Indexed as:

Committee for Justice and Liberty v. Canada (National Energy Board)

IN THE MATTER OF the National Energy Board Act;
AND IN THE MATTER OF an application by Canadian Arctic Gas Pipeline Limited for a certificate of public convenience and necessity for the construction and operation of a natural gas pipeline, under File No. 1555-C46-1;
AND IN THE MATTER OF applications by Foothills Pipe Lines Ltd., Westcoast Transmission Company Limited and The Alberta Gas Trunk Line (Canada) Limited for certificates of public convenience and necessity for the construction and operation of certain natural gas pipelines, under File Nos. 1555-F2-3, 1555-W5-49 and 1555-A34-1;
AND IN THE MATTER OF an application by Alberta Natural Gas Company Ltd. for a certificate of public convenience and necessity for the construction and operation of certain extensions to its natural gas pipeline, under File No. 1555-A2-10;
AND IN THE MATTER OF a submission by The Alberta Gas Trunk Line Company Limited, under File No. 1555-AS-2;
AND IN THE MATTER OF an application by the National Energy Board pursuant to section 28(4) of the Federal Court Act.
The Committee for Justice and Liberty, The Consumers' Association of Canada, Canadian Arctic Resources Committee, Appellants; and
The National Energy Board, Canadian Arctic Gas Pipeline Limited and The Attorney General of Canada et al., Respondents.

[1978] 1 S.C.R. 369

Supreme Court of Canada

1976: March 8, 9 and 10 / 1976: March 11.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson and de Grandpré JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law -- Judicial review -- Boards and tribunals -- Natural justice -- Bias or apprehended bias -- Application for certificate of public necessity -- National Energy Board Act, R.S.C. 1970. c.

N-6, s. 44

The issue in this appeal arose in connection with the organization of hearings by the National Energy Board to consider competing applications for a Mackenzie Valley pipeline, i.e. applications for a certificate of public convenience and necessity under s. 44 of the National Energy Board Act, R.S.C. 1970, c. N-6. The Board assigned Mr. Crowe, Chairman of the Board, and two other of its members to be the panel to hear the applications. The appellants were recognised by the Board as "interested persons" under s. 45 of the Act. The appellants objected to the participation of Mr. Crowe as a member of the panel because of reasonable apprehension or reasonable likelihood of bias: Mr. Crowe became Chairman and Chief Executive Officer of the National Energy Board on October, 15, 1973. Immediately prior to that date he was president of the Canada Development Corporation, having assumed the position late in 1971 after first having been a provisional director following the enactment of the Canada Development Corporation Act, 1971 (Can.), c. 49. The objects of that Corporation included assisting in business and economic development and investing in shared securities, ventures, enterprises and property to that end. As Corporation president and as its representative Mr. Crowe was associated with the Gas Arctic-Northwest Project Study Group which considered the physical and economic feasibility of a northern natural gas pipeline to bring natural gas to southern markets. The Agreement setting up the Study Group brought together two groups of companies which merged their efforts and pursuant to the agreement set up two companies of which Canadian Arctic Gas Pipeline Limited was one. Mr. Crowe was an active participant in the Study Group as a member of the Management Committee and a member and subsequently vice-chairman of its Finance, tax and accounting committee and during his period of membership of the Management Committee he participated in the seven meetings held during that time, and joined in a unanimous decision of the Committee on June 27, 1973, respecting the ownership and routing of a Mackenzie Valley pipeline. The Canada Development Corporation remained a full participant in the Study Group until long after the applications were made for certificates of public convenience and necessity and until after the hearings had commenced, in effect to the time of the reference of the question of reasonable apprehension of bias in Mr. Crowe to the Federal Court of Appeal. Further, during the period of Mr. Crowe's association with the Study Group as the representative of the Canada Development Corporation the latter contributed $1,200,000 to the Study Group as its share of expenses. The National Energy Board referred to the Federal Court of Appeal the following question, "Would the Board err in rejecting the objection and in holding that Mr. Crowe was not disqualified from being a member of the panel on grounds of reasonable apprehension or reasonable likelihood of bias?" pursuant to the Federal Court Act, 1970-71-72 (Can.), c. 1, s. 28(4). That Court answered in the negative.

Held (Martland, Judson and de Grandpré JJ. dissenting: The appeal should be allowed.

Per Laskin C.J. and Ritchie, Spence, Pigeon and Dickson JJ.: In dealing with applications under s. 44 of the National Energy Board Act, the function of the pro Board is quasi-judicial, or, at least, is a function which the Board must discharge in accordance with the rules of natural justice: and if not necessarily the full range of such rules as would apply to a Court (though the Board is a court of record under s. 10 of the Act) certainly to a degree that would reflect integrity of its proceedings and impartiality in the conduct of those proceedings. A reasonable apprehension of bias arises where there exists a reasonable probability that the judge might not act in an entirely impartial manner. The issue in this situation was not one of actual bias. Thus the facts that Mr. Crowe had nothing to gain or lose either through his participation in the Study Group or in making decisions as chairman of the National Energy Board and that his participation in the Study Group was in a representative capacity became irrelevant. The participation of Mr. Crowe in the discussions and decisions leading to the application by Canadian Arctic Gas Pipeline Limited for a certificate did however give rise to a reasonable apprehension, which

reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues to be determined. The test of probability or reasoned suspicion of bias, unintended though the bias may be, is grounded in the concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and emphasis is added to this concern in this case by the fact that the Board is to have regard for the public interest.

Per Martland, Judson and de Grandpré JJ. dissenting: The proper test to be applied was correctly expressed by the Court of Appeal. The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information, the test of "what would an informed person, viewing the matter realistically and practically--conclude?" There is no real difference between the expression found in the decided cases "reasonable apprehension of bias", "reasonable suspicion of bias" or "real likelihood of bias" but the grounds for the apprehension must be substantial. The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted with an administrative discretion. While the basic principle that natural justice must be rendered is the same its application must take into account the special circumstances of the tribunal. By its nature the National Energy Board must be staffed with persons of experience and expertise. The considerations which underlie its operations are policy oriented. The basic principle in matters of bias must be applied in the light of the circumstances of the case a bar. The Board is not a court nor is it a quasi-judicial body. In hearing the objection of interested parties and in performing its statutory function the Board has the duty to establish a balance between the administration of policies which they are duty bound to apply and the protection of the various interests spelled out in s. 44 of the Act. In reaching its decision the Board draws upon its experience, upon that of its own experts and upon that of all agencies of the Government of Canada. The Board is not and cannot be limited to deciding the matter on the sole basis of the representations made before it. In the circumstances of the case the Court of Appeal rightly concluded that no reasonable apprehension of bias by reasonable, right minded and informed persons exists.

Cases Cited

[Ghirardosi v. Minister of Highways for British Columbia, [1966] S.C.R. 367; Blanchette v. C.I.S. Ltd., [1973] S.C.R. 833; Szilard v. Szasz, [1955] S.C.R. referred to].

APPEAL from a judgment of the Federal Court of Appeal [[1976] 2 F.C. 20] which answered in the negative a question referred to it by the National Energy Board. Appeal allowed, Martland, Judson, and de Grandpré JJ. dissenting.

Ian Binnie, and R.J. Sharpe, for the appellants.
Hyman Soloway, Q.C., and R.D. McGregor, for the National Energy Board.
G.W. Ainslie, Q.C., for the Attorney General of Canada.
D.M.M. Goldie, Q.C., for Canadian Arctic Gas Pipeline Ltd.
R.J. Gibbs, Q.C., and G.J. Gorman, Q.C., for Foothills Pipe Lines Ltd.
John Hopwood, Q.C., for Alberta Gas Trunk Line Co. Ltd.
W.C. Burke-Robertson, Q.C., for Alberta Gas Trunk Line (Canada) Ltd.
B.A. Crane, for Trans-Canada Pipelines Ltd.
J.R. Smith, Q.C., for Alberta Natural Gas Co. Ltd.

Solicitors for the appellant Committee for Justice and Liberty Foundation: McTaggart, Potts, Stone & Herrige, Toronto.

Solicitor for the appellant Consumers' Association of Canada: T. Gregory Kane, Toronto.
Solicitor for the appellant Canadian Arctic Resources Committee: Alastair Lucas, Toronto.
Solicitor for the Attorney General of Canada: D.S. Thorson, Ottawa.
Solicitor for The National Energy Board: F.H. Lamar, Ottawa.
Solicitor for Canadian Arctic Gas Pipeline Limited et al.: D.G. Gibson, Ottawa.
Solicitors for Foothills Pipe Lines Ltd.: McLaws & Company, Calgary.
Solicitors for The Alberta Gas Trunk Line (Canada) Limited et al.: Burke-Robertson, Chadwick & Ritchie, Ottawa.
Solicitors for Alberta Natural Gas Company: MacKimmie, Matthews, Calgary.
Solicitor for Westcoast Transmission Company Limited: C.D. Williams, Vancouver.

The judgment of Laskin C.J. and Ritchie, Spence, Pigeon and Dickson JJ. was delivered by

LASKIN C.J.:-- On March 11, 1976, this Court gave judgment in an appeal from a decision of the Federal Court of Appeal which answered in the negative a question referred to it by the National Energy Board pursuant to s. 28(4) of the Federal Court Act, 1970-71-72 (Can.), c. 1. The question so referred was as follows:

> Would the Board err in rejecting the objections and in holding that Mr. [Marshall] Crowe was not disqualified from being a member of the panel on grounds of reasonable apprehension or reasonable likelihood of bias?

This Court allowed the appeal, set aside the decision of the Federal Court of Appeal and declared that the question should be answered in the affirmative. It stated in its formal judgment on March 11, 1976 that reasons of the majority and dissenting judges would be delivered later. The reasons of the majority now follow.

The issue referred to the Federal Court of Appeal and which came by leave to this Court arose in connection with the organization of hearings by the National Energy Board to consider competing applications for a Mackenzie Valley pipeline, that is, applications for a certificate of public convenience and necessity under s. 44 of the National Energy Board Act, R.S.C. 1970, c. N-6. One of the applications, filed on March 21, 1974 by Canadian Arctic Gas Pipeline Limited was in respect of a proposed natural gas pipeline and associated works to move natural gas in an area of the Northwest Territories (the Mackenzie River Delta and Beaufort Basin) to markets in southern Canada and also to move natural gas in Alaska markets in other states of the United States. This application was supplemented by other material filed on January 23, 1975, on March 10, 1975 and on May 8, 1975. The competing application, filed in March, 1975 by Foothills Pipe Lines Ltd., was for a natural gas pipeline to move natural gas only from the area in the Northwest Territories, mentioned above, to southern Canada markets and not from Alaska as well.

On April 17, 1975, the National Energy Board assigned Mr. Crowe, Chairman of the Board and two other members (of the eight members in all who then constituted the Board) to be the panel with Mr. Crowe presiding, to hear the applications, beginning on October 27, 1975. Under s. 45 of its governing statute the Board was empowered to give standing at its s. 44 hearings to "interested persons", and it was then obliged to hear the objections to the granting of a certificate of public convenience and necessity. The three appellants in this case, The Committee for Justice and Liberty Foundation, The Consumers'

Association of Canada and the Canadian Arctic Resources Committee were recognized by the Board as "interested persons" as were other organizations and individuals. In all, some 88 parties were represented at the commencement of the hearings, and of these 80 indicated that they had no objection to Mr. Crowe continuing as a member and presiding over the hearings. One of the non-objectors was Canadian Arctic Gas Pipeline Limited, one of the applicants for a certificate. It was its counsel who raised on July 9, 1975 the question of reasonable apprehension of bias on Mr. Crowe's part in favour of the client by reason of Mr. Crowe's association with a Study Group out of whose deliberations and decisions the applicant was born.

When the hearings opened on October 27, 1975 as scheduled, Mr. Crowe read a statement detailing his involvement with the Study Group. Objections were then invited. In the result, the question mentioned at the beginning of the reasons was referred to the Federal Court of Appeal on October 29, 1975. I turn now to deal with the facts upon which the issue of reasonable apprehension of bias is raised.

Mr. Marshall Crowe became Chairman of the National Energy Board and its Chief Executive Officer on October 15, 1973. Immediately prior to that date he was president of the Canada Development Corporation, assuming that position late in 1971, after first being a provisional director following the enactment of the Canada Development Corporation Act by 1971 (Can.), c. 49. The principal objects of this corporation, then wholly-owned by the Government of Canada, are set out in s. 6(1) of its constituent Act which reads as follows:

> 6.(1) The objects of the company are:
>
> (a) to assist in the creation or development of businesses, resources, properties and industries of Canada;
> (b) to expand, widen and develop opportunities for Canadians to participate in the economic development of Canada through the application of their skills and capital;
> (c) to invest in the shares or securities of any corporation owning property or carrying on business related to the economic interests of Canada; and
> (d) to invest in ventures or enterprises, including the acquisition of property, likely to benefit Canada;
>
> and shall be carried out in anticipation of profit and in the best interests of the shareholders as a whole.

As president of the Canada Development Corporation and as its representative, Mr. Crowe became associated with the Gas Arctic-Northwest Project Study Group which, pursuant to an agreement of June 1, 1972 (hereinafter referred to as the Study Group Agreement) embarked on a consideration of the physical and economic feasibility of a northern natural gas pipeline to bring natural gas to southern markets.

The Study Group Agreement brought together two groups of companies which had previously been exploring separately the feasibility of a natural gas pipeline. The participating companies merged their efforts and resources to that end, and pursuant to the Study Group Agreement they set up two companies, Canadian Arctic Gas Study Limited and Canadian Arctic Gas Pipeline Limited. The first-mentioned company was the vehicle for seeing to the various studies involved in carrying out the preconstruction purposes of the study Group, and the second company, which was incorporated on

November 3, 1972, was to be the operating vehicle which would apply for permission to build the pipeline in implementation of the project. Article 1, s. 2 of the Study Group Agreement set out the purposes of the association of the participating companies as follows:

> 2. The principal purpose of the Study Group shall be: (a) the conduct of research, experimental and feasibility studies, testing and planning to determine whether the construction and operation of a gas pipeline from Northern Alaska and Northwestern Canada to locations on the border between Canada and the lower 48 states of the United States (hereinafter referred to as the Project) are feasible and desirable in light of relevant physical environmental and economic data, terms and condition of available financing, applicable legal requirements and governmental considerations; and if so, (b) the preparation and completion of such studies, exhibits and other data as may be required for the filing of applications with government agencies in Canada and the United States for authority to construct and operate the Project and (c) the filing and prosecution of such applications. These activities are hereinafter referred to as the Pre-construction Activities.
>
> In connection with the foregoing the Study Group shall study and consider all reasonably feasible gas pipeline configurations, routes and facilities and methods of ownership of any thereof, including (i) those serving eastern, central and western market areas, (ii) various routes and facilities appropriate to such purpose, including wholly new facilities and the utilization of the whole or any portion of any presently existing system as it may now be or as it may be expanded or otherwise adapted for such purpose and (iii) ownership of such facilities and the various portions thereof, whether by one or more entities to be established at the instance of the Participants or at the instance of others or by the one present owner of any portion thereof which is now in existence or by any combination of the foregoing, it being acknowledged by the Participants that in connection with each such determination as to such ownership the effect thereof upon financing and future decision-making ability, upon the effective operation of the overall pipeline system and upon regulatory matters will be pipe relevant but that at the date hereof the Participants have made no judgment as to the nature, extent or significance of such effect.

Article IV, ss. 1 and 2 dealt with implementation as follows:

> 1. The Participants may, upon authorization by the Management Committee, cause one or more corporations to be organized or utilized for the purpose of implementing the Project, including the filing of applications for requisite governmental authorizations in the United States and Canada and constructing, owning and operating Project pipeline facilities following the issuance of satisfactory authorizations. Application for the incorporation of a Canadian pipeline corporation shall be filed promptly after the date hereof. Pending formulation of a practicable overall permanent financing plan, the initial issued and outstanding shares and other securities of each such corporation shall be beneficially owned by the Participants in equal undivided interests as provided relative to the Service Company in Section 4 of Article 11 and shall be held by the minimum required number of directors as nominees of

> the Study Group, until and to the extent that the Management Committee shall otherwise determine.
>
> 2. It is recognized that, inasmuch as financing plans for the Project are still in the development stage and the total capital requirements of the Project depend upon various contingencies, the question of ultimate ownership of any corporation referred to in Section 1 of this Article IV cannot be decided at this time. However, it is agreed that in the determination of such ownership the following principles will apply. It is agreed that in recognition of the substantial expenditure of funds, employee time and effort, and initiative by the Participants, and their knowledge of and interest in the Project, it is desirable and appropriate that the Participants have some reasonable opportunity to acquire ownership interests in each such corporation. In addition, shares and other securities shall be offered to investors who are not Participants....

The Study Group Agreement provided for the establishment of a Management Committee, consisting of one representative from each of the participating companies, and it was charged with the steering or direction of the activities of the Study Group and of the companies incorporated pursuant to the Study Group Agreement. There, was also an executive committee of the Management Committee, consisting of three representatives of each of the three participant groups into which the participating companies were classified; and although it discharged certain functions by delegation from the Management Committee, the latter was the main directing force of the Study Group. The three Participant groups were as follows:

> Participant Group A: United States Companies other than producers
>
> Participant Group B: Canadian Companies other than producers
>
> Participant Group C: Canadian and United States producers

Section 5 of art. III charged the Management Committee to seek additional participants "who have an interest in the Project and whose participation may contribute to the objectives of the Project, as stated herein, and who have the ability to and agree to carry out the obligations under this Agreement".

Participants could withdraw upon notice being, given and, indeed, the participating companies varied between fifteen and twenty-seven. So long as they remained participants, the companies were subject to the terms of the Study Group Agreement under which they were to be responsible for an equal share of obligations, including the expenses of carrying out the activities of the Study Group and of the companies incorporated under the Study Group Agreement. The Agreement contained provisions for its termination which had in view the likelihood of approval of a pipeline, but overriding power was reserved to the Management Committee to fix a termination date.

The Canada Development Corporation became a member of the Study Group on November 30, 1972. Mr. Crowe was its designated representative and, as such, became, on December 7, 1972, a member of the Management Committee. He had attended a meeting of the executive committee as an observer on October 25, 1972 when the participation of the Canada Development Corporation was being worked out, but he did not later become a member of that Committee, although he attended two other meetings thereof. In addition to being a member of the powerful Management Committee, Mr. Crowe became also a member of its finance, tax and accounting committee, and was elected vice-chairman

thereof on January 25, 1973. During the period of his membership of the Management Committee, from December 7, 1972 until October 15, 1973 he participated in the seven meetings that it held in that span of time and joined in a unanimous decision of that Committee on June 27, 1973 respecting the ownership and routing of a Mackenzie Valley pipeline.

The decision of June 27, 1973 came about as a result of the establishment by the Management Committee of an Ad Hoc Committee on May 30, 1973 to look into ownership and routing and to report to the Management Committee at its next meeting, fixed for June 18, 1973. On June 11, 1973, the Ad Hoc Committee approved a report 19 (with one dissent) which was presented to the Management Committee at its meeting of June 18, 1973. The report contained the following paragraphs:

> On the understanding that this Project will be filed at the earliest possible date the Ad Hoc Committee supports the concept of single ownership for the Project, subject to the following provisions:
>
> 1. The routing of the Project will follow existing corridors and gas pipeline routes of AGTL, Alberta Natural and TCPL.
> 2. A policy of incremental expansion and common use of existing pipeline facilities will be followed wherever it is economically sound to do so. This means that until complete through lines are constructed, whenever the economics of the situation warrant, and engineering conditions permit, increment looping (under single ownership) will be used.
> 3. As a policy CAGSL will not apply for expansion of its system whenever adequate long term unused capacity is economically available in the Alberta Gas Trunk, Alberta Natural, and/or TC systems.
> 4. As a policy the tariffs for transmission across Alberta will be calculated on a "one zone" basis beginning and ending at the Alberta borders.

The report was discussed at the meeting of June 18, 1973 as was a counter-proposal presented by the dissenting member of the Ad Hoc Committee on behalf of United States pipeline members of the Study Group. It was decided that an engineering study of the two southerly legs of the proposed route would be made and a report would be made to the Ad Hoc Committee "of the optimum manner of moving the contemplated gas volume south of Caroline". The study and report were considered by the Management Committee at a meeting on June 27, 1973. The chairman of the Ad Hoc Committee (according to the minutes of the June 27 meeting) "confirmed that the committee intended the proposal to be not only a basis for the filing of regulatory applications but also to embody the fundamental concept for completion of the project--although the Study Group should retain sufficient flexibility of approach in order to be able, through appropriate future resolutions of the Management Committee, to react to changes in facts and circumstances". The Ad Hoc Committee's revised report was then unanimously approved. Its provisions were as follows:

> The Ad Hoc Committee on Ownership and Routing respectfully recommends to the Management Committee that it request the CAGSL management to proceed forthwith with the preparation and submission of all necessary applications covering the Arctic Gas Pipeline on the following bases:
>
> OWNERSHIP
>
> 1. All new Arctic Gas Pipeline facilities in Canada will be owned by a

single entity.

SIZE AND ROUTING

1. From Prudhoe Bay and the Mackenzie Delta to the 60th Parallel the line will be 48" and will follow the routes previously agreed.

2. From the 60th Parallel to Caroline, Alberta the line will be 48" and will follow the existing route of AGTL.

3. From Caroline to Kingsgate the line will be 42" and will follow the routes of AGTL and ANG.

4. From Caroline to Empress the line will be 42" and will follow route of AGTL.

5. From Empress to the U.S. border the line will be 42" and will follow a direct route.

POLICY GUIDELINES

1. As noted above, the routing of the project through Alberta will follow the existing gas pipeline routes of AGTL and ANG whenever technically feasible.

2. Within the basic concept of single ownership of a complete, integral pipeline system to be constructed within a reasonable period of time advantage will be taken over the short term of surplus capacity in existing systems provided any significant engineering, operating, financing, and legal problems inherent in the utilization of such capacity can be overcome.

3. After completion of the initial Arctic Gas system full consideration will be given to the use of any long-term unused capacity if economically available in the AGTL or ANG systems as a preferred alternate to direct expansion provided undue engineering or operating problems are not thereby introduced.

4. Tariffs for transmission across Alberta will be calculated on a "one zone" basis beginning and ending at the Alberta borders.

5. Gas destined for Canadian markets East of Alberta will be delivered to TransCanada at Empress, Alberta.

In his statement at the opening of the Mackenzie Valley Pipeline hearing on October 27, 1973 Mr. Crowe referred to his involvement in the Study Group and in the decisions of the Management Committee thereof in the following terms:

> Pursuant to the terms of the Study Group Agreement, each of the Participant companies owned equal shares in the Study Group assets which consisted mainly of studies and reports on the feasibility of the Arctic Gas

Project. Subject to the provisions of the Study Group Agreement a participant could on notice withdraw from the Study Group.

During the period I represented the CDC in the Study Group, I attended seven monthly meetings of the Management Committee, and in the months when the Management Committee did not meet, the three meetings of the Executive Committee to which I previously referred.

At the September 26th, 1973 meeting of the Management Committee, I moved the resolution appointing the Project's Banking Advisors. Also I was on a Steering Committee which recommended the Project Financial Advisors and Accounting Advisors and in the meeting of the Executive Committee which I attended, the appointment of these consultants was approved.

Between December 7th, 1972, and June 27th, 1971 the Study Group considered a number of possible routing alternatives for that portion of the pipeline south of the 60 degrees N parallel. One issue forming part of this decision was whether the Arctic Gas Project would construct new facilities in Alberta as opposed to using existing facilities owned by Trunk Line and expanding those facilities as needed to carry volumes of gas from the Mackenzie-Beaufort Area and Prudhoe Bay. This question was the subject matter of technical analysis by Arctic Gas Financial and Engineering Advisors and was reviewed and discussed in six meetings of the Management Committee.

The final decision was that the facilities in Alberta would be owned by Arctic Gas and that the route would parallel the existing Trunk Line system on a separate right-of-way.

In addition to the foregoing the Management Committee dealt with routine matters such as the Chairman's Report, Management Reports, and other Consultant Appointments.

Although Mr. Crowe resigned from the presidency of the Canada Development Corporation as of October 15, 1973 when he became chairman and chief executive officer of the National Energy Board, the Canada Development Corporation continued as a full participant in the Study Group until October 31, 1975, becoming an associate member as of November 1, 1975 pursuant to a resolution of the Management Committee. As such, it had the following rights (as stated by counsel for the Canadian Arctic Gas Pipeline Limited to the Federal Court of Appeal on December 8, 1975):

1. For so long as an Equity Commitment Letter dated April 22, 1975 remains in effect CDC will be entitled to receive notice of, and attend, through a non-voting representative all meetings of all Committees of the Study Group except the Executive Committee of the Management Committee.
2. To receive all materials that a full participant would be from time to time entitled to receive.

In turn the CDC agrees to be bound by the confidentiality rules binding all

> participants.
>
> This relationship may after 31 December, 1975, be terminated by either party.
>
> The equity commitment letter of April 22, 1975 indicates a provisional interest in subscribing for $100 million of [equity] in the capital of CAGPL subject to the terms and conditions set out in that letter.

In brief, the Canada Development Corporation remained a full participant long after the applications were made for certificates of public convenience and necessity and after the hearings thereon commenced, and, in effect, until the National Energy Board referred to the Federal Court of Appeal the question concerning reasonable apprehension of bias in Mr. Crowe. During the period of Mr. Crowe's association with the Study Group as the representative of the Canada Development Corporation the latter contributed a total of 1.2 million dollars to the activities of the Study Group 1.2 as its share of expenses.

Section 44 of the National Energy Board Act, the central provision respecting certificates of public convenience and necessity, reads as follows:

> 44. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline or an international power line if the Board is satisfied that the line is and will be required by the present and future public convenience and necessity, and, in considering an application for a certificate, the Board shall take into account all such matters as to appear to be relevant, and without limiting the generality of the foregoing, the Board may have regard to the following:
>
> (a) the availability of oil or gas to the pipeline, or power to the international power line, as the case may be;
> (b) the existence of markets, actual or potential;
> (c) the economic feasibility of the pipeline or international power line;
> (d) the financial responsibility and financial structure of the applicant, the methods of financing the line and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the line; and
> (e) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

It was contended by counsel supporting the judgment of the Federal Court of Appeal that Mr. Crowe's involvement in the Study Group and in the work and decisions of the Management Committee did not touch all the considerations expressly delineated in items (a) to (e) of s. 44. Indeed the position urged was that on a question of reasonable apprehension of bias the character and degree of involvement must be considered and, if it was minimal or did not touch the major element of concern under s. 44, then a different conclusion would have to be reached than would be the case if, so to speak, all the bases were touched. It was also contended, and of this there can be no doubt, that the National Energy Board has a variety of functions which interlock; for example, it has broad advisory functions under s. 22 of its Act, as well as the more specifically directed function under s. 44. It is said, and properly so, that the Board cannot compartmentalize its knowledge acquired through studies which it commissions or through experience of its members or otherwise, and relate that knowledge only to the particular function out of

which it has emerged.

It was pointed out in this connection that the Board conducted a public inquiry, with Mr. Crowe presiding over the three-member panel, into the supply and requirements for natural gas, pursuant to powers which it has under s. 14(2) of the National Energy Board Act to inquire, of its own motion, into matters within its jurisdiction. The inquiry began in November, 1974 and a report was published in April, 1975, following which the panel was constituted for the Mackenzie Valley Pipeline hearing, with two members thereof (Mr. Crowe and Mr. Farmer) having been on the panel for the public inquiry. Nothing, in my opinion, can be drawn from the report of this inquiry that would blunt the effect of Mr. Crowe's participation in decisions leading to the Canadian Arctic Gas Pipeline Limited application for a certificate filed on March 21, 1974. The fact that the report indicated there were problems in estimating supply, that more information was needed, and that other matters as well that would be relevant on a s. 44 application were in an uncertain state, does not go any farther than it would if these problems and matters had been raised initially before the Board and it considered them for the first time at the pipeline hearing. That the holdings of the inquiry may have prepared Mr. Crowe for the pipeline hearings does not provide support for his participation in those hearings.

What must be kept in mind here is that we are concerned with a s. 44 application in respect of which, in my opinion, the Board's function is quasi-judicial or, at least, is a function which it must discharge in accordance with rules of natural justice, not necessarily the full range of such rules that would apply to a Court (although I note that the Board is a court of record under s. 10 of its Act) but certainly to a degree that would reflect integrity of its proceedings and impartiality in the conduct of those proceedings. This is not, however, a prescription that would govern an inquiry under ss. 14(2) and 22.

I am of the opinion that the only issue here is whether the principle of reasonable apprehension or reasonable likelihood of bias applies to the Board in respect of hearings under s. 44. If it does apply--and this was accepted by all the respondents--then, on the facts herein, I can see no answer to the position of the appellants.

Before setting out the basis of this conclusion I wish to reiterate what was said in the Federal Court of Appeal and freely conceded by the appellants, namely, that no question of personal or financial or proprietary interest, such as to give rise to an allegation of actual bias, is raised against Mr. Crowe. The Federal Court of Appeal founded its conclusion against disqualification on the following statement of principle:

> It is true that all of the circumstances of the case, including the decisions in which Mr. Crowe participated as a member of the study group, might give rise in a very sensitive or scrupulous conscience to the suspicion that he might be unconsciously biased, and therefore should not serve. But that is not, we think, the test to apply in this case. It is, rather, what would an informed person, viewing the matter realistically and practically--and having thought the matter through-- conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.

This was followed by an encompassing factual conclusion which was as follows:

> On the totality of the facts, which have been described only in skeletal form, we are all of the opinion that they should not cause reasonable and right minded persons to have a reasonable apprehension of bias on the part of Mr.

> Crowe, either on the question of whether present or future public convenience and necessity require a pipe-line or the question of which, if any, of the several applicants should be granted a certificate.

The Federal Court of Appeal supported this factual conclusion by emphasizing that Mr. Crowe participated in the Study Group as merely a representative, that he had nothing to gain or lose by his participation or by any decision he might reach in the course of his duties as chairman of the National Energy Board in connection with the applications that were before it. I do not think that Mr. Crowe's representative capacity is a material consideration on the issue in question here, any more than representative capacity would be a material consideration if the president or chairman of one of the other participants in the Study Group had been appointed chairman of the National Energy Board and had then proceeded to sit on an application which he had a hand in fashioning, albeit he was divorced from the Study Group at the time the application was filed. Mr. Crowe was not a mere cipher, carrying messages from the board of directors of the Canada Development Corporation and having no initiative or flexibility in the manner and degree of his participation in the work of the Study Group. Nowhere in the Study Group Agreement nor in the minutes of proceedings of the Management Committee is there any indication that the representatives came to the meetings with fixed instructions from which they could not depart without a reference back. The nature of the exercise carried on under the Study Group Agreement required the representatives to apply their own judgment and their own talents to the joint project, with of course concern for the interests of the companies that they represented and subject, of course, to such directions as the companies might give. Since the representatives were all high officials of the companies, they had latitude in their participation that would not have been open to a junior employee.

Nor do I think that anything turns in this case on the fact that Mr. Crowe (according to the Federal Court of Appeal) had nothing to gain or lose either through his participation in the Study Group or in making decisions as chairman of the National Energy Board. The Federal Court of Appeal appears here to have moved over into the area of actual bias and that is not an issue.

The additional factor which underlay the Federal Court of Appeal's factual conclusion is, in its own words, as follows:

> It must, we think, be borne in mind that two years have passed since that participation came to an end and that the issues to be resolved by the Board, with which there is no reason to think he is not familiar, are widely different from those to which the study group devoted its attention. Theirs were problems of assessing the economic feasibility of a pipeline project as a method of moving gas from the Arctic over long distances to southern markets and planning the project in the interests of establishing a viable and profitable operation. In the issues to be considered by the Board the interest involved is that of the Canadian public, whether it will be well served by the construction and operation of such a system and if so which, if any, among competing applicants should be accorded the opportunity. On the material before us there appears to be no valid reason for apprehension that Mr. Crowe, who is not fettered by any interest of his own in any of the applicant companies or any proprietary interest in the result of any decision in which he participated and is no longer in the service of the study group or the Canada Development Corporation, cannot approach these new issues with the equanimity and impartiality to be expected of one in his position.

The passage of time referred to by the Federal Court of Appeal--two years since Mr. Crowe resigned as president of the Canada Development Corporation--is related to the date of the opening of the actual hearings on the competing applications. The application of Canadian Arctic Gas Pipeline Limited was filed five months after the resignation and the consequent departure of Mr. Crowe from the Study Group. Be that as it may we are not dealing with a case where Mr. Crowe's association with the Study Group is by virtue of that fact alone urged as a disqualification, for example, in relation to some application that the Study Group has initiated or promoted after Mr. Crowe's termination of his relationship with the Group. While I would not see any vice in Mr. Crowe sitting on an application coming from or through the Study Group in relation to a matter which he was not involved, even though it was decided upon shortly after his dissociation from the Study Group, that is not this case.

Lawyers who have been appointed to the Bench have been known to refrain from sitting on cases involving former clients, even where they have not had any part in the case, until a reasonable period of time has passed. A fortiori, they would not sit in any case in which they played any part at any stage of the case. This would apply, for example even if they had drawn up or had a hand in the statement of claim or statement of defence and nothing else. There is, at the lowest, a parallel here between being involved in taking instructions or drawing up pleadings for litigation and being involved in helping to plan the terms of a contemplated s. 44 application which is in fact made.

I cannot agree with the conclusion (if it be that) of the Federal Court of Appeal or with its observation that "the issues to be resolved by the Board, with which there is no reason to think he is not familiar, are widely different from those to which the Study Group devoted its attention", as if that provided an answer, whether wholly or partially, to an allegation of reasonable apprehension of bias. A considerable point was made of this by counsel for the Attorney General of Canada and counsel for the Canadian Gas Arctic Pipeline Limited, and I wish to deal with it in some detail.

Of course, the functions of the Board are different from the functions of an applicant or group of applicants for a board certificate, just as the functions of a court are different from those of a litigant seeking a favourable decision. It does not matter whether or not there is a lis inter partes, in a traditional court sense, in a Board hearing for the grant of a certificate, so long as the Board is required to apply statutory standards to any application, and, indeed where there are, as here, competing applications the resemblance to a lis is increased. An applicant seeking a certificate must inevitably direct itself to the statutory prescriptions by which the Board is governed, taking into consideration of course, the scope of discretion which those standards permit. To say, therefore, that the issues before the Board are different than those to which the Study Group directed itself is not entirely correct, save as it reflects the different roles of the Board and of the Study Group. Moreover, it does not meet the central issue in this case, namely, whether the presiding member of a panel hearing an application under s. 44 can be said to be free from any reasonable apprehension of bias on his part when he had a hand in developing and approving important underpinnings of the very application which eventually was brought before the panel.

There was some inconsistency in the approaches taken by counsel for the Attorney General of Canada and counsel for the Canadian Arctic Gas Pipeline Limited, who made the main submissions in support of the position of all the respondents. The former asserted at one point in his submissions that the decision to seek a pipeline had already been made by the Study Group before Canada Development Corporation became a participant. It was his further contention that Mr. Crowe participated only in the decisions as to routing and as to single ownership of the proposed pipeline and as to the appointment of auditors and bankers. In his view, these decisions fell short of an involvement in the crucial considerations of economic and financial feasibility which, presumably, were either determined before Mr. Crowe became a representative member of the Study Group or were redetermined after he ceased to

be such a member. This is an untenable position. Economic and financial feasibility were involved in the very decision pursue the pipeline project by an application to the Board, and the fact that the proposed application was later refined or revised did not make it one which Mr. Crowe was a stranger before it came to the Board.

Counsel for Canadian Arctic Gas Pipeline Limited appeared to say that there was no concluded decision to apply for a certificate while Mr. Crowe was a representative member of the Study Group. He did agree that economic and financial feasibility were involved in decisions made by the Study Group in which Mr. Crowe participated, but he contended that, in so far as this affected a decision to apply for a certificate, it was not conclusive on the question whether public convenience and necessity existed or would exist two years hence. This submission either begs the question of reasonable apprehension of bias or makes it depend on whether the Study Group can be said to have made the very decision which the Board is called upon to make. There can be no such dependence. Any application under s. 44 would, of course, be pitched to securing a favourable decision, but the Board's powers are wide enough to entitle it to insist on changes in a proposal as a condition of the grant of a certificate. The vice of reasonable apprehension of bias lies not in finding correspondence between the decisions in which Mr. Crowe participated and all the statutory prescriptions under s. 44, especially when that provision give the Board broad discretion "to take into account all such matters as to it appear to be relevant", but rather in the fact that he participated in working out some at least of the terms on which the application was later made and supported the decision to make it. The Federal Court of Appeal had no doubt that Mr. Crowe (to use its words) "took part in [the] meetings and in the decisions taken which ... dealt with fairly advanced plans for the implementation of the pipeline project".

I come then to the question whether the Federal Court of Appeal's negative answer to the question propounded to it is supportable. I have already indicated that that Court introduced considerations into its test of reasonable apprehension of bias which should not be part of its measure. When the concern is, as here, that there be no prejudgment of issues (and certainly no predetermination) relating not only to whether a particular application for a pipeline will succeed but also to whether any pipeline will be approved, the participation of Mr. Crowe in the discussions and decisions leading to the application made by Canadian Arctic Gas Pipeline Limited for a certificate of public convenience and necessity, in my opinion, cannot but give rise to a reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment on of the issues to be determined on a s. 44 application.

This Court in fixing on the test of reasonable apprehension of bias, as in Ghirardosi v. Minister of Highways for British Columbia [[1966] S.C.R. 367.], and again in Blanchette v. C.I.S. Ltd. [[1973] S.C.R. 833.], (where Pigeon J. said at p. 842-43, that "a reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification") was merely restating what Rand J. said in Szilard v. Szasz [[1955] S.C.R. 3.], at pp. 6-7 in speaking of the "probability or reasoned suspicion of biased appraisal and judgment, unintended though it be". This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and I think that emphasis is lent to this concern in the present case by the fact that the National Energy Board is enjoined to have regard for the public interest.

For these reasons, the appeal is allowed and the question submitted to the Federal Court of Appeal is answered in the affirmative. As stated in the formal judgment of this Court, delivered on March 11, 1976, there will be no order as to costs.

The judgment of Martland, Judson and de Grandpré JJ. was delivered by

DE GRANDPRÉ J. (dissenting):-- As mentioned in the formal judgment of March 11, 1976, I hold the dissenting view that the Federal Court of Appeal was right in coming unanimously to the conclusion that a negative answer should be given to the question referred to it by the National Energy Board:

> Would the Board err in rejecting the objections and in holding that Mr. Crowe was not disqualified from being a member of the panel on the grounds of reasonable apprehension or reasonable likelihood of bias?

This question submitted pursuant to subs. 28(4) of the Federal Court Act was the result of concern expressed during the pre-hearing conference on July 9, 1975, by counsel for one of the applicants, namely Canadian Arctic Gas Pipeline Limited (hereinafter referred to as "Arctic Gas"), that if Mr. M.A. Crowe were a member of the panel chosen to deal with the competing applications, a reasonable apprehension of bias in favour of Arctic Gas might be feared. As expressed in the Order of the National Energy Board, dated October 29, 1975, referring the question to the Federal Court of Appeal, the basis of this concern was the fact that the Chairman of the National Energy Board was, prior to that appointment, Chairman of the Canada Development Corporation. That corporation at that time and at all relevant times was wholly owned by the Government of Canada and was one of some 25 or 26 members of the Arctic Gas--Northwest Project Study Group, consortium of companies which had brought about the incorporation of Canadian Arctic Gas Pipeline Limited. In his capacity as Chairman of Canada Development Corporation, until his resignation in 1973, Mr. Crowe had participated in certain determinations and decisions of the Study Group concerning relevant issues now the subject matter of the application, including the routing of the proposed Canadian Arctic Gas pipeline.

As a result of this expression of concern, counsel for Arctic Gas, at the direction of the Board, forwarded in mid-September to all interested persons a number of documents, the relevant ones being correspondence between Canadian Arctic Study Group and Canada Development Corporation, the relevant minutes of the Management and Executive Committees of the Canadian Arctic Gas Study Group, (all irrelevant entries, namely reports and discussions where no action was taken, having been blanked out), minutes of the Finance, Tax and Accounting Committee of the Study Group, the Study Group agreement itself.

In addition, on the 17th of October, a copy of the written statement to be read at the opening of the hearing by Mr. Crowe was addressed to all interested persons.

The hearing of the applications commenced on the 27th day of October 1975. Mr. Crowe at the outset read his statement. Of the 88 interested persons recognized by the Board either as applicants or under s. 45 of the Statute, only 5 objected and 3 of these are appellants before this Court. All of the competing applicants were satisfied that no reasonable apprehension of bias could be entertained.

On this bare outline of the facts, the following preliminary points may be made:

(1) there is no suggestion that there exists any actual or pecuniary bias on the part of Mr. Crowe;
(2) the reasonable apprehension of bias, if it exists, could refer to

  (a) the need for a pipeline, and
  (b) if point (a) is decided in the affirmative, the identity of the party who should receive the certificate;

inasmuch as all of the competing applicants are satisfied with the presence of Mr. Crowe on the panel,

this last point is not before us; of course, it is common ground that all applications might be turned down;

> (3) the question must be studied in the light of the documents submitted to the Court which, in addition to those already mentioned are:
>
> (a) the proceedings before the Board on October 27, 1975;
> (b) the guidelines for northern pipelines issued by the Canadian Government on August 13, 1970;
> (c) a report of the National Energy Board dated April 1975, entitled 'Canadian Natural Gas Supply & Requirements' following public hearings held pursuant to Part 1 of the National Energy Board Act, from November 1974 to March 1975.

It is on this material that the Federal Court of Appeal unanimously came to its conclusion:

> On the totality of the facts, which have been described only in skeletal form, we are all of the opinion that they should not cause reasonable and right minded persons have a reasonable apprehension of bias on the part of Mr. Crowe, either on the question of whether present or future public convenience and necessity require a pipe-line or the question of which, if any, of the several applicants should be granted a certificate.

I have already stated my concurrence with this reading of the facts.

I

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would a informed person, viewing the matter realistically and practically--and having thought the matter through--conclude. Would he think that it is mor likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias, or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

This is the proper approach which, of course, must be adjusted to the facts of the case. The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted by statute with an administrative discretion exercised in the light of its experience and of that of its technical advisers.

The basic principle is of course the same, namely that natural justice be rendered. But its application must take into consideration the special circumstances of the tribunal. As stated by Reid, Administrative Law and Practice, 1971, at p. 220:

> ... 'tribunals' is a basket word embracing many kinds and sorts. It is quickly

> obvious that a standard appropriate to one may be inappropriate to another. Hence, facts which may constitute bias in one, may not amount to bias in another.

To the same effect, the words of Tucker L.J., in Russell v. Duke of Norfolk and others [[1949] 1 All E.R. 109.], at p. 118:

> There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

In the case at bar, the test must take into consideration the broad functions entrusted by law to the Board. These are numerous and it is sufficient for our purpose to refer to the two main classes:

> (1) the advisory functions under Part II of the Act; s. 22 imposes upon the Board the obligation to make continuous studies and reports, on its own and at the request of the Minister; to that end, "the Board shall, wherever appropriate utilize agencies of the Government of Canada to obtain technical, economic and statistical information and advice";
> (2) the issuance of certificates of public convenience and necessity under Part III; s. 44 enacts that in the discharge of this duty, "the Board shall take into account all such matters as to it appear to be relevant and without limiting the generality of the foregoing, the Board may have regard ..." to five factors listed in the section.

While, under s. 22, there is no obligation to take into account the submissions of third parties, s. 45 states that "the Board shall consider the objections of any interested person". Finally, it is to be noted that both these duties culminate in conclusions which are submitted in the first case to the Minister who may decide to act or not to act and, in the second case, to the Governor in Council who may decide to approve or not to approve.

It follows that the National Energy Board is a tribunal that must be staffed with persons of experience and expertise. As was said by Hyde J. of the Quebec Court of Appeal in R. v. Picard et al. [(1968), 65 D.L.R. (2d) 658.], at p. 661:

> Professional persons are called upon to serve in judicial, quasi-judicial and administrative posts in many fields and if Governments were to exclude candidates on such ground, they would find themselves deprived of the services of most professionals with any experience in the matters in respect of which their services are sought. Accordingly, I agree with the Court below that this ground was properly rejected.

The same thought is to be found in the decision the Court of Appeal of Nova Scotia in Tomko v. N.S. Labour Relations Board et al. [(1974), 9 N.S.R. (2d) 277 affd. [1977] 1 S.C.R. 112.], where one MacNeil, a member of the Board, had actively participated in meetings attended by representatives of the employer and representatives of the unions respecting the subject matter on the very point to be adjudicated before the Board. In particular, in a meeting five days before the Order was issued, he had said that the facts gave no excuse to the men to be on strike. Studying the allegation of bias, MacKeigan,

C.J., said (at p. 298):

> One of the principles of 'natural justice' that must be observed by the Panel and its members in exercising power under s. 49 is to act fairly, in good faith, and without bias. The rules which disqualify judges for personal interest in the result or likelihood of bias thus apply. See: de Smith on Judicial Review of Administrative, Action 3rd ed., c. 5, and Reid on Administrative Law and Practice, c. 7.
>
> This does not mean, however, that the standards of what constitutes disqualifying interest or bias are the same for a tribunal like the Panel as for the courts. The nature and purpose of the Trade Union Act dictate that members 'bring an experience and knowledge acquired extra-judicially to the solution of their problems' (Lord Simonds in John East, supra, A.C. at p. 151, D.L.R. at p. 682).
>
> The many unions and many subcontractors and suppliers involved in any single construction project make it inevitable that union representatives on the Panel and most employer representatives would each have at least an indirect interest, much knowledge and many preconceptions and prejudgments respecting any matter coming before the Panel. Thus mere prior knowledge of the particular case or preconceptions or even prejudgments cannot be held per se to disqualify a Panel member.

And he concluded (at p. 299):

> I cannot find on the evidence that MacNeil had the kind of interest or displayed the kind of bias that should disqualify him as a member of the Panel. He obviously knew all about the walkout and its causes, thought it was an illegal work stoppage, knew that the plaintiff was involved in it and had 'condoned' it, and was fully aware of the plaintiff's commanding position in the Labourers' Union. I cannot see, however, that such knowledge and opinions show likelihood of bias, likelihood that MacNeil would be unable to exercise his duties impartially as a member of the Board.

This judgment was confirmed by our Court on December 19, 1975 where Laskin, C.J.C., speaking for the majority, said:

> There was also an allegation of bias against a member the Panel but this Court did not require the respondent to meet it, holding the allegation to be without substance.

Members of administrative boards acquire the expertise by virtue of previous exposure to the industry which they are appointed to regulate. The system would not work if it were not premised on an assertion of faith in those appointed to adjudicate:

> It is to be assumed that a body of men entrusted by the Legislature with large powers affecting the rights of others will act with good faith.
>
> Re Schabas et al and Caput of the University of Toronto et al (1975), 52 D.L.R.

(3d) 495 at page 506.

> Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.
>
> United States v. Morgan (1940), 313 U.S. 409 at page 421, per Mr. Justice Frankfurter.

That good faith is not shaken by the fact a member of the Board may have held tentative views. Not only is this the situation in Canada as it appears from the judgment in Tomko, above but it is the situation in England--1 Halsbury (4th edition) at pp. 83-84:

> In a wide range of other situations the impression may be received that an adjudicator is likely to be biased. A person ought not to participate or appear to participate in an appeal against his own decision, or act or appear to act as both prosecutor and judge; the general rule is that in such circumstances the decision will be set aside. Normally it will also be inappropriate for a member of tribunal to act as witness. Likelihood of bias may also arise because an adjudicator has already indicated partisanship by expressing opinions antagonistic or favourable to the parties before him, or has made known his views about the merits of the very issue or issues of a similar nature in such a way as to suggest prejudgment because he is so actively associated with the institution or conduct of proceedings before him, either in his personal capacity or by virtue of his membership of an interested organisation, as to make himself in substance, both judge and party, or because of his personal relationship with a party or for other reasons. It is not enough to show that the person adjudicating holds strong views on the general subject matter in respect of which he is adjudicating, or that he is a member of a trade union to which one of the parties belongs where the matter is not one in which a trade dispute is involved.
>
> The fact that an administrator may incline towards deciding an issue before him one way rather than another, in the light of implementing a policy for which he is responsible, will not affect the validity of his decision, provided that he acts fairly and with a mind not closed to argument; and similar standards may be applied to other persons whose prior connection with the parties or the issues are liable to preclude them from acting with total detachment.

and in Australia, in Ex parte The Angliss Group [(1969), 122 C.L.R.. 546, 43 A.L.J.R. 150. (H.Ct.)], at p. 151 (A.L.J.R.):

> It is therefore important to bear in mind that the Commission does not sit to enforce existing private rights. Amongst other things, it is its function to develop and apply broad lines of action in matters of public concern resulting in the creation of new rights and in the modification of existing rights. It is not necessarily out of place, and indeed it might be expected that a member of the Commission from time to time in the course of discharging his duties should express more or less tentative views as to the desirability of change in some

> principle of wage fixation. The very nature of the office of a member of the Commission requires that he should apply his mind constantly to general questions of arbitral policy and consider the lines along which the processes of conciliation and arbitration for the prevention and settlement of industrial disputes ought to move.

and in the United States--New Hampshire Milk Dealers Association v. New Hampshire Milk Control Board [(1967), 222 A. (2d) 194.], at p. 198:

> It is a well-established legal principle that a distinction must be made between a preconceived point of view about certain principles of law or a predisposed view about the public or economic policies which should be controlling and a prejudgment concerning issues of fact in a particular case. 2 Davis, Administrative Law Treatise, s. 12.01, p. 131. There is no doubt that the latter would constitute a cause for disqualification. However 'Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed ground for disqualification.'(...) If this were not the law, Justices Holmes and Brandeis would have been disqualified as would be others from sitting on cases involving issue of law or policy on which they have previously manifested strong diverging views from the holdings of a majority of the members of their respective courts.

It is obvious that the considerations which underlie the operations of the Board are policy oriented. Section 91 imposes upon the Board the obligation through the Minister to report to Parliament on a yearly basis and the Act establishes numerous points of contact between the Minister and the Board. This policy orientation is the joint effort of the Minister and of the Board. The guidelines announced by the Government on August 13, 1970 for northern pipelines are relevant and I quote them at length:

1. The Ministers of Energy, Mines and Resource and Indian Affairs and Northern Development will function as a point of contact between Government and industry, acting as a Steering Committee from which industry and prospective applicants will receive guidance and direction to those federal departments and agencies concerned with the particular aspects of northern pipelines.
2. Initially, only one trunk oil pipeline and one trunk gas pipeline will be permitted to be constructed in the north within a 'corridor' to be located and reserved following consultation with industry and other interested groups.
3. Each of these lines will provide either 'common' carrier service at published tariffs or a 'contract' carrier service at a negotiated price for all oil and gas which may be tendered thereto.
4. Pipelines in the north, like pipelines elsewhere which are within the jurisdiction of the Parliament of Canada, will be regulated in accordance with the National Energy Board Act, amended as may be appropriate.
5. Means by which Canadians will have a substantial opportunity for participating in the financing, engineering, construction, ownership and management of northern pipelines will form an important element in Canadian government consideration of proposals for such pipelines.
6. The National Energy Board will ensure that any applicant for a

> Certificate of Public Convenience and Necessity must document the research conducted and submit a comprehensive report assessing, the expected effects of the project upon the environment. Any certificate issued will be strictly conditioned in respect of preservation of the ecology and environment, prevention of pollution, prevention of thermal and other erosion, freedom of navigation, and the protection of the rights of northern residents, according to standards issued by the Governor General in Council on the advice of the Department of Indian Affairs and Northern Development.
>
> 7. Any applicant must undertake to provide specific programs leading to employment of residents of the north both during the construction phase and for the operation of the pipeline. For this purpose, the pipeline company will provide for the necessary training of local residents in coordination with various government programs, including on-the-job training projects. The provision of adequate housing and counselling services will also be a requirement.

Thus the basic principle in matters of bias must be applied in the light of the circumstances of the case at bar. The Board is not a Court nor is it a quasi-judicial body. In hearing the objections of interested parties and in performing its statutory functions, the Board has the duty to establish a balance between the administration of policies they are duty bound to apply and the protection of the various interests spelled out in s. 44 of the Act. The decision to be made by the Board transcends the interest of the parties and involves the public interest at large. In reaching its decision, the Board draws upon its experience, upon the experience of its own experts, upon the experience of all agencies of the Government of Canada and, obviously, is not and cannot be limited to deciding the matter on the sole basis of the representations made before it. It is not possible to apply to such a body the rules of bias governing the conduct of court of law.

II

Such being the legal principles involved, what would a reasonable and right minded person have discovered if he had taken the time and trouble informing himself of the true situation?

He would first have discovered in the words the representative of the Committee for Justice and Liberty Foundation before the Board on the 27th October 1975 that the industry "had foreseen the need to transport northern natural gas south several years ago" and that "Mr. Crowe was actively involved in a sequence of decisions based on the presupposition that a pipeline was required". In other words, the basic decision to build a pipeline or at least to make an application to the National Energy Board was taken in principle long before Mr. Crowe became involved in the Study Group and for that matter in the CDC. As already noted, on August 13, 1970, the Canadian Government published guidelines for northern pipelines; the press release prepared jointly by the Department of Energy, Mines and Resources and by the Department of Indian Affairs and Northern Development underlines:

> The guidelines relate to pipelines tapping oil and gas resources north of the 60th degree of latitude in the Yukon Territory and the Northwest Territories and from Alaska. They establish requirements ranging from environmental protection, pollution control and Canadian ownership and participation to training and employment of residents of the north. Initially, only one trunk line each for oil and gas will be permitted in the north within a 'corridor' to be established at a future date.

At that time, the industry had already not only expressed interest in constructing pipelines but had already plans and research underway. It is not surprising therefore that when the separate groups decided to join forces on June 1, 1972 in order to conform with the guidelines, they had already spent $17,000,000 in these plans and research. When the CDC became a member of the Study Group at the end of November 1972 and Mr. Crowe became the representative of the Corporation on the Management Committee grouping representatives of each of the participants, the problem was that of routing and of ownership and it is to these two points and to these two points only that Mr. Crowe gave his attention. This is the only inference that can be drawn from the records and it is sufficient to refer to the following:

1) the application itself submitted by Arctic Gas states that the need to transport northern natural gas to the southern markets had been foreseen several years before;
2) the routing by October 25, 1972 when Mr. Crowe for the first time was present as a guest, had already given rise to various studies;
3) that very same question of routing was the major matter discussed at subsequent meetings attended by Mr. Crowe;
4) the timing, not the advisability of regulatory filings, was officially discussed on February 28, 1973;
5) this discussion had been preceded by a letter of February 27, 1973, describing the project scheduling "up to the time of application" in late 1973;
6) on May 30, 1973, the minutes mention that "preparations for filings could continue";
7) one of the memoranda studied at the meeting of June 27, 1973 states that the application to the National Energy Board is "to be filed this Fall" and underlines "the question that must be resolved NOW is what kind of an application is to be filed".

What else would the reasonable and right minded person have discovered had he decided to inform himself of the true situation? He would sit have found that

--the CDC, a corporation wholly owned by the Government of Canada, has by statute a number of corporate objects which "shall be carried out in anticipation of profits";

--that two of its directors at the relevant time are the Deputy Minister of Industry, Trade and Commerce and the Deputy Minister of Finance;

--when the CDC joined the Study Group, more than $23 millions had been invested in the project and the eventual share of the CDC stood at a figure in the neighbourhood of $1 million;

--the Study Group which during the participation of Mr. Crowe had decided only two things namely routing and ownership, had split and that the applications now before the Board competing as they are for the obtaining of the certificate under s. 44 of the Act, are in fact being made by parties who during Mr. Crowe's participation in the work of the Study Group had expressed concurrence in the decision of June 27, 1973 which is the major gun in

appellant's arsenal.

Thus it follows that to a considerable degree the sole decision taken by Mr. Crowe and his partners, namely that relative to routing and ownership, was now being contested by some of the participants who at the time agreed therewith.

Obviously, the parties to the agreement could have a change of heart and decide not to continue with the project. Such a possibility is always present in a proposal of such a magnitude and such a complexity where the relevant factors are numerous and subject to change practically on a daily basis. In that sense and in that sense only nothing was definite during the period that Mr. Crowe participated in the work of the Study Group. Apart from this ever present possibility to change one's mind, and this possibility was not discussed between December 1972 and November 1973, the project was on the rails prior to Mr. Crowe joining the group. It is obvious that this ticklish problem of ownership and routing having been settled on June 27, 1973, albeit by a compromise that did not last too long as appears from the competing applications now before the Board, the petition to the National Energy Board had to be prepared. But Mr. Crowe did nothing else but reiterate the decision taken before his coming into the picture to proceed therewith.

The reasonable and right minded person would also have learned that the applications had been from time to time modified so that the proposal put forth by Arctic Gas and which the Board was to examine in the course of the hearings which started on October 27 last would be different from that examined by the Study Group between December 1972 and November 1973.

He would also have discovered that the report of April 1975 on the supply and requirements of Canadian Natural Gas discloses that Mr. Crowe and the other members of the Board have many question marks on the various points which by s. 44 of the Act may be considered by the Board, namely availability of gas, existence of market, economic feasibility, methods of financing and other public interest matter. It is sufficient here to quote from the conclusions of that study:

> Improving deliverability is a complex national problem requiring the cooperation and coordinated planning of producers, gathering and transmission companies and distribution utilities, as well as the governments of producing and consuming provinces and the federal government. Furthermore, short term improvements will have to come from gas already found, but there is a lead time generally of about three years between the initiation of development activity and the delivery of the gas in the market place. It therefore seems imperative to mobilize a concerted effort to bring about appropriate action if any significant improvement in deliverability is to be achieved in the remainder of the 1970's. If Frontier gas were connected--assuming adequate reserves are discovered and suitable transportation arrangements made--the need for and reliance on improved deliverability of gas from the Western Provinces would be reduced after that date.

It is interesting to note that two of the appellants before this Court, namely Canadian Arctic Resources Committee and Consumers' Association of Canada appeared before the Board at the hearing that preceded the publication of this study.

He would also have learned that the Government of Canada as well as the Governments of British Columbia, Saskatchewan, Manitoba, Ontario and Quebec have expressly recognized that they cannot entertain any reasonable apprehension of bias on the part of Mr. Crowe. Nothing has been heard from

the Province of Alberta but considering its vital interest in the subject matter it is reasonable to infer that its silence is a complete acceptance of Mr. Crowe's ability to render justice. It is not unreasonable to assume that the seven governments together would look after the public interest and would be the first to raise the question of bias if any reasonable apprehension existed that the basic principles would be offended by the presence of Mr. Crowe.

In my opinion, the Court of Appeal was right in concluding that no reasonable apprehension of by reasonable, right minded and informed persons could be entertained.

For all these reasons, as well as for those of the Court of Appeal, I would dismiss the appeal with costs.

Appeal allowed, no order as to costs, MARTLAND, JUDSON and DE GRANDPRÉ JJ. dissenting.

Re

Sawyer and Ontario Racing Commission

24 O.R. (2d) 673

99 D.L.R (3d) 561

ONTARIO
COURT OF APPEAL

BROOKE, WILSON AND MORDEN, JJ.A.

28TH MAY 1979.

Administrative law -- Natural justice -- Bias -- Tribunal finding person guilty of breach of rules and imposing penalty -- Tribunal then requesting prosecuting counsel to prepare reasons -- Whether conviction proper -- Whether tribunal's decision can be examined apart from reasons in light of record.

It is improper for prosecuting counsel to write reasons for the decision of a tribunal which has found a person guilty of a breach of its rules and which has imposed a penalty for the breach. This is so even though counsel played no part in the decision-making process and even though the tribunal adopted counsel's draft reasons only after due consideration. Such a practice amounts to a denial of natural justice because it raises a suspicion of bias. Moreover, the Court cannot examine the tribunal's decision apart from the reasons and in light of the record, for the convicted person is entitled to be told by the tribunal its reasons for finding him guilty and to be dealt with according to law by the tribunal.

[Re Bernstein and College of Physicians & Surgeons of Ontario (1977), 15 O.R. (2d) 447, 76 D.L.R. (3d) 38, apld; Re Glassman and Council of College of Physicians & Surgeons, [1966] 2 O.R. 81, 55 D.L.R. (2d) 674, distd; The King v. Sussex Justices, [1924] 1 K.B. 256; R. v. Salford Assessment Committee, [1937] 2 All E.R. 98, refd to]

APPEAL from a judgment of the Divisional Court dismissing an application for judicial review of the appellant's conviction by the Ontario Racing Commission for a violation of the racing rules.

John I. Laskin, for appellant, applicant.

Douglas C. Hunt, for respondent.

The judgment of the Court was delivered by

BROOKE, J.A.:-- By an order dated August 23, 1978, the Divisional Court dismissed the appellant's application for judicial review of his conviction by the Ontario Racing Commission (the Commission) for a violation of the racing rules and allowed his application as to the penalty, which was a suspension from racing for 10 years. The matter of penalty was remitted to the Commission for a new hearing on the ground that in failing to give the appellant an opportunity to present evidence and argument the Commission denied him natural justice.

The issue here is whether the Divisional Court erred in refusing to quash the conviction where, after the formal ruling of the Commission together with the reasons for its decision had been released, it was learned that the reasons for the decision had, at the request of the Commission, been written by counsel who had prosecuted the charge against the appellant after the Commission had reached its decision to convict him.

The facts are not in dispute. The appellant had been licensed as an owner, trainer and driver by the Ontario Racing Commission since 1975. Following a race on January 12, 1977, he was charged with a violation of the racing rules as follows:

> The Judges believe that the horse "Henry T. Byrd", was driven by Thomas Sawyer in the tenth (10th) race at Windsor Raceway on the 12th day of January, 1977 with design to prevent the said horse from finishing in any of the first three positions.

