

**REPORT
OF
THE FAIRNESS COMMITTEE
TO
DAVID A. BROWN, Q.C.
CHAIR OF THE
ONTARIO SECURITIES
COMMISSION**

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INTRODUCTION AND MANDATE

In February 2003, we were asked by David A. Brown, Q.C., the Chair and chief executive officer of the Ontario Securities Commission ("OSC" or the "**Commission**"), to review and provide advice on the Commission's current structure and, in particular, its adjudicative function in light of the increased sanctioning powers (fines of up to \$1 million and disgorgement orders) given to the Commission by Bill 198.¹ In fulfilling our mandate, we proceeded on the basis that, absent clear and convincing evidence, we would not recommend structural change.

The Commission as it is currently structured engages in policy-setting, rule-making, investigation, prosecution and adjudication under one corporate, statutorily established, umbrella. This, so the argument goes, at a minimum creates a perception of bias at the level of the Commission's adjudicative function, even though by both practice and legislation a Commissioner involved in the investigation of a matter cannot participate in the adjudication of the same matter, absent written consent.² Critics of the existing structure contend that the perception of bias works to erode the credibility of the Commission. This is not a new issue. Indeed, it was the subject of debate in England and in the United States in the 1930s.³

Our mandate requires that a number of questions be asked and answered. Does the current controversy about institutional impartiality and independence and the claim that they

¹ S.O. 2002, c. 22, ss. 177-189 [ss. 182, 185 not in force].

² *Securities Act*, R.S.O. 1990, c. S.5, s. 3.5(4) ("**Act**").

³ Nathanson, "Separation of Functions within Federal Administrative Agencies," 35 Ill. L. Rev. 901 (1941) cited in Anisman, "The Ontario Securities Commission as Regulator: Adjudication Fairness and Accountability" October 3, 2003, Queen's Annual Business Law Symposium 2003.

are compromised by the Commission's overlapping functions amount to no more than a revisiting of an old issue? Is there more to the debate than the fact the Commission engages in policy-setting, rule-making and enforcement as well as adjudication? Is the current controversy aggravated by the fact the Commission now has authority to impose substantial fines, order disgorgement, and assess costs against respondents, but not its own staff? Does it result from the OSC's heightened attention to enforcement, the increase in the number of disciplinary proceedings and the high profile given to many of these proceedings by the media? Is it a consequence of the increased judicialization of the Commission proceedings? Have the stakes for both the Commission and respondents become so much higher in many situations as to prompt a call for restructuring? Even if these several factors explain the concerns expressed by critics of the current Commission structure, are they in fact sufficient to legitimately call into question the institutional fairness of the current processes?

If there are structural problems, as many contend, is the answer the creation of a separate adjudicative tribunal that would have jurisdiction over all, or some matters that come before the Commission for adjudication?

If there is a case for a separate adjudicative tribunal, what would the jurisdiction of the tribunal be? Who should sit on it? How would members of that tribunal be selected? Who would appoint them? What would their term of office be? Who would pay them and what would their remuneration be? Would they be full- or part-time members of the tribunal? If members of the tribunal were to be part-time, would there need to be a full-time Chair, and perhaps a Vice-Chair or Chairs? To whom would such a tribunal report and be accountable? Would qualified people be attracted to such a tribunal?

Are there alternatives to splitting off the adjudicative function of the Commission that deserve consideration, even if one were to accept the substance of the criticism about the Commission's overlapping functions as related to its enforcement and adjudicative roles? Is hiving off Enforcement a practical solution? Any separate enforcement unit would still have to take policy direction from the Commission or its Chair. To whom would it report? What about alternatives such as the American Securities and Exchange Commission ("SEC") model which has administrative law judges working within the SEC structure?

Finally, do we face a problem about institutional bias and lack of independence in reality, or simply a perception problem? If the problem is one of perception, whose perceptions count – those of respondents or their counsel, or are there other potentially countervailing perceptions that should be taken into account? Do the ethical walls that exist between Enforcement and the Commissioners, except the Chair, obviate the need for more radical structural change?

In attempting to answer these questions, in addition to considering how securities regulation is structured in other jurisdictions, we have reviewed much of what has been written that is relevant to the controversy to which we have referred above. We have met with the Chair and Vice-Chairs of the Commission, all of the current Commissioners, some Commission staff and former Commission staff, members of the bar (securities solicitors and counsel), all available former Chairs of the Commission since 1978, academics, and members of the financial services and investment communities.

In the end, we are satisfied that we have received and taken into account a reasonable spectrum of informed opinion. We advised all those with whom we met that their

opinions would be received on a without attribution basis. We sought and received consent to disclose only the names of those who met with us. All of those with whom we met are listed in alphabetical order in Appendix III to this Report.

Before concluding this section of our Report, we want to specifically note that we are grateful for the cooperation of all those involved in this undertaking. We particularly want to thank the Chair, the Commissioners, the Commission secretary and Commission staff for their cooperation and assistance in arranging meetings and meeting with us. We are also grateful to all those who took the time to give us the benefit of their opinions. Finally, we wish to thank Marie-Andrée Vermette, Ian Mitchell, and Darren Segec of WeirFoulds LLP, and Jon Goode, presently in the second year of his LL.B. studies at Queen's University, for their invaluable assistance in the preparation of the Report.

THE STRUCTURE OF THE COMMISSION

The OSC is a self-funding, integrated agency established by statute.⁴ It is a regulatory agency responsible for overseeing the securities industry in Ontario. The OSC administers the *Securities Act*, the *Commodity Futures Act* and provisions of the Ontario *Business Corporations Act*.

The Commission is integrated in the sense that its regulatory functions (rule-making, policy development, investigation, enforcement and adjudication) are, for the most part, performed under one corporate umbrella.

The board of directors of the Commission oversees the management of the financial and the other affairs of the Commission.⁵ At present, the board is composed of the Commission's Chair, one Vice-Chair and nine part-time Commissioners, all of whom are appointed by the Lieutenant Governor in Council for varying terms of office, not exceeding five years. Commissioners may be reappointed by the Lieutenant Governor in Council for further terms. The *Act* provides that there must be at least nine, but not more than fourteen Commissioners.

The Commissioners meet every two weeks to deal with regulatory policy matters. We will refer to these policy-oriented meetings later in this report. For now, we note that some contend that the Commissioners' involvement in policy development and discussion assists Commissioners in discharging their adjudicative responsibilities. Current Commissioners are

⁴ *Act*, *supra* note 2.

⁵ *Act*, s. 3.1(2).

divided on the benefits of their involvement in policy formulation and discussion. Some feel there is none; some feel the benefits are minimal; and some find their involvement in policy discussions to be of great assistance to them when discharging their adjudicative responsibilities.

In addition, Commissioners meet regularly, but no less than quarterly, as a board of directors responsible for the oversight of the broader management of the financial and other non-regulatory affairs of the Commission. Their responsibilities mirror the responsibilities of directors of public companies. The Board discharges its oversight responsibilities through regular meetings and by way of three standing Committees of the Board. They are the Audit and Finance Committee, the Corporate Governance and Nominating Committee, and the Compensation Committee.

The Commission has organized itself into ten core branches. They are:

- Capital Markets
- Corporate Finance
- Investment Funds
- Enforcement
- Communications
- Corporate Services
- Office of the General Counsel
- Office of the Chief Accountant
- Office of the Secretary
- Office of the Chief Economist

Apart from Enforcement, we see no need to review or comment on the responsibilities and work of the Commission's ten branches listed above. A brief reference in summary form to Enforcement is, however, necessary.

Enforcement is responsible for the equitable and effective enforcement of Ontario's securities laws. Enforcement thus investigates potential breaches of securities law on a case-by-case basis of what it views as the more serious cases. How Enforcement should select matters that it will pursue is beyond our mandate. Suffice it to say, Enforcement staff receive information about potential offences from a number of sources, including the public, the media, other enforcement agencies and regulators, and the Commission's market surveillance activities. The volume of referrals is sufficiently large to make it impracticable for the Commission to devote investigative resources to all of them. Generally speaking, Enforcement pursues potential breaches that appear to have caused, or may in the future cause the greatest harm to the integrity of the capital markets. Enforcement also considers the likelihood of success if proceedings are to be undertaken as well as the resources that will likely be required to achieve that outcome.

Looked at very generally, Commission records reveal that the categories of offences most consistently pursued by Enforcement staff include abusive trading (including market manipulation and insider trading, abusive sales practices, deficient disclosure and material change reports), failure to file reports, takeover bid issues, registrant misconduct and the sale of unregistered securities.

Under section 11 of the *Act*, Commissioners may be involved in the conduct of investigations to the extent of making orders authorizing an investigation. However, by virtue of section 3.5(4), participation in that process precludes a Commissioner from participating in any

hearing arising out of the investigation. That aside, with the exception of the Chair, Commissioners are not involved in directing or advising on the institution of proceedings against a respondent. The Chair does not sit on hearings because of his involvement in monitoring the enforcement of at least high profile matters.

In its adjudicative capacity, the Commission currently deals with a broad range of transactional issues (takeover bids, poison pills, exemption orders, etc.) as well as matters in which sanctions are being sought, and reviews decisions of self-regulatory organizations ("**SROs**") such as the Investment Dealers Association ("**IDA**"). Section 122 of the *Act* also provides the Commission with the option of seeking sanctions by way of proceedings in the Ontario Court of Justice. This is reserved for cases that the Commission considers involve "criminal" conduct. In such cases, the Commission in its prosecutorial role must establish the elements of the offence alleged beyond a reasonable doubt.

Adjudicative proceedings before the Commission in which sanctions are being sought are commenced under section 127 of the *Act* by the issuance of a Notice of Hearing setting forth the relief sought. The Notice of Hearing is issued by the Commission Secretary. Enforcement staff also prepares a Statement of Allegations which is attached to the Notice of Hearing and which particularizes the conduct for which the Notice of Hearing has been issued. Both documents are available to the media and the public.

Adjudicative hearings are held before panels of Commissioners. Most panels consist of three Commissioners. They are assisted in their work by a recently appointed counsel to the adjudicative branch. The Commission has also established an Adjudicative Committee to monitor various aspects of the adjudicative functions of the Commission.

In section 127 proceedings (in contrast to those before the Ontario Court of Justice), the Commission has to meet the less onerous civil standard of proof. It would appear that unless counsel raises the issue, most hearings are not bifurcated. That is to say, both liability and sanctions are dealt with at one hearing. (Some counsel for respondents strenuously object to this procedure.) Any administrative fines assessed against respondents are paid into the Consolidated Revenue Fund. The Commission also has the power to award costs against respondents, but not in favour of respondents. These are retained by the Commission in support of its mandate.

Pre-hearing conferences, though not always held, typically address disclosure issues. These conferences generally do not focus on hearing management issues.

THE DEBATE

Overview

In the course of our research, we interviewed or received information from over 60 individuals who were or had been engaged in or affected by the Commission's regulatory reach. They include all the Chairs of the Commission since 1978 and represent all constituencies.

We have addressed the issue whether the current structure is legally suspect (Appendix I) and examined the structure for the adjudication of securities matters in a number of other jurisdictions (Appendix II). We have also read much of what has been written on the issues raised.

This includes the November 2002 publicly-released letter to the Chair from three former Chairs of the Commission (James C. Baillie, Stanley M. Beck and Edward J. Waitzer). In it, they urged the Commission to consider structural change in light of its overlapping functions and increased powers under Bill 198. The former Chairs contended that without change, the Commission's institutional credibility would erode.

On the basis of our review, we have concluded that the crucial issue is whether or not the adjudication function should be separated from the Commission.

Virtually everyone interviewed believes that the Commission provides an excellent process for transactional hearings. Our research supports this belief. Transactional

hearings include hearings with respect to take-overs, poison pills, exemptions and offerings. We are satisfied that those issues that arise in the course of an ongoing or current transaction or undertaking are well handled by the Commission, and that its hearing process is exemplary. There is a broad consensus that a separate adjudicative body would not need to be involved, save in exceptional circumstances, in these matters.

The proposed jurisdiction of a separate adjudicative body is for section 127 proceedings where staff is seeking to impose a sanction for past conduct, reviews from SROs, and specific references from the Commission.

This section is structured as follows:

- (1) The argument for a separate adjudicative body.
 - (2) The argument against a separate adjudicative body.
 - (3) The make-up of a separate adjudicative body.
 - (4) Alternatives to the current and bifurcated models.
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(1)

**The Argument for a
Separate Adjudicative Body**

The view that the adjudicative function should be removed from the Commission and be constituted as a completely separate tribunal rests on the following:

- (1) The pervasive and widely held perception is that a "fair hearing" before the Commission cannot be obtained. The perception is based on a number of factors:
 - (a) The various capacities in which the Commission acts (policy-maker, investigator, prosecutor and adjudicator). The courts' acceptance of this structure in law has done nothing to dim this perception in fact.
 - (b) Considerations of institutional loyalty make it difficult for Commissioners in their adjudicative capacity to act dispassionately. In high profile cases where substantial Commission resources have been devoted to bringing cases forward, it is difficult for the hearing Commissioners, as persons committed to the overall enterprise, to put that behind them when adjudicating. While they may believe themselves able to do so, subconsciously it must have an effect.
 - (c) The Chair's links with staff and, in particular, in relation to the issuance of notices of hearing in high profile cases cannot be totally disregarded by the Commissioners presiding at the hearing. The more prominent cases have already gone through various levels (Director of Enforcement, Executive Director, Chair) and there is an institutional commitment to

them. The Chair's involvement in the important cases continues throughout the hearing.

- (d) The existence of what appears to be an aggressive enforcement policy authorised by the Commissioners as a whole. Examples of this policy are seen at the staff level in the following: (a) in settlement discussions, the expressed position that the first offer is the best offer the respondent will receive, and if not accepted, the offers will worsen as the time runs; (b) a credit for cooperation policy, the effect of which is to penalize respondents for exercising their rights; and (c) the refusal of staff to ask a Commissioner to assist in settlement discussions. The frequently expressed concern is that this aggressive enforcement policy influences the Commissioners' approach to the cases that come before them in the exercise of their adjudicative function.
- (e) The increased penalties, career threatening consequences, enormous publicity, and the fact that the Commission almost always appears to win creates in the minds of some respondents and their counsel the impression that "the cards are stacked against them".
- (f) The power of adjudicative panels to award costs against respondents (which are retained by the Commission) is seen by some as creating an economic conflict. This argument is compounded by the absence of any power to award costs to successful respondents.

- (g) Enforcement, with its increased resources, has become much more aggressive with what appears to be little accountability.
 - (h) Commissioners are much more protective of staff in their hearings than they were in the past. Some believe this is because of the level of aggression which is now exhibited by respondents in the hearings. (Others more closely connected with staff believe just the opposite, i.e. that the Commissioners demand much more of staff in a hearing than they do of the respondents.)
 - (i) The home-court advantage. The widespread view is that staff choose to go before the Commission on a hearing rather than the courts because the onus of proof is lower, and they are not restricted by the criminal rules of evidence, including reliance on evidence acquired through the use of section 11.
- (2) The concern that unarticulated policy considerations brought by the Commissioners from their policy-making function inform a sanction hearing. Such hearings should not be used to develop policy. To do so undermines the integrity of the hearing process. At the very least, staff should be obligated to put policy issues on the table at the outset and argue for them.
- (3) Further, there is very little policy involved in sanction hearings. Typically, sanction hearings in their form are much more like a criminal trial.

- (4) In any event, there can be a disconnect between the kinds of policy considered by the Commission in its policy-setting capacity and those policy issues that arise at hearings.
- (5) The concern that in their adjudicative decisions, the Commissioners apply the public interest jurisdiction based on their experience as Commissioners, without identifying the public interest standards in advance. The public interest jurisdiction should be used to articulate standards and rules looking forward in order to prevent damage. It should not be used in an *ex post facto* fashion. Rule-making, guidelines, policies and speeches can set forth the appropriate standards. This would allow everybody to know in advance what the new standards are, and govern themselves accordingly.
- (6) Section 127 proceedings are now for all purposes no different than contentious trials. The major proceedings are complex trials. The Commissioners are poorly suited to participate in such proceedings, either as presidents or members of the panel. The recent appointment of litigation lawyers to provide this expertise is an admission of this reality.
- (7) The Commissioners who are part-time are not in a position to commit to the time requirements of a long hearing.
- (8) The Commission, in order to ensure that its adjudicative function is free from an attack based on a perception of bias, reasonably apprehended or actual, has gone to great lengths to create a partition between Enforcement and Commissioners. The Chair, as the chief executive officer, is the exception. The Chair takes an

active role in overseeing Enforcement and its major cases, both before and after the issuance of a notice of hearing. This structure has led to a malfunctioning of the Commission. Enforcement, which is one of the most important branches, operates on its own without its priorities, policies or practices being subjected to the Commissioners' advice and oversight. Enforcement has been described as a "black hole" within the Commission.

