had been no rupture of the membranes as of may 16th, the particulars did not disclose Dr. Immega's appreciation of the mixed opinion in the medical community concerning whether a spontaneous rupturing of the membranes gave rise to any need for medical intervention. Had that letter been produced, the Member's counsel might well have pursued that area of inquiry at some length or perhaps he would have called expert opinion on the issue or at least have drawn out that evidence from Dr. Immega on cross examination. In my view, the fact that Ms. Lee admitted the mixed state of opinion in the medical profession in the course of her testimony, does not cure this deficiency in disclosure. Once again, an opportunity to plan and construct a defence theme in advance was lost.

103 Likewise, the entire issue of whether homeopathic drugs were or were not administered was not properly tested since the subject vials were never produced. I have dealt with this subject at some length earlier and I will not repeat my comments here.

104 The issue is, given these findings, what remedy follows?

105 Assuming a finding that certain information has not been disclosed, the Member has submitted she satisfies the two-prong test set out in Dixon (supra). She says she has established, on a balance of probabilities, not only that her right to make full answer and defence was impaired but that she has suffered an irreparable prejudice to that right. This submission is clearly founded on her theme that various documents have been deliberately destroyed by the respondent in an effort to avoid disclosure, with the result that the Court can have no confidence in the fairness of any future proceedings here.

106 As I have noted earlier, I reject the notion that, at this point, there has not been full disclosure. I have found that every effort has been made to produce every possible document. I reject the notion that the respondent has deliberately destroyed any documents specifically to avoid disclosure. Although the original interview notes were destroyed, in accordance with the respondent's standing policy, I am satisfied that the typewritten copies of the Investigator's Notes and the photocopy of the Investigator's Report provided to the respondent's counsel and in turn produced to the Member, are accurate renditions of the original documents.

107 I have concluded that here, the Member's ability to make full answer and defence has not been irreparably impaired.

108 As I have reviewed the subject evidence, I have repeatedly asked myself whether the production of this other information would have actually affected the reliability of the result of the Panel hearing? I have concluded that it may be the undisclosed information would not itself have produced any different result.

109 However, as the Supreme Court of Canada noted in Dixon (supra), this does not end the matter since this is not the test in determining whether the right to make full answer and defence was impaired. As I noted earlier, the Court must engage in a two step analysis. Since they are so critical, I will repeat Cory J's remarks at p. 265:

> ...Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed. In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but also to the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence.

110 I acknowledge that in applying this test the Court must consider and weigh defence counsel's role. Should defence counsel here have been more diligent in pursuing disclosure? Knowing that further information was available, did counsel remain passive? While various individuals decisions might be criticized, on a review of the overall circumstances, I find that what occurred here cannot be characterized as any lack of due diligence or deliberate passivity on the part of the Member's counsel. Both the Member's counsel and the respondent's counsel were acting within the parameters of what they understood to be the respondent's statutorily circumscribed duty of disclosure.

111 In the final result, I am satisfied the Member has established there is a reasonable possibility that had the information noted been disclosed either at all or in a more timely fashion, her counsel could have pursued lines of inquiry with witnesses or opportunities to garner additional evidence and that those efforts may have produced a different result. To this degree, I am satisfied the Member is at least entitled to an order for the lesser remedy - that is a new hearing.

112 Accordingly, pursuant to s. 45(9)(c) of the Act, I allow the appeal and refer the matter back to the respondent to assemble a Panel for a new hearing. The Member is entitled to the costs of the appeal.

BOYD J.

cp/i/qldrk/qltlm/qlltl/qlgxc

Indexed as:

Markandey v. Ontario (Board of Ophthalmic Dispensers) (Ont. Ct. (Gen. Div.))

IN THE MATTER OF an Appeal pursuant to Section 15 of The Ophthalmic Dispensers Act, R.S.O. 1990, chapter 0.43
Between
Rajesh Markandey, Appellant, and
The Board of Ophthalmic Dispensers, Respondent

[1994] O.J. No. 484

46 A.C.W.S. (3d) 775

Action No. RE 2661/93

Ontario Court of Justice - General Division
Toronto, Ontario

Trafford J.

March 14, 1994.

(51 pp.)

Professional occupations -- Opticians and ophthalmic dispensers -- Disciplinary proceedings -- General -- Jurisdiction -- Hearing -- Judicial review -- Grounds -- Denial of natural justice -- Violation of s. 7 of Canadian Charter of Rights and Freedoms applicable.

Motion for an order staying proceedings on an appeal by way of a new trial. The applicant was a licensed ophthalmic dispenser in respect of whom the Board of Ophthalmic Dispensers received a complaint from a person alleging a history of problems with the service provided to her by the applicant in the replacement of her contact lenses by mail. The Board had a long-standing policy that the dispensing of contact lenses was only to be done where the ophthalmic dispenser had an opportunity to meet with the patient in person before the dispensing took place. After the receipt of the said complaint, the Complaints' Committee requested the Board's lawyers to conduct an investigation into the applicant's practices. The firm sent an articling student to the applicant's store as an undercover investigator. The law firm reported the student's findings to the Committee. It made no recommendation on prosecution. At the subsequent prosecution of the applicant, one of the members of the Committee participated as a member of the hearing panel. The law firm acted as the Board's prosecutor. At the end of the hearing, the Board suspended the applicant's licence. After he launched his appeal, it was agreed by counsel that the suspension would be stayed pending the appeal. On this motion, the applicant contended, inter alia, that the participation of the law firm and the said member of the Committee in the hearing contravened

common law principles of natural justice as well as sections 7 and 11(d) of the Charter.

HELD: Motion dismissed. Given the independence and impartiality of the court, the granting of a stay of proceedings within the framework of the Ophthalmic Dispensers Act would be an extraordinary remedy. In the absence of a conclusion that proceeding with the appeal would, in effect, amount to an abuse of process or, alternatively, of a finding of entitlement to relief under section 24(1) of the Charter, the applicant's motion must fail. Neither the retention of the law firm to investigate the applicant nor the use of articling students in the type of investigation undertaken here was improper. In order to meet the practical exigencies of its processes, the Board must be permitted to retain individuals in the private sector to conduct its investigations if it is so advised. There was no merit in the applicant's claim of a denial of natural justice in the circumstances of this case.

STATUTES, REGULATIONS AND RULES CITED:

Canadian Charter of Rights and Freedoms, 1982, ss. 7, 8, 11(d), 24(1), 24(2).
Ophthalmic Dispensers Act, R.S.O. 1990, c. O-43, ss. 6, 14, 15.
Ophthalmic Dispensers Act Regulations, Ont. Reg. 905, s. 8.
Health Disciplines Act, R.S.O. 1980, c. 196, s. 13.

Deepak B. Paradkar and Hassan Fancy, for the Appellant.
Douglas C. Hunt and Christopher J. Staples, for the Respondent.

TRAFFORD J.:--

Introduction

1 On April 13, 1993 the Board of Ophthalmic Dispensers found Doctor Rajesh Markandey guilty of professional misconduct and ordered his Certificate of Registration as an Ophthalmic Dispenser to be suspended for a period of nine months with five months of the suspension to be negated if he delivered to the Board a written undertaking. The conduct of the Board, its Complaints Committee and Fasken Campbell Godfrey, the law firm that is the Board's general counsel and was its prosecutor during the disciplinary hearing and, in part, its investigator in this case, is said to be in contravention of the common-law principles of natural justice and Section 7 and Section 11(d) of the Charter. The suspension was imposed after the Board was satisfied that there had been an improper dispensing of contact lenses and a failure to wear a name tag as required by the regulations under the Ophthalmic Dispensers Act, R.S.O. 1990, c.O-43, as amended. Improper dispensing can result in impairment of vision, permanent damage to the eyes or even loss of eyesight. An improperly prepared and dispensed pair of contact lenses can reduce the visual acuity of an individual below the level required to drive an automobile safely and thereby expose them and others to risk of injury. Elderly people are at particular risk in simple activities such as stepping off curbs or climbing stairs. Distortion of vision through the improper preparation of lenses may endanger the patient.

2 This is a motion at the outset of an appeal under Section 15 of the Act which is "... by way of a new trial and the judge may hear all such evidence as he or she considers to be relevant and may affirm the order of the Board or amend it and affirm it as amended or set it aside ...". The Appellant seeks an order

staying the proceedings.

The Legal Issues on the Motion

3 Before summarising the material circumstances of the case, it is helpful to understand the legal issues raised in the motion. They are as follows:

1. Is the extensive role of the law firm in the investigation, prosecution and adjudication of this case a denial of natural justice?

2. Does the Charter apply to the investigative and disciplinary activity of the Board?

3. Are the terms of reference of the Complaints Committee dated September 16, 1992 and the related policy guidelines a denial or infringement of Section 8 of the Charter?

4. Is it unlawful for the Board to commence an investigation of an optician without reasonable and probable grounds to believe he or she is guilty of professional misconduct?

5. Does the absence of bylaws relating to the use of undercover investigators deprive the Board of its jurisdiction to conduct such an investigation?

6. Did the Complaints Committee of the Board unlawfully delegate its power to investigate Doctor Markandey to the law firm?

7. Was the law firm's use of an articling student as an undercover "shopper" a violation of the Rules of Professional Conduct of the Law Society of Upper Canada?

8. Has the disclosure of the case against Doctor Markandey been sufficient?

9. What is the test to be applied in ruling upon this motion? Should relief be granted as if this was an application for judicial review? Alternatively, should a stay of proceedings be granted only if to proceed with this appeal in the nature of a trial de novo would be an abuse of process?

10. Assuming these proceedings are not stayed, should the evidence of the undercover "shopper" be excluded under Section 24(2) of the Charter?

The history of these proceedings including the investigation of a prior complaint against the Appellant, the resolution of it without formal disciplinary proceedings and the subsequent inspection of his premises revealing irregularities in his practice are important to the resolution of these issues.

The Jurisdiction of the Board

4 Doctor Markandey is a licensed physician and surgeon in India who is also a licensed ophthalmic dispenser in Ontario. As such the Board has jurisdiction over him through Section 14 of the Act - "...the Board may, by order, suspend or revoke the certificate of registration of any ophthalmic dispenser whom it finds guilty of unprofessional conduct as defined by the regulations, or of incompetency, fraud or misrepresentation in connection with his or her practice ...". Before suspending or revoking a certificate, a public hearing must be held with an appropriate notice and opportunity to be heard.

5 The Board is empowered, subject to the approval of the Lieutenant Governor in Council, to make regulations, inter alia, defining unprofessional conduct and has done so through Section 8 of Regulation 905. The failure to maintain proper records of the practice, to prominently display to the public the name

and registration of the ophthalmic dispenser on duty and to have physical facilities necessary to meet the generally accepted standards of the profession are defined as unprofessional conduct as is "... any conduct that having regard to all of the circumstances would reasonably be regarded by the Board as unprofessional ...".

6 Consistent with its obligation "... to administer and enforce this Act and the Regulations ...", the Board may pass bylaws providing for the appointment of, inter alia, inspectors and defining their duties and "... all other matters reasonably necessary for carrying out the provisions of (the) Act ...". Although inspectors have been appointed no bylaws relating to the conduct of investigations have been passed. However, in September 1987 policy guidelines for the fitting of contact lenses and for complaints and discipline were approved through a resolution by the Board and distributed to the profession. These guidelines notified the members of the standards to be met in dispensing contact lenses and, in particular, of the intention of the Board to have its inspectors attend at optical dispensaries to inspect equipment, records and premises of opticians and to use "... private investigators to investigate unprofessional or illegal activities ...". Similarly, on October 17, 1990 the Board passed a resolution setting out the terms of reference of its standing committees including the Complaints Committee. The resolution provided as follows:

> "(1) The Complaints Committee shall investigate complaints received in writing by the Board regarding the conduct or actions of any member of the Profession;
>
> (2) The Complaints Committee shall notify a member whose conduct or actions are being investigated of the substance of any written complaints received, and shall give that member a reasonable time in which to submit in writing to the Committee any explanation or representations that he or she may wish to make concerning the matter;
> (3) The Complaints Committee shall make a reasonable effort to examine all records or other documents relevant to the complaint and, where appropriate, cause the complainant to be interviewed and his or her ophthalmic appliances to be examined;
> (4) The Complaints Committee in accordance with the information it has received, may direct that any specified allegation of unprofessional conduct or incompetence on the part of the member be referred to the Board for a disciplinary hearing."

This Committee has the responsibility of reviewing complaints received from the public about opticians, supervising the activities of the investigators employed by the Board, authorising and supervising investigations of suspected professional misconduct or breaches of the Act and instructing prosecutors in respect of charges or disciplinary proceedings. For approximately 15 years Fasken Campbell Godfrey has been acting as counsel to the Board including as prosecutor before it in disciplinary proceedings.

7 The resolution of October 1990 was revoked by the Board on September 16, 1992 by an amending resolution in the following terms:

> "Whereas the Board desires to pass a resolution approving of a practice which it has previously approved of without expressly stating so;
>
> And Whereas the Board desires to revise the Terms of Reference of the

Complaints Committee and to address a number of other matters;

Therefore the Board resolves as follows:

(1) The Complaints Committee of the Board has the full power and duty to conduct whatever investigations it sees fit to determine whether there are grounds for a hearing relating to a complaint or charge before the Board under section 14(2) of the Act, relating to unprofessional conduct of an ophthalmic dispenser.

....

(3) After receiving the Board's approval in accordance with paragraph 5 herein, the Complaints Committee may from time to time refer any specified allegations of unprofessional conduct to the Board for a hearing before the Board by delivering the notice advising the ophthalmic dispenser of the complaint or charge in accordance with section 14(2) of the Act, and the Complaints Committee may employ the Board's solicitors to assist it in this regard.

...

(5) Before referring a complaint or charge in accordance with paragraph 3 above, the Complaints Committee shall advise the Board that the Complaints Committee is of the view that there is a reasonable basis for proceeding with the hearing, without disclosing the evidence to the Board upon which the Company Committee's view is based, in order to obtain the Board's approval to proceeding with the hearing.

(6) The Complaints Committee and the Board may exercise the powers and duties set out in paragraphs 1 to 5 herein:

(a) where it receives a written complaint against an ophthalmic dispenser;

(b) where, acting without a written complaint, it obtains evidence of possible unprofessional conduct or possible violations of the Act.

(7) Before referring allegations to the Board in accordance with paragraph 3 herein, the Complaints Committee has the discretion, but not the duty or obligation, to disclose to the ophthalmic dispenser the substance of the evidence of possible unprofessional conduct against him or her and to give the ophthalmic dispenser an opportunity to make any written submissions to the Complaints Committee he or she may wish to make. Where the Complaints Committee affords such an opportunity to an ophthalmic dispenser and written submissions are received, the Complaints Committee shall consider the submissions together with such other evidence it has in its possession before deciding whether to refer a matter to the Board pursuant to paragraph 3 herein.

...

> Whereas the Board desires to pass a resolution confirming and approving of a practice which it has previously approved of without expressly saying so;
>
> Therefore the Board resolves as follows:
>
> Pursuant to section 18 of Bylaw No. 29 enacted on October 17, 1990, the Board hereby authorises its solicitors, when directed by the Complaints Committee to conduct an investigation, to employ such persons as their solicitors deem appropriate to assist the Board and the Complaints Committee in conducting investigations to determine whether there is evidence of possible violations of the Act. Without limiting the generality of the foregoing, its solicitors may employ articling students and other of its employees in order to conduct the said investigations.
>
> ...
>
> The Board resolves that, for purposes of resolutions authorising prosecutions and disciplinary hearings, it will accept for discussion the report of the Complaints Committee, in which the evidence pertaining to each case is presented in chart format, and in which the names of persons alleged to have committed unprofessional conduct are not divulged, but are represented by coded number. In addition, it is resolved that the Board may hear further details of the evidence, if it wishes to do so, by means of a verbal report from the Committee or the Registrar."

Although the Appellant has in this motion contested the constitutionality of this amending resolution, most of the material circumstances of this case occurred before it was passed.

8 Over the years the Board has adopted a policy requiring members of the Complaints Committee who investigate a complaint or instruct a prosecutor on a disciplinary proceeding not to sit as members of the Board during the hearing of the allegation. Normally, a member of the Complaints Committee sits with prosecuting counsel during the hearing and gives him or her instructions. Usually, but not invariably, the hearing members of the Board know little more than the name of the respondent optician when the proceeding commences. This follows from the screening function of the Board in receiving and reviewing the recommendation of the Complaints Committee. As was indicated above, charts of the evidence rendered anonymous by substituting coded numbers for names of individuals are used to obtain the approval. However, further details of the evidence may be requested by any member of the Board and such detail is ordinarily provided on request. In addition, some members of the Complaints Committee may be required to sit as members of the Board approving the recommendation in order to meet its quorum of five. As the Board consists of eight persons and the Complaints Committee of three of its members, the absence of any one or more of the other five for whatever reason may require the further involvement of one or more members of the Complaints Committee.

