Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, C. S.5, AS AMENDED

- AND –

NORSHIELD ASSET MANAGEMENT (CANADA) LTD.,
OLYMPUS UNITED GROUP INC., JOHN XANTHOUDAKIS,
DALE SMITH AND PETER KEFALAS

REASONS AND DECISION REGARDING A MOTION FOR A STAY OF THE PROCEEDING

(Rule 6 of the *Ontario Securities Commission Rules of Practice* (1997), 20 O.S.C.B. 1947)

Hearing:	December 11, 2008	
Decision:	February 3, 2009	
Panel:	Wendell S. Wigle, Q.C.	- Commissioner (Chair of the Panel)
	David L. Knight, FCA	- Commissioner
	Margot C. Howard	- Commissioner
Counsel:	Anne C. Sonnen Usman M. Sheikh	- for Staff of the Ontario Securities Commission
	Alistair Crawley	- for John Xanthoudakis and Dale Smith

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REASONS AND DECISION

I. BACKGROUND

[1] On December 11, 2008, we heard a motion for an order staying the proceeding against John Xanthoudakis ("Xanthoudakis"), and Dale Smith ("Smith") (collectively the "Moving Parties") before the Ontario Securities Commission (the "Commission"), commenced by a Notice of Hearing issued on October 11, 2006, in connection with a Statement of Allegations issued by Staff of the Commission ("Staff") on the same date (the "Proceeding").

[2] A Notice of Motion was filed with the Commission by the Moving Parties on December 8, 2008 ("Stay Motion"). Written submissions for the Stay Motion were filed by the Moving Parties and Staff. The Stay Motion is made on the grounds of a reasonable apprehension of bias on the part of this hearing panel ("Hearing Panel").

[3] The Moving Parties allege that a reasonable apprehension of bias arises from comments made by the Chair of the Commission (the "Chair"), as described later herein, on three grounds: the doctrine of systemic or structural bias, the doctrine of institutional impartiality, and the doctrine of corporate taint.

[4] The Moving Parties have not made an allegation that this Hearing Panel or any of its members, is actually biased or has done anything to give rise to a reasonable apprehension of bias.

[5] Staff and the Moving Parties appeared before us on December 8, 2008. Although the parties were scheduled to make their closing submissions for the hearing on the merits on that date, we agreed to hear the Stay Motion first, and scheduled the Stay Motion to be heard on December 11, 2008.

[6] Peter Kefalas ("Kefalas"), a respondent in the Proceeding, received notice of the Stay Motion, but did not appear. Counsel for the Moving Parties informed us that Kefalas' counsel advised him that Kefalas takes no position on the Moving Parties' motion.

[7] Staff requested that we reserve our decision on the Stay Motion before us, conclude the Proceeding, and then deliver a single decision determining the Stay Motion as well as the hearing on the merits. Staff submitted that proceeding in this fashion would be fair and convenient, and would not fragment the Proceeding. Staff also submitted that further delays would prejudice Kefalas, who is a respondent in the Proceeding but is not a party to the Stay Motion.

[8] Counsel for the Moving Parties opposed Staff's request, and submitted that we should decide the Stay Motion before continuing with the hearing on the merits because of the seriousness of the Moving Parties' argument. Counsel for the Moving Parties also pointed out that the Commission has adjourned proceedings in the past to hear and decide motions.

[9] At the hearing, we decided that it would be most appropriate to make our decision with respect to the Stay Motion first, and only then, if necessary, hear closing submissions by Staff and the Moving Parties in the hearing on the merits.

[10] Here is a brief summary of our findings:

> (i) a reasonable apprehension of bias on the part of this Hearing Panel does not arise from the Chair's comments, when considering the doctrine of systemic or structural bias;
>
> (ii) a reasonable apprehension of bias on the part of this Hearing Panel does not arise from the Chair's comments, when considering the doctrine of institutional impartiality; and
>
> (iii) a reasonable apprehension of bias on the part of this Hearing Panel does not arise from the Chair's comments, when considering the doctrine of corporate taint.

[11] These are our reasons and decision on the Stay Motion.

A. The Proceeding on the Merits

[12] This Hearing Panel is currently hearing the Proceeding under sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990 c. S.5, as amended (the "Act") against the respondents Norshield Asset Management (Canada) Ltd. ("Norshield"), Olympus United Group Inc. ("Olympus United"), Xanthoudakis, Smith and Kefalas (the "Respondents"). This Stay Motion was brought by two of the respondents, Xanthoudakis and Smith, who are alleged to be the former senior officers and directing minds of Norshield and other affiliated corporations in the Proceeding.

[13] The Statement of Allegations issued by Staff, against Norshield, Olympus United, Xanthoudakis, Smith, and Kefalas, alleges that:

> (i) Norshield, Olympus United, Xanthoudakis, and Smith failed to deal fairly, honestly, and in good faith with clients, contrary to sections 2.1(1) and 2.1(2) of OSC Rule 31-505;
>
> (ii) Norshield and Olympus United failed to keep and/or maintain proper books and records in relation to the Norshield Investment Structure in contravention of section 19 of the [Act] and section 113 of Ontario Regulation 1015 of the Act;
>
> (iii) the Offering Memorandum filed and distributed by Olympus United contained misleading or untrue information and/or failed to state facts which were required to be stated, in contravention of clause (b) of subsection 122(1) of the Act;

(iv) as a consequence of their positions of seniority and responsibility and in their positions as officers and directors of Norshield and/or Olympus United, Xanthoudakis and Smith authorized, permitted or acquiesced in the violations of the requirements of Ontario securities law and breaches of duty described in subparagraphs (i) – (iii) above;

(v) Xanthoudakis and Smith knowingly made statements and provided evidence and information to Staff that was materially misleading or untrue and/or failed to state facts which were required to be stated in an effort to hide the violations of Ontario securities laws and breaches of duty described in subparagraphs (i) – (iv) above; and

(vi) the course of conduct engaged in by Xanthoudakis, Smith and Kefalas compromised the integrity of Ontario's capital markets, was abusive to Ontario's capital markets and was contrary to the public interest.

[14] The hearing on the merits pursuant to sections 127 and 127.1 of the Act, took place on October 27-31, 2008, and on November 3-6, 10-13 and 17, 2008. Staff and the Respondents presented all their evidence, and we set December 8, 2008 to hear their closing arguments.

[15] On November 17, 2008, Staff withdrew some of the allegations it made against Kefalas in its Statement of Allegations. Staff is now seeking that the Commission make a finding that in failing to fulfill his duties as a designated compliance officer and registrant with the Commission, Kefalas' conduct compromised the integrity of, and was abusive to Ontario's capital markets, and was contrary to the public interest.

B. The Judicial Review Application at the Divisional Court

[16] On November 28, 2008, the Moving Parties filed an application for judicial review (the "Application") before the Divisional Court of the Ontario Superior Court of Justice ("Divisional Court") to permanently stay the Proceeding.

[17] In the Application before the Divisional Court on December 5, 2008, counsel for the Moving Parties argued that the statements made by David Wilson, the Chair, in a Canadian Broadcasting Corporation ("CBC") television interview, would cause a reasonable person who is informed of the facts to conclude that the Commission has prejudged the conduct of the Moving Parties and that they will not receive a fair hearing before the Commission. Counsel argued that, consequently, the Commission has lost its jurisdiction over the Proceeding.

[18] Counsel also sought an order from the Divisional Court temporarily staying the Proceeding against the Moving Parties pending the resolution of the Application.

[19] Staff opposed the Moving Parties' request that the Proceeding be temporarily stayed, as well as the Application asserting that the Commission has lost its jurisdiction over the Proceeding. Staff sought an order from the Divisional Court quashing the Moving Parties' Application, on the basis that it was premature.

[20] After hearing oral submissions on December 5, 2008, Mr. Justice Ferrier released his endorsement on that same date. Mr. Justice Ferrier dismissed Staff's motion to quash the Moving Parties' Application on the basis of prematurity. In doing so, Mr. Justice Ferrier stated that "[it] is not appropriate for a single judge to deprive a Divisional Court panel of the exercise of its discretion by determining the issue of prematurity on a motion prior to the hearing of the application". He also found that Staff was unable to provide the court with "any case in which [a] single judge has quashed an application for prematurity when the application is pending before a panel" (*Dale Smith v. Ontario Securities Commission* (5 December 2008), Toronto DC-08-00000589-00JR (Ont. Div. Ct.) ("*Dale Smith v. Ontario Securities Commission*") at para. 9).

[21] Mr. Justice Ferrier also dismissed the Moving Parties' request for a interim stay, pending the conclusion of their Application before the Divisional Court. He stated that:

> There is ample authority in this court to the effect that absent exceptional or extraordinary circumstances demonstrating that the application must be heard, this court should only consider issues arising from a tribunal's proceedings on a full record, including a decision by the tribunal on the very issue.
>
> [Emphasis in original]
>
> (*Dale Smith v. Ontario Securities Commission*, *supra* at para. 11)

[22] Mr. Justice Ferrier applied the test for a stay as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paras. 41-43. He rejected the Moving Parties' argument that the damage to their reputation would be irreparable should the Proceeding continue to a conclusion against them, even if the Divisional Court were to overturn the result. He stated that the issue of bias, if decided against the Moving Parties by the Commission, could be fully and appropriately dealt with by the Divisional Court.

[23] Mr. Justice Ferrier also found that on the balance of convenience, the Divisional Court should reject a motion for an interim stay, absent exceptional or extraordinary circumstances demonstrating that the Moving Parties must be heard, which he did not find (*Ontario College of Art et al. v. Ontario (Human Rights Commission)* (1993), 11 O.R. (3d) 798, [1993] O.J. No. 61 (Ont. Div. Ct.)).