- (9) The absence of involvement on the part of the Commissioners as a whole is of concern not only from the functional point of view, but from the legal as well. The Commissioners are the board of directors of the Commission, a corporation without share capital, with the responsibility of overseeing the management of the financial and other affairs of the Commission. This, of course, includes the enforcement branch. This responsibility cannot be delegated to the chief executive officer.
- (10) If the adjudication function were to be removed from the Commission, there would be no need for the separation of Enforcement from the Commissioners. The Commissioners as a whole would be entitled to take a hands-on approach to the establishment of enforcement priorities, practices (including a protocol to govern the settlement process) and planning. This is particularly important currently. Perhaps as a by-product of the much more aggressive enforcement policy of the present Chair, there is a large informed opinion that Enforcement acts without effective accountability and restraint in exercising its mandate. It is essential for the Commissioners to exercise their corporate responsibilities and take control of Enforcement, especially when the Commission is publicly

emphasising proper corporate governance. Absent the impediment of the partition, the Commissioners would be free to focus on enforcement priorities, establish the appropriate oversight safeguards, and speak with one voice without fear of tainting the adjudicative process. The Commissioners, without the internal bifurcation, could move collectively and decisively to safeguard the capital markets.

- (11) The Commission exhibits in its adjudicative functions a "crisis of confidence". It is overly sensitive to external criticism of its decisions, especially in the media. This results in a failure to develop consistent enforcement policies, priorities and practices, leading to confusion both within the Commission and in staff's dealings with those outside. The removal of the adjudicative function would mean that the Commission would no longer feel responsible for the adjudicative decision-making.
 - (12) Many of the concerns set forth above will only intensify into the future since the aggressiveness of Enforcement is unlikely to abate and, if anything, will probably increase.
 - (13) Some have also raised the issue of the constitutionality of the current structure. If these concerns are justified, it would follow necessarily that the structure would have to be changed. However, our research has led us to conclude that, even with its increased powers, the Commission as now structured likely would survive constitutional scrutiny (Appendix I).
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(2)

**The Argument Against a
Separate Adjudicative Body**

The view against separation of the adjudicative function focuses on the following factors:

- (1) The fact that the apprehension of bias has developed such currency is due to the efforts of the defence bar to advance the interests of their clients. They are acting out of self-interest and are engaged in special pleading. They simply wish to weaken the regulatory authority of the Commission.
- (2) With the separation of functions within the Commission, all reasonable steps have been taken to ensure that there is no improper consideration taken into account by the adjudicative panel. The Supreme Court of Canada requires nothing more.
- (3) The interest in separating out the adjudicative function is part of an increasing and regrettable movement in the direction of the judicialization of administrative processes.
- (4) The impetus for change is very much the product of the criminal law mentality at work. The cure could be worse than the disease.
- (5) A separate adjudicative body is unworkable because:
 - (a) it will not attract the quality of persons required to make it work. Retired judges do not present the panacea many suggest. This is because they lack the vigour required for long and contentious hearings. Nor is the

workload sufficiently attractive to interest the sort of people you would need to recruit. Finally, conflicts of interest would foreclose individuals of high quality from participating;

- (b) the appointing of members and the appropriate level of remuneration raise complex issues that are too numerous; and
 - (c) the tribunal will be marginalized by virtue of not having much to do.
- (6) More "tweaking" could be done to the existing model to provide assistance to the adjudicative panels and to restore confidence. Reference is made to the recent hiring by the Commission of counsel to the adjudicative panels, and to the Commission's Adjudicative Committee.
- (7) While the street may say that the adjudicative function is biased, an objective appraisal would demonstrate the contrary. Thus, in *Cowpland*⁶ and *Bombardier*,⁷ the Ontario and Quebec Securities Commissions respectively refused to approve settlements proposed by staff. These examples are cited as evidence that Commissioners in their adjudicative capacity are not in the pockets of staff.
- (8) Policy input and development is important to the adjudicative function and operates both ways, i.e. from the Commissioners' work within the Commission to their adjudicative function and from their experience adjudicating back to their non-adjudicative work.

⁶ *M.C.J.C. Holdings Inc. and Michael Cowpland* (2003), 26 O.S.C.B. 8206.

⁷ *Décision de la Commission, Bombardier Inc.*, Bulletin hebdomadaire, 2002-11-01, Vol. XXXIII, no 43, Ch 2.1, online: Autorité des Marchés Financiers <<http://www.cvmg.com/upload/bulletin/v33n43ch21.pdf>>.

- (9) Apart completely from policy issues, the experience gained from participating in Commission meetings is important to the Commissioners' adjudicative function.
 - (10) The criticism of the Commission's adjudicative function is simply the result of the effectiveness of the current model.
 - (11) The Chair's involvement in the important cases handled by Enforcement is proper since he is the chief executive officer of the Commission.
 - (12) The SEC model does not provide meaningful separation, the decisions of the administrative law judges being subject to review by the Commissioners. Further, the SEC has not proven to be a very effective enforcer. Australia's model has problems, including attracting the right personnel because of conflicts of interest, and Alberta's experiment was a failure and short-lived. (These systems are discussed in more detail in Appendix II.)
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(3)

The Make-Up of a Separate Adjudicative Body

Various approaches to the make-up of a separate adjudicative body, including the appointment and remuneration of its members, were identified. They include the following:

- (1) A full-time chair with the tenure of a superior court judge, and part-time members appointed for a three or five year term, renewable once. The chair and part-time members would be drawn from the street, the legal and accounting professions, former judges and the universities.
- (2) The appointments to be by order in council on the recommendation of the Minister of Finance, with the Chair of the Commission to make recommendations.
- (3) The appointments to be by the Premier or Attorney General upon the recommendation of a committee comprised of representatives of various stakeholders, the public and perhaps the Chief Justice of Ontario.
- (4) The remuneration for members would have to be sufficient to attract individuals of the highest quality. While some expressed the view that it would be difficult to find well qualified people to act part-time or even full-time, the overwhelming opinion was to the contrary, the latter view being held by many who themselves would be excellent part-time members.

- (5) The remuneration of members should reflect a public service component, that is, the remuneration should be below-market.
 - (6) The expense of the new tribunal should be a charge on the Commission, but the Commission would not be involved in approving the tribunal's budget.
 - (7) There should be a roster of members from which the chair would select a three-person panel to sit on a particular hearing. The roster of part-time members must contain a sufficient number of lawyers or judges with strong trial experience in order that each panel may be presided over by such a member.
 - (8) The chair should be a former judge or lawyer with strong trial and administrative experience, and should be of such stature as to command the immediate respect of the regulated community. The new tribunal "will have to earn its spurs and the choice of the first chair is crucial".
 - (9) The new tribunal must operate out of its own premises, be properly staffed and provided with the necessary resources.
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(4)

**Alternatives to the Current
and Bifurcated Models**

Various alternatives were suggested. These were as follows:

- (1) For all adjudicative hearings of the Commission, provide for an independent chair for the hearing, to be chosen from a panel. Initially, that panel could be established from among those currently involved in alternative dispute resolution and others with relevant expertise. The independent chair would preside with two Commissioners.
- (2) Separate the Commissioners with their policy-making and adjudicative functions from the rest of the Commission. Provide the Commissioners with their own accountants, lawyers, economists and other necessary resources. All hearings would be presided over by the Commissioners.
- (3) Create two classes of Commissioners: those who adjudicate and those who do not. Those Commissioners who adjudicate would have limited involvement with the Commission, perhaps only with respect to certain policy areas.
- (4) Send all section 127 sanction cases into the court system. In any event, complex cases involving fraud, abuse of trust, and theft should go to court.
- (5) Provide for complete separation of Enforcement from all Commissioners, including the Chair. Enforcement's activities would only be supervised through the tribunal process and retrospectively, once the case is over.

- (6) Separate Enforcement completely from the Commission.
 - (7) Establish an independent supervisory panel to review proposed decisions of Enforcement to ensure proper management of the enforcement branch.
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THE ALTERNATIVES

Overview

As identified above, we encountered a number of alternative proposals for restructuring the Commission to eliminate or alleviate the critical problem – that of a perception of unfairness. We address the more important proposals below. Ultimately, our view was that none of these alternatives would address the problem as effectively as the creation of an independent adjudicative tribunal.

Formal Separation of Enforcement

To the extent that the major problem of perception was that of enforcement and adjudication operating under the same corporate direction and under the same roof, the question not unnaturally arose as to whether it would be more appropriate to hive off Enforcement rather than the adjudicative functions of the Commission. Indeed, the reality is that at present Enforcement has many of the characteristics of an independent prosecutorial service. This might seem to suggest not only that Enforcement was a more natural candidate for formal separation, but also that it could be accomplished more easily.

In fact, very few of those we interviewed supported this as a way of dealing with the problem and we were quickly persuaded to the majority point of view. While it is true that currently Enforcement enjoys considerable day to day autonomy in its functioning, much in the manner of an independent prosecutorial service, it is also the case that, particularly in relation to high profile cases, the Chair of the Commission takes an active supervisory and advisory role.

Indeed, as we understand it, this is one of the critical reasons why the current Chair, as a matter of policy, does not sit on hearings. It enables him to be involved more actively in Enforcement in a management capacity. It is also the case that, while their participation is limited, the other Commissioners are engaged in the scrutiny of Enforcement at least to the extent of an annual consideration of the priorities developed primarily by the branch. If Enforcement were to be formally separated from the Commission, it would be essential to develop alternative accountability and reporting mechanisms. While we do not doubt that it is feasible to create such an alternative structure, it is also clear that it is by no means an easy exercise, a fact emphasised to us by reference to the grave problems experienced in one Canadian province with the creation of an independent criminal prosecutorial service.

More importantly, however, enforcement, much more so than adjudication, is one of the core functions of the modern securities commission. Given that the principal aim of any such regime is the facilitation of the effective functioning of capital markets, the development of enforcement priorities and ensuring that Enforcement is operating in an effective manner is of critical importance. Particularly in a post-Enron world, the surrender by the Commission of that enforcement function would undoubtedly create grave concerns (both in Canada and internationally) about the effectiveness of securities regulation in this province. Indeed, as already outlined, it is our strongly held view that all of the Commissioners in fulfilment of their statutory corporate responsibilities should become much more engaged in the setting of enforcement priorities and scrutiny of Enforcement. As well, such a higher level of engagement would enable the Commissioners to bring their experience with the functioning of capital markets much more into play in the development of appropriate enforcement policies and priorities.

It is also the case that the removal of Enforcement from the Commission would have other adverse effects, such as the interplay that currently exists between Enforcement and other branches of the Commission, especially Corporate Finance. We sense that the fracture of those relationships and the removal of those sources of information and policy perspectives on various activities in the financial markets would be a considerable loss to Enforcement and would seriously impair its effectiveness in the long term.

Finally, it needs to be emphasised that the separation of Enforcement from the Commission would not in fact eliminate totally all of the current perceptions of unfairness or bias. Though this is a view that we do not share, some of the critics would still be concerned about the continuing role of the Commissioners as both policy-setters (through rule-making and more informally) and adjudicators.

Internal Restructuring of Adjudication

In the course of our consultations, we were confronted with a number of possibilities for changing the current adjudicative structures in a way that would keep them under the umbrella of the Commission. However, in the end, it was our view that none of these “solutions” would address adequately the concerns of unfairness resulting from overlapping functions.

The most obvious model is that of the SEC, described in Appendix II. Under this model, first instance adjudication within the Commission is primarily the responsibility of Administrative Law Judges with a right of appeal from their decisions to the Commissioners and

then to the courts. Indeed, the Matkin Report⁸ recommended the adoption of such a regime in British Columbia as a way of eliminating the perception of unfairness and the inappropriate exercise of overlapping functions.

In fact, the model is not without its critics in the United States.⁹ In any event, to the extent that this remains an accepted feature of regulatory adjudication at the federal level in that country, it appears to depend in considerable measure on the reputation for independence of the Administrative Law Judges, a reputation that has been built up over more than fifty years. We see no necessary assurance that the transplant of such a system into Ontario would produce similar levels of comfort. It also seems to be the case that a key part of any confidence that exists in the United States is the professional reputation of that specialized branch of the judiciary in an institutional sense. Having Administrative Law Judges in Ontario solely in a securities regulation setting would obviously not allow for the development of regulatory system-wide respect. Perhaps most significantly in terms of the current environment, however, would be the problematic nature of the appeal back to the Commission. For many whom we consulted, this constituted a major concern with the adoption of the American model.¹⁰ It would not, at least in the short to medium term, eliminate the perceptions of unfairness resulting from the ultimate exercise by the Commissioners of overlapping functions. Although the adjudicative role of the Commissioners would have changed from first instance to appellate jurisdiction, the problem

⁸ *Restructuring for the Future: Towards a Fairer Venture Market* (The Report of the Vancouver Stock Exchange & Securities Regulation Commission) (1994) (the “Matkin Report” after the Commission’s sole commissioner) at 64, and see more generally at 50-64.

⁹ See Alfred C. Aman, Jr. and William T. Mayton, *Administrative Law*, 2nd ed. (St. Paul, Minn.: West Group, 2001) at 241 and accompanying note 31.

¹⁰ In fact, in many instances in State administrative proceedings, there is not an appeal back to the original decision-maker from the Administrative Law Judge: see James F. Flanagan, “Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review” (2002) 54 *Administrative Law Review* 1355. Indeed, in a number of States, there are central panels hearing appeals from a range of agencies.

would still remain. Moreover, remove the appeal back to the Commission from the United States model and what is left in effect is a free-standing independent adjudicative regime.

The same concern about the perpetuation of the perception of unfairness also exists in the case of one of the variations that was suggested to us: maintenance of the current structure save that there would be an independent (i.e. non-Commissioner) Chair of the hearing panel, with two Commissioners completing the panel. If this Chair were a respected retired judge or litigation lawyer, there is reason to believe that the perceptions of unfairness would decrease somewhat. However, for a substantial majority of those to whom we put this possibility, such a proposal does not go far enough. The taint of operating within the same institutional setting and under the same institutional roof would still remain, particularly since the majority of any panel would be Commissioners, and thus might not be seen to be independent. It is also the case that the adoption of such a system would still necessitate the existing statutory and internally-developed ethical walls, and effectively preclude the Commissioners from a more active role in relation to enforcement policy. Further, those Commissioners who served on hearing panels either regularly or on lengthy cases would still have difficulties fulfilling in any effective way their other responsibilities as directors of the corporation.

We also rejected the suggestion of having two classes of Commissioners – those responsible for policy-making and the overall functioning of the Commission and those appointed solely to perform an adjudicative role. Aside from the absence of an appeal back to the Commission as a whole, this system has most of the same characteristics of the United States Administrative Law Judge regime. It would also involve a rethinking and restructuring of the current corporate form of the Commission in that it would simply be inappropriate to conceive

any longer of those Commissioners appointed solely to adjudicate as directors of the corporation legally responsible for the supervision of all of its functions.

The Regular Courts

While there was considerable advocacy of the Commission making greater use of the courts under its current enforcement discretion, few, if any, supported a total transfer of adjudicative jurisdiction to the regular courts. For some, that position may have simply been a pragmatic one based on a sense that it is highly unlikely to be politically feasible. Indeed, there was a generally (though not universally) held view that it would not be appropriate for all of this jurisdiction to be exercised by either Ontario Court of Justice or Ontario Superior Court judges. Their wide range of capacities and backgrounds would make any general assignment of jurisdiction to them problematic from the perspective of securities litigation needing a high degree of familiarity, if not expertise. In any event, there are indications that the Courts would not welcome such a wholesale transfer to them of securities enforcement adjudication.

The Matkin Report recommended the creation of a specialized division of the British Columbia Provincial Court to deal with securities cases,¹¹ and we heard some suggestion that, in Ontario, such cases could all go to the Commercial List of the Superior Court. However, even if such a step were possible, we would not recommend it, at least in preference to the creation of a separate adjudicative tribunal. Such a tribunal offers a far better prospect for the appropriate combination of skills or expertise necessary to adjudicate cases involving allegations of *Securities Act* violations. The combination of members with the appropriate litigation, securities law and financial markets experience would ensure the perpetuation of the advantages

¹¹ *Supra* note 8 at 97.

that the creation of a specialized securities regime was originally intended to achieve. Assignment of cases to regular judges, even sitting in a specialized division, does not provide anywhere near the same assurance of expertise. It also remains the case, the increased sanctioning powers of the Commission and trial-like proceedings notwithstanding, that the objective of many securities sanction hearings is not the same as that of the regular criminal and civil litigation models. In a regime where all jurisdiction were transferred to the regular courts, it would be easy for generalist judges not to understand or to lose sight of that principle.

