collective agreement as directed by a Board of Arbitration constituted to settle such an agreement between the parties.

2 The responding employer does not dispute that it has refused to execute the collective agreement which the Board of Arbitration purported to settle under section 43 of the Act. In essence, the employer's position is that the Board of Arbitration exceeded its jurisdiction and that the Board of Arbitration's award, which includes the alleged first collective agreement, is a nullity. Accordingly, says the employer, there is no collective agreement to execute or in effect between the parties. The employer submits that it has not violated the Act, either as alleged by the USWA, or otherwise.

3 In effect, the USWA seeks to enforce the award of the Board of Arbitration, while in response, the employer seeks to challenge the propriety of the award.

II DO EMPLOYEES HAVE A RIGHT TO PARTICIPATE?
(A) THE BOARD CONCLUDES THEY DO NOT

4 By decision (without reasons) issued on January 8, 1997, I dismissed a motion by the employer that this proceeding be adjourned so that notice of the proceeding could be given to the bargaining unit employees who are covered by the alleged collective agreement. The employer asserted the employees were entitled to notice, and to participate in the proceeding if they chose to do so (an issue which the employer had raised immediately upon receiving notice of the complaint). Concomitantly, I also dismissed an intervention by a bargaining unit employee who argued, through counsel, that bargaining unit employees were entitled to notice and to participate, or in the alternative, that the Board should exercise its discretion and provide the employees with notice and an opportunity to participate. (The USWA opposed the motion and the intervention.)

(b) THE FACTS

5 For the purposes of the preliminary issues of notice and status of the bargaining unit employees, the parties agreed to certain facts. It is evident that some other facts were either also agreed or not disputed. Accordingly, the following is the factual basis for the purposes of the preliminary issues of notice and status, and for no collateral or other purpose (other than as indicated infra - see paragraph 32, below):

(1) The employer operates a retail department store with an unlicensed restaurant in the Town of Marathon, a community with a population of approximately 6,000 located on the north shore of Lake Superior in Ontario.

(2) On November 14, 1994 the USWA filed an application for certification with respect to employees of the employer (the name of the employer was different from that herein but for the purpose of this proceeding, there was no dispute that the employer entity has been the same throughout).

(3) By decision dated December 6, 1994, the Board (differently constituted) certified the USWA on an interim basis (pending a decision on the "employee" status of one individual) for all employees of the employer in the Town of Marathon, save and except assistant manager, and persons above the rank of assistant manager, and pending resolution by the Board, excluding as well, office cashier. In a clarity note, the Board noted that the

manager and management trainees are above the rank of assistant manager and are therefore excluded from the bargaining unit.

(4) On January 31, 1995, the USWA gave the employer notice to bargain.

(5) The employer and the USWA engaged in collective bargaining but were unable to agree to a collective agreement.

(6) On December 1, 1995 the USWA applied to the Board for a direction that a first collective agreement between the parties be settled by arbitration, under section 43 of the Act.

(7) On January 8, 1996, the USWA and the employer executed a Memorandum of Settlement in which they consented to a direction by the Board that a first collective agreement between them be settled by arbitration pursuant to section 43 of the Act. They also agreed to meet and have further discussions before proceeding to arbitration, and that in the event that these discussions did not result in the collective agreement that they would proceed to litigate the matter before a Board of Arbitration, which they specified would not be this Board, to be convened pursuant to section 43 of the Act.

(8) A differently constituted panel of the Board incorporated this Memorandum of Settlement into a decision of the Board and directed that a first collective agreement be settled by arbitration in a decision dated January 11, 1996.

(9) Both on the day the application for certification was filed and on the day before the Board directed the first collective agreement arbitration as agreed by the USWA and the employer, some bargaining unit employees were not members of the union.

(10) Some of these bargaining unit employees have not become members of the USWA since the first collective agreement arbitration award was issued, and these employees continue to take the position that they do not wish to become members of the USWA.

(11) The same employees continue to be employed by the employer without being required to become members of the applicant. These employees wish to continue in their employment without becoming members of the USWA.

(12) The first collective agreement arbitration hearing was held on May 8, 9 and 28, 1996. The Board of Arbitration also received written submissions, which were completed in mid-June, 1996.

(13) At the outset of the arbitration hearing on May 8, 1996, Sally Mitchell and Susan Osmond, both of whom are (and were at all material times) employees in the bargaining unit, attended before the Board of Arbitration and indicated that they had a petition signed by a majority of the bargaining unit employees from the employer's store indicating that they did not want to be represented by the USWA, and that there had been a strike vote taken "last year" which the "union didn't win". After hearing the employees' statement, the Board of Arbitration advised them that it didn't care about their

petition (which was not filed or otherwise actually presented to the Board of Arbitration) and that they would not be permitted to participate in the first collective agreement arbitration hearing, but that they could remain at the hearing to learn about the labour relations process.

(14) During the course of the arbitration hearing, it became clear that the USWA was seeking a "union shop" clause in the collective agreement. The Board of Arbitration did not adjourn the hearing or otherwise attempt to notify the two employees who had appeared at the hearing the first day, or any other employees, of this.

(15) The employer objected to the union shop clause, arguing that it would be contrary to the Canadian Charter of Rights and Freedoms to award it. In its written submissions, the employer argued that:

> ARTICLE 2.02 of the Employer's Proposals addresses Union security. It reflects the Employer's FIRM position that there be an OPEN SHOP during this first collective agreement. It is a basic principle that union security is negotiable. In Article 8 of its proposals, the Union proposes a closed shop whereby membership in the Union is a condition of employment. The Employer strongly objects to this concept. There is ample protection for employees in the Act. As indicated above, the majority of the employees oppose the Union and it would be unfair in these circumstances to confer a closed shop provision on its employees who are affected by the Collective Agreement. Furthermore, it is the position of the Employer that such a provision would infringe the charter of rights [sic]. ... In a first collective agreement this Board ought not to impose a provision which compels Union membership as a condition of employment even if the provision was constitutional which the Employer says it is not.
>
> (emphasis supplied in employer's response)

(16) The Board of Arbitration issued its decision or award on November 12, 1996, some five months after the last of the written submissions were made by the parties. The award included the purported collective agreement which is the subject of this complaint, and which contains the union shop provision to which the employer objected and continues to object.

(17) Although dated November 12, 1996, the award was received by the parties on or about November 19 or 20, 1996.

(18) Upon receipt of the award, by letter dated November 20, 1996, the USWA wrote to the employer regarding the assessment and deduction of union dues from bargaining unit employees.

(19) The employer responded by letter dated November 26, 1996 as follows:

Receipt of your letter of November 20, 1996 is acknowledged.

In connection with the Award of the Board of Arbitration dated November 12, 1996, the position of the Employer is that the Board of Arbitration lost jurisdiction when it failed to meet the time requirement set out in Section 43 of the LABOUR RELATIONS ACT, 1995.

Because of this, the Award has no effect.

Since there is no collective agreement, employees do not have to become and remain Union members and dues need not be deducted from the wages of the employees.

The Board made other jurisdictional errors as well.

(20) On December 16, 1996, the employer filed an application for judicial review of the November 12, 1996 award of the Board of Arbitration. Notice of this application for judicial review has been served on the USWA but the application has not yet been perfected, and no hearing date has been set.