[24] The Application remains before the Divisional Court, but will presumably not be heard until the Moving Parties have exhausted all potential remedies in the Proceeding before the Commission.

II. THE STAY MOTION ON THE GROUNDS OF BIAS

A. Summary of Facts

[25] The Moving Parties rely on the following facts for making their Stay Motion.

[26] On Sunday November 23, 2008, the CBC broadcast an investigative report on the television program "CBC News: Sunday Night" entitled "Who is Guarding Your Money" on, among other things, the Commission's enforcement activities. Part of the report focused on Norshield and other related entities.

[27] The program was introduced by the host, Evan Solomon ("Solomon"), posing the question: "Are Canadian investors being ripped off because financial regulators aren't enforcing the law?"

[28] We were presented with a transcript of the television program which we have carefully reviewed.

[29] The Norshield matter was introduced by Solomon stating that, "[i]n fact, in 2005 Norshield collapsed under allegations of fraud and even criminal behaviour". The program then showed an excerpt from an interview with Chris Ouslis, an investor who explained that he had lost over a million dollars investing in Norshield.

[30] Solomon proceeded to state the following:

> Having lost so much money, Chris [Ouslis] asked a simple question, who is watching over the financial system and protecting the hard-earned money of investors? Chris [Ouslis] discovered something that the rest of the world is [only] just now finding out, that the watchdogs, not only in the United States, but especially right here in Canada are doing very little to protect Canadian investors.
>
> (Solomon, E. (2008, November 23), Who is Guarding Your Money [Television transcript], *CBC News: Sunday Night*. Available: Cision Canada Inc.) ("CBC News Transcript") at p. 16)

[31] Solomon referred to the Commission as the "cop on the beat of Bay Street" who is "supposed to enforce the laws for the stock market", and introduced David Wilson as the current Chair of the Commission. In a previously recorded interview, Solomon challenged the Chair about the record of Canada in convicting corporate criminals compared with the United States. The program then refocused on Norshield:

> EVAN SOLOMON (HOST):
>
> Chris Ouslis learned about Canada's lack of financial enforcement practices the hard way. In 2005, Norshield, the fund where Ouslis parked his life savings, collapsed under controversial circumstances. As it turned out, the

Rizutto crime family had invested $5-million in Norshield and the CEO of the fund, John Xanthoudakis, was even beaten up by these Rizutto enforcers. All told $132-million of investor's money simply vanished, including money belonging to Chris Ouslis.

…

In fact, [w]hile CEO John Xanthoudakis has been charged with breaking security laws, nearly four years since Norshield collapsed, no criminal case has begun, no one has gone to jail and the investors still have no idea where their money went. So who's the bad guy in this, who is the person, the villain behind bars that you and your wife can point to and say at least they got their just desserts.

CHRIS OUSLIS (INVESTOR FRAUD VICTIM):

Nobody.

EVAN SOLOMON (HOST):

[Ouslis] says when he turned to the Ontario Securities Commission for help, he was seriously disappointed by their response.

CHRIS OUSLIS (INVESTOR FRAUD VICTIM):

It felt as if they were very much against us. We didn't feel they were really helping us out. They really again tried to dissuade us, tried to distract us, and the question is who is watching over all this. We thought that it would be the OSC.

EVAN SOLOMON (HOST):

So Ouslis asked us to ask the head of the OSC David Wilson how did Norshield get by the enforcement officers at the OSC.

(CBC News Transcript at pp. 19 – 21)

[32] An excerpt of the interview with the Chair indicated that he responded as follows:

The OSC wants to allow people to do business. So we clear prospectus[es] so people can pursue earning a living by managing other people's money in the capital market, and 99% of the time they're good people that aren't fraudulent people. Norshield was run by people who were not honest. That's what happened in Norshield.

(CBC News Transcript at p. 21)

[33] The interview continued as follows:

EVAN SOLOMON (HOST):

He asks, then, what's your purpose? Aren't you supposed to prevent this kind of thing from happening if you don't prevent it from happening, what does the OSC do?

DAVID WILSON (CHAIRMAN OF THE OSC):

Is there a litmus test for honesty or dishonesty before you give a receipt for a prospectus… Life isn't that simple.

EVAN SOLOMON (HOST):

Not being able to determine who is honest and is dishonest may be the one reason that regulatory bodies like the OSC have been unable to prevent a laundry list of corporate catastrophes, from Bre-X, Norbourg, YBM Magnex, Conrad Black, Nortel, and many others. In fact, one study suggests that over a million Canadians have lost money due to corporate fraud.

(CBC News Transcript at p. 21)

B. Allegation of Bias and Overview of the Moving Parties' Submissions

[34] The Moving Parties argue that the Chair's statements were an unequivocal expression of opinion with respect to the conduct of the people who ran Norshield and that he posited the dishonesty of those people as being the problem with Norshield.

[35] The Moving Parties further submit that they are clearly identified in the Notice of Hearing and Statement of Allegations as the "people who ran Norshield". Further, Xanthoudakis was identified in the program by Solomon as the CEO of Norshield, and it was said that he was facing charges of breaching securities laws.

[36] The Moving Parties submit that in considering whether or not to grant the Stay Motion, this Hearing Panel should apply the objective reasonable apprehension of bias test.

[37] The Moving Parties stress that they are not asserting that members of this Hearing Panel are actually biased, but rather that the statements made by the Chair would cause a reasonable and informed person to conclude that the Commission has prejudged the conduct of the Moving Parties and consequently, that they will not receive a fair hearing before this Hearing Panel.

[38] Indeed, counsel for the Moving Parties expressly states on the record that there is no suggestion that members of this Hearing Panel are actually biased:

> This is a public record and the term that's being used, "bias motion", I'd just like to make it clear, as I think it will be clear when it's argued on Thursday, that the legal concept that's being invoked in the motion is one

> of a reasonable apprehension of bias or prejudgment, and it's an objective test based on what a reasonable person informed of the facts would conclude and, therefore, it's not an argument that the members of this Hearing Panel are actually biased.
>
> *So I just want that to be clear in case anyone listening in on this gets the wrong idea. The events that have triggered this motion are completely outside the control of this Hearing Panel …*
>
> [Emphasis added]
>
> (Hearing Transcript dated December 8, 2008, at pp. 11-12)

[39] Counsel for the Moving Parties reiterated his position on the day of the hearing of the Stay Motion:

> In my submission, it illustrates the interconnectedness of the issues that we are dealing with in this case and which, on this particular motion, invokes the interconnectedness with the perception that a reasonable observer would have of the comments made by the Chair in the CBC interview and how those comments might effect the institution of the Ontario Securities Commission and effect this hearing panel, *even though this hearing panel had absolutely nothing to do with that interview and the statement made.*
>
> *I'm not here before you today because of anything that this hearing panel has done. It's completely extraneous.*
>
> [Emphasis added]
>
> (Hearing Transcript dated December 11, 2008, at p. 43)

[40] The Moving Parties submit that the statements made by the Chair were intended to defend the Commission from the express or implied criticism leveled by the CBC that the Commission was not doing a very good job of protecting investors in general, and in relation to Norshield in particular, because it was misled or deceived by people who were dishonest. In the Moving Parties' view, the Chair's comments imply that the public should blame the dishonest people who ran Norshield, not the Commission.

[41] Another inference to draw from the Chair's comments, according to the Moving Parties, is that the public should take comfort from the fact that the Commission has concluded that the Respondents are dishonest and that they will be dealt with accordingly.

[42] The Moving Parties argue that there is nothing to suggest that the Chair was speaking in any capacity other than in his role as the Chair of the Commission, or that he was expressing anything other than the position of the Commission and, moreover, that

the Chair's statements have tied the reputation of the Commission to the accuracy of the position that the people who ran Norshield are dishonest.

[43] The Moving Parties submit that, although the Chair is not one of the members on this Hearing Panel, a reasonable person informed of the facts would conclude that the views of the Chair are shared by the other members of the Commission, including the members of this Hearing Panel.

[44] The Moving Parties also contend that, at the very least, a reasonable person informed of the facts would expect that the other members of the Commission would be influenced by the unequivocal opinion expressed by the Chair.

[45] We were referred to the following excerpt of Mr. Justice Dubin's decision from the Ontario Court of Appeal in *E.A. Manning Ltd. v. Ontario Securities Commission* (1995), 23 O.R. (3d) 257 (C.A.), leave to appeal to S.C.C. refused ("*E.A. Manning"*) at p. 269, as support for the Moving Parties' contention that there may be circumstances where the conduct of the Chair could lead to a reasonable apprehension of bias on the part of this Hearing Panel:

> Although there may be circumstances where the conduct of a tribunal, or its members, could constitute institutional bias and preclude a tribunal from proceeding further, this is not such a case. This is not a case where the Commission has already passed judgment upon the very matters which are to be considered in the pending hearings by the new Commissioners …

[46] Counsel for the Moving Parties submits that the reasonable apprehension of bias test must be applied on a case-by-case basis, and that the value of other case law is limited. Counsel submits that while it may be the case that bias applications based on the comments of a single member of an institution have generally been unsuccessful, it cannot be a rule of law that an institution can never be disqualified as a result of such conduct. Counsel argues that there "has to be a line somewhere". He argues that the case at hand is exceptional given the level of publicity, and the fact that the Chair referred directly to a key allegation in the Proceeding.

[47] The Moving Parties submit that the potential consequences of the Proceeding on them are serious. They point out that since April 2003, the Commission has had the power to order an administrative monetary penalty against a respondent of up to $1 million for each breach of the Act. Further, they point out that section 151 of the Act provides that a decision made by the Commission filed with the Ontario Superior Court of Justice is enforceable as an order of the Ontario Superior Court of Justice. Accordingly, the Commission has the power to order large administrative monetary penalties that are enforceable by legal process.