OUR CONCLUSION

We would strongly advise the Commission to take steps to separate its adjudicative function from the Commission.¹² The arguments supported by the evidence in favour of this separation are persuasive, indeed overwhelming. The evidence to which we refer goes beyond the now familiar complaints of some members of the securities litigation bar. Apart entirely from what might be characterized as anecdotal evidence, we received considerable expert opinion evidence on the governance issues we were asked to consider. A substantial preponderance of that evidence supports our central recommendation – that the Commission should do what is required to be done to establish an adjudicative tribunal that is separate from the Commission.

We are satisfied that the nature of the apprehension of bias has become sufficiently acute as to not only undermine the Commission's adjudicative process, but also the integrity of the Commission as a whole among the many constituencies that we interviewed. Matters of institutional loyalty, the involvement of the Chair in the major cases, the increased penalties, the sense that "the cards are stacked against them", the home-court advantage, the lengthy criminal law-like trials, and the Commission's aggressive enforcement stance, which likely will only increase over time, all combine to make a compelling case for a separate adjudicative body.

¹² While the Wise Persons' Committee recommends that adjudication should be the responsibility of a separate body independent of a proposed National Securities Commission, it provides no analysis, nor did it respond to our letter asking for its analysis.

Further, what we think is a compelling case for bifurcation is made more cogent when the state of the enforcement branch is considered. The state of Enforcement impacts directly on the management of the investigations and the process of cases proceeding to and through a hearing. There needs to be established well-defined policies, protocols (including one relating to settlement issues), priorities and practices for the enforcement branch for the benefit of staff and the Commission. These policies, protocols and practices must be established under the oversight of the Commissioners as a whole. However, this cannot be accomplished where the Commissioners are inhibited from doing so by the existence of their adjudicative functions.

As stated, the arguments against a separate tribunal are answered by the evidence. While the Supreme Court of Canada has affirmed that there can be no complaint at law about the apprehension of bias where legislation has mingled the adjudicative, enforcement and policy-making functions, the perception exists in fact. In our view, more "tweaking" will do little to alleviate the problem.

Nor does the evidence support the need for the cross-pollination between the Commissioners' adjudicative and non-adjudicative functions. The role of policy in sanction proceedings is limited. In any event, if it is to play any role, it should be identified in advance. The Commission has various methods of articulating policy, including its rule-making powers, without resorting to the adjudicative process. The experience gained from participation in the Commission's work, while relevant to the adjudicative function, can be replicated by experience gained from the street, the legal and accounting professions, and the university. And while this Commission experience is relevant, it is viewed by many from every constituency as being overrated in the context of a sanction proceeding.

We recognize that the structural change which we have advised the Commission to undertake will require authorizing legislation and will thus take time. In the meantime, we see no impediment to the Commission discharging its adjudicative responsibilities and functions on a business as usual basis. Subject to certain reservations expressed in Appendix I, our concerns with the current regime are based primarily on a policy, not a legal, analysis. More importantly, as a matter of public interest, the critical enforcement mandate of the Commission cannot grind to a halt pending the drafting and enactment of amending legislation. We are also confident that, in the meantime, the Commission will do nothing to exacerbate or contribute further to the problems on which we base our recommendations for change.

If the government is prepared to create a separate tribunal of the stature we are recommending, we are satisfied that there will be no difficulty in attracting suitable members. Provided there is adequate remuneration for members and an appropriate allocation of resources to the tribunal, the nature and importance of the work should make it attractive to highly qualified persons with relevant expertise, including retired or about to retire members of the securities and financial services communities and the securities bar. A panel of members having a strong representation of those who are highly respected and experienced in complex trials will give the separate tribunal the ability and reputation necessary to take control of proceedings so they can be expeditiously and fairly conducted.

The workload should also be sufficient. It will have the current inventory of sanction cases and reviews from SROs. In addition, there may well be work resulting from the fact that the Commissioners, freed from the previous restraints imposed upon them by their adjudicative duties, will be able to act collectively and more forcefully to protect the capital markets.

The Commission will also be freed from the criticism directed at its adjudicative function including, and perhaps most importantly, its decisions. The sole focus of the Commission's efforts in this area will be to marshal the appropriate cases for hearing and present them effectively to the tribunal.

It is important to reiterate that we have come to this conclusion independently from a consideration of the effect of the increased sanctioning power on the legal position of the Commission. However, it is important to observe that it cannot be said with total confidence that a court will not intervene given the Commission's new sanction powers. Our legal analysis is set out in Appendix I.

Finally, the fact that other jurisdictions have adopted or are adopting separate adjudicative bodies in the regulation of the securities industry supports our conclusion. This experience is set forth in Appendix II.

We believe that this answers the substantive questions we put to ourselves at the outset. Our recommendations, in the form of advice to the Commission summarized in the next section, respond to the structural questions.

RECOMMENDATIONS

In our specific recommendations, which are listed below, and in the main body of this Report, we have attempted to answer the questions that we posed at the outset of this Report. We are satisfied that our recommendations, if implemented, will not encumber the current debate about establishing a National Securities Commission, or the OSC's capacity to discharge its public interest based statutory mandate to protect investors from unfair, improper or fraudulent practices and to further fair and efficient capital markets and confidence in those markets.

For the reasons set out in this Report, we are satisfied that the case has been made for the separation of the Commission's adjudicative function from its other functions, as related only to proceedings in which sanctions against respondents are sought. In our view, this separation will resolve the perception problem to which we have referred in this report and will thus end what we view as an erosion of the Commission's institutional credibility. Hiving off the Commission's adjudicative function will also permit the Commissioners to take a more proactive role in the oversight of Enforcement. The Commissioners' monitoring of enforcement matters will also enhance the Commission's credibility.

Our specific recommendations may be summarized as follows:

- (1) In our view, a clear case for separating the Commission's adjudicative function from its other functions has been made out. We therefore recommend that a securities adjudicative tribunal be established. This will, of course, require legislation. If the tribunal is established, we leave it to others to determine what

its name should be. However, for ease, we will refer to this adjudicative tribunal as the Ontario Securities Tribunal ("**OST**" or, in some cases, the "**Tribunal**").

- (2) The OST should have jurisdiction over all matters in which sanctions against a respondent are sought. It should not have general jurisdiction over matters such as poison pills, takeover bids and exemption orders. In our view, these on-going transaction-specific matters are, in all but rare cases, best left within the Commission. The OST should, however, have a residual jurisdiction over matters that are referred to it by the Commission (including exceptionally on-going transaction-specific matters) on the basis that the Commission concludes that it is in the public interest to make that referral. There should also be a right of appeal to the OST in all ongoing transaction matters with the exception of exemption orders.
- (3) Accommodation for the OST, including hearing rooms, offices and meeting rooms, should be separate from the Commission to avoid any lingering perception that the Commission and the OST are in substance one entity. We accept that in the short term it may make sense for the OST to use OSC hearing rooms. In the longer term, the OST should have separate accommodation consistent in quality with the commercial space now occupied by the Commission.
- (4) Appointments to the OST should be made by the Lieutenant Governor in Council, through the Minister of Finance on the recommendation of a committee no larger than five persons. We think that this committee's involvement is necessary so that appointments to the Tribunal are seen to be, and are, non-political. The

committee should include appointees from the Law Society of Upper Canada, a member of the judiciary nominated by the Chief Justice of Ontario, and two representatives from the securities industry to be nominated by the Minister of Finance. The committee should seek the views of the Chair of the Commission on all matters bearing upon appointments to the OST.

- (5) The OST should have a permanent Chair who is a member of the bar with experience in contentious hearings or trials. In addition, we think that it is desirable that the Chair have some experience in securities related matters. Thus, retired judges having experience on the Commercial List of the Superior Court of Ontario should be given consideration for appointment to the OST as the appointments committee concludes is appropriate.
- (6) The OST should have a Vice-Chair, or Chairs, who should also be members of the bar. An assessment of the likely workload of the Tribunal will determine whether more than one Vice-Chair should be appointed and whether the appointment of a Vice-Chair or Chairs should be permanent or part-time.
- (7) At full complement the OST should consist of no more than 12 persons. Apart from the Chair and Vice-Chair (if the Vice-Chair is a permanent appointment), appointments to the Tribunal should be part-time *per diem* appointments and based on the expertise of potential appointees in matters related to the broad financial services sector. We leave it to the appointments committee to ensure that appointments to the Tribunal are non-political and provide the base of expertise required of an administrative tribunal having responsibility over all *Act*

sanction hearings. This expertise will provide the basis for the deference that we expect the courts will extend to decisions of the Tribunal.

- (8) Members of the OST should be appointed on a good behaviour basis for renewable terms not to exceed 5 years. At the beginning, members of the OST should have staggered terms of appointment to establish some continuity in the early life of the Tribunal.
- (9) The OST should be a *Statutory Powers Procedures Act* Tribunal. As such, it will have rule-making authority which we expect will be exercised to establish a rule-based framework for Tribunal hearings.
- (10) The jurisdiction of the OST would commence once a Notice of Hearing is issued. The OSC should file Notices of Hearing with the OST forthwith upon issuance.
- (11) Settlements concluded following the issuance of a Notice of Hearing should be subject to OST approval. It is our hope that further consideration will be given to the issue whether an admission of a breach of a specific provision of the *Act* (as opposed to admissions of conduct contrary to the public interest) by a respondent should be a pre-condition to a settlement. This is an issue which we think is beyond our mandate.
- (12) We would recommend that as part of its rule-making function, the OST should provide for mediations, where appropriate, and pre-hearing conferences directed to settlement, the resolution of outstanding interlocutory issues such as disclosure,

and hearing management. In our opinion, the increasing length of some hearings militates in favour of pro-active hearing management.

- (13) OST hearings should be bifurcated. That is to say, evidence and submissions on liability should be heard separately from evidence and submissions on sanctions, unless the parties consent to a non-bifurcated hearing.
- (14) The OST should hear all reviews from SROs.
- (15) There should be an appeal as of right to the Divisional Court and then, with leave, to the Court of Appeal from all exercises of original jurisdiction by the OST, as well as from its decisions on SRO reviews. In the cases of the OST's appellate jurisdiction in ongoing transaction matters, there should be provision for a further appeal with leave to the Court of Appeal. These appeal rights should apply for the benefit of all parties, including the Commission.
- (16) The Commission should establish a committee to monitor Enforcement. For convenience, we refer to this committee as the "Enforcement Advisory Committee". We think that it is desirable that Commissioners have a greater role in the enforcement function. They can provide useful advice on a broad range of enforcement-related issues. Once adjudication is separated from the Commission, there will be no need for the ethical walls between Commissioners and Enforcement.
- (17) The Chair of the OST should be paid a salary roughly equivalent to the statutorily prescribed salary of a Superior Court judge. The Tribunal's Vice-Chair, if a

permanent appointee, should receive a salary roughly equivalent to two-thirds of the Chair's salary. Tribunal members should be paid on a *per diem*, as needed, basis. Remuneration should be about \$1,500 a day. This remuneration level recognizes what mediators and arbitrators in the private sector are paid, as reduced by a public service factor which we think is justifiable. We are satisfied that there is a sufficient number of qualified persons who would be prepared to accept an appointment to the OST.

- (18) All current Commissioners should be eligible for appointment to the OST. When the OST is established, the OSC will require fewer part-time Commissioners since the workload of the OSC will be reduced by the removal of matters in which sanctions against respondents are sought. As stated, appointments should be based on the availability of the potential appointee and the expertise he or she can bring to the Tribunal, not the potential appointees' residential address.
- (19) Members of the Tribunal should be assigned to a hearing primarily on the basis of the expertise required for that hearing. We recognize that many hearings involve allegations of theft, fraud or breach of trust. These cases are typically fact-dependent and require little in the way of particular securities-related expertise.
- (20) It is imperative that the OST be properly resourced, consistent with its important role as the adjudicator of matters over which it will have jurisdiction. In particular, the Tribunal must have staff which will include administrative assistants, research clerks (articling law students), lawyers and library facilities. This list is not intended to be exhaustive.

- (21) As an independent adjudicative tribunal with rule-making power, the OST should have the power to award costs, in its discretion, for and against the OSC. Cost orders made in favour of the Commission will typically follow hearings in which the Commission is successful. In our view, the OST should have jurisdiction in the exercise of its discretion to make cost orders against the OSC, typically in those cases where the allegations made against that respondent have not been established.
- (22) How the OST will be funded will, in the final analysis, have to be determined by the government (Minister of Finance). We do, however, think that whatever the particulars of funding arrangements are, the OST should have its own budget and that the OSC, a self-funding regulatory authority, should provide at least some of the funding required by the OST out of the surplus generated by the OSC in its operations.
- (23) The OST should be accountable to a committee of the Legislative Assembly to be determined by the Minister of Finance.
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ALL OF WHICH IS RESPECTFULLY SUBMITTED.

“Coulter A. Osborne”
The Honourable Coulter A. Osborne, Q.C.

“David J. Mullan”
Professor David J. Mullan

“Brian Finlay”
Bryan Finlay, Q.C.

DATED: March 5, 2004

APPENDIX I

THE LAW

I Introduction

As stated above, the Commission is an integrated agency in the sense that the regulatory tasks are almost all performed by a single corporate body – standard-setting or rule-making, monitoring, investigation, enforcement, and adjudication. The carrying on of these multiple functions under the same regulatory umbrella has the potential to raise, at a structural level, issues of bias and lack of independence. Thus, for example, it is normally regarded as axiomatic that enforcement and adjudicative functions should be performed by different bodies. Not so axiomatic is the proposition that standard-setting and adjudicative functions should not be combined.

However, it is also well-accepted that the common law principles which condemn bias and lack of independence can be excluded by statute unless there are constitutional grounds on which the statutory regime is fallible. Provided the statutory authorization of what would otherwise be a biased structure or one lacking independence is explicit or clear, absent a constitutional standard, there will be no basis for judicial review. For these purposes, statutory authorization generally means that the structure itself is one that is created in the primary legislation. The argument will not prevail in situations where the decision-maker or a subordinate legislation-making body is given a discretion over the nature or structure of the decision-making process. In such instances, it will be presumed that the legislature intended that the chosen process be one that comports with the basic common law principles.

In the case of some but by no means all administrative tribunals or agencies, the possibility does exist that even explicit legislation will encounter constitutional impediments. Among those potential impediments are sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* and their guarantees of the “principles of fundamental justice” and the right to an “independent and impartial tribunal”. Sections 7 and 11(d) may also operate to enhance the constraints that the common law imposes on decision-makers or subordinate legislation-making bodies that have a discretion to create or fill out the details of agency organization or decision-making structures.

Apart from constitutional arguments based on the *Charter*, in the wake of the *Reference re Secession of Quebec*¹³ and the *Reference re Remuneration of Judges of Provincial Court of Prince Edward Island*,¹⁴ there is some possibility that underlying or implicit principles of the Canadian Constitution might also provide a guarantee of independence and impartiality even in situations not covered by sections 7 and 11(d).

The objective in this section of our Report is to evaluate whether the Commission, as currently structured under statute and operating in practice, might encounter legal difficulties of the kind just identified. We will also consider whether the Commission’s new powers enabling it to levy fines of up to \$1 million and compel disgorgement might be vulnerable by reference to sections 96-101 of the *Constitution Act, 1867* and its protection of the core jurisdiction of provincial superior courts.

¹³ [1998] 2 S.C.R. 217.

¹⁴ [1997] 3 S. C. R. 3.

II Common Law

In *Brosseau v. Alberta (Securities Commission)*¹⁵ ("**Brosseau**"), the Supreme Court of Canada held that the Alberta *Securities Act* was sufficiently specific as to constitute legislative authority for the exercise by the Chair of both investigatory or enforcement and adjudicative roles in relation to the same matter. In so doing, the Court applied the decision of the Ontario Court of Appeal in *Re W. D. Latimer Co. and Bray*¹⁶ ("**Latimer and Bray**") sustaining a similar exercise of overlapping functions by the Commission. In other words, typical Securities Acts in which overlapping functions were clearly contemplated prevented the making of a common law bias or lack of independence challenge. Indeed, in *Latimer and Bray* particularly, the Court was not at all attracted by the argument that the Commission's work could as a matter of practice have been organized to prevent the overlapping of functions complained about in that case. To the extent that the legislation conferred the various capacities on members of the Commission, they were entitled to exercise all those capacities in relation to the same proceeding.¹⁷

Obviously, as L'Heureux-Dubé J. took pains to point out in *Brosseau*,¹⁸ problems can arise in cases where members of the OSC go beyond their authorized statutory duties in a matter coming before them in their adjudicative capacity. Indeed, this is well-exemplified by another case involving the Commission: *E.A. Manning Ltd. v. Ontario Securities Commission*¹⁹ ("**Manning**"). There, members of the Commission (including the Chair) not only exercised a rule- or policy-making authority for which there was no statutory warrant, but also, in the course

¹⁵ [1989]1 S.C.R. 301.

