basis of the OSC's ruling in Electra that was based on standing to intervene in a s. 124 disciplinary case. The Court of Appeal decision as to standing to intervene in a s. 122 compliance case, where compliance, or lack of it, will have a direct financial impact on the company's shareholders, is a very different case.

18 A leading case in Ontario decided under the Rules of Civil Procedure that were in effect prior to January 1, 1985 is Re Starr and Puslinch (1976), 12 O.R. (2d) 40 (Ont. Div. Ct.). In that case, Grange J. held that there was no absolute rule that for a party to be added he must have a direct interest in the very issue to be determined and that it was sufficient, in the words of Lord Denning in Gurtner v. Circuit, [1968] 2 Q.B. 587, [1968] 1 All E.R. 328 (C.A.) that the "determination of the dispute will directly affect a third person in his legal rights or in his pocket." Grange J. further held [p. 46]:

> that even when the applicant satisfies that condition it is entirely discretionary in the Court whether he will be allowed to intervene or not, and the Court may always decline the application where it considers that the interest of the applicant is already adequately represented.

19 As to the procedures that had been followed in these proceedings, Mr. Baillie argued that they made perfect sense from the perspective of the operations of the OSC and the allocation of resources of an administrative body. Here, the OSC staff had discussed the issues with the parties and decided not to investigate but rather, to accept for its purposes the statements of fact submitted by the respondents. It then entered into a discussion as to an appropriate sanction. This is a quite proper and normal way for staff of the commission to proceed, and a sensible allocation of its resources.

20 Finally, Mr. Baillie argued that a s. 124 disciplinary hearing ought not to be used as a forum to lay down general propositions of law with respect to fair treatment of shareholders. A s. 124 hearing is solely concerned with a suspension of trading privileges and the hearing ought to be strictly confined to that issue in the context of matters raised in the notice of hearing.

21 Counsel for the OSC opened his argument with the observation that the issues raised in this case were of significant importance for the shareholder community. With respect to standing, he urged that it was an opportunity for the commission to reconsider its rulings in Zenmac and Electra. He argued that statements as to standing to intervene in disciplinary hearings in those cases were too broad and might deny a hearing panel the right to be informed of useful evidence that might be adduced through intervention. Most importantly, he argued that all s. 124 hearings are not the same, and that some adaptation may be necessary in particular cases, in order that all the points in issue might be placed before the panel.

22 With respect to this case, Mr. Malcolmson argued that at the least, the TSE ought to have standing as it is the true complainant, although it is using the processes of the OSC to request a sanction against those who breached its by-laws. The case is really one in defence of the integrity of the TSE regulatory process. The TSE's concerns are not with the issuers as such, but rather with its regulatory

process in defence of shareholder interests. In those circumstances, it was argued that the TSE ought to have standing.

23 As for the Southam shareholders, the share exchange clearly affected them in their capacity as shareholders, and Mr. Malcolmson urged that their case could not be adequately put by OSC staff alone. Accordingly, he urged that shareholders be allowed to intervene on matters that are relevant to this proceeding. The public interest would be served by permitting the shareholders to make representation, with the hearing panel always able to control the process so as not to abuse the rights of the respondents.

24 In light of our disposition of the applications in this case, it is not necessary to decide on the reach of the commission's previous rulings in Zenmac and Electra. We would, however, take this opportunity to observe that the holdings in those cases as to standing to intervene in a disciplinary hearing may have been overly broad. Given the structure of the Act, it is often only through s. 124 or s. 123 hearings that shareholder rights may be protected. In such cases, to characterize the hearings as solely disciplinary in nature is to take too narrow a view of what is involved and what is at stake in the process. Shareholder rights may be involved to an extent that particular shareholders should be given standing to intervene to bring to the attention of the panel facts that are essential to a resolution of the matters in issue.