9 The disciplinary proceedings against opticians follow investigations conducted by the Complaints Committee either upon receipt of a complaint by a member of the public or a report from one of the random inspections conducted by an inspector employed by the Board. While it is professional misconduct for an optician to refuse to permit an inspector to inspect professional records or the premises, the suspicions of illegal dispensing or other forms of unprofessional conduct of an inspector are seldom confirmed through an admission by the optician. As a result, the Complaints Committee often

sends a "shopper" to the dispensary to purchase contact lenses as would any other member of the public. Over the past ten years a variety of persons have been utilised and they include both private investigators and employees of Fasken Campbell & Godfrey - its law clerks, support staff and articling students.

The Complaint by Joanne LeClerc

10 In July 1991 the Board received a letter from Ms. Joanne LeClerc, a member of the Canadian Armed Forces stationed in Victoria, alleging a history of problems with the service provided to her by Doctor Markandey in the replacement of her contact lenses by mail. It is the position of the Board that the proper replacement of contact lenses requires an attendance upon the optician. A copy of the complaint was sent to the Appellant. Following a review of his response, the Complaints Committee met informally with him in December 1991. Although no formal disciplinary proceedings were commenced as a result of this investigation, the Chair of the Complaints Committee wrote to Doctor Markandey in the following terms on March 2, 1992:

> "The Complaints Committee has considered the complaint of Joanne LeClerc as well as our discussion of the complaint with you on December 9, 1991. The Complaints Committee considers that your methods of dispensing contact lenses to Ms. Joanne LeClerc fall below the standards expected of an ophthalmic dispenser. In particular, it is the Board's policy that the dispensing of contact lenses should only be done where the ophthalmic dispenser has had an opportunity to meet with the patient before the dispensing takes place and follows up with the patient in person immediately after the contact lenses are dispensed to ensure that a proper fit has been obtained and there are no complications or problems associated with the patient's use of the lenses. In this case, it would appear that none of these steps were taken.
>
> The Complaints Committee has considered whether to take disciplinary proceedings against you. If a disciplinary proceeding took place and you were found by the Committee to be unprofessional in your conduct, your licence could be suspended. The Committee has decided not to take disciplinary proceedings at this time but the Committee will do so in the future if you continue the practice dispensing lenses without the proper cautionary steps being taken. Further, your conduct in this matter may be used against you in any further hearing."

The Inspection by Linda Walker

11 In April 1992, one of the inspectors employed by the Board, Linda Walker, was instructed to attend at the premises of Doctor Markandey. She did so and reported that the premises were "... very dirty ..." and that his records were not being properly maintained. She recommended that continuing attention be given to him.

The Retaining of Fasken Campbell & Godfrey to Conduct an Investigation

12 In May 1992, the Complaints Committee wrote to the law firm requesting that one of its articling students be used to conduct an undercover "shopping". A student was selected and she was instructed to do a replacement contact lens shopping in compliance with the guidelines drafted by the law firm for such assignments. The memorandum provides, in part, as follows:

> "In order to determine whether an unlicensed person is dispensing illegally, we send an investigator to do what is referred to as a "shopping" of the optical dispensary. The investigator must have a valid and current prescription. When obtaining your prescription prior to going on a shopping, ensure that the optometrist or ophthalmologist does not place the pupil distance measurement on your prescription. The investigator goes to the optical dispensary and purchases or attempts to purchase a pair of prescription eye glasses in order to determine whether illegal dispensing is taking place.
>
> ...
>
> Because you will not have a pupil distance measurement on your prescription, in most cases the person attending you will have to measure your pupil distance.
>
> ...
>
> Before you leave the optical dispensary, you should do your best to obtain the name of the person or persons who attended you.
>
> After completing your shopping, you must prepare a detailed memorandum setting out your observations. This memorandum will be used by the Complaints Committee in making its decision whether to commence a prosecution of a disciplinary proceeding and if you are called as a witness at a later date, you may need to use your memorandum to refresh your memory. As a result, it is very important that your memorandum be accurate and complete.
>
> ...
>
> It is important to keep both your handwritten notes and the final memorandum. Do not throw out your original handwritten notes and do not re-write them for any reason. This is important for evidentiary purposes.
>
> ...
>
> Your responsibility is not to obtain a conviction but merely to record the facts of your investigation. Your memorandum should not comment on the legal implications of the facts you observe. Further, your memorandum should not comment on the "best" way to obtain evidence if a conviction. You should not make any reference to the person being engaged in illegal dispensing; that is for the Court to decide."

The articling student attended upon the Appellant who took her prescription over the telephone and dispensed contact lenses to her without performing any measurements or fitting the contact lenses to her eyes. Her notes and memorandum were prepared in accordance with the instructions given to her and returned to her principal.

13 On July 6, 1992 the principal wrote to the Registrar of the Board enclosing a copy of the report prepared by the articling student. No recommendation/legal analysis was given to the Board - apparently,

none was requested. The letter merely requested further instructions if the Complaints Committee wanted to conduct a prosecution.

The Screening by the Board

14 After receiving the report of the "shopper" from the law firm, the Complaints Committee, without any input from the law firm, decided to recommend to the Board it commence disciplinary proceedings against Doctor Markandey.

15 This recommendation was presented to the Board and approved. Although the record is not complete as to who was on the Complaints Committee and the Board at all material times, counsel for the Board in this motion out of an abundant sense of fairness conceded there was likely some overlap between the Complaints Committee, on the one hand, and the Board as constituted to consider the recommendation and to conduct a hearing, on the other hand. Consequently, I am satisfied at least one member of the Board who considered the recommendation and conducted the hearing had more information than what would ordinarily be presented in chart form rendered anonymous by coded numbers.

The Conduct of the Hearing

16 On September 18, 1992 the law firm was instructed by the Registrar to commence the disciplinary proceedings against Doctor Markandey. Notice of a Hearing to be held on December 14, 1992 was given to him through a letter dated November 23, 1992. The letter advised him of the right to be assisted by counsel at the hearing and, if he or his solicitor wanted an adjournment, of the need to request one on December 8, 1992.

17 The Notice itself, in purported compliance with Section 7 of Regulation 905 requiring disclosure of the details of the alleged unprofessional conduct and the nature of the evidence in support of it, stated in general terms the essence of the case against him. Copies of witness statements and all other information on file with the Board relevant to the allegations were not given to him with the Notice or prior to the commencement of the hearing. The information was, however, amplified somewhat in a later telephone conversation between counsel for the Board and the Appellant - the name of the articling student was given to him.

18 The Appellant was also asked by counsel for the Board during this telephone conversation if he intended to retain counsel and he responded that he had spoken to a lawyer but wanted to proceed without one. Similar comments were directed to him on the date of the hearing by both counsel for the Board and the Board itself. He insisted on proceeding without the assistance of a lawyer. It was not until the articling student had completed the examination-in-chief that he requested an adjournment to retain counsel. It was granted. Prior to the resumption of the hearing on April 13, 1993, the Appellant retained one counsel and terminated the retainer before finally retaining a second counsel. This counsel acted for him upon the resumption of the hearing.

19 Immediately after the adjournment of the hearing in December 1992, counsel for the Board wrote to the Appellant and disclosed to him an intention to call an expert witness to testify about the necessary fittings to be performed when dispensing a pair of contact lenses. However, rather than enclosing a copy of the anticipated evidence of the expert, the Appellant was merely advised to have his counsel contact the counsel for the Board to discuss the matter.

20 During his testimony, Doctor Markandey stated that he had contacted Hakim Optical to obtain fitting information about the contact lenses of the "shopper". A representative of the Complaints

Committee contacted Hakim Optical while the hearing was proceeding and was advised that no such contact had been made until after the Notice of Hearing was served in November 1992. Counsel for the Board brought this information to the attention of counsel for Doctor Markandey and indicated to him that, if necessary, he would seek an adjournment to permit the calling of such evidence in reply. However, the counsel agreed that there was no need to call the evidence - through an admission by counsel this information was presented to the Board.

21 After finding Doctor Markandey guilty, the Board heard evidence and submissions on sentencing. During the submissions on behalf of the Appellant, his counsel claimed that he had never done any such thing before. As a result of those submissions, counsel for the Board in reply filed a copy of the letter dated March 2, 1992 arising from the investigation of the complaint made by Ms. Joanne LeClerc.

22 There is no evidence that the law firm was involved in the deliberations of the Board, the formulation of its reasons or the writing of its reasons other than through the submissions made to the Board during the hearing in the presence of Doctor Markandey.

The Launching of an Appeal

23 Doctor Markandey retained new counsel to launch an appeal. A Notice of Appeal dated April 28, 1993 was served upon the Registrar of the Board and its counsel.

24 It was agreed between counsel that the suspension of his registration would be stayed pending the hearing of the appeal.

The Other Developments since the Suspension of Doctor Markandey

25 The retainer of the first appellate counsel was terminated and a second counsel was retained. In the interim counsel for the Board had contacted this Court and prepared and filed an Appeal Record so as to facilitate the scheduling of the appeal. This effort was made while the Appellant did not have counsel.

26 On October 5, 1993 the second appellate counsel wrote to this Court seeking directions relating to the conduct of the appeal which had been scheduled for November 1, 1993. A copy of the letter was sent to the law firm. The letter alleged, amongst other things, a conflict of interest by reason of the "shopper" now being an associate of the law firm, a reasonable apprehension of bias on the part of the Board by reason of the extensive role of the law firm in the conduct of this case and a deficiency in disclosure said to be required by the decision of the Supreme Court of Canada in Regina v. Stinchcombe (1991), 68 C.C.C. (3d) 1.

27 Since those issues were initially raised, the law firm has agreed that it will not be involved in the conduct of the appeal other than to argue this motion and the disclosure has now been completed to the satisfaction of counsel for Doctor Markandey.

28 Having summarised the circumstances of the case let me now turn to the legal issues raised in the motion.

The Alleged Denial of Natural Justice

29 Counsel for the Appellant seeks an order staying the appeal on the basis of a reasonable apprehension of bias arising from one member of the Complaints Committee sitting on the Board constituted to hear the allegation of unprofessional conduct and the extensive role of the law firm in the course of events leading to and including the hearing. The law firm, through its articling student,

conducted the investigation but made no recommendation based on its results. The firm was not involved in formulating the recommendation of the Complaints Committee, the presentation of it to the Board for its approval or the decision by the Board in the screening function. It did act as prosecutor during the hearing but did not involve itself in the deliberations of the Board or the formulation or writing of its reasons. While a disclosure in the case was likely not in compliance with the regulations under the Act, the Appellant was repeatedly advised of the seriousness of the allegation and the right to the assistance of counsel both by the Board and its counsel. There is no suggestion the recommendation of the Complaints Committee to proceed towards discipline tended to cause actual prejudgment of the case against him.

30 In the classic administrative law context, the rules of natural justice require members of the tribunal to be impartial and disinterested. See Pearlman v. Manitoba Law Society Judicial Committee (1991), 84 D.L.R. (4th) 105 at 115 (S.C.C.). Where there is a relationship between the decision-maker and one of the parties or counsel it may be sufficient to raise a reasonable apprehension of bias. However, in some situations the relationship between the investigative, prosecutorial and adjudicative responsibilities of a tribunal is one that is required by its constating legislation. This mandated overlap of functions traditionally kept separate and apart from one another is less than ideal but it is one Courts have accepted in some legislative contexts. In W. D. Latimer Company Ltd. et al. and Bray et al.; re Onuska and Bray et al. (1974), 6 O.R. (2d) 129 (Ont. C.A.), it was suggested by the applicants the knowledge of the case by the Vice-Chairman of the Ontario Securities Commission obtained through his prior involvement in the investigation of the alleged wrongdoing and the decision to commence the proceedings under the Securities Act, R.S.O. 1970, c.426, as amended, created a reasonable apprehension of bias. Dubin, J.A. (as he then was) stated at page 137:

> There is no complaint of bias in fact. What is being said is that it is reasonable for the appellants in this case to fear that a tribunal, which comes to the hearing forearmed with prejudicial information as a result of its own investigation, will not deal fairly with the issues before it. It is the appearance of injustice which it is submitted constitutes bias in law in this case. The most apt maxim in support of the appellant's submission is that "no man shall be judge of his own cause", which Sachs, L.J., in the case of Hannam v. Bradford Corp. [1970] 1 W.L.R. 937 at p. 942 appears to have characterized as a somewhat independent ground for disqualified. However, a rigid application of that principle is difficult of application where by statute the lis is one between the tribunal itself and the person who stands before if for judgment.
> In the instant case, the Commission is by the investigator, the prosecutor and judge. Where a statute by its terms or by clear implication precludes the introduction of a common law rule and where the imposition of such a rule would frustrate the will of the Legislature or of Parliament as expressed in the statute, the Court is not free to insist that the common law rules prevail, however inviting it may be for a Court to do so.

He continued in a similar spirit at pages 139-141:

> Mr. Laidlaw submitted that any member of the Commission who received the report of the investigator was automatically disqualified from participating in a hearing consequent upon what was stated in the report. It is to be observed, however, that the statute requires the report to be submitted to the Commission. By statute, every member of the Commission is entitled to have the report submitted to him and the statute does not divide the responsibilities of the

members of the Commission into administrative and adjudicatory functions with respect to the type of proceedings being considered hers. To give effect to that submission, in my respectful opinion would frustrate the scheme of the statute.

Mr. Weir rested his submission on a broader ground in which he asked the Court to consider the totality of Mr. Bray's involvement in the pre-hearing proceedings. But where a statute authorizes the same body to conduct an inquiry and to adjudicate, then the fact that the tribunal has conducted itself in the manner contemplated by the statute cannot by itself disqualify the tribunal from fulfilling its statutory duty. To have some tentative views about a matter pending before a tribunal is not by itself a ground for disqualification. This principle is recognized in the following passage from Ex parte Angliss Group [1969] A.L.R. 504 at p. 507:

> Those requirements of natural justice are not infringed by a mere lack of nicety, but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with resect to it.

The American Authorities are reviewed in the Northwestern University Law Review, 1964, vol. 59, p. 216, form which I take the following passage at p. 226.

> First, extra-record information received in the course of prior adjudicatory proceedings - whether or not such proceedings are related to the instant case - will not alone form the basis for disqualification. For example, it is clear that within the framework of the existing system of administrative adjudication, the mere fact that agency members review investigative reports from staff workers in deciding whether or not to issue a complaint dies not tend to disqualify such members from subsequently sitting as triers of fact when the case comes up for ultimate administrative disposition. It has been suggested that such initial review of investigative reports "corresponds roughly to a judge's issuance of a temporary injunction or overruling a demurrer". In any event, the practice of judging after making a initial review of the evidence for the purpose of issuing a complaint seems necessitated by a system makes the same men ultimately responsible for instituting and adjudicating the same controversies.

Where by statute the tribunal is authorized to perform tripartite functions, disqualification must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. mere advance information as to the nature of the complaint and the ground for it are not sufficient to disqualify the

> tribunal from completing its task. Evidence of prejudgment, however, is a ground for disqualification, unless the statute specifically permits the tribunal to have arrives at a preliminary judgment before conducting an inquiry.

See also Brosseau v. Alberta Securities Commission [1989] 1 S.C.R. 301 at 309-10 and Brett v. Board of Directors of Physiotherapy (1992), 9 O.R. (3rd) 613 at 619 (Div. Ct.) where Campbell J. in commenting on the screening function of tribunals said:

> When any public body exercises a prosecutorial function it must decide not only that there is some evidentiary basis for a prosecution but also that it is an appropriate case to send on for trial. The proper discharge of this screening function may require a close look at some of the evidence. The screening function cannot be responsibly discharged by the board of it is deprived of the power to look at evidence that is relevant and material to the question, whether a case is an appropriate one to send on for a disciplinary hearing.
> There is statutory limitation on what may be contained in or what may properly accompany or be appended to an investigation report. It is inherent in the investigative and prosecutorial functions that a wide range of material must be examined before a responsible decision can be made to proceed further with the material disclosed as the result of an investigation.