Charges were also made against three other persons in connection with their conduct in the same race and those charges and that against the appellant came on for hearing at an inquiry conducted by the Commission on April 27, 1977. At that time the appellant appeared by counsel and pleaded not guilty to the charge. The case against him was presented by a counsel from the Ministry of the Attorney-General for Ontario. At the conclusion of the evidence and argument the matter was adjourned and on June 13, 1977, the Commission released its formal ruling together with its reasons for judgment. The concluding paragraphs of the formal ruling were as follows:

> AND WHEREAS the Commission after hearing the sworn testimony of the said Thomas E. Sawyer, of witnesses for the Administration, C.T.A. Judge Stephen Fields, and O.R.C. Judge Maxwell Hill, duly recorded by a chartered court reporter, and after reviewing the video replay of the 10th race at Windsor Raceway on January 12, 1977 and the 8th race at Windsor Raceway on January 15, 1977 and the arguments of both counsel and after giving careful consideration to the evidence;
>
> TAKE NOTICE that the Commission, by unanimous decision, found the said Thomas E. Sawyer guilty as charged and ordered that he be suspended from racing for a period of 10 years effective June 13th, 1977 for the reasons set out in Appendix "A" attached.

It was subsequently learned that counsel who prosecuted the charge against the appellant had in fact written the reasons which the Commission attached to its formal ruling. The affidavit filed by counsel is a frank statement of what occurred and is as follows:

2. That I appeared as Counsel to the Ontario Racing Commission in connection with the hearing of a number of charges arising out of the conduct of the tenth race at Windsor Raceway on January 12, 1977, and arising out of the ninth race at the Orangeville Raceway on January 9th, 1977.

. . . . .

4. That following the completion of the hearings referred to above in Paragraph 3 of this my Affidavit, I was asked to attend and did attend, at the offices of the Ontario Racing Commission at 1 St. Clair Avenue West, Toronto, Ontario. I was summoned to attend a meeting at which were present at least five of the seven commissioners of the Ontario Racing Commission. One of the commissioners advised me that the Ontario Racing Commission had found all of the individuals referred to above in Paragraph 3 of this my affidavit guilty as charged with the exception of Paul Hawkins who was found not guilty of one of the charges against him. Mr. D. G. Cunningham, Q.C. asked me to assist the Ontario Racing Commission in preparing reasons for the imposition of the sentences involved by preparing draft reasons with respect to each of the individuals. I played no part whatsoever in assisting the Ontario Racing Commission in arriving at any determination with respect to guilt or innocence or with respect to the determination of any sentence.
5. That following the meeting referred to above in Paragraph 4 of this my Affidavit, I met with Mr. William R. McDonnell, Director of the Ontario Racing Commission, who gave me a piece of paper on which was written the names of the individuals involved and the sentences which the Ontario Racing Commission had decided to impose. A copy of this piece of paper is attached as Exhibit "A" to this my affidavit.
6. That I prepared draft reasons with respect to James P. Carr, a copy of which is attached as Exhibit "B" to this my Affidavit. I further prepared draft reasons with respect to Thomas E. Sawyer a copy of which is attached as Exhibit "C" to this my Affidavit. I further prepared draft reasons with respect to Paul V. Hawkins, a copy of which is attached as Exhibit "D" to this my Affidavit. I further prepared draft reasons with respect to Beverley J. Heywood, a copy of which is attached as Exhibit "E" to this my Affidavit.
7. That I was able to prepare the draft reasons with respect to Beverley J. Heywood, which are attached as Exhibit "E" to this my Affidavit, by virtue of my knowledge of the decision of the Ontario Racing Commission with respect to Beverley J. Heywood, the films of the race in which Beverley J. Heywood was involved, and my knowledge of the substance of the evidence of the presiding Judges of the race, which knowledge came to me during the course of my preparation of the case with respect to Beverley J. Heywood.
8. That I submitted the draft reasons referred to above in Paragraph 6 of this my Affidavit to the Ontario Racing Commission. I was requested to attend and did attend at the offices of the Ontario Racing Commission at 1 St. Clair Avenue West, Toronto, Ontario, where I waited while the

> entire commission met. I appeared before the entire Commission, at their request, in order to explain several of the Latin phrases which appear in the draft reasons. I reminded the entire Commission that I had not appeared as Counsel to the Commission in connection with the hearing of the charges against Beverley J. Heywood. At no time was there any discussion in my presence by any members of the Ontario Racing Commission, with respect to the substance of the draft reasons.

No draft reasons or outline of its reasons for its ruling were given to counsel and the formidable part of the Commission's work which counsel was requested to undertake and did carry out can best be seen by the reasons themselves. A copy of the reasons is attached as an addendum hereto; four pages relate to the appellant. [The reasons have not been reported.]

The draft reasons prepared by counsel are precisely the same as the reasons issued by the Commission in the case against the appellant.

In dismissing the application for judicial review with respect to the conviction the Divisional Court was critical of conduct of the Commission and stated:

> This practice of Commission counsel is looked upon with great disfavour by this Court. This Court in Re Bernstein and College of Physicians and Surgeons of Ontario, 15 O.R. (2d) 447 has already commented on this practice. Mr. Justice O'Leary, at p. 473, said:
>
> "... In my view it is an unusual and improper practice for counsel to write the reasons for the Discipline Committee even if the chairman or some member of the Committee has drafted reasons to guide him ..."
>
> In the present case, no such draft had been prepared.
>
> We are all of the view, however, that this error, in the preparation for the reasons of decision, is not sufficient to warrant setting aside the conviction.

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. It is basic that persons entrusted to judge or determine the rights of others must, for reasons arrived at independently, make that decision whether it or the reasons be right or wrong. It was wrong for the Commission, who were the judges, to privately involve either party in the Commission's function once the case began and certainly after the case was left to them for ultimate disposition. To do so must amount to a denial of natural justice because it would not unreasonably raise a suspicion of bias in others, including the appellant, who were not present and later learned what transpired. In the circumstances justice does not appear to have been done and the decision cannot stand. I refer to The King v. Sussex Justices, [1924] 1 K.B. 256, and R. v. Salford Assessment Committee, [1937] 2 All E.R. 98 at p. 103.

In Re Bernstein and College of Physicians & Surgeons of Ontario (1977), 15 O.R. (2d) 447, 76 D.L.R. (3d) 38, when the Discipline Committee of the College had arrived at a verdict that Dr. Bernstein was guilty of the offence charged, the chairman gave to counsel for the college who had prosecuted the case against the doctor a rough outline of the Committee's reasons for its decisions and requested him to prepare formal reasons for the Committee's approval. The original of the rough draft was not available for the Court's consideration. While the Court allowed the appeal because of a lack of sufficient credible evidence to uphold the conviction of this issue O'Leary, J., who delivered the judgment for the majority, said at p. 473 O.R., pp. 63-4 D.L.R.:

> In this particular case Mr. Hunter, though asked by the Court for the same, was unable to locate the rough outline of the reasons for judgment sometimes prepared by the chairman. In my view it is an unusual and improper practice for counsel to write the reasons for the Discipline Committee even if the chairman or some member of the Committee has drafted rough reasons to guide him. One who has stood trial before a disciplinary body is entitled to have that body's reasons for its decision and not the reasons the prosecutor composes for the decision. If the Committee has made an error in arriving at its conclusion the one who has stood trial, in fairness, should learn of it.

In the case before us the reasons for its decision were never made known by the Commission to anyone including its counsel. I agree with O'Leary, J. What he said is apt here. If it were otherwise the accused's right of appeal or review would be illusory. This principle underlies the provisions of s. 17 of the Statutory Powers Procedures Act, 1971 (Ont.), c. 47, which provides:

> 17. A tribunal shall give its final decision and order, if any, in any proceedings in writing and shall give reasons in writing therefor if requested by a party.

Counsel for the respondent contends that this Court should consider whether the conduct of the Commission has resulted in any prejudice to the appellant and in so doing have regard to the following factors:

> (1) that all of the relevant circumstances surrounding the preparation of the draft reasons for judgment had been disclosed in the affidavit; (2) that counsel had played no part in the decision-making process of the respondent; and (3) that the respondent adopted the draft reasons for judgment only after due consideration.

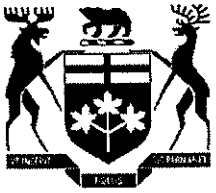
Further, counsel for the respondent contends that the ruling of the respondent ought to be examined apart from the reasons and in light of the record.

I have no doubt whatsoever that the affidavit made by counsel is a frank and accurate statement. However, I do not agree with the above submission. I think Mr. Laskin is right in his submission that justice cannot appear to have been done when the determination of how a case was decided depends, not upon the reasons over the signature of the real author, but rather upon the affidavit of a person who actually wrote the reasons and who now must explain how his thoughts were accepted after the decision of the tribunal. This is not good enough, for the appellant still has not been told by the tribunal why it found him guilty. Similarly I do not agree that this Court should attempt to test the decision by considering the record. We should not retry the case or simply examine it to find if there is evidence which might support the judgment. That is not what is in issue here. What is in issue is that this man has not been dealt with according to the law.

In the result the appeal must succeed and the order of the Divisional Court varied to provide that the

ruling of the Commission, dated June 13, 1977, finding the appellant guilty as charged and suspending him from racing for a period of ten years effective June 13, 1977, is quashed. The appellant will have his costs throughout.

Appeal allowed.



Ontario

Ontario Energy Board | Commission de l'énergie de l'Ontario

A Report with Respect to Decision-Making Processes at the OEB

September 2006

Introduction

Over the past year the Board has set itself on a course of achieving an efficiency agenda – one that is focused on improving efficiency in the Board's:

- Operational Performance – through business planning and performance metrics;
- Regulatory Outcomes – through performance and incentive mechanisms for the gas and electricity sectors; and
- Decision-making processes – through improving the Board's practices as they relate to hearings.

This paper focuses on reviewing the Board's decision-making process, specifically around the Board's current hearing practices and procedures, and considers how the Board's decision-making processes may respect the need for transparency and openness while at the same time be made more:

- focused on relevant issues;
- timely; and
- results oriented (as opposed to process oriented).

In short, the purpose of this review is to facilitate better decision making by the Board. This review was directed and guided by George Vegh, then OEB General Counsel, with the assistance of two external advisors, Lorne Sossin, of University of Toronto, and Ken Rosenberg, of Paliare Roland Rosenberg Rothstein. Input was obtained from members of the energy regulatory bar and other stakeholders. This report considers how the Board's processes may be improved and how these changes may be implemented. The categories under consideration were adjudicative hearings, the role of staff, the role of parties, and pre-hearing processes.

Summary

Adjudicative Hearings

- Adjudicative hearings should be largely restricted to circumstances where fact finding is required to support an order. Where possible, policy matters should be addressed in codes, rules or guidelines.

- The scope of hearings should be constrained by detailed and clear issues development as early as possible in the proceeding, and prior to the commencement of the pre-hearing processes.

Role of Staff

- Board staff should participate in hearings with the objectives of identifying and evaluating options for the Board's consideration in a proceeding by reference to the public interest. Staff should be required to present its view of the public interest on the record so that parties may respond to it. In very rare cases, staff's participation in a proceeding in this role may be incompatible with its ability to assist the panel in its deliberative process. An example of this is where staff is in a prosecutorial role in a compliance proceeding in Part VII.1 of the Act.

Role of Parties

- Parties to a proceeding should be required to demonstrate how their participation relates to the specific and particular interest of their constituency. This can be achieved through various methods, including asking parties at the commencement of a hearing to indicate which issues they have an interest in and how the issue affects their constituency, and querying an intervenor representative if that representative's participation in cross-examination or argument does not appear to relate to the intervenor's constituency. This requirement can be expressed through greater engagement by the panel in supervising the questions and submissions of parties.

Pre-Hearing Processes

- The Board should make more use of technical conferences and less use of written interrogatories. Board members (who may or may not be members of the panel hearing the proceeding) may attend at technical conferences and make rulings on the relevance of questions, responsiveness of answers, and the need for undertakings;
- The Board should make greater use of written transcripts as a full or partial alternative to oral testimony;
- The Board's expectations for settlement should be identified in a proceeding. Specifically, the Board should, prior to settlement discussions, advise parties which issues the Board believes should be settled and which issues the Board believes should go to a hearing;
- Board Members (other than the panel) should be made available to participate in the settlement of selected issues, such as through an in-chambers settlement conference or to review proposed settlement options and provide insight and perspective on the reasonableness of parties' positions; and
- Parties may be required to file their final offer on issues that the Board identifies should be settled. The panel may review these offers after releasing its substantive decision and may consider it in making cost awards and determining whether all of a utility's regulatory costs may be recovered from customers.

These matters are cumulative in that as a threshold matter, the Board should exercise greater control over the identification of issues that should be addressed in a hearing. After this is in place, staff should be responsible to ensure that the Board has a thorough evidentiary basis to address these issues and clearly address the public interest aspect of these issues. Staff positions should be stated clearly on the public record so that parties may respond to them. Clear issue identification and development is also required to assist parties in their preparation of their cases and, in particular, will allow them to identify clearly how their constituency is impacted by the issues in a proceeding. Parties can then be expected to confine their participation to the issues that directly impact their specific constituency both in the pre-hearing processes (discovery and settlement) and at the

hearing itself. Finally, by the time of settlement discussions, the Board should be in a position to identify which issues are appropriate for a settlement. The expectations of parties with respect to settlement should be made clear and reinforced with incentives and consequences.

Part I -- Adjudicative Hearings

The key focus of this review is oral hearings. It is important to put the role of oral hearings at the OEB in context. This is because oral hearings are only one of a number of ways that the Board makes decisions and pursues its regulatory mandates. For example, in the 2004-2005 year, the Board issued approximately 700 decisions, of which less than five per cent resulted from oral hearings.[1] The remainder resulted from written proceedings or proceeded without a hearing. As well, there are many Board issuances which do not require any type of order or any sort of written or oral hearing. Some of these cover very important parts of the Board's mandate. For example, the Board's 2006 Electricity Distribution Rates Handbook, Natural Gas Forum Report, Smart Meter Report, and Regulated Price Plan Handbook were all developed outside of the adjudicative process.

As a result, an oral hearing is only one of many instruments that the Board has available to implement its mandate. A key challenge for the Board is to choose the best instrument in light of the type of direction that is required by the Board.

In this context, it is helpful to consider the nature of the Board's instruments in more detail.

Under the OEB Act, the Board has the power to make orders, rules, codes and policy directions. The key differences between these instruments relate both to their functions and the process by which they are developed.

[1] Ontario Energy Board, 2004-2005 Annual Report, p. 29.

Orders are used to:

- approve rates for services charged by the utility components of the gas and electricity sector;
- approve gas and electric infrastructure facilities;
- issue and amend licences in the electricity sector; and
- make compliance orders.

On the whole, orders may only be issued after a hearing. Hearings may be oral or in writing. The difference between the two largely turns on the minimum legal rights provided to the participants in a hearing. In oral hearings, parties have the right to file evidence, challenge the evidence of other parties, and make oral submissions. [2] In written hearings, parties are entitled to file written materials and have access to all written materials considered by the Board in making its decision.[3] Orders are made by panels on the basis of an evidentiary record.[4]

The Board may also issue Rules (in the gas sector) and Codes (in the electricity sector). Codes/Rules are fundamentally different from orders; as Evans, Janisch, Mullan and Risk state in *Administrative Law: Cases, Text and Materials*, "The essence of a rule, as opposed to an adjudication, is that the former lays down a norm of conduct of general application while the latter deals only with the immediate parties to a particular dispute."[5] As a result, Codes/Rules are useful tools for implementing policy.

In the Gas Sector the Board has issued the following Rules:

- The Affiliate Relationships Code for Gas Utilities;
- The Code of Conduct for Gas Marketers; and
- The Gas Distribution Access Rule.

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[2] *Statutory Powers Procedure Act*, R.S.O. 1990, C. 22, ("*S.P.P.A*") s. 10.1
[3] *S.P.PA.*, 5(3). It should be noted that these are the minimum statutory requirements; the Board may also make orders respecting additional disclosure requirements as the circumstances require.
[4] *Ontario Energy Board Act, 1998* ("*OEB Act*"), s. 4.3.
[5] J.M. Evans, H.N. Janisch, David J. Mullan and R.C.B. Risk, *Administrative Law: Cases, Text and Materials* (Toronto: Emond Montgomery, 2003), at 675. See Chapter 8 for a discussion of rule making.

In the Electricity Sector, the Board has issued the following Codes:

- The Affiliate Relationships Code for Electricity Distributors and Transmitters;
- The Code of Conduct for Electricity Retailers;
- The Distribution System Code;
- The Retail Settlement Code;
- The Standard Supply Service Code; and
- The Transmission System Code.

Proposed Codes/Rules are circulated for notice and comment, which may be received in writing or through oral submissions. They are often developed through a consultation process where Board staff issue a paper and a proposed rule and meet with stakeholders to collect comments and perspectives. These materials may be issued prior to, during or after the public meetings. Codes/Rules are made by the Board, not panels of the Board.[6]

Finally, the Board may issue policy directions which set out the general approach that the Board plans to take in exercising its statutory powers. Guidelines do not necessarily have a statutory basis, nor are they established through a statutory process. Like rules, guidelines are also concerned with conduct. However, unlike rules, guidelines are not binding. As Professor Hudson Janisch states in the work cited above:

> Terminology here is very fluid as "policy" may include "manuals," "guidelines," "standards" and the like. Nothing turns on the precise term employed. The important thing is that unless an agency is given legislative authority to make binding rules, it must always consider exceptions to its general approach. [7]

The courts have encouraged agencies to adopt policy guidelines in the absence of express statutory authority to bring about greater predictability in decision making. The Supreme Court of Canada upheld the authority of the Canadian Radio-television and Telecommunications Commission to issue policy guidelines, despite the lack of specific statutory authority, as part of its role in implementing the Government of Canada's

[6] *OEB Act, 1998*, ss. 4.3, 44, and 70.1.
[7] Ibid., at 266.

broadcasting policy. According to Chief Justice Laskin: "An overall policy is demanded in the interests of prospective licensees and of the public under such a public regulatory regime as is set up by the *Broadcasting Act*. Although one could mature as a result of a succession of applications, there is merit in having it known in advance."[8]

Other agencies have also adopted policy guidelines without specific statutory authority, the most well-known of which are the guidelines issued under the *Competition Act (Canada)* respecting matters such as mergers, predatory pricing and price discrimination. Again, these guidelines are not legally binding, but a regulatory innovation that serves the goals of clarity and predictability. As the Federal Court of Appeal put it in reviewing these guidelines:

> In addition, the possibility that a reviewing court may not agree with an agency's view of the law is an inevitable risk associated with the administrative practice of issuing non-binding guidelines and other policy documents to shed light on agency thinking and to assist those subject to the regulatory regime it administers. The risk should deter neither the courts from deciding what the law is, nor the agencies from engaging in the often useful exercise of administrative rule making.[9]

The following are examples of policy directions issued by the Board:

- Environmental Guidelines for Hydrocarbon Pipelines and Facilities in Ontario;
- The Report on the Natural Gas Forum; and
- The 2006 Electricity Distribution Rates Handbook

As indicated, there is no specific legislative basis for policy directions or the process to be used to develop them. The Board's practice has been to consult on these directions through a notice and comment process much like that followed for Codes/Rules.

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[8] *Capital Cities Communications Inc.* v. *Canadian Radio-television and Telecommunications Commission*, [1978] 2 S.C.R. 141 at 171.
[9] *Canada (Commissioner of Competition)* v. *Superior Propane Inc.*, [2001] 3 F.C. 185, para. 146.

The legal processes for orders, Codes/Rules and guidelines are thus quite different. These differences can also be viewed from a functional perspective. From a functional perspective, the Board's key output is a decision, rule, etc. that provides direction to individual parties and the energy sector as a whole. The key inputs consist of information provided by parties and from other sources. The legal processes differ largely on how that information is collected, processed and ultimately reflected in a decision. This is reflected in the following table.

Type of Decision	Information Collection	Information Processing	Decision
Order	Attested Materials Filed by Parties Precisely Described Relevance Criteria	Focus on Creating Evidentiary Record (intense scrutiny through highly formal rules) Labour intensive for Applicants, Intervenors and Board Staff	Enforceable Remedy aimed at Identified parties; not binding on other parties. Issued by Panel.
Code/Rule	General experience in sector Sectoral Technical Working Groups Driven by Operational Needs of Market Participants	Notice and comment provided either in writing, consultative working groups and/or oral submissions directly to Board members.	Creates generic rights and obligations to guide future behaviour of sector participants. Issued by Board.
Policy Directions	Same	Few Formal Restrictions. Public consultation and stakeholdering through a number of forums.	Provides Direction, Advice, Information or Guidance, does not Bind Board or Parties. Issued by Board.

As is illustrated in this table, the key difference between hearings and other initiatives is that hearings involve intense scrutiny of evidence for the purpose of creating a record upon which a Board panel may make a decision. It has been an effective tool for the Board to find facts that are relevant to support an order aimed at an identifiable company. It is also resource intensive, as the Board and the parties before it aim at ensuring the record is thoroughly and intensively scrutinized.

In other circumstances, where the Board is more concerned with directing outcomes for the sector on a prospective basis, the intensive hearing approach to building a record may not be appropriate. In these circumstances, the Board may be better to draw on its expertise in the area as well as from a range of other sources. That information is not collected through cross-examination, but from broader sources, without the need to have it formally introduced through sworn testimony.

The distinction between these two forms of evidence collection is sometimes referred to as the difference between adjudicative facts and legislative facts. Professor Davis has provided the following seminal description of this distinction:

> "Adjudicative facts are the facts about the parties and their activities, businesses and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why and with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion."[10]

Using this broad (and perhaps over general) distinction between adjudicative and legislative facts, it could be argued that adjudicative facts are best uncovered through hearings in support of party specific findings, and legislative facts are best determined

[10] K. Davis, *Administrative LawTreatise* (1958) at 702. For a discussion of this distinction in the Canadian legal context, see: H.N. Janisch, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada" (1979), 17 Osgoode Hall Law Journal 46 at 76-77.

through non-adjudicative processes in support of general sectoral policy. Most commentators who have considered this issue have argued that the hearing process is severely restricted when it comes to developing policy.

For example, the *Final Report of the Ontario Task Force on Securities Regulation,* which made recommendations about the role of rule making in the context of securities regulation, expressly stated that hearings should not be a mandatory component of the notice-and-comment procedure. Professor Ron Daniels, who authored the report, would only go so far as to endorse "the use of public hearings to the extent they may enhance the development of certain policy instruments in appropriate circumstances."[11]

Others have been more critical of the use of public hearings in rule making. Professor David Mullan, commenting on the history in the United States, where rule making is used much more extensively than in Canada,[12] stated:

> The anxious experimentation with more detailed procedures by Congress and the agencies themselves has demonstrated that the rule-making process should seldom, if ever, be surrounded by all the procedural requirements which attend a court-like adjudication.[13]

Similarly, Professor Hudson Janisch has identified and analyzed the following reasons why rule making (whether through binding rules or through non-binding guidelines) is preferable to an "*ad hoc* order":[14]

- public participation
- legitimacy

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[11] Ontario Task Force on Securities Regulation, *Responsibility and Responsiveness: Final Report of the Ontario Task Force on Securities Regulation* (Toronto: Queen's Printer for Ontario, 1994), at 36.
[12] For a discussion of the American experience, see K.C. Davis, *Administrative Law of the Seventies* (Rochester and San Francisco: LCP BW Publishing, 1976).
[13] D.M. Mullan, "Rule-Making Hearings: A General Statute for Ontario?" prepared for the Commission of Freedom of Information and Individual Privacy, 1979, at 11. See also the discussion at 156–157, where Professor Mullan quotes from the Administrative Conference's recommendation that it "emphatically believes that trial-type procedures should never be required for rule-making except to resolve issues of specific fact."
[14] H. Janisch, "The Choice of Decision-Making Method: Adjudication, Policies and Rule Making" (1992), *Law Society of Upper Canada Lectures* 259 at 266. Professor Janisch is referencing A.E. Bonfield, "State Administrative Policy Formulation and the Choice of Law Making Methodology" (1990), 42 Admin L.R. 121 at 122–131.

- visibility
- comprehensibility
- efficiency
- abstraction
- appropriate factual basis
- initiative
- easier participation
- prospective application
- consistency

The point here is not to criticize the adjudicative process generally or how it has operated at the Board. The hearing process is legally and practically necessary for the Board to determine adjudicative facts. However, it is inappropriate and largely ineffective at developing policy. The limitations in the hearing process in developing policy are demonstrated by the findings in the Board's Natural Gas Forum Report (the "NGF Report"). The NGF Report was a policy exercise aimed at laying out the regulatory framework for the natural gas sector. It identified several issues that contain important policy questions that required resolution. Most of those issues had been identified in adjudicative hearings but could not be pushed to resolution simply through the adjudicative process. Greater direction was required than could be provided by the adjudicative process.

It is also important to bear in mind that the different statutory instruments can and should be used together as part of a comprehensive and coherent approach to energy regulatory issues. In this way, non-adjudicative policy instruments may be used to set the context, framework and policy goals of a given proceeding and the adjudicative process may then be used to identify the adjudicative facts that must be established to make a specific order. A recent example of where the Board has proceeded in this manner is the York Region proceeding.

In the York Region proceeding, the Board identified that there was a serious issue respecting the adequacy of electricity supply to York Region. This determination was made through a non-adjudicative process – by reference to reports and forecasts from the Independent Electricity System Operator and the Board's collection of other publicly available information. The Board then structured a proceeding so that it could determine whether and how to exercise its statutory powers. In doing so, the Board clearly identified the issues it was going to address and the type of evidence it considered necessary to support an ultimate order. This was done through non-adjudicative processes. The Board also used an adjudicative process (in that case a written hearing) to establish the adjudicative facts that identified the specific cause and optimal solutions to the York Region supply situation. It relied upon these facts to order a specific remedy that certain licence holders implement infrastructure solutions to address the issue.

This example demonstrates how the Board may use its adjudicative and non-adjudicative functions in a coordinated and coherent way to produce decisions that are relevant and focussed on key issues. Seen this way, the adjudicative process is used for what it does best – adjudicative fact finding; and the non-adjudicative process is used for what it does best – establishing factual and legal context and issues development.

It is therefore recommended that these practices be more firmly and consistently used by the Board as follows:

- Adjudicative hearings should be largely restricted to circumstances where fact finding is required to support an order. Where possible, policy matters should be addressed in codes, rules or guidelines.

- Hearings should be constrained by detailed and clear issues development prior to the commencement of discovery processes, such as technical conferences and written interrogatories.

Part II - Role of Staff

This part of the paper looks at the role of Board staff in decision making. Within the last several years, the Board has employed a different role for staff and Board Members in the two types of decision making: in non-adjudicative processes and written hearings, staff provide legal, technical and policy expertise and analysis and Board Members take that into account when making a decision. In most oral hearings, staff does not provide this role. The Board relies on parties (applicants and intervenors) to provide substantive input; staff facilitates this input. Specifically, the parties are responsible to put forward and evaluate all options that may be considered by a panel in a proceeding. Thus, in the vast majority of processes at the Board that do not involve oral hearings, there is a division of responsibility within the Board that allows the expertise of the entire institution to be drawn upon to provide input respecting the identification and evaluation of options for the Board to take into account in its decision making. In oral hearings, the universe of possible solutions must come from the parties to the proceeding. The institutional expertise of the Board is not drawn upon by panels.

This practice may not facilitate the optimal achievement of the Board's statutory mandate.

The Board has a statutory mandate to exercise its expertise in both adjudicative and non-adjudicative decision making. The practice of isolating its adjudicative function from its institutional expertise is inconsistent with the expectations of a body with substantive expertise which the courts have recognized as meriting deference.

An issue which then arises is how to integrate the Board's substantive expertise in its adjudicative processes to ensure that processes are consistent with the Board's commitment to procedural fairness.

Each of these will be addressed in turn.

(i) Expertise: Adjudicative and Substantive

The distinction between adjudicative and substantive expertise arises in the context of identifying the level of deference that courts accord decisions of tribunals on the grounds that the tribunal is exercising expertise. In determining the tribunal's expertise, a key issue is whether the tribunal is primarily responsible for the resolution of disputes between parties (adjudicative expertise) or the implementation of policy (substantive expertise). Where the tribunal exercises substantive expertise the courts will accord its decisions with greater deference.

Thus, for example, in *Monsanto v. Ontario (Superintendent of Financial Services)*[15], the Supreme Court of Canada considered the degree of deference owing to a decision of the Financial Services Tribunal ("FST") respecting the distribution of actuarial surplus upon the partial wind up of a pension plan. The Court reviewed the statutory mandate and make up of the FST and held, although the FST had an expertise in holding hearings, it did not have substantive expertise deserving of deference. According to the Court:

> "...the Tribunal does not have specific expertise in this area. The Tribunal is a general body that was created under the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 ("*FSCOA*"), s. 20, to replace the specialized Pension Services Commission. It is responsible for adjudication in a variety of "regulated sector[s]" (*FSCOA*, s. 1), including co-operatives, credit unions, insurance, mortgage brokers, loans and trusts, and pensions (*FSCOA*, s. 1). In addition, the nature of the Tribunal's expertise is primarily adjudicative. Unlike the former Pension Services Commission or the current Financial Services Commission, the Tribunal has no policy functions as part of its pensions mandate (see *FSCOA*, s. 22). As noted in *Mattel Canada*, *supra*, and in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, involvement in policy development will be an important consideration in evaluating a tribunal's expertise. Lastly, in appointing members to the Tribunal and assigning panels for hearings, the statute advises that, to the extent practicable, expertise and experience in the regulated sectors should be taken into account (*FSCOA*, ss. 6(4) and 7(2)). However, there is no requirement that members necessarily have special expertise in the subject matter of pensions. The Tribunal is a small entity

[15] *[2004]* 3 S.C.R. 54

> of 6 to 12 members which further reduces the likelihood that any particular panel would have expertise in the matter being adjudicated (*FSCOA*, s. 6(3)).
>
> Overall, there is little to indicate that the legislature intended to create a body with particular expertise over the statutory interpretation of the Act. The Tribunal would not have any greater expertise than the courts in construing s. 70(6). Thus, this factor also suggests a lower amount of deference is required to be given to the Tribunal's decisions on the issue of statutory interpretation."

As a result, there are two major indications that a tribunal has substantive expertise: first, a statutory requirement that tribunal members have expertise; and second, that the tribunal has a non-adjudicative policy role.

These two components were also considered by the Federal Court of Appeal in *Canada (Commissioner of Competition) v. Superior Propane Inc.*[16] In that case, the Federal Court of Appeal found that the appointment process of members to the Competition Tribunal was sufficient to inject the requisite expertise in the Tribunal.[17] However, the Court also held that the substantive policy expertise of the Competition Bureau could not clothe the Tribunal with expertise because the Bureau and the Tribunal were not part of an integrated organization. According to the Court:

> "...the Tribunal is an adjudicative body. Just as it has done with the administration of human rights legislation, Parliament has divided responsibility for administering the Competition Act between the Competition Bureau, the policy-making, investigative and enforcement agency, headed now by the Commissioner, and the Tribunal, the adjudicative agency. In this respect, the Tribunal is different from multi-functional administrative agencies, such as securities commissions in many provinces, which typically have wide powers that match their regulatory mandate. The absence of broad policy development

[16] [2001] F.C.J. NO. 455

[17] Specifically, the Court noted that, prior to appointing members of the Tribunal, "the Minister must consult with an Advisory Council comprising not more than ten members, who, the CTA, subsection 3(3) provides, are appointed from those

> "...who are knowledgeable in economics, industry, commerce or public affairs and may include, without restricting the generality of the foregoing, individuals chosen from business communities, the legal community, consumer groups and labour."

> powers is a factor that limits the scope of the Tribunal's expertise: Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557, at page 596."

It was therefore the separation of the policy role of the Bureau from the adjudicative role of the Tribunal which limited the scope of the latter's expertise. As the Court noted, the Tribunal is an adjudicative, not a policy body.

Given that the *Ontario Energy Board Act* does not contain a requirement that Board Members may only be selected from a pool of experts, it is helpful to focus on how the non-adjudicative policy making role feeds into a tribunal's expertise. This has been referred to in several cases. For example, in *Mattel*, the Court noted that, in addition to statutory requirements for expert appointments, the Courts will also look to "whether any special procedures or non-judicial means of implementing the Act apply, and whether the tribunal plays a role in policy development" when determining whether a tribunal has substantive expertise. In that case, the Court found that there was some limited expertise in the Tribunal because its "policy-making role is limited in that its function is primarily research oriented, and the CITT cannot elevate its policy recommendations to the status of law."

Similarly, in *Pezim v. British Columbia (Superintendent of Brokers)*[18], the Supreme Court of Canada said the following with respect to securities commissions:

> Where a tribunal plays a role in policy development, a higher degree of judicial deference is warranted with respect to its interpretation of the law. This was stated by the majority of this Court in *Bradco* [*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316] at pp. 336-37:
>
> > . . . a distinction can be drawn between arbitrators, appointed on an *ad hoc* basis to decide a particular dispute arising under a collective agreement, and labour relations boards responsible for overseeing the ongoing interpretation of legislation and development of labour relations policy and precedent within a given labour jurisdiction. To the latter, and other similar specialized tribunals responsible for the regulation of a specific industrial or technological sphere, a greater degree of deference

[18] [1994] 2 S.C.R. 557

> is due to their interpretation of the law notwithstanding the absence of a privative clause. (emphasis added)
>
> In the case at bar, the Commission's primary role is to administer and apply the Act. It also plays a policy development role. Thus, this is an additional basis for deference. However, it is important to note that the Commission's policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment.

As indicated, in the *Superior Propane* case, the Federal Court of Appeal held that the Tribunal did not share the policy expertise of the institution because the Bureau staff's policy function was isolated from adjudicative decision making.

The non-adjudicative and policy roles are particularly important in considering whether it is appropriate for decision makers to be isolated from the institutional expertise of the Board. The Board clearly has extensive non-judicial tools through its rule and code making authority. In fact, because the Board's rule and code making authority imposes rules that are binding on both of panels and industry participants, this authority is much stronger than the non-binding policy powers referred to by the courts in *Mattel, Pezim* and *Superior Propane*.

The key point here is that, when exercising those non-judicial means, the Board decision makers are not quarantined from the rest of the institution. Board Members make the rules and codes after receiving input from staff as well as stakeholders. The ultimate code or rule is the culmination of the work of the institution – both staff and Board Members. The expertise reflected in rule and code making is thus an institutional expertise. It is difficult to argue that this institutional expertise can infuse the adjudicative decisions of the Board if the Board deliberately quarantines the adjudicative decision-making process from that expertise. To the contrary, such an approach would mirror, on a voluntary basis, the mandatory separation of policy functions and adjudicative functions in agencies such as the Competition Bureau and the Competition Tribunal.

There are two key consequences of insulating panels from the institutional expertise of the Board. The first, as indicated, is that the Board may not be able to claim the degree of deference that is accorded expert tribunals.

The second and more fundamental problem is that the Board is not meeting its statutory mandate. If the Board has a policy mandate but exercises only an adjudicative function, it is not meeting the responsibility that the legislature has assigned to it. Dean Landis of Harvard Law School identified the defining feature of administrative processes as follows:[19]

> "The [administrative] process to be successful in a particular field, it is imperative that controversies be decided as 'rightly' as possible, independently of the formal record the parties themselves produce. The ultimate test of the administrative is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making."

The Board's public interest mandate approach not only runs counter to the approach which would have the Board only adjudicate upon parties' disputed issues, it puts an affirmative duty on the Board to ensure that public interest issues are addressed. This was expressed by the United States Court of Appeal in the context of the Federal Power Commission (the predecessor to the FERC):[20]

> "In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."

This in turn puts a positive duty on staff to identify and evaluate options to present to the panel in a proceeding. The authors of Macaulay and Sprague, *Practice and Procedure before Administrative Tribunals* quote approvingly from a statement by the U.S. Federal

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[19] Landis, the Administrative Process (Harvard, 1938) at 39.
[20] *Scenic Hudson Preservation Conference* U.S. App. LEXIS 3514 [32-33]

Trade Commission: "...if the staff fails adequately to present the public interest and to raise all the relevant questions, no one else will".[21] According to Macaulay and Sprague:[22]

> "What is essential to realize is that a tribunal has a duty to provide a balanced record, to test every assumption, to challenge every impact and wring out every issue. *No tribunal* can wait for the apple to fall. It must shake the tree. This balance is obtainable through the active participation by staff in the hearing process."

In other words, for Board staff to proactively put before the Board the public interest position on matters where it is relevant is both a distinct role from that of the parties and is consistent with the Board's statutory mandate and responsibilities. Specifically, in making its decisions, the Board should not be limited to the options put forward by parties or the evaluation of those options by the parties. Panels will benefit from staff's identification and evaluation of options for the Board to consider.

In conclusion on this point, the Board's policy mandate and expertise should inform decisions that result from the adjudicative process. It is therefore inappropriate to quarantine the decision makers from the institutional expertise in making those decisions. The next part of this report reviews the way in which this may be done in a manner consistent with the Board's commitment and legal responsibilities as they relate to a fair and open hearing process.

(ii) Open and Fair Hearings

As an adjudicative tribunal, the OEB must make its decisions in accordance with the statutory and common law rules respecting fairness and due process. The issue is the content of these rights as they relate to positions taken by staff. Specifically, given that staff may assist panels in the deliberative process, the question is whether it is appropriate for the same staff to identify and evaluate options in an oral hearing. In legal terms, the

[21] (Toronto: Carswell, 1988), at 14-8.2.
[22] Ibid., at 14-12.

question is whether this dual role is consistent with the requirements of fairness that attend the Board's hearing process. Addressing this first requires an elaboration of the role of staff being advocated in this report.

The staff role being proposed here is the identification and evaluation of options for consideration by the panel. This involves demonstrating leadership in the hearing room, but not for the purpose of supporting or opposing a party's position. Staff's only driver is the public interest, and they remain neutral as between parties. Their analysis may lead them to see one argument or option as having greater public interest value than another. This is not the same as taking an adversarial position against a party. There are clearly limitations on how adversarial staff may be in pursuing its positions. The courts have noted that tribunal staff, where leading evidence and making submissions, represents the public interest, and therefore have a different responsibility than a private party. The seminal statement in the area is from the British Columbia Supreme Court in *Omenieca Enterprises Ltd. v. British Columbia (Minister of Forests)*:[23]

> "...counsel for the tribunal may be called upon to lead evidence, cross-examine witnesses and make submissions with a view to putting the tribunal as fully in the picture as possible. In so doing, it is important for counsel to proceed in a spirit of disinterested inquiry and to avoid the appearance of partisanship of behalf of any interest. It is undesirable to be too dogmatic in attempting to define the proper functions of counsel to administrative tribunals in all circumstances. The overriding objective is always to ensure that the proceedings are fair and impartial."

Provided that staff are pursuing a public and non-partisan interest, and provided that staff positions are put on the record or otherwise disclosed to the parties, staff involvement both in the hearing and in assisting the Board following a hearing is consistent with the duty of fairness owed to the parties in the circumstances of a Board hearing.

The Supreme Court of Canada described the underlying purpose of the duty of fairness as follows in *Baker v. Canada*:[24]

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[23] (1992), 7 Admin. L.R. (2d) 95 (B.C.S.C.) at 99-100.
[24] (1999), 174 D.L.R. (4th) 193 at 211.

> "I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained with the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker."

The Court listed a number of factors to be considered in identifying the content of the duty of fairness in any particular case. The analytic framework employed by the Court to evaluate the duty of fairness is based on a contextual assessment of the tribunal and its operations. As the Court observed in *2747-3174 Quebec Inc. v. Quebec*:[25]

> "As is the case with the courts, an informed observer analysing the structure of an administrative tribunal will reach one of two conclusions: he or she either will or will not have a reasonable apprehension of bias. That having been said, the informed person's assessment will always depend on the circumstances. The nature of the dispute to be decided, the other duties of the administrative agency and the operational context as a whole will of course affect the assessment. In a criminal trial, the smallest detail capable of casting doubt on the judge's impartiality will be cause for alarm, whereas greater flexibility must be shown toward administrative tribunals. As Lamer C.J. noted in *Lippe, supra, at p. 142,* constitutional and quasi-constitutional provisions do not always guarantee an ideal system. Rather, their purpose is to ensure that, considering all of their characteristics, the structures of judicial and quasi-judicial bodies do not raise a reasonable apprehension of bias. This is analogous to the application of the principles of natural justice, which reconcile the requirements of the decision-making process of specialized tribunals with the parties' rights. I made the following comment in *IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282, at pp. 323-24:*
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> > "I agree with the respondent union that the rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an administrative tribunal such as the Board to abide strictly by the rules applicable to courts of law. In fact, it has long been recognized that the rules of natural justice do not have a

[25] (1996),42 Admin. L.R. (2d) 1 at para. 45:

> fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces."

In addition to the attention paid to the institutional context of the tribunal and its operations, another clear point arising from the case-law is that the content of the duty can change depending upon the impact of the decision on the party to a proceeding. As the Court held in *Baker*:

> "The more important the decision is to the lives of those affected and the greater its impact on that person or persons, the more stringent the procedural protections that will be maintained. This was expressed for example by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia,* [1980] 1 S.C.R. 1105 at p. 1113, 110 D.L.R. (3d) 311:
>
> > 'A high standard of justice is required when the right to continue in one's profession or employment is at stake...A disciplinary suspension can have grave and permanent consequences upon a professional career.'
> > ...
> > The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness."

As a result, it is too simplistic to identify a single duty of fairness that the Board must meet in all of its proceedings. Some Board decisions have a greater impact on persons than others. It is therefore best to identify the content of the duty of fairness by reference to the impact of different types of Board decisions on the rights of various parties.

There is considerable case-law and academic discussion on the role of staff in administrative proceedings and how the boundaries of that role are different depending on the nature of the proceeding. For example, where staff acts as a prosecutor in a proceeding, the duty of fairness requires that staff not assist in the deliberative process. The Supreme Court of Canada put it as follows in *2747-3174 Quebec Inc. v. Quebec:*[26]

[26] (1996),42 Admin. L.R. (2d) 1 at 125:

> "This is not to say that jurists [i.e., lawyers] in the employ of an administrative tribunal can never play any role in the preparation of reasons. An examination of the consequences of such a practice would exceed the limits of this appeal, however, as I need only note, to dispose of it, that prosecuting counsel must in no circumstances be in a position to participate in the adjudicative process. The functions of prosecutor and adjudicator cannot be exercised together in this manner."

In this decision, the Supreme Court of Canada endorsed the following quotation from the Ontario Court of Appeal in *Sawyer v. Ontario (Racing Commission)*[27]

> "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 Colleges of Physicians & Surgeons*, [1966] 2 O.R. 81 at p. 99 ["*Glassman*"]. He was counsel for the appellant's adversary in proceedings to determine the appellant's guilt or innocence on the charge against him. It is basic that persons entrusted to judge or determine the rights of others must, for reasons arrived at independently, make that decision whether it or the reasons be right or wrong. It was wrong for the Commission, who were the judges, to privately involve either party in the Commission's function once the case began and certainly after the case was left to them for ultimate disposition. To do so must amount to a denial of natural justice because it would not unreasonably raise a suspicion of bias in others, including the appellant, who were not present and later learned what transpired."

Both of these decisions related to cases where the tribunal's counsel was both a prosecutor and an advisor: these two functions were held to be incompatible.

Where staff is not in a prosecutorial role, the legal requirements are different. As indicated earlier, this is largely because the law imposes different types of procedural restrictions on tribunals where different rights of a person before it are at stake. Where, such as in the case of a prosecution, a person's career and livelihood are at stake, the courts will impose greater restrictions on tribunals. Where the Board acts in its function as an economic regulator, these restrictions are reduced. Specifically, in this context, the courts' concern with tribunal practices has tended to focus more on ensuring that staff submissions are disclosed to the parties. In other words, the courts do not require that

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[27] (1979), 24 O.R. 673 ("*Sawyer*") at 676

staff not make submissions in proceedings; rather, the emphasis is that parties are made aware of and have an opportunity to respond to staff submissions.

For example, in the *Glassman* decision referred to by the Ontario Court of Appeal in *Sawyer*, the College of Physicians & Surgeons retained independent counsel to advise on matters of law. Although the advice would be provided in prosecutions, the counsel was not a prosecutor. Counsel provided legal advice on the record and parties were given the opportunity to respond. Counsel was also present during the course of deliberations. The Court of Appeal held that the requirement for disclosure of counsel's advice was sufficient to meet any concerns about a denial of natural justice. In coming to this conclusion, the Court explicitly relied upon its earlier decision in *R. v. Public Accountants Council Ex p. Stoller.*[28] In that case, the Court again held that, in a non-prosecutorial position, counsel in the hearing may continue to advise the decision maker: "I point out again that on the authorities, a case such as this is not comparable to a trial where there is a prosecutor and an accused."[29]

Thus, in the non-prosecutorial context, the courts' emphasis has been on ensuring that parties have the right to know and answer the case they have to meet. This involves a requirement that a decision maker not base his or her decision on facts which are not on the record and parties have the opportunity to respond to legal and policy arguments that are considered by the decision maker. The Supreme Court of Canada characterized this right as follows in *Consolidated Bathurst Packaging Ltd.* (1990), 42 Admin L.R. 1 at 38:

> "Since its earliest development, the essence of the *audi alteram partem* rule has been to give the parties a 'fair opportunity of answering the case against [them]...It is true that on factual matters the parties must be given a 'fair opportunity...for correcting or contradicting any relevant statement prejudicial to their view'...However, the rule with respect to legal or policy arguments not raising issues of fact is somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. This right

[28] [1960] O.R. 631.
[29] *Sawyer*, at . 698. For a more recent example of the restrictions in disciplinary proceedings, see: Ahluwalia v. College of Physicians and Surgeons of Manitoba, [1999] M.J. No. 55

does not encompass the right to repeat arguments every time the panel convenes to discuss the case."

Similarly, in *Carlin v. Registered Psychiatric Nurses' Association* Binder J. stated the following:[30]

"In my opinion, in general, it is proper for counsel to:

1. Attend at the hearing of a tribunal, to provide advice to the tribunals, when *requested* by the tribunal to do so, provided, except in very special circumstances, that such advice is given *openly and in the presence of all interested parties*.
2. Assist the hearing tribunal in preparing and even drafting the reasons for decision of the tribunal." (emphasis in the original)

The above passages suggest that, in the non-prosecutorial context, a fair trial requires ensuring that parties have the opportunity to know the case they have to meet. That right consists of being able to respond to law and policy arguments put forward by staff.

This approach is also demonstrated in cases where the courts have been critical of tribunals for not giving parties the opportunity to respond to staff positions. For example, in *B.P. Canada Energy Co. v. Alta (Energy & Utilities Bd.)*, the Alberta Court of Appeal found that a party's right to know the case it had to meet was arguably violated because the Alberta Energy Utilities Board staff and the panel conducted examinations of "core logs and other data not in evidence at the hearing... The fact that the parties were not present for these examinations contributes to this issue's seriousness."[31] The same Court, although dismissing a leave to appeal motion as premature, acknowledged that there may have been arguable issues for appeal with respect to staff's presentation to the Board of "evidence or interpretation of evidence [that] is not disclosed to hearing participants."[32]

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[30] (1996), 39 Admin L.R. (2d) 177 (Alta. Q.B.), at 199 (emphasis in the original).
[31] (2003), 6 Admin. L.R. (4th) 163 at 173.
[32] *Devon Canada Corp. v. Alberta (Energy & Utilities Bd)*, (2003), 3 Admin. L.R. (4th) 154 at 158

This is also aligned with academic opinion. In *Regulations of Professions in Canada*, J.T. Casey proposes the following approach:[33]

> "...the solution lies in the adoption of a procedure which permits counsel to a discipline tribunal to be present during deliberations but which also ensures that the dictates of procedural fairness are met. A commitment that the 'prosecutor' and counsel to the member facing charges will be given the opportunity to address any new legal issues or arguments which arise during deliberations and which were not previously canvassed by the parties in open hearings, would alleviate most of the concerns."

This approach is supported in Jones and deVillars, *Principles of Administrative Law* (3d), where the authors state that providing parties with the opportunity to respond to any new issues raised in deliberations "is entirely consistent with the principles set out in *Consolidated Bathurst* and *Tremblay* and provides the better view of what are the appropriate constraints on counsel to an administrative tribunal."[34]

Finally, in the American context, William F. Pedersen has argued that openness in administrative tribunal decision making reflects an improved method of policing fairness than imposing restrictions on staff's ability to communicate with panels:[35]

> "All these measures abandon splitting up the agency internally as a means of reducing bias. Instead, they treat the agency as a unit in which all staff members are available to advise in a final decision. They then open up the deliberations of that unit to the scrutiny of outside forces to a much greater extent than has been customary. The checks and balances on the agency remain, but they depend much less than they did on analogizing the agency to a court."

A review of the case law and the literature suggests little support for the position that, as a legal matter, staff cannot both make submissions in a proceeding and continue to assist panels in preparing decisions in non-prosecutorial hearings. The key requirement is that parties be made aware of staff positions and have the opportunity to respond.

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[33] (Toronto: Carswell, 1994) at 8-38 to 8-39)
[34] (Toronto: Carswell, 1999) at 325.
[35] "The Decline of Separation of Functions in Regulatory Agencies" (1978), 64 Virginia Law Review, 991 at 1031.

It is therefore recommended that:

- Board staff should participate in hearings with the objectives of identifying and evaluating options for the Board's consideration in a proceeding by reference to the public interest. Staff should be required to present its view of the public interest on the record so that parties may respond to it. Only in very rare cases, staff's participation in a proceeding in this role may be incompatible with its ability to assist the panel in its deliberative process. An example of this is where staff is in a prosecutorial role in a compliance proceeding in Part VII.1 of the Act.

Part III – Role of Parties

The role of the parties in OEB proceedings is linked to the role of staff. The minimal role of staff over the last several years has been accompanied by an increased reliance on parties to the proceeding. This has led to both benefits and costs. The benefit is that the OEB benefits from having a fully engaged stakeholder community. It is not unusual for a Board proceeding to have several representatives of groups representing residential customers, institutional customers, commercial customers, industrial customers, retailers, generators and environmental groups. These intervenors bring their perspective to bear on the complex problems addressed by the Board. The Board encourages intervenor participation through cost awards for hearings, Code/Rule development, and policy initiatives. It is one of the most extensive cost awards regimes in the country.

The cost of this approach is that the parties have been relied upon to represent, not just the particular interests they are retained to advance, but the totality of the public interest. As indicated, staff have not been used to add to the options presented to the Board. In addition to the issues respecting the Board's mandate discussed earlier, there are additional concerns to leaving the development of issues entirely to the parties.

One concern is that the interests claimed to be represented before the Board are extremely broad and cannot reasonably be presumed to align within the organizations that intervene

before the Board. For example, most parties before the Board claim to represent vastly broad and divergent groups, such as "residential customers". Residential customers of energy consist of virtually every person resident in Ontario. It is inconceivable that every resident in Ontario is capable of constituting a single interest on complex matters of energy policy before the Board. For example, what is the interest of residential customers on the creation of retail commodity purchase options? Some customers, who have no interest in retail competition receive no benefit from this option. Other customers, who are interested in retail options, or who are served by retailers, may benefit from having more options available. In these circumstances, residential customers will have quite varied, and even conflicting, interests. A related example is whether residential customers benefit from policies that reduce price volatility of system supply. Some customers may and some may not. When faced with these types of issues, residential customer representatives who wish to advocate on behalf of residential customers must make a determination of which approach to support. In making this choice, they are effectively making policy trade-offs between different categories of customers.

Allowing these representatives to make the trade-offs themselves is not a problem for the Board if the intervenors' representation is accepted as a meaningful but not exclusive input into the Board's determination of what is in the interests of residential customers. In this case, intervenors representing residential customers present a perspective that the Board should consider. This only becomes a problem if the Board treats the customer representatives as representing the "sole" voice of residential customers and is unwilling to consider the matter further. In such a situation, the Board is expecting the intervenor to make the trade-offs that are involved in deciding on a position. In this case, the Board's mandate to represent the interests of consumers (as well as other interests) is exercised by merely registering the opinion of the intervenor.

Another consequence of not using a proactive staff model is that the role of the parties may arguably have become somewhat open ended. Applicants and intervenors provided the entire landscape of options before the Board. With the participation of a proactive

staff that is representing the public interest, the role of parties to proceedings may take on a sharper focus. Intervenors, in particular, will have a clearer and more precise mandate to represent the interests of their constituency. This clarity should make their participation more valuable to the Board and perhaps even allow them to more clearly represent their client's interest.

The expectation of a clear and precise representational interest in an intervenor's participation may be demonstrated in a number of ways: standing, costs and conduct in a proceeding. Each will be addressed in turn.

With respect to standing, the Board's Rules of Practice provide that a "person applying for intervenor status must satisfy the Board that he or she has a substantial interest and intends to participate actively and responsibly in the proceeding..." The Rules also provide that every intervention application must identify "the interest of the intervenor in the proceeding and the grounds for the intervention." [36] While the Board has rarely refused a party standing to participate in a hearing, intervenor status has been denied in cases where the issues are beyond the Board's jurisdiction. Furthermore, it is very rare that an application for intervention status has gone beyond a *pro forma* statement that the outcome of a decision may have an impact on a constituency. To be fair, requiring greater specificity to support an intervention application is more difficult where proceedings are open ended and the issues are not developed with any level of specificity until well into the pre-hearing and even hearing stage. Unless issues are clearly identified at the outset of the proceeding, it is not realistic to expect that intervenors can clearly identify the issues that they are interested in pursuing as early as the standing stage of the proceeding. To the extent that the Board does move clear issue development to an early stage of the proceeding, it may be possible to consider more rigorous standing requirements at that early stage.

With respect to costs, the Board's practice is identified in its *Practice Directions on Cost Awards*. These directions set out eligibility requirements as well as granting the panel the

[36] *Ontario Energy Board Rules of Practice and Procedure*, Rules 23.02, 23.03

discretion to award partial or full costs of participating depending on a number of factors, especially the party's contribution to the proceeding. The Board's practice has been to occasionally discount an intervenor's cost awards based on its contribution. There is no known case of the Board refusing to allow an applicant the ability to recover its costs from utility customers. The Board's Business Plan indicates that it will carry out a review of its current funding model in this fiscal year. Given the complexity and contentiousness of the issues at stake in funding, it is probably better to not consider changes to the cost award regime at this stage, and leave that issue to be addressed in a more thorough review as planned. However, where a party (whether applicant or intervenor) needlessly extends proceedings, the Board's authority over cost awards and cost recovery provide it with the ability to impose financial consequences.

Finally, there is conduct in the proceedings – that is, the hearing itself (the pre-hearing process will be addressed below). Panels have the ability to control their process. They are thus clearly in the position to require parties to demonstrate how their participation relates to the interest that they represent. It may be that, as cases are more thoroughly developed through a more proactive staff, panels will be better placed to direct parties to clearly identify this role. This includes asking parties at the commencement of a hearing to indicate which issues they have an interest in and how the issue affects their constituency, and querying an intervenor representative if that representative's participation in cross-examination or argument does not appear to relate to the intervenor's constituency. This requirement can be expressed through greater engagement by the panel in supervising the questions and submissions of parties. As indicated, the Board's authority over cost awards and recovery of regulatory costs could also be used in this regard.

In summary, recommendations in this area are as follows:

- Parties to a proceeding should be required to demonstrate how their participation relates to the specific and particular interest of their constituency. This can be achieved through various methods, including asking parties at the commencement of a hearing to indicate which issues they have an interest in and how the issue

affects their constituency, and querying an intervenor representative if that representative's participation in cross-examination or argument does not appear to relate to the intervenor's constituency. This requirement can be expressed through greater engagement by the panel in supervising the questions and submissions of parties.

Part IV - Pre-Hearing Processes

The Board has broad authority to develop pre-hearing processes, specifically disclosure requirements and pre-hearing conferences. Each will be considered in turn.

(i) Disclosure

The Board has very broad powers to order disclosure of documents and other types of information.[37] The Board's standard practice has been to use the written interrogatory process. This process has some limitations. First, parties write interrogatories independently and at the same time; the result is considerable duplication of questions. Second, there is little cost to asking a large number of questions, so a large number are asked. Third, applicants face little consequence for providing non-responsive answers to questions. They may therefore avoid answering questions and, in anticipation of this, intervenors state their questions very broadly. The number of irrelevant interrogatories is also increased by the lack of clear issue definition in proceedings.

The Board has recently been experimenting with alternatives to written interrogatories, namely, technical conferences and written records. Technical conferences involve discovery of witnesses in the presence of other parties. Transcripts of conferences are admissible as part of the record in the proceedings. Where a witness cannot immediately provide an answer, an undertaking may be provided. An alternative to technical conferences is written records where affidavit evidence is filed and parties may schedule

[37] See S.P.P.A., s. 5.4.

their own cross-examinations where required. The key difference between the two is that the first is an event sponsored and organized by the Board, while cross-examination in the latter is scheduled and conducted by individual parties as required. Both of these discovery mechanisms have an advantage over written interrogatories in that answers are provided in real time and made available to others. They may also be more effective at clarifying technical issues. They are therefore timelier and less duplicative than the written interrogatory process.

A theoretical issue, which has not yet arisen in practice, is that disputes over appropriateness of questions may not be resolved at the technical conference. The Board's Rules of Practice do not explicitly address this issue, but it would be consistent with the Rules for a party to bring a motion to the Board to determine whether answers should be provided. Another alternative would be for a Board Member to attend at technical conferences to provide rulings as required. This would require an amendment to the Board's Rules of Practice.

It has been the practice that transcripts from technical conferences are used as a supplement to a witness's oral testimony, while transcripts from cross-examination on affidavits are used in lieu of oral testimony. However, that is not a necessary distinction, and transcripts may be used in either way. Where transcripts are used in lieu of oral testimony, the parties have been required to file written arguments addressing both factual and legal submissions. Using transcripts as an alternative to oral testimony has greater potential than is currently exercised at the Board. It is widely available in the courts, and can be used wherever there are no material facts in dispute, or where the real issue relates to the inference to be drawn from facts.[38] Given that it is the case in many Board proceedings, the Board could make much greater use of this process than is currently the case. Making greater use of this would be facilitated by explicitly outlining the process in the Board's Rules of Practice.

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[38] Rules of Civil Procedure, Rule 38 and, for example, *Somerleigh v. Lakehead Region Conservation Authority*, [2005] O.J. 4798 and *Collins v. Canada (Attorney General)*, [2005] O.J. 2317.

(ii) Settlement

The *S.P.P.A* grants the Board broad authority to address the settlement or simplification of issues in a proceeding.[39] The Rules of Practice provide for settlement negotiations at the direction of the Board. Settlement discussions are often facilitated by external consultants or Board staff and are carried on without prejudice. Staff attend settlement discussions, but do not sign settlement agreements and information obtained in settlement negotiations is kept in confidence and, in particular, is not shared with the panel assigned to the proceeding.

Settlement negotiations sometime result in comprehensive proposals that resolve most or even all issues between the parties. Settlement proposals are filed with the Board. Where a settlement proposal is unanimous, the Board may approve the proposal and dispose of the issues that are subject to the proposal. A party who does not agree with the settlement of an issue is entitled to offer evidence in opposition to the settlement proposal and cross-examine on that issue at the hearing.[40]

The Board has not explicitly adopted a policy towards settlements and, for example, has not expressly endorsed settlement as generally in the public interest. Given the public interest mandate of the Board, it is unlikely that such a general proposition would be possible.[41] Although the Board has, on occasion, identified some specific issues that should not be settled, it has done so only rarely.[42] Further, the Board has never indicated which issues it believes should be settled or the consequences for parties if there is no settlement. Rather, the settlement process has been largely left to the parties to work out among themselves.

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[39] See *S.P.P.A.*, s. 5.3.

[40] See Ontario Rules of Civil Procedure, Rule 14.05(3)(c), Rule 38.01.

[41] In the analogous example of negotiated rulemaking, the American courts have rejected the proposition that a regulator could bind itself to a negotiated agreement. The United States Court of Appeal stated that "It sounds like an abdication of regulatory authority to the regulated, the full burgeoning of the interest-group state, and the final confirmation of the 'capture' theory of administrative regulation." See: *USA Group Loan Services Inc. v. Riley* 82 F. 3d 708 (7th Cir. 1996) at 714. Quoted in, Alfred Aman, "Administrative Law for a New Century", in Michael Taggart (ed), *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 90 at 107.

[42] The two examples where this has occurred are the IESO proceeding and the current NGEIR proceeding.

Given the lack of guidance from the Board as to the value of negotiated settlement, it is difficult to conclude whether the current process is successful or not. However, there are structural reasons inherent in the Board's process that may work against settlement.

First, the parties do not have clear incentives to settle in order to avoid a hearing. Specifically, the costs of both funded intervenors and utility applicants are passed through to ratepayers. The parties therefore do not bear the expense of proceeding with a hearing.

Second, the reasonableness of parties' positions or conduct within settlement negotiations is kept secret from the panel. Parties therefore do not face consequences for taking unreasonable positions. This may be contrasted with the judicial Rules of Civil Procedure where parties face cost consequences for turning down settlement offers that are more favourable than that obtained by a judgment.[43]

The Board should provide guidance in the course of a proceeding with respect to its expectations for settlement and then provide incentives and other measures to encourage settlement. Specifically:

- The Board's expectations for settlement should be identified in a proceeding. Specifically, the Board should, prior to settlement discussions, advise parties which issues the Board believes should be settled and which issues the Board believes should go to a hearing.

- Board Members (other than the panel) should be made available to participate in the settlement of selected issues, such as through an in-chambers settlement conference or to review proposed settlement options and provide insight and perspective on the reasonableness of parties' positions;

[43] See Rules of Civil Procedure, Rule 49.

- Parties may be required to file their final offer on issues that the Board identifies should be settled. The panel may review these offers after releasing its substantive decision and may consider it in making cost awards and determining whether all of a utility's regulatory costs may be recovered from customers.

** English Version **

Case Name:

Violette v. New Brunswick Dental Society

Between
Dr. Jean-Guy Violette, (applicant) appellant, and
New Brunswick Dental Society, (respondent) respondent

[2004] N.B.J. No. 5

[2004] A.N.-B. no 5

2004 NBCA 1

267 N.B.R. (2d) 205

10 Admin. L.R. (4th) 1

127 A.C.W.S. (3d) 1248

No. 48/03/CA

New Brunswick Court of Appeal

Rice, Deschênes and Robertson JJ.A.

Heard: June 17, 2003.
Judgment: January 8, 2004.

(97 paras.)