(21) In its application for judicial review, the employer seeks "an order quashing and setting aside" the decision of the first collective agreement Board of Arbitration (together with the usual other relief) on the following basis:

2. THE GROUNDS FOR THE APPLICATION ARE:

(a) the Board exceeded its jurisdiction, erred in law and made a patently unreasonable decision by imposing a collective agreement, containing a provision requiring all current employees in the bargaining unit to become members of the respondent, United Steelworkers of America, as a condition of continued employment, thus infringing their freedom of association contrary to section 2(d) of the CANADIAN CHARTER OF RIGHTS AND FREEDOMS;

(b) the Board exceeded its jurisdiction, erred in law and denied natural justice by refusing to permit certain employees to intervene in the proceeding and make submissions as to whether imposing compulsory union membership on employees of the bargaining unit as a condition of continued employment ought to be ordered;

(c) the Board exceeded its jurisdiction, erred in law and made a patently unreasonable decision by imposing a collective agreement which

amended the matters agreed to in writing by the parties contrary to section 43(18) of the LABOUR RELATIONS ACT, 1995;

(d) the Board lost jurisdiction when it failed to determine all matters in dispute and release its decision within forty-five days of the commencement of its hearing of the matter;

(e) section 2(d) of the CANADIAN CHARTER OF RIGHTS AND FREEDOMS;

(f) sections 43(12), 43(18) and 48(18) of the LABOUR RELATIONS ACT, 1995;

(g) sections 2 and 6 of the JUDICIAL REVIEW PROCEDURES ACT; and

(h) Rules 14, 38 and 68 of the RULES OF CIVIL PROCEDURE.

(22) There has been no application to the Court for a stay of the award. Nor has the employer (or anyone else) sought an expedited hearing of the application for judicial review either under section 6(2) of the Judicial Review Procedure Act or otherwise.

(23) In the meantime, the employer has not implemented the purported collective agreement awarded by the first collective agreement Board of Arbitration and has conducted itself as though the section 43 "freeze" is in effect.

6 In this complaint, the employer takes the position "that the Board of Arbitration exceeded its jurisdiction in rendering the decision it did and when it did so. The award of the Board [of Arbitration] is therefore a nullity." (Paragraph 16 of Appendix "A" to the employer's response). The employer asserts that the award issued by the Board of Arbitration "does not contain a collective agreement which the Board of Arbitration had the power to impose", and that the employer has bargained in good faith and made every reasonable effort to arrive at a collective agreement with the USWA (paragraph 17 of Appendix "A" to its response). Further, at paragraph 18 of Appendix "A" to its response, the employer pleads that:

18. a. The Employer respectfully disagrees with the Union's legal position. Section 43 of the Act provides that sections 6(8), 6(9), 6(10), 6(12), 6(13), 6(14), 6(17) and 6(18) of the Hospital Labour Disputes Arbitration Act and sections 48(12) and 48(18) of the Labour Relations Act apply to the board of arbitration established under section 43. Sections 10(5), 10(6) and 10(7) of the Hospital Labour Disputes Arbitration Act and section 48(19) of the Labour Relations Act therefore do not apply to the board of arbitration established under section 43. Thus, the propriety of the award issued by a board of arbitration under section 43 is open to challenge where a party seeks to enforce the award.

Finally, the employer submits that the union has not made out a case for the remedies requested, and submits that this complaint should therefore be dismissed.

7 By letter December 18, 1996, the employer gave the appropriate notice to the Attornies General of Ontario and of Canada that in responding to this complaint it would be taking the position that the Board of Arbitration had exceeded its jurisdiction on a number of grounds, including a violation of the Canadian Charter of Rights and Freedoms, and the employer delivered to the Attornies

General the appropriate notice of the constitutional question (also dated December 18, 1996). The Attorney General of Ontario responded that it did not intend to intervene in the proceedings before the Board. The Ministry of the Attorney General of Canada has sent nothing to the Board and did not appear at the hearing.

8 The USWA has made a "WITH prejudice" settlement proposal to resolve this complaint. This proposal, which has not been accepted by the employer, has been filed with the Board.

(c) THE ARGUMENTS

9 On the question of notice and status to participate of bargaining unit employees, the employer referred the Board to sections 5 and 6 of the SPPA, and section 1 of the Board's Rules of Procedure. The employer argued that because the relief the USWA is seeking will require the employer to implement the purported collective agreement which contains the union shop provision which would in turn require bargaining unit employees to join the USWA or face losing their jobs, bargaining unit employees have a direct legal interest in the proceedings before the Board and are entitled to proper notice of the proceedings and to participate in them as a party if they (or any of them) choose to do so. In argument, the employer referred to RE HOOGENDOORN AND GREENING METAL PRODUCTS, (1967) 65 D.L.R. (2d) 641 (Supreme Court of Canada); REGINA GREY NUNS' HOSPITAL EMPLOYEES' ASSOCIATION v. LABOUR RELATIONS BOARD [1950] 4 D.L.R. 775 (Saskatchewan King's Bench); PER-FEC-TION INSULATIONS LIMITED, [1984] OLRB Rep. Mar. 352; BECHTEL CANADA LTD., [1978] OLRB Rep. May 401; CUPE v. CANADIAN BROADCASTING CORPORATION, (1990) 70 D.L.R. (4th) 175 (Ontario Court of Appeal) and (1992) 91 D.L.R. (4th) 767 (Supreme Court of Canada); and PETERBOROUGH COUNTY BOARD OF EDUCATION, [1990] OLRB Rep. Mar. 330.

10 Counsel for Ms. Osmond, who sought to intervene in this proceeding, agreed with and adopted the submissions made by counsel for the employer. He submitted that bargaining unit employees should not have to go to court in order to correct the error(s) which he agreed with the employer have been made, and that if the Board is going to entertain this complaint it must listen to the employees as well as to the two institutional parties. In that respect, counsel argued that it would be important for the Board to hear evidence, which he said he intended to call, on how union membership in Northern Ontario is a social as well as a labour relations matter, and of the economic and other consequences that union membership would have for people who didn't want it. In the alternative, counsel submitted that the employees have a sufficient interest and would add things of sufficient significance to the Board's considerations that the Board should allow them to participate in the exercise of its discretion.

11 The USWA submitted that the employees were not entitled to notice or to participate in this complaint, and that there was no reason for the Board to exercise its discretion to allow them to do so. Counsel argued that this complaint raises an issue of implementation of what the USWA asserts is a valid collective agreement which arises out of an arbitration process which is intended to mirror the collective bargaining process. Counsel submitted that employees are properly given notice and an opportunity to participate when representation rights are in issue, but not in unfair labour practice proceedings, particularly when what is in issue in the proceedings is the implementation of a collective agreement. Counsel appeared to concede that if the USWA was successful in this complaint and then sought to enforce the union shop clause through the grievance arbitration process, employees would be entitled to notice and to participate in the arbitration proceedings, but

sought to distinguish between the direct interest which employees who are the object of such grievance arbitration proceedings would have, and the indirect interest they might have in a complaint like this one. Counsel also suggested that employees could raise their concerns in the judicial review proceedings while the operation of the union shop clause was "stayed" as the USWA has suggested as part of its "with prejudice" settlement proposal. Counsel referred the Board to KODAK CANADA LTD., [1977] OLRB Rep. Aug. 577.