25 A useful case on standing to intervene, although not directly on point here, is the decision of Mr. Justice Esson in the British Columbia Court of Appeal in MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 380, 66 B.C.L.R. 207, 50 C.P.C. 298, [1985] 2 C.N.L.R. 54, 13 C.R.R. 283. The issue in the case was whether the MacMillan Bloedel company had the right to carry on logging operations on Meares Island, pending the trial of an action. The appellants took the position that they had aboriginal rights over the land. Those who sought standing to intervene were tribal councils and Indian bands from elsewhere in British Columbia who wished to support the appellants' case. To quote Mr. Justice Esson [at p. 382 W.W.R.], "[t]he applicants have no interest in Meares Island and no direct interest in the issues between the parties". Mr. Justice Esson went on to hold, however, that the applicants did have an interest in the subject of aboriginal title in British Columbia and noted that they had all asserted aboriginal title elsewhere in that province. He also noted that the British Columbia Rules of Civil Procedure contained no express provision "... for permitting intervention of this kind". Nor was he able to refer to any case in which parties could intervene although they did not have a direct interest. In granting standing, however, Mr. Justice Esson ruled that there was an issue to be determined in which applicants had a special interest, given their interest in the subject of aboriginal title. He held as follows [p. 383 W.W.R.]:

> In each case, it will be necessary to consider the nature of the issue and the degree of likelihood that interveners will be able to make a useful contribution to the resolution of the issue, without injustice to the immediate parties.

We would adopt that holding as a useful standard to be applied in deciding whether standing to intervene should be granted to parties other than the respondents in a s. 124 or 123 hearing. It may be, given the essential disciplinary nature of such hearings, that the granting of such applications will be rare. Nonetheless, the holding in Zenmac and Electra should not be inflexibly applied. A hearing panel should be open to application for standing to intervene in an appropriate case. We do not think that this is an appropriate case, although we do think that the applicants should be heard in argument.

26 It might well have been an appropriate case in which to grant the TSE standing, as it was their by-law that was breached and as they have a regulatory function similar to that of the OSC in protecting shareholders' rights. However, the interests of the TSE can be adequately served here by granting them the same right to make argument as we grant to the other applicants, as counsel for the TSE did not suggest that he wished to introduce evidence.

27 The new Ontario Rules of Civil Procedure, in r. 13.02, provide a useful guideline to the commission in this case. Rule 13.01 deals with standing with respect to those who have an interest in the subject-matter. Rule 13.02, which is new in Ontario, gives standing to intervene to an applicant as a friend of the Court, rather than as a party, "... for the purpose of rendering assistance to the court by way of argument". Rule 13.02 reads as follows:

> Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

28 We are of the opinion that the principle of r. 13.02 can usefully be adapted by administrative tribunals such as the OSC, notwithstanding that the OSC is governed by the Statutory Powers Procedure Act, R.S.O. 1980, c. 484. The applicants here, including the TSE, would be adequately served by allowing them to intervene without becoming a party to the proceedings, in order to assist the commission by way of argument. That argument would go as to the appropriate sanction and would be based on the statements of fact placed before the tribunal by Torstar and Southam, and such other facts as may be adduced at the hearing.

29 We appreciate that the applicants were concerned that the necessary factual basis for their argument was not before the commission in the Torstar/Southam statements of fact. We think that the concerns of the applicants can be adequately met by instructing counsel to the commission to meet with the applicants to consider their concerns with respect to the factual background that will be before the commission when this hearing resumes. Counsel to the commission will then have to consider whether it wishes to place some of those facts before the commission, or whether it is content to go forward with the Torstar/Southam statements of facts. We would emphasize that that judgment is solely one for counsel to the commision. Our only instruction is that counsel is to listen to the concerns of the applicants and is then to make his own decision as to the facts that are necessary to proceed with the hearing. Whatever that decision is, the applicants will be

confined to those facts in making argument before the commission.

30 Accordingly, the applicants are granted standing to intervene for the purpose of rendering assistance to the commission by way of argument, but without becoming parties to the proceedings.

Salter, Vice-chairman **(dissenting):**

31 In the circumstances of this case and for the reasons adopted by the majority of this panel in their November 26, 1985 decision, limited standing would be granted to the TSE, Imperial, Dunsmill, Gordon and Jarislowsky. In my view all five applicants should be granted full standing without limitation.