¹⁶ (1974), 6 O.R. (2d) 129 (C.A.).

¹⁷ *Ibid.* at 143.

¹⁸ *Supra* note 15 at 310-11.

¹⁹ (1994), 18 O.R. (3d) 97 (Div. Ct.), affirming (1995), 23 O.R. (3d) 257 (C.A.).

of doing so, adopted a policy that was so specific in its focus as to amount to pre-judgment of wrongdoing in a matter that was subsequently to come before the Commission in its adjudicative capacity. That went beyond any proper conception of what statutory authorization of overlapping functions allowed for. Moreover, in an earlier judgment, the Divisional Court had suggested that the Commission, when acting in its adjudicative capacity, had to be particularly careful to avoid creating any apprehension of bias at a hearing given the apprehensions that would already be present arising out of the overlapping of investigative and adjudicative roles.²⁰ More recently, in 2747-3174 *Quebec Inc. v. Quebec (Régie des permis d'alcool)*²¹ ("**Régie**"), the Supreme Court might also be read as suggesting that, if there is any sense of agency discretion with respect to how it functions, that agency is obliged to operate in practice in a way that avoids what would normally be inappropriate overlapping of functions. If this is true, that would effectively undercut that dimension of *Latimer and Bray*.²²

Be that as it may, statutory authorization still remains a potent justification for fulfilling overlapping obligations in relation to the same matter. Indeed, the Ontario courts continue to reaffirm the authority of both *Brosseau* and *Latimer and Bray* in both securities regulation and other integrated regimes.²³ Thus, to the extent that the structure of the Ontario *Securities Act* remains as it was at the time of *Latimer and Bray*, the integration of functions will survive any common law scrutiny.

²⁰ *Applebaum v. Ontario Securities Commission*, [1993] O.J. No. 649 (Q.L.); (1993), 16 O.C.S.B. 1563 (Div. Ct.).

²¹ [1996] 3 S.C.R. 919.

²² However, cf. *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, refusing to read a constitutional or common law limitation on a statutory power to make appointments at pleasure. The Court held that the appointing authority was not obliged to exercise its powers in such a way as to ensure that the members of the tribunal had security of tenure and thereby greater adjudicative independence. That would fly in the face of the statutory authority to make at pleasure appointments. We return to this matter below.

²³ *Marchmont & Mackay v. Ontario (Securities Commission)* (2002), 162 O.A.C. 263 (Div. Ct.) and *Forget v. Law Society of Upper Canada*, [2003] O.J. No. 249 (C.A.) (Q.L.), affirming (2002), 58 O.R. (3d) 142 (Div. Ct.).

In fact, there have been changes to the Commission's structure, and two in particular merit attention here. First, there has been one significant legislative diminution in the extent of authorized overlapping of functions. Section 3.5(4) of the *Act* now expressly prevents any Commissioner who has any involvement in an investigation and examination under Part VI (such as issuing a section 11 investigation order) from sitting at any hearing in relation to that matter. Indeed, implicit in that provision is probably a more general prohibition on Commissioners having been involved in any aspect of the investigative process in a matter coming before them in their adjudicative capacity.

Secondly, notwithstanding *Latimer and Bray* in particular and the extent to which it authorized overlapping functions which could in practice be avoided, the Commission, through the creation of ethical walls and other self-denying practices, has in fact created a very tight operational separation of enforcement and adjudicative functions. This has been particularly so since the almost wholesale implementation of the recommendations contained in an August 1993 Report prepared for the Commission by Sidney Lederman, then a practising lawyer.²⁴ In effect, the Commission has moved voluntarily to the functional separation of roles that the litigants in both *Brosseau* and *Latimer and Bray* were concerned about. Thus, today, because of section 3.5(4) and the internal practices of the Commission, the Chair would never both order and direct an investigation and then sit in an adjudicative capacity in relation to that same matter.

In short, whether by purely voluntary self-denying ordinances or perhaps because of a sense that it might now possibly be necessary as a matter of law to avoid inappropriately conflicting roles if at all feasible within the relevant statutory framework, the Commission has

²⁴ *Report to the Ontario Securities Commission on Various Administrative Law Issues*, on file at the Ontario Securities Commission.

gone further than was seemingly required by *Brosseau*. In so doing, it has provided itself with even greater assurance that its operations do not come into collision with the standards which the courts have applied to this point in the case of integrated tribunals and agencies.

While the internal walls between the Commissioners and Enforcement may meet the common law's condemnation of inappropriately overlapping functions, there may, however, be countervailing legal difficulties. This is particularly so if they have the effect of removing Commissioners from the effective supervision of the enforcement branch. Given the Commissioners' responsibilities as directors of the corporation, default in the exercise of their supervisory role may violate the law.

We would also emphasize that the current regime of internal separation of functions is confined to the domain of overlapping enforcement and adjudicative roles. The Commissioners still engage in both rule-making and policy-setting and then adjudicate cases in which adherence to those rules and policies may be in issue. Indeed, since the express conferral of rule-making power on the Commission in the 1997 amendments to the *Act*, this aspect of the Commission's functions has assumed far greater significance. On the other hand, subject to the obvious constraints identified in *Manning*, the Canadian courts have never suggested that, at common law, there is any legal bar on agencies being both policy-makers and adjudicators in cases where those policies become relevant.

III Constitutional Dimensions

a Opening the Constitutional Door

i The *Charter*

1. General Application

As interpreted by the Supreme Court of Canada, the *Charter's* application is limited by section 32(1). This means that for a body to be subject to the dictates of the *Charter*, it must either be government or an agency of government, or be engaged in the carrying out of some inherently governmental function or charged with the implementation of a “specific government policy or program”.²⁵

At the margins, it is undoubtedly difficult to discern where, on the basis of these tests and formulations, the line is to be drawn. However, there seems little doubt that regulatory agencies established by public statute will almost certainly always come within the general ambit of the *Charter*. This was underscored by the judgment of the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)*²⁶ ("*Blencoe*"), holding that the now-abolished British Columbia Human Rights Commission was engaged in the implementation of a specific government programme – that of dealing with and eliminating various forms of discrimination.

²⁵ *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624.

²⁶ [2000] 2 S.C.R. 307.

2. Section 7

While, in general, the *Charter* applies to the Commission, it appears very unlikely that the regulatory activities of the Commission engage section 7 of the *Charter* and its recognition of the right not to be deprived of “life, liberty and security of the person” save in accordance with the principles of fundamental justice.

Section 7 applies only to natural persons and so cannot be invoked directly by corporations subject to the OSC’s jurisdiction.²⁷ However, since the Commission does exercise jurisdiction over natural persons, potential holders of section 7 rights, the jurisprudence clearly indicates that artificial legal persons such as corporations can resist the application of laws that if applied to natural persons would infringe their *Charter* rights: *R. v. Wholesale Travel Group*.²⁸ Everything will therefore hinge on whether the actions of the Commission can amount to a deprivation of the “life, liberty and security of the person” of natural persons subject to its jurisdiction.

The most obvious source of a claim that the actions of the Commission engage the right to “life, liberty and security of the person” of individuals rests in the capacity of the Commission to impose sanctions which have career or employment consequences for those individuals. Does employment security come within the reach of the “right to life, liberty and security of the person”?

²⁷ *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927.

²⁸ [1991] 3 S.C.R. 154.

From very early on, the Supreme Court has accepted that section 7 does not protect purely economic interests or the right to work.²⁹ However, “liberty” has been held to include the making of “fundamental life choices” such as to bring into question a municipal by-law requiring city employees to live within the boundaries of the city.³⁰ Similarly, “security of the person” has been held to apply to state action which has a serious and profound impact on a person’s psychological integrity. Thus, proceedings in which the state is trying to retain custody of a child as against the mother have been held to affect the mother’s “security of the person”.³¹ Could it be argued that loss of the capacity to engage in a chosen occupation both interferes with a “fundamental life choice” and has the potential for such a serious and profound impact on the affected individual as to amount to a threat to “security of the person”?

In fact, even though the Supreme Court has arguably never dealt with these questions directly, neither appears likely.

First, in *Blencoe*, the Supreme Court refused to apply these conceptions of liberty and security of the person to the processing of a complaint of discrimination (sexual harassment) against a Cabinet Minister and member of the British Columbia Legislative Assembly. In so doing, the Court took pains to emphasise that mere subjection to regulatory processes or even those of civil litigation, while stressful, did not in itself amount to a removal of a fundamental life choice, nor did it have such a profound and serious psychological impact as to affect the respondent’s security of the person. Nor was that altered in *Blencoe* by the fact that the

²⁹ See e.g. *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407.

³⁰ See the concurring judgment of La Forest J. in *Godbout v. Longueuil*, [1997] 3 S.C.R. 844, approved by the majority of the Court in *Blencoe*, *supra* note 26.

³¹ *New Brunswick (Minister of Health and Community Services v. G.(J.)*, [1999] 3 S.C.R. 46.

proceedings had serious collateral effects in the form, *inter alia*, of removal from caucus and serious reduction in the range of career choices.

Secondly, while the sanctions that could be imposed directly on Blencoe did not include a loss of employment, there has been little in the jurisprudence to suggest that even the presence of the possibility of that sanction will lead to a crossing of the threshold to section 7. In furtherance of the Court's consistently held position that section 7 does not protect the right to work or, more generally, purely economic rights, the recent Supreme Court of Canada judgment in *Siemens v. Manitoba (Attorney General)*³² holds that the operators of video lottery terminals could not invoke section 7 to protect their "right" to "generate business revenue by one's chosen means". Of course, it might be argued that there is a significant difference between taking away the right to deal in securities for disciplinary reasons and legislation (as in *Siemens*) permitting non-binding local plebiscites on whether to allow a particular activity within a municipality. However, there is strong lower court authority for the proposition that professional or occupational disciplinary proceedings do not engage section 7.³³

This does not necessarily mean that section 7 will never have a role to play in Commission proceedings taken against individuals. Thus, in *Blencoe*, despite the holding that the human rights process did not in and of itself engage section 7, the Court did acknowledge that in particular cases where the Human Rights Commission acted in such an egregious way as to in

³² (2002), 221 D.L.R. (4th) 90 at para. 46 (S.C.C.).

³³ See e.g. *Kopyto v. Law Society of Upper Canada* (1993), 107 D.L.R. (4th) 259 (Ont. Div. Ct.) (leave to appeal to Ontario Court of Appeal and Supreme Court of Canada both denied: [1995] S.C.C.A. No. 248 (Q.L.)), where the authorities to that point are reviewed; the concurring judgment of Southin J.A. in *Doern v. British Columbia (Police Complaints Commissioner)* (2001), 203 D.L.R. (4th) 295 at para. 62 (B.C.C.A.) (appeal to the Supreme Court of Canada quashed on May 5, 2003: [2001] S.C.C.A. No. 504 (Q.L.)): "But I do not understand that there is any authority for the proposition that the words "security of the person" mean keeping one's job." See also *Walker v. Prince Edward Island*, *supra* note 29, though see *Harvey v. Law Society of Newfoundland* (1992), 2 Admin. L.R. (2d) 306 (Nfld. S.C., T.D.). Indeed, this line of authority also finds support in the Securities Commission context: *Johnson v. British Columbia (Securities Commission)* (1999), 67 B.C.L.R. (3d) 145 at para. 75 (S.C.) (*per* Allan J.), leave to appeal denied (1999), 128 B.C.S.C. 207 (C.A.).

fact inflict serious and profound psychological stress or prejudice, relief would be available. However, that speaks to the invocation of section 7 in very extreme circumstances and, obviously, has no relevance to any attempt to marshal section 7 in aid of an attack on a particular legislative or legislatively authorized structure on the basis that it does not sufficiently guarantee independence and an absence of bias. Similarly, while some of the Commission's coercive powers (such as enforced attendance of witnesses and the production of documents and giving of testimony) may attract section 7's protections, once again that does not speak to the deployment of section 7 against the more general regime of overlapping functions.

3. Section 11(d)

To invoke section 11, the claimant has to establish that he or she has been “charged with an offence”. In the foundation judgment of *R. v. Wigglesworth*³⁴ (“*Wigglesworth*”), it was held that this required one of two things: either that the proceedings in question were penal in their “very nature” or involved “true penal consequences”. The first category covers those proceedings which are “of a public nature, intended to promote public order and welfare within a public sphere of activity” as opposed to:

...private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited sphere of private activity.³⁵

The second category requires that the objective of the penalty imposed be one that has as its purpose “redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity”. Such a purpose could be indicated by the magnitude of a fine or an “unlimited power to fine”, particularly where the fine in question is

³⁴ [1987] 2 S.C.R. 541.

³⁵ *Ibid.* at para. 23.

to be paid into the Consolidated Revenue Fund rather than being retained for its own purposes by the body which imposed the fine.³⁶

To this point, the Courts have not seen the regulatory sanctions available to Securities Commissions as caught within either category.³⁷ Most recently, in *Johnson v. British Columbia (Securities Commission)*,³⁸ it was held that the ability to levy a fine as high as \$100,000 did not cross the second threshold; this was still an administrative penalty. In further proceedings in *Johnson*,³⁹ the Court of Appeal, though not with specific reference to section 11, also characterized the relevant provision as creating a purely administrative penalty.

Is there any reason to believe that the situation will change now that the OSC's powers under section 127 include the ability to levy a fine of up to \$1 million and to order disgorgement? In recommending that the OSC have the power to levy "administrative" fines for the first time and that such fines have a limit of \$1 million, the Five Year Review Committee, in both its Draft and Final Reports,⁴⁰ was of the view that this would not trigger section 11. The British Columbia cases were cited for this proposition even though the upper limit on the fine would be ten times higher and the proceeds not (as in British Columbia) retained by the Commission for educational purposes but paid into the Consolidated Revenue Fund. The Five Year Review Committee also relied on the Supreme Court of Canada's characterization of the existing section 127 in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* ("*Asbestos*"):

³⁶ *Ibid.* at para. 24.

³⁷ See e.g. *Re Malartic Hygrade Gold Mines (Canada) Ltd. and Ontario Securities Commission* (1986), 54 O. R. (2d) 544 at 549 (H.C.), *Re Barry and Alberta Securities Commission* (1986), 25 D.L.R. (4th) 430 at 736 (Alta.C.A.) (*Brosseau* in the Court of Appeal) (per Stevenson J.A.) (both cited with respect to the first category in *Wigglesworth*).

³⁸ (1999), 67 B.C.L. R. (3d) 145 (S.C.), leave to appeal denied (1999), 128 B.C.A.C. 207 (C.A.).

³⁹ (2001), 206 D.L.R. (4th) 711 (B.C.C.A.).

⁴⁰ At pp. 123-24 and pp. 216-17 respectively

The enforcement techniques in the Act span a broad spectrum from purely regulatory or administrative sanctions to serious criminal penalties. The administrative sanctions are the most frequently used sanctions and are grouped together in subsection 127 as “Orders in the public interest”. Such orders are not punitive... . Rather, the purpose of an order under s. 127 is to restrain future conduct that is likely to be prejudicial to the public interest in fair and efficient capital markets. The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of capital markets... . In contradistinction, it is for the courts to punish or remedy past conduct under ss. 122 and 128 of the Act respectively.⁴¹

This statement was also cited in the second *Johnson* proceedings in justification of the administrative nature of the British Columbia Act’s provision for fines, with the Court specifically stating that it did not matter for these purposes that, at the time, section 127 of the Ontario Act did not confer the power to impose fines.

Not surprisingly, this view of the new powers in section 127 has not gone uncontested. In a paper, “OSC Enforcement Proceedings: Punishing Experience”, delivered to the Ontario Bar Association on February 26, 2003, Alistair Crawley takes serious issue with the Five Year Review Committee’s analysis and, in particular, urges that it cannot be reconciled with the principles laid down by Wilson J. in *Wigglesworth*.⁴² He also questions the reliance on the second *Johnson* case, suggesting that the analysis employed was not central to the issue in that case, merely *dicta, per incuriam* for failing to take account of *Wigglesworth*, and, in any event, distinguishable, given the greater magnitude of the potential fines under the amended section 127.

In our view, there is certainly something to be said for the argument that the ability to levy a fine of up to \$1 million and to order disgorgement changes the nature of the section and brings it within the first category detailed by Wilson J. in *Wigglesworth*. These days,

⁴¹ [2001] 2 S.C.R. 132 at para. 43.

