MINUTES
Board Business Meeting
Room 4141
Thursday, 13 October 2016
9:00 a.m.

PROCÈS-VERBAL
Réunion administrative de l'Office
Salle 4141
Le jeudi 13 octobre 2016
9h00

Members Present: P. Davies, M. Lytle, K. Chaulk, and D. Hamilton formed a quorum

D. Hamilton occupied the Chair and L. George was the Acting Secretary.

REGULATORY DECISION:

1. Energy East – Eastern Mainline Board Item Regarding Ecojustice Letter

The meeting was changed to a Special Board Meeting, and the item was subsequently withdrawn by staff.

There being no further business, the meeting was adjourned.

Secretary of the 13 October 2016 Board Meeting

Signed on 3 November 2016

Chair of the 13 October 2016 Board Meeting

Signed on November 4, 2016

Indexed as:

Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)

Newfoundland Telephone Company Limited, appellant;
v.
The Board of Commissioners of Public Utilities, respondent.

[1992] 1 S.C.R. 623

[1992] 1 R.C.S. 623

[1992] S.C.J. No. 21

[1992] A.C.S. no 21

1992 CanLII 84

File No.: 22060.

Supreme Court of Canada

1991: November 7 / 1992: March 5.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND (42 paras.)

Administrative law -- Apprehension of bias -- Policy-making board -- Board member expressing strong views as to issue board considering -- Decision made after Board declined to remove member from panel -- Extent to which an administrative board member may comment on matters before the board -- Whether or not reasonable apprehension of bias -- If so, whether or not decision void or merely voidable.

Respondent Board, whose members are appointed by cabinet subject only to the qualification that

they not be employed by or have an interest in a public utility, regulates appellant. One commissioner, a former consumers' advocate playing the self-appointed role of champion of consumers' rights on the Board, made several strong statements which were reported in the press against appellant's executive pay policies before a public hearing was held by the Board into appellant's costs. When the hearing commenced, appellant objected to this commissioner's participation on the panel because of an apprehension of bias. The Board found that it had no jurisdiction to rule on its own members and decided that the panel would continue as constituted. A number of public statements relating to the issue before the Board were made by this commissioner during the hearing and before the Board released its decision which (by a majority which included the commissioner at issue) disallowed some of appellant's costs. A minority would [page624] have allowed these costs. Appellant appealed both the order of the Board and the Board's decision to proceed with the panel as constituted to the Court of Appeal.

The Court of Appeal found that the Board had complete jurisdiction to determine its own procedures and all questions of fact and law and that it declined to exercise its jurisdiction when it refused to remove the commissioner from the panel. Although the court concluded that there was a reasonable apprehension of bias, it held that the Board's decision was merely voidable and that, given that the commissioner's mind was not closed to argument, the Board's order was valid.

The issues under consideration here were: (1) the extent to which an administrative board member may comment on matters before the board and, (2) the result which should obtain if a decision of a board is made in circumstances where a reasonable apprehension of bias is found.

Held: The appeal should be allowed.

The duty of fairness applies to all administrative bodies. The extent of that duty, however, depends on the particular tribunal's nature and function. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. Because it is impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision, an unbiased appearance is an essential component of procedural fairness. The test to ensure fairness is whether a reasonably informed bystander would perceive bias on the part of an adjudicator.

There is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts: there must be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members where the standard will be much more lenient. In such circumstances, a reasonable apprehension of bias occurs if a board member pre-judges the matter to such an extent [page625] that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of elected members. For those boards, a strict application of a reasonable apprehension of bias as a test

might undermine the very role which has been entrusted to them by the legislature.

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. As long as those statements do not indicate a mind so closed that any submissions would be futile, they should not be subject to attack on the basis of bias. Statements manifesting a mind so closed as to make submissions futile would, however, even at the investigatory stage, constitute a basis for raising an issue of apprehended bias. Once the matter reaches the hearing stage a greater degree of discretion is required of a member.

The statements at issue here, when taken together, indicated not only a reasonable apprehension of bias but also a closed mind on the commissioner's part on the subject. Once the order directing the holding of the hearing was given, the Utility was entitled to procedural fairness. At the investigative stage, the "closed mind" test was applicable but once matters proceeded to a hearing, a higher standard had to be applied. Procedural fairness at that stage required the commission members to conduct themselves so that there could be no reasonable apprehension of bias.

A denial of a right to a fair hearing cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, must be void. The order of the Board of Commissioners of Public Utilities was accordingly void.

Cases Cited

Considered: Szilard v. Szasz, [1955] S.C.R. 3; Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369; Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170; Save Richmond Farmland Society v. Richmond (Township), [1990] 3 S.C.R. 1213; Cardinal v. Director of Kent [page626] Institution, [1985] 2 S.C.R. 643; referred to: Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311; Martineau v. Matsqui Institution Disciplinary Board, [1980] 1 S.C.R. 602.

Statutes and Regulations Cited

Public Utilities Act, R.S.N. 1970, c. 322, ss. 5(1) [as am. by S.N. 1979, c. 30, s. 1], (8), 6, 14, 15, 79, 83, 85, 86.

Authors Cited

Janisch, Hudson N. Case Comment: Nfld. Light & Power Co. v. P.U.C. (Bd.) (1987), 25 Admin. L.R. 196.

APPEAL from a judgment of the Newfoundland Court of Appeal (1990), 83 Nfld. & P.E.I.R. 257,

260 A.P.R. 257, 45 Admin. L.R. 291, dismissing an appeal from an order and from a ruling of the Board of Commissioners of Public Utilities. Appeal allowed.

James R. Chalker, Q.C., and Evan J. Kipnis, for the appellant. Chesley F. Crosbie, for the respondent.

Solicitors for the appellant: Chalker, Green & Rowe, St. John's. Solicitors for the respondent: Kendell & Crosbie, St. John's.

The judgment of the Court was delivered by

1 **CORY J.**:-- Two issues are raised on this appeal. The first requires a consideration of the extent to which an administrative board member may be permitted to comment upon matters before the board. The second, raises the question as to what the result should be if a decision of a board is made in circumstances where there is found to be a reasonable apprehension of bias.

The Factual Background

2 Pursuant to the provisions of The Public Utilities Act, R.S.N. 1970, c. 322, the Board of Commissioners of Public Utilities ("the Board") is responsible for the regulation of the Newfoundland Telephone Company Limited. Commissioners of the Board are appointed by the Lieutenant-Governor [page627] in Council. The statute simply provides that commissioners cannot be employed by, or have any interest, in a public utility (s. 6). In 1985, Andy Wells was appointed as a Commissioner to the Board. Earlier, while a municipal councillor, Wells had acted as an advocate for consumers' rights. When he was appointed, Wells publicly stated that he intended to play an adversarial role on the Board as a champion of consumers' rights. The Public Utilities Act neither provides for the appointment of commissioners as representatives of any specific group nor does it prohibit such appointments. The appointment of Wells has not been challenged.

3 Acting in accordance with The Public Utilities Act, the Board commissioned an independent accounting firm to provide an analysis of the costs and of the accounts of Newfoundland Telephone for the period between 1981 and 1987. The Board received the report from the accountants on November 3, 1988. In light of the report the Board, on November 10, decided to hold a public hearing. The hearing was to be before five commissioners including Wells and was to commence on December 19.

4 On November 13, 1988, The Sunday Express, a weekly newspaper published in St. John's, reported that Wells had described the pay and benefits package of appellant's executives as

"ludicrous" and "unconscionable". Wells was quoted as saying:

> "If they want to give Brait [the Chief Executive Officer of the appellant] and the boys extra fancy pensions, then the shareholders should pay it, not the rate payers," ...
>
> ...
>
> "So I want the company hauled in here -- all them fat cats with their big pensions -- to justify (these expenses) under the public glare ... I think the rate payers have a right to be assured that we are not permitting this company to be too extravagant."

5 On November 26, The Evening Telegram, a daily newspaper, published in St. John's, quoted Wells:

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> "Who the hell do they think they are?" Mr. Wells asked. "The guys doing the real work, climbing the poles never got any 21 per cent increase."
>
> "Why should we, the rate payers, pay for an extra pension plan," he continued, adding that if the executive employees want more money put in their pensions they should take it out of shareholders' profits.
>
> ...
>
> Mr. Wells said he senses an attitude of contempt by the telephone company towards the Public Utilities Board. The company seems to expect to always get its own way, he said, adding that the auditors had problems getting information from the company to do the audit requested by PUB. "But, I'm not having anything to do with the salary increases and big fat pensions," said Mr. Wells.
>
> ...
>
> The telephone company wants the report kept confidential, "but, who do they think they are," said Mr. Wells. "This document should be public."

6 When the hearing commenced on December 19, the appellant objected to Wells' participation on the panel on the grounds that his statements had created an apprehension of bias. The Board

found that there was no provision in the Act which would allow it to rule on its own members and it decided that it did not have jurisdiction to do so. The Board rejected the appellant's submission and ruled that the panel would continue as constituted.

7 On December 20, The Evening Telegram reported the previous day's events at the hearing. The article read in part:

> Following Monday's proceedings, Mr. Wells said he was not surprised by the request to remove him from the PUB panel for the Newfoundland Telephone hearing.

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> "I don't think those expenses can be justified," said Mr. Wells. "I'm concerned about bias the other way."

8 On January 24, 1989, the "NTV Evening News" (a television news program originating in St. John's) reported on the continuation of the hearing. That report contained the following statements made by a reporter, Jim Thoms, and by Mr. Wells. They were as follows:

Jim Thoms:	Before the hearing began last night board member Andy Wells went public with what he thought of the phone company. He nailed in particular increases in salary and pension benefits for top executives including president Anthony Brait and let it be known even before the board heard any evidence what his judgment would be.
	...
Andy Wells:	I was absolutely astounded to find out for 1988 that, that Brait is now about up to two hundred and thirty-five thousand dollars and I think that's an incredible sum of money to be paid for to manage a small telephone company.
Jim Thoms:	Now Mr. Wells is trying to find out what happened for this year. He was going after '89 salary figures at a meeting today.
Andy Wells:	And I just think that it is unfair to expect ratepayers, the consumers, you and I to pay for this kind of extravagance.
Jim Thoms:	Okay now ... Mr. Wells has left no doubt how his vote will come down in this

matter. He wants the board to disallow the salary and pension increases as unreasonable for rate making purposes and to tell the stockholders to pick up the tab.

Andy Wells: And I think that's, that's a reasonable way of proceeding, it's too easy, [page630] it's too easy for, for the Company to pass off all these expenses as, onto the ratepayers ... .

9 On January 30, 1989 The Evening Telegram reported further comments of Mr. Wells pertaining to the salaries of the executives. The article read in part:

> Mr. Wells complained in December that the salaries paid to the company executives, in particular to president Anthony Brait, were so high they were driving up the cost of telephone service to consumers.
>
> ...
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> Mr. Wells said Sunday that additional company documents subpoenaed by the board indicate Mr. Brait's salary for 1988 was close to $235,000, a figure Mr. Wells described as "ludicrous".
>
> ...
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> "I can't see what circumstances would justify that kind of money," Mr. Wells said.
>
> "I don't think the ratepayers of this province should be expected to pay that kind of salary. The company can bloody well take it out of the shareholders' profits."
>
> ...
>
> Mr. Wells said he doesn't know when the case will be before the court, but said if he is biased, it is on the side of the consumers who pay too much for their phone bills.

10 On April 4, Mr. Wells discussed the issue that was before the Board on the CBC morning radio program. His comments in part are as follows:

> What's wrong is that it's not necessary to provide telephone services to the people of this Province for chief executive officer of a company operating in a protected enclave in the economy like that where revenues are down too where there's no real business pressure. To be paid at that level, I think the company is asking the board, I suppose, or asking the rate payers to approve a level of compensation

> which is excessive and I just don't know, there's absolutely no justification for it at all. The company, obviously, is out of touch with reality and insensitive to the cold hard facts of life that many [page631] Newfoundlanders face in earning living from day to day.

During the same program Commissioner Wells also commented:

> There's no question about that, the question is whether or not this is excessive and very clearly, in my mind, it's certainly is and when you're as I say, you're not talking about a free enterprise situation where you have the competitive pressures in the market place, you're talking about a monopoly that's got a guaranteed situation and if something goes wrong then they can come crying to the board and get rate relief ... .
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> ...
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> Well that's the point, that's the point, I mean I don't particularly care what the company decides to pay its top executives, I care about how much of that compensation is to be paid for by rate payers, by you, as consumers of telephone services and very clearly that issue has to be addressed and I hope when we have an order out on this issue later on the month, they, they will in fact, be addressed. No justification whatsoever to expect the consumers of telephone services in this Province to be paying the full cost of salary levels for these people, no justification whatsoever.
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> ...
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> Very clearly, very clearly there is a significant level of executive over compensation and very clearly the board has to deal with that. To what degree the board does in fact deal with it, by that I mean, to what level we're, we're prepared to allow for rate making purposes, of course, awaits determination and the result of the hearing.
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> ...
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> Well I, no you're right, it's not the amount of money, I mean the amount of money relative to the overall revenues of the company is in fact incidental, it's peanuts but what's important here is the issue of equity, the issue of fairness ... what's important is that pay levels be set with in tune with what's paid generally in the community and that they be fair and be perceived to be fair, very clearly in the minds of I suppose, 99 percent of Newfoundlanders, paying Mr. Brait over $200,000.00 a year along with what's being paid to the rest of the [page632] executives is not fair in the minds of ordinary Newfoundlanders and I think

> they're perfectly right and indeed, I think it's incumbent on this board to address that inequity even though as you say, it's not going to result in lower telephone bills. But as somebody once said if you watch the pennies the dollars look after themselves you know.

11 It is to be noted that all these comments were made before the Board released its decision on the matter. The decision was contained in Order No. P.U. 20 (1989) dated August 3, 1989. In that order, the Board (i) disallowed the "cost of the enhanced pension plan" for certain senior executive officers of the appellant as an expense for rate-making purposes, and (ii) directed the appellant to refund to its customers in the former operating territory of the Newfoundland Telephone Company Limited the sums of $472,300 and $490,300 which were the amounts charged as expenses to the appellant's operating account for 1987 and 1988 to cover the costs of the enhanced pension plan; (iii) made no order respecting the individual salaries of the senior executive officers of the appellant.

12 Mr. Wells and two others constituted the majority of the Board which disallowed the costs of the enhanced pension plan for executive officers of the appellant. A minority of the Board would have allowed this item as a reasonable and prudent expense. Although the Board made no order respecting the salaries of senior executive officers, Mr. Wells added a concurring opinion and comment in which he stated:

> Because the Board failed to properly address those issues and on the basis of the evidence presented, I have to agree with the rest of the Board.
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> ...
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> In conclusion I am in complete agreement with the Majority on the issue of the special executive retirement plan and given the evidence as presented at the hearing, [page633] I have to concur with the rest of the Board on the issue of executive salaries. However, the latter issue requires a more thorough examination by the Board in the future. It is not an issue that has been finally resolved.

Proceedings in the Court of Appeal (1990), 83 Nfld. & P.E.I.R. 257

13 The appellant appealed both the order itself and the ruling of the Board to proceed with Wells as a member of the hearing panel.

14 The Court of Appeal found that the Board had been in error in concluding that it had no jurisdiction to change the composition of the panel. It noted that the Board had complete jurisdiction to determine its own procedures as well as all questions of law and fact. It held that the Board had declined to exercise its jurisdiction when it refused to consider the removal of Wells from the hearing panel.

15 Morgan J.A. for the Court of Appeal then considered whether the comments of Wells had raised a reasonable apprehension of bias with regard to the Board's decision. He observed that natural justice requires that an administrative board proceed without actual bias or in a way that does not raise a reasonable apprehension of bias. He noted that the standard of natural justice varies with the nature and functions of the tribunal in question. While he found that the enabling statute required the Board in this case to act as investigator, prosecutor and judge, he rejected the contention that the hearing formed part of the investigatory process. He held that the members of the Board must act fairly and with their minds open to persuasion. The fact that they have given prior opinions should not disqualify them. However, he concluded that Wells' comments did indeed raise a reasonable apprehension of bias which might well have disqualified him [page634] from the hearing if the appellant had sought a writ of mandamus to have the matter resolved.

16 He then considered the consequences of his conclusion that a reasonable apprehension of bias had been established. In his view a hearing of an administrative board is void ab initio if the adjudicator has an actual conflict of interest. On the other hand, if only a reasonable apprehension of bias exists, the proceedings are simply voidable. He then examined the conclusions of the Board and observed that Wells did not find against the company on the matter of executive wage increases. He took this as proof that Wells' mind had not been closed to argument. As a result he determined that the order of the Board was valid.

Analysis

The Composition and Function of Administrative Boards

17 Administrative boards play an increasingly important role in our society. They regulate many aspects of our life, from beginning to end. Hospital and medical boards regulate the methods and practice of the doctors that bring us into this world. Boards regulate the licensing and the operation of morticians who are concerned with our mortal remains. Marketing boards regulate the farm products we eat; transport boards regulate the means and flow of our travel; energy boards control the price and distribution of the forms of energy we use; planning boards and city councils regulate the location and types of buildings in which we live [page635] and work. In Canada, boards are a way of life. Boards and the functions they fulfil are legion.

18 Some boards will have a function that is investigative, prosecutorial and adjudicative. It is only boards with these three powers that can be expected to regulate adequately complex or monopolistic industries that supply essential services.

19 The composition of boards can, and often should, reflect all aspects of society. Members may include the experts who give advice on the technical nature of the operations to be considered by the Board, as well as representatives of government and of the community. There is no reason why advocates for the consumer or ultimate user of the regulated product should not, in appropriate circumstances, be members of boards. No doubt many boards will operate more effectively with representation from all segments of society who are interested in the operations of the Board.

20 Nor should there be undue concern that a board which draws its membership from a wide spectrum will act unfairly. It might be expected that a board member who holds directorships in leading corporations will espouse their viewpoint. Yet I am certain that although the corporate perspective will be put forward, such a member will strive to act fairly. Similarly, a consumer advocate who has spoken out on numerous occasions about practices which he, or she, considers unfair to the consumer will be expected to put forward the consumer point of view. Yet that same person will also strive for fairness and a just result. Boards need not be limited solely to experts or to bureaucrats.

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The Duty of Boards

21 All administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine. This was recognized in Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311. Chief Justice Laskin at p. 325 held:

> ... the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question ... .

22 Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. See Martineau v. Matsqui Institution Disciplinary Board, [1980] 1 S.C.R. 602. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply 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.

23 In Szilard v. Szasz, [1955] S.C.R. 3, Rand J. found a commercial arbitration was invalid because of bias. He held that the arbitrator did not possess "judicial impartiality" because he had a business relationship with one of the parties to the arbitration. This raised an apprehension of bias that [page637] was sufficient to invalidate the proceedings. At p. 7 he wrote:

> Each party, acting reasonably, is entitled to a sustained confidence in the

> independence of mind of those who are to sit in judgment on him and his affairs.

24 This principle was relied upon in Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369. In that case a member of the Board had participated in a Study Group which had examined the feasibility of the Mackenzie pipeline. The appellants objected to his assignment to a panel which was considering competing applications for a certificate to undertake the pipeline. The standard the Board was required to apply in considering the applications was one of public convenience and necessity. Chief Justice Laskin held that the member's prior activity raised a reasonable apprehension of bias. He observed that the National Energy Board was charged with the duty to consider the public interest. Public confidence in the impartiality of Board decisions was required to further the public interest.

25 Bias was considered in a different setting in Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170. That case concerned a planning decision which was made by elected municipal councillors. The governing legislation for municipalities was designed so that councillors would become involved in planning issues before taking part in their final determination. The decision of the Court recognized that city councillors are political actors who have been elected by the voters to represent particular points of view. Considering the spectrum of administrative bodies whose functions vary from being almost purely adjudicative to being political or policy-making in nature, the Court held that municipal councils fall in the legislative end. Sopinka J., at p. 1197, set forth the "open mind" test for this type of situation:

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> The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged.

26 This same principle was applied in the companion case, Save Richmond Farmland Society v. Richmond (Township), [1990] 3 S.C.R. 1213. That case concerned a municipal councillor who campaigned for election favouring a residential development. He made public statements that he would not change his mind with regard to his position despite public hearings on the issue. Sopinka J. found that the councillor should not be disqualified for bias because he did not have a completely closed mind. He determined that to have ruled otherwise would have distorted the democratic process by discouraging politicians from expressing their views openly.

27 It can be seen that there is a great diversity of administrative boards. Those that are primarily

adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine [page639] the very role which has been entrusted to them by the legislature.

28 Janisch published a very apt and useful Case Comment on Nfld. Light & Power Co. v. P.U.C. (Bd.) (1987), 25 Admin. L.R. 196. He observed that Public Utilities Commissioners, unlike judges, do not have to apply abstract legal principles to resolve disputes. As a result, no useful purpose would be served by holding them to a standard of judicial neutrality. In fact to do so might undermine the legislature's goal of regulating utilities since it would encourage the appointment of those who had never been actively involved in the field. This would, Janisch wrote at p. 198, result in the appointment of "the main line party faithful and bland civil servants". Certainly there appears to be great merit in appointing to boards representatives of interested sectors of society including those who are dedicated to forwarding the interest of consumers.

29 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.

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Application to the Case at Bar

30 It is first necessary to review the legislation which constitutes the Board and sets out its role and function. The key sections to The Public Utilities Act are as follows:

> 5. (1) The Lieutenant-Governor in Council may appoint three or more persons who shall constitute a Board of Commissioners of Public Utilities, and

shall designate a chairman and two vice-chairmen of and appoint a clerk for the Board.

...

(8) The commissioners and the clerk shall be paid such salaries as the Lieutenant-Governor in Council determines.

14. The Board shall have the general supervision of all public utilities, and may make all necessary examinations and enquiries and keep itself informed as to the compliance by public utilities with the provisions of law and shall have the right to obtain from any public utility all information necessary to enable the Board to fulfil its duties.

15. The Board may enquire into any violation of the laws or regulations in force in this province by any public utility doing business therein, or by the officers, agents or employees thereof, or by any person operating the plant of any public utility, and has the power and it is its duty to enforce the provisions of this Act as well as all other laws relating to public utilities.

79. Whenever the Board believes that any rate or charge is unreasonable or unjustly discriminatory, or that any reasonable service is not supplied, or that an investigation of any matter relating to any public utility should for any reason be made, it may, of its own motion, summarily investigate the same with or without notice.

83. The Board shall give the public utility and the complainant, if any, ten days' notice of the time and place when and where the hearing and investigation referred to in Section 82 [i.e. when a complaint is made] will be held and such matters considered and determined and both the public utility and the complainant [page641] are entitled to be heard and to have process to enforce the attendance of witnesses.

85. If after making any summary investigation, the Board becomes satisfied that sufficient grounds exist to warrant a formal hearing being ordered as to the matters so investigated, it shall furnish such public utility interested a statement notifying the public utility of the matters under investigation and ten days after such notice has been given the Board may proceed to set a time and

> place for a hearing and an investigation as provided in this Act.
>
> 86. Notice of the time and place for the hearing referred to in Section 85 shall be given to the public utility and to such other interested persons as the Board shall deem necessary as provided in this Act and thereafter proceedings shall be held and conducted in reference to the matter investigated in like manner as though complaints had been filed with the Board relative to the matter investigated [see s. 83], and the same order or orders may be made in reference thereto as if such investigation had been made on complaint.

31 It can be seen that the Board has been given the general supervision of provincial public utilities. In that role it must supervise the operation of Newfoundland Telephone which has a monopoly on the provision of telephone services in the Province of Newfoundland. The Board, when it believes any charges or expenses of a utility are unreasonable, may of its own volition summarily investigate the charges or expenses. As a result of the investigation it may order a public hearing regarding the expenses. In turn, at the hearing the utility must be accorded the fundamental rights of procedural fairness. That is to say, the utility must be given notice of the complaint, the right to enforce the attendance of witnesses and to make submissions in support of its position.

32 When determining whether any rate or charge is "unreasonable" or "unjustly discriminatory" the Board will assess the charges and rates in economic terms. In those circumstances the Board will not be dealing with legal questions but rather policy issues. The decision-making process of this Board will come closer to the legislative end of the [page642] spectrum of administrative boards than to the adjudicative end.

33 It can be seen that the Board, pursuant to s. 79, has a duty to act as an investigator with regard to rates or charges and may have a duty to act as prosecutor and adjudicator with regard to these same expenses pursuant to ss. 83, 85 and 86.

34 What then of the statements made by Mr. Wells? Certainly it would be open to a commissioner during the investigative process to make public statements pertaining to the investigation. Although it might be more appropriate to say nothing, there would be no irreparable damage caused by a commissioner saying that he, or she, was concerned with the size of executive salaries and the executive pension package. Nor would it be inappropriate to emphasize on behalf of all consumers that the investigation would "leave no stone unturned" to ascertain whether the expenses or rates were appropriate and reasonable. During the investigative stage, a wide licence must be given to board members to make public comment. As long as those statements do not indicate a mind so closed that any submissions would be futile, they should not be subject to attack on the basis of bias.

35 The statements made by Mr. Wells before the hearing began on December 19 did not indicate that he had a closed mind. For example, his statement: "[s]o I want the company hauled in here --

all them fat cats with their big pensions -- to justify (these expenses) under the public glare ... I think the rate payers have a right to be assured that we are not permitting this company to be too extravagant" is not objectionable. That comment is no more than a colourful expression of an opinion that the salaries and pension benefits seemed to be unreasonably high. It does not indicate a closed mind. Even Wells' statement that he did not think that the expenses could be justified, did not indicate a closed mind. However, should a commissioner state that, no matter what evidence might be disclosed as a result of the investigation, his or her [page643] position would not change, this would indicate a closed mind. Even at the investigatory stage statements manifesting a mind so closed as to make submissions futile would constitute a basis for raising an issue of apprehended bias. However the quoted statement of Mr. Wells was made on November 13, three days after the hearing was ordered. Once the hearing date had been set, the parties were entitled to expect that the conduct of the commissioners would be such that it would not raise a reasonable apprehension of bias. The comment of Mr. Wells did just that.

36 Once the matter reaches the hearing stage a greater degree of discretion is required of a member. Although the standard for a commissioner sitting in a hearing of the Board of Commissioners of Public Utilities need not be as strict and rigid as that expected of a judge presiding at a trial, nonetheless procedural fairness must be maintained. The statements of Commissioner Wells made during and subsequent to the hearing, viewed cumulatively, lead inexorably to the conclusion that a reasonable person appraised of the situation would have an apprehension of bias.

37 On January 24, while the hearing was already in progress, Wells was making statements that might readily be understood by a reasonable observer, as they were by the telecast reporter Jim Thoms, that Wells had made up his mind what his judgment would be even before the Board had heard all the evidence. Evidence sufficient to create a reasonable apprehension of bias can be found in some of the statements made by Wells during the course of a January 24th telecast, and in the subsequent comments to the press and to the radio. For example, during a radio broadcast he said:

> To be paid at that level, I think the company is asking the board, I suppose, or asking the rate payers to approve a level of compensation which is excessive and I just don't know, there's absolutely no justification for it at all.
>
> ...
>
> There's no question about that, the question is whether or not this is excessive and very clearly, in my mind, it's [page644] certainly is and when you're as I say, you're not talking about a free enterprise situation where you have the competitive pressures in the market place, you're talking about a monopoly that's got a guaranteed situation ... .
>
> ...

> No justification whatsoever to expect the consumers of telephone services in this Province to be paying the full cost of salary levels for these people, no justification whatsoever.
>
> Very clearly, very clearly there is a significant level of executive over compensation and very clearly the board has to deal with that.
>
> ...
>
> ... I suppose, 99 percent of Newfoundlanders, paying Mr. Brait over $200,000.00 a year along with what's being paid to the rest of the executives is not fair in the minds of ordinary Newfoundlanders and I think they're perfectly right and indeed, I think it's incumbent on this board to address that inequity even though as you say, it's not going to result in lower telephone bills.

38 These statements, taken together, give a clear indication that not only was there a reasonable apprehension of bias but that Mr. Wells had demonstrated that he had a closed mind on the subject.

39 Once the order directing the holding of the hearing was given the Utility was entitled to procedural fairness. At that stage something more could and should be expected of the conduct of board members. At the investigative stage, the "closed mind" test was applicable. Once matters proceeded to a hearing, a higher standard had to be applied. Procedural fairness then required the board members to conduct themselves so that there could be no reasonable apprehension of bias. The application of that test must be flexible. It need not be as strict for this Board dealing with policy matters as it would be for a board acting solely in an adjudicative capacity. This standard of conduct will not of course inhibit the most vigorous questioning of [page645] witnesses and counsel by board members. Wells' statements, however, were such, that so long as he remained a member of the Board hearing the matter, a reasonable apprehension of bias existed. It follows that the hearing proceeded unfairly and was invalid.

The Consequences of a Finding of Bias

40 Everyone appearing before administrative boards is entitled to be treated fairly. It is an independent and unqualified right. As I have stated, it is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established. If there has been a denial of a right to a fair hearing it cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. Procedural fairness is an essential aspect of any hearing before a tribunal. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void. In Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643, at p. 661, Le Dain J. speaking for the Court put his position in this way:

> ... I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

41 In my view, this principle is also applicable to this case. In the circumstances, there is no alternative but to declare that the Order of the Board of Commissioners of Public Utilities is void.

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Disposition

42 In the result the appeal will be allowed, the order of the Court of Appeal will be set aside, and Order No. P.U. 20 (1989) of the Board of Commissioners of Public Utilities is declared void ab initio. The appellant should have the costs of the appeal in this Court and in the Court of Appeal.

Indexed as:

Zündel v. Citron (C.A.)

Sabina Citron, Toronto Mayor's Committee on Community and Race Relations, the Attorney General of Canada, the Canadian Human Rights Commission, Canadian Holocaust Remembrance Association, Simon Wiesenthal Centre, Canadian Jewish Congress and League for Human Rights of B'Nai Brith (Appellants)

v.

Ernst Zündel and Canadian Association for Free Expression Inc. (Respondents)

[2000] 4 F.C. 225

[2000] F.C.J. No. 679

Court File No. A-253-99

Federal Court of Canada - Court of Appeal

Isaac, Robertson and Sexton JJ.A.

Heard: Toronto, April 4, 2000.
Judgment: Ottawa, May 18, 2000.

Administrative law -- Judicial review -- CHRT panel appointed to hear complaints against respondent Zündel following publication of pamphlet on Web site -- Pamphlet, called "Did Six Million Really Die?" same that led to 1988 press release issued by Ontario Human Rights Commission -- Ms. Devins, one of CHRT members had been member of Commission applauding verdict when Zündel convicted of publishing false statements denying Holocaust -- Zündel seeking to dismiss complaints on basis Ms. Devins subject to reasonable apprehension of bias -- Motion dismissed by CHRT -- Motions Judge finding reasonable apprehension of bias -- Press release not addressing same issue as complaint before CHRT -- Number of errors made by Motions Judge -- "Corporate taint" doctrine rejected -- Motions Judge further erred in holding, if reasonable apprehension of bias existed, CHRT could continue hearing.

Human rights -- Zündel convicted of wilfully publishing pamphlet likely to cause injury, mischief to

public interest contrary to Criminal Code, s. 177 -- Conviction overturned by S.C.C. as Code, s. 177 infringing Charter -- CHRT inquiring into complaints Web site operated by Zündel likely to expose people to hatred, contempt contrary to CHRA, s. 13(1) -- One of CHRT members had been member of Ontario Human Rights Commission that previously issued press release applauding Zündel's conviction -- Whether subject to reasonable apprehension of bias -- Press release not addressing same issue as complaint before CHRT -- [page226] Related to charge under Criminal Code, s. 177 to which truth defence -- CHRA, s. 13 providing no defence, even if discriminatory statement truthful -- Impugned statement should not be attributed to member in question.

This was an appeal from a Trial Division decision finding a reasonable apprehension of bias on the part of one member of the Canadian Human Rights Tribunal hearing complaints based on subsection 13(1) of the Canadian Human Rights Act. In May 1988, the respondent, Ernst Zündel, was found guilty of publishing a pamphlet called "Did Six Million Really Die?" that he knew was false or likely to cause injury or mischief to a public interest, contrary to section 177 of the Criminal Code. Two days after the jury had reached its verdict, the Ontario Human Rights Commission issued a press release applauding the verdict. Zündel's criminal conviction was later overturned by the Supreme Court of Canada on the ground that Code section 177 infringed Charter paragraph 2(b). In 1997, approximately four years after that decision, complaints were laid with the Canadian Human Rights Commission that an Internet Web site operated by Zündel would be likely to expose people to hatred or contempt contrary to subsection 13(1) of the Canadian Human Rights Act. The Canadian Human Rights Tribunal appointed to inquire into the complaints was composed of three persons, one of them being Reva E. Devins who had been a member of the Ontario Human Rights Commission when it issued the press release in 1988. The respondent brought a motion before the Tribunal, seeking to dismiss the subsection 13(1) complaints on the basis that Ms. Devins was subject to a reasonable apprehension of bias. The Tribunal rejected Zündel's motion, one of the reasons being that it was brought out of time. On judicial review of that decision, the Motions Judge ruled that at the time the statement was made, the members of the Ontario Human Rights Commission held a strong actual bias against Zündel and that a reasonably informed bystander would apprehend that the "extreme impropriety" of the press release would make Ms. Devins subject to a reasonable apprehension of bias. The Motions Judge concluded, however, that, even though Ms. Devins was subject to a reasonable apprehension of bias, the remaining member of the Tribunal could continue to hear and decide the complaint. Two issues were raised on appeal: (1) whether the finding of the Motions Judge that there was a reasonable apprehension of bias on the part of Ms. Devins was unreasonable, based on erroneous considerations, reached on wrong principle or as a result of insufficient weight being given to relevant matters; (2) whether the [page227] Motions Judge was correct in holding that, if there was a reasonable apprehension of bias, the Tribunal could continue with the hearing.

Held, the appeal should be allowed and the matter remitted for completion of the hearing.

(1) The test for a reasonable apprehension of bias is "what would an informed person, viewing the

matter realistically and practically, and having thought the matter through, conclude". 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. The press release draws a distinction between statements made by the Ontario Human Rights Commission, and statements made by its Chair. It was made in response to a criminal charge that did afford a defence of truthfulness under section 177 of the Criminal Code. The statements attributed to the Commission simply criticized Zündel for denying the truthfulness of the Holocaust. Thus, the truth of the statement would provide a complete defence. By contrast, the essence of the complaint before the Canadian Human Rights Tribunal was that certain people were exposed to hatred or contempt. The truth of the statement would provide no defence. Thus, the issue faced by the jury in 1988 was different from that before the Tribunal. The statement contained in the press release that might be material to the subsection 13(1) complaint was attributed to the Chief Commissioner, not to the Commission as a whole. A reasonable and informed observer would not conclude that such statement should be attributed to Ms. Devins.

The Motions Judge made six other errors. First, he failed to take into account the principle that a member of a Tribunal will act fairly and impartially, in the absence of evidence to the contrary. There is a presumption that a decision maker will act impartially. Second, he failed to consider whether the press release demonstrated an objectively justifiable disposition. Third, he failed to properly connect Ms. Devins to the press release. His reasons confused the passage of time with her connection to the press release. There was no evidence that she was aware of it, let alone agreed with its issuance so as to demonstrate [page228] actual bias at the time the press release was issued. Fourth, the Motions Judge failed to give appropriate weight to the amount of time that had passed between the date on which the press release was issued and the date Ms. Devins was asked to hear the subsection 13(1) complaints. A period of nine years between those two dates was sufficient to expunge any taint of bias that might have existed by reason of the press release. Fifth, he erred in concluding that the Ontario Human Rights Commission was only an adjudicative body and had no legitimate purpose in issuing the press release. The press release was not "thoroughly inappropriate"; rather, it was consistent with the Commission's statutory obligation "to forward the policy that the dignity and worth of every person be recognized". Finally, the Motions Judge erred in concluding that there is a doctrine of corporate "taint" that is said to paint all members of a decision-making body with bias in certain circumstances. An inference could not be drawn that each member of the Ontario Human Rights Commission authorized the entire press release.

(2) The Motions Judge also erred in concluding that, where a reasonable apprehension of bias is proven, the remaining members of the Tribunal could continue to hear and determine the complaint. When the bias allegation was raised, the panel of which Ms. Devins was a member had sat for some 40 days, and had made approximately 53 rulings. Where a member of an administrative tribunal is subject to a reasonable apprehension of bias and a number of serious interlocutory orders have been made over the course of a lengthy hearing, the Tribunal's proceedings should be quashed in their entirety.

Statutes and Regulations Judicially Considered

Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 2(b).
Canadian Human Rights Act, R.S.C., 1985, c. H-6, s. 13(1).
Criminal Code, R.S.C. 1970, c. C-34, s. 177.
Criminal Code, R.S.C., 1985, c. C-46, s. 181.
Human Rights Code, S.O. 1981, c. 53, s. 28.
Police Services Act, R.S.O. 1990, c. P.15.
Public Utilities Act (The), R.S.N. 1970, c. 322, ss. 5, 14, 15, 79, 85.

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Cases Judicially Considered

Applied:
R. v. S. (R.D.), [1997] 3 S.C.R. 484; (1997), 161 N.S.R. (2d) 241; 151 D.L.R. (4th) 193; 1 Admin. L.R. (3d) 74; 118 C.C.C. (3d) 353; 10 C.R. (5th) 1; 218 N.R. 1.
Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892; (1990), 75 D.L.R. (4th) 577; 13 C.H.R.R. D/435; 3 C.R.R. (2d) 116.
Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia), [1997] 2 F.C. 527; (1997), 146 D.L.R. (4th) 708; 47 Admin. L.R. (2d) 244; 212 N.R. 357 (C.A.).
E.A. Manning Ltd. v. Ontario Securities Commission (1995), 23 O.R. (3d) 257; 125 D.L.R. (4th) 305; 32 Admin. L.R. (2d) 1; 7 C.C.L.S. 125; 80 O.A.C. 321 (C.A.); leave to appeal to S.C.C. refused, [1995] 3 S.C.R. vi.
Finch v. Assn. of Professional Engineers & Geoscientists (British Columbia), [1996] 5 W.W.R. 690; (1996), 38 Admin. L.R. (2d) 116; 73 B.C.A.C. 295; 18 B.C.L.R. (3d) 361 (B.C.C.A.).
Bennett v. British Columbia (Securities Commission) (1992), 94 D.L.R. (4th) 339; [1992] 5 W.W.R. 481; 18 B.C.A.C. 191; 69 B.C.L.R. (2d) 171; 31 W.A.C. 191.
Laws v. Australian Broadcasting Tribunal (1990), 93 A.L.R. 435 (H.C.).

Distinguished:
Dulmage v. Ontario (Police Complaints Commissioner) (1994), 21 O.R. (3d) 356; 120 D.L.R. (4th) 590; 30 Admin. L.R. (2d) 203; 75 O.A.C. 305 (Div. Ct.).
Pinochet Ugarte, Re, [1998] H.L.J. No. 52 (QL).
Pinochet Ugarte, Re, [1998] H.L.J. No. 41 (QL).
Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623; (1992), 95 Nfld. & P.E.I.R. 271; 4 Admin. L.R. (2d) 121; 134 N.R. 241.

Considered:

R. v. Zündel, [1992] 2 S.C.R. 731; (1992), 95 D.L.R. (4th) 202; 75 C.C.C. (3d) 449; 16 C.R. (4th) 1; 140 N.R. 1; 56 O.A.C. 161.

APPEAL from a Trial Division decision ([1999] 3 F.C. 409; (1999), 165 F.T.R. 113) finding a reasonable apprehension of bias on the part of one member of the Canadian Human Rights Tribunal hearing complaints based on subsection 13(1) of the Canadian Human Rights Act. Appeal allowed.

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Appearances:

Jane S. Bailey, for the appellants Sabina Citron and the Canadian Holocaust Remembrance Association.
Andrew A. Weretelnyk, for the appellant Toronto Mayor's Committee on Community and Race Relations.
Richard A. Kramer, for the appellant Attorney General of Canada.
René Duval, for the appellant Canadian Human Rights Commission.
Robyn M. Bell, for the appellant Simon Wiesenthal Centre.
Joel Richler and Judy Chan, for the appellant Canadian Jewish Congress.
Marvin Kurz, for the appellant League, for the Human Rights of B'Nai Brith.
Douglas H. Christie and Barbara Kulaszka, for the respondent Ernst Zündel.
Gregory Rhone, for the respondent Canadian Association, for the Free Expression Inc.

Solicitors of Record:

Torys, Toronto, for the appellants Sabina Citron and the Canadian Holocaust Remembrance Association.
City of Toronto, Legal Department, Toronto, for the appellant Toronto Mayor's Committee on Community and Race Relations.
Deputy Attorney General of Canada, for the appellant Attorney General of Canada.
Canadian Human Rights Commission, for the appellant Canadian Human Rights Commission.
Bennett Jones, Toronto, for the appellant Simon Wiesenthal Centre.
Blake, Cassels & Graydon, Toronto, for the appellant Canadian Jewish Congress.
Dale, Streiman & Kurz, Brampton, Ontario, for the appellant League, for the Human Rights of B'Nai Brith.
Douglas H. Christie, Victoria, and Barbara Kulaszka, Brighton, Ontario, for the respondent Ernst Zündel.
Gregory Rhone, Etobicoke, Ontario, for the respondent Canadian Association, for the Free Expression Inc.

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The following are the reasons for judgment rendered in English by

SEXTON J.A.:--

INTRODUCTION

1 Ms. Devins is a member of the Canadian Human Rights Tribunal (the Tribunal) that is hearing a complaint brought against Ernst Zündel. At issue in this appeal is whether Ms. Devins is subject to a reasonable apprehension of bias, stemming from a now twelve-year old press release that was issued by the Ontario Human Rights Commission (the Commission or Ontario Human Rights Commission) when Ms. Devins was a member of that Commission, in which the Commission, among other things, applauded a court ruling that found Mr. Zündel to be guilty of publishing false statements that denied the Holocaust.

BACKGROUND FACTS

2 On May 11, 1988, a jury found Mr. Zündel to be guilty of wilfully publishing a pamphlet called "Did Six Million Really Die?" that he knew was false and that causes or is likely to cause injury or mischief to a public interest, contrary to section 177 of the Criminal Code.[1]

3 Two days after the jury had reached its verdict, the Ontario Human Rights Commission issued the following press release:

TIME/DATE: SOURCE:	10:32 Eastern Time May 13, 1988 Ontario Human Rights Commission
HEADLINE:	*** HUMAN RIGHTS COMMISSION COMMENDS RECENT ZÜNDEL RULING ***

PLACELINE: TORONTO

The Ontario Human Rights Commission commends the recent court ruling that found Ernst Zundel guilty of publishing false statements denying the

Holocaust.

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> "This decision lays to rest, once and for all, the position that is resurrected from time to time that the Holocaust did not happen and is, in fact, a hoax," said Chief Commissioner, Raj Anand. "We applaud the jury's decision since it calls for sanctions against a man responsible for contradicting the truth of the suffering experienced by the Jewish people, which was visited upon them solely because of their religion and ethnicity."
>
> Mr. Anand also stated that the decision is of broader significance in that it affirms not only the rights of Jews, but also of and [sic] other religious and ethnocultural groups to be free from the dissemination of false information that maligns them.

4 Mr. Zündel's criminal conviction was eventually overturned by the Supreme Court of Canada [[1992] 2 S.C.R. 731], which held that section 177 of the Criminal Code[2] was contrary to the right of free expression guaranteed by paragraph 2(b) of the Charter [Canadian Charter of Rights and Freedoms, being part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]], and that the infringement could not be saved by section 1 of the Charter.[3]

5 Approximately four years after the Supreme Court overturned Mr. Zündel's conviction, two complainants laid complaints with the Canadian Human Rights Commission. The complainants said that they believed that an Internet Web site operated by Mr. Zündel would be "likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination," contrary to subsection 13(1) of the Canadian Human Rights Act.[4] A panel of the Canadian Human Rights Tribunal was appointed to inquire into the complaints. Reva E. Devins was one of three persons appointed to determine the complaint.

6 At the inquiry, which commenced on May 26, 1997, the Canadian Human Rights Commission relied heavily on the "Did Six Million Really Die?" pamphlet that had been published on Mr. Zündel's Web [page233] site. This pamphlet was the same one that had led to the earlier criminal charges and to the press release issued by the Ontario Human Rights Commission.

7 After approximately forty days of hearings, Mr. Zündel requested that the Tribunal fax him the biographies of the three Tribunal members. Approximately one week after the biographies had been

faxed to him, counsel for Mr. Zündel located the press release while searching Quicklaw Systems' databases. That same day, counsel for Mr. Zündel brought a motion before the Tribunal, seeking to dismiss the subsection 13(1) complaints on the basis that Ms. Devins was subject to a reasonable apprehension of bias.

THE TRIBUNAL'S DECISION

8 The Tribunal rejected Mr. Zündel's motion. It concluded that the press release had been made by the then Chief Commissioner of the Ontario Human Rights Commission, not by the Commission or by Ms. Devins personally. Moreover, the Tribunal added, the statements were arguably within the Chief Commissioner's statutory mandate. These factors, the Tribunal held, made it difficult to understand how the press release could be said to create a reasonable apprehension of bias on the part of the Chief Commissioner, or that any bias could then be imputed to Ms. Devins. In any event, the Tribunal held that even if Mr. Zündel's submission had any merit, it held that it was "totally inappropriate at this late state for this matter to be advanced."[5] The Tribunal reasoned that because the statement had been made long before the hearing had commenced, Mr. Zündel could have raised the bias allegation at the outset of the proceedings. In so doing, the Tribunal implied that Mr. Zündel had waived his right to raise an allegation of reasonable apprehension of bias. Mr. Zündel sought judicial review of the Tribunal's decision to the Federal Court--Trial Division.

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THE FEDERAL COURT--TRIAL DIVISION'S DECISION

9 In his decision, the Motions Judge held that the press release was a "gratuitous political statement"[6] that made "a specific damning statement"[7] against Mr. Zündel, which was "thoroughly inappropriate for the Chair of the Ontario Commission"[8] to do. He held that "[a]n institution with adjudicative responsibilities has no legitimate purpose in engaging in such public condemnation."[9]

10 The Motions Judge reasoned that because the press release stated that "the Ontario Human Rights Commission commends the present court ruling,"[10] and that "[w]e applaud the jury's decision,"[11] the Chair purported to speak on behalf of all members of the Commission, including Ms. Devins. The Motions Judge added that it would be a "reasonable conclusion to reach that at the time the statement was made, the members of the Ontario Commission held a strong actual bias"[12] against Mr. Zündel. Nevertheless, he concluded that by the time the Canadian Human Rights Tribunal was convened to inquire into the subsection 13(1) complaint, there was "insufficient evidence to find present actual bias"[13] against Ms. Devins.

11 The Motions Judge concluded that even though the statement was released some ten years before Ms. Devins was called to inquire into the subsection 13(1) complaint brought against Mr. Zündel, a reasonably informed bystander would apprehend that the "extreme impropriety"[14] of the

press release would make her subject to a reasonable apprehension of bias.

12 The Motions Judge rejected the Tribunal's decision that Mr. Zündel had waived his right to bring the bias complaint by not bringing it at the outset of the Tribunal's proceedings. The Motions Judge accepted Mr. Zündel's evidence that he was not aware of the press release until shortly before the bias allegation was brought.

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13 Even though he concluded that Ms. Devins was subject to a reasonable apprehension of bias, the Motions Judge declined to prohibit the remaining member of the Tribunal from continuing to hear and to ultimately determine the complaint. He held that because the Canadian Human Rights Act permits one Tribunal member to complete an already commenced hearing where other appointed members are unable to continue,[15] the one remaining member of the panel could continue to hear and decide the complaint.

14 Ms. Citron and the other appellants now appeal the Motion Judge's decision that Ms. Devins was subject to a reasonable apprehension of bias. They have not appealed the Motion Judge's decision that Mr. Zündel did not waive his right to raise the bias allegation by not bringing it at the outset of the Tribunal's proceedings. Mr. Zündel has cross-appealed one aspect of the Motion Judge's decision, arguing that the Motions Judge should have quashed the Tribunal's proceedings in their entirety.

ISSUES

1. Was the finding of the Motions Judge that there was a reasonable apprehension of bias on the part of Ms. Devins unreasonable, based on erroneous considerations, reached on wrong principle, or reached as a result of insufficient weight having been given to relevant matters?
2. Was the Motions Judge correct in holding that, if there was a reasonable apprehension of bias, the Tribunal could continue with the hearing?

ANALYSIS

1. THE REASONABLE APPREHENSION OF BIAS TEST

15 In R. v. S. (R.D.),[16] Cory J. stated the following manner in which the reasonable apprehension of bias test should be applied:

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> [T]he 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 ... ."[17]

16 He held that the test contained 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."[18]

Does the press release address the same issue as the complaint before the Canadian Human Rights Tribunal?

17 On appeal, Mr. Zündel submits that a reasonable bystander would conclude that the press release, which attributes certain statements directly to the Ontario Human Rights Commission, and not merely to the Chair of that Commission, would cause Ms. Devins (who was a member of the Ontario Human Rights Commission when the press release was issued) to be subject to a reasonable apprehension of bias. Mr. Zündel submits that the criminal charges upon which the press release was based were directly in relation to his publication "Did Six Million Really Die?", the very same pamphlet that Mr. Zündel had reproduced on his Web site and that led to the subsection 13(1) human rights complaint that Ms. Devins and the other two members of the Tribunal were asked to determine.

18 In my view, the press release draws a distinction between statements made by the Ontario Human Rights Commission, and statements made by Mr. Anand, the Chair of the Ontario Human Rights Commission. The only statements contained in the press release that are directly attributed to the Ontario Human Rights Commission are the following:

> (i) "The Ontario Human Rights Commission commends the recent court ruling that found Ernst Zundel guilty of publishing false statements denying the Holocaust";

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> (ii) "We applaud the jury's decision since it calls for sanctions against a man responsible for contradicting the truth of the suffering experienced by the Jewish people, which was visited upon them solely because of their religion and ethnicity."

19 The criminal charge that the Ontario Human Rights Commission addressed in the press release was section 177 of the Criminal Code, later renumbered to section 181. The section states:

> 181. Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

20 By contrast, subsection 13(1) of the Canadian Human Rights Act states:

> 13. (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

21 In Canada (Human Rights Commission) v. Taylor,[19] Dickson C.J. held that "s. 13(1) [of the Canadian Human Rights Act] provides no defences to the discriminatory practice it describes, and most especially does not contain an exemption for truthful statements."[20] He concluded that "the Charter does not mandate an exception for truthful statements in the context of s. 13(1) of the Canadian Human Rights Act."[21]

22 The press release was made in response to a criminal charge that did afford a defence of truthfulness ("that he knows is false.")[22] The statements attributed to the Ontario Human Rights Commission simply criticize Mr. Zündel for denying the truthfulness of the Holocaust. By contrast, in a subsection 13(1) complaint, the truth or non-truthfulness [page238] of statements is immaterial to whether the complaint is substantiated. Consequently, the issue faced by the jury in 1988 is different from the issue faced by the Canadian Human Rights Tribunal.

23 Shortly stated, the essence of the offence in section 177 of the Criminal Code was that the statement was false and that it could or would likely cause injury or mischief to a public interest. Thus, the truth of the statement would provide a complete defence. On the other hand, the essence of the complaint before the Canadian Human Rights Tribunal is that certain people were exposed to hatred or contempt. The truth of the statement would provide no defence.

24 The only statement contained in the press release that might be material to the subsection 13(1) complaint is the following:

> Mr. Anand also stated that the decision is of broader significance in that it affirms not only the rights of Jews, but also of and [sic] other religious and ethnocultural groups to be free from the dissemination of false information that

> maligns them. [Emphasis added.]

25 It could be argued that the statement reproduced above states that the information disseminated by Mr. Zündel exposes Jews to hatred, the essence of a subsection 13(1) complaint. However, in my view, an informed person, viewing the matter realistically and practically--and having thought the matter through--would conclude that the press release draws a distinction between statements made by the Ontario Human Rights Commission (i.e. "the Ontario Human Rights Commission commends" or "we applaud" [emphasis added]) and statements made by Raj Anand, the Chief Commissioner of the Ontario Human Rights Commission. The statement reproduced above is attributed to Mr. Anand, and not to the Commission as a whole. Accordingly, I do not think that a reasonable and informed observer would conclude that the above statement should be attributed to Ms. Devins.

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26 Counsel for Mr. Zündel relied heavily on the Ontario Divisional Court's judgment in Dulmage v. Ontario (Police Complaints Commissioner)[23] to demonstrate that statements made by one member of an organization can be used to demonstrate that a different member of that organization is subject to a reasonable apprehension of bias.

27 In Dulmage, the president of the Mississauga chapter of the Congress of Black Women of Canada had been appointed to a Board of Inquiry pursuant to Ontario's Police Services Act.[24] The Board was appointed to investigate a complaint that a public strip search had taken place, contrary to the manner provided in the Metropolitan Toronto Police Force's regulations. Approximately one year before the president of the Mississauga chapter of the Congress of Black Women of Canada was appointed to the Board, the vice-president of the Toronto chapter of that organization was reported to have publicly stated that the strip search incident at issue was "not an 'isolated case' and reflects the 'sexual humiliation and abuse of black women.'"[25] In a different statement, the vice-president recommended "an RCMP investigation of [the]incident,"[26] and urged that the then-Chief of the Metropolitan Toronto Police Force resign, saying that "Chief McCormack has clearly demonstrated an inability to give effective leadership to the Police Force."[27]

28 below] In its decision, the Divisional Court concluded that the president who had been appointed to the Board of Inquiry was subject to a reasonable apprehension of bias. O'Brien J. held:

> ... inflammatory statements dealing with this very incident involved in this inquiry were made by an officer of the Congress of Black Women of Canada. Those statements were made in Toronto, closely adjacent to the City of Mississauga. They deal with an incident which received significant public attention. The statements referred to the incident as an "outrage" and called for the suspension of the [page240] officers involved. Those officers were the very

> ones involved in this hearing.
>
> Ms. Douglas was the president of the Mississauga chapter of the same organization.[28]

29 Similarly, in his dissenting reasons (although not on this point), Moldaver J. held that "[t]he remarks themselves related, at least in part, to the critical issue which the board was required to decide."[29]

30 In my view, Dulmage is distinguishable because the statements at issue in Dulmage dealt with the very question at issue before the Board of Inquiry, whereas the statements made by the Ontario Human Rights Commission address an issue that is immaterial to the subsection 13(1) Tribunal inquiry that Ms. Devins has been asked to determine.

31 I think the House of Lords' decision in Pinochet, Ugarte, Re[30] can be distinguished on a similar basis. In that appeal, the House of Lords vacated the earlier order it had made in Pinochet, Ugarte, Re[31] because Lord Hoffman, one of the members who heard the appeal, had links to an intervener (Amnesty International) that had argued on the appeal at the House of Lords.

32 When Lord Hoffman heard the appeal at issue in Pinochet, he had been a Director and Chairperson of Amnesty International Charity Limited. That corporation was charged with undertaking charity work for Amnesty International, the entity that had intervened in Pinochet.

33 The type of bias at issue in Pinochet was characterized by Lord Browne-Wilkinson as "where the judge is disqualified because he is a judge in his own cause."[32] Lord Browne-Wilkinson then held that "[i]f the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, in promoting the same causes in the same organisation as is a party [page241] to the suit."[33] Lord Browne-Wilkinson highlighted that "[t]he facts of this present case are exceptional,"[34] holding that "[t]he critical elements are (1) that [Amnesty International] was a party to this appeal; (3) the judge was a Director of a charity closely allied to [Amnesty International] and sharing, in this respect, [Amnesty International's] objects."[35] He concluded that "[o]nly in cases where a judge is taking an active role as trustee or Director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties."[36]

34 Accordingly, Pinochet is not analogous to this appeal. It might be so if the Ontario Human Rights Commission was a party to the proceedings before the Tribunal. Since it was not, I do not think that Pinochet demonstrates that Ms. Devins is subject to a reasonable apprehension of bias.

OTHER ERRORS MADE BY THE MOTIONS JUDGE

35 I now turn to other alleged errors made by the Motions Judge. In my view, he committed the following errors, each of which I address at greater length below:

1. He failed to address the presumption of impartiality;
2. He failed to consider whether the press release demonstrated an objectively justifiable disposition;
3. He failed to properly connect Ms. Devins to the press release;
4. He failed to give appropriate weight to the passage of time;
5. He erred in concluding that the Ontario Human Rights Commission was an adjudicative body and had no legitimate purpose in making the press release;

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6. He erred in concluding that a doctrine of "corporate taint" exists.

Presumption of impartiality

36 In my view, the Motions Judge erred by failing to take into account the principle that a member of a Tribunal will act fairly and impartially, in the absence of evidence to the contrary. In R. v. S. (R.D.), Cory J. held that "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'."[37] He added that "the threshold for a finding of real or perceived bias is high,"[38] and that "a real likelihood of probability of bias must be demonstrated, and that a mere suspicion is not enough."[39] Further, Cory J. held that "[t]he onus of demonstrating bias lies with the person who is alleging its existence."[40]

37 In Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia),[41] this Court held that there is a presumption that a decision maker will act impartially.[42] Similarly, in E.A. Manning Ltd. v. Ontario Securities Commission,[43] the Ontario Court of Appeal held, in the context of a bias allegation levelled against a securities commission, that "[i]t 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."[44] And in Finch v. Assn. of Professional Engineers & Geoscientists (British Columbia)[45] the British Columbia Court of Appeal held that it must be assumed, "unless and until the contrary is shown, that every member of this committee will carry out his or her duties in an impartial manner and consider only the evidence in relation to the charges before the panel."[46]

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Failure to consider whether the press release demonstrated an objectively justifiable disposition

38 In R. v. S. (R.D.), Cory J. offered a useful definition of the word "bias." He held that "bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues."[47] He added that "not every favourable or unfavourable disposition attracts the label of prejudice."[48] He held that where particular unfavourable dispositions are "objectively justifiable,"[49] such dispositions would not constitute impermissible bias. He offered "those who condemn Hitler"[50] as examples of objectively justifiable dispositions and, therefore, such comments do not give rise to a reasonable apprehension of bias on the part of the speaker.

39 In the Supreme Court's judgment that overturned Mr. Zündel's criminal conviction for publishing the "Did Six Million Really Die?" pamphlet, McLachlin J. (as she then was) referred to Mr. Zündel's beliefs as "admittedly offensive,"[51] while Cory and Iacobucci JJ. described the pamphlet as part of a "genre of anti-Semitic literature"[52] that "makes numerous false allegations of fact."[53] In light of these statements, how could it not be objectively justifiable for the Ontario Human Rights Commission and its Chair to have made similar statements regarding the same pamphlet in their press release?

Failure to connect Ms. Devins to the press release

40 The Motions Judge held that it would be a reasonable conclusion to think that at the time the press release was issued, both the Chair of the Ontario Human Rights Commission and its members held a strong actual bias (i.e. and not just a reasonable apprehension of bias) as against Mr. Zündel.

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41 He later held that "the passage of time does not eradicate the fact that Ms. Devins is reasonably attributed with strong actual bias."[54] However, from the Motion Judge's reasons, it appears that he took Ms. Devins' present denial of bias into account to conclude that at the time the Tribunal was appointed to inquire into the subsection 13(1) complaint, there was "insufficient evidence to find present actual bias by Ms. Devins against the applicant."[55]

42 In my view, the Motions Judge's reasons confuse the passage of time with Ms. Devins' actual connection to the press release. There was no evidence that Ms. Devins was aware of the press release, let alone agreed with or was party to its issuance so as to demonstrate actual bias at the time the press release was issued. Similarly, there was no evidence of conduct of Ms. Devins from which one could infer a reasonable apprehension of bias later.

Failure to give appropriate weight to the passage of time

43 In the instant matter now on appeal, the Motions Judge attributed little or no weight to the time that had passed between the date the press release was issued and the date on which Ms. Devins was appointed to determine the complaint launched against Mr. Zündel. He held that "the passage of time does not eradicate the fact that Ms. Devins is reasonably attributed with strong actual bias."[56]

44 In so doing, I think the Motions Judge failed to give appropriate weight to the amount of time that had passed between the date on which the press release was issued and the date Ms. Devins was asked to hear the subsection 13(1) complaint. In Dulmage, referred to earlier in these reasons, Moldaver J. concluded that the impugned board member was subject to a reasonable apprehension of bias in part because the press conference during which the statements were made had only taken place one year before the board [page245] hearing, a period of time that he did not consider to be "sufficient to expunge the taint left in the wake of these remarks."[57]

45 In the instant appeal, the Tribunal at issue was appointed some nine years after the press release was issued: a much greater time lag than was at issue in Dulmage, and one that, along with the other factors considered in this judgment, I consider to be sufficient to expunge any taint of bias that might have existed by reason of the press release.

Error in concluding that a doctrine of "corporate taint" exists

46 By concluding that all members of the Ontario Human Rights Commission would be biased by reason of the press release, the Motions Judge appeared to conclude that there is a doctrine of corporate "taint," a taint that is said to paint all members of a decision-making body with bias in certain circumstances. In Bennett v. British Columbia (Securities Commission),[58] the British Columbia Court of Appeal rejected the doctrine of corporate taint. It held:

> We wish to add one further observation and that is as to the target of a bias allegation. 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 s. 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.[59]

47 Similarly, in Laws v. Australian Broadcasting Tribunal,[60] Australia's High Court concluded

that the [page246] doctrine of corporate taint did not exist, absent circumstances that permit an inference to be drawn that all members of an administrative tribunal authorized or approved statements or conduct that gave rise to a reasonable apprehension of bias on the part of one of its members. In Laws, three members of the Australian Broadcasting Tribunal conducted a preliminary investigation of Mr. Laws, and concluded that he had breached broadcasting standards. The Director of the Tribunal's Programs Division later gave an interview in which she repeated the conclusions made by the three Tribunal members. Mr. Laws sought an order prohibiting the entire Tribunal from later holding a formal hearing to determine whether it should exercise regulatory powers against Mr. Laws. His application was brought on the basis that the prejudgment expressed by the three members who had conducted the preliminary investigation and the statements made by the Director of the Programs Division served to taint the entire Tribunal.

48 Australia's High Court rejected Mr. Laws' application. It held:

> However, though it might be correct to regard the interview as a corporate act, it was not necessarily an act done on behalf of each of the individual members of the corporation. The circumstances are not such as to justify the drawing of an inference that each of the individual members of the tribunal authorised the interview or approved of its content. At best, from the appellant's viewpoint, it might be inferred that the three members of the tribunal who made the decision of 24 November so authorised or approved the interview.[61]

49 These decisions, I think, demonstrate that there is no doctrine of corporate taint. I prefer the reasoning in these decisions to the implication drawn by the majority in the Dulmage decision that such a taint could be said to exist.[62]

50 As I have previously explained in these reasons, I do not think that the proviso contained in the paragraph reproduced above from the Laws decision [page247] applies in the circumstances of this appeal: one cannot draw an inference that each of the individual members of the Ontario Human Rights Commission authorized the entire press release that was issued. To the extent that the members of the Commission could be said to have authorized certain statements contained in the press release, any such statements are immaterial to the complaint that Ms. Devins has been asked to determine.

The Supreme Court of Canada's Judgment in Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)

51 Counsel for the appellants relied on the Supreme Court of Canada's judgment in Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)[63] for the proposition that the Ontario Human Rights Commission was engaged in a policy-making function at the time the press release was issued and therefore the statements contained in the press release were subject to a much lower standard of impartiality.

52 In Newfoundland Telephone, Andy Wells was appointed to a Board that was responsible for the regulation of the Newfoundland Telephone Company Limited. After he was appointed to the Board, and after the Board had scheduled a public hearing to examine Newfoundland Telephone's costs, Mr. Wells made several strong statements against Newfoundland Telephone's executive pay policies. Mr. Wells was one of five who sat on that hearing. Counsel for Newfoundland Telephone objected to Mr. Wells' participation at the hearing, arguing that the strong statements Mr. Wells had made demonstrated that he was subject to a reasonable apprehension of bias.

53 In Newfoundland Telephone, Cory J. recognized that administrative decision makers were subject to [page248] varying standards of impartiality. He held that "those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts,"[64] while boards with popularly elected members are subject to a "much more lenient" standard.[65] He added that administrative boards that deal with matters of policy should not be subject to a strict application of the reasonable apprehension of bias test, since to do so "might undermine the very role which has been entrusted to them by the legislature."[66] Accordingly, he held that "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."[67]

54 Accordingly, Cory J. held that, had the following statement been made before the Board's hearing date was set, it would not amount to impermissible bias: "[s]o I want the company hauled in here--all them fat cats with their big pensions--to justify (these expenses) under the public glare ... I think the rate payers have a right to be assured that we are not permitting this company to be too extravagant." He supported that conclusion in the following manner:

> That comment is no more than a colourful expression of an opinion that the salaries and pension benefits seemed to be unreasonably high. It does not indicate a closed mind. Even Wells' statement that he did not think that the expenses could be justified, did not indicate a closed mind. However, should a commissioner state that, no matter what evidence might be disclosed as a result of the investigation, his or her position would not change, this would indicate a closed mind.[68]

55 In Newfoundland Telephone, Cory J. held that once a board member charged with a policy-making function is then asked to sit on a hearing, "a greater degree of discretion is required of a member."[69] Once a hearing date was set, Cory J. held that the board members at issue in Newfoundland Telephone had to "conduct themselves so that there could be no reasonable apprehension of bias."[70] In other words, a person who is subject to the "closed mind" standard can later [page249] be required to adhere to a stricter "reasonable apprehension of bias" standard.

56 Counsel for the appellants have seized on these aspects of Cory J.'s judgment in Newfoundland Telephone to demonstrate that the Motions Judge erred by concluding that when the Ontario Human Rights Commission issued the press release, it was engaged in adjudicative

functions, and was therefore required to abide by a high standard of impartiality. Instead, counsel for the appellants argue that the Ontario Human Rights Commission was engaged in a policy-making function when it issued the press release, and was therefore subject to a much lower standard of impartiality.

57 While I agree that the Motions Judge erred when he concluded that the Ontario Human Rights Commission was engaged in an adjudicative role when it issued the press release, I do not agree with the further implications sought to be drawn by the appellants.

58 When the press release was issued by the Ontario Human Rights Commission, it was charged with the following functions:

> 28. It is the function of the Commission,
>
> (a) to forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;
> (b) to promote an understanding and acceptance of and compliance with this Act;
>
> ...
>
> (d) to develop and conduct programs of public information and education and undertake, direct and encourage research designed to eliminate discriminatory practices that infringe rights under this Act.[71]

59 Clauses 28(a), (b) and (d) demonstrate that the Ontario Human Rights Commission is vested with [page250] policy-making functions and with an obligation to educate and to inform the public. Accordingly, I do not agree with the Motion Judge's conclusion that the press release issued by the Ontario Human Rights Commission was "thoroughly inappropriate." Rather, the statement was consistent with its statutory obligation, inter alia, "to forward the policy that the dignity and worth of every person be recognized."

60 However, I do not think that the Newfoundland Telephone case provides much assistance to the appellants. In my view, one should bear in mind that in Newfoundland Telephone, the Board was specifically charged with dual functions: investigatory ones and adjudicative ones. Among its investigatory powers, the Board was permitted to "make all necessary examinations and enquiries to keep itself informed as to the compliance by public utilities with the provisions of law,"[72] to "enquire into any violation of the laws or regulations in force,"[73] to "summarily investigate ... [w]henever the Board believes that any rate or charge is unreasonable or unjustly discriminatory."[74] In the same breath, the Board was permitted to hold hearings "[i]f after making any summary

investigation, the Board becomes satisfied that sufficient grounds exist to warrant a formal hearing."[75] Accordingly, the statute specifically envisaged that Board members who had acted in an investigatory capacity could later act as adjudicators. Indeed, in Newfoundland Telephone, Cory J. [at page 644] held that even when the Board at issue in that appeal was required to abide by the reasonable apprehension of bias standard, the standard "need not be as strict for this Board dealing with policy matters as it would be for a board acting solely in an adjudicative capacity."

61 By contrast, the Canadian Human Rights Tribunal is vested with no policy functions or with dual functions: it is simply charged with the adjudication of human rights complaints. Accordingly, unlike Newfoundland Telephone, there is no statutory authority for the proposition that Parliament specifically [page251] envisaged that members of the Canadian Human Rights Tribunal would have engaged in policy-making functions with regard to the very same issues that they would later be asked to adjudicate.

CONCLUSION ON BIAS

62 In my view, the Motions Judge erred when he concluded that Ms. Devins was subject to a reasonable apprehension of bias. I would set aside his decision, and remit the matter to the Canadian Human Rights Tribunal.

2. Was the Motions Judge correct in holding that, if there was a reasonable apprehension of bias, the Tribunal could continue with the hearing?

63 In the event I am wrong on the first issue it is necessary to deal with the second issue: namely, whether the Motions Judge erred by concluding that even though Ms. Devins was subject to a reasonable apprehension of bias, the remaining member of the Tribunal could continue to determine the as-yet undetermined complaint at issue before the Canadian Human Rights Tribunal.

64 In my view, the Motions Judge erred by concluding that where a reasonable apprehension of bias is proven, the remaining members of the Tribunal could continue to hear and determine the complaint. At the time the bias allegation was raised, the panel of which Ms. Devins was a member had sat for some 40 days, and had made approximately 53 rulings. Counsel for Mr. Zündel argued that each one of those rulings was contrary to the result for which he had argued.

65 Viewed in this light, I cannot see how the Tribunal's proceedings could somehow be remedied merely by virtue of there being one remaining member of the Tribunal who could determine the complaint. How could one ever know whether the Tribunal's ultimate decision was somehow affected by one or more of the Tribunal's rulings? How could one ever know whether the biased member had expressed her [page252] preliminary views on the merits of the complaint before she was ordered to be recused from the proceedings? And how could one ever know whether those consultations might have somehow affected the remaining member's decisions on the interlocutory rulings? These concerns, I think, demonstrate that where one member of an administrative tribunal is subject to a reasonable apprehension of bias and a number of serious interlocutory orders have

been made over the course of a lengthy hearing, the tribunal's proceedings should be quashed in their entirety, even though a statutory provision on its face permits the tribunal to proceed with fewer members where a member is, for some reason, unable to proceed.