(d) WHY THE BOARD CONCLUDED THAT EMPLOYEES HAD NO RIGHT TO AND COULD NOT PARTICIPATE

12 REGINA GREY NUNS', SUPRA, involved a legislated union shop provision in the then SASKATCHEWAN TRADE UNION ACT in which a Saskatchewan Court quashed an order of the Saskatchewan Labour Relations Board which required an employer to comply with the union shop provision on the basis that that Board acted without jurisdiction when it neglected to follow its own rules and regulations. More specifically, the Court concluded that the Saskatchewan Labour Relations Board is obliged but had failed to give notice of the unfair labour practice proceedings in which the impugned order was made to the 36 persons who would have lost their jobs as a result of the order. In fact, it appears from the reported decision that there were THREE applications to the Saskatchewan Labour Relations Board involved. At page 778 of the reported decision, the Court wrote that:

> On February 22, 1950, the Board received evidence on an application by the applicant herein for an order rescinding an order of the Board dated October 18, 1945, and a further application of the applicant that it constitute an appropriate unit of employees for the purpose of bargaining collectively, and determining that the applicant represents a majority of the employees in the appropriate unit of employees. At the same hearing an application by the Union was heard for an order requiring the Sisters of Charity of the North West Territories (hereafter referred to as the employer) from engaging in unfair labour practices within the meaning of the TRADE UNION ACT; and in particular from violating the provisions of s. 25 of the said Act. The evidence adduced in the first two applications was used in the latter. On February 24, 1950, the Board issued an order directing that a vote should be conducted by secret ballot during the last week of April, 1950, among the employees of the "employer" to determine whether the employees wished to be represented for the purpose of bargaining collectively with the "employer" by the applicant or by the "Union".
>
> On the same date an order was issued ordering and requiring the employer to forthwith refrain from engaging in unfair labour practice in contravention of s. 25 of the Act with respect to 36 employees named in the order. The said 36 employees were members of the applicant Association.

13 It therefore appears that two trade unions were engaged in the contest for the right to represent the employees of the employer involved in the REGINA GREY NUNS', SUPRA, case, but in the course of the representation proceedings it emerged that 36 of the employees who were the subject of the representation contest were not members of the incumbent trade union, and as part of an attempt to defeat the application to displace it, the incumbent trade union sought to have the

Saskatchewan Labour Relations Board require the employer to discharge the 36 employees, notwithstanding that the representation issue was to be determined by a vote.

14 In that context, it is easy to understand why the Court decided as it did. It is apparent that the unfair labour practice order relating to the union shop provision would have had a direct impact on the representation proceedings. That being the case, it was clearly necessary to give notice of the unfair labour practice proceedings to the union which was seeking to displace the incumbent union, and to the 36 persons who would be directly affected. Further, and perhaps more importantly for purposes of the standing issue before me in this complaint, it is apparent that the order in which the incumbent union sought and obtained from the Saskatchewan Labour Relations Board in REGINA GREY NUNS', SUPRA, would have led DIRECTLY to the termination of the 36 employees, and as such was the kind of order which in Ontario today a trade union would seek through the grievance arbitration process. That is, it is analogous to the situation in HOOGENDOORN, SUPRA.

15 In HOOGENDOORN, SUPRA, a collective agreement provided for the deduction and remittance to the union of dues, and required employees to execute an authorization for such a deduction as a condition of employment. Mr. Hoogendoorn refused to authorize the deduction of union dues from his wages, and the employer and the union went to arbitration on the issue of whether the employer was violating the collective agreement by continuing to employ Mr. Hoogendoorn. Mr. Hoogendoorn was not given notice of the arbitration proceedings, and was neither present nor directly represented at the proceedings.

16 Mr. Justice Hall wrote the main opinion for the majority of the Court in HOOGENDOORN, SUPRA. He observed that both the employer and the union understood and agreed that Mr. Hoogendoorn was required to pay union dues and that he refused to do so, that there was therefore no issue between the two collective bargaining parties, and that the purpose of the arbitration proceedings was to get rid of Mr. Hoogendoorn as an employee because of his refusal. Hall, J. therefore agreed with Wells, J.A. (of the Court of Appeal, the Court being appealed from) to the effect that "... Hoogendoorn under all of the peculiar circumstances ... was entitled to be heard ...." In the result, Hall, J. held that an employee whose status is being affected by an arbitration hearing is entitled to be represented in his own right, as distinct from being represented by a union which is taking a position adverse to his/her interests.

17 In a concurring opinion, Cartwright, C.J.C. emphasized that the decision turned on the "peculiar" facts of the case, and he agreed with Judson J. who said, in dissent (at page 644), that:

> The scheme of the LABOUR RELATIONS ACT, R.S.O. 1960, c. 202, is to provide for a bargaining agent which is given power to conclude an agreement with an employer, on behalf of the employees of that employer, which agreement becomes binding upon all employees. No ratification or consent by the employees or any of them is required before a lawful agreement can be concluded and the bargaining agent is given specific authority by the Act to make the kind of agreement represented by art. 5.02 in the instant case. No individual employee is entitled as of right to be present during bargaining or at the conclusion of such an agreement. To require that notice and the right to be present be given to each employee on any occasion when a provision in a collective agreement having general application to all employees was being

> interpreted would be to destroy the principle of the bargaining agent and to vitiate the purpose of the Act.

But, said Cartwright, C.J.C. (at page 642):

> The reason that I differ from the result at which [Judson, J.] arrives is that I am unable to regard the arbitration which was held as anything other than an inquiry as to a single question, that is, whether or not the employer was bound to discharge [Hoogendoorn].

18 HOOGENDOORN, SUPRA, has been interpreted, correctly, I think, as requiring that notice of and an opportunity to participate in arbitration proceedings be given to any employee who may be DIRECTLY affected in his/her employment if the union succeeds (that is, where the interest the union is seeking to have upheld is adverse to the employee's personal interest). Accordingly, not only are employees who the union seeks to have discharged from employment entitled to notice and to participate, so, for example, are employees who are successful in a job posting competition which the union subsequently grieves and asserts that another employee should have been awarded the job instead. Similarly, persons whose employee status is in issue before the Board under section 114(2) of the Act are entitled to notice and to participate if they wish to (PETERBOROUGH COUNTY BOARD OF EDUCATION, SUPRA). On the other hand, employees who may only be INDIRECTLY affected in their employment by an arbitration result are not entitled to notice. For example, where an employee has been hired to replace a discharged employee, that new employee is not entitled to notice or status in an arbitration proceeding in which the union challenges the discharge, even though if the union is successful and the arbitrator reinstates the discharged employee, the employer may have insufficient work to retain the replacement employee and may discharge him/her.

19 The HOOGENDOORN, SUPRA, analysis formed the basis for the Board's decision in PER-FEC-TION INSULATIONS, SUPRA.

20 In BECHTEL CANADA LTD., SUPRA, the Board decided that it would hear a request for reconsideration of a trade union which had not been named as a party to an application for a declaration of an unlawful strike, and which had resulted in a declaration that certain of the respondents had engaged in an lawful strike, and a direction that required those respondents and "their representatives, agents, substitutes or ANY PERSON HAVING NOTICE OF THIS DIRECTION ..." (emphasis added) to refrain from doing certain things. It is not clear from the decision whether the trade union seeking reconsideration had any representative or other relationship with the respondents against whom the direction complained of had been made. But since the request for reconsideration raised a question with respect to the appropriateness of including the words "any person having notice of this direction", it appears that it did not. It appears that what concerned the Board in that case were some court decisions which the Board was concerned brought into question a propriety of the wording it had used. I respectfully suggest that the Board would have no such concerns today, particularly when the words in question do nothing more than direct people not to do what the legislation already prohibits them from doing.