⁴² At 24-28.

it can scarcely be argued that the regulation of securities markets is not “intended to promote public order and welfare within a public sphere of activity”. Indeed, in *Asbestos*, Iacobucci J. specifically acknowledges the public dimensions of section 127. Thus, when the legislature allows the Commission to “protect the public interest” by not only removing participants from capital markets but also fining them, a role heretofore exercised by the courts, not the Commission, it is reconstituting the section by way of providing sanctions for an offence. The Commission now arguably has the power to “punish or remedy past conduct”.

There is also room for the argument that the fine provided for is of such a magnitude that it must have been designed to allow the Commission to “redress the harm done to society at large”. As already noted, another indicator of such an objective is the payment of such fines into the Consolidated Revenue Fund.

We do not, of course, claim that this is a clearcut matter. After all, given the money at stake in today’s capital markets and potential for gain on the part of individual participants, an upper limit of \$1 million might in some settings be relatively trivial. Also, the level of fine to be imposed is a matter of discretion for the Commission in each case. Provided the Commission exercises that discretion in such a way that is in keeping with the notion of an administrative penalty rather than a penal sanction, there may be no problem. The possibility that it might be used for impermissible purposes should not expose the section to section 11 of the *Charter*. For these purposes, some would suggest, relying upon the judgment in *Asbestos*, there is a distinction between imposing a sanction which is “preventive in nature and prospective in orientation” and imposing a sanction to remedy past wrongs or to punish offenders. Provided the Commission has only the first objective in mind, deterrence, it will still be levying only an

administrative penalty; it will not be attempting by its sanction to fulfill all of the traditional purposes of the criminal or penal law: punishment as well as deterrence.⁴³

It is not, however, at all clear to us that a focus on only one of the objectives of criminal sanctions saves a provision from creating an offence, particularly in cases where large fines have been added to the range of sanctions available and where the protection of the public interest is a key ingredient in the mix. Indeed, the argument is further undercut to the extent that the disgorgement remedy seemingly has the potential to be a vehicle for the provision of compensation to wronged investors. (The legislation is completely silent on this point.) It is therefore our considered view that there is a possibility that the new sanctions provided for under section 127 will engage section 11(d) of the *Charter* and require that the Commission meet the requisite constitutional standards of independence and impartiality.

ii Underlying or Unwritten Constitutional Principles

In *Reference re Secession of Quebec*,⁴⁴ the Supreme Court of Canada identified a non-exclusive list of underlying constitutional principles which it went on to state could have normative force independently of any specific constitutional provision. The principles identified there were democracy, federalism, constitutionalism and the rule of law, and respect for minorities. As well, in the *Prince Edward Island Provincial Court Judges* case,⁴⁵ the Court relied on the Preamble to the *Constitution Act, 1867* and its expression of the desire of the drafters to

⁴³ At the moment, the Supreme Court has under reserve a case which raises the question of whether the power to fine under the British Columbia securities legislation includes the authority to impose fines which have as part of their objective general as well as specific deterrence: *Re Cartaway Resources Corp.*, [2002] S.C.C.A. No. 474, on appeal from 2002 BCCA 461. If the Supreme Court sustains the British Columbia Court of Appeal's reduction of the fine imposed from the maximum of \$100,000 to \$10,000 on the basis that it improperly took into account general deterrence, this will certainly have an impact on the scope of fines that are justifiable under such provisions. It might also shed some further light on when a power to fine crosses the line between administrative penalty and criminal sanction. (The Commission intervened in the appeal.)

⁴⁴ *Supra* note 13.

⁴⁵ *Supra* note 14.

provide Canada with a constitution similar in principle to that of the United Kingdom. This provided a basis for the Court holding that there was a constitutional requirement that provincially-appointed judges be sufficiently independent. Even though it was only federally-appointed judges who had (through sections 96-101) an explicit guarantee of independence, the Court's reading of history revealed a much more pervasive notion of judicial independence in the unwritten British constitutional arrangements of 1867 or thereabouts.

This immediately led to suggestions that this constitutional guarantee of independent and impartial decision-making based on the Preamble might also apply to certain species of administrative tribunal. However, in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*⁴⁶ ("***Ocean Port***") the Supreme Court of Canada specifically rejected that argument in the case of the British Columbia Liquor Licensing regime. Indeed, there are statements in the judgment of the Court delivered by McLachlin C.J. that suggest that the argument simply has no application in the case of administrative tribunals and agencies – bodies that the Chief Justice associated more closely with the executive than the judicial branch of governments.

However, some have argued that the *ratio* of *Ocean Port* is more confined and applies only to adjudicative regimes operating under the wing of a government department. In the instance of other agencies which operate at greater distance from government, they maintain that the argument is still feasible. This argument was advanced in *Bell Canada v. Canadian Telephone Employees Association*,⁴⁷ a case that involved an attack on provisions in the *Canadian Human Rights Act* alleging that they created a constitutionally-flawed process, one that lacked

⁴⁶ *Supra* note 22.

⁴⁷ 2003 SCC 36.

sufficient separation between the Canadian Human Rights Commission and the adjudicative Human Rights Tribunal. In delivering a judgment based on the common law and the *Canadian Bill of Rights*, the Court never dealt definitively with the Preamble-based independence claim. However, in a very ambivalent passage, the Court noted the lack of reference by counsel to any authority supporting such an argument and also stated that, in any event, tribunals such as the Canadian Human Rights Tribunal did not call for the same level of independence as provincial and other regular courts.⁴⁸

At this point, however, it seems unlikely that there are grounds for an attack on the Commission's structures based on the Preamble or a more general underlying constitutional principle of tribunal impartiality and independence. On the two occasions on which it has adverted to this kind of argument, the Supreme Court has given little or no encouragement to its use. Indeed, there are grounds for claiming that it has been rejected out of hand.

b The Requirements of Impartiality and Independence

If one or more of the constitutional thresholds is crossed, as suggested already, both the Commission's enabling statute and ways of operating under that statute will be subject to scrutiny. If the statute creates a structure that necessarily gives rise to a reasonable apprehension of institutional bias or lack of independence, it will be invalid unless, in the case of sections 7 or 11(d), but not the Preamble-based argument, it is sustainable by reference to section 1. If the statute permits but does not mandate a structure that gives rise to an allegation of

⁴⁸ At paras. 29-31.

institutional bias, then the *Charter* or the Preamble-based argument will require that in practice the OSC does not function in that manner. However, the statute itself will survive.⁴⁹

In *Régie*, which is really the only directly relevant Supreme Court of Canada judgment, the Supreme Court (as opposed to LeBel J. in the Quebec Court of Appeal) was of the view that any concerns with the way in which the agency operated could be eliminated or alleviated by a different set of operational rules. The legislation did not require it to operate in the manner in which it did. There was therefore no need for the court to strike down the relevant statutory provisions. In other words, particularly if one takes into account the concurring judgment of L'Heureux-Dubé J., the successful challenge was one that could have been predicated on either the quasi-constitutional *Quebec Charter of Human Rights and Freedoms* or the common law.

The problems identified by the Court were as follows:

- (1) According to the evidence available (primarily the annual report of the Régie), the agency's lawyers "are called upon to review files in order to advise the Régie on the action to be taken, prepare files, draft notices of summons, present arguments to the directors and draft opinions".⁵⁰ This raised the spectre of the same lawyer fulfilling multiple roles in relation to the same file and, in particular, both prosecuting a case before the directors of the Régie and advising them on the disposition of that case. As the available evidence of the agency's operations did not eliminate that as a possibility, there was a reasonable apprehension of

⁴⁹ *Régie*, *supra* note 21.

⁵⁰ *Ibid.* at para. 54, *per* Gonthier J.

institutional bias in a substantial number of cases and the system had to be changed to ensure that this no longer occurred.

- (2) The annual report also left open the possibility that the directors (including the chair) of the agency could be involved in various stages of a case. The chair could “initiate an investigation, decide to hold a hearing, constitute the panel that is to hear the case and include himself or herself thereon if he or she so desires”.⁵¹ Similarly, a director could possibly decide that a hearing was required and then sit on that hearing. Here too, the law forbidding institutional bias meant that at the operational level, there had to be some guarantee that this overlapping of functions did not occur (at least among the regular directors as opposed to the chair – the judgment is somewhat vague as to whether the chair might be in a different position.)

Does this create problems for the Commission? It probably does not in the sense that if the Court were to apply the same standards to the Commission as it did to the Régie, the Commission would pass muster given the ethical walls that exist presently within the Commission and the express legislative ban in section 3.5(4) of the *Act* on members of the Commission who have participated in an investigation or examination under Part VI from sitting on any hearing in relation to that matter except with the written consent of the parties. The actual practice and the terms of the statute seem to coalesce to meet the particular concerns that gave rise in *Régie* to a quashing of the decision against the licensee.

⁵¹ *Ibid.* at para. 60.

Is there any warrant for believing that either at common law or constitutionally, the Commission will be held to a higher standard than was the case with the Régie? Here, there are only two possible arguments for such a higher standard: (1) the Commission has an additional policy-making mandate that the Régie's directors did not have; (2) the broadening of the range of the Commission's powers under section 127.

Gonthier J. took pains to emphasise in *Régie*⁵², quoting from Cory J.'s judgment in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*,⁵³ that an overlapping of functions was not necessarily a concern particularly in the case of agencies that regulate “complex or monopolistic industries that supply essential services”. While that does not necessarily embrace a securities commission and while the specific reference is confined to boards that are “investigative, prosecutorial and adjudicative”, at other points in his judgment in *Newfoundland Telephone Co.* Cory J. does describe the Board as a policy-making body.

It is also worth noting that Gonthier J. in the same paragraph makes favourable reference to the leading non-constitutional Securities Commission case *Brosseau* in which L'Heureux-Dubé J. urged that the courts needed to be sensitive to legislative reasons for overlapping functions. While these remarks were expressly premised on the statutory regime passing constitutional muster, the fact that this statement was called in aid by Gonthier J. in a “constitutional” case suggests that the Supreme Court has sympathy at the constitutional level for the legislative choice of the fully integrated model of agency regulation, provided that there is a sufficient functional or operational separation of the various roles within that integrated model.

⁵² *Ibid.* at para. 46.

⁵³ [1992] 1 S.C.R. 623.

Moreover, all of the indicators so far are that the necessary separation of functions is a matter of severing internally the investigative and prosecutorial arms from the adjudicative arm, something that the Commission has probably achieved in practice.

As already stated, there appears to be no case law that suggests a constitutional or even common law problem with overlapping adjudicative and policy-setting functions save, of course, in situations such as exemplified by *Manning*,⁵⁴ where the problem discerned by the Divisional Court was the use of a then legally non-existent rule-making power to promulgate a policy that in effect amounted to an adjudication against the penny stock dealers. Even under the now statutorily authorized rule-making powers, that would still be a problem at common law given that such powers cannot be used for the purposes of adjudication of a matter also before the Commission in its formal adjudicative capacity. However, that speaks to the particular exercise of the policy-making power, not to the general incompatibility of policy-making and adjudicative functions.

Of course, just because the argument has never been made or considered directly by a court does not mean that it is a non-starter. However, for it to succeed at least as a free-standing ground for a finding of institutional bias would almost force the courts into rejecting as a matter of constitutional principle the integrated model of agency. That seems a very dubious prospect and one which, assuming the application of the *Charter*, would undoubtedly prompt a strong section 1 justification. Whether the focal point of the inquiry is the essential hallmarks of institutional independence and impartiality or section 1, the integrated (as opposed to bifurcated) agency has pedigree in Canadian regulatory law. Indeed, as stated, as long ago as the 1930s, this model of agency was the subject of debate in the United States and England. In 1941, the United

⁵⁴ *Supra* note 19.

States Attorney General's Committee on Administrative Procedure in its final report, *Administrative Procedure in Government Agencies*,⁵⁵ recognized and, by a majority, endorsed the concept of integrated administrative agencies operating in this manner. In response to an argument against the existence of integrated agencies, the final report states:

[A]s the Committee has repeatedly noted, an administrative agency is not one man or a few men but many. It is important, the Committee believes, not to make the mistake of conceiving of the agency as a collective person and concluding that, because the agency initiates action and renders decision thereafter, the same person is doing both. In an agency's organization there are varied possibilities of internal separation of function to the end that the same individuals who do the judging do not do the "prosecuting". Such internal separations by no means eliminates the problem of combination of functions; but it alters, or if wisely done may alter, its entire set and cast.⁵⁶

At this point, to hold that the model of an integrated agency is no longer acceptable on constitutional grounds either generally or even in the specific instance of securities commissions would be to effectively withdraw from the legislature a long-recognized method of regulatory organization.

If there is room for argument on this point, it may, however, come from a holding that the powers of the Commission engage the *Charter* not through section 7, but through section 11. That would bring the Commission much closer to the domain of courts of criminal jurisdiction "where the smallest detail capable of casting doubt on the judge's impartiality will be cause for alarm" (Gonthier J. in *Régie* at para. 45). That might just persuade a court to see an overlapping of policy-setting and adjudicative functions as problematic either generally or in a particular case where Commissioners who had had a role in setting a policy were now being called upon to adjudicate on its limits. Those determining "guilt" and assessing true "penal consequences" should not also be setting policies that give content to the species of misconduct

⁵⁵ (Washington: United States Government Printing Office, 1941).

⁵⁶ *Ibid.* at 55.

that attract “charges”. What is also clear is that where section 11(d) is engaged, the Supreme Court allows little room for section 1 justifications of violations of its standards. Thus, in *R. v. Genereux*,⁵⁷ Lamer C.J. (delivering the judgment of the majority) stated:

...I am of the opinion that a trial before a tribunal which does not meet the requirements of section 11(d) of the *Charter* will only pass the second arm of the proportionality test in *Oakes* in the most extraordinary circumstances. A period of war or insurrection might constitute such circumstances.

(Of course, that statement may have to be qualified in the event that section 11(d)’s reach extends to at least some sanctions imposed by administrative agencies.)

If this last argument were to be successful at the general level, it is highly unlikely that the situation could be rectified by Commission action, particularly given the fact that the legislation clearly expects the Commissioners to both adjudicate and set policy. Legislative restructuring would seem to be an inevitable consequence.

Similarly, if the new powers under section 127 bring the OSC into the penal domain and engage section 11(d) of the *Charter*, it may be that what were determined in *Régie* to be acceptable internal measures for keeping separate the enforcement or prosecutorial from the adjudicative functions would not be sufficient. The closer a tribunal comes to the courts of criminal jurisdiction, the more the courts will require both a formal and operational separation. As a consequence, the current OSC ethical walls, while sufficient to meet the standards of *Régie*, might well be insufficient to avoid a reasonable apprehension of bias arising in a truly penal context.

⁵⁷ [1992] 1 S.C.R. 259 at para. 111.

c Section 96 of the *Constitution Act, 1867*

Aside from the constitutional issues about the independence and impartiality of the OSC as now structured, there is also the question of whether its current powers might in any way violate section 96 of the *Constitution Act, 1867* and its guarantees of jurisdiction for superior, district and county courts.

The Supreme Court of Canada has fashioned a three-part test for determining which powers, under which circumstances, can be transferred to inferior courts or to administrative tribunals without infringing section 96 of the *Constitution Act, 1867*:

- (1) The first branch of the test is an historical inquiry into whether the power or jurisdiction conferred upon the tribunal conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation. If the power in question is not broadly conformable to one exercised by a superior court in 1867, the inquiry ends here.
- (2) The second step asks whether the function in question is judicial in its institutional setting. The primary issue is the nature of the question which the tribunal is called upon to decide. Judicial functions are contrasted with policy-making functions. If the power is not being exercised as a judicial power, then the inquiry need not go further.
- (3) The final branch of the test involves an assessment of the tribunal's functions as a whole in order to appraise the impugned function in its entire institutional context. Under this branch of the test, it is permissible for administrative tribunals and inferior courts to exercise powers historically belonging to courts with section 96 judges provided those judicial powers are merely subsidiary or ancillary to the general administrative functions assigned to the tribunal, or the powers are necessarily incidental to the achievement of a broader policy goal of the legislature. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal so that the tribunal can be said to be operating like a section 96 court.⁵⁸

⁵⁸ *Reference re: Residential Tenancies Act 1979 (Ontario)*, [1981] 1 S.C.R. 714; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 at para. 12.

In *Re C.T.C. Dealer Holding Ltd. and Ontario Securities Commission*⁵⁹, the Divisional Court held that the powers granted to the Ontario Securities Commission by section 123 (now section 127) of the *Act* “easily meet the tests laid down by the Supreme Court”. According to the Divisional Court, “neither the grant of power in s. 123 to the Commission nor its construction of that grant raises any question of constitutionality.”