66 My conclusions are supported by Cory J.'s reasons in R. v. S. (R.D.), where he held:

> If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. See Newfoundland Telephone, supra, at p. 645; see also Curragh, supra, at para. 6. Thus, the mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from other words or conduct of the judge. In the context of an application to disqualify a judge from sitting in a particular lawsuit, it has been held that where there is a reasonable apprehension of bias, "it is impossible to render a final decision resting on findings as to credibility made under such circumstances."[76]

CONCLUSION

67 I would allow the appeal, with costs and set aside the order of the Motions Judge dated April 13, 1999 and remit the matter back to the Tribunal for completion of the hearing.

ISAAC J.A.:-- I agree.
ROBERTSON J.A.:-- I agree.

1 R.S.C. 1970, c. C-34.

2 By the time the Supreme Court heard Mr. Zündel's appeal, s. 177 of the Criminal Code had been renumbered to s. 181 [of the Criminal Code, R.S.C., 1985, c. C-46].

3 [1992] 2 S.C.R. 731, at p. 778, per McLachlin J. (as she then was).

4 R.S.C., 1985, c. H-6.

5 Appeal Book, at p. 74.

6 Zündel v. Citron, [1999]3 F.C. 409 (T.D.), at p. 421.

7 Ibid.

8 Ibid.

9 Ibid.

10 Ibid. (emphasis in original).

11 Ibid. (emphasis in original).

12 Ibid.

13 Ibid., at p. 422.

14 Ibid.

15 The Motions Judge never specifically identified the provision of the Canadian Human Rights Act on which he relied.

16 [1997] 3 S.C.R. 484.

17 Ibid., at p. 530.

18 Ibid., at p. 531.

19 [1990] 3 S.C.R. 892.

20 Ibid., at p. 934.

21 Ibid., at p. 935.

22 S. 177 (which was later renumbered to s. 181) stated that "[e]very one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for two years" (emphasis added).

23 (1994), 21 O.R. (3d) 356 (Div. Ct.).

24 R.S.O. 1990, c. P.15.

25 Dulmage, supra, note 23, at p. 360.

26 Ibid.

27 Ibid., at p. 361.

28 Ibid., at p. 363 (emphasis added).

29 Ibid., at p. 365.

30 [1998] H.L.J. No. 52 (QL).

31 [1998] H.L.J. No. 41 (QL).

32 Pinochet, Ugarte, Re, supra, note 30, at para. 30.

33 Ibid., at para. 37 (emphasis added).

34 Ibid., at para. 40.

35 Ibid.

36 Ibid. (emphasis added).

37 R. v. S. (R.D.), supra, note 16, at p. 531 (emphasis in original).

38 Ibid., at p. 532.

39 Ibid., at p. 531.

40 Ibid., at p. 532.

41 [1997] 2 F.C. 527 (C.A.).

42 Ibid., at p. 542.

43 (1995), 23 O.R. (3d) 257 (C.A.), application for leave to appeal to S.C.C. dismissed August 17, 1995 [[1995] 3 S.C.R. vi].

44 Ibid., at p. 267.

45 [1996] 5 W.W.R. 690 (B.C.C.A).

46 Ibid., at p. 704.

47 R. v. S. (R.D.), supra, note 16, at p. 528.

48 Ibid.

49 Ibid.

50 Ibid.

51 R. v. Zündel, supra, note 3, at p. 743.

52 Ibid., at p. 779.

53 Ibid., at p. 781.

54 Zündel, supra, note 6, at p. 422.

55 Ibid.

56 Ibid.

57 Dulmage, supra, note 23, at p. 365.

58 (1992), 94 D.L.R. (4th) 339 (B.C.C.A.).

59 Ibid., at p. 349.

60 (1990), 93 A.L.R. 435 (A.H.C.).

61 Ibid., at p. 445.

62 In his dissenting reasons, Moldaver J. appeared to recognize that no such doctrine exists. He held that "a member need not automatically withdraw solely because of statements made by a representative of an affiliated community organization about issues before the board" (at p. 364). Later in his judgment (at p. 366), he repeated the point, holding:

> Lest there be any doubt about it, I wish to emphasize that mere association, either past or present, on the part of a board member with an organization, which, by its very nature, might be said to favour one side or the other, will not of itself satisfy the test for reasonable apprehension of bias.

63 [1992] 1 S.C.R. 623.

64 Ibid., at p. 638.

65 Ibid.

66 Ibid., at pp. 638-639.

67 Ibid., at p. 639.

68 Ibid., at pp. 642-643.

69 Ibid., at p. 643.

70 Ibid., at p. 644.

71 Human Rights Code, S.O. 1981, c. 53.

72 The Public Utilities Act, R.S.N. 1970, c. 322, ss. 5 (as am. by S.N. 1979, c. 30, s. 1), 14.

73 Ibid., s. 15.

74 Ibid., s. 79.

75 Ibid., s. 85.

76 Supra, note 16, at p. 526.

Indexed as:

Sparvier v. Cowessess Indian Band (T.D.)

Ken Sparvier (Applicant)
v.
Cowessess Indian Band #73, Richard Redman, Muriel Lavallee and Samuel Sparvier (Respondents)

[1993] 3 F.C. 142

[1993] F.C.J. No. 446

Court File No. T-1214-92

Federal Court of Canada - Trial Division

Rothstein J.

Heard: Winnipeg, January 29, 1993.
Judgment: Ottawa, May 12, 1993.

Native peoples -- Elections -- Election appeal tribunal constituted under Cowessess Indian Reserve Elections Act overturning election of applicant as Chief, calling new election because some candidates not meeting Act's residency requirement -- Act requiring election of appeal tribunal members prior to nomination meeting -- Even assuming not so elected, tribunal validly constituted as provision directory in context of Act -- Candidates' residency within tribunal's jurisdiction -- Only tribunal established by Act to deal with contraventions -- Residency requirement must be enforceable to have meaning -- Act providing election practice ground of appeal -- "Election practices" including eligibility to be candidate.

Judicial review -- Prerogative writs -- Certiorari -- Appeal tribunal established pursuant to Cowessess Indian Reserve Elections Act overturning election of Band Chief, calling new election because some candidates not meeting Act's residency requirement -- Principles of natural justice apply to tribunal's proceedings -- Breached rules of natural justice because of one member's admitted bias, very short notice of proceedings, not permitting applicant to be present during submissions of others -- Doctrine of necessity may apply if Court lacking jurisdiction to direct establishment of new appeal tribunal.

Federal Court jurisdiction -- Trial Division -- Within Court's jurisdiction to review decision of

election appeal tribunal created under Cowessess Indian Reserve Elections Act as federal board -- Unclear whether Court having jurisdiction to direct establishment of new appeal tribunal.

This was an application to quash the decision of an election appeal tribunal nullifying the election of Band Chief and directing that a new election take place. On April 24, 1992 the applicant was elected Band Chief. One of the unsuccessful candidates appealed the results. An appeal tribunal established [page143] pursuant to the Cowessess Indian Reserve Elections Act decided to call a new election on the ground that two of the five candidates (not the applicant) failed to meet the residency requirement of the Act. In the second election another candidate was elected. The applicant submitted that the Appeal Tribunal was not properly constituted. Appeal Tribunal members and alternates were proposed and agreed upon by Band Council on March 2, 1992. The nomination meeting was held April 3. They were confirmed on April 16. Cowessess Indian Reserve Elections Act, paragraph 6(4)(a) provides that the Tribunal will be elected before the nomination meeting. The applicant argued that the Appeal Tribunal was not constituted until April 16, or after the nomination meeting and therefore was not in conformity with paragraph 6(4)(a). The applicant also submitted that it was not within the Appeal Tribunal's jurisdiction to rule on residency because residency did not fall within the grounds for appeal set out in subsection 6(2), i.e. was not an election practice or an illegal, corrupt or criminal practice. It was submitted that the Appeal Tribunal's jurisdiction was intended to cover procedural matters in the course of an election only. Finally, the applicant submitted that the Appeal Tribunal committed a number of procedural errors. He alleged that a member of the Appeal Tribunal made negative remarks about him during the Appeal Tribunal's proceedings, creating a reasonable apprehension of bias with respect to the proceedings and decision of the Tribunal. Another member of the Tribunal rented farmland to the applicant before the Appeal Tribunal, also leading to a reasonable apprehension of bias. The applicant also argued that he was only given one day's notice before the hearing and that this was tantamount to no notice at all, that the hearing was not open and that the nature of the hearing was not clearly disclosed to the parties.

Held, there was a denial of procedural fairness, but the order requested should not issue pending submissions on the issue of remedy.

The Federal Court had jurisdiction over the subject-matter of this application. For the Court to have jurisdiction, it must be shown that the decision to be reviewed was made by a "federal board, commission or other tribunal" as defined in section 2 of the Federal Court Act An Indian band council elected pursuant to customary Indian law is a federal board as is one elected pursuant to the Indian Act Again, an appeal tribunal elected pursuant to customary Indian law is a federal board. The Appeal Tribunal derived its power from band custom, including the Cowessess Indian Reserve Elections Act.

The Appeal Tribunal was validly constituted. The provision requiring that it be elected before the nomination meeting is, in the context of the Act, directory, not mandatory and non-compliance did

not result in the Appeal Tribunal not being properly constituted. Nor did non-compliance invalidate the election process or the actions or orders of the Appeal Tribunal. The main object of the Cowessess Indian Reserve Elections Act is to provide the mechanism to elect a chief and Band Council in [page144] accordance with Band custom. An Appeal Tribunal is elected before the nomination meeting so that it will be in place throughout the election process to deal with election practices or illegal, corrupt or criminal practices of candidates and so that its members will at an early stage avoid becoming involved in a partisan way in the election. Neither reason is of such overriding importance that non-compliance with the timing requirement of paragraph 6(4)(a) should result in the actions of an Appeal Tribunal elected after a nomination meeting being of no legal effect. Invalidating the actions of an Appeal Tribunal solely because it was elected after the nomination date could well work a serious inconvenience or injustice to the members of the Band who have no control over those entrusted with ensuring compliance with the Act.

The question of residency of candidates was within the Appeal Tribunal's jurisdiction under subsection 6(2). The Appeal Tribunal is the only tribunal established by the Act to deal with contraventions of the Act. If the Appeal Tribunal cannot deal with the issue, then a non-resident, if nominated, could become a councillor or chief contrary to the Act. If the residency requirement is to be given meaning, it must be enforceable. The Appeal Tribunal process is the means which the Act has established for enforcing this requirement. The term "election practices" includes the question of eligibility to be a candidate for election. For a non-resident to stand for nomination would amount to a practice that was illegal as it would be contrary to the Act.

While the political movement of the Aboriginal People to take more control over their own lives should not be quickly interfered with by the courts, band members are individuals who are entitled to due process and procedural fairness on the part of tribunals the decisions of which affect them. To the extent that the Federal Court has jurisdiction, the principles of natural justice and procedural fairness apply. Whether the Appeal Tribunal is acting judicially, quasi-judicially or administratively, a fair hearing including an unbiased tribunal, notice and the opportunity to make representations was essential.

The Appeal Tribunal did not follow the basic rules of procedural fairness. Members of an Appeal Tribunal are not popularly elected, but are selected by the Band Council. Absent compelling reasons, more rigorous, rather than a less strict application of the reasonable apprehension of bias test is desirable, but on the facts, even a more lenient application of the test lead to the same result. The evidence was clear that one of the Appeal Tribunal members was actually biased with respect to the applicant. That that member did not vote did not resolve the matter. A reasonable apprehension of bias in one member is sufficient to disqualify the whole tribunal, even though that member merely sat at the hearing without taking an active role in either it or subsequent deliberations. In the case at bar, the biased member had taken an active role in the proceedings prior to resigning because of his bias. A reasonably informed [page145] bystander would perceive bias on the part of the Appeal Tribunal as a result of the biased member's admitted position -- to oust the applicant -- and his participation in the Appeal Tribunal's proceedings. This fatally affected the

proceedings and the decision of the Appeal Tribunal.

The Band was not large. It would not be realistic to expect members of the Appeal Tribunal, if they are residents of the reservation to be completely without social, family or business contacts with a candidate in an election. If a rigorous test for reasonable apprehension of bias were applied, the membership of decision-making bodies such as the Appeal Tribunal, in bands of small populations could constantly be challenged on grounds of bias, frustrating the election process and endangering the process of autonomous elections of band governments. The issues raised herein call attention to these questions of policy.

The very short notice period raised several concerns: (a) relevant persons may not be available; (b) there was practically no time to investigate the facts relating to the subject-matter of the appeal; (c) it was unreasonable to expect the participants to adequately organize and prepare their representations. That the applicant had actual notice and attended the proceedings did not detract from the disadvantageous situation of having to proceed without an adequate opportunity to investigate the matter and prepare representations. The applicant's participation represented neither genuine consent to the proceedings nor waiver of his right to adequate notice.

To deny the applicant, whose position as Chief Elect was at stake before the Tribunal, the right to be present during the submissions of others raised the question of whether he was able to know the case to be met, another basic requirement of procedural fairness.

If the Appeal Tribunal's decision were quashed without anything further, the results of the April 24 election would be reinstated. The Court, for procedurally technical reasons, instead of Band members, would be determining who should be Chief. An appeal validly filed with the Appeal Tribunal, the question of residency of candidates, and the validity of the April 24 election would remain undetermined. Such unsatisfactory results might be avoided by referring the matter back to a differently constituted Appeal Tribunal. The Court, being unclear as to its jurisdiction to direct the establishment of a new Appeal Tribunal, no order would be issued until the question of remedy is addressed by counsel. If the Court lacks jurisdiction, this may be a case to which the doctrine of necessity would apply.

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Statutes and Regulations Judicially Considered

Federal Court Act, R.S.C., 1985, c. F-7, ss. 2 (as am. by S.C. 1990, c. 8, s. 1), 18 (as am. idem, s. 4), 18.1 (as enacted idem, s. 5).
Indian Act, R.S.C. 1970, c. I-6.
The Indian Act, S.C. 1951, c. 29.

Cases Judicially Considered

Applied:
Gabriel v. Canatonquin, [1978] 1 F.C. 124 (T.D.); affd [1980] 2 F.C. 792; [1981] 4 C.N.L.R. 61 (C.A.).
Montreal Street Railway Company v. Normandin, [1917] A.C. 170 (P.C.).
Apsassin v. Canada (Department of Indian Affairs and Northern Development), [1988] 3 F.C. 20; [1988] 1 C.N.L.R. 73; (1987), 14 F.T.R. 161 (T.D.).
Simpson v. Attorney-General, [1955] N.Z.L.R. 271 (S.C.); affd [1955] N.Z.L.R. 276 (C.A.).
Lakeside Colony of Hutterian Brethren v. Hofer, [1992] 3 S.C.R. 165; (1992), 142 N.R. 241.
Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311; (1978), 88 D.L.R. (3d) 671; 78 CLLC 14,181; 23 N.R. 410.
Martineau v. Matsqui Institution Disciplinary Board, [1980] 1 S.C.R. 602; (1979), 106 D.L.R. (3d) 385; 50 C.C.C. (2d) 353; 15 C.R. (3d) 1 (Eng.); 15 C.R. (3d) 315 (Fr.); 30 N.R. 119.
Cardinal et al. v. Director of Kent Institution, [1985] 2 S.C.R. 643; (1985), 24 D.L.R. (4th) 44; [1986] 1 W.W.R. 577; 69 B.C.L.R. 255; 16 Admin. L.R. 233; 23 C.C.C. (3d) 118; 49 C.R. (3d) 35; 63 N.R. 353.
Rex v. Sussex Justices Ex parte McCarthy, [1924] 1 K.B. 256.
Committee for Justice and Liberty et al. v. National Energy Board et al., [1978] 1 S.C.R. 369; (1976), 68 D.L.R. (3d) 716; 9 N.R. 115.
Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623; (1992), 95 Nfld. & P.E.I.R. 271; 4 Admin. L.R. (2d) 121; 134 N.R. 241.
Regina v. Ont. Labour Relations Bd., Ex p. Hall, [1963] 2 O.R. 239; (1963), 39 D.L.R. (2d) 113; 63 C.L.L.C. 15,478 (H.C.).
Haight-Smith v. Kamloops School District No. 34 (1988), 51 D.L.R. (4th) 608; [1988] 6 W.W.R. 744; (1988), 28 B.C.L.R. (2d) 391; 30 Admin. L.R. 298 (C.A.).
Kane v. Board of Governors (University of British Columbia), [1980] 1 S.C.R. 1105; (1980), 110 D.L.R. (3d) 311; [1980] 3 W.W.R. 125; 18 B.C.L.R. 124; 31 N.R. 214.

Considered:
Szilard v. Szasz, [1955] S.C.R. 3; [1955] 1 D.L.R. 370.

Referred to:
Trotchie v. The Queen et al., [1981] 2 C.N.L.R. 147 (F.C.T.D.).
Beauvais v. R., [1982] 1 F.C. 171; [1982] 4 C.N.L.R. 43 (T.D.).
Rider v. Ear (1979), 103 D.L.R. (3d) 168; [1979] 6 W.W.R. 226; [1979] 4 C.N.L.R. 119 (Alta. T.D.).

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Wade, H. W. R. Administrative Law, 6th ed. Oxford: Clarendon Press, 1988.

APPLICATION to quash the decision of an election appeal tribunal pursuant to the Cowessess Indian Reserve Elections Act nullifying election of Band Chief and directing that a new election take place. The tribunal acted unfairly, but its decision was not to be quashed pending submissions on the issue of remedy.

Counsel:

Marusia A. Kobrynsky and C. Mervin Ozirny, for the applicant. Orest Rosowsky, for the respondents.

Solicitors:

Ozirny, Fisher, Bell & Matthews, Melville, Saskatchewan, for the applicant. Rosowsky & Campbell, Kamsack, Saskatchewan, for the respondents.

The following are the reasons for order drendered in English by

1 ROTHSTEIN J.:-- This is an application made pursuant to section 18 of the Federal Court Act, R.S.C., 1985, c. F-7 as amended, for an order quashing, and seeking ancillary relief from, the decision dated May 5, 1992 made by an election appeal tribunal pursuant to the Cowessess Indian Reserve Elections Act (the Act). The decision nullified the result of a band election held on April 24, 1992, for Chief of the Band and directed that a new election take place. In addition, the applicant also seeks an order declaring invalid and setting aside the result of the re-election for the office of Chief held pursuant to the said decision.

SUMMARY OF FACTS

2 The Cowessess Indian Reserve Elections Act, along with other non-codified customs and traditions, govern elections for Band Chief and Councillors of the Cowessess Band. Such elections are to be held every three years. On April 24, 1992, an election was held in which the applicant, Ken Sparvier, was the [page148] successful candidate. One of the unsuccessful candidates, Terry Lavallee, appealed the election to an appeal tribunal established pursuant to the Act on the grounds that two of the five candidates in the election (not Mr. Sparvier or himself) were non-residents and were therefore ineligible candidates. The Appeal Tribunal conducted a hearing on May 5, 1992, and

decided to call a new election which was held on May 22, 1992. In the second election Terry Lavallee was the successful candidate. Following the decision of the Appeal Tribunal on May 5, 1992, the applicant commenced proceedings in the Court of Queen's Bench of Saskatchewan challenging the Appeal Tribunal, its procedures and the decision it made. That Court held that it did not have jurisdiction to hear the application. The applicant subsequently filed this application in the Federal Court of Canada.

PRELIMINARY MOTIONS

3 At the outset of this hearing, counsel for the applicant moved to add Terry Lavallee as a respondent. Counsel said this was necessary due to her desire to seek a declaration that Mr. Lavallee is illegally acting as Chief of the Band and an injunction enjoining him from exercising any authority or performing any duties as Chief of the Band.

4 Counsel for the respondents acknowledged that if the order of the Court resulted in a quashing of the decision of the Appeal Tribunal, it was likely that everything following from such decision would have no legal effect, including the subsequent election in which Mr. Lavallee was elected Chief.

5 After hearing argument, I denied this preliminary motion. In my opinion if an order were to issue quashing the decision of the Appeal Tribunal, and Mr. Lavallee did not voluntarily relinquish the position of Chief, a subsequent application could be brought seeking the appropriate order to ensure that the order quashing the decision of the Appeal Tribunal would be effective. I indicated to counsel that I would consider remaining seized of the matter for that purpose.

6 A second preliminary motion was made by counsel for the respondents and related to the submission by counsel for the applicant that the Appeal Tribunal [page149] was not properly constituted. Specifically, counsel for the respondents argued that the issue of the constitution of the Appeal Tribunal required the calling of viva voce evidence. He submitted there were discrepancies in the affidavit evidence between the applicant and the respondents and that the only way to resolve such discrepancies would be by way of oral evidence. He therefore sought an order that the application be treated as an action and that evidence be heard on this and other issues.

7 Counsel for the applicant submitted that there was evidence as to how the Appeal Tribunal was constituted in 1989 which gave an indication of the customs and tradition relating to this matter. Therefore the affidavit evidence before the Court was sufficient.

8 I decided to reserve my decision on this matter and directed the parties to argue the matter on the basis of the written material. I indicated that, if necessary, the calling of viva voce evidence could be considered subsequently. In view of my decision in respect of the constitution of the Appeal Tribunal, it is not necessary that viva voce evidence on custom and tradition be called on that issue and the motion of the respondents is therefore denied.

JURISDICTION OF THE FEDERAL COURT

9 On May 19, 1992, Mr. Sparvier made an application to the Court of Queen's Bench of Saskatchewan to quash the decision of the Appeal Tribunal. Mr. Justice McLean of that Court ruled that the Federal Court of Canada had exclusive jurisdiction to deal with the subject-matter of the application and declined jurisdiction on that basis.

10 The parties have agreed that this Court has jurisdiction to decide this matter. However, because jurisdiction cannot be conferred by consent, I will set forth my reasons as to why I have concluded that this Court has such jurisdiction.

11 By Order in Council P.C. 6016, dated November 12, 1951 [SOR/51-529], it was declared that the Cowessess Indian Band No. 73 would conduct its elections for Chief and Band Councillors in accordance with the provisions of the The Indian Act [S.C. 1951, c. 29]. In or about 1980, the Cowessess Band [page150] adopted the "Cowessess Indian Reserve Elections Act" which codified, at least to some extent, the Band's customs as the basis for selecting a chief and councillors. This reversion to Band custom was approved by the federal government on the 10th day of November, 1980, when Order in Council P.C. 6016 was amended by deleting from the Schedule thereto, the Cowessess Band of Indians. The effect of this deletion was that members of the Cowessess Band would no longer select their Chief and Councillors pursuant to the Indian Act [R.S.C. 1970, c. I-6] but rather, according to the custom of their Band. As a result, the Cowessess Indian Reserve Elections Act enacted by the Cowessess Indian Band No. 73 now governs the election of chief and councillors.

12 This application was brought pursuant to section 18 [as am. by S.C. 1990, c. 8, s. 4] of the Federal Court Act In order for the Court to have jurisdiction, it must be shown that the decision being reviewed is one made by a "federal board, commission or other tribunal" as defined in section 2 [as am. idem, s. 1] of the Federal Court Act Section 2 states:

> 2. ...
>
> "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867.

13 It is well settled that for purposes of judicial review, an Indian band council and persons purporting to exercise authority over members of Indian bands who act pursuant to provisions of the Indian Act constitute a "federal, board, commission or other tribunal" as defined in section 2 of the

Federal Court Act See Trotchie v. The Queen et al., [1981] 2 C.N.L.R. 147 (F.C.T.D.); Beauvais v. R., [1982] 1 F.C. 171 (T.D.); Rider v. Ear (1979), 103 D.L.R. (3d) 168 (Alta. T.D.). Gabriel v. Canatonquin, [1978] 1 F.C. 124 (T.D.); affd [1980] 2 F.C. 792 (C.A.), decided that an Indian band council came within the jurisdiction of the Federal Court where the election of the band council was pursuant to band custom and [page151] not the Indian Act Pratte J.A., in writing for the Court, stated at page 793:

> We are all of the view that the judgment below [[1978] 1 F.C. 124] correctly held that the council of an Indian band is a "federal board" within the meaning of section 2 of the Federal Court Act ... .
>
> We see no merit in the appellants' contention that the Trial Division does not have jurisdiction because the only issue raised by the action, namely the validity of the election of the defendants to the Council of the Band, is governed by customary Indian law and not by a federal statute.

14 If Gabriel v. Canatonquin is correct and a council of a band, elected pursuant to customary Indian law, is a federal board in the same manner as would be the case had it been elected pursuant to a federal statute such as the Indian Act, then an appeal tribunal, elected pursuant to customary Indian law would, by similar logic, be a federal board.

15 The Appeal Tribunal in this case derives its power from band custom including the Cowessess Indian Reserve Elections Act. Applying Gabriel v. Canatonquin, the Appeal Tribunal is a federal board. This Court thus has jurisdiction to decide this application.

16 I now turn to the substantive matters before me.

CHRONOLOGY OF EVENTS

March 2, 1992 --

> Special meeting of Band Council.
>
> Electoral Officer and Deputy Electoral Officer appointed.
>
> Nomination date of April 3, 1992 set.
>
> Appeal Tribunal members and alternates proposed and agreed upon by Band Council. The members were to be Clifford Lerat, Bob Stevenson and Maryanne Lavallée. If any of these persons did not wish to participate, Muriel Lavallée

and/or Sam Sparvier would be asked.

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April 3, 1992 --

Nomination date.

April 16, 1992 --

Regular meeting of Band Council.

Appeal Tribunal members and alternate confirmed. Members were Sam Sparvier, Maryanne Lavallée and Muriel Lavallée. The alternate was Clifford Urat.

April 24, 1992 --

Election for Chief and Councillors held. Results of the election:

Ken Sparvier	137
Terry Lavallée	121
Reynold Delorme	86
Theresa Stevenson	67
Tony Sparvier	17

Total:	408

April 30, 1992 --

Notice of appeal to Appeal Tribunal filed by Terry Lavallée.

May 4, 1992 --

Recount of ballots.

Notice by Appeal Tribunal that hearing would be held on appeal of Terry Lavallée on May 5, 1992.

May 5, 1992 --

Hearing of Appeal Tribunal.

May 19, 1992 --

Applicant applies to Court of Queen's Bench for relief. Court of Queen's Bench declines jurisdiction.

May 22, 1992 --

Second election held. Results of this election:

Terry Lavallée	220
Ken Sparvier	106
Theresa Stevenson	21

Total:	347

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ANALYSIS

1. Constitution of the Appeal Tribunal

17 The first substantive argument of the applicant was that the Appeal Tribunal was not properly constituted. Counsel for the applicant submitted that the Cowessess Indian Reserve Elections Act contains provisions which reflect certain customs and traditions of the Band respecting elections. In particular, I was referred to paragraph 6(4)(a) of the Act which states:

6. (4) A Tribunal will rule on whether to allow or disallow an appeal hearing.

(a) The Tribunal will be elected before the nomination meeting and will consist of persons from the Cowessess Reserve membership.

18 In this case, the nomination meeting was held on April 3, 1992, but the Appeal Tribunal referred to in paragraph 6(4)(a) was not, in the submission of counsel for the applicant, constituted until April 16, 1992. Counsel for the applicant argued that since the Appeal Tribunal was elected after the nomination meeting, it was not constituted in conformity with paragraph 6(4)(a) and had no legal status. Although counsel for the applicant acknowledged that the Act was not a "code" and should not be considered to be a comprehensive enactment governing all matters to do with the

election of Chief and Councillors of the Band, she argued that it was specific with respect to the Appeal Tribunal and, in particular, that the Appeal Tribunal must be constituted before the nomination meeting.

19 Counsel for the applicant submitted that the reason for this timing requirement in the Act was to avoid members of the Band becoming involved, in a partisan way, at a nomination meeting and then being selected for what was supposed to be an impartial Appeal Tribunal to deal with election irregularities. Applicant's counsel also acknowledged that the timing in paragraph 6(4)(a) of the Act may be necessary in order for the Appeal Tribunal to be in place to deal with any election irregularity that takes place through the entire election process including the nomination process.

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20 Counsel for the respondents submitted that if the Appeal Tribunal had not been properly constituted, then the first election itself would have no legal effect since an integral part of the election process had not been properly established.

21 The members of the Appeal Tribunal had been proposed and agreed upon by the Band Council at its meeting on March 2, 1992. The membership and alternate member of the Tribunal were confirmed on April 16, 1992. While I think a good argument could be made that the members were "elected" on March 2, 1992, before the nomination meeting, I will, for the purposes of this decision, assume that they were not and that there was not formal compliance with paragraph 6(4)(a) of the Act.

22 Essentially, the question with which I must deal is whether the non-compliance with paragraph 6(4)(a) of the Cowessess Indian Reserve Election Act has the effect of invalidating the actions taken by the Appeal Tribunal. This raises the issue of whether paragraph 6(4)(a) is mandatory or merely directory.

23 The leading case in this area of the law is the decision of the House of Lords in Montreal Street Railway Company v. Normandin, [1917] A.C. 170 (P.C.). In that case, it was claimed that a jury verdict should be set aside due to the failure of the sheriff to update the voters list from which were taken prospective members of juries. At pages 174 and 175, Sir Arthur Channel for the House of Lords stated:

> It is necessary to consider the principles which have been adopted in construing statutes of this character, and the authorities so far as there are any on the particular question arising here. The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected

> in Maxwell on Statutes, 5th ed., p. 596 and following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, [page155] though punishable, not affecting the validity of the acts done. [Emphasis mine.]

24 In the case of Apsassin v. Canada (Department of Indian Affairs and Northern Development), [1988] 3 F.C. 20 (T.D.), Addy J., after adopting the passage from Montreal Street Railway quoted above, stated at page 71 of his decision:

> Examination of the object of the statute reveals that a decision which would render the surrender null and void solely because of non-compliance with the formalities of subsection 51(3) would certainly not promote the main object of the legislation where all substantial requirements have been fulfilled; it might well cause serious inconveniences or injustice to persons having no control over those entrusted with the duty of furnishing evidence of compliance in proper form. In the subsection, unlike subsection (1), where it is provided that unless it is complied with no surrender shall be valid or binding, there is no provision for any consequences of non-observance. I therefore conclude that the provisions of subsection 51(3) are merely directory and not mandatory.

25 The Montreal Street Railway decision was also cited in Simpson v. Attorney-General, [1955] N.Z.L.R. 271 (S.C.); affd [1955] N.Z.L.R. 276 (C.A.). That case involved the question of whether the Parliament of New Zealand was properly constituted in light of the writs for election apparently not being made returnable within the time designated by the relevant legislation. At page 275, Barrowclough C.J. stated:

> The main object of that Act I conceive to be to sustain, and not to destroy the House of Representatives; and I am satisfied that those provisions of s. 101 which relate to the times when the warrant and the writs shall be issued are directory and not mandatory; and that neglect to take, within the specified times, the several steps there directed cannot invalidate the election.

26 The main object of the Cowessess Indian Reserve Elections Act is to provide the mechanism to elect a Chief and Band Council in accordance with Band custom. The Appeal Tribunal is to be elected to deal with election practices or illegal, corrupt or criminal practices of candidates as more particularly set forth in subsection 6(2) of the Act:

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> 6. (2) Grounds for an appeal are restricted to:
>
> (a) Election practices which contravene this Act.
> (b) Illegal, corrupt or criminal practice on the part of the candidate which might discredit the high integrity of the Indian Government of Cowessess Reserve.

27 In my view, an important reason for electing the Appeal Tribunal before the nomination meeting is that it will be in place throughout the election process to deal with the matters over which it has jurisdiction. Another reason for it being constituted before the nomination meeting may be that its members will, at an early stage, avoid becoming involved in a partisan way in the election. Neither reason, however, suggests that the timing of the election of the Appeal Tribunal is of such overriding importance that non-compliance with the timing requirement of paragraph 6(4)(a) should result in the actions of an appeal tribunal elected after a nomination meeting being of no legal effect.

28 In my opinion, if the Tribunal is not elected until some portion of the election process has taken place, it may still deal with appeals once it is constituted. If any member finds that he or she has become aligned with a candidate in such a manner as to raise a reasonable apprehension of bias, he or she should not accept election to the Appeal Tribunal.

29 Invalidating the actions of an appeal tribunal solely because it was elected after the nomination date could well work a serious inconvenience or injustice to the members of the Band who have no control over those entrusted with ensuring compliance with the Act. I am satisfied that the provision requiring that the Appeal Tribunal be elected before the nomination meeting is, in the context of the Act, directory and not mandatory, and that non-compliance does not result in the Appeal Tribunal not being properly constituted. Nor does non-compliance invalidate the election process or the actions or orders of the Appeal Tribunal.

2. Excess of Jurisdiction -- Residency

30 In this case, the Appeal Tribunal found that the election of April 24, 1992, in which the applicant was [page157] elected Chief was invalid because two of the five candidates failed to meet the residency qualification of the Act. The Tribunal's decision states:

> (1) To the best of our ability and in reference to the stipulations as outlined in the Cowessess Band Election Act [sic] we find that the candidates for the position of Chief, namely Reynold Delorme and C. Tony Sparvier fail to meet the definition of the term "resident" as stated in the Cowessess Band Election Act [sic]. Therefore it is the decision of the Tribunal that these two individuals names

> be deleted from the ballot and that a re-election for the position of Chief be held with the remaining candidates names intact on the new ballot. The office of Chief will remain vacant until the results of such election become evident. This re-election to be scheduled and held at the earliest possible date to be set by the Electorial [sic] Officer.

31 The issue of residency is dealt with in subsection 2(7) of the Act. It states:

> 2. (7) All Candidates for Chief and Councillors must file nomination documentation to show non-conflict of interests. Candidates must be a resident of the Reserve for a period of one year before nomination.

32 Counsel for the applicant submitted that a ruling on residency did not fall within the jurisdiction of the Appeal Tribunal because this issue did not constitute an election practice or an illegal, corrupt or criminal practice referred to in subsection 6(2) of the Act. It was submitted that the jurisdiction of the Appeal Tribunal was narrowly circumscribed in subsection 6(2) and was intended to cover procedural matters in the course of an election only. Further, it was submitted that the issue of residency is unclear as resident or residency is not defined in the Act. Finally, it was said that it could not be reasonably argued that the candidates whose residency was being challenged, had participated in any illegal, corrupt or criminal practice.

33 Counsel for the respondents argued that the two candidates whose residency was questioned signed a consent to nomination, declaring that to the best of their knowledge and belief, they were legally qualified to be nominated, elected and to hold the office of Chief. He submitted that the process of being nominated and consenting to nomination was an election practice and that, in declaring that they were legally [page158] qualified to be nominated, these candidates mis-stated the facts with respect to their residency. Accordingly, it was within the jurisdiction of the Appeal Tribunal to deal with the matter.

34 My consideration of the Act has caused me to conclude that the Appeal Tribunal did not exceed its jurisdiction in respect of its decision regarding residency. The Appeal Tribunal is the only tribunal established by the Act to deal with contraventions of the Act. It is given the power to uphold the election or order a new election. Subsection 6(7) of the Act states:

> 6. (7) The decision of the group (6.6) will represent the final decision regarding the election. The hearing may:
>
> (a) Uphold the election.
> (b) Order a new election for the position(s) appealed only.

35 Counsel for the applicant urges an interpretation of the terms "election practices" or "illegal practices" in subsection 6(2) that would focus only on those matters related to election procedures.

This would exclude the issue of residency which, in her submission, is a question of the eligibility of candidates to run for office and not election procedures.

36 I cannot agree with this distinction. Although I follow the interpretive approach she suggests, she has provided no rationale that would explain why the drafters of the Act intended to exclude the question of residency from the jurisdiction of the Appeal Tribunal. The Act has no other provision dealing with non-residency of candidates. If the Appeal Tribunal cannot deal with the issue, it would follow that a non-resident, if nominated, could become a councillor or chief contrary to the Act.

37 Counsel for the applicant argued that the time to raise such an issue would be at a nomination meeting. However, persons voting at a nomination meeting must still comply with the provisions of the Act. If the residency requirement is to be given meaning, the requirement must be one that can be enforced. It seems to me that the Appeal Tribunal process is the means which the Act has established for enforcing this requirement.

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38 In my view, the term "election practices" includes the question of eligibility to be a candidate for election. Further, for a non-resident to stand for nomination would amount to a practice that was illegal in that it would be contrary to subsection 2(7) of the Cowessess Indian Reserve Elections Act. As such, I conclude that the question of residency of candidates is within the jurisdiction of the Appeal Tribunal under subsection 6(2) of the Act.

39 The Act does not define residency. However, this in itself does not preclude the Appeal Tribunal from dealing with the issue. The Courts are regularly faced with the necessity of interpreting words that are not defined in relevant legislation.

3. Procedural Errors

40 Counsel for the applicant submitted that the Appeal Tribunal committed a number of procedural errors. First, it was alleged that a member of the Appeal Tribunal, Clifford Lerat, made negative remarks about the applicant during the Appeal Tribunal's proceedings. Although Mr. Lerat did not participate in the vote of the Appeal Tribunal, it was submitted that his presence and comments created an apprehension of bias with respect to the proceedings and decision of the Tribunal. In addition, counsel for the applicant argued that Muriel Lavallee, another member of the Tribunal, rented farmland to Terry Lavallee, the applicant before the Appeal Tribunal. It was submitted that this also led to a reasonable apprehension of bias. Finally, on the question of bias, it was argued that a residency issue with respect to the election of one of the councillors was raised before the Appeal Tribunal but that this was never dealt with by the Tribunal.

41 Applicant's counsel also submitted that there was no evidence before the Tribunal upon which it could rule on the residency of candidates. She therefore said that the Tribunal must have ruled on the basis of information not before it.

42 Applicant's counsel also argued that the applicant was given only one day's notice before the hearing and that this was tantamount to no notice at all, that the hearing was not an open one, and that the nature [page160] of the hearing itself was not clearly disclosed to the parties. She therefore argued that even if the Tribunal had been properly constituted and had ruled within its jurisdiction, its procedures were so tainted that the decision could not stand in any event.

43 With respect to Mr. Lerat's presence, respondents' counsel argued that there was no evidence that he affected the decision of the Appeal Tribunal. As to Muriel Lavallee, respondents' counsel argued that because of the small size of bands, and the fact that in many cases, a band consists of only a few families, no procedure could be held without some relationship creating an apprehension of bias and that if such rule were strictly applied, it would run counter the trend toward increased Indian self-government.

44 On the question of notice, respondents' counsel submitted that there was no indication of any complaint by the applicant that he had not been given adequate notice and that the applicant did attend the meeting of the Appeal Tribunal and made submissions. Counsel for the respondents also said that the applicant knew that residency was the issue because the night before the meeting, he had questioned whether the Appeal Tribunal had jurisdiction to deal with the issue.

45 It was submitted by respondents' counsel that the Appeal Tribunal's proceedings were conducted in accordance with Band custom. Richard Redman, the Electoral Officer for the Band, stated at paragraph 24 of his affidavit:

> 24. THE procedure followed by the Tribunal at the hearing was in accordance with Band custom.

Respondents' counsel takes the position that because the procedure of the Appeal Tribunal was in accordance with Band custom, the degree of natural justice or procedural fairness owed to the applicant is minimal. To hold otherwise, it was said, would render nugatory the procedures followed by all other bands in Canada who elect their officials according to their own custom, because the Court would simply be [page161] imposing its rules of procedure in place of customary band procedures.

46 No authority was cited by counsel for the respondents to the effect that the principles of natural justice or procedural fairness are not to be applied in situations where band custom dictates procedures to be followed by band tribunals.

47 While I accept the importance of an autonomous process for electing band governments, in my opinion, minimum standards of natural justice or procedural fairness must be met. I fully

recognize that the political movement of Aboriginal People taking more control over their lives should not be quickly interfered with by the courts. However, members of bands are individuals who, in my opinion, are entitled to due process and procedural fairness in procedures of tribunals that affect them. To the extent that this Court has jurisdiction, the principles of natural justice and procedural fairness are to be applied.

48 In deciding what "principles" should apply to the matter at bar, I have had regard to the Supreme Court of Canada decision in Lakeside Colony of Hutterian Brethren v. Hofer, [1992] 3 S.C.R. 165, where at page 195 of the decision, Gonthier J., for the majority, states:

> The content of the principles of natural justice is flexible and depends upon the circumstances in which the question arises. However, the most basic requirements are that of notice, opportunity to make representations, and an unbiased tribunal. [My emphasis.]

In the case at bar, there is an Appeal Tribunal that is empowered to make decisions affecting elections and the rights of candidates in those elections. Its powers entitle it to uphold an election or order a new election. it has a duty to consider appeals alleging election practices which contravene the Act or illegal, corrupt or criminal practices on the part of candidates.

49 In the material before me, counsel used the terms "natural justice" and "procedural fairness" interchangeably. Since Nicholson v. Haldimand-Norfolk [page162] Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311, it has not been necessary to classify the functions of tribunals as judicial, quasi-judicial or administrative to ascertain whether principles of natural justice are applicable. Nicholson introduced the concept of procedural fairness which applied to all tribunals whether judicial, quasi-judicial or administrative.

50 In Martineau v. Matsqui Institution Disciplinary Board, [1980] 1 S.C.R. 602, Dickson J. (as he then was) in a concurring but separate judgment from the majority, stated at page 629:

> In general, courts ought not to seek to distinguish between the two concepts [natural justice or procedural fairness], for the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework.

At page 630 he stated:

> It is wrong, in my view, to regard natural justice and fairness as distinct and separate standards and to seek to define the procedural content of each.

Accordingly, the terminology I will use in this decision is procedural fairness.

51 I am satisfied that the Appeal Tribunal, in this case, had an obligation to conduct its

proceedings in accordance with rules of procedural fairness. In Cardinal et al. v. Director of Kent Institution, [1985] 2 S.C.R. 643, Le Dain J. stated at page 661:

> The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.

There is no question that the candidates in a band election are affected by a decision of an appeal tribunal. Whether the Appeal Tribunal is considered to be acting judically, quasi-judically or administratively, a fair hearing is essential.

52 Having come to this conclusion, I am of the opinion that the basic requirements set forth by Gonthier J. in Hofer, (supra), are applicable to the Appeal Tribunal of the Cowessess Indian Band No. 73. These [page163] are the requirements of an unbiased tribunal, notice and the opportunity to make representations.

a. Bias

53 The question of bias strikes at the heart of the validity of the Appeal Tribunal's actions. The underlying doctrine with respect to bias is based on the oft-quoted maxim of Lord Chief Justice Hewart in Rex v. Sussex Justices.Ex parte McCarthy, [1924] 1 K.B. 256, at page 259:

> ... justice should not only be done, but should manifestly and undoubtedly be seen to be done.

54 The test for a reasonable apprehension of bias was stated by de Granpre J. in the Committee for Justice and Liberty et al. v. National Energy Board et al., [1978] 1 S.C.R. 369, at page 394:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and rightminded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. ..."

55 The application of the test for reasonable apprehension of bias will depend on the nature of the tribunal in question. In Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623, Cory J. states at pages 638-639:

> It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members

> of the board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgement of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.

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56 In my view, the function of the Appeal Tribunal is adjudicative. Its duty is to decide appeals based on contraventions of the Cowessess Indian Reserve Elections Act or illegal, corrupt or criminal practices on the part of candidates. Even though Appeal Tribunal members may not be legally trained, it appears that they are to decide, based on facts and their application of the Act or other Band customs, traditions or perhaps other laws, whether or not to uphold an election or order a new election. Members are not popularly elected. Although the Act uses the term "elected", members are selected by the Band Council.

57 This leads me to conclude that in the absence of compelling reasons, a more rigorous rather than a less strict application of the reasonable apprehension of bias test would be desirable in the case of the Appeal Tribunal. I will comment further on the question of compelling reasons to the contrary subsequently. I should add, however, that on the facts of this case, a less strict application of the test leads me to the same conclusion I would have reached had I applied the test in a more rigorous fashion.

58 In the case at bar, Clifford Lerat, during the proceedings of the Appeal Tribunal, made disparaging remarks towards the applicant. At paragraph 23 of his affidavit dated May 19, 1992, the applicant states:

> 23. THAT even before I started on my presentation, Clifford Lerat said to me, "Kenny, you've always been after me since day one." I replied that I was only there to make my presentation.

Comments of a similar vein were apparently made to another Band member at his appearance before the Tribunal. At paragraph 4 of his affidavit dated May 19, 1992, Clifford Young deposes as follows:

4. THAT before I even started my presentation, Clifford Lerat stood up and said, "I want you to know that we're doing this because Kenny (meaning Ken Sparvier) is too mean to the people and that is why we've got this guy to get him out." Clifford Lerat pointed to the Electoral Officer, Richard Redman, as he made this comment. The other persons in the room heard what Clifford Lerat said but did not say anything.

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Mr. Redman's affidavit contains the following information:

19. THAT during the said hearing, Clifford Lerat made several derogatory statements with respect to the Chief elect, Ken Sparvier.
20. THAT I indicated that I could not disqualify Clifford Lerat as it was not my function to do so and that Clifford Lerat had a right to his own opinions and was entitled to participate in the election process by supporting any candidate that he chose to support.
21. THAT subsequent to Ken Sparvier's presentation, Ken Sparvier left the room and a discussion took place amongst the Tribunal where Clifford Lerat voluntarily agreed to step down from the Tribunal as he felt that he was not able to render an unbiased decision due to his feelings against Ken Sparvier.
22. THAT accordingly the Tribunal continued to function with its remaining members, Muriel Lavallee and Samual Sparvier.

59 Mr. Lerat's actions created more than a reasonable apprehension of bias. The evidence is clear that with respect to the applicant, he was actually biased. If this were a situation only of an apprehension of bias of a member of a policy-oriented board, the incident might not be fatal. However, in a case such as this, where there is no doubt as to the actual bias of a member of an adjudicative board such as the Appeal Tribunal, even on a lenient application of the test, that bias cannot be ignored. A lenient application of the test after all, does not mean no application of the test at all.

60 Mr. Lerat apparently did not participate in the vote of the Appeal Tribunal. That he did not vote, however, does not resolve the matter. In Regina v. Ont. Labour Relations Bd., Ex p. Hall, [1963] 2 O.R. 239 (H.C.), McRuer C.J.H.C. states at page 243:

> It is likewise well settled that if one member of a Board is shown to be biased the decision of the Board may be quashed on certiorari: The Queen v. Meyer et al. (1875), 1 Q.B.D. 173, and Frome United Breweries Co. v. Keepers of the Peace and Justices for County Borough of Bath, [1926] A.C. 586 at p. 591. The general principles of law to be applied to the case before me can no better be stated than

in the language of Viscount Cave in the Frome case. At p. 590 he said:

> My Lords, if there is one principle which forms an integral part of the English law, it is that every member of a [page166] body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal. This rule has been asserted, not only in the case of Courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called Courts, have to act as judges of the rights of others. (The italics are mine.)

At p. 591 Viscount Cave went on:

> From the above rule it necessarily follows that a member of such a body as I have described cannot be both a party and a judge in the same dispute, and that if he has made himself a party he cannot sit or act as a judge, and if he does so the decision of the whole body will be vitiated.

61 This "poisoning of the well" rule is summarized by Esson J.A. in Haight-Smith v. Kamloops School District No. 34 (1988), 51 D.L.R. (4th) 608 (B.C.C.A.), at page 614:

> What does apply is the rule that, if a person disqualified by bias is present at a hearing and sits or retires with the tribunal, the decision may be set aside notwithstanding that that person took no part in the decision and did not actually influence it.

In Mullan, Administrative Law (2nd ed.), at page 3-131 the learned author states the usual implication succinctly:

> A reasonable apprehension of bias in one member of a tribunal is sufficient to disqualify the whole tribunal, even though that member merely sat at the hearing without taking an active role in either it or subsequent deliberations. Mere presence is generally enough.

On the evidence before me, it is clear that Mr. Lerat sat with the Appeal Tribunal during the submissions made to it. While the evidence indicates that he stepped down from the Appeal Tribunal because of his admitted bias, it appears that up to this point, he took an active role in the

proceedings. I am of the opinion that there can be no other conclusion but that a reasonably informed bystander would perceive bias on the part of the Appeal Tribunal as a result of Mr. Lerat's admitted position to oust the applicant and his participation in the Appeal Tribunal's proceedings. This fatally affected the proceedings and the decision of the Appeal Tribunal.

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62 In view of this finding, it is unnecessary for me to decide the allegation by the applicant that the presence of Muriel Lavallee on the Appeal Tribunal also provided a basis for apprehension of bias. However, a few comments may nonetheless be in order. Muriel Lavallee rented farmland to the applicant before the Appeal Tribunal, Terry Lavallee, and there was thus a business relationship of landlord and tenant between them.

63 In Szilard v. Szasz, [1955] S.C.R. 3, Rand J. stated at pages 6-7:

> These authorities illustrate the nature and degree of business and personal relationships which raise such a doubt of impartiality as enables a party to an arbitration to challenge the tribunal set up. It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication as its threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.

64 The Cowessess Indian Band is not large. The total number of electors who voted in the April 24, 1992 vote was 408. In respect of the size of the community in question, the Cowessess Band is, in my opinion, analogous with the voluntary religious associations to which Gonthier J. referred in Hofer, supra, where at page 197 he stated:

> However, given the close relationship amongst members of voluntary associations, it seems rather likely that members of the relevant tribunal will have had some previous contact with the issue in question, and given the structure of a voluntary association, it is almost inevitable that the decision makers will have at least an indirect interest in the question.

I indicated earlier that in view of the adjudicative function of the adjudicative function of the Appeal Tribunal, in the absence of compelling reasons to the contrary, a more rigor application of the reasonable apprehension of bias test would be desirable. However, it does not appear to me to be realistic to expect members of the Appeal Tribunal, if they are residents of the reservation, to be completely without social, family or business contacts with a candidate in an election. At paragraph 15 of his affidavit dated June 16, 1992, Lionel Sparvier states:

> 15. THAT pursuant to Cowessess Band custom, the members of the tribunal are selected from members of the Cowessess [page168] Indian Band, and are invariably related to one or more candidates for council or Chief due to the large number of candidates who run for elected positions traditionally.

If a rigorous test for reasonable apprehension of bias were applied, the membership of decision-making bodies such as the Appeal Tribunal, in bands of small populations, would constantly be challenged on grounds of bias stemming from a connection that a member of the decision-making body had with one or another of the potential candidates. Such a rigorous application of principles relating to the apprehension of bias could potentially lead to situations where the election process would be frustrated under the weight of these assertions. Such procedural frustration could, as stated by counsel for the respondents, be a danger to the process of autonomous elections of band governments.

65 It may be that to avoid these difficulties, Appeal Tribunal members could be selected from outside the residents of the reservation, perhaps on a reciprocal basis with other bands. Such a process may create difficulties of its own or be unsustainable in the context of an autonomous Indian band. These are policy matters to which the issues in this case call attention.

66 However, the Court must work within the framework of the existing law. I have added these comments because of the difficulties I see with the application of a more desirable strict bias test in the case of an adjudicative board such the Appeal Tribunal, to the practicalities of inevitable social and business relationships in a small community such as the Cowessess Band.

67 As to the allegation that the Appeal Tribunal did not deal with the residency challenge to the election of one of the Band Councillors, I have not been provided with sufficient facts to indicate the basis upon which the Appeal Tribunal refused to deal with that issue. Without more information, I am unable to say that a reasonably informed bystander could perceive bias on the part of the Tribunal with respect to candidates for the election of Chief because of the Tribunal's [page169] inaction with respect to an election for Band Councillor.

(b) Notice

68 Although it is not necessary to decide whether or not there was adequate notice in view of my decision respecting bias, a few comments may prove to be useful.

69 On May 4, 1992, the applicant, presumably along with other individuals, attended at the Old Day School on the Cowessess Reserve to witness a recount of the ballots in the April 24, 1992 election. At this point, the Appeal Tribunal consisted of Sam Sparvier, Muriel Lavallee and Maryanne Lavallee. Maryanne Lavallee then resigned due to a conflict of interest (she was the mother of Terry Lavallee, applicant before the Appeal Tribunal) and was replaced by Clifford Lerat. This newly constituted Tribunal met with Mr. Redman and concluded that there was sufficient evidence to warrant the holding of an appeal hearing. Immediately following this determination,

Mr. Redman announced that the Appeal Tribunal would commence its hearing on the appeal at 9:00 am the next morning, May 5, 1992.

70 It is without question that the applicant had a direct interest in the proceedings of the Tribunal. His election as Chief was to be either confirmed or voided by the Tribunal. Counsel for the applicant submitted that notice in this case, approximately twelve hours, was inadequate.

71 The Cowessess Indian Reserve Elections Act is silent on the issue of notice, nor do the authorities set out, in terms of hours or days, guidelines as to what does or does not constitute adequate notice. What is adequate notice must be determined on the circumstances of each case. Clearly, a notice period of less than twelve hours is very short. Such a short notice period raises a number of concerns: (a) relevant persons may not be available; (b) there is practically no time to investigate the facts relating to the subject-matter of the appeal; (c) it is unreasonable to expect the participants to adequately organize and prepare their representations. No evidence was led to indicate [page170] any compelling reason for the Tribunal commencing its proceedings upon such short notice.

72 It is true that the applicant had actual notice and attended the Appeal Tribunal proceedings. However, his attendance does not detract from the disadvantageous conditions of having to proceed without an adequate opportunity to investigate the matter and prepare representations. I think it is reasonable for me to infer that the applicant's participation did not represent genuine consent to the proceedings of the Appeal Tribunal and that he did not waive his right to adequate notice.

(c) Opportunity to make representations before the Tribunal

73 In view of my findings with respect to bias, it is not necessary for me to deal with the question of whether there was a reasonable opportunity for participants to make representations to the Appeal Tribunal or whether the Appeal Tribunal had evidence before it upon which it was able to make a decision with respect to the issue before it. I would observe, however, that the applicant's position as Chief Elect was, to all intents and purposes, what was at stake in the Appeal Tribunal's proceedings. For the applicant not to be present during the submissions of others, raises the question as to whether he was able to know the case he had to meet. I have grave doubt about the adequacy of a procedure which entitles those who wish to make presentations to do so but not to be able to listen to the presentations of others or answer adverse evidence or arguments.

74 In Kane v. Board of Governors (University of British Columbia), [1980] 1 S.C.R. 1105, Dickson J., as he then was, for the majority, stated at pages 1113-1114:

> 4. The tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity "for correcting or contradicting any relevant statement prejudicial to their views". Board of Education v. Rice, at p. 182; Local Government Board v. Arlidge, supra, at pp. 133 and 141.

> 5. It is a cardinal principle of our law that, unless expressly or by necessary implication, empowered to act ex parte, an [page171] appellante authority must not hold private interviews with witnesses (de Smith, Judicial Review of Administrative Action, (3rd. ed.) 179) or, a fortiori, hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such party must, in the words of Lord Denning in Kanda v. Government of the Federation of Malaya, at p. 337, "... know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. ... Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other."

75 It does not appear to me that these basic rules of procedural fairness were followed by the Appeal Tribunal in this case.

76 With respect to the matter of whether the Appeal Tribunal had evidence before it upon which it could determine the question of residency of candidates, I do not have sufficient information before me to make a determination on this question. The Appeal Tribunal did not transcribe its proceedings. It would be desirable, where a decision of a tribunal has been challenged on the basis that it was made without evidence, for those seeking to uphold the decision to give an indication of what evidence, if any, there was before the tribunal.

4. Error in Establishing Election Procedure

77 A final argument of counsel for the applicant was that even if the applicant was unsuccessful on all other points, the Appeal Tribunal erred in establishing its own procedure for the election it ordered. Counsel for the applicant argued that under subsection 6(7) of the Act the jurisdiction of the Appeal Tribunal was only to order a new election and to leave the procedure to those provisions set forth in the Act.

78 In view of my findings with respect to bias, it is not necessary for me to decide this issue. I would add, however, that to avoid this type of controversy arising, any order made by an appeal tribunal with respect to a new election should conform to the provisions of the Act and other relevant customs and traditions.

SUMMARY OF CONCLUSIONS

79

1. The Appeal Tribunal was validly constituted.

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2. The residency of candidates for the purpose of eligibility is a matter within the Appeal Tribunal's jurisdiction to decide.
3. The Appeal Tribunal's members' ability to consider the issue of residency in an impartial manner was adversely affected by the presence and participation of Clifford Lerat in the proceedings of the Appeal Tribunal. His involvement gave rise to a reasonable apprehension of bias in the entire Appeal Tribunal. This amounts to a denial of procedural fairness to the applicant in the proceedings of the Appeal Tribunal.

DISPOSITION

80 Subsection 18.1(3) [as enacted by S.C. 1990, c. 8, s. 5] of the Federal Court Act provides:

18.1 ...

(3) On an application for judicial review, the Trial Division may

(a) order a federal board, commission or other tribunal to do any act or thing it has, unlawfully failed or refused to do or has unreasonably delayed in doing; or
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Upon a finding of reasonable apprehension of bias amounting to a denial of procedural fairness in the proceedings of a tribunal, a court would normally quash the decision of the tribunal. Depending upon the circumstances, the court could refer the matter back for determination in accordance with such directions as it considers to be appropriate.

81 The effect of the Court quashing the decision of the Appeal Tribunal in this case, without anything further, would be to reinstate the results of the April 24, 1992 [page173] election. I do not find such a result to be satisfactory for a number of reasons. In essence, the Court, for procedurally technical reasons, instead of the Band members, would be determining who should be Chief of the Cowessess Indian Band No. 73. It would leave unresolved an appeal validly filed with the Appeal Tribunal. The question of residency of candidates and the validity of the April 24, 1992 election would be left undetermined. The applicant would be required to assume and carry on the duties of

Chief under a cloud.

82 These unsatisfactory results might be avoided if, in addition to quashing the decision of the Appeal Tribunal, the Court referred the matter back to a differently constituted Appeal Tribunal for redetermination of the residency issue, following appropriate procedures in so far as bias, notice and the right to make representations are concerned. If the Appeal Tribunal concluded that all candidates in the April 24, 1992 election were properly resident of the reserve for a period of over one year before nomination, it would then uphold that election and the applicant, being the successful candidate, could be declared Chief. If the Appeal Tribunal found one or more of the candidates ineligible by reason of non-residency and concluded that it was necessary to order a new election for Chief, it could do so.

83 However, it is not clear to me that I have the jurisdiction to give directions requiring the establishment of a new appeal tribunal. A new appeal tribunal would have to be elected by the Band Council. The question arises as to whether or not I could order the Band Council to elect a new appeal tribunal. Band custom or tradition may also have a bearing. There may also be procedural difficulties which may have to be addressed.

84 If the Court's jurisdiction does not extend to directing the establishment of a new appeal tribunal, the question of the application of the doctrine of necessity, arises. The doctrine of necessity arises in cases in which, when no one else is empowered to act, otherwise disqualified tribunal members (other than Clifford Lerat, whose bias was real and proven) may be qualified to hear and determine an appeal. The principle is stated in Administrative Law by Sir William Wade, 6th ed., 1988 at pages 478-479:

> In all the cases so far mentioned the disqualified adjudicator could be dispensed with or replaced by someone to whom the objection did not apply. But there are many cases where no substitution is possible, since no one else is empowered to act. Natural justice then has to give way to necessity; for otherwise [page174] there is no means of deciding and the machinery of justice or administration will break down.

The doctrine of necessity was not argued when this matter was originally heard by me. Whether or not it is applicable in this case may be a matter for consideration.

85 For the foregoing reasons, I am of the opinion that counsel should have the opportunity to more fully address the question of remedy in this case, including if possible, agreement as to how the matter may be resolved, before an order is issued by the Court. The Registrar of the Court will therefore communicate with counsel shortly after these reasons are issued to arrange for a conference call with me so that I may ascertain how counsel wish to proceed -- that is whether by way of oral hearing, by written argument, or in some other manner, with respect to the issue of remedy.

86 So there will be no doubt and to avoid confusion or inconvenience to the Band, I expressly state that at this time, the administration of the Band is not affected by the issuance of these reasons. An order shall not be issued until counsel have the opportunity to make further submissions on the issue of remedy.

Re

Dulmage et al. and Police Complaints Commissioner et al. [Indexed as: Dulmage v. Ontario (Police Complaints Commissioner)]

21 O.R. (3d) 356

[1994] O.J. No. 2781

Action No. 603/94

Ontario Court (General Division), Divisional Court,

O'Driscoll, O'Brien and Moldaver JJ.

November 30, 1994

Administrative law -- Bias -- Reasonable apprehension of bias -- Vice-president of Toronto chapter of organization publicly criticizing behaviour of police officers who allegedly caused public strip search to be conducted -- President of Mississauga chapter of same organization sitting as member of Board of Inquiry appointed to deal with allegations against those officers -- Reasonable apprehension of bias existing -- Chair of Board of Inquiry erring in refusing to disqualify member.

A Board of Inquiry was appointed under the Police Services Act, R.S.O. 1990, c. P.15, to deal with allegations that the applicant police officers had caused a female police officer to conduct a public strip search of a black woman contrary to the manner provided in the regulations of the Metropolitan Toronto Police Force. A member of the panel, D, was President of the Mississauga chapter of the Congress of Black Women of Canada. The vice-president of the Toronto chapter of that organization stated at a press conference that the strip search incident was not an isolated case and reflected the sexual humiliation and abuse of black women. The applicants applied for an order disqualifying D on the basis of a reasonable apprehension of bias. The board adjourned. When the board reconvened, the Chair advised counsel that he had sought out and obtained additional information, primarily that the Mississauga and Toronto chapters of the Congress of Black Women of Canada were two separate legal incorporations, and that as president of the Mississauga chapter D was not aware of any involvement of herself or her chapter in discussions or actions concerning either the complaint in question or any other complaint regarding strip searches.

Rejecting the argument of counsel for the applicants that it was improper for the board to seek additional information as it had, the Chair refused to disqualify himself and also dismissed the motion to disqualify D. In his decision not to disqualify D, the Chair dealt with two main rationales the board felt would support a finding of reasonable apprehension of bias. These were: (a) an apprehension that the position taken by a member of another chapter of the Congress might somehow influence or pressure D because she was president of a different chapter of the same congress; and (b) a suggestion that D might be perceived to have prejudged the case or to have adopted the position taken by another chapter if she did not repudiate that position.

The applicants applied for judicial review of those decisions.

Held, the application should be allowed.

Per O'Brien J. (O'Driscoll J. concurring): The board's approach to the question of reasonable apprehension of bias was not complete. It is unnecessary to show an individual is biased, or that a person might be influenced, or that a certain position be repudiated. The test is whether there is a reasonable apprehension of bias on the part of a reasonable person. A high standard of justice is required when the right to continue one's profession or employment is at stake. That inflammatory statements dealing with the very incident involved in this inquiry were made by an officer of an organization of which a member of the board was an officer gave rise to a reasonable apprehension of bias; the motion to disqualify D should have been allowed.

While the subsequent actions of the Chair in attempting to deal with the matter might not, of themselves, have led to a reasonable apprehension of bias, they did aggravate the appearance of bias which existed. The board, as presently constituted, should be prohibited from proceeding further with the inquiry, and the proceedings should be heard before a completely differently constituted panel.

Per Moldaver J. (dissenting in part): The Board erred in failing to remove D due to a reasonable apprehension of bias. While the board recognized that the motion to disqualify D rested upon a reasonable apprehension of bias as opposed to actual or likely bias on her part and while it also appreciated the proper test to be applied, it did not properly apply that test in arriving at its conclusion. Instead, the board appeared to be looking for evidence from which actual or likely bias on the part of D could be found or reasonably inferred.

Faced with an allegation of bias against one of its members, it was perfectly proper for the board to retire and seek out any factual information which might be relevant to the issue. Having done so, the board immediately reconvened and fully disclosed the information which it had obtained to all concerned. There was no evidence to suggest that when it retired, the board was seeking out information designed to resist the motion to disqualify D. When an allegation of disqualifying bias is made against an adjudicator, there is no reason why the adjudicator should be precluded from disclosing matters of fact which may be relevant to the motion. Accordingly, there was no basis for ordering the removal of the other two members of the board.

Cases referred to

Committee for Justice & Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115; Duncan (Re), [1958] S.C.R. 41, 11 D.L.R. (2d) 616; Ellis-Don Ltd. v. Ontario (Labour Relations Board) (1993), 98 D.L.R. (4th) 762, 93 C.L.L.C. 14,024 (Ont. Div. Ct.); Kane v. University of British Columbia, [1980] 1 S.C.R. 1105, [1980] 3 W.W.R. 125, 31 N.R. 214, 18 B.C.L.R. 124, 110 D.L.R. (3d) 311; Robinson v. Comité Garderie Plein Soleil (1992), 8 Admin. L.R. (2d) 304 (N.W.T.S.C.)

Statutes referred to

Police Services Act, R.S.O. 1990, c. P.15, s. 93

APPLICATION for judicial review of decisions of a Board of Inquiry dismissing an application to disqualify a member and dismissing an application to have the inquiry proceed before a differently constituted panel.

Joanne Mulcahy, for applicants.

W.J. Manuel, for respondents.

O'BRIEN J. (O'DRISCOLL J. concurring): -- Police Constables Dulmage and Sommer seek judicial review of two decisions of a board of inquiry constituted under the Police Services Act, R.S.O. 1990, c. P.15. In those decisions the board:

(i) Dismissed the constables' application to disqualify one of three members of the board, a Ms. Frederica Douglas;
(ii) Dismissed the constables' application to have the three members withdraw and requiring the inquiry to proceed before a differently constituted board.

The applications were based on the constables' allegations of reasonable apprehension of bias on the part of Ms. Douglas and subsequently, of the board, arising from the manner the board dealt with the initial application to disqualify.

The board of inquiry was appointed under the Police Services Act to deal with allegations made against the constables that they caused a female police officer to conduct a public strip search of the complainant Audrey Smith contrary to the manner provided in the regulations of the Metropolitan Toronto Police Force.

The alleged infraction occurred while they were engaged in investigating an alleged offence on the part of Ms. Smith of possession of cocaine for the purposes of trafficking.

Background

The board of inquiry was established pursuant to s. 93 of the Police Services Act. That Act provides for a three-person panel; one member to be a member of the Law Society of Upper Canada, one chosen from a panel recommended by the Ontario Police Association (and not a police officer or lawyer) and one from a panel recommended by the Ontario Association of Municipalities (and not a lawyer, or police officer).

The complainant Audrey Smith alleges the improper public strip search was conducted in the early morning hours of August 10, 1993, near Queen Street and Jameson Avenue in Toronto.

The inquiry was originally scheduled to commence its hearings in April of 1994. The hearing was adjourned to September 1994, when it appeared a potential witness was the son of one of the panel members. That adjournment had nothing to do with the issues raised in these applications.

The inquiry commenced again September 12, 1994, at which time the matter of disclosure of information was dealt with and the hearing adjourned to September 15, 1994.

On that date counsel for the applicants applied for an order disqualifying Ms. Douglas. The application was on the basis that Ms. Douglas was president of the Mississauga chapter of the Congress of Black Women of Canada and representatives of that organization had made statements and given press releases which created a reasonable apprehension of bias.

Applicants' counsel learned that news broadcasts were made and press conferences held in the month of September 1993 dealing with the incident involving Audrey Smith.

Reports of the press conferences were carried in an issue of The Toronto Sun of September 29, 1993, and the newspaper "Share" on September 30, 1993. Those reports are exhibited in the material filed in support of this application. Both reports referred specifically to the Audrey Smith incident.

The Toronto Sun report included the following:

METRO COPS HAMMERED

> The alleged Audrey Smith strip-search reflects growing racial and sexual violence against non-white women by Metro Police, black action groups charged today.
>
> Smith is the Jamaican visitor who claimed police strip-searched her and left her naked on Queen St. in Parkdale one night last month.

At a packed Queen's Park press conference minority group spokesmen called for an outside RCMP probe into the Smith case, the suspension of the Metro officers involved and the resignation of Chief Bill McCormack.

"This is a complete outrage and a humiliating and personal affront to every minority woman" said Barbara Isaac of the National Organization of Immigrant and Visible Women.

"Women can no longer feel safe on our streets knowing they can be stopped and strip-searched at any time."

"This is a chilling message to everyone in our community," said Kike Roach of the National Action Committee on the Status of Women.

The Smith incident is not an "isolated case" and reflects the "sexual humiliation and abuse of black women," said Adonica Huggins of the Congress of Black Women.

She questioned the force's "impartiality" in the Smith investigation and called for the RCMP to step in.

Huggins said the officers involved should be suspended until the probe is over and called for McCormack's resignation.

The Share report included the following:

WOMENS GROUPS CONDEMN POLICE ACTION

McCormack, the Metro Police Force and Ontario politicians were all roundly criticized on Tuesday by community and national groups, who charged that police abuse of women of colour is commonplace in society.

The groups, which held a press conference at Queen's Park, included the Congress of Black Women of Canada (CBWC), the National Action Committee on the Status of Women, the Toronto Coalition Against Racism, the Black Action Defense Committee (BADC), Theatre in the Rough, the African Resource Centre, the National

> Organization of Immigrant and Visible Minority Women of Canada, the Assault Womens Program at George Brown College and the Coalition of Visible Minority Women.
>
> All speakers expressed a lack of confidence in the Metro police investigation of the allegations by Smith, and CBWC representative Adonica Huggins called for the intervention of the Royal Canadian Mounted Police (RCMP).
>
> "An RCMP investigation of this incident is critical," said Huggins, a Vice-President of the Toronto Chapter of the CBWC.
>
> She echoed the sentiments of many speakers, and was applauded when she demanded the resignation of McCormack.
>
> "Chief McCormack has clearly demonstrated an inability to give effective leadership to the Police Force," Huggins said. "His continued failure to set the standards for acceptable and appropriate behaviour, and to reprimand those police officers who break the law is evidence of his incompetence".
>
> The groups accused the police of being "racist and sexist", and charged that they are involved in a "disinformation campaign" to discredit Smith.

The Toronto Sun report refers to statements made by Adonica Huggins. The material filed on this application indicated she was vice-president of the Toronto chapter of the Congress of Black Women of Canada.

On September 15, counsel for the constables sought the disqualification of Ms. Douglas on the basis of her involvement, and association with, the same organization that had made public statements, or taken a public position regarding the allegations against his clients.

During the course of submissions to the board, the constables' counsel indicated he had been aware for some months prior to the hearing that Ms. Douglas was president of the Mississauga chapter of the Congress of Black Women of Canada but had no concern about her appointment to the panel. His concern developed after he learned of the statements and press releases made by other members of that organization.