Occasionally, the deliberations of the sitting members of a Board with its non-sitting members attract similar concerns. In Re Consolidated-Bathurst Packaging Ltd. and International Woodworkers of America, Local 2-69 et al. (1990), 68 D.L.R. (4th) 524, Gonthier J. speaking for the majority of the Court said the rules of natural justice should not discourage administrative bodies from taking advantage of the accumulated experience of their members. The characteristics and exigencies of decision making by specialised tribunals should be reconciled with the procedural rights of the parties. At pages 561-63 he stated:

> It is obvious that no outside interference may be used to compel or pressure a decision-maker to participate in discussion on policy issues raised by a case on which he must render a decision. It also goes without saying that a formalized consultation process could not be used to force or induce decision-makers to adopt positions with which they do not agree. Nevertheless, discussions with colleagues do not constitute, in and of themselves, infringements on the panel members' capacity to decide the issues at stake independently. A discussion does not prevent a decision-maker from adjudicating in accordance with his own conscience and opinions not does it constitute an obstacle to freedom. Whatever discussion may take place, the ultimate decision will be that of the decision-maker for which he assumes full responsibility.
> The essential difference between full board meetings and informal discussions with colleagues is the possibility that moral suasion may be felt by the members of the panel if their opinions are not shared by other Board members, the chairman or vice-chairmen. However, decision-makers are entitled to change their minds whether this change of mind is the result of discussions with colleagues or the result of their own reflection on the matter. A decision-maker may also be swayed by the opinion of the majority of his colleagues in the interest of adjudicative coherence since this is a relevant criterion to be taken into consideration even when the decision maker is not bound by any stare

> decisis rule.
> It follows that the relevant issue in this case is not whether the practice of holding full board meetings can cause panel members to change their minds but whether this practice impinges on the ability of panel members to decide according to their opinions.
>
> . . .
>
> Full board meetings held on an ex parte basis do entail some disadvantages from the point of view of the audi alteram partem rule because the parties are not aware of what is said at those meetings and do not have an opportunity to reply to new arguments made by the persons present at the meeting. In addition, there is always the danger that the persons present at the meeting may discuss the evidence.
> For the purpose of the application of the audi alteram partem rule, a distinction must be drawn between discussions on factual matters and discussions on legal or policy issues. In every decision, panel members must determine what the facts are, what legal standards apply to those facts and, finally they must assess the evidence with these legal standards.

He later emphasised, however, the importance of permitting the parties to be heard again if new ground is raised through such consultations. See also Tremblay v. Commission des Affaires Sociales et al. (1992), 90 D.L.R. (4th) 609 at 626 (S.C.C.) where, recognizing the need to promote adjudicative consistency, the Court nevertheless held in the circumstances of this case there was an appearance of bias due to the institutionalised nature of the consultations, the voting procedures held during them and the keeping of minutes. Again, in the context of the conduct of legal advisers to administrative tribunals, there has been a need for Courts to reconcile the procedural rights of the parties with the importance of legal advice to specialised tribunals at critical stages of their processes. In Re Ozubko et al. and Manitoba Horse Racing Commission (1986), 33 D.L.R. (4th) 714 at 723 (Man. C.A.), the traditional role of counsel was approved as follows:

> The breach of natural justice, which is alleged in this case, is a perception of bias flowing from the fact that the law firm which acts on behalf of the Commission was responsible for assisting and formulating the charges and prosecuting the charges, both before the board of judges and the Commission itself.
> In my view, apprehended bias has not been established and the rules of natural justice are not transgressed.
> Under the legislative scheme is contemplated that the Commission will utilize the services of lawyers, and in its prosecutorial role it is entirely reasonable that the same lawyers should assist in preparing the charge, presenting the evidence and arguing for a verdict that the charges has been proven within a adversarial context as existed in this case.

Compare, however, Adair et al. v. Health Discipline Board et al. (1993), 15 O.R. (3rd) 705 at 707 (Div. Ct.) where the failure of counsel to restrict his role to that of an adviser to the Board led to the following comments:

> Solicitors advising boards have been told more than once by this court and by the court of Appeal that when they descend into the arena, the

> impression may be left that the person facing discipline charges is not just being judged by the body appointed by the legislature, but, as well, perhaps even chiefly by a solicitor hired to give advice to the board. Such conduct by the Solicitor creates the appearance of unfairness.
>
> . . .
>
> Bearing in mind that the proposition that illegal strike action is, or could be, in itself, dishonourable, unprofessional or disgraceful conduct, was the idea of the solicitor, not the board, that the complainant, in asking the board to review the decision of the Complaints committee specifically accepted the proposition that illegal strike action was not per se professional misconduct, one cannot have confidence that the decision and reasons of the board are truly its decision and reasons. The Appearance exists that the board abandoned its responsibility to make a decision and give its reasons therefor, to its solicitor. This leaves the reasonable impression that the board did not treat the nurses fairly.

31 Accepting those principles as I must, I am satisfied there has been no denial of natural justice in the circumstances of this case through either the selection of the hearing panel of the Board or the extensive role of counsel in the case. It would have been preferable for the members of the Complaints Committee not to be involved in the screening of its recommendation as voting members of the Board and it would have been preferable for the hearing panel of the Board not to have been involved in either the investigation of Doctor Markandey or the review of it. However, there is no suggestion of prejudgment of the case by any members of the hearing panel. The transcript of the hearing does not reveal any such tendency or other departure from a fair hearing. The performance of the law firm does not, in itself, or cumulatively with the overlap, detract from this conclusion. The instructions to the articling student stressed the need for accurate and complete notes and clearly stated the assignment " ... is not to obtain a conviction but merely to record the facts ..." of the investigation. No recommendation or legal analysis was given to the Complaints Committee in the formulation of its recommendation. No assistance was given to the Board in screening the recommendation. While the disclosure of the case against Doctor Markandey was less than required by the regulations under the Act, the prosecutor repeatedly advised the Appellant of the seriousness of the allegation and the right to the assistance of counsel. It is not a case of a deliberate failure to disclose material exculpatory information so as to improperly obtain a finding of unprofessional conduct. The transcript of the hearing does not reveal any significant errors by the prosecutor nor any improper influence on the Board. There is no evidence of involvement in or impact upon the deliberations of the Board other than through submissions made to it during the hearing in the presence of Doctor Markandey. Consequently, the requested relief will not be granted on the basis of a denial of natural justice under common law principles.

The Application of the Charter

32 Throughout the motion, counsel for the Appellant placed substantial reliance on Section 7 and Section 11(d) of the Charter and urged this Court to, in effect, rule that their application to the circumstances of this case changes the result at common law. The Board, it was submitted, is exercising a regulatory function of the Government of Ontario under the Act and may impose disciplinary measures of a penal nature on opticians found guilty of unprofessional conduct. Reference was made to Retail, Wholesale and Department Store Union, Local 590 et al. v. Dolphin Delivery Ltd. (1987), 33 D.L.R. (4th) 174 at 195 and 198 (S.C.C.) where McIntyre J. stated for the Court some general principles relating to the application of the Charter:

> It is my view that s. 32 of the charter specifies the actors to whom the Charter will apply. They are legislative, executive and administrative branches of the government. It will apply to those branches of government whether or not their action is invoked in public or private litigation. It would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom. Action by the executive or administrative branches of government will generally depend upon legislation, that is statutory authority. Such action may also depend, however, on the common law, as in the case of the prerogative. To the extent that it relies on statutory authority which constitutes or results in an infringement of a guaranteed right or freedom, the Charter will apply and it will be unconstitutional. The action will also be unconstitutional to the extent that it relies for authority or justification on a rule of the common law which constitutes or creates an infringement of a charter right or freedom. In this way the Charter will apply to the common law, whether in public or private litigation. It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged infringes a guaranteed right or freedom.
>
> . . .
>
> It would also seem that the Charter would apply to many forms of delegated legislation, regulations, Orders in counsel, possibly municipal by-laws and by-laws and regulations of other creatures of parliament and the Legislatures. It is not suggested that this list is exhaustive. Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the Charter rights of another, the Charter will be applicable.

In Slaight Communications Incorporated v. Davidson [1989], 1 S.C.R. 1038 at 1077-8, Lamer, J. (as he then was) stated the constitutional limitations to the discretion conferred on an adjudicator in the following terms:

> The fact that the Charter applies to the order made by the adjudicator in the case at bar is not, in my opinion open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless of course, that power is expressly conferred or necessarily applied. Such interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1.

Relying on Sopinka, J. in McKinney v. University of Guelph (1991), 76 D.L.R. (4th) 546, counsel for the Appellant noted the "... role of the Charter is to protect the individual against the coercive power of the state ...". See also Re Klein and The Law Society of Upper Canada (1985), 16 D.L.R. (4th) 489 at 528; Royal College of Dental Surgeons of Ontario et al. v. Rocket et al. (1990), 71 D.L.R. (4th) 68 at 83 (S.C.C.); Re Grier and Alberta Optometric Association et al (1987), 42 D.L.R. (4th) 327 (Alta. C.A.).

33 Insofar as the regulatory activity of the Board impacted upon a licensed optician, it was said by counsel for the Appellant to affect his or her "... liberty ..." interest under Section 7 of the Charter. In Re Mia and Medical Services Commission of British Columbia (1985), 17 D.L.R. (4th) 385 at 411-12 and 414, McEachern, C.J.S.C. in ruling upon a legislative scheme that permitted a billing scheme for licensed medical doctors limiting them to specified areas of the province, defined "... liberty ..." as follows:

> In addition to her charter right to pursue the gaining of a livelihood, the petitioner also has a Charter right to "liberty". Liberty as Finch J. said in R. v. Robson, supra, at p. 732 D.L.R., p. 199 B.C.L.R. is"...so grand a concept that ie may not be possible to capture its meaning in words". I agree.
> Some authors have suggested that "liberty" in s. 7 is only concerned with actual physical liberty from captivity and not human conduct or activity; that does not relate to economic matter; or that its meaning can be restricted in various ways. Although there must always be restraints on the right of free person to do anything they wish, requirements of reasonableness are imposed by the concluding words of s. 7 and by s. 1 which I shall mention later but, speaking generally, limitation on traditional liberties should be applied reluctantly and with extreme care.
> I am aware that, generally speaking, American courts have been reluctant to interfere in the legislative settlement of economic problems, I accept that as a general rule, but I am not concerned with duly enacted legislation in this case, and even if I were, there are some rights enjoyed by our people including the right to work or practice a profession that are so fundamental that they must be protected even if they include an economic element.
> At the very least, liberty must include those freedoms of lawful conduct always enjoyed by Canadians and by our predecessors in the Anglo-Saxon heritage. If we have enjoyed a right for many centuries then it must surely be included in "liberty" whether specifically stated in the Charter or not.
> Rights we have enjoyed for centuries include the right to pursue a calling or profession for which we are qualified, and to move freely throughout the realm for that purpose. These are rights of our people who have always taken for granted. Who would question them until now?
>
> . . .
>
> In view of this history I have no doubt that freedom of movement within the province for the purpose of lawful employment of enterprise, or for the practice of a profession, trade or calling by qualified persons in any community, is needed a right properly embraced within the rubric of liberty. Practices which purport to limit or restrict that right are invalid and must be struck down unless permitted by the Charter.

See also Re Branigan and Yukon Medical Council et al. (1986), 26 D.L.R. (4th) 268 at 276-77 (Yukon Terr. S.C.); Re Maritime Medical Care Inc. and Khaliq-Kareemi (1989), 57 D.L.R. (4th) 505 at 511 (N.S.S.C., Appellate Div.) and Wilson and Maxson v. Medical Services Commission of British Columbia et al. [1989] 2 W.W.R. 1 at 17-18 (B.C.C.A.) where the Court said:

> Common sense, our history and or daily experience tell us that liberty is not unrestrained. Regulation of our activities is commonplace. Society could not survive and chaos would result if we were all at liberty to do as we saw fit.

> Section 7 recognizes the validity of competing societal interests by providing that a person may be deprived of life, liberty and security in accordance with the principles of fundamental justice. Government may impose an administrative structure which limits or even deprives one liberty to further it perception of the needs of society "unless the use of such structure is in itself so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice". r.C. Jones [1986] 2 S.C.R. 284, [1986] 6 W.W.R. 577 Alta. L.R. (2d) 97, 28 C.C.C. 513, 31 D.L.R. (4th) 569, 25 C.R.R. 63, 69 N.R. 241 (per La Forest J.) restated by Dickson C.J.C. in Morgentaler, at pp. 72-73
>
> To summarize "Liberty" within the meaning of s.7 is not confined to mere freedom from bodily restraint. It does no, however, extend to protect property or pure economic rights. It may embrace individual freedom of movement, including the right to choose one's occupation and where to pursue it, subject to the right of the state to impose, in accordance with the principles of fundamental justice, legitimate and reasonable restrictions on the activities of individuals.

Insofar as this position of the Appellant is based upon Section 11(d) of the Charter, I reject it. In Wigglesworth v. The Queen (1987) 45 D.L.R. (4th) 235 at 251-52 (S.C.C.), Wilson, J. defined the applicability of this provision to a proceeding in terms of its essential nature as a criminal proceeding or its consequences being truly penal in nature as follows:

> While it is easy to state that those involved in a criminal or penal matter are to enjoy the rights guaranteed by s. 11, it is difficult to formulate a precise test to be applied in determining whether specific proceedings are proceedings in respect of a criminal or penal matter so as to fail within the ambit of the section. The phrase "criminal and penal matters" which appears in the marginal note would seem to suggest that a matter could fall within s. 11 either because its very nature it is a criminal proceeding or because a conviction in resect of the offence may lead to a true penal consequence. I believe that a matter could fall within s. 11 under either branch.
>
> . . .
>
> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is a kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity; see, for example, Re Law Society of Manitoba and Savino, supra, at p. 292; Re Malartic Hygrade Gold Mines (Canada) Ltd. and Ontario Securities Com'n (1986), 27 D.L.R. (4th) 112 at p. 117, 54 O.R. (2d) 544 at p. 549,24 C.R.R. 1 (Ont. H.C.), and Re Barry and Alberta Securities Com'n supra at p. 736, per Stevenson J.A. There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or

> maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But all prosecutions for criminal offences under the Criminal Code and for Quasi-criminal offences under provincial legislation are automatically subject to s. 11. they are the very kind of offences to which s. 11 was intended to apply.
>
> This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11 not because they are the classic kind of matter intended to fall within the section, ut because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.

The proceedings before the Board were purely disciplinary in nature and the imposition of a suspension of Doctor Markandey's Certificate of Registration as an optician is not a penal consequence. See also Re Malartic Highgrade Gold Mines (Canada) Ltd. and The Ontario Securities Commission (1986) 54 O.R. (2d) 544 at 548 (Div. Ct.).

34 Although there may be cases where the investigative and disciplinary activity of a Board affects the "liberty" interest of a licensee under Section 7 of the Charter, it is settled law in Ontario that it does not "... extend to the protection of a right to engage in a particular type of commercial activity or professional calling ...". See Guthrie v. Ontario Association of Architects et al. (1988), 29 O.AC. 146 at 148 (Div. Ct.); Biscotti v. Ontario Securities Commission (1990), 74 O.R. (2d) 119 at 123 (Div. Ct.) and (1991), 1 O.R. (3rd) 409 at 412 (Ont. C.A.); Regina v. Miles of Music Ltd. and Roch (1989) 31 O.A.C. 380 at 389 (Ont. C.A.). Consequently, on that basis alone this submission of the Appellant must be rejected by me.

35 However, in the alternative, assuming the liberty interests of Doctor Markandey were denied or infringed through the disciplinary proceedings before the Board, was the denial or infringement in accordance with the principles of fundamental justice? Those principles must be determined in the regulatory context of this case. See Edmonton Journal v. Attorney General for Alberta et al. (1990), 64 D.L.R. (4th) 577 at 583-4 (S.C.C.); Regina v. Wholesale Travel Group Inc. (1991), 84 D.L.R. (4th) 161 at 210-12; McKinlay Transport Ltd. et al. v. The Queen [1990], 1 S.C.R. 6, 27 at 647. Here, the legislature has created a board to administer and otherwise regulate the dispensing of, inter alia, contact lenses. The importance of the proper medical care of impaired vision need not be restated here. Educational standards must be set. Professional standards generally acceptable to the members of the profession must be fairly enforced. The modalities of effective investigation should, I believe, be left in the first instance to the determination of those most knowledgeable in the practicality of ophthalmic dispensing. The efforts of this Board to comply with the common law rules of natural justice are commendable - the establishment of a Complaints Committee to conduct the investigations, the need for the Board as a whole to screen the proposed disciplinary proceedings and the policy of deleting, if

possible, members of the Complaints Committee from the hearing panel is fundamentally fair. The use of counsel to ensure its investigations and disciplinary procedures are lawful tends to ensure the fairness of the processes even though the role is an extensive one impacting on the investigative, prosecutorial and adjudicative responsibilities of the Board. Absent evidence of misconduct such as prejudgment of the case by a member of the hearing panel who sat on the Complaints Committee or a delegation by the Board of its power to discipline an optician to its counsel or the exercise of the discretion of the Board in a manner otherwise offensive to the Constitution of Canada including the Charter it would be difficult to conclude the proceedings were contrary to principles of fundamental justice. In any event to so conclude as invited by counsel for the Appellant in this case would be to rule the common law principles of natural justice as articulated by the Court of Appeal for Ontario and the Supreme Court of Canada are unconstitutional. I decline to do so in the circumstances of this case.