21 The CUPE v. CBC, SUPRA, case in effect stands for the proposition that a Board of Arbitration cannot make a decision which has the effect of removing work from the members of a union which was not given notice of or allowed to participate in the arbitration proceeding. Although the legal basis for the decision is manifest (and is based on the HOOGENDOORN,

SUPRA, principle), I respectfully suggest that the real basis for the decision was the Court's attempt to deal in a practical way with what was clearly a jurisdictional dispute between trade unions which came under the CANADA LABOUR CODE, a piece of federal legislation which did not contain a specific jurisdictional dispute complaint provision analogous to, for example, section 99 of the LABOUR RELATIONS ACT, 1995, and where it was far from clear, the comments of both the Ontario Court of Appeal and the Supreme Court of Canada notwithstanding, that the matter could be dealt with by the Canada Labour Board.

22 The Board's approach to standing in proceedings before it is entirely consistent with the above jurisprudence. A party which seeks to intervene in a proceeding before the Board must demonstrate a real discernible legal interest in the proceedings, or persuade the Board that it is able to provide the Board with assistance which is required to ensure that all of the issues are properly presented, such that it should be granted a kind of AMICUS CURIAE status. AMICUS CURIAE status, which is invoked as a matter of the Board's discretion, has rarely been granted. KIDD CREEK MINES LTD., [1984] OLRB Rep. Mar. 481, provides an example of when it was granted. In that case, United Steelworkers of America, i.e. the applicant herein, was granted AMICUS CURIAE intervenor status limited to making representations on the legal and policy issues raised by an application for certification by a Local of the United Brotherhood of Electrical Workers for a bargaining unit of maintenance electricians, notwithstanding that the Steelworkers neither represented those employees nor sought to do so. Intervenor status was granted on the basis that the Steelworkers was the dominant trade union in the mining industry and represented many mine maintenance electricians within broader bargaining units. In another case, NEW DOMINION STORES, [1986] OLRB Rep. Apr. 519, the United Steelworkers of America was denied such an intervenor status.

23 In order to provide a basis for status, an interest must be direct and substantial. An interest which is merely political, which is anticipatory or speculative, or which is concerned with an indirect economic or commercial effect is not sufficient to entitle a party to intervene in a proceeding. Nor is the fact that the decision in a proceeding may be used or referred to as a precedent in another proceeding (NEW DOMINION STORES, SUPRA, at page 521; and, more generally, see RE SCHOFIELD AND MINISTRY OF CONSUMER AND COMMERCIAL AFFAIRS, [1981] 28 OR (2d) 764 (Ontario Court of Appeal)).

24 To support an intervention on an AMICUS CURIAE basis, the Board must be persuaded that the party seeking to intervene can provide it with real and substantial input on important issues which the Board is unlikely to receive from the direct parties, and that the participation of such an intervenor will not cause undue delay or prejudice to rights of a direct party.

25 Accordingly, in other than representation proceedings, it is only where an employee's employment status or interest are DIRECTLY in issue that s/he is entitled to notice or to participate in the proceedings before the Board.

26 In this complaint, employees could not raise a representational interest or issue (and there was no suggestion that they could), and no employee's employment can be DIRECTLY affected in the HOOGENDOORN, SUPRA, sense. In the latter respect, the USWA requests the following relief:

(A) A Declaration that the Employer has breached the Act as particularized in this application; and

(B) An Order and Declaration that the Employer is bound by the collective agreement ordered by the Board of Arbitration which is effective November 12, 1996; and

(C) An Order that the Employer compensate all bargaining unit employees for all wages or other benefits of employment which have not been paid to affected bargaining unit employees as a result of the Employer's violations of the ACT as aforesaid; and

(D) An Order that the Employer pay the Union all union dues owing to the Union from November 12, 1996; and

(E) An order that the Board's decision be posted in the workplace for 60 days and that the Board's decision be mailed to all bargaining unit employees at their residence at the expense of the Employer; and

(F) In light of the egregious nature of the Employer's conduct as particularized in this complaint, and in the context of this complaint and the history of these proceedings as described herein, the Union also requests an Order that the Union be compensated for all expenses incurred in connection with this application, including but not limited to the union's legal fees.

(G) Such other remedial order as counsel may advise and the Board may consider just and appropriate in the circumstances.

27 The USWA does not request that the Board order the employer to discharge any employee who refuses to become a member of the union. Nor does it directly request that the employer implement and comply with the union shop clause. Nor would any of the relief requested have that direct result if it was granted. Accordingly, the union is not seeking any remedy which would directly affect employees, all of whom are represented by the USWA as their exclusive bargaining agent, WHETHER OR NOT THEY ARE OR BECOME MEMBERS OF THE UNION. The issue between the parties is at a pre-HOOGENDOORN, SUPRA, stage. In order to enforce the union shop clause which is in dispute, the USWA will either have to persuade the employer to apply it and discharge any bargaining unit employee who refuses to become a member (an unlikely scenario in this case) which might then spawn the sort of litigation by employees which ultimately resulted in the HOOGENDOORN, SUPRA, decision, or go through grievance arbitration proceedings to enforce the provision, which will put the employees who are the object of the grievance in the same position in which Mr. Hoogendoorn was, and therefore entitle them to notice and standing in those proceedings.

28 What the USWA seeks in this case is enforcement of the Board of Arbitration's award, and not of the first collective agreement which the Board of Arbitration purported to settle between the parties. Accordingly, the bargaining unit employees are not DIRECTLY affected by this application and are not entitled to notice or standing on that basis. Bargaining unit employees are therefore not entitled to notice or standing by operation of law.

29 If one were to conclude otherwise, it would follow that bargaining unit employees would individually be entitled to notice or standing in an application for a direction that a first collective agreement be settled by arbitration in the first place. It would also presumably follow that bargaining unit employees would individually be entitled to a place at the bargaining table, at least with respect to matters pertaining to "their" wage rate, wage progression, benefits, job classification and the myriad of other employment related questions. As the majority and the minority of the Supreme Court of Canada agreed in HOOGENDOORN, SUPRA, this would be quite inconsistent

with a trade union's status under the Act as the exclusive collective bargaining representative of bargaining unit employees in their employment relationship with their employer, a principle which is fundamental to the Act. (Indeed, it would even be more difficult to sustain a conclusion contrary to the one I have arrived at in matters arising out of first collective agreement proceedings under section 43, since the mandatory ratification vote provisions in section 44 of the Act specifically do not apply to a collective agreement imposed by order of this Board or settled by arbitration (section 44(2)(a)). It would be rather odd to conclude that employees have some sort of individual status in circumstances where they have no collective voice).

30 Nor is there anything in the STATUTORY POWERS PROCEDURE ACT, the LABOUR RELATIONS ACT, 1995 or the Board's Rules which entitled bargaining unit employees to notice or standing. The SPPA provides that the parties to a proceeding shall be the persons specified as parties by the statute under which the proceeding arises, or persons entitled by law to be parties (section 5). There is nothing in the LABOUR RELATIONS ACT, 1995 under which this proceeding is brought, which specifies that bargaining unit employees are parties to a complaint under section 96 of the Act (which this complaint is). Nor is there anything in the Board's Rules which has that effect. Ultimately, the Board's Rules contain a curiously-worded broad definition of "party", but which specifies that "party" does not include a person who the Board decides is not one. Accordingly, bargaining unit employees are not specified parties and are not entitled by law to be parties.