During proceedings before it, dealing with allegations of possible bias, the board adjourned. There were some discussions among board members in private. The board Chair, Mr. Gary Yee,

then advised counsel that he had obtained additional information which he provided the inquiry as follows:

(i) The Mississauga chapter and Toronto chapters (of the Congress of Black Women of Canada) were two separate legal incorporations.
(ii) Ms. Douglas became president of the Mississauga chapter in February of 1993 and was still the president at that time; and
(iii) As president of that chapter Ms. Douglas was not aware of any involvement of herself or her chapter in discussions or actions concerning either the Audrey Smith complaint or any other complaint regarding strip searches.

Mr. Yee then had a faxed letter sent to all counsel confirming that information.

Counsel for the constables then argued it was improper for the board to seek additional information as it had. On September 15, the Chair rejected that argument.

At that time the Chair indicated there were still six of the original eight scheduled days for hearing available, and was confident a new board member would be available the next day as there were a number of (potential) panel members in the Toronto area from which a new board could be constituted.

The Chair also stated that if no reasonable apprehension of bias were found it was still within the discretion of Ms. Douglas to voluntarily step aside. Ms. Douglas did not do so.

The following day, counsel for the Police Complaints Commissioner called as a witness the National President of the Congress of Black Women of Canada who testified under oath.

Ms. Jordan testified as to the national and regional nature of the organization and testified that Adonica Huggins was vice-president of the Toronto chapter.

Ms. Jordan also testified that she had seen the newspaper articles but that she was not aware of the position taken by Ms. Huggins and that the process of the Congress for consulting regional representatives had not been taken prior to Ms. Huggins taking the position, she apparently had, in the public statements.

On September 16 the Chair made two additional rulings:

(i) It refused to disqualify itself; and
(ii) It found no reasonable apprehension of bias and denied the motion to disqualify Ms. Douglas.

In its decisions of September 16, the Chair dealt with two main rationales the board felt would support a finding of reasonable apprehension of bias. They were:

(a) An apprehension that the position taken by a member of another chapter of the congress might somehow influence or pressure Ms. Douglas because she was president of a different chapter of the same congress;
(b) A suggestion that Ms. Douglas might be perceived to have prejudged the case or to have adopted the position taken by another chapter if she did not, in fact, repudiate that position.

Conclusions

In my view the board's approach to the question of reasonable apprehension of bias is not complete.

It is unnecessary to show an individual is biased, or that a person might be influenced, or that a certain position be repudiated. The test is whether there is a reasonable apprehension of bias on the part of a reasonable person.

This is outlined by Laskin C.J.C., for the majority, in Committee for Justice & Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369 at p. 391, 68 D.L.R. (3d) 716 at p. 733:

> This Court in fixing on the test of reasonable apprehension of bias, as in Ghirardosi v. Minister of Highways (B.C.) (1966), 56 D.L.R. (2d) 469, [1966] S.C.R. 367, 55 W.W.R. 750, and again in Blanchette v. C.I.S. Ltd. (1973), 36 D.L.R. (3d) 561, [1973] S.C.R. 833, [1973] 5 W.W.R. 547 (where Pigeon, J., said at p. 579 D.L.R., p. 842-3 S.C.R., that "a reasonable apprehension that the Judge might not act in an entirely impartial manner is ground for disqualification"), was merely restating what Rand, J., said Szilard v. Szasz, [1955] 1 D.L.R. 370 at p. 373, [1955] S.C.R. 3 at pp. 6-7, in speaking of the "probability or reasoned suspicion of biased appraisal and judgment unintended though it be". This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and I think that emphasis is lent to this concern in the present case by the fact that the National Energy Board is enjoined to have regard for the public interest.

It is clear that a high standard of justice is required when the right to continue one's profession or employment is at stake and it is obvious that a disciplinary hearing can have grave and permanent consequences upon a professional career: see Kane v. University of British Columbia, [1980] 1 S.C.R. 1105 at p. 1113, [1980] 3 W.W.R. 125 at p. 136, per Dickson J. (as he then was) for the majority.

Returning to this decision, inflammatory statements dealing with the very incident involved in this inquiry were made by an officer of the Congress of Black Women of Canada. Those statements were made in Toronto, closely adjacent to the City of Mississauga. They deal with an incident which received significant public attention. The statements referred to the incident as an "outrage" and called for the suspension of the officers involved. Those officers were the very ones involved in

this hearing.

Ms. Douglas was the president of the Mississauga chapter of the same organization.

In the circumstances I conclude there was a reasonable apprehension of bias on the part of a reasonable person and the motion to disqualify Ms. Douglas should have been allowed.

While the subsequent actions of the board chairman in attempting to deal with that matter might not, of itself, have led to a reasonable apprehension of bias, it did aggravate the appearance of bias which I find existed.

In the circumstances, I would allow the application and would quash the decision dismissing the application to disqualify Ms. Douglas.

An order will go prohibiting the board, as presently constituted, from proceeding further with the inquiry, and, in the circumstances, there will be an order directing the proceedings be heard before a completely differently constituted panel.

The applicants are to have their costs payable by the Police Complaints Commissioner fixed at $2,500 plus costs of transcripts for this hearing and fixed at $750 in the application to stay proceedings heard by White J. on September 19, 1994.

MOLDAVER J. (dissenting in part): -- I have had the advantage of reading the reasons of my colleague O'Brien J. I agree with him that the board erred in failing to remove Ms. Douglas due to reasonable apprehension of bias. My reasons for so concluding are very much dependent upon the particular facts and circumstances of this case, as I shall explain.

In my view, the board, in its reasons, quite correctly recognized that a member need not automatically withdraw solely because of statements made by a representative of an affiliated community organization about issues before the board.

That acknowledged, it seems to me that once the board's attention had been drawn to such statements in the context of a motion to disqualify, the board had a duty to carefully consider a variety of factors in order to properly determine whether the allegation of reasonable apprehension of bias had been made out. These factors included:

(a) What position did the author of the statements hold within the affiliated organization;
(b) When the statements were made, did the author purport to make them on behalf of the entire organization or were they limited to the author's personal views or perhaps the views of a separate and distinct chapter within the organization;
(c) What was the nature of the issue being discussed in the statements? Did the comments relate to the critical issue or issues which the board was required to

decide or were they directed to peripheral, less consequential or general matters;

(d) If the remarks were directed to the critical issue or issues, did they reflect a position of neutrality or were they pointed, direct and judgmental;

(e) Were the remarks directed towards a private, discrete audience or were they directed to the public at large and intended for public consumption;

(f) When, in relation to the scheduled board hearing, were the remarks made;

(g) What position within the organization did the impugned board member hold (i) when the statements were made by the affiliated member and (ii) at the time of the scheduled hearing.

This list is not meant to be exhaustive; furthermore, the importance of any one or more of these factors will vary depending upon the particular circumstances of the case.

I now propose to consider these factors contextually.

The statements of concern are found in two newspaper articles dated September 29 and 30, 1993, respectively, which my colleague O'Brien J. has reproduced in full. From those clippings, it would appear that shortly after the events giving rise to the Audrey Smith incident, a number of representatives from various community-based organizations called a press conference to voice their concerns about the prevalence of racism and sexism on the part of the Metro Police Force towards women from visible minorities.

In those articles, various statements were attributed to Ms. Adonica Huggins. At the time, Ms. Huggins was the vice-president of the Toronto chapter of the Congress of Black Women of Canada (the "congress"). As such, she certainly held a position of some prominence within the organization. According to the newspaper clippings, it would appear that in making her remarks, Ms. Huggins purported to speak on behalf of the congress as a whole. There is no evidence, either in the clippings or elsewhere, to suggest that Ms. Huggins attempted to limit her remarks to the Toronto chapter or to her own personally held views.

The remarks themselves related, at least in part, to the critical issue which the board was required to decide. Moreover, they were pointed, direct and highly judgmental. In fact, I think it fair to say that from her perspective, Ms. Huggins had already predetermined the guilt of the subject officers in the Audrey Smith matter.

While Ms. Huggins was certainly entitled to hold this view and express it publicly, she did so while ostensibly representing the congress. Furthermore, there can be no doubt that Ms. Huggins intended that these remarks be both public and widely distributed. That, after all, was the purpose for holding a press conference.

While it is true that the press conference took place approximately one year before the board hearing, I do not consider that time gap to be, in and of itself, sufficient to expunge the taint left in the wake of these remarks. This is particularly so having regard to the substantial publicity which

the Audrey Smith case has continued to attract since that time.

Finally, as regards Ms. Douglas, at all materials times she was the president of the Mississauga chapter of the congress. Accordingly, it is apparent that throughout, she not only maintained a prominent position within the organization but also, she headed up the chapter which neighbours upon the Toronto chapter.

Considering the collective impact of these factors and recognizing that an unbiased appearance is an essential component of procedural fairness, I have concluded that a reasonably informed member of our society could reasonably perceive bias on the part of Ms. Douglas.

While the board clearly recognized that the motion to disqualify Ms. Douglas rested upon a reasonable apprehension of bias as opposed to actual or likely bias on her part and while it also appreciated the proper test to be applied, a close reading of the board's decision has left me with the distinct impression that it did not properly apply that test in arriving at its conclusion. Instead, the board appeared to be looking for evidence from which actual or likely bias on the part of Ms. Douglas could be found or reasonably inferred. The following excerpt at p. 6 of the board's reasons serves to highlight this concern:

> What we are left with has no real precedent that we are aware of. Essentially, counsel for the officers are attempting to remove a member of this board, not for any statement or position she has taken, not for any financial interest, not for any close family or personal relationship, not for any improper conduct of the board member, and I must add, not even for the mere fact that she is president of the Congress of Black Women, Mississauga chapter, but solely because a representative of the Toronto chapter of the congress has apparently taken a position on this case, and the board member is president of the Mississauga chapter, separately incorporated and autonomous, as shown by the evidence. [See Application Record, Tab. 4, p. 18]

(Emphasis added)

As I have attempted to point out, the factors which I have considered in concluding that Ms. Douglas should be removed from the board go well beyond the fact that "a representative of the Toronto chapter of the congress has apparently taken a position in this case, and the board member is the president of the Mississauga chapter, separately incorporated and autonomous".

By framing the issue that way, the board precluded itself from taking into account and adequately assessing the various factors, which, as I have earlier outlined, it should have considered in resolving the "reasonable apprehension of bias" issue.

Lest there be any doubt about it, I wish to emphasize that mere association, either past or present, on the part of a board member with an organization, which, by its very nature, might be said to favour one side or the other, will not of itself satisfy the test for reasonable apprehension of bias.

Indeed, s. 93 of the Police Services Act, R.S.O. 1990, c. P.15, contemplates this very situation by requiring that one board member be chosen from a panel recommended by the Ontario Police Association and another from a panel recommended by the Ontario Association of Municipalities.

Thus, as all parties recognized in this case, the mere fact that Ms. Douglas held a position of prominence within the congress would not, in and of itself, serve to disqualify her from sitting on the Audrey Smith matter. Likewise, there would be no reason to preclude a former police officer from sitting as a board member simply because of his or her prior affiliation with the police.

For these reasons, the order of the board permitting Ms. Douglas to continue as a member in the Audrey Smith hearing is quashed and an order will go prohibiting her from proceeding further with the inquiry.

The applicants have also sought an order prohibiting the other two board members, Mr. Gary Yee (Chair) and Mr. John Robinson, from proceeding further with the inquiry.

In support of this application, counsel for the applicant submitted that a reasonable apprehension of bias had arisen from the conduct which the board engaged in following upon the application to disqualify Ms. Douglas.

It is apparent from the record that after the motion to disqualify Ms. Douglas had been made, the board retired in order to seek additional information from her which might be relevant to the motion. After doing so, the board reconvened and in the presence of all concerned, Mr. Yee disclosed the following pieces of information to the parties:

(a) That Ms. Douglas is currently the president of the Congress of Black Women, Mississauga chapter and has been since February 1992;
(b) As president of the Mississauga chapter, Ms. Douglas was not aware of any involvement of herself or her chapter in discussion or actions concerning either the Audrey Smith complaint, or any other complaint regarding strip searches; and
(c) That the Congress of Black Women, Mississauga chapter, is separately incorporated and it is one of 12 independent local chapters in Ontario.

Thereafter, Mr. Black, counsel for officers Sommer and Dulmage, sought and received a brief adjournment.

When the hearing reconvened, Mr. Black took the position that the board was not entitled to consider the information disclosed in the absence of his consent, and while he was prepared to accept the points relating to Ms. Douglas' position in the Mississauga chapter and the autonomous nature of that chapter, he was not prepared to accept information regarding what Ms. Douglas was or was not aware of.

The board then ruled that it had done nothing improper in seeking out and disclosing the various

pieces of information. Furthermore, the board left it open for any of the parties to call additional evidence if anyone disagreed with the information which the board had supplied. Furthermore, each of the parties was entitled to make submissions about the meaning or inferences to be drawn from this information (see Supplementary Record, Tab 5).

Mr. Black nevertheless persisted in his motion to disqualify the entire board, which motion was refused (see Supplementary Record, Tab 6).

Before this court, counsel for the applicants submitted that by seeking out additional information from Ms. Douglas in private and treating it as evidence, the board had placed itself in a position of appearing to resist the application to disqualify Ms. Douglas. In doing so, it was contended that the board had exceeded its jurisdiction and breached the rules of natural justice and the duty of procedural fairness owed to the applicants.

With respect, I disagree. In my opinion, the applicants have completely mischaracterized the conduct of the board.

Faced as it was with an allegation of bias against one of its members, I am of the view that it was perfectly proper for the board to retire and seek out any factual information which might be relevant to this issue. Having done so, the board immediately reconvened and fully disclosed the information which it had obtained to all concerned.

There is no evidence to support the suggestion that when it retired, the board was seeking out information designed to resist the motion to disqualify Ms. Douglas. Instead, it is apparent that the board was simply attempting to uncover any factual information which might be relevant, irrespective of its implications. This is self-evident when one considers the content of at least one of the pieces of information which the board disclosed. The fact that Ms. Douglas had been the president of the Mississauga chapter since 1992 could be viewed as evidence tending to support the applicant's motion, given that she would have occupied that senior office at the time of the September 1993 press conference.

Beyond that, it is equally apparent that the board was only seeking information concerning matters of fact. It was not seeking out Ms. Douglas's opinion on the merits of the motion or any arguments which she might have sought to advance to resist it.

Finally there is no evidence from which it could be concluded or even inferred that the board withheld information which it had learned in private from the parties upon reconvening the hearing.

When an allegation of disqualifying bias is made against an adjudicator, be it judge or tribunal member, I see no reason why the adjudicator should be precluded from disclosing matters of fact which may be relevant to the motion. Indeed the case-law would seem to suggest that such conduct on the part of an adjudicator is perfectly proper: see Ellis-Don Ltd. v. Ontario (Labour Relations Board) (1993), 98 D.L.R. (4th) 762, 93 C.L.L.C. 14,024 (Ont. Div. Ct.), and Robinson v. Comité

Garderie Plein Soleil (1992), 8 Admin. L.R. (2d) 304 (N.W.T.S.C.).

Indirect support for doing exactly what the board did in this case may be found in a Supreme Court of Canada decision cited as Re Duncan, [1958] S.C.R. 41, 11 D.L.R. (2d) 616.

Although the issue in that case concerned Mr. Duncan's conduct before the Supreme Court and whether such conduct amounted to contempt, the facts giving rise to that issue are instructive.

At the outset of an appeal in which Mr. Duncan was representing one of the parties, he stood up and made the following statement to the full court:

> In my opinion, the administration of justice would not be served by Mr. Justice Locke sitting on this appeal. It is in the interests of my client and my personal interest that Mr. Justice Locke should withdraw.

At that juncture, Mr. Justice Locke said: "Why, for what reason?" Mr. Duncan declined to give any reason. The Chief Justice then asked Mr. Duncan: "Is that all you have to say?", to which he replied, "Yes".

The court then retired and upon reconvening, the Chief Justice announced:

> The Court has considered the unprecedented situation which has arisen. None of us knows of any reason for the remarkable statement earlier this morning and no reason has been advanced. The Court, therefore, proposes to continue.

(Emphasis added)

Mr. Justice Locke then said:

> I have something to say, however. I do not know you, Mr. Duncan. I have never had anything to do with you in my life. I have no feeling of any kind towards you. I know nothing about the case we are about to hear, but, since you have chosen to take this stand, I decline to sit in this case, I withdraw.

These excerpts from the case lead me to conclude that although the Chief Justice did not come out and directly say so, it is apparent that upon retiring, the members of the court were seeking to uncover any facts which might have shed some light on Mr. Duncan's motion. The fact that the exercise proved futile does not detract from its apparent legitimacy.

For these reasons, I see no basis for ordering the removal of Messrs. Yee and Robinson from the board. In my opinion they are perfectly entitled, should they see fit to do so, to continue in their adjudicative roles.

In the result, the application is allowed in part.

In view of the limited success on the part of each side, I would make no order as to costs.

Application allowed.

Ellis-Don Limited *Appellant*

v.

The Ontario Labour Relations Board and the International Brotherhood of Electrical Workers, Local 894 *Respondents*

INDEXED AS: ELLIS-DON LTD. *v.* ONTARIO (LABOUR RELATIONS BOARD)

Neutral citation: 2001 SCC 4.

File No.: 26709.

2000: February 15; 2001: January 26.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law — Natural justice — Institutional consultations — Union filing grievance with labour relations board against contractor for violation of provincial collective agreement — First draft of panel's decision dismissing grievance — Full board meeting discussing draft decision — Panel's final decision upholding grievance — Whether rules of natural justice breached — Whether principles governing institutional consultations violated — Whether contractor's failure to ask for reconsideration of decision constitutes bar to judicial review — Nature of evidentiary burden on party applying for judicial review because of alleged breach of natural justice.

Administrative law — Judicial review — Audi alteram partem — Union filing grievance with labour relations board against contractor for violation of provincial collective agreement — First draft of panel's decision dismissing grievance — Full board meeting discussing draft decision — Panel's final decision upholding grievance — Contractor alleging breach of audi alteram partem rule — Whether apprehension of breach sufficient to trigger judicial review.

Ellis-Don Limited *Appelante*

c.

La Commission des relations de travail de l'Ontario et la Fraternité internationale des ouvriers en électricité, section locale 894 *Intimées*

RÉPERTORIÉ : ELLIS-DON LTD. *c.* ONTARIO (COMMISSION DES RELATIONS DE TRAVAIL)

Référence neutre : 2001 CSC 4.

N° du greffe : 26709.

2000 : 15 février; 2001 : 26 janvier.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit administratif — Justice naturelle — Consultations institutionnelles — Grief déposé par un syndicat auprès d'une commission des relations de travail pour violation d'une convention collective provinciale — Grief rejeté dans le projet de décision de la formation — Discussion du projet de décision en réunion plénière de la commission — Grief accueilli dans la décision définitive de la formation — Les règles de justice naturelle ont-elles été violées? — Les principes régissant les consultations institutionnelles ont-ils été violés? — L'omission de l'entrepreneur de demander un nouvel examen de la décision rend-elle irrecevable sa demande de contrôle judiciaire? — Nature du fardeau de présentation de la partie qui demande un contrôle judiciaire en raison d'une présumée violation des règles de justice naturelle.

Droit administratif — Contrôle judiciaire — Règle audi alteram partem — Grief déposé par un syndicat auprès d'une commission des relations de travail pour violation d'une convention collective provinciale — Grief rejeté dans le projet de décision de la formation — Discussion du projet de décision en réunion plénière de la commission — Grief accueilli dans la décision définitive de la formation — Allégation de violation de la règle audi alteram partem formulée par l'entrepreneur — Une crainte de violation suffit-elle pour donner lieu au contrôle judiciaire?

In 1962, the appellant entered into a collective bargaining agreement to contract or subcontract only to individuals or companies whose employees were members of the affiliated unions of the Toronto Building and Construction Trades Council. In 1971, the Electrical Contractors Association of Toronto applied to the respondent Board to be certified as a bargaining agent for the electrical contractors of Toronto. In that accreditation process, the IBEW, Local 353 filed a required document listing all employers for which it claimed bargaining rights but it did not include the appellant's name. In 1978, when province-wide bargaining was introduced, the bargaining rights of Local 353 were extended to Local 894. In 1990, Local 894 filed a grievance with the Board alleging that the appellant had subcontracted electrical construction work to non-union subcontractors contrary to the provincial collective agreement. A three-member panel of the Board heard the grievance. The appellant argued that Local 353 had abandoned its bargaining rights in part because it omitted the appellant's name from the document filed in the 1971 accreditation proceedings and Local 894 offered no explanation for the omission. A first draft of the panel's decision would have dismissed the grievance based on the abandonment of bargaining rights. However, after a full Board meeting discussed the draft, a majority of the panel found that there had been no abandonment of bargaining rights and upheld the grievance. The appellant applied for judicial review. It alleged that the change between the draft and the final decision was of a factual nature as opposed to a legal or policy change, and claimed that there was a breach of natural justice and a violation of the rules governing institutional consultations. Prior to the hearing of the application for judicial review, the appellant obtained an order compelling the Chair of the Board, the Vice-Chair who presided over the panel, and the Registrar of the Board to give evidence with respect to the procedures implemented by the Board in arriving at its final decision. This order was reversed on appeal based upon a finding of statutory testimonial immunity. The Divisional Court later dismissed the application for judicial review and the Court of Appeal affirmed the decision.

En 1962, l'appelante a conclu une convention collective où elle s'engageait à n'accorder des contrats ou des contrats de sous-traitance qu'aux personnes et aux sociétés dont les employés étaient membres du Toronto Building and Construction Trades Council. En 1971, l'Electrical Contractors Association of Toronto a déposé auprès de la Commission intimée une demande d'accréditation en tant qu'agent négociateur pour les entrepreneurs électriciens de Toronto. Dans le cadre de ce processus d'accréditation, la section locale 353 de la FIOE a déposé un document requis énumérant les employeurs à l'égard desquels elle prétendait détenir des droits de négociation mais n'y a pas inscrit le nom de l'appelante. En 1978, lorsqu'un régime de négociation à l'échelle de la province a été introduit, les droits de négociation de la section locale 353 ont été accordés à la section locale 894. En 1990, la section locale 894 a déposé un grief auprès de la Commission, alléguant que l'appelante avait donné en sous-traitance des travaux de construction en électricité à des entrepreneurs dont les employés n'étaient pas syndiqués, contrevenant ainsi à la convention collective provinciale. Une formation de trois membres de la Commission a entendu le grief. L'appelante a prétendu que la section locale 353 avait renoncé à ses droits de négociation en partie parce qu'elle avait omis d'inscrire son nom dans le document déposé dans le cadre du processus d'accréditation en 1971, et la section locale 894 n'a fourni aucune explication pour l'omission. Un projet de décision de la formation proposait de rejeter le grief en raison d'une renonciation aux droits de négociation. Toutefois, après discussion du projet en réunion plénière de la Commission, les membres majoritaires de la formation ont conclu à l'absence de renonciation aux droits de négociation et ont accueilli le grief. L'appelante a présenté une demande de contrôle judiciaire. Elle a prétendu que la modification survenue entre le projet de décision et la décision définitive était de nature factuelle, par opposition à une modification de nature juridique ou de principe, et qu'il y avait eu violation des règles de justice naturelle et des règles régissant les consultations institutionnelles. Avant l'audition de la demande de contrôle judiciaire, l'appelante a obtenu une ordonnance obligeant le président de la Commission, la vice-présidente qui a présidé la formation et le registrateur de la Commission à témoigner relativement à la procédure mise en œuvre par la Commission pour en arriver à sa décision définitive. Cette ordonnance a été infirmée en appel sur le fondement de l'exonération de témoigner prévue par la loi. La Cour divisionnaire a par la suite rejeté la demande de contrôle judiciaire et la Cour d'appel a confirmé cette décision.

Held (Major and Binnie JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Arbour and LeBel JJ.: Institutional consultation ensures consistency in the decisions of an administrative body and does not create an apprehension of bias or lack of independence if the following rules are respected: (1) the consultation proceeding cannot be imposed by a superior level authority within the administrative hierarchy; (2) the consultation must be limited to questions of policy and law; and (3) even on questions of law and policy, the decision-makers must remain free to make their own decision. The mere fact that litigated issues are discussed by a full board does not amount to a breach of the *audi alteram partem* rule. Any risk of breaching this rule can be addressed by notifying the parties of any new issue addressed in the board meeting and allowing an opportunity to respond. If these rules are met, then adjudicators may modify a draft decision and a presumption of regularity applies such that a change between a draft and final reasons will not of itself create a presumption that something improper occurred during institutional consultations.

In this case, there is no direct evidence of improper tampering with the decision of the panel. The only information available is that discussions took place at the full Board meeting and that a change was made in the draft decision. The final decision discarded the idea that the failure to list the appellant created a rebuttable presumption of abandonment of bargaining rights and stated that the omission merely constituted a factor to be considered in deciding the issue of abandonment. The change consists in a different conclusion as to the legal consequences to be derived from the facts, which is a pure question of law. Moreover, it does not constitute the application of an entirely new policy since the change brought the final decision more in line with a number of cases decided by the Board that made it very difficult to establish an abandonment of bargaining rights. It would be speculative to argue that the change was prompted by a re-assessment of the particular facts. Furthermore, a change from a favourable to an unfavourable decision by itself does not demonstrate an apparent failure of natural justice sufficient to justify judicial review. In the case of an alleged violation of the *audi alteram partem* rule, the applicant must establish an actual breach; an apprehended breach is not sufficient to trigger judicial review. Here, the record does not indi-

Arrêt (les juges Major et Binnie sont dissidents) : Le pourvoi est rejeté.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Arbour et LeBel : La consultation institutionnelle assure la cohérence des décisions d'un organisme administratif et ne crée pas de crainte raisonnable de partialité ou de manque d'indépendance si les règles suivantes sont respectées : (1) la procédure de consultation ne peut pas être imposée par un niveau d'autorité supérieur dans la hiérarchie administrative; (2) la consultation doit se limiter aux questions de principe et de droit; (3) même relativement aux questions de droit et de principe, les arbitres doivent demeurer libres de prendre leur propre décision. Le simple fait que des questions ayant déjà été débattues soient discutées de nouveau au cours d'une réunion plénière ne constitue pas une violation de la règle *audi alteram partem*. Tout risque de violation de cette règle peut être éliminé si on avise les parties de toute nouvelle question soulevée pendant la réunion de la commission et qu'on leur donne la possibilité de répondre. Si ces règles sont respectées, les arbitres peuvent modifier un projet de décision et la présomption de régularité fait en sorte qu'une modification entre un projet de motifs et les motifs définitifs ne donne pas lieu en soi à la présomption que quelque chose d'inapproprié s'est produit pendant les consultations institutionnelles.

En l'espèce, il n'existe aucune preuve directe de manipulation de la décision de la formation. Les seuls renseignements disponibles sont que des discussions ont eu lieu à la réunion plénière et qu'une modification a été apportée dans le projet de décision. La décision définitive a écarté l'idée que l'omission d'inscrire l'appelante avait donné lieu à une présomption réfutable de renonciation aux droits de négociation et a indiqué que l'omission n'était qu'un des facteurs qui devaient être examinés pour trancher la question de la renonciation. La modification consiste en une conclusion différente quant aux effets juridiques découlant des faits, ce qui constitue une pure question de droit. De plus, elle ne constitue pas l'application d'un principe entièrement nouveau étant donné qu'elle a rendu la décision définitive plus compatible avec de nombreuses affaires tranchées par la Commission qui ont fait en sorte qu'il est devenu très difficile de faire la preuve de la renonciation à des droits de négociation. Il serait hypothétique de prétendre que la modification a été causée par une réévaluation des faits en cause. En outre, modifier une décision favorable en une décision défavorable n'établit pas en soi une apparence d'absence de justice naturelle suffisante pour justifier le contrôle judiciaire. Dans le cas d'une présumée violation de la règle *audi alteram*

cate an actual breach of the *audi alteram partem* rule. There is no indication of a change on the facts, of impropriety or of a violation of the principles governing institutional consultation. The change in the decision of the panel concerned a matter of law and policy.

This case reveals a tension between the fairness of the process and the principle of deliberative secrecy which plays an important role in safeguarding the independence of administrative adjudicators. Deliberative secrecy also favours administrative consistency by granting protection to a consultative process. Without such protection, there could be a chilling effect on institutional consultations, thereby depriving administrative tribunals of a critically important means of achieving consistency. Consistency and independence come at the price of a less open process and difficulty in building the evidentiary foundation to prove alleged breaches of natural justice. However, a court cannot reverse the presumption of regularity simply because of a change in reasons for a decision in the absence of any further evidence.

Although the appellant failed to ask for reconsideration, reconsideration did not constitute an absolute prerequisite to judicial review.

Per Major and Binnie JJ. (dissenting): This appeal tests the limits of the rule that panel members can consult a full board on matters of law or policy but not of fact. The concept of "policy" has been stretched beyond its breaking point in this appeal and the principle that "he who hears must decide" should be vindicated. *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, should not be interpreted to authorize a full board to micro-manage the output of particular panels to the extent evident in this case. Compliance with the rules of natural justice raises a legal issue and the standard of review is correctness.

The procedure in this case violated the requirement that a full board can only discuss policy and law. Although the issue of "abandonment", when considered in the abstract, has a policy component, the change in

partem, le demandeur doit démontrer l'existence d'une violation réelle; une crainte de violation ne suffit pas pour donner lieu au contrôle judiciaire. En l'espèce, le dossier n'indique aucune violation réelle de la règle *audi alteram partem*. Il n'y a aucune indication d'une modification quant aux faits, d'une irrégularité ou d'une violation des principes régissant la consultation institutionnelle. La modification de la décision de la formation portait sur une question de droit et de principe.

La présente affaire révèle l'existence d'une tension entre le caractère équitable du processus et le principe du secret du délibéré, qui joue un rôle important dans la protection de l'indépendance des arbitres administratifs. Le secret du délibéré favorise également la cohérence administrative au moyen de la protection qu'il confère à un processus consultatif. Sans cette protection, il risque d'y avoir un effet paralysant sur les consultations institutionnelles, ce qui priverait les tribunaux administratifs d'un moyen essentiel d'assurer la cohérence. La cohérence et l'indépendance sont assorties du prix que constituent un processus moins ouvert et la difficulté de bâtir le fondement probatoire visant à démontrer les présumées violations des règles de justice naturelle. Toutefois, une cour ne peut pas écarter la présomption de régularité simplement en raison d'une modification dans les motifs de la décision en l'absence de toute preuve additionnelle.

Même si l'appelante a omis de demander un nouvel examen, une telle mesure ne constituait pas un préalable obligatoire au contrôle judiciaire.

Les juges Major et Binnie (dissidents) : Le présent pourvoi porte sur les limites de la règle selon laquelle les membres d'une formation peuvent consulter une commission dans son ensemble sur des questions de principe, par opposition à des questions de fait. La notion de « principe » a été démesurément étendue dans le présent pourvoi et le principe voulant que « celui qui entend doit trancher » doit être défendu. L'arrêt *SITBA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282, ne doit pas être interprété comme permettant à une commission dans son ensemble de faire la microgestion des conclusions tirées par des formations particulières d'une façon aussi évidente que dans la présente affaire. La conformité aux règles de justice naturelle est une question de droit et la norme de contrôle est celle de la décision correcte.

La procédure adoptée dans la présente affaire a violé l'exigence qu'une commission dans son ensemble doit se limiter aux questions de principe et de droit. Même si, lorsqu'elle est examinée de façon abstraite, la ques-

the panel's reasons was a re-assessment of fact. The Board's jurisprudence has developed the legal and policy content of the concept of abandonment of bargaining rights in terms of active promotion of rights and it was for the panel to determine in the factual context of this particular case whether this standard was met. The panel made it clear that it considered abandonment to be an issue of fact. The Board's policy was never in doubt and was defined in the same language in the initial and final decisions.

The undisputed evidence is that the initial decision held as a fact that the union had abandoned its bargaining rights, the final decision held as a fact that it had not, and the intervening event was the full Board meeting. The reasonable inference is that factual matters were referred for discussion at the full Board meeting.

While the finding of testimonial immunity prevents determining the Board's decision-making process, it does not prevent the appellant from establishing a basis for judicial review. The Board cannot rely on legislation to deny all legitimate access to relevant information and then rely on the absence of the information as a conclusive answer to the complaint. The difficulties of proof presented in this case should be factored into the evidentiary burden of proof placed on the appellant.

The Ontario Court of Appeal considered the Board's proceedings to be protected by the "presumption of regularity". The strength of the evidence necessary to displace this presumption depends on the nature of the case and, having regard to the difficulties of obtaining evidence, the appellant should be held to have discharged its evidentiary onus. The Board has to live with the reasonable inference that the full Board meeting influenced a reversal of fact-driven issues. There is a public interest in the integrity of decision-making at stake and the appellant has made out a *prima facie* case for judicial review. As the Board's procedure violated the principles of natural justice, the resulting order was made without

tion de la « renonciation » comporte un aspect principe, la modification des motifs de la formation constituait une réévaluation des faits. La jurisprudence de la Commission a élaboré le contenu juridique et de principe de la notion de renonciation aux droits de négociation relativement à la promotion active des droits, et il incombait à la formation de déterminer dans le contexte factuel de la présente affaire si cette norme était respectée. La formation a indiqué clairement qu'elle considérait la renonciation comme une question de fait. La politique de la Commission n'a jamais été mise en doute et a été décrite dans les mêmes termes dans la décision définitive et dans la décision initiale.

La preuve non contestée révèle que, dans sa décision initiale, la formation a tiré la conclusion de fait que le syndicat avait renoncé à ses droits de négociation et que, dans sa décision définitive, elle a tiré la conclusion de fait que le syndicat n'avait pas renoncé à ses droits, et l'événement qui s'est produit entre ces deux décisions est la réunion plénière de la Commission. Cela mène à la conclusion raisonnable que des questions de fait ont été renvoyées pour fin de discussion à la réunion plénière de la Commission.

Même si la conclusion qu'il y a exonération de l'obligation de témoigner empêche que le processus décisionnel de la Commission soit déterminé, elle n'empêche pas l'appelante d'établir le fondement d'un contrôle judiciaire. La Commission ne peut pas, avec l'aide du législateur, priver une personne de tout accès légitime aux renseignements pertinents, pour ensuite invoquer l'absence de ces mêmes renseignements en tant que réponse déterminante à la plainte. Les difficultés en matière de preuve qui se présentent en l'espèce doivent être considérées comme faisant partie du fardeau de présentation de la preuve reposant sur l'appelante.

La Cour d'appel de l'Ontario a estimé que la procédure de la Commission était protégée par la « présomption de régularité ». La force de la preuve nécessaire pour réfuter cette présomption varie selon la nature de l'affaire et, compte tenu des difficultés qu'a éprouvées l'appelante à obtenir des éléments de preuve, elle doit être jugée s'être acquittée de sa charge de présentation. La Commission doit vivre avec la conclusion raisonnable que la réunion plénière a eu une influence sur le changement d'opinion relatif à des questions reposant sur les faits. Il y a un intérêt public dans l'intégrité du processus décisionnel en cause et l'appelante a établi une preuve *prima facie* pour les fins du contrôle judiciaire. Étant donné que la procédure suivie par la Commission contrevenait aux principes de justice naturelle, l'ordonnance en ayant découlé a été rendue en l'absence

jurisdiction and should be set aside despite the existence of privative clauses.

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By LeBel J.

Applied: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; **referred to:** *Khan v. College of Physicians & Surgeons of Ontario* (1992), 94 D.L.R. (4th) 193; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756; *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15; *Lorne's Electric*, [1987] OLRB Rep. 1405; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105.

By Binnie J. (dissenting)

IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282; *R. v. Jolivet*, [2000] 1 S.C.R. 751, 2000 SCC 29; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Marvel Jewellery Ltd.*, [1975] OLRB Rep. 733; *Accomodex Franchise Management Inc.*, [1993] OLRB Rep. 281; *R. Reusse Co.*, [1988] OLRB Rep. 523; *Vieczorek v. Piersma* (1987), 36 D.L.R. (4th) 136; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382; *Université du Québec à Trois-Rivières v. Laroque*, [1993] 1 S.C.R. 471; *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602.

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Labour Relations Act, R.S.O. 1990, c. L.2, ss. 108, 111 [am. 1992, c. 21, s. 45].

de compétence et doit être annulée malgré l'existence de clauses privatives.

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APPEAL from a judgment of the Ontario Court of Appeal (1998), 38 O.R. (3d) 737, 108 O.A.C. 301, 6 Admin. L.R. (3d) 187, affirming a decision of the Divisional Court (1995), 89 O.A.C. 45, [1995] O.J. No. 3924 (QL), dismissing the appellant's application for judicial review. Appeal dismissed, Major and Binnie JJ. dissenting.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1998), 38 O.R. (3d) 737, 108 O.A.C. 301, 6 Admin. L.R. (3d) 187, qui a confirmé une décision de la Cour divisionnaire de l'Ontario (1995), 89 O.A.C. 45, [1995] O.J. No. 3924 (QL), qui avait rejeté la requête en révision judiciaire de l'appelante. Pourvoi rejeté, les juges Major et Binnie sont dissidents.

Earl A. Cherniak, Q.C., and *Kirk F. Stevens*, for the appellant.

Earl A. Cherniak, c.r., et *Kirk F. Stevens*, pour l'appelante.

Sheila R. Block and *Andrew E. Bernstein*, for the respondent Ontario Labour Relations Board.

Sheila R. Block et *Andrew E. Bernstein*, pour l'intimée la Commission des relations de travail de l'Ontario.

Alan M. Minsky, *Q.C.*, and *Susan Philpott*, for the respondent International Brotherhood of Electrical Workers, Local 894.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Arbour and LeBel JJ. was delivered by

LEBEL J. —

I. Introduction

1 The main issue raised by this appeal is whether the rules of natural justice were breached by the Ontario Labour Relations Board ("OLRB" or "Board") when a three-member panel of the Board upheld a grievance filed by the respondent International Brotherhood of Electrical Workers, Local 894 ("Union" or "IBEW, Local 894") against the appellant Ellis-Don Limited. The question of the breach of the rules of natural justice arose when the appellant learned that a first draft of the decision would have dismissed the grievance and that a full Board meeting had been held during which this draft was discussed. The appellant suggests that the differences between the draft and the final decision that allowed the grievance are the result of a change in the assessment of the facts. Ellis-Don alleges that this constitutes sufficient evidence that factual matters were discussed at the full Board meeting, in violation of the rules established by this Court in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282.

II. The Facts

2 This matter has a long history and is closely tied to the evolution of the labour relations system in the Ontario construction industry and to its move towards a more centralized collective bargaining system. In 1962, Ellis-Don was a very active general contractor, but was entering the Toronto market for the first time. A system of local collective bargaining prevailed in the construction industry at this time. Ellis-Don entered into a "Working Agreement" with the Toronto Building and Con-

Alan M. Minsky, *c.r.*, et *Susan Philpott*, pour l'intimée la Fraternité internationale des ouvriers en électricité, section locale 894.

Version française du jugement du juge en chef McLachlin et des juges L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Arbour et LeBel rendu par

LE JUGE LEBEL —

I. Introduction

La principale question en litige dans le présent pourvoi est de savoir si la Commission des relations de travail de l'Ontario (la « CRTO » ou la « Commission ») a violé les règles de justice naturelle lorsqu'une formation de trois commissaires a accueilli un grief déposé contre l'appelante, Ellis-Don Limited, par l'intimée la Fraternité internationale des ouvriers en électricité, section locale 894 (le « syndicat » ou la « section locale 894 de la FIOE »). La question de la violation des règles de justice naturelle s'est posée lorsque l'appelante a appris que le grief aurait été rejeté dans un projet de décision initial et que ce projet avait été discuté au cours d'une réunion plénière de la Commission. L'appelante affirme que les différences entre le projet et la décision définitive qui a accueilli le grief découlent d'un changement dans l'évaluation des faits. Ellis-Don allègue qu'il s'agit là d'une preuve suffisante que des questions de fait ont été discutées à la réunion plénière de la Commission, ce qui contrevient aux règles établies par notre Cour dans l'arrêt *SITBA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282.

II. Les faits

L'affaire remonte loin et elle est étroitement liée à l'évolution du système de relations du travail dans l'industrie de la construction en Ontario ainsi qu'à son orientation vers un système de négociation collective plus centralisé. En 1962, Ellis-Don était un entrepreneur général très actif, mais elle s'attaquait au marché de Toronto pour la première fois. À cette époque, il existait un système de négociations collectives locales dans l'industrie de la construction. Ellis-Don a conclu avec le Toronto

struction Trades Council ("Council"), in which Ellis-Don agreed to employ only members of the unions affiliated with the Council and to contract or subcontract only to individuals or companies whose employees were members in good standing in the unions affiliated with the Council. The Working Agreement provided for automatic renewals unless notice of termination was given (such notice was never given).

Building and Construction Trades Council (le « Conseil ») une « convention de travail ». Elle s'y engageait à n'employer que les membres des syndicats affiliés au Conseil et à n'accorder des contrats ou des contrats de sous-traitance qu'aux personnes et aux sociétés dont les employés étaient membres en règle de ces syndicats. La convention de travail prévoyait son renouvellement automatique sauf avis de résiliation (cet avis n'a jamais été donné).

Local 353 of the International Brotherhood of Electrical Workers ("IBEW, Local 353") was affiliated with the Council. It was and still is the IBEW local with jurisdiction in the Toronto area (the respondent Union, Local 894, was not yet a member of the Council in 1962).

3 La section locale 353 de la Fraternité internationale des ouvriers en électricité (la « section locale 353 de la FIOE ») était affiliée au Conseil. Elle avait et a toujours compétence exclusive dans la région de Toronto (le syndicat intimé, section locale 894, n'était pas encore membre du conseil en 1962).

In 1971, the Electrical Contractors Association of Toronto applied to the OLRB to be certified as a bargaining agent for the electrical contractors of Toronto. According to the regulations then in force, upon filing of that application by the employers' association, the IBEW, Local 353 had to list the employers in respect of which they claimed to hold bargaining rights on a form known as Schedule F.

4 En 1971, l'Electrical Contractors Association of Toronto déposa auprès de la CRTO une demande d'accréditation en tant qu'agent négociateur pour les entrepreneurs électriciens de Toronto. Conformément à la réglementation alors en vigueur, à la suite du dépôt de cette demande par l'association d'employeurs, la section locale 353 de la FIOE devait fournir, sur un formulaire connu comme l'annexe F, une liste des employeurs à l'égard desquels elle prétendait détenir des droits de négociation.

IBEW, Local 353 failed to list Ellis-Don as an employer in the form it filed in response to the application of the Electrical Contractors Association of Toronto.

5 La section locale 353 de la FIOE omit d'inscrire Ellis-Don en tant qu'employeur dans le formulaire qu'elle a déposé en réponse à la demande de l'Electrical Contractors Association of Toronto.

In 1978, there was a move towards a province-wide bargaining scheme in the industry. The jurisdiction of the Council was extended to include Central Ontario in 1979. Local 894 of the IBEW became affiliated with the Council. By amending legislation, the bargaining rights of the IBEW, Local 353 in respect of Ellis-Don's employees were to be extended to Local 894, provided those bargaining rights had not been abandoned by Local 353 prior to the introduction of the province-wide bargaining scheme.

6 En 1978, le régime de négociation dans l'industrie a commencé à s'appliquer à l'échelle de la province. La compétence du Conseil s'est étendue au centre de l'Ontario en 1979. La section locale 894 de la FIOE est devenue affiliée au Conseil. Des modifications législatives ont fait en sorte que les droits de négociation de la section locale 353 de la FIOE relativement aux employés de Ellis-Don ont été accordés à la section locale 894, dans la mesure où la section locale 353 n'avait pas renoncé à ces droits avant la mise en œuvre du régime de négociation à l'échelle de la province.

7 On January 12, 1990, the Union filed a grievance with the Board, alleging that the appellant had subcontracted electrical construction work to non-union electrical subcontractors, contrary to the provisions of the provincial collective agreement between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, the IBEW, and the IBEW Construction Council of Ontario representing its affiliated local unions.

8 A three-member panel of the OLRB presided over by Vice-Chair Susan Tacon heard the grievance. The appellant did not dispute that it had subcontracted some work to non-union electrical contractors. However, it argued that it was not bound by the provincial agreement because the IBEW, Local 353 had abandoned its bargaining rights prior to the introduction of the province-wide bargaining scheme, when it failed to include the name of Ellis-Don in Schedule F of the accreditation proceedings of the Electrical Contractors Association of Toronto. According to Ellis-Don, this omission and the IBEW, Local 894's failure to call evidence to explain it, demonstrated either that the IBEW, Local 894 in fact recognized that it did not hold bargaining rights on behalf of the appellant's employees or that these bargaining rights had been abandoned.

9 After the hearing of the grievance, a draft decision was prepared by Vice-Chair Tacon. This draft proposed to dismiss the grievance on the ground that the IBEW, Local 353 had failed to list Ellis-Don on Schedule F at the time of the certification proceedings of the Electrical Contractors Association of Toronto and was thus deemed to have abandoned its bargaining rights with respect to the appellant:

> Local [8]94, the applicant herein, called no evidence to explain the failure of Local 353 to include Ellis-Don on schedule F, as would be expected if the union in the accreditation application thought it possessed bargaining rights vis-à-vis Ellis-Don. Absent an explanation, the most reasonable inference is that the union in the

Le 12 janvier 1990, le syndicat déposa un grief auprès de la Commission, alléguant que l'appelante avait donné en sous-traitance des travaux de construction en électricité à des entrepreneurs dont les employés n'étaient pas syndiqués, contrevenant ainsi aux dispositions de la convention collective provinciale conclue entre l'Electrical Trade Bargaining Agency de l'Electrical Contractors Association of Ontario, la FIOE et le conseil de l'Ontario de la FIOE, représentant ses syndicats locaux affiliés.

Une formation de trois membres de la CRTO présidée par la vice-présidente Susan Tacon entendit le grief. L'appelante ne nia pas avoir accordé des contrats de sous-traitance à des entrepreneurs électriciens dont les employés n'étaient pas syndiqués. Elle prétendit toutefois ne pas être liée par la convention provinciale parce que la section locale 353 de la FIOE avait renoncé à ses droits de négociation avant la mise en œuvre du régime de négociation à l'échelle de la province lorsqu'elle avait omis d'inscrire son nom à l'annexe F de la demande d'accréditation de l'Electrical Contractors Association of Toronto. Selon Ellis-Don, cette omission et le fait que la section locale 894 de la FIOE n'avait pas présenté d'éléments de preuve pour l'expliquer démontrait que la section locale 894 de la FIOE reconnaissait dans les faits qu'elle ne possédait pas de droits de négociation au nom des employés de l'appelante ou qu'elle y avait renoncé.

Après l'audition du grief, la vice-présidente Tacon rédigea un projet de décision. Ce dernier proposait de rejeter le grief pour le motif que la section locale 353 de la FIOE avait omis d'inscrire le nom de Ellis-Don à l'annexe F au moment de la demande d'accréditation de l'Electrical Contractors Association of Toronto et qu'elle était donc réputée avoir renoncé à ses droits de négociation relativement à l'appelante :

> [TRADUCTION] La section locale [8]94, la demanderesse en l'espèce, n'a présenté aucun élément de preuve pour expliquer l'omission de la section locale 353 d'inclure Ellis-Don à l'annexe F, ce à quoi on s'attendrait si le syndicat visé par la demande d'accréditation croyait avoir des droits de négociation vis-à-vis Ellis-Don.

accreditation application assumed it did not possess such bargaining rights in 1971, when the accreditation application was filed. In effect, the union was asserting it did not have bargaining rights for Ellis-Don. The respondent union in the accreditation application must be taken to have abandoned whatever bargaining rights it possessed as against Ellis-Don at the latest by that point. The mere use by Ellis-Don of union electrical subcontractors is not tantamount to granting voluntary recognition anew once the bargaining rights created by the working agreement were extinguished.

The consequences of the Board's finding that bargaining rights had been abandoned by Local 353 IBEW prior to 1978 is that that trade union cannot "plug into" the province-wide scheme so that the issue of abandonment post 1978 does not arise. Local [8]94, the applicant in the instant grievance referral, relies on that province-wide scheme to acquire the bargaining rights which it seeks to enforce against Ellis-Don. In the Board's view, no such rights were held by Local 353 in 1978 so that the legislation in 1978 and the subsequent amendments could not extend any bargaining rights to Local [8]94. [Emphasis added.]

Faute d'explication, la conclusion la plus raisonnable à tirer est que le syndicat visé par la demande d'accréditation a tenu pour acquis qu'il n'avait pas de droits de négociation en 1971, au moment du dépôt de la demande d'accréditation. Dans les faits, le syndicat affirmait ne pas avoir de droits de négociation concernant Ellis-Don. Le syndicat intimé visé par la demande d'accréditation doit être considéré comme ayant renoncé à tout droit de négociation qu'il pouvait avoir relativement à Ellis-Don au plus tard à ce moment-là. Le simple recours par Ellis-Don à des sous-traitants dont les employés étaient syndiqués n'équivaut pas à une nouvelle reconnaissance volontaire une fois éteints les droits de négociation créés par la convention de travail.

La conclusion de la Commission que la section locale 353 de la FIOE avait renoncé aux droits de négociation avant 1978 a comme conséquence que le syndicat ne peut pas « s'intégrer » au régime provincial, de sorte que la question de la renonciation après 1978 ne se pose pas. La section locale [8]94, la demanderesse dans le cadre du présent grief, invoque ce régime provincial en vue d'acquérir les droits de négociation qu'elle entend faire respecter par Ellis-Don. La Commission est d'avis que la section locale 353 n'avait aucun droit de négociation en 1978, de sorte que les dispositions législatives de 1978 et les modifications subséquentes n'ont pas pu conférer un tel droit à la section locale [8]94. [Je souligne.]

The draft decision was circulated among all the members of the OLRB and Vice-Chair Tacon called a full Board meeting to discuss its implications. It appears that this meeting was held on January 27, 1992.

10 Le projet de décision fut transmis à tous les membres de la CRTO et la vice-présidente Tacon convoqua une réunion plénière de la Commission pour discuter de ses effets. Cette réunion aurait eu lieu le 27 janvier 1992.

On February 28, 1992, the Board released its final decision, upholding the grievance (Board member Trim dissenting): [1992] OLRB Rep. 147. The majority found that there had been no abandonment of bargaining rights by the Union in spite of the omission of Ellis-Don from schedule F (at para. 54):

11 Le 28 février 1992, la Commission rendit sa décision définitive, qui accueillait le grief (le membre Trim étant dissident) : [1992] OLRB Rep. 147. Les membres majoritaires conclurent, au par. 54, que le syndicat n'avait pas renoncé à ses droits de négociation malgré l'omission du nom de Ellis-Don à l'annexe F :

The absence of evidence to explain the omission of Ellis-Don from the schedule F filed by Local 353, IBEW in the accreditation application is of concern to the Board. The question for the Board is whether this omission, of itself, is sufficient, in the context of all the other circumstances, to cause the Board to conclude that Local 353 had abandoned the bargaining rights it had earlier obtained. The omission of Ellis-Don's name is

[TRADUCTION] L'absence de preuve expliquant l'omission du nom de Ellis-Don à l'annexe F déposée par la section locale 353 de la FIOE dans le cadre de la demande d'accréditation préoccupe la Commission, qui estime qu'il s'agit de savoir si cette omission est suffisante en soi, dans le contexte de l'ensemble des autres circonstances, pour lui permettre de conclure que la section locale 353 avait renoncé aux droits de négociation

not inconsistent with abandonment and, thus, may signify what respondent counsel asserts. However, that omission is also consistent with an assumption on the part of the Local that the accreditation application affected only specialty contractors or that schedule F speaks only to employers for whom the Local held bargaining rights but who had had employees in the past (albeit not within the previous year). It appears (and there is no cogent evidence to suggest otherwise) that the employer association represented specialty electrical contractors, not general contractors. In that context, the name of Ellis-Don may have been omitted, in the respondent union's reply, as apparently were the names of other general contractors who had signed the working agreement, to reflect the framing of the original application. The question is not what is the most reasonable or a reasonable inference from the omission of Ellis-Don's name but whether the omission signifies abandonment. In the Board's opinion, it is more probable than not that the omission of Ellis-Don's name from schedule F did not reflect an abandonment of bargaining rights. As well, the context of a consistent pattern of Ellis-Don's subletting electrical work to "union" contractors prior to the accreditation application, although not necessarily conclusive proof of the existence of bargaining rights (see paragraph 46 above), cannot be ignored. Given the Board's finding that the working agreement was duly executed by the parties and constituted a series of voluntary recognition agreements, including the voluntary recognition of Local 353, and given that the working agreement was never terminated but, rather, that at least with respect to the subcontracting of electrical work, Ellis-Don fully complied with that agreement for many years with Ellis-Don receiving the advantages of the working agreement during that period, the Board is not satisfied, as a matter of fact, that the bargaining rights of Local 353 were abandoned because of the omission of Ellis-Don's name from schedule F. In short, considering all the circumstances, the Board does not find that Local 353 abandoned its bargaining rights prior to the introduction of province-wide bargaining. [Emphasis added.]

qu'elle avait obtenus auparavant. L'omission du nom de Ellis-Don n'est pas incompatible avec une renonciation et peut donc signifier ce que l'avocat de l'intimée affirme. Cependant, cette omission est compatible également avec le fait que la section locale aurait tenu pour acquis que la demande d'accréditation ne touchait que les entrepreneurs spécialisés ou que l'annexe F ne s'appliquait qu'aux employeurs relativement auxquels la section locale avait des droits de négociation mais qui avaient eu des employés dans le passé (quoique pas dans l'année précédente). Il semble (et il n'y a aucune preuve convaincante du contraire) que l'association d'employeurs représentait les entrepreneurs électriciens spécialisés, et non pas les entrepreneurs généraux. Dans ce contexte, le nom de Ellis-Don peut avoir été omis dans la réponse du syndicat intimé, comme l'ont apparemment été les noms d'autres entrepreneurs généraux qui avaient signé la convention de travail, compte tenu du cadre de la demande initiale. La question n'est pas de savoir quelle est la conclusion la plus raisonnable ou quelle serait une conclusion raisonnable à tirer de l'omission du nom de Ellis-Don, mais bien de savoir si cette omission équivaut à une renonciation. La Commission est d'avis qu'il est plus probable que l'omission du nom de Ellis-Don à l'annexe F n'indiquait pas une renonciation aux droits de négociation. De même, bien qu'elle ne constitue pas nécessairement une preuve concluante de l'existence de droits de négociation (voir le paragraphe 46 ci-dessus), il ne faut pas faire abstraction de la pratique constante de Ellis-Don de donner en sous-traitance des travaux en électricité à des entrepreneurs dont les employés sont syndiqués. Étant donné la conclusion de la Commission que la convention de travail a été dûment signée par les parties et qu'elle constituait un ensemble d'ententes de reconnaissance volontaire, notamment la reconnaissance volontaire de la section locale 353, et étant donné que la convention de travail n'a jamais été résiliée, mais plutôt que, au moins en ce qui concerne la sous-traitance de travaux d'électricité, Ellis-Don s'est entièrement conformée pendant de nombreuses années à cette convention et qu'elle en a bénéficié pendant cette période, la Commission n'est pas convaincue que, en tant que question de fait, la section locale 353 a renoncé aux droits de négociation en raison de l'omission du nom de Ellis-Don à l'annexe F. En résumé, vu l'ensemble des circonstances, la Commission estime que la section locale 353 n'a pas renoncé à ses droits de négociation avant la mise en œuvre du régime de négociation à l'échelle de la province. [Je souligne.]

A few weeks later, in March 1992, a retired member of the OLRB handed over to Ellis-Don a copy of the draft that had been circulated to all members of the Board. From the same source, Ellis-Don also learned that a full Board meeting had been held at the request of Vice-Chair Tacon to consider the draft decision.

Quelques semaines plus tard, en mars 1992, un membre à la retraite de la CRTO remit à Ellis-Don une copie du projet qui avait été envoyé à tous les membres de la Commission. De la même source, Ellis-Don apprit également qu'une réunion plénière de la Commission avait été tenue à la demande de la vice-présidente Tacon pour examiner le projet de décision. 12

Ellis-Don claimed that there was a breach of natural justice and that jurisprudential rules governing institutional consultations had been violated. Without asking for reconsideration of the decision, it applied for judicial review. According to the appellant, the change between the draft decision and the arbitration award ultimately released by the Board was of a factual nature as opposed to a legal or policy change. This indicated that facts had been discussed at the full board meeting, contrary to the principles established by this Court in *Consolidated-Bathurst, supra*.

Ellis-Don prétendit qu'il y avait eu violation des règles de justice naturelle et que les règles jurisprudentielles régissant les consultations institutionnelles n'avaient pas été respectées. Sans solliciter un nouvel examen de la décision, elle présenta une demande de contrôle judiciaire. Selon l'appelante, la modification survenue entre le projet de décision et la décision arbitrale rendue par la suite par la Commission était de nature factuelle, par opposition à une modification de nature juridique ou de principe. Cela indiquait que les faits avaient été discutés à la réunion plénière de la Commission, en contravention des principes établis par notre Cour dans l'arrêt *Consolidated-Bathurst*, précité. 13

Prior to the hearing of the application for judicial review, the appellant sought an interlocutory order to stay the decision of the OLRB; it also requested that several members of the Board be summoned for examination before an official examiner and that certain documents be produced. In July 1992, Steele J., of the Ontario Divisional Court, granted an order compelling members of the Board to appear before an official examiner, but refused to stay the decision and to order the production of documents: (1992), 95 D.L.R. (4th) 56. In January 1994, a three-judge panel of the Divisional Court reversed the decision of Steele J. and decided that the members of the Board could not be compelled to appear before an official examiner: (1994), 16 O.R. (3d) 698. The Divisional Court based its decision on the common law rule respecting the compellability of administrative tribunal members and on s. 111 of the Ontario *Labour Relations Act*, R.S.O. 1990, c. L.2 (now S.O. 1995, c. 1, s. 117). Leave to appeal this decision was denied by the Ontario Court of Appeal in

Avant l'audition de la demande de contrôle judiciaire, l'appelante demanda que soit rendue une ordonnance interlocutoire suspendant la décision de la CRTO; elle requit aussi l'assignation à comparaître pour fins d'interrogatoire de plusieurs membres de la Commission devant un auditeur officiel ainsi que la production de certains documents. En juillet 1992, le juge Steele, de la Cour divisionnaire de l'Ontario, ordonna aux membres de la Commission de comparaître devant un auditeur officiel mais refusa de suspendre la décision et d'ordonner la production des documents : (1992), 95 D.L.R. (4th) 56. En janvier 1994, une formation de trois juges de la Cour divisionnaire infirma la décision du juge Steele et affirma que les membres de la Commission ne pouvaient pas être contraints à comparaître devant un auditeur officiel : (1994), 16 O.R. (3d) 698. La Cour divisionnaire fonda sa décision sur la règle de common law relative à la contraignabilité des membres des tribunaux administratifs et sur l'art. 111 de la *Loi sur les relations de travail* de l'Ontario, L.R.O. 1990, ch. L.2 (maintenant L.O. 1995, ch. 1, art. 117). L'autorisation d'interjeter appel de cette décision fut refusée 14

June 1994 and by the Supreme Court of Canada in January 1995, [1995] 1 S.C.R. vii.

15 On December 20, 1995, the Divisional Court dismissed the appellant's application for judicial review. A unanimous Court of Appeal confirmed this judgment in April 1998

III. Relevant Statutory Provisions

16 *Labour Relations Act, 1995*, S.O. 1995, c. 1

114. (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling. [Previously s. 108 of the *Labour Relations Act*, R.S.O. 1990, c. L.2.]

117. Except with the consent of the Board, no member of the Board, nor its registrar, nor any of its other officers, nor any of its clerks or servants shall be required to give testimony in any civil proceeding or in any proceeding before the Board or in any proceeding before any other tribunal respecting information obtained in the discharge of their duties or while acting within the scope of their employment under this Act.

IV. Judicial History

A. *Divisional Court (Decision on the Application for Judicial Review)* (1995), 89 O.A.C. 45

17 The court dismissed the application for judicial review. Adams J., writing for the panel, found that the difference between the draft and the final decisions reflected a change in the applicable policy or legal standard, but not a new determination of the facts. Adams J. noted that the fact that IBEW, Local 353 had omitted Ellis-Don's name from Schedule F of the accreditation proceedings of the Electrical Contractors Association of Toronto and the fact that this association represented specialty electrical contractors, not general contractors,

par la Cour d'appel de l'Ontario en juin 1994 et par la Cour suprême du Canada en janvier 1995, [1995] 1 R.C.S. vii.

Le 20 décembre 1995, la Cour divisionnaire rejeta la demande de contrôle judiciaire de l'appelante. La Cour d'appel, à l'unanimité, confirma ce jugement en avril 1998.

III. Les dispositions législatives pertinentes

Loi de 1995 sur les relations de travail, L.O. 1995, ch. 1

114. (1) La Commission a compétence exclusive pour exercer les pouvoirs que lui confère la présente loi ou qui lui sont conférés en vertu de celle-ci et trancher toutes les questions de fait ou de droit soulevées à l'occasion d'une affaire qui lui est soumise. Ses décisions ont force de chose jugée. Toutefois, la Commission peut à l'occasion, si elle estime que la mesure est opportune, réviser, modifier ou annuler ses propres décisions, ordonnances, directives ou déclarations. [Auparavant l'art. 108 de la *Loi sur les relations de travail*, L.R.O. 1990, ch. L.2.]

117. Sauf si la Commission y consent, ses membres, son registrateur, et les autres membres de son personnel sont exemptés de l'obligation de témoigner dans une instance civile ou dans une instance devant la Commission ou devant toute autre commission, en ce qui concerne des renseignements obtenus dans le cadre de leurs fonctions ou en rapport avec celles-ci dans le cadre de la présente loi.

IV. Historique des procédures judiciaires

A. *La Cour divisionnaire (Décision relative à la demande de contrôle judiciaire)* (1995), 89 O.A.C. 45

La cour rejeta la demande de contrôle judiciaire. Le juge Adams, s'exprimant au nom de la formation, conclut que la différence entre le projet et la décision définitive constituait une modification des principes ou de la norme juridique applicables, mais non pas une nouvelle détermination des faits. Il souligna que le fait que la section locale 353 de la FIOE avait omis d'inscrire le nom de Ellis-Don à l'annexe F de la demande d'accréditation de l'Electrical Contractors Association of Toronto et le fait que cette association représentait les entre-

remained unchanged between the draft decision and the final award. For Adams J., the Board simply had to decide whether the omission, in and of itself, dictated the conclusion of abandonment. He wrote (at p. 55):

> This determination had a substantial and obvious policy component, notwithstanding the particular manner in which the panel expressed itself. In this sense, it involved a matter which could be addressed at a level of principle without offending the requirements of natural justice.

Adams J. listed several policy options open to the Board: (i) the omission could constitute *per se* evidence of abandonment; (ii) the omission could give rise to a rebuttable presumption of abandonment (thus requiring an explanation from the IBEW, Local 894); (iii) the omission could constitute a factor to be considered along with the rest of the evidence before the Board; or (iv) the omission could be irrelevant to the issue of abandonment. Adams J. concluded that the Board had determined that the omission was a factor to be considered, without being determinative in the circumstances, even in the absence of an explanation from the IBEW, Local 894.

Adams J. noted that the conclusion of the arbitration award was consistent with the unlikelihood that the Union intended to abandon its bargaining rights and with the case law and policy of the Board which required unequivocal evidence that a trade union has "slept on its rights" (p. 56). Accordingly, Adams J. found that there was no basis to infer that members of the Board who were not on the hearing panel might have participated in the panel's fact-finding. Adams J. referred to the decision of the Ontario Court of Appeal in *Khan v. College of Physicians & Surgeons of Ontario* (1992), 94 D.L.R. (4th) 193, to support the idea that modern decision-making cannot be made in complete isolation. Adams J. explained that, if the appellant suspected that there had been a discussion of factual issues at the full Board meeting, it

preneurs électriciens spécialisés, et non pas les entrepreneurs généraux, n'avaient pas changé entre le projet de décision et la décision définitive. Selon le juge Adams, la Commission devait simplement déterminer si l'omission en soi menait nécessairement à la conclusion qu'il y avait eu renonciation. Il a écrit, à la p. 55 :

> [TRADUCTION] Cette détermination comportait un élément de principe important et manifeste, malgré la manière particulière dont le la formation s'est exprimée. Dans ce sens, elle comportait une question qui pouvait être tranchée au niveau des principes sans contrevenir aux exigences de la justice naturelle.

18 Le juge Adams énuméra plusieurs choix de principe qui s'offraient à la Commission : (i) l'omission pouvait constituer en soi la preuve de la renonciation; (ii) l'omission pouvait donner lieu à une présomption réfutable de renonciation (ce qui aurait donc obligé la section locale 894 de la FIOE à fournir une explication); (iii) l'omission pouvait constituer un facteur à examiner au même titre que les autres éléments de preuve soumis à la Commission; ou (iv) l'omission pouvait n'avoir aucune pertinence quant à la question de la renonciation. Il conclut que la Commission avait décidé que l'omission était un facteur à prendre en considération, sans qu'elle ne soit déterminante dans les circonstances, même en l'absence d'explication de la part de la section locale 894 de la FIOE.

19 Le juge Adams fit remarquer que la conclusion de la décision arbitrale était compatible avec l'improbabilité d'une intention du syndicat de renoncer à ses droits de négociation ainsi qu'avec la jurisprudence et la politique de la Commission, qui exigeait la preuve sans équivoque qu'un syndicat avait [TRADUCTION] « négligé de faire valoir ses droits » (p. 56). Par conséquent, à son avis, rien ne permettait de déduire que les membres de la Commission qui ne faisaient pas partie de la formation ayant entendu l'affaire auraient peut-être participé à l'appréciation des faits. Il cita la décision rendue par la Cour d'appel de l'Ontario dans *Khan c. College of Physicians & Surgeons of Ontario* (1992), 94 D.L.R. (4th) 193, à l'appui de l'idée que, de nos jours, la prise de décision ne peut pas avoir lieu dans un isolement complet. Il expliqua que, si l'ap-

should, at least as a matter of courtesy, have given the Board an opportunity to explain itself by seeking reconsideration. Finally, in the opinion of Adams J., the decision of the Board was not patently unreasonable.

pelante estimait que des questions de fait avaient été discutées à la réunion plénière de la Commission, elle aurait dû, au moins par courtoisie, donner à la Commission la possibilité de s'expliquer en demandant un nouvel examen. Enfin, le juge Adams était d'avis que la décision de la Commission n'était pas manifestement déraisonnable.

B. *Court of Appeal* (1998), 38 O.R. (3d) 737

B. *La Cour d'appel* (1998), 38 O.R. (3d) 737

20 A unanimous Court of Appeal dismissed the appeal. It held that the appellant had not established that the change in the panel's decision was the consequence of interference by the full Board in the panel's fact-finding process. A review of the record revealed that the possibility of interference by the full Board on factual matters amounted to little more than speculation. The court was satisfied that the change was the result of the application of a different legal standard to the facts introduced in evidence before the panel.

La Cour d'appel rejeta l'appel à l'unanimité. Elle a considéré que l'appelante n'avait pas démontré que la modification de la décision de la formation avait été causée par l'ingérence de l'ensemble des membres de la Commission dans le processus d'appréciation des faits de la formation. L'examen du dossier avait révélé que la possibilité d'ingérence de la part de l'ensemble des membres de la Commission relativement aux questions de fait constituait tout au plus une hypothèse. La cour était convaincue que la modification découlait de l'application d'une norme juridique différente aux faits présentés en preuve devant la formation.

21 The court held, at p. 740, that the panel had not speculated on the intention of the IBEW, Local 353 in omitting the appellant's name from Schedule F:

> The fact of the omission, that the employer association involved in the application represented special electrical contractors, not general contractors, that Ellis-Don is a general contractor who had signed the provincial working agreement, that other general contractors who had signed the agreement were also omitted from Schedule F, that Ellis-Don obtained the benefit of the agreement and that it had used only unionized electrical contractors until the grievance gave rise to this dispute, were all in evidence and were not speculation.

La cour conclut, à la p. 740, que la formation n'avait pas émis d'hypothèses sur les intentions de la section locale 353 de la FIOE, lorsqu'elle a omis d'inscrire le nom de l'appelante à l'annexe F :

> [TRADUCTION] Les faits selon lesquels il y a eu omission, que l'association d'employeurs visée par la demande représentait des entrepreneurs électriciens spécialisés, et non pas des entrepreneurs généraux, que Ellis-Don est un entrepreneur général qui avait signé la convention de travail provinciale, que le nom d'autres entrepreneurs généraux ayant signé la convention a également été omis à l'annexe F, que Ellis-Don a bénéficié de la convention et qu'elle n'avait fait appel qu'à des entrepreneurs électriciens dont les employés étaient syndiqués jusqu'au grief ayant donné lieu au présent litige, ont tous été présentés en preuve et n'étaient pas des hypothèses.

22 The Court of Appeal also found that the Divisional Court had correctly refused to draw an adverse inference from the Board's refusal to disclose the internal deliberations which took place at the full Board meeting. According to the Court of Appeal, a presumption of regularity applied, as there was no evidence that the procedure at the full

La Cour d'appel décida également que la Cour divisionnaire avait refusé avec raison de tirer une conclusion défavorable du refus de la Commission de révéler le contenu des délibérations internes qui avaient eu lieu à sa réunion plénière. À son avis, une présomption de régularité s'appliquait puisqu'il n'y avait aucune preuve que la procédure sui-

Board meeting in question departed from its usual practice, whereby discussion was limited to the policy implications of a draft decision. The mere fact that the construction panel had changed its conclusion could not give rise to an inference that the Board had acted improperly during the consultation process.

vie à la réunion plénière en question était différente de la pratique habituelle, en vertu de laquelle la discussion était limitée aux répercussions de principe d'un projet de décision. Le simple fait que la formation du secteur de la construction avait modifié sa conclusion ne pouvait pas entraîner la déduction que la Commission avait agi de façon inappropriée au cours du processus de consultation.

V. The Issues

This appeal does not challenge the legality of an institutional consultation process within administrative bodies like the OLRB. Moreover, there has been no suggestion that the Court should revisit the rules established in *Consolidated-Bathurst*, *supra*, and *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952. At issue in this appeal is whether the Board complied with these rules when it held the full Board meeting and discussed the grievance against Ellis-Don. This requires us to discuss the nature of the evidentiary burden on a party applying for judicial review because of an alleged breach of natural justice.