Medicine -- Dentists -- Discipline -- Powers of disciplinary body -- Judicial review -- Administrative law -- Judicial review -- Bars -- Alternative remedy.

Appeal by Violette, a dentist, from the dismissal of his judicial review application. A patient's letter complained to the Society that Violette lacked competence to treat her disorder. The Society provided Violette with the letter, but did not issue a formal charge. Violette chose not to attend its disciplinary committee's hearing. Counsel at the hearing was not a prosecutor, but acted as adviser only. The committee found Violette incompetent to treat the disorder and ordered him to cease further treatments. The Dental Act did not expressly require a formal charge. The Act provided for appeals to an appeal

Board, and prohibited stays of the committee's orders. Violette applied for judicial review, arguing that the failure to provide a formal charge was unfair, and that counsel at the hearing was biased and in a conflict of interest. His application was dismissed on the ground that he was required to pursue an appeal to the Board. Violette argued that an appeal to the Board provided an inadequate remedy because the Board consistently supported the Society's policy of not issuing formal charges, and because the Board was unable, pending the appeal, to stay the committee's order that he cease treatment. He further argued that appeals to the Board involved delay and duplicated costs. Evidence showed that Board cases generally moved with dispatch and were not more costly than court proceedings.

HELD: Appeal dismissed. Violette's choice to not attend the committee's hearing constituted a waiver of his complaints of procedural unfairness. If he sought procedural fairness he should have acted fairly by raising timely objections at the hearing. In any case, his complaint regarding the lack of a formal charge was groundless, as the patient's letter provided sufficient information for him to understand the charges of incompetency. His complaint of bias and conflict by the committee's counsel was groundless, given the counsel's limited involvement as its adviser only and not as prosecutor. His complaint of the Board's lack of power to stay the committee's orders could not justify circumventing that statutory prohibition by a judicial review application. The allegation of delay and duplicative costs at the Board level was not supported by the evidence.

Statutes, Regulations and Rules Cited:

Dental Act, S.N.B. 1985, c. 73, ss. 34, 35, 35(1)(a), 35(1)(b), 40(1), 47(3).

Registered Health Professionals Act, S.O. 191, c. 18.

Appeal From:

Appeal from judgment of the New Brunswick Court of Queen's Bench, Garnett J., March 26, 2003.

Counsel:

David M. Norman, Q.C., for the appellant.
Frederick C. McElman and Heather Hobart, for the respondent.

Reasons for judgment by: Robertson J.A. Concurred in by: Rice J.A. Partially concurring reasons: Deschênes J.A.

ROBERTSON J.A.:--

I - INTRODUCTION

1 The Discipline Committee of the respondent Dental Society concluded that the appellant dentist had demonstrated incompetence in his treatment of a patient. Various ameliorative and punitive sanctions were imposed. Rather than appealing that decision to the Society's Board of Directors and, if necessary, appealing the Board's decision to the Court of Queen's Bench, as provided for under the New Brunswick Dental Act 1985, S.N.B. 1985, c. 73, the appellant sought judicial review. The Dental Society opposed this pre-emptive challenge, arguing that the appellant had failed to exhaust his administrative remedies.

The appellant countered that this general principle does not apply as his administrative remedy is not an adequate alternative to judicial review. The Applications Judge did not accept the appellant's argument and dismissed the review application without ruling on its merits. In my respectful view, she did not err in dismissing the application. However, my reasoning differs.

2 I conclude that the internal right of appeal to the Board does not qualify as an adequate alternative to judicial review for the following reason. The appellant challenged the Discipline Committee's decision on five grounds. Each ground alleges a breach of the fairness duty. One of those grounds is tied to the Dental Society's failure to provide him with a formal charge of wrongdoing falling within the terms of s. 35 of the Dental Act. For this reason, the appellant insists that he was denied the opportunity to make full and proper defence to the complaint in breach of the fairness duty. The Discipline Committee did not accept the argument and having regard to the record below it is reasonable to presume that the Board will do likewise. As a matter of policy, the Dental Society and its committees will not provide members with a formal charge of wrongdoing. In brief, the Board has prejudged one of the issues. This explains why the appeal to this tribunal does not qualify as an adequate alternative to judicial review and why this Court must address the merits of the appellant's allegations, beginning with the Society's failure to provide the appellant with a formal charge of wrongdoing.

3 This case also raises a relatively novel issue: Does a party who abandons the right to participate in a tribunal hearing waive the right to challenge the tribunal's decision, either on its merits or with respect to issues that could have been raised during the proceedings? Ultimately, I conclude that waiver applies to some of the issues raised. As for the others, I find no breach of the fairness duty. In particular, I find that the fairness doctrine does not require the drafting of a formal charge of wrongdoing. So long as the complaint letter provides sufficient details, as measured against the analytical framework outlined below, there is no breach of the fairness duty. On the facts of the present case, I so find. It is against this backdrop that I am prepared to uphold the Applications Judge's decision to dismiss the review application.

II - BACKGROUND

4 On January 18, 2000, Michèle Picard filed a complaint with the Dental Society regarding the dental care she received from the appellant during the preceding 5-year period. The complaint was forwarded to the Society's Mediation Committee. Both parties asked that the matter be referred to the Society's Complaints Committee. On March 9, 2000, the matter was so referred. On May 18, 2000, the Complaints Committee recommended that the matter be referred to the Society's Discipline Committee.

5 The appellant chose not to attend the Discipline Committee hearing held on May 31, 2002. His counsel did so for the purpose of raising a preliminary objection. Specifically, counsel alleged that his client had not been informed of the issues to be considered and decided by the Discipline Committee under s. 35(1) of the Dental Act. Correlatively, it was argued that Ms. Picard's complaint letter lacked the required sufficiency. Before the Committee had ruled on the preliminary objection, counsel for the appellant withdrew from the hearing. The Committee ruled against the appellant and, absent the appellant and his counsel, continued with the hearing.

6 The Discipline Committee upheld Ms. Picard's complaint. It concluded that the appellant, a dentist in general practice, demonstrated incompetence in the provision of dental services to this patient. Specifically, the Committee held that the appellant lacked the skills and judgment necessary to treat patients having myofacial pain dysfunction syndrome, temporomandibular joint dysfunction or craniomandibular disorder, commonly known as "TMJ" Disorder. The Committee found the appellant guilty of incompetence with respect to the orthodontic services he provided to Ms. Picard. It also found

that the appellant had failed to properly document a diagnosis and treatment plan. Finally, the Committee concluded that the appellant would be a danger to the public if permitted to treat patients for TMJ Disorder.

7 In light of the above findings, the Discipline Committee ordered that the appellant: (1) be prohibited from treating patients with TMJ Disorder; (2) be prohibited from providing orthodontic services to new and existing patients until such time as the Society could conduct an audit to determine his competency in this area of dentistry; (3) pay the full cost of the audit; (4) successfully complete a course in charting and patient record keeping; (5) pay the Society's and Discipline Committee's full costs respecting the complaint; and (6) pay a fine of $2,500. The Committee also directed the Society's Registrar to publish a notice of the Committee's decision in two specified newspapers, once a week, for three weeks.

8 On June 15, 2002, notice of the Discipline Committee's decision was published for the first time in each of the two newspapers. The notice stated that the appellant had been found guilty of incompetence in the treatment of a patient; ordered to refrain from treating patients with the TMJ Disorder and from offering orthodontic services until such time as an audit was completed; ordered to complete a course in charting and patient record keeping; and to pay a fine of $2,500.

9 On June 18, 2002, the appellant filed an application for judicial review, together with an application for a stay of the Committee's decision pending disposition of the review application. In that application, the appellant alleged that he had been denied natural justice in five material respects.

10 On June 19, 2002, another judge stayed the Discipline Committee's decision, notwithstanding s. 47(3) of the Dental Act. That provision states that, notwithstanding that an appeal to the Board of Directors or the Court of Queen's Bench may have been filed, any order or decision under appeal continues to be valid and "no stay of proceedings may be granted prior to the hearing of the appeal". In the present case, the appellant had not appealed the Discipline Committee's decision to the Board at the time the stay of proceedings was sought.

11 On July 11, 2002, the appellant appealed the Discipline Committee's decision to the Society's Board of Directors. At the bottom of the appeal notice is written: "This appeal is being made without prejudice to the Application for Judicial Review." Apparently, the appeal to the Board is on hold pending the outcome of the present proceedings.

12 The application for judicial review was heard on August 19, 2002, and dismissed on March 26, 2003. The Applications Judge ruled that the appeal provisions found within the Dental Act provided the appellant with an adequate alternative remedy. As the appellant failed to succeed on the threshold issue, it was unnecessary for the Applications Judge to rule on the merits of the alleged breaches of the fairness duty.

III - THE GOVERNING LEGAL PRINCIPLE

13 It is apparent that confusion exists over the proper formulation of the governing legal principle. At the outset, I stated the general principle in terms of exhausting one's administrative remedies before seeking judicial review, unless those alternatives are inadequate. However, the Dental Society offers a different formulation. It insists that a right to appeal to another administrative tribunal, in and of itself, constitutes an adequate alternative remedy and that judicial review is only available if the applicant is able to establish "exceptional circumstances". In support of its position, the respondent cites a brief decision of this Court: Dowd v. New Brunswick Dental Society (1999), 210 N.B.R. (2d) 386 (C.A.). With respect, I do not read that decision as holding that a statutory right of appeal to the Board is ipso

facto an adequate alternative remedy. That determination can only be made having regard to all relevant factors, including those that the Supreme Court outlined in Harelkin v. University of Regina, [1979] 2 S.C.R. 561 and Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3. In the circumstances, it is best that I offer a brief overview of the development of the general principle.

14 The case law evidences two factual patterns surrounding the issue of whether a reviewing court should, in the exercise of its supervisory jurisdiction, deny judicial review without ruling on the merits of the application. In the first scenario, judicial review is sought after an administrative tribunal has made a preliminary or interlocutory ruling. In such cases, the general rule is that the reviewing court will not intervene before the tribunal has rendered its final decision, unless "exceptional circumstances" exist. [The decisions of this Court in Milk Marketing Board (N.B.) v. Goodine Dairy Farm (2002), 251 N.B.R. (2d) 5 (C.A.) and Mary and David Goodine v. New Brunswick Milk Marketing Board, [2003] NBCA 59; [2003] N.B.J. No. 323, online: QL (NBJ), must be read in this light.] In the second scenario, judicial review is sought after a first-level tribunal has rendered a final decision, but the applicant refuses to pursue an internal appeal to a second-level tribunal. This is the fact situation that the Supreme Court faced in Harelkin: a case that is discussed below. The present case deviates from the typical one in that there is both an internal and external right of appeal. First, there is the right to appeal to the Board and, second, a further right to appeal the Board's decision to the Court of Queen's Bench on a question of law. The significance of having both an internal and external appeal right is also discussed below.

15 In cases where the first-level tribunal has reached a final decision, an applicant's failure to pursue an administrative remedy will usually bar relief, if that remedy is deemed to be an adequate alternative to judicial review proceedings. Hence, the general principle is that applicants must exhaust their administrative remedies before seeking judicial review. What remains problematic is the task of assessing whether the alternative remedy is adequate. Fortunately, Harelkin does provide some guidance on this point.

16 In Harelkin, the issue was whether the applicant, a university student, should have pursued a further right of appeal to the university senate committee before seeking judicial review, after his appeal had been dismissed without a hearing in contravention of both the statute and the duty of fairness. In holding that the applicant should have exhausted the internal appeal process, Beetz J., for the majority, said at p. 588:

> In order to evaluate whether appellant's right of appeal to the senate committee constituted an adequate alternative remedy and even a better remedy than a recourse to the courts by way of prerogative writs, several factors should have been taken into consideration among which the procedure on the appeal, the composition of the senate committee, its powers and the manner in which they were probably to be exercised by a body which was not a professional court of appeal and was not bound to act exactly as one nor likely to do so. Other relevant factors include the burden of a previous finding, expeditiousness and costs.

17 Parenthetically, note that prior to the Supreme Court's decision in Harelkin, the general principle was formulated differently. It was said that an application for certiorari would not be entertained where there is a right to appeal to a second-level tribunal, except under special circumstances. In light of Harelkin, the special circumstances exception to the general principle has been transformed into a question of whether the alternative remedy is adequate.

18 The second Supreme Court decision of relevance is Canadian Pacific Ltd. v. Matsqui Indian Band.

In that case, a native band had assessed taxes against Canadian Pacific with respect to lands over which their railway lines ran, on the basis that those lands were located within the "reserve". Canadian Pacific argued that it held fee simple title to the assessed lands and, therefore they were outside the "reserve" and, consequently, not subject to taxation. Instead of raising this matter before the various tribunals established to hear assessment appeals, and the further right of appeal to the Federal Court, Canadian Pacific sought judicial review of the initial assessments. In a divided and complex judgement the Supreme Court held that the review application was premature. At para. 37 the Court makes reference to the factors to be considered when ruling on the adequacy of alternative remedies:

> ... a variety of factors should be considered by courts in determining whether they should enter into judicial review, or alternatively should require an applicant to proceed through a statutory appeal procedure. These factors include: the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). I do not believe that the category of factors should be closed, as it is for courts particular circumstances to isolate and balance the factors which are relevant.

19 Both Harelkin and Matsqui are of legal significance for another reason. It is now clear that the obligation to exhaust one's statutory remedies is not displaced solely because the applicant alleges a breach of the fairness duty or because the adverse ruling is jurisdictional in nature. Standing alone those grounds of review do not deprive the reviewing court of its discretion to refuse relief in the exercise of its supervisory jurisdiction. An applicant seeking judicial review must still establish that the alternative remedy is not adequate: see Air Canada v. Lorenz, [2000] 1 F.C. 494 (T.D.), per Evans J. (as he then was), and cases cited therein at para. 37; Delmas v. Vancouver Stock Exchange (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); Myers v. Law Society of Newfoundland (1998), 165 Nfld. & P.E.I.R. 150 (C.A.); and Turnbull v. Canadian Institute of Actuaries et al. (1995), 107 Man. R. (2d) 63 (C.A.).

20 The respondent cites one trial decision that I find problematic. In Rossignol v. New Brunswick Dental Society, [1997] N.B.R. (2d) (Supp.) No. 115 (Q.B.), the applicant, a dentist, sought judicial review of a decision of the Discipline Committee even though the appeal to the Board of Directors had been heard and its decision under reserve. The applications judge ruled that the application was without merit, but in any event concluded that the matter should not have been set down for hearing. In his opinion, only in exceptional circumstances could a court intervene by way of judicial review in circumstances where the applicant had failed to pursue a statutory right of appeal to the court. The applicant having failed to establish exceptional circumstances, the application was dismissed. While I agree in the result, I find it difficult to envisage a case in which a court would entertain judicial review of a first-level decision that had already been appealed to, and heard by, a second-level tribunal whose decision is still under reserve. This is true even if the appeal remedy were declared an inadequate alternative. No more need be said of Rossignol as the facts of the present case differ materially. The appellant did file an appeal with the Board, but only for the purpose of preserving his right to appeal the Discipline Committee's decision in the event the judicial review application was dismissed. See also Hughes v. New Brunswick Denturists' Society, [1998] N.B.R. (2d) (Supp.) No. 21 (Q.B.) where the review application was dismissed, as there was an appeal pending before a second-level tribunal.

21 In summary, we start with the general principle that one must exhaust his or her administrative remedies before resorting to judicial review proceedings, unless it can be established that the alternative remedies are inadequate. The fact that the applicant is alleging a breach of the fairness duty or that the error is jurisdictional in nature is of no import.

IV - AN ADEQUATE ALTERNATIVE REMEDY

22 The general principle that one's administrative remedies must be exhausted before seeking judicial review is readily understood. What remains problematic is whether, on the facts of a particular case, the alternative remedy will be found "adequate". This much can be said with confidence: the adequacy of an alternative remedy is measured in terms of whether the appeals tribunal can effectively address the issues being raised on the review application. Thus, reviewing courts will consider the expertise and composition of the appeals tribunal. In short, consideration must be given to the nature of the alleged error and the ability of the appeals tribunal to address it effectively. If the appeals tribunal is unable to deal effectively with an issue, or grant practical relief, the obligation to exhaust one's administrative remedies dissipates.

23 In cases where an applicant alleges a breach of the fairness duty, a court must decide if the administrative proceeding at the second-level is capable of curing a breach at the first-level. As was held in Harelkin at p. 589: "Nor should [the applicant] have assumed that, since [one] of the governing bodies of the university had erroneously failed to comply with the principles of natural justice, another governing body of superior jurisdiction would do the same." As Professor Mullan aptly states in his text Administrative Law (Toronto: Irwin Law, 2001) at p. 488: "... the frailty of the proceedings at first instance may be cured by a full rehearing by an unbiased, independent body according procedural fairness in the context of a statutory appeal or review." Thus, a de novo hearing before another independent administrative body so qualifies: see D.J.M. Brown and J.M. Evans, Judicial Review of Administrative Action in Canada, looseleaf (Toronto: Canvasback Publishing, 1998) at para. 3:2370. However, in cases where the parties are unable to agree on whether the fairness duty was breached, the adequacy of an internal right of appeal requires further consideration.

24 Adequacy is also measured in terms of whether the administrative scheme is efficient, expeditious and the least expensive route available to the parties. Of fundamental concern is whether the applicant would be unduly prejudiced by any significant delay in obtaining a ruling under the alternative remedy: see Brown and Evans, at para. 3:2350.

25 This leads me to consider whether an adequate external right of appeal can cure an otherwise inadequate right of internal appeal. As noted earlier, the Dental Act provides for a right to appeal the Discipline Committee's decision to the Board, together with a further right to appeal the Board's decision to the Court of Queen's Bench on a question of law. In the present case, all five alleged breaches of the fairness duty qualify as questions of law outside the relative expertise of the Board. In my view, it is unquestionable that the Court of Queen's Bench possesses the jurisdiction to address fully the issues raised by the appellant on the judicial review application and, if necessary, to grant effective relief by quashing the decision of the Board. In this sense, the external right of appeal constitutes an adequate alternative remedy. However, what is the result if the internal right of appeal is found inadequate? In my opinion, the existence of a further external right of appeal to the court does not negate the right to seek judicial review where it can be established that the administrative remedy is not an adequate alternative. Otherwise, the applicant would be forced to pursue an administrative remedy that is wasteful in terms of both time and money.

V - ANALYSIS

A) The Adequacy of the Alternative Remedy

26 Our task is to decide whether the internal appeal to the Board of Directors provides an adequate remedy in terms of addressing the errors that the appellant raised on the judicial review application. As

well, we must determine whether this alternative remedy is convenient in terms of time and cost. The appellant advances three grounds why the appeal to the Board does not qualify as an adequate alternative to judicial review.

27 First, the appellant denies the adequacy of the alternative remedy because of s. 47(3) of the Dental Act. That subsection effectively prohibits the granting of a stay, with respect to the Discipline Committee's decision, pending an appeal before the Board. In these circumstances, it is understandable that the appellant would seek out an alternative judicial route for purposes of obtaining a stay. Publication in provincial newspapers that one is incompetent would motivate anyone to find a legal way of circumventing s. 47(3). Frankly, I am surprised that the Legislature would permit a professional organization to draft legislation with such an antediluvian feature. One need only turn to the legislation governing other professionals, such as lawyers and doctors, to see that members of those professions retain the express right to seek a stay with respect to a disciplinary decision that has the effect of impinging on a member's reputation and ability to earn a living: see Law Society Act, S.N.B. 1996, c. 89, s. 53(1); Medical Act, S.N.B. 1981, c. 87, s. 59(19); and also the Opticians Act, S.N.B. 2002, c. 58, ss. 79 and 80.

28 Quaere: Why should doctors and lawyers be entitled to seek a stay of a disciplinary decision, but not dentists? That is a question that the Dental Society and Legislature should address. As well, we do not have to address whether the stay should have been granted in this case. Rather, we are asked to decide whether an appeal to the Board is an inadequate alternative to judicial review because of s. 47(3) of the Dental Act. As a general proposition, one would not expect the law to recognize a right to do indirectly what the legislature says cannot be done directly. To hold otherwise would be to subvert the legislature's intent. In my view, it would not be proper for this Court to allow a pre-emptory challenge to the Discipline Committee's decision simply because it is the only means available for circumventing a statutory prohibition. If the appeal to the Board cannot be viewed as an adequate alternative to judicial review because of the statutory prohibition against stays, it is because the legislature so intended. Thus, I am unable to accept that s. 47(3) can be invoked as a ground for declaring that an appeal to the Board is an inadequate alternative to judicial review.

29 The appellant's second ground for challenging the adequacy of an appeal to the Board of Directors is tied to the delay inevitably encountered in pursuing this internal appeal and obtaining a decision. Citing earlier precedents, the appellant maintains that it would be another year before a decision from the Board would ultimately issue. In response, I note that ten months elapsed between the date the Discipline Committee rendered its decision and the date that the reviewing judge delivered judgment. In the circumstances, the appellant cannot argue that he would have been prejudiced had he pursued his right of appeal to the Board. At the same time, the jurisprudence does reveal that the Board has rendered its decisions in a more timely fashion: see Dowd v. Nelson et al. (1996), 172 N.B.R. (2d) 241 (Q.B.). That being said, I must caution the Society that if a Discipline Committee renders a decision that impinges on a member's ability to earn a livelihood, the Board is under a duty to hear and decide all appeals within a time frame that preserves the fairness of the decision-making process and respects the legitimate interests of the member. Given the fact that s. 47(3) of the Dental Act prohibits the granting of a stay pending an appeal to the Board, fairness demands that this tribunal proceed expeditiously.

30 The appellant also raised the matter of costs. With respect, I do not find this argument persuasive. Legal costs will be incurred irrespective of the appeal route chosen. The requirement that the appellant pay the costs incurred by the Board on an appeal is a statutory one and, therefore, cannot be a ground of complaint. If the Board's decision were ultimately set aside, the appellant would be entitled to reimbursement.

31 The third prong of the appellant's adequacy argument is tied to one of the alleged breaches of the fairness duty. As stated earlier, the appellant has consistently argued that the Discipline Committee failed to provide him with sufficient particulars of his alleged wrongdoing: a formal charge of wrongdoing that reveals the issues to be heard and considered by the Discipline Committee under s. 35 of the Dental Act. That provision enumerates the types of conduct subject to disciplinary action. At this point, additional facts are required.

32 Once Ms. Picard's complaint was forwarded to the Discipline Committee, counsel for the appellant wrote to the Registrar of the Dental Society on June 30, 2000, requesting details of the issues to be dealt with by the Committee. The letter went unanswered. By letter dated July 5, 2000, counsel for the appellant again wrote to the Registrar requesting details with respect to the issues to be addressed by the Committee. The Registrar replied that the Society "does not draft formal charges with respect to complaints" and also stated "I appreciate that causes you difficulty and that you made this position clear to the Society and our legal counsel in the past." On July 19, 2001, counsel for the appellant wrote to counsel for the Dental Society asking for particulars. On December 4, 2001, counsel for the appellant forwarded a copy of his July 19 letter to the Registrar asking for a response. It is common ground that neither the Registrar, nor counsel to the Society, responded to those two letters.

33 These additional facts lead one to conclude that the Dental Society has adopted a policy of providing members with no particulars of their alleged wrongdoing, beyond those found in the complaint letter. Thus, if the appellant were to raise this issue on appeal to the Board, he can reasonably expect to receive the same response provided by the Registrar and the Discipline Committee. This understanding is reinforced once it is acknowledged that the same legal counsel represents both the Dental Society and its Committees and that the alleged breach involves a question of law over which the Board cannot reasonably claim a relative expertise. If the Board were to seek legal advice with respect to the sufficiency issue, it is reasonable to assume that it would receive the same legal advice presumably offered and accepted by the Discipline Committee. Of course, this assumption is premised on the understanding that the Board lacks a relative expertise and, for this reason, must seek out legal advice.

34 In my opinion, the Board lacks any relative expertise with respect to the alleged breach of the fairness duty pertaining to the necessity to provide a formal charge of wrongdoing. This is not to suggest that once an applicant pleads a breach of the fairness duty, a reviewing court will automatically assume that the tribunal lacks the expertise necessary to deal with the issue effectively. It all depends on the nature of the alleged breach and the nature of the tribunal in question. One needs to recognize that under s. 4 of the Dental Act, the Board is to consist of no less than nine directors. At least one must be a non-dentist. One of the directors must be a dental hygienist, while another must be a dental assistant. One director must be a dentist appointed by the responsible Minister. The Society is then left with the task of regulating the qualifications of those who may sit on the Board. There is nothing in the record that indicates that the Board, or individual members, possess an expertise in dealing with a very narrow legal issue: whether persons subject to disciplinary proceedings must be provided with a formal charge of wrongdoing.

35 In summary, it is reasonable to conclude that if the appellant were to raise the sufficiency issue before the Board of Directors, the Board would give the response it has given in the past. As a matter of policy, particulars of alleged wrongdoing are limited to those set out in the written complaint. Alternatively, even if the Dental Society lacks such a policy, it is reasonable to infer that the Board will receive the same legal advice that the Discipline Committee would presumably have received. In the circumstances, it makes little sense to force the appellant to pursue an administrative appeal with respect to an issue that has been effectively pre-judged. If, in law, the fairness duty were breached because of a failure to provide a formal charge of wrongdoing, it would not be cured on appeal to the Board of

Directors. Hence, in the circumstances of this case, the appeal to the Board does not constitute an adequate alternative remedy. Accordingly, I must address the merits of the appellant's arguments.

B) Sufficiency of Notice Issue

1) The Law

36 It is trite to state that persons alleged of wrongdoing must be given sufficient information to allow them to prepare a proper defence. In administrative law, a distinction is drawn between formal and informal proceedings. Adjudicative hearings of a formal nature require a more detailed notice than one given with respect to investigations or informal proceedings. The rationale underlying this requirement is that, a notice lacking in detail may render the person's right to answer wholly illusory: see Demaria v. Canada (Regional Classification Board), [1987] 1 F.C. 74 at para. 8 (C.A.); (1986), 21 Admin. L.R. 227 at 230 (F.C.A.), and Brown and Evans, Judicial Review of Administrative Action in Canada, at 9:5110.

37 An assessment of the sufficiency of a complaint notice must also take into account contextual factors. For instance, in order to determine whether the affected person had a reasonable opportunity to respond, one must consider that person's experience and general understanding: see Morneault v. Canada (Attorney General) (2000), 189 D.L.R. (4th) 96 (F.C.A.). Where it can be readily inferred from the surrounding circumstances that a party was aware of the nature and subject-matter of the hearing, then an otherwise objectionable notice may be excused. Similarly, notice is unlikely to be regarded as defective, despite the lack of particulars, where most of the relevant information is within the party's own knowledge: see W.G. v. Child and Family Services of Winnipeg et al. (1997), 120 Man.R. (2d) 1 (Q.B.) and Re Samson v. Sisters of Charity of the Immaculate Conception et al. (1984), 6 D.L.R. (4th) 431 (B.C.S.C.), aff'd (1985), 20 D.L.R. (4th) 547 (B.C.C.A.), leave to S.C.C. refused (1985), 65 N.R. 75n.

38 In addition to the distinction drawn between formal and informal proceedings, the duty to supply particulars is said to be more demanding in cases where a tribunal is called on to make a finding of misconduct or incompetence that is likely to cause damage to a person's reputation or that will deprive that person of an important right or benefit: see Yard v. Witless Bay (Town Council) (1993), 106 Nfld. & P.E.I.R. 251 (Nfld.S.C.(T.D.)). At the same time, the law does not insist on the same level of detail, precision and accuracy as it does in connection with criminal proceedings. For example, multiple and overlapping particulars of conduct alleged to comprise professional misconduct have not been viewed in the same light as "counts" in a criminal indictment. Nor have the rules against multiple charges and duplicitous proceedings been applied to administrative proceedings. A case on point is Gilliss v. Barristers' Society of New Brunswick (1986), 68 N.B.R. (2d) 165 (C.A.).

39 In Gilliss, a lawyer challenged the Law Society's finding of professional misconduct and the decision to suspend him from the practice of law. The complaint notice stated that an inquiry would be held with respect to the handling and disposition of trust funds of a particular client and to determine whether the lawyer's conduct amounted to professional misconduct or conduct unbecoming a barrister. On appeal, the lawyer argued that the notice was materially deficient because it did not specify whether his alleged conduct amounted to one type of misconduct as opposed to the other. The notice being duplicitous, the lawyer argued that the fairness duty was breached and that tribunals performing judicial functions are bound by the technical rules involved in the drafting of indictments and informations. The Court did not agree.

40 Other decisions dealing with the question of the sufficiency of a complaint are Mackin v. Judicial Council (N.B.) (1987), 82 N.B.R. (2d) 203 (C.A.) and McAllister v. New Brunswick Veterinary Medical

Association (1985), 62 N.B.R. (2d) 119 (C.A.).

41 In Mackin, the majority of this Court found that a letter from the Attorney General concerning conduct of a Provincial Court judge and requesting the Judicial Council to look into matters referenced in the letter, was not sufficiently specific to constitute a complaint to be investigated by the Judicial Council, pursuant to the provisions of the Provincial Court Act, R.S.N.B. 1973, c. P-21. The Court's decision on this point turned on the specific provision of the legislation that empowered the Judicial Council to receive a complaint. At that time, s. 6.2(1) provided that the Judicial Council was required to refer to the Chief Judge all written complaints against a judge alleging any misconduct, neglect of duty or inability to perform his duties. The complaint in question was from the Attorney General of the day who wrote complaining of comments Judge Mackin had made during a hearing. At pages 219-20, Hoyt J.A. (as he then was) wrote:

> It has been seen that the Judicial Council can only receive a complaint which alleges misconduct, neglect of duty or inability to perform his duties. It then refers "the matter" to the Chief Judge for investigation. A complaint, in my view, made against a Judge must be expressed in clear terms. I cannot read into Mr. Clark's letter and enclosed press release a complaint against Judge Mackin alleging misconduct, neglect of duty or inability to perform his duties. It is imprecise in its allegations and is nothing more than a request for the Judicial Council to investigate and see whether it could uncover misconduct, neglect of duty or inability on the part of Judge Mackin to perform his duties.

42 In summary, there is no obligation on a disciplinary body to provide a person with a formal charge of wrongdoing. A complaint letter may suffice. However, its adequacy will be measured in two ways. First, it must meet any requirements set down in the applicable legislation: see also Maxwell v. Law Society of New Brunswick (1990), 103 N.B.R. (2d) 342 (Q.B.). Second, the complaint notice must provide sufficient particulars to enable the parties to appreciate the issues to be heard and decided. Formal disciplinary proceedings, leading to possible findings of misconduct or incompetence, demand that particulars of wrongdoing be drafted with sufficient precision and accuracy to enable the person to appreciate the true nature of the complaint and make full answer and defence to all accusations. In that regard, the knowledge possessed by the person accused of wrongdoing is one of the contextual factors to be weighed. However, the duty to supply particulars does not correspond to that imposed under the criminal law. At the same time, the fairness doctrine holds that a bald allegation of wrongdoing is not sufficient. Admittedly, each of these propositions qualifies as a general statement of the law. In my view, greater certainty can be achieved if the following analytical framework is applied.

43 In disciplinary cases where the regulatory authority does not draft a formal document outlining the essential underlying facts and the type of misconduct in issue, attention must necessarily focus on the sufficiency of the complaint letter. Sufficiency is to be measured in three ways. First, it must be determined whether the letter provides sufficient particulars to enable the member to identify, by implication, that which is not explicit. In the present case, the complaint letter must enable the appellant to isolate those provisions of s. 35 of the Dental Act that are in issue. Assuming that the complaint letter sufficiently identifies the alleged wrongdoing, it is necessary to determine whether that document contains sufficient facts to enable the member to tie the allegation of wrongdoing to his or her conduct. For example, the complainant cannot simply allege incompetence in the provision of professional services. That is simply a bald allegation of wrongdoing. Finally, there must be an ex post facto match between the alleged wrongdoing and the findings of the tribunal. For example, a complaint letter will be declared materially defective if it alleges incompetence only and the tribunal goes on to make an unrelated finding that the member is dishonest. Should the complaint letter be formally amended during

the tribunal hearing, the result may be otherwise.

44 In my view, this three-step process for evaluating the sufficiency of a complaint letter is justified. The potential consequences of a finding of wrongdoing are among the most severe in the civil arena. There is the potential loss of the right to practice one's chosen profession and the adverse financial consequences that necessarily follow. There is also the issue of a tarnished reputation and the ability to pursue an alternative career for want of the necessary qualifications: see D. Mullan, "The Role of Lawyers to Professional Disciplinary Bodies" (1994) 13:3 Advocates' Soc. J. 10 at 11.

45 I hasten to add that, in future, a challenge to the adequacy of a complaint notice can be properly advanced before the Board of Directors. I say this because the issue is one of mixed fact and law for which the Board is capable of assessing the adequacy of a complaint notice when measured against the legal framework outlined above.

2) Application to the Facts

46 The Dental Society is absolutely correct in its submission that it was under no obligation to provide the appellant with a formal charge, as is required in criminal law. However, I do not accept its reasoning.

47 The Dental Society begins its argument by acknowledging that the Dental Act neither requires nor authorizes the Registrar or a committee to provide a member with a "specified allegation of the member's professional misconduct or incompetence." Counsel for the Dental Society acknowledges that such a requirement exists in some jurisdictions, but not in New Brunswick: see s. 26 of the Procedural Code adopted under the Regulated Health Professions Act, 1991, S.O. 1991, c. 18. Thus, we are to infer that there is no legal obligation to provide a member with a specified charge. All that is required is the complaint letter itself.

48 In my respectful view, there is a fundamental flaw in the Dental Society's argument. The mere fact that a statute does not expressly impose a disclosure requirement does not mean that none exists at law. It may exist according to the precepts of the fairness duty. Otherwise, there would be no need for a fairness doctrine in administrative law. One could argue that compliance with the fairness duty simply means compliance with a tribunal's enabling statute.

49 It is clear in law that a party to a disciplinary hearing must be given sufficient information for the purpose of enabling that party to mount an effective defence. To that end, I can see no objection to the Complaints Committee identifying those provisions of s. 35 of the Dental Act that are in issue, even though it is under no legal obligation to do so.

50 The Complaints Committee's role is to investigate the merits of a complaint and to weed out those that do not raise matters that come within the purview of s. 35 of the Dental Act. Once the Complaints Committee determines that there is merit to the complaint and that the alleged wrongdoing falls within s. 35, its statutory role is to forward the complaint to the Discipline Committee. The Complaints Committee does not provide a report with respect to its investigation and findings. I assume this is so because the Discipline Committee is not hearing an appeal from the Complaints Committee and, therefore, the Complaints Committee would not wish to taint the proceedings before the Discipline Committee. But is there a valid reason why the Complaints Committee should not, at the very least, identify those paragraphs of s. 35 that are in issue? Admittedly, the fairness doctrine does not impose such an obligation. But the jurisprudence reveals that other professional groups expect as much of their complaint's committee: see Fox v. Registered Nurses Association of Nova Scotia (2002), 209 N.S.R. (2d) 342 (C.A.); Reddy v. Association of Professional Engineers and Geoscientists of British Columbia

(2000), 2 C.L.R. (3d) 109 (B.C.S.C.). However, if the New Brunswick Dental Society persists with its policy of not identifying those provisions of s. 35 that are in issue, the Society runs the risk that the complaint letter will be found materially deficient when measured against the analytical framework imposed at law.

51 As stated at para. 42 of these reasons, the adequacy of a complaint notice will be measured in two ways. First, as a general proposition, a complaint letter will be found wanting if it fails to meet the requirements set down in the tribunal's enabling statute. In this case, that requirement is set out in s. 34 of the Dental Act. That provision reads as follows:

> 34. In this Part "complaint" means any complaint, report or allegation in writing and signed by the complainant regarding the conduct, actions, competence, character, fitness, health or ability of a member and "member" includes dentist, former dentist, member, former member and professional corporation.

52 It is common ground that Ms. Picard's complaint meets the requirements of s. 34. This leads me to the second stage of the analysis. Does Ms. Picard's complaint letter provide sufficient notice of the issues to be considered and decided with respect to the alleged wrongdoing? In this case, it is wrongdoing falling within the terms of s. 35 of the Dental Act that is important. That provision reads as follows:

> 35(1) Subject to subsection (3), the Board shall upon receiving a complaint cause an investigation to be carried out by a Local Mediation Panel, and if it is not resolved by the Local Mediation Panel, may cause an investigation to be carried out by the Complaints Committee, if the complaint in substance alleges that a member
>
> (a) has been guilty of:
>
> (i) professional misconduct;
> (ii) conduct unbecoming a member including any conduct that might adversely affect the standing or good name of the profession or the Society;
> (iii) incompetence;
> (iv) dishonesty;
> (v) conduct demonstrating that the member is incapable or unfit to practise dentistry;
> (vi) any conduct in breach of the provisions of this Act, the bylaws or the rules; or
> (vii) any habit rendering him unfit, incapable or unsafe to practise dentistry; or
>
> (b) is suffering from any ailment or condition rendering him unfit, incapable or unsafe to practise dentistry;

53 While Ms. Picard's letter of complaint does not expressly identify which paragraphs of s. 35 of the Dental Act were allegedly breached, such precision could not be expected of a layperson. In all cases, attention must necessarily focus on the sufficiency of the complaint letter, as measured by the three-part analysis discussed at para. 43 of these reasons. First, it must be determined whether the complaint letter

provides sufficient particulars to enable the member to identify those provisions of s. 35 of the Dental Act that are implicitly in issue. Assuming that the complaint letter sufficiently identifies the alleged wrongdoing, it is necessary to determine whether the complaint letter contains sufficient facts to enable the member to tie the allegation of wrongdoing to his or her conduct. Finally, there must be a match between the alleged wrongdoing and the findings of the tribunal.

54 Attached to these reasons, as Appendix "A", is a copy of Ms. Picard's complaint letter. Having regard to the jurisprudence, the analytical framework outlined and Ms. Picard's complaint letter, I am of the opinion that her letter meets the sufficiency requirement.

55 The essence of Ms. Picard's letter is as follows. She writes that the appellant diagnosed her as having an "extreme case of TMJ". Ms. Picard's letter goes on to outline the problems she encountered over the five years she was being treated by the appellant (1995-2000) and, in particular, with respect to dental services involving the application of orthodontic devices. Ms. Picard reveals that in 1998, she travelled with the appellant to Quebec to see a dental specialist and a friend of the appellant's. Ms. Picard states that the appellant wished to purchase dental equipment and wanted her to travel to Quebec so that the specialist could show the appellant how to use the equipment on a "real patient". Ms. Picard states that, a year before filing the complaint, she asked the appellant to refer her to a specialist because of continuing pain, but to no avail. Ms. Picard alleges that she wasted the $5,000 paid to the appellant over the five years he provided dental services and that she should have been sent to a specialist three years earlier. Ms. Picard states that eventually she went to another dentist who, in turn, referred her to a specialist. She claims that the latter advised her that she would likely require surgery and that she had suffered permanent damage to her jaw. Ms. Picard's complaint letter concludes with the following sentence: "I believe Dr. Violette was negligent and exceeded his professional competencies as a General Dentist, and that I should have been referred to a specialist as soon as the problem was diagnosed."

56 In my view, the complaint letter meets the sufficiency requirement. I accept that the allegation of negligence does not come within the purview of s. 35. That allegation must be dealt with in a civil action. But I am also of the view that the essence of the alleged wrongdoing is self-evident. Succinctly stated, Ms. Picard alleges that Dr. Violette does not possess the professional skills necessary to treat patients with TMJ. This conduct clearly falls within s. 35(1)(a)(iii) of the Dental Act. The "substance" of Ms. Picard's complaint is that the appellant is guilty of "incompetence", to the extent that he is practising in an area of dentistry for which he lacks the necessary skills. Moreover, Ms. Picard's letter sets out the required factual circumstances in support of her allegation. Finally, none of the findings of the Discipline Committee deviate from the competency issue. For example, the Discipline Committee did not find the appellant guilty of professional misconduct, conduct unbecoming a member, dishonesty or conduct demonstrating that the member is incapable of or unfit to practise dentistry. Ms. Picard alleges that the appellant lacked the competence to treat patients with a specific disorder. The findings of the Discipline Committee affirm that her complaint was justified.

57 The appellant relies on several cases to support his argument that Ms. Picard's complaint letter lacks the required sufficiency. In my respectful view, those cases are distinguishable on the facts.

58 In Mackin, the Attorney General's complaint letter did no more than ask for an investigation with respect to the propriety of comments made by a judge during a hearing. In Kenney v. College of Physicians and Surgeons (N.B.) (1991), 120 N.B.R. (2d) 49 (C.A.), the president of the medical staff of a hospital wrote to a physician "that there are substantive and serious unanswered questions which go to professional competence ... which need to be addressed immediately." That letter formed the basis of a complaint to the Medical Society. This Court held that the letter was not sufficient to constitute a complaint within the meaning of the enabling legislation or the notice requirements of the rules of natural

justice. In Nicholson v. New Brunswick Institute of Chartered Accountants (1993), 137 N.B.R. (2d) 222 (Q.B.) an accountant was being sued for negligence by a former client who was being advised by two other accountants. Those accountants filed a letter of complaint with the Institute in which they stated: "The allegations in the Notice of Action would appear to constitute breach of certain rules of professional conduct and may cast doubt as to the competence, reputation or integrity of the member. Accordingly, we are bringing this matter to your attention ..." The Applications Judge held that as the letter made only vague allegations, it lacked the precision necessary to constitute a complaint because it made no effort to describe the conduct being complained of. Finally, in Re Davis and Newfoundland Pharmaceutical Association (1978), 86 D.L.R. (3d) 375 (Nfld.S.C.(T.D.)) a pharmacist received notice of a hearing "to discuss several complaints with regard to dispensing procedures at your pharmacy." It was held that this notice failed to comply with the rules of natural justice.

59 In my view, the cases cited by the appellant, in support of his argument that Ms. Picard's complaint letter lacks sufficiency, involve circumstances where there is no more than a bald allegation of wrongdoing. This is not true of the present case.

C) The Other Alleged Breaches of the Fairness Duty

60 It is unnecessary to address whether the appeal to the Board constitutes an adequate alternative remedy, with respect to the remaining alleged breaches of the fairness duty. So long as one of the alleged breaches cannot be cured on appeal to the second-level tribunal, judicial economy dictates that the court address the merits of the remaining issues. This is certainly true in cases where the issues do not involve the application of the tribunal's relative expertise. If the issues do involve the application of the tribunal's expertise, the reviewing court is obligated to first determine the proper review standard.

61 The appellant alleges four other breaches of the fairness duty. Two focus on the participation of Mr. McElman, who is counsel to the Dental Society and its committees. First, it is alleged that Mr. McElman's participation during the hearing before the Discipline Committee overstepped the boundaries circumscribed at law. Second, it is alleged that his multiple roles constitute a conflict of interest leading to a reasonable apprehension of bias on the part of the Discipline Committee. I shall deal with these two allegations under the heading of "Bias/Conflict". Third, the appellant alleges a breach of the fairness duty because of the Discipline Committee's failure to advise him that expert evidence would be adduced at the hearing. As a result, the appellant maintains that he was denied the opportunity to adduce rebuttal expert evidence. Four, the appellant alleges unfairness as the Discipline Committee allowed the solicitor for the complainant, Ms. Picard, to act as prosecutor. That solicitor also represents Ms. Picard in the civil action brought against the appellant. I shall deal with these two objections under the heading of "Procedural Fairness".

1)The Bias/Conflict Arguments

62 There are at least three ways for tribunal counsel to breach the fairness duty. First, counsel may participate in the deliberations of the tribunal, thereby offending the principle that only those who hear may decide: see Ellis-Don Ltd. v. Ontario (Labour Relations Board), [2001] 1 S.C.R. 221 and I.W.A. v. Consolidated-Bathurst Packing Ltd., [1990] 1 S.C.R. 282. The operative word here is "participate". Otherwise, it is permissible for counsel to assist a tribunal that is required, for example, to give reasons for its decision involving legal considerations: see Snider v. Manitoba Association of Registered Nurses (2000), 142 Man. R. (2d) 308 (C.A.). It is also permissible for a legal advisor to draft a written decision confirming, for example, the denial of a stay of proceedings so long as the draft reflects the tribunal's oral deliberations: see Fox v. Registered Nurses Association of Nova Scotia (2002), 209 N.S.R. (2d) 342 (C.A.). What is not permissible is for the tribunal to delegate or share its decision-making responsibility

with its legal advisor. How one obtains evidence as to the nature and extent of counsel's participation in the decision-making process is an entirely different issue: see Tremblay v. Quebec (Commission des affaires sociales), [1992] 1 S.C.R. 952, and Ellis-Don Ltd. v. Ontario (Labour Relations Board).

63 Second, counsel's participation during the hearing may transcend the role of facilitator to that of tribunal member. Case law reveals instances where tribunal counsel assumes the de facto and impermissible role of tribunal chair: see Venczel v. Ontario Assn. of Architects (1990), 74 O.R. (2d) 755 (Div. Ct.).

64 Third, in cases where tribunal counsel performs overlapping advisory functions, there is the potential for allegations of institutional bias. This is not to deny that it is permissible for a lawyer to act as counsel to a professional organization and its committees. In Després v. L'Association des arpenteurs-géomètres du Nouveau-Brunswick, (1992), 130 N.B.R. (2d) 210 (C.A.), this Court held that performance of these overlapping functions creates neither an apprehension nor appearance of bias: see also, Gilliss v. Barristers' Society of New Brunswick. Nevertheless, there is always the possibility that a tribunal will be accused of pre-judging an issue where the same counsel advises more than one tribunal within the same professional organization, as is true in the present case. By contrast, the one instance in which the law does not tolerate overlapping advisory functions is in regard to disciplinary proceedings. In such cases, the law requires a formal separation between the prosecutorial branch of the professional body and those responsible for advising the decision-maker. A case on point is the decision of this Court in Després. The relevant facts are set out at para. 6 of the Court's reasons:

> I turn now to the second ground of appeal, namely, that the various roles played by the solicitor for the Association cumulatively had the effect of offending principles of natural justice. Mr. Yerxa is the solicitor for the Association. He attended the Discipline Committee hearing on behalf of the Association and conducted its case by tendering exhibits, calling and examining witnesses and cross-examining witnesses called by Mr. Després. He then made a final submission or argument before the Committee on behalf of the Association suggesting that the facts disclosed that Mr. Després did not meet the Association's professional standards. The Committee met privately and reached its decision. It then called upon Mr. Yerxa to help in the "wording" of that decision. The chairman of the Discipline Committee filed an affidavit at the hearing of the Notice of Application in which he described Mr. Yerxa's role as follows:
>
> > [T]he Discipline Committee, after having reached its decision, did request the assistance of Mr. Yerxa in the wording of the written decision ...

65 Writing for the Court in Després, Hoyt J.A. (as he then was) reasoned at para. 12:

> ... The failure of the Committee to render its decision without the assistance of one of the lawyers that took part in the hearing would, in my opinion, lead a reasonable and well-informed person to conclude that the tribunal's decision was not reached fairly and impartially, thus creating the likelihood of a biased decision. As in Bernstein and Sawyer, I do not impute any improper motive or activity by either Mr. Yerxa or the members of the Discipline Committee. One can understand the desire of a lay (in legal matters) committee, embarking on such a formal course, to have legal assistance. For better or worse, however, Mr. Després was entitled to have the reasons, however "rough" they may have

been, of the Committee that heard the complaint against him.

66 In brief, counsel may not perform the overlapping functions of prosecutor and advisor to a disciplinary tribunal. Yet it would be misleading on my part not to acknowledge that, in Gilliss v. Barristers' Society of New Brunswick, counsel to the Professional Conduct Committee was also the one who pursued the complaint before that committee, by tendering evidence and examining witnesses. In that case, this Court found that counsel's participation did not breach the fairness duty. On the facts, it would appear that tribunal counsel took a "non-adversarial" position. Whether Gilliss can be validly distinguished, or would be decided differently today, does not detract from the reality that the law has evolved since that case was decided. The analysis provided in Després is based on case law post Gilliss.

67 In summary, one cannot act as both prosecutor and legal advisor to a disciplinary tribunal: see also D.P. Jones & A.S. de Villars, Principles of Administrative Law, 3d ed. (Toronto: Carswell, 1999), at 321; D. Mullen, Administrative Law, at 303 and cases cited at notes 188 and 189 and, in particular, 2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool), [1996] 3 S.C.R. 919 commencing at para. 54.

68 The task of this Court is to determine whether Mr. McElman's involvement in the decision-making process falls "within the bounds of permissible assistance and did not impair the integrity of the discipline process." See Kan v. College of Physicians and Surgeons of Ontario (1992), 9 O.R. 3d 641 (C.A.) cited with approval in Després v. L'Association des arpenteurs-géomètres du Nouveau-Brunswick.

69 No one suggests that Mr. McElman participated in the deliberations of the Discipline Committee or that he was involved in the preparation of its decision. Moreover, the transcript of the disciplinary hearing discloses clearly that Mr. McElman's participation cannot be faulted. On the few occasions that he did intervene, it was for purposes of clarification. It must be remembered that the complainant, Ms. Picard, had retained independent counsel, Mr. Filliter, to pursue the matter on her behalf before the Discipline Committee. Mr. McElman did not assume the formal role of prosecutor. There was no need to do so as Mr. Filliter had assumed responsibility for prosecution of the complaint. In the end, I need not say more with respect to this allegation other than to state that all of the jurisprudence cited to this Court is readily distinguishable: See Dowd v. Nelson; Adair v. Ontario (Health Disciplines Board) (1993), 15 O.R. (3d) 705 (Div. Ct.) and Venczel v. Ontario Association of Architects.

2) The Procedural Fairness Arguments

70 The appellant maintains that he should have been given advance notice of those who would testify before the Discipline Committee for purposes of adducing rebuttal evidence. He also complains that Mr. Filliter was permitted to prosecute the complaint.

71 The Dental Society advances two arguments in response to the appellant's contention that there was a lack of procedural fairness. The first argument parallels the one advanced with respect to the sufficiency of notice issue, discussed above. The Society notes that the Dental Act does not impose a requirement to provide a member with a list of witnesses in advance of the hearing. Again, reference is made to the Ontario legislation that requires prior disclosure of expert witnesses and a copy of their written representations, or if there is none, a copy of the written summary of the evidence to be adduced. All documents must be served 10 days before the hearing. Otherwise, the evidence is not admissible: see s.42 of the Procedural Code under the Regulated Health Professions Act, 1991. By contrast s. 40(1) of the New Brunswick Dental Act is limited to providing rules relating to the disclosure of documents presented to the Discipline Committee, and to rights of examination and cross-examination. The

legislation does not require advance notice of those who will testify at the hearing.

72 In my view, the fact that an enabling statute makes no express provision for the disclosure of information prior to a hearing, including a list of witnesses, does not support the inference that no such requirement exists at law. Otherwise, and I repeat, there would be no need for a fairness doctrine in administrative law. One could simply argue that compliance with the fairness duty means compliance with the enabling statute. The fact that the Ontario legislation makes express provision for such matters is but a reflection of what is demanded under the fairness doctrine and commonsense. In my view, it is fundamental that a party to a disciplinary hearing be informed, in advance of the hearing, of those persons who will either testify or participate in the hearing. However, I am also of the view that the proper time to raise a formal objection is prior to the hearing date or, at the very latest, at the commencement of the hearing. Once the objection is raised the tribunal has the opportunity to entertain a request for an adjournment.

73 This leads me to the Dental Society's alternative argument to the appellant's allegation that the fairness duty was breached. The Dental Society maintains that it is too late for the appellant to complain of matters arising out of the conduct of the hearing and the evidence received. The Society maintains that the appellant and his counsel had a full opportunity to raise objections to any evidence introduced at the Discipline Committee hearing. Not only did they fail to do so, but they consciously decided to withdraw from the hearing. In my view, the Society's alternative argument has merit.

74 The appellant raised only one preliminary objection before the Discipline Committee: that the complaint letter lacked sufficient particulars of wrongdoing. No objections were raised with respect to the other alleged breaches of the fairness duty, which were raised for the first time in the judicial review application. Specifically, no objection was made to the failure of the Committee to provide the appellant with a list of those who would testify at the hearing. As well, counsel for the appellant did not object to the presence of a specialist who would be testifying on behalf of the complainant, nor to the presence of Mr. Filliter. Finally, no adjournment was sought for purposes of obtaining rebuttal expert testimony. My reading of the transcript confirms these understandings.

75 In my view, the Dental Society's argument based on the appellant's withdrawal from the hearing before the Discipline Committee cannot be sidestepped. Had the appellant participated in the hearing before the Discipline Committee, he could have raised objections and, if necessary, asked for an adjournment. This he did not do. That failure raises a relatively novel legal question. Does a party who abandons the right to participate in a tribunal hearing waive the right to challenge a tribunal's decision, either on its merits or with respect to issues that could have been raised during the hearing?

76 I was able to find only one case dealing with the legal consequences flowing from a party's conscious and informed decision not to participate in a tribunal hearing. In Chipman Wood Products (1973) Ltd. v. Thompson et al. (1996), 181 N.B.R. (2d) 386 (C.A.), an employee had been injured in the course of his employment. The Workplace Health, Safety and Compensation Commission denied his application for compensation. The employee appealed to the Appeals Tribunal. The employer was given notice of the hearing but decided not to appear, as is often the case. The employee was successful, in part, and the employer exercised his statutory right to appeal to this Court on two grounds. First, the employer challenged the merits of the Appeals Tribunal's decision. Second, the employer alleged an apprehension of bias on the part of the Appeals Tribunal. This allegation arose once it was learned that the local MLA, who was also a Cabinet minister, had represented the employee before the Appeals Tribunal. As it should happen, it is Cabinet that appoints members to the Appeals Tribunal in New Brunswick.

77 In Chipman, this Court held that the employer's decision not to attend the appeal hearing constituted a waiver of the right to argue the merits of the Appeals Tribunal's decision. It also held that a party might waive his right to make an objection to a decision-maker who would otherwise be disqualified on the ground of bias. However, on the facts of that case, waiver did not arise because the employer could not reasonably have anticipated that a provincial Cabinet minister would be representing the employee. By contrast, the Commission was aware of this conflict a month in advance of the appeal hearing. Accordingly, the decision of the Appeals Tribunal was set aside. At paragraph 6, Chief Justice Hoyt wrote:

> I am attracted to Chipman Wood Products' submission that its non-appearance before the Tribunal meant only that it was placing itself in the hands of an impartial tribunal to render a decision on the merits of Mr. Thompson's appeal. It could not anticipate Mr. Tyler's representation of Mr. Thompson and the effect that it might have on the Tribunal. The Commission was aware on October 18, more than a month before the hearing, that Mr. Thompson would "be represented at the hearing by Mr. Doug Tyler (MLA - Grand Lake)". Waiver in this context is considered in de Smith, Woolf & Jowell, Judicial Review of Administrative Action, 5th Ed. (London: Sweet & Maxwell, 1995) at p. 542:
>
> > "A party may waive his objections to a decision-maker who would otherwise be disqualified on the ground of bias. Objection is generally deemed to have been waived if the party or his legal representative knew of the disqualification and acquiesced in the proceedings by failing to take objection at the earliest practicable opportunity. But there is no presumption of waiver if the disqualified adjudicator failed to make a complete disclosure of his interest, or if the party affected was prevented by surprise from taking the objection at the appropriate time, or if he was unrepresented by counsel and did not know of his right to object at the time ..."
>
> Thus, while Chipman Wood Products, by its failure to attend after receiving notice of the hearing (but not knowing of Mr. Tyler's intended presence as a representative of Mr. Thompson), waived any objection to the merits of the Appeals Tribunal's decision, it could not be said to have waived any jurisdictional defect that may have arisen at the hearing.

78 My reading of Chipman leads me to believe that the law in New Brunswick is as follows. If a party, represented by legal counsel, abandons the right to participate in a tribunal hearing, that party waives the right to challenge the merits of the tribunal's decision. However, waiver does not apply in the case of jurisdictional defects, unless they could have been reasonably anticipated at the time the decision to abandon the tribunal hearing was taken. I hasten to point out that in New Brunswick the participation of a claimant's employer on a workers' compensation appeal is the exception and not the rule. This is because the employer is aware that the Commission will be defending its decision before the Appeals Tribunal. There are already two parties to the appeal who are adverse in interest. The participation of a third is neither required nor expected. This is why the employer in Chipman could not reasonably anticipate that a provincial Cabinet minister, involved in the appointment of tribunal members, would be representing one of the parties.

79 The legal principles established in Chipman are hardly surprising. In his text Administrative Law,

Professor Mullan cautions that it is "dangerous" for a party to abandon a tribunal hearing after obtaining an adverse ruling with respect to an allegation of tribunal bias. At page 348, he writes:

> Should the adjudicator refuse to disqualify herself or himself, more difficult questions arise. Having put the allegations on the record, has the affected party protected her or his position or might further steps need to be taken at this point to avoid a later allegation or waiver? One point is clear, that the party need not abandon the proceedings in the sense of refusing to take part. Indeed, not only does the law not require this but it is also very dangerous to take this step since it assumes that at some point a court will rule in that party's favour on the bias allegation. If that does not happen, the right to a hearing has effectively been abandoned.

80 In conclusion, I am of the view that the appellant's informed decision not to participate in the hearing before the Discipline Committee constitutes abandonment, leading to waiver of possible breaches of the rules of procedural fairness. This conclusion is hardly surprising. He who seeks fairness must act fairly by raising timely objections. This necessarily requires the affected party's participation.

81 This is not a case where a party's participation was neither expected nor necessary, as was true in Chipman. Nor is this a case in which the abandoning party was self-represented. Consequently, the right to challenge the merits of the Discipline Committee's decision on the judicial review application was lost. As well, the right to raise objections based on alleged breaches of the fairness duty cannot be entertained on the judicial review application. All of the objections could, and should, have been raised with the Committee. In particular, the appellant could have sought an adjournment because of the Committee's failure to provide the appellant with a list of witnesses prior to the hearing of the complaint. As well, the appellant could have persisted with his argument that it was improper for the Committee to allow Mr. Filliter to prosecute the complaint on behalf of his client. Arguably, the Committee should have retained independent counsel to perform that task.

82 Parenthetically, it could be argued that I need not have dealt with the appellant's bias and conflict of interest allegations because the waiver principle applies equally to those alleged breaches of the fairness duty. It could be countered that such allegations are jurisdictional in nature and, therefore, not subject to the waiver principle. The decision of this Court in Chipman does not support this argument. But as I need not address that issue, I leave it for another day.

VI - Disposition

83 I would dismiss the appeal with costs of $2,500.

ROBERTSON J.A.
I concur:
RICE J.A.

The following are the reasons delivered by

DESCHÊNES J.A.:--

INTRODUCTION

84 I have read the draft of the reasons for judgment of my colleague Justice Robertson. I agree that the appeal should be dismissed but am unable to subscribe to his reasons for doing so. In particular, I

disagree with my colleague's opinion that the internal appeal process available to the appellant, Dr. Violette, to challenge the decision of the Discipline Committe does not provide him with an adequate alternative remedy to judicial review. In my view, the Applications Judge did not err in law in denying Dr. Violette's request for judicial review. Her decision is reported at 2003 NBQB 128; [2003] N.B.J. No. 129, online: QL (NBJ). I also disagree with my colleague's view "that the further external right of appeal to the court does not negate the right to seek judicial review where it can be established that the administrative remedy is not an adequate alternative" because "the applicant would be forced to pursue an administrative remedy that is wasteful in terms of both time and money".

ANALYSIS AND DECISION

85 Justice Robertson finds that the internal appeal of the decision of the Discipline Committee to the Board of Directors of the Dental Society under the New Brunswick Dental Act 1985, S.N.B. 1985, c. 73 is not an adequate alternative remedy principally on the basis that the Board has pre-judged an issue relating to procedural fairness. For this reason, Justice Robertson holds that an appeal to the Board would be wasteful in terms of time and money.

86 My colleague's recitation of the factual background shows that the Registrar of the Dental Society informed Dr. Violette that the Society did not habitually provide formal charges to members against whom complaints were filed and that his request for a formal charge was denied. That leaves Justice Robertson to conclude that the view of the Dental Society, as expressed by its Registrar, would probably be the view of the Board. As a consequence, Justice Robertson finds that any appeal to the Board by Dr. Violette could not be an adequate alternative remedy.

87 The conclusion that the Board as an appeal tribunal has its collective mind closed on the issue of the sufficiency of the information provided to Dr. Violette is premised upon the following assumptions:

(a) The Dental Society and the Discipline Committee commonly seek legal advice from counsel engaged by the Board acting as an appeal tribunal to provide it with legal advice. They (the Dental Society and the Discipline Committee) probably sought legal advice on the issue and were probably advised by counsel that Dr. Violette had been provided with sufficient information to properly defend himself. Accordingly, the Discipline Committee and the Dental Society were probably advised that they were not required to provide Dr. Violette with a formal charge.

(b) The Board, as an appeal tribunal, lacks the expertise to deal with a discreet and narrow legal issue: whether the Dental Society was required to provide Dr. Violette with a formal charge of wrongdoing. Thus, the Board would probably rely on the same counsel for advice, would probably receive the same advice as given to the Dental Society and the Discipline Committee by that counsel, and would probably follow such advice. The appeal process under the legislative scheme is therefore inadequate as an alternative remedy.

88 In my respectful view, the conclusion that the Board has pre-judged the information sufficiency issue is entirely speculative. That being so, I cannot accept my colleague's view that an appeal to the Board is not an adequate alternative remedy. There is evidence that the Registrar of the Dental Society may have been provided with legal advice regarding the information sufficiency issue, but there is nothing to suggest that the Discipline Committee sought any such legal advice. We certainly do not know what advice counsel may have offered the Board as an appeal tribunal. Nor whether he would have been

consulted by the Board in the first place. In fact, we do not know if he would have acted as counsel for the Board (as an appeal tribunal) had an appeal been filed. Having said as much, my comments should not be taken as an endorsement of the Dental Society's policy of engaging one counsel for both the Discipline Committee and the Board (as an appeal tribunal) in relation to the same disciplinary matter.

89 Justice Robertson also finds that the further statutory right of appeal to the Court of Queen's Bench on a question of law does not foreclose judicial review.