31 Finally, I was not satisfied that the participation of the bargaining unit employees would add anything to the proceedings. Issue has been joined between the USWA and the employer, and the employees essentially seek to support the employer's position. I was not satisfied that the evidence which counsel indicated the employees would seek to call was arguably relevant to the matters in issue, or that it would otherwise add anything to the proceeding. Accordingly, I did not find it appropriate to exercise my discretion to give the employees notice or to allow them to participate notwithstanding that they are not entitled to notice or standing.

III THE UNION'S "MOTION FOR JUDGEMENT", OR WHAT SHOULD THE BOARD DO?

32 I then heard the representations of counsel with respect to what was in effect a motion for "summary judgement" by the USWA also on the basis of the aforesaid agreed or undisputed facts (see paragraph 5, above). In effect, the USWA argues that the employer has conceded the breaches of the Act alleged, and that while the employer is entitled to raise the issues it pleads in response to the complaint in the judicial review proceedings, it cannot do so in the complaint before the Board.

(a) ARGUMENT

33 The employer submits that it is entitled to present its defence to the complaint as pleaded. Counsel argues that since the USWA seeks to have the Board declare that the employer is bound by what the union alleges is a collective agreement (together with certain ancillary orders), the employer is entitled to try to persuade the Board that there is no such collective agreement (for the reasons which it seeks to put forward in defence to the complaint).

34 Although the parties disagree on how the Board should proceed and what the result should be in this complaint, neither party suggests that the Board does not have jurisdiction to deal with it, or

that it should not do so even if it has the jurisdiction. However, I have concerns in that respect (which I raised with the parties at the hearing).

35 The USWA's position is that the complaint raises the issue of what role the Board has to play in the supervision of a first collective agreement arbitration process, or the result of that process, when it is not itself the Board of Arbitration. The USWA asks that the Board find that there was a collective agreement and says that all the Board needs to look to in that respect is the award of the first contract Board of Arbitration. The USWA submits that what the employer in effect seeks to have the Board do is sit in review of the first collective agreement Board of Arbitration, and that the Board has no jurisdiction to do this. The union submits that the appropriate place for the employer to advance its position in that respect is in the application for judicial review which it has filed. Counsel submits that upon reviewing the relevant legislative provisions as a whole, and particularly sections 43(10) and (19), 48(18) and 56 of the Act, it should be apparent that the Board has the jurisdiction to deal with this complaint and grant the relief sought.

36 The employer submits that it is not asking the Board to sit in review of the first collective agreement Board of Arbitration. Counsel acknowledges that where a valid award results in a proper first collective agreement, and the employer refuses to acknowledge it, the Board has the jurisdiction to grant a union the appropriate relief. However, argues counsel, before granting any such relief, the Board must examine and consider an employer's reasons for refusing to implement or acknowledge an arbitrated first collective agreement if the employer seeks to defend its conduct. In other words, the employer agrees that the Board is at least a step in the first collective agreement arbitration enforcement process, but argues that the Board must inquire into the matter and consider the defences which are put forward in response to a complaint in that respect. Indeed, argues the employer, the issue is not really one of compliance, but whether there is a collective agreement which must be complied with. The employer submits that this is not a strict liability situation and that a union cannot make a complaint and then seek to gag the employer and deny it the right to make an answer.

(b) DECISION

37 As counsel for the USWA said in his reply submissions, the reason this complaint has been made is because there is no "file and enforce through the Courts" provision like section 48(19) in section 43 of the Act. (Nor, I observe, like any of sections 96(6), 99(10), 102, 103(8) or 104(44) of the LABOUR RELATIONS ACT, 1995; nor a provision like section 10(7) of the HOSPITAL LABOUR DISPUTES ARBITRATION ACT which provides that:

> (7) If the parties or either of them fail to execute the document prepared by the board within a period of five days from the day of its submission by the board to them, the document shall come into effect as though it had been executed by the parties and the document thereupon constitutes a collective agreement under the LABOUR RELATIONS ACT.

Nor does the SPPA apply to proceedings before an arbitrator to which the LABOUR RELATIONS ACT, 1995 applies (section 3(2)), and section 19 of the SPPA therefore does not apply either).

38 In effect, what the USWA seeks is a "rubber stamp" Board decision which it can file in Court and enforce as an order of the Court pursuant to section 96(6) of the Act. The USWA says that the Board can and must find that there is a collective agreement, but that it is not open to the Board to

even entertain a challenge to the existence of the collective agreement, much less make a finding that there is no agreement. The USWA agrees that the issues raised by the employer are properly before the Courts and submits that it shouldn't have to wait until the Court disposes of the employer's application for judicial review before obtaining enforcement of the arbitrated first collective agreement.

39 On the other hand, although the employer says it does not seek to have the Board inquire into, set aside, over-rule or otherwise interfere with the first collective agreement arbitration award, which counsel acknowledged the Board cannot do, the defence the employer seeks to put forward to the complaint is that the Board of Arbitration exceeded its jurisdiction, that the Board of Arbitration's award does not contain a collective agreement which the Board of Arbitration could impose, and that the award of the Board of Arbitration is a nullity (para. 16 and 17 of Appendix "A" to the employer's Response). There is no material difference between the defence the employer seeks to assert in this complaint, and the grounds for its pending application for judicial review.

40 The absence of a "file and enforce" provision in section 43 appears to be a gap in the legislative scheme for first collective agreement arbitration. However, the Board is a statutory tribunal which has only the jurisdiction which the Legislature chooses to give it. It has no inherent jurisdiction, either to fill perceived "gaps" in the Act or other legislation which the Board administers, or otherwise. Further, it is apparent from the scheme of the Act that the Board is not an enforcement body for either its own decisions, or for the decisions of anyone else. In labour relations matters, the decisions of the Board or of Boards of Arbitration to which the Act applies are enforced through the Ontario Court (General) Division. I observe that it would appear that the Court has not only a specific statutory jurisdiction in that respect (in proceedings other than under section 43 of the Act, it appears), but also an inherent supervisory jurisdiction over "inferior" tribunals like the Board. In this complaint, what the USWA is really seeking is the enforcement of the first collective agreement Board of Arbitration's award.

41 Further, it is quite clear that the Board has no jurisdiction to sit in review of a properly-constituted Board of Arbitration (Re WINDSOR WESTERN HOSPITAL AND MORDOWANEC (1986) 56 OR (2d) 297 (Divisional Court)). The relief sought by the USWA in this complaint includes a declaration that the employer is bound by the arbitrated first collective agreement. Indeed, it is apparent that that is the primary relief the union seeks. In order to grant this relief (as well as the other relief the USWA seeks), the Board would have to be satisfied that there is a valid subsisting collective agreement. To find that there is a valid subsisting collective agreement in this case would seem to require the Board to sit in review of the process by which the collective agreement came to be every bit as much as the employer's suggestion that there is no valid collective agreement. And in that respect, the employer's submissions notwithstanding, it is apparent that in defending this complaint, that is also precisely what the employer wants the Board to do; that is, dismiss the complaint on the basis that the Board of Arbitration has not produced a valid collective agreement. Consequently, it is difficult to see how the Board could avoid examining what the first collective agreement Board of Arbitration did in this case.

42 In the result, it is far from clear that the Board has jurisdiction to entertain this particular complaint, given the manner in which the parties have joined issue. I would not have the same doubts if either the employer acknowledged the validity of a collective agreement, but still refused to execute or implement it, or if the employer refused to execute or implement a purported collective agreement which was the product of direct collective bargaining between the parties on

the basis that there was no agreement (in that latter respect, see for example, SPARTON OF CANADA LIMITED [1985] OLRB Rep. Sept. 1420).