The appellant submits several closely linked propositions. First, it asserts that the change in the final decision was of a factual nature and that this is sufficient to prove that factual matters were discussed at the full Board meeting. The appellant also contends that the Court should intervene as the change raises a reasonable apprehension of a breach of natural justice. It suggests that the refusal of the Board to offer evidence about its internal decision proceedings gave rise to the application of a presumption of irregularity that would permit courts to imply that there has been improper tampering with the evidence during the full Board conference.

The Court also has to decide whether the appellant's failure to ask for reconsideration of the Board's decision constitutes a bar to judicial review.

V. Les questions en litige

23 Le présent pourvoi ne conteste pas la légalité du processus de consultation institutionnelle des organismes administratifs comme la CRTO. De plus, on n'a pas prétendu que notre Cour devait réexaminer les règles établies dans les arrêts *Consolidated-Bathurst*, précité, et *Tremblay c. Québec (Commission des affaires sociales)*, [1992] 1 R.C.S. 952. Est en litige dans le présent pourvoi la question de savoir si la Commission s'est conformée à ces règles lorsqu'elle a tenu sa réunion plénière pour discuter du grief déposé contre Ellis-Don. Nous devons donc examiner la nature du fardeau de présentation de la partie qui demande un contrôle judiciaire en raison d'une présumée violation des règles de justice naturelle.

24 L'appelante présente plusieurs arguments étroitement liés. Premièrement, elle affirme que la modification apportée dans la décision définitive était de nature factuelle et que cela suffit pour prouver que des questions de fait ont été abordées à la réunion plénière de la Commission. L'appelante soutient également que notre Cour doit intervenir puisque la modification soulève une crainte raisonnable de violation des règles de justice naturelle. Elle avance que le refus de la Commission de présenter des éléments de preuve relativement à son processus décisionnel interne entraîne l'application d'une présomption d'irrégularité qui permettrait aux tribunaux de déduire qu'il y a eu manipulation de la preuve au cours de la réunion plénière de la Commission.

25 Notre Cour doit également déterminer si l'omission de l'appelante de demander un nouvel examen de la décision de la Commission rend irrecevable sa demande de contrôle judiciaire.

VI. Analysis

A. *The Rules Concerning Institutional Consultation*

26 The problems relating to procedures of institutional consultation within administrative bodies have been thoroughly canvassed in the reasons of Gonthier J. in *Consolidated-Bathurst*, *supra*, and *Tremblay*, *supra*. A mere reminder of the principles set out in these decisions will suffice here to deal with the main legal issues presented by this case.

27 In the *Consolidated-Bathurst* case, the legality of institutional consultation procedures within administrative bodies had been put in doubt for two reasons. First, it was argued that these procedures created a reasonable apprehension of bias and lack of independence on the part of the adjudicators. The members of an administrative body hearing a case might be subject to undue pressure from other colleagues or from their hierarchical superiors. These pressures would come from persons who would not have heard the evidence nor the arguments of the parties, and would nevertheless be in a position to influence the final decision. Second, it was suggested that these consultations also breached the *audi alteram partem* rule, as new arguments might be raised during the full Board discussion without being communicated to the parties.

28 Writing for the majority, Gonthier J. recognized the legitimacy of institutional consultations to ensure consistency between decisions of different adjudicators or panels within an administrative body. Indeed, the critical nature of this procedure was underlined later by the judgment of this Court in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756. Writing for a unanimous Court, L'Heureux-Dubé J. observed that ensuring the consistency of decisions of administrative bodies or tribunals was not a proper function of judicial review by superior courts. Inconsistencies or conflicts between different decisions of the same tribu-

VI. Analyse

A. *Les règles relatives à la consultation institutionnelle*

Les problèmes relatifs aux procédures de consultation institutionnelle des organismes administratifs ont été exposés de façon exhaustive dans les motifs du juge Gonthier dans les arrêts *Consolidated-Bathurst* et *Tremblay*, précités. Un simple rappel des principes établis dans ces décisions suffit pour les fins de l'examen des principales questions en litige soulevées par la présente affaire.

Dans l'affaire *Consolidated-Bathurst*, la légalité des procédures de consultation institutionnelle des organismes administratifs avait été mise en doute pour deux motifs. En premier lieu, on a prétendu que ces procédures créaient une crainte raisonnable de partialité et d'un manque d'indépendance de la part des arbitres. Les membres d'un organisme administratif qui entendent une affaire sont susceptibles de faire l'objet de pressions indues de la part de leurs collègues ou de leurs supérieurs hiérarchiques. Ces pressions proviendraient de personnes qui n'auraient pas entendu la preuve ni les arguments des parties et qui seraient néanmoins bien placées pour influencer la décision définitive. En second lieu, on a prétendu que ces consultations contrevenaient également à la règle *audi alteram partem*, puisque de nouveaux arguments pouvaient être soulevés pendant les discussions de la réunion plénière de la Commission sans être communiqués aux parties.

S'exprimant au nom des juges majoritaires, le juge Gonthier a reconnu la légitimité des consultations institutionnelles en tant que moyen d'assurer la cohérence des décisions rendues par différents arbitres ou différentes formations au sein d'un organisme administratif. D'ailleurs, l'importance vitale de cette procédure a par la suite été soulignée par notre Cour dans l'arrêt *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 R.C.S. 756. S'exprimant au nom de notre Cour à l'unanimité, le juge L'Heureux-Dubé a fait remarquer qu'il n'appartient pas aux cours de juridiction supérieure d'assurer la cohérence des décisions des organismes et

nal would not be reason to intervene, provided the decisions themselves remained within the core jurisdiction of the administrative tribunals and within the bounds of rationality. It lay on the shoulders of the administrative bodies themselves to develop the procedures needed to ensure a modicum of consistency between its adjudicators or divisions (*Domtar*, *supra*, at p. 798).

1. Apprehension of Bias or Lack of Independence

In *Consolidated-Bathurst*, *supra*, Gonthier J. examined whether the existence of this kind of institutional consultation procedure in itself created an apprehension of bias or lack of independence as Sopinka J. feared in his dissent. According to Gonthier J., such a procedure would not of itself raise such an apprehension, provided it was designed to safeguard the ability of the decision-maker to decide independently both on facts and law in the matter. Gonthier J. laid down a set of basic principles to ensure compliance with the rules of natural justice. First, the consultation proceeding could not be imposed by a superior level of authority within the administrative hierarchy, but could be requested only by the adjudicators themselves. Second, the consultation had to be limited to questions of policy and law. The members of the organization who had not heard the evidence could not be allowed to re-assess it. The consultation had to proceed on the basis of the facts as stated by the members who had actually heard the evidence. Finally, even on questions of law and policy, the decision-makers had to remain free to take whatever decision they deemed right in their conscience and understanding of the facts and the law, and not be compelled to adopt the views expressed by other members of the administrative tribunal. Provided these rules were respected, institutional consultation would not be reason to intervene.

des tribunaux administratifs dans le cadre de leur fonction de contrôle judiciaire. Des incohérences ou des contradictions entre les différentes décisions du même tribunal ne constitueraient pas un motif d'intervention, pourvu que les décisions elles-mêmes relèvent de la compétence fondamentale du tribunal administratif et qu'elles soient raisonnables. Il incombait aux organismes administratifs eux-mêmes d'élaborer les procédures requises pour assurer un minimum de cohérence entre ses arbitres ou ses divisions (*Domtar*, précité, p. 798).

1. Crainte de partialité ou de manque d'indépendance

29 Dans l'arrêt *Consolidated-Bathurst*, précité, le juge Gonthier a examiné la question de savoir si l'existence de ce genre de procédure de consultation institutionnelle créait en soi une crainte de partialité ou de manque d'indépendance, comme le redoutait le juge Sopinka dans sa dissidence. Selon le juge Gonthier, une telle procédure ne soulevait pas en soi cette crainte, pourvu qu'elle soit conçue de manière à protéger la capacité de l'arbitre de se prononcer de façon indépendante tant sur les faits que sur le droit dans l'affaire en cause. Il a formulé un ensemble de principes essentiels visant à assurer le respect des règles de justice naturelle. Premièrement, la procédure de consultation ne pouvait pas être imposée par un niveau d'autorité supérieur dans la hiérarchie administrative, mais ne pouvait être demandée que par les arbitres eux-mêmes. Deuxièmement, la consultation devait se limiter aux questions de principe et de droit. On ne pouvait pas permettre aux membres de l'organisation qui n'avaient pas entendu les témoignages de les réévaluer. La consultation devait reposer sur les faits énoncés par les membres qui avaient entendu les témoignages. Enfin, même relativement aux questions de droit et de principe, les arbitres devaient demeurer libres de prendre la décision qu'ils jugeaient juste selon leur conscience et selon leur compréhension des faits et du droit, et ne pas être forcés d'adopter les opinions exprimées par d'autres membres du tribunal administratif. Dans la mesure où ces règles étaient respectées, la consultation institutionnelle ne créait pas de crainte

tutional consultation would not create a reasonable apprehension of bias or lack of independence.

30 It is noteworthy that also at issue in the *Consolidated-Bathurst* case were the consultation proceedings followed within the OLRB. The majority decided that such procedures did not create a reasonable apprehension of bias or lack of independence.

31 The principles developed in *Consolidated-Bathurst* were also applied in the later case of *Tremblay*, *supra*. In the *Tremblay* case, the Supreme Court of Canada considered that the consultation procedures were imposed from above on the decision-makers and that they were so formalized that they became binding on the triers of facts, therefore compromising their independence.

2. *Audi Alteram Partem*

32 The other issue in *Consolidated-Bathurst* concerned the impact of the consultation proceeding on the application of the *audi alteram partem* rule. The reasons of Gonthier J. conceded that there existed risks in that regard, but held that they could be addressed by ensuring that the parties be notified of any new issue raised during the discussion and allowed an opportunity to respond in an effective manner. The mere fact that issues already litigated between the parties were to be discussed again by the full Board would not amount to a breach of the *audi alteram partem* rule.

33 Provided these rules were complied with, the adjudicators retained the right to change their minds and to modify a first draft of a decision. Such changes would not create a presumption that something improper had occurred during the consultation process. In the absence of other evidence to the contrary, the presumption of regularity of administrative procedures would apply.

raisonnable de partialité ou de manque d'indépendance.

Il importe de signaler que l'affaire *Consolidated-Bathurst* portait aussi sur la procédure de consultation suivie par la CTRO. Notre Cour a décidé à la majorité que les procédures de cette nature ne créaient pas de crainte raisonnable de partialité ou de manque d'indépendance.

Les principes élaborés dans *Consolidated-Bathurst* ont également été appliqués dans l'arrêt ultérieur *Tremblay*, précité. Dans *Tremblay*, notre Cour a jugé que les procédures de consultation étaient imposées aux décideurs par les autorités supérieures et qu'elles étaient si rigides qu'elles liaient les juges des faits et compromettaient donc leur indépendance.

2. La règle *audi alteram partem*

L'autre question en litige dans *Consolidated-Bathurst* portait sur l'effet de la procédure de consultation sur l'application de la règle *audi alteram partem*. Dans ses motifs, le juge Gonthier a admis qu'il existait des risques à cet égard, mais il était d'avis que ces risques pouvaient être éliminés si on veillait à ce que les parties soient avisées de toute nouvelle question soulevée pendant la discussion et qu'elles aient la possibilité de répondre de manière efficace. Le simple fait que des questions ayant déjà été débattues par les parties soient discutées de nouveau au cours d'une réunion plénière de la Commission ne constituait pas une violation de la règle *audi alteram partem*.

Dans la mesure où ces règles étaient respectées, les arbitres conservaient le droit de changer d'idée et de modifier un projet de décision initial. Une modification de cette nature ne donnait pas lieu à la présomption que quelque chose d'inapproprié s'était produit pendant le processus de consultation. En l'absence d'éléments de preuve contraires, la présomption de régularité des procédures administratives s'appliquait.

B. *Application to the Case at Hand*

These principles, as set out in *Consolidated-Bathurst*, *supra*, and applied in *Tremblay*, *supra*, govern the present case. As the appellant bears the burden of establishing that the rules of natural justice have been breached, so it must demonstrate that there was inappropriate tampering with the assessment of evidence.

1. Evidentiary Problems

The appellant faced difficult evidentiary problems when it launched its application for judicial review. The only facts it knew were that a draft decision dismissing the grievance had been circulated, that a full meeting of the OLRB had been called at the request of Vice-Chair Susan Tacon, that such a meeting had indeed been held and that the final arbitration award upheld the grievance.

The final decision was silent as to what had happened during the full Board meeting. As stated above, there has been no request for reconsideration, and thus, perhaps, an opportunity was lost to obtain information on the consultation process within the OLRB. From these facts, there is no direct evidence of improper tampering with the decision of the panel. Ellis-Don sought to strengthen its case by obtaining evidence of what had happened during the consultation process. The appellant tried to get this evidence through an interlocutory motion to examine certain members and officers of the OLRB. After the dismissal of its motion by the Divisional Court, Ellis-Don found itself in an impasse, as it could not obtain evidence of the process followed in the particular case from the OLRB through the interrogation of its members or officers.

The appellant then tried a new tack during the hearing of its application for judicial review. The purpose of its argument remained the same: to establish an improper interference by the full Board in the decision of the panel. Thus, it sought to convince the courts that the change in the deci-

B. *Application à la présente affaire*

34 Ces principes, énoncés dans *Consolidated-Bathurst*, précité, et appliqués dans *Tremblay*, précité, régissent la présente affaire. De la même manière que l'appelante a le fardeau de démontrer que les règles de justice naturelle n'ont pas été respectées, elle doit également démontrer que l'évaluation de la preuve a fait l'objet de manipulation.

1. Les problèmes de preuve

35 L'appelante faisait face à de difficiles problèmes de preuve lorsqu'elle a institué sa demande de contrôle judiciaire. Les seuls faits qu'elle connaissait étaient qu'un projet de décision rejetant le grief avait été diffusé, qu'une réunion plénière de la CRTO avait été convoquée à la demande de la vice-présidente Susan Tacon, que cette réunion avait effectivement eu lieu et que la décision arbitrale définitive avait confirmé le grief.

36 La décision définitive ne faisait pas état de ce qui s'était passé à la réunion plénière de la Commission. Comme je l'ai mentionné précédemment, aucune demande de nouvel examen n'a été présentée, de sorte que la possibilité d'obtenir des renseignements sur le processus de consultation de la CRTO a peut-être été perdue. À la lumière de ces faits, il n'existe aucune preuve directe de manipulation de la décision de la formation. Ellis-Don a tenté de renforcer sa preuve en obtenant des éléments de preuve sur ce qui s'était passé pendant le processus de consultation. Elle a cherché à obtenir ces éléments de preuve au moyen d'une requête interlocutoire pour interrogatoire de certains membres et de certains dirigeants de la CRTO. Sa requête ayant été rejetée par la Cour divisionnaire, Ellis-Don s'est trouvée dans une impasse, ne pouvant pas obtenir de la CRTO d'éléments de preuve sur le processus suivi dans son cas en interrogeant ses membres ou ses dirigeants.

37 L'appelante a alors emprunté une nouvelle avenue au cours de l'audition de sa demande de contrôle judiciaire. Le but de son argument est resté le même : démontrer l'ingérence inappropriée de l'ensemble des membres de la Commission dans la décision de la formation. Elle a donc cherché à

sion was of a factual nature and that it could properly be implied that a discussion of the facts had occurred at the full Board meeting. It also suggested that the threshold for judicial review in such a case was an apprehension of breach of natural justice and that there was no need to establish an actual breach of the *audi alteram partem* rule. It argued that such an apprehended breach of natural justice had been established through a displacement of the presumption of regularity of the administrative proceedings of the Board. According to the appellant, it fell to the respondents to establish that the proceedings had not been tainted by any breach of natural justice. Absent evidence to this effect, the Court should find that there was a breach of natural justice, that the Board had been biased and that the *audi alteram partem* rule had been violated. This unrebutted presumption would justify granting the application for judicial review and quashing the decision of the Board.

convaincre les cours que la modification de la décision était de nature factuelle et qu'on pouvait à bon droit déduire que les faits avaient été abordés à la réunion plénière de la Commission. Elle a également avancé que le seuil permettant le contrôle judiciaire dans un tel cas était la crainte de violation des règles de justice naturelle et qu'il n'était pas nécessaire de démontrer l'existence de violation de la règle *audi alteram partem*. Elle a prétendu que cette crainte de violation des règles de justice naturelle avait été établie au moyen du déplacement de la présomption de régularité des procédures administratives de la Commission. Selon l'appelante, il incombait aux intimées de démontrer que les procédures n'avaient été viciées par aucune violation des règles de justice naturelle. Faute de preuve en ce sens, notre Cour devait statuer qu'il y avait eu violation des règles de justice naturelle, que la Commission avait fait preuve de partialité et que la règle *audi alteram partem* n'avait pas été respectée. Cette présomption non réfutée devait justifier l'accueil de la demande de contrôle judiciaire et l'annulation de la décision de la Commission.

2. The Nature of the Change

2. La nature de la modification

38 The appeal rests on the argument that there was a change in the assessment of facts. It stressed that the only explanation for the change was the Board's acceptance of the factual theory advanced by the Union that had originally been rejected in the draft. Starting from that premise, Ellis-Don argued that in the circumstances, there were enough elements to reverse the presumption of regularity of the proceedings of the Board and to conclude that factual matters had been discussed at the full Board meeting. Thus, we first have to examine the nature of the change in question.

Le pourvoi repose sur l'argument qu'une modification de l'évaluation des faits a eu lieu. L'appelante a soutenu que cette modification ne s'expliquait que par l'acceptation par la Commission de la théorie factuelle avancée par le syndicat, qui avait initialement été rejetée dans le projet. À partir de cette prémisse, Ellis-Don a fait valoir que, dans les circonstances, il se trouvait assez d'éléments pour écarter la présomption de régularité de la procédure suivie par la Commission et conclure que des questions de fait avaient été discutées à sa réunion plénière. Par conséquent, nous devons en premier lieu examiner la nature de la modification en question.

39 From the outset, it must be conceded that the distinction between mixed questions of fact and law as opposed to pure questions of law is difficult and that the lines between them are often blurred. Moreover, a consultation procedure will not take place in a purely abstract manner. Even if the factual background is accepted, it will be considered

D'entrée de jeu, il faut admettre que la distinction entre les questions de fait et de droit et les questions de droit pur est difficile à faire et que la frontière entre elles est souvent floue. De plus, une procédure de consultation ne se déroule pas d'une manière purement abstraite. Même si les faits sont acceptés, ils sont examinés et la discussion porte

and the discussion will take place in relation to it. Sometimes intricate questions may arise. There may be discussions of the legal characterization of facts or of fact selection itself. These are especially likely when a critical part of the evidence has been disregarded and when this error might change the whole appreciation of the law applicable to the case.

In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, an administrative law case, Iacobucci J. examined the difficulty of drawing distinctions between questions of law and fact and attempted to define them as follows (at paras. 35-37):

Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa.*

For example, the majority of the British Columbia Court of Appeal in *Pezim*, *supra*, concluded that it was an error of law to regard newly acquired information on the value of assets as a "material change" in the affairs of a company. It was common ground in that case that the proper test was whether the information constituted a material change; the argument was about whether the acquisition of information of a certain kind qualified as such a change. To some extent, then, the question resembled one of mixed law and fact. But the question was one of law, in part because the words in question were present in a statutory provision and questions of statutory interpretation are generally questions of law, but also because the point in controversy was one that might potentially arise in many cases in the future: the argument was about kinds of information and not merely about the particular information that was at issue

sur ces faits. Des questions complexes peuvent parfois surgir. La qualification juridique des faits et le choix même des faits peuvent être abordés. Cela est particulièrement probable lorsqu'une partie essentielle de la preuve n'a pas été prise en considération et que cette erreur est susceptible de modifier toute l'appréciation du droit applicable à l'affaire.

40 Dans l'arrêt *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, une affaire de droit administratif, le juge Iacobucci a examiné la difficulté de distinguer entre les questions de droit et les questions de fait et il a tenté de les définir ainsi, aux par. 35-37 :

En résumé, les questions de droit concernent la détermination du critère juridique applicable; les questions de fait portent sur ce qui s'est réellement passé entre les parties; et, enfin, les questions de droit et de fait consistent à déterminer si les faits satisfont au critère juridique. Un exemple simple permettra d'illustrer ces concepts. En droit de la responsabilité civile délictuelle, la question de savoir en quoi consiste la «négligence» est une question de droit. Celle de savoir si le défendeur a fait ceci ou cela est une question de fait. Une fois qu'il a été décidé que la norme applicable est la négligence, la question de savoir si le défendeur a respecté la norme de diligence appropriée est une question de droit et de fait. Toutefois, je reconnais que la distinction entre les questions de droit, d'une part, et celles de droit et de fait, d'autre part, est difficile à faire. Parfois, ce qui semble être une question de droit et de fait se révèle une question de droit, ou vice versa.

Par exemple, dans *Pezim*, précité, la Cour d'appel de la Colombie-Britannique à la majorité a conclu que constituait une erreur de droit le fait de considérer que de nouveaux renseignements sur la valeur d'éléments d'actif étaient un «changement important» dans les affaires d'une société. Tous étaient d'accord pour dire, dans cette affaire, que le critère approprié était de déterminer si les renseignements constituaient un changement important; le débat portait sur la question de savoir si l'obtention d'un certain type de renseignements pouvait être qualifiée de changement de cette nature. Dans une certaine mesure, donc, la question ressemblait à une question de droit et de fait. Il s'agissait cependant d'une question de droit, en partie parce que les mots en cause se trouvaient dans une disposition législative et que les questions d'interprétation des lois sont généralement des questions de droit, mais aussi parce que le point liti-

in that case. The rule on which the British Columbia Securities Commission seemed to rely — that newly acquired information about the value of assets can constitute a material change — was a matter of law, because it had the potential to apply widely to many cases.

gieux était susceptible de se présenter à nouveau dans bon nombre de cas dans le futur: le débat concernait les types de renseignements et non simplement les renseignements particuliers visés par l'instance. La règle sur laquelle la British Columbia Securities Commission semblait s'être appuyée — le fait que de nouveaux renseignements sur la valeur d'éléments d'actif peuvent constituer un changement important — était une question de droit, parce qu'elle était susceptible de s'appliquer à un grand nombre de cas.

By contrast, the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [Emphasis added.]

À l'opposé, il arrive que les faits dans certaines affaires soient si particuliers, de fait qu'ils soient si uniques, que les décisions concernant la question de savoir s'ils satisfont aux critères juridiques n'ont pas une grande valeur comme précédents. Si une cour décidait que le fait d'avoir conduit à une certaine vitesse, sur une route donnée et dans des conditions particulières constituait de la négligence, sa décision aurait peu de valeur comme précédent. Bref, plus le niveau de généralité de la proposition contestée se rapproche de la particularité absolue, plus l'affaire prend le caractère d'une question d'application pure, et s'approche donc d'une question de droit et de fait parfaite. Voir R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), aux pp. 103 à 108. Il va de soi qu'il n'est pas facile de dire avec précision où doit être tracée la ligne de démarcation; quoique, dans la plupart des cas, la situation soit suffisamment claire pour permettre de déterminer si le litige porte sur une proposition générale qui peut être qualifiée de principe de droit ou sur un ensemble très particulier de circonstances qui n'est pas susceptible de présenter beaucoup d'intérêt pour les juges et les avocats dans l'avenir. [Je souligne.]

(See also, in a criminal law context, the remarks of Arbour J. in *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15, at paras. 21-22.)

(Voir également, dans le contexte du droit criminel, les observations du juge Arbour dans l'arrêt *R. c. Biniaris*, [2000] 1 R.C.S. 381, 2000 CSC 15, par. 21-22.)

41 In the case at hand, it appears the change in the decision of the panel concerned a matter of law and policy. The general question in issue was the problem of abandonment of bargaining rights. The factual situation as such was well established. It was not disputed that when requested to list the employers for whose employees it held bargaining rights, the IBEW, Local 353 omitted the name of Ellis-Don. It was also conceded that the Union had

En l'espèce, il appert que la modification de la décision de la formation portait sur une question de droit et de principe. La question générale en litige était le problème de la renonciation aux droits de négociation. Les faits en soi étaient bien établis. Il n'était pas contesté que lorsqu'elle a dû énumérer les employeurs relativement auxquels elle avait des droits de négociation, la section locale 353 de la FIOE a omis d'inscrire le nom de Ellis-Don. Il était également admis que le syndicat n'avait présenté aucune preuve à l'audience devant

not offered any evidence at the hearing before the panel as to the reasons for this failure.

The position taken in the first draft was that the failure to list Ellis-Don in Schedule F created a rebuttable presumption of abandonment. The final decision discarded the idea that there was such a presumption and stated that the omission of Ellis-Don's name from the schedule merely constituted one of the factors to be considered in deciding the issue of abandonment. The change consists in a different conclusion as to the legal consequences to be derived from the facts, which is a pure question of law. Moreover, it does not constitute the application of an entirely new policy: the change in the final decision brought it more in line with a number of cases decided by the OLRB that made it very difficult to establish an abandonment of bargaining rights. (See, for example, *Lorne's Electric*, [1987] O.L.R.B. Rep. 1405, at pp. 1408-10).

The appellant also argued that the change was prompted by a re-assessment of the particular facts and that it did not really concern a matter of policy and law. On the record before us, this amounts to little more than speculation.

3. The Standard for Judicial Review

The appellant relies heavily on the following statement of Gonthier J. in *Tremblay*, *supra*, at pp. 980-81:

A litigant who sees a "decision" favourable to him changed to an unfavourable one shall not think that there has been a normal consultation process. . . .

This comment is quoted out of context. It would be useful to quote at length the paragraph from which it was excerpted.

Finally, I would note that the procedure of early signature of draft decisions by members and assessors followed in the case at bar seems to me unadvisable. Although this procedure may be practical, it only adds to the appearance of bias when a decision maker decides to alter his opinion after free consultation with his col-

la formation du secteur de la construction relativement aux motifs de cette omission.

42 La position adoptée dans le projet initial était que l'omission d'inscrire Ellis-Don à l'annexe F avait donné naissance à une présomption réfutable de renonciation. La décision définitive a écarté l'idée d'une présomption de cette nature et a indiqué que l'absence du nom de Ellis-Don de l'annexe n'était qu'un des facteurs qui devaient être examinés pour trancher la question de la renonciation. La modification consiste en une conclusion différente quant aux effets juridiques découlant des faits, ce qui constitue une pure question de droit. De plus, elle ne constitue pas l'application d'un principe entièrement nouveau : la modification dans la décision définitive a rendu cette dernière plus compatible avec de nombreuses affaires tranchées par la CRTO qui ont fait en sorte qu'il est devenu très difficile de faire la preuve de la renonciation à des droits de négociation. (Voir, par exemple, *Lorne's Electric*, [1987] O.L.R.B. Rep. 1405, p. 1408 à 1410.)

43 L'appelante a également prétendu que la modification avait été causée par une réévaluation des faits en cause et qu'elle ne portait pas vraiment sur une question de principe et de droit. Le dossier dont nous sommes saisis indique que cet argument relève tout au plus d'une hypothèse.

3. La norme de contrôle judiciaire

44 L'appelante insiste beaucoup sur la déclaration suivante faite par le juge Gonthier dans l'arrêt *Tremblay*, précité, p. 980-981 :

Le justiciable qui voit une «décision» qui lui était favorable se changer en décision défavorable ne pensera pas qu'il s'agit du processus normal de consultation . . .

45 Comme ce commentaire est cité hors contexte, il serait bon de le replacer dans son contexte :

Je souligne finalement que la procédure de signature anticipée des projets de décisions par les membres et assesseurs suivie en l'espèce m'apparaît être à déconseiller. Même si cette procédure s'avère pratique, elle ne fait qu'ajouter à l'apparence de partialité lorsqu'un décideur décide de modifier son opinion après libre consul-

leagues. A litigant who sees a "decision" favourable to him changed to an unfavourable one will not think that there has been a normal consultation process; rather, he will have the impression that external pressure has definitely led persons who were initially favourable to his case to change their minds.

tation avec ses collègues. Le justiciable qui voit une «décision» qui lui était favorable se changer en décision défavorable ne pensera pas qu'il s'agit du processus normal de consultation; il aura plutôt l'impression qu'une pression extérieure a bel et bien fait changer d'avis les personnes d'abord favorables à sa cause.

In this paragraph, it appears that Gonthier J. did not state a principle of law, but merely commented on the effect of an administrative practice that required the signature of draft reasons.

Dans ce paragraphe, le juge Gonthier ne semble pas avoir énoncé un principe de droit, mais plutôt avoir simplement fait un commentaire sur l'effet d'une pratique administrative exigeant la signature d'un projet de motifs.

46 According to the appellant, a change from a favourable to an unfavourable result demonstrates an apparent failure of natural justice. The appellant asserts that its burden is limited to the demonstration of an apparent failure of natural justice and that this should suffice to justify the judicial review of the decision of the Board. The appellant would not have to establish an actual breach.

Selon l'appelante, modifier une décision favorable en une décision défavorable établit une apparence d'absence de justice naturelle. L'appelante affirme qu'elle ne doit démontrer que l'apparence d'absence de justice naturelle et que cela devrait suffire pour justifier le contrôle judiciaire de la décision de la Commission. Elle n'aurait pas à établir l'existence d'une violation réelle des règles de justice naturelle.

47 Such a test was never adopted by the law. Breaches of natural justice are grounds for judicial review, but this complex notion covers a number of very diverse situations, particularly bias and lack of independence of the adjudicator and the *audi alteram partem* rule in all its variations.

Le droit n'a jamais adopté ce critère. La violation des règles de justice naturelle constitue un motif de contrôle judiciaire, mais cette notion complexe s'applique à diverses situations très différentes, tout particulièrement la partialité et le manque d'indépendance de l'arbitre ainsi que la règle *audi alteram partem* sous toutes ses formes.

48 The appellant tries to extend to every case of breach of natural justice an approach limited to the problem of bias and lack of independence. The test of appearance of a breach was developed for the application of the concept of bias mainly in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394. This test was reaffirmed in *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 689, which dealt with reasonable apprehension of lack of independence. In the case of bias, the courts faced the problem of establishing the state of mind of the decision-maker, evidence of which is often difficult to apprehend directly. Therefore, the test adopted had to be usually limited to the demonstration of a reasonable apprehension that the mind of the adjudicator might be biased. If a requirement to establish actual bias had been adopted as a general principle,

L'appelante tente de rendre applicable à tous les cas de violation des règles de justice naturelle une démarche limitée au problème de la partialité et du manque d'indépendance. Le critère de l'apparence de violation a été élaboré en vue de l'application du concept de la partialité principalement dans l'arrêt *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369, p. 394. Ce critère a été confirmé de nouveau dans l'arrêt *Valente c. La Reine*, [1985] 2 R.C.S. 673, p. 689, qui portait sur la crainte raisonnable de manque d'indépendance. Dans le cas de la partialité, les tribunaux étaient placés devant le problème d'établir l'état d'esprit de l'arbitre, preuve souvent difficile à saisir directement. Par conséquent, le critère adopté devait généralement se limiter à la preuve d'une crainte raisonnable que l'esprit de l'arbitre était susceptible d'être biaisé. Si l'on avait adopté

judicial review for bias would have been a rare event indeed.

comme principe général l'obligation de prouver l'existence d'une partialité réelle, le contrôle judiciaire pour motif de partialité aurait vraiment été un événement rare.

In the case of an alleged violation of the *audi alteram partem* rule, even if it can be difficult to obtain evidence to that effect in certain cases, the applicant for judicial review must establish an actual breach. There is no authority for the proposition put forward by the appellant that an "apprehended" breach is sufficient to trigger judicial review. In *Consolidated-Bathurst*, *supra*, the reasons of Gonthier J. clearly distinguished the two problems: bias and *audi alteram partem*. On the one hand, Gonthier J. examined whether the process of institutional consultation created an apprehension of bias. While reviewing the application of the *audi alteram partem* rule, he never indicated that an apprehension of breach was sufficient to justify intervention. Indeed, he found that the record before the Court revealed no evidence that any other issues or arguments had been discussed at the full Board meeting. Therefore, he held that the appellant had failed to prove a breach of the *audi alteram partem* rule: see *Consolidated-Bathurst*, at pp. 339-40. Thus, one has to look at the nature of the natural justice problem involved to determine the threshold for judicial review. *Consolidated-Bathurst* does not stand as authority for the assertion that the threshold for judicial review in every case of alleged breach of natural justice is merely an apprehended breach of natural justice.

49 Dans le cas d'une présumée violation de la règle *audi alteram partem*, même s'il peut s'avérer difficile de prouver ce fait dans certains cas, celui qui demande le contrôle judiciaire doit démontrer l'existence d'une violation réelle. Aucune décision n'appuie la proposition avancée par l'appelante, selon laquelle une « crainte » de violation suffit pour donner lieu au contrôle judiciaire. Dans *Consolidated-Bathurst*, précité, le juge Gonthier a fait une distinction claire entre les deux problèmes : la partialité et la règle *audi alteram partem*. D'une part, il a examiné la question de savoir si le processus de consultation institutionnelle avait donné lieu à une crainte de partialité. En étudiant l'application de la règle *audi alteram partem*, il n'a jamais indiqué qu'une crainte de violation suffisait pour justifier une intervention. En fait, il était d'avis que le dossier dont notre Cour était saisie ne révélait aucune preuve que d'autres questions ou arguments avaient été abordés à la réunion plénière de la Commission. Il a donc conclu que l'appelant n'avait pas réussi à démontrer l'existence d'une violation de la règle *audi alteram partem* : voir *Consolidated-Bathurst*, p. 339-340. Par conséquent, il faut examiner la nature du problème de justice naturelle en cause pour déterminer le seuil justifiant le contrôle judiciaire. L'arrêt *Consolidated-Bathurst* n'appuie pas l'affirmation que le seuil justifiant le contrôle judiciaire dans tous les cas de présumée violation des règles de justice naturelle est simplement la crainte de violation de ces règles.

In support of its argument, the appellant also invoked the ruling of this Court in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, where Dickson J. (as he then was) wrote at p. 1116:

50 À l'appui de son argument, l'appelante a également invoqué la décision rendue par notre Cour dans *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105, où le juge Dickson (plus tard Juge en chef) a écrit à la p. 1116 :

> We [i.e., the Court] are not concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.

> Nous [c.-à-d., notre Cour] ne sommes pas concernés ici par la preuve de l'existence d'un préjudice réel mais plutôt par la possibilité ou la probabilité qu'aux yeux des gens raisonnables, il existe un préjudice.

However, this excerpt does not have the meaning ascribed to it by the appellant. In *Kane*, the applicant had established an actual breach of the *audi alteram partem* rule: during the deliberations of the Board of Governors of UBC on a disciplinary matter, the President of the University had provided the decision-makers with supplementary facts in the absence of the parties. Dickson J., writing for the majority, simply said that once a breach of the *audi alteram partem* rule had been made out, it was not necessary to prove that this breach had caused an actual prejudice to the litigant, but only the likelihood of it.

Cet extrait n'a toutefois pas la signification que lui attribue l'appelante. Dans *Kane*, le demandeur avait démontré l'existence d'une violation réelle de la règle *audi alteram partem* : au cours des délibérations du Conseil d'administration de l'U.C.-B. dans une affaire disciplinaire, le président de l'université avait fait part aux arbitres de faits supplémentaires en l'absence des parties. S'exprimant au nom des juges majoritaires, le juge Dickson a simplement affirmé qu'une fois la violation de la règle *audi alteram partem* établie, il n'était pas nécessaire de prouver que cette violation avait causé un préjudice réel au justiciable, mais seulement de démontrer la probabilité de préjudice.

51 In the present case, the Court must apply the normal standards of judicial review in matters involving the *audi alteram partem* rule. In support of its allegation of a breach of the *audi alteram partem* rule, Ellis-Don had to demonstrate an actual breach. As stated above, it could not get directly at the evidence after the dismissal of its interlocutory motion. The record as such does not indicate any breach of this nature. The only information available is that discussions took place at the full Board meeting and that a change was made on a question of law and policy in the draft decision. This is not sufficient to warrant judicial review.

Dans la présente affaire, notre Cour doit appliquer les normes de contrôle judiciaire habituelles dans les questions portant sur la règle *audi alteram partem*. Pour étayer son allégation de violation de la règle *audi alteram partem*, Ellis-Don devait démontrer l'existence d'une violation réelle. Comme je l'ai mentionné précédemment, elle n'a pas pu obtenir de preuve directe à la suite du rejet de sa requête interlocutoire. À sa face même, le dossier n'indique aucune violation de cette nature. Les seuls renseignements disponibles sont que des discussions ont eu lieu à la réunion plénière de la Commission et qu'une modification a été apportée relativement à une question de droit et de principe qui figurait dans le projet de décision. Cela n'est pas suffisant pour justifier un contrôle judiciaire.

52 The case reveals a tension between the fairness of the process and the principle of deliberative secrecy. The existence of this tension was conceded by Gonthier J. in *Tremblay*, *supra*, at pp. 965-66. Undoubtedly, the principle of deliberative secrecy creates serious difficulties for parties who fear that they may have been the victims of inappropriate tampering with the decision of the adjudicators who actually heard them. Even if this Court has refused to grant the same level of protection to the deliberations of administrative tribunals as to those of the civil and criminal courts, and would allow interrogation and discovery as to the process followed, Gonthier J. recognized that this principle of deliberative secrecy played an impor-

La présente affaire révèle l'existence d'une tension entre le caractère équitable du processus et le principe du secret du délibéré. L'existence de cette tension a été admise par le juge Gonthier dans *Tremblay*, précité, p. 965-966. Il ne fait aucun doute que le principe du secret du délibéré crée de graves difficultés aux parties qui craignent avoir été victimes de manipulation de la décision des arbitres qui les ont entendues. Bien que notre Cour ait refusé d'accorder le même niveau de protection aux délibérations des tribunaux administratifs qu'à celles des cours de justice civile et criminelle et qu'elle n'ait pas permis l'interrogatoire et l'interrogatoire préalable relativement au processus suivi, le juge Gonthier a reconnu que ce principe du

tant role in safeguarding the independence of administrative adjudicators.

Deliberative secrecy also favours administrative consistency by granting protection to a consultative process that involves interaction between the adjudicators who have heard the case and the members who have not, within the rules set down in *Consolidated-Bathurst*, *supra*. Without such protection, there could be a chilling effect on institutional consultations, thereby depriving administrative tribunals of a critically important means of achieving consistency.

Satisfying those requirements of consistency and independence comes undoubtedly at a price, this price being that the process becomes less open and that litigants face tough hurdles when attempting to build the evidentiary foundation for a successful challenge based on alleged breaches of natural justice (see, e.g., H. N. Janisch, "Consistency, Rulemaking and *Consolidated-Bathurst*" (1991), 16 *Queen's L.J.* 95; D. Lemieux, "L'équilibre nécessaire entre la cohérence institutionnelle et l'indépendance des membres d'un tribunal administratif: *Tremblay* c. *Québec (Commission des affaires sociales)*" (1992), 71 *Can. Bar Rev.* 734). The present case provides an excellent example of those difficulties.

After the dismissal of its interlocutory motion, the appellant could not examine the officers of the Board on the process that had been followed. In the absence of any further evidence, this Court cannot reverse the presumption of regularity of the administrative process simply because of a change in the reasons for the decision, especially when the change is limited on its face to questions of law and policy, as discussed above. A contrary approach to the presumption would deprive administrative tribunals of the independence that the principle of deliberative secrecy assures them in their decision-making process. It could also jeopardize institutionalized consultation proceedings that have become more necessary than ever to

secret du délibéré jouait un rôle important dans la protection de l'indépendance des arbitres administratifs.

53 Le secret du délibéré favorise également la cohérence administrative au moyen de la protection qu'il confère à un processus consultatif qui comporte une interaction entre les arbitres qui ont entendu l'affaire et les membres qui ne l'ont pas entendue, dans le cadre des règles établies dans *Consolidated-Bathurst*, précité. Sans cette protection, il risque d'y avoir un effet paralysant sur les consultations institutionnelles, ce qui priverait les tribunaux administratifs d'un moyen essentiel d'assurer la cohérence.

54 Il ne fait aucun doute que le respect de ces exigences de cohérence et d'indépendance est assorti d'un prix, ce prix étant que le processus devient moins ouvert et que les justiciables font face à de grands obstacles lorsqu'ils tentent de bâtir le fondement probatoire permettant d'avoir gain de cause dans une contestation fondée sur de présumées violations des règles de justice naturelle (voir, p. ex., H. N. Janisch, « Consistency, Rulemaking and *Consolidated-Bathurst* » (1991), 16 *Queen's L.J.* 95; D. Lemieux, « L'équilibre nécessaire entre la cohérence institutionnelle et l'indépendance des membres d'un tribunal administratif : *Tremblay* c. *Québec (Commission des affaires sociales)* » (1992), 71 *R. du B. can.* 734). La présente affaire fournit un excellent exemple de ces difficultés.

55 Après le rejet de sa requête interlocutoire, l'appelante n'a pu interroger les responsables de la Commission au sujet du processus suivi. En l'absence de toute preuve additionnelle, notre Cour ne peut pas écarter la présomption de régularité du processus administratif simplement en raison d'une modification dans les motifs de la décision, surtout lorsque la modification est limitée à sa face même à des questions de droit et de principe, comme je l'ai mentionné précédemment. Une méthode contraire relative à la présomption priverait les tribunaux administratifs de l'indépendance que le principe du secret du délibéré leur confère dans le cadre de leur processus décisionnel. Cela pourrait également compromettre des procédures

ensure the consistency and predictability of the decisions of administrative tribunals.

4. Conclusion on the Grounds for Judicial Review

56 The record shows no indication of a change on the facts, of impropriety or of a violation of the principles governing institutional consultation. Any intervention would have to be based on mere speculation about what might have happened during the consultation with the full Board. The judicial review of a decision of an administrative body may not rest on speculative grounds. Thus, the Divisional Court and the Court of Appeal of Ontario correctly applied the rules governing judicial review when they dismissed the appellant's application.

5. Failure to Ask for Reconsideration

57 There was also some discussion in this Court about the failure of the appellant to ask for reconsideration. However, even the Board conceded that in the circumstances, reconsideration did not constitute an absolute prerequisite to judicial review. In the present case, it might have been a good tactical move that would perhaps have elicited some information from the Board about its consultation process, but the principles of judicial review did not require the use or exhaustion of this particular remedy. Of course, in some cases, failure to seek reconsideration might be a factor to be weighed by superior courts when determining whether to grant a remedy in an application for judicial review.

VII. Conclusion

58 For these reasons, I would dismiss the appeal with costs.

de consultation institutionnelle, devenues plus nécessaires que jamais pour assurer la cohérence et la prévisibilité des décisions des tribunaux administratifs.

4. Conclusion relative aux motifs de contrôle judiciaire

Le dossier ne donne aucune indication d'une modification quant aux faits, d'une irrégularité ou d'une violation des principes régissant la consultation institutionnelle. Toute intervention serait nécessairement fondée sur de simples hypothèses au sujet de ce qui a pu se passer pendant la consultation à la réunion plénière de la Commission. Le contrôle judiciaire de la décision d'un organisme administratif ne peut pas reposer sur des motifs hypothétiques. Par conséquent, la Cour divisionnaire et la Cour d'appel de l'Ontario ont correctement appliqué les règles régissant le contrôle judiciaire lorsqu'elles ont rejeté la demande de l'appelante.

5. L'omission de demander un nouvel examen

L'omission de l'appelante de demander un nouvel examen a également été abordée devant notre Cour. Toutefois, même la Commission a admis que, dans les circonstances, un nouvel examen ne constituait pas un préalable obligatoire au contrôle judiciaire. En l'espèce, cela aurait pu constituer une bonne tactique qui aurait peut-être permis de tirer des renseignements de la Commission au sujet de son processus de consultation, mais les principes applicables au contrôle judiciaire n'exigeaient pas l'usage ou l'épuisement de ce recours particulier. Il va sans dire que, dans certains cas, l'omission de demander un nouvel examen pourrait constituer un facteur qu'une cour de juridiction supérieure devrait prendre en considération pour déterminer s'il y a lieu d'accorder un redressement dans le cadre d'une demande de contrôle judiciaire.

VII. Conclusion

Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens.

The reasons of Major and Binnie JJ. were delivered by

BINNIE J. (dissenting) — It is occasionally observed that the most important person in the hearing room is the party that has just lost a case. Whatever may be the loser's bitterness or incredulity at the outcome, the overriding imperative is that the outcome was — and was seen to be — reached impartially under a fair procedure. That is the overriding issue in this appeal.

The appellant, a general contractor in the Ontario construction industry, claims that 30 years ago the respondent union abandoned whatever bargaining rights it held for the employees of the appellant and its subcontractors. It complains that a panel of the Ontario Labour Relations Board that had heard weeks of evidence and argument and which reached an initial decision in the appellant's favour, subsequently abdicated its adjudicative responsibilities in favour of a full Board meeting. The Chair of the Board, the Alternate Chair, the 20 Vice-Chairs and about 40 other members were invited to the meeting to discuss the decision before its release in the absence of the parties whose interests were directly at stake. The appellant was given no opportunity to address evidence or argument to this wider audience.

The appellant's complaint is thus that a decision in its favour, based on what the Board itself characterized as an issue of fact, was changed to one against it immediately following a full Board meeting called specifically to consider the reasons for decision in this specific case. It further complains that the Board resisted every legal avenue for the appellant to shed further light on how or why that change occurred. The appellant says it has been unfairly dealt with.

Version française des motifs des juges Major et Binnie rendus par

LE JUGE BINNIE (dissident) — On fait parfois remarquer que la personne la plus importante dans la salle d'audience est la partie qui vient tout juste de perdre une cause. Malgré l'amertume ou l'incrédulité du perdant face à l'issue de l'affaire, l'exigence prédominante est que la conclusion ait été, et ait paru être, tirée de façon impartiale dans le cadre d'une procédure équitable. Il s'agit de la question prédominante dans le présent pourvoi. 59

L'appelante, un entrepreneur général œuvrant dans l'industrie de la construction en Ontario, prétend qu'il y a 30 ans le syndicat intimé a renoncé aux droits de négociation qu'il pouvait détenir relativement à ses employés et à ses sous-traitants. Elle se plaint qu'une formation de la Commission des relations de travail de l'Ontario, qui a examiné des éléments de preuve et entendu des arguments pendant des semaines et a rendu une décision initiale en faveur de l'appelante, a ensuite abandonné ses responsabilités décisionnelles en faveur de la Commission en réunion plénière. Le président de la Commission, le président suppléant, les 20 vice-présidents et quelque 40 autres membres ont été invités à la réunion, avant que la décision ne soit rendue publique, pour en discuter en l'absence des parties dont les intérêts étaient directement touchés. Aucune possibilité n'a été offerte à l'appelante de présenter des éléments de preuve ou des arguments à cet auditoire plus nombreux. 60

La plainte de l'appelante réside donc dans le fait qu'une décision avait été rendue en sa faveur, à la lumière de ce que la Commission elle-même qualifiait de question de fait, pour ensuite être modifiée à son désavantage suivant immédiatement une réunion plénière de la Commission convoquée précisément en vue de l'examen des motifs de la décision rendue dans cette affaire. L'appelante se plaint également du fait que la Commission a contesté tous les moyens légaux qui lui auraient permis d'en connaître davantage sur la façon dont ce changement s'est produit ou sur les raisons pour lesquelles il s'est produit. L'appelante dit avoir été traitée inéquitablement. 61

62 When this Court decided in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, that panel members could consult with the full Board on matters of policy as opposed to issues of fact, it was feared in some quarters that the integrity of administrative decision-making could appear to be compromised without effective redress. This appeal tests the limits of the *Consolidated-Bathurst* rule. It also tests the availability of effective redress for non-observance of those limits.

Lorsque notre Cour a décidé dans l'arrêt *SITBA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282, que les membres d'une formation pouvaient consulter la Commission dans son ensemble sur des questions de principe, par opposition à des questions de fait, certains craignaient que l'intégrité du processus de décision administrative puisse paraître compromise sans qu'il n'y ait de redressement efficace. Le présent pourvoi amène la Cour à se pencher sur les limites de la règle établie dans l'arrêt *Consolidated-Bathurst*. Il l'amène également à examiner la possibilité de redressement efficace en cas de non-respect de ces limites.

63 The Board has long treated abandonment of bargaining rights as a question of fact. In its initial decision prepared by the Vice-Chair, which the Board acknowledged to be authentic, the panel wrote that it "has found unequivocal evidence of abandonment by the applicant [union] of its bargaining rights prior to 1978" (para. 55), being the date when the Ontario construction industry went to province-wide bargaining. In its revised decision, the Vice-Chair wrote that "considering all the circumstances, the Board does not find that Local 353 abandoned its bargaining rights prior to the introduction of province-wide bargaining" ([1992] OLRB Rep. 147, at para. 54). The evidence discloses no explanation for the change other than the full Board meeting. In my view, *Consolidated-Bathurst* should not be interpreted to authorize the full Board to micro-manage the output of particular panels to the extent evident in this case. The concept of "policy" has been stretched beyond its breaking point. The principle that "he who hears must decide" should be vindicated. I would therefore allow the appeal and return the issue to be addressed by a different panel of the Board.

La Commission a longtemps considéré la renonciation aux droits de négociation comme une question de fait. Dans sa décision initiale préparée par la vice-présidente et dont la Commission a reconnu l'authenticité, la formation a écrit qu'elle [TRADUCTION] « a conclu à l'existence d'une preuve sans équivoque que la demanderesse [la FIOE] a renoncé à ses droits de négociation avant 1978 » (par. 55), soit la date à laquelle l'industrie de la construction en Ontario est passée à un régime de négociation à l'échelle de la province. Dans la décision révisée de la formation, la vice-présidente a écrit que [TRADUCTION] « vu l'ensemble des circonstances, la Commission estime que la section locale 353 n'a pas renoncé à ses droits de négociation avant la mise en œuvre du régime de négociation à l'échelle de la province » ([1992] OLRB Rep. 147, par. 54). Aucune explication pour le changement ne ressort de la preuve autre que la tenue de la réunion plénière de la Commission. Je suis d'avis que l'arrêt *Consolidated-Bathurst* ne doit pas être interprété comme permettant à la Commission dans son ensemble de faire la microgestion des conclusions tirées par des formations particulières d'une façon aussi évidente que dans la présente affaire. La notion de « principe » a été démesurément étendue. Le principe voulant que « celui qui entend doit trancher » doit être défendu. Je suis donc d'avis d'accueillir le pourvoi et de renvoyer la question pour qu'elle soit examinée par une formation différente de la Commission.

I have had the benefit of reading the reasons of my colleague LeBel J. and will not duplicate his description of the events leading to the present controversy or his review of the leading authorities. I will elaborate only as may be necessary to identify my points of disagreement.

J'ai eu l'avantage de lire les motifs de mon collègue le juge LeBel, et je ne reprendrai pas sa description des événements qui ont mené au présent litige ni son examen des précédents. J'apporterai des précisions seulement dans la mesure où cela m'est nécessaire pour indiquer les points sur lesquels je suis en désaccord. 64

Standard of Review

La norme de contrôle

The respondent union argues that the Board's decision should be set aside only if it is "patently unreasonable". This presupposes that the error was made within the Board's jurisdiction. The appellant contends that the panel of the Board lost jurisdiction when it called for a full Board meeting to discuss what it regards as a question of fact. Compliance with the rules of natural justice is a legal issue. The standard of review is correctness as noted in D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf), vol. 2, at para. 14:2300, pp. 14-14 and 14-15:

Le syndicat intimé prétend que la décision de la Commission ne doit être écartée que si elle est « manifestement déraisonnable ». Cela suppose que l'erreur a été commise dans le cadre de la compétence de la Commission. L'appelante soutient que la formation a perdu compétence lorsqu'elle a demandé la tenue d'une réunion plénière de la Commission pour discuter de ce qu'elle considère comme une question de fait. La conformité aux règles de justice naturelle est une question de droit. La norme de contrôle est celle de la décision correcte, comme l'ont souligné D. J. M. Brown et J. M. Evans dans *Judicial Review of Administrative Action in Canada* (feuilles mobiles), vol. 2, par. 14:2300, p. 14-14 et 14-15 : 65

> . . . whether the administrative decision-maker has breached the rules of natural justice or the duty of procedural fairness by failing to permit any, or adequate, participation by the person concerned will usually be assessed on the basis of "correctness." And the presence of a privative clause will be of no consequence in this regard.

> [TRADUCTION] . . . la question de savoir si le décideur administratif a contrevenu aux règles de justice naturelle ou à l'obligation d'équité procédurale en ne permettant pas à la personne concernée d'apporter sa participation ou une participation adéquate est généralement évaluée selon la norme de la « décision correcte ». Et la présence d'une clause privative n'a aucune conséquence à cet égard.

I think this is a correct statement of the law.

J'estime qu'il s'agit d'un énoncé correct du droit.

He Who Hears Must Decide

Celui qui entend doit trancher

Nothing is more fundamental to administrative law than the principle that he who hears must decide. *Consolidated-Bathurst*, *supra*, affirmed the vigour of this general rule while recognizing an exception for a full board meeting to give "quality and coherence" in matters of Board policy (p. 324). Policy issues were thought to be different from fact finding, and the latter was ruled off-

Rien n'est plus fondamental en droit administratif que le principe voulant que celui qui entend doit décider. L'arrêt *Consolidated-Bathurst*, précité, a confirmé l'importance de cette règle générale tout en reconnaissant l'existence d'une exception s'appliquant aux réunions plénières de la Commission et visant à donner de la « qualité et de [la] cohérence » à ses politiques (p. 324). Les questions de principe ont été jugées différentes de l'appréciation des faits, qui, a-t-on estimé, ne pouvait même pas 66

limits even for discussion at the full Board meeting, *per* Gonthier J., at p. 335:

> Full board meetings held on an *ex parte* basis do entail some disadvantages from the point of view of the *audi alteram partem* rule because the parties are not aware of what is said at those meetings and do not have an opportunity to reply to new arguments made by the persons present at the meeting. In addition, there is always the danger that the persons present at the meeting may discuss the evidence. [Emphasis added.]

At p. 339, Gonthier J. stressed that the *Consolidated-Bathurst* principle is limited to "legal or policy arguments *not* raising issues of fact" (emphasis added):

> It is true that on factual matters the parties must be given a "fair opportunity . . . for correcting or contradicting any relevant statement prejudicial to their view". . . . However, the rule with respect to legal or policy arguments not raising issues of fact is somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. [Emphasis added.]

67 It appears more probable than not that at the full Board meeting in this case there was a discussion about factual matters which likely included "statement[s] prejudicial to [the appellant's] view" because the panel subsequently reversed itself on the appropriateness of an adverse inference against the union for its failure to lead relevant evidence, reversed itself on the issue of abandonment, and thus reversed itself on the outcome of the hearing.

The Issue of Abandonment

68 The Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1 ("the Act") does not speak of abandonment of bargaining rights. The concept was developed in the Board's jurisprudence to allow termination of the bargaining rights of a union that fails to "actively promote those rights". These principles were adopted by the panel, citing earlier cases,

être abordée à la réunion plénière de la Commission, le juge Gonthier, à la p. 335 :

> Les réunions plénières de la Commission tenues *ex parte* comportent certains inconvénients sur le plan de la règle *audi alteram partem* parce que les parties ne savent pas ce qui a été dit à ces réunions et n'ont pas la possibilité de répliquer aux nouveaux arguments soumis par les personnes qui y ont assisté. De plus, il y a toujours le risque que les personnes présentes à la réunion discutent de la preuve. [Je souligne.]

À la p. 339, le juge Gonthier a souligné que le principe établi dans l'arrêt *Consolidated-Bathurst* se limitait aux « arguments juridiques ou de politique qui *ne* soulèvent *pas* de questions de fait » (italiques ajoutés) :

> Il est vrai que relativement aux questions de fait, les parties doivent obtenir une [TRADUCTION] «possibilité raisonnable [. . .] de corriger ou de contredire tout énoncé pertinent qui nuit à leur point de vue» [. . .] Cependant, la règle relative aux arguments juridiques ou de politique qui ne soulèvent pas des questions de fait est un peu moins sévère puisque les parties n'ont que le droit de présenter leur cause adéquatement et de répondre aux arguments qui leur sont défavorables. [Je souligne.]

Il paraît plus probable que des questions factuelles comprenant vraisemblablement des « énoncé[s] [. . .] qui nui[sent au] point de vue [de l'appelante] » ont été abordées à la réunion plénière de la Commission en l'espèce, parce que la formation a par la suite renversé sa propre décision sur l'opportunité d'une conclusion défavorable au syndicat en raison de son omission de produire une preuve pertinente et qu'elle l'a renversée sur la question de la renonciation et quant à l'issue de l'audience.

La question de la renonciation

La *Loi de 1995 sur les relations de travail* de l'Ontario, L.O. 1995, ch. 1 (« la Loi ») ne traite pas de la renonciation aux droits de négociation. Cette notion a été élaborée dans la jurisprudence de la Commission en vue de permettre l'abolition des droits de négociation d'un syndicat qui fait défaut de faire la [TRADUCTION] « promotion active de ces droits ». Citant des décisions antérieures, la formation a adopté ces principes en utilisant des termes

in identical terms in para. 43 of its initial decision and para. 43 of its final decision:

> Over the last 20 years the principle of abandonment has been deeply entrenched in the Board's jurisprudence. Once a union has obtained bargaining rights either through certification or voluntary recognition it is expected that it will actively promote those rights. If a union declines to pursue bargaining rights it may lose them through disuse. Whether a union has abandoned its bargaining rights is a matter which must be assessed on the facts of each individual case, but once the Board is satisfied that a union has failed to preserve its rights, the union may no longer rely on them to support the appointment of a Conciliation Officer under section 15 of the Act. . . . [Emphasis added.]

The issue for the panel, therefore, was whether the respondent union had "actively promote[d]" its bargaining rights with the appellant, or had lost them "through disuse".

The Initial Decision

I take the following events from the initial decision prepared for the panel dated December 1991. (It seems to be more than a draft. It appears from the "true copy" in the record that the original was signed by the presiding Vice-Chair.)

On January 12, 1990, IBEW Local 894 grieved the appellant's subcontract of electrical work to a non-union contractor. It claimed that the appellant was bound by the current province-wide agreement between the Electrical Contractors Association of Ontario and the IBEW Construction Council of Ontario. The appellant took the position that it was not party to that agreement. In response, the union reached back almost 30 years to a "working agreement" the IBEW, Local 353 had signed with the appellant in 1962. The appellant's position was that if there was voluntary recognition of IBEW bargaining rights at that time (which it denied), such bargaining rights had been abandoned no later than the early 1970s when the Electrical Contractors Association of Toronto sought accreditation as bargaining agent for employers with whom

identiques au par. 43 de sa décision initiale et au par. 43 de sa décision définitive :

> [TRADUCTION] Au cours des 20 dernières années, le principe de la renonciation s'est profondément enraciné dans la jurisprudence de la Commission. Une fois qu'un syndicat a obtenu des droits de négociation par voie d'accréditation ou de reconnaissance volontaire, on s'attend à ce qu'il fasse la promotion active de ces droits. Si un syndicat néglige d'exercer des droits de négociation, il peut les perdre par inaction. La question de savoir si un syndicat a renoncé à ses droits de négociation doit être examinée à la lumière des faits de chaque affaire particulière, mais une fois que la Commission est convaincue qu'un syndicat a omis de préserver ses droits, le syndicat ne peut plus les invoquer pour demander la nomination du conciliateur prévu par l'article 15 de la Loi. . . [Je souligne.]

La question que devait donc trancher la formation était de savoir si le syndicat intimé avait fait la « promotion active » de ses droits de négociation envers l'appelante ou s'il les avait perdus « par inaction ».

La décision initiale

69 Je tire les événements suivants de la décision initiale préparée pour la formation et datée de décembre 1991. (Il semble s'agir de plus qu'une ébauche. Il ressort de la « copie certifiée conforme » figurant au dossier que l'original a été signé par la vice-présidente.)

70 Le 12 janvier 1990, la section locale 894 de la FIOE a déposé un grief visant le marché de sous-traitance de travaux d'électricité conclu par l'appelante avec un entrepreneur dont les employés n'étaient pas syndiqués. Elle a prétendu que l'appelante était liée par la convention en cours à l'échelle de la province entre l'Electrical Contractors Association of Ontario et le conseil des métiers de la construction de la FIOE pour l'Ontario. L'appelante a soutenu ne pas être partie à cette convention. En réponse, le syndicat a fait un recul de 30 ans environ dans le passé pour invoquer une [TRADUCTION] « convention de travail » que la section locale 353 de la FIOE avait signée avec l'appelante en 1962. L'appelante a avancé que s'il y avait eu reconnaissance volontaire des droits de négociation de la FIOE à cette époque (ce qu'elle a

the IBEW, Local 353 asserted bargaining rights. The statutory form ("schedule F") and regulations required the union to list "all employers" in the unit with whom the respondent union "is entitled to bargain as a result of a collective agreement, a recognition agreement or a certificate of The Labour Relations Board that has not yet resulted in a collective agreement" but who had not directly employed electricians in the year prior to the application. The IBEW, Local 353 had filed such a list. It did not include the name of the appellant. The appellant argued that if any bargaining rights had been acquired under what the Board regarded as the 1962 "recognition agreement", such rights had been abandoned by the time the union filed the accreditation documents in 1971. The accreditation exercise was subsequently extended to province-wide bargaining.

nié), ces droits avaient fait l'objet d'une renonciation au plus tard au début des années 70, lorsque l'Electrical Contractors Association of Toronto a sollicité l'accréditation en tant qu'agent de négociation envers les employeurs au sujet desquels la section locale 353 de la FIOE faisait valoir des droits de négociation. Le formulaire prévu par la loi (« l'annexe F ») ainsi que le règlement exigeaient que le syndicat dresse la liste de [TRADUCTION] « tous les employeurs » de l'unité avec laquelle le syndicat intimé [TRADUCTION] « a le droit de négocier en vertu d'une convention collective, d'une entente de reconnaissance ou d'un certificat de la Commission des relations de travail qui n'a pas encore donné lieu à une convention collective », mais qui n'avaient pas directement employé d'électriciens dans l'année précédant la demande. La section locale 353 de la FIOE avait déposé une telle liste. Le nom de l'appelante n'y figurait pas. L'appelante a prétendu que si des droits de négociation avaient été acquis en vertu de ce que la Commission considérait comme l'« entente de reconnaissance » de 1962, ces droits avaient fait l'objet d'une renonciation au moment où le syndicat avait déposé les documents d'accréditation en 1971. L'exercice d'accréditation a ensuite été étendu à la négociation à l'échelle de la province.

71 The initial decision included a description of the 1971 accreditation process:

> What is important is that, as part of an accreditation application, the respondent trade union files with the Board a "schedule F" wherein the union lists those employers with whom it asserts it has bargaining rights but who did not have employees within one year prior to the accreditation application date. In reviewing Board File 1469-71-R, wherein an accreditation order was issued on January 9, 1975, it is apparent that Ellis-Don's name does not appear on the final schedule F. Nor was Ellis-Don's name struck off an initial schedule F as were other employers who challenged their inclusion on schedule F by the respondent trade union. Quite simply, it appears that Local 353 did not include Ellis-Don's name on schedule F which the union filed with the Board.

La décision initiale comportait une description du processus d'accréditation de 1971 :

> [TRADUCTION] Ce qui compte, c'est que dans le cadre de sa demande d'accréditation, le syndicat intimé dépose auprès de la Commission une « annexe F », dans laquelle il énumère les employeurs au sujet desquels il affirme avoir des droits de négociation mais qui n'avaient aucun employé dans l'année précédant la date de la demande d'accréditation. Il ressort du dossier 1469-71-R de la Commission, dans lequel une ordonnance d'accréditation a été rendue le 9 janvier 1975, que le nom de Ellis-Don ne figure pas à l'annexe F finale. Le nom de Ellis-Don n'avait pas non plus été radié d'une annexe F initiale comme l'avait été celui d'autres employeurs ayant contesté leur inclusion dans cette annexe par le syndicat intimé. Il semble tout simplement que la section locale 353 n'a pas inscrit le nom de Ellis-Don à l'annexe F que le syndicat a déposée auprès de la Commission.

An accreditation order was made on January 9, 1975. It is important to emphasize that the union's grievance in this case is based on its view that the appellant is bound by the subcontracting clause in the provincial agreement between the Electrical Contractors Association of Ontario and the IBEW Construction Council of Ontario, which is the present version of the agreement which grew out of the accreditation process in the 1970s, in which the union failed to assert bargaining rights against the appellant.

72 Une ordonnance d'accréditation a été rendue le 9 janvier 1975. Il est important de souligner que le grief du syndicat en l'espèce est fondé sur son opinion que l'appelante est liée par la clause de sous-traitance figurant dans la convention provinciale conclue entre l'Electrical Contractors Association of Ontario et le conseil des métiers de la construction de la FIOE pour l'Ontario, la version actuelle de la convention qui a découlé du processus d'accréditation des années 70, où le syndicat a omis de faire valoir l'existence de droits de négociation à l'égard de l'appelante.

The appellant raised a variety of objections and arguments against the union's contention, most of which were rejected. In particular, in its initial decision the panel refused to draw any adverse inference from the failure of various unions (apart from the "civil trades") to attempt to enforce the province-wide agreements against the appellant prior to 1990, despite evidence of limited subcontracting of work to non-union firms over the years. The respondent union explained that if it did not appear to be "actively promot[ing]" its rights, it was because there was no need to. The appellant invariably gave work to electrical subcontractors who were unionized. The only point on which the panel concluded that union action may have been called for was the accreditation process which led to the predecessor agreement to the agreement it now sues upon:

73 L'appelante a soulevé un éventail d'oppositions et d'arguments contre la prétention du syndicat, dont la plupart ont été rejetés. En particulier, dans sa décision initiale, la formation a refusé de tirer une conclusion défavorable du fait que différents syndicats (à l'exception de ceux des « métiers ») n'avaient pas tenté de faire appliquer les conventions provinciales à l'appelante avant 1990, malgré la preuve que, au fil des ans, quelques marchés de sous-traitance avaient été conclus avec des entreprises dont les employés n'étaient pas syndiqués. Le syndicat intimé a expliqué qu'il n'avait pas paru faire la « promotion active » de ses droits parce que cela n'était pas nécessaire. L'appelante confiait continuellement des travaux à des sous-traitants en électricité dont les employés étaient syndiqués. Le seul point sur lequel la formation a conclu que le syndicat aurait pu devoir agir était le processus d'accréditation qui a mené à la convention précédant celle sur laquelle il s'appuie maintenant pour poursuivre :

> Local [8]94, the applicant herein, called no evidence to explain the failure of Local 353 to include Ellis-Don on schedule F, as would be expected if the union in the accreditation application thought it possessed bargaining rights vis-a-vis Ellis-Don. Absent an explanation, the most reasonable inference is that the union in the accreditation application assumed it did not possess such bargaining rights in 1971, when the accreditation application was filed. [Emphasis added.]

> [TRADUCTION] La section locale [8]94, la demanderesse en l'espèce, n'a présenté aucun élément de preuve pour expliquer l'omission de la section locale 353 d'inclure Ellis-Don à l'annexe F, ce à quoi on s'attendrait si le syndicat visé par la demande d'accréditation croyait avoir des droits de négociation vis-à-vis Ellis-Don. Faute d'explication, la conclusion la plus raisonnable à tirer est que le syndicat visé par la demande d'accréditation a tenu pour acquis qu'il n'avait pas de droits de négociation en 1971, au moment du dépôt de la demande d'accréditation. [Je souligne.]

Whether or not an adverse inference is warranted on particular facts is bound up inextricably with the adjudication of the facts. The union, though

La question de savoir si une conclusion défavorable est justifiée ou non par les faits particuliers est inextricablement liée à la détermination des faits.

challenged to do so, declined to call any witness with knowledge of the events of 1971. "Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it", J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 297; *R. v. Jolivet*, [2000] 1 S.C.R. 751, 2000 SCC 29, at para. 28.

74 In sum, the panel, in its initial decision, reasoned as follows:

> 1. A union that was actively pursuing bargaining rights against the appellant under the predecessor agreement to the one now sued upon was required by the Act and Regulations to list the appellant on schedule F.
>
> 2. Unless explained away by the union, the failure afforded *some* evidence of abandonment.
>
> 3. The union called witnesses, but nobody who could speak to its failure to include the appellant in schedule "F".
>
> 4. There was no other evidence of "active" assertion of bargaining rights by the union that could tilt the panel's conclusion in the union's favour.

75 In the result, having regard to the union's failure to "actively promote" its bargaining rights, the panel in its initial decision found "unequivocal evidence of abandonment by the applicant [IBEW] of its bargaining rights prior to 1978".

76 My colleague LeBel J. concludes at para. 42 that this initial decision turns on a "rebuttable presumption" which was subsequently discarded, as a matter of policy, by the full Board. It is therefore necessary to examine in some detail what changes to the decision were made following the full Board meeting.

Même si on l'a mis au défi de le faire, le syndicat n'a cité aucun témoin connaissant les événements de 1971. [TRADUCTION] « Une telle omission équivaut à l'aveu implicite que la déposition du témoin absent serait défavorable à la cause de la partie ou, du moins, qu'elle ne l'appuierait pas », J. Sopinka, S. N. Lederman et A. W. Bryant, *The Law of Evidence in Canada* (2e éd. 1999), p. 297; *R. c. Jolivet*, [2000] 1 R.C.S. 751, 2000 CSC 29, par. 28.

En bref, la formation a suivi le raisonnement suivant dans sa décision initiale :

> 1. Un syndicat faisant activement valoir des droits de négociation contre l'appelante en vertu de la convention antérieure à celle qui fait maintenant l'objet de la poursuite était tenu par la Loi et le Règlement d'inscrire l'appelante à l'annexe F.
>
> 2. Cette omission constituait une *certaine* preuve de renonciation, sauf si elle avait fait l'objet d'une explication de la part du syndicat.
>
> 3. Le syndicat a fait entendre des témoins, mais aucun n'a pu expliquer son omission d'inscrire l'appelante à l'annexe F.
>
> 4. Il n'y avait aucune autre preuve d'affirmation « active » de droits de négociation par le syndicat, qui pourrait faire pencher la conclusion de la formation en faveur du syndicat.

Par conséquent, compte tenu de l'omission du syndicat de faire la « promotion active » de ses droits de négociation, la formation a conclu dans sa décision initiale à l'existence d'une [TRADUCTION] « preuve sans équivoque que la demanderesse [la FIOE] a renoncé à ses droits de négociation avant 1978 ».