[48] Amongst other sanctions sought in the Proceeding, the Notice of Hearing states that: "the purpose of the hearing is to consider whether it is in the public interest for the Commission to make an order that:…(e)…Xanthoudakis, Smith…pay an administrative

monetary penalty of not more than $1 million for each failure to comply with Ontario *Securities Law* …".

[49] The Moving Parties argue that the seriousness of the consequences to them requires a commensurate adherence to the requirements of fairness and natural justice, and to the public perception of the adherence to those principles. This argument is discussed more fully below in our analysis of the theory of institutional impartiality.

[50] In making their argument that there is a reasonable apprehension of bias on the part of this Hearing Panel, the Moving Parties refer us to the conclusions reached by four separate expert reports which considered the adjudicative function of the Commission, in support of their contention that this Hearing Panel is not sufficiently independent from the Chair.

[51] Before considering the Moving Parties' submissions, we must determine the appropriate legal test for assessing whether a reasonable apprehension of bias exists.

III. THE APPROPRIATE LEGAL TEST

[52] The Moving Parties and Staff presented us with a series of cases dealing with the appropriate legal test for assessing whether a reasonable apprehension of bias exists.

[53] The reasonable apprehension of bias test has been considered by the Supreme Court of Canada on numerous occasions. It is well established that because of the difficulty in determining actual bias, courts and administrative tribunals should concern themselves with the question of whether or not a reasonable apprehension of bias exists, and not whether actual bias exists.

[54] Lord Hewart C.J. famously expressed another reason why the test of a reasonable apprehension of bias is preferred:

> [it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.
>
> (*R. v. Sussex Justices, Ex parte* McCarthy (1923), [1924] 1 K.B. 256 (K.B.) at p. 259)

[55] The manner in which the test should be applied was set out by Mr. Justice de Grandpré in dissent in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at p. 394 ("*Committee for Justice and Liberty*"), and has been referenced with approval by the Supreme Court of Canada on numerous occasions:

> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information … [The] test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not

> that [the decision-maker], whether consciously or unconsciously, would not decide fairly".

[56] The Supreme Court of Canada had another opportunity to elaborate upon and apply the reasonable apprehension of bias test in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 ("*Newfoundland Telephone"*) and *R. v. R.D.S.*, [1997] 3 S.C.R. 484 ("*R.D.S."*); as well as in other cases.

[57] In *Newfoundland Telephone*, *supra* at para. 22, Mr. Justice Cory stated that procedural fairness:

> … cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

[58] Further, Mr. Justice Cory pointed out that the conduct of members of administrative boards which are primarily adjudicative in nature, must be such that there can be no reasonable apprehension of bias with regard to their decision, similar to the standard applicable to the courts (see *Newfoundland Telephone*, *supra* at para. 27).

[59] Both the Moving Parties and Staff submit that proceedings before the Commission are primarily adjudicative in nature, and should hence attract the more stringent application of the reasonable apprehension of bias test. We agree with their submissions on this point.

[60] We also take note that Mr. Justice Cory, in *R.D.S.*, *supra* at para. 111, commented on the test for finding a reasonable apprehension of bias in *Committee for Justice and Liberty*. In discussing the test set out by Mr. Justice de Grandpré as set out above, Mr. Justice Cory added the following:

> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See Bertram, supra, at pp. 54-55; Gushman, supra, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": R. v. Elrick, [1983] O.J. No. 515 (H.C.), at para. 14. See also Stark, supra, at para. 74; R. v. Lin, [1995] B.C.J. No. 982 (S.C.), at para. 34.
>
> [Emphasis in original]

[61] Mr. Justice Cory also found that the onus is on the applicant to prove that a reasonable apprehension of bias exists (see *R.D.S.*, *supra* at para. 114).

[62] Furthermore, the threshold for finding real or perceived bias is high, because such a finding calls into question an element of judicial integrity:

> Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.
>
> (*R.D.S.*, *supra* at para. 113)

[63] Mr. Justice Cory also noted that an additional reason why the threshold for finding a reasonable apprehension of bias is high, is because there is a presumption that judges will carry out their oath of office (see *R.D.S.*, *supra* at para. 117).

[64] Similarly, there is a presumption that Commissioners will act fairly and impartially in discharging their adjudicative responsibilities. In *E.A. Manning*, *supra* at p. 267, the Ontario Court of Appeal held, in the context of a bias application brought against the Commission, that the presumption of fairness and impartiality applies directly to Commissioners:

> Securities Commissions, by their very nature, are expert tribunals, the members of which are expected to have special knowledge of matters within their jurisdiction. They may have repeated dealings with the same parties in carrying out their statutory duties and obligations. *It must be presumed, in the absence of any evidence to the contrary, that the Commissioners will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case*.
>
> [Emphasis added]

[65] Also in *R. v. R.D.S*, *supra* at para. 36, Justices L'Heureux-Dubé and McLachlin stated that the reasonable person for the purposes of the test is "not a 'very sensitive or scrupulous' person, but rather a right-minded person familiar with the circumstances of the case".

[66] In applying the test set out by Mr. Justice de Grandpré in *Committee for Justice and Liberty*, the Supreme Court of Canada in *R. v. Lippé*, [1991] 2 S.C.R. 114 ("*Lippé"*), decided that an informed person must be presumed to have knowledge of any safeguards in place.

[67] When considering the mind of a fully informed person under the test for institutional impartiality in *Lippé*, *supra* at p. 144, Mr. Chief Justice Lamer wrote:

> At this point in the analysis, one must consider what safeguards are in place to minimize the prejudicial effects and whether they are sufficient to

> meet the guarantee of institutional impartiality under s. 11(d) of the Canadian *Charter*. Again, the test is whether the court system will give rise to a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases. *It is important to remember that the fully informed person at this stage of the analysis must be presumed to have knowledge of any safeguards in place*. If these safeguards have rectified the partiality problems in the substantial number of cases, the tribunal meets the requirements of institutional impartiality under s. 11(d) of the Canadian *Charter*. Beyond that, if there is still a reasonable apprehension of bias in any given situation, that challenge must be brought on a case-by-case basis.
>
> [Emphasis (italics) added]

[68] Consequently, in light of the jurisprudence above, we find that when assessing whether a reasonable apprehension of bias exists, the test is that of a reasonable person informed of all the relevant circumstances; that is, a person who is fully informed of any safeguards in place at the Commission.

IV. ANALYSIS

A. Overview

[69] The Moving Parties submit that:

> [in] making statements that disparaged the honesty and integrity of the [Moving Parties], the Chair of the OSC raised a reasonable apprehension of bias that the Commission generally, and the members of the hearing panel specifically, are biased. That is a reasonably well informed member of the public would ascertain that there is a real likelihood of bias on the part of the Commission members on the panel.
>
> (Factum of the Moving Parties, at para. 39)

[70] In the course of their oral arguments, the Moving Parties refer to three doctrines in support of their position that a reasonable person would view the Chair's comments as raising a reasonable apprehension of bias. They are: (1) systemic and structural bias; (2) institutional impartiality; and (3) corporate taint.

[71] Staff contends: that this Hearing Panel is independent; that this Hearing Panel benefits from a presumption of fairness and impartiality; and that the fully informed person is presumed to have knowledge of any safeguards in place at the Commission.

[72] Consequently, Staff submits that the Moving Parties' position that a reasonable person as defined by the jurisprudence under either the doctrine of systemic or structural bias, institutional impartiality, or corporate taint would conclude, based on the Chair's comments, that this Hearing Panel has prejudged the matter, cannot succeed.

[73] We set out below the submissions of the Moving Parties and Staff, and our analysis of the law under each of these doctrines.

B. Is there a reasonable apprehension of bias on the part of this Hearing Panel arising from the Chair's comments, when considering the doctrine of systemic or structural bias?

1. Submissions

a. The Moving Parties' Submissions

[74] The Moving Parties argue that a reasonable person informed of the facts would find that there is a prejudgment on the part of the Commission, as a result of the statements made by the Chair of the Commission on the CBC television program.

[75] The Moving Parties argue that, when making our determination as to whether there is a reasonable apprehension of bias on the part of this Hearing Panel arising from the Chair's comments, we should consider whether the current structure of the Commission and the separation of its adjudicative function is sufficient to ensure that hearing panels adjudicate matters in an impartial and independent manner. The Moving Parties further submit that the increased sanctioning powers of the Commission raise the standard of procedural fairness the Commission must meet, and that the current structure may not be sufficient in that regard.

[76] Counsel for the Moving Parties refers us to the conclusion reached in four separate reports; that there should be a separate adjudicative tribunal composed of Commissioners who do not participate in any other function within the Commission.

[77] The Moving Parties refer us to the "Report of the Fairness Committee to David A. Brown, Q.C., Chair of the Ontario Securities Commission" by the Honourable Coulter A. Osborne, Q.C., David J. Mullan and Bryan Finlay, Q.C., dated March 5, 2004 (the "Osborne Report"). The mandate of the report is stated as follows, at p. 1:

> … 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 up to $1 million and disgorgement orders) given to the Commission by Bill 198. In fulfilling our mandate, we proceed on the basis that, absent clear and convincing evidence, we would not recommend structural change.

[78] The Moving Parties note that the Osborne Report considered a publicly released letter dated November, 2002 to the then Chair of the Commission from three former Chairs (James C. Baillie, Stanley M. Beck and Edward J. Waitzer), which urged the Commission to consider structural change in light of its overlapping functions and increased powers under Bill 198. The report states that the "former Chairs contended that without change, the Commission's institutional credibility would erode".

[79] Further, the Moving Parties refer us to the Osborne Report's recommendation that the Commission take steps to separate its adjudicative function from the Commission.