43 But even if the Board does have jurisdiction, I do not think it appropriate for the Board to inquire into this complaint.

44 The fundamental issue between the parties is the validity of the first collective agreement which the Board of Arbitration purported to settle. This issue is appropriately and best dealt with by the Court in the application for judicial review.

45 Further, I am not satisfied that there would be any particular utility in the Board inquiring into the complaint because there is no dispute between the parties regarding the material facts, and counsel candidly acknowledged that whatever the Board did in this complaint if the matter proceeded, it is virtually certain that the Board's decision would also be the subject of an application for judicial review where the fundamental issues would be substantially the same as those in the judicial review proceedings which are already underway.

46 Consequently, I am satisfied that it is appropriate for the Board to exercise its discretion to decline to inquire into this complaint, and the complaint is therefore dismissed.

47 In the course of argument, it was suggested that if the Board did not deal with this complaint, the USWA would have no remedy, and the employees would not have the benefit of the collective agreement which has been arbitrated and to which they are entitled. Even though it is not the Board's place to offer advice (and these parties are both already very ably advised, in any event), I respectfully suggest that that is not necessarily the case. First of all, the usual, at least first step in enforcing a collective agreement is the grievance arbitration process, which can be utilized even if the employer refuses to co-operate (see section 49 of the Act). Second, it is not at all clear that a responding party to an application for judicial review cannot seek an expedited hearing in appropriate circumstances, or that it cannot otherwise seek the Court's assistance.

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Torstar Corp. v. Southam Inc.

RE TORSTAR CORPORATION AND SOUTHAM INCORPORATED

Ontario Securities Commission

Beck, Chairman, Salter, Vice-Chairman, Kane, Tashereau and Blain, Commrs.

Heard: November 15, 1985
Judgment: November 26, 1985

Counsel: Ralph Shay and Len Petrillo, for the Toronto Stock Exchange.

James C. Baillie, Q.C., for the directors of Southam Inc.

Robert A. Donaldson, Q.C., and Donald J.M. Brown, Q.C., for the directors of Torstar Corporation.

Earl I. Rotman and Richard Storrey, for Dunsmill Investments Ltd.

Ronald N. Robertson, Q.C., and Robert W. McDowell, for Imperial Life Assurance of Canada.

John F. Petch, Q.C., for Gordon Capital Corporation

Subject: Securities; Public; Corporate and Commercial

Securities and Commodities --- Commissions and exchanges -- Nature and powers.

Securities and Commodities --- Commissions and exchanges -- Hearings and appeals.

Securities and Commodities --- Trading in securities -- Sale of shares.

Procedural fairness -- Audi alteram partem -- Opportunity to be heard -- Ontario Securities Commission conducting disciplinary hearing against directors of two corporations -- Shareholders and Toronto Stock Exchange seeking to intervene -- Intervention matter of discretion for commission -- Staff counsel to be relied upon to put forward evidence -- Toronto Stock Exchange and investors restricted to making arguments.

T and S engaged in a share transfer contrary to the by-laws of the Toronto Stock Exchange ("TSE"). The TSE complained of this to the Ontario Securities Commission ("OSC") and asked the OSC to sanction the directors who authorized the transaction. The OSC responded by issuing a notice of hearing to 13 directors of T and 10 directors of S. The purpose of the hearing was to determine whether the 23 directors should be denied the benefit of certain exemptions in the Securities Act (Ontario). This would have had the effect of preventing them from trading in shares in Ontario.

Prior to the hearing the OSC staff had agreed that they would proceed on the basis of statements of fact submitted by each of the boards of S and T in which each admitted guilt. The OSC and the lawyers of S and T also agreed on an appropriate sanction but the TSE did not. At the hearing, the TSE, some shareholders and a representative of shareholders in S sought leave to intervene.

For the investors, it was argued that as members of the public whose interest were sought to be protected by the relevant TSE by-law, they had an interest in identifying the extent of the harm done to them by the deal. They also argued that the agreed statement of facts was inadequate and they should be heard to enable the circumstances of the transaction to be elucidated fully. It was also suggested that there was no necessary identity of interest between the investors and the OSC staff and that the intervention of the investors was particularly important here as the OSC staff had not made an independent investigation of the matter. These arguments were largely supported by counsel to the OSC who also urged that the TSE as the real complainant concerned with the integrity of its regulatory processes should be entitled to intervene as well.

Opposing the applications, S argued that if the investors had wanted an independent investigation by the OSC staff, they had had sufficient time prior to the hearing to request it of the staff and that that was the proper route to follow. Investor representation was not appropriate at disciplinary hearings of this sort. Given the significance of the potential sanctions, the directors should only have to meet the case outlined in the notice of hearing and face one prosecutor, the OSC, not a multiplicity of prosecutors in the form of the investors and the TSE. It was also argued that, in the absence of a request by the investors for an independent investigation, the OSC staff had acted properly in accepting the statements of fact proffered by S and T and in reaching agreement on sanction.

Held:

Applicants were denied status to intervene as parties but were permitted to intervene for the purposes of making arguments.

While there was not an inflexible rule against allowing party intervenors in disciplinary proceedings under ss. 123 and 124 of the Securities Act, this was not an appropriate case for the OSC to exercise its discretion to allow the investors that status. Their concerns with the adequacy of the factual statements were able to be met by directing counsel to the OSC to meet with them before the resumption of the hearing to consider their concerns and decide in his judgment whether

anything further should be done. That aside, the interests of the investors would be adequately served by allowing them to intervene for the purposes of argument only. This meant that they could make submissions as to the appropriate sanction on the basis of the facts before the OSC.

Per Charles A. Salter (dissenting)

Full standing should be granted without limitation. This was dictated by two considerations: the likelihood that the investors could make a useful contribution to the matter without injustice to the parties and the critical importance of investor confidence in the integrity of the regulatory process. In the case of the TSE, the OSC in the past had automatically accorded it standing where it sought to intervene in defence of the integrity of its regulatory processes. As for the investors in S, they had earlier attempted to protect themselves from a take-over and to deny them standing to intervene fully at the public hearing considering questions relating to the take-over of S would be improper. They were entitled to have the matter explored fully by the OSC. This was particularly appropriate where the object of s. 124 hearing might not be confined to disciplinary purposes but might also have the objective of trying to ensure compliance with Ontario law and policy. Here, that could mean the expansion of the hearing to consider whether such transactions were contrary to public policy. To that extent, direct participation by the investors was preferable to their evidence and argument having to be put by counsel to the OSC. Moreover, it could not be objected to on the ground that it was inappropriate for such policy issues to be raised and dealt with by the OSC in the context of an individual adjudication rather than at a policy hearing.

Cases considered (by the majority):

Electra Investments (Can.) Ltd., Re, (1983), O.S.C.B. 1C -- considered

Gurtner v. Circuit, [1968] 2 Q.B. 587, [1968] 1 All E.R. 328 (C.A.) -- referred to

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.) -- applied

O.S.C. and Electra Investments (Can.) Ltd., Re (1983), 44 O.R. (2d) 61, 38 C.P.C. 57 (Ont. C.A.) -- distinguished

Starr and Puslinch, Re (1976), 12 O.R. (2d) 40 (Ont. Div. Ct.) -- considered

Zenmac Explorations Ltd., Re (1982), O.S.C.B. 542C -- considered

Cases considered (on dissent):

Bache Halsey Stuart Can. Ltd. and TSE, Re (1981), O.S.C.B. 493C -- considered

Cablecasting Ltd., Re (1978), O.S.C.B. 37 -- considered

Royal Trustco Ltd., Re (1981), O.S.C.B. 322C -- referred to

243978 Alta. Ltd., Signum Communications Inc., Re (1982), O.S.C.B. 566C -- referred to

Statutes considered:

Securities Act, R.S.O. 1980, c. 466, ss. 34, 71, 72, 88, 122, 123, 124(1).