Does the grant of new sanctions to the Commission, and, in particular, the power to levy fines and to order disgorgement infringe section 96 by reference to these standards? In terms of the first stage of the test, the power to fine was certainly not a matter within the exclusive jurisdiction of the superior, district or county courts in 1867, nor was the power to award damages (if the disgorgement power is viewed as having that purpose). However, the high level of the fine and the absence of any upper limit on the power to order disgorgement could possibly cause the power or jurisdiction to be characterized as being of a kind exercised exclusively by those courts at the time of confederation. Similarly, given the fact that the levying of such penalties follows the determination in a judicialized setting that the respondent has engaged in conduct proscribed in the *Act*, it seems clear that the power in question is being exercised in a judicial manner.

However, under the third test, there seems little doubt that the powers in question have been integrated into a much broader scheme of regulation of which they are merely an ancillary part, albeit exercised in a judicial manner. The adjudicative capacities of the Commission are merely part of a comprehensive regulatory structure intended by various means

⁵⁹ *Re C.T.C. Dealer Holding Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (Div. Ct.); application for leave to appeal to the Ontario Court of Appeal dismissed: (1987), 35 B.L.R. xx.

to provide protection to investors from unfair, improper or fraudulent practices, and to foster fair and efficient capital markets and confidence in capital markets.⁶⁰

Certainly, on occasion, the courts have deployed section 96 in a manner which focuses on the specific power being exercised by the non-section 96 court and assessed its validity in isolation from the other capacities possessed by an otherwise valid tribunal. Thus, in *MacMillan Bloedel Ltd. v. Simpson*,⁶¹ the Supreme Court's sole attention was on the conferring of exclusive authority on provincially-appointed judges to punish those under the age of majority for contempt of superior court orders. Under sections 96-101, this jurisdiction could not be removed from superior court judges. However, in this instance, the power to fine and order disgorgement is without prejudice to the capacity of the regular courts to deal with civil claims arising out of tortious behaviour by participants in capital markets and to deal with criminal offences or even *Securities Act* offences arising of the actions of such participants. Also, the ability of the Commission to order disgorgement is obviously discretionary and in no legislated sense correspondent to a civil liability regime. It does not on its face establish a surrogate mechanism for dealing with tort claims in the capital markets sector.

In sum, we do not believe that there is any serious claim that section 96 of the *Constitution Act, 1867* threatens the new powers of the Commission under section 127.

IV Conclusions

It seems unlikely that there are legal problems either under common law or on any constitutional basis with the present structure of the Commission. Of the potential bias or lack of

⁶⁰ *Act*, s.1.1.

⁶¹ [1995] 4 S.C.R. 725.

independence arguments that might be made against the way in which the Commission operates currently, the only realistic possibility seems to be one based on section 11(d) of the *Charter* and its requirement of an “independent and impartial tribunal” for the trial of persons “charged with an offence”.

We believe that there is some possibility that the courts will regard the new powers to fine and order disgorgement as crossing the threshold to the application of section 11(d): the adjudication of charges that are “penal in nature” or carry with them “truly penal consequences”. On the other hand, it may be that the courts will hold that the provision is valid and subject the imposition of a fine or disgorgement order to constitutional review only if, in the particular instance, it is in the nature of a criminal or truly penal sanction rather than a permissible administrative penalty.

Moreover, even if this provision triggers section 11, we also believe, with one possible exception, that it is likely that the way the Commission operates in practice will save it from attack, even though the *Act* still contemplates a significant overlapping of functions. First, the *Act* now contains a prohibition on Commissioners acting in both investigatory and adjudicative capacities in connection with the same proceedings. Secondly, the Commission has created very effective walls between its investigation and enforcement branches and the Commissioners acting in their adjudicative capacities, though, as noted, this may create other kinds of legal difficulties if it leads to Commissioners defaulting in their responsibilities as corporate directors to supervise the conduct of Enforcement. Thirdly, we see no basis in existing law for the proposition that integrated agencies are in and of themselves compromised. The mere fact that a particular agency carries out a full range of regulatory functions does not

automatically lead to the conclusion that the adjudicative arm of that agency lacks independence and impartiality. It will all depend on how that agency operates in practice.

In one respect, however, if section 11(d) is generally triggered by the extent of the new powers, the current legislation and practice may be problematic. If, as stated by Gonthier J. in *Régie*, the courts are meant to be particularly vigilant in policing situations where section 11 applies and hesitant to allow section 1 justifications, it could be the case that the Commissioners are acting contrary to the *Charter* when they both set policies and then adjudicate cases bearing criminal sanctions in which the reach and application of those policies are in issue. Once again, however, there is an issue as to whether this would lead to the total invalidation of overlapping adjudicative and policy-setting (or rule-making) functions or provide a remedy only in those cases where Commissioners who had participated in the policy or rule-making were now called upon to apply it as adjudicators. More generally, there is also the possibility that, in a truly penal context, the ethical walls which exist currently between the prosecutorial/enforcement and adjudicative functions of the OSC may not be sufficient to avoid the taint of a reasonable apprehensions of bias.

APPENDIX II

OTHER JURISDICTIONS

OVERVIEW

From a review of other systems and jurisdictions, it is clear that there is not yet much of a track record for separate adjudicative tribunals in securities regulation. However, there is a clear move to separate adjudicative bodies in the self-regulatory systems, and in jurisdictions such as Québec, England, Australia and Hong Kong. A description of these separate adjudicative bodies and, more generally, of the systems and models adopted in these jurisdictions and others follows. The models in Québec, England and Australia were adopted very recently and, consequently, they cannot yet afford assistance regarding the "viability" and effectiveness of their separate adjudicative panels. Only Hong Kong's system has the necessary history to reflect the viability of the model.

The United States' SEC is also examined. The SEC model does not include a separate adjudicative tribunal. However, as explained in this section, some "separateness" is achieved through the Administrative Law Judges. Because the SEC is the result of a unique history and a different political tradition, it is our view that only limited lessons can be drawn from its experience. For this reason, and because the SEC has a much longer history than the other systems described in this section, we have approached the SEC differently, i.e. analytically instead of descriptively.

The conclusion that a study of other jurisdictions gives rise to is that while the evidence may be limited, the move towards the separate adjudicative model is substantial. There

is no reason to believe that the motivation for it is any different than what we have found in Ontario. In societies that are insisting on good governance, accountability and transparency with respect to the working of the capital markets, nothing less is being required of those institutions whose responsibility is the proper oversight of those markets.

CANADIAN REGULATORS

The Provincial Commissions and Agencies

In Canada, those provinces with a securities commission, with the exception of Québec, have adopted a model similar to Ontario.⁶² Both British Columbia and Alberta commissioned reports on the structure and function of their respective securities commissions.⁶³ These studies on the issue that concerns us recommended different solutions. The *Matkin Report* (British Columbia) recommended a model similar to the SEC, while the *McCoy Report* (Alberta) recommended separating the agency from the Commissioners. Both recommendations were premised either in whole or in part on the perception of institutional bias arising from the Commission acting as policy-maker, enforcer and adjudicator.⁶⁴ While Alberta implemented the proposal, it only lasted a short time.⁶⁵ The model was unsatisfactory. There were, in fact, two CEOs: the Chair of the Commission and the Chief of Securities Administration, a situation which proved unworkable for obvious reasons. The Commissioners quickly became separated from their staff and lost control.

In Québec, the *Martineau Report* in 2001 proposed the creation of a single regulatory body for Québec's financial sector.⁶⁶ The report identified the problems related to the

⁶² *Securities Act*, R.S.B.C. 1996, c. 418; *Securities Act*, R.S.A. 2000, c. S-4; *Securities Act*, R.S.N.L. 1990, c. S-13; *The Securities Act, 1988*, S.S. 1988-89, c. S-42.2; *Securities Act*, R.S.N.S. 1989, c. 418; *The Securities Act*, C.C.S.M. c. 550 (September 1, 2003).

⁶³ J. G. Matkin, *Restructuring for the Future, Towards A Fairer Venture Market*, The Report of the Vancouver Stock Exchange and Securities Regulation Commission, January 1994 ("*Matkin Report*"); The Honourable Elaine J. McCoy, *The Alberta Securities Commission: Discussion Paper*, March 1987 ("*McCoy Report*").

⁶⁴ *Matkin Report* at 59-64; *McCoy Report* at 20-44.

⁶⁵ *Alberta Securities Commission Reorganization Act*, S.A. 1988, c. 7; *Securities Amendment Act*, 1995, S.A. 1995, c. 28.

⁶⁶ Y. Martineau, *A Streamlined Regulatory Structure for Québec's Financial Sector*, Report of the Task Force on Financial Sector Regulation, December 2001 ("*Martineau Report*").

exercise by a regulatory body of the quasi-judicial function, including the problem of apprehension of bias. It stated:

In addition, the institutional independence and intellectual autonomy of the authority exercising the quasi-judicial function must be preserved from the influence of the authority exercising other regulatory functions. These essential attributes of the judiciary may be compromised or appear to be compromised when, for instance, the quasi-judicial authority uses common services within the regulatory body (investigators, legal advisers, secretaries, communication services, staff, etc.). A barrier must therefore be raised between certain activities.⁶⁷

The report recommended the establishment of the Agence nationale d'encadrement du secteur financier du Québec ("**Agency**"), which was proposed to be the single body to regulate the financial sector. In addition, it proposed a separate adjudicative tribunal for the Agency.

Legislation was subsequently passed, the effect of which, amongst others, was to establish the Agency (now renamed Autorité des marchés financiers) and also to create a separate adjudicative tribunal ("**Board**") for securities matters only (the Bureau de décision et de révision en valeurs mobilières).⁶⁸ The Board is to be composed of members appointed by the Government, which also determines the number of members. Their term of office is five years, but may be less where the candidate so requests for a valid reason or where required by special circumstances.⁶⁹ There is to be a chair and deputy chairs, designated by the Government, who are full-time.⁷⁰ The Government determines the remuneration for members, as well as their benefits and other conditions of employment.⁷¹ Their pension plan is determined pursuant to the *Act respecting the Pension Plan of Management Personnel*.⁷² The chair will submit an annual

⁶⁷ *Martineau Report* at 51.

⁶⁸ *An Act respecting the Agence nationale d'encadrement du secteur financier*, S.Q. 2002, c. 45.

⁶⁹ *Ibid.*, s. 97.

⁷⁰ *Ibid.*, s. 99.

⁷¹ *Ibid.*, s. 101.

⁷² *Ibid.*, s. 102.

budget estimates for approval by the Government.⁷³ The Agency and the Board started their operations on February 1, 2004.

The jurisdiction of the Board is broad. At the request of the Agency or "any interested person", the Board shall exercise the powers provided in the *Securities Act*, R.S.Q., chapter V-1.1, which include:⁷⁴

- (a) the revocation, suspension or imposition of restrictions on the rights granted by registration to a dealer or adviser;
- (b) prescribing the conduct of an entity trading securities or engaged in clearing activities;
- (c) making a freeze order;
- (d) recommending to the Minister the appointment of a provisional administrator for a person or company in certain circumstances;
- (e) the refusal of an exemption;
- (f) prescribing the cessation of an activity in respect of a transaction in securities;
- (g) the imposition of an administrative penalty up to \$1 million, the repayment of the cost of an investigation or an order prohibiting a person from acting as director or senior executive; and
- (h) the power of review with respect to certain decisions rendered by the Agency or by a self-regulatory organization. Where it is a self-regulatory organization that is applying for the review, the Board shall not, in appraising the facts or the law, substitute its appraisal of the public interest for the appraisal made by the Agency for the purposes of its decision.

The Board, before rendering a decision that adversely affects the rights of a person, must afford an opportunity to be heard. An appeal lies from a decision of the Board to the Court of Québec and, from there, to the Court of Appeal, with leave.

In its Newsletter of December 18, 2003, the Bureau de transition stated:

⁷³ *Ibid.*, s. 110.

⁷⁴ *Ibid.*, s. 93.

"The ... *Bureau de transition* has already formulated three orientations to guide the introduction of the [Board]:

- Ensure the efficiency of the [Board] in its role of specialized administrative tribunal;
 - Ensure the [Board]'s institutional independence;
 - Ensure the [Board]'s administrative independence."
-

Self-Regulatory Organizations

Both the Investment Dealers Association ("**IDA**") and RS Market Regulation Services Inc. ("**RS**") have adopted, as their adjudication model, a hearing panel composed of three persons. The Mutual Fund Dealers Association will, we understand, adopt a similar model. An RS panel is selected from the Hearing Committee and is composed of a current or former member of the Law Society, who acts as the chair, a person who is or was a director, officer, partner or employee of an entity subject to regulation, and one other. The Hearing Committee is chosen by the board of RS from individuals nominated by the regulated entities, from the bar, those subject to regulation and other knowledgeable persons. The IDA panel is composed of two industry representatives from the appropriate District Council of the IDA, and a representative of the public who acts as the chair. The public representative is not to be associated with any investment dealer and must have legal training and industry knowledge, usually as a securities lawyer or retired judge. In both instances, the hearings are trial-like.

The sanctions available to the IDA panel include a reprimand, a temporary or permanent bar from employment with an IDA member, a \$1 million penalty for each offence, and a payment of an amount equal to three times the pecuniary benefit which accrued to the member as a result of the violation. The RS panel may impose one or more of the following sanctions:

- (a) a reprimand;
- (b) a fine not to exceed the greater of:
 - (i) \$1,000,000, and

- (ii) an amount equal to triple the financial benefit which accrued to the person as a result of committing the contravention;
- (c) the restriction of access to the marketplace for such period and upon such terms and conditions, if any, considered appropriate;
- (d) the suspension of access to the marketplace for such period and upon such terms and conditions, if any, considered appropriate;
- (e) the revocation of access to the marketplace; and
- (f) any other remedy determined to be appropriate in the circumstances.

In terms of the issue of perception of unfairness, it is significant to note that the Five Year Review Committee's Final Report (at p. 120) drew attention to the concerns that had been expressed about perceptions of unfairness in the way in which IDA disciplinary panels are currently constituted:

We suggest the IDA look again at the structure of its disciplinary panels; as two thirds of the members of a disciplinary panel are IDA member representatives, there may be concerns about the perceived independence of the panel We encourage the IDA to reconsider this allocation.

The December 2003 Report of the Ontario Securities Commission Regulatory Burden Task Force (at p. 12-13) was even more definitive on this issue:

We also recommend that the IDA's other governance structures and procedures be altered where necessary to ensure, to the greatest extent possible that its self-regulatory activities are, and are perceived to be, impartial and thus fair to investors. For example, the IDA's disciplinary hearings are now conducted by panels composed of three members. The Chair of each panel is a lawyer who is not associated with IDA members and the other two panel members are representatives of IDA members. Although the IDA advised us that they were not aware of any situation where the two IDA representatives had outvoted the Chair in a disciplinary decision, the perception remains that the two IDA representatives could determine or influence the outcome of hearings. We therefore recommend that each IDA disciplinary panel be composed of an independent lawyer as Chair, an independent IDA director and a representative of an IDA member. The presence of the IDA member representative would ensure that the panel's adjudicative function would have the benefit of the industry expertise of that representative. This

panel structure would eliminate any appearances of impartiality [*sic*] in the decisions reached by the IDA disciplinary panels.

While the context and the nature of the perceptions of partiality are somewhat different from the situation with the OSC, this recommendation does underscore the increasingly pervasive nature of concerns about bias and conflict of interest across the whole spectrum of securities and financial services regulation.

FOREIGN REGULATORS

The SEC

The SEC describes its enforcement process as follows:

Under the securities laws the Commission can bring enforcement actions either in the federal courts or internally before an administrative law judge. The factors considered by the Commission in deciding how to proceed include: the seriousness of the wrongdoing, the technical nature of the matter, tactical considerations, and the type of sanction or relief to obtain. For example, the Commission may bar someone from the brokerage industry in an administrative proceeding, but an order barring someone from acting as a corporate officer or director must be obtained in federal court. Often, when the misconduct warrants it, the Commission will bring both proceedings.