90 There is no question that the issues as to whether Dr. Violette was provided with sufficient information to properly defend himself and whether the Dental Society had to provide him with a formal charge are, as my colleague concludes, questions of law. It would have been an easy matter to get a ruling from the Board on these issues (pre-judged or not) and have these questions of law brought up on appeal to the Court of Queen's Bench. In that forum, the argument as to pre-judging would have no application and the determination of the issues would be made expeditiously and efficiently. The matter might have been sent back to the Board to be dealt with in accordance with the Court's ruling. The Board could then have asked the Discipline Committee to deal with the merits of the case in conformity with the ruling of the Court of Queen's Bench. That process is hardly a wasteful undertaking. On the contrary, my view is that such a process is a better mechanism than judicial review because an appeal to the Court of Queen's Bench on a question of law provides a greater inventory of options. For example, the outcome of the judicial review application in this case could only be the quashing of the decision of the discipline committee while an appeal on a question of law could have settled the legal issues and culminated in a referral of the matter to the appropriate body to be dealt with on the merits in accordance with appropriate judicial directions. After all, what is being sought here is a proper forum for the adjudication of the merits of the complaint in accordance with procedural fairness.

91 In that context and looking at the totality of the available alternative remedies under the Dental Act, (the appeal to the Board and the appeal to the Court of Queen's Bench on questions of law) I conclude that the application judge did not err in law in finding that the statutory appeal process provided Dr. Violette with adequate vehicles to vindicate his rights.

92 In her decision, the Applications Judge set out the relevant statutory provisions relating to the appeal process. As can be seen, the jurisdiction of the Board (as an appeal tribunal) is extensive and there is no doubt that Dr. Violette could have appealed the Discipline Committee's decision to the Board. The Board might well have agreed with Dr. Violette on the question of procedural fairness and sent the matter back to the Discipline Committee with appropriate directions, or it might have decided to deal with the matter itself. Of course, the Board might have disagreed with Dr. Violette on the procedural issue. The question of law at issue could have been appealed forthwith to the Court of Queen's Bench. The Court of Queen's Bench would adjudicate on the matter, and the merits of the complaint could then be dealt with in accordance with the Dental Act.

93 It is true that the statutory scheme does not allow the suspended member to obtain a stay of the suspension pending an appeal under the Dental Act. The inability to obtain such a stay undoubtedly prompted the application for judicial review. (Rule 69.06(1)(a) of the Rules of Court allows the Court to order a stay of proceedings pending the final disposition of the judicial review application).

94 In this case, Dr. Violette's decision to seek judicial review of the Discipline Committee's decision in effect allowed him to obtain a stay of the suspension order issued by his peers. That interim remedy is foreclosed by the Act when an appeal is pursued. It must be recalled at this point that Dr. Violette, through counsel, appeared before the Discipline Committee only to raise an issue of procedural fairness. Thereafter, he withdrew and did not participate in the proceedings before it. In addition, Dr. Violette

filed an appeal to the Board under the Act, raising as grounds of appeal the very same grounds argued before the Court on judicial review. Apparently, the appeal process under the Act is being held in abeyance pending the resolution of the proceedings in this Court. Dr. Violette is now before us to impugn the unfavourable ruling on the judicial review application. During all this time, a stay of the Discipline Committee's suspension order has been in effect and Dr. Violette has been allowed to engage in conduct which would have been prohibited had the appeal process followed the course envisaged by the statute regulating his profession. That being said, I need not comment on whether the stay should have been granted. That decision is not under appeal. As well, I do subscribe to Justice Robertson's view that the prohibition against the granting of stays contained in s. 47(3) of the Act cannot be invoked as a ground for declaring that an appeal to the Board is an inadequate alternative to judicial review.

95 In my respectful view, to allow Dr. Violette to proceed as he did in this case undermines the integrity of the appellate review process put in place by the Legislature through the Dental Act. I agree with the Applications Judge's reasoning that to allow the application for judicial review in a situation such as this one would, in effect, circumvent the clear intention of the Legislature. The Applications Judge did not commit an error of law in using her discretion to deny judicial review.

96 Apart from the reservations expressed herein, I subscribe to the legal analysis of the substantive issues addressed by Justice Robertson.

97 I would dismiss the appeal in the manner proposed by my colleague, Justice Robertson.

DESCHÊNES J.A.

* * * * *

APPENDIX "A"

January 18, 2000

New Brunswick Dental Society
520 King Street
Carleton Place #820
Fredericton NB E3B 4Z9

[ADDRESS OMITTED]

OBJECT: Letter of Complaint against Dr. Jean-Guy Violette

Dr. Violette was my regular dentist when I moved to Fredericton, I guess I chose him because he was French ... Back in 1995 when I started to have some slight headaches and jaw clicking, it was recommended by him that I undergo TMJ assessment and treatment.

It all started with many different appliances ... many x-rays. My tongue was the cause of all this as Dr. Violette would remind me constantly in a tone filled with guilt (which I now translate to verbal abuse).

I was diagnosed with cranio facial pain dysfunction ... he often referred to me as an "extreme case of TMJ" ...

(Example) *** Back in December 1995, I was studying at UNB in Nursing ... and had Nursing clinical at the hospital which Dr. Violette was well aware of. This month in particular, he decided to add an

appliance to my mouth "to control my tongue". Basically that was all he told me. He proceeded with this and did not give me a chance to ask any questions. This appliance was glued to my upper teeth. As soon as he was done and I could close my mouth, I realized I was unable to speak with this in my mouth. I started to cry in dismay ... immediately wrote him a note to say this was unacceptable as I was in the middle of a Nursing Clinical Practice at the hospital (which is a pass or fail course) and needed to be able to speak to my patients ... this would gravely interfere and risked to make me fail the course. He basically looked at me and said in his usual tone that if he took it out now ... to basically see another Dentist as he would no longer help me! In our society we are taught to respect and trust our Doctors/Dentists as they know what is best. I was young, in pain, and under his pressure. I felt I had no choice. So he wrote me the letter which is enclosed explaining the situation to my Nursing teacher. Bottom line: I failed the course as I could not practice without speech!

I feel this later resulted in the fact that: the same course was failed again for personal reasons ... and according to the legal books of the Nursing Faculty, if a student fails the same course twice, they can be dismissed from the program ... I had only 2 weeks left to graduate ... after 5 years ... I was dismissed.

Then I ended up in braces for approximately 11/2 years. The pain seemed to somewhat recede from this treatment. The braces corrected most of my overbite, as well as the slight gap I had between my two front teeth ... the pain seemed to have calmed down enough and Dr. Violette removed the braces and gave me an appliance to be worn at all times both top and bottom ... this simply clipped on the teeth with little metal hooks ...

A few months later ... maybe 6 months to 1 year ... I noticed that my teeth were moving back to their original positions slowly ... and the pain was returning ... as well as the headaches. When I returned to see Dr. Violette to complain ... he assessed this and basically said he should have given me a different kind of appliance after the braces to avoid this ... he then made me another appliance ... called Bruxism I think ... some was covered through Blue Cross ... this was extremely painful to wear ... and was not helpful at all ... I then had a few more gadgets tried in my mouth which I am sure the details are in my files ... Many times he would say something like ... oh well, this didn't work, it was something new I tried ... I guess we will have to try something else ... I feel I was a guinee pig for 5 years!

In 1998 I believe, Dr. Violette asked me if I would accompany him to Quebec city as he was going to see a friend specialist to buy some kind of Ortho machine or tool. He wanted me to go so that the specialist could show him how to use it with a real patient. He was paying the expenses so I agreed as I believed that a specialist's opinion would be excellent in my case. We went, it too 2 days ... (I missed 2 days of work) ... Basically the specialist recommended for me to see a Physio...have a special appliance put in...and then braces again. I immediately turned to Dr. Violette (in front of this specialist) and asked "Braces again? Hopefully I won't have to pay for them all over" he basically said, oh, no, don't worry about that, I'll fix you up. Come back home ... a few days later at an appointment, he had made up a treatment schedule ... and a total fee of over 1200$ ... I asked why?? He basically said that it cost him a lot of money in Quebec and he had to charge me this ... **but then again I went to Quebec for him to buy his machine ... ??? I was stunned. Again, I felt pressure as I felt he was abusing the concept that we had already paid over 5000$ and we probably could not afford to go somewhere else and start all over ... and could certainly not afford a lawyer! ... so I paid this fee a little every month ... The specialist made quite a few recommendations which I do not believe many if any were actually followed through ... I had to ASK him to write up a referral to see a Physio ... and also I referred myself to a massage therapist for extra relief, as well as occasional Chiropractor appointments.

A few months ago, he gave me an appliance ... basically a rubber mouth guard and said to wear it at all times if possible as it would help keep my jaw aligned and also help with the pain ... I learned today that

this "mouth guard" is the same type given to hockey players who have braces simply to protect their lips???!!!

Again, almost every appointment, a guilt trip of how it is all my tongue's fault for all these problems ...

About 1 year ago or so, I asked Dr. Violette why not just refer me to a specialist ... he was insulted I think. He basically said there was no need as all was under control and that he was able to treat me himself ... there was no specialist in this area anyway.

The last 6 months have proven a huge challenge for me ... I am getting quite depressed and emotional ... have lost quite a bit of weight ... close to 30 pounds now ... most of my teeth do not even meet to touch together as a result of the second braces ... I can barely eat anything ... most of my meals consists of: anything I don't have to chew ... ice cream, eggs, milkshakes ...

I practically do not sleep because of the discomfort from the jaw pain (jaw itself, shoulders and neck) as well as hunger pains at this point ...

My last appointment at Dr. Violette's office was very negative which made me decide I had had enough. Basically the same story, my teeth had not moved as he had hoped from placing the brackets higher on my teeth a few weeks earlier (he had taken them off to put them higher saying ... this is really going to move them this time and to expect a lot of pain), all because of my tongue ... so he would fit me for some other appliance to control this tongue of mine. I basically asked him: I said, Jean-Guy, I do everything you ask exactly ... wear the retainers, keep my tongue at the roof of my mouth ... etc ... what else am I supposed to do here. He basically said that we were getting nowhere because of the tongue ... and if this continued I would probably simply end up with braces for another 5 years. That was it! I bit my tongue hard ... let them do the prints ... and left ...

The next day I called the office to request that all my future appointments be cancelled and my file to be transferred to Dr. Grant (which a friend referred me to).The secretary called me later that day to say: Jean-Guy just wanted me to call to make sure you know that Dr. Grant is not a specialist ... and that he would call me that night to discuss my situation. I bluntly told her to let him know that Dr. Grant is my new dentist, and he would refer me to the specialist I have been needing for so long, and that I refused to receive a call from Dr. Violette at my home at any time!

I sincerely hope that this complaint will reach the appropriate people in order for such "experiments" as I call my experiences, to stop on unsuspecting patients ... so that nobody should go through the 5 years of hell I went though ... At this point, I feel I was much better 5 years ago before he started to treat me. I regret having went through all of this for nothing but wasted money. I should have simply endured the occasional neck pain and headaches ... as opposed to the constant jaw, neck and shoulder pain and the migraines I have now.

As Dr. Violette referred to me as "an Extreme case of TMJ" ... he should have known to transfer me in order to avoid further damage to my jaw joint as I was obviously above his capabilities as a General Dentist with Ortho courses. I should have been transferred to a specialist probably at least 3 years ago if not more ...

Now I am told by Dr. Rinehart, January 13, 2000, that I will more than likely need a jaw surgery, and that there is permanent damage to my jaw joint.

He took off the braces I had on, as they were not treating my problem. I will return for an appointment on January 18, 2000 for a special appliance to be inserted on my teeth. I was given a prescription for my

extreme pain and discomfort, as well as referred to a Physiotherapist, Sandra at the North side Physiotherapy clinic.

I have already spent over 1400$ in treatment so far, with my Blue Cross coverage only helping with less than half. I have also missed time from work due to extreme pain, or appointments ...

Could this damage have been avoided if I had in fact been transferred to a specialist back 3, 4 or 5 years ago?

Would I have needed this surgery and to go through all this pain ... probably not. This was a mild to moderate medical problem which turned out to be an extreme one and is affecting negatively all my activities of daily living ...

What I am looking for:

This complaint is made in the hopes that some good will come out of this, for the possible future patients in a similar situation.

I believe Dr. Violette was negligent and exceeded his professional competencies as a General Dentist, and that I should have been referred to a specialist as soon as the problem was diagnosed.

Yours truly,

[signature appears on original]

Michèle Picard

cp/e/nc/qw/qltlc

drs/e/qlrsw/qlcem/qljal

Indexed as:

2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)

The Attorney General of Quebec, appellant, and
The Régie des alcools, des courses et des jeux, appellant;
v.
2747-3174 Québec Inc., respondent.

[1996] 3 S.C.R. 919

[1996] S.C.J. No. 112

File No.: 24309.

Supreme Court of Canada

1996: March 27 / 1996: November 21.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Civil rights -- Fair hearing by independent tribunal -- Administrative tribunals -- Régie des permis d'alcool -- Cancellation of liquor permits on account of disturbance of public tranquility -- Structure and operating procedures of Régie -- Whether Régie complies with guarantees of independence and impartiality set out in s. 23 of Charter of Human Rights and Freedoms -- Scope of s. 23 of Charter -- Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 23, 56(1) -- Act respecting liquor permits, R.S.Q., c. P-9.1, ss. 2, 75, 86(8).

Following a hearing, the directors of the Régie des permis d'alcool du Québec revoked the respondent's liquor permits on the ground of disturbance of public tranquility -- a penalty provided for in ss. 75 and 86(8) of the Act respecting liquor permits (the "Act"). The respondent brought a motion in evocation in the Superior Court in which it asked (1) that the Régie's decision be quashed and (2) that s. 2 of the Act, which established the Régie, be declared invalid on the basis that the Régie did not comply with the guarantees of independence and impartiality set out in s. 23 of the Charter of Human Rights and Freedoms. The Superior Court granted the motion and, by declaring the impugned provision invalid and of no force or effect, called the very existence of the Régie into question. However, the court suspended the effect of the declaration of invalidity for a period of 12 months. The Attorney General of Quebec and the Régie appealed the decision. In 1993, the Régie des alcools, des courses et des jeux replaced the Régie des permis d'alcool, but the parties considered the Superior Court proceedings to be as important as ever because of the similarity between the two bodies. The Court of Appeal allowed the appeal in

part, declaring s. 2 of the Act to be valid. However, the majority of the court held the reference to s. 75 in s. 86(8) of the Act to be invalid and of no force or effect.

Held: The appeal should be allowed.

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: Section 23 of the Charter entrenches in Quebec the right of every citizen to a public and fair hearing by an independent and impartial tribunal. The word "tribunal" used in that section is defined in s. 56(1) of the Charter as including "any person or agency exercising quasi-judicial functions". Section 56(1) applies to every agency that exercises quasi-judicial functions, even incidentally. Whether or not s. 23 is applicable therefore depends on the characterization of the functions of the agency that are in question. If they are quasi-judicial, the agency is a "tribunal" and must in exercising them comply with the requirements of impartiality and independence. In this case, s. 23 is applicable to the Régie because a decision to cancel a permit on account of disturbance of public tranquility is the result of a quasi-judicial process. The permit holder's rights are clearly affected by the cancellation. While the issuance of a permit may in certain respects be regarded as a privilege, its cancellation has a significant impact on the livelihood of the permit holder, who loses the right to operate his or her business. It is also significant that the process leading to the cancellation of a permit on account of disturbance of public tranquility is similar to that in a court. The Régie may make its decision only after a hearing in the course of which witnesses may be heard, exhibits filed and submissions made. Although there is strictly speaking no lis inter partes before the Régie, individuals with conflicting interests may present contradictory versions of the facts at the hearing. Finally, a decision to cancel a permit on the ground of disturbance of public tranquility results from the application of a pre-established standard to specific facts adduced in evidence and is a final judgment protected by a privative clause. Although in making such a decision the Régie may to some extent establish a general policy that it has itself developed, it does so by means of a standard imposed by and set out in the Act. The application of such a policy to specific circumstances, with the assessment of the facts it presupposes, is a quasi-judicial act.

Although flexibility must be shown toward administrative tribunals when it comes to impartiality, a detailed review of the Régie's structure and multiple functions raises a reasonable apprehension of bias on an institutional level. The Act authorizes employees of the Régie to participate at every stage of the process leading up to the cancellation of a liquor permit, from investigation to adjudication. While a plurality of functions in a single administrative agency is not necessarily problematic, here a person informed about the role of the Régie's lawyers would have a reasonable apprehension of bias in a substantial number of cases. Although the Act and regulations do not define the duties of these jurists, the Régie's annual report 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 such measures seem essential in the circumstances. The possibility that a jurist who has made submissions to the directors might then advise them in respect of the same matter is disturbing, especially since some of the directors have no legal training. Such a lack of separation of functions in a lawyer raises a reasonable apprehension of bias. Prosecuting counsel must never be in a position to participate in the adjudication process. The functions of prosecutor and adjudicator cannot be exercised together in this manner. Moreover, the Act and regulations authorize the chairman to initiate an investigation, decide to hold a hearing, constitute the panel that is to hear the case and include himself or herself thereon if he or she so desires. Furthermore, the annual report suggests that other directors sometimes make the decision to hold a hearing, and it does not rule out the possibility that they might

then decide the case on its merits. While the fact that the Régie, as an institution, participates in the process of investigation, summoning and adjudication is not in itself problematic, the possibility that a particular director could, following the investigation, decide to hold a hearing and could then participate in the adjudication process would cause an informed person to have a reasonable apprehension of bias in a substantial number of cases. As with the Régie's jurists, a form of separation among the directors involved in the various stages of the process seems necessary to eliminate that apprehension of bias.

The three main components of judicial independence are financial security, security of tenure and institutional independence. Only the last two are in question in this case and, as is the case with impartiality, a certain degree of flexibility is appropriate where administrative agencies are concerned. In interpreting s. 23 of the Charter, it is necessary to consider the functions and characteristics of the administrative agencies in question. In the instant case, the directors have sufficient security of tenure within the meaning of Valente, since sanctions are available for any arbitrary interference by the executive during a director's term of office. The directors' conditions of employment meet the minimum requirements of independence. These do not require that all administrative adjudicators, like judges of courts of law, hold office for life. Fixed-term appointments, which are common, are acceptable. However, the removal of adjudicators must not simply be at the pleasure of the executive. The orders of appointment provide expressly that the directors can be dismissed only for certain specific reasons. In addition, it is possible for the directors to apply to the ordinary courts to contest an unlawful dismissal. Finally, in light of the evidence as a whole, the large number of points of contact between the Régie and the Minister of Public Security does not raise a reasonable apprehension with respect to the Régie's institutional independence. It is not unusual for an administrative agency to be subject to the general supervision of a member of the executive with respect to its management. The essential elements of institutional independence may be summed up as judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function. It has not been shown how the Minister of Public Security might influence the decision-making process. The chairman is responsible for monitoring the Régie's day-to-day activities and its various employees, and for preparing the rolls. The fact that the Minister is ultimately responsible for both the Régie and the various police forces conducting investigations would not cause an informed person to have a reasonable apprehension with respect to the independence of the directors. The directors swear an oath requiring them to perform the duties of their office honestly and fairly. The Minister's links with the various parties involved are accordingly not sufficient to raise concerns.

Although the structure of the Régie does not meet the requirements of s. 23 of the Charter, the various shortcomings that have been identified are not imposed by the constituent legislation or the regulations made thereunder. It is thus not necessary to declare specific provisions of the Act to be inconsistent with the Charter. It is sufficient to grant the respondent's motion in evocation and quash the Régie's decision.

Per L'Heureux-Dubé J.: This case is governed solely by administrative law. Administrative law is part of public law and the common law generally applies in Quebec public law, subject to legislative amendments. The common law methodology must therefore be used rather than a methodology based on the civil law. The Charter has legal preeminence over the common law because of its quasi-constitutional status. To determine what interaction there is between the common law and quasi-constitutional statute law, it is necessary to begin by analysing, identifying and setting out the applicable common law; the effect of the quasi-constitutional statute law on the common law must then be specified.

The respondent's allegations against the Régie des permis d'alcool du Québec fall under the heads of impartiality and independence. An agency's independence from the executive is a prerequisite for, but is not sufficient to guarantee, impartiality. Tribunals are never perfectly independent; their independence is relative and varies with their decision-making level. When the issue of independence is raised in a

judicial review context, the courts must therefore assess the necessary degree of independence in each case based on the nature of the administrative tribunal, the institutional constraints it faces and the peremptory nature of its decisions. While independence can be seen as a continuum, the same is not true of impartiality. An agency can be either impartial or biased: there is no intermediate option. Reasonable apprehension of bias is the indicator that allows this issue to be resolved judicially. If the agency would cause an informed person to have a reasonable apprehension of bias in a substantial number of cases, a legal finding of bias will result. Flexibility comes into play in the specific content of the test for reasonable apprehension of bias in each case. However, such flexibility must not be shown in respect of impartiality: the requirement of impartiality cannot be relaxed. It is thus the reasonableness of the apprehension that will vary among administrative tribunals, not their intrinsic impartiality. In the present case, the issue of independence is subordinate to that of impartiality for the purposes of analysis. If bias is found, the issue of independence becomes totally moot.

Agencies that perform quasi-judicial or administrative acts are subject to the nemo judex in propria sua causa debet esse rule in accordance, respectively, with the duty to act in accordance with natural justice and the duty to act fairly. Since the acts alleged against the Régie are either administrative or quasi-judicial, they are subject to the duty of impartiality included in the nemo judex rule. Here, the evidence has clearly shown that the Régie would cause an informed person to have a reasonable apprehension of bias in a substantial number of cases. It should therefore be found that the Régie is biased on an institutional, organizational level. By implication, the Régie has violated the nemo judex rule and thus breached its duty to act fairly. This breach opens the door to the common law remedies applicable in the circumstances: the Régie's decision can be quashed through a motion in evocation under art. 846 C.C.P. and the provisions of the enabling statute can be declared of no force or effect inter partes under arts. 453 et seq. C.C.P.

Before examining the effect of the Charter's provisions on the common law, it must first be determined whether those provisions are applicable to the instant case. In interpreting ss. 23 and 56(1) of the Charter, particularly the concept of a quasi-judicial tribunal, the "modern" methodological approach must be applied. It is time to abandon the method based on the "plain meaning" of words as the basic approach to legal interpretation. According to the modern approach, consideration must be given at the outset not only to the words themselves but also, inter alia, to the context, the statute's other provisions, provisions of other statutes in pari materia and the legislative history in order to correctly identify the legislature's objective. It is only after reading the provisions with all these elements in mind that a definition will be decided on. This "modern" interpretation method has the advantage of bringing out the underlying premises and thus preventing them from going unnoticed, as they would with the "plain meaning" method. In light of the dynamic development of our law and the plurality of perspectives on legal analysis, the era of concealed underlying premises is now over. However, the "plain meaning" method, with its methodological estoppel that prevents the initiation of legal reasoning, is justified in a technical field such as tax law because of the imperatives of stability and predictability of the law; moreover, the use of the "plain meaning" in that area does not have any undesirable side effects.

When ss. 23 and 56(1) of the Charter are interpreted in an informed manner using the modern legal interpretation approach, the definition of the term "quasi-judicial" that must be adopted is one that limits its denotation to the "matters of penal significance" category. Section 23 is therefore applicable only to "agencies exercising quasi-judicial functions involving 'matters of penal significance'". The common law remedies are available when an administrative agency makes a quasi-judicial decision in the matters of penal significance category, and ss. 23 and 56(1) of the Charter provide other remedies. In particular, in the event of a breach of the duty to be impartial in this category, the aggrieved individual may have the enabling statute struck down erga omnes, in whole or in part, under s. 52 of the Charter. In the present case, the Régie's decision to cancel the respondent's liquor permit was not a quasi-judicial decision in the

matters of penal significance category. This type of decision falls within the "non-penal" category. Accordingly, s. 23 of the Charter is not applicable to this case and the erga omnes declaratory remedy is not available. The case is governed rather by administrative law and the remedies of evocation and declaration. Since the respondent's application is well founded, there is no reason to decline to exercise the remedial discretion conferred on the courts by the Code of Civil Procedure. The motion in evocation must therefore be allowed and the Régie's decision set aside.

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By Gonthier J.

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APPEAL from a judgment of the Quebec Court of Appeal, [1994] R.J.Q. 2440, 65 Q.A.C. 245, 122 D.L.R. (4th) 553, affirming in part a judgment of the Superior Court, [1993] R.J.Q. 1877, 17 Admin. L.R. (2d) 69, granting the respondent's motion in evocation. Appeal allowed.

Jean-Yves Bernard and Benoît Belleau, for the appellants. Simon Venne and Marie Paré, for the respondent.

Solicitors for the appellants: Bernard, Roy & Associés, Montréal.
Solicitors for the respondent: Simon Venne and Marie Paré, Montréal.

English version of the judgment of Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. delivered by

1 **GONTHIER J.**:-- *This appeal gives the Court an opportunity to clarify the scope of the* requirements imposed on administrative tribunals by s. 23 of the Charter of Human Rights and Freedoms, R.S.Q., c. C-12. The specific case of the Régie des permis d'alcool underscores the need to reconcile the imperatives of administrative convenience with the principles of impartiality and independence, which cannot readily be compromised.

I - Facts

2 The respondent corporation operated the Bistro-Bar La Petite Maison Enr. in St-Jérôme pursuant to

two permits issued by the Régie des permis d'alcool. Following a number of complaints and the combined action of three police forces, the chairman of the Régie sent the respondent a notice of summons on May 1, 1992. In that document, which set out the various allegations against the respondent, the Régie informed the respondent that it intended to hold a hearing before making any decision concerning the cancellation or suspension of the permits. Counsel for the Régie and for the respondent accordingly adduced evidence for seven days before two directors through a number of witnesses. Then, on October 14, 1992, the chairman of the Régie sent the respondent a supplementary notice of summons on the basis of new evidence. A further seven days of hearings were necessary before the directors decided, on February 17, 1993, to revoke both of the respondent's liquor permits on the ground of disturbance of public tranquility. Among the reasons given by the directors for imposing this penalty under ss. 75 and 86(8) of the Act respecting liquor permits, R.S.Q., c. P-9.1 (the "Act"), were that the establishment caused excessive noise and that narcotics trafficking was taking place there.

3 The respondent challenged that decision in the Superior Court by way of evocation. It asked that the decision be quashed and further asked that s. 2 of the Act, which establishes the Régie, be declared invalid on the basis that the Régie does not comply with the guarantees of independence and impartiality set out in s. 23 of the Charter. On June 15, 1993, the Superior Court granted the motion and, by declaring the impugned provision invalid and of no force or effect, called the very existence of the Régie into question: [1993] R.J.Q. 1877, 17 Admin. L.R. (2d) 69. However, the Superior Court suspended the effect of the declaration of invalidity for a period of 12 months.

4 An appeal was brought by the Attorney General of Quebec and the Régie. Before the appeal could be heard on its merits, the Régie des alcools, des courses et des jeux replaced the Régie des permis d'alcool pursuant to the Act respecting the Régie des alcools, des courses et des jeux and amending various legislative provisions, S.Q. 1993, c. 39. That Act, part of which came into force on July 14, 1993, provides that the new body acquires the rights and assumes the obligations of the defunct Régie des permis d'alcool and has an expanded role in respect of racing and gambling. The parties nevertheless considered the Superior Court proceedings to be as important as ever because of the similarity between the two bodies. On September 23, 1994, the Court of Appeal allowed the appeal in part, declaring s. 2 of the Act: *[1994] R.J.Q. 2440, 65 Q.A.C. 245, 122 D.L.R. (4th) 553, to be valid. However, the majority of* the court held the reference to s. 75 in s. 86(8) of the Act to be invalid and of no force or effect. Beauregard J.A., in dissent, would have allowed the appeal in its entirety.

II - Relevant Statutory Provisions

5 Act respecting liquor permits, R.S.Q., c. P-9.1

> 2. A body is established under the name of "Régie des permis d'alcool du Québec".
>
> 75. The holder of a permit must not use that permit in a manner that will disturb public tranquility.
>
> 85. The Régie may cancel a permit or suspend it for such period as it may determine, of its own initiative or on the application of the permit holder, the Minister of Public Security, the municipal corporation in whose territory the permit is used or any other interested person.
>
> 86. The Régie may cancel or suspend a permit, if
>
> . . .
>
> (8) the permit holder contravenes any provision of sections 70 to 73, 75,

78 and 82, or refuses or neglects to comply with the requirements of the Régie contemplated in section 110;

Charter of Human Rights and Freedoms, R.S.Q., c. C-12

23. Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.

. . .

56. (1) In sections 9, 23, 30, 31, 34 and 38, in Chapter III of Part II and in Part IV, the word "tribunal" includes a coroner, a fire investigation commissioner, an inquiry commission, and any person or agency exercising quasi-judicial functions.

III - Judgments of the Courts Below

Superior Court

6 Vaillancourt J. considered the motion submitted to him from the perspective of s. 23 of the Charter. In his view, s. 23 is applicable where the Régie exercises quasi-judicial functions, such as where it suspends a liquor permit in effect. Vaillancourt J. then made a distinction between impartiality and independence and, although of the view that impartiality is invariable, stated that the requirements of independence must be applied less strictly to administrative bodies. In assessing the structure of the Régie, Vaillancourt J. applied the tests developed in R. v. Lippé, [1991] 2 S.C.R. 114. It was thus first necessary to determine whether a fully informed person would have a reasonable apprehension of bias in a substantial number of cases.

7 On this point, Vaillancourt J. was of the view that two factors establish institutional bias on the part of the Régie. First, there is a close relationship of dependence between the Minister of Public Security, the chairman, the directors, counsel for the Régie and the police. Second, Vaillancourt J. pointed out that in the vast majority of cases the Régie conducts the investigation, assesses the complaints, lays the complaints, presides over the hearing and makes the decisions. According to Vaillancourt J., the apprehension of bias resulting from these characteristics of the Régie cannot be sufficiently alleviated by the fact that the Act contains other guarantees, such as those related to the security of tenure and financial security of the directors. In his view, the constitution and organization of the Régie at the relevant time did not meet the requirements of s. 23 of the Charter. He therefore considered it necessary to declare the provision establishing the Régie invalid and of no force or effect. To mitigate the consequences of the organization's immediate disappearance, however, Vaillancourt J. suspended the effect of his decision for a period of 12 months.

Court of Appeal

Brossard J.A.

8 According to Brossard J.A., an analysis of the Act confirms the trial judge's finding of a close relationship and even interdependence among all those involved in the process of investigation, summoning, hearing and adjudication. That is true of the directors, police investigators and counsel, who are directly or indirectly dependent on the Minister of Public Security for various aspects of their

functions. Brossard J.A. also considered that the Act does not include further guarantees capable of overcoming the apprehension of bias. Thus, if the Régie were to be considered an adjudicative body, its institutional structure would not, according to Brossard J.A., meet the requirements of impartiality and independence under s. 23 of the Charter.

9 In Brossard J.A.'s view, however, the Régie is first and foremost an economic regulatory agency that exercises adjudicative functions only incidentally. As such, it does not have to meet the requirements of s. 23 when it is exercising merely administrative functions. This conclusion was sufficient for Brossard J.A. to reverse the trial judgment declaring s. 2 of the Act invalid and of no force or effect.

10 Brossard J.A. nevertheless considered that the Régie is subject to s. 23 of the Charter when making an adjudicative decision. He concluded after analysing the Act, cases and authors that only a decision to cancel or suspend a permit on account of disturbance of public tranquility under ss. 75 and 86(8) has those characteristics. Since the Régie does not provide the guarantees of impartiality and institutional independence required to exercise that power, Brossard J.A. declared the reference to s. 75 in s. 86(8) of the Act invalid and of no force or effect.

LeBel J.A.

11 LeBel J.A. agreed with Brossard J.A. concerning the very existence of the Régie. As a multifunctional body that exercises powers of regulation, supervision, investigation and adjudication, the Régie cannot be subject in its entirety to the requirements of s. 23 of the Charter. According to LeBel J.A., the functions are distinct and can be severed, and s. 23 applies only to those that are judicial or quasi-judicial in nature.

12 On this point, LeBel J.A. dissociated himself from Brossard J.A.'s opinion. In his view, the entire process of cancellation or suspension of liquor permits under ss. 85 and 86 of the Act is judicial or quasi-judicial in nature. LeBel J.A. noted in particular that this process could result in the infringement of a right or a specific legal situation. He also noted that the Act requires the Régie to operate judicially in a number of aspects by sending a notice of summons, holding a hearing and filing a written decision giving reasons.

13 According to LeBel J.A., the Régie does not comply with the fundamental guarantee of impartiality in exercising these quasi-judicial functions. In his view, its structure and the manner in which its investigations and hearings are conducted necessarily can only raise a reasonable apprehension of institutional bias. LeBel J.A. stated that the Régie's action in these areas is based on a lack of separation of roles, since the same directors can initiate an investigation, lay charges and try them, and the same counsel can prepare a file, recommend that a complaint be laid and present the case to the directors, for whom they sometimes act as advisers. However, LeBel J.A. did not consider the method of appointment and designation of directors problematic. Nevertheless, in light of the Régie's structural deficiencies, he would have declared ss. 85 and 86 of the Act invalid and of no force or effect in their entirety.

Beauregard J.A. (dissenting)

14 Beauregard J.A. agreed with his colleagues concerning the very existence of the Régie. He considered, however, that the cancellation or suspension of a liquor permit, regardless of the ground, amounts to the exercise of an administrative discretion. In his view, the sole purpose of the opportunity given to the permit holder to be heard and of the procedure of a judicial nature imposed on the Régie is to guarantee the permit holder fair treatment. Since the Régie does not exercise an adjudicative function in cancelling a permit, s. 23 is not applicable in Beauregard J.A.'s opinion.

15 In the alternative, had he concluded that the cancellation power was quasi-judicial in nature, Beauregard J.A. would have been of the view that the requirements of s. 23 of the Charter had not been met. He noted that to comply with s. 23, it would at the very least have been necessary for the Régie's structure to include very clear separations between the individuals exercising different functions.

IV - Analysis

16 This appeal again raises the principles of judicial impartiality and independence and requires this Court to assess the structure and operating procedures of the Régie des permis d'alcool from that perspective. Before getting to the heart of the matter, however, it will be necessary to consider the scope of the requirements set out in s. 23 of the Charter. The parties disagree as to the extent of the protection resulting therefrom.

A. Section 23 of the Charter

(1) Scope

17 Section 23 of the Charter entrenches in Quebec the right of every citizen to a public and fair hearing by an independent and impartial tribunal. Despite the variations in terminology, it recognizes classic principles relating to judicial impartiality and independence. I will come back to the specific content of the right protected by s. 23 but will begin by noting that its characteristics and importance are an indication of its scope. Difficulties remain in this regard, however, as a result of s. 56 of the Charter, which provides that the word "tribunal" used in s. 23 includes "any person or agency exercising quasi-judicial functions". The characterization process necessitated by this provision must therefore be explained.

18 The appellants made a series of preliminary submissions all of which challenged the application of s. 23 to the case at bar. The appellants essentially argued that the Régie is exempt from the requirements of impartiality and independence because it is first and foremost an administrative agency that regulates and controls a clearly defined sector of economic activity in the public interest. As a result, they argued, it should not be found to exercise primarily quasi-judicial functions within the meaning of s. 56. The appellants suggested a method of analysis based on carrying out an overall assessment of the agency in question and emphasizing its principal function. Such an approach, which is highly debatable in my view, distorts the argument. It may weaken the guarantees of impartiality and independence that must be available to citizens every time they participate in a judicial or quasi-judicial process, even if the agency in question usually exercises administrative functions.

19 A characterization of the agency as a whole thus cannot be conclusive at this point in the analysis. For the purposes of s. 56, it is sufficient to determine whether the functions in question are quasi-judicial. If so, s. 23 will be applicable and the agency must meet the requirements of impartiality and independence when exercising those quasi-judicial functions. From this point of view and in such circumstances, the agency will be a "tribunal" within the meaning of s. 56. This approach, which is dictated by logic, is consistent with the nature of the protected right. Although the s. 23 guarantees concern first and foremost the judicial or quasi-judicial process, they cannot be excluded on the pretext that this process is merely incidental to the primary function of the agency in question. Moreover, s. 56 applies to every agency that exercises quasi-judicial functions, even incidentally, characterizing it as a "tribunal". Thus, within the meaning of s. 56, a tribunal is an agency exercising quasi-judicial functions, and not one that exercises only quasi-judicial functions. As a consequence, however, s. 23 is applicable only while the agency is exercising its quasi-judicial functions.

20 In Syndicat canadien de la fonction publique v. Conseil des services essentiels, [1989] R.J.Q. 2648, the Court of Appeal expressed the matter slightly differently with respect to ss. 23 and 56. Chevalier J. (ad hoc) stated the following at p. 2659:

> [Translation] In my view, the words used by the legislature in drafting section 56 show that it intended to make a clear distinction between an agency created essentially to exercise quasi-judicial functions and one that is occasionally required to act quasi-judicially in exercising its principal administrative function. It does not, I repeat, become a quasi-judicial agency within the meaning of section 56 just because it has such ancillary powers.
>
> . . .
>
> Since section 23 is, as a result of the definition in section 56, applicable only to an agency exercising quasi-judicial functions and since, as we have seen, the Conseil was not created primarily to exercise such functions, it must be concluded that the requirements of the Quebec Charter contained in section 23 are not applicable to the Conseil in so far as its existence as an institution is in issue.
>
> . . .
>
> . . . in my view, the wording "agency exercising quasi-judicial functions" in the definition in section 56 was chosen to indicate that the Conseil must, when dealing with a matter that will result in an order of a quasi-judicial nature, satisfy the requirements of section 23. [Emphasis in original.]

21 Similarly, in the case at bar, the judges of the majority held s. 23 to be applicable, although they did so after observing that the Régie was not a "tribunal" within the meaning of s. 56. While the result of their reasoning is correct, the process itself is somewhat unsound. As I explained, whether or not s. 23 is applicable depends on the characterization of the functions in question. If they are quasi-judicial, the agency is a "tribunal" and must in exercising them comply with the requirements of impartiality and independence. The distinctions made by the Court of Appeal instead pertain rather to the effect of a declaration of unconstitutionality. At that later point in the analysis it will be possible to determine whether defects deriving from the agency's constituent legislation affect its very existence or merely undermine one aspect of its operations.

22 That being the case, it is now necessary to identify the tests for distinguishing functions that are quasi-judicial from those that are not. The debate surrounding this distinction was for a long time of great importance in administrative law and resulted in numerous judicial decisions. Thus, the superior courts, owing inter alia to enactments requiring them to do so, relied on the distinction in order to determine what acts were subject to judicial review. The scope of the rules of natural justice then depended to a large extent on the characterization of the process by which the agency in question made its decision. However, this Court gradually abandoned that rigid classification by establishing that the content of the rules a tribunal must follow depends on all the circumstances in which it operates, and not on a characterization of its functions (see, inter alia, Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311; Martineau v. Matsqui Institution Disciplinary Board, [1980] 1 S.C.R. 602). As Sopinka J. noted in Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission), [1989] 2 S.C.R. 879, at pp. 895-96:

> Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates.

23 The distinction, which was often a source of confusion, is thus now less relevant. It is no longer applied unless a statute so requires. That was the case for a long time with the Federal Court Act, R.S.C., 1985, c. F-7, and is still the case with s. 56 of the Charter. The judgments of this Court based on the Federal Court Act thus continue to be important, as do the more general considerations relating to the quasi-judicial process put forward in other contexts.

24 In this regard, Minister of National Revenue v. Coopers & Lybrand, [1979] 1 S.C.R. 495, which LeBel J.A. applied in the case at bar, provides a useful classification of the distinctive characteristics of a quasi-judicial act. Dickson J., speaking for the Court, summarized the factors to be considered as follows at pp. 504-5:

> It is possible, I think, to formulate several criteria for determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis. The list is not intended to be exhaustive.
>
> (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
>
> (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
>
> (3) Is the adversary process involved?
>
> (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?
>
> These are all factors to be weighed and evaluated, no one of which is necessarily determinative. Thus, as to (1), the absence of express language mandating a hearing does not necessarily preclude a duty to afford a hearing at common law. As to (2), the nature and severity of the manner, if any, in which individual rights are affected, and whether or not the decision or order is final, will be important, but the fact that rights are affected does not necessarily carry with it an obligation to act judicially. . . .
>
> In more general terms, one must have regard to the subject matter of the power, the nature of the issue to be decided, and the importance of the determination upon those directly or indirectly affected thereby: see

> Durayappah v. Fernando. The more important the issue and the more serious the sanctions, the stronger the claim that the power be subject in its exercise to judicial or quasi-judicial process.
>
> The existence of something in the nature of a lis inter partes and the presence of procedures, functions and happenings approximating those of a court add weight to (3). But, again, the absence of procedural rules analogous to those of courts will not be fatal to the presence of a duty to act judicially.

25 As can be seen from these comments by Dickson J., a restrictive enumeration of the characteristics of a quasi-judicial decision is risky. As a general rule, no factor considered in isolation can lead to a conclusion that a quasi-judicial process is involved. Such a finding will instead be justified by the conjunction of a series of relevant factors in light of all the circumstances. However, s. 23 of the Charter clarifies the procedure to be followed somewhat. It states that every person has a right, "for the determination of his rights and obligations or of the merits of any charge brought against him", to a public and fair hearing by an independent and impartial tribunal. This is an indication that the applicability of s. 23 depends, inter alia, on the possible impact of the decision on the citizen's rights and obligations. This does not mean, however, that s. 23 must be complied with whenever a decision could affect a citizen's rights. For it to be applicable, the procedure followed by the agency in question and the standard under which the decision was made must also have some of the characteristics proposed by Dickson J. in Coopers & Lybrand, supra.

26 Since writing these reasons, I have read those of Justice L'Heureux-Dubé. Being of the view that s. 23 of the Charter does not apply here, she would dispose of the appeal as I do, but solely on the basis of the rules of administrative law. With the greatest respect, I cannot agree with her on this point. She opens a debate in which the parties did not engage and introduces a concept, "matters of penal significance", that does not appear in the Charter and has no basis therein capable of justifying a restriction on the meaning of "quasi-judicial functions" in s. 56 or of rights and obligations in s. 23. In my view, ss. 23 and 56 of the Charter clearly express the legislature's intention that the requirements of s. 23 apply to both courts and quasi-judicial tribunals (as they are expressly worded), and to both penal and civil matters, as can be seen from the specific reference in s. 23 to both the determination of a person's "rights and obligations", which is a civil concept even though it can be used outside the civil sphere, and the "merits of any charge brought against him", which is a concept from the penal sphere. This does not mean, of course, that the manner in which s. 23 is applied cannot vary depending on the context. The legislature's intention to have the judicial rights guaranteed by the Charter apply to civil matters is also illustrated more specifically by the section's legislative evolution. As my colleague points out, s. 23 originally read as follows in 1975 (S.Q. 1975, c. 6):

> 23. Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.
>
> The tribunal may decide to sit in camera, however, in the interests of morality or public order.
>
> It may also sit in camera in the interests of children, particularly in matters of divorce, separation from bed and board, marriage annulment or declaration or disavowal of paternity.

27 The Act to amend the Code of Civil Procedure and the Charter of Human Rights and Freedoms,

S.Q. 1993, c. 30, repealed this third paragraph and transferred its substance together with a special provision for journalists to art. 13 of the Code of Civil Procedure, R.S.Q., c. C-25, which reads as follows:

> However, in family matters, sittings in first instance are held in camera, unless the court, upon application, orders that, in the interests of justice, a sitting be public. Any journalist who proves his capacity is admitted to sittings held in camera, without further formality, unless the court considers his presence detrimental to a person whose interests may be affected by the proceedings. This paragraph applies notwithstanding section 23 of the Charter of human rights and freedoms (R.S.Q., chapter C-12). [Emphasis added.]

28 It is clear from these provisions that the legislature intended s. 23 to apply to civil matters. Family matters cannot be severed from the civil sphere. Furthermore, the suggested inconsistency between s. 23 and the functions of the Commission des droits de la personne is not evident, as s. 23 is applicable only in the context of the determination of rights and obligations. In short, with the greatest respect, I see nothing in the context to indicate that the legislature had any intention other than that which it expressed in the section itself. Moreover, as my colleague acknowledges, this scope of s. 23 has not as yet been questioned.

29 It is thus in light of these principles that the Court must now examine more closely the Régie des permis d'alcool and the process leading to the cancellation of a permit on account of disturbance of public tranquility.

(2) Application to This Appeal

30 The majority of the Court of Appeal declared the reference to s. 75 in s. 86(8) of the Act invalid. LeBel J.A. would have declared all of ss. 85 and 86 invalid, but his colleague Brossard J.A. showed greater restraint, taking a position which became that of the Court of Appeal. In this Court, the respondent is asking only that the appeal be dismissed, which requires a review of the Régie's structure and operations from the point of view only of its power to cancel permits on account of disturbance of public tranquility. In order to characterize the process leading to the imposition of such a penalty, however, it is necessary to review briefly the granting and cancellation of liquor permits in general.

31 The various types of permits that the Régie can issue and the conditions attached thereto are clearly established by the Act (ss. 25 et seq.). A person who wishes to obtain a permit must submit an application to the Régie and must show, inter alia, that he or she fulfils the conditions provided in the Act (s. 40). For example, an applicant who is an individual must be of full age and must reside legally in Quebec (s. 36). In addition, the applicant must be the owner or lessee of the establishment, must have arranged the establishment in accordance with the prescribed standards, and must pay the duties prescribed by regulation (s. 39). Upon receiving an application, the Régie must publish a notice in a newspaper and notify the municipality in whose territory the permit will be used (s. 96). Any person may object to the application within 15 days of the publication of the notice or, if an objection has been made, intervene in favour of the application within 30 days of the publication of the notice (s. 99). The Régie then makes its decision. If there is no objection and the Régie decides to grant the application, it may decide upon mere examination of the record (s. 102). Otherwise, it must give any interested persons the opportunity to be heard before deciding (s. 101). The permit application will of course be denied if the conditions for obtaining a permit are not met. It must also be denied in certain circumstances set out in ss. 41 to 42.2. One example of this is where the Régie considers that the issue of the permit would be

contrary to the public interest or could disturb public tranquility (s. 41(1)).

32 Once a permit is issued, it remains valid as long as it is not cancelled (s. 51). The permit holder must periodically pay duties; if not, the permit can be cancelled automatically (ss. 53 to 55). The permit holder also has certain obligations to perform in relation, inter alia, to business hours (ss. 56 to 65) and to the posting of the permit and the prices of the beverages sold (ss. 66 to 68). The permit holder is also required to use the permit in a manner that will not disturb public tranquility (s. 75).

33 A valid permit may be cancelled or suspended by the Régie of its own initiative or on the application of the permit holder, the Minister of Public Security, the municipal corporation in whose territory the permit is used or any other interested person (s. 85). There are a number of grounds for cancellation, which are listed in s. 86. The only one that is directly in issue here is the ground set out in s. 86(8), which relates to the obligation to use the permit in a manner that does not disturb public tranquility (s. 75). A decision to cancel or suspend a permit may be rendered only after a hearing (s. 101). At that hearing, the procedure of which may be regulated in detail by the Régie (s. 104), any relevant evidence is admissible (s. 103). Witnesses may be summoned in the manner set out in arts. 280 to 283 of the Code of Civil Procedure (s. 22 of the Regulation respecting the procedure applicable before the Régie des permis d'alcool du Québec, R.R.Q. 1981, c. P-9.1, r. 7). Certain witnesses may on occasion substitute written depositions for their testimony (s. 104.1). Furthermore, any person with an interest in a matter before the Régie may appear and plead in person or through a lawyer (s. 36 of the Regulation, supra). Following the hearing, the Régie makes a decision, which must be substantiated, is final and cannot be appealed (s. 107). Where it concerns allegations of disturbing public tranquility, the decision must be based on the criteria listed in s. 24.1:

> 24.1 The Régie, in the performance of its functions and the exercise of its powers in cases involving public tranquility, may, among other factors, take into account:
>
> (1) any noise, gathering or assembly which results or may result from the operation of the establishment that may disturb the peace in the neighbourhood;
>
> (2) the measures taken by the applicant or permit holder for, and their efficiency in, preventing, in the establishment,
>
> (a) the possession, consumption, sale, exchange or gift, in any manner, of a drug, narcotic or any other substance that may be held to be a drug or narcotic;
>
> (b) the possession of a firearm or any other offensive weapon;
>
> (c) gestures or actions of a sexual nature that may disturb the peace and related solicitation;
>
> (d) acts of violence, including theft or mischief, that may disturb the peace of the customers or the citizens of the neighbourhood;
>
> (e) games of chance or any wager or betting that may disturb the peace;

> (f) any contravention of this Act or the regulations thereunder or of the Act respecting offences relating to alcoholic beverages (chapter I-8.1);
>
> (g) any contravention of any Act or a regulation concerning safety, hygiene or sanitation in a public place or public building;
>
> (3) the place where the establishment is situated and, in particular, whether the sector concerned is a residential, commercial, industrial or tourist sector.

34 With these characteristics in mind, it is my view that a decision to cancel a permit on account of disturbance of public tranquility is the result of a quasi-judicial process. First of all, the permit holder's rights are clearly affected by the cancellation. Cancelling the permit could have a serious impact on the permit holder, who will obviously lose the right to operate his or her business as a consequence and will not be able to submit a new permit application until one year has elapsed (s. 93 of the Act). While the granting of a permit may in certain respects be regarded as a privilege, the cancellation of a liquor permit will nevertheless have a significant impact on the permit holder's livelihood. A permit holder can expect the permit to remain valid (s. 51) unless one of the grounds for cancellation is proven.

35 It is also significant that the Régie may make its decision only after a hearing in the course of which witnesses may be heard, exhibits filed and submissions made. The characteristics of the hearing make the process similar to that in a court. Although there is strictly speaking no lis inter partes before the Régie, individuals with conflicting interests may nevertheless present contradictory versions of the facts at the hearing.

36 Finally, a decision to cancel a permit on the ground of disturbance of public tranquility results from the application of a pre-established standard to specific facts adduced in evidence and is a final judgment protected by a privative clause. It is true that in making such a decision the Régie may to some extent establish a general policy that it has itself developed. It does so, however, by means of a standard imposed by and set out in the Act. The application of such a policy to specific circumstances, with the assessment of the facts it presupposes, is a quasi-judicial act.

37 Such a characterization can also be found in Quebec decisions (Jacob et Bar Le Morency Inc. v. Régie des permis d'alcool du Québec (1988), 16 Q.A.C. 308, at p. 311; Taverne Le Relais Inc. v. Régie des permis d'alcool du Québec, [1989] R.J.Q. 2490 (Sup. Ct.), at p. 2494). As P. Garant stated in Droit administratif (3rd ed. 1991), vol. 1, at p. 204, illustrating his comment with the Régie des permis d'alcool, inter alia:

> [Translation] Generally speaking, the power to suspend and cancel any permit, licence or authorization is considered quasi-judicial, regardless of whether the power is exercised on the basis of objective standards or of standards that are partly objective and partly subjective. In many cases, these standards are stated quite clearly in the legislation.

38 For example, this Court held that the Labour Relations Board's decision to revoke a union's certification constituted the exercise of a quasi-judicial function (Alliance des professeurs catholiques de Montréal v. Labour Relations Board of Quebec, [1953] 2 S.C.R. 140). There is no reason to deviate from this general rule when it comes to the power to cancel liquor permits on account of disturbance of public tranquility.

39 The applicability of s. 23 having been established, it is now necessary to consider the merits of the present case. Before doing so, however, I wish to note that, even in cases not involving s. 23, administrative agencies may be required to comply with the principles of natural justice under general law rules. It is clear that the purpose of those principles is to ensure in certain ways the impartiality and independence of the decision maker (see, for example, Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170; Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623). The exact content of the rules to be followed will depend on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make. Conversely, the fact that an agency is subject to s. 23 does not mean that its structure must have the same characteristics as that of the courts. The flexibility this Court has shown in such matters is just as appropriate where s. 23 is concerned.

B. Impartiality, Independence and the Régie des permis d'alcool

40 In its motion in evocation, the respondent corporation challenged the structure and operations of the Régie des permis d'alcool. Its challenge is based on certain of the Régie's institutional characteristics but does not concern the actual conduct of the decision makers in the present case. In its submissions, the respondent questioned both the Régie's institutional impartiality and its independence.

41 These concepts of impartiality and independence, although very similar, can nevertheless be distinguished. As Le Dain J. stated in Valente v. The Queen, [1985] 2 S.C.R. 673, at p. 685, in discussing the Canadian Charter of Rights and Freedoms:

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" . . . connotes absence of bias, actual or perceived. The word "independent" in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

42 Since Lippé, supra, there is no longer any doubt that impartiality, like independence, has an institutional aspect. Lamer C.J., speaking for the Court on this point, stated the following at p. 140:

> Notwithstanding judicial independence, there may also exist a reasonable apprehension of bias on an institutional or structural level. Although the concept of institutional impartiality has never before been recognized by this Court, the constitutional guarantee of an "independent and impartial tribunal" has to be broad enough to encompass this. Just as the requirement of judicial independence has both an individual and institutional aspect (Valente, supra, at p. 687), so too must the requirement of judicial impartiality. I cannot interpret the Canadian Charter as guaranteeing one on an institutional level and the other only on a case-by-case basis.

. . .

> The objective status of the tribunal can be as relevant for the "impartiality" requirement as it is for "independence". Therefore, whether or not any particular judge harboured pre-conceived ideas or biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met. [Emphasis in original.]

43 In the case at bar, the respondent's concerns are related first to the Régie's multiple functions and to the impact of that multiplicity of functions on the duties of its various employees. The respondent thus concentrated on the context in which the decision makers operate and noted certain institutional characteristics capable in its view of affecting their state of mind, and accordingly raising an apprehension of bias. These submissions therefore concerned impartiality. Second, the respondent questioned the security of tenure of the directors and their institutional independence. In so doing, it of course challenged the directors' appearance of independence, as it relied on institutional characteristics that, because they are connected with the decision makers' relationships with others, could affect their ability to decide in accordance with their consciences.

(1) Institutional Bias

44 As a result of Lippé, supra, and Ruffo v. Conseil de la magistrature, [1995] 4 S.C.R. 267, inter alia, the test for institutional impartiality is well established. It is clear that the governing factors are those put forward by de Grandpré J. in Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369, at p. 394. The determination of institutional bias presupposes that a well-informed person, viewing the matter realistically and practically -- and having thought the matter through -- would have a reasonable apprehension of bias in a substantial number of cases. In this regard, all factors must be considered, but the guarantees provided for in the legislation to counter the prejudicial effects of certain institutional characteristics must be given special attention.

45 This test is perfectly suited, under s. 23 of the Charter, to a review of the structure of administrative agencies exercising quasi-judicial functions. Whether appearing before an administrative tribunal or a court of law, a litigant has a right to expect that an impartial adjudicator will deal with his or her claims. As is the case with the courts, an informed observer analysing the structure of an administrative tribunal will reach one of two conclusions: he or she either will or will not have a reasonable apprehension of bias. That having been said, the informed person's assessment will always depend on the circumstances. The nature of the dispute to be decided, the other duties of the administrative agency and the operational context as a whole will of course affect the assessment. In a criminal trial, the smallest detail capable of casting doubt on the judge's impartiality will be cause for alarm, whereas greater flexibility must be shown toward administrative tribunals. As Lamer C.J. noted in Lippé, supra, at p. 142, constitutional and quasi-constitutional provisions do not always guarantee an ideal system. Rather, their purpose is to ensure that, considering all of their characteristics, the structures of judicial and quasi-judicial bodies do not raise a reasonable apprehension of bias. This is analogous to the application of the principles of natural justice, which reconcile the requirements of the decision-making process of specialized tribunals with the parties' rights. I made the following comment in IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282, at pp. 323-24:

> I agree with the respondent union that the rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the

> efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an administrative tribunal such as the Board to abide strictly by the rules applicable to courts of law. In fact, it has long been recognized that the rules of natural justice do not have a fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces.

I note, however, that this necessary flexibility, and the difficulty involved in isolating the essential elements of institutional impartiality, must not be used to justify ignoring serious deficiencies in a quasi-judicial process. The perception of impartiality remains essential to maintaining public confidence in the justice system.

(i) The Liquor Permit Cancellation Process

46 The arguments against the Régie des permis d'alcool relate primarily to its role at various stages in the liquor permit cancellation process. The Act authorizes employees of the Régie to participate in the investigation, the filing of complaints, the presentation of the case to the directors and the decision.

47 I note at the outset that a plurality of functions in a single administrative agency is not necessarily problematic. This Court has already suggested that such a multifunctional structure does not in itself always raise an apprehension of bias. In Brosseau v. Alberta Securities Commission, [1989] 1 S.C.R. 301, at pp. 309-10, L'Heureux-Dubé J., although she did not rule on the impact of the constitutional guarantees, stated the following:

> As with most principles, there are exceptions. One exception to the "nemo judex" principle is where the overlap of functions which occurs has been authorized by statute, assuming the constitutionality of the statute is not in issue.
>
> . . .
>
> In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" per se.

Cory J. made a similar comment in Newfoundland Telephone, supra, at p. 635:

> Some boards will have a function that is investigative, prosecutorial and adjudicative. It is only boards with these three powers that can be expected to regulate adequately complex or monopolistic industries that supply essential services.

48 Although an overlapping of functions is not always a ground for concern, it must nevertheless not result in excessively close relations among employees involved in different stages of the process. The lack of separation of roles within the Régie des permis d'alcool was the principal basis for the Court of

Appeal's decision in the present case, which means that a thorough review of its institutional structure will be necessary.

49 The Régie is composed of at least six directors, including a chairman and a vice-chairman (s. 4). The directors are appointed by the government for a term of not over five years. Their remuneration, social benefits and conditions of employment are also determined by the government. Once fixed, however, their remuneration cannot be reduced (s. 5). The directors are prohibited from holding offices incompatible with the functions assigned to them by the Act (s. 9). They are also prohibited, under pain of forfeiture of office, from having any direct or indirect interest in an undertaking likely to make their personal interest in conflict with the duties of their office (s. 10). The directors have the powers and immunity of commissioners appointed under the Act respecting public inquiry commissions, R.S.Q., c. C-37 (s. 11). In addition, neither the Régie nor the directors can be prosecuted for official acts done in good faith in the exercise of their functions (s. 12).

50 The chairman, in addition to his or her role as a director, is responsible for the administration and the general direction of the affairs of the Régie (s. 8). The chairman's duties include presiding over the plenary sessions of the Régie, informing the directors on any questions of general policy, signing the documents and instruments within the Régie's jurisdiction either alone or with any other designated person, and preparing the roll (s. 15 of the Règles de régie interne de la Régie des permis d'alcool du Québec, R.R.Q. 1981, c. P-9.1, r. 9). Moreover, the parties admitted that the chairman conducts an annual evaluation, on the basis of a rating guide, of the performance of the Régie's members and employees. The chairman is in turn evaluated by the Minister of Public Security. These assessments appear to be used to calculate bonuses. The vice-chairman replaces the chairman in his or her absence (s. 8). The Régie's 1991-92 annual report, which was filed in evidence, describes the vice-chairman's duties as follows, (at p. 21):

> [Translation] The incumbent of this position co-ordinates and supervises the legal advice and support functions of the Régie's directors and legal advisers. She ensures that the Régie's decisions are consistent and that files for submission to the courts are in order.

51 The other employees of the Régie work in various administrative units. Only the secretariat is of interest in this appeal, as it is responsible, inter alia, for the legal services unit, which includes lawyers appointed and remunerated in accordance with the Public Service Act, R.S.Q., c. F-3.1.1. Their role is described as follows in the annual report (at p. 22):

> [Translation] Members of legal services review any files that may result in notices to appear before the Régie to ensure that they comply with the law.
>
> These advisers also meet with the solicitors of record to clarify certain aspects of the cases, see that notices of summons are drafted and sent, and present arguments to the Régie sitting in public hearings. Legal services also give legal opinions to the managers and directors, perform legal research and draft opinions, prepare draft regulations on matters within the Régie's jurisdiction and provide the public with information on statutes and regulations.

52 In practice, employees of the Régie are involved at every stage of the process leading up to the cancellation of a liquor permit, from investigation to adjudication. Thus, the Act authorizes the Régie to

require permit holders to provide information (s. 110). Members of the Régie's staff designated by the chairman, or members of police forces, may also inspect establishments during business hours (s. 111). The Régie has signed memorandums of understanding with certain police forces to establish a framework for their role of inspection and seizure. The Régie can thus initiate the investigation process. However, a formal investigation is not an absolute prerequisite for cancellation of a permit. The Régie may summon a permit holder of its own initiative or on the application of any interested person, including the Minister of Public Security (s. 85). As the annual report indicates, legal services lawyers participate in the preliminary review of files before the decision to summon a permit holder is made. Where the application for cancellation is made by a third party, s. 26 of the Regulation respecting the procedure applicable before the Régie des permis d'alcool du Québec, requires that the Régie summon the permit holder if the facts mentioned call prima facie for the enforcement of ss. 86 to 90 of the Act. The Act and regulations do not, however, specify the circumstances in which the Régie may proceed proprio motu.

53 If the Régie decides to hold a hearing, a notice of summons drafted by a legal services lawyer is sent to the permit holder. In the case at bar, the notice was signed by the chairman of the Régie. Where a ground related to public tranquility is involved, a hearing is then held before at least two directors designated by the chairman (ss. 15 and 16). One of the legal services lawyers acts as counsel for the Régie at that hearing. The directors must decide the matter and, in the case of a tied vote, the matter is referred to the Régie sitting in plenary session. The proceedings are completed with the publication of written reasons.

(ii) Role of the Régie's Lawyers

54 This detailed description of the Régie's structure and operations shows that the issue of the role of the lawyers employed by legal services is at the heart of this appeal. In my view, an informed person having thought the matter through would in this regard have a reasonable apprehension of bias in a substantial number of cases. 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 to me that such measures, the precise limits of which I will deliberately refrain from outlining, are essential in the circumstances. Evidence as to the role of the lawyers and the allocation of tasks among them is incomplete, but the possibility that a jurist who has made submissions to the directors might then advise them in respect of the same matter is disturbing, especially since some of the directors have no legal training. In this regard, I agree with Brossard J.A. (at p. 581 D.L.R.):

> [Translation] The appellants invite us to presume that their opinions are general or related to the administrative functions of the directors and point out that the Régie's annual report does not establish the existence of any practice by which the prosecuting lawyers would also be called on to give legal opinions in the context of the exercise of the directors' adjudicative function. However, the report does not rule out this possibility. Yet in matters of institutional bias, it is the reasonable apprehension of the informed person that we must consider and not the proven or presumed existence of an actual conflict of interest.