Statutory Powers Procedure Act, R.S.O. 1980, c. 484.

Rules considered:

Ontario Rules of Civil Procedure, rr. 13.01, 13.02.

Annotation

The decision and the reasoning of the majority in this case are disappointing for a number of reasons.

First, after adopting the principle proposed by Esson J.A. in the MacMillan Bloedel case[FN1] i.e., assessing the degree of likelihood that intervenors will be able to make a useful contribution without injustice to the immediate parties, the Commission's bald assertion that "we do not think that this is an appropriate case" is hardly a reason. Indeed, it is arguably a breach of the requirement of the Statutory Powers Procedure Act[FN2] that reasons be given.

Second, the transfer of Esson J.A.'s test from a lis inter partes in a civil Court to a tribunal such as the OSC is questionable. In a Court setting, intervenor status is for a party without sufficient interest to be either a plaintiff or defendant, in a dispute over whether the plaintiff has the right to the remedy sought against the defendant. The Court's traditional reluctance to allow intervention, at least at the trial level, is to avoid burdening the plaintiff's case for the sake of those with only peripheral interests. In this OSC hearing, the issues were by no means so bipolar, and the interests of the would-be intervenors were certainly not peripheral. In other words, the "intervenor" label before a board means something quite different from that same label in a Court of law. Normally, the roles before a board are not like those of plaintiffs and defendants seeking or opposing judicial remedies; hence, "intervenor" will mean only "another party", since board hearings usually have one applicant or principal party, with all other parties being called "intervenors", whether they support or oppose the principal party. For this reason, boards do not, stricto sensu, determine "standing to sue" or "standing to intervene" as does a Court of law. Rather, they determine the right to participate, in accordance with whether the prospective participant has any interests which may be affected (without construing "interests" in any narrow, technical legal sense), assessed in the context of the purpose and scheme

of the applicable statutes empowering the board.

Third, allowing participation for the purpose of making argument but not for the purpose of presenting evidence is to deny the very purpose for which these intervenors sought to participate: they did not ask to present argument but to present evidence. If their interests were deemed insufficient, total exclusion would at least have had the advantage of clarity of purpose, as would the allowance of normal intervenor status. But the point of allowing people to enter the fray with their hands tied behind their backs is rather difficult to understand. One obvious beneficiary is the OSC staff, whose turf as defender of shareholders has been protected even from the self-help aspirations of those very shareholders. The OSC staff has been given a monopoly on the presentation of facts, and OSC counsel has been delegated the decision as to whether the facts sought to be presented by persons with a direct and very substantial pecuniary interest in the outcome will or will not become part of the evidence. Why it was assumed that he can do this better than these persons' own counsel is not clear.

Fourth, it reduces those whom the statute most clearly intends to protect to the role of second-class participants. It is anomalous to have a hearing with first-class and second-class parties, where those accorded only second-class status have just as real and legitimate interests as the others.[FN3] The necessity of including affected interests in the work of a commission was well-stated by Mr. Justice Linden in the decision of the Ontario Divisional Court in Re Royal Comm. on Northern Environments:

> It is significant to note that the commissioner, in opening his hearings, stated: '... a central theme of my inquiry is the necessity to address the position of Native People north of the 50th parallel'. This exercise by necessity must profoundly affect the people represented by the Grand Council. We are, therefore, convinced that the Grand Council, as official spokesman for the Nishnawbe-Aski, has a substantial and direct interest in the work of the commission.

[FN4]

The analogy drawn by the majority to the amicus curiae provisions of Ontario Rules of Civil Procedure, r. 13.02 is a false analogy. There is no comparison between an amicus curiae (who must, by definition, be disinterested in the matter, being there literally as a friend of the Court, to assist it) and the Toronto Stock Exchange (whose rule it is that was allegedly breached), or a group of shareholders who have lost large sums of money allegedly due to the principal parties. The protection of shareholders is the very raison d'etre of the OSC.

Full party status is a prerequisite to standing to appeal an unsatisfactory decision. An amicus curiae cannot appeal, and would never have any reason to do so, as he has no personal interest in the outcome. But the shareholders in this case might wish to appeal if they felt that certain facts had been ignored or that the appropriate penalties had not been ordered by the commission. A cynic may even suggest that one reason for refusing to grant full party status was to prevent an

appeal. A more flattering explanation is a preoccupation with efficiency: concluding the hearing as quickly as possible.

Excluding or limiting the role of interested participants by giving them second class status is not a laudable way of preserving efficiency. Indeed, as has been noted in a number of applications for judicial review of such rulings, there are better ways of saving time than the exclusion of parties with interests in full participation. For example, to quote Linden J. again:

> The commissioner, in his reasons, was unduly influenced by his concern that, if he gave the Grand Council participation rights, he would be unable to prevent all of the other people of the North who might conceivably feel they have an interest from participating. This was not a proper factor to consider in determining whether an applicant has standing pursuant to s. 5(1). If participation rights are given to individuals by the statute, then they are entitled to exercise those rights, even though it may slow down the work of the commission.
>
> Further, holding that the council has standing, in general, does not mean that every single time the council wishes to produce a witness or ask a question in cross-examination that they have the right to do so indiscriminately. The commissioner remains in charge of the inquiry. He is in control of its process, thus he is obligated to rule on the relevance of any questions to the interest of the council (or such other individuals as are given standing).

[FN5] A public hearing held by a board such as the OSC is not merely the staff's hearing conducted in public by the commission; it is the public's hearing in which members of the public with recognized interests have a right to full and effective participation.[FN6]

The discussion in this case (and in the cited previous OSC decisions) which equates the presence of intervenors in discipline cases to that of an accused facing two prosecutors relies on a questionable assumption. While fairness to the accused is indispensable, it is clearly only the OSC staff and not the intervenors (whose questioning and presentation of evidence can be readily controlled by the board) which prosecutes. Only if the commission lacked the confidence to control the intervenors to prevent them from behaving as second prosecutors could the presence of intervenors become a problem.

It is very dangerous for a trier of fact in a discipline case to accept lawyers' bargains as to what the evidence should consist of when the agreed facts are seriously disputed by the victims. Clearly, the "accused" will have a strong interest in excluding evidence which tends to make him look worse. For its part, the OSC staff, now put on the defensive by the would-be intervenors, will have a keen desire to appear thorough and competent in the eyes of the commissioners, who are, collectively, "the boss". Their normal bureaucratic, self-protective instincts may tend to make them less than totally impartial arbiters of the relevance of additional facts proffered for their consideration by those refused full party

status.

The way in which a board deals with applications to participate in its hearings is a measure of its procedural self-confidence and maturity. The OSC's unexplained refusal to permit full participation to persons who are clearly not busybodies and whose pecuniary interests are affected in the most fundamental way was not, to borrow the words of the dissenting reasons of Commissioner Salter, "responsive to broad considerations of investor confidence in the regulatory process".

APPLICATION for status to intervene as parties in proceedings under s. 124 of the Securities Act (Ontario).