[80] After noting that the implementation of their recommendations would take time, the authors of the Osborne Report state the following at p. 34:

> 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.

[81] The Moving Parties submit that the Chair's statements are "exactly what the Fairness Committee was warning against, conduct which will exacerbate or contribute to the underlying concern about the impartiality of hearings before this Commission" (Hearing Transcript dated December 8, 2008, at p. 51).

[82] The Moving Parties also bring to our attention a report prepared by the law firm Stikeman Elliott LLP for the Trinidad and Tobago Securities and Exchange Commission entitled: "Review and Revision of the Trinidad and Tobago Securities Industry Act, 1995 and Related By-Laws and Associated Legislation: Background" (30 November, 2004) (the "Stikeman Elliott Report"). After reviewing the findings of the Osborne Report, the Stikeman Elliott Report states that the "Standing Committee on Finance and Economic Affairs of the Ontario Legislature endorsed the recommendations in the Osborne Report and the Ontario Government announced in November 2004 that it will implement the recommendations of the Osborne Report" (at p. 93). The Moving Parties assert that it is an important contextual factor that the Legislature has expressed its intention to adopt the recommendations (see Hearing Transcript dated December 11, 2008, at p. 53).

[83] The Moving Parties also refer us to a report by the Honourable Peter Cory and Marilyn L. Pilkington entitled "Canada Steps Up: Critical Issues in Enforcement" (September, 2006), which was commissioned by a task force of the Investment Dealers Association of Canada ("IDA Task Force") focused on modernizing securities legislation in Canada (the "Canada Steps Up Report"). The Moving Parties refer us to the following excerpt of the report at pp. 226-227:

> In our view, the integration of adjudication with the other functions of securities regulators is inappropriate in that it gives rise to a reasonable apprehension of bias even when those within the commission exercise their best efforts to maintain separate spheres of activity and authority.
>
> It is understandably difficult for commissioners to separate their adjudicative role from their commitment to the work of the commission.
>
> …
>
> The attempt to ensure adjudicative independence by (1) protecting the flow of information, (2) involving only the chair of the commission in the review of investigation and (3) excluding the chair from adjudication, is a tacit recognition of the problems inherent in the current integrated structure. This

> approach does not, however, provide adequate protection for adjudicative independence. Moreover, it appears to create an artificial and potentially dysfunctional organizational structure.
>
> In our view, the independence of adjudication should be protected by the structure itself, and should not depend on the ability of commissioners and staff to keep their various functions separate and distinct. This is essential in light of the expansion in the powers and penalties available to regulators. The need for an independent adjudication process has become an urgent priority. The public, and those who are regulated, must be confident in the independence and fairness of the adjudication process.

[84] The Moving Parties suggest that in determining whether or not a reasonable apprehension of bias arises as a result of the Chair's comments, we should consider the perception of systemic or structural bias described in these reports.

[85] Indeed, the Moving Parties argue that in an ordinary case, there can be a perception of bias in the public's mind as a result of the fact that the investigation and the enforcement of a particular matter is brought forward by Staff before a hearing panel of the Commission. In the ordinary case, the Moving Parties argue, that could give rise to an apprehension that the process may not be entirely fair to a respondent.

[86] Further, they argue that we should consider the unique circumstances of this case, where the Chair has spoken in very direct terms about the conduct and the honesty of respondents subject to a proceeding. According to counsel for the Moving Parties, these circumstances bring the robustness of the structure of the Commission into sharp relief.

[87] The Moving Parties argue that a further question arising from the test for determining whether there is a reasonable apprehension of bias is to decide whether the reasonable person is presumed to appreciate internal distinctions and functions between the Chair of the Commission and the other Commissioners. The Moving Parties submit that this issue is an important one, which explains why there needs to be structural measures in place to provide a sufficient level of independence to preserve the presumption of impartiality.

[88] The Moving Parties further argue that in deciding the Stay Motion we should consider the issue surrounding the structural independence of the tribunal in light of the Commission's increased sanctioning powers. We review this argument fully in our analysis regarding the doctrine of institutional impartiality below.

b. Staff's Submissions

[89] Staff submits that the only question before us is whether a reasonable person as defined by the case law would conclude that this Hearing Panel is unable to render an impartial decision based on the evidence before it in the Proceeding.

[90] Staff argues that the Commissioners who sit on hearing panels are presumed to act impartially and that a reasonable person, would not find a reasonable apprehension of bias under the circumstances set out in the Stay Motion.

[91] In response to the Moving Parties' arguments that there is a perception of systemic or structural bias that is the subject of several reports, which should be considered as background when deciding the Stay Motion, Staff submits that these reports, research papers and other materials commenting on the Commission and its structure, have not been adopted as law, and that they do not have the force of law.

[92] Further, Staff points out that the Osborne Report was actually both commissioned and tabled by the Commission before the Finance Committee that oversees it. Furthermore, Staff submits that the recommendation of separating the adjudicative function from the other functions exercised by securities regulators across the country has been superseded by discussions of establishing a single national regulator, and that the question of whether the current structure of the Commission should be modified or not is ultimately a matter for the Legislature to decide. In the circumstances, Staff stresses that it is the Act, the Commission's practices and guidelines and the relevant case law that must govern the issue before us.

[93] Finally, Staff submits that there is significant case law in analogous circumstances where a senior decision-maker or senior decision-maker of an administrative body has made comments about a matter before a tribunal, which have not been attributed to the entire tribunal.

2. Analysis and the Law

a. Presumption of Fairness and Impartiality

[94] It is well established that judges and members of administrative tribunals have a duty of impartiality that requires them to approach all cases with an open mind. The Supreme Court of Canada has held that there is a presumption that judges will act fairly and impartially.

[95] As was discussed (at paragraph 64 of these reasons), the Ontario Court of Appeal has held that there is a presumption that Commissioners will act fairly and impartially in discharging their adjudicative responsibilities.

[96] In *Gaudet v. Ontario Securities Commission* (1990), 13 O.S.C.B. 1405 ("*Gaudet*") at 1410-1411, aff'd (1990), 13 O.S.C.B. 4799 (Ont. Div. Ct.) ("*Gaudet Divisional Court*"), the Commission rejected a motion brought by certain respondents for a publication ban in relation to the terms of a settlement agreement with other respondents. It was alleged that the settlement agreements with co-respondents and the approval of those settlement agreements were prejudicial to them in obtaining a fair hearing both before the Commission and in related criminal proceedings. The Commission rejected the application and held:

> Judges often have to deal with far more potentially damaging inadmissible evidence than the type of evidence that is in question here; a judge, for example, will continue to hear a case even though he or she has excluded an involuntary confession.
>
> The same considerations are true for commissioners of the Ontario Securities Commission who through reading the financial press and in other ways will often be aware of allegations and of other proceedings but, like judges, should be able to approach a hearing in an objective manner. Moreover, commissioners should be fully aware that they are to hear and determine a matter based on the evidence placed before them.

[97] The Divisional Court affirmed *Gaudet*, emphasizing that Commissioners are not only aware of the necessity of trying matters on the evidence before them but "invariably demonstrate their ability to do so" (see *Gaudet Divisional Court*, *supra* at p. 4799).

[98] It is well established that Commissioners benefit from a presumption of fairness and impartiality when exercising their adjudicative function. Accordingly, we now turn to the conclusions that courts have reached with respect to the Commission's integrated agency model.

b. The Integrated Agency Model with Multiple Functions Upheld by the Law

[99] The Commission's statutory responsibilities are exercised through the Commission's rule and policy-making functions as well as its adjudicative function. While these functions are distinct, the Commission's powers are exercised in furtherance of investor protection and in aid of fostering fair and efficient capital markets.

[100] In its policy and rule-making function, the Commission makes rules that have the force of law and adopts policies that influence the activities of market participants. In its adjudicative role, members of the Commission serve as independent adjudicators on hearing panels presiding over enforcement matters and regulatory policy issues. Hearing panels render decisions independently of the Commission as a whole.

[101] In that regard, it is important to note that matters before Commission hearing panels are governed by the Act, the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "SPPA"), the Commission's *Rules of Practice* (1997) 20 O.S.C.B. 1947 ("Rules of Practice"), principles of administrative law, and the common law.

[102] The fact that members of the Commission perform different functions is not a new or novel concept to administrative law and has been expressly endorsed by the Supreme Court of Canada in *Brosseau v. Alberta (Securities Commission),* [1989] 1 S.C.R. 301 ("*Brosseau*") and by the Ontario Court of Appeal in *E.A. Manning*.

[103] The Supreme Court of Canada in *Brosseau, supra* at paras. 31-37 stated:

Securities commissions, by their nature, undertake several different functions. They are involved in overseeing the filing of prospectuses, regulating the trade in securities, registering persons and companies who trade in securities, carrying out investigations and enforcing the provisions of the Act. By their nature, they will have repeated dealings with the same parties. The dealings could be in an administrative or adjudicative capacity. When a party is subjected to the enforcement proceedings contemplated by the s. 165 or s. 166 of the Act, that party is given an opportunity to present its case in a hearing before the Commission, as was done in this case. The Commission both orders the hearing and decides the matter. Given the circumstances, it is not enough for the appellant to merely claim bias because the Commission, in undertaking this preliminary internal review, did not act like a court. It is clear from its empowering legislation that, in such circumstances, the Commission is not meant to act like a court, and that certain activities which might otherwise be considered "biased" form an integral part of its operations …

Securities acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this Court in *Gregory & Co. v. Quebec Securities Commission*, [1961] S.C.R. 584, where Fauteux J. observed at p. 588:

> The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.

This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.