55 Furthermore, the courts have not hesitated to declare on the basis of the rules of natural justice that

such a lack of separation of functions in a lawyer raises a reasonable apprehension of bias. In Re Sawyer and Ontario Racing Commission (1979), 24 O.R. (2d) 673 (C.A.), for example, the lawyer who presented the administrative agency's point of view subsequently took part in the review of the reasons for the decision. Brooke J.A. described the role of that lawyer as follows, at p. 676:

> 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. . . . He was counsel for the appellant's adversary in proceedings to determine the appellant's guilt or innocence on the charge against him. It is basic that persons entrusted to judge or determine the rights of others must, for reasons arrived at independently, make that decision whether it or the reasons be right or wrong. It was wrong for the Commission, who were the judges, to privately involve either party in the Commission's function once the case began and certainly after the case was left to them for ultimate disposition. To do so must amount to a denial of natural justice because it would not unreasonably raise a suspicion of bias in others, including the appellant, who were not present and later learned what transpired.

See also Després v. Association des arpenteurs-géomètres du Nouveau-Brunswick (1992), 130 N.B.R. (2d) 210 (C.A.); Khan v. College of Physicians and Surgeons of Ontario (1992), 76 C.C.C. (3d) 10 (Ont. C.A.), at p. 41.

56 Similarly, in the case at bar, the Régie's lawyers could not advise the directors and make submissions to them without there being a reasonable apprehension of bias. This is not to say that jurists in the employ of an administrative tribunal can never play any role in the preparation of reasons. An examination of the consequences of such a practice would exceed the limits of this appeal, however, 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. The functions of prosecutor and adjudicator cannot be exercised together in this manner.

(iii) Role of the Directors

57 The Court of Appeal's decision was also based on the fact that the directors could intervene at various stages in the permit cancellation process. The Régie, which is composed of the incumbent directors, may require permit holders to provide information (s. 110) and may assign one of its employees or a member of a police force to inspect an establishment (s. 111). The directors, including the chairman first and foremost, may thus initiate the review of a specific case. Similarly, the decision to hold a hearing presupposes a certain participation by the directors. It is the Régie that is responsible for sending notices of summons. Where a complaint is submitted to it by a third party, the Régie must hold a hearing if the allegations of fact call prima facie for the enforcement of the relevant provisions (s. 26 of the Regulation respecting the procedure applicable before the Régie des permis d'alcool du Québec). The circumstances in which the Régie may decide to summon a permit holder of its own initiative are not specified, but it may be concluded by analogy that similar criteria would be applied. Although the Act and the various regulations are silent on this subject, the Court of Appeal held in Jacob et Bar Le Morency, supra, that the decision to summon was an administrative decision within the chairman's authority that did not have to be made in plenary session. Gendreau J.A. described this power of the chairman as follows, at p. 311:

> [Translation] The chairman determines only one simple question that

> boils down to deciding whether it is appropriate, in light of the information obtained and placed in the record kept under s. 20(1) of the Act, to constitute a panel of the Régie to determine whether the permit holder's use complies with the Act. The purpose of the chairman's power is therefore limited to setting the quasi-judicial investigation process in motion, and this power is included among those conferred by the Act.
>
> Furthermore, neither the purpose nor the effect of the chairman's decision is to affect the permit holder's rights; the operation of his or her establishment is not prevented, suspended or restricted. Nor does the notice include a decision or a statement of a presumption of unlawful exercise of trade that the appellants would have to rebut to retain their permit. In short, the chairman, in assigning the case to a panel of the Régie, in no way hinders the appellants either in putting their arguments to the directors in timely fashion or in acting as the authorized managers of their bar until the adjudication, the result of which is not prejudged.

58 Although the evidence was silent as to the Régie's practice, that judgment indicates that the decision to summon may be made by the chairman acting alone. In the case at bar, at the very least, the notice of summons bears the chairman's signature. The annual report, however, describes the duties of the directors as follows (at p. 23):

> [Translation] In addition, they must take turns in assuming internal responsibility for verifying and, where appropriate, authorizing the draft decisions submitted by the retailers' and manufacturers' permit directorates, reviewing administrative files submitted by legal services or the above-mentioned directorates in order to decide whether a summons is necessary, having a draft decision prepared or taking any other appropriate action. [Emphasis added.]

Furthermore, once a notice of summons has been sent, the chairman has the power to designate the directors responsible for deciding the case in question (s. 15 of the Règles de régie interne de la Régie des permis d'alcool du Québec).

59 A lack of evidence makes it difficult to assess the Régie's operations. It must be noted, however, that the Act and regulations authorize the chairman to initiate an investigation, decide to hold a hearing, constitute the panel that is to hear the case and include himself or herself thereon if he or she so desires. Furthermore, the annual report suggests that other directors sometimes make the decision to hold a hearing, and it does not rule out the possibility that those directors might then decide the case on its merits. In the case at bar, these factors can only reinforce the reasonable apprehension of bias an informed person would have in respect of the Régie owing to the role of counsel.

60 Having said this, I agree with the opinion expressed by Gendreau J.A. in Jacob et Bar Le Morency that the decision to hold a hearing does not amount to a prior determination of the validity of the allegations against the permit holder. The fact that the Régie, as an institution, participates in the process of investigation, summoning and adjudication is not in itself problematic. However, the possibility that a particular director could, following the investigation, decide to hold a hearing and could then participate in the decision-making process would cause an informed person to have a reasonable apprehension of bias in a substantial number of cases. It seems to me that, as with the Régie's jurists, a form of separation among the directors involved in the various stages of the process is necessary to counter that

apprehension of bias.

(2) Independence

61 The independence of administrative tribunals, which s. 23 of the Charter protects in addition to impartiality, is based, inter alia, on the relations the decision makers maintain with others and the objective circumstances surrounding those relations. In Beauregard v. Canada, [1986] 2 S.C.R. 56, at p. 69, Dickson C.J. defined independence as follows:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider -- be it government, pressure group, individual or even another judge -- should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.

The three main components of judicial independence, namely security of tenure, financial security and institutional independence, were identified in Valente, supra. The purpose of these objective elements is to ensure that the judge can reasonably be perceived as independent and that any apprehension of bias will thus be eliminated. Independence is in short a guarantee of impartiality.

62 The principles developed by this Court in relation to judicial independence must be applied under s. 23 of the Charter. That does not mean of course that the administrative tribunals to which s. 23 applies must be in all respects comparable to courts of law. As is the case with impartiality, a certain degree of flexibility is appropriate where administrative agencies are concerned. Le Dain J.'s reasons in Valente leave room for a flexibility that takes the nature of the tribunal and all the circumstances into account. Lamer C.J. noted this recently in Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3, at para. 83:

> Therefore, while administrative tribunals are subject to the Valente principles, the test for institutional independence must be applied in light of the functions being performed by the particular tribunal at issue. The requisite level of institutional independence (i.e., security of tenure, financial security and administrative control) will depend on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office.

See also the reasons of Sopinka J., at para. 113.

63 The Quebec courts that have interpreted s. 23 have likewise considered the functions and characteristics of the administrative agencies in question in their analyses (see, for example, Coffin v. Bolduc, [1988] R.J.Q. 1307 (Sup. Ct.); Nantais v. Bolduc, [1988] R.J.Q. 2465 (Sup. Ct.); Services Asbestos Canadien (Québec) Ltée v. Commission de la construction du Québec, [1989] R.J.Q. 1564 (Sup. Ct.); Taverne Le Relais, supra; G.E. Hamel Ltée v. Cournoyer, [1989] R.J.Q. 2767 (Sup. Ct.); Société de vin internationale Ltée v. Régie des permis d'alcool du Québec, J.E. 91-853 (Sup. Ct.)). There is in fact no question that administrative tribunals do not necessarily have to provide the same objective guarantees of independence as higher courts. I note, however, that s. 23 does not authorize the existence of agencies in respect of which an informed observer would, after analysing all relevant factors, have a reasonable apprehension of bias.

64 It is now necessary, in light of these principles, to consider the respondent's arguments against the Régie. Only security of tenure and institutional independence were challenged on the basis of specific factors. I shall refrain from ruling on other aspects of the status of the directors or the structure of the Régie.

(i) Security of Tenure

65 The respondent relied primarily on the term of office of the directors and the method of dismissal. They are appointed by the government for a term of not more than five years (s. 4). Supplementary directors may also be appointed for as long as the government determines. The orders of appointment adduced in evidence refer to terms of two, three and five years. Once appointed, at least judging by the orders of appointment adduced in evidence, the directors can be dismissed only for specific reasons. All the contracts contain the following clause, which is taken from the agreement between the government and the chairman of the Régie:

[Translation]

5.2 Dismissal

> Mr. Laflamme also agrees that the government may revoke this appointment at any time, without notice or compensation, on grounds of defalcation, mismanagement, gross fault or any ground of equal seriousness, proof of which lies upon the government.

66 Some of the employment contracts also contain the following clause:

[Translation]

7. Renewal

> As provided for in article 2, Mr. Laflamme's term shall end on May 31, 1995. If the minister responsible intends to recommend to the government that his term as director and chairman of the Régie be renewed, the said minister shall notify him at least six months prior to the expiry of the present term.
>
> If this appointment is not renewed or if the government does not appoint Mr. Laflamme to another position, Mr. Laflamme shall rejoin the staff of the Ministère de la Sécurité publique on the terms and conditions set out in article 6.

67 In my view, the directors' conditions of employment meet the minimum requirements of independence. These do not require that all administrative adjudicators, like judges of courts of law, hold office for life. Fixed-term appointments, which are common, are acceptable. However, the removal of adjudicators must not simply be at the pleasure of the executive. Le Dain J. summarized the requirements of security of tenure as follows in Valente, at p. 698:

> . . . that the judge be removable only for cause, and that cause be subject

> to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.

68 In the case at bar, the orders of appointment provide expressly that the directors can be dismissed only for certain specific reasons. In addition, it is possible for the directors to apply to the ordinary courts to contest an unlawful dismissal. In these circumstances, I am of the view that the directors have sufficient security of tenure within the meaning of Valente, since sanctions are available for any arbitrary interference by the executive during a director's term of office.

(ii) Institutional Independence

69 It was suggested that the large number of points of contact between the Régie and the Minister of Public Security was problematic. The Minister is responsible for the application of the Act (s. 175). The Régie is required to submit a report to the Minister each year (s. 21) and the Minister may require information from the chairman on the agency's activities (s. 22). In addition, the Minister of Public Security must approve any rules the Régie might adopt in plenary session for its internal management (s. 24), and the Government must approve the various regulations made by the Régie (s. 116). Each year, the Minister also conducts the evaluation of the chairman of the Régie. Furthermore, the Minister is responsible for the various police forces that may, at the Régie's request, conduct investigations. Finally, the Minister may initiate the permit cancellation process by submitting an application to the Régie under s. 85.

70 In light of the evidence as a whole, I do not consider these various factors sufficient to raise a reasonable apprehension with respect to the institutional independence of the Régie. It is not unusual for an administrative agency to be subject to the general supervision of a member of the executive with respect to its management. As Le Dain J. stated in Valente, at p. 712, the essential elements of institutional independence may be summed up as judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function. It has not been shown how the Minister might influence the decision-making process. The chairman is responsible for monitoring the Régie's day-to-day activities and its various employees, and for preparing the rolls. The fact that the Minister of Public Security is ultimately responsible for both the Régie and the various police forces conducting investigations would not in my view cause an informed person to have a reasonable apprehension with respect to the independence of the directors. The directors swear an oath requiring them to perform the duties of their office honestly and fairly. The Minister's links with the various parties involved are accordingly not sufficient to raise concerns.

C. The Appropriate Order

71 The structure of the Régie does not meet the requirements of s. 23 of the Charter. However, the various shortcomings I have identified are not imposed by the constituent legislation or regulations made thereunder. Thus, I do not consider it necessary to declare specific provisions of the Act to be inconsistent with the Charter. It is sufficient to grant the respondent's motion in evocation and accordingly quash the Régie's decision.

72 The respondent is also seeking costs calculated on the basis of expenses actually incurred. Although I am proposing to allow the appeal, I would award costs to the respondent in light in particular

of the fact that the issue is one of general interest and the success of the respondent's arguments in this Court. My award is limited to the usual tariff, however.

V - Conclusion

73 For these reasons, I would allow the appeal, set aside the judgments of the Court of Appeal and the Superior Court, grant the motion in evocation and quash the Régie's decision of February 17, 1993 cancelling the respondent's liquor permits, the whole with costs to the respondent.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J.:--

INDEX

I. ntroduction

74 This appeal brings the impartiality of the Quebec Régie des permis d'alcool into question and requires the Court to consider what remedies are available and appropriate in the circumstances. Since my colleague Justice Gonthier has summarized the relevant facts and the judicial history, I need not do so. The central issues in this appeal essentially relate to the following two points:

1. Did the Régie breach its duty to be impartial toward the respondent?

2. If so, what remedies are available under the applicable law?

75 Contrary to the opinion of my colleague Gonthier J., I believe that this appeal is governed solely by administrative law. Although I agree with the result reached by my colleague, I reach it using a different analysis. If I had concluded that s. 23 of the Charter of Human Rights and Freedoms, R.S.Q., c. C-12 (the "Charter"), applies to the facts that gave rise to this appeal, I would have expressed complete agreement with my colleague's reasons. In my view, however, s. 23 of the Charter is not applicable in the case at bar, for the following reasons.

II. The Régie's Duty to Be Impartial

A. General Considerations

(1) The Common Law's Applicability in Public Law

76 Although it may seem obvious, I believe it would be helpful to point out what I consider to be the proper starting point in analysing a situation like this one. The proceedings began after steps were taken to suspend or cancel permits issued by an agency created by a provincial statute, namely Quebec's Régie des permis d'alcool. There is no question that this is an administrative law matter. Administrative law, which is part of public law, is based on the common law in all Canadian provinces, including Quebec: see generally R. Dussault and L. Borgeat, Administrative Law: A Treatise (2nd ed. 1985), vol. 1, at pp. 19-21.

77 The fact that administrative law has its basis in the common law is very well established in the case law of both the Quebec courts and this Court. In Bisaillon v. Keable, [1980] C.A. 316, the issue was the nature and scope of the principle that police sources of information are confidential. The three judges of the Quebec Court of Appeal, including myself, referred to the place of the common law in Quebec public law. I wrote the following (at p. 328):

> [Translation] There can, it seems to me, be little question that this privilege of immunity for police sources of information is a principle recognized by the common law.
>
> . . .
>
> The appellant argued . . . that since this is a public law matter and the source of our law is the common law, the form and scope of this privilege are the same under both Canadian and Quebec public law. He relied, inter alia, on Canadian Broadcasting Corporation v. Cordeau, in which Beetz J., referring to Cotroni, expressed agreement with what Pigeon J. had said in rendering the unanimous judgment of the Court:

> A rule of common law is not repealed by a statute that does not mention it (Alliance des professeurs catholiques de Montréal v. Labour Relations Board ([1953] 2 S.C.R. 140)).

I noted, however, that when the common law is codified, either in Quebec or elsewhere in Canada, the legislation takes precedence.

78 After pointing out all the relevant distinctions between our police system and the English system, Turgeon J.A. reached the same conclusion (at p. 322):

> [Translation] I conclude that in the case at bar the appellant cannot rely on the English common law I have summarized above. Quebec legislation must prevail. . . .

79 In the same case, Monet J.A. (dissenting in the result) stated the following about the relationship between the common law and statute law in Quebec (at pp. 335-36):

> [Translation] England's public law is the source of our public law. A number of fundamental legal rules are known not to have been incorporated into statutes.
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> . . .
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> The status of police officers, police forces and police chiefs is, of course, different here and in England in several respects. The same is true of the Attorney General's role, as noted by Turgeon J.A.
>
> However, in public law, can these structural differences serve to justify overturning a substantive rule that is not essentially based on the degrees of police autonomy and independence? I do not think so. Except where a statute enacted by the competent legislative authority has totally abolished or eliminated such a rule in an express and unequivocal fashion, I am of the view that it remains part of our public law. We have not been referred to any such statute. Moreover, as far as I know, the Supreme Court of Canada has not overturned the rule, nor have the many consistent decisions of the courts of this country.

80 On appeal to the Supreme Court (Bisaillon v. Keable, [1983] 2 S.C.R. 60, at p. 98), Beetz J., writing for the Court, adopted Monet J.A.'s position in the following terms:

> Unless overturned by validly adopted statutory provisions, these common law rules must be applied in an inquiry into the administration of justice, which is thus a matter of public law.

81 According to the ratio decidendi of Keable, the common law generally applies in Quebec public law, subject to specific legislative amendments. That ratio was restated in Laurentide Motels Ltd. v. Beauport (Ville) (1986), 3 Q.A.C. 163. In that case, the issue was the scope of a municipality's delictual liability for negligence in providing firefighting services. Nichols J.A., who quoted, inter alia, L.-P. Pigeon, Rédaction et interprétation des lois (1965), provided an excellent review of the common law's

place in Quebec public law (at pp. 193-95):

> [Translation] The judgment lays down an extremely important principle: in matters of public law in the Province of Québec, the basic law is English law. Why? Because in keeping with the rule that general law is not derogated from beyond what is expressed, application of common law extends to all that is not formally excluded.
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> . . .
>
> Three components of public law may create obligations and duties for municipalities: statute law, regulations and common law principles.
>
> . . .
>
> It thus becomes necessary to rely on the public common law that has traditionally governed our municipalities.
>
> . . .
>
> It therefore seems clear to me that it is necessary to turn to English public law.

82 Vallerand and Chouinard JJ.A. adopted concurring reasons that led them to the same disposition. On appeal ([1989] 1 S.C.R. 705), this Court reached the same conclusion. In my concurring opinion, I stated the following (at pp. 737-41):

> The Quebec Act of 1774 sealed the fate of the two major legal systems that would govern the law applicable in Quebec: French civil law as it stood before 1760 with its subsequent amendments in Quebec for everything relating to property and civil rights, and the common law as it stood in England at that time, and as subsequently amended, for what related to public law.
>
> . . .
>
> Louis-Philippe Pigeon said the following (Drafting and Interpreting Legislation (1988), at pp. 65-66):
>
> > This is why, for instance, English law is the basis of municipal and school law, and of administrative law generally. Our Court of Appeal rendered a very important decision on this point: Langelier v. Giroux, 52 B.R. 113 (Que.) . . .
> >
> > . . .
> >
> > . . . the common law which applies in Canada in the area of public law, in criminal as in administrative law, in the absence of legislation excluding it, is the common law as subsequently amended by statute and case-law. . . .
>
> In everything not related to property and civil rights, then, common

> law is the fundamental law in the Province of Québec. [Pigeon, supra, at p. 66.]
>
> . . .
>
> Public law has its origin in the common law, and common-law decisions must thus be examined to determine the state of public law in the area applicable in Canada.

83 Beetz J., writing for the majority, expressed the same view about the common law's place in Quebec public law (at pp. 721 and 726):

> The public law of Quebec is acknowledged to be composed of two elements: statute and the common law. . . .
>
> The second component of the public law is the common law. Two clarifications must be made at this point. First, only that part of the common law which is of public character is applicable. Because the common law makes, in principle, no distinction between public and private law, the identification of the "public" common law can be a difficult task. Nonetheless, because Quebec is a jurisdiction of two juridical regimes, the civil law and the common law, the identification must be made. Second, it is the common law as it exists at present that is applicable in Quebec under art. 356 C.C.L.C.
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> . . .
>
> As my colleague indicates in her reasons, there is no statutory provision either exonerating the city of Beauport from, or subjecting the city of Beauport to, liability for damage caused by its acts pursuant to its discretionary powers. The resolution of the question of whether arts. 1053 et seq. C.C.L.C. apply to determine the city of Beauport's responsibility must therefore begin in the "public" common law.

84 See also Maska Auto Spring Ltée v. Ste-Rosalie (Village), [1991] 2 S.C.R. 3. It must therefore be concluded that in administrative law, it is the common law that applies both in Quebec and in the rest of Canada.

(2) Methodology of Legal Analysis in Administrative Law

85 That being said, it is necessary to determine the appropriate method of legal analysis for administrative law matters, by contrast with property and civil rights matters, since the two differ.

86 As noted in Quebec Civil Law: An Introduction to Quebec Private Law (1993), prepared by the Faculty of Law and the Institute of Comparative Law at McGill University, under the general editorship of Professors J. Brierley and R. Macdonald, the idea that there is a "basic fabric" or "background canvas" of the law exists in both the civil law and the common law (at pp. 100, 105 and 137):

> [The Code] presumes itself to be a definitionally exhaustive synthesis of the general concepts governing all topics within its purview. Statutory law must either implicitly incorporate the structure of rights presented by the Code, or

> explicitly derogate from it.
>
> . . .The premises are that there is no other source of legislative rules of equal status, and that none of the fundamental organizing framework of the Civil law is expressed in external legislative sources. It is in this theoretical rather than empirical sense that a Code can claim to be a gapless presentation of the basic fabric of the Civil law.
>
> . . .
>
> In view of the above features and ambitions, it is to be expected that the style of expression of a Code should differ from that of other legislative instruments such as statutes and regulations. . . .
>
> . . . In fact, however, the Code is largely enabling, just like the uncodified rules in Common law systems, of which it is the legislated equivalent.
>
> . . .
>
> In playing this primary role, the Code serves, like the unenacted common law in the Common law tradition, as the background canvas and organizing framework for legal interpretation. [Italics and underlining added.]

87 To make the similarities and differences between the two basic fabrics or background canvases easier to understand, I must begin by going back to the end of the French regime. At that time, the "French" basic fabric of the law as a whole was made up of the custom of Paris, on which the judgments of the Sovereign Council of New France were superimposed, and Roman law and canon law, which were supplementary in nature. In 1760, with the Conquest, all of this basic fabric was destroyed and then replaced by the common law in all areas of the law. The common law thus became the basic fabric for all of Quebec law. In 1774, the "French" basic fabric was restored in the area of property and civil rights, thus supplanting the common law basic fabric in that area only. In 1866, the "French" basic fabric in the area of property and civil rights was largely codified; the common law basic fabric remained for the rest of the law.

88 There are therefore two basic fabrics in Quebec. In the area of property and civil rights, there is the "French" basic fabric, which is made up of the Civil Code, the Code of Civil Procedure and the old law in its supplementary role. In all other areas, the common law is the basic fabric. Statute law is superimposed on these two basic fabrics. The Charter appeared in 1975. It interacts with the two basic fabrics in terms of both legal preeminence and the methodology of legal analysis.

89 With regard to legal preeminence, it is clear that the Charter prevails over statute law because of its quasi-constitutional status: see Winnipeg School Division No. 1 v. Craton, [1985] 2 S.C.R. 150. I myself have noted that quasi-constitutional legislation has "preeminence over ordinary legislation": Dickason v. University of Alberta, [1992] 2 S.C.R. 1103, at p. 1154. As P.-A. Côté, The Interpretation of Legislation in Canada (2nd ed. 1991), at p. 311, notes about the interpretative function of such preeminence:

> Although not formally incorporated in the Constitution,266 Parliament has nevertheless endowed certain statutes with a predominance over other legislation. Among them, in federal law, is the Canadian Bill of Rights . . . and in Quebec law, the Charter of Human Rights and Freedoms. . . .

> 266 Even in the absence of a provision establishing its preponderance, a charter of rights prevails over other statutes. . . .

90 That being said, does the Charter also have the same preeminence over the two basic fabrics of Quebec law? In the area of property and civil rights, the Civil Code, despite its sociopolitical status as a "social constitution", is nevertheless a statute enacted by the provincial legislature. In my view, the Charter therefore prevails over the Civil Code. The Charter thus becomes the basic fabric as far as the Civil Code is concerned, because it takes precedence over all statute law. As noted in Quebec Civil Law: An Introduction to Quebec Private Law, supra, at p. 116:

> Within the inventory of legislative sources of law, the Code occupies a unique place. As an enactment of a legislature, its normative status is inferior to that of the constitution, and to quasi-constitutional documents. But in contrast, as a Code expressing the general law, it is sometimes said to be presumptively superior to all other forms of legislation and, a fortiori, to delegated legislation. In theory, therefore, the Code can be seen as something more than an ordinary enactment, and it is significant at least symbolically that it has never been reproduced in the Revised Statutes of Quebec. [Emphasis added.]

91 With regard to the constitutional aspects of this specific structure that our legal system has, see H. Brun and G. Tremblay, Droit constitutionnel (2nd ed. 1990), at pp. 9-37.

92 Therefore, in terms of the methodology of analysis applicable in the area of property and civil rights, legal analysis normally proceeds on the basis of the following hierarchy, and in the following order: the Charter is looked at first, since it is the basic fabric of statute law, and consideration is then given successively to the civil law -- that is, the Civil Code, the Code of Civil Procedure and the old law -- statute law, academic commentary and finally court decisions.

93 However, the case at bar does not fall within the area of property and civil rights: it falls under administrative law, a part of public law, where the common law and the common law methodology apply. Are legal preeminence and the methodology of legal analysis the same when the common law is applicable?

94 First of all, it is clear that the Charter has the same legal preeminence over the common law: any common law rule can be codified, replaced or repealed by statute law and, a fortiori, by a quasi-constitutional statute.

95 However, what methodology of legal analysis must be used with respect to the Charter's interaction with the common law basic fabric? To answer this question, it is necessary to examine how the interaction between the common law and statute law is treated. As the common law sees it, statute law, even when it has quasi-constitutional status, is still law enacted by a legislature. In the common law, the analysis of the interaction between the basic fabric and statute law must begin with the following presumptions:

> The common law has its foundations in those general and immutable principles of justice which should regulate the intercourse of men with men, wherever they may reside. The statute law emanates from the wisdom of the legislature of the day, varies with varying circumstances, and consists of enactments which

> may be beneficial at one time and injurious at another . . . . [Uniacke v. Dickson (1848), 1 N.S.R. 287, at p. 290, per Halliburton C.J.]
>
> The word 'common' . . . means 'general', and the contrast to common law is special law. Common law is in the first place unenacted law; thus it is distinguished from statutes and ordinances. . . . Common law is in theory traditional law -- that which has always been law and still is law, in so far as it has not been overridden by statute or ordinance. [F. W. Maitland, The Constitutional History of England (1908), at pp. 22-23.]
>
> The starting point, therefore, is an assumption . . . that the common law of England is a comprehensive body of rules by reference to which every conceivable problem can be determined. Only a small portion of that body of rules has at any particular time been "found" and set forth in judicial decisions for our guidance. The rest remains to be found and applied from time to time as circumstances require. It follows that, in theory at least, the common law never changes. When a rule of the common law is found and enunciated for the first time, that is not a new law. It has always been the law but is now found for the first time. . . .
>
> . . . However it is the theory of our system of law that the ultimate court of appeal is finding and expounding the true rule of the common law as it has always been. [W. R. Jackett, "Foundations of Canadian Law in History and Theory", in O. E. Lang, ed., Contemporary Problems of Public Law in Canada (1968), 3, at p. 28.]
>
> Except in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law. . . . [Halsbury's Laws of England (3rd ed. 1961), vol. 36, at p. 412, at para. 625.]
>
> . . . Acts should not be taken to limit common law rights, or otherwise alter the common law, unless they do so clearly and unambiguously. . . . [Halsbury's Laws of England (4th ed. 1995), vol. 44(1), at p. 876, at para. 1438.]
>
> A new statutory remedy never takes away the old [common law remedy] unless the new is given in substitution of the old or henceforth prohibits either expressly or by necessary implication those concerned from resorting to the old mode of relief.
>
> . . .
>
> . . . where, in any particular case, it appears that the [statutory] rules . . . are left to implication then it is a question to be determined upon an examination of the statute as a whole how far the rights of the parties are to be governed by the rules of law which, apart from the statute, are applicable. . . . [Smith v. National Trust Co. (1912), 45 S.C.R. 618, at pp. 624 (Idington J.) and 641 (Duff J.).] [Italics and underlining added.]

96 A good example of the application of these presumptions in a legal analysis of administrative law

can be found in Zaidan Group Ltd. v. London (City) (1990), 71 O.R. (2d) 65 (C.A.). In that case, the appellant was claiming interest on a municipal tax refund pursuant to the common law principle of unjust enrichment. Carthy J.A., writing for the Ontario Court of Appeal, began by analysing and setting out the law applicable to the case from the perspective of the common law. He then analysed the interaction between the common law and statute law, specifically the Municipal Interest and Discount Rates Act, S.O. 1982, c. 44. He made the following methodological comment at p. 69:

> The common thread of unfairness recognized by the common law breaks when a legislative body acts within its jurisdiction and stipulates, as here, that the municipality shall levy assessed amounts. . . . The statute could equally have said that a taxpayer must pay the assessed amounts without any recourse by way of complaint. The unfairness of such a statute would be universally denounced but, if it were constitutionally competent to the legislature, the common law would have nothing to say on the subject. There is no question of a gap being left in the legislation for the common law to fill. . . .
>
> Austin J., relying upon this court's decision in Windsor Roman Catholic Separate School Board v. Windsor (City) (1988), 64 O.R. (2d) 241 [C.A.] . . . characterized the relevant statutory provisions as a complete statutory code which excludes the common law. I am saying much the same thing but putting it in terms of the ambit of the principle of unjust enrichment. . . . [Emphasis added.]

97 Zaidan Group thus supports the following methodological proposition. To determine what interaction there is between the common law and statute law, it is necessary to begin by analysing, identifying and setting out the applicable common law, after which the statute law's effect on the common law must be specified by determining what common law rule the statute law codifies, replaces or repeals, whether the statute law leaves gaps that the common law must fill and whether the statute law is a complete code that excludes or supplants all of the common law in the specific area of law involved. That judgment was unanimously affirmed by this Court: Zaidan Group Ltd. v. London (City), [1991] 3 S.C.R. 593. See also Frame v. Smith, [1987] 2 S.C.R. 99, in which La Forest J., writing for the majority, used exactly the same methodology in considering the interaction between the common law and statute law in Ontario family law.

98 Does the applicability of that methodology differ in cases involving quasi-constitutional statute law? In my view, it does not: precisely the same methodology must be used. In this regard, I refer to Bhadauria v. Seneca College of Applied Arts and Technology (1979), 27 O.R. (2d) 142, in which the Ontario Court of Appeal used this method to resolve the legal issue involved. In that case, the Ontario Court of Appeal recognized a new common law tort, the tort of discrimination, on the basis, inter alia, of the public policy expressed in the Ontario Human Rights Code, R.S.O. 1970, c. 318. Before considering the Ontario Human Rights Code, the court analysed, identified and set out the common law in light of the facts of the case. After resolving the issue from the perspective of the common law, the court then examined what interaction there might be between the common law and the quasi-constitutional statute law. The court concluded as follows, at p. 150:

> . . . it is appropriate that these rights receive the full protection of the common law. . . . [T]he common law must, on the principle of Ashby v. White et al., supra, afford her a remedy.
>
> I do not regard the Code as in any way impeding the appropriate

> development of the common law in this important area. . . . Nor does the Code, in my view, contain any expression of legislative intention to exclude the common law remedy. [Emphasis added.]

99 This Court reversed the Ontario Court of Appeal's decision on the ground that the Ontario Human Rights Code is a complete code that excludes the common law: Seneca College of Applied Arts and Technology v. Bhadauria, [1981] 2 S.C.R. 181, in which Laskin C.J., writing for the Court, stated the following at pp. 194-95:

> The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the courts but rather makes them part of the enforcement machinery under the Code.
>
> For the foregoing reasons, I would hold that not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code. [Emphasis added.]

100 This Court reversed the Ontario Court of Appeal's position on the ground that the quasi-constitutional statute law in question was a complete code. However, the following proposition necessarily underlies the ratio decidendi of Bhadauria as far as methodology is concerned: to determine what interaction there is between the common law and the quasi-constitutional statute law, it is necessary to begin by analysing, identifying and setting out the applicable common law; the effect of the quasi-constitutional statute law on the common law must then be specified. The same distinction and reasoning underlie Canada Trust Co. v. Ontario Human Rights Commission (1990), 69 D.L.R. (4th) 321 (Ont. C.A.) (see pp. 344-45, per Tarnopolsky J.A.).

101 In short, the methodology can be summarized as follows. In both Quebec and Canadian administrative law, the common law applies and the common law methodology must be used rather than a methodology based on the civil law. The analysis must proceed as follows: (1) identify the common law rules applicable to the particular case, that is, (1a) the common law already enunciated by the courts and (1b) any common law not yet enunciated, if necessary; and (2) determine the effect that the provisions of the quasi-constitutional statute under consideration have on the applicable common law rules, that is, (2a) whether the provisions apply to the particular case and, if so, (2b) whether the provisions have the effect of (i) codifying, (ii) replacing or (iii) repealing the common law, and (2c) whether the provisions are a complete code that excludes or supplants the common law in a specific area of law.

102 This is what I intend to do. I will begin by considering this appeal from the perspective of the common law and I will then examine the Charter issues.

103 From this point of view, it must be asked whether the Régie's acts are subject to judicial review. The answer to this question depends to some extent on how the acts in question are classified. If they are reviewable, what duties does the Régie have toward the respondent? Were those duties breached? If so, what courses of action should be open to the respondent and what type of remedies should be granted?

104 Before directly addressing the issue of how to classify the Régie's acts in the case at bar, and in

order to make that issue easier to resolve, the concepts of impartiality and independence in general, and as they must be viewed in the instant case, should be clarified.

(3) Distinctions Between Independence and Impartiality

105 The independence of a quasi-judicial tribunal from the executive branch of government does not in itself guarantee that the tribunal will be impartial. It is conceivable that a tribunal might be relatively independent and yet biased for various reasons. In such a hypothetical situation, the relevant issue would be not the relative degree of independence, but the issue of bias itself. In R. v. Lippé, [1991] 2 S.C.R. 114, at p. 139, this Court distinguished the concepts of impartiality and independence:

> . . . judicial independence is but a "means" to this "end". If judges could be perceived as "impartial" without judicial "independence", the requirement of "independence" would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.
>
> However . . . judicial independence may not be sufficient. Judicial independence is only one component of judicial impartiality. . . . [Emphasis added.]

106 Independence is a necessary, but not sufficient, prerequisite for impartiality. This statement recalls a passage from MacKeigan v. Hickman, [1989] 2 S.C.R. 796, at p. 827 (cited in Lippé, supra, at p. 139):

> As this Court stated in MacKeigan . . . judicial independence is an underlying condition which contributes to the guarantee of an impartial hearing . . . . [Emphasis in original.]

107 Thus, from an analytical point of view, the concept of judicial independence is subordinate to the concept of impartiality. Independence is not an end in itself; it is merely one characteristic of our judicial system that seeks to achieve another purpose: impartiality.

108 In practice, no administrative tribunal can be completely independent of the executive. The courts themselves are not perfectly independent. As my colleague McLachlin J. noted in MacKeigan: "It is impossible to conceive of a judiciary devoid of any relationship to the legislative and executive branches of government" (p. 827). The independence of tribunals is therefore relative and varies with their decision-making level. According to Brun and Tremblay, supra, at p. 937:

> [Translation] The requirement of independence under s. 23 is stricter for the courts than for administrative tribunals.

109 This proposition, while true for certain aspects of independence, must be qualified. Variability in the degree of independence results from the nature of tribunals, which need a certain flexibility because of institutional constraints. However, depending on their decision-making level, it might be argued that the requirement of independence should in some respects be stricter for administrative tribunals than for the courts, in so far as their decisions are final and not subject to appeal. Since even the courts do not have complete independence and since the independence of administrative tribunals is variable, independence is an adaptable concept that can be viewed as a continuum. When the issue of independence is raised in a judicial review context, the courts must assess the necessary degree of

independence in each case based on the nature of the administrative tribunal, the institutional constraints it faces and the peremptory nature of its decisions.

110 While independence can be seen as a continuum, the same is not, in my view, true of impartiality. The concept of impartiality should be seen as a dichotomy involving two states: that of bias and that of impartiality. The only choice in such a dichotomy is between bias and impartiality, meaning that there is no intermediate option and thus no continuum. In the trial decision that gave rise to this appeal, [1993] R.J.Q. 1877, Vaillancourt J. referred a number of times to the principle that impartiality should be viewed in this manner (at pp. 1897, 1900 and 1904):

> [Translation] There is no compromising when it comes to impartiality, which cannot be "adjusted" or "decreased". A decision maker, whether it is a court or a quasi-judicial tribunal, cannot be permitted to be "almost" impartial.
>
> . . .
>
> These agencies have certainly become indispensable to the efficient operation of our government, as they have in most modern democracies, but is that a sufficient reason to permit their decisions not to be impartial? I do not think so, first and foremost because impartiality must, I repeat, be beyond reproach and also because everyone has a fundamental right to justice of that quality. . . .
>
> I have also expressed my view of impartiality and independence in light of the cases cited above. While the former cannot be diminished, lesser degrees of the latter can exist, depending on the circumstances. [Emphasis added.]

111 I agree, and none of the three Court of Appeal judges really questioned the idea that there is a dichotomy between bias and impartiality -- rightly so, since the argument that a tribunal can be "more or less impartial" or "just a little biased" seems rather difficult to justify. The argument that "the tribunal either is or is not impartial" seems to be much stronger.

(4) Distinctions Between Bias and Reasonable Apprehension of Bias

112 In my view, the distinction between bias and reasonable apprehension of bias must be clarified at this point. While bias is an indivisible concept, reasonable apprehension of bias must be seen as varying with the tribunal in question and all the relevant circumstances.

113 I am generally in agreement with my colleague Gonthier J.'s analysis of the concept of reasonable apprehension of bias in this appeal. However, I think it appropriate to add something to that analysis.

114 As noted by my colleague, it is true that in the context of a criminal trial, the smallest detail capable of casting doubt on the judge's impartiality will be cause for alarm, whereas greater flexibility must be shown toward administrative tribunals. However, such flexibility must not be shown in respect of impartiality: the requirement of impartiality cannot be relaxed. Flexibility must rather come into play in the specific content of the test for reasonable apprehension of bias in each individual case.

115 Thus, it is the reasonableness of the apprehension that will vary among administrative tribunals, not their intrinsic impartiality. In other words, a given reason for apprehending bias may be reasonable in a criminal trial but unreasonable in a quasi-judicial hearing. In every case, however, the decision-making

body must be perfectly impartial; if it is biased, it will immediately violate the nemo judex in propria sua causa debet esse rule.

B. Classification of the Régie's Acts

116 It is well settled in our law that there are four possible categories of government acts: quasi-judicial, administrative, legislative and ministerial: see generally Dussault and Borgeat, supra, at pp. 240-56. In a case such as this one, the most relevant approach is to begin by asking the following question: what is the Régie alleged to have done? The respondent has not alleged either a jurisdictional error or a violation of the audi alteram partem rule. The allegations against the Régie all fall under the heads of impartiality and independence, that is, in the general category covered by the nemo judex in propria sua causa debet esse rule.

117 For the purposes of our analysis, the issue of independence is subordinate to that of impartiality. If bias is found, the issue of independence becomes totally moot. The opposite is not true: if a direct finding of bias cannot be made, then an analysis of independence will be necessary. Having made this methodological clarification, I will first consider the classification of the Régie's acts from the viewpoint of impartiality in general.

118 To what categories of government acts will the nemo judex rule be applicable as a matter of law? Ministerial acts by nature involve no discretion. Absent discretion, the nemo judex rule cannot apply, since there cannot be any bias. Legislative acts are, by nature and conceptually speaking, totally discretionary and the nemo judex rule therefore does not apply to them either.

119 If the act is ministerial, the decision maker is strictly required to adhere to a certain norm: see generally Dussault and Borgeat, supra, at p. 248:

> Thus, the norm gives them an indication of the specific way in which decisions must be made. It leaves no possibility for them to exercise judgment, skill or discretion and no freedom to evaluate or to interpret. To use the terms of the Royal Commission of Inquiry into Civil Rights in Ontario, the administrator is then "a mere instrument or automaton, and has no 'authoritative' power to decide whether he will act or what he will do". He or she may even be termed "a slave of the Act or regulation". [Emphasis added.]

120 If the act is legislative rather than administrative, the body has no duty to act fairly unless the enabling legislation so provides: Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735. If the legislative act involves general policy or public convenience rather than an individual or unique concern, the decision in question is "final and not reviewable in legal proceedings": National Anti-Poverty Organization v. Canada (Attorney General), [1989] 3 F.C. 684 (C.A.), at p. 700; leave to appeal to this Court refused, [1989] 2 S.C.R. ix.

121 Every quasi-judicial tribunal has a duty to act in accordance with natural justice: Alliance des professeurs catholiques de Montréal v. Labour Relations Board of Quebec, [1953] 2 S.C.R. 140, at p. 154 (per Rinfret C.J.); Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311. Likewise, every public body that has the power to decide an issue affecting individual rights or interests -- that is, every body that performs administrative acts -- has a duty to act fairly: Martineau v. Matsqui Institution Disciplinary Board, [1980] 1 S.C.R. 602. As noted by Laskin C.J. in Nicholson, at p. 324:

> I accept, therefore, for present purposes and as a common law principle what Megarry J. accepted in Bates v. Lord Hailsham, [1972] 1 W.L.R. 1373, at p. 1378, "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness".

122 It is well known that the principles of natural justice include the nemo judex rule: see generally Dussault and Borgeat, Administrative Law: A Treatise (2nd ed. 1990), vol. 4, at p. 296. The duty of fairness also includes the nemo judex rule: In re H. K. (An Infant), [1967] 2 Q.B. 617, at p. 630, Lord Parker C.J.:

> I myself think that even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection. . . . That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly. [Emphasis added.]

123 In Energy Probe v. Atomic Energy Control Board, [1985] 1 F.C. 563 (C.A.), at p. 583, leave to appeal to this Court refused, [1985] 1 S.C.R. viii, Marceau J.A. expressed the same opinion:

> The law of bias was developed with regard to the exercise of all sorts of judicial or quasi-judicial functions, so that, in the process, it was easily extended from courts to tribunals and to all other bodies called upon to determine questions affecting the civil rights of individuals.

124 Accordingly, it is clear that the nemo judex rule is a mandatory minimum that applies to administrative acts as part of the duty to act fairly, even if that duty does not necessarily include all of the rules of natural justice. In other words, compliance with the nemo judex rule is a necessary prerequisite for compliance with the duty to act fairly: it follows that any violation of the nemo judex rule necessarily involves a breach of the duty to act fairly.

125 I noted above that impartiality, that is, the nemo judex rule, is a dichotomy: either it applies or it does not apply. In the case at bar, it is agreed that the Régie's acts are neither ministerial nor legislative but rather administrative or quasi-judicial. The nemo judex rule applies irrespectively of whether they are classified as administrative or as quasi-judicial. The issue of whether they should be classified as administrative or quasi-judicial is therefore irrelevant in the instant case and does not have to be resolved to dispose of the appeal.

126 Having said this, I nevertheless agree with the manner in which my colleague Gonthier J. analysed this issue. In a case in which acts did have to be classified to dispose of an appeal, I would use exactly the same analysis.

127 In conclusion, the acts alleged against the Régie are either administrative or quasi-judicial and are subject to the duty of impartiality included in the nemo judex rule.

C. An Administrative Agency's Duty to Be Impartial

128 Given that the Régie has a duty to be impartial, what is the specific nature of that duty in the case at bar?

129 Since impartiality is not a continuum, an administrative agency will either comply with the duty by being impartial or breach the duty by being biased; *there is no intermediate situation.* The fundamental question that must be answered in each case is the following: was or is the administrative agency biased? Since it is impossible to have direct access to the psychological foundations of bias in a decision maker's mind, it is necessary to rely on an indicator that allows the question to be answered judicially. That indicator is reasonable apprehension of bias, which I have already discussed. The legal issue thus becomes the following: would the administrative agency cause an informed person to have a reasonable apprehension of bias in a substantial number of cases? If so, a legal finding of bias will result; if not, a legal finding of impartiality will be made.

130 In the case at bar, the courts found after analysing the evidence, as my colleague Gonthier J. has also found, that the Régie does give rise to such a reasonable apprehension of bias. There is no reason to intervene in the determination of these findings of fact. In the instant case, it has therefore been established that the Régie would cause an informed person to have a reasonable apprehension of bias in a substantial number of cases. Accordingly, it should be found that the Régie is biased in this case. By implication, the Régie has violated the nemo judex rule and thus breached its duty to act fairly. This breach opens the door to the common law remedies applicable in the circumstances, account being taken of the courts' discretion with respect to prerogative remedies.

131 Since a breach of the duty to act fairly has been shown on the ground of bias -- in this case institutional, organizational bias -- the issue of the agency's independence becomes moot. As I have already mentioned, independence is not a factor that is per se part of this analysis: it is merely a factor that is subordinate to impartiality because, given that no tribunal can be completely independent, independence becomes relevant only as an aspect of impartiality. Conceptually, independence is only one element in the broader category of impartiality. Having already found that the general duty to be impartial was breached, a specific analysis of independence would add nothing to my conclusions in the case at bar and is therefore unnecessary.

D. Remedies

132 The common law remedies available in the circumstances are the writs of certiorari, prohibition, mandamus and the declaratory action. These common law remedies apply in the same manner in every Canadian province, including Quebec. In Quebec, however, the Code of Civil Procedure, R.S.Q., c. C-25, has established a procedure for seeking remedies that differs from the common law procedure. Certiorari and prohibition have been merged into one remedy: evocation, which can be sought by motion under art. 846 of the Code of Civil Procedure. Mandamus can be sought by motion under arts. 834 to 837 and 844 and 845 of the Code of Civil Procedure. Finally, a declaration can be obtained under arts. 453 et seq. of the Code of Civil Procedure.

133 In the case at bar, the respondent brought a motion in evocation under art. 834 of the Code of Civil Procedure. The respondent asked that the Régie's decision be quashed and set aside. As I have noted, I agree with my colleague Gonthier J. that certain organizational aspects of the Régie would cause an informed person to have a reasonable apprehension of bias in a substantial number of cases. I also agree with my colleague that the Régie must make certain organizational changes, such as procedures to

separate functions. Since the respondent's application is well founded, there is no reason to decline to exercise the remedial discretion conferred on the courts by the Code of Civil Procedure. I would therefore allow the motion in evocation and quash and set aside the Régie's decision.

134 I note that the respondent has chosen not to seek a declaratory remedy, which it could have done through a motion for a declaratory judgment under arts. 453 et seq. of the Code of Civil Procedure. The only declaratory conclusion sought by the respondent in its motion under art. 834 of the Code of Civil Procedure is the following:

> [Translation] SAY AND DECLARE that s. 2 of the Act respecting liquor permits is invalid and of no force or effect on the basis that it violates s. 23 of the Charter of Human Rights and Freedoms;

135 If the declaratory action provided for in arts. 453 et seq. had been instituted and argued, it would have been possible to grant this conclusion, but in the circumstances I will consider that action on an incidental basis only.

136 I believe it will be helpful to briefly review the history of the declaratory action that is now codified in art. 453. The declaratory action originated in France in the 14th century, found its way to Scotland where it became known as declarator starting in the 16th century, and was then adopted by British equity in the 19th century: see L. Sarna, The Law of Declaratory Judgments (2nd ed. 1988); I. Zamir, The Declaratory Judgment (2nd ed. 1993). The declaratory action was not codified in Quebec until 1965; before then, the declaratory judgment concept was little known in that province.

137 I note, however, that today this action has two historical components: the common law since the 19th century and the civil law since 1965. Even before 1965, it was possible under Quebec law to bring a common law declaratory action. In Saumur v. Procureur général de Québec, [1964] S.C.R. 252, the appellants sought to have the Act respecting freedom of worship and the maintenance of good order declared invalid before they had even suffered any injury thereunder. Taschereau C.J. dismissed the appeal, without examining the Act's constitutionality, on the ground that there was no existing and actual interest in a dispute. What the judgment in fact decided was that the common law declaratory action was available in Quebec in the public law context, although it was in fact rarely used.

138 In my view, since Quebec public law is governed by the common law, the declaratory action has been available in Quebec in the public law context since the beginning of the 19th century and will remain available until it is changed by legislation. In the property and civil rights context, the declaratory action has been available only since it was codified in 1965. Common law declaratory judgments have been rendered in the British colonies since the beginning of the 19th century: see, for example, Taylor v. Attorney-General (1837), 8 Sim. 413, 59 E.R. 164, where the High Court of Chancery rendered a declaratory judgment in a Nova Scotia case.

139 Thus, Quebec public law includes a common law declaratory action that is available in the administrative law context. Such an action can be brought today in the same manner as a civil law declaratory action, that is, under art. 453 of the Code of Civil Procedure. In administrative law, this common law declaratory action makes it possible to obtain a declaration concerning the parties' rights in relation to each other, including the rights of an individual and an administrative agency pursuant to an enabling statute: see generally Zamir, supra, at pp. 212-16.

140 In the case at bar, the appropriate remedy in this regard would have been a declaration under art. 453 of the Code of Civil Procedure that the relevant provisions of the statute are of no force or effect

between the parties.

141 However, this common law remedy does not have the same scope as the declaratory remedy available under the Charter. The courts do not have the power, either at common law or in equity, to go against parliamentary sovereignty by striking down legislative provisions: British Railways Board v. Pickin, [1974] A.C. 765 (H.L.). Likewise, the Code of Civil Procedure establishes that a declaratory judgment is binding only on the parties to the case:

> 453. Any person who has an interest in having determined immediately . . . any right, power or obligation which he may have under a . . . statute . . . may, by motion to the court, ask for a declaratory judgment in that regard.
>
> 456. A declaratory judgment rendered in accordance with this chapter has the same effect and is subject to the same recourses as any other final judgment.

142 Thus, such a declaratory judgment would have had the legal effect of making the relevant provisions of no force or effect as against the respondent only. The legal effect would have been inter partes in nature. Of course, pursuant to the res judicata principle, the judgment would also have had a legal effect in respect of the parties' future relations. Moreover, pursuant to the stare decisis principle, it would have had a legal effect and persuasive authority in respect of the Régie's relations with third parties.

143 However, and I consider this point to be of crucial importance, the common law remedy would not have had the effect of invalidating the statute erga omnes, which was the effect of the application of the Charter to this case by the courts below. The invalidation of a statute erga omnes, by creating a veritable legal vacuum, gives rise to a situation in which it becomes urgent for the legislature and the administrative agencies involved to amend enabling statutes and alter organizational structures, all of which they must do in a reactive fashion. The remedy under art. 453, since it is inter partes in nature, allows for a more flexible approach that provides institutions with an opportunity to reform the system more strategically.

144 This does not mean that the Charter remedy declaring a statute invalid erga omnes must always be avoided. It is easy to imagine many circumstances and situations in which such a remedy would be necessary. However, I think that this case does not have the requisite characteristics to justify such an erga omnes remedy, even with respect to a single section of the enabling statute. In the case at bar, the appropriate declaratory remedy was an inter partes declaratory judgment under art. 453 of the Code of Civil Procedure.

145 Having identified the common law rules applicable to the case at bar, I must still determine the effect of the Charter's provisions on the common law. It must first be determined whether those provisions are applicable to the instant case. As I will show, they are not. In my view, that disposes of this appeal, and I will examine the issue from a Charter perspective on an alternative basis only.

III. The Charter

146 The issue in the case at bar involves the interpretation of ss. 23 and 56(1) of the Charter, particularly the concept of a quasi-judicial tribunal. The interpretation method is thus of fundamental importance here, which is why I intend to begin by discussing it.

A. Methodological Approach

147 This appeal provides a good opportunity to clarify certain methodological points underlying the essential activity of legal interpretation. With the rapid development of modern administrative law, the importance of legal interpretation is continually increasing, in proportion to the growing size of our administrative system and the complexity of the issues it must address. Legal interpretation, as a separate discipline, is therefore bound to become an essential part of the knowledge, skills and abilities that contemporary jurists must possess.

148 The following comments by W. N. Eskridge, Dynamic Statutory Interpretation (1994), at pp. 6-8, take on their full meaning in the context of this appeal:

> Some of [my] argumentation . . . draws on prior work in common law and, especially, constitutional theory. Because statutory interpretation theory languished for so long, its renaissance has borrowed heavily from existing scholarship in these areas. Nonetheless . . . statutory interpretation theory is distinct from, and intellectually independent of, common law and constitutional theory. For example, statutory interpretation involves much richer authoritative texts than common law or constitutional interpretation. . . . More than common law or constitutional interpretation, statutory interpretation is a holistic enterprise, permitting deep involvement of the interpreter in the structure and history of a statutory text, as well as its formal relation to other statutory provisions.
>
> . . .
>
> The institutional features of the law implementation process offer exciting intellectual possibilities for the study of statutory interpretation because that field -- much more than common law or constitutional interpretation -- demands a theory of Congress (and the presidency) as well as a theory of language and interpretation. . . .
>
> Finally, statutory interpretation is the most important form of legal interpretation in the modern regulatory state because it is as much agency-centered as judge-centered. Although not inevitably judge-made, our common law as well as constitutional traditions are juricentric. This renders them less relevant for thinking about the creation of public policy in the modern administrative state. [Emphasis added.]

149 In view of the scope of these changes, which are fuelling the transformation of this area of legal thought, I believe the time has come to set out in more precise terms the basic methodological approach that should normally be used by jurists engaged in legal interpretation.

150 The concept of precision (or imprecision) in the methodological approaches used in law is, in my view, clearly different from the concept of precision in the substantive content of the law. First of all, these two concepts can be distinguished by the impact that their imprecision or vagueness may have. While imprecision in the substantive law may potentially affect a certain segment of our society, vagueness in legal methodology has effects that pervade the entire judicial system in its broadest sense and are accordingly felt by society as a whole. It is easy to see that if vagueness were, hypothetically, introduced into methodological concepts -- such as the rules of legal interpretation -- this would have a

broader systemic impact than imprecision in some specific aspect of substantive law.

151 Next, a distinction must be made in terms of the jurisdiction of the courts -- both this Court and the other levels of the judicial system -- in respect of these two concepts. Even if, according to the principle of parliamentary sovereignty, the judiciary does not legislate and merely applies the substantive law to specific cases, it retains a residual normative jurisdiction derived from the common law. In areas of the law outside substantive law, this jurisdiction relates, for example, to the rules of practice of the adversary process and, in so far as it is not codified, the law of evidence. In my view, the methodology of legal interpretation is one of those areas of the law in respect of which the judiciary must exercise its normative jurisdiction. I agree with the formulation of this principle suggested by Côté, supra, at pp. 8-9:

> The official theory of interpretation is first and foremost a normative theory, a doctrine; that is, an intellectual construction which prescribes the manner in which the phenomenon of legal interpretation should be conceived, sets out the objectives which the interpreter must pursue, and indicates the means that he may and may not, or should and should not, apply. This theory provides a model for the jurist, in both the search for meaning of the enactment (the heuristic function of the theory), and in the justification of the meaning which is adopted in a given case (the justificative function of the theory). The official theory does not so much tend to describe or explain the phenomenon of interpretation as to impose on the legal community a correct theoretical mode, a doctrine, an orthodoxy. [Emphasis added.]

152 I will now review the model for the jurist that has been prescribed by this Court since the Canadian Charter of Rights and Freedoms was enacted in 1982. In the past, this Court relied on the so-called "plain meaning rule" methodological approach, which has been described as follows (E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87; applied in Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536, at p. 578):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. This principle is expressed repeatedly by modern judges, as, for example, Lord Reid in Westminster Bank Ltd. v. Zang, and Culliton C.J. in R. v. Mojelski. Earlier expressions, though in different form, are to the same effect; Lord Atkinson in Victoria (City) v. Bishop of Vancouver Island put it this way:
>
> > In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense. [Emphasis added.]

153 In reality, there are two successive stages in this "plain meaning rule" process: first, by default, the so-called "plain meaning" of the words must be used; second, if -- and only if -- there is something in the context to indicate that the meaning differs from the "plain meaning", then it is possible to "depart" from that "plain meaning". According to this rule, it is only at this second stage that the legal interpretation process should begin; if the meaning seems prima facie clear, then this rule functions as a

sort of methodological estoppel that seeks to prevent the legal interpretation process from beginning. According to Côté, supra, at pp. 241-42, this "plain meaning" method has serious shortcomings:

> The ["plain meaning"] Rule also regulates. It invites the judge to conclude his study if, upon reading the words of the law alone, the meaning is clear. Understood in this way, the rule of literal interpretation seems virtually to contradict the basic principles of linguistic communication.
>
> It should not be forgotten that research in semantics has shown that words only take on their real meaning when placed in context. The meaning of words and sentences is crystallized by the context, and in particular by the purpose of the message. Any interpretation that divorces legal expression from the context of its enactment may produce absurd results. [Emphasis added.]

154 In my view, the principal failing of the "plain meaning" process is the following: it obscures the fact that the so-called "plain meaning" is based on a set of underlying assumptions that are concealed in legal reasoning. In reality, the "plain meaning" can be nothing but the result of an implicit process of legal interpretation. As noted by Côté, supra, at p. 240:

> But this is already an "interpretation", although not necessarily a conscious one.127

127 . . . "The process of recognizing the clarity or obscurity of a text always implies at least an implicit interpretation of it . . ."

155 The "plain meaning" rule has been criticized in England for the same reasons: M. Zander, The Law-Making Process (4th ed. 1994), at pp. 121-27:

> . . . the literal rule has also been subjected to severe criticism:
>
> (1) The most fundamental objection to the rule is that it is based on a false premise, namely that words have plain, ordinary meanings apart from their context.
>
> . . .
>
> (3) The plain-meaning approach cannot be used for general words, which are obviously capable of bearing several meanings.
>
> (4) Not infrequently the courts say that the meaning of the words is 'plain' but then disagree as to their interpretation.
>
> (5) . . . As Professor Glanville Williams has pointed out, often one party is contending for an 'obvious' meaning of the words while the other argues for a secondary meaning of the words. The choice cannot then be made sensibly without regard to the context.
>
> . . .

> Even the most die-hard advocates of the literal approach sometimes lapse into some alternative method . . . .
>
> The result of the inevitable inconsistency as to the application of the literal approach is that it loses much of its claim to be the basis of greater certainty.
>
> . . .
>
> The literalist approach makes too little allowance for the natural ambiguities of language, for the frailties of even the most skilled of draftsmen and for the impossibility of foreseeing future events. . . .
>
> The literal approach is based on a narrow concentration on the actual words used, to the exclusion of the surrounding circumstances that might explain what the words were actually intended to mean. . . . It is a characteristic of some primitive legal systems that they attach excessive weight to the importance of words so that, for instance, the plaintiff who makes a slip in stating his claim is nonsuited. The literal approach to language by lawyers may be a form of this tradition. The draftsman is in effect punished for failing to do his job properly (except that it is his client, or in the case of statutes, the wider community, that bears the cost). The punitive or disciplinarian school of judicial interpretation remains a powerful element in the operation of the English legal system.
>
> . . .
>
> A final criticism of the literal approach to interpretation is that it is defeatist and lazy. The judge gives up the attempt to understand the document at the first attempt. Instead of struggling to discover what it means, he simply adopts the most straightforward interpretation of the words in question -- without regard to whether this interpretation makes sense in the particular context. It is not that the literal approach necessarily gives the wrong result but rather that the result is purely accidental. It is the intellectual equivalent of deciding the case by tossing a coin. The literal interpretation in a particular case may in fact be the best and wisest of the various alternatives, but the literal approach is always wrong because it amounts to an abdication of responsibility by the judge. Instead of decisions being based on reason and principle, the literalist bases his decision on one meaning arbitrarily preferred.
>
> . . .
>
> The approach is mechanical, divorced both from the realities of the use of language and from the expectations and aspirations of the human beings concerned and, in that sense, it is irresponsible. [Underlining added; italics in original.]

156 The same type of criticism of legal interpretation has been made in the United States: N. J. Singer, Statutes and Statutory Construction (5th ed. 1992), vol. 2A, at pp. 5-6:

> A frequently encountered rule of statutory interpretation asserts that a statute, clear and unambiguous on its face, need not and cannot be interpreted by a court and that only statutes which are of doubtful meaning are subject to the process of statutory interpretation. . . . However, this rule is deceptive in that it implies that words have intrinsic meanings. . . .
>
> The assertion in a judicial opinion that a statute needs no interpretation because it is "clear and unambiguous" is in reality evidence that the court has already considered and construed the act. It may also signify that the court is unwilling to consider evidence bearing on the question how the statute should be construed, and is instead declaring its effect on the basis of the judge's own uninstructed and unrationalized impression of its meaning. [Emphasis added.]

157 Eskridge, supra, at pp. 38-41, demonstrates that the "plain meaning" method is unsound even in terms of its theoretical underpinnings:

> The new textualist position is that statutory text is the most determinate basis for statutory interpretation. That proposition, important to their theory, is questionable. . . .
>
> The simplest version of textualism is enforcement of the "plain meaning" of the statutory provision: that is, given the ordinary meanings of words and accepted precepts of grammar and syntax, what does the provision signify to the reasonable person? An initial problem with simple plain meaning is that, for any statute of consequence, the legislative drafting process ensures textual ambiguities, which only multiply over time.
>
> . . .
>
> An additional problem with a simple textualist theory is that the meaning of text is decisively influenced by context.
>
> . . .
>
> This is my third problem with a simple, naive textualism: the interpreter's own context, including her situatedness in a certain generation and a certain status in our society, influences the way she reads simple texts.
>
> . . .
>
> A simple plain meaning approach to statutory interpretation seems unlikely to yield the determinacy needed for a foundational theory of statutory interpretation. [Emphasis added.]

158 In light of the evolution of our law following the passage of the charters and given the growing recognition that there are many different perspectives -- the aboriginal perspective, for example -- I believe that the era of concealed underlying premises is now over. In my view, those premises must be brought to the surface in order to promote consistency in our law and the integrity of our judicial system.