- **Civil action:** The Commission files a complaint with a U.S. District Court that describes the misconduct, identifies the laws and rules violated, and identifies the sanction or remedial action that is sought. Typically, the Commission asks the court to issue an order, called an injunction, that prohibits the acts or practices that violate the law or Commission rules. A court's order can also require various actions, such as audits, accounting for frauds, or special supervisory arrangements. In addition, the SEC often seeks civil monetary penalties and the return of illegal profits, known as disgorgement. The courts may also bar or suspend an individual from serving as a corporate officer or director. A person who violates the court's order may be found in contempt and be subject to additional fines or imprisonment.
- **Administrative action:** The Commission can seek a variety of sanctions through the administrative proceeding process. Administrative proceedings differ from civil court actions in that they are heard by an administrative law judge (ALJ), who is independent of the Commission. The administrative law judge presides over a hearing and considers the evidence presented by the Division staff, as well as any evidence submitted by the subject of the proceeding. Following the hearing the ALJ issues an initial decision in which he makes findings of fact and reaches legal conclusions. The initial decision also contains a recommended sanction. Both the Division staff and the defendant may appeal all or any portion of the initial decision to the Commission. The Commission may affirm the decision of the ALJ, reverse the decision, or remand it for additional hearings. Administrative sanctions include cease and desist orders, suspension or revocation of broker-dealer and investment advisor registrations, censures, bars from association with the securities industry, and payment of civil monetary penalties, and return of illegal profits.⁷⁵

For our purposes, the following two aspects from the above are important:

⁷⁵ U.S. Securities and Exchange Commission's website: <http://www.sec.gov/about/whatwedo.shtml>

(1) to bar someone from acting as a corporate officer or director, the SEC must proceed in court; and

(2) the use of the ALJ.

The importance of (1) is derived from the fact that in section 127 proceedings, the Commission views barring someone from acting as a corporate officer or director as an appropriate sanction in serious cases. The significance of (2) is that although the ALJ's initial decision is subject to review by the SEC,⁷⁶ the ALJ does provide a substantial separation of functions in comparison to the Commission:

In short, ALJs are very nearly as independent of federal agencies as federal trial judges are of the Executive Branch. This high degree of independence of ALJs from agencies is designed to protect the rights of individuals affected by agency adjudicatory decisions from any potential sources of bias.⁷⁷

The *Administrative Procedures Act*⁷⁸ ("APA") provides the legislative framework for most decision-making by federal agencies.⁷⁹ The APA is viewed as favouring a "court-centered approach" rather than the "agency-centered approach".⁸⁰ Nevertheless, the ALJ model has attracted various attempts to promote agency-centered principles at the expense of the court-centered scheme.⁸¹ In the particular context of the SEC, the adjudicative function of the ALJs

⁷⁶ K.C. Davis & R.J. Pierce, Jr., *Administrative Law Treatise*, 3rd ed., vol. II (New York: Little Brown and Company, 1994) at 97:

APA s. 557(b) provides: "On appeal from or review of the initial decision, the agency has all the power which it would have in making the initial decision except as it may limit the issues on notice or by rule." The effect of this provision is to allow agencies to treat ALJ initial decisions as recommendations, with all ultimate decisionmaking power held by the agency head. Most agencies operate in this manner. The agency adopts an ALJ's decision only if, and to the extent that, it agrees with the decision.

⁷⁷ *Ibid.*

⁷⁸ 5 U.S.C. §§ 557 – 559, 701 – 706, 3344, 6362, 7562 (1946).

⁷⁹ Davis & Pierce, *supra* note 76 at 2.

⁸⁰ J.A. Wertkin, "A Return to First Principles: Rethinking ALJ Compromises" (2002) 22 *Journal of the National Association of Administrative Law Judges* 365 at 397.

⁸¹ *Ibid.*

has been criticized for not providing enough independence.⁸² Others disagree. Although the SEC retains ultimate authority, the reality appears to grant substantial independence to the ALJs.⁸³ In the final analysis, however, the ebb and flow of the particulars of this debate about "court-centered" versus "agency-centered" is not important. Because of the existence of the APA, care must be taken in the application of the reasoning from the debate to our situation.⁸⁴ There is another reason to be careful in drawing comparisons. The SEC is an agency that has its own history and is a creature of a different political tradition. For example:

The Securities and Exchange Commission has five Commissioners who are appointed by the President of the United States with the advice and consent of the Senate. Their terms last five years and are staggered so that one Commissioner's term ends on June 5 of each year. To ensure that the Commission remains non-partisan, no more than three Commissioners may belong to the same political party. The President also designates one of the Commissioners as Chairman, the SEC's top executive.⁸⁵

What remains to be distilled from the debate is the substantial body of opinion supporting the agency retaining the final say because of its need to ensure that the agency's

⁸²American Bar Association Committee on Federal Regulation of Securities, "Report of Task Force on the SEC Administrative Law Judge Process" (1992) 47 Business Lawyer 1731. It should be noted that the American Bar Association, since relatively early in the twentieth century, has opposed the growth of administrative power: see Davis & Pierce, *supra* note 76 at 10-29 for the historical development of the administrative process in the U.S.

⁸³ Daniel Fessler, who served on the California Public Utilities Commission for 6 years, stated:

As a decisionmaker, I am bound by the record developed before the administrative law judge. I do not see that record or have an opportunity to shape the outcome of the proceedings until the hearing process has been complete. Thus, if I believe a question or point of view vital from the public perspective, and yet I cannot find it expressed in the "record" (which may be thousands of pages long) then I am precluded from taking that perspective in reaching a decision. In these circumstances, my choices are few and all unpalatable. I can seek to remand the matter for further proceedings and delay. You can imagine the popularity of this strategy with the parties who may have spent a year-and-a-half in the hearing room to date. Or I can limit myself to the record and thus reduce or contort the quest for the public good. [footnotes omitted]

See "Conference: Harvard Electricity Policy Group: Regulatory Decisionmaking Reform" (1995) 8 Admin. L.J. Am. U. 789 at 802. While this relates to a different agency, and while the SEC itself does not appear to keep the relevant statistics, we have been advised by one source that possibly only 10 percent of the ALJ's determinations at the SEC are reviewed by the Commission. Moreover, there is no perception of bias: D.J. Gifford, "Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure" (1990-1991) 66 Notre Dame L. Rev. 965 at 981-982.

⁸⁴ See M. Asimov, "When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies" (1981) 81 Colum. L. Rev. 759 (1981); E.H. Fleischman, "Toward Neutral Principles: The SEC's Discharge of its Tri-Functional Administrative Responsibilities" (1993) 42 Cath. U. L. Rev. 251.

⁸⁵ U.S. Securities and Exchange Commission's website: <http://www.sec.gov/about/commissioner.shtml>

policy interests are advanced in the adjudicative process. However, where the adjudicative process is no longer viewed as the means to advance policy interests, the rationale for the agency to retain control over the decision-making is largely removed.⁸⁶ Further, where the proceeding is accusatory and severe sanctions are being sought, a trial-type procedure has been stated to be entirely appropriate.⁸⁷

The SEC's adjudicative model demonstrates:

- (1) a "court-centered" approach in which the fact-finding and initial decision are made by a judge prior to the agency's review;
- (2) that resort must be to the courts to prohibit a person from acting as a director or officer of a public company; and
- (3) that the rationale for the agency having the final say is to ensure that the policies of the agency are advanced. However, it is very difficult to obtain any meaningful statistics regarding the use of this review mechanism for policy purposes.

⁸⁶ Gifford, *supra* note 83 at 978.

⁸⁷ W.F. Pedersen, Jr., "The Decline of Separation of Functions in Regulatory Agencies" (1978) 64 Va. L. Rev. 991 at 993.

England

Financial Services Authority ("FSA")

The FSA is created and governed by the *Financial Services and Markets Act 2000* ("*FSA Act*").⁸⁸ The FSA enforces not only the *FSA Act* but other related legislation as well (*Criminal Justice Act 1993*, *Money Laundering Regulations 1993*, and *Unfair Terms Regulations*).⁸⁹ The FSA's powers include, among others, the ability to prosecute in criminal court, seek injunctions in civil court and impose disciplinary sanctions.⁹⁰

The FSA has the power to appoint investigators, require reports by skilled persons, and gather information related to its purposes.⁹¹ It can require information and documents not only from those under investigation, but also from certain connected parties.⁹² In addition, there exists a power for specific investigations where someone may have breached a particular requirement of the *FSA Act*. This power of investigation applies to firms, authorized persons, employees of firms and small e-money issuers.⁹³ Investigators have the power to require attendance before them, to require provision of information and documents, and to require that assistance be given to them.⁹⁴ The FSA has the power to control the scope and the length of the investigations, as well as the conduct and the reporting of its investigators.⁹⁵ The FSA can apply to a Justice of the Peace or a Sheriff for a search warrant, and such can be granted

⁸⁸ *Financial Services and Markets Act 2000* (U.K.), 2000, c. 8.

⁸⁹ *FSA Handbook* (Enforcement) Ch. 1.2.1, online: Financial Services Authority <www.fsa.gov.uk> ("**Enforcement**").

⁹⁰ Enforcement Ch. 1.3.5.

⁹¹ *FSA Act*, ss.165-169 and 284.

⁹² *Ibid.*, s. 165.

⁹³ *Ibid.*, s. 168.

⁹⁴ *Ibid.*, ss. 171 and 172.

⁹⁵ *Ibid.*, ss. 170(7) and (2).

where the issuing authority is satisfied that all the conditions have been met.⁹⁶ Moreover, the *FSA Act* creates three criminal offences with respect to non-cooperation with the FSA.⁹⁷

The FSA is granted various powers of enforcement. They include the power to:

- (a) discipline authorized firms and approved persons;
- (b) impose civil penalties in cases of market abuse;
- (c) prohibit an individual from being employed in connection with a regulated activity;
- (d) apply to court for injunctions (or interdicts) and other orders against persons contravening relevant requirements or engaging in market abuse;
- (e) petition the court for the winding-up or administration of companies, and the bankruptcy of individuals, carrying on regulated activities;
- (f) apply to the court for restitution orders against persons contravening relevant requirements or persons engaged in market abuse;
- (g) require restitution of profits which have accrued to authorized persons contravening relevant requirements or persons engaged in market abuse, or of losses which have been suffered by others as a result of those breaches;
- (h) prosecute various related offences;
- (i) fine, issue public censures, suspend or cancel listing for breaches of the Listing Rules by an issuer; and
- (j) issue public censures, suspend or remove a sponsor from the UKLA list of approved sponsors for breaches of Listing Rules by a sponsor.⁹⁸

Decision-making in respect of the serious powers of enforcement rests with the Regulatory Decisions Committee ("**RDC**"). The RDC is appointed by the FSA board of directors ("**Board**") to exercise regulatory powers on behalf of the FSA.⁹⁹ The RDC exists

⁹⁶ *Ibid.*, s. 176.

⁹⁷ *Ibid.*, s. 177.

⁹⁸ For this summary see Enforcement Ch. 2 Annex I ENF 2 1G(1.4).

⁹⁹ *FSA Handbook* (Decision-Making) Ch. 4.2.1, online: Financial Services Authority <www.fsa.gov.uk> ("**Decision**").

outside the FSA's management structure, and only the Chair of the RDC is an FSA employee.¹⁰⁰ The RDC is composed of at least the Chair, one or more Deputy Chair and general members.¹⁰¹ The members of the RDC represent the public interest and include current and recently retired practitioners with financial service industry skills and knowledge, as well as non-practitioners.¹⁰²

The Chair of the RDC is appointed by the Board on the recommendation of an independent group established by the Board. All other members of the RDC are appointed by the Board on the recommendation of the Chair of the RDC.¹⁰³ The members are appointed for a fixed period and can only be removed for misconduct or incapacity.¹⁰⁴ Each meeting of the RDC must be comprised of at least the Chair or Deputy Chair and two other members.¹⁰⁵ RDC decisions can be made in private.¹⁰⁶ Decisions to begin or discontinue proceedings in court will be made by the RDC Chair¹⁰⁷ and, where the Chair is not available, by the director of Enforcement or by a member of the FSA executive.

If the RDC decides to take enforcement action against a person, such action may be referred by the person to the Financial Services and Markets Tribunal ("**Tribunal**") whose members are appointed by the Lord Chancellor.¹⁰⁸ The *FSA Act* establishes the office of President, the Chairman's panel, and the panel. The President of the Tribunal is to have at least 10 years of legal experience,¹⁰⁹ the members of the Chairman's panel must have at least 7 years

¹⁰⁰ Decision Ch. 4.2.3.

¹⁰¹ Decision Ch. 4.2.2.

¹⁰² Decision Ch. 4.2.3.

¹⁰³ Decision Ch. 4.2.5.

¹⁰⁴ Decision Ch. 4.2.5 and 4.2.7.

¹⁰⁵ Decision Ch. 4.2.8.

¹⁰⁶ Decision Ch. 4.2.12.

¹⁰⁷ Decision Ch. 4.6.1.

¹⁰⁸ *FSA Act*, s.132.

¹⁰⁹ *Ibid.*, Sch. 13 s. 2(5).

of legal experience,¹¹⁰ and the members of the panel at large must appear to the Lord Chancellor to be qualified by experience or otherwise to deal with the kind of matters that the Tribunal is likely to encounter. Any hearing by the Tribunal requires at least one member, and each Tribunal must have at least one member from the Chairman's panel. The Lord Chancellor has the power to determine both the remuneration and the rules of the Tribunal.

Any reference to the Tribunal must be made within 28 days of the original decision/supervisory notice.¹¹¹ A reference before the Tribunal will be a full rehearing of the matter that will determine what action, if any, it is appropriate for the FSA to take.¹¹² The Tribunal cannot force the FSA to do something that it could not have done at the time the original decision was made.¹¹³ A decision of the Tribunal carries the weight of a decision of the County Court. The Tribunal has the power to appoint experts, summons witnesses to give evidence, and order costs against individuals bringing a claim or against the FSA. There is an appeal to the Court of Appeal on a question of law with leave either from the Court of Appeal or the Tribunal.¹¹⁴

There has been much criticism about the efficacy of the FSA in its enforcement role. The criticism is based on the plethora of checks and balances imposed in the course of an investigation and proceeding. The Tribunal, however, as an independent adjudicative body, does not appear to have been implicated:

The more serious sanctions – financial penalties; public censure; refusal, withdrawal or variation of a firm's permission; and refusal or withdrawal of approved person status – are the Regulatory Decisions Committee's province. The RDC is independent of the

¹¹⁰ *Ibid.*, Sch. 13.

¹¹¹ *Ibid.*, s.133(1).

¹¹² Decision Ch. 5.1.3.

¹¹³ Decision Ch. 5.1.4.

¹¹⁴ *FSA Act*, s. 137.

FSA's executive management structure and its findings are subject to review by the Financial Services and Markets Tribunal which has said that it will generally conduct hearings in public. "This shows that the Tribunal thinks it not only important that justice be done but that it is seen to be done," observed Mr. Whittaker [General Counsel to the FSA].¹¹⁵

¹¹⁵ "But is it Fair?", *Compliance Monitor*, April 2003 (Lexis). For general discussion of the criticism see: Peter Biby, "Command and control" *The Lawyer*, Centaur Communications Ltd.: September 29, 2003 (Factiva).; "Tough Talking" *The Lawyer*, Centaur Communications Ltd.: September 29, 2003 (Factiva).; Richard Fletcher and Grant Ringshaw, "Will the City Watchdog Really Bite as Hard as it Barks?", *The Sunday Telegraph*, November 23, 2003 (Factiva); and Financial Services – Regulator's powers, online: The Incorporated Council Of Law Reporting <<http://www.lawreports.co.uk/civjulc3.2.htm>>.

Australia

The *Australian Securities and Investments Commission Act, 2001 (Cth.)* ("**ASIC Act**") provides that the Australian Securities and Investments Commission ("**ASIC**") may prosecute where an investigation reveals that an offence may have been committed under corporations legislation, and the person ought to be prosecuted for the offence.¹¹⁶ The majority of the prosecutions undertaken by the ASIC are carried out in conjunction with the Director of Public Prosecutions. Further, if the ASIC, on reasonable grounds, suspects or believes that a person other than the accused can give information relevant to a prosecution, the ASIC may require the person to give all reasonable assistance in connection with a prosecution.¹¹⁷ The ASIC may also bring a civil proceeding against a person for the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct committed in connection with a matter to which the investigation or examination relates.¹¹⁸ Finally, the ASIC may also commence civil proceedings seeking the imposition of a civil penalty of up to \$200,000 (Aust.) and disqualification from managing corporations where a person has contravened certain provisions of the *Corporations Act*.¹¹⁹

The ASIC may itself hold hearings for the purpose of performing any of its functions or powers under corporations legislation. Examples of these powers are disqualifying a person from managing a corporation in limited circumstances.¹²⁰ The ASIC may apply to the

¹¹⁶ *ASIC Act*, s.49.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, s.50.

¹¹⁹ *Corporations Act 2001* (Cth.), ss. 206C, and 1317G, J; Schedule 4 Part 4 of the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure). Bill 2003 proposes to increase the penalty for breach of a civil penalty provision to up to \$1 million (Aust.) for a corporation (while leaving the penalty at up to \$200,000 (Aust.) for individuals). It is also noteworthy that, instead of commencing civil proceedings or civil penalty proceedings, the ASIC may accept an enforceable undertaking: *ASIC Act*, s.93AA.