32 A useful starting point is the characterization given the problem of standing by Mr. Justice Esson in the MacMillan Bloedel decision referred to by the majority: the nature of the issue and the degree of likelihood that intervenors will be able to make a useful contribution to its resolution, without injustice to the immediate parties. I believe it is also necessary for this commission, in addressing such questions, to take into account its clear obligation to be responsive to broad considerations of investor confidence in the regulatory process.

33 Specifically, the commission should take into account the activities of Southam shareholderrs earlier this year. Southam had sought, through certain amendments to its by-laws, to protect itself from take-over. A number of substantial shareholders opposed the amendments and, in the result, compelled Southam to negotiate with them substantial revisions in those amendments. To deny or to limit standing for shareholders in this hearing would sharply reduce investors' confidence in our processes. Their investments are at risk; they have taken action privately to protect their interests; can they properly be excluded from a public process? Here, as in Re Royal Trustco Ltd. (1981), O.S.C.B. 322C, the conduct in question has attracted keen and legitimate interest among investors and should be thoroughly explored by the commission. Full standing for the shareholder applicants will contribute to that process.

34 As the majority point out, different considerations will apply in s. 124 hearings that are essentially disciplinary in nature. This present hearing has been convened under s. 124, but may go beyond purely disciplinary considerations. Section 124 orders made in recent years respecting Universal Explorations Ltd., Turbo Resources Ltd. and the Caisse de Dépôt et Placement du Québec are in point. In those cases, the clear intention underlying a denial of access to the Ontario trading markets by way of s. 124 orders was to compel compliance by the several respondents with Ontario law or policy, and this present case may take on such a character. Thus it may come about that a s. 124 proceeding can have a direct financial impact on shareholders.

35 We may well anticipate that the shareholder applicants, if afforded full standing, will lead evidence and advance arguments regarding the Torstar-Southam exchange of shares and thereby seek to characterize the transaction as offensive

and contrary to public policy in the circumstances of the case. If their intervention is to be allowed -- and I would allow it -- it is in my view preferable that such evidence be led and arguments made by the shareholder applicants' counsel directly rather than secondhand through staff counsel. Direct participation by them will better serve to reinforce investors' readiness to take action in defence of perceived threats to their interests.

36 It is to be acknowledged that such enlargement of the scope of this hearing would take the commission on to new policy ground, and Mr. Baillie urges us not to adopt any wide-ranging policy on target companies' defensive tactics through case-by-case decisions, but rather through the normal policy formulation process. The commission's observations on this principle in Re Cablecasting Ltd. (1978), O.S.C.B. 37 at 43 are helpful:

> The Commission's policy pronouncements are tested by experience and by public debate. Frequently the versions of these statements initially published for comment require modification to deal with implications not envisaged by the draftsman. To create a new policy and apply it in the heat of a contested application without being subject to these disciplines would be a bold act. Clearly, in our view, the Commission has authority to do this; equally clearly, it should refrain from exercising this authority except on facts that demand some relief.

Full participation by the shareholder applicants may establish facts that demand relief, and certainly the commission's continuing concern with policy questions surrounding defensive tactics is not unknown. Preliminary reconnaissances have already been carried out: a draft policy on defensive tactics was published for comment in March of 1984, revised in December of that year and remains current on the commission's agenda.

37 Entirely different considerations apply to the TSE's application for standing. The TSE has been accorded standing, without comment, in previous commission proceedings under s. 124: Re 243978 Alta. Ltd., Signum Communications Inc. (1982), O.S.C.B. 566C is an example. Mr. Malcolmson aptly characterizes the TSE's interest as preservation of the integrity of its regulatory processes in defence of shareholder interests. The commission, as stated in Re Bache Halsey Stuart Can. Ltd. and TSE (1981), O.S.C.B. 493C at 507C,

> ... is mindful of the important role that self-regulatory organizations such as the T.S.E. . . . . must play in Canada. While there may be some regional differences and disparities, stock exchanges in North America have been the foundation upon which our capital market system is based. They provide the investor with the facilities through which to purchase and sell previously issued securities. The willingness of the investor to furnish new capital in substantial measure depends upon the fairness, integrity and efficiency with which the secondary markets operate and the investors' confidence in them. Self-regulatory organizations, including stock exchanges, must be vigilant to provide a market-place which is efficient, is perceived as fair to all participants, large and small, assures an equality of access to material and

timely information, and moves quickly to see that investors are not disadvantaged by the actions of promoters, insiders or their members.