159 This is the approach I advocated, on behalf of the majority of the Court, in Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513, in which the issue involved the interpretation of the term "financing". In that case, although I did not go into all the methodological details explicitly, I used the "informed interpretation" method proposed by Bennion as a normative method for English common law (F. A. R. Bennion, Statutory Interpretation: Codified, with a critical Commentary (1984), at pp. 261-63 and 557; the formulation of that method was reproduced in Bennion, Statutory Interpretation: A Code (2nd ed. 1992), at pp. 427-29):

> (1) It is a rule of law (in this Code called the informed interpretation rule) that the interpreter is to infer that the legislator, when settling the wording of an enactment, intended it to be given a fully informed, rather than a purely literal, interpretation (though the two usually produce the same result).
>
> (2) Accordingly, the court does not decide whether or not any real doubt exists as to the meaning of an enactment (and if so how to resolve it) until the court has first discerned and considered, in the light of the guides to legislative intention, the context of the enactment, including all such matters as may illumine the text and make clear the meaning intended by the legislator in the factual situation of the instant case.
>
> . . .
>
> The informed interpretation rule is a necessary one. If the drafter had to frame the enactment in terms suitable for a reader ignorant of past and contemporary facts and of legal principles (and in particular the principles of statutory interpretation), he or she would need to use far more words than is practicable in order to convey the meaning intended. . . .
>
> The informed interpretation rule is to be applied no matter how plain the statutory words may seem at first glance. Indeed the plainer they seem, the more the reader needs to be on guard. A first glance at an enactment is not a fully-informed glance. Without exception, statutory words require careful assessment of themselves and their context if they are to be construed correctly.
>
> One danger of the first glance approach lies in what is sometimes called impression. When the human mind comes into contact with a verbal proposition, an impression of meaning is immediately formed. It may be difficult to dislodge.
>
> . . .
>
> For the purpose of applying the informed interpretation rule, the context of an enactment comprises, in addition to the other provisions of the Act containing it, the legislative history of that Act, the provisions of other Acts in pari materia, and all facts constituting or concerning the subject-matter of the Act. [Underlining added; italics in original.]

160 What Bennion calls the "informed interpretation" approach is called the "modern interpretation rule" by Sullivan and "pragmatic dynamism" by Eskridge. All these approaches reject the former "plain

meaning" approach. In view of the many terms now being used to refer to these approaches, I will here use the term "modern approach" to designate a synthesis of the contextual approaches that reject the "plain meaning" approach. According to this "modern approach", consideration must be given at the outset not only to the words themselves but also, inter alia, to the context, the statute's other provisions, provisions of other statutes in pari materia and the legislative history in order to correctly identify the legislature's objective. It is only after reading the provisions with all these elements in mind that a definition will be decided on. This "modern" interpretation method has the advantage of bringing out the underlying premises and thus preventing them from going unnoticed, as they would with the "plain meaning" method.

161 Since Hills, supra, I have continually stressed the importance of using the "modern" interpretation method rather than the former "plain meaning" method:

> But, as I said above, a strict textual interpretation is not warranted here. [Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554, at p. 618.]
>
> The Code, and in particular s. 118(a), should be interpreted in light of all the rules of statutory interpretation, among which the context plays an important part. The pragmatic and functional approach referred to above is the very opposite of a textual and formalistic approach. The analysis of s. 118(a) by my colleague Gonthier J. begins and is primarily concerned with a literal and grammatical interpretation. I definitely cannot agree with such an interpretation, which, in my view, is not appropriate. . . . [Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn., [1993] 3 S.C.R. 724, at p. 757.]
>
> "Plain meaning" must not be used as an end in itself, particularly where it inevitably leads to absurd results which must be inconsistent with what Parliament would have intended. The thoughts of Justice Shamgar, President of the Supreme Court of Israel (as reproduced in Selected Judgments of the Supreme Court of Israel, vol. VIII (1992), at p. 263) strike me as particularly insightful:
>
> > . . . language does not govern the purpose, rather it serves it. The law is an instrument for realizing legal policy, and therefore interpretation needs to aim toward emancipating the wording from its semantic bonds, were these to distance it from the legislative purpose which the words are intended to realize.
> >
> > . . .
>
> If ever a case existed for rejecting a tightly tailored "plain meaning" approach in the face of consequences that are both absurd and contrary to the spirit and purpose of the law, it is raised in the present appeal. Of course, it is not for a court to second-guess the wisdom of the legislature since, subject to constitutional constraints, the legislature is entitled to legislate irrationally if it so chooses. Nonetheless, this Court should not adopt an interpretation . . . that would lead to absurd consequences when the mischief intended to be addressed is so poignantly clear. . . . [R. v. St. Pierre, [1995] 1 S.C.R. 791, at paras. 84 and 91.]

162 The "modern" interpretation method was recognized by Côté, supra, at p. 234:

> In trying to ascertain legislative intent, the reader must begin with the text chosen by the author as a vehicle for his thoughts. But should he stop there? According to Lord Denning,
>
> > Beyond doubt the task of the lawyer -- and of the judge -- is to find out the intention of Parliament. In doing this, you must, of course, start with the words used in the statute: but not end with them -- as some people seem to think.
>
> Two reasons in particular militate in favour of going beyond the enactment. First, as we have seen, the goal of interpretation is more than simply discovering the historic thought of the author of the enactment: it has other goals, and consequently requires a number of factors to be taken into account, such as the consequences of interpretation, which have nothing to do with the text itself. Second, even if we consider that interpretation's sole purpose is to reveal the thought of the legislator, two principal reasons dictate going beyond the literal method in order to reveal such thought. Firstly, because of what has often been called the "open texture" of language, the literal approach is often not sufficient to dispel all doubts about an enactment's application. Secondly, the literal approach confines the courts to the explicit component of Parliament's message: the implicit component, which is derived from the text of the statute, must also be considered in the quest for legislative intent. [Emphasis added.]

163 The "modern" interpretation method has also been recognized in other common law countries: L. M. du Plessis, The Interpretation of Statutes (1986), at pp. 55 and 57:

> However, all these [various successive stages of interpretation] together with the rules and presumptions applicable to them are always at least implicitly relevant in the sense that they must be borne in mind even if their applicability to the interpretation of a specific provision of an enactment is quite self-evident, and even if the "correct" answers to the questions of understanding they raise, can be arrived at intuitively.29
>
> ---
>
> 29 "Purely" or unbridled intuitive interpretation is of course at its best a risky business, and an interpreter would do best rather to obey the norms applicable to the various stages of interpretation as meticulously as possible. . . .
>
> . . .
>
> The presumptions are to serve as basic guidelines throughout the process of interpretation. Because due cognisance of the operation of the presumptions is not necessarily a clearly discernible first stage in the process of interpretation, since the presumptions obtain throughout all the stages of interpretation, the interpreter should be conscious of their existence, contents and operation right

> from the outset. This awareness of the presumptions should underlie his step by step interpretation of the enactment, carrying him through the various stages involved, and guiding him in the "right direction".
>
> . . .
>
> During this first stage of interpretation recourse may as a rule be had to dictionaries to ascertain the "ordinary meaning" of words or expressions. . . . An interpreter may, as a matter of fact, by no means remain with the result obtained by applying this rule even though "the language of the enactment is (ostensibly) clear". . . . The real meaning of an enactment may in fact remain hidden to an interpreter who adheres merely to "clear language" or who qualifies this language -- if it happens not to be so clear -- without due cognisance of all the other co-equal structural elements which constitute the overall context of meaning within which the enactment prevails. [Underlining added; italics in original.]

164 Finally, the "modern" interpretation method was reformulated in Canada by Professor R. Sullivan: Driedger on the Construction of Statutes (3rd ed. 1994), at p. 131:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just. [Emphasis added.]

165 However, since Hills this Court has wavered between the former "plain meaning" method and the "modern" interpretation method. For example, in R. v. McIntosh, [1995] 1 S.C.R. 686, at para. 21, Lamer C.J., speaking for the majority, used the former method, quoting the second edition of Driedger, supra, at p. 87, with approval:

> In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.

166 However, in R. v. Creighton, [1993] 3 S.C.R. 3, Lamer C.J. came around to an interpretation based on the "modern" method, that is, an interpretation that rejected the "plain meaning" of the term "unlawful act" under s. 222(5)(a) of the Criminal Code. That interpretation is part of a line of decisions that originated with R. v. Larkin (1942), 29 Cr. App. R. 18: see R. v. DeSousa, [1992] 2 S.C.R. 944, at pp. 958-59. Although in Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031, at para. 14, Lamer C.J. stated that his support for the "modern" method was based on the presumption of constitutionality, that presumption is not actually the basis for the line of decisions in question. Moreover, in Ontario v.

Canadian Pacific Ltd., Gonthier J., writing for the majority, used the "modern" contextual interpretation method.

167 This Court subsequently used the "modern" interpretation method again: in R. v. Lewis, [1996] 1 S.C.R. 921, at para. 68, that method, as formulated by Professor Sullivan, was cited with approval by my colleague Iacobucci J.:

> In order to arrive at the correct interpretation of statutory provisions, the words of the text must be read in context: see Driedger on the Construction of Statutes [3rd ed. 1994], at p. 193, and Côté, supra, at p. 257.

168 The "modern" method was also used by this Court in McIntosh, supra, at paras. 58-59, where my colleague McLachlin J. stated the following in dissent:

> But even if the words were plain, the task of interpretation cannot be avoided. As Driedger on the Construction of Statutes (3rd ed. 1994) puts it at p. 4, "no modern court would consider it appropriate to adopt that meaning, however "plain", without first going through the work of interpretation".
>
> The point of departure for interpretation is not the "plain meaning" of the words, but the intention of the legislature. . . . To quote Driedger, supra, at p. 3: "The purpose of the legislation must be taken into account, even where the meaning appears to be clear, and so must the consequences". . . . The plain meaning of the words, if such exists, is a secondary interpretative principle aimed at discerning the intention of the legislator.

169 However, this Court now seems to have returned to the former "plain meaning" method in Verdun v. Toronto-Dominion Bank, [1996] 3 S.C.R. 550, at paras. 21-22:

> While the parties' use of these various interpretive techniques is adept, a full discussion of these techniques is unnecessary to the resolution of this appeal. This is so because the language and context of the provisions in question make their meaning clear.
>
> To state the obvious, the first step in a question of statutory interpretation is always an examination of the language of the statute itself. As E. A. Driedger wrote in his text, Construction of Statutes (2nd ed. 1983), at p. 87:
>
> . . .
>
> In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something . . . to show that they were used in a special sense different from their ordinary grammatical sense.

170 The fact that this Court is wavering at random between the former "plain meaning" method and the "modern" contemporary method introduces uncertainty into the law as far as this methodological point is concerned. What method should jurists use? As things stand at the moment, the answer is at best obscure. If the courts randomly choose one of the two interpretation methods depending on the desired result, then the activity of legal interpretation is reduced to an arbitrary exercise whose result is

unpredictable. In so far as such an undesirable situation prevails, the comment on methodology made by Philp J.A., writing for a unanimous panel of the Manitoba Court of Appeal in Judges of the Provincial Court (Man.) v. Manitoba (1995), 102 Man. R. (2d) 51, at p. 69, is appropriate:

> The . . . argument is a Humpty-Dumpty-like exercise in making words mean what they want them to mean ("When I use a word", Humpty-Dumpty said, in a rather scornful tone, "it means just what I choose it to mean -- neither more nor less." Lewis Carroll, Through the Looking-Glass, Chapter 6). [Emphasis added.]

171 With respect to this idea of a Humpty-Dumpty-like interpretation exercise, see also generally: Roynat Inc. v. Ja-Sha Trucking & Leasing Ltd. (1992), 89 D.L.R. (4th) 405 (Man. C.A.), at p. 408; Bodnar v. Real Estate Council of British Columbia (1994), 121 D.L.R. (4th) 27 (B.C.C.A.), at p. 37. A Humpty-Dumpty-like interpretation exercise is actually nothing more than an interpretation based on random or vague rules or solely on intuition or unrationalized impressions, or one that fails to consider the underlying premises of legal reasoning. It goes without saying that the courts must avoid this type of interpretation exercise.

172 In light of the dynamic development of our law, the plurality of perspectives on legal analysis, the methodological problems presented by the "plain meaning" and the growing international recognition of all these factors, I believe that it is time to abandon the former "plain meaning" method in Canada and, from now on, to use the "modern" method as the basic approach to legal interpretation. That is what I now intend to do in the case at bar.

173 However, before beginning that analysis, it is important to consider two methodological caveats. First, the "modern" interpretation method must not be taken further than it can go. It seems to me that the "pragmatic dynamism" approach suggested by Eskridge could lead to such excess if carried too far. Eskridge has stated the following, supra, at p. 50:

> Aristotle urged that application of general statutes to unanticipated cases requires the interpreter "to correct the omission -- to say what the legislator would have said had he been present, and would have put into law if he had known."
>
> An Aristotelian approach to statutory interpretation is suggested by the American pragmatic tradition. Pragmatism argues that there is no "foundationalist" (single overriding) approach to legal issues. Instead, the problem solver should consider the matter from different angles, applying practical experience and factual context before arriving at a solution. Practical experience in both Europe and the United States suggests that when statutory interpreters apply a statute to specific situations, the interpreter asks "not only what the statute means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society".
>
> . . . [My pragmatist-inspired] argument is based on an Aristotelian theory of application and changed circumstances: a statute is relatively abstract until it is applied to a specific situation. Especially over time, the circumstances will not be ones that the statute or its drafters contemplated, and any application of the statute will be dynamic in a weak sense, going beyond the drafters'

> expectations. Sometimes the circumstances will be materially different from those contemplated by the statutory drafters, and in that event any application of the statute will be dynamic in a strong sense, going against the drafters' expectations, which have been negated because important assumptions have been undone. [Underlining added; italics in original.]

174 This "pragmatic dynamism" approach has recently been commented on as follows in Canadian academic literature (P. Michell, "Just Do It! Eskridge's Critical Pragmatic Theory of Statutory Interpretation" (1996), 41 McGill L.J. 713, at p. 731):

> At the core of this approach is a healthy scepticism about all theoretical approaches and a measure of uncertainty as to whether the answer chosen is the correct one. At the same time, however, critical pragmatism is concerned to get the job done, not to equivocate or temporize. Seen from this perspective, the essential problem of statutory interpretation is to apply a general, abstract statutory provision to a concrete factual situation. Circumstances often arise which the enacting legislators did not or could not have contemplated. Interpreters, on this account, must do what works best, by reference to the "web of beliefs" that surround a statute. [Emphasis added.]

175 In my view, Eskridge's "pragmatic dynamism" provides the judiciary with a justification for manufacturing interpretations that are diametrically opposed to the clear purpose of a statute. Eskridge based this approach on an opinion expressed by Aristotle in his Nichomachean Ethics. Yet that opinion tends to diverge from the rule of law and état de droit concepts as they are accepted today in our democratic societies. To avoid basing the development of our judicial system on unsound theoretical foundations, we must therefore be extremely cautious about sociopolitical opinions expressed by the classical authors. For an example of the many complications created by the use of the classical authors' sociopolitical opinions in the law, see generally M. C. Nussbaum, "Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies" (1994), 80 Va. L. Rev. 1515.

176 On the other hand, when it comes to pure methodology -- such as Aristotelian-Thomist formal logic and the Socratic method -- having recourse to the classical authors is obviously fully justified, inter alia in developing methods of legal interpretation. As correctly noted by Professor Nussbaum, the discipline of law could benefit from greater methodological rigor ("The Use and Abuse of Philosophy in Legal Education" (1993), 45 Stan. L. Rev. 1627, at pp. 1637-38):

> Philosophy does not just conduct inquiries into specific topics; it also turns round and examines itself, asking what belief and knowledge are, what rationality is, what interpreting a text is, what methods are and are not conducive to understanding. Once again, this explicitness and rigor seems to me to have a great deal to offer to the law, which inevitably talks about evidence and knowledge, about interpretation and objectivity, and about the nature of rationality. The point is not that philosophers have some secret key to these difficult questions, but that they spend their whole lives working on them, whereas lawyers rarely spend much time on them at all. So there is at least some chance that philosophers' more systematic and detailed inquiries will offer something to the lawyer.

. . .

> Law has become methodologically philosophical in some areas, in particular, in the debates about interpretation in constitutional law. But this self-scrutiny could be extended much further and could be pursued more rigorously, with benefit to all. [Emphasis added.]

177 The second methodological caveat is as follows. It is clear that the "plain meaning" method, with its methodological estoppel that prevents the initiation of legal reasoning, can be used in situations in which it is justified and does not have undesirable side effects. I am thinking, for example, of the area of tax law, in which our case law clearly establishes that the basic approach is that involving the "plain meaning" rule: Alberta (Treasury Branches) v. M.N.R., [1996] 1 S.C.R. 963, at para. 14 (per Cory J.):

> The appropriate principles to be considered in interpreting taxation legislation were clearly set out in Friesen v. Canada, [1995] 3 S.C.R. 103. . . .
>
> > In interpreting sections of the Income Tax Act, the correct approach, as set out by Estey J. in Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536, is to apply the plain meaning rule.

178 What are the underlying reasons for such an approach in taxation? In Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours, [1994] 3 S.C.R. 3, my colleague Gonthier J. set out the social and economic policy reasons in an analysis returned to by my colleague La Forest J. in Schwartz v. Canada, [1996] 1 S.C.R. 254, at para. 56:

> In . . . Notre-Dame de Bon-Secours . . . my colleague Gonthier J. clarified the proper rules governing the interpretation of tax legislation. After explaining the underlying principles of the traditional rule providing for a strict construction of fiscal statutes, he analyzed the evolution that had occurred on the issue during the past decade. As he explained . . . this evolution was the logical consequence of the recognition of the social and economic purposes of such legislation. . . . Gonthier J. held, at p. 17:
>
> > [T]here is no longer any doubt that the interpretation of tax legislation should be subject to the ordinary rules of construction. . . . "[T]he words of an Act are to be read in their entire context and in their . . . ordinary sense. . . ." [Driedger, Construction of Statutes (2nd ed. 1983), at p. 87.] [Emphasis added.]

179 From the standpoint of the methodology of legal interpretation, it must be borne in mind that tax law is a technical field that has a language of its own, since it is, along with accounting and management, part of what may generally be called "the business world". Professor A. Belkaoui, Working Paper 76-7, Linguistic Relativism in Accounting (1976), at pp. 1, 9 and 11, has demonstrated this very clearly:

> Accounting is the language of business. It represents phenomena in the business world as language represents phenomena in the real world. Both linguistics and accounting have a great number of similarities.
>
> . . .
>
> "(Accounting) is a language with a special vocabulary aimed at conveying the financial story of organizations. To understand corporate

> annual reports, a reader must learn the fundamentals of the language" (Horngren, 1974, p. 70).
>
> . . .
>
> "As is the case with language, accounting has many dialects. There are differences in terminology and practice among industries and among companies within industries. . . ." (Anthony and Rose, 1975, p. 12).
>
> . . .
>
> Symbolic representations do exist in accounting. For example, Mcdonald (1972, p. 6) identified numeral[s] and words, and, debit and credit, as symbols respectively accepted and unique to the accounting discipline. Hence, the terms used to portray accounting postulates and principles, such as materiality, going concern, conservatism, etc. . . . have a meaning unique to the accounting field. [Emphasis added.]

180 It is evident from this analysis that terms generally used in the business world, including taxation terms, have a meaning unique to the business world. Since the business world occupies such an important place and has such profound ramifications in our society, there are a great many terms of business language that have already been precisely defined by those working in the field. In fact, taxation terms often have definitions that have been clearly established through empirical means, that are generally recognized and accepted or that have been standardized by various bodies: see, for example, the dozens of specialized dictionaries and glossaries in taxation, accounting and management. See also, inter alia, the CICA Handbook and The Accountant's Manual of the Canadian Institute of Chartered Accountants. See also, from the Corporation professionnelle des administrateurs agréés du Québec, Guide de la saine gestion des entreprises et des organisations (Principes d'administration et de gestion généralement reconnus) (2nd ed. 1992), c. 1 "références lexicologiques", section 1.1-1, the purpose of which is [Translation] "to ensure uniformity in how concepts are understood and to limit how they are interpreted".

181 Thus, the "plain meaning" used by this Court in the taxation field is actually the "plain meaning as already defined by the business world". But there is more. Not only have the terms already been defined by the business community, but terminological and lexicographic research is being done in that field and published in specialized literature. See, for example, Professor C. Nobes' nine-language comparative analysis ("The True and Fair View Requirement: Impact on and of the Fourth Directive" (1993), 24 Accounting and Business Research 35) of the expression "a true and fair view", which financial statements are required to present, in the context of the law applicable in the 12 European Economic Community countries.

182 It is thus the business world itself that develops its own contextualized definitions based on what is here being called the "modern" method. This Court then uses those definitions as what it views as the "plain meaning" generally accepted in the business world. The "plain meaning" method in taxation relies on methodological estoppel, which prevents us from initiating any reasoning on legal interpretation because those working in the field have already carried out the relevant analyses in situations in which we consider that there is a "plain meaning". In situations in which there is no "plain meaning" or there is ambiguity, this Court must then define the term in question by engaging in legal interpretation.

183 In summary, the "plain meaning" rule is justified in taxation because of the imperatives of stability

and predictability of the law; moreover, the use of the "plain meaning" in taxation does not have any dysfunctional side effects. Accordingly, in such circumstances it is clear that the basic approach to legal interpretation in the field of tax law should be that involving the "plain meaning" rule. Since Hills, supra, I have constantly supported this approach, adopting the "plain meaning" rule in appropriate circumstances.

184 In conclusion, it is therefore the "modern" methodological approach that will apply in interpreting the Charter, a question to which I will now turn.

B. Sections 23 and 56(1) of the Charter: Legal Interpretation

185 Sections 23 and 56(1) of the Charter read as follows:

> 23. Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.
>
> The tribunal may decide to sit in camera, however, in the interests of morality or public order.
>
> 56. (1) In sections 9, 23, 30, 31, 34 and 38, in Chapter III of Part II and in Part IV, the word "tribunal" includes a coroner, a fire investigation commissioner, an inquiry commission, and any person or agency exercising quasi-judicial functions.

186 What must be interpreted here is the expression "person or agency exercising quasi-judicial functions" (in s. 56(1)), read in conjunction with the term "tribunal" (in s. 23).

(1) The So-Called "Plain Meaning"

187 The idea generally accepted thus far by academic commentators is that s. 23 of the Charter applies to "every quasi-judicial tribunal", that is, every administrative agency that performs quasi-judicial acts. According to Brun and Tremblay, supra, at pp. 936-37:

> [Translation] Section 23 is applicable to all judicial or quasi-judicial bodies created by the province. . . . A body does not necessarily become a tribunal within the meaning of s. 23 because it happens to exercise judicial functions while exercising its primary administrative functions. However, even if s. 23 does not apply to such a body as an institution, it must comply with s. 23 when it exercises its ancillary judicial functions. . . . This means, in short, that s. 23 applies to all Quebec tribunals and to the Quebec government when it makes judicial decisions.

188 This interpretation of the applicability of s. 23 is very broad. Some authors have even mentioned the possibility of s. 23 applying to a minister (J. F. Keable, "Les tribunaux administratifs et organismes de régulation et les exigences de la Charte en matière d'indépendance et d'impartialité (art. 23, 56.1 de la Charte québécoise)", in Application des Chartes des droits et libertés en matière civile, (1988), 251, at p. 261:

> [Translation] Professor Gilles Pépin has already correctly noted that s. 23 could

> apply to a minister....

189 The idea accepted by academic commentators that in this context the term "quasi-judicial tribunal" means "every administrative tribunal that exercises a quasi-judicial function" does not seem to be based on a formal interpretative analysis. For example, although Keable has expressed the view that s. 23 applies [Translation] "in both civil and penal matters", this suggestion does not seem to be supported by an analysis of the doctrine or court decisions (at p. 261):

> [Translation] We feel that the decisions rendered under s. 11(d) of the Canadian Charter of Rights and Freedoms should be relevant in interpreting s. 23 of the Charter. Section 23 also refers to the idea of an independent tribunal, but it must be applied in both civil and penal matters and, because of s. 56(1), it is applicable to administrative tribunals as well the courts. [Emphasis added.]

190 This Court has not yet undertaken a formal interpretative analysis of these terms. The Superior Court of Quebec addressed the issue in Coffin v. Bolduc, [1988] R.J.Q. 1307. In that case, the Court had to decide whether a professional disciplinary committee was independent and impartial. Rioux J. compared the scope of s. 11(d) of the Canadian Charter of Rights and Freedoms with that of s. 23 of the Quebec Charter, at p. 1313:

> [Translation] The terminology used in s. 23 of the Quebec charter and s. 11(d) of the federal charter may, prima facie, suggest that they are similar. However, the context shows that the two provisions have totally different purposes.
>
> The federal provision seeks, in the field of criminal or penal law, to eliminate courts. . . .
>
> The provincial provision, which is applicable to all judicial and quasi-judicial bodies that Quebec has created or will create. . . .
>
> In other words, it may be said that s. 11 of the Canadian Charter of Rights and Freedoms has codified and set out the principles developed by public law to guarantee the independence of judges sitting in criminal or penal cases. . . .
>
> The wording of s. 23 of the provincial charter is broader in scope, however, since it is applicable not only to the courts as such, whether civil or criminal, but also to administrative tribunals and persons and agencies with quasi-judicial powers. [Emphasis added.]

191 Rioux J. then quoted Gilles Pépin's statement that [Translation] "s. 23 [is] meant to apply to institutions, such as ministers, that clearly do not have some of the essential attributes of judicial independence". However, Rioux J.'s opinion on the scope of s. 23 does not seem to be based on a formal interpretative analysis. Rioux J. and the commentators seem to have defined the term "quasi-judicial" in the Charter by using the former "plain meaning" method, that is, by failing to interpret the statute in an informed manner using the "modern" legal interpretation approach. The definition appears instead to have been adopted on the basis of intuition or unrationalized impressions.

192 In my view, this is a methodological error. Statutory interpretation cannot be limited to the "plain meaning" method; statutes must be read using the "modern" interpretation method: every legislative

provision should be read in context, having regard to the purpose of the statute, its history, the consequences of proposed interpretations, the presumptions and rules of interpretation and the admissible external aids.

193 In other words, to someone not using the "modern" interpretation method, the term "quasi-judicial" seems prima facie clear: its "plain meaning" is obvious; it simply means "every quasi-judicial tribunal". For someone applying the former "plain meaning" rule, the methodological estoppel is thus trying to prevent the initiating of the informed reasoning of legal interpretation. The person stops before beginning to reason and looks no further. As I have noted, the era in which this method prevailed is now over: we must henceforth interpret legislative provisions using the "modern" approach.

194 A provision must be read in context, while bearing in mind all the relevant interpretation factors. That is what I now intend to do, having regard to (1) the immediate context, that is, the provision itself; (2) the broader context, that is, the chapter in which the provision is found; and (3) the general context, that is, the statute as a whole.

(2) Immediate Context: Noscitur A Sociis

195 This is a well-known rule of interpretation: a term or expression cannot be interpreted without taking surrounding terms into account. The meaning of a term is revealed by its association with other terms: it is known by its associates (noscitur a sociis). This general principle is most often applied in interpreting terms that are part of a list. In the case at bar, the provision does contain such a list of associated terms:

> 56. (1) . . . the word "tribunal" includes [1] a coroner, [2] a fire investigation commissioner, [3] an inquiry commission, and [4] any person or agency exercising quasi-judicial functions.

196 Four terms are associated here: coroner, fire investigation commissioner, inquiry commission and the "quasi-judicial" group. To begin with, what do these four terms have in common? All four may apply to "matters of penal significance"; this idea is common to the four terms. Next, I note that two of the four terms, the inquiry commission and the "quasi-judicial" group, have a broader denotation: they may apply to the "non-penal" sphere as well as to "matters of penal significance". According to the noscitur a sociis interpretation principle, terms in a list may have a broader or narrower denotation. In the case at bar, the denotation of the list should be limited to the concept common to all the terms: that of "matters of penal significance".

197 If it were agreed that two of the four terms -- and the "quasi-judicial" group in particular -- could apply to the "non-penal" sphere, that would disregard the denotation of the other two terms and thus fail to take account of the noscitur a sociis rule. The meanings of these four associated terms would then be inconsistent in light of the noscitur a sociis rule and therefore logically, semantically and grammatically inconsistent. The interpretation would be based on unrationalized impressions. In my view, the four terms must, on the contrary, be defined so that they have the same denotation: that of "matters of penal significance". This denotative definition is coherent and complies with the noscitur a sociis rule.

198 I believe it would be helpful at this point to make two methodological clarifications. First, a distinction must be drawn between a denotative definition (denotation or extension) and a connotative definition (connotation, intension or comprehension). The connotative definition of a quasi-judicial agency was stated in Minister of National Revenue v. Coopers & Lybrand, [1979] 1 S.C.R. 495, at pp. 504-5; there is nothing in this appeal that conflicts with that definition; in fact, the connotative definition

of the term "quasi-judicial agency" set out in Coopers & Lybrand underlies this appeal. However, the denotative definition of the same term can vary in each individual case, depending on the wording of the legislative provisions in which the term is found. That is the situation in this appeal.

199 In the circumstances of the instant case, the denotation of the term "quasi-judicial" is limited by the surrounding terms, in accordance with the noscitur a sociis rule. Of course, it is easy to see that, in other situations in which different wordings are used, the denotation of the same term could be entirely different even though the connotative definition never changes (with respect to connotation and denotation, see, inter alia, Driedger on the Construction of Statutes, supra, at pp. 142 et seq.; see also generally I. Copi and C. Cohen, Introduction to Logic (8th ed. 1990), at pp. 142-43 and 480 et seq.).

200 Second, a general definition of the "matters of penal significance" category involved in this appeal should be provided. I believe that this category includes at least purely penal concepts, that is, fines and imprisonment. Without defining the scope of those concepts conclusively here, I think that this category probably also includes all matters of penal significance, including certain aspects of professional disciplinary law, certain immigration decisions and concepts related to search and seizure. It is not necessary to define the scope of this "matters of penal significance" category conclusively to resolve this appeal. This category will be clarified to a greater extent by future judgments. What is clear in the case at bar is that the Régie's actions in issuing, renewing and cancelling liquor permits do not fall within the "matters of penal significance" category. They clearly fall within the "non-penal" sphere.

(3) Broader Context: Provisions of Chapter III of Part I of the Charter

201 Having made these methodological clarifications, I will now return to an informed interpretation of the provisions under consideration in their broader context. The following is a summary of one of the principles of contextual interpretation drawn from Driedger on the Construction of Statutes, supra, at pp. 247-48:

> In adopting a contextual approach, the courts focus on any provision or series of provisions that in their opinion is capable of shedding light on the interpretive problem at hand. Looking to other provisions is useful because courts make certain assumptions about the way legislation is drafted. . . .
>
> In some cases the courts focus on a particular provision or series of provisions found elsewhere in the Act. . . . The court's reasoning here is based on the presumption of orderly and economical arrangement. It would be contrary to the principles of sound drafting for a drafter to place a provision dealing with both commercial and non-commercial activities in the midst of a series of provisions dealing with commercial activities only. [Emphasis added.]

202 The rule of interpretation is as follows: if a provision that deals with both field A and field non-A is placed in a series of provisions dealing only with field A, this is contrary to the principles of sound legislative drafting. This rule of interpretation applies directly to the situation in the case at bar.

203 Section 23 is part of Chapter III of Part I of the Charter, which sets out "Judicial Rights", including all guarantees of a penal or criminal nature: imprisonment, search and seizure, arrest, habeas corpus, presumption of innocence, etc. An interpretation of the term "quasi-judicial" that covered both "matters of penal significance" and "non-penal" matters would, according to the above rule, be contrary to the principles of sound drafting, since there is no reference to the "non-penal" sphere in Chapter III of Part I of the Charter. Such an interpretation, contrary to the principles of sound legislative drafting,

would be strained.

204 On the other hand, if the term "quasi-judicial" is defined so that its denotation is limited to the "matters of penal significance" category, then the interpretation is perfectly consistent with the principles of sound legislative drafting: it is no longer a strained interpretation and the definition becomes compatible with the part of the statute in which the term is found.

205 An informed interpretation of the provisions in either their immediate or broader context leads to the same result as far as the definition of the term "quasi-judicial" is concerned. That brings me to an interpretation of the provisions in their general context.

(4) Context of the Statute as a Whole

206 The principles applicable to the interpretation of statutes as a whole have been summarized as follows:

> [T]he elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he had read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous. [Attorney-General v. Prince Ernest Augustus of Hanover, [1957] A.C. 436 (H.L.), at p. 463.]
>
> [T]he office of a good expositor of an Act of Parliament is to make construction on all the parts together, and not of one part only by itself ; nemo enim aliquam partem recte intelligere possit, antequam totum iterum atque iterum perlegerit . . . and so before this time have other statutes been expounded by the ancient Judges and sages of the law. [Lincoln College's Case (1595), 3 Co. Rep. 58b, 76 E.R. 764, at p. 767.] [Emphasis added.]

207 The nemo enim aliquam partem recte intelligere possit, antequam totum iterum atque iterum perlegerit rule literally means: no one can understand a part before reading and rereading the whole in full. This rule has been part of the common law for over 400 years and has been codified in Quebec, as far as contracts are concerned, by art. 1427 of the Civil Code of Québec, S.Q. 1991, c. 64 (formerly art. 1018 of the Civil Code of Lower Canada). It is thus necessary to read and reread the entire statute in full before deciding how the term in question should be defined. If necessary in order to properly understand the scheme of the statute, the regulations made thereunder must also be read and reread. The justification behind the nemo intelligere possit antequam iterum perlegerit rule is as follows. It must be assumed that the statute is coherent. The principle of internal statutory coherence has been recognized by the common law since the 17th century: Chamberlain's Case (1611), Lane 117, 145 E.R. 346, at p. 347 (Tanfield J.):

> . . . the meaning of an act of parliament ought to be expounded by an examination of the intention of the makers thereof, collected out of all the causes thes therein, so that there be no repugnancy, but a concordancy in all the parts thereof. . . . [Emphasis added.]

208 I note that the modern expression of the internal coherence principle, which has been part of our law since it was reformulated by Lord Atkinson in City of Victoria v. Bishop of Vancouver Island, [1921] 2 A.C. 384 (P.C.), at p. 388, was adopted again by this Court in The King v. Assessors of the Town of Sunny Brae, [1952] 2 S.C.R. 76, at p. 97:

> In my opinion, the construction of a statute which produces such anomalies is contrary to well settled canons of construction.
>
> A statute is to be construed, if at all possible, "so that there may be no repugnancy or inconsistency between its portions or members". . . . [Emphasis added.]

209 According to Driedger on the Construction of Statutes, supra, at p. 176, the presumption of internal statutory coherence is virtually irrebuttable:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework.
>
> . . .
>
> The presumption of coherence is virtually irrebuttable. [Emphasis added.]

210 In the case at bar, an incoherence -- a repugnancy -- appears in the scheme of the Charter itself if the term "quasi-judicial" is defined incorrectly. The incoherence disappears if the term "quasi-judicial" is defined so that its denotation is limited to the "matters of penal significance" category. As I will endeavour to show, that incoherence, which can be seen simply from an informed reading of the Charter itself based on the "modern" approach, is clear.

211 Section 57 of the Charter establishes the Commission des droits de la personne. The Commission's responsibilities include making non-adversary investigations (s. 71, para. 2(1)). It has the discretion to refuse or cease to act in favour of a victim (s. 77, para. 2). When it exercises such a discretion to refuse to act, it is making a quasi-judicial decision: see, for example, Lisenko v. Société zoologique de Granby Inc., T.D.P.Q., No. 460-53-000001-938, March 8, 1994; see also Cutler v. Québec (Commission des droits de la personne) (1986), 7 C.H.R.R. D/3610 (Que. Sup. Ct.).

212 There are two possible interpretations of the combination of ss. 23 and 56(1) of the Charter: either they apply to "every agency exercising quasi-judicial functions" or they apply only to "agencies exercising quasi-judicial functions involving 'matters of penal significance'". The first definition results from an interpretation based on the former "plain meaning" method, while the second results from a "modern" contextual interpretation. I will begin with an analysis based on the first definition.

213 If s. 23 applies to "every agency exercising quasi-judicial functions" and the Commission exercises a quasi-judicial function when it exercises its discretion to refuse to act, then s. 23 applies to the Commission in respect of that decision. This means that the Commission must be impartial and independent when it exercises its discretion to refuse to act; it must comply with the nemo judex rule. However, it is not only this part of s. 23 that applies: it is the entire section. Section 23 also includes a right to a public hearing. The Commission must therefore exercise its discretion to refuse to act in a public hearing, inasmuch as s. 23 applies according to the first definition.

214 There is a second contradiction between this public hearing requirement and the Commission's operating procedures. The Regulation respecting the handling of complaints and the procedure

applicable to the investigations of the Commission des droits de la personne,(1991) 123 G.O. II, 1097, complies with the audi alteram partem rule by providing that the parties can be heard through written submissions rather than at a public hearing. This requirement contrasts with what is provided for in the case of the Human Rights Tribunal. Section 51 of the Rules of practice of the Human Rights Tribunal, (1993) 125 G.O. II, 6031, specifically states that the Tribunal's hearings must be public. The legislature's intention is thus clear: the Tribunal must hold public hearings, while the Commission may proceed on the basis of written submissions. These two forms of hearings comply with the audi alteram partem rule while taking the impact of each agency into account.

215 However, the hearing of a case by the Commission is not public, since it is done through written proceedings. This means that the Regulation would contravene s. 23 by giving the Commission a discretion not to hold a public hearing. It follows that an individual who is before the Commission could theoretically bring an action under s. 52 of the Charter to invalidate that statute erga omnes. Thus, an individual who files a written complaint with the Commission could theoretically have the Charter itself struck down erga omnes. That was clearly not the legislature's intention. Did the legislature intend to allow for the possibility of written proceedings and yet also impose a duty to hold a public hearing? Of course not: this is an imaginary internal incoherence in the statute that results simply from an incorrect interpretation of the term "quasi-judicial" based on its so-called "plain meaning".

216 This internal contradiction in the scheme of the Charter disappears if "quasi-judicial" is defined so that its denotation is limited to "matters of penal significance". Do cases before the Commission des droits de la personne involve "matters of penal significance"? No. Section 23 is therefore not applicable; there is no duty to hold a public hearing. However, the Commission still has a duty to act fairly, which, as I have noted, includes the nemo judex and audi alteram partem rules. The latter can be complied with through either written proceedings or a hearing, which will not necessarily be public. All the common law remedies discussed above remain available to individuals before the Commission.

217 These internal contradictions in the scheme of the Charter are also found in other administrative schemes. The legality of the existence of a great many administrative entities could be challenged by relying strictly on the right to a public hearing. For example, in the case at bar, the enabling statute provides the Régie with a discretion as to whether to hold a hearing in certain specific cases: Act respecting liquor permits, R.S.Q., c. P-9.1, ss. 101 and 102. If s. 23 applies, that discretion violates the right to a public hearing. Moreover, it could be argued that in some cases, even if an agency provides an opportunity to be heard viva voce, such a hearing is not necessarily public within the meaning of s. 23.

218 It is not clear that the legislature intended to extend the right to a viva voce hearing and to have such a hearing held in public, accompanied by a right to bring an action to have the enabling statute invalidated erga omnes, to all Quebec administrative agencies. Extending those rights to such a degree would certainly have absurd consequences for the operation of Quebec's administrative system.

219 From a strictly legal point of view, it is clear that this appeal affects a large number of Quebec administrative agencies. Furthermore, from a practical point of view, I note that the concepts considered in this appeal seem to have given rise to a great deal of litigation; this was mentioned by LeBel J.A. in his reasons (1994), 122 D.L.R. (4th) 553, at pp. 559-60.

> [Translation] Because of this provision and the similarity in content of the two Acts and the role of the Régie, the parties acknowledged the continued practical importance of the proceeding commenced in the Superior Court in this case. In any event, there are many cases marking time in the Quebec courts on account of this dispute.

220 Regardless of whether there is an avalanche of similar litigation, it is clear that every individual must be entitled to have a decision reviewed if an apprehension of judicial bias exists. However, was it the legislature's purpose to authorize the bringing of an action to have the enabling statute declared invalid erga omnes in every case, and in respect of all the provisions of each such statute? This question is interesting if one considers that, in the instant case, the provisions creating the Régie were themselves the ones challenged; as noted by LeBel J.A.: [Translation] "The lower court judgment thus challenges the validity of the very existence of the Régie" (p. 559).

221 For this question to be answered in the affirmative, the legislature would have had to intend that the enabling statutes of a large number of administrative agencies could all be invalidated erga omnes at the same time and with relative ease. To use the words of LeBel J.A., that would mean that "the validity of the very existence" of a large number of administrative agencies would be "called into question". Ultimately, an attempt might be made to strike down the enabling statutes of a great many agencies that make decisions without holding public hearings. Such a result seems much more like a perverse, unforeseen effect arising from a faulty methodology of legal interpretation and definition than an effect truly intended by the legislature.

222 In sum, the incoherence in the scheme of the Charter is as follows: if the incorrect definition of "quasi-judicial" were accepted, the Commission would have to hold a public hearing for each decision that affects an individual's rights, including a decision to refuse or cease to act. The mere fact that the statute and Regulation provide for a discretion as to whether to hold a public hearing contravenes the duty under s. 23. This situation is directly contrary to the presumption of internal statutory coherence. Yet that presumption is virtually irrebuttable. Anyone who wished to support the incorrect interpretation of the term "quasi-judicial", an interpretation that is now accepted in academic writing, would have the burden of rebutting this presumption of internal coherence and the other rules of interpretation mentioned above.

(5) Legislative Evolution

223 The evolution of a provision over time can furnish useful information for interpreting it. As noted by Pigeon J. in Gravel v. City of St-Léonard, [1978] 1 S.C.R. 660, at p. 667:

> Legislative history may be used to interpret a statute because prior enactments may throw some light on the intention of the legislature in repealing, amending, replacing or adding to it.

224 This interpretation principle is based on the presumption that changes to legislation are intended to effect a substantive change in the law. In analysing changes in the terms used in statute law, the Ontario Court of Appeal has noted the importance of this presumption: "[t]he amendment must have had some purpose and significance" (Re Peralta and The Queen in right of Ontario (1985), 49 O.R. (2d) 705, at p. 716; affirmed by Peralta v. Ontario, [1988] 2 S.C.R. 1045).

225 When the Charter was passed in 1975, s. 23 read as follows:

> Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.
>
> The tribunal may decide to sit in camera, however, in the interests of morality or public order.

> It may also sit in camera in the interests of children, particularly in matters of divorce, separation from bed and board, marriage annulment or declaration or disavowal of paternity. [Emphasis added.]

226 The third paragraph of s. 23 was repealed in 1993 by the Act to amend the Code of Civil Procedure and the Charter of Human Rights and Freedoms, S.Q. 1993, c. 30, which had the effect of transferring that provision to art. 13 of the Code of Civil Procedure and changing its content. This third paragraph listed four situations in family cases in which there was an interest in holding in camera hearings because the case might affect a child. The general rule that hearings had to be public did not apply to that class of cases. The amendment had the legal effect of maintaining that class, notwithstanding the public hearing requirement set out in s. 23 of the Charter, while allowing media access.

227 Is this "family" class part of the "matters of penal significance" category or the "non-penal significance" category? This question does not have to be answered to decide this appeal; it will be answered if it ever comes before the courts. However, it is worthwhile to look at the two possible answers, since they both lead to the same conclusion in this case.

228 Without deciding this question here, I believe that the "family" class is indeed part of the "matters of penal significance" category. To begin with, I note that the hearings in question are held before the courts, not before administrative tribunals. Accordingly, as I will explain in greater detail below, those hearings automatically have "penal significance", inter alia because of the possibility of being found in contempt of court.

229 Even if the categorization is applied to this "family" class for analytical and explanatory purposes on the assumption that such cases would be heard by a quasi-judicial tribunal, the end result is the same. "Penal significance" should be determined by the decision's potential impact on the persons involved in the case. Is the decision's impact as significant as the impact of a penal sentence? It is in such cases that the parties are entitled to a higher level of procedural protection. The very nature of such cases, because of the human consequences they have, means that their impact is of the greatest significance for the persons involved. The "family" class thus seems, by its very nature, to be part of the hearings "of penal significance" category.

230 Aside from the possibility of being found in contempt of court, the "family" class may involve other sanctions of penal significance, such as seizure pursuant to a support order. Moreover, Chapter IV of Title V of the First Book of the Civil Code of Lower Canada, which concerned actions for annulling marriage, included the possibility of a $500 penalty being imposed on the officer who solemnized the marriage (art. 157 (repealed in 1980)). The "family" class thus seems to be part of the hearings "of penal significance" category because of the sentences that may be imposed in such cases.

231 Accordingly, if this "family" class is part of the "matters of penal significance" category, this is another clear indication that Chapter III of Part I and s. 23 of the Charter should be placed in that category.

232 Alternatively, is this "family" class part of the matters "of non-penal significance" category? A priori, I do not think so: matters "of penal significance" may exist in any area of the law, be it property and civil rights, public law, criminal law or some other area. However, assuming that this "family" class is part of the "non-penal significance" category, what would the consequences be?

233 The legislature would rightly have removed elements that did not belong in Chapter III of Part I of the Charter because they did not fit into a chapter that is essentially "of penal significance". The legislature would rightly have placed those elements where they do belong, that is, in a general part of the law: the Code of Civil Procedure, which includes elements from both the "penal significance" category and the "non-penal significance" category.

234 Thus, if this "family" class is part of the "non-penal significance" category, its removal from the Charter and transfer to the Code of Civil Procedure is another clear indication that Chapter III of Part I and s. 23 of the Charter should be placed in the "penal significance" category.

235 Accordingly, the legislative evolution of s. 23 leads to the same definition of the term "quasi-judicial" in s. 56(1): the definition whose denotation is limited to "quasi-judicial tribunals dealing with matters of penal significance".

(6) External Context

236 After finding that an informed interpretation of the immediate, broader and general contexts always leads to the same definition of the term "quasi-judicial", that is, one whose denotation is limited to the "matters of penal significance" category, I will now look at the external context that existed when the Charter was enacted and that remains substantially the same today.

237 The legislature is presumed to be competent and to have knowledge of all the legislation and case law in existence at the time a statute is enacted: The Queen v. Inhabitants of Watford (1846), 9 Q.B. 626, 115 E.R. 1413, at p. 1417 (per Lord Denman C.J.). This presumption was expressed as follows by Driedger on the Construction of Statutes, supra, at pp. 156-57:

> The legislature is presumed to know all that is necessary to produce rational and effective legislation. This presumption is very far-reaching. It credits the legislature with the vast body of knowledge of which judicial notice may be taken as well as anything contained in briefs or reports tabled with legislation. The legislature is presumed to have a mastery of existing law, both common law and statute law, as well as the case law interpreting statutes. It is also presumed to have knowledge of practical affairs. . . .
>
> Logically, the substance of what the legislature is presumed to know must be knowledge that was available to it at the time the legislation was enacted. [Emphasis added.]

238 The Charter was drafted in successive stages from 1968 to 1974; it was passed in 1975 and came into force in 1976. During that entire period, it must be presumed that the Quebec legislature had knowledge of all the relevant law. I now intend to briefly review that relevant law, which served as a source of inspiration for the legislature in completing the drafting of the Charter. The relevant provisions, reproduced in chronological order according to when they came into force, are as follows.

> 1948 - Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71, art. 10:
>
> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. [Emphasis added.]

1950 - European Convention on Human Rights, 213 U.N.T.S. 221, art. 6(1):

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [Emphasis added.]

1960 - Canadian Bill of Rights, S.C. 1960, c. 44, s. 2(e) and (f):

. . . no law of Canada shall be construed or applied so as to

. . .

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; [Emphasis added.]

1966 - International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 14(1):

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. . . . [Emphasis added.]

1975 - Charter of Human Rights and Freedoms, S.Q. 1975, c. 6, s. 23:

Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.

239 The wording of s. 23 of the Charter therefore appears to be a sort of digest of the wording of the Universal Declaration of Human Rights. The legislature removed a number of terms from that wording, including "criminal"; a priori, it might be thought that this is an indication that the legislature intended the provision to apply to both "penal" and "civil" matters. However, it is necessary to look further and read all the provisions that existed when the Charter was enacted.

240 The other three provisions very clearly distinguish applicability in "civil" matters from applicability in "criminal" matters. This distinction is made explicitly in these provisions through the use of the "in . . . civil . . . or . . . criminal" structure in the European Convention of Human Rights and the "in . . . criminal . . . or . . . suit at law" structure in the International Covenant on Civil and Political Rights, and through the clear separation into two different paragraphs in the Canadian Bill of Rights. All of these provisions existed when the Charter was enacted and it must be assumed that the legislature had full knowledge of them.

241 This idea of a clear distinction between the "non-penal" sphere and the "penal" sphere when it comes to judicial protection was very well known when the Charter was passed. Professor Tarnopolsky referred to it as follows in the context of the Canadian Bill of Rights (The Canadian Bill of Rights (2nd ed. 1975), at p. 259):

> It seems that Parliament intended the two subsections [2(e) and (f) of the Canadian Bill of Rights] to cover civil and criminal hearings respectively. Subsection (e) uses terms which are usually applicable to standards used by courts to supervise administrative agencies which are required to hold hearings. Subsection (f) on the other hand, refers specifically to a hearing where a person is "charged with a criminal offence". [Emphasis added.]

242 If the Quebec legislature had really intended to make s. 23 applicable to both "non-penal" and "penal" matters, would it not have been much simpler for it to use the explicit wording of the other three provisions? Would it not have been much more consistent with the rules of sound legislative drafting to make that applicability explicit in two ways: through the wording of the section itself, in two paragraphs, and by positioning the section in another part of the Charter, not in Chapter III but somewhere else where its applicability would not have been ambiguous?

243 I note that this distinction was the subject of academic debate at the time; I further note that clear distinctions already existed in the other available wordings that were used as models for drafting s. 23. All of this makes the legislature's intention in passing ss. 23 and 56(1) clear: it intended that they apply to "matters of penal significance".

244 If the legislature had intended to make these provisions applicable to every agency that makes quasi-judicial decisions, it would have (1) drafted them with a clear wording, using the ready-made models that were available, and (2) placed them elsewhere than in Chapter III.

C. Conclusion

245 Did the Quebec legislature intend that a quasi-constitutional remedy invalidating enabling legislation erga omnes should be available in respect of every quasi-judicial decision, or only in respect of quasi-judicial decisions of penal significance? This intention can be determined by reading the relevant provisions in context and assessing which of the two possible interpretations is the most plausible.

246 In the immediate context, the denotation of the terms listed in s. 56(1) should be limited to the "matters of penal significance" concept pursuant to the noscitur a sociis rule. In the context of Chapter III of Part I of the Charter, s. 23 should be limited to "matters of penal significance" pursuant to the principles of contextual interpretation and sound legislative drafting. In the context of the statute as a whole, an interpretation of s. 23 that is not limited to "matters of penal significance" makes the Charter internally incoherent. Finally, the external context furnished the Quebec legislature with an explicit and clear model for the wording of s. 23 that would easily have enabled it to clearly express an intention to have the section apply to the "non-penal" sphere; however, the legislature chose not to use that wording.

247 After interpreting the provisions in an informed manner using the "modern" contextual approach, I conclude that the term "quasi-judicial" in s. 56(1) of the Charter has the following denotation: "quasi-judicial in areas of penal significance". Accordingly, since in the case at bar the Régie des permis d'alcool did not make a quasi-judicial decision in the "matters of penal significance" category, the Charter is not applicable. The instant case is governed rather by administrative law and the remedies of

evocation and declaration.

248 Since the Charter is not applicable, it is not necessary to resolve the specific issue of whether the provisions in question have codified, replaced or repealed the common law. However, I note on an incidental basis that the Charter is not a "complete code that excludes or supplants the common law" in the area of administrative law.

D. Consequences of the "Penal Significance" and "Non-Penal Significance" Categorization

249 What are the consequences of this categorization for administrative law and the law in general? First of all, a clarification must be made here. There is no doubt that the term "tribunal" used in both the English and French versions of s. 23 includes a court hearing any type of matter. I refer to arts. 4(j) and 22 of the Code of Civil Procedure and s. 1 of the Courts of Justice Act, R.S.Q., c. T-16, in the English versions of which the French term "tribunal" is translated as "court":

> 4. . . .
>
> (j) "court" means one of the courts of justice enumerated in article 22 or a judge presiding in a courtroom.
>
> 22. The courts under the legislative authority of Québec which have jurisdiction in civil matters are:
>
> (a) the Court of Appeal;
> (b) the Superior Court;
> (c) the Court of Québec;
>
> . . .
>
> (e) the municipal courts.
>
> 1. The Courts of Québec, in civil, criminal and mixed matters, are:
>
> The Court of Appeal;
>
> The Superior Court;
>
> The Court of Québec;
>
> The Municipal Courts.

250 Of course, if the court hears criminal cases or penal cases under provincial law, all of Chapter III of Part I of the Charter applies. If the court hears other types of cases, for example, property and civil rights cases, the hearing still has "penal significance", inter alia because the court always has the power to find a party in contempt of court and punish that party accordingly: see arts. 1, 14, 15, 49 to 54 and 84 of the Code of Civil Procedure. Chapter III of the Charter therefore applies to the courts, whether they are hearing penal cases or civil cases.

251 In any event, the matters "of penal significance" and "of non-penal significance" categorization

that I have established in this appeal does not really have any practical application in the case of the courts; this categorization applies solely to a "person or agency exercising quasi-judicial functions" pursuant to s. 56(1) of the Charter. One way to understand this categorization is to ask the following question: is the impact of the administrative agency's decision on the persons involved significant enough to warrant procedural protection as broad as that provided for in Chapter III of Part I of the Charter? If so, the agency in question falls within the category created by s. 56(1), and s. 23 applies. If not, the agency in question does not fall within the s. 56(1) category and, since s. 23 does not apply, the common law will govern the situation.

252 Even in administrative law cases to which Chapter III of Part I of the Charter does not apply, it should be borne in mind that all administrative and quasi-judicial acts are subject, inter alia, to the audi alteram partem and nemo judex in propria sua causa debet esse rules under the common law. In each case, the court responsible for reviewing the decision will have to determine the specific content of the duty the agency has to act fairly or observe natural justice.

253 Depending on the facts of the case, the level of common law procedural protection might be the same as the protection available if Chapter III of Part I of the Charter applied, aside, of course, from the invalidation of statutes erga omnes. Even the privilege against self-incrimination under s. 38 of the Charter would come into play in all applicable cases, in the following manner. First of all, the privilege applies not when the testimony is given, but once an attempt is made to use it in an incriminating fashion: Dubois v. The Queen, [1985] 2 S.C.R. 350. Next, in Starr v. Houlden, [1990] 1 S.C.R. 1366, at p. 1441, I stated the following in reference to testimony before a provincial commission of inquiry:

> Furthermore, ss. 11 and 13 of the Canadian Charter of Rights and Freedoms . . . guarantee that regardless of what evidence was tendered during the inquiry . . . Ms. Starr or anyone else implicated will be protected against the subsequent use of testimony given at the inquiry should the matter ever be prosecuted in a court of law.

254 In my view, therefore, in an administrative law context the privilege against self-incrimination under s. 38 of the Charter would be applicable once an attempt was made to use for the purpose of incrimination, testimony given ex ante before an administrative agency. For other examples of common law procedural protection, see generally, for instance, D. P. Jones, A. S. de Villars, Principles of Administrative Law (2nd ed. 1994), at pp. 229-369.

255 In reality, erga omnes invalidation is the only right conferred by Chapter III of Part I of the Charter that could not be conferred on a litigant under the common law in an administrative law context.

IV. Summary

256 1. In Quebec public law, the common law generally applies, subject to legislative amendments. Accordingly, administrative law issues should first be considered from the perspective of the common law.

257 2. Agencies that perform quasi-judicial or administrative acts are subject to the nemo judex in propria sua causa debet esse rule in accordance, respectively, with the duty to act in accordance with natural justice and the duty to act fairly.

258 3. The nemo judex rule includes a duty to be impartial. An agency can be either impartial or biased: there is no intermediate option. Reasonable apprehension of bias is the indicator that allows this

issue to be resolved judicially. Would the agency cause an informed person to have a reasonable apprehension of bias in a substantial number of cases? If so, a legal finding of bias will result; if not, a legal finding of impartiality will be made.

259 4. The agency's independence from the executive branch of government is a prerequisite for, but is not sufficient to guarantee, impartiality. Tribunals are never perfectly independent; their independence is relative and varies along a continuum depending on the nature of the tribunal, the institutional constraints it faces and the peremptory nature of its decisions. When a finding of bias is made for some other reason, a judicial analysis of independence may be unnecessary.

260 5. In the case at bar, it has been shown that the Régie would cause an informed person to have a reasonable apprehension of bias in a substantial number of cases. It should therefore be found that the Régie is biased. By implication, the Régie has violated the nemo judex rule and thus breached its duty to act fairly. This breach opens the door to the common law remedies applicable in the circumstances.

261 6. Any breach of the duty to be impartial means that the decision in question can be quashed through a motion in evocation under art. 846 of the Code of Civil Procedure and that the provisions of the enabling statute can be declared of no force or effect inter partes under arts. 453 et seq. of the Code of Civil Procedure.

262 7. When an administrative agency makes a quasi-judicial decision in the matters of penal significance category, the same common law remedies mentioned above are available; however, ss. 23 and 56(1) of the Charter also come into play and provide other additional remedies. In the event of a breach of the duty to be impartial in this category, the aggrieved individual may also have the enabling statute struck down erga omnes, in whole or in part, under s. 52 of the Charter.

263 8. In the case at bar, the Régie's decision was not a quasi-judicial decision in the matters of penal significance category. It was a decision about the suspension and cancellation of liquor permits. This type of decision falls within the "non-penal" category. Accordingly, s. 23 of the Charter is not applicable to the circumstances of this case. The erga omnes declaratory remedy is not available in the instant case.

V. Disposition

264 For these reasons, I would dispose of the appeal as suggested by my colleague Gonthier J., but solely on the basis of the rules of administrative law.

cp/d/hbb/DRS/DRS

REPORT

OF

THE FAIRNESS COMMITTEE

TO

DAVID A. BROWN, Q.C.

CHAIR OF THE

ONTARIO SECURITIES

COMMISSION

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INTRODUCTION AND MANDATE

In February 2003, we were asked by David A. Brown, Q.C., the Chair and chief executive officer of the Ontario Securities Commission ("**OSC**" or the "**Commission**"), to review and provide advice on the Commission's current structure and, in particular, its adjudicative function in light of the increased sanctioning powers (fines of up to $1 million and disgorgement orders) given to the Commission by Bill 198.[1] In fulfilling our mandate, we proceeded on the basis that, absent clear and convincing evidence, we would not recommend structural change.

The Commission as it is currently structured engages in policy-setting, rule-making, investigation, prosecution and adjudication under one corporate, statutorily established, umbrella. This, so the argument goes, at a minimum creates a perception of bias at the level of the Commission's adjudicative function, even though by both practice and legislation a Commissioner involved in the investigation of a matter cannot participate in the adjudication of the same matter, absent written consent.[2] Critics of the existing structure contend that the perception of bias works to erode the credibility of the Commission. This is not a new issue. Indeed, it was the subject of debate in England and in the United States in the 1930s.[3]

Our mandate requires that a number of questions be asked and answered. Does the current controversy about institutional impartiality and independence and the claim that they

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[1] S.O. 2002, c. 22, ss. 177-189 [ss. 182, 185 not in force].
[2] *Securities Act*, R.S.O. 1990, c. S.5, s. 3.5(4) ("***Act***").
[3] Nathanson, "Separation of Functions within Federal Administrative Agencies," 35 Ill. L. Rev. 901 (1941) cited in Anisman, "The Ontario Securities Commission as Regulator: Adjudication Fairness and Accountability" October 3, 2003, Queen's Annual Business Law Symposium 2003.

are compromised by the Commission's overlapping functions amount to no more than a revisiting of an old issue? Is there more to the debate than the fact the Commission engages in policy-setting, rule-making and enforcement as well as adjudication? Is the current controversy aggravated by the fact the Commission now has authority to impose substantial fines, order disgorgement, and assess costs against respondents, but not its own staff? Does it result from the OSC's heightened attention to enforcement, the increase in the number of disciplinary proceedings and the high profile given to many of these proceedings by the media? Is it a consequence of the increased judicialization of the Commission proceedings? Have the stakes for both the Commission and respondents become so much higher in many situations as to prompt a call for restructuring? Even if these several factors explain the concerns expressed by critics of the current Commission structure, are they in fact sufficient to legitimately call into question the institutional fairness of the current processes?

If there are structural problems, as many contend, is the answer the creation of a separate adjudicative tribunal that would have jurisdiction over all, or some matters that come before the Commission for adjudication?

If there is a case for a separate adjudicative tribunal, what would the jurisdiction of the tribunal be? Who should sit on it? How would members of that tribunal be selected? Who would appoint them? What would their term of office be? Who would pay them and what would their remuneration be? Would they be full- or part-time members of the tribunal? If members of the tribunal were to be part-time, would there need to be a full-time Chair, and perhaps a Vice-Chair or Chairs? To whom would such a tribunal report and be accountable? Would qualified people be attracted to such a tribunal?

Are there alternatives to splitting off the adjudicative function of the Commission that deserve consideration, even if one were to accept the substance of the criticism about the Commission's overlapping functions as related to its enforcement and adjudicative roles? Is hiving off Enforcement a practical solution? Any separate enforcement unit would still have to take policy direction from the Commission or its Chair. To whom would it report? What about alternatives such as the American Securities and Exchange Commission ("**SEC**") model which has administrative law judges working within the SEC structure?

Finally, do we face a problem about institutional bias and lack of independence in reality, or simply a perception problem? If the problem is one of perception, whose perceptions count – those of respondents or their counsel, or are there other potentially countervailing perceptions that should be taken into account? Do the ethical walls that exist between Enforcement and the Commissioners, except the Chair, obviate the need for more radical structural change?

In attempting to answer these questions, in addition to considering how securities regulation is structured in other jurisdictions, we have reviewed much of what has been written that is relevant to the controversy to which we have referred above. We have met with the Chair and Vice-Chairs of the Commission, all of the current Commissioners, some Commission staff and former Commission staff, members of the bar (securities solicitors and counsel), all available former Chairs of the Commission since 1978, academics, and members of the financial services and investment communities.

In the end, we are satisfied that we have received and taken into account a reasonable spectrum of informed opinion. We advised all those with whom we met that their

opinions would be received on a without attribution basis. We sought and received consent to disclose only the names of those who met with us. All of those with whom we met are listed in alphabetical order in Appendix III to this Report.

