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August 12, 2004

PRIVILEGED AND CONFIDENTIAL

Ms. Monica C. Kowal
General Counsel
Ontario Securities Commission
20 Queen Street West
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Dear Ms. Kowal:

Re: Fairness Committee Report – Opinion

This letter responds to your request for my opinion on two questions arising from the report of the Fairness Committee to the Commission dated March 5, 2004. I will begin by setting out the two questions and a summary of my opinion. I will then briefly review the relevant aspects of the structure and functions of the Commission, before explaining in more detail the reasoning underlying my opinion.

Summary

1. *Does the nature, degree and effect of the apprehension of bias to which the Fairness Committee makes reference in its report affect the ability of the Commission to lawfully exercise its adjudicative powers conferred by the Securities Act?*

   No. The apprehension of bias of which the Committee speaks in its report is based on factors attributable to the structure and functions of the Commission as set out in the *Securities Act*. The law is clear that statutory authorization, express or implied, overcomes any allegation of reasonable apprehension of bias, unless the statute contravenes the *Charter* or some other provision of the Constitution. Further, the Committee's statements about reasonable apprehension of bias are based on the multiple functions that the Commission carries out. The Supreme Court of Canada has repeatedly recognized that the overlapping of functions in a single agency may often be necessary for the agency effectively to carry out its intended role, and that the overlapping of functions does not by itself create a reasonable apprehension of bias.

2. *Having regard to the structure and operation of the Commission, will the imposition of the new sanctions under section 127 of the Securities Act engage section 11(d) of the*

Charter and if so, what would the Commission be required to do that it does not presently do so as to meet the constitutional requirements of independence and impartiality?

The new sanctions do not change the nature of the Commission's public interest jurisdiction or the orders that it may make under section 127 so as to engage section 11(d) of the *Charter*. The public interest jurisdiction and the sanctions that may be imposed remain regulatory, protective and corrective, rather than penal, in nature. However, even if section 11(d) was engaged, the current institutional arrangements under which the Commission operates do not violate the section 11(d) guarantee of independence and impartiality, which includes entitlement to an unbiased tribunal. The overlap of functions does not by itself create a lack of impartiality for purposes of this guarantee, any more than it gives rise to a reasonable apprehension of bias at common law.

Structure and functions of the Commission

The *Securities Act* continues the Commission as a corporation without share capital, comprising members and a Chair appointed by the Lieutenant Governor in Council. The purposes of the Act are stated to be to provide protection to investors from unfair, improper or fraudulent practices, and to foster fair and efficient capital markets and confidence in capital markets (section 1.1). The Act sets out a series of fundamental principles that the Commission is to consider in pursuing these purposes (section 2.1). Among them is the principle that "[e]ffective and responsive securities regulation requires timely, open and efficient administration and enforcement of [the] Act by the Commission." The Commissioners are responsible for the administration of the Act and required to perform the duties assigned to them under the Act (section 3.2(2)).

The Act confers a wide range of powers on the Commission. These range from regulatory and administrative powers to investigative, prosecutorial and adjudicative powers. The Act also vests in the Commission responsibility for making rules and setting policies, subject to the accountability mechanisms set out in section 143 of the Act. The Commission is to carry out each of the roles contemplated by the powers and duties that the Act confers on it in a manner consistent with and in furtherance of the Commission's mandate set out in section 1.1 of the Act.

The Act expressly separates investigation from adjudication by providing that no member of the Commission who participates in the exercise of the Commission's investigation powers shall sit on a hearing arising out of the investigation, except with the consent of the parties (section 3.5(4)).

The Commission is authorized by the Act to employ such persons as it considers necessary to enable it effectively to perform its duties and exercise its powers (section 3.6(1)). The Commission has organized its staff so as to segregate staff involved in enforcement from other employees of the Commission.

Question 1: Effect of perceived bias on the Commission's ability to exercise its powers

As I understand it, the focus of this question is on whether, apart from any *Charter* issue, the Commission is unable lawfully to exercise its adjudicative powers because of the nature, degree and effect of the apprehension of bias to which the Fairness Committee makes reference in its report. My conclusion on this question is that the apprehension of bias to which the Fairness Committee refers in its report does not affect the ability of the Commission lawfully to exercise its powers.