Mon collègue le juge LeBel conclut au par. 42 que cette décision initiale repose sur une « présomption réfutable » qui a ensuite été écartée pour des raisons de principe par l'ensemble des membres de la Commission. Il est donc nécessaire d'examiner plus en détail les modifications qui ont été apportées à la décision à la suite de la réunion plénière de la Commission.

The Full Board Meeting

For reasons which are not explained, the Vice-Chair requested a full Board meeting to discuss the panel's initial decision. The Vice-Chair did not formulate a policy issue or notify colleagues that there would be a general review of the policy implications of abandonment. The Vice-Chair just referenced this particular pending decision as the topic for full Board discussion.

Consolidated-Bathurst holds that convening a full board meeting while a particular case is pending is permissible so long as (i) the question for discussion is one of policy rather than fact, (ii) that in the end the panel is free to make its own decision, and (iii) that if the discussion at the full board raises matters not addressed by the parties, that the parties be put on notice and permitted to make representations before a decision is made.

In my view, the procedure adopted in the present case violates only the first of these limitations. There is no evidence that the second limitation was not observed, and as to the third limitation, the appellant had the opportunity to address the panel on every aspect of the abandonment issue. Its proper complaint is that the initial decision ought not to have been referred to the full Board meeting at all.

Fact *versus* Policy

I agree with my colleague LeBel J. that one of the conditions precedent to the validity of a full board meeting is that "the consultation had to be limited to questions of policy and law. The members of the organization who had not heard the evidence could not be allowed to re-assess it. The consultation had to proceed on the basis of the facts as stated by the members who had actually heard the evidence" (para. 29). This limitation is based on what was said by Gonthier J. for the majority in *Consolidated-Bathurst*, *supra*, at

La réunion plénière de la Commission

77 Pour des motifs qui ne sont pas expliqués, la vice-présidente a demandé la tenue d'une réunion plénière de la Commission pour discuter de la décision initiale de la formation. La vice-présidente n'a formulé aucune question de principe ni avisé ses collègues qu'il y aurait un examen général des conséquences de la renonciation sur le plan des principes. Elle s'est contentée d'indiquer que cette décision à venir serait le sujet de discussion de la réunion plénière.

78 L'arrêt *Consolidated-Bathurst* conclut qu'il est permis de convoquer une réunion plénière de la Commission pendant qu'une affaire particulière est en cours dans la mesure où (i) la question à discuter est une question de politique plutôt qu'une question de fait, (ii) la formation est libre en bout de ligne de rendre sa propre décision, et (iii) si la discussion ayant lieu à la réunion plénière soulève des questions non abordées par les parties, celles-ci sont avisées et peuvent faire des observations avant qu'une décision ne soit prise.

79 Je suis d'avis que la procédure adoptée dans la présente affaire ne viole que la première de ces restrictions. Il n'y a aucune preuve indiquant que la deuxième restriction n'a pas été respectée et, quant à la troisième, l'appelante a eu la possibilité de présenter ses arguments à la formation relativement à toutes les facettes de la question de la renonciation. L'appelante prétend à bon droit que la décision initiale n'aurait jamais dû être renvoyée à la réunion plénière de la Commission.

Les faits par opposition aux principes

80 Je conviens avec mon collègue le juge LeBel que l'une des conditions préalables à la validité d'une réunion plénière de la Commission veut que « la consultation devait se limiter aux questions de principe et de droit. On ne pouvait pas permettre aux membres de l'organisation qui n'avaient pas entendu les témoignages de les réévaluer. La consultation devait reposer sur les faits énoncés par les membres qui avaient entendu les témoignages » (par. 29). Cette restriction est fondée sur ce qu'a dit le juge Gonthier, au nom de la majorité, dans

pp. 335-36. In that case, the issue was the scope of the employer's duty to bargain in good faith imposed by what is now s. 17 of the Ontario *Labour Relations Act*. More specifically, the question was whether the duty to bargain in good faith included a duty of candour to disclose without being asked future plans of the employer that would have a significant impact on the economic lives of bargaining unit employees (*Consolidated-Bathurst*, *supra*, at p. 311). A discussion about the relationship between the obligation to bargain in good faith and a duty of candour raised an abstract policy issue that *could* be segregated from the facts of that case. Here, the Board's policy had been authoritatively established, i.e., the "active promotion" test. It was for the panel to determine in the factual context of this particular case whether or not this standard was met.

Consolidated-Bathurst, précité, p. 335-336. Dans cette affaire, la question était de savoir quelle était la portée de l'obligation de négocier de bonne foi imposée à l'employeur par ce qui est maintenant l'art. 17 de la *Loi sur les relations de travail* de l'Ontario. Plus particulièrement, la question était de savoir si l'obligation de négocier de bonne foi comprenait l'obligation de franchise relativement à la divulgation des projets de l'employeur qui auraient des conséquences importantes sur la situation économique des employés de l'unité de négociation (*Consolidated-Bathurst*, précité, p. 311). Une analyse de la relation entre l'obligation de négocier de bonne foi et une obligation de franchise a soulevé une question de principe abstraite qui *pouvait* être dissociée des faits de cette affaire. En l'espèce, la politique de la Commission avait été établie par les précédents, c.-à-d., le critère de la [TRADUCTION] « promotion active ». Il incombait à la formation de déterminer dans le contexte factuel de la présente affaire si cette norme était respectée ou non.

81 I agree with my colleague LeBel J. that the issue of "abandonment", when considered in the abstract, has a policy component. As I will attempt to demonstrate, however, what happened following the full Board meeting was not a change in policy but a re-assessment of the facts.

Je conviens avec mon collègue le juge LeBel que, si elle est examinée de façon abstraite, la question de la « renonciation » comporte un aspect principe. Comme je tente de le démontrer, cependant, ce qui s'est produit à la suite de la réunion plénière de la Commission ne constituait pas un changement de principe, mais une réévaluation des faits.

Mixed Questions of Policy and Fact

Les questions de principe et de fait

82 Counsel for the Board argues that *primary* facts are those "observed by the witnesses and proved by testimony. Whether established primary facts satisfy some legal definition or requirement is a question of law, which is an entirely proper subject for a full board meeting". There is, of course, an intermediate category between "primary facts" and "law" which is that of mixed law (or policy) and fact. Within this intermediate category there are gradations from the factual end of the spectrum, where the legal content may be uncontroversial or minimal, to the legal end, where the facts may be of little consequence and, as the Board's counsel notes, a decision will have "an impact which goes beyond the resolution of the dispute between the

L'avocate de la Commission prétend que les faits *essentiels* sont ceux qui [TRADUCTION] « sont observés par les témoins et prouvés par les témoignages. La question de savoir si les faits essentiels établis satisfont à une définition ou à une exigence légales est une question de droit, qui peut parfaitement faire l'objet d'une réunion plénière de la Commission ». Il y a évidemment une catégorie intermédiaire entre les « faits essentiels » et le « droit », soit la catégorie des questions de droit (ou de principe) et de fait. Dans cette catégorie intermédiaire se trouvent des échelons qui partent de l'extrémité factuelle de l'échelle, où le contenu juridique est non contesté ou minime, pour se rendre à l'extrémité juridique, où les faits ont peu

parties". This spectrum was recognized by the Court in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, *per* Iacobucci J., at paras. 35-38. In the present case, the legal or policy content of "abandonment" was defined in a portion of the decision that was unchanged from the initial decision to the final rewrite, as mentioned above. The test was not whether the union intended to throw away rights (which, as the Divisional Court noted, is an unlikely scenario), but whether it *actively* promoted those rights in circumstances where it would reasonably be expected to do so.

d'importance et, comme l'avocate de la Commission le souligne, où la décision a [TRADUCTION] « un effet allant au-delà du règlement du litige entre les parties ». Cette échelle a été reconnue par notre Cour dans l'arrêt *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, le juge Iacobucci, par. 35-38. Dans la présente affaire, l'aspect juridique ou de principe de la « renonciation » a été décrit dans une partie de la décision qui n'a fait l'objet d'aucune modification entre la décision initiale et la révision définitive, comme je l'ai mentionné précédemment. Le critère ne consistait pas à déterminer si le syndicat avait l'intention d'abandonner des droits (ce qui est un scénario improbable, comme la Cour divisionnaire l'a souligné), mais plutôt à savoir s'il avait fait la promotion *active* de ces droits dans des circonstances où on s'attendrait raisonnablement à ce qu'il le fasse.

In my view, the question here is not whether a policy issue can be teased out of the adjudicative facts. The question is whether, taking the law (or policy) as the Board has defined it, the reference to the full Board descends so far into the adjudicative process as to violate the principle that he who hears must decide and he who decides must hear. This depends, I think, on whether the policy issue can be *segregated* sufficiently from the facts of the particular dispute to avoid interfering with fact adjudication, as indeed Gonthier J. contemplated in *Consolidated-Bathurst* at p. 337:

83 J'estime que la question qui se pose en l'espèce n'est pas de savoir si l'on peut extirper une question de principe des faits en litige. Il s'agit de savoir si, à la lumière de l'interprétation par la Commission du droit (ou du principe), le renvoi à la Commission dans son ensemble s'insère dans le processus décisionnel au point de violer le principe voulant que celui qui entend doit trancher et que celui qui tranche doit entendre. J'estime que cela dépend de la question de savoir si la question de principe peut être suffisamment *dissociée* des faits du litige particulier pour qu'elle n'intervienne pas dans la décision sur les faits, comme l'envisageait d'ailleurs le juge Gonthier dans *Consolidated-Bathurst*, p. 337 :

> These discussions can be segregated from the factual decisions which will determine the outcome of the case once a test is adopted by the panel. [Emphasis added.]

> Il est possible de dissocier ces discussions des décisions sur les faits qui déterminent l'issue du litige après que le banc a adopté un critère. [Je souligne.]

Where no such segregation can safely be made, the reference to the full Board of a decision before its release risks putting at risk the integrity of its decision-making process, as noted by Professor H. N. Janisch in his commentary, "Consistency, Rulemaking and *Consolidated Bathurst*" (1991), 16 *Queen's L.J.* 95, at p. 104.

Lorsqu'il est impossible de faire cette dissociation avec certitude, le renvoi d'une décision à la Commission dans son ensemble avant qu'elle ne soit rendue risque de menacer l'intégrité du processus décisionnel, comme l'a fait remarquer le professeur H. N. Janisch dans son article intitulé « Consistency, Rulemaking and *Consolidated Bathurst* » (1991), 16 *Queen's L.J.* 95, p. 104.

84 The implications of the Court's acceptance of what was done in this case are extensive. Under s. 9(1) of the Act, for example, the Board is required to determine an appropriate bargaining unit. Over the years, the Board has developed extensive policies on the topic which individual panels are expected to apply to the facts: see J. Sack, C. M. Mitchell and S. Price, *Ontario Labour Relations Board Law and Practice* (3rd ed. (loose-leaf)), vol. 1, at p. 3.121. Frequently, the evidence on this issue is extensive. Generally speaking, I think it would be inappropriate for a panel to refer a particular case for *ad hoc* policy making by the full board in relation to the specific facts in the absence of the parties. Equally, s. 76 prohibits the use of "intimidation or coercion to compel any person" to belong or not to belong to collective bargaining organizations, etc. This requires a definition of "intimidation or coercion", but whether or not a particular situation meets the definition should be determined by the panel charged with the decision. Similarly, s. 69 regulates successor rights on the "sale of a business". One test of this is whether "the business continues to function": *Marvel Jewellery Ltd.*, [1975] OLRB Rep. 733, at p. 735, and this too is considered by the Board to be a question of fact: *Accomodex Franchise Management Inc.*, [1993] OLRB Rep. 281. It is evident that all of these determinations, and many others, are predicated on a legal or policy interpretation of a concept or statutory provision, as the case may be. *Consolidated-Bathurst* did not licence wholesale full board consultations on those fact-dependent adjudications. This is especially the case where the Board's jurisprudence on the policy point is already well established. In this case, as stated, the Board's policy on abandonment in terms of active promotion of rights was never in doubt and was defined in the same language in the final decision as it had been in the initial decision.

L'acceptation par notre Cour de ce qui a été fait dans la présente affaire a des conséquences importantes. En vertu du par. 9(1) de la Loi, par exemple, la Commission est tenue de déterminer l'unité de négociation appropriée. Au fil des ans, la Commission a élaboré des politiques détaillées sur le sujet pour que chaque formation les applique aux faits : voir J. Sack, C. M. Mitchell et S. Price, *Ontario Labour Relations Board Law and Practice* (3e éd. (feuilles mobiles)), vol. 1, p. 3.121. Il arrive fréquemment que la preuve relative à cette question soit considérable. De façon générale, j'estime qu'il serait inapproprié de la part d'une formation de renvoyer une affaire à la Commission dans son ensemble pour que celle-ci prenne, en l'absence des parties, une décision *ad hoc* relativement aux faits en cause. En outre, l'art. 76 interdit l'usage de « la menace de contraindre quiconque » à appartenir ou à ne pas appartenir à des organisations de négociation collective, etc. Cela exige que l'on définisse la « menace », mais la question de savoir si une situation donnée est visée ou non par la définition doit être tranchée par la formation chargée de rendre la décision. De la même manière, l'art. 69 régit les droits de succession afférents à la vente d'une entreprise. L'un des critères applicables à cet égard consiste à savoir si [TRADUCTION] « l'entreprise continue de fonctionner » : *Marvel Jewellery Ltd.*, [1975] OLRB Rep. 733, p. 735, et il s'agit là également, selon la Commission, d'une question de fait : *Accomodex Franchise Management Inc.*, [1993] OLRB Rep. 281. Il est évident que toutes ces décisions ainsi que de nombreuses autres reposent sur une interprétation juridique ou de principe d'une notion ou d'une disposition législative, selon le cas. L'arrêt *Consolidated-Bathurst* n'a pas permis la tenue de consultations générales en réunion plénière relativement aux décisions reposant sur les faits. Cela est particulièrement vrai lorsque la jurisprudence de la Commission sur la politique en question est déjà bien établie. Dans la présente affaire, comme je l'ai mentionné précédemment, la politique de la Commission sur la renonciation, qui repose sur la promotion active des droits, n'a jamais été mise en doute et a été décrite dans les mêmes termes tant dans la décision définitive que dans la décision initiale.

Reversal of a Finding of Fact

The panel made it clear both in its initial decision and in the rewrite that it considered abandonment to be an issue of fact. It explained in both at para. 43:

> Prior to the introduction of province-wide bargaining in the ICI sector, the Board has on several occasions determined, as a matter of fact, that a trade union has abandoned its bargaining rights through inaction. . . . A useful summary of the caselaw and the factors influencing the Board's assessment is found in *R. Reusse Co. Ltd.* . . . [Emphasis added.]

In the case cited, *R. Reusse Co.*, [1988] OLRB Rep. 523, the Board set out its policy as follows at paras. 13 and 15:

> It was not disputed that the question of abandonment is a matter of fact to be resolved by the Board in the circumstances of each case. . . .
>
> . . .
>
> What is most striking about this application is that, having attained bargaining rights in 1965, Local 397 did *nothing* for almost *15 years* (just to the advent of province-wide bargaining) to negotiate renewals of the collective agreement, administer those "existing" agreements or otherwise contact the respondent. Given such an extended passage of time, the Board must carefully scrutinize the reasons proffered by the union as explanation for its inactivity in order to avoid the reasonable inference that the union has abandoned its bargaining rights. [Emphasis in original.]

The Board's decision in the present case (both initial and final) simply repeated the language in *Reusse*, *supra*:

> It was not disputed that the question of abandonment is a matter of fact to be resolved by the Board in the circumstances of each case: *J. S. Mechanical*, *supra*; *Inducon Construction (Northern) Inc.*, *supra*; *John Entwistle Construction Limited*, *supra*; *Re Carpenters' District Council of Lake Ontario and Hugh Murray (1974) et al.*, *Re Labourers' International Union of*

L'infirmation d'une conclusion de fait

La formation a indiqué clairement, tant dans sa décision initiale que dans sa version révisée, qu'elle considérait la renonciation comme une question de fait. Elle a expliqué dans les deux décisions, au par. 43 : 85

> [TRADUCTION] Avant l'introduction de la négociation à l'échelle de la province dans le secteur de la construction industrielle, commerciale et institutionnelle, la Commission avait conclu à plusieurs reprises que, dans les faits, un syndicat avait renoncé à ses droits de négociation par inaction. [. . .] Un résumé utile de la jurisprudence et des facteurs influençant l'évaluation de la Commission est fait dans *R. Reusse Co. Ltd.*. . . [Je souligne.]

Dans la décision citée *R. Reusse Co.*, [1988] OLRB Rep. 523, la Commission a énoncé ainsi sa politique, aux par. 13 et 15 :

> [TRADUCTION] Il n'a pas été contesté que la question de la renonciation est une question de fait que la Commission doit résoudre selon les circonstances de chaque affaire . . .
>
> . . .
>
> Ce qui est le plus frappant au sujet de la présente demande, c'est que, ayant obtenu des droits de négociation en 1965, la section locale 397 n'a *rien* fait pendant presque *15 ans* (jusqu'à l'arrivée de la négociation collective à l'échelle de la province) en vue de négocier des renouvellements de la convention collective, d'appliquer les conventions « existantes » ou de communiquer de quelque autre façon avec l'intimée. Étant donné l'écoulement d'une aussi longue période, la Commission doit examiner avec soin les raisons fournies par le syndicat à titre d'explication pour son inaction afin d'éviter la conclusion raisonnable que le syndicat a renoncé à ses droits de négociation. [Italiques dans l'original.]

La décision de la Commission en l'espèce (tant initiale que définitive) n'a fait que reprendre les termes utilisés dans *Reusse*, précité :

> [TRADUCTION] Il n'a pas été contesté que la question de la renonciation est une question de fait que la Commission doit résoudre selon les circonstances de chaque affaire : *J. S. Mechanical*, précité; *Inducon Construction (Northern) Inc.*, précité; *John Entwistle Construction Limited*, précité; *Re Carpenters' District Council of Lake Ontario and Hugh Murray (1974) et al.*, *Re*

North America, Local 527 et al. and *John Entwistle Construction Ltd. et al.*, *supra*; *Twin City Plumbing and Heating*, [1982] OLRB Rep. Apr. 631. [Emphasis added.]

and then continued (at para. 44):

> It is in the above jurisprudential context that the Board must analyse the evidence in the instant case.

86 Indeed, the panel concluded in its final version of the decision in this case at para. 54 that "[it] is not satisfied, as a matter of fact, that the bargaining rights of Local 353 were abandoned because of the omission of Ellis-Don's name from schedule F" (emphasis added). We are not bound by the characterization placed on its own decision by the panel, but in this respect I think the panel was correct.

The Controlling Issue Was Whether the Union had "Actively Promoted" its Bargaining Rights

87 The initial decision accepted the respondent union's position that it could hardly be faulted for lack of "active promotion" when its intervention proved not to be necessary to ensure that electrical work was subcontracted to union subcontractors, albeit the Board also found that the appellant did not consider itself under any obligation to do so. The important exception was the panel's expectation that a union that was "actively" promoting its bargaining rights would have included the appellant on schedule F in the accreditation process that led to the predecessor to the one now invoked by the union. The panel noted that the union might well have had a plausible explanation for its lack of "active" promotion in the accreditation process but had not put any such evidence forward. In its initial decision the panel was not prepared to act on the unsupported hypotheses offered up by counsel for the respondent union. In its final decision, however, the panel seemingly accepted the same

Labourers' International Union of North America, Local 527 et al. et *John Entwistle Construction Ltd. et al.*, précité; *Twin City Plumbing and Heating*, [1982] OLRB Rep. Apr. 631. [Je souligne.]

Et elle a poursuivi au par. 44 :

> [TRADUCTION] C'est dans le contexte jurisprudentiel ci-dessus que la Commission doit analyser la preuve en l'espèce.

D'ailleurs, la formation a conclu dans la version définitive de la décision en l'espèce, au par. 54, qu'elle [TRADUCTION] « n'est pas convaincue que, en tant que question de fait, la section locale 353 a renoncé aux droits de négociation en raison de l'omission du nom de Ellis-Don à l'annexe F » (je souligne). Nous ne sommes pas liés par la façon dont la formation a qualifié sa propre décision, mais j'estime qu'elle avait raison à cet égard.

La question dominante était de savoir si le syndicat avait fait la « promotion active » de ses droits de négociation

La décision initiale acceptait la position du syndicat intimé selon laquelle on pouvait difficilement le blâmer pour l'absence de « promotion active » alors qu'il s'était avéré non nécessaire qu'il intervienne pour veiller à ce que les travaux d'électricité soient confiés à des sous-traitants dont les employés sont syndiqués, quoique la Commission a également conclu que l'appelante ne considérait pas avoir l'obligation de le faire. L'exception importante était le fait que la formation s'attendait à ce qu'un syndicat qui faisait la promotion « active » de ses droits de négociation ait inscrit l'appelante à l'annexe F lors du processus d'accréditation qui a mené à la convention antérieure à celle maintenant invoquée par le syndicat. La formation a fait remarquer que le syndicat pouvait fort bien avoir une explication plausible pour son manque de promotion « active » dans le cadre du processus d'accréditation, mais qu'il n'en avait présentée aucune en preuve. Dans sa décision initiale, la formation n'était pas prête à agir en s'appuyant sur les hypothèses non étayées faites par l'avocat du syndicat intimé. Dans sa décision définitive, toutefois, la formation a semblé considérer les mêmes hypothèses non étayées comme l'expli-

unsupported speculation to be the adequate explanation that it had earlier found not to exist.

The panel initially concluded that in the particular circumstances of the case an adverse inference *should* be drawn against the union for its decision not to call the evidence. I do not say that the panel was obliged to draw an adverse inference. The fact is that following a lengthy hearing, it did so. The correctness of that determination was bound up with the evidence:

> It is perfectly appropriate for a jury to infer, although they are not obliged to do so, that the failure to call material evidence which was particularly and uniquely available to the Vieczoreks was an indication that such evidence would not have been favourable to them. It is a common sense conclusion that may be reached by any trier of fact. There are no authorities which cast any doubt upon the proposition. [Emphasis added.]
>
> (*Vieczorek v. Piersma* (1987), 36 D.L.R. (4th) 136 (Ont. C.A.), *per* Cory J.A., at pp. 140-41)

To the same effect is the statement found in Sopinka, Lederman and Bryant, *supra*, at p. 97:

> A presumption of fact is a deduction of fact that may logically and reasonably be drawn from a fact or group of facts found or otherwise established. Put differently, it is a common sense logical inference that is drawn from proven facts. [Emphasis added.]

To characterise this "common sense conclusion . . . by [a] trier of fact" as a "rebuttable presumption" does not, in my view, transform this issue of factual adjudication into a question of law, as my colleague LeBel J. concludes at para. 42. In any event, with respect, a debate about labels should not detract us from the more fundamental inquiry about whether in this case the full board consultation intruded into adjudicative matters of fact the panel itself was required to decide.

cation adéquate qu'elle avait auparavant jugée inexistante.

88 La formation a initialement estimé qu'à la lumière des faits particuliers de l'affaire, une conclusion défavorable au syndicat *devrait* être tirée en raison de sa décision de ne présenter aucune preuve à cet égard. Je ne dis pas que la formation était obligée de tirer une conclusion défavorable. Il n'en demeure pas moins que c'est ce qu'elle a fait à la suite d'une longue audience. Le bien-fondé de cette décision était lié à la preuve :

> [TRADUCTION] Il est parfaitement approprié qu'un jury déduise, même s'il n'est pas obligé de le faire, que l'omission de produire des éléments de preuve substantielle dont seuls les Vieczorek disposaient était une indication que ces éléments de preuve ne leur auraient pas été favorables. Il s'agit d'une conclusion fondée sur le bon sens qui peut être tirée par tout juge des faits. Aucune décision ne met en doute cette proposition. [Je souligne.]
>
> (*Vieczorek c. Piersma* (1987), 36 D.L.R. (4th) 136 (C.A. Ont.), le juge Cory, p. 140 et 141)

Voir dans le même sens l'énoncé figurant dans Sopinka, Lederman et Bryant, *op. cit.*, à la p. 97 :

> [TRADUCTION] Une présomption de fait est une déduction de fait qui peut logiquement et raisonnablement être tirée à partir d'un fait ou d'un groupe de faits dont on a conclu à l'existence ou qui ont été autrement établis. Autrement dit, il s'agit d'une conclusion logique fondée sur le bon sens qui est tirée à partir de faits prouvés. [Je souligne.]

89 Qualifier cette « conclusion fondée sur le bon sens [. . .] tirée par [un] juge des faits » de « présomption réfutable » ne change pas selon moi cette question de conclusion factuelle en question de droit, comme mon collègue le juge LeBel le conclut au par. 42. Quoi qu'il en soit, j'estime, en toute déférence, que nous ne devrions pas laisser un débat terminologique nous écarter de l'examen plus fondamental de la question de savoir si, en l'espèce, la consultation de l'ensemble des membres de la Commission a empiété sur des faits sur lesquels la formation elle-même était tenue de se prononcer.

90 The Vice-Chair's reasons, rewritten after the full Board meeting, now said, at para. 54:

> The absence of evidence to explain the omission of Ellis-Don from the schedule F filed by Local 353, IBEW in the accreditation application is of concern to the Board. The question for the Board is whether this omission, of itself, is sufficient, in the context of all the other circumstances, to cause the Board to conclude that Local 353 has abandoned the bargaining rights it had earlier obtained. The omission of Ellis-Don's name is not inconsistent with abandonment and, thus, may signify what respondent counsel asserts. However, that omission is also consistent with an assumption on the part of the Local that the accreditation application affected only specialty contractors or that schedule F speaks only to employers for whom the Local held bargaining rights but who had had employees in the past (albeit not within the previous year). It appears (and there is no cogent evidence to suggest otherwise) that the employer association represented specialty electrical contractors, not general contractors. In that context, the name of Ellis-Don may have been omitted, in the respondent union's reply, as apparently were the names of other general contractors who had signed the working agreement, to reflect the framing of the original application. The question is not what is the most reasonable or a reasonable inference from the omission of Ellis-Don's name but whether the omission signifies abandonment. In the Board's opinion, it is more probable than not that the omission of Ellis-Don's name from schedule F did not reflect an abandonment of bargaining rights. [Emphasis added.]

Les motifs de la vice-présidente, réécrits après la réunion plénière de la Commission, se lisaient ainsi, au par. 54 :

> [TRADUCTION] L'absence de preuve expliquant l'omission du nom de Ellis-Don à l'annexe F déposée par la section locale 353 de la FIOE dans le cadre de la demande d'accréditation préoccupe la Commission, qui estime qu'il s'agit de savoir si cette omission est suffisante en soi, dans le contexte de l'ensemble des autres circonstances, pour lui permettre de conclure que la section locale 353 avait renoncé aux droits de négociation qu'elle avait obtenus auparavant. L'omission du nom de Ellis-Don n'est pas incompatible avec une renonciation et peut donc signifier ce que l'avocat de l'intimée affirme. Cependant, cette omission est compatible également avec le fait que la section locale aurait tenu pour acquis que la demande d'accréditation ne touchait que les entrepreneurs spécialisés ou que l'annexe F ne s'appliquait qu'aux employeurs relativement auxquels la section locale avait des droits de négociation mais qui avaient eu des employés dans le passé (quoique pas dans l'année précédente). Il semble (et il n'y a aucune preuve convaincante du contraire) que l'association d'employeurs représentait les entrepreneurs électriciens spécialisés, et non pas les entrepreneurs généraux. Dans ce contexte, le nom de Ellis-Don peut avoir été omis dans la réponse du syndicat intimé, comme l'ont apparemment été les noms d'autres entrepreneurs généraux qui avaient signé la convention de travail, compte tenu du cadre de la demande initiale. La question n'est pas de savoir quelle est la conclusion la plus raisonnable ou quelle serait une conclusion raisonnable à tirer de l'omission du nom de Ellis-Don, mais bien de savoir si cette omission équivaut à une renonciation. La Commission est d'avis qu'il est plus probable que l'omission du nom de Ellis-Don à l'annexe F n'indiquait pas une renonciation aux droits de négociation. [Je souligne.]

The test applied by the panel ("it is more probable than not that the omission . . . did not reflect an abandonment of bargaining rights") is typical for a finding of fact. The rewrite does not reflect any change in policy or legal principle governing the weight to be given to the evidence. It simply multiplies speculation about why the union might (or might not) have acted as it did. The Board thus chose to put less weight on the union's failure to list the appellant on schedule F and more weight on speculative factors. In other words, the evidence was reweighed or re-assessed, apparently as

Le critère appliqué par la formation (« il est plus probable que l'omission [. . .] n'indiquait pas une renonciation aux droits de négociation ») est typique d'une conclusion de fait. La révision ne révèle aucune modification de la question de principe ou du principe juridique régissant le poids à accorder à la preuve. Elle multiplie simplement les hypothèses au sujet des raisons pour lesquelles le syndicat aurait (ou n'aurait pas) agi comme il l'a fait. La Commission a donc choisi d'accorder moins d'importance à l'omission du syndicat d'inscrire l'appelante à l'annexe F et davantage

a result of the full Board meeting. This is contrary to *Consolidated-Bathurst*.

d'importance à des facteurs hypothétiques. En d'autres termes, la preuve a été réévaluée apparemment par suite de la réunion plénière de la Commission. Cela est contraire à l'arrêt *Consolidated-Bathurst*.

The Divisional Court's Rationalization of the Board's Decision

La justification de la décision de la Commission par la Cour divisionnaire

It was left to Adams J. in the Ontario Divisional Court ((1995), 89 O.A.C. 45) to offer a suggestion about how to rationalize the panel's initial decision with its ultimate decision, at para. 31:

91 Il revenait au juge Adams, de la Cour divisionnaire de l'Ontario ((1995), 89 O.A.C. 45), de suggérer une manière de justifier la décision définitive de la formation par rapport à sa décision initiale, au par. 31 :

The Board had several policy options open to it on the facts as found: (i) the absence of Ellis-Don on Schedule F constituted per se evidence of bargaining right abandonment; (ii) the omission gave rise to a rebuttable presumption of abandonment, thus requiring an explanation from Local 353; (iii) the omission was a factor to be considered along with all the other evidence before the Board; or, finally, (iv) the failure of Local 353 to place Ellis-Don's name on Schedule F was irrelevant, in the circumstances, to the issue of abandonment. Ultimately, the Board concluded the failure of Local 353 to include Ellis-Don on Schedule F was a factor to be considered and was not determinative in the circumstances.

[TRADUCTION] Plusieurs choix de principe s'offraient à la Commission quant aux faits tenus pour avérés: (i) l'absence de Ellis-Don à l'annexe F constituait en soi la preuve de la renonciation aux droits de négociation; (ii) l'omission a donné lieu à une présomption réfutable de renonciation, ce qui obligeait la section locale 353 à fournir une explication; (iii) l'omission constituait un facteur à examiner au même titre que tous les autres éléments de preuve soumis à la Commission; ou enfin, (iv) l'omission de la section locale 353 d'inscrire le nom de Ellis-Don à l'annexe F n'avait aucune pertinence, dans les circonstances, quant à la question de la renonciation. En fin de compte, la Commission a déterminé que l'omission de la part de la section locale 353 d'inscrire Ellis-Don à l'annexe F constituait un facteur à prendre en considération et n'était pas déterminante dans les circonstances.

The options are presented as a menu of policy choices, but the passage does no more than describe transition stages from a strong inference to a weak inference to no inference at all. The question of what weight should be attached to the union's conduct in light of all the evidence heard over several weeks seems to me, quintessentially, for the trier of fact. The appellant was not dealing with the Ministry of Labour, where departmental procedures are not expected to conform to a judicial or quasi-judicial method of making decisions. The Ontario *Labour Relations Act* holds out the promise of a quasi-judicial tribunal where union and management are eyeball-to-eyeball with the decision-makers. So long as the legislative promise

92 Les options sont présentées comme un menu de choix de principes, mais l'extrait ne fait rien de plus que décrire les étapes de transition, à partir d'une forte conclusion, en passant par une faible conclusion, jusqu'à l'absence de conclusion. La question de savoir quelle importance devrait être accordée à la conduite du syndicat à la lumière de l'ensemble de la preuve entendue pendant plusieurs semaines me semble, de par sa nature même, relever du juge des faits. L'appelante n'avait pas affaire au ministère du Travail, où l'on ne s'attend pas à ce que les procédures ministérielles soient conformes à une méthode judiciaire ou quasi judiciaire de prise de décisions. La *Loi sur les relations de travail* de l'Ontario renferme la promesse d'un tribunal quasi judiciaire où syndicats et patrons font face aux décideurs. Tant que la promesse

is there the relevant constraints should be observed in factual adjudications.

93 The panel's initial decision, as I read it, did not suggest that the absence of the appellant on schedule F *per se* constituted abandonment. The initial decision concluded that the union's decision not to include the appellant on schedule F "was a factor to be considered along with all the other evidence" but that in the absence of any explanation, or contrary evidence from the union that bargaining rights had in fact been actively asserted at some point between 1962 and 1971, there was nothing opposable to the common sense inference of abandonment.

94 The Divisional Court also faulted the appellant for its failure to seek a reconsideration by the Board under s. 114(1) of the Act. Apparently the court was not pleased with appellant counsel's somewhat triumphal rejoinder that the Board had been "caught . . . with [its] hand in the cookie jar" and he was not disposed to give it an opportunity to extricate itself. While a motion for reconsideration was an option, it was not equivalent to an internal appeal for purposes of an "exhaustion of administrative remedies" argument. The Board's position advanced with ingenuity and vigour in these proceedings no doubt reflects what the panel would have said on a reconsideration, namely the assertion that *Consolidated-Bathurst* sanctioned the procedure adopted in this case.

Failure to Obtain Evidence from Board Witnesses

95 The appellant obtained an order from Steele J. of the Ontario Court (General Division) ((1992), 95 D.L.R. (4th) 56) compelling the attendance of the Chair of the Board, the Vice-Chair who presided over the panel, and the Registrar of the Board "to obtain information with respect to the procedures implemented by the O.L.R.B. in arriv-

législative existe, les contraintes pertinentes en matière de conclusions relatives aux faits doivent être respectées.

La décision initiale de la formation, selon mon interprétation, ne donnait pas à entendre que l'absence de l'appelante à l'annexe F constituait en soi une renonciation. Il a été conclu dans la décision initiale que la décision du syndicat de ne pas inscrire l'appelante à l'annexe F [TRADUCTION] « constituait un facteur à examiner au même titre que tous les autres éléments de preuve », mais que, en l'absence d'explication ou de preuve contraire de la part du syndicat selon laquelle les droits de négociation avaient en fait été affirmés activement à un certain moment entre 1962 et 1971, rien ne pouvait être opposé à la conclusion fondée sur le bon sens selon laquelle il y avait eu renonciation.

La Cour divisionnaire a également blâmé l'appelante d'avoir omis de demander un nouvel examen par la Commission aux termes du par. 114(1) de la Loi. Apparemment, la cour n'a pas aimé la réplique quelque peu triomphale de l'avocat de l'appelante selon laquelle la Commission avait été [TRADUCTION] « pris[e] la main dans le sac », ni le fait qu'il n'était pas prêt à lui donner la possibilité de se sortir de cet embarras. Même si la requête en nouvel examen constituait une option, elle n'équivalait pas à un appel interne pour les fins de l'argument fondé sur [TRADUCTION] « l'épuisement des recours administratifs ». La position que la Commission a fait valoir avec ingéniosité et insistance en l'espèce reflète sans aucun doute ce que la formation aurait dit lors d'un nouvel examen, à savoir l'affirmation que *Consolidated-Bathurst* a sanctionné la procédure adoptée dans la présente affaire.

L'omission d'obtenir la déposition de témoins membres de la Commission

L'appelante a obtenu une ordonnance du juge Steele, de la Cour de l'Ontario (Division générale) ((1992), 95 D.L.R. (4th) 56), qui obligeait le président de la Commission, la vice-présidente qui a présidé la formation, et le registrateur de la Commission à comparaître [TRADUCTION] « afin d'obtenir des renseignements sur la procédure mise en

ing at its final decisions" (p. 58). The motions judge was reversed by the Ontario Divisional Court ((1994), 16 O.R. (3d) 698) on the basis of s. 111 of the *Labour Relations Act*, R.S.O. 1990, c. L.2 (now s. 117), which grants testimonial immunity in the following terms:

Except with the consent of the Board, no member of the Board, nor its registrar, nor any of its other officers, nor any of its clerks or servants shall be required to give testimony in any civil proceeding or in any proceeding before the Board or in any proceeding before any other tribunal respecting information obtained in the discharge of their duties or while acting within the scope of their employment under this Act.

œuvre par la CRTO pour en arriver à ses décisions définitives » (p. 58). La décision du juge des requêtes a été infirmée par la Cour divisionnaire de l'Ontario ((1994), 16 O.R. (3d) 698) sur le fondement de l'art. 111 de la *Loi sur les relations de travail*, L.R.O. 1990, ch. L.2 (maintenant l'art. 117), qui accorde l'exonération de l'obligation de témoigner dans les termes suivants :

Sauf si la Commission y consent, ses membres, son registrateur, et les autres membres de son personnel sont exemptés de l'obligation de témoigner dans une instance civile ou dans une instance devant la Commission ou devant toute autre commission, en ce qui concerne des renseignements obtenus dans le cadre de leurs fonctions ou en rapport avec celles-ci dans le cadre de la présente loi.

The Ontario Court of Appeal and subsequently this Court ([1995] 1 S.C.R. vii), denied leave to appeal from this interlocutory decision.

96 La Cour d'appel de l'Ontario et, par la suite, notre Cour ([1995] 1 R.C.S. vii) ont refusé la permission d'interjeter appel de cette décision interlocutoire.

The legislative grant of testimonial immunity in s. 111 may be justified on various policy grounds, as pointed out by my colleague LeBel J. at paras. 52-53. However, it creates the following problem in the present context:

97 Le fait que l'art. 111 accorde l'exonération de l'obligation de témoigner peut se justifier par différentes raisons de principe, comme l'a souligné mon collègue le juge LeBel aux par. 52-53. Cela crée toutefois le problème suivant dans le contexte actuel :

Safeguards are of no use if they cannot be enforced. How can judicial review be used to police the safeguards built into the decision-making process if the operation of that process is veiled behind a cloak of deliberative secrecy? Just as at the substantive level, there exists a need for safeguards to reconcile natural justice with institutional decision-making; at an operational level some mechanism must be found to reconcile the need for judicial review with the privilege of deliberative secrecy.

[TRADUCTION] Les mesures de protection ne sont d'aucune utilité si elles ne peuvent pas être appliquées. Comment peut-on utiliser le contrôle judiciaire pour vérifier les mesures de protection intégrées au processus décisionnel si le fonctionnement de ce processus se cache derrière le voile du secret du délibéré? Tout comme il y a au niveau du fond la nécessité de mesures de protection pour concilier la justice naturelle et la prise de décision institutionnelle, il faut trouver au niveau opérationnel un mécanisme conciliant la nécessité du contrôle judiciaire et le privilège du secret du délibéré.

(R. E. Hawkins, "Behind Closed Doors II: The Operational Problem — Deliberative Secrecy, Statutory Immunity and Testimonial Privilege" (1996), 10 *C.J.A.L.P.* 39, at p. 40)

(R. E. Hawkins, « Behind Closed Doors II : The Operational Problem — Deliberative Secrecy, Statutory Immunity and Testimonial Privilege » (1996), 10 *C.J.A.L.P.* 39, p. 40)

This Court in *Consolidated-Bathurst* contemplated meaningful redress when full board meetings exceed their proper role. This was demonstrated in *Tremblay v. Quebec (Commission des*

98 Dans l'arrêt *Consolidated-Bathurst* notre Cour a examiné la possibilité de redressement significatif lorsque les réunions plénières vont au-delà du rôle qui leur revient. Cela a été démontré dans l'arrêt

affaires sociales), [1992] 1 S.C.R. 952, in which Gonthier J. wrote, at p. 965:

> The institutionalization of the decisions of administrative tribunals creates a tension between on one hand the traditional concept of deliberative secrecy and on the other the fundamental right of a party to know that the decision was made in accordance with the rules of natural justice . . . . Paradoxically, it is the public nature of these rules which, while highly desirable, may open the door to an action in nullity or an evocation. It may be questioned whether justice is seen to be done. Accordingly, the very special way in which the practice of administrative tribunals has developed requires the Court to become involved in areas into which, if a judicial tribunal were in question, it would probably refuse to venture. . . . [Emphasis added.]

and at p. 966:

> . . . by the very nature of the control exercised over their decisions administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals.

99 Here the undisputed evidence is that the initial decision of the panel held as a fact that the union had abandoned its bargaining rights. The final decision held as a fact that it had not, and the intervening event was the full Board meeting. In *Tremblay*, Gonthier J. observed at p. 980:

> . . . the procedure of early signature of draft decisions by members and assessors followed in the case at bar seems to me unadvisable. Although this procedure may be practical, it only adds to the appearance of bias when a decision maker decides to alter his opinion after free consultation with his colleagues.

(While, as stated, an original signed copy of the initial decision in the present case is not in the Court record, the "true copy" that was filed indicates that the original was signed.) Gonthier J. continued at pp. 980-81:

> A litigant who sees a "decision" favourable to him changed to an unfavourable one will not think that there has been a normal consultation process; rather, he will have the impression that external pressure has definitely

Tremblay c. Québec (Commission des affaires sociales), [1992] 1 R.C.S. 952, dans lequel le juge Gonthier a écrit, à la p. 965 :

> L'institutionnalisation des décisions des tribunaux administratifs crée une tension entre, d'une part, le traditionnel concept du secret du délibéré et, d'autre part, le droit fondamental d'une partie de savoir que la décision a été rendue en conformité avec les principes de justice naturelle. [. . .] Le caractère public de ces règles, par ailleurs fort souhaitable, est paradoxalement ce qui peut donner prise à une action en nullité ou à une évocation. L'apparence de justice peut être mise en cause. L'évolution bien particulière de la pratique des tribunaux administratifs oblige donc la Cour à s'immiscer dans des domaines où, s'il s'agissait d'un tribunal judiciaire, elle refuserait probablement de s'aventurer . . . [Je souligne.]

et à la p. 966 :

> . . . de par la nature du contrôle qui est exercé sur leurs décisions, les tribunaux administratifs ne [peuvent] invoquer le secret du délibéré au même degré que les tribunaux judiciaires.

En l'espèce, la preuve non contestée révèle que dans sa décision initiale, la formation a tiré la conclusion de fait que le syndicat avait renoncé à ses droits de négociation. Dans sa décision définitive, elle a tiré la conclusion de fait que le syndicat n'avait pas renoncé à ses droits, et l'événement qui s'est produit entre ces deux décisions est la réunion plénière de la Commission. Dans l'arrêt *Tremblay*, le juge Gonthier a fait remarquer à la p. 980 :

> . . . la procédure de signature anticipée des projets de décisions par les membres et assesseurs suivie en l'espèce m'apparaît être à déconseiller. Même si cette procédure s'avère pratique, elle ne fait qu'ajouter à l'apparence de partialité lorsqu'un décideur décide de modifier son opinion après libre consultation avec ses collègues.

(Même si, comme je l'ai mentionné, le dossier de notre Cour ne contient aucun exemplaire original signé de la décision initiale en l'espèce, la « copie certifiée conforme » qui a été déposée indique que l'original a été signé.) Le juge Gonthier a poursuivi aux p. 980-981 :

> Le justiciable qui voit une «décision» qui lui était favorable se changer en décision défavorable ne pensera pas qu'il s'agit du processus normal de consultation; il aura plutôt l'impression qu'une pression extérieure a bel et

led persons who were initially favourable to his case to change their minds.

The appellant does not need to establish "external pressure" in this case. It merely has to establish a basis for a reasonable inference that factual matters were referred for discussion at the full Board meeting that ought to have been left to the undisturbed deliberations of the panel.

Section 111 prevented the appellant from getting to the bottom of the Board's decision-making process in this case. The result, in my view, is not that the appellant is thereby prevented from establishing a basis for judicial review. The Court ought not to be blind to the difficulties of proof in determining whether the appellant has made out its case. Otherwise the limitation imposed by *Consolidated-Bathurst* becomes a pious sentiment rather than an enforceable rule of law, which indeed is a question raised by Professor David J. Mullan in his case comment:

> . . . it is possible to see the judgment as simply drawing the attention of members to their responsibilities without any real expectation that there will be consistent monitoring of behaviour.

(D. J. Mullan, "Policing the *Consolidated-Bathurst* Limits — Of Whistleblowers and Other Assorted Characters" (1993), 10 Admin. L.R. (2d) 241, at p. 242)

I think *Tremblay* showed that the Court *did* have a "real expectation" that the limits on the scope of full board meetings would be enforceable. In that case, the Court quashed the decision of the Quebec *Commission des affaires sociales* because its equivalent of the full board meeting procedure compromised the ability of individual panels to reach their own decision free of constraints imposed by colleagues.

The Board is responsible for maintaining its deliberative secrecy, and it will generally be assisted by the courts in that regard. However,

bien fait changer d'avis les personnes d'abord favorables à sa cause.

100 L'appelante n'a pas à établir l'existence d'une « pression extérieure » en l'espèce. Il suffit qu'elle établisse le fondement d'une conclusion raisonnable que des questions factuelles ont été renvoyées pour fins de discussions à la réunion plénière de la Commission et qu'il aurait fallu que ces questions soient laissées à la formation pour qu'elle délibère en toute quiétude à leur sujet.

101 Vu l'article 111 l'appelante n'a pu aller au fond du processus décisionnel de la Commission en l'espèce. J'estime que cela n'empêche pas l'appelante d'établir le fondement d'un contrôle judiciaire. Notre Cour ne devrait pas fermer les yeux sur la difficulté de déterminer si l'appelante a établi sa preuve. Autrement, la restriction imposée par l'arrêt *Consolidated-Bathurst* devient un vœu pieux plutôt qu'une règle de droit exécutoire, question que soulève d'ailleurs le professeur David J. Mullan dans son commentaire d'arrêt :

> [TRADUCTION] . . . il est possible de considérer que le jugement ne fait qu'attirer l'attention des membres sur leurs responsabilités sans qu'il n'y ait d'attente réelle que leur conduite fasse l'objet d'une surveillance continue.

(D. J. Mullan, « Policing the *Consolidated-Bathurst* Limits — Of Whistleblowers and Other Assorted Characters » (1993), 10 Admin. L.R. (2d) 241, p. 242)

102 J'estime que l'arrêt *Tremblay* a montré que notre Cour avait *effectivement* l'« attente réelle » que les limites imposées à la portée des réunions plénières soient exécutoires. Dans cette affaire, notre Cour a annulé la décision de la Commission des affaires sociales du Québec parce que son équivalent de la procédure de la réunion plénière compromettait la capacité de chaque formation de rendre sa propre décision à l'abri des contraintes imposées par des collègues.

103 La Commission est responsable du maintien du secret de ses délibérations et les tribunaux l'appuieront généralement à cet égard. Toutefois, lors-

where there is a breach of that secrecy from within the Board itself, whether by reason of a whistleblower or otherwise, the inconvenient information cannot be wished out of existence. The appellant is not to be faulted for coming into possession of information volunteered by a retired member of the Board.

qu'une violation de ce secret provient de la Commission elle-même, que ce soit en raison de la présence d'un dénonciateur ou pour d'autres raisons, les renseignements embarrassants ne peuvent pas disparaître comme par enchantement. On ne peut pas blâmer l'appelante d'avoir obtenu des renseignements qu'un membre retraité de la Commission a pris l'initiative de lui fournir.

104 The Board in its submissions cautions the Court against "lowering the bar" for judicial review, and worries that once "an allegation of wrongdoing was made, an administrative tribunal would have no choice but to reveal its deliberations so as to rebut the 'reasonable apprehension'". The Board construes "deliberations" broadly to include process as well as substance, and says that it embraces not only the decision makers (the panel) but all attendees at the full board meeting as well. However, it is in the nature of judicial review that the secrecy as to the process may have to be relaxed by the Board to dispel legitimate concerns about the integrity of its decision-making process. The alternative for the Board in a case where an applicant has met the threshold evidentiary onus (as here) is to allow the decision to be vacated as the price of preserving intact the secrecy surrounding its formation.

Dans ses arguments, la Commission met notre Cour en garde contre le fait [TRADUCTION] « [d']abaisser la barre » en matière de contrôle judiciaire et elle craint que dès [TRADUCTION] « qu'une allégation de faute serait faite, un tribunal administratif n'aurait pas d'autre choix que de révéler ses délibérations pour réfuter la "crainte raisonnable" ». La Commission interprète largement le mot « délibérations », qui comporte selon elle le processus de même que le fond, et elle dit que ce mot vise non seulement les décideurs (la formation), mais aussi tous ceux qui ont participé à la réunion plénière. Toutefois, la nature du contrôle judiciaire fait en sorte qu'il se peut que la Commission ait à lever le secret afin de dissiper des craintes légitimes au sujet de l'intégrité de son processus décisionnel. Dans un cas où le demandeur s'est acquitté de la charge initiale de présentation (comme en l'espèce), la solution de rechange pour la Commission consiste à permettre que la décision soit annulée pour que soit préservé le secret entourant son élaboration.

105 In my view, the Board cannot have it both ways. It cannot, with the assistance of the legislature, deny a person in the position of the appellant all legitimate access to relevant information, then rely on the absence of this same information as a conclusive answer to the appellant's complaint. We are not in the business of playing Catch 22. The record discloses a change of position by the panel on an issue of fact. This runs counter to *Consolidated-Bathurst* and has to be dealt with properly if confidence in the integrity of the Board's decision making is to be maintained. The exigencies of

À mon avis, la Commission ne peut pas jouer sur les deux plans. Elle ne peut pas, avec l'aide du législateur, priver une personne dans la position de l'appelante de tout accès légitime aux renseignements pertinents, pour ensuite invoquer l'absence de ces mêmes renseignements en tant que réponse déterminante à la plainte de l'appelante. Nous ne sommes pas ici devant une situation sans issue. Le dossier révèle que la formation a modifié sa position sur une question de fait. Cela va à l'encontre de l'arrêt *Consolidated-Bathurst* et il faut prendre les mesures appropriées pour que la confiance dans l'intégrité du processus décisionnel de la Commission soit préservée. Les exigences applicables en matière de contrôle judiciaire ont été expressément

judicial review were specifically affirmed by Gonthier J. in *Tremblay* at pp. 965-66:

> . . . when there is no appeal from the decision of an administrative tribunal, as is the case with the Commission, that decision can only be reviewed in one way: as to legality by judicial review. It is of the very nature of judicial review to examine *inter alia* the decision maker's decision-making process. Some of the grounds on which a decision may be challenged even concern the internal aspect of that process: for example, was the decision made at the dictate of a third party? Is it the result of the blind application of a previously established directive or policy? All these events accompany the deliberations or are part of them.
>
> Accordingly, it seems to me that by the very nature of the control exercised over their decisions administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals. Of course, secrecy remains the rule, but it may nonetheless be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice. [Emphasis added.]

In *Tremblay*, of course, the Court was not confronted with a testimonial immunity provision comparable to s. 111 of the Ontario *Labour Relations Act*. Nevertheless, it could not have been intended by the Court to make a distinction between fact and policy, only to have its enforcement rendered impracticable. Where such difficulties of proof are presented, as here, they will have to be factored into the evidentiary burden of proof placed on the appellant.

The Presumption of Regularity

The Ontario Court of Appeal considered the Board's proceedings to be protected by the "presumption of regularity" ((1998), 38 O.R. (3d) 737, at p. 740). This presumption, like any rebuttable presumption, yields to contrary evidence. Here again the Board relies on its successful denial of access to relevant information to feed the presumption and defeat the appellant's complaint. Not only were subpoenas set aside, as mentioned, but attempts by the appellant to obtain relevant information through the provincial *Freedom of Infor-*

énoncées par le juge Gonthier dans *Tremblay*, p. 965-966 :

> . . . lorsque les décisions d'un tribunal administratif sont sans appel, comme c'est le cas à la Commission, il n'existe qu'une seule façon de réviser celles-ci: le contrôle de la légalité. Or, il relève de la nature même du contrôle judiciaire d'examiner, entre autres, le processus décisionnel du décideur. Certains des motifs pour lesquels une décision peut être attaquée portent même sur l'aspect interne de ce processus décisionnel: par exemple, la décision a-t-elle été prise sous la dictée d'un tiers? Résulte-t-elle de l'application aveugle d'une directive ou d'une politique pré-établie? Tous ces événements sont concomitants au délibéré ou en font partie.
>
> Il me semble donc que, de par la nature du contrôle qui est exercé sur leurs décisions, les tribunaux administratifs ne puissent invoquer le secret du délibéré au même degré que les tribunaux judiciaires. Le secret demeure bien sûr la règle, mais il pourra néanmoins être levé lorsque le justiciable peut faire état de raisons sérieuses de croire que le processus suivi n'a pas respecté les règles de justice naturelle. [Je souligne.]

106 Il est évident que dans *Tremblay* notre Cour ne faisait pas face à une disposition d'exonération de l'obligation de témoigner comparable à l'art. 111 de la *Loi sur les relations de travail* de l'Ontario. Néanmoins, notre Cour n'a pas pu avoir l'intention de faire une distinction entre fait et principe, pour voir ensuite l'application de cette distinction rendue impossible. Lorsque de telles difficultés en matière de preuve se présentent, comme en l'espèce, elles doivent être considérées comme faisant partie du fardeau de présentation de la preuve reposant sur l'appelante.

La présomption de régularité

107 La Cour d'appel de l'Ontario a estimé que la procédure de la Commission était protégée par la « présomption de régularité » ((1998), 38 O.R. (3d) 737, p. 740). Comme toute présomption réfutable, cette présomption s'efface devant une preuve contraire. Encore une fois en l'espèce, la Commission s'appuie sur le fait qu'elle a réussi à interdire à l'appelante l'accès aux renseignements pertinents pour renforcer la présomption et faire rejeter la plainte de l'appelante. Non seulement des assignations de témoins ont été annulées, mais la Com-

mation and Protection of Privacy Act, R.S.O. 1990, c. F.31, were successfully resisted. Building on this success, the Board relies upon the statement of Gonthier J. in *Consolidated-Bathurst* at p. 336:

> The appellant does not claim that new evidence was adduced at the meeting and the record does not disclose any such breach of the *audi alteram partem* rule. The defined practice of the Board at full board meetings is to discuss policy issues on the basis of the facts as they were determined by the panel. The benefits to be derived from the proper use of this consultation process must not be denied because of the mere concern that this established practice might be disregarded, in the absence of any evidence that this has occurred. In this case, the record contains no evidence that factual issues were discussed by the Board at the September 23, 1983 meeting. [Emphasis added.]

108 Where, as here, a serious question is raised on material emanating from the Board itself as to whether the *Consolidated-Bathurst* limits were respected, I do not think it is for the Board to claim that the failure of the party to obtain the additional evidence that the Board itself has fought to withhold is a complete answer to the claim. The strength of the evidence necessary to displace the presumption of regularity depends on the nature of the case: W. Wade and C. Forsyth, *Administrative Law* (7th ed. 1994), at p. 334. Having regard to the difficulties put in the way of the appellant to obtain evidence to which at common law it would have been entitled (*Tremblay*, at pp. 965-66), I think the appellant discharged its evidentiary onus to displace the "presumption" of regularity.

109 The Board relies on the public interest in the effective operation of its docket, but that is not the only public interest at stake here. Public confidence in the integrity of decision making by courts and adjudicative tribunals is of the highest importance. Parties coming before the Board should not

mission a résisté avec succès aux tentatives de l'appelante d'obtenir des renseignements pertinents au moyen de la *Loi sur l'accès à l'information et la protection de la vie privée*, L.R.O. 1990, ch. F.31, de la province. Partant de ce succès, la Commission se fonde sur l'énoncé du juge Gonthier dans *Consolidated-Bathurst*, p. 336 :

> L'appelante ne soutient pas que de nouveaux éléments de preuve ont été soumis à la réunion et le dossier ne révèle aucune violation de la règle *audi alteram partem* pour ce motif. La pratique définie par la Commission lors de ces réunions plénières consiste précisément à discuter des questions de politique en tenant pour avérés les faits établis par le banc. Il ne faut pas refuser les avantages que l'utilisation valable de ce processus de consultation peut procurer, uniquement à cause de la simple crainte que cette pratique établie ne soit pas respectée, en l'absence de toute preuve que la chose s'est produite. En l'espèce, le dossier ne contient aucune preuve que des questions de fait ont été discutées par la Commission lors de la réunion du 23 septembre 1983. [Je souligne.]

Lorsque, comme en l'espèce, une question sérieuse est soulevée à partir de documents émanant de la Commission même quant à savoir si les limites imposées par l'arrêt *Consolidated-Bathurst* ont été respectées, je ne crois pas que la Commission puisse prétendre que l'omission de la partie d'obtenir la preuve supplémentaire que la Commission elle-même a cherché à ne pas communiquer constitue une réponse complète à la plainte. La force de la preuve nécessaire pour réfuter la présomption de régularité varie selon la nature de l'affaire : W. Wade et C. Forsyth, *Administrative Law* (7e éd. 1994), p. 334. Quant aux difficultés qu'a éprouvées l'appelante à obtenir des éléments de preuve auxquels elle aurait eu droit en common law (*Tremblay*, p. 965-966), j'estime qu'elle s'est acquittée de sa charge de présentation consistant à déplacer la « présomption » de régularité.

La Commission se fonde sur l'intérêt public relatif à la gestion efficace de ses dossiers, mais il ne s'agit pas du seul intérêt public en jeu en l'espèce. La confiance du public dans l'intégrité du processus décisionnel des cours de justice et des tribunaux administratifs est de la plus haute impor-

come away with a *reasonable* apprehension that they were subject to a rogue process. Once it was determined here that the change between the initial decision and the final decision related to an issue that was almost entirely factual, and was nevertheless put up for discussion at a full Board meeting, I think the appellant has made out a *prima facie* basis for judicial review which in this case the Board chose not to rebut. To hold otherwise would suggest that the Court in *Consolidated-Bathurst* affirmed procedural limitations on full board meetings for breach of which there is no effective remedy.

tance. Les parties comparaissant devant la Commission ne doivent pas repartir avec la crainte *raisonnable* d'avoir été soumise à un processus irrégulier. Une fois qu'il a été déterminé en l'espèce que le changement intervenu entre la décision initiale et la décision définitive portait sur une question qui était presque entièrement factuelle et qui a néanmoins été soulevée à une réunion plénière de la Commission, j'estime que l'appelante a établi à première vue un fondement pour le contrôle judiciaire, que la Commission a décidé de ne pas réfuter en l'espèce. Conclure autrement indiquerait que notre Cour a confirmé, dans *Consolidated-Bathurst*, l'existence de restrictions procédurales relatives aux réunions plénières sans qu'il n'y ait une réparation efficace pour la violation de ces restrictions.

I do not think it is necessary in this case to address the possibility of relief against an "apparent" breach of fair hearing rights. I note, however, that many of the justifications my colleague, LeBel J. lists, at para. 48, for resort to "appearances" in bias cases apply here, principally the difficulty of proof and the need to vindicate the integrity of the adjudicative process. In the normal case it will be apparent whether someone has received the sort of hearing to which he or she is entitled. Did he or she know the case to meet? Was there proper disclosure? Was there a hearing? Were reasons given? Were those reasons adequate? Generally, unlike cases of bias, a participant has enough information in the ordinary course to determine the content of procedural fairness in a particular case and to assess whether it was received. For the most part, it will be "seen" by all whether fair hearing rights have been respected. This type of case is different. The statute bars access to the information relevant to a determination whether the full Board meeting was contrary to natural justice. The problems of information and proof inherent in bias cases, which contributed to the creation of the "appearances" standard, are present here.

Je ne pense pas qu'il soit nécessaire en l'espèce d'examiner la possibilité de réparation en matière de violation « apparente » du droit à une audience équitable. Je souligne toutefois que plusieurs des justifications que mon collègue le juge LeBel énumère, au par. 48, pour le recours aux « apparences » dans les affaires de partialité s'appliquent en l'espèce, tout particulièrement la difficulté de la preuve et la nécessité de défendre l'intégrité du processus décisionnel. Il sera généralement apparent qu'une personne a reçu ou non le genre d'audience à laquelle elle a droit. Connaissait-elle la preuve invoquée contre elle? Y a-t-il eu communication appropriée? Y a-t-il eu une audience? Des motifs ont-ils été fournis? Ces motifs étaient-ils adéquats? Généralement et contrairement aux affaires de partialité, un participant a suffisamment de renseignements pour déterminer le contenu de l'équité procédurale dans une affaire particulière et s'il en a bénéficié. En majeure partie, tous « verront » si le droit à une audience équitable a été respecté. Il s'agit en l'espèce d'une affaire différente. La loi interdit l'accès aux renseignements pertinents pour déterminer si la réunion plénière de la Commission était contraire à la justice naturelle. Les problèmes de renseignements et de preuve inhérents aux affaires de partialité, qui ont contribué à la création de la norme des « apparences », sont présents en l'espèce.

110

111 However, it is not necessary in this case to step into such controversial jurisprudential waters. The evidence shows a reference of the case to the full Board, and a change in the factual adjudication. This brings the appellant within the principle enunciated by Gonthier J. in *Consolidated-Bathurst* at pp. 335-36:

> The determination and assessment of facts are delicate tasks which turn on the credibility of the witnesses and an overall evaluation of the relevancy of all the information presented as evidence. As a general rule, these tasks cannot be properly performed by persons who have not heard all the evidence and the rules of natural justice do not allow such persons to vote on the result. Their participation in discussions dealing with such factual issues is less problematic when there is no participation in the final decision. However, I am of the view that generally such discussions constitute a breach of the rules of natural justice because they allow persons other than the parties to make representations on factual issues when they have not heard the evidence. [Emphasis added.]

On this point, there seems to have been no disagreement between Gonthier J. and Sopinka J., dissenting in the result, who wrote at p. 296:

> . . . in matters affecting the integrity of the decision-making process, it is sufficient if there is an appearance of injustice. The tribunal will not be heard to deny what appears as a plausible objective conclusion. [Emphasis added.]

Once the likelihood is established that the full Board meeting trespassed on adjudicative matters properly left to the panel, the further question of prejudice is properly dealt with in accordance with the observation of Dickson J. in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1116: "We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons."

112 In my view, subject to the privative clause issue, the appellant is entitled to a new hearing before a different panel of the Board. This is not an easy

Il n'est cependant pas nécessaire en l'espèce de pénétrer sur ce territoire jurisprudentiel controversé. La preuve indique l'existence d'un renvoi de l'affaire à la réunion plénière et d'un changement de décision quant aux faits. Cela fait en sorte que l'appelante est visée par le principe énoncé par le juge Gonthier dans *Consolidated-Bathurst*, p. 335-336 :

> La détermination et l'évaluation des faits sont des tâches délicates qui dépendent de la crédibilité des témoins et de l'évaluation globale de la pertinence de tous les renseignements présentés en preuve. En général, les personnes qui n'ont pas entendu toute la preuve ne sont pas à même de bien remplir cette tâche et les règles de justice naturelle ne permettent pas à ces personnes de voter sur l'issue du litige. Leur participation aux discussions portant sur ces questions de fait pose moins de problèmes quand elles ne participent pas à la décision définitive. Cependant, j'estime que ces discussions violent généralement les règles de justice naturelle parce qu'elles permettent à des personnes qui ne sont pas parties au litige de faire des observations sur des questions de fait alors qu'elles n'ont pas entendu la preuve. [Je souligne.]

Sur ce point, il ne semble y avoir eu aucun désaccord entre le juge Gonthier et le juge Sopinka, dissident quant à l'issue, qui a écrit à la p. 296 :

> . . . en matière d'atteinte à l'intégrité du processus décisionnel, il suffit qu'il y ait apparence d'injustice. On ne peut accepter que le tribunal nie ce qui paraît être une conclusion objective plausible. [Je souligne.]

Dès que l'on démontre la probabilité que la réunion plénière de la Commission ait empiété sur des questions décisionnelles devant être laissées à la formation, la question suivante du préjudice doit être examinée conformément à l'observation faite par le juge Dickson dans l'arrêt *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105, p. 1116 : « Nous ne sommes pas concernés ici par la preuve de l'existence d'un préjudice réel mais plutôt par la possibilité ou la probabilité qu'aux yeux des gens raisonnables, il existe un préjudice. »

112 À mon avis, sous réserve de la question de la clause privative, l'appelante a droit à une nouvelle audience devant une formation différente de la

order to make given the fact that this case has been before the Board and the courts for many years. However, the courts in Ontario refused to stay the Board's original order upholding the respondent union's bargaining rights, and the union and its members have not on that account been prejudiced by the delay.

Commission. Il ne s'agit pas d'une ordonnance facile à rendre compte tenu du fait que la présente affaire est devant la Commission et les tribunaux depuis de nombreuses années. Toutefois, les tribunaux ontariens ont refusé de suspendre l'ordonnance originale de la Commission confirmant les droits de négociation du syndicat intimé, de sorte que le délai n'a causé aucun préjudice au syndicat et à ses membres.

The Privative Clauses

Les clauses privatives

Decisions of the Board are protected by a considerable armoury of statutory provisions including a "finality clause" and a "privative clause": 113

Les décisions de la Commission sont protégées par une armée de dispositions législatives qui comprennent une « clause d'irrévocabilité » et une « clause privative » :

114. (1) [Jurisdiction] The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

116. [Board's orders not subject to review] No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

114. (1) [Compétence exclusive] La Commission a compétence exclusive pour exercer les pouvoirs que lui confère la présente loi ou qui lui sont conférés en vertu de celle-ci et trancher toutes les questions de fait ou de droit soulevées à l'occasion d'une affaire qui lui est soumise. Ses décisions ont force de chose jugée. Toutefois, la Commission peut à l'occasion, si elle estime que la mesure est opportune, réviser, modifier ou annuler ses propres décisions, ordonnances, directives ou déclarations.

116. [La décision de la Commission n'est pas susceptible de révision] Sont irrecevables devant un tribunal les demandes en contestation ou en révision des décisions, ordonnances, directives ou déclarations de la Commission ou les instances visant la contestation, la révision, la limitation ou l'interdiction de ses activités, par voie notamment d'injonctions, de jugement déclaratoire, de brefs de *certiorari*, *mandamus*, prohibition ou *quo warranto*.

The effect of such clauses was explained by Dickson J. (as he then was), speaking for the Court in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382, at p. 389: 114

L'effet de ces dispositions a été expliqué par le juge Dickson (plus tard Juge en chef), s'exprimant au nom de notre Cour dans l'arrêt *Union internationale des employés des services, local nº 333 c. Nipawin District Staff Nurses Association*, [1975] 1 R.C.S. 382, p. 389 :

A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant

Un tribunal peut, d'une part, avoir compétence dans le sens strict du pouvoir de procéder à une enquête mais, au cours de cette enquête, faire quelque chose qui retire l'exercice de ce pouvoir de la sauvegarde de la clause privative ou limitative de recours. Des exemples de ce genre d'erreur seraient le fait d'agir de mauvaise foi, de fonder la décision sur des données étrangères à la ques-

factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it. [Emphasis added.]

To the same effect see *Université du Québec à Trois-Rivières v. Laroque*, [1993] 1 S.C.R. 471, at pp. 491 and 494; *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425, at p. 435; Brown and Evans, *Judicial Review of Administrative Action in Canada*, *supra*, at para. 13:5440, p. 13-78; G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at para. 4.100, p. 4-6. The Board lies at the judicial end of the spectrum of administrative tribunals discussed in *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at pp. 628-29. Where, as here, the Board upholds a grievance and orders the payment of damages under a procedure that violated the principles of natural justice, the order is made without jurisdiction and will be set aside despite the privative clause.

Disposition

115 I would allow the appeal with costs and remit the union's application to the Ontario Labour Relations Board for a rehearing before a different panel. The appellant should have its costs on a party and party basis here and in the courts below.

Appeal dismissed with costs, MAJOR and BINNIE JJ. *dissenting.*

Solicitors for the appellant: Lerner & Associates, Toronto.

Solicitors for the respondent Ontario Labour Relations Board: Tory Tory DesLauriers & Binnington, Toronto.

Solicitors for the respondent International Brotherhood of Electrical Workers, Local 894: Koskie Minsky, Toronto.

tion, d'omettre de tenir compte de facteurs pertinents, d'enfreindre les règles de la justice naturelle ou d'interpréter erronément les dispositions du texte législatif de façon à entreprendre une enquête ou répondre à une question dont il n'est pas saisi. [Je souligne.]

Dans le même sens, voir *Université du Québec à Trois-Rivières c. Laroque*, [1993] 1 R.C.S. 471, p. 491 et 494; *Metropolitan Life Insurance Co. c. Internatinal Union of Operating Engineers, Local 796*, [1970] R.C.S. 425, p. 435; Brown et Evans, *Judicial Review of Administrative Action in Canada, op. cit.*, par. 13:5440, p. 13-78; G. W. Adams, *Canadian Labour Law* (2e éd. (feuilles mobiles)), par. 4.100, p. 4-6. La Commission se situe à l'extrémité judiciaire de l'échelle des tribunaux administratifs mentionnée dans l'arrêt *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602, p. 628-629. Lorsque, comme en l'espèce, la Commission accueille un grief et ordonne le versement de dommages-intérêts en vertu d'une procédure qui a contrevenu aux principes de justice naturelle, l'ordonnance est rendue en l'absence de compétence et sera annulée malgré la clause privative.

Dispositif

Je suis d'avis d'accueillir le pourvoi avec dépens et de renvoyer la demande du syndicat à la Commission des relations de travail de l'Ontario pour une nouvelle audience devant une formation différente. L'appelante a droit aux dépens sur une base de frais entre parties en notre Cour et dans les tribunaux d'instance inférieure.

Pourvoi rejeté avec dépens, les juges MAJOR *et* BINNIE *sont dissidents.*

Procureurs de l'appelante : Lerner & Associates, Toronto.

Procureurs de l'intimée la Commission des relations de travail de l'Ontario : Tory Tory DesLauriers & Binnington, Toronto.

Procureurs de l'intimée la Fraternité internationale des ouvriers en électricité, section locale 894 : Koskie Minsky, Toronto.

Consolidated-Bathurst Packaging Ltd. *Appellant*

v.

International Woodworkers of America, Local 2-69 *Respondent*

and

The Ontario Labour Relations Board *Respondent*

INDEXED AS: IWA *v.* CONSOLIDATED-BATHURST PACKAGING LTD.

File No.: 20114.

1989: April 26; 1990: March 15.