¹²⁰ *Corporations Act 2001* (Cth.), s. 206F(1)(b)(ii).

court in more general situations,¹²¹ and may refuse to grant a financial services licence¹²². Financial penalties under the legislation are generally left up to the courts. There is, however, a proposal currently under consideration which would grant the ASIC powers to impose financial penalties of up to \$100,000 (Aust.) in certain circumstances.¹²³ The ASIC has the discretion to hold hearings in private or to hold them in a public venue.¹²⁴ Subject to any exceptions, a person may request that a hearing take place in public.¹²⁵ Whether the hearing is held in private or public, the ASIC may restrict publication of material that is confidential or unfairly prejudices a person.¹²⁶

An ASIC member has the power to summon witnesses and may take evidence under oath or affirmation. Additionally, a member presiding at a hearing may require a witness to answer a question or to produce a document.¹²⁷ The ASIC must take into account evidence or submissions given to it at a hearing.¹²⁸

The *ASIC Act* also sets out procedural guidelines relating to the conduct of a hearing:

- "(1) A hearing must be conducted with as little formality and technicality, and with as much expedition, as the requirements of the corporations legislation (other than the excluded provisions) and a proper consideration of the matters before the ASIC permit.
- (2) At a hearing, ASIC:
 - (a) is not bound by rules of evidence;

¹²¹ e.g. ss.206C, 206D, 206E.

¹²² *Corporations Act 2001* (Cth.), ss. 913(5)(a) and (b).

¹²³ Gabrielle Costa, "Tough Governance Talked Down", *The Sunday Morning Herald*, 25 November 2003 (Factiva).

¹²⁴ *ASIC Act*, s.52.

¹²⁵ *Ibid.*, s.53.

¹²⁶ *Ibid.*, s.54.

¹²⁷ *Ibid.*, s.58.

¹²⁸ *Ibid.*, s.60.

- (b) may, on such conditions as it thinks fit, permit a person to intervene; and
- (c) must observe the rules of natural justice.

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- (5) At a hearing, a natural person may appear in person or be represented by an employee of the person approved by ASIC.
- (6) A body corporate may be represented at a hearing by an officer of the body corporate approved by ASIC.
- (7) An unincorporated association, or a person in the person's capacity as a member of an unincorporated association, may be represented at a hearing by a member or officer of the association approved by ASIC.
- (8) Any person may be represented at a hearing by a barrister or solicitor of the Supreme Court of a State or Territory or of a High Court."¹²⁹

The ASIC may, on its own motion or at a person's request, refer to a Court for decision a question of law arising at a hearing. However, where a question has been referred, the ASIC must not render a decision to which the question is relevant until the Court decides the issue. Further, the ASIC cannot proceed in a manner, or make a decision, that is inconsistent with the Court's opinion on the question.

Review of decisions made by the ASIC is to be conducted by the Administrative Appeals Tribunal.¹³⁰ The ASIC is obligated to give notice to those affected by its decisions and to inform them of their right to have the decisions reviewed.¹³¹ The Tribunal describes itself as follows:

The Tribunal is an independent body that reviews, on the merits, a broad range of administrative decisions made by Australian (and, in limited circumstances, State) Government ministers and officials, authorities and other tribunals. The Tribunal also reviews administrative decisions made by some non-government bodies. Merits review of an administrative decision involves its reconsideration. On the facts before it, the

¹²⁹ *Ibid.*, s.59.

¹³⁰ *Ibid.*, s.244; see *Administrative Appeals Tribunal Act 1975* (Cth). The decision may also be judicially reviewed on a question of law before the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth.).

¹³¹ *ASIC Act*, s.244A.

Tribunal decides whether the correct – or in a discretionary area, the preferable – decision has been made in accordance with the applicable law. It will affirm, vary or set aside the original decision.

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The Tribunal's jurisdiction is contained in over 395 separate Acts and Statutory Instruments, covering areas such as taxation, social security, veterans' entitlements, Commonwealth employees' compensation and superannuation, criminal deportation, civil aviation, customs, freedom of information, bankruptcy, student assistance, security assessments undertaken by the Australian Security Intelligence Organisation (ASIO), corporations and export market development grants.

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The Tribunal's membership consists of a President, Presidential Members (including Judges and Deputy Presidents), Senior Members and Members. The President is a Judge of the Federal Court of Australia. Some Presidential Members are Judges of the Federal Court or Family Court of Australia. All Deputy Presidents are lawyers. Senior Members may be lawyers or have special expertise in other areas.

Members have expertise in areas such as accountancy, actuarial skills, administration, aviation, engineering, environment, insurance, law, medicine, military affairs, taxation, social welfare and valuation.

Appointments to the Tribunal may be full-time or part-time.¹³²

A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.¹³³

The ASIC Annual Report 2002-03 with respect to enforcement states:

Criminal matters

We had 29 criminals jailed as part of 43 people convicted from briefs prosecuted by the Director of Public Prosecutions (DPP). Staff investigated and obtained evidence for the DPP, which then decided and prosecuted all indictable matters. We involved DPP officers in considering evidence on potentially serious criminal investigations at an early stage.

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Civil action and compensation

¹³² Administrative Appeals Tribunal's website: <http://www.aat.gov.au>

¹³³ *Administrative Appeals Tribunal Act 1975* (Cth.) s. 44(1).

We took 67 civil proceedings resulting in orders against 151 people or companies. Courts ordered \$121 million in compensation and froze \$2 million for investors and creditors, and wound up illegal schemes. We also took proceedings for civil penalties against directors, company officers and others who failed in their duties.

• • •

Bannings, fines and disciplinary proceedings

To protect the public, we banned, or obtained Court orders banning, 16 people from directing companies, 39 people from offering financial services, and disciplined or deregistered 8 company auditors and liquidators for misconduct through the Courts, administratively, or through enforceable undertakings.

In addition, there is the Takeovers Panel ("**Panel**").¹³⁴ The Panel, as its name suggests, is responsible for resolving disputes concerning takeovers. The Panel has the power to, among other things:

- (1) declare that the circumstances surrounding the takeover of an Australian company are unacceptable; and
- (2) make orders to protect the rights of persons during a takeover bid.

Panel members are appointed by the Governor General, on the nomination of the Minister for Financial Services and Regulation.¹³⁵ There exists a minimum of five members on the Panel at any given time. The *Corporations Act* provides that private parties to a takeover no longer have the right to commence civil litigation while the takeover is current, and that all disputes which used to be dealt with by the civil courts are now to be resolved by the Panel.¹³⁶

The Panel also has limited powers to review its own decisions of first instance and to review decisions of the ASIC related to granting exemptions or modifications during a

¹³⁴ The Panel was established by section 171 of the *Australian Securities and Investments Commission Act 1989* and is continued in existence by section 261 of the *ASIC Act*. It was renamed by the *Financial Services Reform Act 2001*.

¹³⁵ *ASIC Act*, s.172.

¹³⁶ *Corporations Act 2001* (Cth.), s. 695B.

takeover period. Any review of the panel's own decisions will be conducted before a fresh panel.¹³⁷ The specifics of the relationship between the Panel and the ASIC are set out in greater detail in a Memorandum of Understanding.

¹³⁷ Takeovers Panel's website: <http://www.takeovers.gov.au>

Hong Kong

The Hong Kong Securities and Futures Commission is responsible for regulating the securities and futures markets. Since 1993, it has been self-funding. The Securities and Futures Ordinance¹³⁸ enacted in March 2002 reflects the reform of the securities and futures legislation started in 1999.¹³⁹ It consolidates ten ordinances that had been enacted over 25 years. The new enforcement scheme is as follows.

The Commission exercises a disciplinary function over registered persons and entities. The Commission has the power to impose sanctions, including the power to: (i) fine up to \$10 million (H.K.) or 3 times the amount of the profit gained or loss avoided as a result of the misconduct, (ii) revoke or suspend registration, and (iii) prohibit the person from various positions in registered entities.¹⁴⁰ The Commission may only exercise this jurisdiction after giving notice and an opportunity to be heard. Moreover, it is required to set forth guidelines as to the particulars of the conduct which will warrant the exercise of its fining power.¹⁴¹

A decision of the Commission may be reviewed by the Securities and Futures Appeals Tribunal.¹⁴² The Tribunal members are appointed by the Chief Executive (comparable to the Prime Minister) in such numbers "as he considers appropriate".¹⁴³ A panel consists of a chairman and two other members. The Tribunal is given large powers to call and hear evidence

¹³⁸ *Securities And Futures Ordinance* (Cap. 571) Ordinance No. 5 of 2002 ("**Ordinance**").

¹³⁹ The Government of the Hong Kong Special Administrative Region, *Consultation Document on the Securities and Futures Bill*, April 2000 ("**Consultation Document**").

¹⁴⁰ Ordinance ss. 194, 196.

¹⁴¹ Ordinance s. 199.

¹⁴² Ordinance s. 217.

¹⁴³ Ordinance Sch. 8.5.2.

and to punish for contempt.¹⁴⁴ A further right of appeal is to the Court of Appeal on a point of law.¹⁴⁵

Market misconduct is addressed through the Market Misconduct Tribunal.¹⁴⁶ Market misconduct comprises insider dealing, stock market manipulation, false trading in securities or futures contracts, price rigging in securities or futures markets, disclosure of information about prohibited transactions, and disclosure of false or misleading information inducing transactions.¹⁴⁷ The Tribunal is able to impose a range of sanctions, including:

- (a) disgorgement of profits made or loss avoided, subject to compound interest thereon;
- (b) disqualification of a person from being a director or otherwise involved in the management of a listed company for up to 5 years;
- (c) a "cold shoulder" order on a person (i.e., the person is deprived of access to market facilities) for up to 5 years;
- (d) a "cease and desist" order (i.e., an order not to breach any of the market misconduct provisions again);
- (e) referring a person found to have engaged in market misconduct to a body of which that person is a member for disciplinary action by that body; and
- (f) payment of the costs of the Market Misconduct Tribunal inquiry and/or Commission investigation.¹⁴⁸

Similar to the Appeals Tribunal, the Market Misconduct Tribunal is chaired by a judge assisted by two other members who are appointed by the Chief Executive. Additional Tribunals may be appointed if appropriate.¹⁴⁹ Where there appears to the Financial Secretary (comparable to the Minister of Finance) to be cause, proceedings can be brought by a Presenting

¹⁴⁴ Ordinance ss. 219, 221.

¹⁴⁵ Ordinance s. 229.

¹⁴⁶ Ordinance s. 251.

¹⁴⁷ Ordinance s. 245.

¹⁴⁸ Ordinance s. 257.

¹⁴⁹ Ordinance s. 251(7).

Officer, who is a legal officer, counsel or solicitor appointed by the Secretary for Justice (comparable to the Attorney General).¹⁵⁰ The Tribunal is granted wide power to collect and hear evidence.¹⁵¹ An appeal from the Tribunal lies to the Court of Appeal on a point of law or, with leave, on a question of fact.¹⁵²

The Market Misconduct Tribunal builds on the experience gained from the Insider Dealing Tribunal ("**IDT**"), a tribunal introduced in 1991 to inquire into and to impose civil sanctions against insider dealing.¹⁵³ That tribunal's work has been well received. By April 2000, the IDT had completed 9 inquiries into suspected insider trading and imposed sanctions on 15 insiders.¹⁵⁴ A panel of that tribunal was similarly composed: a judge and two experienced lay persons.¹⁵⁵

Criminal proceedings may be taken for:

- (a) insider dealing;¹⁵⁶
- (b) stock market manipulation;¹⁵⁷
- (c) false trading in securities or futures contracts;¹⁵⁸
- (d) price rigging in securities or futures markets;¹⁵⁹
- (e) disclosure of information about prohibited transactions in securities or futures contracts;¹⁶⁰ and

¹⁵⁰ Ordinance s. 251(4)(5).

¹⁵¹ Ordinance s. 253.

¹⁵² Ordinance s. 266.

¹⁵³ *Securities Insider Dealing Ordinance* (Cap 395) 1996.

¹⁵⁴ Consultation Document Ch. 11.4.

¹⁵⁵ Ordinance s. 251.

¹⁵⁶ Ordinance s. 291.

¹⁵⁷ Ordinance s. 299.

¹⁵⁸ Ordinance s. 295.

¹⁵⁹ Ordinance s. 296.

¹⁶⁰ Ordinance s. 297.

- (f) disclosure of false or misleading information inducing transactions in securities or futures contracts.¹⁶¹

While the Commission will make the initial decision whether to proceed under the criminal regime or before the Market Misconduct Tribunal, the Financial Secretary (for the Market Misconduct Tribunal) retains the power to redirect.¹⁶² The Market Misconduct Tribunal has not been granted a power to fine, although this appears to have been carefully considered. The Government was advised that under the jurisprudence developing before the European Court of Human Rights involving human rights protection similar to that existing under Hong Kong law, a fining power could in certain cases be construed as "criminal".¹⁶³ This was one of the considerations that led to the creation of parallel civil and criminal regimes.¹⁶⁴ The Commission may also seek an injunction as well as other speedy relief by a summary process before the Court of First Instance (High Court).¹⁶⁵

¹⁶¹ Ordinance s. 298.

¹⁶² Ordinance s. 252(10).

¹⁶³ Consultation Document Ch. 11.11.

¹⁶⁴ Consultation Document Ch. 11.13.

¹⁶⁵ Ordinance s. 213.

Trinidad and Tobago

At the present time, Trinidad and Tobago are reviewing their *Securities Industry Act, 1995* and related regulatory instruments and legislation.¹⁶⁶ A reform is contemplated. The recommendation made by Stikeman Elliott, their consultants, is to separate the policy-making and enforcement functions from the adjudicative function of the Trinidad and Tobago Securities and Exchange Commission. There would be one tribunal that would exercise two functions, an appellate function reviewing decisions made by the Commission, and an adjudicative function at first instance hearing market misconduct cases. There would also exist the right to proceed by way of a criminal prosecution in the appropriate circumstances. Judicial review would be available for decisions made by the tribunal in its appellate function, and there would be a right of appeal from decisions made by the tribunal in its adjudicative function.

The tribunal would be chaired by a judge and would be staffed on an as needed basis from a roster of five persons, who could be former judges, members of the bar, foreign securities practitioners, and former registrants with no active business interest in the local securities markets. The model is similar to Hong Kong, but instead of two tribunals, only one is recommended. This is said to be because of the size of the market and the resources available.

¹⁶⁶ Review and Revision of the Trinidad and Tobago *Securities Industry Act, 1995* and Related By-Laws and Associated Legislation, Addendum to Inception Report, January 30, 2003.

APPENDIX III

LIST OF THOSE INTERVIEWED

Kerry Adams

Professor Anita I. Anand

Philip Anisman

James C. Baillie, Q.C.

Paul J. Bates

Stanley M. Beck, Q.C.

Brian P. Bellmore

Paul C. Bourque, Q.C.

William J. Braithwaite

David A. Brown, Q.C.

Brian Butler

Professor Mary Condon

Purdy Crawford

Peter J. Dey, Q.C.

James D. G. Douglas

Linda L. Fuerst

Calvin S. Goldman, Q.C.

Mark T. Gordon

Edward L. Greenspan, Q.C.

Joseph P. Groia

Lawrence P. Haber

Harold Hands

William L. Hess, Q.C.

Professor Hudson Janisch

Melissa Kennedy

Professor Eric Kirzner

Henry J. Knowles, Q.C.

Jonathan Lampe

Alan J. Lenczner, Q.C.

Jeffrey S. Leon

Paul H. Le Vay

Professor Jeff G. MacIntosh

James G. Matkin

David C. Moore

Paul M. Moore, Q.C.

H. Lorne Morphy, Q.C.

Jay Naster

Professor Chris Nicholls

Joseph J. Oliver

Ermanno Pascutto

Jane Ratchford

Lawrence E. Ritchie

John F. Rook, Q.C.

Stanley Sadinsky

M. Janet Salter

Robert L. Shirriff, Q.C.

Kelly Sieman

Ian R. Smith

Steven I. Sofer

John P. Stevenson

David W. Stratas

Johanna Superina

Suresh Thakrar

Professor Michael J. Trebilcock

D. Grant Vingoe

Larry M. Waite

Edward J. Waitzer

Michael Watson, Q.C.

Howard I. Wetston, Q.C.

Joel Wiesenfeld

Wendell S. Wigle, Q.C.

Susan Wolburgh-Jenah

Robert J. Wright, Q.C.

Marvin Yontef