38 In support of the self-regulatory process I would grant the TSE full standing along with the shareholder applicants.

39 I would also direct the amendment of the notice of this hearing to include as respondents the corporate entities Southam Inc. and Torstar Corporation

Application dismissed but order made authorizing applicants to intervene for the purpose of making argument.

FN1. MacMillan Bloedel Ltd. v. Mullin; Martin v. British Columbia, [1985] 3 W.W.R. 380, 66 B.C.L.R. 207, 50 C.P.C. 298, [1985] 2 C.N.L.R. 54, 13 C.R.R. 283 (B.C.C.A.).

FN2. Statutory Powers Procedure Act, R.S.O. 1980, c. 484, s. 17. 3.

FN3. Although decided in the different factual context, this is the ratio of the much cited decision of the Trial Division of the Federal Court in A.G. Man. v. National Energy Bd., [1974] 2 F.C. 502, 48 D.L.R. (3d) 73.

FN4. Re Royal Comm. on Northern Environment (1983), 33 C.P.C. 82 at 86-87, 144 D.L.R. (3d) 416, 12 C.E.L.R. 74 (Ont. Div. Ct.)

FN5. Ibid. at p. 87 C.P.C.; see also Thorson v. A.G. Can., [1975] 1 S.C.R. 138 at 145, 43 D.L.R. (3d) 1, 1 N.R. 225 (S.C.C.), per Laskin J.:

> I do not think anything is added to the reasons for denying standing, if otherwise cogent, by reference to grave inconvenience and public disorder. An effective answer to similar arguments advanced in Dyson v. The Attorney-General was given by Farwell L.J. in his reasons ... endorsed by Fletcher Moulton L.J. in the second Dyson case. The Courts are quite able to control declaratory actions, both through discretion, by directing a stay, and by imposing costs; and as a matter of experience, MacIreith v. Hart, to which I will return, does not seem to have spawned any inordinate number of ratepayers' actions to challenge the legality of municipal expenditures.

And see Sask. Tele-Communications v. C.R.T.C., [1980] 1 F.C. 505 (Fed. T.D.) at 509-10, per Maguire J.:

> It was argued that the Commission must have power to determine whether a submission filed is an intervention or a representation. No specific provision to this effect appears in the Act or Regulations. Where, as here, the submission is filed in the form of an intervention, contains what the Act and Regulations require of an intervention, and otherwise meets the requirements of the Act and Regulations, the Commission cannot in my opinion

treat it as a representation, rather than an intervention.

FN6. Re C.R.T.C. and London Cable Television Ltd., [1976] 2 F.C. 621, 29 C.P.R. (2d) 268, 67 D.L.R. (3d) 267, 13 N.R. 292 (Fed. C.A.), per Jackett C.J., leave to appeal to Supreme Court of Canada refused [1977] 2 S.C.R. 740, 30 C.P.R. (2d) 76, 77 D.L.R. (3d) 641, 15 N.R. 111 (S.C.C.); Cdn. Broadcasting League v. C.R.T.C. (No. 2), [1980] 1 F.C. 396, 13 C.P.C. 331 (sub nom. Cdn. Broadcasting League v. C.R.T.C.), 101 D.L.R. (3d) 669, 29 N.R. 383 (Fed. C.A.), per Le Dain J.

END OF DOCUMENT

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

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

EB-2009-0308

WRITTEN SUBMISSIONS OF THE COMPLIANCE COUNSEL ON INTERVENTION REQUESTS OF EDA AND SSMWG

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Glenn Zacher (43623P)
Tel: (416) 869-5688

Patrick G. Duffy (50187S)
Tel: (416) 869-5257
Fax: (416) 861-0445

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor

Maureen Helt

Compliance Counsel