Present: Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law — Natural justice — Audi alteram partem rule — Right to know case to be made — Three-person panel hearing case and ultimately making decision — Case involving important and wider policy implications — Full Board meeting called to discuss policy implications of a draft decision — Facts accepted as stated in draft decision — No vote or consensus taken — No minutes kept — Attendance not recorded — Whether or not breach of rules of natural justice occurred — Labour Relations Act, R.S.O. 1980, c. 228, ss. 14, 102(9), (13), 106, 108, 114.

The Ontario Labour Relations Board ordinarily sits in panels of three when hearing applications under the *Labour Relations Act*. A three-member panel decided that the appellant had failed to bargain in good faith by not disclosing during negotiations for a collective agreement that it planned to close a plant. In the course of deliberating over this decision, a meeting of the full Board was held to discuss a draft of the reasons. No express statutory authority exists for this practice.

The record did not indicate how many of the Board's 48 members attended the meeting in question and

Consolidated-Bathurst Packaging Ltd. *Appelante*

c.

Syndicat international des travailleurs du bois d'Amérique, section locale 2-69 *Intimé*

et

La Commission des relations de travail de l'Ontario *Intimée*

RÉPERTORIÉ: SITBA *c.* CONSOLIDATED-BATHURST PACKAGING LTD.

N° du greffe: 20114.

1989: 26 avril; 1990: 15 mars.

Présents: Les juges Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier et McLachlin.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit administratif — Justice naturelle — Règle audi alteram partem — Droit de connaître la preuve invoquée contre soi — Audition d'une affaire et décision ultime par un banc de trois personnes — Affaire comportant des conséquences importantes et plus générales en matière de politique — Convocation d'une réunion plénière de la Commission pour discuter des conséquences en matière de politique d'un avant-projet de décision — Faits énoncés dans l'avant-projet de décision tenus pour avérés — Aucun vote ni aucune vérification du consensus — Aucune rédaction de procès-verbal des délibérations — Aucune prise des présences — Y a-t-il eu violation des règles de justice naturelle? — Loi sur les relations de travail, L.R.O. 1980, ch. 228, art. 14, 102(9), (13), 106, 108, 114.

La Commission des relations de travail de l'Ontario siège ordinairement en bancs de trois membres quand elle entend les demandes présentées en vertu de la *Loi sur les relations de travail*. Un banc de trois commissaires a statué que l'appelante avait refusé de négocier de bonne foi en ne divulguant pas, au cours des négociations visant la signature d'une convention collective, qu'elle projetait de fermer une usine. Pendant les délibérations relatives à cette décision, la Commission a tenu une réunion plénière pour débattre un avant-projet de motifs. Aucune disposition législative n'autorise expressément cette pratique.

Le dossier ne précise pas combien des 48 membres de la Commission ont assisté à la réunion en cause ni s'il y

whether labour and management were equally represented as contemplated by s. 102(9) of the Act. The members of the panel who heard the case, however, appear to have been present. The meeting was conducted in accordance with the Board's longstanding and usual practice. This practice required that discussion be limited to the policy implications of a draft decision, that the facts be accepted as contained in the decision, that no vote or consensus be taken, that no minutes be kept, and that no attendance be recorded.

Appellant applied for judicial review of the Board's decision on the ground that the rules of natural justice had been breached. The application was granted by the Divisional Court but was disallowed on appeal. At issue here was whether the two rules of natural justice had been breached: (a) that the adjudicator be independent and unbiased, that he who decides must hear, and (b) the *audi alteram partem* rule, the right to know the case to be met.

Held (Lamer and Sopinka JJ. dissenting): The appeal should be dismissed.

Per Wilson, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: Full board meetings are a practical means of calling upon the accumulated experience of board members when making an important policy decision and obviate the possibility of different panels inadvertently deciding similar issues in a different way. The rules of natural justice should reconcile the characteristics and exigencies of decision making by specialized tribunals with the procedural rights of the parties.

The members of a panel who actually participate in the decision must have heard both the evidence and the arguments presented by the parties. The presence of other Board members at the full board meeting does not, however, amount to "participation" in the final decision. Discussion with a person who has not heard the evidence does not necessarily vitiate the resulting decision because this discussion might "influence" the decision maker.

Decision makers cannot be forced or induced to adopt positions they do not agree with by means of some formalized consultation process. A discussion does not prevent a decision maker from adjudicating in accordance with his own conscience and does not constitute an obstacle to this freedom. The ultimate decision, whatever discussion may take place, is that of the decision

avait représentation égale des employés et de l'employeur comme le prescrit le par. 102(9) de la Loi. Les membres du banc qui avaient entendu l'affaire semblent cependant avoir été présents. La réunion s'est déroulée conformément à la pratique habituelle que la Commission suit depuis longtemps. Cette pratique consiste à restreindre les débats aux conséquences en matière de politique d'un avant-projet de décision, à considérer les faits mentionnés dans la décision comme avérés, à ne pas prendre de vote ni vérifier s'il y a consensus, à ne pas rédiger de procès-verbal des délibérations et à ne pas prendre les présences.

L'appelante a demandé le contrôle judiciaire de la décision de la Commission pour le motif qu'il y avait eu violation des règles de justice naturelle. Cette demande a été accueillie par la Cour divisionnaire, mais rejetée en appel. Il s'agit en l'espèce de déterminer si les deux règles suivantes de justice naturelle ont été violées: a) celle portant que le décideur doit être indépendant et impartial, que celui qui tranche une affaire doit l'avoir entendue, et b) la règle *audi alteram partem*, le droit de connaître la preuve invoquée contre soi.

Arrêt (les juges Lamer et Sopinka sont dissidents): Le pourvoi est rejeté.

Les juges Wilson, La Forest, L'Heureux-Dubé, Gonthier et McLachlin: Les réunions plénières de la Commission sont un moyen pratique de faire appel à l'expérience acquise par les commissaires lorsqu'il s'agit de rendre une décision importante de politique et d'éviter que des bancs différents rendent des décisions divergentes sur des questions semblables. Les règles de justice naturelle devraient concilier les caractéristiques et les exigences du processus décisionnel des tribunaux spécialisés avec les droits des parties en matière de procédure.

Les membres du banc qui participent effectivement à une décision doivent avoir entendu la totalité de la preuve et des plaidoiries soumises par les parties. La présence d'autres commissaires à la réunion plénière de la Commission n'équivaut cependant pas à une «participation» à la décision finale. La discussion avec une personne qui n'a pas entendu la preuve n'entache pas forcément de nullité la décision qui s'ensuit parce que cette discussion est susceptible d'«influencer» le décideur.

On ne peut recourir à aucun mécanisme formel de consultation pour forcer ou inciter un décideur à adopter un point de vue qu'il ne partage pas. Une discussion n'empêche pas un décideur de juger selon sa propre conscience pas plus qu'elle ne constitue une entrave à sa liberté. Quelles que soient les discussions qui peuvent avoir lieu, la décision ultime appartient au décideur et il

maker and he or she must assume full responsibility for that decision. Board members are not empowered by the Act to impose one member's opinion on another and procedures which may in effect compel or induce a panel member to decide against his or her own conscience or opinion cannot be used to thwart this *de jure* situation.

The criteria for independence is not absence of influence but rather the freedom to decide according to one's own conscience and opinions. 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. As practised by the Board, the holding of full board meetings does not impinge on the ability of panel members to decide according to their opinions so as to give rise to a reasonable apprehension of bias or lack of independence.

For the purpose of the application of the *audi alteram partem* rule, a distinction must be drawn between discussions on factual matters and discussions on legal or policy issues.

Evidence cannot always be assessed in a final manner until the appropriate legal test has been chosen by the panel and until all the members of the panel have evaluated the credibility of each witness. It is, however, possible to discuss the policy issues arising from the body of evidence filed before the panel even though this evidence may give rise to a wide variety of factual conclusions. These discussions can be segregated from the factual decisions which will determine the outcome of the case once a test is adopted by the panel. The purpose of the policy discussions is not to determine which of the parties will eventually win the case but rather to outline the various legal standards which may be adopted by the Board and discuss their relative value.

Policy issues must be approached in a different manner because they have, by definition, an impact which goes beyond the resolution of the dispute between the parties. While they are adopted in a factual context, they are an expression of principle or standards akin to law. Since these issues involve the consideration of statutes, past decisions and perceived social needs, the impact of a policy decision by the Board is, to a certain extent, independent from the immediate interests of the parties even though it has an effect on the outcome of the complaint.

On factual matters the parties must be given a fair opportunity for correcting or contradicting any relevant

en assume la responsabilité entière. La Loi n'habilite pas les membres de la Commission à imposer leur avis à un autre commissaire et on ne saurait recourir à des procédures qui peuvent avoir pour effet de forcer ou d'inciter un membre d'un banc à statuer à l'encontre de ses propres conscience ou opinions pour contrecarrer cette situation de droit.

Le critère de l'indépendance est non pas l'absence d'influence, mais plutôt la liberté de décider selon ses propres conscience et opinions. La réunion plénière de la Commission a constitué un élément important du processus légitime de consultation, mais non une participation à la décision par des personnes qui n'avaient pas entendu les parties. La pratique de la Commission consistant à tenir des réunions plénières n'entrave pas la capacité des membres d'un banc de statuer selon leurs opinions, de manière à susciter une crainte raisonnable de partialité ou d'un manque d'indépendance.

Aux fins de l'application de la règle *audi alteram partem*, il faut distinguer les discussions portant sur des questions de fait et celles portant sur des questions de droit ou de politique.

Il n'est pas toujours impossible d'évaluer la preuve de façon définitive avant que le banc n'ait choisi le critère juridique approprié et avant que tous les membres du banc n'aient évalué la crédibilité de chaque témoin. Cependant, il est possible de débattre des questions de politique que soulève la preuve soumise au banc même si cette preuve peut entraîner une grande variété de conclusions sur les faits. Il est possible de dissocier ces discussions des décisions sur les faits qui déterminent l'issue du litige après que le banc a adopté un critère. Les discussions sur les politiques n'ont pas pour objet de décider quelle partie aura finalement gain de cause, mais elles ont pour objet d'exposer les différents critères juridiques que la Commission peut adopter et de débattre leur valeur relative.

Il faut aborder les questions de politique de manière différente parce qu'elles ont, par définition, des conséquences qui vont au-delà du règlement du litige particulier entre les parties. Bien qu'elles découlent de faits précis, elles constituent l'expression d'un principe ou de normes apparentées au droit. Puisque ces questions font appel à l'analyse des lois, des décisions antérieures et des besoins sociaux qui sont perçus, les conséquences d'une décision de politique prise par la Commission ne dépendent pas, dans une certaine mesure, de l'intérêt immédiat des parties, même si elles peuvent avoir un effet sur l'issue de la plainte.

Relativement aux questions de fait, les parties doivent obtenir une possibilité raisonnable de corriger ou de

statement prejudicial to their view. The rule with respect to legal or policy arguments not raising issues of fact is, however, somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. This right does not encompass the right to repeat arguments every time the panel convenes to discuss the case.

The safeguards attached by the Board to this consultation process are sufficient to allay any fear of violations of the rules of natural justice provided the parties are advised of any new evidence or grounds and are given an opportunity to respond. The balance so achieved between the rights of the parties and the institutional pressures the Board faces are consistent with the nature and purpose of the rules of natural justice. In the instant case, the policy decided upon was the very subject of the hearing when the parties had full opportunity to deal with the matter and present diverging proposals which they did.

Per Lamer and Sopinka JJ. (dissenting): The introduction of policy considerations in the decision-making process by members of the Board who were not present at the hearing and their application by members who were present but who heard no submissions from the parties in that respect violates the rationale underlying the principles of natural justice.

The final decision was formally that of the three-member panel. The inference that the full Board meeting might have affected the outcome, however, exists and is fed by two difficulties. Firstly, uniformity can only be achieved if some decisions of the individual panels are brought into line with others by the uniform application of policy. Secondly, in matters affecting the integrity of the decision-making process, an appearance of injustice is sufficient to taint the decision.

The Board is required by statute to hold a hearing and to give the parties a full opportunity to present evidence and submissions. It is also entitled to apply policy. The role of policy in the decision-making function of boards must be reappraised in light of the evolution of the law relating to the classification of tribunals and the application of the rules of natural justice and fairness to those boards. The content of the rules of natural justice is no longer dictated by classification as judicial, quasi-judicial or executive, but by reference to the circumstances of the case, the governing statutory provisions and the nature of the matters to be determined. It is no longer appropriate to conclude that failure to disclose policy to

contredire tout énoncé pertinent qui nuit à leur point de vue. Cependant, la règle relative aux arguments juridiques ou de politique qui ne soulèvent pas des questions de fait est un peu moins sévère puisque les parties n'ont que le droit de présenter leur cause et de répondre aux arguments qui leur sont défavorables. Ce droit n'inclut pas celui de reprendre les plaidoiries chaque fois que le banc se réunit pour débattre l'affaire.

Les garanties dont la Commission assortit ce processus de consultation sont suffisantes pour dissiper toute crainte de violation des règles de justice naturelle pourvu également que les parties soient informées de tout nouvel élément de preuve ou de tout nouveau moyen et qu'elles aient la possibilité d'y répondre. L'équilibre ainsi réalisé entre les droits des parties et les pressions institutionnelles qui s'exercent sur la Commission sont compatibles avec la nature et l'objet des règles de justice naturelle. En l'espèce, la politique visée par la décision était l'objet même de l'audition à laquelle les parties avaient l'entière possibilité de traiter de la question et de présenter des propositions divergentes, et c'est ce qu'elles ont fait.

Les juges Lamer et Sopinka (dissidents): L'introduction de considérations de politique dans le processus décisionnel par des commissaires qui n'ont pas assisté à l'audition et leur application par des commissaires qui étaient présents mais qui n'ont pas entendu de plaidoiries des parties au sujet de ces considérations, est contraire à la raison d'être des principes de justice naturelle.

La décision finale est bel et bien celle du banc de trois commissaires. La conclusion que la réunion plénière de la Commission peut avoir influé sur l'issue de l'affaire existe toutefois et découle de deux difficultés. Premièrement, l'uniformité ne peut se réaliser que si on fait concorder certaines décisions de bancs particuliers par l'application constante d'une politique. Deuxièmement, en matière d'atteinte à l'intégrité du processus décisionnel, il suffit qu'il y ait apparence d'injustice pour vicier la décision.

La Loi oblige la Commission à tenir une audition et à donner aux parties toute possibilité de présenter des éléments de preuve et des arguments. Elle a aussi le pouvoir d'appliquer des politiques. Il y a lieu de réévaluer le rôle des politiques dans le processus décisionnel des commissions en fonction de l'évolution du droit relatif à la classification des tribunaux et à l'application des règles de justice naturelle et d'équité à leur endroit. Le contenu des règles de justice naturelle ne dépend plus de leur classification en règles judiciaires, quasi judiciaires ou administratives, mais il est déterminé par les circonstances de l'affaire, les dispositions législatives applicables et la nature des litiges à décider. Il ne

be applied by a tribunal is not a denial of natural justice without examining all the circumstances under which the tribunal operates.

The full board hearing deprived the appellant of a full opportunity to present evidence and submissions and accordingly constituted a denial of natural justice. It could not be determined with certainty from the record that a policy which was developed at the full Board hearing and was not disclosed to the parties was a factor in the decision. That this might very well have happened, however, was fatal to the Board's decision.

The goal of uniformity in the decisions of individual boards, while laudable, cannot be achieved at the expense of the rules of natural justice. The legislature, if it so chooses, can authorize the full board procedure.

The conclusion that no substantial wrong occurred could not be made. Prejudice arising because of a technical breach of the rules of natural justice must be established by the party making the allegation. The appellant, however, could hardly be expected to establish prejudice when it was not privy to the discussion before the full Board and when there is no evidence as to what in fact was discussed. The gravity of the breach of natural justice could not be assessed in the absence of such evidence.

The full board procedure was not saved by s. 102(13) of the *Labour Relations Act* which granted the Board the power to determine its own practice and procedure subject to the qualification that full opportunity be granted the parties to any proceedings to present their evidence and to make their submissions. The appellant was not given a full opportunity to present evidence and make submissions. The Board's practice must give way when at a variance with the rules of natural justice.

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By Gonthier J.

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convient plus de conclure que l'omission de divulguer les politiques que le tribunal va appliquer ne constitue pas un déni de justice naturelle sans examiner toutes les circonstances dans lesquelles le tribunal fonctionne.

La réunion plénière de la Commission a privé l'appelante de la pleine possibilité de présenter des éléments de preuve et de faire valoir des arguments et a constitué un déni de justice naturelle. Le dossier ne permet pas de déterminer avec certitude si la formulation, lors de la réunion plénière, d'une politique qui n'a pas été divulguée aux parties a eu un effet sur la décision. Le fait que la chose ait très bien pu se produire est cependant fatal à la décision de la Commission.

Même si l'uniformisation des décisions de tribunaux particuliers est souhaitable, elle ne peut se faire aux dépens des règles de justice naturelle. Si le législateur veut permettre la poursuite de cet objectif, il est libre d'autoriser la procédure de réunion plénière de la Commission.

Il est impossible de conclure qu'il n'y a pas eu de préjudice grave. Le préjudice causé par une violation technique des règles de justice naturelle doit être prouvé par la partie qui l'invoque. On ne saurait cependant demander à l'appelante de prouver l'existence d'un préjudice alors qu'elle n'a pas eu connaissance de ce qui a été discuté à la réunion plénière de la Commission et qu'il n'y a pas de preuve quant à ce qui y a été réellement discuté. En l'absence de cette preuve, il est impossible de déterminer la gravité de la violation des règles de justice naturelle.

La procédure de réunion plénière de la Commission n'est pas sauvegardée par le par. 102(13) de la *Loi sur les relations de travail* qui confère à la Commission le pouvoir de régir sa propre pratique et procédure sous réserve d'accorder aux parties toute possibilité de présenter leur preuve et de faire valoir leurs arguments. L'appelante n'a pas eu toute possibilité de présenter sa preuve et de soumettre ses arguments. Quand les règles de justice naturelle entrent en conflit avec une pratique de la Commission, cette dernière doit céder le pas.

Jurisprudence

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By Sopinka J. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (1986), 56 O.R. (2d) 513, allowing an appeal from a judgment of the Divisional Court (1985), 51 O.R. (2d) 481, 20 D.L.R. (4th) 84, 85 CLLC 14,031, granting an application to quash a decision of the Ontario Labour Relations Board, [1983] OLRB Rep. December 1995, 5 CRBR (NS) 79, made on a reconsideration of its original decision, [1983] OLRB Rep. September 1411, 4 CLRBR (NS) 178. Appeal dismissed, Lamer and Sopinka JJ. dissenting.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1986), 56 O.R. (2d) 513, qui a accueilli l'appel d'une décision de la Cour divisionnaire (1985), 51 O.R. (2d) 481, 20 D.L.R. (4th) 84, 85 CLLC 14,031, qui avait accueilli une demande d'annulation d'une décision de la Commission des relations de travail de l'Ontario, [1983] OLRB Rep. December 1995, 5 CRBR (NS) 79, rendue relativement à une demande de réexamen de sa décision initiale, [1983] OLRB Rep. September 1411, 4 CLRBR (NS) 178. Pourvoi rejeté, les juges Lamer et Sopinka sont dissidents.

William R. Herridge, Q.C., for the appellant.

William R. Herridge, c.r., pour l'appelante.

Paul Cavalluzzo and *David Bloom*, for the respondent International Woodworkers of America, Local 2-69.

Paul Cavalluzzo et *David Bloom*, pour l'intimé le Syndicat international des travailleurs du bois d'Amérique, section locale 2-69.

Gordon F. Henderson, Q.C., and *R. Ross Wells*, for the respondent the Ontario Labour Relations Board.

The reasons of Lamer and Sopinka JJ. were delivered by

SOPINKA J. (dissenting)—The issue in this case is the propriety of a practice of the Ontario Labour Relations Board pursuant to which a full Board session is held to discuss a draft decision of a three-person panel.

Facts

The Ontario Labour Relations Board (hereinafter the "Board") derives its statutory authority under the *Labour Relations Act*, R.S.O. 1980, c. 228 (hereinafter the "Act"). The Board ordinarily sits in panels of three in hearing applications under the Act. This is authorized by s. 102(9) of the Act which provides:

102. ...

(9) The chairman or a vice-chairman, one member representative of employers and one member representative of employees constitute a quorum and are sufficient for the exercise of all the jurisdiction and powers of the Board.

The original decision of a panel of three members of the Board ([1983] OLRB Rep. September 1411) from which this litigation arises was that the appellant had failed to bargain in good faith by not disclosing during negotiations for a collective agreement that it planned to close its Hamilton plant. In the course of deliberating over this decision, a meeting was held of the full Board to discuss a draft of the reasons. No express statutory authority exists for this practice.

Although we are told that the full Board consists of 48 members, it does not appear from the record how many attended the meeting in question and whether labour and management were equally represented as contemplated by s. 102(9) of the Act. The affidavit of Mr. Michael Gordon, filed on behalf of the appellant, identifies thirteen of the

Gordon F. Henderson, c.r., et *R. Ross Wells*, pour l'intimée la Commission des relations de travail de l'Ontario.

Version française des motifs des juges Lamer et Sopinka rendus par

LE JUGE SOPINKA (dissident)—Le présent pourvoi soulève la question du bien-fondé d'une pratique suivie par la Commission des relations de travail de l'Ontario en vertu de laquelle celle-ci tient une réunion plénière pour débattre l'avant-projet de la décision que doit rendre un banc de trois commissaires.

Les faits

La Commission des relations de travail de l'Ontario (ci-après la «Commission») tient son existence de la *Loi sur les relations de travail*, L.R.O. 1980, ch. 228 (ci-après la «Loi»). La Commission siège ordinairement en bancs de trois membres quand elle entend les demandes présentées en vertu de la Loi. Le paragraphe 102(9) de la Loi, qui permet cette façon de procéder, est ainsi conçu:

102 ...

(9) Le président ou un vice-président, un membre représentant les employeurs et un membre représentant les employés constituent le quorum et peuvent exercer les attributions de la Commission.

La décision initiale du banc de trois commissaires ([1983] OLRB Rep. September 1411) qui est à l'origine du présent litige portait que l'appelante avait refusé de négocier de bonne foi en ne divulguant pas, au cours des négociations visant la signature d'une convention collective, qu'elle projetait de fermer son usine de Hamilton. Pendant les délibérations relatives à cette décision, la Commission a tenu une réunion plénière pour débattre un avant-projet de motifs. Aucune disposition législative n'autorise expressément cette pratique.

Bien qu'on nous dise que la Commission au complet se compose de 48 membres, le dossier ne mentionne pas combien de membres ont assisté à la réunion en cause, ni s'il y avait représentation égale des employés et de l'employeur comme le prescrit le par. 102(9) de la Loi. L'affidavit de M. Michael Gordon, produit pour le compte de l'appe-

people present, among them an alternate chairman, several vice-chairmen, a number of Board members, solicitors and senior employees of the Board. Of those specifically identified, only Board member Wightman was a member of the panel which heard the case. Nevertheless it appears from the Board's reasons on reconsideration that the other members of the panel of three were also present.

While it is not contested that no evidence was introduced at this full board meeting, it is not clear from the record what was discussed. The meeting took several hours but no minutes were kept. The reasons of the Board on reconsideration describe the practice of the Board in relation to full board hearings but provide no details as to what was discussed. It may be assumed that the matters discussed were in accordance with the Board's practice in this regard. This practice is described in the decision of the Board on Consolidated-Bathurst's application to reconsider the original decision, [1983] OLRB Rep. December 1995, which reads, in part, at paragraph 8:

> 8. After deliberating over a draft decision, any panel of the Board contemplating a major policy issue may, through the Chairman, cause a meeting of all Board members and vice-chairmen to be held to acquaint them with this issue and the decision the panel is inclined to make. These "Full Board" meetings have been institutionalized to facilitate a maximum understanding and appreciation throughout the Board of policy developments and to evaluate fully the practical consequences of proposed policy initiatives on labour relations and the economy in the Province.

There is no evidence that the procedure at the meeting in question departed from the Board's usual practice, whereby discussion is limited to the policy implications of a draft decision, the facts contained in the decision are taken as given, no vote or consensus is taken, no minutes are kept, and no attendance is recorded. The practice is not a recent innovation. It goes back at least as far as

lante, fournit les noms de treize des personnes présentes, dont un président suppléant, quelques vice-présidents, un certain nombre de commissaires, des avocats et des cadres de la Commission. Parmi les personnes expressément nommées, seul le commissaire Wightman faisait partie du banc qui avait entendu l'affaire. Néanmoins, il ressort des motifs rendus par la Commission au sujet de la demande de réexamen que les autres membres du banc de trois commissaires étaient eux aussi présents.

Bien qu'il ne soit pas contesté qu'aucun élément de preuve n'a été soumis pour la première fois à la réunion plénière de la Commission, le dossier n'indique pas clairement le sujet des délibérations. La réunion a duré plusieurs heures, mais personne n'a rédigé de procès-verbal. Les motifs rendus par la Commission sur la demande de réexamen décrivent la pratique de la Commission de tenir des réunions plénières, sans toutefois préciser ce sur quoi les débats ont porté. On peut supposer que les sujets discutés étaient conformes à la pratique de la Commission à cet égard. Cette pratique est décrite dans la décision rendue par la Commission au sujet de la demande de réexamen de la décision initiale, présentée par Consolidated-Bathurst, [1983] OLRB Rep. December 1995, dont le par. 8 est ainsi conçu:

> [TRADUCTION] 8. Après avoir délibéré sur un avant-projet de décision, un banc qui envisage de trancher une question importante de politique peut faire convoquer, par l'intermédiaire du président, une réunion plénière des membres et des vice-présidents pour leur faire part de la question soulevée et de la décision que le banc favorise. Ces réunions plénières ont été institutionnalisées pour mieux faire comprendre et apprécier par l'ensemble des commissaires l'évolution des politiques et pour examiner à fond les conséquences pratiques que les politiques envisagées pourraient avoir sur les relations de travail et sur l'économie de la province.

Il n'y a aucune preuve que la procédure suivie lors de la réunion en cause a été différente de la pratique habituelle de la Commission qui consiste à restreindre les débats aux conséquences en matière de politique d'un avant-projet de décision, à considérer les faits mentionnés dans la décision comme avérés, à ne pas prendre de vote ni vérifier s'il y a consensus, à ne pas rédiger de procès-verbal

1971 when it was referred to, disapprovingly, in Chief Justice McRuer's report in the *Royal Commission Inquiry into Civil Rights*, February 22, 1971, pp. 2004-6.

The appellant learned of the full board meeting by chance and requested a reconsideration by the Board of its decision. This request was denied. In the course of its reasons the Board, as mentioned above, described its practice in detail and defended it as promoting consistency in the Board's decisions and as an institutionalization of the informal practice of conferral among colleagues. The Board considered its practice not a breach of natural justice but rather a procedure well suited to the Board's size, composition, and statutory mandate. Subsequent to the Board's refusal to reconsider its decision, the appellant applied to the Divisional Court for judicial review.

Divisional Court (1985), 51 O.R. (2d) 481

The majority of the Divisional Court, with Osler J. dissenting, granted the application, quashed the Board's decision, and ordered the Board to reconsider the matter in light of the Court's reasons for judgment. The reasons of the majority of the Divisional Court, delivered by Rosenberg J., were to the effect that because the parties had no knowledge as to what had been said in the discussions and no opportunity to respond, there was a violation of the principle that he who hears must decide. It could not be said with certainty that the three-member panel was not influenced in its decision by the full Board, because of the lack of evidence as to what transpired at the meeting. Thus the Court quashed the Board's decision. Osler J., on the other hand, was of the view that the common law contained no prohibition of consultation among decision makers and their colleagues, so long as those who have not heard the evidence and submissions do not participate in the decision. While the parties must be given the

des délibérations et à ne pas prendre les présences. Cette pratique n'est pas récente. Elle remonte au moins aussi loin qu'en 1971, puisque le juge en chef McRuer la mentionne, pour la condamner, dans le rapport de la *Royal Commission Inquiry into Civil Rights*, le 22 février 1971, aux pp. 2004 à 2006.

L'appelante a appris par hasard la tenue de la réunion plénière de la Commission et elle a demandé à la Commission de réexaminer sa décision. Cette demande a été rejetée. Dans ses motifs, la Commission a, comme je l'ai déjà mentionné, décrit sa pratique en détail et l'a justifiée par la cohérence que cette pratique favorise dans les décisions de la Commission, affirmant qu'il s'agit de l'institutionnalisation de la coutume officieuse qu'ont les commissaires de se consulter entre eux. La Commission a estimé que cette pratique ne constituait pas un déni de justice naturelle, mais qu'elle constituait plutôt une procédure bien adaptée à la taille de la Commission, à sa composition et au mandat que lui confère la Loi. Suite au refus de la Commission de réexaminer sa décision, l'appelante a demandé à la Cour divisionnaire de procéder au contrôle judiciaire de la décision.

La Cour divisionnaire (1985), 51 O.R. (2d) 481

La Cour divisionnaire à la majorité, le juge Osler étant dissident, a fait droit à la demande, annulé la décision de la Commission et lui a ordonné de réexaminer l'affaire en fonction des motifs de jugement de la cour. Les motifs de la majorité des juges de la Cour divisionnaire, rédigés par le juge Rosenberg, portent que parce que les parties ne savaient pas ce qui s'était dit au cours des délibérations et n'ont pas eu la possibilité de répliquer, il y a eu violation du principe voulant qu'il appartient à celui qui entend une cause de la trancher. Il était impossible d'affirmer avec certitude que la réunion plénière de la Commission n'avait pas influencé la décision du banc de trois commissaires à cause de l'absence de preuve au sujet de ce qui s'était passé à la réunion. La cour a donc annulé la décision de la Commission. Le juge Osler, quant à lui, a estimé que la common law n'interdit nullement à celui qui doit rendre une décision de consulter des collègues pour autant que ceux qui n'ont pas entendu la preuve et les plaidoi-

opportunity to respond to new ideas or evidence, this case provided no evidence that the full board meeting had yielded any such ideas or evidence.

Court of Appeal (1986), 56 O.R. (2d) 513

The decision of the Divisional Court was reversed on appeal to the Court of Appeal. Cory J.A., as he then was, in the Court of Appeal, concluded that pursuant to s. 102(13) of the *Labour Relations Act* the Labour Relations Board had exclusive jurisdiction to determine its own practice and procedure subject only to the obligation to give a full opportunity to the parties to the proceedings to present evidence and make submissions. He further concluded that there was no denial of natural justice in this case and that the meeting was an exercise of common sense whereby the significance and effect of a decision was discussed with other experts in the field. He emphasized, however, that the full board procedure was limited in that the parties must be recalled if new evidence is considered in the full Board's discussion, and that while the panel can receive advice from the full Board there can be no participation by the other Board members in the decision.

Issues

The issue in this appeal is whether the following rules of natural justice have been violated:

(a) he who decides must hear;

(b) the right to know the case to be met.

The Effect of the Full Board Procedure

The first step in deciding whether the rules of natural justice have been breached is to assess what role, if any, the full board procedure played in the decision-making process. The appellant submits that the outcome of its case may have been influenced by a formalized meeting of the full Board. The respondent Union counters by submitries ne prennent pas part à la décision. Quoique les parties doivent avoir la possibilité de répliquer aux énoncés ou aux éléments de preuve nouveaux, rien n'indique en l'espèce que la réunion plénière de la Commission a donné lieu à de tels énoncés ou éléments de preuve.

La Cour d'appel (1986), 56 O.R. (2d) 513

La Cour d'appel a infirmé la décision de la Cour divisionnaire. Le juge Cory (alors juge de la Cour d'appel) a conclu qu'en vertu du par. 102(13) de la *Loi sur les relations de travail*, la Commission des relations de travail avait compétence exclusive pour déterminer sa propre pratique et procédure sous réserve seulement de l'obligation d'accorder aux parties toute possibilité de présenter leur preuve et de faire valoir leurs arguments. Il a conclu de plus qu'il n'y avait pas eu déni de justice naturelle en l'espèce et que la réunion était conforme au bon sens en ce qu'elle permettait à des experts d'un domaine de se consulter sur l'importance et la portée d'une décision. Il a cependant souligné que la procédure de réunion plénière de la Commission était limitée étant donné qu'il fallait réentendre les parties si les délibérations de la Commission au complet portaient sur de nouveaux éléments de preuve. Il a aussi souligné que si le banc pouvait obtenir l'avis de la Commission au complet, les autres membres de la Commission ne pouvaient participer à la décision.

Les questions en litige

Il s'agit de déterminer en l'espèce s'il y a eu violation des règles suivantes de justice naturelle:

a) celui qui tranche une affaire doit l'avoir entendue;

b) le droit de connaître la preuve invoquée contre soi.

Les conséquences de la procédure de réunion plénière de la Commission

Pour déterminer s'il y a eu violation des règles de justice naturelle, il faut commencer par évaluer le rôle qu'a pu jouer la procédure de réunion plénière de la Commission dans le processus décisionnel. L'appelante soutient que la réunion plénière officielle de la Commission a pu influer sur l'issue de son affaire. Le syndicat intimé réplique

ting that the appellant must establish a breach of the rules of natural justice but can point to no new evidence or arguments in the decision of the Board that were obtained as a result of the full board procedure. The purport of the Board's reasons on the application for reconsideration is that the ultimate decision was left to the panel and therefore presumably that the discussion of policy implications did not influence the final decision.

In the Board's reasons on reconsideration, it is stated at p. 2002 that the object of the full Board hearings is as follows:

These "Full Board" meetings have been institutionalized to facilitate a maximum understanding and appreciation throughout the Board of policy developments and to evaluate fully the practical consequences of proposed policy initiatives on labour relations and the economy in the Province.

The Board further states, at pp. 2002-3, that:

9. "Full Board" meetings are as important to fashioning informed and practical decisions which will withstand the scrutiny of subsequent panels as is the research and reflection undertaken by the vice-chairmen in preparing their draft decisions .... The "Full Board" meeting merely institutionalizes these discussions and better emphasizes the broad ranging policy implications of individual decisions.

The learned authors of Sack and Mitchell, *Ontario Labour Relations Board Law and Practice*, at p. 7, summarized the practice in the following terms:

When such a matter is referred in this way, the full Board does not consider the evidence or the facts of the case, but individual members may express their views on questions of law or policy. No vote is taken. The panel which heard the case then confers in private session and reaches a decision. In this way, some uniformity in Board decisions on matters of policy and procedure has been achieved in spite of the fact that differently constituted panels sit every day.

que l'appelante doit faire la preuve d'une violation des règles de justice naturelle, mais qu'elle ne peut signaler, dans la décision de la Commission, la présence d'aucun nouvel élément de preuve ni d'aucun nouvel argument qui soit apparu en raison de la procédure de réunion plénière de la Commission. Les motifs rendus par la Commission au sujet de la demande de réexamen tendent à montrer que la décision ultime a été laissée au banc et qu'il faut donc présumer que le débat sur les conséquences de la politique n'a pas influé sur la décision finale.

Dans les motifs donnés par la Commission relativement à la demande de réexamen, on affirme, à la p. 2002, que les réunions plénières de la Commission visent les objets suivants:

[TRADUCTION] Ces réunions plénières de la Commission ont été institutionnalisées pour mieux faire comprendre et apprécier par l'ensemble des commissaires l'évolution des politiques et pour examiner à fond les conséquences pratiques que les politiques envisagées pourraient avoir sur les relations de travail et sur l'économie de la province.

La Commission ajoute, aux pp. 2002 et 2003:

[TRADUCTION] 9. Les réunions plénières de la Commission sont tout aussi importantes pour concevoir des décisions éclairées et pratiques qui résisteront à l'examen de bancs saisis ultérieurement que le sont les recherches et la réflexion des vice-présidents quand ceux-ci préparent leurs avant-projets de décision. [...] La réunion plénière de la Commission ne fait qu'institutionnaliser ces débats et souligne mieux la portée considérable des conséquences de décisions particulières en matière de politique.

Sack et Mitchell, les auteurs de l'ouvrage intitulé *Ontario Labour Relations Board Law and Practice*, décrivent brièvement cette pratique, à la p. 7:

[TRADUCTION] Quand une question lui est ainsi soumise, la Commission au complet ne s'arrête pas aux faits de l'espèce ou à la preuve soumise, mais un commissaire peut exprimer son avis sur des questions de droit ou de politique. Il n'y a pas de vote. Le banc qui a entendu l'affaire délibère ensuite privément et arrête sa décision. De cette manière, il est possible d'arriver à une certaine uniformité dans les décisions de la Commission sur des questions de politique et de procédure même si la composition des bancs change tous les jours.

The issue before the Board was whether unsolicited disclosure of a proposed plant closing which was alleged to be at least under serious consideration was an aspect of the duty to bargain in good faith. In this regard the Board was being asked by the respondent Union to extend its decision in *United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Ltd.*, [1980] OLRB Rep. 577, or at least to give it a broad interpretation. That case had decided that, as part of the employer's obligation to negotiate in good faith, an employer had a duty to disclose a *de facto* decision to close a plant. Resolution of this issue required the panel to choose between competing policies. The important role of policy is depicted in the following passages in the Board's original reasons at pp. 1430-31, 1436 and 1443:

In cases of this kind there are, of course, significant conflicting values at stake. There is the desirability of stability in collective bargaining relationships as evidenced by the statutory policy requiring a collective agreement for a minimum term of one year and the twin statutory requirements of "no strike and no lockout". All differences during the term of an agreement are to be funnelled through grievance arbitration. It is also widely understood that management must have the ability to take initiatives in responding to the new demands posed by changing circumstances. The market place seldom awaits labour and management consensus. On the other hand, unilateral management initiatives can adversely affect significant interests of employees and unions who, in the absence of change, may have built up certain expectations and attitudes concerning the status quo.

. . .

The Board must also be sensitive to the statutory purpose of the bargaining duty, the language describing that duty, and the industrial relations implications of one approach over another.

. . .

What policy justification then supports greater unsolicited disclosure and merits the Board's intervention in the face of these potential difficulties?

La Commission devait décider si l'obligation de négocier de bonne foi exigeait la divulgation spontanée d'un projet de fermer une usine qui, selon les allégations, était tout au moins sérieusement à l'étude. À cet égard, le syndicat intimé demandait à la Commission d'appliquer à l'espèce la décision qu'elle avait rendue dans l'affaire *United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Ltd.*, [1980] OLRB Rep. 577, ou, tout au moins, de lui donner une interprétation libérale. Dans cette affaire, la Commission avait statué qu'en vertu de l'obligation qui lui incombe de négocier de bonne foi, l'employeur est tenu de divulguer la décision *de facto* de fermer une usine. La solution de cette question exigeait du banc saisi qu'il choisisse entre deux politiques opposées. Les motifs de la décision initiale de la Commission font état de l'importance du rôle des politiques dans les passages suivants aux pp. 1430, 1431, 1436 et 1443:

[TRADUCTION] Les affaires de ce genre font intervenir des valeurs opposées importantes. Il y a, d'une part, l'avantage de la stabilité dans les relations de négociation collective que favorisent la règle de droit prescrivant que la convention collective ait une durée minimale d'une année et la double règle qui interdit le recours à la grève et au lock-out. Tous les différends qui surviennent pendant la durée d'une convention collective doivent être résolus par l'arbitrage des griefs. Il est aussi généralement reconnu que la direction doit avoir la possibilité de prendre les mesures que les changements du marché exigent. Les conditions économiques attendent rarement l'unanimité de la direction et des syndicats pour évoluer. D'autre part, les actions unilatérales de la direction peuvent nuire à des droits importants des travailleurs et des syndicats chez qui, faute de changement, il peut s'être développé certaines attentes et attitudes à l'égard du *statu quo*.

. . .

La Commission doit aussi tenir compte de l'objet de l'obligation de négocier, de la formulation de cette obligation et des conséquences du choix d'une orientation par rapport à une autre sur les relations industrielles.

. . .

Quelles sont les raisons de principe qui justifieraient une divulgation spontanée plus étendue et qui motiveraient l'intervention de la Commission face à la possibilité de telles difficultés?

In the result the Board chose to broaden the application of *Westinghouse* by extending the meaning of a *de facto* decision to the facts of this case. At paragraph 53, p. 1447 of its decision, it stated:

53. In any event, we find that the matter of the impending closing was so concrete and highly probable in early January and dealt with by the board of directors in such a perfunctory manner (in that there was no documentation or apparent consideration of alternatives), the company had a minimum obligation to say that unless a certain percentage of the new business was retained or unless there was a dramatic turn in the operation a recommendation to close would be made within the next few weeks. Having regard to the Christmas letter to employees; the productive second half of 1982; and to the then state of dialogue between local labour and management on the future of the plant, the company's silence at the bargaining table was tantamount to a misrepresentation within the meaning of the *de facto* decision doctrine established in *Westinghouse*.

The following passage, at p. 2004, from the Board's reasons on reconsideration summarizes the participation of the full Board in the application of policy:

Unsolicited disclosure in collective bargaining—the issue involved in the case—is an area of great significance to effective and harmonious collective bargaining in this Province and it is fair to say that many of the labour and management Board members in attendance at the meeting gave their reaction to the principles and their application as set out in the draft decision. No vote, however, was held and no other mechanism for measuring consensus was employed.

Given the number of Board members present and the fact that included were an alternate Chairman, Vice-chairmen and solicitors, the views expressed were potentially very influential.

In view of the above I adopt the following from the reasons of the majority of the Divisional Court, at pp. 491-92, as a correct statement as to the effect of the full board meeting:

En définitive, la Commission a choisi d'élargir la portée de la décision *Westinghouse* en appliquant le sens de l'expression «décision *de facto*» aux faits de l'espèce. Au paragraphe 53 de sa décision, la Commission dit, à la p. 1447:

[TRADUCTION] 53. De toute façon, nous concluons que la fermeture prochaine était si réelle et probable au début de janvier et que le conseil de direction l'a traitée de manière si superficielle (parce qu'il n'y a eu ni documentation, ni apparemment aucune étude des autres solutions possibles), que la société avait au moins l'obligation de dire qu'à défaut de réaliser une augmentation réelle du chiffre d'affaires ou de connaître un revirement spectaculaire dans l'exploitation de l'entreprise, la société recommanderait la fermeture dans les semaines suivantes. Compte tenu de la lettre envoyée aux employés à l'occasion de Noël, d'un bon deuxième semestre en 1982 et de l'état des pourparlers engagés entre le syndicat local et la direction sur l'avenir de l'usine, le silence de la société à la table des négociations équivalait à une déclaration mensongère au sens de la théorie de la décision *de facto* énoncée dans l'affaire *Westinghouse*.

L'extrait suivant des motifs rendus par la Commission relativement à la demande de réexamen résume la participation de la Commission au complet à l'application d'une politique (à la p. 2004):

[TRADUCTION] La divulgation spontanée à l'occasion de négociations collectives, l'objet du litige en l'espèce, a une grande importance pour ce qui est d'assurer l'efficacité et l'harmonie des négociations collectives dans la province. Aussi, il est juste de dire que de nombreux commissaires représentant les employés ou les employeurs présents à la réunion ont exprimé leur avis sur les principes énoncés dans l'avant-projet de décision et sur leur application. Cependant, il n'y a pas eu de vote, ni de recours à quelque autre moyen de vérifier s'il y avait consensus.

En raison du nombre de commissaires présents et parce que, parmi les personnes présentes, il y avait un président suppléant, des vice-présidents et des avocats, les avis qui y ont été exprimés étaient susceptibles d'avoir une très grande influence sur la décision.

Compte tenu de ce qui précède, j'estime que l'extrait suivant des motifs des juges formant la majorité de la Cour divisionnaire énonce correctement, aux pp. 491 et 492, les répercussions de la réunion plénière de la Commission:

Chairman Shaw [*sic*] states in his reasons that the final decision was made by the three members who heard evidence and argument. He cannot be heard to state that he and his fellow members were not influenced by the discussion at the full board meeting. The format of the full board meeting made it clear that it was important to have input from other members of the board who had not heard the evidence or argument before the final decision was made. The tabling of the draft decision to all of the members of the board plus all of the support staff involved a substantial risk that opinions would be advanced by others and arguments presented. It is probable that some of the people involved in the meeting would express points of view. The full board meeting was only called when important questions of policy were being considered. Surely, the discussion would involve policy reasons why s. 15 should be given either a broad or narrow interpretation. Members or support staff might relate matters from their own practical experience which might be tantamount to giving evidence. The parties to the dispute would have no way of knowing what was being said in these discussions and no opportunity to respond.

[TRADUCTION] Le président Shaw [*sic*] affirme dans ses motifs que la décision définitive a été arrêtée par les trois commissaires qui avaient entendu la preuve et les plaidoiries. Il ne peut valablement affirmer que lui-même et ses collègues membres du tribunal n'ont pas été influencés par le débat survenu lors de la réunion plénière de la Commission. La façon dont s'est déroulée la réunion plénière de la Commission laisse voir qu'il était important d'avoir l'avis des autres commissaires qui n'avaient entendu ni la preuve ni les plaidoiries avant de prendre une décision finale. La présentation de l'avant-projet de décision à tous les commissaires et à tout le personnel de soutien comportait un risque sérieux que d'autres personnes soumettent leur avis et fassent valoir des arguments. Il est probable que certaines des personnes présentes à la réunion ont exprimé leur avis. Il n'y avait convocation d'une réunion plénière de la Commission que s'il y avait des questions de politique importantes à débattre. La discussion a certainement porté sur les raisons de principe de donner à l'art. 15 une interprétation libérale ou une interprétation restreinte. Les commissaires ou le personnel de soutien ont pu faire part d'informations tirées de leur expérience pratique, ce qui pourrait équivaloir à présenter des éléments de preuve. Les parties au litige n'avaient aucun moyen de savoir ce qui se disait dans ce débat, ni aucune possibilité de répliquer.

I would conclude from the foregoing that the full board meeting might very well have affected the outcome. The Board in its reasons on reconsideration does not directly seek to refute this inference. It does affirm that the final decision was that of the panel. There are two difficulties which confront the Board in seeking to negate the inference. First, I find it difficult to understand how the full board practice can achieve its purpose of bringing about uniformity without affecting the decision of individual panels. Uniformity can only be achieved if some decisions are brought into line with others by the uniform application of policy. The second difficulty is that in matters affecting the integrity of the decision-making process, it is sufficient if there is an appearance of injustice. The tribunal will not be heard to deny what appears as a plausible objective conclusion. The principle was expressed by Mackay J. in *Re Ramm* (1957), 7 D.L.R. (2d) 378 (Ont. C.A.) Mackay J. wrote, at p. 382:

Je conclus de ce qui précède que la réunion plénière de la Commission a fort bien pu influer sur l'issue de l'affaire. Dans les motifs qu'elle a rendus au sujet de la demande de réexamen, la Commission ne tente pas directement de réfuter cette conclusion. Elle assure cependant que la décision finale est bel et bien celle du banc saisi. La Commission rencontre deux difficultés lorsqu'elle cherche à réfuter cette conclusion. Premièrement, il m'est difficile de comprendre comment la pratique de la Commission de tenir des réunions plénières peut permettre d'atteindre son objectif de réaliser l'uniformité sans influencer la décision des bancs particuliers. L'uniformité ne peut se réaliser que si on fait concorder certaines décisions par l'application constante d'une politique. La deuxième difficulté découle de ce qu'en matière d'atteinte à l'intégrité du processus décisionnel, il suffit qu'il y ait apparence d'injustice. On ne peut accepter que le tribunal nie ce qui paraît être une conclusion objective plausible. Ce principe a été formulé par le juge Mackay dans l'arrêt *Re Ramm* (1957), 7 D.L.R. (2d) 378 (C.A. Ont.), où il dit, à la p. 382:

With respect to the difference in the constitution of members of the Public Accountants Council on the first and second hearings, it may very well be that the two members of the Public Accountants Council who were not present at the earlier hearing, abstained from argument on the issues which fell for determination. It appears, however, that they did vote inasmuch as the decision to revoke the licence of the appellant Ramm was unanimous. It is well established that it is not merely of some importance but of fundamental importance, that "justice should not only be done but should manifestly and undoubtedly be seen to be done". In a word, it is not irrelevant to inquire whether two members of the Council who were not present at the earlier meeting took part in the proceeding in the Council's deliberation on the subsequent hearing. What is objectionable is their presence during the consultation when they were in a position which made it impossible for them to discuss in a judicial way, the evidence that had been given on oath days before and in their absence and on which a finding must be based. [Emphasis added.]

In *Mehr v. Law Society of Upper Canada*, [1955] S.C.R. 344, at p. 350, Cartwright J. cited with approval the following passage from the judgment of Lord Eldon L.C. in *Walker v. Frobisher* (1801), 6 Ves. Jun. 70, 31 E.R. 943, at pp. 72 and 944:

> ... but the arbitrator swears, it (hearing further persons) had no effect upon his award. I believe him. He is a most respectable man. But I cannot from respect for any man do that, which I cannot reconcile to general principles. A Judge must not take upon himself to say, whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice, but upon general principles it cannot be supported.

This statement had been approved previously by this Court in *Szilard v. Szasz*, [1955] S.C.R. 3. Cartwright J. was also impressed by the statement of Romer J. in *Rex v. Huntingdon Confirming Authority*, [1929] 1 K.B. 698, at p. 717:

> Further, I would merely like to point this out: that at that meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in the way it did by the eloquence of

[TRADUCTION] Quand à la différence dans la composition du Public Accountants Council lors des première et seconde auditions, il se peut fort bien que les deux membres du Public Accountants Council absents lors de la première audition se soient abstenus de débattre des questions à décider. Il appert cependant qu'ils ont voté puisque la décision de révoquer la licence de l'appelant Ramm était unanime. Il est reconnu qu'il est non seulement important, mais essentiel que «non seulement justice soit rendue, mais qu'il y ait aussi apparence manifeste que justice est rendue». En un mot, il ne s'agit pas de se demander si deux membres du Conseil absents lors de la première audition ont participé aux délibérations du Conseil lors de l'audition subséquente. Ce qui est critiquable, c'est leur présence pendant la période de consultation, situation qui ne leur permettait pas d'examiner, d'une manière judiciaire, la preuve présentée sous serment plusieurs jours auparavant, en leur absence, sur laquelle une décision devait être fondée. [Je souligne.]

Dans l'arrêt *Mehr v. Law Society of Upper Canada*, [1955] R.C.S. 344, à la p. 350, le juge Cartwright cite, en l'approuvant, le passage suivant des motifs du lord chancelier Eldon dans l'arrêt *Walker v. Frobisher* (1801), 6 Ves. Jun. 70, 31 E.R. 943, aux pp. 72 et 944 respectivement:

> [TRADUCTION] ... mais l'arbitre jure que cela (le fait d'avoir entendu d'autres personnes) n'a pas influencé sa décision. Je le crois. C'est un homme très respectable. Je ne puis cependant, par déférence pour qui que ce soit, faire ce qui m'apparaît contraire aux principes généraux. Un juge ne peut prendre sur lui de dire si un élément de preuve irrégulièrement admis a influencé sa décision. La décision peut avoir rendu justice parfaitement, mais elle ne saurait être justifiée selon les principes généraux.

Notre Cour a déjà approuvé cette affirmation dans l'arrêt *Szilard v. Szasz*, [1955] R.C.S. 3. Le juge Cartwright a lui aussi été impressionné par l'énoncé du juge Romer dans l'arrêt *Rex v. Huntingdon Confirming Authority*, [1929] 1 K.B. 698, à la p. 717:

> [TRADUCTION] De plus, j'aimerais simplement souligner ceci: à cette réunion du 16 mai, il y avait trois juges qui n'avaient pas entendu la preuve présentée sous serment le 25 avril. Il y a eu partage d'opinions. La résolution en faveur de confirmer a été adoptée à huit voix contre deux et il est à tout le moins possible que la majorité ait été amenée à se prononcer comme elle l'a fait en raison

those members who had not been present on April 25, to whom the facts were entirely unknown.

I turn next to consider whether a discussion of policy matters at the full board meeting which may have affected the outcome constituted a breach of the rules of natural justice.

The Principles of Natural Justice

Section 102(13) of the Act provides that the Board shall give full opportunity to the parties to present their evidence and make their submissions. The Board is empowered to determine its own practice and procedure but rules governing its practice and procedure are subject to the approval of the Lieutenant Governor in Council. While not every practice of the Board would necessarily be subject to the approval of the Lieutenant Governor, the full board practice is one which might require such approval. No such approval has been given and indeed the practice does not appear to have been adopted formally as a rule of the Board. In view of the fact, however, that this point was not argued I do not propose to deal with it further.

The full board hearing in this case is said to violate the principles of natural justice in two respects: first, that members of the Board who did not preside at the hearing participated in the decision; and second, that the case is decided at least in part on the basis of materials which were not disclosed at the hearing and in respect of which there was no opportunity to make submissions.

Although these are distinct principles of natural justice, they have evolved out of the same concern: a party to an administrative proceeding entitled to a hearing is entitled to a meaningful hearing in the sense that the party must be given an opportunity to deal with the material that will influence the tribunal in coming to its decision, and to deal with it in the presence of those who make the decision. As stated by Crane in his case comment on the *Consolidated-Bathurst* decision (1988), 1 *C.J.A.L.P.* 215, at p. 217: "The two rules have the

de l'éloquence des membres qui avaient été absents le 25 avril et qui ignoraient absolument tout des faits.

Je vais maintenant examiner si le débat qui a été tenu sur des questions de politique lors de la réunion plénière de la Commission et qui a pu influer sur l'issue de l'affaire a constitué une violation des règles de justice naturelle.

Les principes de justice naturelle

Le paragraphe 102(13) de la Loi prévoit que la Commission doit accorder aux parties toute possibilité de présenter leur preuve et de faire valoir leurs arguments. La Commission a le pouvoir d'établir sa propre pratique et procédure, mais les règles qui régissent cette pratique et cette procédure sont soumises à l'approbation du lieutenant-gouverneur en conseil. Bien que ce ne soient pas toutes les pratiques de la Commission qui doivent être ainsi approuvées, la pratique des réunions plénières de la Commission en est une qui pourrait nécessiter cette approbation. Aucune approbation de cette nature n'a été donnée et la pratique ne paraît pas avoir été adoptée officiellement à titre de règle de la Commission. Mais puisque ce point n'a pas été débattu, je n'ai pas l'intention de m'y arrêter.

On a soutenu que la réunion plénière de la Commission en l'espèce viole les principes de justice naturelle de deux manières: premièrement, parce que des commissaires qui ne faisaient pas partie du banc qui a entendu l'affaire ont participé à la décision et, deuxièmement, parce que la décision a été, au moins en partie, prise en fonction d'éléments qui n'ont pas été divulgués à l'audition et à l'égard desquels il n'y a pas eu de possibilité de présenter des arguments.

Bien qu'il s'agisse de principes de justice naturelle distincts, ceux-ci découlent du même souci: faire en sorte qu'une partie à une procédure administrative qui a droit à une audition bénéficie d'une véritable audition, en ce sens qu'elle doit avoir la possibilité de répondre à tous les éléments qui influeront sur la décision du tribunal et d'y répondre en présence de ceux qui prennent cette décision. Crane le formule ainsi dans son commentaire sur la décision *Consolidated-Bathurst* (1988), 1 *C.J.A.L.P.* 215, à la p. 217: [TRADUCTION] «Les

same purpose: to preserve the integrity and fairness of the process." In the first case the party has had no opportunity to persuade some of the members at all, while in the second the party has not been afforded an opportunity to persuade the tribunal as to the impact of material obtained outside the hearing.

The concern for justice is aptly put by the pithy statement in the McRuer Report criticizing the full board procedure. At pages 2005-6, the former Chief Justice of the High Court of Ontario states:

> To take a matter before the full Board for a discussion and obtain the views of others who have not participated in the hearing and without the parties affected having an opportunity to present their views is a violation of the principle that he who decides must hear.
>
> . . .
>
> Notwithstanding that the ultimate decision is made by those who were present at the hearing, where a division of the Board considers that a matter should be discussed before the full Board or a larger division, the parties should be notified and given an opportunity to be heard.

Although I am satisfied that, at least formally, the decision here was made by the three-member panel, that does not determine the matter. The question, rather, is whether the introduction of policy considerations in the decision-making process by members of the Board who were not present at the hearing and their application by members who were present but who heard no submissions from the parties in respect thereto, violates the rationale underlying the above principles.

In answering this question, it is necessary to consider the role of policy in the decision-making processes of administrative tribunals. There is no question that the Labour Board is entitled to consider policy in arriving at its decisions. See Dickson J. (as he then was) in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at pp. 235-36:

deux règles ont le même objet, celui de préserver l'intégrité et l'équité du processus». Dans le premier cas, la partie n'a pas du tout eu la possibilité de convaincre certains des commissaires alors que, dans le second cas, la partie n'a pas eu la possibilité de convaincre le tribunal quant à l'incidence des éléments obtenus en dehors de l'audition.

L'énoncé lapidaire du rapport McRuer qui critique la procédure de réunion plénière de la Commission formule bien ce souci de justice. Aux pages 2005 et 2006, l'ancien juge en chef de la Haute Cour de l'Ontario dit ceci:

> [TRADUCTION] Le fait de porter une affaire à la connaissance de toute la Commission pour en débattre et obtenir l'avis de personnes qui n'ont pas participé à l'audition sans que les parties touchées aient la possibilité d'exprimer leur avis constitue une violation du principe selon lequel celui qui tranche une affaire doit l'avoir entendue.
>
> . . .
>
> Malgré que la décision ultime soit prise par ceux qui ont assisté à l'audition, quand une section de la Commission juge nécessaire qu'une affaire soit débattue devant l'ensemble de la Commission ou une section plus grande, il faudrait en prévenir les parties et leur donner la possibilité d'être entendues.

Quoique je sois convaincu qu'officiellement, à tout le moins, c'est le banc de trois commissaires qui a pris la décision, cette conclusion ne clôt pas le débat. La question en litige est plutôt de savoir si l'introduction de considérations de politique dans le processus décisionnel par des commissaires qui n'ont pas assisté à l'audition et leur application par des commissaires qui étaient présents mais qui n'ont pas entendu de plaidoiries des parties au sujet de ces considérations est contraire à la raison d'être des principes susmentionnés.

Pour répondre à cette question, il faut examiner le rôle des politiques dans le processus décisionnel des tribunaux administratifs. Il n'y a pas de doute que la Commission des relations de travail peut tenir compte de politiques pour rendre ses décisions. Voir le juge Dickson (maintenant Juge en chef) dans l'arrêt *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227, aux pp. 235 et 236:

The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

The Board, then, is obliged by statute to hold a hearing and to give the parties a full opportunity to present evidence and submissions. It is also entitled to apply policy. At a time when the content of the rules of natural justice was determined by classifying tribunals as quasi-judicial or administrative, the Board would have been classified as exercising hybrid functions. A tribunal exercising hybrid functions did so in two stages. As a quasi-judicial tribunal it was required to comply with the rules of natural justice. In making its decision, however, it assumed its administrative phase and could overrule the conclusion which was indicated at the hearing by the application of administrative policy. Examples of this type of tribunal and the jurisprudence relating to its functions can be found in cases such as *B. Johnson & Co. (Builders), Ltd. v. Minister of Health*, [1947] 2 All E.R. 395, and *Re Cloverdale Shopping Centre and the Township of Etobicoke* (1966), 2 O.R. 439 (Ont. C.A.) In this state of the law there was no obligation on a tribunal during its administrative phase to comply with the rules of natural justice and hence to disclose policy which was being applied. Although tribunals exercising so-called administrative functions were subject to a general duty of fairness, disclosure of the policy to be applied by the tribunal was generally not a requirement. In the case of hybrid tribunals, therefore, such non-disclosure at the quasi-judicial stage would not have been considered a breach of the rules of natural justice. In this respect policy was treated on the same footing as the law. Both law and policy might be dealt with at the hearing but the tribunal was entitled to supplement it by its own researches without disclosure to the parties.

La commission est un tribunal spécialisé chargé d'appliquer une loi régissant l'ensemble des relations de travail. Aux fins de l'administration de ce régime, une commission n'est pas seulement appelée à constater des faits et à trancher des questions de droit, mais également à recourir à sa compréhension du corps jurisprudentiel qui s'est développé à partir du système de négociation collective, tel qu'il est envisagé au Canada, et à sa perception des relations de travail acquise par une longue expérience dans ce domaine.

La Loi oblige donc la Commission à tenir une audition et à donner aux parties toute possibilité de présenter des éléments de preuve et des arguments. Elle a aussi le pouvoir d'appliquer des politiques. À l'époque où la classification des tribunaux en tribunaux quasi judiciaires ou administratifs déterminait le contenu des règles de justice naturelle, la Commission aurait été classée dans la catégorie des tribunaux qui exerçaient des fonctions hybrides. Un tribunal qui exerçait des fonctions hybrides le faisait en deux étapes. À titre de tribunal quasi judiciaire, il était tenu de se conformer aux règles de justice naturelle. Au moment de rendre sa décision, il entrait dans la phase administrative de ses fonctions et pouvait, par l'application d'une politique administrative, écarter la conclusion indiquée à l'audience. On trouve des exemples de ce type de tribunal et de la jurisprudence qui traite de ses fonctions dans les arrêts *B. Johnson & Co. (Builders), Ltd. v. Minister of Health*, [1947] 2 All E.R. 395, et *Re Cloverdale Shopping Centre and the Township of Etobicoke* (1966), 2 O.R. 439 (C.A. Ont.) Selon cet état du droit, un tribunal n'était pas tenu, dans la phase administrative de ses fonctions, d'observer les règles de justice naturelle et par conséquent de divulguer la politique qu'il appliquait. Bien que les tribunaux qui remplissaient ces fonctions dites administratives étaient assujettis à une obligation générale d'agir avec équité, ils n'étaient pas tenus, en règle générale, de divulguer la politique qu'ils allaient appliquer. Par conséquent, dans le cas des tribunaux hybrides, la non-divulgation de cette politique pendant la phase quasi judiciaire n'aurait pas été considérée contraire aux règles de justice naturelle. À cet égard, les politiques étaient placées sur le même pied que le droit. Il était possible de traiter les politiques et le droit à l'audition, mais le tribunal pouvait la compléter par ses propres recherches sans en informer les parties.

This view of the role of policy must be reappraised in light of the evolution of the law relating to the classification of tribunals and the application to them of the rules of natural justice and fairness. The content of these rules is no longer dictated by classification as judicial, quasi-judicial or executive, but by reference to the circumstances of the case, the governing statutory provisions and the nature of the matters to be determined. See *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, and *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879.

It is no longer appropriate, therefore, to conclude that failure to disclose policy to be applied by a tribunal is not a denial of natural justice without examining all the circumstances under which the tribunal operates.

The proceedings which are the subject of this appeal involve the exercise of extraordinary powers by the Board. In this case the Board was asked to order reopening of the Hamilton plant although it had operated at a loss. Although the Board declined to make that order, it apparently considered that it had jurisdiction to do so. In lieu thereof the employer was ordered to pay damages. These are civil consequences that affect the rights of employers to a greater degree than many civil actions in the courts in which a litigant enjoys the whole panoply of protection afforded by the rules of practice, procedure and the rules of evidence. The Act, here, provides for a full opportunity to the parties to present evidence and to make submissions. Is this opportunity denied when the tribunal considers and applies policy without giving the parties an opportunity to deal with it at the hearing? Is it a breach of the standard of fairness which underlies the rules of natural justice?

The answers to these questions lie in the nature of policy and whether it is correct to treat it on the

Il y a lieu de réévaluer cette conception du rôle des politiques en fonction de l'évolution du droit relatif à la classification des tribunaux et à l'application des règles de justice naturelle et d'équité à leur endroit. Le contenu de ces règles ne dépend plus de leur classification en règles judiciaires, quasi judiciaires ou administratives, mais il est déterminé par les circonstances de l'affaire, les dispositions législatives applicables et la nature des litiges à décider. Voir *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311, *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602, et *Syndicat des employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne)*, [1989] 2 R.C.S. 879.

Il ne convient donc plus de conclure que l'omission de divulguer les politiques que le tribunal va appliquer ne constitue pas un déni de justice naturelle sans examiner toutes les circonstances dans lesquelles le tribunal fonctionne.

Les procédures visées par le présent pourvoi portent sur l'exercice de pouvoirs exceptionnels de la part de la Commission. En l'espèce, on demandait à la Commission d'ordonner la réouverture de l'usine de Hamilton, même si son exploitation avait été déficitaire. Même si la Commission a refusé de rendre cette ordonnance, elle semble avoir estimé qu'elle avait compétence pour la rendre. L'employeur a plutôt été condamné à payer des dommages-intérêts. Ce sont là des conséquences civiles qui touchent plus les droits des employeurs que ne le font de nombreuses actions civiles devant des tribunaux où le justiciable bénéficie de toute la protection offerte par les diverses règles de pratique, de procédure et de preuve. En l'espèce, la Loi prescrit d'accorder toute possibilité aux parties de présenter leur preuve et de faire valoir leurs arguments. Cette possibilité est-elle refusée quand le tribunal examine et applique une politique sans donner aux parties la possibilité d'en traiter à l'audition? Est-ce là une violation de la norme d'équité qui sous-tend les règles de justice naturelle?

La réponse à ces questions dépend de la nature des politiques et de ce qu'il est ou non correct de

same footing as the law. In *Innisfil (Corporation of the Township) v. Corporation of Township of Vespra*, [1981] 2 S.C.R. 145, this Court was called upon to deal with the question whether a party to a proceeding before the Ontario Municipal Board was entitled to challenge policy by leading evidence and by cross-examination—the traditional methods for contesting fact. The Court of Appeal of Ontario had held that government policy introduced at the hearing was not binding but could be met by other evidence. Cross-examination was, however, denied. In this Court, the right to challenge policy by evidence was affirmed. In addition, the appellants were accorded the right to cross-examine and the Court of Appeal was reversed in this respect. Estey J., who delivered the judgment of the Court, stated, at p. 167:

> On the other hand, where the rights of the citizen are involved and the statute affords him the right to a full hearing, including a hearing of his demonstration of his rights, one would expect to find the clearest statutory curtailment of the citizen's right to meet the case made against him by cross-examination.

If a party has the right to attack policy in the same fashion as fact, it follows that to deprive the party of that right is a denial of a full opportunity to present evidence and is unfair. Policy in this respect is not like the law which cannot be the subject of evidence or cross-examination. Policy often has a factual component which the law does not. Furthermore, under our system of justice it is crucial that the law be correctly applied. The court or tribunal is not bound to rely solely on the law as presented by the parties. Accordingly, a tribunal can rely on its own research and if that differs from what has been presented at the hearing, it is bound to apply the law as found. Ordinarily there is no obligation to disclose to the parties the fruits of the tribunal's research as to the law, although it is a salutary practice to obtain their views in respect of an authority which has come to the tribunal's attention and which may have an important influence on the case. For an example of the application of this practice in this Court, see *City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, at p.

les mettre sur le même pied que le droit. Dans l'arrêt *Innisfil (Municipalité du canton) c. Municipalité du canton de Vespra*, [1981] 2 R.C.S. 145, notre Cour devait décider si une partie à une procédure tenue devant la Commission municipale de l'Ontario avait le droit de contester une politique en présentant des éléments de preuve et en procédant à des contre-interrogatoires, qui sont les méthodes traditionnelles de contester les faits. La Cour d'appel de l'Ontario avait statué que la politique du gouvernement présentée à l'audition n'avait pas force obligatoire, mais qu'elle était susceptible de contestation sous forme de preuve contradictoire. On a cependant refusé le droit de contre-interroger. Notre Cour a confirmé le droit de contester une politique au moyen d'une preuve. De plus, l'appelante s'est vu accorder le droit de contre-interroger, ce qui infirmait la décision de la Cour d'appel à cet égard. Le juge Estey, qui a rendu l'arrêt de la Cour, dit ceci, à la p. 167:

> D'autre part, quand les droits d'une personne sont en jeu et que la loi lui accorde le droit à une audition complète, dont celle de la démonstration de ses droits, on s'attendrait à trouver dans la loi la négation catégorique du droit de cette personne de réfuter, par contre-interrogatoire, la preuve apportée contre elle.

Si une partie a le droit de contester une politique de la même manière qu'elle peut contester un fait, il s'ensuit que priver une partie de ce droit constitue un refus d'accorder à cette partie toute possibilité de présenter sa preuve et est injuste. Sous ce rapport, une politique diffère du droit qui ne peut faire l'objet d'une preuve ou d'un contre-interrogatoire. Une politique a souvent une composante factuelle que le droit n'a pas. De plus, selon notre système de justice, il est essentiel que le droit soit correctement appliqué. Un tribunal judiciaire ou administratif n'est pas astreint à s'en remettre aux seules règles de droit que les parties lui ont soumis. En conséquence, un tribunal administratif peut se fonder sur ses propres recherches et, en cas de divergence avec ce qui a été soumis à l'audition, il est tenu d'appliquer le droit déterminé par le résultat de ses recherches. Ordinairement, il n'y a pas d'obligation de révéler aux parties le fruit des recherches du tribunal quant au droit, bien qu'il soit recommandable d'obtenir leur avis quant à un précédent qui est porté à l'attention du tribunal et

36. We do not have the same attitude to policy. There is not necessarily one policy that is the right policy. Often there are competing policies, selection of the better policy being dependent on being subjected to the type of scrutiny which was ordered in *Innisfil*, *supra*.

Ample support can be found in the cases and writings for the proposition that generally policy is to be treated more like fact than law. In *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, Laskin C.J., in holding that the Commission was entitled to rely on policy, stated at p. 171:

> ... it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the *Broadcasting Act*. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.

In *de Smith's Judicial Review of Administrative Action* (4th ed. 1980), at p. 223, the learned author states:

> ... an opportunity to be heard, both on the application and the merits of the policy, may be required in order to prevent a fettering of discretion.

In support, the learned author cites *R. v. Criminal Injuries Compensation Board*, [1973] 1 W.L.R. 1334, at p. 1345, *per* Megaw L.J.:

> As to the question of the board's minutes, I think that justice and paragraph 22 of the Scheme alike require that if the board in any particular case are minded to be guided by any principle laid down in any pre-existing minute of the board, the applicant must be informed of the existence and terms of that minute, so that he can, if he wishes, make his submissions with regard thereto: that is, submissions on the questions whether the principle is right or wrong in relation to the terms of the

qui peut avoir une influence considérable sur sa décision. Pour un exemple de l'application de cette pratique en notre Cour, on peut consulter l'arrêt *Ville de Kamloops c. Nielsen*, [1984] 2 R.C.S. 2, à la p. 36. Nous n'avons pas la même attitude envers les politiques. Il n'y a pas nécessairement une politique qui soit la bonne à suivre. Il arrive souvent que les politiques s'opposent et que le choix de la meilleure dépende d'un examen comme celui ordonné dans l'arrêt *Innisfil*, précité.