The Constitutionality of the Terms of Reference of the Complaints Committee dated September 16, 1992

36 On September 16, 1992 the Board passed a Resolution amending the terms of reference of the Complaints Committee passed on October 17, 1990. The Amending Resolution expressly authorized the use of the law firms articling students as undercover "shoppers". It is the position of the Appellant that this resolution is a contravention of Section 8 of the Charter and should be so declared by this Court. Extensive reference was made to Hunter v. Southam Inc. (1984), 14 C.C.C. (3rd) 97 (S.C.C.) where Dickson, J. (as he then was) described the scope of the provision at pp. 108-109 as follows:

> Like the Supreme court of the United States, I would be wary of foreclosing the possibility that the right to be secure against unreasonable search and seizure might protect interests beyond the right of privacy, but for the purposes of the present appeal I am satisfied that its protections go at least that far. the guaranteed of security from unreasonable search and seizure only protects a reasonable expectation. The limitation on the right guaranteed by s. 8 whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.
>
> . . .
>
> If the issue to be resolved in assessing the constitutionality of searches under s. 10 were whether in fact the governmental interest in carrying out a given search outweighed that of the individual in resisting the governmental intrusion upon his privacy, then it would be appropriate to determine the balance of competing interests after the search had been conducted. Such a post facto analysis would, however, be seriously at odds with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified State intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization not one of subsequent validation.

See also Regina v. McKinlay Transport Ltd. [1990] 1 S.C.R. 627 at 647 for a statement by Wilson, J. of

the need to apply these criteria contextually. This was complemented by a further submission that the Board, through the Complaints Committee, would be proceeding unlawfully if it commenced any investigation, including this one, without reasonable and probable grounds to believe an optician had committed an offence under the Act or was guilty of unprofessional conduct.

37 Because the investigation of Doctor Markandey was conducted under the October 1990 terms of reference there is no need for me to rule on the constitutionality of the Amending Resolution. However, for an articling student to proceed to the premises of Doctor Markandey and, in the public domain, purchase contact lenses as part of an investigation requested by the Complaints Committee is not, in my opinion, to invade his reasonable expectation of privacy. Although he did not know the articling student was functioning in an undercover investigative capacity, he had been advised by the Board in September 1987 of its intention to use private investigators to enforce its professional standards. The surreptitious nature of this modality of investigating him in the public domain does not conflict with Section 8 of the Charter. This is particularly so in the circumstances of this case, including the informal resolution in March 1992 of the complaint by Ms. Joanne LeClerc alleging the improper dispensing of contact lenses through the mail and the report of Inspector Linda Walker filed in May 1992. Those matters provided a reasonable basis to suspect that Doctor Markandey may be guilty of unprofessional conduct. The responsibility of the Complaints Committee in those circumstances was to devise an effective but fair investigative technique to detect any such wrongdoing. It did so. To require reasonable and probable grounds to believe he committed an offence under the Act as a foundation for the commencement of an investigation would unduly limit the investigative capability of the Board and, consequently, place the public at an unnecessary risk of injury through unprofessional conduct. Reasonable suspicion to support such a belief is sufficient. See Chartier v. Attorney General for Quebec (1979), 48 C.C.C. (2nd) 34 (S.C.C.) for a definition of reasonable and probable grounds.

The Absence of Bylaws relating to Investigations

38 Section 6 of the Act provides that the Board may pass bylaws for "...the appointment and remuneration of ...inspectors and such other persons as the Board may employ ... and (prescribe) their duties and all other matters reasonably necessary for carrying out the provisions of this Act ...". No bylaw was passed either appointing the law firm or any of its articling students as inspectors or setting out the undercover shoppings as permitted investigative techniques. The position of the Appellant is that this failure rendered the investigation unlawful, constitutionally and otherwise.

39 Section 14 of the Act confers the jurisdiction on the Board to suspend or revoke the Certificate of Registration of an optician. This section coupled with its obligation to administer and enforce the Act confers on it by necessary implication a power to conduct investigations necessary to fulfil its mandate. As was stated by Campbell, J. in Brett v. Board of Directors of Physiotherapy, supra, at page 617:

> The applicant complains of the use of various investigative techniques including the use of undercover investigators and the soliciting of financial information about the applicant. The investigative function requires and necessarily contemplates a wide discretion in the selection of the techniques and the methods required by a particular investigation. The investigative modalities selected in this case do not affect the jurisdiction of the board to determine whether there should be a hearing or the jurisdiction of the tribunal to embark upon a hearing.

. . .

> This is only one example of he proposition that every activity inherent in and necessary to the investigative and prosecutorial functions a need not, in order to satisfy the principle in Latimer and Brosseau, be explicitly listed or adverted in the statutory machinery so long as the impugned activity is fairly within the contemplation of the legislative scheme and inherent in the functions entrusted to the discipline body by the legislative machinery.

Here, the Act does not require the passing of bylaws or regulations governing the modality of the investigations of the Board or appointing its investigators. To conduct an inspection in the regulatory context is one thing; to conduct an undercover investigation in the same context is another very different thing. The Act, similarly, does not prevent the Board from issuing policy guidelines or passing resolutions relating to its responsibilities. To say that the Board, through a resolution such as the October 1990 terms of reference requiring a written complaint to commence an investigation by the Complaints Committee may limit its jurisdiction set out in the Act, as advocated by the Appellant, is incorrect. If a Board cannot confer jurisdiction on itself inconsistent with regulations passed by the Lieutenant Governor in Council, it cannot limit its jurisdiction as conferred by the enabling legislation through such resolutions or policy statements. See Re Normand and Registration Committee of The Royal College of Dental Surgeons of Ontario (1985), 50 O.R. (2nd) 443 (Div. Ct.). The failure of the Board to follow any such resolution or policy statement does not create a jurisdictional impediment to its disciplinary proceedings or an appeal to this Court under Section 15 of the Act.

The Retaining of the Law Firm to Investigate Doctor Markandey

40 It is the position of the Appellant that the Board improperly delegated its powers of investigation to the law firm when it requested an undercover shopping in July 1992. The law firm merely conducted an investigation as requested - it was an agent of the Complaints Committee when it did so. It could not have been the intention of the Legislature to have the individual members of the Board gathering evidence themselves. This would be impractical and it would create an absurd situation that would compromise its intention to protect the public. To meet the practical exigencies of its processes the Board must be permitted to retain individuals in the private sector to conduct its investigations if it is so advised. Doing so does not detract from the responsibility of the Board to commence and to supervise the investigation. It clearly does and must retain its power to decide those matters to be the subject disciplinary proceedings or prosecutions.

The Use of Articling Students in the Investigation

41 The instructions of the law firm to its articling students to function as investigators and to ensure the prescription does not include their pupil distance measurement, it is said by the Appellant, tends to prove professional misconduct by their principals. Reference is made to Rule 1 (Integrity), Rule 24 (The Duty of an Articling Principal) and Rule 17 (Outside interests and the Practice of Law). These rules require, respectively, a lawyer to act with integrity in all aspects of his or her practice, to convey to the student an appreciation of the traditions and ethics of the profession and to ensure outside activities do not jeopardise the lawyers professional integrity. Although this use of articling students may have been inadvisable, I am not prepared to conclude it is in violation of any of the Rules of Professional Conduct of the Law Society of Upper Canada. The instructions do, I emphasize, create an opportunity for an optician to be unprofessional in his or her practice but they do not lead inexorably to such misconduct. This is particularly so as the students are instructed to accurately record the facts of the investigation - it is not their responsibility to obtain a conviction.

The Disclosure in this Case

42 Section 7 of the Regulations under the Act requires the Board to disclose to a respondent optician "... the details of the alleged unprofessional conduct or the incompetency, fraud or misrepresentation and the nature of the evidence in support thereof ...". In this case the prosecutor for the Board prepared a Notice of Hearing that provided, in part, as follows:

> "And take further notice that evidence will be led that on or about June 3, 1992, June 4, 1992 and June 5, 1992 at a dispensary known as United Optical and located at 6351 Yonge Street, Toronto, Ontario, you dispensed contact lenses without conducting the necessary tests and fittings contrary to Section 8(b) and 8(r) of Regulation 905 promulgated pursuant to the Ophthalmic Dispensers' Act."

Similar clauses were included in the notice in relation to the other allegations. A subsequent telephone conversation between the prosecutor and the Appellant resulted in the disclosure of the name of the undercover shopper. The notes and memorandum prepared by her and the file of the Board relating to this investigation were not disclosed in preparation for the hearing. No request for such disclosure was made by the Appellant. No adjournment was requested by him until the examination-in-chief of the student was completed. The Appellant was then undefended despite the urgings of the Board and its counsel to retain and instruct counsel. The Board did not make any inquiry on the record to satisfy itself of the sufficiency of the disclosure in this case. However, this is not a case where counsel to the Board deliberately withheld exculpatory information material to the conduct of the Appellant's case. Indeed, I am now satisfied that full disclosure has been made in preparation for this appeal.

43 The importance of full disclosure to the fairness of the disciplinary proceedings before the Board cannot be overstated. Although the standards of pre-trial disclosure in criminal matters would generally be higher than in administrative matters (See Biscotti et al. v. Ontario Securities Commission, supra), tribunals should disclose all information relevant to the conduct of the case, whether it be damaging to or supportive of a respondent's position, in a timely manner unless it is privileged as a matter of law. Minimally, this should include copies of all witness statements and notes of the investigators. The disclosure should be made by counsel to the Board after a diligent review of the course of the investigation. Where information is withheld on the basis of its irrelevance or a claim of legal privilege, counsel should facilitate of review of these decisions, if necessary. The absence of a request for disclosure, whether it be for additional disclosure or otherwise, is of no significance. The obligation to make disclosure is a continuing one. The Board has a positive obligation to ensure the fairness of its own processes. The failure to make proper disclosure impacts significantly on the appearances of justice and the fairness of the hearing itself. Seldom will relief not be granted for a failure to make proper disclosure. For comparable principles in the context of criminal prosecutions see M.H.C. v. The Queen (1991), 63 C.C.C. (3rd) 385 (S.C.C.); R. v. Stinchcombe (1991) 68 C.C.C. (3rd) 1 (S.C.C.); R. v. Egger (1993), 82 C.C.C. (3rd) 193 (S.C.C.); R. v. McAnespie (1993), 82 C.C.C. (3rd) 527 (Ont. C.A.); R. v. Hutter (1993), 16 O.R. (3rd) 145 (Ont. C.A.); R. v. L.A.T. (1993), 84 C.C.C. (3rd) 90 (Ont. C.A.); R. v. T (1993), 14 O.R. (3rd) 378 (Ont. C.A.) and "The Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions" at pp. 143-273 prepared by The Honourable G. Arthur Martin, O.C., O.Ont., Q.C. LL.D.

The Test to be Applied in this Motion

44 This is a motion at the outset of an appeal in the nature of a trial de novo. It is not an application for judicial review under the Judicial Review Procedure Act, R.S.O. 1990, c.J-1 that would require a review of the record in these proceedings. Nor is this case an urgent one where delay in applying to the Divisional Court is likely to involve a failure of justice. The jurisdiction of the Court in this case is to

conduct a trial and to "... affirm the order of the Board or amend it and affirm it as amended or set it aside ...". While the jurisdiction is a broad one it does not encompass judicial review. For a case where the appellate review did include the power to grant relief by way of judicial review, see Re Reddall and The College of Nurses of Ontario (1987), 123 D.L.R. (3rd) 678 (Div. Ct.) and (1988), 149 D.L.R. (3rd) 60 (Ont. C.A.) and Section 13 of the Health Disciplines Act, R.S.O. 1980, c.196, as amended. The discretionary nature of relief available through an application for judicial review and the likelihood of the Divisional Court declining to grant any relief where an appeal in the nature of a trial de novo exists (see Pronto Cabs Ltd. v. Metropolitan Licensing Commission of Metropolitan Toronto (1982), 39 O.R. (2d) 488 (Div. Ct.)) does not alter the scope of the jurisdiction of this Court under Section 15 of the Act. Indeed, it might be said that this Act, in its operational effect, entitles the Appellant to an Order quashing the Order of the Board upon the filing of the Notice of Appeal.

45 Given the independence and impartiality of this Court, the granting of a stay of proceedings within the framework of this Act would be an extraordinary remedy. Absent a conclusion that proceeding with the appeal would, in effect, amount to an abuse of process or, alternatively, the granting of relief under Section 24(1) of the Charter is "... appropriate and just in the circumstances ...", this motion must be dismissed. See Regina v. Jewitt (1985), 2 S.C.R. 128 at 136-7 where Dickson, C.J.C. said:

> I would adopt the conclusion of the Ontario Court of Appeal in R. v. Young, supra, and affirm that
>
> > ...there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings.
>
> I would also adopt the caveat added by the court in Young that this is a power which can be exercised only in the "clearest of cases".

46 Leaving aside the quality of the disclosure to the Appellant before the hearing, the circumstances of this case do not justify a stay of proceedings. While it would be ideal to segregate members of the Board sitting on the Complaints Committee investigating a case from the members of the Board screening the recommendation of the Complaints Committee from the members of the Board conducting the disciplinary proceedings arising from the investigation, it is not mandatory in this case. The retaining of the law firm to conduct the undercover "shopping" was not an unlawful delegation by the Board of its investigative powers. The absence of a written complaint and bylaws appointing the articling students as inspectors or prescribing the modes of investigations by the Board, did not deprive it of jurisdiction to discipline Doctor Markandey. Requesting the "shopping" after resolving the LeClerc complaint and receiving the Walker report was done in circumstances where the Complaints Committee had grounds to reasonably suspect unprofessional conduct by the Appellant. This was not a case where the Complaints Committee should exercise its discretion not to proceed against an optician who, in an isolated act of unprofessional conduct, otherwise conducts himself or herself in accordance with the generally accepted standards of the profession. The Appellant had the benefit of such a discretion in the LeClerc matter. The inadvisable use of articling students as "shoppers" would not make a stay of proceedings appropriate.

47 Let me now address the failure to make proper disclosure before the hearing. Since the disclosure is now full and complete and since there is no suggestion the failure to make timely disclosure before the hearing is likely to prejudice the Appellant during this appeal, this factor would not justify a stay of

proceedings. The Appellant is now in a position to make full answer and defence to the case against him. To say this is not to condone less than full disclosure. The Board and its counsel must be vigilant in their efforts to conduct the disciplinary proceedings before it fairly. If this was an application for judicial review in which prejudice to the conduct of the defence before the Board was established, relief would likely be available to Doctor Markandey. This, however, is an appeal in the nature of a trial and, consequently, a stay of proceedings is not warranted.

The Exclusion of Evidence under Section 24(2) of the Charter

48 Having dismissed the motion to stay the proceedings, let me now deal briefly with the application to exclude the evidence of the articling student under Section 24(2) of the Charter on the basis of it being obtained in a manner denying or infringing the rights of the Appellant under Section 8 of the Charter. Where, as here, the undercover investigation is conducted in the public domain, there is no violation of the Appellant's reasonably expectation of privacy. The Complaints Committee created an opportunity for Doctor Markandey to commit unprofessional conduct where it had a reasonable basis to suspect his practice did not meet the generally accepted standards of the profession.

49 Considering all of the circumstances of the case as summarised in this judgment, I am not satisfied by the Appellant that the admission of the testimony could bring the administration of justice into disrepute. See Collins v. The Queen (1987), 33 C.C.C. (3rd) 1 (S.C.C.). The evidence of the articling student is, accordingly, admissible.

Conclusion

50 In conclusion, the motion to stay the proceedings is dismissed and the testimony of the articling student is ruled admissible. Counsel are directed to approach the Court forthwith after receipt of these Reasons to set a date for the hearing of the appeal.

TRAFFORD J.

Case Name:

Suman (Re)

IN THE MATTER OF the Securities Act, R.S.O. 1990, c. S.5, as Amended, and
IN THE MATTER OF Shane Suman and Monie Rahman

2009 LNONOSC 18

(2009), 32 OSCB 592

Ontario Securities Commission

Panel: Lawrence E. Ritchie, Vice-Chair and Chair of the Panel;
David L. Knight, FCA, Commissioner;
Carol S. Perry, Commissioner

Heard: July 30, 2008.
Decision: January 12, 2009.

(49 paras.)

Appearances:

Cullen Price, Kathryn Daniels, For the Ontario Securities Commission.

Randy Bennett, Sara J. Erskine, For Monie Rahman.

Shane Suman, Representing himself.

REASONS FOR DECISION

I. BACKGROUND

A. Overview

1 The Application before us raises the issue of a respondent's right to have access to proprietary information of a third party, when that information is in the hands of Staff of the Ontario Securities Commission (the "Commission"). In considering the Applicant's request, we, as a Commission panel, must consider and balance (a) the legitimate interest of the third party in ensuring the protection of sensitive commercial information, and (b) Staff's ability to garner cooperation from witnesses in its investigative process, against (c) a respondent's right to make full answer and defence to serious

allegations with potentially serious consequences.

2 After the hearing on July 30, 2008, we issued our Order, dated August 1, 2008, which set out a protocol by which, in our view, the various interests of the parties are best accommodated. The following are our Reasons for making that Order.