The special circumstances of the tribunal in this case are substantially the same as those in the case of *Re W. D. Latimer Co. and Attorney-General for Ontario*, *supra*. In the Supreme Court of Ontario, Wright J. made the following observation at p. 404:

> What fair play is in particular circumstances, and whether and how the power of the Courts to enforce it should be exercised are what the Court must decide. It must on the one hand see that the citizen is not unfairly dealt with or put in a position of potential unjustified peril at the hands of some person or body exercising jurisdiction. It must on the other hand see that such persons or bodies seeking to perform their public duty are not unduly hampered in their work and that

> the purpose of the Legislature, if it be the source of their jurisdiction, is respected and realized as it has been expressed.

The particular structure and responsibilities of the Commission must be considered in assessing allegations of bias. Upon the appeal of *Latimer* to the Ontario Court of Appeal, Dubin J.A., for a unanimous Court, dismissed the complaint of bias. He acknowledged that the Commission had a responsibility both to the public and to its registrants. He wrote at p. 135:

> … I view the obligation of the Commission towards its registrants as analogous to a professional body dealing in disciplinary matters with its members. The duty imposed upon the Commission of protecting members of the public from the misconduct of its registrants is, of course, a principal object of the statute, but the obligation of the Commission to deal fairly with those whose livelihood is in its hands is also by statute clearly placed upon it, and nothing is to be gained, in my opinion, by placing a priority upon one of its functions over the other.

Dubin J.A. found that the structure of the Act whereby commissioners could be involved in both the investigatory and adjudicatory functions did not, by itself, give rise to a reasonable apprehension of bias.

I am in agreement with this proposition. So long as the Chairman did not act outside of his statutory authority, and so long as there is no evidence to show involvement above and beyond the mere fact of the Chairman's fulfilling his statutory duties, a "reasonable apprehension of bias" affecting the Commission as a whole cannot be said to exist.

[Emphasis added]

[104] In light of this decision, the combination of the enforcement and adjudicative functions, to the extent that it is authorized by the Act, cannot form the grounds of a challenge of a reasonable apprehension of bias or a lack of independence.

c. The Various Reports

[105] Although the structure of the Commission was upheld by the Supreme Court of Canada in *Brosseau*, even before new safeguards were adopted and implemented by the Legislature and the Commission, the Moving Parties refer us to several reports that have since recommended that the adjudicative process be separated from the other functions of the Commission. These reports are: (1) the Osborne Report; (2) the Canada Steps Up Report; (3) the Stikeman Elliott Report; and (4) a report by the Crawford Panel on a

Single Canadian Securities Regulator entitled: "Blueprint for a Canadian Securities Commission" (7 June 2006) (the "Crawford Report").

[106] The main issue in these reports is whether adjudication by a multifunctional Commission raises concerns with respect to independence and impartiality; two aspects of natural justice.

[107] In response to the Moving Parties' arguments that there is a pre-existing perception of systemic or structural bias towards Commission hearing panels, Staff refers us to the fact that this issue has been debated in a number of reports, commissions, research papers and other materials including those referred to by the Moving Parties, but that none of these reports has been adopted as law.

[108] The Osborne Report was commissioned by the Commission to provide a review of the Commission's structure, and in particular its adjudicative function in light of its increased sanctioning powers; that is, the increased powers of the Commission to order the payment of an administrative monetary penalty of up to $1 million for each breach of the Act and to make disgorgement orders. Although the authors proceeded on the basis that except clear and convincing evidence they would not recommend structural change, they strongly advised the Commission to take steps to separate its adjudicative function from the Commission. However, the Osborne Report, *supra* at p. 34, states:

> 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.
>
> [Emphasis added]

[109] Moreover, in response to the argument made by the Moving Parties that the Osborne Report should have some weight, Staff points out that Appendix "I" of the report, which sets out the legal analysis which informs the report, states that:

> 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.*
>
> …

> 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.
>
> …
>
> 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. *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.*
>
> [Emphasis added]
>
> (The Osborne Report, *supra* at p. 44-47)

[110] The Osborne Report, *supra* at p. 48, then refers to the enhanced safeguards that have been adopted and implemented under the legislative framework; one of them, most importantly, being subsection 3.5(4) of the Act which statutorily divides the investigative role from the adjudicative role: "[i]n 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."

[111] The Supreme Court of Canada in *Brosseau*, and the Ontario Court of Appeal in *Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129 (C.A.) ("*Latimer and Bray"*) both considered the case of a Commissioner who was involved in the investigation and adjudication of a matter. Both of the courts authorized the dual role of the Commissioners because it was statutorily mandated. That dual role, as stated in Appendix "I" to the Osborne Report, *supra* at pp. 48-49, has since been altered by the Legislature:

> 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 matter.
>
> *… In so doing, [the Commission] 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.*
>
> [Emphasis added]

[112] Further, we note that Appendix "I" to the Osborne Report, *supra* at pp. 69-71, under "Conclusions", states:

> 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 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".
>
> …
>
> *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.
>
> [Emphasis added]

[113] Finally, the Moving Parties refer us to the final report of the IDA Task Force entitled "Canada Steps Up: Final Report" (October, 2006). Recommendation #50 of the Final Report, incorporates the conclusions reached by the Canada Steps Up Report, discussed at paragraph 83 of these reasons, and states that the IDA Task Force recommends that the adjudicative function of the Commission be transferred to an independent tribunal or tribunals. The Moving Parties submit that this recommendation was formulated on the assumption that a reasonable and informed observer may conclude that the Commission is biased if it adjudicates matters that have been investigated by Staff, authorized for hearing by Staff, or in some jurisdictions by the chair of the respective commission and prosecuted by counsel employed or retained by the that commission. Further, the Canada Steps Up Report, *supra* at p. 227 states:

> In our view, the independence of adjudication should be protected by the structure itself, and should not depend on the ability of commissioners and staff to keep their various functions separate and distinct.

[114] In response to the Moving Parties' argument, Staff points out that some authors have expressed a different view. In particular, Staff refers us to a paper by Philip Anisman that addresses the structure of the Commission, which in many regards, provides a response to the bifurcation arguments set out in the reports cited above (Philip Anisman, "The Ontario Securities Commission as Regulator: Adjudication, Fairness and Accountability" in Anita I. Anand and William F. Flanagan, eds., *Conflicts of Interest in Capital Market Structures* (Papers Presented at the 10th Queen's Annual Business Law Symposium 2003, 2004)). The author states at p. 106:

> In fact, the exercise of multiple functions by an agency will not alone result in disqualification of an adjudicator who has not participated in other functions with respect to the case before him. This follows from the fact that impartiality is an individual, not an institutional quality. If an agency adequately separates its investigative and prosecutorial functions from its adjudication so that no individual performs overlapping functions, a reasonable apprehension of bias will not be found.

[115] In addition, we note that while the Crawford Report nevertheless recommends the separation of the Commission's adjudicative functions from its other functions, it recognizes, at p. 27, that:

> Currently, most provincial and territorial securities regulators are responsible for making policy, conducting investigations and sitting as adjudicative tribunals. The Supreme Court of Canada has held that a multi-functional agency cannot be attacked on the grounds of reasonable apprehension of bias if its structure is statutorily authorized.

[116] We now move to the analysis of the safeguards which have been put in place to separate the Commission's adjudicative function from its other functions, since the Supreme Court of Canada's landmark decision in *Brosseau*.

d. Independence of Panel Members and the Multi-Functional Roles of the Commission

[117] Hearing panels of the Commission are mandated by statute, common law and the governing provisions of the Commission to decide matters independently on the evidence before them. Proceedings before hearing panels are governed by the Act, the *SPPA*, the Commission's *Rules of Practice*, principles of administrative law, and the common law.

[118] Further, the Act, the O*ntario Securities Commission 2007-2008 Statement of Governance Practices* (the "Commission's Statement of Governance Practices"), the Commission's *Charter of Governance Roles and Responsibilities* (the "Charter of Governance"), and the Commission's *Guidelines for Members and Employees Engaging in Adjudication* (the "Guidelines") all provide for a separation of the Commission's adjudicative function from the Chair of the Commission, who oversees decisions made by Staff of the Enforcement Branch. All of these documents are available on the Commission's website.

(i) Independence of Panel Members

[119] Commissioners who serve on hearing panels are deemed to exercise their adjudicative role impartially and independently. The Ontario Court of Appeal has held that Commissioners are to be afforded the same presumption as judges that they will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case (see *E.A. Manning*).

[120] The principle of independence stems primarily from the fact that Commissioners who serve on hearing panels of the Commission are appointed under the Act by the Lieutenant Governor in Council for such term of office as the Lieutenant Governor in Council determines.

[121] Further, subsection 3(7) of the Act provides that "the Chair is the chief executive officer of the Commission and shall devote his or her full time to the work of the Commission".

[122] In addition, the Act provides for an operational separation of the Commission's enforcement function and its adjudicative function in a particular case. Subsection 3.5(4) of the Act expressly provides that "[n]o member who exercises a power or performs a duty of the Commission under part VI [being the investigatory roles] … shall sit on a hearing by the Commission that deals with the matter, except with the written consent of the parties to the proceeding".

[123] The operation of this requirement under the Act of segregating the adjudicator role from that of the Chair is also reflected in the practices of the Commission. That is, the Chair oversees operational decisions of Enforcement Staff and does not sit on hearing panels.

[124] That practice is also reflected in the Commission's 2008 Annual Report.