La jurisprudence et la doctrine appuient abondamment la proposition qu'en général il y a lieu de traiter une politique davantage comme un fait que comme du droit. Dans l'arrêt *Capital Cities Communications Inc. c. Conseil de la Radio-Télévision canadienne*, [1978] 2 R.C.S. 141, le juge en chef Laskin, statuant que la Commission avait le droit de se fonder sur une politique, dit à la p. 171:

> ... il était tout à fait approprié d'énoncer des principes directeurs comme le Conseil l'a fait à l'égard de la télévision par câble. Les principes en cause ont été établis après de longues auditions auxquelles les parties intéressées étaient présentes et ont pu faire des observations. Sous le régime de réglementation établi par la *Loi sur la radiodiffusion*, il est dans l'intérêt des titulaires éventuels de licences et du public d'avoir une politique d'ensemble. Même si une telle politique peut ressortir d'une succession de demandes, il est plus judicieux de la faire connaître à l'avance.

Dans son ouvrage intitulé *de Smith's Judicial Review of Administrative Action* (4e éd. 1980), de Smith affirme, à la p. 223:

> [TRADUCTION] ... la possibilité d'être entendu tant sur l'application que sur le bien-fondé d'une politique peut être nécessaire afin d'éviter une diminution de pouvoir discrétionnaire.

Pour étayer son avis, l'auteur cite les motifs du lord juge Megaw dans l'arrêt *R. v. Criminal Injuries Compensation Board*, [1973] 1 W.L.R. 1334, à la p. 1345:

> [TRADUCTION] Quand aux procès-verbaux de la commission, je crois que la justice de même que le régime du paragraphe 22 exigent que si, dans un cas particulier, la commission veut s'inspirer de quelque principe formulé dans un procès-verbal préexistant, le requérant soit avisé de l'existence et des termes de ce procès-verbal, de sorte qu'il puisse, s'il le désire, présenter des arguments à son égard, c'est-à-dire des arguments relatifs aux questions de savoir si le principe est bon ou mauvais par rapport

Scheme and whether the principle, if right, is applicable or inapplicable to the facts of the particular case.

Another comment from de Smith is found in the section on the right to a hearing, at p. 182, note 92:

Whilst it would be going too far to assert that in all circumstances there is an implied right to be apprised of and to argue against policy proposals, there are some indications pointing in this direction: see for example, *British Oxygen Co. Ltd.* v. *Board of Trade* [1971] A.C. 610, 625, 631 (desirable that notice be given to applicants for industrial grants of any rule or policy generally followed by the Department, and an opportunity for the applicants to make representations on the soundness or applicability of the policy or rule: this would make applications more effective and prevent the Department from fettering its statutory discretion) . . . .

In Professor Garant's *Droit administratif* (2nd ed. 1985), he states, at pp. 792-93:

[TRANSLATION] It seems to be well established that a policy or guidelines previously adopted by a tribunal do not give rise to a reasonable apprehension of bias, if the tribunal respects the *audi alteram partem* rule, even if the decision to intervene is in accordance with the policy or guidelines.

See also Dussault and Borgeat, *Administrative Law: A Treatise* (2nd ed. 1985), at p. 423, and Pépin and Ouellette, *Principes de contentieux administratif* (2nd ed. 1982), at p. 269.

In the discussion of "The Duty of Disclosure" Aronson and Franklin in *Review of Administrative Action* write, at p. 183:

The extent to which policy, expertise and independent inquiry are integral to the decision-making process will inevitably vary according to the subject matter for decision or investigation. But even in a trial-type hearing, the adjudicator is not bound exclusively by the parties' proofs and arguments, and will need to accommodate public and institutional interests. The more "polycentric", policy-oriented or technical a problem, the greater is the pressure on decision-makers to seek out solutions, to confer separately with interested persons, and to use their experience to find a settlement. The ability of administrators to inform themselves, and to apply their expertise and accumulated experience, and the expecta-

aux conditions du régime et si, à supposer qu'il soit bon, ce principe est applicable ou non aux faits de l'espèce.

On trouve cet autre commentaire de de Smith dans la section portant sur le droit à une audition, à la p. 182, note 92:

[TRADUCTION] Quoique ce serait aller trop loin que de soutenir qu'il existe, en toutes circonstances, un droit implicite d'être informé de toute proposition de politique et de la contester, il y a des indications en ce sens: voir, par exemple, *British Oxygen Co. Ltd.* v. *Board of Trade*, [1971] A.C. 610, aux pp. 625 et 631 (il est à souhaiter que les demandeurs de subventions industrielles soient informés de l'existence de toute règle ou politique généralement appliquée par le Ministère, et qu'ils aient la possibilité de présenter des arguments sur le bien-fondé ou l'applicabilité de la politique ou de la règle: cette pratique rendrait les demandes plus efficaces et empêcherait le Ministère de restreindre son pouvoir discrétionnaire) . . .

Dans son ouvrage intitulé *Droit administratif* (2e éd. 1985), le professeur Garant affirme, aux pp. 792 et 793:

La jurisprudence nous semble bien à l'effet qu'un énoncé de politique ou des directives prises préalablement par un tribunal ne donnent pas lieu à crainte raisonnable de préjugé, si le tribunal respecte la règle *audi alteram partem*, même si la décision à intervenir est conforme à l'énoncé de politique ou aux directives.

Voir également Dussault et Borgeat, *Traité de droit administratif* (2e éd. 1984), à la p. 423, et Pépin et Ouellette, *Principes de contentieux administratif* (2e éd. 1982), à la p. 269.

Au sujet de [TRADUCTION] «L'obligation de divulguer», Aronson et Franklin écrivent dans leur ouvrage intitulé *Review of Administrative Action*, à la p. 183:

[TRADUCTION] La mesure dans laquelle les politiques, l'expérience et la recherche personnelle font partie intégrante du processus décisionnel varie forcément selon le sujet de la décision ou de la recherche. Même dans une audition apparentée à un procès, le décideur n'est pas restreint à la preuve et aux arguments soumis par les parties, mais il doit tenir compte de l'intérêt du public et des institutions. Plus un problème est «polycentrique», technique ou axé sur une politique, plus le décideur sera poussé à chercher des solutions, à conférer séparément avec les personnes intéressées et à faire appel à leur expérience pour arriver à un règlement. La capacité des juges de tribunaux administratifs de se renseigner, de

tion that they will do so, makes the duty of disclosure sometimes difficult to define, and to observe. At the same time, however, it enhances the importance of the duty. Disclosure can act as an important safeguard against the use of inaccurate material or untested theories. It can also contribute to the efficiency of the hearing by directing argument and information to the relevant issues and materials. [Emphasis added.]

Wade, *Administrative Law* (4th ed. 1977) states, at p. 470:

Policy is of course the basis of administrative discretion in a great many cases, but this is no reason why the discretion should not be exercised fairly *vis-a-vis* any person who will be adversely affected. The decision will require the weighing of any such person's interests against the claims of policy; and this cannot fairly be done without giving that person an opportunity to be heard.

In my opinion, therefore, the full board hearing deprived the appellant of a full opportunity to present evidence and submissions and constituted a denial of natural justice. While it cannot be determined with certainty from the record that a policy developed at the full board hearing and not disclosed to the parties was a factor in the decision, it is fatal to the decision of the Board that this is what might very well have happened.

While achieving uniformity in the decisions of individual boards is a laudable purpose, it cannot be done at the expense of the rules of natural justice. If it is the desire of the legislature that this purpose be pursued it is free to authorize the full board procedure. It is worthy of note that Parliament has given first reading to Bill C-40, a revised *Broadcasting Act* which authorizes individual panels to consult with the Commission and officers of the Commission in order to achieve uniformity in the application of policy (s. 19(4)). Provision is made, however, for the timely issue of guidelines and statements with respect to matters within the jurisdiction of the Commission.

mettre à profit leurs compétences et expérience et les attentes qu'ils le feront, rend parfois difficile de définir et de respecter l'obligation de divulguer. Mais, en même temps, cette capacité accroît l'importance de cette obligation. La divulgation peut constituer une protection importante contre l'utilisation d'éléments inexacts ou de théories non éprouvées. Elle peut aussi favoriser l'efficacité de l'audition en concentrant les renseignements et l'argumentation sur les sujets et les éléments de preuve pertinents. [Je souligne.]

Wade affirme, à la p. 470 de son ouvrage intitulé *Administrative Law* (4e éd. 1977):

[TRADUCTION] Il va sans dire que les politiques constituent le fondement de la discrétion administrative dans de nombreuses affaires, mais ceci ne justifie pas de ne pas exercer ce pouvoir discrétionnaire avec équité envers toute personne qui sera défavorisée par une décision. La décision exige qu'on soupèse les intérêts de ces personnes en fonction de ce qu'exige une politique; on ne peut le faire sans donner à cette personne la possibilité d'être entendue.

À mon avis, la réunion plénière de la Commission a donc privé l'appelante de la pleine possibilité de présenter des éléments de preuve et de faire valoir des arguments et a constitué un déni de justice naturelle. Quoique le dossier ne permette pas de déterminer avec certitude si la formulation, lors de la réunion plénière, d'une politique qui n'a pas été divulguée aux parties a eu un effet sur la décision, le fait que la chose ait très bien pu se produire est fatal à la décision de la Commission.

Même si l'uniformisation des décisions de tribunaux particuliers est souhaitable, elle ne peut se faire aux dépens des règles de justice naturelle. Si le législateur veut permettre la poursuite de cet objectif, il est libre d'autoriser la procédure de réunion plénière de la Commission. Il convient de souligner que le Parlement a adopté en première lecture le projet de loi C-40, une refonte de la *Loi sur la radiodiffusion*, lequel permet à des bancs particuliers de consulter le Conseil et ses cadres afin de réaliser une application uniforme des politiques (par. 19(4)). On prévoit cependant la promulgation régulière de directives et d'énoncés de politique relativement aux matières relevant de la compétence du Conseil.

Section 114

The respondents do not contend that if a breach of natural justice has occurred, the privative clause in s. 108 of the Act would apply. They have, however, submitted that if there was a breach of natural justice, it was technical only and hence no remedy should be available. The respondents cite s. 114 of the Act as well as *Toshiba Corp. v. Anti-Dumping Tribunal* (1984), 8 Admin. L.R. 173 (F.C.A.) Section 114 reads:

114. No proceedings under this Act are invalid by reason of any defect of form or any technical irregularity and no such proceedings shall be quashed or set aside if no substantial wrong or miscarriage of justice has occurred.

Toshiba concerned a preliminary staff report prepared for the Anti-Dumping Tribunal which was not revealed to the parties and which the Court described as "a dangerous practice." Nonetheless, the Court of Appeal was satisfied that the report contained only matters of general knowledge or was based upon facts and sources which were brought out at the hearing in such a manner that the parties had the opportunity to test them. Thus any breach of natural justice was minor and inconsequential and the application for judicial review was dismissed.

The submission that there is no prejudice as a result of a technical breach of rules of natural justice requires that the party making the allegation establish this fact. To do so in this case it would be necessary for the respondents to satisfy the court that the matters discussed were all matters that had been brought out at the hearing. This has not occurred; unlike *Toshiba* there is no report or minutes of the full board meeting against which the hearing proceedings can be compared. The appellant can hardly be expected to establish prejudice when it was not privy to the discussion before the full Board and there is no evidence as to what in fact was discussed. In the absence of such evidence the gravity of the breach of natural jus-

L'article 114

Les intimés ne soutiennent pas que s'il y a eu violation des règles de justice naturelle, la clause privative de l'art. 108 de la Loi s'applique. Ils ont toutefois soutenu que s'il y a eu violation des règles de justice naturelle, elle a été purement formelle et qu'il n'y a pas lieu d'accorder quelque réparation que ce soit. Les intimés invoquent l'art. 114 de la Loi et l'arrêt *Toshiba Corp. c. Tribunal antidumping* (1984), 8 Admin. L.R. 173 (C.A.F.) L'article 114 est ainsi conçu:

114 Les instances introduites en application de la présente loi ne sont pas nulles en raison d'un vice de forme ou d'une irrégularité technique. Elles ne sont pas rejetées ni annulées, à moins qu'il n'en résulte un préjudice grave ou une erreur judiciaire fondamentale.

L'arrêt *Toshiba* porte sur un rapport préliminaire du personnel préparé pour le Tribunal antidumping qui n'avait pas été divulgué aux parties, ce que la cour a qualifié de «pratique dangereuse». Néanmoins, la Cour d'appel s'est dite convaincue que tout ce qui était contenu dans le rapport était de notoriété publique ou était fondé sur des faits et des sources soulevés à l'audience d'une manière telle que les parties avaient eu la possibilité de les examiner. Donc, s'il y avait eu violation des règles de justice naturelle, elle était mineure et sans importance de sorte que la demande de contrôle judiciaire a été rejetée.

L'argument selon lequel il n'y a pas eu de préjudice causé par une violation technique des règles de justice naturelle exige de la partie qui l'invoque qu'elle établisse cette absence. Pour faire cette preuve en l'espèce, il faudrait que les intimés convainquent la cour que les sujets discutés avaient tous été abordés à l'audition. Ce n'est pas ce qui s'est produit; à la différence de l'affaire *Toshiba*, il n'y a pas de compte rendu ou de procès-verbal de la réunion plénière de la Commission qui permettraient de faire la comparaison avec les procédures d'audition. On ne saurait demander à l'appelante de prouver l'existence d'un préjudice alors qu'elle n'a pas eu connaissance de ce qui a été discuté à la réunion plénière de la Commission et qu'il n'y a pas de preuve quant à ce qui y a été réellement discuté. En l'absence de cette preuve, il est impossible de déterminer la gravité de la violation des

tice cannot be assessed, and I cannot conclude that no substantial wrong has occurred.

Section 102(13)

Nor can I conclude that the full board procedure is saved by virtue of s. 102(13) of the *Labour Relations Act*. Section 102(13) reads:

102. ...

(13) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions, and the Board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable. [Emphasis added.]

I recognize the importance of deference to a board's choice of procedures expressed by this Court in *Komo Construction Inc. v. Commission des Relations de Travail du Québec*, [1968] S.C.R. 172, at p. 176 [reported in English translation at (1967), 1 D.L.R. (3d) 125, at p. 127], *per* Pigeon J.:

While upholding the rule that the fundamental principles of justice must be respected, it is important to refrain from imposing a code of procedure upon an entity which the law has sought to make master of its own procedure.

However, in this case the appellant was not given a full opportunity to present evidence and make submissions, which is an explicit limit placed by statute on the Board's control of its procedure. Furthermore, when the rules of natural justice collide with a practice of the Board, the latter must give way.

Disposition

In the result, the appeal is allowed, the judgment of the Court of Appeal is set aside and the order of the Divisional Court restored with costs to the appellant against the respondents both here and in the Court of Appeal.

règles de justice naturelle et je ne puis conclure qu'il n'y a pas eu de préjudice grave.

Le paragraphe 102(13)

Je ne puis non plus conclure que la procédure de réunion plénière de la Commission est sauvegardée en vertu du par. 102(13) de la *Loi sur les relations de travail*. Le paragraphe 102(13) est ainsi conçu:

102 ...

(13) La Commission régit sa propre pratique et procédure, sous réserve toutefois d'accorder aux parties toute possibilité de présenter leur preuve et de faire valoir leurs arguments. La Commission peut, sous réserve de l'approbation du lieutenant-gouverneur en conseil, établir des règles de pratique et de procédure, réglementer l'exercice de ses attributions et prescrire les formules qu'elle estime opportunes. [Je souligne.]

Je reconnais l'importance de la déférence à l'égard du choix fait par une commission de sa procédure, dont parle le juge Pigeon de notre Cour dans l'arrêt *Komo Construction Inc. v. Commission des Relations de Travail du Québec*, [1968] R.C.S. 172, à la p. 176:

Tout en maintenant le principe que les règles fondamentales de justice doivent être respectées, il faut se garder d'imposer un code de procédure à un organisme que la loi a voulu rendre maître de sa procédure.

Cependant, en l'espèce, l'appelante n'a pas eu toute possibilité de présenter sa preuve et de faire valoir ses arguments, alors que cette possibilité constitue une limite expresse que la Loi impose au contrôle de la Commission sur sa procédure. De plus, quand les règles de justice naturelle entrent en conflit avec une pratique de la Commission, cette dernière doit céder le pas.

Dispositif

En conséquence, le pourvoi est accueilli, l'arrêt de la Cour d'appel est infirmé et l'ordonnance de la Cour divisionnaire est rétablie avec dépens en faveur de l'appelante contre les intimés en notre Cour et en Cour d'appel.

The judgment of Wilson, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. was delivered by

GONTHIER J.—I have had the opportunity to read the reasons of my colleague, Sopinka J., and I must respectfully disagree with his conclusions in this case. While I do not generally disagree with the summary of the facts, decisions and issues, I consider it useful to refer to them in somewhat more detail.

The appeal is from a decision of the Court of Appeal of Ontario dismissing an application for judicial review of two decisions of the Ontario Labour Relations Board (the "Board"). In the first decision, a tripartite panel composed of G. W. Adams, Q.C., Chairman of the Board, W. H. Wightman and B. F. Lee representing the management and labour sides respectively, decided, Mr. Wightman dissenting, that the appellant had failed to bargain in good faith with the respondent union because it did not disclose during the negotiations its impending decision to close the plant covered by the collective agreement. Counsel for the appellant then learned that a full board meeting had been called to discuss the policy implications of its decision when it was still in the draft stage. The parties were neither notified of nor invited to participate in this meeting. The appellant applied for a reconsideration of this decision under s. 106 of the *Labour Relations Act*, R.S.O. 1980, c. 228, on the ground that the full board meeting had vitiated the Board's decision and on the ground that the evidence adduced at the first hearing had been improperly considered. The same panel rejected both these arguments in the second decision (the "reconsideration decision").

The Board's decisions were challenged in the Divisional Court on the basis: (1) that the original decision was manifestly unreasonable in fact and in law, and (2) that the full board meeting called by the Board prior to the panel's decision constituted a violation of the rules of natural justice. The Divisional Court rejected the first ground and the appellant did not raise this argument in the

Version française du jugement des juges Wilson, La Forest, L'Heureux-Dubé, Gonthier et McLachlin rendu par

LE JUGE GONTHIER—J'ai eu l'avantage de lire les motifs de mon collègue le juge Sopinka et, en toute déférence, je ne puis partager ses conclusions en l'espèce. Bien que, dans l'ensemble, je ne sois pas en désaccord avec le résumé des faits, des décisions et des questions en litige, je crois utile de les exposer un peu plus en détail.

Le pourvoi est formé contre un arrêt de la Cour d'appel de l'Ontario qui a rejeté une demande de contrôle judiciaire de deux décisions de la Commission des relations de travail de l'Ontario (la «Commission»). Dans la première décision, un banc tripartite composé du président de la Commission G. W. Adams, c.r., et de W. H. Wightman et B. F. Lee qui représentaient l'employeur et les employés respectivement, a statué, avec dissidence de la part de M. Wightman, que l'appelante n'avait pas négocié de bonne foi avec le syndicat intimé en ne divulguant pas, pendant les négociations, sa décision imminente de fermer l'usine visée par la convention collective. L'avocat de l'appelante a alors appris qu'une réunion plénière de la Commission avait été convoquée dans le but d'analyser les conséquences en matière de politique de sa décision alors que celle-ci était encore au stade d'avant-projet. Les parties n'ont été ni avisées de cette réunion, ni invitées à y participer. L'appelante a demandé le réexamen de cette décision en vertu de l'art. 106 de la *Loi sur les relations de travail*, L.R.O. 1980, ch. 228, pour le motif que la réunion plénière de la Commission a entaché de nullité sa décision et que les éléments de preuve soumis à la première audition n'avaient pas été examinés correctement. Le même banc a rejeté ces deux arguments dans la seconde décision (la «décision relative à la demande de réexamen»).

Les décisions de la Commission ont été contestées devant la Cour divisionnaire pour les motifs suivants: (1) la décision initiale était manifestement déraisonnable en fait et en droit et (2) la réunion plénière convoquée par la Commission avant que le banc ne rende sa décision violait les règles de justice naturelle. La Cour divisionnaire a rejeté le premier motif invoqué et l'appelante ne l'a

Court of Appeal nor in this Court. Thus, the only issue before this Court is whether the impugned meeting vitiated the first decision rendered by the Board on the ground that the case was there discussed with panel members by persons who did not hear the evidence nor the arguments.

In order to determine whether the principles of natural justice have been breached in this case, it is necessary to examine in some detail the facts which led to the initial complaint made by the respondent union. It will also be necessary to examine the evidence as to the purpose and the context of the full board meeting so as to understand the policy matters in issue at that meeting.

I—The Facts

(a) *Plant Closure and Collective Agreement Negotiations*

The appellant operated a corrugated container plant in Hamilton (the "Hamilton plant") and decided to close it on April 26, 1983. This decision was approved by the Board of Directors on February 25, 1983 and announced on March 1, 1983. The respondent union was the bargaining agent for the employees of the Hamilton plant and negotiated a new collective agreement with the appellant from November 2, 1982 to January 13, 1983, the date at which a memorandum of settlement was concluded. The collective agreement was signed on April 22, 1983. It is obvious from the evidence heard by the Board that the decision to close the Hamilton plant and the labour negotiations concerning this plant took parallel courses. It is also obvious that the respondent union was never informed of the possibility of an impending plant closure. Although its demands did initially include a modification of art. 18.26 of the existing collective agreement concerning plant closure and severance pay, the respondent union unilaterally dropped this demand during the negotiations and art. 18.26 was simply renewed. At no other point during the negotiations did the subject of plant closure arise.

soulevé ni en cour d'appel, ni en notre Cour. La seule question en litige devant notre Cour est donc celle de savoir si la réunion contestée a entaché de nullité la première décision de la Commission pour le motif que les membres du banc qui ont entendu l'affaire en ont alors discuté avec d'autres personnes qui n'avaient pas entendu la preuve ni les plaidoiries.

Pour décider s'il y a eu manquement aux principes de justice naturelle en l'espèce, il est nécessaire d'analyser plus en détail les faits à l'origine de la première plainte du syndicat intimé. Il sera aussi nécessaire d'examiner la preuve relative à l'objet et aux circonstances de la réunion plénière de la Commission afin de comprendre les questions de politique qui étaient en cause lors de cette réunion.

I—Les faits

a) *La fermeture de l'usine et les négociations visant la signature d'une convention collective*

L'appelante exploitait une usine de fabrication de boîtes de carton ondulé à Hamilton («l'usine de Hamilton») qu'elle a décidé de fermer le 26 avril 1983. Cette décision, qui avait été approuvée par le conseil d'administration le 25 février 1983, a été annoncée le 1er mars 1983. Le syndicat intimé était l'agent négociateur des employés de l'usine de Hamilton et du 2 novembre 1982 au 13 janvier 1983 avait négocié une nouvelle convention collective avec l'appelante, date à laquelle un mémoire d'entente avait été signé. La convention collective a été signée le 22 avril 1983. Il ressort clairement de la preuve entendue par la Commission que les événements menant à la décision de fermer l'usine de Hamilton se sont déroulés parallèlement aux négociations collectives relatives à cette usine. Il est aussi évident que le syndicat intimé n'a jamais été avisé de la possibilité d'une fermeture imminente de l'usine. Quoique les demandes du syndicat aient compris au départ la modification de l'art. 18.26 de la convention collective existante qui traitait de la fermeture d'usine et des indemnités de départ, le syndicat intimé a abandonné cette demande de sa propre initiative pendant les négociations et l'art. 18.26 a été simplement reconduit. Le sujet de la fermeture de l'usine n'a plus jamais été soulevé au cours des négociations.

According to the testimonies of the representatives of the appellant, the Hamilton plant was so unprofitable that it would have been closed in 1982 if an industry-wide strike had not taken place from June to December of that year. The Hamilton plant remained open during that period and the appellant hoped that some goodwill would be generated through the new contracts entered into as a result of the industry-wide strike. As early as 1981, following the negotiation of the 1980-82 collective agreement, the appellant and the respondent union met to discuss concerns over the possibility of a plant closure given the severe losses anticipated for that year. The appellant had decided to turn the plant around and sought the respondent union's collaboration adding that there were no plans to close the Hamilton plant at that time. In October of 1981, the employees of the bargaining unit did commit themselves to the improvement of productivity at the plant. After registering a loss of $1.3 million for the year 1981, the appellant continued to invest in the Hamilton plant but warned that it would not continue to "throw 'good money after bad'" and that the plant would have to become profitable in the short term. In May of 1982, immediately before the industry-wide strike, 25 employees had to be laid off and the plant was operating only two shifts a day on a four-day work week.

In this context, the industry-wide strike was a godsend for the Hamilton plant. New clients had to award contracts to the Hamilton plant for the duration of this strike and the plant was operating at capacity, three shifts a day, seven days a week. Unfortunately, the anticipated goodwill from new customers did not materialize and Mr. Ted Haiplik, Vice-President and General Manager of the Container Division, reported to his superiors that in his opinion the Hamilton plant should be closed. Mr. Souccar, to whom Mr. Haiplik reports, testified that this recommendation was made to him in the "first or second week of February during one of their regular meetings". The matter was brought to the attention of the Board of Directors during their meeting of February 25, 1983 and they decided that the plant would close on April

D'après les dépositions des représentants de l'appelante, l'usine de Hamilton entraînait des pertes si considérables qu'elle aurait fermé ses portes en 1982 s'il n'y avait pas eu une grève à l'échelle de cette industrie de juin à décembre de la même année. L'usine de Hamilton est restée ouverte pendant cette période et l'appelante espérait qu'une certaine clientèle serait générée grâce aux nouveaux contrats signés par suite de la grève à l'échelle de l'industrie. Dès 1981, après la négociation de la convention collective visant les années 1980 à 1982, l'appelante et le syndicat intimé avaient discuté de la crainte que l'usine ferme ses portes à cause des pertes considérables prévues au cours de cette année. L'appelante avait décidé de rentabiliser l'usine et elle a demandé la collaboration du syndicat intimé, ajoutant qu'elle n'avait pas l'intention de fermer l'usine de Hamilton à ce moment-là. En octobre 1981, les employés de l'unité de négociation se sont engagés à améliorer la productivité à cette usine. Après avoir essuyé des pertes de 1,3 million de dollars en 1981, l'appelante a continué d'investir de l'argent dans l'usine de Hamilton, tout en prévenant qu'elle ne continuerait pas de [TRADUCTION] «jeter de l'argent par les fenêtres» et que l'usine devrait devenir rentable à court terme. En mai 1982, immédiatement avant la grève à l'échelle de l'industrie, 25 employés avaient dû être mis à pied et l'usine ne fonctionnait plus qu'à deux quarts par jour, quatre jours par semaine.

Dans ces circonstances, la grève à l'échelle de l'industrie fut un don du ciel pour l'usine de Hamilton. De nouveaux clients durent attribuer des contrats à l'usine de Hamilton pour la durée de la grève et l'usine fonctionnait à plein rendement, à trois quarts par jour, sept jours par semaine. Malheureusement, il n'y eut pas autant de nouveaux clients que prévu et M. Ted Haiplik, vice-président et directeur général de la division des emballages a fait rapport à ses supérieurs qu'à son avis il fallait fermer l'usine de Hamilton. Monsieur Souccar, le supérieur immédiat de M. Haiplik, a témoigné avoir reçu cette recommandation pendant [TRADUCTION] «la première ou la deuxième semaine de février, à l'occasion d'une de leurs réunions régulières». La question a été portée à l'attention du conseil d'administration lors de sa

26, 1983. Mr. Souccar insisted that it took four to five weeks following the end of the industry-wide strike to determine the amount of market share retained by the appellant and assess its viability under normal circumstances. Thus, according to Mr. Souccar, no decision concerning the closure of the Hamilton plant could be made before February of 1983.

Throughout this period, no mention was made of the possibility of plant closure during the negotiations except to point out that customers were monitoring these negotiations closely to see whether there was any possibility of a strike after the deadline set for January 8, 1983 by the respondent union. Moreover, Mr. Gruber, labour negotiator for the appellant, testified that he was not aware of any plans to close the plant during the negotiations. It is in this context that the Board was asked to determine whether the appellant had breached its obligation to bargain in good faith and, more particularly, whether it had the obligation to disclose its plans to close the Hamilton plant.

The obligation to disclose, without being asked, information relevant to any particular labour negotiation was held by the Board to be part and parcel of the obligation to bargain in good faith in *United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Ltd.*, [1980] OLRB Rep. 577, (*Westinghouse*), where this information relates to plans "which, if implemented during the term of the collective agreement, would have a significant impact on the economic lives of bargaining unit employees" (at p. 598). In order to understand the policy issues which were the subject of discussion at the full board meeting held by the Board, it is necessary to analyse the *Westinghouse* decision and its implications in this case.

(b) *The Westinghouse Decision and the Arguments Raised by the Parties before the Board*

In *Westinghouse*, management had decided to relocate its Switchgear and Control Division from Hamilton to several other locations two months

réunion du 25 février 1983; le conseil a alors décidé que l'usine fermerait ses portes le 26 avril 1983. Monsieur Souccar a souligné qu'il fallait de quatre à cinq semaines, après une grève à l'échelle de l'industrie, pour connaître la part de marché retenue par l'appelante et vérifier sa viabilité dans des circonstances normales. Donc, d'après M. Souccar, aucune décision de fermer l'usine de Hamilton ne pouvait être prise avant février 1983.

Pendant toute cette période, personne n'a jamais parlé de la possibilité de fermer l'usine au cours des négociations, sauf qu'on a mentionné que les clients suivaient ces négociations de près pour vérifier s'il y aurait possibilité de grève après la date cible du 8 janvier 1983 fixée par le syndicat intimé. De plus, M. Gruber, qui agissait à titre de négociateur pour l'appelante a témoigné qu'il n'avait été au courant d'aucun projet de fermer l'usine pendant les négociations. C'est dans ce contexte qu'on a demandé à la Commission de décider si l'appelante avait manqué à l'obligation qu'elle avait de négocier de bonne foi et, plus précisément, si elle avait l'obligation de divulguer son projet de fermer l'usine de Hamilton.

La Commission a statué, dans la décision *United Electrical, Radio & Machine Workers of America, Local 504 v. Westinghouse Canada Ltd.*, [1980] OLRB Rep. 577 (la décision *Westinghouse*), que l'obligation de divulguer spontanément tout renseignement utile aux fins des négociations collectives fait partie intégrante de l'obligation de négocier de bonne foi si ces renseignements ont trait à des projets [TRADUCTION] «qui, s'ils sont mis à exécution pendant la durée de la convention collective, auront des conséquences importantes sur la situation économique des employés de l'unité de négociation» (à la p. 598). Pour comprendre les questions de politique qui ont été débattues lors de la réunion plénière de la Commission, il faut analyser la décision *Westinghouse* et ses répercussions sur l'espèce.

b) *La décision Westinghouse et les arguments invoqués par les parties devant la Commission*

Dans l'affaire *Westinghouse*, la direction avait décidé de déménager de Hamilton à divers autres endroits la division des appareils de commutation

after the conclusion of negotiations for a collective agreement. In this decision, the Board ruled that the obligation to bargain in good faith set out in s. 14 of the *Labour Relations Act*, now s. 15, comprised the obligation to reveal during the course of negotiations decisions which may seriously affect members of the bargaining unit. However, the Board found it difficult to define the point at which a planned decision becomes sufficiently certain to warrant disclosure during the negotiations without creating unnecessarily threatening perceptions in the bargaining process. The Board described as follows the perils of forced disclosure of plans which may be discarded in the future and held that an employer does not have the obligation to disclose plans until they have become at least *de facto* decisions, at pp. 598-99:

41. The competitive nature of our economy and the ongoing requirement of competent management to be responsive to the forces at play in the marketplace result in ongoing management consideration of a spectrum of initiatives which may impact on the bargaining unit. More often than not, however, these considerations do not manifest themselves in hard decisions. For one reason or another, plans are often discarded in the conceptual stage or are later abandoned because of changing environmental factors. The company's initiation of an open-ended discussion of such imprecise matters at the bargaining table could have serious industrial relations consequences. The employer would be required to decide in every bargaining situation at what point in his planning process he must make an announcement to the trade union in order to comply with section 14. Because the announcement would be employer initiated and because plans are often not transformed into decisions, the possibility of the union viewing the employer's announcement as a threat (with attendant litigation) would be created. If not seen as a threat the possibility of employee overreaction to a company initiated announcement would exist. A company initiated announcement, as distinct from a company response to a union inquiry may carry with it an unjustified perception of certainty. The collective bargaining process thrusts the parties into a delicate and often difficult interface. Given the requirement upon the company to respond honestly at the bargaining table to union inquiries with respect to company plans which may have a

et de contrôle deux mois après la fin des négociations visant la signature d'une convention collective. Dans cette décision, la Commission a statué que l'obligation de négocier de bonne foi, énoncée à l'art. 14 de la *Loi sur les relations de travail*, devenu depuis l'art. 15, comportait l'obligation de divulguer, pendant les négociations, les décisions susceptibles de toucher sérieusement les membres de l'unité de négociation. Cependant, la Commission a trouvé difficile de déterminer à quel moment une décision projetée devient suffisamment certaine pour justifier sa divulgation pendant les négociations sans qu'il en résulte inutilement des perceptions de menaces au cours du processus de négociation. La Commission a défini de la manière suivante les dangers de la divulgation forcée de projets qui seront peut-être délaissés plus tard et elle a statué que l'employeur n'est pas tenu de divulguer des projets avant qu'ils n'aient atteint au moins le stade de décisions *de facto*, aux pp. 598 et 599:

[TRADUCTION] 41. La nature concurrentielle de notre économie et l'obligation, pour une administration compétente, de s'adapter aux forces du marché exigent des administrateurs qu'ils envisagent constamment de nouvelles mesures susceptibles d'avoir des répercussions sur l'unité de négociation. Mais plus souvent qu'autrement, il n'en résulte pas de décision concrète. Pour une raison ou une autre, les projets sont souvent rejetés à l'étape de leur conception ou abandonnés plus tard en raison de changements des circonstances externes. L'amorce par la société de discussions libres portant sur des sujets aussi vagues à la table de négociation pourrait avoir de graves conséquences sur les relations de travail. L'employeur devrait décider à chaque fois qu'il y a négociation à quel moment, dans l'évolution de son projet, il doit en faire part au syndicat pour se conformer à l'art. 14. Parce que cette annonce viendrait de l'employeur et que les projets n'ont souvent aucune suite, il y aurait possibilité que le syndicat perçoive l'annonce faite par l'employeur comme une menace (et qu'elle entraîne des contestations). Si l'annonce n'était pas perçue comme une menace, il y aurait quand même possibilité de réaction exagérée des employés à l'annonce de la société. Une mesure annoncée par la société, par opposition à une réponse de la société à une demande syndicale de renseignements, peut donner prise à un sentiment de certitude qui n'est pas justifié dans les faits. Les négociations collectives lancent les parties dans des pourparlers délicats et souvent périlleux. Compte tenu de l'obligation déjà imposée à la société de répondre

significant impact on the bargaining unit, the effect of requiring the employer to initiate discussion on matters which are not yet decided within his organization would be of marginal benefit to the trade union and could serve to distort the bargaining process and create the potential for additional litigation between the parties. The section 14 duty, therefore, does not require an employer to reveal on his onw [*sic*] initiative plans which have not become at least de facto decisions. [Emphasis added.]

The Board then decided that management " ... had not made a hard decision to relocate during the course of bargaining as would have required it to reveal its decision to the trade union" (at p. 599). [Emphasis added.]

The facts in this case are substantially similar to those in the *Westinghouse* case in that a decision which would substantially affect the bargaining unit was taken by management either during or immediately after collective agreement negotiations thereby raising the issue of whether plans to close the Hamilton plant had gone sufficiently far through management's decision-making process to justify their disclosure to union representatives during the course of the negotiations. Before the Board, the appellant and the respondent union both argued, *inter alia*, that the test established in the *Westinghouse* decision ought to be modified. In his reasons, [1983] OLRB Rep. September 1411, Chairman Adams stated the respondent union's position as follows, at p. 1428:

26. The complainant's second major alternative argument requested this Board to reconsider its holding in *Westinghouse* that an employer does not have to reveal on his own initiative plans which have not become at least *de facto* decisions. The complainant asserted that the test ought to be disclosure where an employer is "seriously considering an action which if carried out will have a serious impact on employees".

Chairman Adams later summarized the appellant's arguments as follows, at p. 1429:

29. On behalf of the respondent company it was submitted that the extent of its bargaining duty was to disclose any decisions the company had made about the closing

franchement, à la table des négociations, aux demandes de renseignements du syndicat au sujet des projets de l'employeur susceptibles d'avoir des conséquences importantes sur l'unité de négociation, exiger de l'employeur qu'il engage le débat sur des sujets qui n'ont pas encore fait l'objet d'une décision de sa part comporterait peu d'avantages pour le syndicat et risquerait de fausser le processus de négociation et d'engendrer plus de litiges entre les parties. L'obligation définie à l'art. 14 n'impose pas à l'employeur le devoir de divulguer, de sa propre initiative, les projets qui n'ont pas encore atteint au moins le stade de décisions *de facto*. [Je souligne.]

La Commission a donc statué que la direction [TRADUCTION] « ... n'avait pas pris de décision ferme de déménager, pendant les négociations collectives, qui l'aurait obligée à divulguer sa décision au syndicat» (à la p. 599). [Je souligne.]

Les faits de l'espèce ressemblent beaucoup à ceux de l'affaire *Westinghouse* puisque la direction avait pris, pendant ou immédiatement après la négociation de la convention collective, une décision susceptible d'influencer profondément l'unité de négociation et qu'il fallait alors décider si le projet de fermer l'usine de Hamilton était rendu suffisamment loin dans le processus décisionnel de la direction pour justifier sa divulgation aux représentants du syndicat au cours des négociations. Devant la Commission, la société appelante et le syndicat intimé ont soutenu notamment qu'il fallait modifier le critère établi dans la décision *Westinghouse*. Dans ses motifs, [1983] OLRB Rep. September 1411, le président Adams formule ainsi la position du syndicat intimé, à la p. 1428:

[TRADUCTION] 26. Dans son deuxième argument important soulevé à titre subsidiaire, le plaignant demande à la Commission de réexaminer la décision qu'elle a rendue dans l'affaire *Westinghouse* et en vertu de laquelle un employeur n'est pas tenu de divulguer, de sa propre initiative, des projets qui n'ont pas encore atteint au moins le stade de décisions *de facto*. Le plaignant soutient que la norme devrait imposer la divulgation quand un employeur «envisage sérieusement de prendre une mesure dont la réalisation aura des conséquences profondes sur les employés».

Le président Adams a résumé plus loin l'argumentation de l'appelante en ces termes, à la p. 1429:

[TRADUCTION] 29. On a soutenu, au nom de la société intimée, qu'elle était tenue de divulguer lors des négociations collectives toute décision de fermer l'usine qu'elle

of the plant during the course of negotiations. Counsel submitted that on the evidence before the board one could only conclude that a definitive decision had not been made and that the respondent was not obligated to engage in speculation about a possible plant closing during bargaining.

Thus, although other legal and factual arguments were put forward by the parties, the main issue before the Board was whether the *Westinghouse* decision had to be reconsidered and the test it adopted replaced by either one of the tests proposed by the parties. This issue was a policy issue which had important implications from the point of view of labour law principles as well as of the effectiveness of collective bargaining in Ontario. The Board's desire to discuss it in a full board meeting was therefore understandable.

The Board panel decided in this case, Mr. Wightman dissenting on this issue, that the test set out in the *Westinghouse* case should be confirmed and that in this case, the appellant had made a *de facto* decision to close the Hamilton plant during the course of the negotiations. Thus, the appellant had the obligation to disclose this decision to the respondent union even if no questions were asked on this subject. The Board also found in the alternative that the decision to close the plant was so highly probable that the appellant should have informed the respondent union that if the Hamilton plant's financial situation did not improve in the short term, a recommendation to close the plant would shortly be made to the Board of Directors.

(c) *The Full Board Meeting*

On September 23, 1983, Mr. Michael Gordon, counsel for the appellant, became aware that a full board meeting concerning the Hamilton plant closure was taking place at the Board's offices. Mr. Gordon was aware that full board meetings have been part of the Board's practice for some time but had never been aware that any of the cases in which he had been involved was the subject of such a meeting. The appellant then filed an application for a reconsideration of the initial decision on the

avait prise au cours des négociations. L'avocat de l'intimée soutient que d'après la preuve soumise à la Commission, on ne peut que conclure qu'aucune décision définitive n'avait été arrêtée et que l'intimée n'était pas tenue de spéculer, pendant les négociations, sur la possibilité de fermer l'usine.

Donc, même si les parties ont invoqué d'autres arguments de droit et de fait, la principale question en litige devant la Commission était de savoir s'il y avait lieu de réexaminer la décision *Westinghouse* et de remplacer le critère adopté dans cette décision par l'un de ceux proposés par les parties. La question en était une de politique qui avait des conséquences importantes du point de vue des principes du droit du travail et de l'efficacité des négociations collectives en Ontario. La volonté de la Commission de débattre cette question en réunion plénière était donc compréhensible.

Le banc de la Commission chargé de l'audition a décidé en l'espèce, avec dissidence de la part de M. Wightman sur ce point, qu'il y avait lieu de confirmer le critère établi dans la décision *Westinghouse* et que, dans la présente affaire, l'appelante avait pris la décision *de facto* de fermer l'usine de Hamilton pendant le déroulement des négociations. Ainsi, l'appelante avait l'obligation de divulguer sa décision au syndicat intimé même si on ne lui avait pas posé de question à ce propos. La Commission a conclu, à titre subsidiaire, que la décision de fermer l'usine était si probable que l'appelante aurait dû informer le syndicat intimé que si la situation financière de l'usine de Hamilton ne s'améliorait pas rapidement, la recommandation de fermer l'usine serait soumise au conseil d'administration.

c) *La réunion plénière de la Commission*

Le 23 septembre 1983, M^e^ Michael Gordon, l'avocat de l'appelante, a appris qu'une réunion plénière se déroulait aux bureaux de la Commission à propos de la fermeture de l'usine de Hamilton. M^e^ Gordon savait que la Commission avait depuis un certain temps l'habitude de tenir des réunions plénières, mais il n'avait jamais eu connaissance que l'un des dossiers auxquels il avait participé faisait l'objet d'une telle réunion. L'appelante a présenté une demande de réexamen de la

basis, *inter alia*, that the practice of holding full board meetings is illegal.

In this reconsideration decision, Chairman Adams described in detail the purpose of these meetings and the way in which they are held. Not surprisingly, Chairman Adams emphasized the necessity to foster coherence and maintain a high level of quality in the decisions of the Board, at p. 2001:

6. In considering this question, it is to be noted that the Act confers many areas of broad discretion on the Board in determining how the statute should be interpreted or applied to an infinite variety of factual situations. Within these areas of discretion, decision-making has to turn on policy considerations. At this level of "administrative law", law and policy are to a large degree inseparable. In effect, law and policy come to be promulgated through the form of case by case decisions rendered by panels. It is in this context that the Board is sometimes criticized for not creating enough certainty in "Board law" to facilitate the planning of the parties regulated by the statute. This criticism, however, ignores the fact that there is a huge corpus of Board law much of which is almost as old as the legislation itself and as settled and stable as law can be. Board decision-making has recognized the need for uniformity and stability in the application of the statute and the discretions contained therein. Indeed, it is because there is so much settled law and policy that upwards to 80% of unfair labour practice charges are withdrawn, dismissed, settled or adjusted without the issuance of a decision and that a high percentage of other matters are either settled or withdrawn without the need for a hearing . . . . Thus, there is great incentive for the Board to articulate its policies clearly and, once articulated, to maintain and apply them. Nevertheless, there remains, even in applying an established policy, an inevitable area of discretion in applying the statute to each fact situation. Moreover, the Board reserves the right to change its policies as required and new amendments to the Act create additional requirements for ongoing policy analysis. To perform its job effectively, the Board needs all the insight it can muster to evaluate the practical consequences of its decisions, for it lacks the capacity to ascertain by research and investigation just what impact its decisions have on labour relations and the economy generally. In this context therefore, and accepting that no one panel of the Board can bind another panel by any decision rendered, what institutional procedures has the Board developed to foster greater insightfulness in the exercise

décision initiale pour le motif notamment que la pratique de tenir des réunions plénières de la Commission est illégale.

Dans la décision relative à la demande de réexamen, le président Adams décrit en détail l'objet de ces réunions et la façon dont elles sont tenues. Naturellement, le président Adams insiste sur la nécessité de promouvoir la cohérence des décisions de la Commission et d'y maintenir un niveau élevé de qualité, à la p. 2001:

[TRADUCTION] 6. En examinant cette question, il faut souligner que la Loi confère à la Commission des pouvoirs discrétionnaires étendus sur plusieurs sujets quant à la façon d'interpréter et d'appliquer la Loi à toutes sortes de situations concrètes. À l'intérieur de ces pouvoirs discrétionnaires, la prise des décisions doit s'appuyer sur des considérations de politique. À ce niveau de «droit administratif», le droit et les politiques sont dans une large mesure inséparables. En effet, le droit et les politiques en viennent à être établis sous la forme de décisions rendues par différents bancs dans des affaires particulières. C'est dans ce contexte que l'on blâme parfois la Commission de ne pas créer suffisamment de certitude dans sa jurisprudence de manière à faciliter la planification par les parties régies par la Loi. Cette critique ne tient cependant pas compte du fait qu'il existe une jurisprudence abondante de la Commission depuis presque aussi longtemps que la Loi elle-même existe et qu'elle est aussi stable et incontestable que le droit peut l'être. La Commission a reconnu dans ses décisions qu'il est nécessaire d'avoir une uniformité et une stabilité dans l'application de la Loi et des pouvoirs discrétionnaires que celle-ci comporte. En réalité, c'est parce qu'il y a tant de droit et de politiques bien établis que jusqu'à 80 pour 100 des plaintes de pratiques déloyales en matière de travail sont retirées, rejetées, réglées ou arrangées sans délivrance d'une décision et qu'une grande proportion des autres affaires sont soit réglées soit retirées sans qu'il soit nécessaire de tenir une audience. [. . .] Donc, il y a de grands avantages pour la Commission à ce que celle-ci établisse clairement ses politiques et qu'après les avoir établies, elle les maintienne et les applique. Néanmoins, même quand la Commission applique une politique établie, il reste une marge inévitable de pouvoir discrétionnaire dans l'application de la Loi à chaque situation concrète. De plus, la Commission conserve le droit de changer ses politiques au besoin et les nouvelles modifications apportées à la Loi créent d'autres obligations de procéder à une analyse permanente des politiques. Pour s'acquitter efficacement de ses tâches, la Commission a besoin de toutes

of the Board's powers by particular panels? What internal mechanisms has the Board developed to establish a level of thoughtfulness in the creation of policies which will meet the labour relations community's needs and stand the test of time? What internal procedures has the Board developed to ensure the greatest possible understanding of these policies by all Board members in order to facilitate a more or less uniform application of such policies? The meeting impugned by the respondent must be seen as only part of the internal administrative arrangements of the Board which have evolved to achieve a maximum regulatory effectiveness in a labour relations setting. [Emphasis added.]

It will be noted that Chairman Adams does not claim that the purpose of full board meetings is to achieve absolute uniformity in decisions made by different panels in factually similar situations. Chairman Adams accepts that "no one panel of the Board can bind another panel by any decision rendered" (at p. 2001). The methods used at those meetings to discuss policy issues reflect the need to maintain an atmosphere wherein each attending Board member retains the freedom to make up his mind on any given issue and to preserve the panel members' ultimate responsibility for the outcome of the final decision. Thus, Chairman Adams states that discussions at full board meetings are limited to policy issues, that the facts of each case must be taken as presented and that no votes are taken nor any attendance recorded, at p. 2002:

8. After deliberating over a draft decision, any panel of the Board contemplating a major policy issue may, through the Chairman, cause a meeting of all Board members and vice-chairmen to be held to acquaint them with this issue and the decision the panel is inclined to

les lumières qu'elle peut rassembler dans le but d'évaluer les conséquences pratiques de ses décisions, parce qu'elle n'a pas les moyens de vérifier par des recherches et des enquêtes quelles seront au juste les conséquences de ses décisions sur les relations de travail et sur l'ensemble de l'économie. Dans ces circonstances, et si on accepte qu'aucun banc de la Commission ne peut en lier un autre par sa décision, quelles procédures institutionnelles la Commission a-t-elle mises au point pour conférer plus de perspicacité dans l'exercice par les bancs particuliers des pouvoirs conférés à la Commission? Quels mécanismes internes la Commission a-t-elle établis pour fixer un niveau de réflexion dans la formulation de politiques qui répondent aux besoins de la collectivité en matière de relations de travail et qui de plus résisteront à l'épreuve du temps? Quelles procédures internes la Commission a-t-elle établies pour assurer la meilleure compréhension possible de ces politiques par tous les commissaires de manière à faciliter une application plus ou moins uniforme de ces politiques? La réunion contestée par l'intimé doit être perçue seulement comme une partie des arrangements administratifs internes que la Commission a pris pour réaliser le maximum d'efficacité de la réglementation dans un contexte de relations de travail. [Je souligne.]

On remarquera que le président Adams ne soutient pas que l'objet des réunions plénières de la Commission est de réaliser l'uniformité absolue des décisions prises par les différents bancs dans des situations de fait semblables. Le président Adams reconnaît qu' [TRADUCTION] «aucun banc de la Commission ne peut en lier un autre par sa décision» (à la p. 2001). Les méthodes utilisées à ces réunions pour débattre des questions de politique traduisent la nécessité de préserver une ambiance où chaque commissaire présent garde la liberté de se former une opinion sur une question précise et de sauvegarder la responsabilité ultime des membres de chaque banc à l'égard de la décision finale. Ainsi, le président Adams affirme, à la p. 2002, qu'aux réunions plénières de la Commission les discussions se limitent aux questions de politique, que les faits de chaque cas sont tenus pour avérés et qu'on ne prend pas de vote, ni de présence:

[TRADUCTION] 8. Après avoir délibéré sur un avant-projet de décision, un banc qui envisage de trancher une question importante de politique peut faire convoquer, par l'intermédiaire du président, une réunion plénière des membres et des vice-présidents pour leur faire part

make. These "Full Board" meetings have been institutionalized to facilitate a maximum understanding and appreciation throughout the Board of policy developments and to evaluate fully the practical consequences of proposed policy initiatives on labour relations and the economy in the Province. But this institutional purpose is subject to the clear understanding that it is for the panel hearing the case to make the ultimate decision and that discussion at a "Full Board" meeting is limited to the policy implications of a draft decision. The draft decision of a panel is placed before those attending the meeting by the panel and is explained by the panel members. The facts set out in the draft are taken as given and do not become the subject of discussion. No vote is taken at these meetings nor is any other procedure employed to identify a consensus. The meetings invariably conclude with the Chairman thanking the members of the panel for outlining their problem to the entire Board and indicating that all Board members look forward to that panel's final decision whatever it might be. No minutes are kept of such meetings nor is actual attendance recorded. [Emphasis added.]

At page 2004 of his reasons, Chairman Adams confirmed that the impugned meeting was held in accordance with the above-mentioned rules.

Finally, Chairman Adams rejected the idea that full board meetings could have an overbearing effect on the panel members' capacity to decide the issues at hand in accordance with their opinion, at p. 2003:

10. The respondent's submission is really attempting to probe the mental processes of the panel which rendered the decision in question and in so doing ignores the inherent nature of judicial decision-making and administrative law making .... In general, the deliberations of this panel were not unlike those engaged in by a judge sitting in court. The "Full Board" meeting, to the extent there is no judicial analogy, distinguishes an administrative agency from somewhat more individual common law judging. But, as an extra-record event, "Full Board" meetings are in substance no different than the post-hearing consultation of a judge with his law clerks or the informal discussions that inevitably occur between brother judges. Such meetings, we also suggest, have no greater or lesser effect than a judge's post-hearing read-

de la question soulevée et de la décision que le banc favorise. Ces réunions plénières ont été institutionnalisées pour mieux faire comprendre et apprécier par l'ensemble des commissaires l'évolution des politiques et pour examiner à fond les conséquences pratiques que les politiques envisagées pourraient avoir sur les relations de travail et sur l'économie de la province. Cependant, cet objet institutionnel est assujetti au principe accepté de tous qu'il appartient au banc qui entend l'affaire de prendre la décision ultime et que les débats à la réunion plénière de la Commission se limitent aux conséquences en matière de politique d'un avant-projet de décision. L'avant-projet de décision d'un banc est soumis à la réunion par le banc lui-même et expliqué par les commissaires qui le composent. Les faits mentionnés dans l'avant-projet de décision sont tenus pour avérés et ne font pas l'objet de discussions. Aucun vote n'est pris lors de ces réunions et aucune autre procédure n'est utilisée pour vérifier s'il y a consensus. Le président clôt toujours ces réunions en remerciant les commissaires composant le banc d'avoir exposé leur problème à toute la Commission et en disant que tous les commissaires attendront avec impatience la décision du banc quelle qu'elle puisse être. Il n'y a pas de procès-verbal de ces réunions ni de prise de présences. [Je souligne.]

À la page 2004 de ses motifs, le président Adams confirme que la réunion contestée a été tenue selon les règles ci-dessus mentionnées.

Enfin, le président Adams rejette l'idée que les réunions plénières de la Commission puissent avoir une influence impérieuse sur la capacité des membres du banc de trancher selon leur opinion les questions soulevées. Il dit, à la p. 2003:

[TRADUCTION] 10. L'argument de l'intimé cherche réellement à déterminer le cheminement mental du banc qui a rendu la décision visée et, ce faisant, il ne tient pas compte de la nature propre du processus décisionnel judiciaire et des décisions de droit administratif. [...] De manière générale, les délibérations de ce banc n'ont pas différé de celles d'un juge appelé à rendre une décision judiciaire. La réunion plénière de la Commission, dans la mesure où il n'y a pas d'équivalent en matière judiciaire, différencie un organisme administratif du processus quelque peu plus individualiste de jugement en common law. Cependant, à titre d'événement officieux, les réunions plénières de la Commission ne diffèrent pas substantiellement des consultations que mène un juge après l'audience, avec ses recherchistes ou des discussions informelles qui surviennent inévitablement entre collègues juges. Ces réunions, à notre avis, n'ont ni plus, ni moins d'influence que la consultation

ing of reports and periodicals which may not have been cited or relied on by the advocates.

It follows that the full board meetings held by the Board are designed to promote discussion on important policy issues and to provide an opportunity for members to share their personal experiences in the regulation of labour relations. There is no evidence that the particular meeting impugned in this case was used to impose any given opinion upon the members of the panel or that the spirit of discussion and exchange sought through those meetings was not present during those deliberations. Moreover, three sets of reasons were issued by the members of the panel, one member dissenting in part while another dissented on the principal substantive issue at stake in this case. If this meeting had been held for the purpose of imposing policy directives on the members of the panel, it certainly did not meet its objective.

Incidentally, the record does not disclose the identity of all the persons who attended the impugned meeting. In his affidavit, Mr. Gordon, counsel for the appellant before the Board, describes the events which led him to conclude that a full board meeting was taking place; he also lists the persons whom he saw entering or leaving the room where the meeting took place. This affidavit does disclose that Mr. Wightman was seen leaving the room in which the meeting was held but there is no evidence that the other members of the panel did attend the meeting. However, the Board's decision on the motion for reconsideration indicates that all members of the panel attended the meeting.

II—Decisions of the Courts Below

Of the two decisions rendered by the Board in this case, only the reconsideration decision is relevant since it alone deals with the issue of the legality of the practice of holding full board meetings on important policy issues. The Board decided that the practice of holding full board meetings on policy issues does not breach principles of natural justice because of its tripartite nature, the manner in which they are conducted and because of the institutional requirements which they serve.

que le juge fait après l'audition de jurisprudence ou de doctrine que les avocats n'ont ni invoquée, ni citée.

Il s'ensuit que les réunions plénières que tient la Commission sont conçues pour favoriser la discussion d'importantes questions de politique et donner aux commissaires l'occasion de mettre en commun leur expérience en matière de relations de travail. Il n'y a rien qui indique que la réunion visée en l'espèce ait servi à imposer une opinion quelconque aux membres du banc ou que l'esprit de discussion et d'échange que ces réunions cherchent à favoriser n'ait pas prévalu au cours de ces délibérations. De plus, chacun des trois commissaires qui composaient le banc a rédigé des motifs, l'un d'eux étant dissident en partie alors qu'un autre était dissident sur la principale question de fond à trancher en l'espèce. Si cette réunion avait été tenue pour imposer aux membres du banc des directives en matière de politique, elle n'a certes pas atteint son objectif.

Soit dit en passant, le dossier n'identifie pas tous ceux qui ont assisté à la réunion contestée. Dans son affidavit, Me Gordon, l'avocat de l'appelante à l'audience devant la Commission, relate les événements qui l'ont amené à conclure qu'une réunion plénière avait lieu; il fournit aussi les noms des personnes qu'il a vu entrer et sortir de la pièce où se déroulait la réunion. Cet affidavit mentionne qu'on a vu M. Wightman sortir de la pièce où la réunion se déroulait, mais il n'y a aucune preuve que les autres membres du banc ont assisté à la réunion. Cependant, la décision de la Commission sur la demande de réexamen indique que tous les membres du banc ont assisté à la réunion.

II—Les décisions des tribunaux d'instance inférieure

Des deux décisions rendues par la Commission en l'espèce, seule la décision relative à la demande de réexamen est pertinente puisqu'elle seule porte sur la légalité de la pratique de la Commission de tenir des réunions plénières sur des questions de politique importantes. La Commission a statué que sa pratique de tenir des réunions plénières sur des questions de politique ne viole pas les principes de justice naturelle à cause de sa nature tripartite, de la manière dont les réunions sont tenues et à cause

According to Chairman Adams, with whom Messrs. Lee and Wightman concurred, ss. 102 and 103 of the *Labour Relations Act* create a procedural framework based on panels composed of three members and the high number of cases handled by the Board creates the necessity to have a large number of full-time and part-time members and, therefore, a wide variety of panels. Such institutional constraints create the necessity to provide a mechanism which would promote a maximum amount of coherence in Board decisions. In essence, the Board decided that full board meetings are a necessary component of decision making within the procedural framework of the *Labour Relations Act* and that they do not breach the principles of natural justice.

In the Divisional Court (1985), 51 O.R. (2d) 481, Rosenberg J., with whom J. Holland J. concurred, allowed the appellant's application for judicial review on the basis that the impugned full board meeting allowed persons who did not hear the evidence to "participate" in the decision even though they did not vote. Rosenberg J. adopted the recommendations of the McRuer Report entitled *Royal Commission Inquiry into Civil Rights*, vol. 5, Report No. 3, 1971, which dealt specifically with the Board and recommended that the parties be notified and given an opportunity to be heard whenever important policy issues must be dealt with by the entire Board, at pp. 2205-06:

> In Report Number 1 we pointed out that no person should participate in a decision of a judicial tribunal who was not present at the hearing and heard and considered the evidence and that all persons who had heard and considered the evidence should participate in the decision.
>
> The practice we have outlined violates that principle. To take a matter before the full Board for a discussion and obtain the views of others who have not participated in the hearing and without the parties affected having an opportunity to present their views is a violation of the principle that he who decides must hear.

. . .

des exigences institutionnelles auxquelles elles répondent. Selon le président Adams, aux motifs duquel les commissaires Lee et Wightman ont souscrit, les art. 102 et 103 de la *Loi sur les relations de travail* établissent un système de procédure fondé sur des bancs de trois commissaires et le grand nombre d'affaires traitées par la Commission est à l'origine de la nécessité d'avoir un grand nombre de commissaires à temps plein et à temps partiel et, en conséquence, d'avoir un grand nombre de bancs. Ces contraintes institutionnelles sont à l'origine de la nécessité de fournir un mécanisme qui favorise la plus grande cohérence possible des décisions de la Commission. Essentiellement, la Commission a jugé que ses réunions plénières sont une composante nécessaire de son processus décisionnel à l'intérieur du système de procédure établi par la *Loi sur les relations de travail* et qu'elles ne violent pas les principes de justice naturelle.

En Cour divisionnaire (1985), 51 O.R. (2d) 481, le juge Rosenberg, aux motifs duquel le juge J. Holland a souscrit, a accueilli la demande de contrôle judiciaire de l'appelante pour le motif que la réunion plénière contestée de la Commission a permis à des personnes qui n'avaient pas entendu la preuve de «participer» à la décision même s'ils n'avaient pas voté. Le juge Rosenberg a suivi les recommandations du rapport McRuer de la *Royal Commission Inquiry into Civil Rights*, vol. 5, rapport n° 3, 1971, qui visait précisément la Commission et qui portait qu'il y a lieu d'aviser les parties et de leur donner la possibilité d'être entendues chaque fois que la Commission au complet doit débattre d'importantes questions de politique, aux pp. 2205 et 2206:

> [TRADUCTION] Dans le rapport numéro 1, nous avons souligné que nul ne devrait participer à la décision d'un tribunal judiciaire s'il n'a pas été présent à l'audition et s'il n'a pas entendu et examiné la preuve et que toutes les personnes qui ont entendu et examiné la preuve devraient participer à la décision.
>
> La pratique que nous avons exposée viole ce principe. Le fait de porter une affaire à la connaissance de toute la Commission pour en débattre et obtenir l'avis de personnes qui n'ont pas participé à l'audition sans que les parties touchées aient la possibilité d'exprimer leur avis constitue une violation du principe selon lequel celui qui tranche une affaire doit l'avoir entendue.

. . .

Notwithstanding that the ultimate decision is made by those who were present at the hearing, where a division of the Board considers that a matter should be discussed before the full Board or a larger division, the parties should be notified and given an opportunity to be heard.

The majority stated, at pp. 491-92, that the practice of holding full board meetings creates situations where members who did not hear the evidence can have an influence over the result as well as situations where arguments are proposed by persons attending the meeting without giving the parties the opportunity to respond:

Chairman Shaw [*sic*] states in his reasons that the final decision was made by the three members who heard evidence and argument. He cannot be heard to state that he and his fellow members were not influenced by the discussion at the full board meeting. The format of the full board meeting made it clear that it was important to have input from other members of the board who had not heard the evidence or argument before the final decision was made. The tabling of the draft decision to all of the members of the board plus all of the support staff involved a substantial risk that opinions would be advanced by others and arguments presented. It is probable that some of the people involved in the meeting would express points of view. The full board meeting was only called when important questions of policy were being considered. Surely, the discussion would involve policy reasons why s. 15 should be given either a broad or narrow interpretation. Members or support staff might relate matters from their own practical experience which might be tantamount to giving evidence. The parties to the dispute would have no way of knowing what was being said in these discussions and no opportunity to respond. [Emphasis added.]

Rosenberg J. then added at p. 492 that factual issues are necessarily built into policy issues since it is impossible, in his opinion, to decide factual issues without a prior determination of the legal standards applicable to them.

Malgré que la décision ultime soit prise par ceux qui ont assisté à l'audition, quand une section de la Commission juge nécessaire qu'une affaire soit débattue devant l'ensemble de la Commission ou une section plus grande, il faudrait en prévenir les parties et leur donner la possibilité d'être entendues.

La majorité a affirmé, aux pp. 491 et 492, que la pratique de la Commission de tenir des réunions plénières crée des situations où des commissaires qui n'ont pas entendu la preuve peuvent influencer la décision, de même que des situations où des personnes présentes à la réunion soumettent des arguments sans que les parties aient la possibilité d'y répondre:

[TRADUCTION] Le président Shaw [*sic*] affirme dans ses motifs que la décision définitive a été arrêtée par les trois commissaires qui avaient entendu la preuve et les plaidoiries. Il ne peut valablement affirmer que lui-même et ses collègues membres du tribunal n'ont pas été influencés par le débat survenu lors de la réunion plénière de la Commission. La façon dont s'est déroulée la réunion plénière de la Commission laisse voir qu'il était important d'avoir l'avis des autres commissaires qui n'avaient entendu ni la preuve ni les plaidoiries avant de prendre une décision finale. La présentation de l'avant-projet de décision à tous les commissaires et à tout le personnel de soutien comportait un risque sérieux que d'autres personnes soumettent leur avis et fassent valoir des arguments. Il est probable que certaines des personnes présentes à la réunion ont exprimé leur avis. Il n'y avait convocation d'une réunion plénière de la Commission que s'il y avait des questions de politique importantes à débattre. La discussion a certainement porté sur les raisons de principe de donner à l'art. 15 une interprétation libérale ou une interprétation restreinte. Les commissaires ou le personnel de soutien ont pu faire part d'informations tirées de leur expérience pratique, ce qui pourrait équivaloir à présenter des éléments de preuve. Les parties au litige n'avaient aucun moyen de savoir ce qui se disait dans ce débat, ni aucune possibilité de répliquer. [Je souligne.]

Le juge Rosenberg a alors ajouté, à la p. 492, que les questions de fait sont nécessairement imbriquées dans les questions de politique puisqu'il est impossible, à son avis, de statuer sur des questions de fait sans d'abord déterminer les normes juridiques qui leur sont applicables.

Osler J. dissented on the basis that there is no authority prohibiting decision makers acting in a judicial capacity to engage in either formal or informal discussions with their colleagues concerning policy issues at stake in a case standing for judgment. Full board meetings are merely a formalized method of seeking the opinion of colleagues on policy issues. In fact, this practice is desirable given the importance of achieving a high degree of coherence in Board decisions. Osler J. also noted that the tripartite procedural framework imposed by the *Labour Relations Act* made it necessary to resort to full board meetings as a means of achieving such coherence. Finally, Osler J. held that the record in this case does not indicate that either new evidence was heard during the impugned meeting or that new ideas requiring a reply from the parties were discussed during this meeting. The policy alternatives had all been proposed by the parties during argument and Chairman Adams' decision as well as Mr. Wightman's dissent simply adopted one of the alternatives.

The Court of Appeal (1986), 56 O.R. (2d) 513, unanimously allowed the appeal for the reasons set out in Osler J.'s dissent. Cory J.A. (as he then was) added that the following limitations on the practice of holding full board meetings on policy issues must be observed by the Board, at p. 517:

> It must be stressed, however, and indeed it was conceded by the appellants, that if new evidence was considered by the entire Board during its discussion, then both parties would have to be recalled, advised of the new evidence and given full opportunity to respond to it in whatever manner they deemed appropriate. In the absence of the introduction of fresh material, the evidence must be taken as found in the draft reasons for the purposes of the full Board discussions.
>
> As in any judicial or *quasi*-judicial proceeding, the panel should not decide the matter upon a ground not raised at the hearing without giving the parties an opportunity for argument. It is also an inflexible rule that while the panel may receive advice there can be no participation by other members of the Board in the final decision.

Le juge Osler a exprimé une dissidence en faisant valoir qu'il n'y a aucun précédent qui interdise aux décideurs qui agissent à titre judiciaire de mener des discussions officielles ou officieuses avec leurs collègues au sujet des questions de politique soulevées par une affaire en instance. Les réunions plénières de la Commission constituent simplement un moyen formel de demander l'avis de collègues sur des questions de politique. En réalité, cette pratique est souhaitable à cause de l'importance d'avoir des décisions de la Commission très cohérentes. Le juge Osler a aussi fait remarquer que le système de procédure tripartite qu'impose la *Loi sur les relations de travail* rend nécessaire le recours aux réunions plénières de la Commission comme moyen de réaliser cette cohérence. Enfin, le juge Osler a statué que le dossier en l'espèce n'indique pas que, pendant la réunion contestée, on a présenté de nouveaux éléments de preuve ou fait valoir de nouvelles idées exigeant une réplique des parties. Les choix de politique possibles avaient tous été proposés par les parties pendant leurs plaidoiries et le président Adams dans sa décision et le commissaire Wightman dans sa dissidence n'avaient fait qu'adopter un de ces choix.

La Cour d'appel (1986), 56 O.R. (2d) 513, a accueilli à l'unanimité l'appel pour les motifs énoncés par le juge Osler dans sa dissidence. Le juge Cory (alors juge de la Cour d'appel) a ajouté que la Commission devrait respecter les conditions suivantes quand elle tient des réunions plénières au sujet de questions de politique, à la p. 517:

> [TRADUCTION] Il faut souligner cependant, ce que les appelants ont reconnu, que si, pendant sa réunion plénière, la Commission examine de nouveaux éléments de preuve, il faut rappeler les deux parties, leur faire part des nouveaux éléments de preuve et leur donner entière possibilité de répliquer de la manière qu'elles jugent appropriée. En l'absence de tout nouvel élément de preuve, la preuve exposée dans l'avant-projet de décision doit être tenue pour avérée pour les fins de discussion à la réunion plénière de la Commission.
>
> Comme dans toute procédure judiciaire ou quasi judiciaire, le banc ne doit pas fonder sa décision sur un moyen non soulevé à l'audience sans donner aux parties la possibilité de présenter leurs arguments. Il existe également une règle stricte selon laquelle, bien que le banc puisse recevoir des avis, aucun autre membre de la Commission ne peut participer à la décision finale.

It was therefore the view of the Court of Appeal that, while some precautions are necessary in the use of any formalized consultation process, the full board meeting procedure described by Chairman Adams does not violate any principle of natural justice.

III—Analysis

(a) *Introduction*

It is useful to begin with a summary of the arguments submitted by the parties. The appellant argues that the practice of holding full board meetings on policy issues constitutes a breach of a rule of natural justice appropriately referred to as "he who decides must hear". According to the appellant's version of this rule, a decision maker must not be placed in a situation where he can be "influenced" by persons who have not heard the evidence or the arguments. Thus, the appellant's position is that panel members must be totally shielded from any discussion which may cause them to change their minds even if this change of opinion is honest, because the possibility of undue pressure by other Board members is too ominous to be compatible with principles of natural justice. The appellant also claims that full board meetings do not provide the parties with an adequate opportunity to answer arguments which may be voiced by Board members who have not heard the case.