Before concluding this section of our Report, we want to specifically note that we are grateful for the cooperation of all those involved in this undertaking. We particularly want to thank the Chair, the Commissioners, the Commission secretary and Commission staff for their cooperation and assistance in arranging meetings and meeting with us. We are also grateful to all those who took the time to give us the benefit of their opinions. Finally, we wish to thank Marie-Andrée Vermette, Ian Mitchell, and Darren Segec of WeirFoulds LLP, and Jon Goode, presently in the second year of his LL.B. studies at Queen's University, for their invaluable assistance in the preparation of the Report.

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THE STRUCTURE OF THE COMMISSION

The OSC is a self-funding, integrated agency established by statute.[4] It is a regulatory agency responsible for overseeing the securities industry in Ontario. The OSC administers the *Securities Act*, the *Commodity Futures Act* and provisions of the Ontario *Business Corporations Act*.

The Commission is integrated in the sense that its regulatory functions (rule-making, policy development, investigation, enforcement and adjudication) are, for the most part, performed under one corporate umbrella.

The board of directors of the Commission oversees the management of the financial and the other affairs of the Commission.[5] At present, the board is composed of the Commission's Chair, one Vice-Chair and nine part-time Commissioners, all of whom are appointed by the Lieutenant Governor in Council for varying terms of office, not exceeding five years. Commissioners may be reappointed by the Lieutenant Governor in Council for further terms. The *Act* provides that there must be at least nine, but not more than fourteen Commissioners.

The Commissioners meet every two weeks to deal with regulatory policy matters. We will refer to these policy-oriented meetings later in this report. For now, we note that some contend that the Commissioners' involvement in policy development and discussion assists Commissioners in discharging their adjudicative responsibilities. Current Commissioners are

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[4] *Act*, *supra* note 2.
[5] *Act*, s. 3.1(2).

divided on the benefits of their involvement in policy formulation and discussion. Some feel there is none; some feel the benefits are minimal; and some find their involvement in policy discussions to be of great assistance to them when discharging their adjudicative responsibilities.

In addition, Commissioners meet regularly, but no less than quarterly, as a board of directors responsible for the oversight of the broader management of the financial and other non-regulatory affairs of the Commission. Their responsibilities mirror the responsibilities of directors of public companies. The Board discharges its oversight responsibilities through regular meetings and by way of three standing Committees of the Board. They are the Audit and Finance Committee, the Corporate Governance and Nominating Committee, and the Compensation Committee.

The Commission has organized itself into ten core branches. They are:

- Capital Markets
- Corporate Finance
- Investment Funds
- Enforcement
- Communications
- Corporate Services
- Office of the General Counsel
- Office of the Chief Accountant
- Office of the Secretary
- Office of the Chief Economist

Apart from Enforcement, we see no need to review or comment on the responsibilities and work of the Commission's ten branches listed above. A brief reference in summary form to Enforcement is, however, necessary.

Enforcement is responsible for the equitable and effective enforcement of Ontario's securities laws. Enforcement thus investigates potential breaches of securities law on a case-by-case basis of what it views as the more serious cases. How Enforcement should select matters that it will pursue is beyond our mandate. Suffice it to say, Enforcement staff receive information about potential offences from a number of sources, including the public, the media, other enforcement agencies and regulators, and the Commission's market surveillance activities. The volume of referrals is sufficiently large to make it impracticable for the Commission to devote investigative resources to all of them. Generally speaking, Enforcement pursues potential breaches that appear to have caused, or may in the future cause the greatest harm to the integrity of the capital markets. Enforcement also considers the likelihood of success if proceedings are to be undertaken as well as the resources that will likely be required to achieve that outcome.

Looked at very generally, Commission records reveal that the categories of offences most consistently pursued by Enforcement staff include abusive trading (including market manipulation and insider trading, abusive sales practices, deficient disclosure and material change reports), failure to file reports, takeover bid issues, registrant misconduct and the sale of unregistered securities.

Under section 11 of the *Act*, Commissioners may be involved in the conduct of investigations to the extent of making orders authorizing an investigation. However, by virtue of section 3.5(4), participation in that process precludes a Commissioner from participating in any

hearing arising out of the investigation. That aside, with the exception of the Chair, Commissioners are not involved in directing or advising on the institution of proceedings against a respondent. The Chair does not sit on hearings because of his involvement in monitoring the enforcement of at least high profile matters.

In its adjudicative capacity, the Commission currently deals with a broad range of transactional issues (takeover bids, poison pills, exemption orders, etc.) as well as matters in which sanctions are being sought, and reviews decisions of self-regulatory organizations ("**SROs**") such as the Investment Dealers Association ("**IDA**"). Section 122 of the *Act* also provides the Commission with the option of seeking sanctions by way of proceedings in the Ontario Court of Justice. This is reserved for cases that the Commission considers involve "criminal" conduct. In such cases, the Commission in its prosecutorial role must establish the elements of the offence alleged beyond a reasonable doubt.

Adjudicative proceedings before the Commission in which sanctions are being sought are commenced under section 127 of the *Act* by the issuance of a Notice of Hearing setting forth the relief sought. The Notice of Hearing is issued by the Commission Secretary. Enforcement staff also prepares a Statement of Allegations which is attached to the Notice of Hearing and which particularizes the conduct for which the Notice of Hearing has been issued. Both documents are available to the media and the public.

Adjudicative hearings are held before panels of Commissioners. Most panels consist of three Commissioners. They are assisted in their work by a recently appointed counsel to the adjudicative branch. The Commission has also established an Adjudicative Committee to monitor various aspects of the adjudicative functions of the Commission.

In section 127 proceedings (in contrast to those before the Ontario Court of Justice), the Commission has to meet the less onerous civil standard of proof. It would appear that unless counsel raises the issue, most hearings are not bifurcated. That is to say, both liability and sanctions are dealt with at one hearing. (Some counsel for respondents strenuously object to this procedure.) Any administrative fines assessed against respondents are paid into the Consolidated Revenue Fund. The Commission also has the power to award costs against respondents, but not in favour of respondents. These are retained by the Commission in support of its mandate.

Pre-hearing conferences, though not always held, typically address disclosure issues. These conferences generally do not focus on hearing management issues.

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THE DEBATE

Overview

In the course of our research, we interviewed or received information from over 60 individuals who were or had been engaged in or affected by the Commission's regulatory reach. They include all the Chairs of the Commission since 1978 and represent all constituencies.

We have addressed the issue whether the current structure is legally suspect (Appendix I) and examined the structure for the adjudication of securities matters in a number of other jurisdictions (Appendix II). We have also read much of what has been written on the issues raised.

This includes the November 2002 publicly-released letter to the Chair from three former Chairs of the Commission (James C. Baillie, Stanley M. Beck and Edward J. Waitzer). In it, they urged the Commission to consider structural change in light of its overlapping functions and increased powers under Bill 198. The former Chairs contended that without change, the Commission's institutional credibility would erode.

On the basis of our review, we have concluded that the crucial issue is whether or not the adjudication function should be separated from the Commission.

Virtually everyone interviewed believes that the Commission provides an excellent process for transactional hearings. Our research supports this belief. Transactional

hearings include hearings with respect to take-overs, poison pills, exemptions and offerings. We are satisfied that those issues that arise in the course of an ongoing or current transaction or undertaking are well handled by the Commission, and that its hearing process is exemplary. There is a broad consensus that a separate adjudicative body would not need to be involved, save in exceptional circumstances, in these matters.

The proposed jurisdiction of a separate adjudicative body is for section 127 proceedings where staff is seeking to impose a sanction for past conduct, reviews from SROs, and specific references from the Commission.

This section is structured as follows:

(1) The argument for a separate adjudicative body.

(2) The argument against a separate adjudicative body.

(3) The make-up of a separate adjudicative body.

(4) Alternatives to the current and bifurcated models.

(1)

The Argument for a Separate Adjudicative Body

The view that the adjudicative function should be removed from the Commission and be constituted as a completely separate tribunal rests on the following:

(1) The pervasive and widely held perception is that a "fair hearing" before the Commission cannot be obtained. The perception is based on a number of factors:

(a) The various capacities in which the Commission acts (policy-maker, investigator, prosecutor and adjudicator). The courts' acceptance of this structure in law has done nothing to dim this perception in fact.

(b) Considerations of institutional loyalty make it difficult for Commissioners in their adjudicative capacity to act dispassionately. In high profile cases where substantial Commission resources have been devoted to bringing cases forward, it is difficult for the hearing Commissioners, as persons committed to the overall enterprise, to put that behind them when adjudicating. While they may believe themselves able to do so, subconsciously it must have an effect.

(c) The Chair's links with staff and, in particular, in relation to the issuance of notices of hearing in high profile cases cannot be totally disregarded by the Commissioners presiding at the hearing. The more prominent cases have already gone through various levels (Director of Enforcement, Executive Director, Chair) and there is an institutional commitment to

them. The Chair's involvement in the important cases continues throughout the hearing.

(d) The existence of what appears to be an aggressive enforcement policy authorised by the Commissioners as a whole. Examples of this policy are seen at the staff level in the following: (a) in settlement discussions, the expressed position that the first offer is the best offer the respondent will receive, and if not accepted, the offers will worsen as the time runs; (b) a credit for cooperation policy, the effect of which is to penalize respondents for exercising their rights; and (c) the refusal of staff to ask a Commissioner to assist in settlement discussions. The frequently expressed concern is that this aggressive enforcement policy influences the Commissioners' approach to the cases that come before them in the exercise of their adjudicative function.

(e) The increased penalties, career threatening consequences, enormous publicity, and the fact that the Commission almost always appears to win creates in the minds of some respondents and their counsel the impression that "the cards are stacked against them".

(f) The power of adjudicative panels to award costs against respondents (which are retained by the Commission) is seen by some as creating an economic conflict. This argument is compounded by the absence of any power to award costs to successful respondents.

(g) Enforcement, with its increased resources, has become much more aggressive with what appears to be little accountability.

(h) Commissioners are much more protective of staff in their hearings than they were in the past. Some believe this is because of the level of aggression which is now exhibited by respondents in the hearings. (Others more closely connected with staff believe just the opposite, i.e. that the Commissioners demand much more of staff in a hearing than they do of the respondents.)

(i) The home-court advantage. The widespread view is that staff choose to go before the Commission on a hearing rather than the courts because the onus of proof is lower, and they are not restricted by the criminal rules of evidence, including reliance on evidence acquired through the use of section 11.

(2) The concern that unarticulated policy considerations brought by the Commissioners from their policy-making function inform a sanction hearing. Such hearings should not be used to develop policy. To do so undermines the integrity of the hearing process. At the very least, staff should be obligated to put policy issues on the table at the outset and argue for them.

(3) Further, there is very little policy involved in sanction hearings. Typically, sanction hearings in their form are much more like a criminal trial.

(4) In any event, there can be a disconnect between the kinds of policy considered by the Commission in its policy-setting capacity and those policy issues that arise at hearings.

(5) The concern that in their adjudicative decisions, the Commissioners apply the public interest jurisdiction based on their experience as Commissioners, without identifying the public interest standards in advance. The public interest jurisdiction should be used to articulate standards and rules looking forward in order to prevent damage. It should not be used in an *ex post facto* fashion. Rule-making, guidelines, policies and speeches can set forth the appropriate standards. This would allow everybody to know in advance what the new standards are, and govern themselves accordingly.

(6) Section 127 proceedings are now for all purposes no different than contentious trials. The major proceedings are complex trials. The Commissioners are poorly suited to participate in such proceedings, either as presidents or members of the panel. The recent appointment of litigation lawyers to provide this expertise is an admission of this reality.

(7) The Commissioners who are part-time are not in a position to commit to the time requirements of a long hearing.

(8) The Commission, in order to ensure that its adjudicative function is free from an attack based on a perception of bias, reasonably apprehended or actual, has gone to great lengths to create a partition between Enforcement and Commissioners. The Chair, as the chief executive officer, is the exception. The Chair takes an

active role in overseeing Enforcement and its major cases, both before and after the issuance of a notice of hearing. This structure has led to a malfunctioning of the Commission. Enforcement, which is one of the most important branches, operates on its own without its priorities, policies or practices being subjected to the Commissioners' advice and oversight. Enforcement has been described as a "black hole" within the Commission.

(9) The absence of involvement on the part of the Commissioners as a whole is of concern not only from the functional point of view, but from the legal as well. The Commissioners are the board of directors of the Commission, a corporation without share capital, with the responsibility of overseeing the management of the financial and other affairs of the Commission. This, of course, includes the enforcement branch. This responsibility cannot be delegated to the chief executive officer.

(10) If the adjudication function were to be removed from the Commission, there would be no need for the separation of Enforcement from the Commissioners. The Commissioners as a whole would be entitled to take a hands-on approach to the establishment of enforcement priorities, practices (including a protocol to govern the settlement process) and planning. This is particularly important currently. Perhaps as a by-product of the much more aggressive enforcement policy of the present Chair, there is a large informed opinion that Enforcement acts without effective accountability and restraint in exercising its mandate. It is essential for the Commissioners to exercise their corporate responsibilities and take control of Enforcement, especially when the Commission is publicly

emphasising proper corporate governance. Absent the impediment of the partition, the Commissioners would be free to focus on enforcement priorities, establish the appropriate oversight safeguards, and speak with one voice without fear of tainting the adjudicative process. The Commissioners, without the internal bifurcation, could move collectively and decisively to safeguard the capital markets.

(11) The Commission exhibits in its adjudicative functions a "crisis of confidence". It is overly sensitive to external criticism of its decisions, especially in the media. This results in a failure to develop consistent enforcement policies, priorities and practices, leading to confusion both within the Commission and in staff's dealings with those outside. The removal of the adjudicative function would mean that the Commission would no longer feel responsible for the adjudicative decision-making.

(12) Many of the concerns set forth above will only intensify into the future since the aggressiveness of Enforcement is unlikely to abate and, if anything, will probably increase.

(13) Some have also raised the issue of the constitutionality of the current structure. If these concerns are justified, it would follow necessarily that the structure would have to be changed. However, our research has led us to conclude that, even with its increased powers, the Commission as now structured likely would survive constitutional scrutiny (Appendix I).

(2)

The Argument Against a Separate Adjudicative Body

The view against separation of the adjudicative function focuses on the following factors:

(1) The fact that the apprehension of bias has developed such currency is due to the efforts of the defence bar to advance the interests of their clients. They are acting out of self-interest and are engaged in special pleading. They simply wish to weaken the regulatory authority of the Commission.

(2) With the separation of functions within the Commission, all reasonable steps have been taken to ensure that there is no improper consideration taken into account by the adjudicative panel. The Supreme Court of Canada requires nothing more.

(3) The interest in separating out the adjudicative function is part of an increasing and regrettable movement in the direction of the judicialization of administrative processes.

(4) The impetus for change is very much the product of the criminal law mentality at work. The cure could be worse than the disease.

(5) A separate adjudicative body is unworkable because:

(a) it will not attract the quality of persons required to make it work. Retired judges do not present the panacea many suggest. This is because they lack the vigour required for long and contentious hearings. Nor is the

workload sufficiently attractive to interest the sort of people you would need to recruit. Finally, conflicts of interest would foreclose individuals of high quality from participating;

(b) the appointing of members and the appropriate level of remuneration raise complex issues that are too numerous; and

(c) the tribunal will be marginalized by virtue of not having much to do.

(6) More "tweaking" could be done to the existing model to provide assistance to the adjudicative panels and to restore confidence. Reference is made to the recent hiring by the Commission of counsel to the adjudicative panels, and to the Commission's Adjudicative Committee.

(7) While the street may say that the adjudicative function is biased, an objective appraisal would demonstrate the contrary. Thus, in *Cowpland*[6] and *Bombardier*,[7] the Ontario and Quebec Securities Commissions respectively refused to approve settlements proposed by staff. These examples are cited as evidence that Commissioners in their adjudicative capacity are not in the pockets of staff.

(8) Policy input and development is important to the adjudicative function and operates both ways, i.e. from the Commissioners' work within the Commission to their adjudicative function and from their experience adjudicating back to their non-adjudicative work.

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[6] *M.C.J.C. Holdings Inc. and Michael Cowpland* (2003), 26 O.S.C.B. 8206.
[7] Décision de la Commission, *Bombardier Inc.*, Bulletin hebdomadaire, 2002-11-01, Vol. XXXIII, no 43, Ch 2.1, online: Autorité des Marchés Financiers <http://www.cvmg.com/upload/bulletin/v33n43ch21.pdf>.

(9) Apart completely from policy issues, the experience gained from participating in Commission meetings is important to the Commissioners' adjudicative function.

(10) The criticism of the Commission's adjudicative function is simply the result of the effectiveness of the current model.

(11) The Chair's involvement in the important cases handled by Enforcement is proper since he is the chief executive officer of the Commission.

(12) The SEC model does not provide meaningful separation, the decisions of the administrative law judges being subject to review by the Commissioners. Further, the SEC has not proven to be a very effective enforcer. Australia's model has problems, including attracting the right personnel because of conflicts of interest, and Alberta's experiment was a failure and short-lived. (These systems are discussed in more detail in Appendix II.)

(3)

The Make-Up of a Separate Adjudicative Body

Various approaches to the make-up of a separate adjudicative body, including the appointment and remuneration of its members, were identified. They include the following:

(1) A full-time chair with the tenure of a superior court judge, and part-time members appointed for a three or five year term, renewable once. The chair and part-time members would be drawn from the street, the legal and accounting professions, former judges and the universities.

(2) The appointments to be by order in council on the recommendation of the Minister of Finance, with the Chair of the Commission to make recommendations.

(3) The appointments to be by the Premier or Attorney General upon the recommendation of a committee comprised of representatives of various stake-holders, the public and perhaps the Chief Justice of Ontario.

(4) The remuneration for members would have to be sufficient to attract individuals of the highest quality. While some expressed the view that it would be difficult to find well qualified people to act part-time or even full-time, the overwhelming opinion was to the contrary, the latter view being held by many who themselves would be excellent part-time members.

(5) The remuneration of members should reflect a public service component, that is, the remuneration should be below-market.

(6) The expense of the new tribunal should be a charge on the Commission, but the Commission would not be involved in approving the tribunal's budget.

(7) There should be a roster of members from which the chair would select a three-person panel to sit on a particular hearing. The roster of part-time members must contain a sufficient number of lawyers or judges with strong trial experience in order that each panel may be presided over by such a member.

(8) The chair should be a former judge or lawyer with strong trial and administrative experience, and should be of such stature as to command the immediate respect of the regulated community. The new tribunal "will have to earn its spurs and the choice of the first chair is crucial".

(9) The new tribunal must operate out of its own premises, be properly staffed and provided with the necessary resources.

(4)

Alternatives to the Current and Bifurcated Models

Various alternatives were suggested. These were as follows:

(1) For all adjudicative hearings of the Commission, provide for an independent chair for the hearing, to be chosen from a panel. Initially, that panel could be established from among those currently involved in alternative dispute resolution and others with relevant expertise. The independent chair would preside with two Commissioners.

(2) Separate the Commissioners with their policy-making and adjudicative functions from the rest of the Commission. Provide the Commissioners with their own accountants, lawyers, economists and other necessary resources. All hearings would be presided over by the Commissioners.

(3) Create two classes of Commissioners: those who adjudicate and those who do not. Those Commissioners who adjudicate would have limited involvement with the Commission, perhaps only with respect to certain policy areas.

(4) Send all section 127 sanction cases into the court system. In any event, complex cases involving fraud, abuse of trust, and theft should go to court.

(5) Provide for complete separation of Enforcement from all Commissioners, including the Chair. Enforcement's activities would only be supervised through the tribunal process and retrospectively, once the case is over.

(6) Separate Enforcement completely from the Commission.

(7) Establish an independent supervisory panel to review proposed decisions of Enforcement to ensure proper management of the enforcement branch.

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THE ALTERNATIVES

Overview

As identified above, we encountered a number of alternative proposals for restructuring the Commission to eliminate or alleviate the critical problem – that of a perception of unfairness. We address the more important proposals below. Ultimately, our view was that none of these alternatives would address the problem as effectively as the creation of an independent adjudicative tribunal.

Formal Separation of Enforcement

To the extent that the major problem of perception was that of enforcement and adjudication operating under the same corporate direction and under the same roof, the question not unnaturally arose as to whether it would be more appropriate to hive off Enforcement rather than the adjudicative functions of the Commission. Indeed, the reality is that at present Enforcement has many of the characteristics of an independent prosecutorial service. This might seem to suggest not only that Enforcement was a more natural candidate for formal separation, but also that it could be accomplished more easily.

In fact, very few of those we interviewed supported this as a way of dealing with the problem and we were quickly persuaded to the majority point of view. While it is true that currently Enforcement enjoys considerable day to day autonomy in its functioning, much in the manner of an independent prosecutorial service, it is also the case that, particularly in relation to high profile cases, the Chair of the Commission takes an active supervisory and advisory role.

Indeed, as we understand it, this is one of the critical reasons why the current Chair, as a matter of policy, does not sit on hearings. It enables him to be involved more actively in Enforcement in a management capacity. It is also the case that, while their participation is limited, the other Commissioners are engaged in the scrutiny of Enforcement at least to the extent of an annual consideration of the priorities developed primarily by the branch. If Enforcement were to be formally separated from the Commission, it would be essential to develop alternative accountability and reporting mechanisms. While we do not doubt that it is feasible to create such an alternative structure, it is also clear that it is by no means an easy exercise, a fact emphasised to us by reference to the grave problems experienced in one Canadian province with the creation of an independent criminal prosecutorial service.

More importantly, however, enforcement, much more so than adjudication, is one of the core functions of the modern securities commission. Given that the principal aim of any such regime is the facilitation of the effective functioning of capital markets, the development of enforcement priorities and ensuring that Enforcement is operating in an effective manner is of critical importance. Particularly in a post-Enron world, the surrender by the Commission of that enforcement function would undoubtedly create grave concerns (both in Canada and internationally) about the effectiveness of securities regulation in this province. Indeed, as already outlined, it is our strongly held view that all of the Commissioners in fulfilment of their statutory corporate responsibilities should become much more engaged in the setting of enforcement priorities and scrutiny of Enforcement. As well, such a higher level of engagement would enable the Commissioners to bring their experience with the functioning of capital markets much more into play in the development of appropriate enforcement policies and priorities.

It is also the case that the removal of Enforcement from the Commission would have other adverse effects, such as the interplay that currently exists between Enforcement and other branches of the Commission, especially Corporate Finance. We sense that the fracture of those relationships and the removal of those sources of information and policy perspectives on various activities in the financial markets would be a considerable loss to Enforcement and would seriously impair its effectiveness in the long term.

Finally, it needs to be emphasised that the separation of Enforcement from the Commission would not in fact eliminate totally all of the current perceptions of unfairness or bias. Though this is a view that we do not share, some of the critics would still be concerned about the continuing role of the Commissioners as both policy-setters (through rule-making and more informally) and adjudicators.

Internal Restructuring of Adjudication

In the course of our consultations, we were confronted with a number of possibilities for changing the current adjudicative structures in a way that would keep them under the umbrella of the Commission. However, in the end, it was our view that none of these "solutions" would address adequately the concerns of unfairness resulting from overlapping functions.

The most obvious model is that of the SEC, described in Appendix II. Under this model, first instance adjudication within the Commission is primarily the responsibility of Administrative Law Judges with a right of appeal from their decisions to the Commissioners and

then to the courts. Indeed, the Matkin Report[8] recommended the adoption of such a regime in British Columbia as a way of eliminating the perception of unfairness and the inappropriate exercise of overlapping functions.

In fact, the model is not without its critics in the United States.[9] In any event, to the extent that this remains an accepted feature of regulatory adjudication at the federal level in that country, it appears to depend in considerable measure on the reputation for independence of the Administrative Law Judges, a reputation that has been built up over more than fifty years. We see no necessary assurance that the transplant of such a system into Ontario would produce similar levels of comfort. It also seems to be the case that a key part of any confidence that exists in the United States is the professional reputation of that specialized branch of the judiciary in an institutional sense. Having Administrative Law Judges in Ontario solely in a securities regulation setting would obviously not allow for the development of regulatory system-wide respect. Perhaps most significantly in terms of the current environment, however, would be the problematic nature of the appeal back to the Commission. For many whom we consulted, this constituted a major concern with the adoption of the American model.[10] It would not, at least in the short to medium term, eliminate the perceptions of unfairness resulting from the ultimate exercise by the Commissioners of overlapping functions. Although the adjudicative role of the Commissioners would have changed from first instance to appellate jurisdiction, the problem

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[8] *Restructuring for the Future: Towards a Fairer Venture Market* (The Report of the Vancouver Stock Exchange & Securities Regulation Commission) (1994) (the "Matkin Report" after the Commission's sole commissioner) at 64, and see more generally at 50-64.

[9] See Alfred C. Aman, Jr. and William T. Mayton, *Administrative Law*, 2nd ed. (St. Paul, Minn.: West Group, 2001) at 241 and accompanying note 31.

[10] In fact, in many instances in State administrative proceedings, there is not an appeal back to the original decision-maker from the Administrative Law Judge: see James F. Flanagan, "Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review" (2002) 54 Administrative Law Review 1355. Indeed, in a number of States, there are central panels hearing appeals from a range of agencies.

would still remain. Moreover, remove the appeal back to the Commission from the United States model and what is left in effect is a free-standing independent adjudicative regime.

The same concern about the perpetuation of the perception of unfairness also exists in the case of one of the variations that was suggested to us: maintenance of the current structure save that there would be an independent (i.e. non-Commissioner) Chair of the hearing panel, with two Commissioners completing the panel. If this Chair were a respected retired judge or litigation lawyer, there is reason to believe that the perceptions of unfairness would decrease somewhat. However, for a substantial majority of those to whom we put this possibility, such a proposal does not go far enough. The taint of operating within the same institutional setting and under the same institutional roof would still remain, particularly since the majority of any panel would be Commissioners, and thus might not be seen to be independent. It is also the case that the adoption of such a system would still necessitate the existing statutory and internally-developed ethical walls, and effectively preclude the Commissioners from a more active role in relation to enforcement policy. Further, those Commissioners who served on hearing panels either regularly or on lengthy cases would still have difficulties fulfilling in any effective way their other responsibilities as directors of the corporation.

We also rejected the suggestion of having two classes of Commissioners – those responsible for policy-making and the overall functioning of the Commission and those appointed solely to perform an adjudicative role. Aside from the absence of an appeal back to the Commission as a whole, this system has most of the same characteristics of the United States Administrative Law Judge regime. It would also involve a rethinking and restructuring of the current corporate form of the Commission in that it would simply be inappropriate to conceive

any longer of those Commissioners appointed solely to adjudicate as directors of the corporation legally responsible for the supervision of all of its functions.

The Regular Courts

While there was considerable advocacy of the Commission making greater use of the courts under its current enforcement discretion, few, if any, supported a total transfer of adjudicative jurisdiction to the regular courts. For some, that position may have simply been a pragmatic one based on a sense that it is highly unlikely to be politically feasible. Indeed, there was a generally (though not universally) held view that it would not be appropriate for all of this jurisdiction to be exercised by either Ontario Court of Justice or Ontario Superior Court judges. Their wide range of capacities and backgrounds would make any general assignment of jurisdiction to them problematic from the perspective of securities litigation needing a high degree of familiarity, if not expertise. In any event, there are indications that the Courts would not welcome such a wholesale transfer to them of securities enforcement adjudication.

The Matkin Report recommended the creation of a specialized division of the British Columbia Provincial Court to deal with securities cases,[11] and we heard some suggestion that, in Ontario, such cases could all go to the Commercial List of the Superior Court. However, even if such a step were possible, we would not recommend it, at least in preference to the creation of a separate adjudicative tribunal. Such a tribunal offers a far better prospect for the appropriate combination of skills or expertise necessary to adjudicate cases involving allegations of *Securities Act* violations. The combination of members with the appropriate litigation, securities law and financial markets experience would ensure the perpetuation of the advantages

[11] *Supra* note 8 at 97.

that the creation of a specialized securities regime was originally intended to achieve. Assignment of cases to regular judges, even sitting in a specialized division, does not provide anywhere near the same assurance of expertise. It also remains the case, the increased sanctioning powers of the Commission and trial-like proceedings notwithstanding, that the objective of many securities sanction hearings is not the same as that of the regular criminal and civil litigation models. In a regime where all jurisdiction were transferred to the regular courts, it would be easy for generalist judges not to understand or to lose sight of that principle.

5

OUR CONCLUSION

We would strongly advise the Commission to take steps to separate its adjudicative function from the Commission.[12] The arguments supported by the evidence in favour of this separation are persuasive, indeed overwhelming. The evidence to which we refer goes beyond the now familiar complaints of some members of the securities litigation bar. Apart entirely from what might be characterized as anecdotal evidence, we received considerable expert opinion evidence on the governance issues we were asked to consider. A substantial preponderance of that evidence supports our central recommendation – that the Commission should do what is required to be done to establish an adjudicative tribunal that is separate from the Commission.

We are satisfied that the nature of the apprehension of bias has become sufficiently acute as to not only undermine the Commission's adjudicative process, but also the integrity of the Commission as a whole among the many constituencies that we interviewed. Matters of institutional loyalty, the involvement of the Chair in the major cases, the increased penalties, the sense that "the cards are stacked against them", the home-court advantage, the lengthy criminal law-like trials, and the Commission's aggressive enforcement stance, which likely will only increase over time, all combine to make a compelling case for a separate adjudicative body.

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[12] While the Wise Persons' Committee recommends that adjudication should be the responsibility of a separate body independent of a proposed National Securities Commission, it provides no analysis, nor did it respond to our letter asking for its analysis.

Further, what we think is a compelling case for bifurcation is made more cogent when the state of the enforcement branch is considered. The state of Enforcement impacts directly on the management of the investigations and the process of cases proceeding to and through a hearing. There needs to be established well-defined policies, protocols (including one relating to settlement issues), priorities and practices for the enforcement branch for the benefit of staff and the Commission. These policies, protocols and practices must be established under the oversight of the Commissioners as a whole. However, this cannot be accomplished where the Commissioners are inhibited from doing so by the existence of their adjudicative functions.

As stated, the arguments against a separate tribunal are answered by the evidence. While the Supreme Court of Canada has affirmed that there can be no complaint at law about the apprehension of bias where legislation has mingled the adjudicative, enforcement and policy-making functions, the perception exists in fact. In our view, more "tweaking" will do little to alleviate the problem.

Nor does the evidence support the need for the cross-pollination between the Commissioners' adjudicative and non-adjudicative functions. The role of policy in sanction proceedings is limited. In any event, if it is to play any role, it should be identified in advance. The Commission has various methods of articulating policy, including its rule-making powers, without resorting to the adjudicative process. The experience gained from participation in the Commission's work, while relevant to the adjudicative function, can be replicated by experience gained from the street, the legal and accounting professions, and the university. And while this Commission experience is relevant, it is viewed by many from every constituency as being overrated in the context of a sanction proceeding.

We recognize that the structural change which we have advised the Commission to undertake will require authorizing legislation and will thus take time. In the meantime, we see no impediment to the Commission discharging its adjudicative responsibilities and functions on a business as usual basis. Subject to certain reservations expressed in Appendix I, our concerns with the current regime are based primarily on a policy, not a legal, analysis. More importantly, as a matter of public interest, the critical enforcement mandate of the Commission cannot grind to a halt pending the drafting and enactment of amending legislation. We are also confident that, in the meantime, the Commission will do nothing to exacerbate or contribute further to the problems on which we base our recommendations for change.

If the government is prepared to create a separate tribunal of the stature we are recommending, we are satisfied that there will be no difficulty in attracting suitable members. Provided there is adequate remuneration for members and an appropriate allocation of resources to the tribunal, the nature and importance of the work should make it attractive to highly qualified persons with relevant expertise, including retired or about to retire members of the securities and financial services communities and the securities bar. A panel of members having a strong representation of those who are highly respected and experienced in complex trials will give the separate tribunal the ability and reputation necessary to take control of proceedings so they can be expeditiously and fairly conducted.

The workload should also be sufficient. It will have the current inventory of sanction cases and reviews from SROs. In addition, there may well be work resulting from the fact that the Commissioners, freed from the previous restraints imposed upon them by their adjudicative duties, will be able to act collectively and more forcefully to protect the capital markets.

The Commission will also be freed from the criticism directed at its adjudicative function including, and perhaps most importantly, its decisions. The sole focus of the Commission's efforts in this area will be to marshal the appropriate cases for hearing and present them effectively to the tribunal.

It is important to reiterate that we have come to this conclusion independently from a consideration of the effect of the increased sanctioning power on the legal position of the Commission. However, it is important to observe that it cannot be said with total confidence that a court will not intervene given the Commission's new sanction powers. Our legal analysis is set out in Appendix I.

Finally, the fact that other jurisdictions have adopted or are adopting separate adjudicative bodies in the regulation of the securities industry supports our conclusion. This experience is set forth in Appendix II.

We believe that this answers the substantive questions we put to ourselves at the outset. Our recommendations, in the form of advice to the Commission summarized in the next section, respond to the structural questions.

6

RECOMMENDATIONS

In our specific recommendations, which are listed below, and in the main body of this Report, we have attempted to answer the questions that we posed at the outset of this Report. We are satisfied that our recommendations, if implemented, will not encumber the current debate about establishing a National Securities Commission, or the OSC's capacity to discharge its public interest based statutory mandate to protect investors from unfair, improper or fraudulent practices and to further fair and efficient capital markets and confidence in those markets.

For the reasons set out in this Report, we are satisfied that the case has been made for the separation of the Commission's adjudicative function from its other functions, as related only to proceedings in which sanctions against respondents are sought. In our view, this separation will resolve the perception problem to which we have referred in this report and will thus end what we view as an erosion of the Commission's institutional credibility. Hiving off the Commission's adjudicative function will also permit the Commissioners to take a more pro-active role in the oversight of Enforcement. The Commissioners' monitoring of enforcement matters will also enhance the Commission's credibility.

Our specific recommendations may be summarized as follows:

(1) In our view, a clear case for separating the Commission's adjudicative function from its other functions has been made out. We therefore recommend that a securities adjudicative tribunal be established. This will, of course, require legislation. If the tribunal is established, we leave it to others to determine what

its name should be. However, for ease, we will refer to this adjudicative tribunal as the Ontario Securities Tribunal ("**OST**" or, in some cases, the "**Tribunal**").

(2) The OST should have jurisdiction over all matters in which sanctions against a respondent are sought. It should not have general jurisdiction over matters such as poison pills, takeover bids and exemption orders. In our view, these on-going transaction-specific matters are, in all but rare cases, best left within the Commission. The OST should, however, have a residual jurisdiction over matters that are referred to it by the Commission (including exceptionally on-going transaction-specific matters) on the basis that the Commission concludes that it is in the public interest to make that referral. There should also be a right of appeal to the OST in all ongoing transaction matters with the exception of exemption orders.

(3) Accommodation for the OST, including hearing rooms, offices and meeting rooms, should be separate from the Commission to avoid any lingering perception that the Commission and the OST are in substance one entity. We accept that in the short term it may make sense for the OST to use OSC hearing rooms. In the longer term, the OST should have separate accommodation consistent in quality with the commercial space now occupied by the Commission.

(4) Appointments to the OST should be made by the Lieutenant Governor in Council, through the Minister of Finance on the recommendation of a committee no larger than five persons. We think that this committee's involvement is necessary so that appointments to the Tribunal are seen to be, and are, non-political. The

committee should include appointees from the Law Society of Upper Canada, a member of the judiciary nominated by the Chief Justice of Ontario, and two representatives from the securities industry to be nominated by the Minister of Finance. The committee should seek the views of the Chair of the Commission on all matters bearing upon appointments to the OST.

(5) The OST should have a permanent Chair who is a member of the bar with experience in contentious hearings or trials. In addition, we think that it is desirable that the Chair have some experience in securities related matters. Thus, retired judges having experience on the Commercial List of the Superior Court of Ontario should be given consideration for appointment to the OST as the appointments committee concludes is appropriate.

(6) The OST should have a Vice-Chair, or Chairs, who should also be members of the bar. An assessment of the likely workload of the Tribunal will determine whether more than one Vice-Chair should be appointed and whether the appointment of a Vice-Chair or Chairs should be permanent or part-time.

(7) At full complement the OST should consist of no more than 12 persons. Apart from the Chair and Vice-Chair (if the Vice-Chair is a permanent appointment), appointments to the Tribunal should be part-time *per diem* appointments and based on the expertise of potential appointees in matters related to the broad financial services sector. We leave it to the appointments committee to ensure that appointments to the Tribunal are non-political and provide the base of expertise required of an administrative tribunal having responsibility over all *Act*

sanction hearings. This expertise will provide the basis for the deference that we expect the courts will extend to decisions of the Tribunal.

(8) Members of the OST should be appointed on a good behaviour basis for renewable terms not to exceed 5 years. At the beginning, members of the OST should have staggered terms of appointment to establish some continuity in the early life of the Tribunal.

(9) The OST should be a *Statutory Powers Procedures Act* Tribunal. As such, it will have rule-making authority which we expect will be exercised to establish a rule-based framework for Tribunal hearings.

(10) The jurisdiction of the OST would commence once a Notice of Hearing is issued. The OSC should file Notices of Hearing with the OST forthwith upon issuance.

(11) Settlements concluded following the issuance of a Notice of Hearing should be subject to OST approval. It is our hope that further consideration will be given to the issue whether an admission of a breach of a specific provision of the *Act* (as opposed to admissions of conduct contrary to the public interest) by a respondent should be a pre-condition to a settlement. This is an issue which we think is beyond our mandate.

(12) We would recommend that as part of its rule-making function, the OST should provide for mediations, where appropriate, and pre-hearing conferences directed to settlement, the resolution of outstanding interlocutory issues such as disclosure,

and hearing management. In our opinion, the increasing length of some hearings militates in favour of pro-active hearing management.

(13) OST hearings should be bifurcated. That is to say, evidence and submissions on liability should be heard separately from evidence and submissions on sanctions, unless the parties consent to a non-bifurcated hearing.

(14) The OST should hear all reviews from SROs.

(15) There should be an appeal as of right to the Divisional Court and then, with leave, to the Court of Appeal from all exercises of original jurisdiction by the OST, as well as from its decisions on SRO reviews. In the cases of the OST's appellate jurisdiction in ongoing transaction matters, there should be provision for a further appeal with leave to the Court of Appeal. These appeal rights should apply for the benefit of all parties, including the Commission.

(16) The Commission should establish a committee to monitor Enforcement. For convenience, we refer to this committee as the "Enforcement Advisory Committee". We think that it is desirable that Commissioners have a greater role in the enforcement function. They can provide useful advice on a broad range of enforcement-related issues. Once adjudication is separated from the Commission, there will be no need for the ethical walls between Commissioners and Enforcement.

(17) The Chair of the OST should be paid a salary roughly equivalent to the statutorily prescribed salary of a Superior Court judge. The Tribunal's Vice-Chair, if a

permanent appointee, should receive a salary roughly equivalent to two-thirds of the Chair's salary. Tribunal members should be paid on a *per diem*, as needed, basis. Remuneration should be about $1,500 a day. This remuneration level recognizes what mediators and arbitrators in the private sector are paid, as reduced by a public service factor which we think is justifiable. We are satisfied that there is a sufficient number of qualified persons who would be prepared to accept an appointment to the OST.

(18) All current Commissioners should be eligible for appointment to the OST. When the OST is established, the OSC will require fewer part-time Commissioners since the workload of the OSC will be reduced by the removal of matters in which sanctions against respondents are sought. As stated, appointments should be based on the availability of the potential appointee and the expertise he or she can bring to the Tribunal, not the potential appointees' residential address.

(19) Members of the Tribunal should be assigned to a hearing primarily on the basis of the expertise required for that hearing. We recognize that many hearings involve allegations of theft, fraud or breach of trust. These cases are typically fact-dependent and require little in the way of particular securities-related expertise.

(20) It is imperative that the OST be properly resourced, consistent with its important role as the adjudicator of matters over which it will have jurisdiction. In particular, the Tribunal must have staff which will include administrative assistants, research clerks (articling law students), lawyers and library facilities. This list is not intended to be exhaustive.

(21) As an independent adjudicative tribunal with rule-making power, the OST should have the power to award costs, in its discretion, for and against the OSC. Cost orders made in favour of the Commission will typically follow hearings in which the Commission is successful. In our view, the OST should have jurisdiction in the exercise of its discretion to make cost orders against the OSC, typically in those cases where the allegations made against that respondent have not been established.

(22) How the OST will be funded will, in the final analysis, have to be determined by the government (Minister of Finance). We do, however, think that whatever the particulars of funding arrangements are, the OST should have its own budget and that the OSC, a self-funding regulatory authority, should provide at least some of the funding required by the OST out of the surplus generated by the OSC in its operations.

(23) The OST should be accountable to a committee of the Legislative Assembly to be determined by the Minister of Finance.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

"Coulter A. Osborne"
The Honourable Coulter A. Osborne, Q.C.

"David J. Mullan"
Professor David J. Mullan

"Brian Finlay"
Bryan Finlay, Q.C.

DATED: March 5, 2004

APPENDIX I

THE LAW

I Introduction

As stated above, the Commission is an integrated agency in the sense that the regulatory tasks are almost all performed by a single corporate body – standard-setting or rule-making, monitoring, investigation, enforcement, and adjudication. The carrying on of these multiple functions under the same regulatory umbrella has the potential to raise, at a structural level, issues of bias and lack of independence. Thus, for example, it is normally regarded as axiomatic that enforcement and adjudicative functions should be performed by different bodies. Not so axiomatic is the proposition that standard-setting and adjudicative functions should not be combined.

However, it is also well-accepted that the common law principles which condemn bias and lack of independence can be excluded by statute unless there are constitutional grounds on which the statutory regime is fallible. Provided the statutory authorization of what would otherwise be a biased structure or one lacking independence is explicit or clear, absent a constitutional standard, there will be no basis for judicial review. For these purposes, statutory authorization generally means that the structure itself is one that is created in the primary legislation. The argument will not prevail in situations where the decision-maker or a subordinate legislation-making body is given a discretion over the nature or structure of the decision-making process. In such instances, it will be presumed that the legislature intended that the chosen process be one that comports with the basic common law principles.

In the case of some but by no means all administrative tribunals or agencies, the possibility does exist that even explicit legislation will encounter constitutional impediments. Among those potential impediments are sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* and their guarantees of the "principles of fundamental justice" and the right to an "independent and impartial tribunal". Sections 7 and 11(d) may also operate to enhance the constraints that the common law imposes on decision-makers or subordinate legislation-making bodies that have a discretion to create or fill out the details of agency organization or decision-making structures.

Apart from constitutional arguments based on the *Charter,* in the wake of the *Reference re Secession of Quebec*[13] and the *Reference re Remuneration of Judges of Provincial Court of Prince Edward Island,*[14] there is some possibility that underlying or implicit principles of the Canadian Constitution might also provide a guarantee of independence and impartiality even in situations not covered by sections 7 and 11(d).

The objective in this section of our Report is to evaluate whether the Commission, as currently structured under statute and operating in practice, might encounter legal difficulties of the kind just identified. We will also consider whether the Commission's new powers enabling it to levy fines of up to $1 million and compel disgorgement might be vulnerable by reference to sections 96-101 of the *Constitution Act, 1867* and its protection of the core jurisdiction of provincial superior courts.

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[13] [1998] 2 S.C.R. 217.
[14] [1997] 3 S. C. R. 3.

II Common Law

In *Brosseau* v. *Alberta (Securities Commission)*[15] (***"Brosseau"***), the Supreme Court of Canada held that the Alberta *Securities Act* was sufficiently specific as to constitute legislative authority for the exercise by the Chair of both investigatory or enforcement and adjudicative roles in relation to the same matter. In so doing, the Court applied the decision of the Ontario Court of Appeal in *Re W. D. Latimer Co. and Bray*[16] (***"Latimer and Bray"***) sustaining a similar exercise of overlapping functions by the Commission. In other words, typical Securities Acts in which overlapping functions were clearly contemplated prevented the making of a common law bias or lack of independence challenge. Indeed, in *Latimer and Bray* particularly, the Court was not at all attracted by the argument that the Commission's work could as a matter of practice have been organized to prevent the overlapping of functions complained about in that case. To the extent that the legislation conferred the various capacities on members of the Commission, they were entitled to exercise all those capacities in relation to the same proceeding.[17]

Obviously, as L'Heureux-Dubé J. took pains to point out in *Brosseau,*[18] problems can arise in cases where members of the OSC go beyond their authorized statutory duties in a matter coming before them in their adjudicative capacity. Indeed, this is well-exemplified by another case involving the Commission: *E.A. Manning Ltd.* v. *Ontario Securities Commission*[19] (***"Manning"***). There, members of the Commission (including the Chair) not only exercised a rule- or policy-making authority for which there was no statutory warrant, but also, in the course

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[15] [1989]1 S.C.R. 301.
[16] (1974), 6 O.R. (2d) 129 (C.A.).
[17] *Ibid.* at 143.
[18] *Supra* note 15 at 310-11.
[19] (1994), 18 O.R. (3d) 97 (Div. Ct.), affirming (1995), 23 O.R. (3d) 257 (C.A.).

of doing so, adopted a policy that was so specific in its focus as to amount to pre-judgment of wrongdoing in a matter that was subsequently to come before the Commission in its adjudicative capacity. That went beyond any proper conception of what statutory authorization of overlapping functions allowed for. Moreover, in an earlier judgment, the Divisional Court had suggested that the Commission, when acting in its adjudicative capacity, had to be particularly careful to avoid creating any apprehension of bias at a hearing given the apprehensions that would already be present arising out of the overlapping of investigative and adjudicative roles.[20] More recently, in *2747-3174 Quebec Inc.* v. *Quebec (Régie des permis d'alcool)*[21] ("***Régie***"), the Supreme Court might also be read as suggesting that, if there is any sense of agency discretion with respect to how it functions, that agency is obliged to operate in practice in a way that avoids what would normally be inappropriate overlapping of functions. If this is true, that would effectively undercut that dimension of *Latimer and Bray.*[22]

Be that as it may, statutory authorization still remains a potent justification for fulfilling overlapping obligations in relation to the same matter. Indeed, the Ontario courts continue to reaffirm the authority of both *Brosseau* and *Latimer and Bray* in both securities regulation and other integrated regimes.[23] Thus, to the extent that the structure of the Ontario *Securities Act* remains as it was at the time of *Latimer and Bray,* the integration of functions will survive any common law scrutiny.

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[20] *Applebaum* v. *Ontario Securities Commission,* [1993] O.J. No. 649 (Q.L.); (1993), 16 O.C.S.B. 1563 (Div. Ct.).
[21] [1996] 3 S.C.R. 919.
[22] However, *cf Ocean Port Hotel Ltd.* v. *British Columbia (General Manager, Liquor Control and Licensing Branch),* [2001] 2 S.C.R. 781, refusing to read a constitutional or common law limitation on a statutory power to make appointments at pleasure. The Court held that the appointing authority was not obliged to exercise its powers in such a way as to ensure that the members of the tribunal had security of tenure and thereby greater adjudicative independence. That would fly in the face of the statutory authority to make at pleasure appointments. We return to this matter below.
[23] *Marchment & Mackay* v. *Ontario (Securities Commission)* (2002), 162 O.A.C. 263 (Div. Ct.) and *Forget* v. *Law Society of Upper Canada,* [2003] O.J. No. 249 (C.A.) (Q.L.), affirming (2002), 58 O.R. (3d) 142 (Div. Ct.).

In fact, there have been changes to the Commission's structure, and two in particular merit attention here. First, there has been one significant legislative diminution in the extent of authorized overlapping of functions. Section 3.5(4) of the *Act* now expressly prevents any Commissioner who has any involvement in an investigation and examination under Part VI (such as issuing a section 11 investigation order) from sitting at any hearing in relation to that matter. Indeed, implicit in that provision is probably a more general prohibition on Commissioners having been involved in any aspect of the investigative process in a matter coming before them in their adjudicative capacity.

Secondly, notwithstanding *Latimer and Bray* in particular and the extent to which it authorized overlapping functions which could in practice be avoided, the Commission, through the creation of ethical walls and other self-denying practices, has in fact created a very tight operational separation of enforcement and adjudicative functions. This has been particularly so since the almost wholesale implementation of the recommendations contained in an August 1993 Report prepared for the Commission by Sidney Lederman, then a practising lawyer.[24] In effect, the Commission has moved voluntarily to the functional separation of roles that the litigants in both *Brosseau* and *Latimer and Bray* were concerned about. Thus, today, because of section 3.5(4) and the internal practices of the Commission, the Chair would never both order and direct an investigation and then sit in an adjudicative capacity in relation to that same matter.

In short, whether by purely voluntary self-denying ordinances or perhaps because of a sense that it might now possibly be necessary as a matter of law to avoid inappropriately conflicting roles if at all feasible within the relevant statutory framework, the Commission has

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[24] *Report to the Ontario Securities Commission on Various Administrative Law Issues*, on file at the Ontario Securities Commission.

gone further than was seemingly required by *Brosseau*. In so doing, it has provided itself with even greater assurance that its operations do not come into collision with the standards which the courts have applied to this point in the case of integrated tribunals and agencies.

While the internal walls between the Commissioners and Enforcement may meet the common law's condemnation of inappropriately overlapping functions, there may, however, be countervailing legal difficulties. This is particularly so if they have the effect of removing Commissioners from the effective supervision of the enforcement branch. Given the Commissioners' responsibilities as directors of the corporation, default in the exercise of their supervisory role may violate the law.

We would also emphasize that the current regime of internal separation of functions is confined to the domain of overlapping enforcement and adjudicative roles. The Commissioners still engage in both rule-making and policy-setting and then adjudicate cases in which adherence to those rules and policies may be in issue. Indeed, since the express conferral of rule-making power on the Commission in the 1997 amendments to the *Act*, this aspect of the Commission's functions has assumed far greater significance. On the other hand, subject to the obvious constraints identified in *Manning*, the Canadian courts have never suggested that, at common law, there is any legal bar on agencies being both policy-makers and adjudicators in cases where those policies become relevant.

III Constitutional Dimensions

a Opening the Constitutional Door

i The *Charter*

1. General Application

As interpreted by the Supreme Court of Canada, the *Charter*'s application is limited by section 32(1). This means that for a body to be subject to the dictates of the *Charter*, it must either be government or an agency of government, or be engaged in the carrying out of some inherently governmental function or charged with the implementation of a "specific government policy or program".[25]

At the margins, it is undoubtedly difficult to discern where, on the basis of these tests and formulations, the line is to be drawn. However, there seems little doubt that regulatory agencies established by public statute will almost certainly always come within the general ambit of the *Charter*. This was underscored by the judgment of the Supreme Court of Canada in *Blencoe* v. *British Columbia (Human Rights Commission)*[26] ("***Blencoe***"), holding that the now-abolished British Columbia Human Rights Commission was engaged in the implementation of a specific government programme – that of dealing with and eliminating various forms of discrimination.

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[25] *Eldridge* v. *British Columbia*, [1997] 3 S.C.R. 624.
[26] [2000] 2 S.C.R. 307.

2. Section 7

While, in general, the *Charter* applies to the Commission, it appears very unlikely that the regulatory activities of the Commission engage section 7 of the *Charter* and its recognition of the right not to be deprived of "life, liberty and security of the person" save in accordance with the principles of fundamental justice.

Section 7 applies only to natural persons and so cannot be invoked directly by corporations subject to the OSC's jurisdiction.[27] However, since the Commission does exercise jurisdiction over natural persons, potential holders of section 7 rights, the jurisprudence clearly indicates that artificial legal persons such as corporations can resist the application of laws that if applied to natural persons would infringe their *Charter* rights: *R.* v. *Wholesale Travel Group.*[28] Everything will therefore hinge on whether the actions of the Commission can amount to a deprivation of the "life, liberty and security of the person" of natural persons subject to its jurisdiction.

The most obvious source of a claim that the actions of the Commission engage the right to "life, liberty and security of the person" of individuals rests in the capacity of the Commission to impose sanctions which have career or employment consequences for those individuals. Does employment security come within the reach of the "right to life, liberty and security of the person"?

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[27] *Irwin Toy* v. *Quebec,* [1989] 1 S.C.R. 927.
[28] [1991] 3 S.C.R. 154.

From very early on, the Supreme Court has accepted that section 7 does not protect purely economic interests or the right to work.[29] However, "liberty" has been held to include the making of "fundamental life choices" such as to bring into question a municipal by-law requiring city employees to live within the boundaries of the city.[30] Similarly, "security of the person" has been held to apply to state action which has a serious and profound impact on a person's psychological integrity. Thus, proceedings in which the state is trying to retain custody of a child as against the mother have been held to affect the mother's "security of the person".[31] Could it be argued that loss of the capacity to engage in a chosen occupation both interferes with a "fundamental life choice" and has the potential for such a serious and profound impact on the affected individual as to amount to a threat to "security of the person"?

In fact, even though the Supreme Court has arguably never dealt with these questions directly, neither appears likely.

First, in *Blencoe,* the Supreme Court refused to apply these conceptions of liberty and security of the person to the processing of a complaint of discrimination (sexual harassment) against a Cabinet Minister and member of the British Columbia Legislative Assembly. In so doing, the Court took pains to emphasise that mere subjection to regulatory processes or even those of civil litigation, while stressful, did not in itself amount to a removal of a fundamental life choice, nor did it have such a profound and serious psychological impact as to affect the respondent's security of the person. Nor was that altered in *Blencoe* by the fact that the

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[29] See *e.g. Walker* v. *Prince Edward Island,* [1995] 2 S.C.R. 407.
[30] See the concurring judgment of La Forest J. in *Godbout* v. *Longueuil,* [1997] 3 S.C.R. 844, approved by the majority of the Court in *Blencoe, supra* note 26.
[31] *New Brunswick (Minister of Health and Community Services* v. *G.(J.),* [1999] 3 S.C.R. 46.

proceedings had serious collateral effects in the form, *inter alia*, of removal from caucus and serious reduction in the range of career choices.

Secondly, while the sanctions that could be imposed directly on Blencoe did not include a loss of employment, there has been little in the jurisprudence to suggest that even the presence of the possibility of that sanction will lead to a crossing of the threshold to section 7. In furtherance of the Court's consistently held position that section 7 does not protect the right to work or, more generally, purely economic rights, the recent Supreme Court of Canada judgment in *Siemens* v. *Manitoba (Attorney General)*[32] holds that the operators of video lottery terminals could not invoke section 7 to protect their "right" to "generate business revenue by one's chosen means". Of course, it might be argued that there is a significant difference between taking away the right to deal in securities for disciplinary reasons and legislation (as in *Siemens*) permitting non-binding local plebiscites on whether to allow a particular activity within a municipality. However, there is strong lower court authority for the proposition that professional or occupational disciplinary proceedings do not engage section 7.[33]

This does not necessarily mean that section 7 will never have a role to play in Commission proceedings taken against individuals. Thus, in *Blencoe*, despite the holding that the human rights process did not in and of itself engage section 7, the Court did acknowledge that in particular cases where the Human Rights Commission acted in such an egregious way as to in

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[32] (2002), 221 D.L.R. (4th) 90 at para. 46 (S.C.C.).

[33] See e.g. *Kopyto* v. *Law Society of Upper Canada* (1993), 107 D.L.R. (4th) 259 (Ont. Div. Ct.) (leave to appeal to Ontario Court of Appeal and Supreme Court of Canada both denied: [1995] S.C.C.A. No. 248 (Q.L.)), where the authorities to that point are reviewed; the concurring judgment of Southin J.A. in *Doern* v. *British Columbia (Police Complaints Commissioner)* (2001), 203 D.L.R. (4th) 295 at para. 62 (B.C.C.A.) (appeal to the Supreme Court of Canada quashed on May 5, 2003: [2001] S.C.C.A. No. 504 (Q.L.)): "But I do not understand that there is any authority for the proposition that the words "security of the person" mean keeping one's job." See also *Walker* v. *Prince Edward Island, supra* note 29, though see *Harvey* v. *Law Society of Newfoundland* (1992), 2 Admin. L.R. (2d) 306 (Nfld. S.C., T.D.). Indeed, this line of authority also finds support in the Securities Commission context: *Johnson* v. *British Columbia (Securities Commission)* (1999), 67 B.C.L.R. (3d) 145 at para. 75 (S.C.) *(per* Allan J.), leave to appeal denied (1999), 128 B.C.S.C. 207 (C.A.).

fact inflict serious and profound psychological stress or prejudice, relief would be available. However, that speaks to the invocation of section 7 in very extreme circumstances and, obviously, has no relevance to any attempt to marshall section 7 in aid of an attack on a particular legislative or legislatively authorized structure on the basis that it does not sufficiently guarantee independence and an absence of bias. Similarly, while some of the Commission's coercive powers (such as enforced attendance of witnesses and the production of documents and giving of testimony) may attract section 7's protections, once again that does not speak to the deployment of section 7 against the more general regime of overlapping functions.

3. Section 11(d)

To invoke section 11, the claimant has to establish that he or she has been "charged with an offence". In the foundation judgment of *R.* v. *Wigglesworth* [34] ("***Wigglesworth***"), it was held that this required one of two things: either that the proceedings in question were penal in their "very nature" or involved "true penal consequences". The first category covers those proceedings which are "of a public nature, intended to promote public order and welfare within a public sphere of activity" as opposed to:

> ...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 sphere of private activity.[35]

The second category requires that the objective of the penalty imposed be one that has as its purpose "redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity". Such a purpose could be indicated by the magnitude of a fine or an "unlimited power to fine", particularly where the fine in question is

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[34] [1987] 2 S.C.R. 541.
[35] *Ibid.* at para. 23.

to be paid into the Consolidated Revenue Fund rather than being retained for its own purposes by the body which imposed the fine.[36]

To this point, the Courts have not seen the regulatory sanctions available to Securities Commissions as caught within either category.[37] Most recently, in *Johnson* v. *British Columbia (Securities Commission),*[38] it was held that the ability to levy a fine as high as $100,000 did not cross the second threshold; this was still an administrative penalty. In further proceedings in *Johnson,*[39] the Court of Appeal, though not with specific reference to section 11, also characterized the relevant provision as creating a purely administrative penalty.

Is there any reason to believe that the situation will change now that the OSC's powers under section 127 include the ability to levy a fine of up to $1 million and to order disgorgement? In recommending that the OSC have the power to levy "administrative" fines for the first time and that such fines have a limit of $1 million, the Five Year Review Committee, in both its Draft and Final Reports,[40] was of the view that this would not trigger section 11. The British Columbia cases were cited for this proposition even though the upper limit on the fine would be ten times higher and the proceeds not (as in British Columbia) retained by the Commission for educational purposes but paid into the Consolidated Revenue Fund. The Five Year Review Committee also relied on the Supreme Court of Canada's characterization of the existing section 127 in *Committee for Equal Treatment of Asbestos Minority Shareholders* v. *Ontario (Securities Commission)* ("***Asbestos***"):

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[36] *Ibid.* at para. 24.

[37] See *e.g. Re Malartic Hygrade Gold Mines (Canada) Ltd. and Ontario Securities Commission* (1986), 54 O. R. (2d) 544 at 549 (H.C.), *Re Barry and Alberta Securities Commission* (1986), 25 D.L.R. (4th) 430 at 736 (Alta.C.A.) (*Brosseau* in the Court of Appeal) (per Stevenson J.A.) (both cited with respect to the first category in *Wigglesworth).*

[38] (1999), 67 B.C.L. R. (3d) 145 (S.C.), leave to appeal denied (1999), 128 B.C.A.C. 207 (C.A.).

[39] (2001), 206 D.L.R. (4th) 711 (B.C.C.A.).

[40] At pp. 123-24 and pp. 216-17 respectively

> The enforcement techniques in the Act span a broad spectrum from purely regulatory or administrative sanctions to serious criminal penalties. The administrative sanctions are the most frequently used sanctions and are grouped together in subsection 127 as "Orders in the public interest". Such orders are not punitive... . Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of capital markets... . In contradistinction, it is for the courts to punish or remedy past conduct under ss. 122 and 128 of the Act respectively.[41]

This statement was also cited in the second *Johnson* proceedings in justification of the administrative nature of the British Columbia Act's provision for fines, with the Court specifically stating that it did not matter for these purposes that, at the time, section 127 of the Ontario *Act* did not confer the power to impose fines.

Not surprisingly, this view of the new powers in section 127 has not gone uncontested. In a paper, "OSC Enforcement Proceedings: Punishing Experience", delivered to the Ontario Bar Association on February 26, 2003, Alistair Crawley takes serious issue with the Five Year Review Committee's analysis and, in particular, urges that it cannot be reconciled with the principles laid down by Wilson J. in *Wigglesworth.*[42] He also questions the reliance on the second *Johnson* case, suggesting that the analysis employed was not central to the issue in that case, merely *dicta, per incuriam* for failing to take account of *Wigglesworth,* and, in any event, distinguishable, given the greater magnitude of the potential fines under the amended section 127.

In our view, there is certainly something to be said for the argument that the ability to levy a fine of up to $1 million and to order disgorgement changes the nature of the section and brings it within the first category detailed by Wilson J. in *Wigglesworth.* These days,

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[41] [2001] 2 S.C.R. 132 at para. 43.
[42] At 24-28.

it can scarcely be argued that the regulation of securities markets is not "intended to promote public order and welfare within a public sphere of activity". Indeed, in *Asbestos*, Iacobucci J. specifically acknowledges the public dimensions of section 127. Thus, when the legislature allows the Commission to "protect the public interest" by not only removing participants from capital markets but also fining them, a role heretofore exercised by the courts, not the Commission, it is reconstituting the section by way of providing sanctions for an offence. The Commission now arguably has the power to "punish or remedy past conduct".

There is also room for the argument that the fine provided for is of such a magnitude that it must have been designed to allow the Commission to "redress the harm done to society at large". As already noted, another indicator of such an objective is the payment of such fines into the Consolidated Revenue Fund.