There are three main elements to the reasoning that leads to this conclusion. First, it is well established that statutory authorization, express or implied, overcomes any allegation of reasonable apprehension of bias. Second, the Committee's complaints about reasonable apprehension of bias are founded on the Commission's structure established, and the Commission's discharge of powers conferred, by the *Securities Act*. Third, courts have repeatedly recognized that overlapping of functions in a single agency may often be desirable and does not by itself give rise to a reasonable apprehension of bias. I will deal with each of these elements in turn.

Statutory authorization overcomes apprehension of bias

It is firmly established in Canada that (leaving aside any constitutional issues) an apprehension of bias on the part of a tribunal will not affect the lawfulness of the tribunal's actions where what is alleged to give rise to bias is authorized by statute. This is because reasonable apprehension of bias is an element of the common law principles of natural justice, which the legislature is free to displace. As it happens, the leading cases are cases in which allegations of reasonable apprehension of bias were made against securities commissions, and the allegations were founded on concerns about the multiple functions that the commissions were authorized to discharge.

In *Re W.D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129 (C.A.), one of the members of the panel of the Ontario Securities Commission hearing a proceeding to consider the cancellation or suspension of registrations had participated in authorizing the investigation that led to the proceeding, attended a Commission meeting at which a recommendation to commence the proceeding was approved and attended a further Commission meeting at which the notice of hearing was approved. An application was brought to prohibit the continuation of the proceeding based on a reasonable apprehension of bias arising from the overlap of investigative and adjudicative functions. The argument was that it was reasonable "to fear that a tribunal, which comes to the hearing forearmed with prejudicial information as a result of its own investigation, will not deal fairly with the issues before it".

The Court of Appeal affirmed the dismissal of the application. It observed that "the Commission [was] by statute the investigator, the prosecutor and judge." It held that "[w]here a statute by its terms or by clear implication precludes the introduction of a common law rule and where the imposition of such a rule would frustrate the will of the Legislature or of Parliament as expressed in the statute, the Court is not free to insist that the common law rules prevail." It concluded that to give effect to the argument that any member of the Commission who received the report of the investigator was automatically disqualified from participating in a

hearing would frustrate the scheme of the statute. It went on to state that "[w]here by statute the tribunal is authorized to perform tripartite functions, disqualification must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted."

The Supreme Court of Canada approved of and adopted the approach taken in the *Latimer* case in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301. In that case the Commission convened a hearing to consider the possible issuance of a cease trading order and removal of exemptions. The chairman of the Commission, who was to sit on the hearing panel, had received a report on the investigation that led to the issuance of the notice of hearing. It was alleged that the chairman's involvement in the investigation gave rise to a reasonable apprehension of bias, so that the Commission had no jurisdiction to proceed with the hearing.

The Supreme Court agreed with the Court of Appeal's statement of the law in *Latimer*. It held that where an apprehension of bias is alleged based on an overlap of functions, the overlap has been authorized by statute, and the constitutionality of the statute is not in issue, the doctrine of reasonable apprehension of bias does not apply. The challenge based on bias could therefore not succeed unless the Commission had in some manner gone beyond its statutory duties. Since everything that the chairman did was either expressly or impliedly authorized by statute, there was no bias as a matter of law, and the Commission had jurisdiction to proceed with the hearing.

In cases decided since *Brosseau*, the Supreme Court has reaffirmed that common law principles of natural justice may be ousted by statute, either expressly or by necessary implication: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781 at para. 22; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paras. 117-118.