(ii) The Commission's 2008 Annual Report

[125] In their adjudicative role, the Commissioners act as independent adjudicators. Further, the principle of the separation of the Chair of the Commission who oversees operational decisions related to the Enforcement Branch from Commission hearing panels is reflected in the Commission's 2008 Annual Report. The 2008 Annual Report is available to the public on the Commission's website. When describing its various roles as a securities regulator, the Commission's 2008 Annual Report states at pp. 5-6:

> As a securities regulator, the Commission performs both a policy and rule-making function and an adjudicative function.
>
> …
>
> In their adjudicative role, the Commissioners act as independent adjudicators on panels presiding over proceedings on enforcement matters

and regulatory policy issues, reviews of adjudicative decisions of self-regulatory organizations and reviews of decisions made by OSC staff. The Chair of the Commission oversees operational decisions related to enforcement and does not sit on adjudicative panels. The Commission, through its Adjudicative Committee, oversees adjudicative policies, procedures and practices to ensure they are independent, effective and fair.

…

In addition, on April 1, 2008, *the Commission approved adjudicative guidelines that provide guidance to Members on the standards expected of them in the exercise of their adjudicative responsibilities. The purpose of the guidelines is to ensure that the adjudicative process is, and is seen to be, conducted with impartiality, integrity and effectiveness.*

[Emphasis added]

(iii) The Ontario Securities Commission 2007-2008 Statement of Governance Practices

[126] The Commission's Statement of Governance Practices also describes the Commission's governance structure, including the separation of the Commission's adjudicative function.

[127] The Commission's Statement of Governance Practices states the following:

Members, acting independently of the Commission as a whole, also perform an adjudicative function by serving individually, as required, on panels that preside over administrative proceedings. The Members, acting as a whole, however, have a responsibility to oversee the Commission's adjudicative policies, practices and procedures generally, to promote the fair, independent, transparent and expeditious disposition of all adjudicative matters. *To assist it in the discharge of this responsibility, the Commission established an Adjudicative Committee to oversee the Commission's adjudicative policies, procedures and practices to ensure they are independent, effective and fair.*

[Emphasis added]

(iv) The Commission Charter of Governance Roles and Responsibilities

[128] Further, in April 2006, the Commission adopted a Charter of Governance to:

… more clearly delineate the Members' two principal governance roles and responsibilities as both regulators and administrators of the Act and as

> the Board of Directors, *and to ensure greater transparency in and understanding of the Commission's governance structure.*
>
> (Commission's Statement of Governance Practices at p. 1)
>
> [Emphasis added]

[129] With respect to the adjudicative function, the Charter of Governance, *supra* at p. 4 states:

> *Members perform their adjudicative function by individually serving on adjudicative panels that conduct hearings and render decisions independently of the Commission as a whole*. Nonetheless, the Commission, as a whole, has a responsibility to oversee the Commission's adjudicative processes and procedures generally.
>
> ***Conducting hearings***
> Adjudicative panels of the Commission, usually composed of two or more Members, conduct hearings on proceedings brought before the Commission. In these hearings, the panel may be asked, for example, to issue an order imposing a sanction in the public interest, to issue an order freezing assets, to review a decision made by Commission staff, or to review a decision of an SRO. *The way in which these proceedings are conducted is governed by the Statutory Powers Procedures Act (Ontario), the Commission's Rules of Practice and principles of administrative law. The Act provides for appeal of final decisions of the Commission to the Divisional Court.*
>
> [Emphasis added]

(v) The Guidelines for Members and Employees Engaging in Adjudication

[130] On March 17, 2008, the Commission adopted the Guidelines, which are intended to provide additional guidance to Commission members "in the exercise of their adjudicative responsibilities to ensure that all proceedings before the Commission's adjudicative panels are, and are seen to be, conducted with integrity, competence, effectiveness, independence and impartiality" (Guidelines, *supra* at p. 1). Pursuant to subsection 1.3(1) of the Guidelines, the Guidelines apply to all Members, and to all employees of the Commission, when involved in the adjudicative process.

[131] The Guidelines clearly contemplate that a party to a proceeding may make a motion to the hearing panel on issues related to bias and require, if such a motion is made during the course of a proceeding, the members to invite all parties to the proceeding to make submissions on the continued participation of any of the members prior to the continuation of the proceeding. The hearing panel is directed by the Guidelines to provide written reasons at the request of any party following the panel's decision on such a motion.

[132] Section 2 of the Guidelines, states that:

> … the test for determining whether the Member should recuse himself or herself is whether the facts give rise to reasonable apprehension of bias or a lack of adjudicative independence in the mind of a reasonable and informed person. Any assessment of a Member's actual or perceived bias in the exercise of his or her adjudicative duties in connection with a Proceeding should include a consideration of all relationships or activities that could reasonably be apprehended as being incompatible with the exercise of that Member's adjudicative responsibilities.

[133] The Guidelines require that all panel members reach their decisions based on the relevant law, the evidence presented to them and the submissions made in the course of the proceeding. Subsection 3.6(1) of the Guidelines explicitly states that "Members should conduct their deliberations and make their decisions independently of other Members of the Commission who are not on the Panel" and that "the prospect of disapproval from any person, institution, or group, including other Members, should not deter a Member from making the decision that he or she believes is fair and just".

[134] Subsection 3.6(3) of the Guidelines establishes limits on consultations and states that a Commissioner may, on an informal basis, have consultations with another Member who is not a panel Member, "other than the Chair of the Commission and any Member who would have an actual or perceived conflict of interest".

[135] Section 5.1 of the Guidelines addresses the participation of members in policy making functions generally, and indicates: "Members should endeavour to independently perform their adjudicative roles and functions in accordance with these Guidelines".

3. Finding

[136] The Commission's integrated agency model is a legislatively mandated structure, and was upheld by the Supreme Court of Canada in the landmark case of *Brosseau*. Under the current Commission structure, the Chair is the head of the Commission and is ultimately responsible for the work of the Enforcement Branch. Since *Brosseau,* steps have been taken by both the Legislature and the Commission to enhance safeguards which are designed to separate the Commission's adjudicative function from the Commission's enforcement function as well as the Chair. Some of these steps are reflected in the Commission's guidelines, policies, and other materials, all of which are available on the Commission's website.

[137] While we have considered the comments and recommendations made in the reports brought to our attention by the Moving Parties, we are mindful that they do not reflect the state of the law. The comments and recommendations made in the reports were made to encourage debate on possible policy changes in the future. For instance, we note that the Osborne Report states that it is "unlikely that there are legal problems either under common law or on any constitutional basis with the present structure of the

Commission" (Osborne Report, *supra* at p. 69), and instead formulates its recommendations on a policy basis.

[138] Accordingly, we find that a reasonable apprehension of bias on the part of this Hearing Panel does not arise from the Chair's comments, when considering the doctrine of systemic or structural bias.

C. Is there a reasonable apprehension of bias on the part of this Hearing Panel arising from the Chair's comments, when considering the doctrine of institutional impartiality?

[139] Along with arguments regarding systemic or structural bias, counsel for the Moving Parties also stress the importance of considering the effect of the increased sanctioning powers enacted in 2003, and their potentially serious impact on the Moving Parties.

[140] Counsel for the Moving Parties submits that a higher degree of institutional impartiality and independence is required in order for the Commission to exercise these increased sanctioning powers. Counsel for the Moving Parties further submits that the combination of the Commission's current structure and multiple functions and increased sanctioning powers may breach section 11(d) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Charter*"), and that although he is not making a constitutional challenge, this is something that this Hearing Panel should consider.

[141] Below is our analysis of the arguments and relevant cases provided by the Moving Parties and Staff on that point.

1. Submissions

a. The Moving Parties' Submissions

[142] In addition to the written submissions and authorities previously filed by the Moving Parties, on the eve of the hearing of the Stay Motion, counsel for the Moving Parties filed a supplementary book of authorities which deal in part, with the doctrine of institutional impartiality. The cases filed by counsel for the Moving Parties in his supplementary book of authorities relating to institutional impartiality and independence are: (1) *Lippé*, *supra*; (2) *Ruffo v. Conseil de la magistrature*, [1995] S.C.J. No. 100; (3) and *Hannam v. Bradford City Council*, [1970] 2 All ER 690.

[143] Counsel for the Moving Parties refers us to *Lippé*, in support of his contention that a doctrine of institutional impartiality exists in Canada and should be considered when assessing whether the Chair's comments give rise to a reasonable apprehension of bias on the part of this Hearing Panel. As set out by the Supreme Court of Canada, impartiality also has an institutional component. In *Lippé*, *supra* at para. 50, the Supreme Court of Canada stated:

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

[144] Counsel for the Moving Parties submits that the doctrine of institutional impartiality is relevant to our deliberations by way of background and context. At the hearing, counsel for the Moving Parties argued the following:

> Of course, the application of these principles changes when one is dealing with administrative tribunals and in particular when we move into a statutory context where an administrative tribunal is set up with multiple functions, and I know you are familiar with the Supreme Court of Canada decision in the Brosseau case and other cases of that nature, where it's accepted that the simple fact a Securities Commission will perform tripartite functions does not mean that when it's time to exercise the adjudicative function that that gives rise to a reasonable apprehension of bias, and even if it might, I think the decisions will indicate well, that's what the statute has laid out. *So unless we have constitutional issues invoked the issue of adjudicative process is going to be upheld by the courts.*
>
> *The additional layer of complexity of that is in what circumstances the constitutional issues become invoked and I'm probably going to do discredit to the law here, but in a nutshell it boils down to, in the case of an administrative tribunal, if we reach a point where the sanctions that can be handed out are considered penal sanctions under the standards set out in the Crown and Wigglesworth, if we reach that point, then the right to a trial before a fair and independent tribunal under Sub-section 11(d) of the Charter is invoked.* So in those circumstances, if that occurred the fact that a tribunal's been set up a particular way by statute wouldn't survive constitutional review.
>
> That's not what we are here to do today. I'*m giving that by way of background in terms of the context in which we have to review these issues.*
>
> [Emphasis added]
>
> (Hearing Transcript dated December 11, 2008, at pp. 37-39)

[145] Counsel for the Moving Parties also submits that proceedings before the Commission operate at the most judicial end of the spectrum of administrative

adjudicative bodies, and hence attract a more stringent application of the reasonable apprehension of bias test. As mentioned earlier, we agree with that submission.

b. Staff's Submissions

[146] Staff submits that the doctrine of institutional impartiality is relevant in two contexts: (1) where an administrative board has a formalized consultative process designed to give consistency to decisions, which overrides the adjudicators' independence; and (2) where there is a *Charter* challenge to the legislation governing the administrative tribunal.