3 This matter arises out of a Statement of Allegations and Notice of Hearing dated July 24, 2007. Staff of the Commission ("Staff") alleges that Shane Suman ("Suman"), a former employee of MDS Sciex, a division of MDS Inc. ("MDS"), conveyed material non- public information about MDS to his wife, Monie Rahman ("Rahman"). The information concerned the proposed acquisition by MDS of Molecular Devices Corporation ("MDCC"), a U.S. issuer listed on the NASDAQ. The acquisition was publicly announced on January 29, 2007 (the "Announcement"). Staff alleges that Suman and Rahman (collectively, the "Respondents") bought 12,000 shares and 900 options contracts in MDCC in the days immediately prior to the Announcement. Staff alleges that the Respondents liquidated the MDCC securities on March 16, 2007 for a profit of $954,938.

4 Staff alleges that Suman, as an employee of MDS, was a person in a special relationship with MDS in accordance with subsection 76(5) of the Securities Act, R.S.O. 1990, c. S.22, as amended (the "Act") at the time of the subject trading and at the time of the Announcement. Staff alleges that Suman traded in MDCC securities with knowledge of material undisclosed information respecting it, being its proposed acquisition by MDS, contrary to the public interest. Staff also alleges that Suman improperly advised Rahman about the proposed acquisition, contrary to subsection 76(2) of the Act and contrary to the public interest. With respect to Rahman, Staff alleges that she traded in MDCC securities with the knowledge of a material undisclosed fact, being the acquisition of MDCC by MDS, having acquired the knowledge from her husband, whom she knew to be an employee of MDS, contrary to the public interest.

5 Staff seeks an order that Suman be prohibited from becoming or acting as an officer or director of an issuer, pursuant to paragraph 8 of subsection 127(1) of the Act, that he cease trading in any securities for such period as is specified by the Commission, pursuant to paragraph 2 of subsection 127(1), pay an administrative penalty of not more than $1,000,000, pursuant to paragraph 9 of subsection 127(1), disgorge any amounts he obtained by virtue of his non-compliance with Ontario securities law, pursuant to paragraph 10 of subsection 127(1), and pay the costs of the Commission investigation and hearing, pursuant to subsection 127(1) [sic]. With respect to Rahman, Staff seeks an order that she be prohibited from becoming or acting as an officer or director of an issuer, pursuant to paragraph 8 of subsection 127(1), that she cease trading in any securities for such period as is specified by the Commission, pursuant to paragraph 2 of subsection 127(1), and that she be ordered to pay the costs of the Commission investigation and hearing.

6 At the time of the Application, the hearing on the merits was scheduled to begin on October 20, 2008. The hearing was subsequently adjourned to a future date.

B. The Disclosure Motion

7 On August 28, 2007, counsel for Staff and counsel for the Respondents attended before the Commission for a first appearance. On consent, the matter was adjourned to a pre-hearing conference on October 23, 2007. Further pre-hearing conferences were held on November 26, 2007, December 28, 2007, January 29, 2008, February 12, 2008 and June 27, 2008.

8 By the date of the pre-hearing conference on October 23, 2007, Staff had produced to the

Respondents the September 3, 2007 report of Steven L. Rogers, whom Staff proffers as a forensic computer expert (the "Rogers Report"), setting out the results of his forensic analysis of computer hard drives belonging to Suman (the "Suman Images") and forensic images taken from computer hard drives belonging to MDS (the "MDS Images"). By the date of the second pre-hearing conference, held on November 26, 2007, Staff had produced to the Respondents copies of the Suman Images.

9 In December 2007, Staff produced copies of the MDS Images to then counsel to the Respondents, ("Previous Counsel"), which Staff submits contain confidential and highly sensitive commercial information of a third party. As a condition to the production, Staff sought and obtained an undertaking from Previous Counsel, to safeguard any confidential information contained in them. In January 2008, Previous Counsel terminated his retainer with the Respondents. In accordance with his undertaking, he returned the copies to Staff.

10 On March 7, 2008, Staff produced to the Respondents five of seven MDS Images that did not raise confidentiality concerns. Staff declined to produce copies of the two remaining images (the "Disputed Hard Drive Images"), taking the position that the Disputed Hard Drive Images contain private personal employee information and highly sensitive commercial information. Further, Staff took the position that the Disputed Hard Drive Images contain little, if any, relevant information. Staff nonetheless, offered to provide the Respondents with an opportunity to review the Disputed Hard Drive Images at the Commission's offices "in a private setting at a mutually convenient time but without the ability to make copies given the confidentiality concerns expressed above."

11 The Respondents objected to the offered conditions and gave notice that they would bring a motion for disclosure of the Disputed Hard Drive Images. At a sixth pre-hearing conference, held on June 27, 2008, at which Suman acted for himself and as agent for Rahman, the disclosure motion was set down for July 17, 2008.

12 On July 14, 2008, Staff refined its offer to provide limited access to the material, saying that it would permit the Respondents access to the Disputed Hard Drive Images on the basis that:

(i) the Respondents would retain counsel on a limited basis to maintain possession and control of the electronic disclosure by providing and fulfilling the terms of an undertaking to safeguard the confidential information in a form acceptable to Staff;

(ii) upon receipt of the undertaking, signed by counsel, Staff would provide counsel with copies of the Disputed Hard Drive Images; and

(iii) the Respondents would consent to an order not to obtain, use or distribute, for any reason collateral to their defence in this matter, any of the confidential information.

13 On the evening of July 14, 2008, Rahman retained new counsel. However, Suman continues to represent himself.

14 On July 17, 2008, the motion was adjourned to July 30, 2008, when it was heard.

II. THE POSITIONS OF THE PARTIES

A. The Respondents

15 The Respondents submit that complete and unrestricted disclosure of the Disputed Hard Drive Images is necessary to enable them to make full answer and defence, and that Staff has failed to comply with its disclosure obligations.

16 Kevin Lo ("Lo") has been retained by Rahman's counsel to provide expert forensic analysis of the Disputed Hard Drive Images. In his affidavit sworn July 25, 2008, Lo states that he requires physical possession of complete copies of the Disputed Hard Drive Images in order to verify that the images referred to in the Rogers Report are actually on the Disputed Hard Drive Images and to conduct a forensic analysis of the Disputed Hard Drive Images. He estimates that it will take 4 to 6 full days to conduct his analysis. He also states that he will need to review the Disputed Hard Drive Images with Suman, who would have familiarity with their content.

17 Rahman submits that in Commission proceedings, the principles of natural justice and fairness require a high standard of disclosure akin to that in criminal trials. Rahman submits that the Commission has accepted that Staff must meet the standard for disclosure established in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.) ("*Stinchcombe*"). Rahman cites a number of cases decided in the context of Commission proceedings in support of this standard for disclosure (*Re Market Regulation Services Inc.* (2008), 31 O.S.C.B. 5441 ("*Re Berry*"), at paras. 66-68, *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] S.C.J. No. 62 (S.C.C.) ("*Deloitte*"), and *Re Biovail Corporation et al.*, (2008), 31 O.S.C.B. 7161 ("*Re Biovail*")).

18 Rahman submits that the situation in this case is similar or analogous to that in *Deloitte*. In *Deloitte*, Staff obtained an order under s. 17 of the Act authorizing it to disclose to Philip Services Corporation ("Philip") and its officers (collectively, the "Philip Respondents"), documents and information obtained from Deloitte, Philip's auditor. Deloitte appealed on the basis that the information was private. Deloitte was successful at the Divisional Court, but the Ontario Court of Appeal overturned that decision and restored the Commission's order. The Supreme Court of Canada dismissed Deloitte's further appeal on the basis that the Commission's decision was reasonable and soundly based to allow the Philip Respondents to make full answer and defence, since there was a reasonable possibility that all of the disputed material would be relevant to the allegations.

19 Rahman submits that the principle that Staff must disclose relevant information to enable the respondent to make full answer and defence was recently reaffirmed by the Commission in *Re Biovail*. At paragraph 15 of that decision, the Commission stated:

> Documents should not be withheld if there is a reasonable possibility that doing so would impair the right of the accused to make full answer and defence.

20 Further, Rahman submits that a specific order restricting the use of the Disputed Hard Drive Images is unnecessary, as MDS's privacy interests are adequately protected by the implied undertaking rule. In *Re Melnyk* (2006), 29 O.S.C.B. 7875 ("*Re Melnyk*"), the Commission reaffirmed that the implied undertaking rule "is a recognized principle of law in Ontario and applies to Commission proceedings." (*Re Melnyk*, at para. 35, referring to *A. Co. v. Naster* (2001), 143 O.A.C. 356 (Ont. Div. Ct.))

21 Rahman notes that Staff's Statement of Allegations alleges that Suman had access to information concerning the proposed acquisition of MDCC through his administration of and use of MDS's computers and email server, which have been forensically captured on the MDS Images, including the Disputed Hard Drive Images. Rahman submits that Staff intends to rely on the MDS Images, including the Disputed Hard Drive Images, to prove its allegations. Further, Staff intends to rely on the Rogers Report, which was based on Staff's unrestricted access to the MDS Images, including the Disputed Hard

Drive Images. Rahman submits that the Respondents are entitled to have the same access as Staff.

22 Rahman submits that the information on the Disputed Hard Drive Images is relevant to the Respondents' ability to make full answer and defence. She submits that imposing improper restrictions or undue burdens on the Respondents neither satisfies the disclosure obligations of Staff nor permits the Respondents to make full answer and defence.

B. Staff

23 Staff recognizes that it has a broad duty to disclose all relevant information, subject to its discretion to withhold information that is clearly irrelevant, privileged, beyond its control or should not be disclosed on grounds of privacy, which discretion is open to review by the Commission. Staff submits that it has met its disclosure obligations.

24 Staff submits that when the information of a third party is involved, Staff must consider the respondents' right to meet the case against them yet also be sensitive to the third party's privacy interests and expectations.

25 Staff submits that dissemination of information contained in the Disputed Hard Drive Images could cause harm to MDS. For example, Staff submits that the Disputed Hard Drive Images contain information about potential acquisition targets, joint venture partners, research and development plans and product cost data.

26 Staff submits that its position is consistent with practice in the criminal context. Staff relies on the Crown Policy Manual, published by the Ministry of the Attorney General, which addresses the situation where an accused is self-represented and the Crown's disclosure material contains information that is subject to privacy concerns. In that situation, the Crown Policy Manual states:

> An unrepresented accused is entitled to the same disclosure as the represented accused. However, if there are reasonable grounds for concern that leaving disclosure material with the unrepresented accused would jeopardize the safety, security, privacy interests, or result in the harassment of any person, Crown counsel may provide the disclosure by means of controlled and supervised, yet adequate and private, access to the disclosure materials. ... Crown counsel shall inform the unrepresented accused in writing of the appropriate uses, and limits upon the use, of the disclosure materials.
>
> *Crown Policy Manual*, Ontario Ministry of the Attorney General, section D-1, para. 9(b).

27 Staff submits that the above policy flows from the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (the "Martin Committee"). The Martin Committee's Recommendation 12(h) was as follows:

> where reasonably capable of reproduction, and where Crown counsel intends to introduce them into evidence, copies of documents, photographs, audio or video recordings of anything other than a statement by a person, and other materials should normally be supplied to the defence. The defence may be limited to a reasonable opportunity, in private, to view and listen to a copy of any audio or video recording where Crown Counsel has reasonable cause to

> believe that there exists a reasonable privacy or security interest of the victim(s) or witness(es), or any other reasonable public interest, which cannot be satisfied by an appropriate undertaking from defence counsel.
>
> *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Queen's Printer for Ontario, 1993), p. 234, para. 12(h)

28 Further, Staff submits that this recommendation has received judicial approval in *R. v. Blencowe*, [1997] O.J. No. 3619 (Ont. Gen. Div.) ("*Blencowe*"), at paras. 56-57, *R. v. Schertzer*, [2004] O.J. No. 5879 (Ont. S.C.J.) ("*Schertzer*"), at paras. 5-7, and *R. v. Cassidy*, [2004] O.J. No. 39 (Ont. C.A.) ("*Cassidy*"), at paras. 9-13.

29 Further, Staff submits that while the Respondents may prefer a different procedure for disclosure, Staff is obligated to provide a fair procedure, not a perfect procedure. Staff relies on the following statement by the Alberta Securities Commission:

> Disclosure must enable respondents to know and be in a position to answer the case against them. The disclosure obligation continues throughout the course of a hearing. However, disclosure need not be perfect. Nor is perfect disclosure a realistic expectation in complex cases involving large volumes of material.
>
> *Re Proprietary Industries Inc.*, 2005 ABASC 986, at para. 44.

30 We note that another Panel of the Commission made a similar point in *Re Biovail*, at para. 47.

31 Staff submits that its approach to disclosure in this matter is consistent with the Martin Committee procedure, which was approved by the Court, and strikes the appropriate balance between the Respondents' right to answer the case against them and the right of MDS to safeguard its confidential information - "especially in a case where the underlying allegation is one of abuse by the Respondents of the confidential information of the witness, namely, MDS."

32 Staff notes that despite its offer on March 7, 2008 to allow the Respondents to inspect the Disputed Hard Drive Images privately at the offices of Staff, no effort to access the material has been made. Further, Staff notes that although Rahman retained counsel on the evening of July 14, 2008, the day when Staff suggested the Respondents retain counsel for the limited purpose of giving an undertaking, and although Staff provided Rahman's counsel with a draft undertaking, no such undertaking has been provided, and Suman continues to be self-represented.

33 Staff also disputes Lo's affidavit evidence that he requires physical possession of the Disputed Hard Drive Images, relying on the reply affidavit of Colin McCann, who is Assistant Manager of the Technology and Evidence Control Unit of Staff and the primary investigator in this matter ("McCann"), sworn July 25, 2008. In his affidavit, McCann states that there is no technical impediment to Lo performing his analysis at the offices of Staff, and that he would need much less than 4 to 6 days to review the Disputed Hard Drive Images.

34 Staff does not accept that the implied undertaking rule adequately protects MDS's interests. Further, Staff submits that the existence of an implied undertaking does not preclude the Commission from including in its order express limitations on disclosure intended to protect the privacy of a third party, as it did in *Deloitte*.

35 Staff submits that while child pornography, which was the focus of the criminal cases cited by Staff, engages perhaps the highest level of privacy interest, there is a full spectrum of privacy rights entitled to protection, including the commercial interests of MDS. (*R. v. Beauchamp*, [2008] O.J. No. 1347 (Ont. S.C.J.) at para. 53)

36 Staff submits that there is no principle of fundamental justice that the Crown and the accused must enjoy precisely the same privileges and procedures, and even in the context of *Stinchcombe*, the right to disclosure is not unlimited; the Crown has discretion, reviewable by the trial judge, to withhold disclosure based on, for example, privilege. The real question is whether the disclosure procedure allows the accused to make full answer and defence. (*R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.), at paras. 111-112)

37 Finally, Staff objects to any process that allows Lo to consult with Suman. In Staff's submission, this would taint Lo's expert evidence because of Suman's inherent bias. As the motion is brought by Rahman, the issue is whether Rahman, her counsel and her expert have access to the Disputed Hard Drive Images.

III. ANALYSIS

38 The Respondents are entitled to disclosure of relevant materials in order to make full answer and defence. In several decisions - most recently, *Re Berry* and *Re Biovail* - the Commission has accepted that given the serious consequences faced by a respondent in many Commission proceedings, such as this one, "principles of natural justice and fairness require a high standard of disclosure akin to that required in criminal trials", and accordingly, the Commission has accepted that "Staff has a broad duty of disclosure akin to the *Stinchcombe* standard". The *Stinchcombe* standard "requires the Crown to disclose all relevant information, whether inculpatory or exculpatory, subject to the discretion of the Crown, which discretion is reviewable by the Court." (*Re Berry*, at para. 66. See also *Re Biovail*, at para. 15)

39 However, as Staff points out, the case law also recognizes that a respondent's right to disclosure from Staff is not absolute. In *Deloitte*, the Supreme Court of Canada recognized that the Commission's disclosure orders must balance the rights of respondents and third parties:

> ... the OSC, in cases like this, is in an awkward position. A proceeding has been ordered against respondents who are entitled to disclosure of information involving a third party. The OSC must search for an approach that provides fair consideration for the respondents in jeopardy and enables them to meet the case against them yet also is sensitive to the third party's privacy interests and expectations. (*Deloitte*, at para. 28)

40 As the Supreme Court of Canada said in *Deloitte*, "the OSC has a duty to parties like [MDS] to protect its privacy interests and confidences. That is to say that OSC is obligated to order disclosure only to the extent necessary to carry out its mandate under the Act." (*Deloitte*, at para. 29)

41 In that case, the Court held that the Commission had "properly weighed the necessary disclosure and the interests of Deloitte," as could be seen from the operative parts of the order. The Commission's order required Staff to disclose the compelled evidence on the basis that the respondents and their counsel would not use it for any purpose other than making full answer and defence to the allegations in those proceedings and would maintain custody and control over the evidence, so that copies of it would not be improperly disseminated. The Court concluded that the Commission's order "properly balanced the interests of Deloitte and its own obligation to conduct hearings under the Act fairly and properly by

restricting the disclosure to that which was necessary to pursue the OSC's mandate." (*Deloitte*, at para. 29-30)

42 Staff has limited the Respondents' access to the Disputed Hard Drive Images on the basis that they were received from a third party, in the course of Staff's investigation, and that third party asserts that they contain confidential and otherwise sensitive information.