Complaints about bias arise from structure authorized by statute

The Committee sets out beginning at page 12 of its report the factors that form the basis for what it states is "[t]he pervasive and widely held perception that a 'fair hearing' before the Commission cannot be obtained". A review of these factors shows that each of them is based on some aspect of the Commission's structure or functioning that the legislature has authorized expressly or by implication in the *Securities Act*. There is nothing, to use the language of the *Latimer* case, "going beyond the performance of the duties imposed upon [the Commission] by the enactment pursuant to which the proceedings are conducted." It follows that there is nothing in the assertion of reasonable apprehension of bias that affects the ability of the Commission lawfully to exercise its adjudicative powers.

Overlapping of functions does not create a reasonable apprehension of bias

Apart from statutory authorization, there is a further reason why the overlapping of functions that is the focus of the Committee's statements about bias does not give rise to a reasonable apprehension of bias. The Supreme Court has recognized the desirability of vesting overlapping functions in administrative agencies. It has recently reaffirmed that the overlapping of functions does not on its own create a reasonable apprehension of bias that deprives a tribunal

of impartiality. Though there may be room for disagreement from a policy perspective as to whether it is desirable to confer overlapping functions on an agency, overlapping of functions does not by itself create a reasonable apprehension of bias as a matter of law.

The Supreme Court addressed the question of overlapping functions in its 1989 decision in the *Brosseau* case, which as mentioned above rejected an allegation of reasonable apprehension of bias against the Alberta Securities Commission. The allegation of reasonable apprehension of bias in *Brosseau* was based on common law principles. At common law, the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining the relevant information.

While the decision in *Brosseau* turned on the statutory authorization of what was alleged to give rise to bias, the Court spoke more broadly (at 310) about overlapping functions in administrative agencies:

> Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. In establishing such tribunals, the legislator is free to choose the structure of the administrative body.... In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" per se.

The Court returned to this theme in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623. The Court stated (at 634):

> Administrative boards play an increasingly important role in our society. They regulate many aspects of our life, from beginning to end....
>
> Some boards will have a function that is investigative, prosecutorial and adjudicative. It is only boards with these three powers that can be expected to regulate adequately complex or monopolistic industries that supply essential services.

The Court also addressed the suggestion that an apprehension of bias arose when a member of a tribunal that plays a policy role expressed views prior to a hearing on an issue bound up in the hearing. The Court (at 638-639) refused to accept this suggestion, holding that a reasonable apprehension of bias would not arise unless the tribunal member was shown to have a "closed mind"; that is, unless "there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile." It noted that some tribunals play a significant policy role, and are intended to factor the policies that they develop into their decisions:

> Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.

In *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, a challenge was brought to the legislation establishing the Régie (the Quebec liquor licensing authority) on the ground that Régie's structure and operations infringed the right guaranteed in the Quebec *Charter of Human Rights and Freedoms* to a hearing before an independent and impartial tribunal. The Quebec *Charter* is a quasi-constitutional statute, which takes precedence over ordinary legislation. The arguments against the Régie were based primarily on its role at various stages in the liquor permit cancellation process. The legislation authorized employees of the Régie to participate in the investigation, the filing of complaints, the presentation of the case to the directors and the decision.

At the outset of its consideration of these arguments (at paras. 47-48), the Court observed – referring to its statements in the *Brosseau* and *Newfoundland Telephone* cases – that "a plurality of functions in a single administrative agency is not necessarily problematic." It added that "[a]lthough an overlapping of functions is not always a ground for concern, it must nevertheless not result in excessively close relations among employees involved in different stages of the process."

The Court concluded (at paras. 52, 56) that, in the case of the Régie, a reasonable apprehension of bias arose from the fact that, in practice, the same employees of the Régie were involved at every stage of the process leading up to the cancellation of a liquor permit, from investigation to adjudication. Among other things, the same counsel employed by the Régie were involved at both the prosecution and the adjudication stage. It also indicated (at para. 60) that "a form of separation among the directors involved in the various stages of the process is necessary to counter that apprehension of bias." It made clear, however that "[t]he fact that the Régie, as an institution, participates in the process of investigation, summoning and adjudication is not in itself problematic."