[147] With respect to the first argument, Staff refers us to the Supreme Court of Canada's decision in *Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69*, 68 D.L.R. (4th) 524 (*"Consolidated-Bathurst")*. In that case, the Court found that a formalized consultative process, as it was setup at the Ontario Labour Relations Board, did not give rise to a reasonable apprehension of bias. We note that the Commission has no such process, as described in our discussion of the several safeguards that have been adopted and implemented to ensure that Commissioners making adjudicative decisions do so according to their own conscience and opinion. While Commissioners can consult amongst themselves about particular issues, they adjudicate independently and do not consult in a formalized manner about their decisions.

[148] Further, Staff brought our attention to the following excerpt of Justice Gonthier's decision for the majority of the court in *Consolidated-Bathurst, supra* at pp. 562-563:

> However, in my opinion and for the reasons which follow, *the danger that full board meetings may fetter the judicial independence of panel members is not sufficiently present to give rise to a reasonable apprehension of bias* or lack of independence within the meaning of the test stated by this Court in Committee for Justice and Liberty v. National Energy Board …
>
> A full board meeting set up in accordance with the procedure described by Chairman Adams is not imposed: it is called at the request of the hearing panel or any of its members. It is carefully designed to foster discussion without trying to verify whether a consensus has been reached: no minutes are kept, no votes are taken, attendance is voluntary and presence at the full board meeting is not recorded. The decision is left entirely to the hearing panel. It cannot be said that this practice is meant to convey to panel members the message that the opinion of the majority of the Board members present has to be followed. On the other hand, it is true that a consensus can be measured without a vote and that this institutionalization of the consultation process carries with it a potential for greater influence on the panel members. *However, the criteria for independence are not absence of influence but rather the freedom to decide according to one's own conscience and opinions.* In fact, the record shows that each panel member held to his own opinion since Mr. Wightman dissented and Mr. Lee only

> concurred in part with Chairman Adams. It is my opinion, in agreement with the Court of Appeal, that the full board meeting was an important element of a legitimate consultation process and not a participation in the decision of persons who had not heard the parties. The Board's practice of holding full board meetings or the full board meeting held on September 23, 1983 would not be perceived by an informed person viewing the matter realistically and practically -- and having thought the matter through -- as having breached his right to a decision reached by an independent tribunal thereby infringing this principle of natural justice.
>
> [Emphasis added]

[149] With respect to the second argument, Staff submits that the Moving Parties chose not to argue that subsection 11(d) of the *Charter* is applicable to proceedings before the Commission, and accordingly this Hearing Panel should not entertain their argument.

2. Analysis and the Law

[150] The Moving Parties argue that a higher level of institutional impartiality and independence is required of Commission hearing panels, in order for them to exercise the Commission's increased sanctioning powers. We note that the doctrine of institutional impartiality, as recognized by the Supreme Court of Canada in *Lippé,* is based on the constitutional guarantee of an "independent and impartial tribunal". To this day, we note that, there is no case law to establish that subsection 11(d) of the *Charter* is applicable to proceedings before the Commission.

[151] Further, counsel for the Moving Parties chose not to argue that subsection 11(d) of the *Charter* is applicable to proceedings before the Commission, by applying the penal sanctions test set out by the Supreme Court of Canada in *R. v. Wigglesworth* [1987] 2 S.C.R. 541. Rather, Counsel for the Moving Parties concedes that the tripartite functions of the Commission do not give rise to a reasonable apprehension of bias, as established by the Supreme Court of Canada in *Brosseau*, and that in any event the structure of the Commission is authorized by statute and can only be challenged by way of a constitutional argument. At the hearing, counsel for the Moving Parties stated the following:

> That's not what we are here to do today. I'm giving that by way of background in terms of the context in which we have to review these issues.
>
> (Hearing Transcript dated December 11, 2008, at p. 39)
>
> and later on
>
> In my submission, we're getting awfully close to a penal process – awfully close to it – and some might argue we're there, but that's not an argument for our purposes today.

(Hearing Transcript dated December 11, 2008, at p. 45)

[152] In his reply, counsel for the Moving Parties stated that "it has not been our submission that this case should be stayed based on the structural institutional bias as a result of the overlapping functions of the Securities Commission. I think my friend pointed out quite correctly, if that was our argument, that's one we should have brought at an earlier stage, but it isn't" (Hearing Transcript dated December 11, 2008, at p. 138).

[153] Consequently it is our understanding that the Moving Parties' reference to the doctrine of institutional impartiality was only to provide context and background to his submissions, and to the circumstances in which this allegation arises.

[154] While we agree that the Commission exercises its adjudicative function at the most judicial end of the spectrum of administrative bodies, our application of the reasonable apprehension of bias test is conducted in the context of a statutorily mandated structure which has been endorsed by the Supreme Court of Canada. Further, as set out above, the Commission has adopted further safeguards to separate the Commission's adjudicative function from its investigatory and rule-making functions.

[155] As set out above, the Legislature expressly provided the Commission with broader sanctioning powers in 2003. The Moving Parties have chosen not to argue that as a result of these increased sanctioning powers, subsection 11(d) of the *Charter* applies to Commission proceedings. The Supreme Court of Canada in *Re Cartaway Resources Corp.* (2004), 238 D.L.R. (4th) 193 (SCC) at para. 60 affirmed that the Commission may properly impose sanctions which are a general deterrent, stating "… it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative".

[156] Finally, we note that the Commission does not have a formalized consultative process, and hence we do not have to conduct the same type of analysis the Supreme Court of Canada did in *Consolidated-Bathurst*. As noted in our discussion of the Commission's adjudicative function, there is a clear separation of the Commissioners' adjudicative role from their other roles and responsibilities.

3. Finding

[157] The argument of counsel for the Moving Parties that the robustness of the Commission structure is at issue in light of the increased sanctioning powers that came into effect in 2003, does not affect the conclusions reached by the Supreme Court of Canada in *Brosseau*.

[158] Accordingly, we find that a reasonable apprehension of bias on the part of this Hearing Panel does not arise from the Chair's comments, when considering the doctrine of institutional impartiality.

D. Is there a reasonable apprehension of bias on the part of this Hearing Panel arising from the Chair's comments, when considering the doctrine of corporate taint?

[159] In addition to the arguments addressing systemic or structural bias, we also heard arguments involving the doctrine of corporate taint. Our review of the parties' submissions follows.

1. Submissions

a. The Moving Parties' Submissions

[160] Though counsel for the Moving Parties did not describe his submissions on this point as advancing the doctrine of corporate taint, he submits that the nature of the comments made by the Chair are such that the entire Commission should be disqualified based on a reasonable apprehension of bias. Given the content of his submissions, it is difficult not to conclude that he is indeed arguing, in substance, the doctrine of corporate taint. We note that, in his oral submissions, counsel for the Moving Parties stated the following:

> So the concept of institutional bias, which, on occasion, I think is unfortunately referred to as corporate taint, in my submission that is a legitimate and important legal doctrine and one that needs to be considered in this case, so I'm going to cover that topic as well.
>
> (Hearing Transcript dated December 11, 2008, at p. 7)

[161] In his oral submissions, counsel for the Moving Parties stated that "a reasonable-minded, informed observer is going to have a very difficult time accepting that the strong views expressed by the Chair would not have an impact on other [Commissioners], and the context in which the statements were made, in my submission, only exaggerate that particular viewpoint, in that the context in which the statement was made appears to have been one in which the Chair was defending the OSC" (Hearing Transcript dated December 11, 2008 at p. 66).

[162] Counsel for the Moving Parties submits that the statements made by the Chair were very public and widespread, and that viewers were meant to take comfort from the fact that the Commission recognizes that the Moving Parties are "not honest" and is proceeding to act on that recognition. Counsel further submits that given the public manner in which the comments were made, a reasonable person would perceive this Hearing Panel to have a vested interest in making a finding consistent with the comments made by the Chair. This Hearing Panel would, counsel contends, face harsh public scrutiny if it were to find that Staff's allegations against the Moving Parties are not substantiated, as a result of the Chair's statements. Thus, counsel for the Moving Parties argues that a reasonable person would believe that this Hearing Panel is inclined consciously or subconsciously to find that the Respondents acted dishonestly both to

protect the reputation of the Commission, and to avoid publicly disagreeing with the Chair.

[163] Counsel for the Moving Parties states that "these circumstances are unique", and that "it cannot be a rule of law that in no circumstances can an institution ever be disqualified from adjudicating a case as a result of comments or conduct of a member of that institution … one cannot elevate those fact specific cases to a general proposition of law that no [finding of reasonable apprehension of bias] could ever be made in the appropriate circumstances…" (Hearing Transcript dated December 11, 2008 at pp. 141-144).

[164] We note that counsel for the Moving Parties argues in his factum, under the heading of 'institutional taint', that while the court in *E.A. Manning* found that no corporate taint existed at the Commission, that case is factually distinguishable from the case at hand.