43 We have been asked, by this motion, to make an order which requires us to balance the Respondents' right to disclosure of the Disputed Hard Disk Images without, in their words, "any unfair and unnecessary obstruction and restrictions", against the legitimate privacy concerns of MDS, a third party to this proceeding.

44 At the hearing on the merits, Staff intends to rely on the Rogers Report, which was based on a forensic analysis of the MDS Images, including the Disputed Hard Drive Images, in support of its allegation that Suman had access to material non-public information about the proposed acquisition as an employee in the information technology department at MDS. Accordingly, there is no issue as to the relevance of these materials: they clearly are relevant.

45 The Commission's order in *Deloitte* was intended to address Deloitte's submission that the compelled documents, if disclosed, could be used against it in civil proceedings. Notwithstanding section 17 of the Act and the implied undertaking rule, we find it appropriate in this case, as well, to include in our disclosure order an express order that the material disclosed to the Respondents shall not be used for any collateral or ulterior purpose and shall be governed by section 17.

46 As stated above, we agree that the interests of third parties need to be given thoughtful and considered attention when they become engaged by OSC investigations and subsequent Commission proceedings. OSC Staff needs the cooperation of third parties to effectively investigate possible improprieties and wrongdoing, and that cooperation ought not be discouraged or constrained by concerns that their legitimate privacy interests will be ignored. For this reason, we reaffirm the message reflected in *Deloitte* that this Commission will strive to accord Respondents with their rights to make full answer and defence, in a manner which minimizes intrusions into the privacy and confidences of third parties. In this case, Staff has also identified specific concerns raised by MDS with respect to the risk of improper use or dissemination of sensitive commercial information contained in the Disputed Hard Drive Images. We do not agree, however, that it is necessary to restrict Suman to merely having an opportunity to inspect the Disputed Hard Drive Images at Staff's offices. We are of the view that MDS's interests can be protected if our order requires that the Disputed Hard Drive Images be maintained in the custody and control of counsel for Rahman, counsel for Suman (if he retains counsel), or an expert retained by counsel for the Respondents.

47 To further ensure against the improper use or dissemination of sensitive information, we order that the Disputed Hard Drive Images may not be viewed by anyone other than the Respondents, counsel for the Respondents or either of them or an expert retained by counsel. Further, we order that the Disputed Hard Drive Images may not be electronically copied, and may not be hard copied except for the purpose of enabling the Respondents to make full answer and defence. Further, the Disputed Hard Drive Images and all hard copies made by or on behalf of the Respondents are to be returned upon the completion of this proceeding and any appeal.

48 We are of the view that our order achieves an appropriate balance, which permits the Respondents to have broader access to the MDS Images than Staff proposed, on the one hand, but also imposes certain conditions on disclosure to ensure the appropriate custody and limit the use of the sensitive

commercial information.

IV. CONCLUSION

49 For the above reasons, we made the following order on August 1, 2008:

a) The hearing on the merits, previously scheduled to commence on September 3, 2008, is adjourned to commence on October 20, 2008, or such other date as is agreed by the parties and determined by the Office of the Secretary, or otherwise ordered by the Commission;

b) Staff shall provide the Respondents or either of them with an opportunity for private inspection of the Disputed Hard Drive Images at Staff's offices, with or without the assistance of counsel for the Respondents or either of them ("Counsel"), and with or without the assistance of a computer forensic expert retained by Counsel ("Expert Retained by Counsel");

c) Staff shall provide Counsel with a copy of the Disputed Hard Drive Images;

d) Counsel may provide an Expert Retained by Counsel with the copy of the Disputed Hard Drive Images provided by Staff;

e) Except with the express consent of Staff or by order of the Commission, no one other than the Respondents, Counsel and/or an Expert Retained by Counsel shall view the Disputed Hard Drive Images;

f) The Disputed Hard Drive Images shall not be electronically copied;

g) The Disputed Hard Drive Images shall not be hard copied except for the purpose of enabling Rahman and Suman to make full answer and defence in this proceeding;

h) The Disputed Hard Drive Images shall be maintained in the custody and control of Counsel or an Expert Retained by Counsel;

i) Upon the completion of this proceeding and any appeal, Counsel shall return to Staff the copy of the Disputed Hard Drive Images provided by Staff and all hard copies made by or on behalf of the Respondents or either of them, Counsel or an Expert Retained by Counsel;

j) The Disputed Hard Drive Images and the information contained therein shall not be used or disseminated except for the purpose of making full answer and defence to the allegations made against the Respondents in this proceeding and any appeal, and shall not be used for any collateral or ulterior purpose; and

k) The Disputed Hard Drive Images, to the extent not filed and admitted in

this proceeding, shall be governed by section 17 of the Act, as well as the implied undertaking rule, and shall not be used by Suman or Rahman in any other regulatory, criminal or civil proceeding.

DATED at Toronto this 12th day of January, 2009.

"Lawrence E. Ritchie"

"Carol S. Perry"

"David L. Knight"

qp/e/qllas

DATE: 20011116
DOCKET: C35181

COURT OF APPEAL FOR ONTARIO

MORDEN, ABELLA and ROSENBERG JJ.A.

B E T W E E N :	
ONTARIO HUMAN RIGHTS COMMISSION	Naomi Overend and Jennifer Scott for the Appellant
Applicant (Appellant)	Michael Hines for the Respondent Dofasco Inc.
- and -	
DOFASCO INC., CATHERINE JEFFREY and THE BOARD OF INQUIRY (*Human Rights Code*)	Fiona Campbell for the Complainant Catherine Jeffrey
	Margaret Leighton for the Board of Inquiry
Respondents (Respondents in Appeal)	
	Heard: June 14, 2001

On appeal from an order of the Divisional Court (Hartt, Carnwath and Matlow JJ.) dated June 22, 2000.

MORDEN J.A.:

[1] This appeal is concerned with the nature and extent of the power of a board of inquiry under the *Human Rights Code*, R.S.O. 1990, c. H. 19 to order a complainant, who alleges that she was discriminated against in her employment on the basis of a physical handicap, to disclose medical and other documents relating to her.

[2] I shall, shortly, describe what has taken place in this proceeding but say now that the board of inquiry ("the board") which is composed of one person, Matthew D. Garfield, made an order, on a motion by Dofasco Inc., requiring the complainant, Catherine Jeffrey, to disclose certain documents. I shall set out the terms of the order, which are considerably more complex than this brief statement indicates, later in these reasons.

[3] The appellant, the Ontario Human Rights Commission ("the commission"), brought an application to the Divisional Court for judicial review of the board's order, which the court dismissed. The commission, with leave, appeals to this court from this decision.

The *Underlying* Facts Relating to the Disclosure Order

[4] The facts relating to the board's disclosure order and to the judicial review proceeding, which is before the court, are, in the main, those set forth in the pleadings filed with the board. Pleadings are provided for in the Rules 35 to 37 of the board's Rules of Practice.

[5] The commission's pleading alleged that the complainant was employed by Dofasco from 1976 to 1994. She worked as a crane operator. She was injured in 1988 and re-injured in 1990. She was diagnosed with chronic pain disability/ fibromyositis/fibromyalgia. This condition made her incapable of working as a crane operator.

[6] The complainant was off work between 1990 and 1994 but continued to have contact with Dofasco Inc. from time to time. On March 1, 1994 Dofasco, for the first and only time, raised the possibility of assigning her reasonably suitable alternative work, as a switchboard operator. Her response was to defer the decision on whether or not to accept this work until after she had consulted with her specialist doctor. She informed Dofasco of this. Because of her doctor's absence, she was unable to see him until April 26, 1994.

[7] Dofasco was unwilling to wait for this and demanded that the complainant report to Dofasco Medical Services on March 11 and report for work on March 14. She did report to Dofasco Medical Services on March 11. Despite knowing that she was unable to see her specialist until April 26, Dofasco Inc. terminated her employment forthwith after she did not report for work on March 14, claiming that her contract of employment had been frustrated because of her "prolonged and ongoing refusal to report for available and suitable work".

[8] The commission alleged that the facts disclosed the following issues:

> (a) The complainant was terminated because of her handicap, which constitutes *prima facie* discrimination;
>
> (b) Dofasco did not attempt to accommodate the needs arising from the complainant's handicap to the point of "undue hardship", and therefore cannot establish that the complainant was "incapable" of her essential duties;

(c) In fact, Dofasco was not engaged in a good faith process of accommodation, given the timing of its job offer, its refusal to wait for the complainant to get required medical advice, and its refusal to consider any other options;

(The commission raised additional issues in its pleading relating to harassment and reprisals on the part of Dofasco. They are not relevant to the proceeding before the court.)

[9] This is followed by the general allegation that Dofasco discriminated against the complainant on the ground of handicap contrary to ss. 5 and 9 of the *Human Rights Code*.

[10] The commission sought the following remedies:

(a) Compensation for lost wages and benefits for the complainant for the period March 15, 1994 to the present, less any amounts of such compensation the complainant received for this period from the WSIB or CPP;

(b) Compensation for the intrinsic value of the rights infringed in the amount of $10,000;

(c) Compensation for mental anguish suffered because of the wilful or reckless manner of infringement in the amount of $10,000;

[11] Dofasco's pleading is relatively long and detailed. A summary set forth in paragraph 37 reads:

To summarize, for four years the Complainant consistently asserted inability to perform productive work for Dofasco, apparently supported by her physicians, while failing to provide relevant medical information and emphasizing her desire for WCB vocational training. In the four years between her second accident and her termination, the Complainant never stated she was ready to return to work or that her physicians had cleared her to return to work. During that time period, she never suggested there were any particular jobs or bundles of duties that she could productively perform, nor, to the Respondent's knowledge, did any of her physicians. During her four year absence from work, the Complainant repeatedly took the position that (initially) she was not ready to return to work, and

> (later) that she was unlikely to ever be able to return to work at Dofasco. The Commission's Pleadings do not refer to any indication from the Complainant that she was, either prior to or subsequent to her termination, medically fit to return to any productive job at Dofasco. This background, coupled with her refusal to even attempt an ultra-light duty job, the WCB's concurrence that she could do the work and her clear focus on maintaining WCB eligibility, constituted ample grounds for terminating the employment relationship. For four years, the Complainant had not fulfilled the basic "essential duty" of an employee to, ie., perform productive work. Apart from wishful thinking, there was no reason to believe that, whatever accommodation Dofasco made for her, she ever would. A "window of opportunity", arising out of the broader corporate restructuring process, became accessible for a short period of time [earlier in Dofasco's pleading it was alleged that there was a "pressing" need to fill the switchboard operator's vacancy]. Dofasco acted reasonably in stating its preparedness to accept medical clearance from a doctor other than the absent specialist and its readiness to physically modify the worksite. The Complainant declined to take advantage of this, and the window "closed". There was no prospect that such an opportunity would arise again in the foreseeable future. Dofasco then proceeded to exercise its rights of termination under Section 17 of the *Code*.

Dofasco also pleaded:

> Dofasco has now learned that in August, 1993, the Complainant was awarded disability benefits under the Canada Pension Plan. Dofasco has requested but has not yet received documents explaining why this decision was reached despite the findings of Dr. Darracott in November, 1992 [that "from a physical point of view, there [was] no clinical evidence to suggest she has physically disabling pathology"].
>
> Under the Canada Pension Plan, an applicant can only receive a CPP Disability Pension if they are "incapable regularly of pursuing any substantially gainful occupation" and their disability is "likely to be long continued and of indefinite duration".

[12] Dofasco then raised the following issues:

At the time of her termination, was the Complainant capable of performing any work, or was she "incapable of pursuing any substantially gainful occupation", as her CPP Disability Pension status would suggest?

If the Complainant now claims to have been capable of performing work in March, 1994, should the Board of Inquiry dismiss this Complaint as an abuse of process, given the fact that such a position directly contradicts the position she has successfully taken before the Canada Pension Plan i[n] respect of the same time period?

If, as her CPP status would suggest, the Complainant was totally unemployable in March, 1994, did Dofasco have any obligation at all to accommodate her "needs"?

Assuming the Complainant was capable of some work in March, 1994, was she capable of the switchboard duties?

Assuming the Complainant's needs were such that some measure of accommodation would have permitted her to perform work in March, 1994, were Dofasco's efforts at accommodation sufficient to accommodate those needs?

Did the Complainant, herself, take all reasonable steps available to her to participate in the accommodative process?

The Motion Before The Board

[13] After the exchange of pleadings, Dofasco brought a motion for:

An Order compelling production of the files of Dr. Leong, Dr. Buckley, Dr Kean and Dr. Forrest relating to the Complainant during the period between March 22, 1990 and the present date;

An order compelling production of the files of any other medical practitioner who examined or treated the

> Complainant during the period between March 22, 1990 until the present date;
>
> An order compelling production of all files maintained by the Workplace Safety and Insurance Board regarding the Complainant;
>
> An order compelling production of the Complainant's medical file maintained by the Medical Department of Dofasco Inc.
>
> An order compelling production of the Complainant's disability pension file maintained by the Canada Pension Plan;
>
> An order compelling production of true copies of the Complainant's income tax returns from 1993 until the present as well as true copies of any documents received by the Complainant from Revenue Canada which confirm or correct any of those returns.
>
> Alternatively, an order requiring the Complainant's written consent to the disclosure of each of the foregoing documents to the Respondent's counsel.
>
> Such further and other relief as to this Board of Inquiry seems just.

[14] The board heard the motion on December 16, 1999 and gave its decision orally that day. It stated the competing submissions of the parties as follows:

> Dofasco brings a motion for production of medical files, WCB file, CPP file and income tax returns (T1s and notices of assessment) from the Complainant. Dofasco argues that it should have the same degree of access to original documents in a file as the Complainant. Dofasco also submits that it is being denied the ability to know the case it has to meet, prepare its defence under section 17 of the Code, and deal with central issues in this case including the quantum of damages. Dofasco has highlighted instances of imperfect disclosure in these proceedings including sequentially numbered documents not produced by the Complainant.

> The Commission opposes the motion and argues that the relief sought is too wide and that Dofasco is not entitled to the production of files *per se* and documents not relevant to the handicap of the Complainant (chronic pain disability, fibromyositis, fibromyalgia). The Commission argues that the Board's rules do not contemplate such a wide net of disclosure – a "fishing expedition".
>
> Though not present, the Complainant, through letters by her counsel in the motion materials, indicates that she has met her disclosure obligations under the Rules.

[15] After stating that "[t]he motion is granted in part", the board gave the following reasons:

> The test for production is arguable relevance. Section 5.4(1) of the *Statutory Powers Procedure Act* and Board of Inquiry Rule 42 give me a broad power to order disclosure. Rule 42 confers on me the power to order disclosure of "...anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding."
>
> The threshold for disclosure here, as in the courts, is not a very high one. There must be some relevance and the production must have some nexus to issues before the Board. The general movement is toward greater disclosure. This is reflected by the Ontario Court of Appeal's comments in *Cook v. Ip* (1985), 5 C.P.C. (2d) 81, at 86:
>
> > There can be no doubt that it is in the public interest to ensure that all relevant evidence is available to the Court. This is essential if justice is to be done between the parties...The production of medical records is thus fundamental to a Court's determination of the nature, extent and effect of the injuries which may have been suffered and the appropriate measure of damages flowing from them.

Dofasco has satisfied me that the nature of the documents sought (some of which are known and some of which are not known) are crucial to knowing its case to be met and preparing its key defence under section 17 of the Code. The motion materials clearly show that production by the Complainant has been incomplete. My goal is to balance the needs of Dofasco to know and prepare its case and the confidentiality of the Complainant inherent in such disclosure.

The Commission argues against an order of disclosure of documents from medical practitioners not enumerated by Dofasco and those parts of the file of Dr. Leong (the Complainant's family doctor) dealing with medical conditions not enumerated above. I find that ailments other than those listed above are arguably relevant to Dofasco's section 17 accommodation defence and the quantum of damages. Dofasco should not be prevented from presenting such arguments.

I find further that information contained in the Complainant's files at the WSB and CPP will arguably be relevant to the issues in this proceeding. Employment related income is clearly relevant to issues in this proceeding, including the quantum of damages. Information in the Complainant's file at Dofasco's medical department will no doubt be relevant to key issues in this proceeding.