In its 2001 decision in *Ocean Port*, the Supreme Court referred to the decision in the *Régie des permis d'alcool* case (at para. 40) as resulting from "the possibility of a *single officer* participating at each stage of the process, from the investigation of a complaint through to the decision ultimately rendered" (emphasis in original). It added (at para. 41) that "the overlapping of investigative, prosecutorial and adjudicative functions in a single agency is frequently necessary for a tribunal to effectively perform its intended role."

The Supreme Court dealt most recently with an allegation of lack of impartiality based on overlapping functions in *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884. The allegations, made by Bell against the Canadian Human Rights Commission, were based in part on the right conferred by the *Canadian Bill of Rights* – also quasi-constitutional legislation – to a fair hearing in accordance with the principles of fundamental justice for the determination of rights and obligations.

One of Bell's objections was that Parliament had placed in the same body the functions of formulating guidelines (a policy function), investigating complaints and acting as prosecutor before the Canadian Human Rights Tribunal. The Court responded to this argument as follows (at para. 40):

> Bell is correct in suggesting that the Commission shares these functions. However, this overlapping of different functions in a single administrative agency is not unusual, and does not on its own give rise to a reasonable apprehension of bias (see *Régie des permis d'alcool* ...; *Newfoundland Telephone* ...; *Brosseau v. Alberta Securities Commission* ...). As McLachlin C.J. observed in *Ocean Port*, ... "[t]he overlapping of investigative, prosecutorial and adjudicative functions in a single agency is frequently necessary for [an administrative agency] to effectively perform its intended role".

In my view, the application to the Commission of the Supreme Court's approach to overlapping functions provides a further reason for concluding that there is no reasonable apprehension of bias that prevents the Commission from lawfully discharging its powers. The Commission is the very type of agency that the Court has indicated may have to be vested with overlapping powers in order to effectively carry out its mandate. The combination of statutory provisions and settled practice means that there is no ongoing involvement of the same Commissioners or the same Commission employees in investigative, prosecutorial and adjudicative functions of the kind that was problematic in the *Régie des permis d'alcool* case. The fact that the Commission discharges multiple roles does not create a reasonable apprehension of bias.

Question 2: Applicability of section 11(d) of the *Charter*

In my view the new sanctions available under section 127 do not change the nature of the Commission's public interest jurisdiction or the orders that it may make under section 127 so as to engage section 11(d) of the *Charter*. The public interest jurisdiction and the sanctions that may be imposed remain regulatory, protective and corrective, rather than penal, in nature. However, even if section 11(d) was engaged, the current institutional arrangements under which the Commission operates do not violate the section 11(d) guarantee of independence and impartiality.

In setting out the reasoning underlying these conclusions, I will first describe the new sanctions and what I understand making them available was intended to accomplish. I will then set out the law governing the applicability of section 11(d) of the *Charter*. Next, I will review the nature of the Commission's jurisdiction under section 127, both as it was characterized before the amendments adding the new sanctions and in light of the new sanctions, and explain why, in my view, the Commission's exercise of that jurisdiction does not engage section 11(d). I will then briefly explain why, even if section 11(d) were applicable, the current structure of the Commission would not violate the constitutional requirement of independence and impartiality.

The new sanctions

Section 127 of the *Securities Act* was recently amended to add to the orders that the Commission may make in the public interest, where a person or company has not complied with Ontario securities law, an order requiring the person or company to pay an administrative penalty of not more than $1 million for each failure to comply (section 127(1)9) or requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance (section 127(1)10). Section 127(1) now reads as follows:

> 127.(1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:
>
> 1. An order that the registration or recognition granted to a person or company under Ontario securities law be suspended or restricted for such period as is specified in the order or be terminated, or that terms and conditions be imposed on the registration or recognition.
>
> 2. An order that trading in any securities by or of a person or company cease permanently or for such period as is specified in the order.
>
> 3. An order that any exemptions contained in Ontario securities law do not apply to a person or company permanently or for such period as is specified in the order.
>
> 4. An order that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Commission.
>
> 5. If the Commission is satisfied that Ontario securities law has not been complied with, an order that a release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular, offering memorandum, proxy solicitation or any other document described in the order,
>
> i. be provided by a market participant to a person or company,
>
> ii. not be provided by a market participant to a person or company, or
>
> iii. be amended by a market participant to the extent that amendment is practicable.
>
> 6. An order that a person or company be reprimanded.
>
> 7. An order that a person resign one or more positions that the person holds as a director or officer of an issuer.