The Commission:

1 This hearing was commenced on November 15, 1985 pursuant to a notice of hearing issued under s. 124(1) of the Securities Act, R.S.O. 1980, c. 466, as amended (the "Act"). The notice of hearing recites that it is for the purpose of determining whether the exemptions contained in ss. 34, 71, 72 and 88 of the Act should not apply to certain of the directors of Torstar Corporation ("Torstar") and Southam Inc. ("Southam") by reason of an exchange of shares entered into between Torstar and Southam, which exchange was done without compliance with s. 19.06 of the General By-law ("By-law 19.06") of The Toronto Stock Exchange (the "TSE").

2 By-law 19.06 requires every company having shares listed on the TSE to give prompt notice of a proposal to issue treasury securities and to supply a copy of each agreement entered into with respect to such issue. The by-law further provides that the TSE shall have the right to either accept or not accept such notice, or to require shareholder approval as a condition of acceptance in certain circumstances. The by-law also provides that if the notice is not accepted, the proposed issue of treasury securities shall not be proceeded with.

3 The TSE had indicated, in a news release issued on May 7, 1985, the seriousness with which it regarded breaches of By-law 19.06. In that release, the TSE noted that the only remedies available to it, delisting or suspension of trading, might be inappropriate and might have a detrimental effect on the public shareholders. Accordingly, it announced that in future it would seek sanctions from the Ontario Securities Commission (the "OSC") against managements of listed companies that knowingly break TSE rules.

4 By letter dated September 5, 1985, the TSE wrote to the OSC, complaining that the Southam/Torstar share exchange of August 26, 1985 was done without compliance with By-law 19.06. The TSE requested that the OSC take action under s. 124 of the Act to sanction the directors of Southam and Torstar who authorized the share issuance. The effect of denying the exemptions in ss. 34, 71, 72 and 88 of the Act to anyone resident in Ontario is to deny them the ability to trade in securities in Ontario. As a result of its investigation of the facts behind the TSE letter of September 5, the OSC issued a notice of hearing on October 24. Those named in the notice of hearing are the 13 directors of Torstar and 10 directors of Southam who authorized the share exchange transaction.

5 At the commencement of the hearing, counsel for the OSC referred to a number of understandings that had been reached between staff and counsel for the parties. The first agreement was as to the evidence that would be before the Commission panel. A statement of facts was to be put in evidence by each of the boards of directors of Southam and Torstar. The hearing was to proceed on the basis of those statements of facts only, and no other evidence would be called. OSC staff agreed to that procedure, on the understanding that the statements of facts were solely those of the Torstar and Southam boards, and did not constitute statements of fact agreed to between staff of the OSC and counsel for the respondents. Counsel for the OSC did say, however, that the statement of facts was sufficient for his purpose in making argument as to the appropriate sanction, as the statements contained an admission of a breach of By-law 19.06, with an explanation as to events that led to the share exchange transaction.

6 As to sanction, OSC staff and counsel for the respondents had agreed on an appropriate sanction to be recommended to the Commission panel. The TSE, however, did not agree with the proposed sanction.

7 Apart from the OSC and the respondents, five other parties asked for standing to intervene in the hearing. The five are the TSE, which characterized itself as the "true applicant", and three Southam shareholders -- Imperial Life Assurance Company of Canada ("Imperial"), Dunsmill Investments Ltd. ("Dunsmill") and Gordon Capital Corporation ("Gordon"), and Stephen Jarislowsky ("Jarislowsky") of Jarislowsky, Fraser & Company Ltd., investment counsel, whose clients are large holders of Southam shares. The submissions as to standing to intervene can best be summarized through the argument of R.N. Robertson Q.C., counsel for Imperial.

8 Mr. Robertson emphasized that the TSE stated, in its May 7 press release, that the purpose of By-law 19.06 is to ensure that public investors receive fair and equal treatment. Imperial is one of those public investors, and considers itself to have been significantly and adversely affected by the actions of the Southam directors. As a result of the Southam/Torstar share exchange, the market price of the Southam shares fell by some $3.00 per share. Imperial, as a holder of some 190,000 shares, saw the market value of its holding company reduced by over $600,000 at that time.

9 Mr. Robertson particularly stressed that the facts as set out in the statements by Torstar and Southam, which were accepted by staff of the OSC as adequate to argue the matter of sanctions, did not provide the full background facts leading up to the Torstar/Southam share exchange. He argued that the commission panel required a full examination of all the factors surrounding the transaction in order to assess a proper remedial order or sanction. The purpose of the enforcement of the by-law is to protect public shareholders. Accordingly, the shareholders who are immediately affected by the breach of the by-law ought to be given an opportunity to be heard and to set before the commission those factors which it believes ought to be taken into consideration, as well as being given the opportunity to suggest an adequate remedial order or sanction.

the respondent should face only one prosecutor -- the OSC staff, and not be faced with a second prosecutor through the granting of standing to intervene. The first case referred to was Re Zenmac Explorations Ltd. (1982), O.S.C.B. 542C. Zenmac was a hearing convened pursuant to the provisions of s. 123 of the Act, to consider whether a temporary cease trading order in the securities of Zenmac should be made permanent. J. Patrick Sheridan ("Sheridan") applied for standing to intervene on the basis that he was the owner of some 200,000 voting shares of Zenmac. As such, he argued that he would be directly affected by a cease trade order. In denying Sheridan's application, the commission noted that s. 123 proceedings are adversarial in nature, with the carriage of the proceeding being in the hands of OSC staff counsel. The other parties to the proceedings are the individuals and companies against whom the proceedings are directed. In the words of the decision in Zenmac:

> To grant the Applicants status, that is to permit the intervention as a party of someone who might be perceived as being a second prosecutor, would not be appropriate.

16 The OSC followed its own decision in Zenmac in Re Electra Investments (Can.) Ltd. (1983), O.S.C.B. 1C. Electra was a s. 124 hearing convened to decide whether Electra's trading rights in Ontario ought to be withdrawn on the basis that it had made a take-over bid for the shares of Energy and Precious Metals Inc. ("EPM") without complying with Pt. XIX of the Act. EPM was named in the notice of hearing and counsel for EPM was served with the notice. At the hearing, counsel for Electra objected to EPM having standing, and referred the commission to its decision in Zenmac.

17 The commission ruled that the decision in Zenmac was directly applicable in the matter before it. The commission held as follows:

> Section 124 proceedings are adversarial in nature and prosecution of the complaints is in the hands of staff counsel. In our view, the other parties to the proceedings are the individuals and persons against whom the proceedings are directed. To grant EPM status, which is to permit the intervention as a party of someone who might be perceived as being a second prosecutor, would not be appropriate. Indeed, staff counsel should be viewed as adequately representing the interest of EPM and its shareholders insofar as section 124 of the Act is concerned.

In the Electra matter, the OSC ultimately sought a compliance order in the High Court pursuant to the terms of s. 122 of the Act to require Electra to make a take-over bid to the other shareholders of EPM. In those proceedings, EPM was granted standing as its shareholders would have a direct interest in the matter of whether a take-over bid was to be ordered or not. That ruling was upheld by the Court of Appeal [Re O.S.C. and Electra Investments (Can.) Ltd., reported at 44 O.R. (2d) 61, 38 C.P.C. 57] on the basis that "[i]t is thus clear that these shareholders were likely to be financially affected and to acquire a benefit as a result of the hearing. They were then properly before the Court" [p. 64 O.R., p. 62 C.P.C.] . There is nothing in the Court of Appeal's decision that in any way diminishes the