[16] Following this, the board made its "order" as follows:

1. The Complainant shall provide to her counsel an executed Consent to the disclosure of the file of Dr. Leong, Dr. Buckley, Dr. Kean and Dr. Forrest relating to the Complainant during the period between March 22, 1990 and the present date. Complainant's counsel shall then provide said Consents to the doctors and request production by January 15, 2000.

2. The Complainant shall provide a list to Mr. Hines [counsel for Dofasco] by January 31, 2000 of any other medical practitioner who examined or treated her during the period between March 22, 1990 until the present date, the doctor's area of expertise or specialty, the dates of said visits, and the ailment or condition treated.

3. The Complainant shall provide to her counsel executed Consents to the disclosure of her files maintained at the Workplace Safety and Insurance Board, at the Canada Pension Plan regarding her disability and her medical file maintained by Dofasco's medical department, all for the period between March 22, 1990 until the present date. Complainant's counsel shall then provide said Consents to the above entities and request production by January 15, 2000.

4. The Complainant shall produce to Mr. Hines true copies of her T1 income tax returns and notices of assessment from 1993 until the present. Said documents may be edited by the Complainant so that non-employment income parts are expunged. Production of the income tax documents as above shall be given by January 31, 2000.

5. The Complainant shall provide a sworn Affidavit of Documents as stipulated in the Rules of Civil Procedure dealing with documents obtained from the above sources. The Affidavit shall also include a section listing those documents not provided to Dofasco for reason of not being arguably relevant. Said affidavit, including copies of productions shall be provided to Mr. Hines by January 31, 2000. Mr. Hines may see the originals of productions upon request to the Complainant's counsel.

6. Disbursements of the productions above shall be borne by Dofasco.

7. The Complainant's counsel shall get Mr. Hines' approval as to the form and content of the Consents and letters of request.

The Application for Judicial Review

[17] The commission brought an application for judicial review of the board's decision before the Divisional Court. It sought, in the notice of application, an order quashing the board's order and remitting the matter to the board for "a decision in accordance with proper legal principles to be specified" and stated the following grounds:

In making this order, the Board of Inquiry:

i) Made an error of law in its interpretation of s. 17 of the *Human Rights Code*;

ii) Made an error of law in its interpretation of the Rules of Practice of the Board of Inquiry in placing even more onerous procedural and substantive obligations on the complainant with respect to disclosure than would the *Rules of Civil Procedure*, despite the fact that the Rules of Practice of the Board of Inquiry specify, for parties other than the Human Rights Commission, only that disclosure must be made of documents on which that party will rely;

iii) Exercised its discretion unreasonably, or patently unreasonably, in requiring disclosure concerning medical conditions unrelated to the handicaps alleged in the complaint, in the absence of any evidence that the complaint had *any* such conditions which might have affected her ability to work. This constitutes, almost by definition, a "fishing expedition" [emphasis in original].

[18] The Divisional Court (Hartt, Carnwath and Matlow JJ.) dismissed the application. Carnwath J. gave the following reasons for the court orally at the conclusion of the hearing:

> We all agree the application fails. We find it would be unreasonable to interfere with the interim decision of the Board, a decision devoid of exceptional or extraordinary circumstances. The hearing before the Board should not be fragmented and should be permitted to run its course. The section 17 issue should receive a full hearing by the Board. Any aggrieved party may appeal, based on a full evidentiary record. Moreover, records are arguably relevant to the determination of a remedy and quantum of damages.
>
> We find the Board's decision was a reasonable exercise of its discretion at this preliminary stage. In carrying out the balancing of the fourth part of the test in *A.M. v. Ryan*, [1997] 1 S.C.R. 157, we find the Board's exercise of discretion to be reasonable, particularly in the light of the acknowledgment of counsel that the usual undertaking of Mr. Hines to maintain confidentiality is in effect.

The panel, in the exercise of its discretion, awards party-and-party costs of $3,500.00, inclusive of fees and disbursements, plus G.S.T. to Dofasco Inc. The costs are awarded solely against the Commission.

Legislative Provisions

[19] Before setting forth the issues argued before this court and my reasons relating to them, I set forth the relevant legislative provisions in the *Human Rights Code*, R.S.O. 1990, c. H. 19, as amended, the Rules of Practice made by the Board of Inquiry, and the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, as amended.

Human Rights Code

5. – (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or handicap.

....

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

....

17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

(2) The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

....

35.(1) There shall be a board of inquiry for the purposes of this Act composed of such members as are appointed by the Lieutenant Governor in Council.

....

(5) The board of inquiry may make rules regulating its practice and procedure and generally for the conduct and management of its affairs and such rules are not regulations within the meaning of the *Regulations Act.*

....

39. (1) The board of inquiry shall hold a hearing,

(a) to determine whether a right of the complainant under this Act has been infringed;

(b) to determine who infringed the right; and

(c) to decide upon an appropriate order under section 41,

and the hearing shall be commenced within thirty days after the date on which the subject-matter of the complaint was referred to the board.

(2) The parties to a proceeding before the board of inquiry are,

(a) the Commission, which shall have the carriage of the complaint;

(b) the complainant;

(c) any person who the Commission alleges has infringed the right;

(d) any person appearing to the board of inquiry to have infringed the right;

....

(4) Where the board exercises its power under clause 12 (1) (b) of the *Statutory Powers Procedure Act* to issue a summons requiring the production in evidence of

documents or things, it may, upon the production of documents or things before it, adjourn the proceedings to permit the parties to examine the documents or things.

Rules of Practice – Ontario Board of Inquiry – Effective November 1, 1996

1. These Rules apply to all proceedings of the Board of Inquiry....

MUTUAL DISCLOSURE

40. The Human Rights Commission, shall provide full disclosure of the results of its investigation including, but not limited to, witness statements, documents, and evidence relating to the complaint, to all parties and to any other person the panel directs, at least ten (10) days prior to the first scheduled mediation date or thirty (30) days before the case management-prehearing if no mediation is scheduled.

41. All other parties except the Human Rights Commission, shall deliver to all parties full disclosure of the information and evidence including, but not limited to, witness statements and documents it will rely on to support its case at least ten (10) days prior to the first scheduled case management-prehearing.

42. At any time in a proceeding, a panel may order any party to deliver to any other party further particulars, physical or documentary evidence, expert(s)' reports, lists of witnesses and witness statements for the purposes of the hearing, and anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding.

43. If a party fails to disclose in accordance with these Rules or an order of the panel, the party may not refer to or enter the document or physical evidence at the hearing without an order or a ruling of the panel which may be on such conditions as the panel considers appropriate.

Statutory Powers Procedure Act

2. This Act, and any rule made by a tribunal under section 25.1 shall be liberally construed to secure the just,

most expeditious and cost-effective determination of every proceeding on its merits.

....

5.4(1) If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,

(a) the exchange of documents;

(b) the oral or written examination of a party;

(c) the exchange of witness statements and reports of expert witnesses;

(d) the provision of particulars;

(e) any other form of disclosure.

(1.1) The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding.

(2) Subsection (1) does not authorize the making of an order requiring disclosure of privileged information.

....

8. Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

....

12(1) A tribunal may require any person, including a party, by summons,

....

(b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal,

relevant to the subject-matter of the proceeding and admissible at an oral or electronic hearing.

....

25.0.1 A tribunal has the power to determine its own procedures and practices and may for that purpose,

(a) make orders with respect to the procedures and practices that apply in any particular proceeding; and

(b) establish rules under section 25.1.

25.1(1) A tribunal may make rules governing the practice and procedure before it.

(2) The rules may be of general or particular application.

(3) The rules shall be consistent with this Act and with the other Acts to which they relate.

(4) The tribunal shall make the rules available to the public in English and in French.

(5) Rules adopted under this section are not regulations as defined in the *Regulations Act*.

(6) The power conferred by this section is in addition to any power to adopt rules that the tribunal may have under another Act.

32. Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply despite anything in this Act, the provisions of this Act prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith.

The Issues Raised by the Commission

[20] The basic issues raised by the commission are that the Divisional Court erred in applying the review standard of reasonableness rather than correctness and that the board committed jurisdictional error in ordering extensive disclosure and productions of records that (a) were in the hands of non-parties to the proceeding and (b) were privileged. The commission also argued that the Board erred in ordering disclosure of documents that were not arguably relevant to the proceeding and documents other than those on which the disclosing party intended to rely.

What the Board and the Divisional Court Decided

The Board's Order

[21] Before the issues raised by the commission can be properly addressed, it is essential to have an accurate understanding of the meaning and scope of the board's order. No doubt, and I say this with respect to the board, its order could be expressed more clearly than it is. Following the hearing of this appeal, we sought further submissions in writing from counsel for each party on particular questions relating to the meaning of the order. On the basis of all the submissions made, I now express my opinion on what the board did order in so far as it relates to the issues in this proceeding.

[22] I think that paragraph 5 in the order, which relates to the provision of an affidavit of documents, is the key paragraph in the order. It refers to the "documents obtained from the above sources." I take this to refer to the documents ("files") referred to in paragraphs 1 and 3 of the order. I do not interpret it as referring to paragraph 2, which does not refer to either files or documents, or to paragraph 4, which relates to the complainant's income tax returns and provides that they be produced to Mr. Hines, counsel for Dofasco. No argument was directed to paragraph 4 and I do not regard it is being a contentious matter in this proceeding.

[23] The difficulty in interpreting paragraph 5 is that, literally, it provides that both the affidavit of documents and copies of the productions are to be provided to Mr. Hines by a certain date. In my view, the only sensible meaning of the paragraph is that the complainant is obliged to produce only those documents for which no claim of privilege (provided for in an affidavit of documents) or for which no claim to withhold production on the ground of non-arguable relevance is asserted in the affidavit. I say this because there would be no point in requiring the use of the affidavit of documents if all of the documents listed in it, including those, on proper grounds, sought to be withheld, had to be produced to the opposite party at the outset of the process. The purpose of the affidavit, as in ordinary civil litigation, is to provide a framework within which the board may subsequently determine whether claims of privilege and irrelevance should be upheld. I shall expand on this point further later in these reasons.

[24] It may be noted that this interpretation is consistent with the second sentence in paragraph 5: "The affidavit shall also include a section listing those documents *not provided to Dofasco* for reason of not being arguably relevant" (emphasis added).

[25] The commission and the complainant argue against this interpretation largely on the basis that the board had earlier said in its reasons: "I find that ailments other than those listed above are arguably relevant to Dofasco's section 17 accommodation defence and the quantum of damages." In the context of the reasons and order as a whole, I do not read this as expressing a final decision on the producability of every document. I read it as being subject to the affidavit of documents procedure contemplated by paragraph 5.

[26] Further, it may be noted that earlier in its reasons the board stated its basis conclusion in these words: "The motion is granted in part". This meant that the moving party, Dofasco, was not successful in obtaining immediate production of the documents it sought or, at least, all of them.

[27] I would also note that my interpretation of paragraph 5 of the board's order is in accord with the meaning contended for by counsel for the board itself. Because the correct interpretation of the order relates to the question of whether the board acted within or exceeded its jurisdiction, I think that it was appropriate for the board to make a submission on the subject (Brown and Evans, *Judicial Review of Administrative Action in Canada* (1998-) at pp. 4-49 to 4-54).

The Divisional Court's Reasons

[28] It is clear that the Divisional Court did not read the board's order as I have. The court assumed that the complainant was required to produce all of the documents sought by Dofasco. For the purpose of analyzing the court's reasons, I shall accept its interpretation. The first paragraph in its reasons indicates that the commission's application was premature and that the issues respecting the production of documents should await determination until after the board had heard the complaint on its substantive merits. The court said that the "records are arguably relevant to the determination of a remedy and quantum of damages" and, further, that an aggrieved party could appeal "based on a full evidentiary record". With respect, all of this overlooks the fact that the right of the complainant to protection from production of documents that are privileged or not arguably relevant would be irreparably infringed the moment the documents were handed over to Dofasco, whether or not they were used against the complainant at the hearing.

[29] I move on to the next paragraph in the Divisional Court's reasons. I do not think that it can rightly be said that the board carried out "the balancing of the fourth part of the test in *A.M. v. Ryan*, [1997] 1 S.C.R. 157". The board made no reference to this decision. The board did say that "my goal is to balance the needs of Dofasco to know and prepare its case and the confidentiality of the Complainant inherent in such disclosure". That "goal" was to be carried out at the next stage of the proceeding, before the main hearing, after the documents for which privilege and non-relevance was claimed had been identified in the affidavit of documents.

[30] The Divisional Court went on to say that the exercise of the board's discretion was reasonable particularly in light of the "usual undertaking of Mr. Hines to maintain confidentiality [being] in effect."

[31] There is no document in the material setting forth an undertaking and no undertaking is referred to in the order, as would be expected if an undertaking was material to the order made. The board, through its counsel, informed us that "[t]he undertaking referred to by the Divisional Court was not given to the Board. The Board has no knowledge of the specific terms of the undertaking and was not asked to consider or rule on this issue."

[32] Mr. Hines informed us that he gave an undertaking "not to disclose any document (or information contained therein) to my client *or anyone else* (including, for example, potential expert witnesses) without the permission of the Board of Inquiry. It was expressly acknowledged that such permission for further disclosure could only be obtained after argument involving the commission and Mrs. Jeffrey". (Emphasis in original.)

[33] Mr. Hines said that he could not explain why the Divisional Court referred to it as "the usual undertaking". He agreed with counsel for the commission that the undertaking was "unusual."

[34] The commission informed us that, during the hearing of the motion, Mr. Hines offered an undertaking not to disclose the documents ordered produced to him to his client Dofasco but that the undertaking did not form part of the board's order on production.

[35] I, of course, have no hesitation in accepting Mr. Hines' statement that, in the course of argument he offered the undertaking he described. It appears, however, that it had no effect on the board's decision. In the circumstances, I have no doubt that the undertaking should not be taken into account in determining the meaning and legal effect of the board's order.

[36] I might add that the foregoing discussion shows that, if it is intended that an undertaking be material to the making of an order, the undertaking should be in writing and, also, referred to in the order.

The Board's General Powers relating to Disclosure

[37] Before addressing the specific jurisdictional issues raised by the commission, I shall deal with matters of a more general nature relating to the board's powers respecting disclosure.

[38] As far as history is concerned, it was the generally held view that administrative tribunals did not have an inherent power to order pre-hearing

disclosure of documents (see Mullan, *Administrative Law* (2001) at p. 242) but this could be subject to a tribunal's duty, in some cases, to order pre-hearing disclosure as part of its duty to give effect to principles of natural justice or procedural fairness: *Ontario (Human Rights Commission) v. Ontario (Board of Inquiry into Northwestern General Hospital)* (1993), 115 D.L.R. (4th) 279 (Ont. Div. Ct.)); *Howe v. Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483 (C.A.), Laskin J.A. in dissent.

[39] When the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, as amended, was first enacted in 1971, S.O. 1971, c. 47, it conferred the right on a person whose "good character, propriety of conduct or competence was an issue" in a proceeding "to be furnished *prior to the proceeding* with reasonable information of any allegations with respect thereto" (emphasis added). This was the only right to pre-hearing disclosure conferred by the Act until 1994 and the enactment of s. 5.4 by S.O. 1994, c. 27, s. 56(12). This amendment was preceded by a proposal by the Society of Ontario Adjudicators and Regulators to amend the *Statutory Powers Procedure Act*, in several respects. The proposal respecting disclosure read as follows:

> A tribunal may require disclosure at any stage of the proceedings, including
>
> (a) the disclosure and exchange of documents;
>
> (b) the examination of a party or witness;
>
> (c) an examination by written questions;
>
> (d) the inspection of property;
>
> (e) the filing of witness statements;
>
> (f) the provision of particulars.

See Appendix III of *Administrative Law – Issues and Practice*, Anisman and Reid ed., (1995) at page 266.

[40] The Society's brief explanation for the proposal was that it was "for greater certainty and to expedite proceedings". Before the amendment it may not have been that clear that tribunals could provide for pre-hearing disclosure, at least to the extent of having the power to order such disclosure. In any event, it can be seen from s. 5.4(1) that the Legislature did not enact a general provision conferring powers relating to disclosure on all tribunals. It restricted the power to only those tribunals that had made rules dealing with disclosure under s. 25.1.

[41] Having regard to the foregoing, if a tribunal was of the view that power relating to pre-hearing disclosure was not relevant to or appropriate for its proceedings, it would not make rules dealing with disclosure. Obviously, the Board of Inquiry provided for in the *Ontario Human Rights Code* thought that power to make orders relating to pre-hearing disclosure was important to its processes because it made Rules of Practice which included rules dealing with disclosure (Rules 40-44) which came into effect on November 1, 1996. It appears that these rules were made under both s. 25.1 of the *Statutory Powers Procedure Act* and s. 35(5) of the *Human Rights Code*. It may be noted that each of these statutory enabling provisions was enacted by the same statute, S.O. 1994, c. 27: s. 56(38) for the *Statutory Powers Procedure Act* and s. 65(10) for the *Human Rights Code*.