8. An order that a person is prohibited from becoming or acting as a director or officer of any issuer.

9. If a person or company has not complied with Ontario securities law, an order requiring the person or company to pay an administrative penalty of not more than $1 million for each failure to comply.

10. If a person or company has not complied with Ontario securities law, an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance.

Section 3.4(2) of the Act provides that the Commission shall pay into the Consolidated Revenue Fund money that it receives through a settlement of enforcement proceedings or an order for an administrative penalty or disgorgement, but provides an exception where the money is designated under the terms of the order or settlement for an allocation to or for the benefit of third parties that is approved by the Minister or belongs to a class of allocations approved by the Minister. Though there have to date been no orders made imposing the new sanctions, I understand that in every case to date of a payment under a settlement a designation has been made that the money be used for the benefit of third parties.

The addition of the new sanctions to section 127 followed publication of the Draft Report of the Five Year Review Committee, *Reviewing the Securities Act (Ontario)* (May 29, 2002). The Committee expressed the primary purpose of the Commission's enforcement powers, as a regulator with a public interest jurisdiction, as "providing protection to investors, preventing future harm, and ensuring fair and efficient capital markets and confidence in those markets" (at 117 of the Draft Report). It concluded (at 122) that the sanctions then available to the Commission constrained its ability to fashion appropriate remedies in all situations, whether to send a sufficiently strong deterrent message or to avoid harm to innocent parties. It noted that securities regulators in many other jurisdictions had the power to order the payment of administrative penalties, and recommended that this power be added to section 127.

The Committee also recommended (at 124-125) that the Commission be given the power to order the disgorgement of profits made as a result of contravention of Ontario securities law. It concluded that an order for disgorgement "would serve to maximize the deterrent effect of the overall sanction", and "send a strong deterrent message in circumstances in which the respondent has profited from its improper actions".

When the amending legislation to add the two new sanctions was introduced, the government spokesperson described the new sanctions as intended "to further protect Ontario investors" (*Hansard*, November 19, 2002).

Criteria for application of section 11(d) of the Charter

Section 11(d) of the Charter states:

Any person charged with an offence has the right:

...

> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The leading case on the application of section 11 is *R. v. Wigglesworth*, [1987] 2 S.C.R. 541. The Supreme Court held in *Wigglesworth* that a proceeding will engage section 11 only if one of two conditions is met: the proceeding is "criminal by its very nature" or, even if it is not, it may lead to a "true penal consequence".

The Court elaborated on the meaning of both of these conditions. It defined a proceeding that is "criminal by nature" as one that is "of a public nature, intended to promote public order and welfare within a public sphere of activity". It contrasted this type of proceeding with "private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity". As illustrations of this latter type of proceeding, which cannot be said to be "criminal by nature", it referred to decisions in Ontario and Alberta holding that section 11 does not apply to a proceeding brought before a securities commission under securities legislation to obtain a cease-trading order. It went on to state that "[p]roceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of 'offence' proceedings to which section 11 is applicable."

In elaborating on the second type of proceeding that would engage section 11 – a proceeding that is not "criminal by nature but can nonetheless lead to a "true penal consequence" – the Court stated that a "true penal consequence" would be "imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity". It added that one indication of the purpose of a particular fine is how the body is to dispose of the fine that it collects. If the fine is not paid into the Consolidated Revenue Fund, but used for the benefit of the body that levied it, it is more likely that it represents an internal or private sanction. In my view, use of the penalty for the benefit of third parties should similarly favour characterization as an internal or private sanction.

Nature of section 127 jurisdiction and orders makes section 11(d) of the Charter inapplicable

Orders made by securities commissions in the exercise of their public interest jurisdiction under section 127 of the Ontario *Securities Act* and similar provisions in other jurisdictions have consistently been regarded as regulatory, protective or corrective, rather than penal, in nature.