We do not, of course, claim that this is a clearcut matter. After all, given the money at stake in today's capital markets and potential for gain on the part of individual participants, an upper limit of $1 million might in some settings be relatively trivial. Also, the level of fine to be imposed is a matter of discretion for the Commission in each case. Provided the Commission exercises that discretion in such a way that is in keeping with the notion of an administrative penalty rather than a penal sanction, there may be no problem. The possibility that it might be used for impermissible purposes should not expose the section to section 11 of the *Charter*. For these purposes, some would suggest, relying upon the judgment in *Asbestos*, there is a distinction between imposing a sanction which is "preventive in nature and prospective in orientation" and imposing a sanction to remedy past wrongs or to punish offenders. Provided the Commission has only the first objective in mind, deterrence, it will still be levying only an

administrative penalty; it will not be attempting by its sanction to fulfill all of the traditional purposes of the criminal or penal law: punishment as well as deterrence.[43]

It is not, however, at all clear to us that a focus on only one of the objectives of criminal sanctions saves a provision from creating an offence, particularly in cases where large fines have been added to the range of sanctions available and where the protection of the public interest is a key ingredient in the mix. Indeed, the argument is further undercut to the extent that the disgorgement remedy seemingly has the potential to be a vehicle for the provision of compensation to wronged investors. (The legislation is completely silent on this point.) It is therefore our considered view that there is a possibility that the new sanctions provided for under section 127 will engage section 11(d) of the *Charter* and require that the Commission meet the requisite constitutional standards of independence and impartiality.

ii Underlying or Unwritten Constitutional Principles

In *Reference re Secession of Quebec,*[44] the Supreme Court of Canada identified a non-exclusive list of underlying constitutional principles which it went on to state could have normative force independently of any specific constitutional provision. The principles identified there were democracy, federalism, constitutionalism and the rule of law, and respect for minorities. As well, in the *Prince Edward Island Provincial Court Judges* case,[45] the Court relied on the Preamble to the *Constitution Act, 1867* and its expression of the desire of the drafters to

[43] At the moment, the Supreme Court has under reserve a case which raises the question of whether the power to fine under the British Columbia securities legislation includes the authority to impose fines which have as part of their objective general as well as specific deterrence: *Re Cartaway Resources Corp.*, [2002] S.C.C.A. No. 474, on appeal from 2002 BCCA 461. If the Supreme Court sustains the British Columbia Court of Appeal's reduction of the fine imposed from the maximum of $100,000 to $10,000 on the basis that it improperly took into account general deterrence, this will certainly have an impact on the scope of fines that are justifiable under such provisions. It might also shed some further light on when a power to fine crosses the line between administrative penalty and criminal sanction. (The Commission intervened in the appeal.)

[44] *Supra* note 13.

[45] *Supra* note 14.

provide Canada with a constitution similar in principle to that of the United Kingdom. This provided a basis for the Court holding that there was a constitutional requirement that provincially-appointed judges be sufficiently independent. Even though it was only federally-appointed judges who had (through sections 96-101) an explicit guarantee of independence, the Court's reading of history revealed a much more pervasive notion of judicial independence in the unwritten British constitutional arrangements of 1867 or thereabouts.

This immediately led to suggestions that this constitutional guarantee of independent and impartial decision-making based on the Preamble might also apply to certain species of administrative tribunal. However, in *Ocean Port Hotel Ltd.* v. *British Columbia (General Manager, Liquor Control and Licensing Branch)*[46] ("***Ocean Port***") the Supreme Court of Canada specifically rejected that argument in the case of the British Columbia Liquor Licensing regime. Indeed, there are statements in the judgment of the Court delivered by McLachlin C.J. that suggest that the argument simply has no application in the case of administrative tribunals and agencies – bodies that the Chief Justice associated more closely with the executive than the judicial branch of governments.

However, some have argued that the *ratio* of *Ocean Port* is more confined and applies only to adjudicative regimes operating under the wing of a government department. In the instance of other agencies which operate at greater distance from government, they maintain that the argument is still feasible. This argument was advanced in *Bell Canada* v. *Canadian Telephone Employees Association,*[47] a case that involved an attack on provisions in the *Canadian Human Rights Act* alleging that they created a constitutionally-flawed process, one that lacked

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[46] *Supra* note 22.
[47] 2003 SCC 36.

sufficient separation between the Canadian Human Rights Commission and the adjudicative Human Rights Tribunal. In delivering a judgment based on the common law and the *Canadian Bill of Rights,* the Court never dealt definitively with the Preamble-based independence claim. However, in a very ambivalent passage, the Court noted the lack of reference by counsel to any authority supporting such an argument and also stated that, in any event, tribunals such as the Canadian Human Rights Tribunal did not call for the same level of independence as provincial and other regular courts.[48]

At this point, however, it seems unlikely that there are grounds for an attack on the Commission's structures based on the Preamble or a more general underlying constitutional principle of tribunal impartiality and independence. On the two occasions on which it has adverted to this kind of argument, the Supreme Court has given little or no encouragement to its use. Indeed, there are grounds for claiming that it has been rejected out of hand.

b The Requirements of Impartiality and Independence

If one or more of the constitutional thresholds is crossed, as suggested already, both the Commission's enabling statute and ways of operating under that statute will be subject to scrutiny. If the statute creates a structure that necessarily gives rise to a reasonable apprehension of institutional bias or lack of independence, it will be invalid unless, in the case of sections 7 or 11(d), but not the Preamble-based argument, it is sustainable by reference to section 1. If the statute permits but does not mandate a structure that gives rise to an allegation of

[48] At paras. 29-31.

institutional bias, then the *Charter* or the Preamble-based argument will require that in practice the OSC does not function in that manner. However, the statute itself will survive.[49]

In *Régie*, which is really the only directly relevant Supreme Court of Canada judgment, the Supreme Court (as opposed to LeBel J. in the Quebec Court of Appeal) was of the view that any concerns with the way in which the agency operated could be eliminated or alleviated by a different set of operational rules. The legislation did not require it to operate in the manner in which it did. There was therefore no need for the court to strike down the relevant statutory provisions. In other words, particularly if one takes into account the concurring judgment of L'Heureux-Dubé J., the successful challenge was one that could have been predicated on either the quasi-constitutional *Quebec Charter of Human Rights and Freedoms* or the common law.

The problems identified by the Court were as follows:

(1) According to the evidence available (primarily the annual report of the Régie), the agency's lawyers "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".[50] This raised the spectre of the same lawyer fulfilling multiple roles in relation to the same file and, in particular, both prosecuting a case before the directors of the Régie and advising them on the disposition of that case. As the available evidence of the agency's operations did not eliminate that as a possibility, there was a reasonable apprehension of

[49] *Régie, supra* note 21.
[50] *Ibid.* at para. 54, *per* Gonthier J.

institutional bias in a substantial number of cases and the system had to be changed to ensure that this no longer occurred.

(2) The annual report also left open the possibility that the directors (including the chair) of the agency could be involved in various stages of a case. The chair could "initiate an investigation, decide to hold a hearing, constitute the panel that is to hear the case and include himself or herself thereon if he or she so desires".[51] Similarly, a director could possibly decide that a hearing was required and then sit on that hearing. Here too, the law forbidding institutional bias meant that at the operational level, there had to be some guarantee that this overlapping of functions did not occur (at least among the regular directors as opposed to the chair – the judgment is somewhat vague as to whether the chair might be in a different position.)

Does this create problems for the Commission? It probably does not in the sense that if the Court were to apply the same standards to the Commission as it did to the Régie, the Commission would pass muster given the ethical walls that exist presently within the Commission and the express legislative ban in section 3.5(4) of the *Act* on members of the Commission who have participated in an investigation or examination under Part VI from sitting on any hearing in relation to that matter except with the written consent of the parties. The actual practice and the terms of the statute seem to coalesce to meet the particular concerns that gave rise in *Régie* to a quashing of the decision against the licensee.

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[51] *Ibid.* at para. 60.

Is there any warrant for believing that either at common law or constitutionally, the Commission will be held to a higher standard than was the case with the Régie? Here, there are only two possible arguments for such a higher standard: (1) the Commission has an additional policy-making mandate that the Régie's directors did not have; (2) the broadening of the range of the Commission's powers under section 127.

Gonthier J. took pains to emphasise in *Régie*[52], quoting from Cory J.'s judgment in *Newfoundland Telephone Co.* v. *Newfoundland (Board of Commissioners of Public Utilities)*,[53] that an overlapping of functions was not necessarily a concern particularly in the case of agencies that regulate "complex or monopolistic industries that supply essential services". While that does not necessarily embrace a securities commission and while the specific reference is confined to boards that are "investigative, prosecutorial and adjudicative", at other points in his judgment in *Newfoundland Telephone Co.* Cory J. does describe the Board as a policy-making body.

It is also worth noting that Gonthier J. in the same paragraph makes favourable reference to the leading non-constitutional Securities Commission case *Brosseau* in which L'Heureux-Dubé J. urged that the courts needed to be sensitive to legislative reasons for overlapping functions. While these remarks were expressly premised on the statutory regime passing constitutional muster, the fact that this statement was called in aid by Gonthier J. in a "constitutional" case suggests that the Supreme Court has sympathy at the constitutional level for the legislative choice of the fully integrated model of agency regulation, provided that there is a sufficient functional or operational separation of the various roles within that integrated model.

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[52] *Ibid.* at para. 46.
[53] [1992] 1 S.C.R. 623.

Moreover, all of the indicators so far are that the necessary separation of functions is a matter of severing internally the investigative and prosecutorial arms from the adjudicative arm, something that the Commission has probably achieved in practice.

As already stated, there appears to be no case law that suggests a constitutional or even common law problem with overlapping adjudicative and policy-setting functions save, of course, in situations such as exemplified by *Manning,*[54] where the problem discerned by the Divisional Court was the use of a then legally non-existent rule-making power to promulgate a policy that in effect amounted to an adjudication against the penny stock dealers. Even under the now statutorily authorized rule-making powers, that would still be a problem at common law given that such powers cannot be used for the purposes of adjudication of a matter also before the Commission in its formal adjudicative capacity. However, that speaks to the particular exercise of the policy-making power, not to the general incompatibility of policy-making and adjudicative functions.

Of course, just because the argument has never been made or considered directly by a court does not mean that it is a non-starter. However, for it to succeed at least as a free-standing ground for a finding of institutional bias would almost force the courts into rejecting as a matter of constitutional principle the integrated model of agency. That seems a very dubious prospect and one which, assuming the application of the *Charter,* would undoubtedly prompt a strong section 1 justification. Whether the focal point of the inquiry is the essential hallmarks of institutional independence and impartiality or section 1, the integrated (as opposed to bifurcated) agency has pedigree in Canadian regulatory law. Indeed, as stated, as long ago as the 1930s, this model of agency was the subject of debate in the United States and England. In 1941, the United

[54] *Supra* note 19.

States Attorney General's Committee on Administrative Procedure in its final report, *Administrative Procedure in Government Agencies,*[55] recognized and, by a majority, endorsed the concept of integrated administrative agencies operating in this manner. In response to an argument against the existence of integrated agencies, the final report states:

> [A]s the Committee has repeatedly noted, an administrative agency is not one man or a few men but many. It is important, the Committee believes, not to make the mistake of conceiving of the agency as a collective person and concluding that, because the agency initiates action and renders decision thereafter, the same person is doing both. In an agency's organization there are varied possibilities of internal separation of function to the end that the same individuals who do the judging do not do the "prosecuting". Such internal separations by no means eliminates the problem of combination of functions; but it alters, or if wisely done may alter, its entire set and cast.[56]

At this point, to hold that the model of an integrated agency is no longer acceptable on constitutional grounds either generally or even in the specific instance of securities commissions would be to effectively withdraw from the legislature a long-recognized method of regulatory organization.

If there is room for argument on this point, it may, however, come from a holding that the powers of the Commission engage the *Charter* not through section 7, but through section 11. That would bring the Commission much closer to the domain of courts of criminal jurisdiction "where the smallest detail capable of casting doubt on the judge's impartiality will be cause for alarm" (Gonthier J. in *Régie* at para. 45). That might just persuade a court to see an overlapping of policy-setting and adjudicative functions as problematic either generally or in a particular case where Commissioners who had had a role in setting a policy were now being called upon to adjudicate on its limits. Those determining "guilt" and assessing true "penal consequences" should not also be setting policies that give content to the species of misconduct

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[55] (Washington: United States Government Printing Office, 1941).
[56] *Ibid.* at 55.

that attract "charges". What is also clear is that where section 11(d) is engaged, the Supreme Court allows little room for section 1 justifications of violations of its standards. Thus, in *R.* v. *Genereux,*[57] Lamer C.J. (delivering the judgment of the majority) stated:

> ...I am of the opinion that a trial before a tribunal which does not meet the requirements of section 11(d) of the *Charter* will only pass the second arm of the proportionality test in *Oakes* in the most extraordinary circumstances. A period of war or insurrection might constitute such circumstances.

(Of course, that statement may have to be qualified in the event that section 11(d)'s reach extends to at least some sanctions imposed by administrative agencies.)

If this last argument were to be successful at the general level, it is highly unlikely that the situation could be rectified by Commission action, particularly given the fact that the legislation clearly expects the Commissioners to both adjudicate and set policy. Legislative restructuring would seem to be an inevitable consequence.

Similarly, if the new powers under section 127 bring the OSC into the penal domain and engage section 11(d) of the *Charter*, it may be that what were determined in *Régie* to be acceptable internal measures for keeping separate the enforcement or prosecutorial from the adjudicative functions would not be sufficient. The closer a tribunal comes to the courts of criminal jurisdiction, the more the courts will require both a formal and operational separation. As a consequence, the current OSC ethical walls, while sufficient to meet the standards of *Régie*, might well be insufficient to avoid a reasonable apprehension of bias arising in a truly penal context.

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[57] [1992] 1 S.C.R. 259 at para. 111.

c Section 96 of the *Constitution Act, 1867*

Aside from the constitutional issues about the independence and impartiality of the OSC as now structured, there is also the question of whether its current powers might in any way violate section 96 of the *Constitution Act, 1867* and its guarantees of jurisdiction for superior, district and county courts.

The Supreme Court of Canada has fashioned a three-part test for determining which powers, under which circumstances, can be transferred to inferior courts or to administrative tribunals without infringing section 96 of the *Constitution Act, 1867*:

> (1) The first branch of the test is an historical inquiry into whether the power or jurisdiction conferred upon the tribunal conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation. If the power in question is not broadly conformable to one exercised by a superior court in 1867, the inquiry ends here.
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> (2) The second step asks whether the function in question is judicial in its institutional setting. The primary issue is the nature of the question which the tribunal is called upon to decide. Judicial functions are contrasted with policy-making functions. If the power is not being exercised as a judicial power, then the inquiry need not go further.
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> (3) The final branch of the test involves an assessment of the tribunal's functions as a whole in order to appraise the impugned function in its entire institutional context. Under this branch of the test, it is permissible for administrative tribunals and inferior courts to exercise powers historically belonging to courts with section 96 judges provided those judicial powers are merely subsidiary or ancillary to the general administrative functions assigned to the tribunal, or the powers are necessarily incidental to the achievement of a broader policy goal of the legislature. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal so that the tribunal can be said to be operating like a section 96 court.[58]

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[58] *Reference re: Residential Tenancies Act 1979 (Ontario)*, [1981] 1 S.C.R. 714; *MacMillan Bloedel Ltd.* v. *Simpson*, [1995] 4 S.C.R. 725 at para. 12.

In *Re C.T.C. Dealer Holding Ltd. and Ontario Securities Commission*[59], the Divisional Court held that the powers granted to the Ontario Securities Commission by section 123 (now section 127) of the *Act* "easily meet the tests laid down by the Supreme Court". According to the Divisional Court, "neither the grant of power in s. 123 to the Commission nor its construction of that grant raises any question of constitutionality."

Does the grant of new sanctions to the Commission, and, in particular, the power to levy fines and to order disgorgement infringe section 96 by reference to these standards? In terms of the first stage of the test, the power to fine was certainly not a matter within the exclusive jurisdiction of the superior, district or county courts in 1867, nor was the power to award damages (if the disgorgement power is viewed as having that purpose). However, the high level of the fine and the absence of any upper limit on the power to order disgorgement could possibly cause the power or jurisdiction to be characterized as being of a kind exercised exclusively by those courts at the time of confederation. Similarly, given the fact that the levying of such penalties follows the determination in a judicialized setting that the respondent has engaged in conduct proscribed in the *Act,* it seems clear that the power in question is being exercised in a judicial manner.

However, under the third test, there seems little doubt that the powers in question have been integrated into a much broader scheme of regulation of which they are merely an ancillary part, albeit exercised in a judicial manner. The adjudicative capacities of the Commission are merely part of a comprehensive regulatory structure intended by various means

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[59] *Re C.T.C. Dealer Holding Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (Div. Ct.); application for leave to appeal to the Ontario Court of Appeal dismissed: (1987), 35 B.L.R. xx.

to provide protection to investors from unfair, improper or fraudulent practices, and to foster fair and efficient capital markets and confidence in capital markets.[60]

Certainly, on occasion, the courts have deployed section 96 in a manner which focuses on the specific power being exercised by the non-section 96 court and assessed its validity in isolation from the other capacities possessed by an otherwise valid tribunal. Thus, in *MacMillan Bloedel Ltd.* v. *Simpson,*[61] the Supreme Court's sole attention was on the conferring of exclusive authority on provincially-appointed judges to punish those under the age of majority for contempt of superior court orders. Under sections 96-101, this jurisdiction could not be removed from superior court judges. However, in this instance, the power to fine and order disgorgement is without prejudice to the capacity of the regular courts to deal with civil claims arising out of tortious behaviour by participants in capital markets and to deal with criminal offences or even *Securities Act* offences arising of the actions of such participants. Also, the ability of the Commission to order disgorgement is obviously discretionary and in no legislated sense correspondent to a civil liability regime. It does not on its face establish a surrogate mechanism for dealing with tort claims in the capital markets sector.

In sum, we do not believe that there is any serious claim that section 96 of the *Constitution Act, 1867* threatens the new powers of the Commission under section 127.

IV Conclusions

It seems unlikely that there are legal problems either under common law or on any constitutional basis with the present structure of the Commission. Of the potential bias or lack of

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[60] *Act,* s.1.1.
[61] [1995] 4 S.C.R. 725.

independence arguments that might be made against the way in which the Commission operates currently, the only realistic possibility seems to be one based on section 11(d) of the *Charter* and its requirement of an "independent and impartial tribunal" for the trial of persons "charged with an offence".

We believe that there is some possibility that the courts will regard the new powers to fine and order disgorgement as crossing the threshold to the application of section 11(d): the adjudication of charges that are "penal in nature" or carry with them "truly penal consequences". On the other hand, it may be that the courts will hold that the provision is valid and subject the imposition of a fine or disgorgement order to constitutional review only if, in the particular instance, it is in the nature of a criminal or truly penal sanction rather than a permissible administrative penalty.

Moreover, even if this provision triggers section 11, we also believe, with one possible exception, that it is likely that the way the Commission operates in practice will save it from attack, even though the *Act* still contemplates a significant overlapping of functions. First, the *Act* now contains a prohibition on Commissioners acting in both investigatory and adjudicative capacities in connection with the same proceedings. Secondly, the Commission has created very effective walls between its investigation and enforcement branches and the Commissioners acting in their adjudicative capacities, though, as noted, this may create other kinds of legal difficulties if it leads to Commissioners defaulting in their responsibilities as corporate directors to supervise the conduct of Enforcement. Thirdly, we see no basis in existing law for the proposition that integrated agencies are in and of themselves compromised. The mere fact that a particular agency carries out a full range of regulatory functions does not

automatically lead to the conclusion that the adjudicative arm of that agency lacks independence and impartiality. It will all depend on how that agency operates in practice.

In one respect, however, if section 11(d) is generally triggered by the extent of the new powers, the current legislation and practice may be problematic. If, as stated by Gonthier J. in *Régie*, the courts are meant to be particularly vigilant in policing situations where section 11 applies and hesitant to allow section 1 justifications, it could be the case that the Commissioners are acting contrary to the *Charter* when they both set policies and then adjudicate cases bearing criminal sanctions in which the reach and application of those policies are in issue. Once again, however, there is an issue as to whether this would lead to the total invalidation of overlapping adjudicative and policy-setting (or rule-making) functions or provide a remedy only in those cases where Commissioners who had participated in the policy or rule-making were now called upon to apply it as adjudicators. More generally, there is also the possibility that, in a truly penal context, the ethical walls which exist currently between the prosecutorial/enforcement and adjudicative functions of the OSC may not be sufficient to avoid the taint of a reasonable apprehensions of bias.

APPENDIX II

OTHER JURISDICTIONS

OVERVIEW

From a review of other systems and jurisdictions, it is clear that there is not yet much of a track record for separate adjudicative tribunals in securities regulation. However, there is a clear move to separate adjudicative bodies in the self-regulatory systems, and in jurisdictions such as Québec, England, Australia and Hong Kong. A description of these separate adjudicative bodies and, more generally, of the systems and models adopted in these jurisdictions and others follows. The models in Québec, England and Australia were adopted very recently and, consequently, they cannot yet afford assistance regarding the "viability" and effectiveness of their separate adjudicative panels. Only Hong Kong's system has the necessary history to reflect the viability of the model.

The United States' SEC is also examined. The SEC model does not include a separate adjudicative tribunal. However, as explained in this section, some "separateness" is achieved through the Administrative Law Judges. Because the SEC is the result of a unique history and a different political tradition, it is our view that only limited lessons can be drawn from its experience. For this reason, and because the SEC has a much longer history than the other systems described in this section, we have approached the SEC differently, i.e. analytically instead of descriptively.

The conclusion that a study of other jurisdictions gives rise to is that while the evidence may be limited, the move towards the separate adjudicative model is substantial. There

is no reason to believe that the motivation for it is any different than what we have found in Ontario. In societies that are insisting on good governance, accountability and transparency with respect to the working of the capital markets, nothing less is being required of those institutions whose responsibility is the proper oversight of those markets.

CANADIAN REGULATORS

The Provincial Commissions and Agencies

In Canada, those provinces with a securities commission, with the exception of Québec, have adopted a model similar to Ontario.[62] Both British Columbia and Alberta commissioned reports on the structure and function of their respective securities commissions.[63] These studies on the issue that concerns us recommended different solutions. The *Matkin Report* (British Columbia) recommended a model similar to the SEC, while the *McCoy Report* (Alberta) recommended separating the agency from the Commissioners. Both recommendations were premised either in whole or in part on the perception of institutional bias arising from the Commission acting as policy-maker, enforcer and adjudicator.[64] While Alberta implemented the proposal, it only lasted a short time.[65] The model was unsatisfactory. There were, in fact, two CEOs: the Chair of the Commission and the Chief of Securities Administration, a situation which proved unworkable for obvious reasons. The Commissioners quickly became separated from their staff and lost control.

In Québec, the *Martineau Report* in 2001 proposed the creation of a single regulatory body for Québec's financial sector.[66] The report identified the problems related to the

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[62] *Securities Act*, R.S.B.C. 1996, c. 418; *Securities Act*, R.S.A. 2000, c. S-4; *Securities Act*, R.S.N.L. 1990, c. S-13; *The Securities Act, 1988*, S.S. 1988-89, c. S-42.2; *Securities Act*, R.S.N.S. 1989, c. 418; *The Securities Act*, C.C.S.M. c. 550 (September 1, 2003).

[63] J. G. Matkin, *Restructuring for the Future, Towards A Fairer Venture Market*, The Report of the Vancouver Stock Exchange and Securities Regulation Commission, January 1994 ("***Matkin Report***"); The Honourable Elaine J. McCoy, *The Alberta Securities Commission: Discussion Paper*, March 1987 ("***McCoy Report***").

[64] *Matkin Report* at 59-64; *McCoy Report* at 20-44.

[65] *Alberta Securities Commission Reorganization Act*, S.A. 1988, c. 7; *Securities Amendment Act*, 1995, S.A. 1995, c. 28.

[66] Y. Martineau, *A Streamlined Regulatory Structure for Québec's Financial Sector*, Report of the Task Force on Financial Sector Regulation, December 2001 ("***Martineau Report***").

exercise by a regulatory body of the quasi-judicial function, including the problem of apprehension of bias. It stated:

> In addition, the institutional independence and intellectual autonomy of the authority exercising the quasi-judicial function must be preserved from the influence of the authority exercising other regulatory functions. These essential attributes of the judiciary may be compromised or appear to be compromised when, for instance, the quasi-judicial authority uses common services within the regulatory body (investigators, legal advisers, secretaries, communication services, staff, etc.). A barrier must therefore be raised between certain activities.[67]

The report recommended the establishment of the Agence nationale d'encadrement du secteur financier du Québec ("**Agency**"), which was proposed to be the single body to regulate the financial sector. In addition, it proposed a separate adjudicative tribunal for the Agency.

Legislation was subsequently passed, the effect of which, amongst others, was to establish the Agency (now renamed Autorité des marchés financiers) and also to create a separate adjudicative tribunal ("**Board**") for securities matters only (the Bureau de décision et de révision en valeurs mobilières).[68] The Board is to be composed of members appointed by the Government, which also determines the number of members. Their term of office is five years, but may be less where the candidate so requests for a valid reason or where required by special circumstances.[69] There is to be a chair and deputy chairs, designated by the Government, who are full-time.[70] The Government determines the remuneration for members, as well as their benefits and other conditions of employment.[71] Their pension plan is determined pursuant to the *Act respecting the Pension Plan of Management Personnel*.[72] The chair will submit an annual

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[67] *Martineau Report* at 51.
[68] *An Act respecting the Agence nationale d'encadrement du secteur financier*, S.Q. 2002, c. 45.
[69] *Ibid.*, s. 97.
[70] *Ibid.*, s. 99.
[71] *Ibid.*, s. 101.
[72] *Ibid.*, s. 102.

budget estimates for approval by the Government.[73] The Agency and the Board started their operations on February 1, 2004.

The jurisdiction of the Board is broad. At the request of the Agency or "any interested person", the Board shall exercise the powers provided in the *Securities Act*, R.S.Q., chapter V-1.1, which include:[74]

(a) the revocation, suspension or imposition of restrictions on the rights granted by registration to a dealer or adviser;

(b) prescribing the conduct of an entity trading securities or engaged in clearing activities;

(c) making a freeze order;

(d) recommending to the Minister the appointment of a provisional administrator for a person or company in certain circumstances;

(e) the refusal of an exemption;

(f) prescribing the cessation of an activity in respect of a transaction in securities;

(g) the imposition of an administrative penalty up to $1 million, the repayment of the cost of an investigation or an order prohibiting a person from acting as director or senior executive; and

(h) the power of review with respect to certain decisions rendered by the Agency or by a self-regulatory organization. Where it is a self-regulatory organization that is applying for the review, the Board shall not, in appraising the facts or the law, substitute its appraisal of the public interest for the appraisal made by the Agency for the purposes of its decision.

The Board, before rendering a decision that adversely affects the rights of a person, must afford an opportunity to be heard. An appeal lies from a decision of the Board to the Court of Québec and, from there, to the Court of Appeal, with leave.

In its Newsletter of December 18, 2003, the Bureau de transition stated:

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[73] *Ibid.*, s. 110.
[74] *Ibid.*, s. 93.

"The ... *Bureau de transition* has already formulated three orientations to guide the introduction of the [Board]:

- Ensure the efficiency of the [Board] in its role of specialized administrative tribunal;
- Ensure the [Board]'s institutional independence;
- Ensure the [Board]'s administrative independence."

Self-Regulatory Organizations

Both the Investment Dealers Association ("**IDA**") and RS Market Regulation Services Inc. ("**RS**") have adopted, as their adjudication model, a hearing panel composed of three persons. The Mutual Fund Dealers Association will, we understand, adopt a similar model. An RS panel is selected from the Hearing Committee and is composed of a current or former member of the Law Society, who acts as the chair, a person who is or was a director, officer, partner or employee of an entity subject to regulation, and one other. The Hearing Committee is chosen by the board of RS from individuals nominated by the regulated entities, from the bar, those subject to regulation and other knowledgeable persons. The IDA panel is composed of two industry representatives from the appropriate District Council of the IDA, and a representative of the public who acts as the chair. The public representative is not to be associated with any investment dealer and must have legal training and industry knowledge, usually as a securities lawyer or retired judge. In both instances, the hearings are trial-like.

The sanctions available to the IDA panel include a reprimand, a temporary or permanent bar from employment with an IDA member, a $1 million penalty for each offence, and a payment of an amount equal to three times the pecuniary benefit which accrued to the member as a result of the violation. The RS panel may impose one or more of the following sanctions:

(a) a reprimand;

(b) a fine not to exceed the greater of:

(i) $1,000,000, and

(ii) an amount equal to triple the financial benefit which accrued to the person as a result of committing the contravention;

(c) the restriction of access to the marketplace for such period and upon such terms and conditions, if any, considered appropriate;

(d) the suspension of access to the marketplace for such period and upon such terms and conditions, if any, considered appropriate;

(e) the revocation of access to the marketplace; and

(f) any other remedy determined to be appropriate in the circumstances.

In terms of the issue of perception of unfairness, it is significant to note that the Five Year Review Committee's Final Report (at p. 120) drew attention to the concerns that had been expressed about perceptions of unfairness in the way in which IDA disciplinary panels are currently constituted:

> We suggest the IDA look again at the structure of its disciplinary panels; as two thirds of the members of a disciplinary panel are IDA member representatives, there may be concerns about the perceived independence of the panel ... . We encourage the IDA to reconsider this allocation.

The December 2003 Report of the Ontario Securities Commission Regulatory Burden Task Force (at p. 12-13) was even more definitive on this issue:

> We also recommend that the IDA's other governance structures and procedures be altered where necessary to ensure, to the greatest extent possible that its self-regulatory activities are, and are perceived to be, impartial and thus fair to investors. For example, the IDA's disciplinary hearings are now conducted by panels composed of three members. The Chair of each panel is a lawyer who is not associated with IDA members and the other two panel members are representatives of IDA members. Although the IDA advised us that they were not aware of any situation where the two IDA representatives had outvoted the Chair in a disciplinary decision, the perception remains that the two IDA representatives could determine or influence the outcome of hearings. We therefore recommend that each IDA disciplinary panel be composed of an independent lawyer as Chair, an independent IDA director and a representative of an IDA member. The presence of the IDA member representative would ensure that the panel's adjudicative function would have the benefit of the industry expertise of that representative. This

> panel structure would eliminate any appearances of impartiality [*sic*] in the decisions reached by the IDA disciplinary panels.

While the context and the nature of the perceptions of partiality are somewhat different from the situation with the OSC, this recommendation does underscore the increasingly pervasive nature of concerns about bias and conflict of interest across the whole spectrum of securities and financial services regulation.

FOREIGN REGULATORS

The SEC

The SEC describes its enforcement process as follows:

Under the securities laws the Commission can bring enforcement actions either in the federal courts or internally before an administrative law judge. The factors considered by the Commission in deciding how to proceed include: the seriousness of the wrongdoing, the technical nature of the matter, tactical considerations, and the type of sanction or relief to obtain. For example, the Commission may bar someone from the brokerage industry in an administrative proceeding, but an order barring someone from acting as a corporate officer or director must be obtained in federal court. Often, when the misconduct warrants it, the Commission will bring both proceedings.

- **Civil action:** The Commission files a complaint with a U.S. District Court that describes the misconduct, identifies the laws and rules violated, and identifies the sanction or remedial action that is sought. Typically, the Commission asks the court to issue an order, called an injunction, that prohibits the acts or practices that violate the law or Commission rules. A court's order can also require various actions, such as audits, accounting for frauds, or special supervisory arrangements. In addition, the SEC often seeks civil monetary penalties and the return of illegal profits, known as disgorgement. The courts may also bar or suspend an individual from serving as a corporate officer or director. A person who violates the court's order may be found in contempt and be subject to additional fines or imprisonment.

- **Administrative action:** The Commission can seek a variety of sanctions though the administrative proceeding process. Administrative proceedings differ from civil court actions in that they are heard by an administrative law judge (ALJ), who is independent of the Commission. The administrative law judge presides over a hearing and considers the evidence presented by the Division staff, as well as any evidence submitted by the subject of the proceeding. Following the hearing the ALJ issues an initial decision in which he makes findings of fact and reaches legal conclusions. The initial decision also contains a recommended sanction. Both the Division staff and the defendant may appeal all or any portion of the initial decision to the Commission. The Commission may affirm the decision of the ALJ, reverse the decision, or remand it for additional hearings. Administrative sanctions include cease and desist orders, suspension or revocation of broker-dealer and investment advisor registrations, censures, bars from association with the securities industry, and payment of civil monetary penalties, and return of illegal profits.[75]

For our purposes, the following two aspects from the above are important:

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[75] U.S. Securities and Exchange Commission's website: http://www.sec.gov/about/whatwedo.shtml

(1) to bar someone from acting as a corporate officer or director, the SEC must proceed in court; and

(2) the use of the ALJ.

The importance of (1) is derived from the fact that in section 127 proceedings, the Commission views barring someone from acting as a corporate officer or director as an appropriate sanction in serious cases. The significance of (2) is that although the ALJ's initial decision is subject to review by the SEC,[76] the ALJ does provide a substantial separation of functions in comparison to the Commission:

> In short, ALJs are very nearly as independent of federal agencies as federal trial judges are of the Executive Branch. This high degree of independence of ALJs from agencies is designed to protect the rights of individuals affected by agency adjudicatory decisions from any potential sources of bias.[77]

The *Administrative Procedures Act*[78] ("**APA**") provides the legislative framework for most decision-making by federal agencies.[79] The APA is viewed as favouring a "court-centered approach" rather than the "agency-centered approach".[80] Nevertheless, the ALJ model has attracted various attempts to promote agency-centered principles at the expense of the court-centered scheme.[81] In the particular context of the SEC, the adjudicative function of the ALJs

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[76] K.C. Davis & R.J. Pierce, Jr., *Administrative Law Treatise*, 3rd ed., vol. II (New York: Little Brown and Company, 1994) at 97:

> APA s. 557(b) provides: "On appeal from or review of the initial decision, the agency has all the power which it would have in making the initial decision except as it may limit the issues on notice or by rule." The effect of this provision is to allow agencies to treat ALJ initial decisions as recommendations, with all ultimate decisionmaking power held by the agency head. Most agencies operate in this manner. The agency adopts an ALJ's decision only if, and to the extent that, it agrees with the decision.

[77] *Ibid.*

[78] 5 U.S.C. §§ 557 – 559, 701 – 706, 3344, 6362, 7562 (1946).

[79] Davis & Pierce, *supra* note 76 at 2.

[80] J.A. Wertkin, "A Return to First Principles: Rethinking ALJ Compromises" (2002) 22 Journal of the National Association of Administrative Law Judges 365 at 397.

[81] *Ibid.*

has been criticized for not providing enough independence.[82] Others disagree. Although the SEC retains ultimate authority, the reality appears to grant substantial independence to the ALJs.[83] In the final analysis, however, the ebb and flow of the particulars of this debate about "court-centered" versus "agency-centered" is not important. Because of the existence of the APA, care must be taken in the application of the reasoning from the debate to our situation.[84] There is another reason to be careful in drawing comparisons. The SEC is an agency that has its own history and is a creature of a different political tradition. For example:

> The Securities and Exchange Commission has five Commissioners who are appointed by the President of the United States with the advice and consent of the Senate. Their terms last five years and are staggered so that one Commissioner's term ends on June 5 of each year. To ensure that the Commission remains non-partisan, no more than three Commissioners may belong to the same political party. The President also designates one of the Commissioners as Chairman, the SEC's top executive.[85]

What remains to be distilled from the debate is the substantial body of opinion supporting the agency retaining the final say because of its need to ensure that the agency's

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[82] American Bar Association Committee on Federal Regulation of Securities, "Report of Task Force on the SEC Administrative Law Judge Process" (1992) 47 Business Lawyer 1731. It should be noted that the American Bar Association, since relatively early in the twentieth century, has opposed the growth of administrative power: see Davis & Pierce, *supra* note 76 at 10-29 for the historical development of the administrative process in the U.S.

[83] Daniel Fessler, who served on the California Public Utilities Commission for 6 years, stated:

> As a decisionmaker, I am bound by the record developed before the administrative law judge. I do not see that record or have an opportunity to shape the outcome of the proceedings until the hearing process has been complete. Thus, if I believe a question or point of view vital from the public perspective, and yet I cannot find it expressed in the "record" (which may be thousands of pages long) then I am precluded from taking that perspective in reaching a decision. In these circumstances, my choices are few and all unpalatable. I can seek to remand the matter for further proceedings and delay. You can imagine the popularity of this strategy with the parties who may have spent a year-and-a-half in the hearing room to date. Or I can limit myself to the record and thus reduce or contort the quest for the public good. *[footnotes omitted]*

See "Conference: Harvard Electricity Policy Group: Regulatory Decisionmaking Reform" (1995) 8 Admin. L.J. Am. U. 789 at 802. While this relates to a different agency, and while the SEC itself does not appear to keep the relevant statistics, we have been advised by one source that possibly only 10 percent of the ALJ's determinations at the SEC are reviewed by the Commission. Moreover, there is no perception of bias: D.J. Gifford, "Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure" (1990-1991) 66 Notre Dame L. Rev. 965 at 981-982.

[84] See M. Asimov, "When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies" (1981) 81 Colum. L. Rev. 759 (1981); E.H. Fleischman, "Toward Neutral Principles: The SEC's Discharge of its Tri-Functional Administrative Responsibilities" (1993) 42 Cath. U. L. Rev. 251.

[85] U.S. Securities and Exchange Commission's website: http://www.sec.gov/about/commissioner.shtml

policy interests are advanced in the adjudicative process. However, where the adjudicative process is no longer viewed as the means to advance policy interests, the rationale for the agency to retain control over the decision-making is largely removed.[86] Further, where the proceeding is accusatory and severe sanctions are being sought, a trial-type procedure has been stated to be entirely appropriate.[87]

The SEC's adjudicative model demonstrates:

(1) a "court-centered" approach in which the fact-finding and initial decision are made by a judge prior to the agency's review;

(2) that resort must be to the courts to prohibit a person from acting as a director or officer of a public company; and

(3) that the rationale for the agency having the final say is to ensure that the policies of the agency are advanced. However, it is very difficult to obtain any meaningful statistics regarding the use of this review mechanism for policy purposes.

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[86] Gifford, *supra* note 83 at 978.
[87] W.F. Pedersen, Jr., "The Decline of Separation of Functions in Regulatory Agencies" (1978) 64 Va. L. Rev. 991 at 993.

England

*Financial Services Authority ("**FSA**")*

The FSA is created and governed by the *Financial Services and Markets Act 2000* ("***FSA Act***").[88] The FSA enforces not only the *FSA Act* but other related legislation as well (*Criminal Justice Act 1993, Money Laundering Regulations 1993,* and *Unfair Terms Regulations).*[89] The FSA's powers include, among others, the ability to prosecute in criminal court, seek injunctions in civil court and impose disciplinary sanctions.[90]

The FSA has the power to appoint investigators, require reports by skilled persons, and gather information related to its purposes.[91] It can require information and documents not only from those under investigation, but also from certain connected parties.[92] In addition, there exists a power for specific investigations where someone may have breached a particular requirement of the *FSA Act*. This power of investigation applies to firms, authorized persons, employees of firms and small e-money issuers.[93] Investigators have the power to require attendance before them, to require provision of information and documents, and to require that assistance be given to them.[94] The FSA has the power to control the scope and the length of the investigations, as well as the conduct and the reporting of its investigators.[95] The FSA can apply to a Justice of the Peace or a Sheriff for a search warrant, and such can be granted

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[88] *Financial Services and Markets Act 2000* (U.K.), 2000, c. 8.
[89] *FSA Handbook* (Enforcement) Ch. 1.2.1, online: Financial Services Authority <www.fsa.gov.uk> ("**Enforcement**").
[90] Enforcement Ch. 1.3.5.
[91] *FSA Act*, ss.165-169 and 284.
[92] *Ibid.*, s. 165.
[93] *Ibid.*, s. 168.
[94] *Ibid.*, ss. 171 and 172.
[95] *Ibid.*, ss. 170(7) and (2).

where the issuing authority is satisfied that all the conditions have been met.[96] Moreover, the *FSA Act* creates three criminal offences with respect to non-cooperation with the FSA.[97]

The FSA is granted various powers of enforcement. They include the power to:

(a) discipline authorized firms and approved persons;

(b) impose civil penalties in cases of market abuse;

(c) prohibit an individual from being employed in connection with a regulated activity;

(d) apply to court for injunctions (or interdicts) and other orders against persons contravening relevant requirements or engaging in market abuse;

(e) petition the court for the winding-up or administration of companies, and the bankruptcy of individuals, carrying on regulated activities;

(f) apply to the court for restitution orders against persons contravening relevant requirements or persons engaged in market abuse;

(g) require restitution of profits which have accrued to authorized persons contravening relevant requirements or persons engaged in market abuse, or of losses which have been suffered by others as a result of those breaches;

(h) prosecute various related offences;

(i) fine, issue public censures, suspend or cancel listing for breaches of the Listing Rules by an issuer; and

(j) issue public censures, suspend or remove a sponsor from the UKLA list of approved sponsors for breaches of Listing Rules by a sponsor.[98]

Decision-making in respect of the serious powers of enforcement rests with the Regulatory Decisions Committee ("**RDC**"). The RDC is appointed by the FSA board of directors ("**Board**") to exercise regulatory powers on behalf of the FSA.[99] The RDC exists

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[96] *Ibid.*, s. 176.
[97] *Ibid.*, s. 177.
[98] For this summary see Enforcement Ch. 2 Annex I ENF 2 1G(1.4).
[99] *FSA Handbook* (Decision-Making) Ch. 4.2.1, online: Financial Services Authority <www.fsa.gov.uk> ("**Decision**").

outside the FSA's management structure, and only the Chair of the RDC is an FSA employee.[100] The RDC is composed of at least the Chair, one or more Deputy Chair and general members.[101] The members of the RDC represent the public interest and include current and recently retired practitioners with financial service industry skills and knowledge, as well as non-practitioners.[102]

The Chair of the RDC is appointed by the Board on the recommendation of an independent group established by the Board. All other members of the RDC are appointed by the Board on the recommendation of the Chair of the RDC.[103] The members are appointed for a fixed period and can only be removed for misconduct or incapacity.[104] Each meeting of the RDC must be comprised of at least the Chair or Deputy Chair and two other members.[105] RDC decisions can be made in private.[106] Decisions to begin or discontinue proceedings in court will be made by the RDC Chair[107] and, where the Chair is not available, by the director of Enforcement or by a member of the FSA executive.

If the RDC decides to take enforcement action against a person, such action may be referred by the person to the Financial Services and Markets Tribunal ("**Tribunal**") whose members are appointed by the Lord Chancellor.[108] The *FSA Act* establishes the office of President, the Chairman's panel, and the panel. The President of the Tribunal is to have at least 10 years of legal experience,[109] the members of the Chairman's panel must have at least 7 years

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[100] Decision Ch. 4.2.3.
[101] Decision Ch. 4.2.2.
[102] Decision Ch. 4.2.3.
[103] Decision Ch. 4.2.5.
[104] Decision Ch. 4.2.5 and 4.2.7.
[105] Decision Ch. 4.2.8.
[106] Decision Ch. 4.2.12.
[107] Decision Ch. 4.6.1.
[108] *FSA Act*, s.132.
[109] *Ibid.*, Sch. 13 s. 2(5).

of legal experience,[110] and the members of the panel at large must appear to the Lord Chancellor to be qualified by experience or otherwise to deal with the kind of matters that the Tribunal is likely to encounter. Any hearing by the Tribunal requires at least one member, and each Tribunal must have at least one member from the Chairman's panel. The Lord Chancellor has the power to determine both the remuneration and the rules of the Tribunal.

Any reference to the Tribunal must be made within 28 days of the original decision/supervisory notice.[111] A reference before the Tribunal will be a full rehearing of the matter that will determine what action, if any, it is appropriate for the FSA to take.[112] The Tribunal cannot force the FSA to do something that it could not have done at the time the original decision was made.[113] A decision of the Tribunal carries the weight of a decision of the County Court. The Tribunal has the power to appoint experts, summons witnesses to give evidence, and order costs against individuals bringing a claim or against the FSA. There is an appeal to the Court of Appeal on a question of law with leave either from the Court of Appeal or the Tribunal.[114]

There has been much criticism about the efficacy of the FSA in its enforcement role. The criticism is based on the plethora of checks and balances imposed in the course of an investigation and proceeding. The Tribunal, however, as an independent adjudicative body, does not appear to have been implicated:

> The more serious sanctions – financial penalties; public censure; refusal, withdrawal or variation of a firm's permission; and refusal or withdrawal of approved person status – are the Regulatory Decisions Committee's province. The RDC is independent of the

[110] *Ibid.*, Sch. 13.
[111] *Ibid.*, s.133(1).
[112] Decision Ch. 5.1.3.
[113] Decision Ch. 5.1.4.
[114] *FSA Act*, s. 137.

FSA's executive management structure and its findings are subject to review by the Financial Services and Markets Tribunal which has said that it will generally conduct hearings in public. "This shows that the Tribunal thinks it not only important that justice be done but that it is seen to be done," observed Mr. Whittaker [General Counsel to the FSA].[115]

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[115] "But is it Fair?", *Compliance Monitor*, April 2003 (Lexis). For general discussion of the criticism see: Peter Biby, "Command and control" *The Lawyer*, Centaur Communications Ltd.: September 29, 2003 (Factiva).; "Tough Talking" *The Lawyer*, Centaur Communications Ltd.: September 29, 2003 (Factiva).; Richard Fletcher and Grant Ringshaw, "Will the City Watchdog Really Bite as Hard as it Barks?", *The Sunday Telegraph*, November 23, 2003 (Factiva); and Financial Services – Regulator's powers, online: The Incorporated Council Of Law Reporting <http://www.lawreports.co.uk/civjulc3.2.htm>.

Australia

The *Australian Securities and Investments Commission Act, 2001 (Cth.)* ("***ASIC Act***") provides that the Australian Securities and Investments Commission ("**ASIC**") may prosecute where an investigation reveals that an offence may have been committed under corporations legislation, and the person ought to be prosecuted for the offence.[116] The majority of the prosecutions undertaken by the ASIC are carried out in conjunction with the Director of Public Prosecutions. Further, if the ASIC, on reasonable grounds, suspects or believes that a person other than the accused can give information relevant to a prosecution, the ASIC may require the person to give all reasonable assistance in connection with a prosecution.[117] The ASIC may also bring a civil proceeding against a person for the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct committed in connection with a matter to which the investigation or examination relates.[118] Finally, the ASIC may also commence civil proceedings seeking the imposition of a civil penalty of up to $200,000 (Aust.) and disqualification from managing corporations where a person has contravened certain provisions of the *Corporations Act*.[119]

The ASIC may itself hold hearings for the purpose of performing any of its functions or powers under corporations legislation. Examples of these powers are disqualifying a person from managing a corporation in limited circumstances.[120] The ASIC may apply to the

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[116] *ASIC Act*, s.49.
[117] *Ibid.*
[118] *Ibid.*, s.50.
[119] *Corporations Act 2001* (Cth.), ss. 206C, and 1317G, J; Schedule 4 Part 4 of the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure). Bill 2003 proposes to increase the penalty for breach of a civil penalty provision to up to $1 million (Aust.) for a corporation (while leaving the penalty at up to $200,000 (Aust.) for individuals). It is also noteworthy that, instead of commencing civil proceedings or civil penalty proceedings, the ASIC may accept an enforceable undertaking: *ASIC Act*, s.93AA.
[120] *Corporations Act 2001* (Cth.), s. 206F(1)(b)(ii).

court in more general situations,[121] and may refuse to grant a financial services licence[122]. Financial penalties under the legislation are generally left up to the courts. There is, however, a proposal currently under consideration which would grant the ASIC powers to impose financial penalties of up to $100,000 (Aust.) in certain circumstances.[123] The ASIC has the discretion to hold hearings in private or to hold them in a public venue.[124] Subject to any exceptions, a person may request that a hearing take place in public.[125] Whether the hearing is held in private or public, the ASIC may restrict publication of material that is confidential or unfairly prejudices a person.[126]

An ASIC member has the power to summon witnesses and may take evidence under oath or affirmation. Additionally, a member presiding at a hearing may require a witness to answer a question or to produce a document.[127] The ASIC must take into account evidence or submissions given to it at a hearing.[128]

The *ASIC Act* also sets out procedural guidelines relating to the conduct of a hearing:

> "(1) A hearing must be conducted with as little formality and technicality, and with as much expedition, as the requirements of the corporations legislation (other than the excluded provisions) and a proper consideration of the matters before the ASIC permit.
>
> (2) At a hearing, ASIC:
>
> (a) is not bound by rules of evidence;

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[121] e.g. ss.206C, 206D, 206E.
[122] *Corporations Act 2001* (Cth.), ss. 913(5)(a) and (b).
[123] Gabrielle Costa, "Tough Governance Talked Down", *The Sunday Morning Herald*, 25 November 2003 (Factiva).
[124] *ASIC Act*, s.52.
[125] *Ibid.*, s.53.
[126] *Ibid.*, s.54.
[127] *Ibid.*, s.58.
[128] *Ibid.*, s.60.

(b) may, on such conditions as it thinks fit, permit a person to intervene; and

(c) must observe the rules of natural justice.

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(5) At a hearing, a natural person may appear in person or be represented by an employee of the person approved by ASIC.

(6) A body corporate may be represented at a hearing by an officer of the body corporate approved by ASIC.

(7) An unincorporated association, or a person in the person's capacity as a member of an unincorporated association, may be represented at a hearing by a member or officer of the association approved by ASIC.

(8) Any person may be represented at a hearing by a barrister or solicitor of the Supreme Court of a State or Territory or of a High Court."[129]

The ASIC may, on its own motion or at a person's request, refer to a Court for decision a question of law arising at a hearing. However, where a question has been referred, the ASIC must not render a decision to which the question is relevant until the Court decides the issue. Further, the ASIC cannot proceed in a manner, or make a decision, that is inconsistent with the Court's opinion on the question.

Review of decisions made by the ASIC is to be conducted by the Administrative Appeals Tribunal.[130] The ASIC is obligated to give notice to those affected by its decisions and to inform them of their right to have the decisions reviewed.[131] The Tribunal describes itself as follows:

> The Tribunal is an independent body that reviews, on the merits, a broad range of administrative decisions made by Australian (and, in limited circumstances, State) Government ministers and officials, authorities and other tribunals. The Tribunal also reviews administrative decisions made by some non-government bodies. Merits review of an administrative decision involves its reconsideration. On the facts before it, the

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[129] *Ibid.*, s.59.
[130] *Ibid.*, s.244; see *Administrative Appeals Tribunal Act 1975* (Cth). The decision may also be judicially reviewed on a question of law before the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth.).
[131] *ASIC Act,* s.244A.

Tribunal decides whether the correct – or in a discretionary area, the preferable – decision has been made in accordance with the applicable law. It will affirm, vary or set aside the original decision.

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The Tribunal's jurisdiction is contained in over 395 separate Acts and Statutory Instruments, covering areas such as taxation, social security, veterans' entitlements, Commonwealth employees' compensation and superannuation, criminal deportation, civil aviation, customs, freedom of information, bankruptcy, student assistance, security assessments undertaken by the Australian Security Intelligence Organisation (ASIO), corporations and export market development grants.

• • •

The Tribunal's membership consists of a President, Presidential Members (including Judges and Deputy Presidents), Senior Members and Members. The President is a Judge of the Federal Court of Australia. Some Presidential Members are Judges of the Federal Court or Family Court of Australia. All Deputy Presidents are lawyers. Senior Members may be lawyers or have special expertise in other areas.

Members have expertise in areas such as accountancy, actuarial skills, administration, aviation, engineering, environment, insurance, law, medicine, military affairs, taxation, social welfare and valuation.

Appointments to the Tribunal may be full-time or part-time.[132]

A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.[133]

The ASIC Annual Report 2002-03 with respect to enforcement states:

Criminal matters

We had 29 criminals jailed as part of 43 people convicted from briefs prosecuted by the Director of Public Prosecutions (DPP). Staff investigated and obtained evidence for the DPP, which then decided and prosecuted all indictable matters. We involved DPP officers in considering evidence on potentially serous criminal investigations at an early stage.

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Civil action and compensation

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[132] Administrative Appeals Tribunal's website: http://www.aat.gov.au
[133] *Administrative Appeals Tribunal Act 1975* (Cth.) s. 44(1).

> We took 67 civil proceedings resulting in orders against 151 people or companies. Courts ordered $121 million in compensation and froze $2 million for investors and creditors, and wound up illegal schemes. We also took proceedings for civil penalties against directors, company officers and others who failed in their duties.
>
> • • •
>
> **Bannings, fines and disciplinary proceedings**
>
> To protect the public, we banned, or obtained Court orders banning, 16 people from directing companies, 39 people from offering financial services, and disciplined or deregistered 8 company auditors and liquidators for misconduct through the Courts, administratively, or through enforceable undertakings.

In addition, there is the Takeovers Panel ("**Panel**").[134] The Panel, as its name suggests, is responsible for resolving disputes concerning takeovers. The Panel has the power to, among other things:

(1) declare that the circumstances surrounding the takeover of an Australian company are unacceptable; and

(2) make orders to protect the rights of persons during a takeover bid.

Panel members are appointed by the Governor General, on the nomination of the Minister for Financial Services and Regulation.[135] There exists a minimum of five members on the Panel at any given time. The *Corporations Act* provides that private parties to a takeover no longer have the right to commence civil litigation while the takeover is current, and that all disputes which used to be dealt with by the civil courts are now to be resolved by the Panel.[136]

The Panel also has limited powers to review its own decisions of first instance and to review decisions of the ASIC related to granting exemptions or modifications during a

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[134] The Panel was established by section 171 of the *Australian Securities and Investments Commission Act 1989* and is continued in existence by section 261 of the *ASIC Act*. It was renamed by the *Financial Services Reform Act 2001*.
[135] *ASIC Act*, s.172.
[136] *Corporations Act 2001* (Cth.), s. 695B.

takeover period. Any review of the panel's own decisions will be conducted before a fresh panel.[137] The specifics of the relationship between the Panel and the ASIC are set out in greater detail in a Memorandum of Understanding.

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[137] *Takeovers Panel's website: http://www.takeovers.gov.au*

Hong Kong

The Hong Kong Securities and Futures Commission is responsible for regulating the securities and futures markets. Since 1993, it has been self-funding. The Securities and Futures Ordinance[138] enacted in March 2002 reflects the reform of the securities and futures legislation started in 1999.[139] It consolidates ten ordinances that had been enacted over 25 years. The new enforcement scheme is as follows.

The Commission exercises a disciplinary function over registered persons and entities. The Commission has the power to impose sanctions, including the power to: (i) fine up to $10 million (H.K.) or 3 times the amount of the profit gained or loss avoided as a result of the misconduct, (ii) revoke or suspend registration, and (iii) prohibit the person from various positions in registered entities.[140] The Commission may only exercise this jurisdiction after giving notice and an opportunity to be heard. Moreover, it is required to set forth guidelines as to the particulars of the conduct which will warrant the exercise of its fining power.[141]

A decision of the Commission may be reviewed by the Securities and Futures Appeals Tribunal.[142] The Tribunal members are appointed by the Chief Executive (comparable to the Prime Minister) in such numbers "as he considers appropriate".[143] A panel consists of a chairman and two other members. The Tribunal is given large powers to call and hear evidence

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[138] *Securities And Futures Ordinance* (Cap. 571) Ordinance No. 5 of 2002 ("**Ordinance**").
[139] The Government of the Hong Kong Special Administrative Region, *Consultation Document on the Securities and Futures Bill*, April 2000 ("**Consultation Document**").
[140] Ordinance ss. 194, 196.
[141] Ordinance s. 199.
[142] Ordinance s. 217.
[143] Ordinance Sch. 8.5.2.

and to punish for contempt.[144] A further right of appeal is to the Court of Appeal on a point of law.[145]

Market misconduct is addressed through the Market Misconduct Tribunal.[146] Market misconduct comprises insider dealing, stock market manipulation, false trading in securities or futures contracts, price rigging in securities or futures markets, disclosure of information about prohibited transactions, and disclosure of false or misleading information inducing transactions.[147] The Tribunal is able to impose a range of sanctions, including:

(a) disgorgement of profits made or loss avoided, subject to compound interest thereon;

(b) disqualification of a person from being a director or otherwise involved in the management of a listed company for up to 5 years;

(c) a "cold shoulder" order on a person (i.e., the person is deprived of access to market facilities) for up to 5 years;

(d) a "cease and desist" order (i.e., an order not to breach any of the market misconduct provisions again);

(e) referring a person found to have engaged in market misconduct to a body of which that person is a member for disciplinary action by that body; and

(f) payment of the costs of the Market Misconduct Tribunal inquiry and/or Commission investigation.[148]

Similar to the Appeals Tribunal, the Market Misconduct Tribunal is chaired by a judge assisted by two other members who are appointed by the Chief Executive. Additional Tribunals may be appointed if appropriate.[149] Where there appears to the Financial Secretary (comparable to the Minister of Finance) to be cause, proceedings can be brought by a Presenting

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[144] Ordinance ss. 219, 221.
[145] Ordinance s. 229.
[146] Ordinance s. 251.
[147] Ordinance s. 245.
[148] Ordinance s. 257.
[149] Ordinance s. 251(7).

Officer, who is a legal officer, counsel or solicitor appointed by the Secretary for Justice (comparable to the Attorney General).[150] The Tribunal is granted wide power to collect and hear evidence.[151] An appeal from the Tribunal lies to the Court of Appeal on a point of law or, with leave, on a question of fact.[152]

The Market Misconduct Tribunal builds on the experience gained from the Insider Dealing Tribunal ("**IDT**"), a tribunal introduced in 1991 to inquire into and to impose civil sanctions against insider dealing.[153] That tribunal's work has been well received. By April 2000, the IDT had completed 9 inquiries into suspected insider trading and imposed sanctions on 15 insiders.[154] A panel of that tribunal was similarly composed: a judge and two experienced lay persons.[155]

Criminal proceedings may be taken for:

(a) insider dealing;[156]

(b) stock market manipulation;[157]

(c) false trading in securities or futures contracts;[158]

(d) price rigging in securities or futures markets;[159]

(e) disclosure of information about prohibited transactions in securities or futures contracts;[160] and

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[150] Ordinance s. 251(4)(5).
[151] Ordinance s. 253.
[152] Ordinance s. 266.
[153] *Securities Insider Dealing Ordinance* (Cap 395) 1996.
[154] Consultation Document Ch. 11.4.
[155] Ordinance s. 251.
[156] Ordinance s. 291.
[157] Ordinance s. 299.
[158] Ordinance s. 295.
[159] Ordinance s. 296.
[160] Ordinance s. 297.

(f) disclosure of false or misleading information inducing transactions in securities or futures contracts.[161]

While the Commission will make the initial decision whether to proceed under the criminal regime or before the Market Misconduct Tribunal, the Financial Secretary (for the Market Misconduct Tribunal) retains the power to redirect.[162] The Market Misconduct Tribunal has not been granted a power to fine, although this appears to have been carefully considered. The Government was advised that under the jurisprudence developing before the European Court of Human Rights involving human rights protection similar to that existing under Hong Kong law, a fining power could in certain cases be construed as "criminal".[163] This was one of the considerations that led to the creation of parallel civil and criminal regimes.[164] The Commission may also seek an injunction as well as other speedy relief by a summary process before the Court of First Instance (High Court).[165]

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[161] Ordinance s. 298.
[162] Ordinance s. 252(10).
[163] Consultation Document Ch. 11.11.
[164] Consultation Document Ch. 11.13.
[165] Ordinance s. 213.

Trinidad and Tobago

At the present time, Trinidad and Tobago are reviewing their *Securities Industry Act, 1995* and related regulatory instruments and legislation.[166] A reform is contemplated. The recommendation made by Stikeman Elliott, their consultants, is to separate the policy-making and enforcement functions from the adjudicative function of the Trinidad and Tobago Securities and Exchange Commission. There would be one tribunal that would exercise two functions, an appellate function reviewing decisions made by the Commission, and an adjudicative function at first instance hearing market misconduct cases. There would also exist the right to proceed by way of a criminal prosecution in the appropriate circumstances. Judicial review would be available for decisions made by the tribunal in its appellate function, and there would be a right of appeal from decisions made by the tribunal in its adjudicative function.

The tribunal would be chaired by a judge and would be staffed on an as needed basis from a roster of five persons, who could be former judges, members of the bar, foreign securities practitioners, and former registrants with no active business interest in the local securities markets. The model is similar to Hong Kong, but instead of two tribunals, only one is recommended. This is said to be because of the size of the market and the resources available.

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[166] Review and Revision of the Trinidad and Tobago *Securities Industry Act, 1995* and Related By-Laws and Associated Legislation, Addendum to Inception Report, January 30, 2003.

APPENDIX III

LIST OF THOSE INTERVIEWED

Kerry Adams

Professor Anita I. Anand

Philip Anisman

James C. Baillie, Q.C.

Paul J. Bates

Stanley M. Beck, Q.C.

Brian P. Bellmore

Paul C. Bourque, Q.C.

William J. Braithwaite

David A. Brown, Q.C.

Brian Butler

Professor Mary Condon

Purdy Crawford

Peter J. Dey, Q.C.

James D. G. Douglas

Linda L. Fuerst

Calvin S. Goldman, Q.C.

Mark T. Gordon

Edward L. Greenspan, Q.C.

Joseph P. Groia

Lawrence P. Haber

Harold Hands

William L. Hess, Q.C.

Professor Hudson Janisch

Melissa Kennedy

Professor Eric Kirzner

Henry J. Knowles, Q.C.

Jonathan Lampe

Alan J. Lenczner, Q.C.

Jeffrey S. Leon

Paul H. Le Vay

Professor Jeff G. MacIntosh

James G. Matkin

David C. Moore

Paul M. Moore, Q.C.

H. Lorne Morphy, Q.C.

Jay Naster

Professor Chris Nicholls

Joseph J. Oliver

Ermanno Pascutto

Jane Ratchford

Lawrence E. Ritchie

John F. Rook, Q.C.

Stanley Sadinsky

M. Janet Salter

Robert L. Shirriff, Q.C.

Kelly Sieman

Ian R. Smith

Steven I. Sofer

John P. Stevenson

David W. Stratas

Johanna Superina

Suresh Thakrar

Professor Michael J. Trebilcock

D. Grant Vingoe

Larry M. Waite

Edward J. Waitzer

Michael Watson, Q.C.

Howard I. Wetston, Q.C.

Joel Wiesenfeld

Wendell S. Wigle, Q.C.

Susan Wolburgh-Jenah

Robert J. Wright, Q.C.

Marvin Yontef

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