[42] I shall now consider some of the terms in the disclosure scheme. The first observation relates to the meaning of the key word "disclosure" in s. 5.4 of the *Statutory Powers Procedure Act* and in the board's rules. As the context of s. 5.4 and the rules make clear, the word clearly extends to the obligation of a party to furnish to the other party documents in its possession for the other party's inspection. I mention this because in the *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, as amended, "disclosure" means something less: the disclosure in a party's affidavit of documents of the existence of documents and does not extend to making the documents available to the other side for inspection. This latter step is called production. Disclosure and production in the *Rules of Civil Procedure* together comprise the total process of documentary discovery. See, in particular, rules 30.01 to 30.05.

[43] The foregoing analysis does not mean that under s. 5.4 and the board's rules the board cannot make orders which are part of, or a step in, the complete disclosure process as long as their purpose is to lead to the proper production of documents, e.g. an order directing the preparation and delivery of an affidavit of documents. This power would be included in the board's general power relating to disclosure. This observation is relevant to the board's order in this case, which provided for an affidavit of documents as a prelude to ruling subsequently on what documents should be produced.

[44] My second observation relates to the first. It can be seen at a glance that the disclosure provisions relating to the board are substantially fewer and much less detailed that those provided for in the *Rules of Civil Procedure*. It appears to me that what is expected with respect to the board's powers is that, in many proceedings before the board, the powers would not have to be exercised because parties would voluntarily exchange all relevant documents. In other proceedings the board might be required to make any one or more of a wide range of particular orders provided that they are directed toward the ultimate proper production of documents to the party seeking production.

The Jurisdiction of the Board to Make the Orders Challenged in this Proceeding

[45] I should mention at this point that, by reason of my interpretation of the board's order, which is different from that of the Divisional Court, it is not necessary to

consider the appropriate standard of review. For the reasons I shall give, whether the standard be reasonableness or correctness, paragraphs 1, 3, and 5 in the order are within the board's authority and paragraph 2 is not. I now address the remaining issues raised by the appellant.

Did the Board Err in not Confining its Order only to Documents on which the Complainant Intended to Rely to Support Her Case?

[46] The commission submits that the board's order should have been confined to only those documents on which the complainant intends to rely to support her case. It relies upon Rule 41 in making the submission. Rule 41, standing alone, appears to support the commission's submission. There is, however, more in the governing legislation than Rule 41. Rule 42, which is backed up by s. 5.4(1) of the *Statutory Powers Procedure Act*, confers on the board the power to order any party to deliver to any other party "further ... documentary evidence ... for the purposes of the hearing, and anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding". This would clearly include any documents in a party's possession that are relevant to an issue in the proceeding and which may be helpful to the other party.

[47] This interpretation accords with one of the recognized purposes of discovery, which include not only enabling a party to know the case he or she has to meet but, also, to obtain documents "which *may* ... enable the party requiring the affidavit [of documents] either to advance his own case or to damage the case of his adversary" (*Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.) at 63; and see Williston and Rolls, *The Law of Civil Procedure* (1970) at pp. 894-898). This, in turn, facilitates more accurate fact-finding at the trial or hearing, if the proceeding has not earlier resulted in a settlement. I refer, generally, to *Cook v. Ip* (1985), 52 O.R. (2d) 289 (C.A.) at 292.

[48] Section 5.4(1) of the *Statutory Powers Procedure Act*, which confers power on the board to "make orders for [a] the exchange of documents", should be read as meaning the exchange of documents to carry out the basic purposes of pre-hearing disclosure and so should not be read as confined to documents on which a party intends to rely.

[49] The commission has referred to Rule 43, which is concerned with the sanction for failing to disclose, as being some indication that a party's disclosure rights are confined to receiving only those documents on which the other party will rely. Clearly, this sanction relates only to the case of non-disclosure of a document on which a party wishes to rely, but this consideration cannot reasonably result in the conclusion that the whole of the disclosure scheme is confined to documents on which the producing party intends to rely.

Did the Board Err in Ordering Non-Parties to Disclose Documents?

[50] The commission submits that the board had no power to order disclosure from the complainant's doctors because they are not parties to the proceeding. It is not necessary to determine whether the disclosure provisions in the board's rules and s. 5.4 of the *Statutory Powers Procedure Act* confer power to order disclosure by non-parties because I think that the order in question is confined to imposing disclosure obligations on a party (the complainant) and not on her doctors, who are not parties. The complainant has a general right of access to her medical records in the form of obtaining copies of them from her doctors: *McInerney v. MacDonald*, [1992] 2 S.C.R. 138. This is consistent with the general position in civil proceedings that a party has control over his or her doctors' records and has the obligation to produce them: Holmested and Watson, *Ontario Civil Procedure* [1984-) at pp. 30-38 to 30-39; and 30-49 to 30-62.

[51] It is generally agreed that if documents under the control of non-parties are important to the fair and accurate resolution of issues it is preferable that they be produced before the hearing to avoid almost inevitable adjournments if they are produced for the first time at the hearing (see s. 39(4) of the *Human Rights Code*) and to enable each side to prepare its case more effectively. In this regard s. 2 of the *Statutory Powers Procedure Act* (which provides that the Act and rules made under it "shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits") may be of assistance in interpreting s. 5.4(1)(e) in a way that would support pre-hearing disclosure from third parties. This point was not argued and I express no final opinion on it.

Did The Board Err in Ordering Production of Documents that are Privileged or are Not Arguably Relevant?

[52] I mention at the outset that Mr. Hines conceded that the board had no power to order the production of privileged documents. This is correct (*Statutory Powers Procedure Act*, s. 5.4(2)) and, in the same vein, I think that the board has no power to order the production of documents that are not arguably relevant. The exercise of such a power would invade a party's privacy rights without any countervailing advantage to the administration of justice. This does not mean that a court should not show deference to a decision by the board that a particular document is arguably relevant but this, of course, is a different issue.

[53] This is an appropriate place to deal in general terms with the question of substantive relevance in this proceeding. In its reasons, the board found that "the ailments other than those listed above [chronic pain disability, fibromyositis, and fibromyalgia] are arguably relevant to Dofasco's section 17 accommodation defence and the quantum of damages." In my view, the board had a reasonable basis for this finding. There was material before the board that the complainant had satisfied the Canada Pension Plan administrators that she was "incapable of pursuing any substantially gainful occupation."

[54] Dofasco's position, accepted by the board, is that the evidence relating to this disability benefit is relevant to its defence under s. 17(1) of the *Human Rights Code* that

the complainant was "incapable of performing or fulfilling the essential duties or requirements" of work at Dofasco. Further, there was a rational basis for the board's finding that the "motion materials clearly show that production by the complainant has been incomplete."

[55] In dealing with the specific issues of privilege and non-relevance I shall first consider paragraph 5 in the board's order which relates to the provision by the complainant of an affidavit of documents and copies of production. I have, earlier in these reasons, set forth my interpretation of this paragraph. It appears to be concerned with the documents in the possession of the doctors named in paragraph 1 and with the documents referred in paragraph 3, which are in the files of the Workplace Safety and Insurance Board, the Canada Pension Plan, and Dofasco's medical department. I shall then consider paragraph 2 of the order which requires the complainant to furnish to counsel for Dofasco the medical information referred to in it.

[56] I shall not consider paragraph 4, which relates to the production to Mr. Hines of income tax returns and notices of assessment, because, as I have earlier noted, no complaint was made with respect to it.

[57] If paragraph 5 were interpreted to require the complainant to provide to Mr. Hines *all* of the documents referred to in it, without any screening of them by the board to exclude those which are privileged or not arguably relevant, there would, to put it mildly, be a serious problem with respect to the validity of the order. However, as I have determined, the board's order should not be interpreted as providing for such unrestricted production. The requirement of an affidavit of documents, which contains a paragraph in which privilege may be claimed for specified documents (Form 30A, para. 3) and, by virtue of the board's order, a further section in which protection may be claimed for documents which are not arguably relevant, is in my view, within the powers of the board. Further, the requirement of the use of the procedure contemplated by the affidavit ensures that the order does not exceed the powers of the board. This procedure enables Dofasco to challenge the objections to production of identified documents on the basis of privilege and non-relevance, if it sees fit, and enables the board to deal with the challenges on a document by document basis. In carrying out this function the board, if it considers it to be helpful, could examine the document in question. Cf. rule 30.06(d) in the *Rules of Civil Procedure*.

[58] The requirement merely to disclose the existence of a document in an affidavit of documents does not involve a breach of privilege (*MacPhayden v. Employers Liability Assurance Corporation*, [1933] O.W.N. 72 (H. Ct.) and Williston and Rolls, *op. cit.*, at p. 897). It is an essential step to enable claims to privilege to be determined in an orderly and fair way.

[59] In short, paragraph 5 in the order and those paragraphs related to it (paragraphs 1 and 3) do not involve an infringement of the complainant's right to privilege or to keep from Dofasco documents which are not arguably relevant. On the contrary, they afford protection for these rights.

[60] I do not think that the same can be said for paragraph 2 in the order. It requires the complainant to furnish to counsel for the Dofasco a document setting forth all medical practitioners not mentioned in paragraph 1 who treated the complaint between March 22, 1990 and the present, their area of expertise or speciality, the dates of the visits, and the ailment or condition treated. It is not known what particular information would be set forth in this document but the requirement to produce it inevitably carries with it the grave risk that, in complying with the order, the complainant would be providing to Dofasco information of a most intimate nature relating to her physical and emotional condition that is completely unrelated to her claims in this proceeding from both Dofasco's and her point of view. In my view, this particular part of the order, which contains no terms or conditions to protect the privacy interests of the complainant, exceeds the board's power under s. 5.4(1) and (2) of the *Statutory Powers Procedure Act* and its own rules.

[61] I appreciate that the board has, and should have, wide latitude in making procedural orders but, it appears to me, in paragraph 2, the board has made no attempt at all to balance the complainant's right to protect privileged or irrelevant information with Dofasco's right to obtain production of relevant material. In this respect, paragraph 2 stands in stark contrast to paragraphs 1, 3, and 5.

[62] What is required to be produced by paragraph 2 may, of course, include information and material which is not privileged and is relevant to Dofasco's defence. If this be the case, the board has sufficient powers under s. 5.4(1) of the *Statutory Powers Procedure Act*, and its own rules, to make an order which would require the information to be produced after the complainant's claims respecting privilege and non-relevance have been resolved.

An Observation

[63] I appreciate that the foregoing will make discouraging reading for those who value the speed and efficiency of the administrative process as an alternative to the cost, delay, and apparent red tape of the procedure which is generally thought to be part of the process in the ordinary courts. The discovery process in these courts has been subjected to severe criticism as a factor contributing to increased cost and delay (see Report of the Canadian Bar Association *Task Force on Systems of Civil Justice* (1996) at p. 43 and Andrews, *Principles of Civil Procedure* (1994) at para 21-041) and yet, in the present case, we have a serious example of discovery undoubtedly causing substantial delay and expense in the proceedings before an administrative tribunal.

[64] No doubt, the discovery process cannot work effectively, in either civil or administrative proceedings, without substantial cooperation between the parties in voluntarily disclosing the existence of all relevant documents. This has been lacking in the present case but, in saying this, I wish to make it clear that I do not intend to criticize the parties or their counsel. This case arose relatively early in the history of a right to disclosure under the *Statutory Powers Procedures Act* and the Rules of the Board of

Inquiry and it appears to me that the main cause of the difficulties has been growing pains with the new procedure.

Disposition

[65] I would allow the appeal, in part, set aside the order of the Divisional Court, and in its place make an order setting aside paragraph 2 in the board's order but otherwise dismissing the commission's application. In the circumstances, I would not make any costs order with respect to the application, the motion for leave to appeal, or this appeal.

"J.W. Morden J.A."

"I agree R.S. Abella J.A."

"I agree M. Rosenberg J.A."

RELEASED: November 16, 2001

Indexed as:

Toshiba Corporation v. Canada (Anti-Dumping Tribunal) (F.C.A.)

IN THE MATTER OF an Application under Section 28 of the Federal Court Act
AND IN THE MATTER OF a decision dated March 30, 1982, made by the Anti-Dumping Tribunal in Inquiry No. ADT-9-81 respecting countertop microwave ovens in which cooking time, power level and/or other operating features are controlled by electro-mechanical or solid-state devices with limited control and no memory capability (commonly described as "mechanical control countertop microwave ovens"), and countertop microwave ovens in which cooking time, power level and/or other operating features are controlled wholly or in part by a microprocessor-based electronic control (commonly described as "electronic control countertop microwave ovens"), commonly considered either for household use only or for household and commercial use, but excluding mechanical control microwave ovens and electronic control microwave ovens commonly considered for commercial use only, originating in or exported from Japan, Singapore and the Republic of Korea
Between
Toshiba Corporation and Toshiba of Canada Ltd., Applicants,
and
The Anti-Dumping Tribunal, Canadian Appliance Manufacturers Association, Camco Inc. and The Enterprise Foundry Company Limited, Respondents

[1984] F.C.J. No. 247

[1984] A.C.F. no 247

8 Admin. L.R. 173

26 A.C.W.S. (2d) 215

Appeal No. A-272-82

Federal Court of Appeal
Ottawa, Ontario

Pratte, Mahoney and Hugessen JJ.

Heard: March 27 and 28, 1984

Judgment: March 30, 1984

(5 pp.)

G. Greenwood, for the Applicants, Sanyo.
R. Gottlieb and D. Pearson, for the Applicants, Sharp and Toshiba.
J. Shields, for the Respondent, Anti-Dumping Tribunal.
J. Sexton, Q.C., and J. Steiner, for the Respondents, Canadian Appliance Manufacturers Association and Camco Inc.
C.J.M. Flavell and Anne Bigué, for Samsung Electronics.

The judgment of the Court was delivered by

HUGESSEN J.:-- This Section 28 application and the companion applications in Court files A-271-82 and A-291-82 are directed against a finding of the Anti-Dumping Tribunal to the effect that certain countertop microwave ovens imported from Japan, Singapore and Korea had caused and were causing material injury to the production in Canada of like goods.

Only one issue emerged from the hearing which requires any commentary at all from this Court. Counsel for the various applicants attempted valiantly to raise other issues in the guise either of questions of law or of perverse findings of fact but, upon analysis, these revealed themselves during the course of the hearing either to be simple questions of fact which were exclusively within the competence of the Tribunal to decide and for which, in every case, evidentiary support could be found in the record, or to be matters of procedure which were well within the Tribunal's discretionary power to regulate the course of its hearing.

The issue upon which some comment is required relates to the use made by the Tribunal of reports prepared for it by its staff. The employment of experts to assist the Tribunal in its work is specifically authorised by Section 26 of the Anti-Dumping Act. In the present case, the Tribunal's staff prepared two reports, the first prior to the commencement of the public hearings and the second after the hearings were over. These reports raise different questions and it is appropriate to deal with them separately.

The preliminary report is, in effect, an introduction to the subject matter of the inquiry prepared with the obvious intention of allowing the Tribunal members to approach their difficult task (which the Statute requires them to complete within a very limited time-frame (Section 16)) in an intelligent and rational manner. Inevitably it contains a number of statements of fact which bear directly upon the ultimate issue which the Tribunal was called upon to decide. It was not revealed to the parties or their counsel. This is a dangerous practice:

> MAGNASONIC CANADA LIMITED v. ANTI-DUMPING TRIBUNAL, (1972) F.C. 1239,
>
> SARCO CANADA LIMITED v. ANTI-DUMPING TRIBUNAL, (1979) 1 F.C. 247,

BRUNSWICK INTERNATIONAL (CANADA) LIMITED v.
ANTI-DUMPING TRIBUNAL, 1 C.E.R. 327.

Upon analysis, however, I am satisfied that everything contained in the preliminary staff report is either a matter of general or public knowledge or is based upon facts and sources which were, in due course, properly brought out at the hearing in such a manner that all the parties to that hearing had a full opportunity to test them. Thus, while, in my view, there might have been a technical breach of the rules of natural justice, it can be said with confidence at the end of the day that such breach was minor and inconsequential and that the result of the inquiry would not have been different had such breach not occurred.

Indeed I would add that, in my view, the preliminary staff report is wholly innocuous. It would have been prudent for the Tribunal to have revealed it to the parties at the outset of the inquiry. Failure to do so, however, does not vitiate the result.

Quite different considerations apply to the final staff report. It consists of summary and commentary on the evidence and submissions made at the inquiry. There is nothing whatever improper in this and it is not dissimilar to the kind of work that law clerks sometimes do for judges. It is a proper part of the functions of the Tribunal's staff. Nothing requires that such reports be revealed to the parties. They are simply part of the Tribunal's own internal decision-making process for which, of course, the Tribunal alone is responsible. In my view, they should not even form part of the record in this Court.

I would dismiss the Section 28 application.

HUGESSEN J.