In the *Brosseau* case (at 314), the Supreme Court observed that "[s]ecurities acts in general can be said to be aimed at regulating the market and protecting the general public," and spoke of the Alberta Commission's "protective role, common to all securities commissions".

The Supreme Court specifically considered the nature and scope of the public interest power under section 127 prior to the addition of the new sanctions in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001]

2 S.C.R 132. The Court (at para. 42) agreed with the Ontario Court of Appeal that "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets." It went on to state that "orders [under section 127] are not punitive .... Rather, the purpose of an order under [section] 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets."

The Supreme Court's characterization in *Asbestos* of orders made in the exercise of securities commissions' public interest jurisdiction was consistent with the characterization of these orders by lower courts in a number of earlier decisions. Based on the view that public interest proceedings are regulatory and protective rather than penal in nature, the Alberta Court of Appeal and the Ontario Divisional Court had both held, prior to *Asbestos* (and in the absence of any administrative penalty or disgorgement sanction), that these types of proceedings do not come within section 11(d) of the *Charter*: *Barry v. Alberta Securities Commission* (1986), 25 D.L.R. (4th) 730 at 736 (C.A.), affirmed on other grounds, [1989] 1 S.C.R. 301; *Malartic Hygrade Gold Mines v. Ontario Securities Commission* (1986), 54 O.R. (2d) 544 at 549 (Div. Ct.).

In *Johnson v. British Columbia (Securities Commission)* (1999), 67 B.C.L.R. (3d) 145 (S.C.), leave to appeal refused, (1999), 128 B.C.A.C. 207 (C.A.), the B.C. Supreme Court considered whether the addition of the power to impose an administrative penalty changed this position. Section 162 had been added to the B.C. *Securities Act* in 1989. It provides, in terms very similar to those now in section 127(1)9 of the Ontario statute, that the B.C. Commission, where it considers it in the public interest to do so, may order a person who it finds has contravened the Act, a regulation or a decision of the Commission to pay the Commission an administrative penalty. The maximum penalty under section 162 was initially $100,000. It has since been raised to $250,000 for individuals and $500,000 for others, and is expected to be raised to $1 million shortly when B.C.'s new securities legislation is proclaimed. The Court held that the addition of the administrative penalty sanction did not change the nature of public interest proceedings before the Commission or bring them within section 11(d).

Though not in the specific context of a section 11(d) claim, the B.C. Court of Appeal similarly held following the Supreme Court's *Asbestos* decision, in *Johnson v. British Columbia (Securities Commission)* (2001), 206 D.L.R. (4th) 711 at 726, that the addition of the administrative penalty sanction did not "[alter] the Act's basic character as regulatory legislation, and that the sanction was of no different character from the regulatory sanctions contained in the Ontario Act discussed in *Asbestos*. In *Smolensky v. British Columbia (Securities Commission)* (2003), 17 B.C.L.R. (4th) 145 at para. 71, the B.C. Supreme Court again held that the addition of the administrative penalty sanction did not bring section 11(d) into play. (On appeal, this and other *Charter* rulings made at first instance were set aside as premature, without addressing the merits of the point: (2004), 236 D.L.R. (4th) 262 (B.C.C.A.), application for leave to appeal pending, [2004] S.C.C.A. No. 274.)

In my view, the recent decision of the Supreme Court of Canada in *Cartaway Resources Corp (Re)*, 2004 SCC 26, clears away any doubt that the addition of the new sanctions does not transform the nature of the Commission's section 127 powers. These powers remain regulatory, protective and corrective.