[165] Counsel for the Moving Parties submits that, in that case, the comments made by the then Chair of the Commission, Edward Waitzer, which formed the facts from which the case arose, were not directly germane to the issues in the hearing and did not refer to the applicants E.A. Manning Ltd. directly. Counsel for the Moving Parties submits that in this case, the Chair referred specifically to the Moving Parties and to the very conduct that is in issue in the Proceeding. Staff has alleged in the Statement of Allegations that Xanthoudakis and Smith "failed to deal fairly, honestly, and in good faith" and "knowingly made statements and provided evidence and information to Staff that was materially misleading or untrue and/or failed to state facts which were required to be stated in an effort to hide the violations of Ontario securities laws". Counsel for the Moving Parties submits that the Chair's statements "carry no other meaning other than the plain one: that the Applicants are dishonest and have broken securities laws".

[166] Counsel for the Moving Parties contends that the Ontario Court of Appeal in *E.A. Manning*, left open the possibility that the conduct of a tribunal or its members could constitute institutional bias, and refers us to the following part of the Court's decision at p. 269:

> Although there may be circumstances where the conduct of a tribunal, or its members, *could constitute institutional bias and preclude a tribunal from proceeding further,* this is not such a case. This is not a case where the Commission has already passed judgment upon the very matters which are to be considered in the pending hearings by the new Commissioners …
>
> [Emphasis added]

[167] According to counsel for the Moving Parties, a line should be drawn somewhere, and although there is no case law supporting his argument, he would like us to find that this Hearing Panel is "tainted" by the Chair's comments, resulting in a reasonable apprehension of bias.

b. Staff's Submissions

[168] Staff submits that the Moving Parties' argument on this point is an allegation that the circumstances of this case give rise to corporate taint, and that the doctrine of corporate taint has been expressly rejected by Canadian courts, and that bias is an attitude of mind unique to an individual.

[169] Staff argues that while a reasonable apprehension of bias could be attributed to the Chair, the jurisprudence does not support the Moving Parties' submission that the Chair's comments taint the rest of the Commission, including the Commissioners on this Hearing Panel.

[170] In making its submission, Staff referred us to a number of cases, all of which rejected the doctrine of corporate taint and are considered in detail in our analysis below.

2. Analysis and the Law

[171] As discussed in the appropriate legal test section above, there is a presumption that Commissioners will act impartially when exercising adjudicative functions. Comments or actions by individuals who are related to but are not the decision-makers, do not on their own rebut the presumption that decision-makers will act impartially. Staff refers us to the following passage from *Judicial Review of Administrative Action in Canada* by Donald J.M. Brown, Q.C. and John M. Evans:

> *There must be some causal connection between the comments indicating prejudgment and the decision-maker in question. Accordingly, disqualification will generally not result from instances where the conduct of the decision-maker is not directly involved.* Thus, extensive pre-hearing publicity has been held to be insufficient to disqualify a decision-maker. Indeed, statements by employees and officials connected with an agency, but without any decision-making responsibility, will not normally lead to disqualification of the persons who are to make the decision in question. For example, such statements by a Police Commissioner, *the chair and staff of the Ontario Securities Commission*, the chair of the Labour Board involving another dispute, an agency's prosecuting staff, counsel to the board, and others employed by the administrative agency in question did not lead to disqualification of the actual decision-makers.
>
> [Emphasis added]
>
> (Donald J.M. Brown, Q.C. & John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 2008) at s. 11:4512)

[172] While in *E.A. Manning,* the Ontario Court of Appeal left open the possibility that in some circumstances the conduct of a tribunal or its members could constitute institutional bias, it also found that even if the statements by the Chair in that case had

been directed against E.A. Manning Ltd. specifically, that in itself would not have disqualified the other Commissioners from conducting the hearings (see *E.A. Manning*, *supra* at p. 272). The Court stated the following at pp. 271-272 of its decision:

> Mr. Waitzer's comments did not in any way relate to the subject matter of the complaints made against the appellants in the pending proceedings, nor should they be viewed as a veiled threat against the appellants, as was contended.
>
> However, *even if statements by a regulator relate to the very matters which he or she is considering, that, in itself, is not a basis for concluding that the regulator has prejudged the matter.*
>
> In *Newfoundland Telephone*, *supra*, Cory J. stated:
>
> > Further, a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. This does not of course mean that there are no limits to the conduct of board members. It is simply a confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the Board which is being considered. In the end, however, commissioners must base their decision on the evidence which is before them. Although they may draw upon their relevant expertise and their background of knowledge and understanding, this must be applied to the evidence which has been adduced before the board.
>
> *Even if it could be said that the statements of the Chair exhibited some bias against the appellants that, in itself, would not disqualify the other Commissioners from conducting the hearings.*
>
> In *Van Rassel v. Royal Canadian Mounted Poli*ce, [1987] 1 F.C. 473, 7 F.T.R. 187 (T.D.), it was alleged that the commissioner of the R.C.M.P. made a public comment strongly critical of the R.C.M.P. officer who faced a trial before the R.C.M.P. service tribunal. Joyal J. held that even if such a statement were made, it could not lead to a reasonable apprehension of bias against the whole tribunal, at p. 487:
>
> > Assuming for the moment that the document is authentic and that the words were directed to the applicant, it would not on that basis constitute the kind of ground to justify my intervention at this time. The Commissioner of the RCM Police is not the tribunal. It is true that he has appointed the tribunal but once appointed, the tribunal is as independent

> and as seemingly impartial as any tribunal dealing with a service-related offence. One cannot reasonably conclude that the bias of the Commissioner, if bias there is, is the bias of the tribunal and that as a result the applicant would not get a fair trial.
>
> [Emphasis added.]

[173] Further, this type of bias allegation was expressly rejected by the British Columbia Court of Appeal in *Bennett v. British Columbia (Securities Commission)* (1992), 94 D.L.R. (4th) 339 (B.C.C.A.). The Court stated the following:

> Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear. No individual is identified here. Rather, the effect of the submissions is that all of the members of the Commission appointed pursuant to section 4 of the *Securities Act*, regardless of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where an entire tribunal of unidentified members had been disqualified from carrying out statutory responsibilities by reason of real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration. (at p. 349)

[174] Similarly in *Hamilton Street Railway Co. v. (Ontario) Human Rights Commission*, [2006] O.J. No. 4662 (Ont. Div. Ct.) at para. 19, the Ontario Divisional Court rejected the doctrine of corporate taint where an allegation of bias was made against the entire Human Rights Commission, based on a statement made by the Chief Commissioner in the press.

[175] *Zündel v. Citron*, [2000] 189 D.L.R. (4th) 131 (F.C.A.) at paras. 49-50; application for leave to appeal dismissed, [2000] S.C.C.A. No. 322, rejected attempts by the Applicants to apply the doctrine of corporate taint against the Human Rights Commission. The Court found that statements made by the Chief Commissioner praising a Court ruling against Zündel, did not result in a reasonable apprehension of bias against the whole Commission though the Commission later considered the same fact scenario which gave rise to the court proceedings.

[176] In *Telus Communications Inc. v. Telecommunications Workers Union* (2005), 257 D.L.R. (4th) 19 (F.C.A.), bias was alleged against the entire Canadian Industrial Relations Board, as a result of alleged comments by the Chair. The Federal Court of Appeal again found that the doctrine of corporate taint did not apply, because it would undermine the presumption of impartiality:

> Neither the doctrine of corporate taint nor the subjection of the entire Board to a reasonable apprehension of bias as a result of the Chairperson's

> alleged comments, applies here. Painting the entire Board with bias as a result of the one board member's alleged comments undermines the presumption of impartiality and fairness that is attributed to each member and compromises the integrity of the entire Board. (at para. 41)

3. Finding

[177] The argument that a reasonable apprehension of bias exists on the part of this Hearing Panel based on the remarks of other members of an institution, even its Chair, has been repeatedly rejected by the courts in Canada. Bias is an attitude of mind unique to the individual. Further, counsel for the Moving Parties did not refer us to any authority which would support the view that, even in circumstances where a reasonable apprehension of bias is found against one individual, bias ought to be attributed to independent adjudicators who were not party to the action giving rise to the apprehension of bias.

[178] Accordingly, we find that a reasonable apprehension of bias on the part of this Hearing Panel does not arise from the Chair's comments, when considering the doctrine of corporate taint.

V. CONCLUSION

[179] There is no allegation by the Moving Parties that this Hearing Panel, or any of its members, is actually biased or that they have done anything to give rise to a reasonable apprehension of bias.

[180] While the reports cited by the Moving Parties recommend that the Commission's adjudicative function be separated from the Commission's investigative and rule-making functions, their recommendations are primarily based on policy concerns. In contrast, the Supreme Court of Canada upheld the Commission's integrated agency model in *Brosseau*, and found no lack of institutional independence or impartiality. Moreover, since the decision in *Brosseau*, several safeguards have been adopted and implemented by both the Legislature and the Commission to separate the Commission's adjudicative function from its other functions.

[181] While the Commission's integrated agency model might concern an individual uninformed of the safeguards at the Commission, a reasonable person fully informed of the Commission's safeguards would not conclude that this Hearing Panel might have prejudged the Proceeding against the Moving Parties.

[182] As the head of the Commission, the Chair ostensibly endorses all of Staff's enforcement activities; however, the Commissioners who are assigned to hearing panels routinely make fair and impartial decisions free of any improper influence. The Chair does not sit on hearing panels, and does not discuss ongoing enforcement matters with panel members. Whether the Chair or the Enforcement Branch's views are highly

publicized or not, a hearing panel has the same onus to act independently and impartially. This is evidenced by the statutory structure and the safeguards discussed above.

[183] Hence, we find that there is no reasonable apprehension of bias on the part of this Hearing Panel arising from the Chair's comments made during the interview conducted on the CBC television program.

[184] For all these reasons, the Stay Motion is hereby dismissed.

DATED at Toronto this 3rd day of February, 2009.

"Wendell S. Wigle"
Wendell S. Wigle

"David L. Knight"
David L. Knight

"Margot C. Howard"
Margot C. Howard