The issue in *Cartaway* was whether the B.C. Securities Commission could consider general deterrence as a factor in imposing an administrative penalty in the exercise of its public interest jurisdiction. In holding that the Commission was entitled to consider general deterrence in ordering the maximum administrative penalty under section 162, the Court reviewed (at para. 58) the nature of securities commissions' public interest jurisdiction. It referred to its holding in *Asbestos* that "[b]ecause s. 127 is regulatory, its sanctions are not remedial or punitive, but rather are preventative in nature and prospective in application." It held (at para. 60) that "nothing inherent in the Commission's public interest jurisdiction, as it was considered by this Court in *Asbestos*, ... prevents the Commission from considering general deterrence in making an order." "To the contrary," it stated, it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative."

The Court went on to observe (at para. 62):

> It may well be that the regulation of market behaviour only works effectively when securities commissions impose *ex post* sanctions that deter forward-looking market participants from engaging in similar wrongdoing. That is a matter that falls squarely within the expertise of securities commissions, which have a special responsibility in protecting the public from being defrauded and preserving confidence in our capital markets.

The Supreme Court in *Cartaway* thus saw an order for payment of a $100,000 monetary penalty to the B.C. Securities Commission, made in the exercise of its public interest jurisdiction, as a protective and preventative regulatory order, fully consistent with the Court's characterization of securities commissions' public interest jurisdiction in the *Asbestos* case.

The fact that a higher maximum penalty is available under section 127(1)9 of the Ontario Act provides no reason for treating the Ontario Commission's power to order administrative penalties any differently. Nor does a maximum penalty at the $ 1 million level amount (in the language of the *Wigglesworth* case) to "a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity". The transactions that come before the Commission vary in scale. Some involve very significant amounts of money. It was reasonable for the Legislature to conclude that, depending on the circumstances in which a violation of Ontario securities law occurs, a penalty of or approaching $1 million may be necessary to achieve the regulatory, protective and corrective purpose of section 127. The Commission has long had the authority under section 127 to make orders whose practical monetary consequences will be $1 million or more. As the Supreme Court recognized in *Cartaway* (at para. 64), "[p]rotecting the public interest will require a different remedial emphasis according to the circumstances." It would not be appropriate in my view to treat the $1 million maximum as changing the nature of section 127 proceedings and the purpose of a section 127 sanction from the nature and purpose reiterated in *Cartaway*.

Similarly, depending on the circumstances, it may be entirely reasonable to consider that a disgorgement order under section 127(1)10 is necessary, as part of an overall

package of sanctions, to "deter forward-looking market participants from engaging in similar wrongdoing". The reasoning in *Cartaway* applies equally to this type of order. A disgorgement order in any event bears little resemblance to a traditional penal sanction.

I conclude that section 127 orders, whether or not they include the new sanctions, are regulatory, protective and preventative in nature. Section 127 proceedings are therefore not "criminal by nature" within the meaning of the *Wigglesworth* case. Nor do section 127 orders involve a "true penal consequence". The new sanctions accordingly do not engage section 11(d) of the *Charter*.

No breach of section 11(d) requirements in any event

In dealing with this aspect of question two, I will focus on the impartiality element of the requirement in section 11(d) that a tribunal to whose proceedings the section applies be independent and impartial. I understand this to be the element of section 11(d) of concern to the Fairness Committee. The Supreme Court of Canada has treated the test of impartiality for purposes of section 11(d) as equivalent to the test for a reasonable apprehension of bias at common law: *e.g.*, *R. v. Lippé*, [1991] 1 S.C.R. 114 at 143. As mentioned above, according to that test the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining the relevant information.

In my view, even if section 11(d) did apply, the overlapping of functions to which the Committee repeatedly refers in its report would not give rise to a breach of its requirement of impartiality. The discussion above of the Supreme Court's approach to allegations of reasonable apprehension of bias based on overlapping functions apart from the *Charter* applies equally in the context of section 11(d). It follows that even if section 11(d) of the *Charter* applied to the Commission in light of the new sanctions, the overlapping of functions would not give rise to a breach of the right that section 11(d) guarantees to a hearing before an impartial tribunal. The multiple roles that the Commission carries out, including the involvement of Commissioners in both policy-making and adjudication, does not create an absence of impartiality, whether at common law or under the *Charter*.

Yours very truly,

John B. Laskin

JBL/tp