It is important to note at the outset that the appellant's arguments raise issues with respect to two important and distinct rules of natural justice. It has often been said that these rules can be separated in two categories, namely "that an adjudicator be disinterested and unbiased (*nemo judex in causa sua*) and that the parties be given adequate notice and opportunity to be heard (*audi alteram partem*)": Evans, *de Smith's Judicial Review of Administrative Action* (4th ed. 1980), at p. 156; see also Pépin and Ouellette, *Principes de contentieux administratif* (2nd ed. 1982), at pp. 148-49. While the appellant does not claim that the panel was biased, it does claim that full board meetings may prevent a panel member from deciding the topic of discussion freely and independently

La Cour d'appel a donc été d'avis que, bien que certaines précautions s'imposent lorsqu'on a recours à un processus formel de consultation, la procédure de réunion plénière de la Commission décrite par le président Adams ne porte atteinte à aucun principe de justice naturelle.

III—Analyse

a) *Introduction*

Il convient de commencer par résumer les arguments des parties. L'appelante soutient que la pratique de la Commission de tenir des réunions plénières sur des questions de politique viole la règle de justice naturelle dite «celui qui tranche une affaire doit l'avoir entendue». D'après l'interprétation que l'appelante donne à cette règle, un décideur ne doit pas se trouver dans une situation où il peut être «influencé» par des personnes qui n'ont pas entendu la preuve ni les plaidoiries. Donc, l'appelante soutient que les commissaires qui composent un banc doivent être totalement à l'abri de toute discussion qui pourrait les amener à changer d'avis, même si ce changement d'avis est sincère, parce que le risque de pression indue de la part des autres commissaires est trop grand pour être compatible avec les principes de justice naturelle. L'appelante soutient encore que les réunions plénières de la Commission ne fournissent pas aux parties une possibilité suffisante de répondre aux arguments que des commissaires qui n'ont pas entendu la preuve peuvent y faire valoir.

Il importe de souligner dès le début que les arguments de l'appelante soulèvent des questions relativement à deux règles importantes, mais distinctes, de justice naturelle. On a souvent dit que ces règles peuvent se répartir en deux catégories, savoir [TRADUCTION] «que le décideur doit être désintéressé et impartial (*nemo judex in causa sua*) et que les parties doivent recevoir un préavis suffisant et avoir la possibilité d'être entendues (*audi alteram partem*)»: Evans, *de Smith's Judicial Review of Administrative Action* (4e éd. 1980), à la p. 156; voir également Pépin et Ouellette, *Principes de contentieux administratif* (2e éd. 1982), aux pp. 148 et 149. Bien que l'appelante ne soutienne pas que le banc a été partial, elle soutient que les réunions plénières de la Commis-

from the opinions voiced at the meeting. Independence is an essential ingredient of the capacity to act fairly and judicially and any procedure or practice which unduly reduces this capacity must surely be contrary to the rules of natural justice.

The respondent union argues that the practice of holding full board meetings on important policy issues is one which is justified for the reasons set forth by Chairman Adams in the reconsideration decision quoted previously.

Before embarking on an analysis of these arguments, one should keep in mind the difference between a full board meeting and a full board hearing: a full board hearing is simply a normal hearing where representations are made by both parties in front of an enlarged panel comprised of all the members of the Board in the manner prescribed by s. 102 of the *Labour Relations Act*; on the other hand, a full board meeting does not entail representations by the parties since they are not invited to or even notified of the meeting. The procedure recommended by the McRuer Report is somewhat different in that it entails the presence of the parties at an informal meeting where they would have the right to answer the arguments raised by members of the Board. In this case, the parties have not made any arguments on the relative virtues of these procedures and have restricted their arguments to the legality of the full board meeting procedure in relation to the rules of natural justice.

I agree with the respondent union that the rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an administrative tribunal such as the Board to abide strictly by the rules applicable to courts of law. In fact, it has long been recognized that the rules of natural justice do

sion peuvent empêcher un membre du banc de se prononcer sur le sujet des discussions de façon libre et indépendante des opinions exprimées lors de la réunion. L'indépendance est un élément essentiel de la capacité d'agir avec équité et de façon judiciaire et toute procédure ou pratique qui mine indûment cette capacité doit certainement être contraire aux règles de justice naturelle.

Le syndicat intimé soutient que la pratique de la Commission de tenir des réunions plénières sur des questions de politique importantes est justifiée pour les motifs énoncés par le président Adams dans la décision relative à la demande de réexamen déjà citée.

Avant d'entreprendre l'analyse de ces arguments, il faut se rappeler la différence qui existe entre une réunion plénière de la Commission et une audience plénière de la Commission: une audience plénière de la Commission est tout simplement une audience normale au cours de laquelle les deux parties plaident devant un banc élargi composé de tous les membres de la Commission, de la manière prescrite par l'art. 102 de la *Loi sur les relations de travail*; par contre, une réunion plénière ne comporte pas de plaidoiries par les parties puisque celles-ci ne sont pas invitées à participer à la réunion, ni même avisées de sa tenue. La procédure que recommande le rapport McRuer est quelque peu différente parce qu'elle comporte la présence des parties à une réunion officieuse à laquelle celles-ci auraient le droit de répondre aux arguments soulevés par les commissaires. En l'espèce, les parties n'ont pas abordé le mérite relatif de ces procédures et ont limité leurs plaidoiries à la légalité de la procédure de réunions plénières de la Commission eu égard aux règles de justice naturelle.

Je suis d'accord avec le syndicat intimé que les règles de justice naturelle doivent tenir compte des contraintes institutionnelles auxquelles les tribunaux administratifs sont soumis. Ces tribunaux sont constitués pour favoriser l'efficacité de l'administration de la justice et doivent souvent s'occuper d'un grand nombre d'affaires. Il est irréaliste de s'attendre à ce qu'un tribunal administratif comme la Commission observe strictement toutes les règles applicables aux tribunaux judiciaires. De

not have a fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces. This principle was reiterated by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:

> 2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice which, as Harman L.J. said, [*Ridge v. Baldwin*, at p. 850] is only "fair play in action". In any particular case, the requirements of natural justice will depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter which is being dealt with, and so forth": per Tucker L.J. in *Russell v. Duke of Norfolk*, at p. 118. To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument. [Emphasis added.]

The main issue is whether, given the importance of the policy issue at stake in this case and the necessity of maintaining a high degree of quality and coherence in Board decisions, the rules of natural justice allow a full board meeting to take place subject to the conditions outlined by the Court of Appeal and, if not, whether a procedure which allows the parties to be present, such as a full board hearing, is the only acceptable alternative. The advantages of the practice of holding full board meetings must be weighed against the disadvantages involved in holding discussions in the absence of the parties.

(b) *The Consequences of the Institutional Constraints Faced by the Board*

The *Labour Relations Act* has entrusted the Board with the responsibility of fostering harmonious labour relations through collective bargaining, as appears clearly in the preamble of the Act:

> WHEREAS it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees.

fait, il est admis depuis longtemps que les règles de justice naturelle n'ont pas un contenu fixe sans égard à la nature du tribunal et aux contraintes institutionnelles auxquelles il est soumis. Le juge Dickson (maintenant Juge en chef) a réitéré ce principe dans l'arrêt *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105, à la p. 1113:

> 2. En tant qu'élément constitutif de l'autonomie dont il jouit, le tribunal doit respecter la justice naturelle qui, comme l'a dit le lord juge Harman [dans] *Ridge v. Baldwin*, à la p. 850, équivaut simplement [TRADUCTION] «à jouer franc jeu». Dans chaque cas, les exigences de la justice naturelle varient selon [TRADUCTION] «les circonstances de l'affaire, la nature de l'enquête, les règles qui régissent le tribunal, la question traitée, etc.»: le lord juge Tucker dans *Russell v. Duke of Norfolk*, à la p. 118. Les règles de justice naturelle ne peuvent être abrogées que par un texte de loi exprès ou nettement implicite en ce sens. [Je souligne.]

La question principale est de savoir si, vu l'importance de la question de politique en cause en l'espèce et la nécessité de maintenir un niveau élevé de qualité et de cohérence dans les décisions de la Commission, les règles de justice naturelle permettent la tenue d'une réunion plénière de la Commission sous réserve des conditions exposées par la Cour d'appel et, dans la négative, si une procédure qui permet aux parties d'être présentes, telle une audience plénière de la Commission, est la seule autre solution acceptable. Il faut soupeser les avantages de la pratique de la Commission de tenir des réunions plénières en regard des inconvénients que comporte la tenue de débats en l'absence des parties.

b) *Les conséquences des contraintes institutionnelles auxquelles la Commission est soumise*

La *Loi sur les relations de travail* confie à la Commission la responsabilité de faciliter les bonnes relations de travail par la négociation collective, comme le stipule expressément le préambule de la Loi:

> ATTENDU qu'il est dans l'intérêt public de la province de l'Ontario de faciliter les bonnes relations entre employeurs et employés en favorisant le recours à la négociation collective entre les employeurs et les syndicats à titre de représentants librement choisis des employés.

The Board has been granted the powers thought necessary to achieve this task, not the least of which is the power to decide in a final and conclusive manner all matters which fall within its jurisdiction: s. 106(1) of the *Labour Relations Act*. As was stated by Chairman Adams in his reconsideration decision, the Board has also been given very broad discretionary powers as is the case with the power to determine what constitutes "bargaining in good faith" (s. 15).

The immensity of the task entrusted to the Board should not be underestimated. As Chairman Adams wrote in the reconsideration decision, the Board had a caseload of 3189 cases to handle in 1982-83 and employed 12 full-time chairman and vice-chairmen, 4 part-time vice-chairmen, 10 full-time Board members representing labour and management as well as another 22 part-time Board members to hear and decide those cases. The Board's full-time chairman and vice-chairmen have an average caseload of 266 cases per year. Moreover, the tripartite nature of the Board makes it necessary to have an equal representation from management and labour unions on each panel as appears clearly from s. 102 of the *Labour Relations Act*:

102.—(1) The Ontario Labour Relations Board is continued.

(2) The Board shall be composed of a chairman, one or more vice-chairmen and as many members equal in number representative of employers and employees respectively as the Lieutenant Governor in Council considers proper, all of whom shall be appointed by the Lieutenant Governor in Council.

. . .

(9) The chairman or a vice-chairman, one member representative of employers and one member representative of employees constitute a quorum and are sufficient for the exercise of all the jurisdiction and powers of the Board.

. . .

(11) The decision of the majority of the members of the Board present and constituting a quorum is the

La Commission a reçu, en vertu du par. 106(1) de la *Loi sur les relations de travail*, les pouvoirs jugés nécessaires pour accomplir cette tâche dont celui, qui n'est pas le moindre, de rendre, au sujet de toute question qui relève de sa compétence, des décisions finales et définitives. Comme l'affirme le président Adams dans sa décision sur la demande de réexamen, la Commission a aussi reçu des pouvoirs discrétionnaires très étendus, notamment celui de déterminer ce que comporte une «négociation de bonne foi» (art. 15).

Il ne faut pas sous-estimer l'ampleur de la tâche assignée à la Commission. Comme le président Adams l'a écrit dans la décision relative à la demande de réexamen, la Commission a eu 3 189 affaires à traiter durant l'exercice 1982-1983 et elle comptait, outre le président, 11 vice-présidents à plein temps, 4 vice-présidents à temps partiel, 10 commissaires permanents représentant les employés et les employeurs ainsi que 22 autres commissaires à temps partiel pour entendre et trancher ces affaires. Le président et les vice-présidents à plein temps ont en moyenne 266 affaires par année à entendre. De plus, la nature tripartite de la Commission fait en sorte qu'elle doit compter un nombre égal de représentants des employeurs et des syndicats sur chaque banc, comme le stipule clairement l'art. 102 de la *Loi sur les relations de travail*:

102 (1) La Commission des relations de travail de l'Ontario demeure en fonction.

(2) La Commission se compose d'un président, d'un ou plusieurs vice-présidents et des autres membres répartis en un nombre égal de représentants des employeurs et de représentants des employés que le lieutenant-gouverneur en conseil juge nécessaires. Ces personnes sont nommées par le lieutenant-gouverneur en conseil.

. . .

(9) Le président ou un vice-président, un membre représentant les employeurs et un membre représentant les employés constituent le quorum et peuvent exercer les attributions de la Commission.

. . .

(11) La décision de la majorité des membres de la Commission présents qui constitue le quorum est la

decision of the Board, but, if there is no majority, the decision of the chairman or vice-chairman governs.

The rules governing the quorum of any panel of the Board are especially suited for panels of three although they do not appear to prevent the formation of a larger panel. However, even if the *Labour Relations Act* allows full board hearings, such a procedure would not necessarily be practical every time an important policy issue is at stake.

Indeed, it is apparent from the size of the Board's caseload and from the number of persons which would sit on such an enlarged panel that holding full board hearings is a highly impractical way of solving important policy issues. Furthermore, the difficulties involved in setting up a panel comprised of an equal number of management and labour representatives and in scheduling such a meeting are also obvious when one takes into consideration the large number of Board members who would have to be present. In fact, one wonders whether it is really possible to call a full board hearing every time an important policy issue arises. The solution proposed in the McRuer Report, i.e., allowing the parties to be present and to answer the arguments made at the meeting, would entail similar difficulties since their presence would necessitate some formal procedure and involve organizational difficulties as well.

The first rationale behind the need to hold full board meetings on important policy issues is the importance of benefiting from the acquired experience of all the members, chairman and vice-chairmen of the Board. Moreover, the tripartite nature of the Board makes it even more imperative to promote exchanges of opinions between management and union representatives. As was pointed out clearly by Dickson J. (as he then was) in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, the primary purpose of the creation of

décision de la Commission. Si aucune majorité ne se dégage, le président ou le vice-président a voix prépondérante.

Les règles régissant le quorum d'un banc de la Commission conviennent particulièrement bien à des bancs de trois personnes même si elles ne paraissent pas interdire la constitution de bancs composés d'un plus grand nombre de commissaires. Cependant, même si la *Loi sur les relations de travail* autorise les audiences plénières de la Commission, une telle procédure ne serait pas forcément pratique dans tous les cas où il se présente une question de politique importante.

En réalité, il ressort manifestement du nombre d'affaires soumises à la Commission et du nombre de personnes qui participeraient à ces bancs élargis que la tenue d'audiences plénières de la Commission constitue une façon très peu pratique de résoudre des questions de politique importantes. De plus, les difficultés que présenteraient la constitution d'un banc composé d'un nombre égal de représentants des employeurs et des employés et la fixation de la date de cette réunion ressortent clairement si on considère le grand nombre de commissaires qui devraient être présents. En fait, on se demande même s'il est vraiment possible de convoquer une audience plénière de la Commission chaque fois qu'il y a une importante question de politique à débattre. La solution préconisée dans le rapport McRuer, c'est-à-dire celle d'autoriser les parties à assister à la réunion et à répliquer aux arguments qui y sont avancés, comporterait des difficultés semblables puisque la présence des parties exigerait une procédure formelle quelconque et susciterait aussi des difficultés d'organisation.

La première raison pour laquelle il est nécessaire de tenir des réunions plénières de la Commission au sujet des questions de politique majeures tient à l'importance de bénéficier de l'expérience acquise de tous les commissaires, y compris le président et les vice-présidents de la Commission. De plus, la nature tripartite de la Commission rend encore plus impérieux de favoriser les échanges d'avis entre les représentants des employeurs et ceux des syndicats. Comme le souligne clairement le juge Dickson (maintenant Juge en chef) dans l'arrêt *Syndicat canadien de la Fonction publique,*

administrative bodies such as the Ontario Labour Relations Board is to confer a wide jurisdiction to solve labour disputes on those who are best able, in light of their experience, to provide satisfactory solutions to these disputes, at pp. 235-36:

Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

The rules of natural justice should not discourage administrative bodies from taking advantage of the accumulated experience of its members. On the contrary, the rules of natural justice should in their application reconcile the characteristics and exigencies of decision making by specialized tribunals with the procedural rights of the parties.

The second rationale for the practice of holding full board meetings is the fact that the large number of persons who participate in Board decisions creates the possibility that different panels will decide similar issues in a different manner. It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be [TRANSLATION] "difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one": Morissette, *Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse* (1986), 16 *R.D.U.S.* 591, at p.

section locale 963 c. Société des alcools du Nouveau-Brunswick, [1979] 2 R.C.S. 227, aux pp. 235 et 236, le but premier de la constitution des organismes administratifs comme la Commission des relations de travail de l'Ontario est d'attribuer une compétence générale pour régler les différends du travail à ceux qui sont le plus en mesure, à cause de leur expérience, de trouver des solutions satisfaisantes à ces différends:

L'article 101 révèle clairement la volonté du législateur que les différends du travail dans le secteur public soient réglés promptement et en dernier ressort par la Commission. Des clauses privatives de ce genre sont typiques dans les lois sur les relations de travail. On veut protéger les décisions d'une commission des relations de travail, lorsqu'elles relèvent de sa compétence, pour des raisons simples et impérieuses. La commission est un tribunal spécialisé chargé d'appliquer une loi régissant l'ensemble des relations de travail. Aux fins de l'administration de ce régime, une commission n'est pas seulement appelée à constater des faits et à trancher des questions de droit, mais également à recourir à sa compréhension du corps jurisprudentiel qui s'est développé à partir du système de négociation collective, tel qu'il est envisagé au Canada, et à sa perception des relations de travail acquise par une longue expérience dans ce domaine.

Les règles de justice naturelle ne devraient pas dissuader les organismes administratifs de tirer profit de l'expérience acquise par leurs membres. Au contraire, les règles de justice naturelle devraient, par leur application, concilier les caractéristiques et les exigences du processus décisionnel des tribunaux spécialisés avec les droits des parties en matière de procédure.

La seconde raison d'être de la pratique de tenir des réunions plénières de la Commission tient au fait que le grand nombre de personnes qui participent aux décisions de la Commission crée un risque que des bancs différents rendent des décisions divergentes sur des questions semblables. Il est évident qu'il faut favoriser la cohérence des décisions rendues en matière administrative. L'issue des litiges ne devrait pas dépendre de l'identité des personnes qui composent le banc puisque ce résultat serait «difficile à concilier avec la notion d'égalité devant la loi, l'un des principaux corollaires de la primauté du droit, et peut-être aussi le plus intelligible»: Morissette, *Le contrôle de la compétence d'attribution: thèse, antithèse et syn-*

632. Given the large number of decisions rendered in the field of labour law, the Board is justified in taking appropriate measures to ensure that conflicting results are not inadvertently reached in similar cases. The fact that the Board's decisions are protected by a privative clause (s. 108) makes it even more imperative to take measures such as full board meetings in order to avoid such conflicting results. At the same time, the decision of one panel cannot bind another panel and the measures taken by the Board to foster coherence in its decision making must not compromise any panel member's capacity to decide in accordance with his conscience and opinions.

A full board meeting is a forum for discussion which, in Cory J.A.'s words (as he then was) is "no more than an amplification of the research of the hearing panel carried out before they delivered their decision" (at p. 517). Like many other judicial practices, however, full board meetings entail some imperfections, especially with respect to the opportunity to be heard and the judicial independence of the decision maker, as is correctly pointed out by Professors Blache and Comtois in "La décision institutionnelle" (1986), 16 *R.D.U.S.* 645, at pp. 707-8:

[TRANSLATION] There are advantages and disadvantages to institutionalizing the decision-making process. The main advantages with which it is credited are increasing the efficiency of the organization as well as the quality and consistency of decisions. It is felt that institutional decisions tend to promote the equal treatment of individuals in similar circumstances, increase the likelihood of better quality decisions and lead to a better allocation of resources. Against this it is feared that institutionalization creates a danger of the introduction, without the parties' knowledge, of evidence and ideas obtained extraneously and reduces the decision maker's personal responsibility for the decision to be made.

The question before this Court is whether the disadvantages involved in this practice are sufficiently important to warrant a holding that it

thèse (1986), 16 *R.D.U.S.* 591, à la p. 632. Vu le grand nombre de décisions rendues en matière de droit du travail, la Commission est justifiée de prendre les mesures nécessaires pour éviter d'arriver, par inadvertance, à des solutions différentes dans des affaires semblables. Puisque les décisions de la Commission sont protégées par une clause privative (l'art. 108), il est encore plus impérieux de recourir à des mesures comme les réunions plénières de la Commission pour éviter ces solutions incompatibles. En même temps, la décision d'un banc ne saurait lier un autre banc et les mesures prises par la Commission pour favoriser la cohérence de ses décisions ne doivent pas entraver la capacité de chacun des membres d'un banc de décider selon sa conscience et ses opinions.

Une réunion plénière de la Commission est un lieu de discussion qui, selon l'expression du juge Cory (alors juge de la Cour d'appel,) ne constitue [TRADUCTION] «rien de plus qu'un approfondissement de la recherche à laquelle procède le banc qui entend une affaire avant de rendre sa décision» (à la p. 517). Cependant, comme bien d'autres pratiques judiciaires, les réunions plénières de la Commission comportent certaines imperfections, notamment en ce qui concerne la possibilité pour les parties d'être entendues et l'indépendance du décideur, comme le soulignent avec justesse les professeurs Blache et Comtois dans «La décision institutionnelle» (1986), 16 *R.D.U.S.* 645, aux pp. 707 et 708:

L'institutionnalisation du processus décisionnel présente des avantages et des inconvénients. Les principaux avantages qui lui sont imputés sont d'accroître l'efficacité de l'organisme ainsi que la cohérence et la qualité des décisions. La décision institutionnelle est, croit-on, susceptible de favoriser l'égalité de traitement d'individus se trouvant dans des situation similaires, de maximiser la possibilité de rendre des décisions d'une qualité supérieure, et de favoriser une meilleure affectation des ressources. On craint par contre que l'institutionnalisation ne risque d'encourager l'introduction, à l'insu des parties, de preuve et d'idées obtenues hors instance et d'entraîner la diminution de la responsabilité personnelle du décideur face à la décision à rendre.

La question dont est saisie notre Cour est de savoir si les inconvénients que cette pratique comporte sont assez importants pour conclure qu'elle consti-

constitutes a breach of the rules of natural justice or whether full board meetings are consistent with these rules provided that certain safeguards be observed.

(c) *The Judicial Independence of Panel Members in the Context of a Full Board Meeting*

The appellant argues that persons who did not hear the evidence or the submissions of the parties should not be in a position to "influence" those who will ultimately participate in the decision, i.e., vote for one side or the other. The appellant cites the following authorities in support of its argument: *Mehr v. Law Society of Upper Canada*, [1955] S.C.R. 344, at p. 351; *The King v. Huntingdon Confirming Authority*, [1929] 1 K.B. 698, at pp. 715 and 717; *Re Rosenfeld and College of Physicians and Surgeons* (1969), 11 D.L.R. (3d) 148 (Ont. H.C.), at pp. 161-64; *Regina v. Broker-Dealers' Association of Ontario* (1970), 15 D.L.R. (3d) 385 (Ont. H.C.), at pp. 394-95; *Re Ramm* (1957), 7 D.L.R. (2d) 378 (Ont. C.A.), at pp. 382-83; *Regina v. Committee on Works of Halifax City Council* (1962), 34 D.L.R. (2d) 45 (N.S.S.C.), at pp. 53-55; *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577, at p. 594; *Re Rogers* (1978), 20 Nfld. & P.E.I.R. 484 (P.E.I.S.C.), at p. 499; *Doyle v. Restrictive Trade Practices Commission*, [1985] 1 F.C. 362 (C.A.), at p. 371; *Royal Commission Inquiry into Civil Rights*, vol. 5, Report No. 3, c. 124, at pp. 2004-5. In all those decisions with the exception of *Re Rogers*, some of the members of the panel which rendered the impugned decision had not heard all the evidence or all the representations of the parties; their vote was cast even though some of the members of these panels did not have the benefit of assessing the credibility of the witnesses or the validity of the factual and legal arguments. I agree that, as a general rule, the members of a panel who actually participate in the decision must have heard all the evidence as well as all the arguments presented by the parties and in this respect I adopt Pratte J.'s words in *Doyle v. Restrictive Trade Practices Commission*, *supra*, at pp. 368-69:

tue une violation des règles de justice naturelle ou si les réunions plénières de la Commission sont conformes à ces règles pourvu que certaines garanties soient respectées.

c) *L'indépendance judiciaire des membres d'un banc dans le contexte d'une réunion plénière de la Commission*

L'appelante soutient que les personnes qui n'ont pas entendu la preuve ou les plaidoiries des parties ne doivent pas être en mesure d'«influencer» celles qui, en fin de compte, participeront à la décision, c'est-à-dire de se prononcer en faveur d'un côté ou de l'autre. L'appelante cite les décisions suivantes pour étayer son argumentation: *Mehr v. Law Society of Upper Canada*, [1955] R.C.S. 344, à la p. 351; *The King v. Huntingdon Confirming Authority*, [1929] 1 K.B. 698, aux pp. 715 et 717; *Re Rosenfeld and College of Physicians and Surgeons* (1969), 11 D.L.R. (3d) 148 (H.C. Ont.), aux pp. 161 à 164; *Regina v. Broker-Dealers' Association of Ontario* (1970), 15 D.L.R. (3d) 385 (H.C. Ont.), aux pp. 394 et 395; *Re Ramm* (1957), 7 D.L.R. (2d) 378 (C.A. Ont.), aux pp. 382 et 383; *Regina v. Committee on Works of Halifax City Council* (1962), 34 D.L.R. (2d) 45 (C.S.N.-É.), aux pp. 53 à 55; *Grillas c. Ministre de la Main-d'Oeuvre et de l'Immigration*, [1972] R.C.S. 577, à la p. 594; *Re Rogers* (1978), 20 Nfld. & P.E.I.R. 489 (C.S.Î.-P.-É.) à la p. 499; *Doyle c. Commission sur les pratiques restrictives du commerce*, [1985] 1 C.F. 362 (C.A.), à la p. 371; *Royal Commission Inquiry into Civil Rights*, vol. 5, rapport nº 3, ch. 124, aux pp. 2004 et 2005. Dans toutes ces décisions, sauf *Re Rogers*, certains des membres du banc qui avait rendu la décision contestée n'avaient pas entendu la totalité de la preuve ou des plaidoiries des parties; ils avaient participé au vote même s'ils n'avaient pas été en mesure d'évaluer la crédibilité des témoins ou les arguments factuels et juridiques. Je reconnais qu'en règle générale les membres d'un banc qui participent effectivement à une décision doivent avoir entendu la totalité de la preuve et des plaidoiries soumises par les parties et, à cet égard, je fais miens les propos tenus par le juge Pratte dans l'arrêt *Doyle c. Commission sur les pratiques restrictives du commerce*, précité, aux pp. 368 et 369:

The important issue is whether the maxim "he who decides must hear" invoked by the applicant should be applied here.

This maxim expresses a well-known rule according to which, where a tribunal is responsible for hearing and deciding a case, only those members of the tribunal who heard the case may take part in the decision. It has sometimes been said that this rule is a corollary of the *audi alteram partem* rule. This is true to the extent a litigant is not truly "heard" unless he is heard by the person who will be deciding his case .... This having been said, it must be realized that the rule "he who decides must hear", important though it may be, is based on the legislator's supposed intentions. It therefore does not apply where this is expressly stated to be the case; nor does it apply where a review of all the provisions governing the activities of a tribunal leads to the conclusion that the legislator could not have intended them to apply. Where the rule does apply to a tribunal, finally, it requires that all members of the tribunal who take part in a decision must have heard the evidence and the representations of the parties in the manner in which the law requires that they be heard.

In that case, one of the issues was whether it was sufficient for the members of the panel who had not heard the evidence to read the transcripts and this question was answered in the negative in light of the relevant statutory provisions. In this case, however, the members of the panel who participated in the impugned decision, i.e., Chairman Adams and Messrs. Wightman and Lee, heard all the evidence and all the arguments. It follows that the cases cited by the appellant cannot support its argument, nor can the presence of other Board members at the full board meeting amount to "participation" in the final decision even though their contribution to the discussions which took place at that meeting can be seen as a "participation" in the decision-making process in the widest sense of that expression.

However, the appellant claims that the following extract from the reasons of Romer J. in *The King v. Huntingdon Confirming Authority*, *supra*, constitutes the basis of a rule whereby decision makers who have heard all the evidence and representations should not be influenced by persons who have not, at p. 717:

Ce qui importe, c'est de savoir s'il y a lieu d'appliquer ici la maxime «*he who decides must hear*» qu'invoque le requérant.

Cette maxime exprime une règle bien connue suivant laquelle, lorsque la loi charge un tribunal d'entendre et décider une affaire, seuls les membres du tribunal qui ont entendu l'affaire peuvent participer à la décision. On a parfois dit que cette règle exprimait une conséquence de la règle *audi alteram partem*. Cela est vrai dans la mesure où un justiciable n'est vraiment «entendu» que s'il est entendu par celui qui décidera sa cause. [...] Ceci dit, il faut voir que la règle «*he who decides must hear*», si importante qu'elle soit, est fondée sur la volonté présumée du législateur. Elle ne s'applique donc pas lorsque le législateur en a expressément écarté l'application; elle ne s'applique pas non plus lorsque l'étude de l'ensemble des dispositions régissant l'activité d'un tribunal conduit à croire que le législateur n'a pas dû vouloir qu'elle s'y applique. Enfin, lorsque la règle s'applique à un tribunal, elle exige que tous les membres de ce tribunal qui participent à une décision aient entendu la preuve et les représentations des parties de la façon que la loi veut qu'elles soient entendues.

Dans cette affaire, l'une des questions à trancher était de savoir s'il suffisait que les membres du banc qui n'avaient pas entendu la preuve lisent la transcription sténographique des audiences, ce à quoi on a répondu par la négative en raison des dispositions législatives applicables. En l'espèce cependant, les membres du banc qui ont participé à la décision contestée, c'est-à-dire le président Adams et les commissaires Wightman et Lee, ont entendu toute la preuve et toutes les plaidoiries. Il s'ensuit que les décisions citées par l'appelante ne peuvent étayer son argumentation et la présence d'autres commissaires à la réunion plénière de la Commission ne peut pas non plus équivaloir à une «participation» à la décision finale, même si l'on peut considérer leur apport aux discussions qui s'y sont déroulées comme une «participation» au processus décisionnel au sens le plus large du terme.

Cependant, l'appelante soutient que le passage suivant des motifs du juge Romer dans l'arrêt *The King v. Huntingdon Confirming Authority*, précité, à la p. 717, constitue le fondement de la règle en vertu de laquelle le décideur qui a entendu la totalité de la preuve et des plaidoiries ne doit pas être influencé par des personnes qui ne l'ont pas fait:

Further, I would merely like to point this out: that at that meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown. [Emphasis added.]

Thus, Romer J. was of the opinion that the influence of those who did not hear the evidence could go beyond their vote and that this influence constituted a denial of natural justice. Following that reasoning, it was held in *Re Rogers* that the presence of a person who heard neither the evidence nor the representations at one of the meetings where a quorum of the Prince Edward Island Land Use Commission was deliberating invalidated the decision of the Commission even though that person did not vote on the matter. The opposite result was reached in *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board* (1960), 24 D.L.R. (2d) 673 (Ont. C.A.), where it was held that the presence of Board members who neither heard the evidence nor voted on the matter did not invalidate the Board's decision, at p. 675.

I am unable to agree with the proposition that any discussion with a person who has not heard the evidence necessarily vitiates the resulting decision because this discussion might "influence" the decision maker. In this respect, I adopt Meredith C.J.C.P.'s words in *Re Toronto and Hamilton Highway Commission and Crabb* (1916), 37 O.L.R. 656 (C.A.), at p. 659:

The Board is composed of persons occupying positions analogous to those of judges rather than of arbitrators merely; and it is not suggested that they heard any evidence behind the back of either party; the most that can be said is that they—that is, those members of the Board who heard the evidence and made the award—allowed another member of the Board, who had not heard the evidence, or taken part in the inquiry before, to read the evidence and to express some of his views regarding the case to them .... [B]ut it is only fair to add that if every Judge's judgment were vitiated because

[TRADUCTION] De plus, j'aimerais simplement souligner ceci: à cette réunion du 16 mai, il y avait trois juges qui n'avaient pas entendu la preuve présentée sous serment le 25 avril. Il y a eu partage d'opinions. La résolution en faveur de confirmer a été adoptée à huit voix contre deux et il est à tout le moins possible que la majorité ait été amenée à se prononcer comme elle l'a fait en raison de l'éloquence des membres qui avaient été absents le 25 avril et qui ignoraient absolument tout des faits. [Je souligne.]

Le juge Romer a donc été d'avis que l'influence de ceux qui n'avaient pas entendu la preuve pouvait aller au-delà de leur vote et que cette influence a constitué un déni de justice naturelle. On a jugé, en suivant ce raisonnement dans l'arrêt *Re Rogers*, que la présence d'une personne qui n'a entendu ni la preuve ni les plaidoiries à l'une des réunions de délibérations de la Land Use Commission de l'Île-du-Prince-Édouard où il y avait quorum avait pour effet d'invalider la décision de la Commission même si cette personne n'avait pas voté sur la question. On est arrivé au résultat contraire dans l'arrêt *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board* (1960), 24 D.L.R. (2d) 673 (C.A. Ont.), où on statue, à la p. 675, que la présence de commissaires qui n'ont ni entendu la preuve ni voté sur la question n'a pas pour effet d'invalider la décision de la Commission.

Je ne puis souscrire à l'affirmation portant que toute discussion avec une personne qui n'a pas entendu la preuve entache forcément de nullité la décision qui s'ensuit parce que la discussion est susceptible d'«influencer» le décideur. À cet égard, je fais miens les propos du juge en chef Meredith dans l'arrêt *Re Toronto and Hamilton Highway Commission and Crabb* (1916), 37 O.L.R. 656 (C.A.), à la p. 659:

[TRADUCTION] La Commission se compose de personnes qui occupent des postes qui ressemblent à un poste de juge plutôt qu'à un poste de simple arbitre; personne ne prétend qu'ils ont entendu quelque élément de preuve à l'insu de l'une ou l'autre des parties; tout ce qu'on peut dire c'est qu'ils, à savoir les commissaires qui ont entendu la preuve et rendu la décision, ont permis à un autre commissaire qui n'avait pas entendu la preuve ni participé à l'enquête auparavant, d'en lire la transcription et de leur exprimer certaines de ses vues sur la cause [...] [M]ais, il convient d'ajouter que si toutes les

he discussed the case with some other Judge a good many judgments existing as valid and unimpeachable ought to fall; and that if such discussions were prohibited many more judgments might fall in an appellate Court because of a defect which must have been detected if the subject had been so discussed. [Emphasis added.]

The appellant's main argument against the practice of holding full board meetings is that these meetings can be used to fetter the independence of the panel members. Judicial independence is a long standing principle of our constitutional law which is also part of the rules of natural justice even in the absence of constitutional protection. It is useful to define this concept before discussing the effect of full board meetings on panel members. In *Beauregard v. Canada*, [1986] 2 S.C.R. 56, Dickson C.J. described the "accepted core of the principle of judicial independence" as a complete liberty to decide a given case in accordance with one's conscience and opinions without interference from other persons, including judges, at p. 69:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider—be it government, pressure group, individual or even another judge—should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

See also *Valente v. The Queen*, [1985] 2 S.C.R. 673, at pp. 686-87, and Benyekhlef, *Les garanties constitutionnelles relatives à l'indépendance du pouvoir judiciaire au Canada*, at p. 48.

It is obvious that no outside interference may be used to compel or pressure a decision maker to participate in discussions on policy issues raised by a case on which he must render a decision. It also goes without saying that a formalized consultation process could not be used to force or induce decision makers to adopt positions with which they do

décisions d'un juge étaient entachées de nullité parce qu'il a discuté de l'affaire avec un autre juge, il faudrait invalider un grand nombre de jugements considérés comme valides et inattaquables, et que si ces discussions étaient prohibées, encore plus de jugements pourraient être infirmés en Cour d'appel à cause du vice qu'il faudrait constater si le sujet avait été ainsi discuté. [Je souligne.]

Dans son principal argument à l'encontre de la pratique de la Commission de tenir des réunions plénières, l'appelante soutient que ces réunions peuvent servir à diminuer l'indépendance des membres du banc. L'indépendance des juges est un principe reconnu depuis longtemps dans notre droit constitutionnel; elle fait également partie des règles de justice naturelle même en l'absence de protection constitutionnelle. Il est utile de définir cette notion avant d'aborder l'effet des réunions plénières de la Commission sur les membres d'un banc. Dans l'arrêt *Beauregard c. Canada*, [1986] 2 R.C.S. 56, le juge en chef Dickson définit «ce qui a ... été accepté comme l'essentiel du principe de l'indépendance judiciaire», comme la liberté complète de juger une affaire donnée selon sa conscience et ses opinions, sans l'intervention d'autres personnes, y compris de juges, à la p. 69:

> Historiquement, ce qui a généralement été accepté comme l'essentiel du principe de l'indépendance judiciaire a été la liberté complète des juges pris individuellement d'instruire et de juger les affaires qui leur sont soumises: personne de l'extérieur—que ce soit un gouvernement, un groupe de pression, un particulier ou même un autre juge—ne doit intervenir en fait, ou tenter d'intervenir, dans la façon dont un juge mène l'affaire et rend sa décision. Cet élément essentiel continue d'être au centre du principe de l'indépendance judiciaire.

Voir également *Valente c. La Reine*, [1985] 2 R.C.S. 673, aux pp. 686 et 687, et Benyekhlef, *Les garanties constitutionnelles relatives à l'indépendance du pouvoir judiciaire au Canada*, à la p. 48.

Il est évident qu'aucune ingérence extérieure ne peut être pratiquée pour forcer ou contraindre un décideur à participer à des discussions au sujet de questions de politique soulevées par une affaire sur laquelle il doit statuer. Il va de soi aussi qu'on ne peut recourir à aucun mécanisme formel de consultation pour forcer ou inciter un décideur à

not agree. Nevertheless, discussions with colleagues do not constitute, in and of themselves, infringements on the panel members' capacity to decide the issues at stake independently. A discussion does not prevent a decision maker from adjudicating in accordance with his own conscience and opinions nor does it constitute an obstacle to this freedom. Whatever discussion may take place, the ultimate decision will be that of the decision maker for which he assumes full responsibility.

The essential difference between full board meetings and informal discussions with colleagues is the possibility that moral suasion may be felt by the members of the panel if their opinions are not shared by other Board members, the chairman or vice-chairmen. However, decision makers are entitled to change their minds whether this change of mind is the result of discussions with colleagues or the result of their own reflection on the matter. A decision maker may also be swayed by the opinion of the majority of his colleagues in the interest of adjudicative coherence since this is a relevant criterion to be taken into consideration even when the decision maker is not bound by any *stare decisis* rule.

It follows that the relevant issue in this case is not whether the practice of holding full board meetings can cause panel members to change their minds but whether this practice impinges on the ability of panel members to decide according to their opinions. There is nothing in the *Labour Relations Act* which gives either the chairman, the vice-chairmen or other Board members the power to impose his opinion on any other Board member. However, this *de jure* situation must not be thwarted by procedures which may effectively compel or induce panel members to decide against their own conscience and opinions.

It is pointed out that "justice should not only be done, but should manifestly and undoubtedly be seen to be done": see *Rex v. Sussex Justices*, [1924] 1 K.B. 256, at p. 259. This maxim applies whenever the circumstances create the danger of an injustice, for example when there is a reason-

adopter un point de vue qu'il ne partage pas. Cependant, les discussions avec des collègues ne constituent pas en soi une atteinte à la capacité des membres d'un banc de trancher les questions en litige de manière indépendante. Une discussion n'empêche pas un décideur de juger selon ses propres conscience et opinions, pas plus qu'elle ne constitue une entrave à sa liberté. Quelles que soient les discussions qui peuvent avoir lieu, la décision ultime appartient au décideur et il en assume la responsabilité entière.

La différence fondamentale entre les réunions plénières de la Commission et les discussions informelles entre collègues tient à la pression morale que les membres du banc peuvent ressentir si les autres commissaires, le président ou les vice-présidents ne partagent pas leur avis. Cependant, les décideurs ont le droit de changer d'avis, peu importe que ce soit à la suite de discussions avec des collègues ou de leur propre réflexion sur le sujet. L'opinion de la majorité de ses collègues peut également amener un décideur à changer d'avis par souci de cohérence de la jurisprudence puisqu'il s'agit d'un critère légitime qui doit être pris en considération, même si le décideur n'est lié par aucune règle de *stare decisis*.

Il s'ensuit que la question qu'il faut se poser en l'espèce est non pas de savoir si la pratique des réunions plénières de la Commission peut amener les membres d'un banc à changer d'avis, mais plutôt de savoir si cette pratique entrave la capacité des membres de ce banc de statuer selon leurs opinions. Il n'y a rien dans la *Loi sur les relations de travail* qui autorise le président, les vice-présidents ou les autres commissaires à imposer leur avis à quelque autre commissaire. Cependant, cette situation de droit ne doit pas être contrecarrée par des procédures qui peuvent avoir pour effet de forcer ou d'inciter des membres d'un banc à statuer à l'encontre de leurs propres conscience et opinions.

On souligne qu'il est essentiel [TRADUCTION] «que non seulement justice soit rendue, mais que justice paraisse manifestement et indubitablement être rendue»: voir *Rex v. Sussex Justices*, [1924] 1 K.B. 256, à la p. 259. Cette maxime s'applique chaque fois que les circonstances créent un risque

able apprehension of bias, even if the decision maker has completely disregarded these circumstances. 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*, [1978] 1 S.C.R. 369, at p. 394, reaffirmed and applied as the criteria for judicial independence in *Valente v. The Queen*, *supra*, at p. 684:

> . . . 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. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—concluded . . . ."

See also p. 689.

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 is 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

d'injustice, par exemple, quand il existe une crainte raisonnable de partialité, même si le décideur n'a pas du tout tenu compte de ces circonstances. Cependant, pour les motifs ci-après, je suis d'avis que le risque que les réunions plénières de la Commission diminuent l'indépendance judiciaire des membres du banc n'est pas suffisant pour susciter une crainte raisonnable de partialité ou d'un manque d'indépendance au sens du critère formulé par notre Cour dans l'arrêt *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369, à la p. 394, lequel a été confirmé et appliqué à titre de critère d'indépendance judiciaire dans l'arrêt *Valente c. La Reine*, précité, à la p. 684:

> . . . la crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. Selon les termes de la Cour d'appel, ce critère consiste à se demander «à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique . . .»

Voir aussi à la p. 689.

La réunion plénière de la Commission tenue conformément à la procédure décrite par le président Adams n'est pas imposée, elle est convoquée à la demande du banc qui a entendu l'affaire ou par l'un de ses membres. Elle est soigneusement organisée pour favoriser la discussion sans qu'il y ait tentative de vérifier s'il y a consensus; il n'est pas dressé de procès-verbal, le vote n'y est pas pris, la présence à la réunion est facultative et les présences n'y sont pas prises. La décision revient entièrement au banc qui a entendu l'affaire. On ne saurait dire que cette pratique vise à signaler aux membres du banc qu'il faut se conformer à l'avis de la majorité des commissaires présents. Par ailleurs, il est vrai qu'il est possible de vérifier s'il y a consensus sans recourir à un vote et que cette institutionnalisation du processus de consultation comporte un risque d'influence plus prononcée sur les membres du banc. Cependant, le critère de l'indépendance est non pas l'absence d'influence, mais plutôt la liberté de décider selon ses propres conscience et opinions. En fait, le dossier démontre que chacun des membres du banc s'en est tenu à son opinion puisque M. Wightman a été dissident et que M. Lee n'a souscrit qu'en partie à l'avis du

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.

(d) *Full Board Meetings and the Audi Alteram Partem Rule*

Full board meetings held on an *ex parte* basis do entail some disadvantages from the point of view of the *audi alteram partem* rule because the parties are not aware of what is said at those meetings and do not have an opportunity to reply to new arguments made by the persons present at the meeting. In addition, there is always the danger that the persons present at the meeting may discuss the evidence.

For the purpose of the application of the *audi alteram partem* rule, a distinction must be drawn between discussions on factual matters and discussions on legal or policy issues. In every decision, panel members must determine what the facts are, what legal standards apply to those facts and, finally, they must assess the evidence in accordance with these legal standards. In this case, for example, the Board had to determine which events led to the decision to close the Hamilton plant and, in turn, decide whether the appellant had failed to bargain in good faith by not informing of an impending plant closing either on the basis that a "*de facto* decision" had been taken or on some other basis. The determination and assessment of facts are delicate tasks which turn on the credibility of the witnesses and an overall evaluation of the relevancy of all the information presented as evidence. As a general rule, these tasks cannot be properly performed by persons who have not heard all the evidence and the rules of natural justice do not allow such persons to vote on the result. Their

président Adams. J'estime, à l'instar de la Cour d'appel, que la réunion plénière de la Commission a constitué un élément important du processus légitime de consultation, mais non une participation à la décision par des personnes qui n'avaient pas entendu les parties. Une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique, ne percevrait pas la pratique de la Commission de tenir des réunions plénières ou la réunion plénière de la Commission tenue le 23 septembre 1983 comme une atteinte à son droit d'obtenir une décision d'un tribunal indépendant et ainsi comme une violation de ce principe de justice naturelle.

d) *Les réunions plénières de la Commission et la règle audi alteram partem*

Les réunions plénières de la Commission tenues *ex parte* comportent certains inconvénients sur le plan de la règle *audi alteram partem* parce que les parties ne savent pas ce qui a été dit à ces réunions et n'ont pas la possibilité de répliquer aux nouveaux arguments soumis par les personnes qui y ont assisté. De plus, il y a toujours le risque que les personnes présentes à la réunion discutent de la preuve.

Aux fins de l'application de la règle *audi alteram partem*, il faut distinguer les discussions portant sur des questions de fait et celles portant sur des questions de droit ou de politique. Dans toute décision, les membres du banc doivent établir les faits, les normes juridiques à appliquer à ces faits et, enfin, il doivent évaluer la preuve conformément à ces normes juridiques. En l'espèce, par exemple, la Commission devait déterminer quels événements avaient donné lieu à la décision de fermer l'usine de Hamilton, pour ensuite décider si l'appelante avait omis de négocier de bonne foi en n'informant pas de la fermeture prochaine de l'usine, pour le motif qu'«une décision *de facto*» avait été prise en ce sens ou pour un autre motif. La détermination et l'évaluation des faits sont des tâches délicates qui dépendent de la crédibilité des témoins et de l'évaluation globale de la pertinence de tous les renseignements présentés en preuve. En général, les personnes qui n'ont pas entendu toute la preuve ne sont pas à même de bien remplir cette tâche et les règles de justice naturelle ne permet-

participation in discussions dealing with such factual issues is less problematic when there is no participation in the final decision. However, I am of the view that generally such discussions constitute a breach of the rules of natural justice because they allow persons other than the parties to make representations on factual issues when they have not heard the evidence.

It is already recognized that no new evidence may be presented to panel members in the absence of the parties: *Kane v. Board of Governors of the University of British Columbia*, *supra*, at pp. 1113-14. The appellant does not claim that new evidence was adduced at the meeting and the record does not disclose any such breach of the *audi alteram partem* rule. The defined practice of the Board at full board meetings is to discuss policy issues on the basis of the facts as they were determined by the panel. The benefits to be derived from the proper use of this consultation process must not be denied because of the mere concern that this established practice might be disregarded, in the absence of any evidence that this has occurred. In this case, the record contains no evidence that factual issues were discussed by the Board at the September 23, 1983 meeting.

In his reasons for judgment, Rosenberg J. has raised the issue of whether discussions on policy issues can be completely divorced from the factual findings, at p. 492:

> In this case there was a minority report. Although the chairman states that the facts in the draft decision were taken as given there is no evidence before us to indicate whether the facts referred to those in the majority report or the minority report or both. Also, without in any way doubting the sincerity and integrity of the chairman in making such a statement, it is not practical to have all of the facts decided except against a background of determination of the principles of law involved. For example, a finding that Consolidated-Bathurst was seriously considering closing the Hamilton plant is of no significance if the requirement is that the failure to bargain in good faith must be a *de facto* decision to close. Accordingly,

tent pas à ces personnes de voter sur l'issue du litige. Leur participation aux discussions portant sur ces questions de fait pose moins de problèmes quand elles ne participent pas à la décision finale. Cependant, j'estime que ces discussions violent généralement les règles de justice naturelle parce qu'elles permettent à des personnes qui ne sont pas parties au litige de faire des observations sur des questions de fait alors qu'elles n'ont pas entendu la preuve.

Il est déjà admis que les membres d'un banc ne peuvent être saisis de nouveaux éléments de preuve en l'absence des parties: *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, précité, aux pp. 1113 et 1114. L'appelante ne soutient pas que de nouveaux éléments de preuve ont été soumis à la réunion et le dossier ne révèle aucune violation de la règle *audi alteram partem* pour ce motif. La pratique définie par la Commission lors de ces réunions plénières consiste précisément à discuter des questions de politique en tenant pour avérés les faits établis par le banc. Il ne faut pas refuser les avantages que l'utilisation valable de ce processus de consultation peut procurer, uniquement à cause de la simple crainte que cette pratique établie ne soit pas respectée, en l'absence de toute preuve que la chose s'est produite. En l'espèce, le dossier ne contient aucune preuve que des questions de fait ont été discutées par la Commission lors de la réunion du 23 septembre 1983.

Dans ses motifs de jugement, le juge Rosenberg soulève la question de savoir si les discussions de questions de politique peuvent être totalement séparées des constatations de fait, à la p. 492:

> [TRADUCTION] En l'espèce, il y a eu des motifs minoritaires. Bien que le président affirme que les faits mentionnés dans l'avant-projet de décision ont été tenus pour avérés, rien dans la preuve qui nous est soumise n'indique si les faits se rapportaient à ceux des motifs de la majorité, de la minorité ou des deux à la fois. De plus, même si je ne doute nullement de la bonne foi et de l'intégrité du président au moment où il affirme cela, il n'est pas pratique de déterminer tous les faits si ce n'est en fonction de la détermination des principes de droit applicables. Par exemple, la constatation que Consolidated-Bathurst envisageait sérieusement de fermer l'usine de Hamilton n'a pas d'importance s'il est nécessaire que

until the board decides what the test is the findings of fact cannot be finalized.

With respect, I must disagree with Rosenberg J. if he suggests that it is not practical to discuss policy issues against the factual background provided by the panel.

It is true that the evidence cannot always be assessed in a final manner until the appropriate legal test has been chosen by the panel and until all the members of the panel have evaluated the credibility of each witness. However, it is possible to discuss the policy issues arising from the body of evidence filed before the panel even though this evidence may give rise to a wide variety of factual conclusions. In this case, Mr. Wightman seemed to disagree with Chairman Adams with respect to the credibility of the testimonies of some of the appellant's witnesses. While this might be relevant to Mr. Wightman's conclusions, it was nevertheless possible to outline the policy issues at stake in this case from the summary of the facts prepared by Chairman Adams. In turn, it was possible to outline the various tests which could be adopted by the panel and to discuss their appropriateness from a policy point of view. These discussions can be segregated from the factual decisions which will determine the outcome of the case once a test is adopted by the panel. The purpose of the policy discussions is not to determine which of the parties will eventually win the case but rather to outline the various legal standards which may be adopted by the Board and discuss their relative value.

Policy issues must be approached in a different manner because they have, by definition, an impact which goes beyond the resolution of the dispute between the parties. While they are adopted in a factual context, they are an expression of principle or standards akin to law. Since these issues involve the consideration of statutes, past decisions and perceived social needs, the impact of a policy decision by the Board is, to a certain extent, independent from the immediate interests

l'omission de négocier de bonne foi découle d'une décision *de facto* de fermer l'usine. En conséquence, la constatation des faits ne peut être parachevée avant que la Commission ne décide du critère applicable.

En toute déférence, je ne puis souscrire à l'avis du juge Rosenberg s'il veut dire qu'il n'est pas pratique de discuter des questions de politique en fonction de la base factuelle fournie par le banc.

Il est vrai qu'il n'est pas toujours possible d'évaluer la preuve de façon définitive avant que le banc n'ait choisi le critère juridique approprié et avant que tous les membres du banc n'aient évalué la crédibilité de chaque témoin. Cependant, il est possible de débattre des questions de politique que soulève la preuve soumise au banc même si cette preuve peut entraîner une grande variété de conclusions sur les faits. En l'espèce, M. Wightman semble avoir différé d'opinion avec le président Adams sur la crédibilité des dépositions de certains témoins de l'appelante. Bien que cela puisse être pertinent relativement aux conclusions de M. Wightman, il était néanmoins possible d'énoncer les questions de politique en cause dans cette affaire à partir du résumé des faits préparé par le président Adams. Puis, il était possible d'exposer les différents critères que le banc pouvait adopter et de discuter de leur pertinence sur le plan des politiques. Il est possible de dissocier ces discussions des décisions sur les faits qui déterminent l'issue du litige après que le banc a adopté un critère. Les discussions sur les politiques n'ont pas pour objet de décider quelle partie aura finalement gain de cause, mais elles ont pour objet d'exposer les différents critères juridiques que la Commission peut adopter et de débattre leur valeur relative.

Il faut aborder les questions de politique de manière différente parce qu'elles ont, par définition, des conséquences qui vont au-delà du règlement du litige particulier entre les parties. Bien qu'elles découlent de faits précis, elles constituent l'expression d'un principe ou de normes apparentées au droit. Puisque ces questions font appel à l'analyse des lois, des décisions antérieures et des besoins sociaux qui sont perçus, les conséquences d'une décision de politique prise par la Commis-

of the parties even though it has an effect on the outcome of the complaint.

I have already outlined the reasons which justify discussions between panel members and other members of the Board. It is now necessary to consider the conditions under which full board meetings must be held in order to abide by the *audi alteram partem* rule. In this respect, the only possible breach of this rule arises where a new policy or a new argument is proposed at a full board meeting and a decision is rendered on the basis of this policy or argument without giving the parties an opportunity to respond.

I agree with Cory J.A. (as he then was) that the parties must be informed of any new ground on which they have not made any representations. In such a case, the parties must be given a reasonable opportunity to respond and the calling of a supplementary hearing may be appropriate. The decision to call such a hearing is left to the Board as master of its own procedure: s. 102(13) of the *Labour Relations Act*. However, this is not a case where a new policy undisclosed or unknown to the parties was introduced or applied. The extent of the obligation of an employer engaged in collective bargaining to disclose information regarding the possibility of a plant closing was at the very heart of the debate from the outset and had been the subject of a policy decision previously in the *Westinghouse* case. The parties had every opportunity to deal with the matter at the hearing and indeed presented diverging proposals for modifying the policy. There is no evidence that any new grounds were put forward at the meeting and each of the reasons rendered by Chairman Adams and Messrs. Wightman and Lee simply adopts one of the arguments presented by the parties and summarized at pp. 1427-30 of Chairman Adams' decision. Though the reasons are expressed in great detail, the appellant does not identify any of them as being new nor does it contend that it did not have an opportunity to be heard or to deal with them.

sion ne dépendent pas, dans une certaine mesure, de l'intérêt immédiat des parties, même si elles peuvent avoir un effet sur l'issue de la plainte.

J'ai déjà exposé les motifs qui justifient les membres d'un banc d'avoir des discussions avec les autres commissaires. Il faut maintenant examiner les conditions dans lesquelles les réunions plénières de la Commission doivent être tenues afin de respecter la règle *audi alteram partem*. À cet égard, la seule violation possible de la règle a lieu quand on propose une nouvelle politique ou un nouvel argument à une réunion plénière de la Commission et qu'une décision fondée sur cette politique ou cet argument est rendue sans qu'on accorde aux parties la possibilité de répliquer.

Je souscris à l'avis du juge Cory (alors juge de la Cour d'appel) qu'il faut aviser les parties de tout nouveau moyen à propos duquel elles n'ont pas soumis de plaidoiries. Dans un tel cas, il faut accorder aux parties une possibilité raisonnable de répliquer et la convocation d'une audience supplémentaire peut se révéler appropriée. La décision de convoquer une telle audience revient à la Commission en tant que maîtresse de sa propre procédure: par. 102(3) de la *Loi sur les relations de travail*. Cependant, en l'espèce, il n'y a eu ni présentation ni application d'une nouvelle politique qui n'avait pas été divulguée aux parties ou que celles-ci ne connaissaient pas. La portée de l'obligation d'un employeur qui négocie collectivement de divulguer les renseignements relatifs à la fermeture possible d'une usine était au cœur même du débat depuis le début et avait déjà fait l'objet d'une décision de politique dans l'affaire *Westinghouse*. Les parties avaient eu toutes les chances possibles de traiter ce sujet à l'audience et avaient même soumis des propositions contradictoires de modification de la politique. Il n'y a aucune preuve que de nouveaux moyens ont été présentés lors de la réunion et les motifs de chacun des trois commissaires, le président Adams et MM. Wightman et Lee, ne font qu'adopter l'un des arguments soumis par les parties que le président Adams résume aux pp. 1427 à 1430 de sa décision. Bien que les motifs soient très élaborés, l'appelante n'en désigne aucune partie comme nouvelle, ni ne soutient qu'elle n'a pas eu la possibilité de se faire entendre ou d'en traiter.

Since its earliest development, the essence of the *audi alteram partem* rule has been to give the parties a "fair opportunity of answering the case against [them]": Evans, *de Smith's Judicial Review of Administrative Action, supra,* at p. 158. It is true that on factual matters the parties must be given a "fair opportunity . . . for correcting or contradicting any relevant statement prejudicial to their view": *Board of Education v. Rice*, [1911] A.C. 179, at p. 182; see also *Local Government Board v. Arlidge*, [1915] A.C. 120, at pp. 133 and 141, and *Kane v. Board of Governors of the University of British Columbia, supra*, at p. 1113. However, the rule with respect to legal or policy arguments not raising issues of fact is somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. This right does not encompass the right to repeat arguments every time the panel convenes to discuss the case. For obvious practical reasons, superior courts, in particular courts of appeal, do not have to call back the parties every time an argument is discredited by a member of the panel and it would be anomalous to require more of administrative tribunals through the rules of natural justice. Indeed, a reason for their very existence is the specialized knowledge and expertise which they are expected to apply.

Depuis sa première formulation, la règle *audi alteram partem* vise essentiellement à donner aux parties une [TRADUCTION] «possibilité raisonnable de répliquer à la preuve présentée contre [elles]»: Evans, *de Smith's Judicial Review of Administrative Action*, précité, à la p. 158. Il est vrai que relativement aux questions de fait, les parties doivent obtenir une [TRADUCTION] «possibilité raisonnable [. . .] de corriger ou de contredire tout énoncé pertinent qui nuit à leur point de vue»: *Board of Education v. Rice*, [1911] A.C. 179, à la p. 182; voir également *Local Government Board v. Arlidge*, [1915] A.C. 120, aux pp. 133 et 141, et *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, précité, à la p. 1113. Cependant, la règle relative aux arguments juridiques ou de politique qui ne soulèvent pas des questions de fait est un peu moins sévère puisque les parties n'ont que le droit de présenter leur cause adéquatement et de répondre aux arguments qui leur sont défavorables. Ce droit n'inclut pas celui de reprendre les plaidoiries chaque fois que le banc se réunit pour débattre l'affaire. Pour des raisons pratiques manifestes, les cours supérieures, et en particulier les cours d'appel, ne sont pas tenues de convoquer de nouveau les parties chaque fois qu'un membre du banc infirme un argument et il serait anormal d'être plus exigeant envers les tribunaux administratifs en raison des règles de justice naturelle. En réalité, une de leurs raisons d'être est justement leurs connaissances et compétences spécialisées qu'on souhaite les voir appliquer.

I therefore conclude that the consultation process described by Chairman Adams in his reconsideration decision does not violate the *audi alteram partem* rule provided that factual issues are not discussed at a full board meeting and that the parties are given a reasonable opportunity to respond to any new ground arising from such a meeting. In this case, an important policy issue, namely the validity of the test adopted in the *Westinghouse* case, was at stake and the Board was entitled to call a full board meeting to discuss it. There is no evidence that any other issues were discussed or indeed that any other arguments were raised at that meeting and it follows that the appellant has failed to prove that it has been the

Je conclus donc que le processus de consultation décrit par le président Adams dans sa décision relative à la demande de réexamen ne viole pas la règle *audi alteram partem* pourvu que les questions de fait ne soient pas discutées à la réunion plénière de la Commission et que les parties aient une possibilité raisonnable de répliquer à tout nouveau moyen soulevé à cette réunion. En l'espèce, une importante question de politique était en jeu, savoir la validité du critère adopté dans la décision *Westinghouse* et la Commission avait le droit de convoquer une réunion plénière pour en débattre. Il n'y a aucune preuve qu'on ait discuté d'autres sujets ou même qu'on ait soulevé quelque autre argument lors de cette réunion. Il s'ensuit que

victim of any violation of the *audi alteram partem* rule. Indeed, the decision itself indicates that it rests on considerations known to the parties upon which they had full opportunity to be heard.

IV—Conclusion

The institutionalization of the consultation process adopted by the Board provides a framework within which the experience of the chairman, vice-chairmen and members of the Board can be shared to improve the overall quality of its decisions. Although respect for the judicial independence of Board members will impede total coherence in decision making, the Board through this consultation process seeks to avoid inadvertent contradictory results and to achieve the highest degree of coherence possible under these circumstances. An institutionalized consultation process will not necessarily lead Board members to reach a consensus but it provides a forum where such a consensus can be reached freely as a result of thoughtful discussion on the issues at hand.

The advantages of an institutionalized consultation process are obvious and I cannot agree with the proposition that this practice necessarily conflicts with the rules of natural justice. The rules of natural justice must have the flexibility required to take into account the institutional pressures faced by modern administrative tribunals as well as the risks inherent in such a practice. In this respect, I adopt the words of Professors Blache and Comtois in "La décision institutionnelle", *supra*, at p. 708:

[TRANSLATION] The institutionalizing of decisions exists in our law and appears to be there to stay. The problem is thus not whether institutional decisions should be sanctioned, but to organize the process in such a way as to limit its dangers. There is nothing revolutionary in this approach: it falls naturally into the tradition of English and Canadian jurisprudence that the rules of natural justice should be flexibly interpreted.

l'appelante n'a pas prouvé qu'elle ait été victime d'une violation quelconque de la règle *audi alteram partem*. En réalité, la décision elle-même montre qu'elle repose sur des considérations connues des parties et au sujet desquelles elles avaient eu tout le loisir de se faire entendre.

IV—Conclusion

L'institutionnalisation du processus de consultation adopté par la Commission fournit un cadre qui permet au président, aux vice-présidents et aux commissaires de mettre leur expérience en commun et d'améliorer la qualité globale de leurs décisions. Quoique le respect de l'indépendance judiciaire des commissaires empêche d'obtenir la cohérence parfaite des décisions de la Commission, celle-ci cherche, par ce processus de consultation à éviter les décisions contradictoires rendues par inadvertance et à atteindre le niveau de cohérence le plus élevé possible dans les circonstances. Un processus institutionnalisé de consultation ne permet pas nécessairement aux commissaires de parvenir à un consensus, mais il fournit une tribune où il est possible de parvenir librement à ce consensus suite à une discussion réfléchie des questions soulevées.

Les avantages d'un processus institutionnalisé de consultation sont manifestes et je ne puis souscrire à la proposition que cette pratique contrevient forcément aux règles de justice naturelle. Les règles de justice naturelle doivent avoir la souplesse nécessaire pour tenir compte à la fois des pressions institutionnelles qui s'exercent sur les tribunaux administratifs modernes et des risques inhérents à cette pratique. À cet égard, je fais miens les propos tenus par les professeurs Blache et Comtois dans «La décision institutionnelle» précité, à la p. 708:

Le phénomène d'institutionnalisation de la décision existe dans notre droit et il semble qu'il y soit pour rester. Le problème qui se pose n'est donc pas de savoir si la décision institutionnelle devrait ou non être autorisée, mais d'articuler des modalités de mise en œuvre qui permettent d'en limiter les risques. Il s'agit là d'une approche qui n'a rien de révolutionnaire et s'inscrit dans la tradition jurisprudentielle anglaise et canadienne selon laquelle il faut interpréter avec flexibilité les règles de justice naturelle.

The consultation process adopted by the Board formally recognizes the disadvantages inherent in full board meetings, namely that the judicial independence of the panel members may be fettered by such a practice and that the parties do not have the opportunity to respond to all the arguments raised at the meeting. The safeguards attached to this consultation process are, in my opinion, sufficient to allay any fear of violations of the rules of natural justice provided as well that the parties be advised of any new evidence or grounds and given an opportunity to respond. The balance so achieved between the rights of the parties and the institutional pressures the Board faces are consistent with the nature and purpose of the rules of natural justice.

Le processus de consultation adopté par la Commission reconnaît formellement les inconvénients inhérents aux réunions plénières de la Commission, savoir que l'indépendance judiciaire des membres d'un banc peut être diminuée par une telle pratique et que les parties n'ont pas la possibilité de répliquer à tous les arguments soulevés au cours de ces réunions. Les garanties dont est assorti ce processus de consultation sont, à mon avis, suffisantes pour dissiper toute crainte de violation des règles de justice naturelle pourvu également que les parties soient informées de tout nouvel élément de preuve ou de tout nouveau moyen et qu'elles aient la possibilité d'y répondre. L'équilibre ainsi réalisé entre les droits des parties et les pressions institutionnelles qui s'exercent sur la Commission sont compatibles avec la nature et l'objet des règles de justice naturelle.

For these reasons, I would dismiss the appeal with costs.

Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens.

Appeal dismissed with costs, LAMER *and* SOPINKA JJ. *dissenting.*

Pourvoi rejeté avec dépens, les juges LAMER *et* SOPINKA *sont dissidents.*

Solicitors for the appellant: Beard, Winter, Toronto.

Procureurs de l'appelante: Beard, Winter, Toronto.

Solicitors for the respondent the International Woodworkers of America, Local 2-69: Cavalluzzo, Hayes & Lennon, Toronto.

Procureurs de l'intimé le Syndicat international des travailleurs du bois d'Amérique, section locale 2-69: Cavalluzzo, Hayes & Lennon, Toronto.

Solicitors for the respondent Ontario Labour Relations Board: Gowling & Henderson, Ottawa.

Procureurs de l'intimée la Commission des relations de travail de l'Ontario: Gowling & Henderson, Ottawa.

General Manager, Liquor Control and Licensing Branch *Appellant*

v.

Ocean Port Hotel Limited *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Manitoba, Her Majesty the Queen in right of Alberta and the Minister of Justice and Attorney General for Alberta *Interveners*

INDEXED AS: OCEAN PORT HOTEL LTD. *v.* BRITISH COLUMBIA (GENERAL MANAGER, LIQUOR CONTROL AND LICENSING BRANCH)

Neutral citation: 2001 SCC 52.

File No.: 27371.

Hearing and judgment: March 22, 2001.

Reasons delivered: September 14, 2001.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Administrative law — Tribunals — Liquor Appeal Board — Institutional independence — Liquor Control and Licensing Act providing for appointment of Board members "at the pleasure of the Lieutenant Governor in Council" — In practice, members are appointed for one-year term and serve on a part-time basis — Whether Board members sufficiently independent to render decisions on violations of Act and impose penalties provided — Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267, s. 30.

An initial police investigation and a subsequent investigation by a Senior Inspector with the Liquor Control and Licensing Branch led to allegations that the respondent, which operates a hotel and pub, had committed five infractions of the *Liquor Control and Licensing Act* and Regulations. Following a hearing, another

General Manager, Liquor Control and Licensing Branch *Appelant*

c.

Ocean Port Hotel Limited *Intimée*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Manitoba, Sa Majesté la Reine du chef de l'Alberta et le ministre de la Justice et procureur général de l'Alberta *Intervenants*

RÉPERTORIÉ : OCEAN PORT HOTEL LTD. *c.* COLOMBIE-BRITANNIQUE (GENERAL MANAGER, LIQUOR CONTROL AND LICENSING BRANCH)

Référence neutre : 2001 CSC 52.

N° du greffe : 27371.

Audition et jugement : 22 mars 2001.

Motifs déposés : 14 septembre 2001.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit administratif — Tribunaux administratifs — Commission d'appel — Indépendance institutionnelle — Liquor Control and Licensing Act prévoyant que les commissaires sont révocables à tout moment au gré du lieutenant-gouverneur en conseil — En pratique, les commissaires sont nommés pour un an et exercent leur charge à temps partiel — Les commissaires jouissent-ils d'une indépendance suffisante pour rendre des décisions sur des contraventions à la loi et prononcer les peines prévues? — Liquor Control and Licensing Act, R.S.B.C. 1996, ch. 267, art. 30.

À la suite d'une enquête de police puis d'une enquête d'un inspecteur principal de la Liquor Control and Licensing Branch, il est allégué que l'intimée, qui exploite un hôtel et un pub, a commis cinq infractions à la *Liquor Control and Licensing Act* et aux règlements. Au terme d'une audience, un autre inspecteur principal

Senior Inspector with the Branch concluded that the allegations had been substantiated and imposed a penalty that included a two-day suspension of the respondent's liquor licence. The respondent appealed to the Liquor Appeal Board by way of a hearing *de novo*. The findings on four of the five allegations were upheld, and the penalty was confirmed. Pursuant to s. 30(2)(a) of the Act, the chair and members of the Board "serve at the pleasure of the Lieutenant Governor in Council". In practice, members are appointed for a one-year term and serve on a part-time basis. All members but the chair are paid on a *per diem* basis. The chair establishes panels of one or three members to hear matters before the Board "as the chair considers advisable". The Court of Appeal concluded that members of the Board lacked the necessary guarantees of independence required of administrative decision makers imposing penalties and set aside the Board's decision.

Held: The appeal should be allowed and the matter remitted to the British Columbia Court of Appeal to decide the issues which it did not address.

It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. The statute must be construed as a whole to determine the degree of independence the legislature intended. Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice. However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication.

There is a fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts. Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. Given their primary policy-making function, however, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and struc-

de la même direction conclut que les allégations ont été prouvées et impose une suspension de deux jours du permis d'alcool de l'intimée. L'intimée interjette appel *de novo* devant la commission d'appel, la Liquor Appeal Board. Les conclusions sont maintenues à l'égard de quatre des cinq allégations, et la peine est confirmée. En vertu de l'al. 30(2)a) de la Loi, le président et les commissaires « sont révocables à tout moment au gré du lieutenant-gouverneur en conseil ». En pratique, les commissaires sont nommés pour un an et ils exercent leur charge à temps partiel. Tous les commissaires sauf le président touchent une rétribution quotidienne. Le président établit des formations d'un ou trois commissaires, « selon ce qu'il considère indiqué », qui entendent les affaires soumises à la commission. La Cour d'appel conclut que les commissaires n'avaient pas les garanties d'indépendance requises pour des décideurs habilités à prononcer des peines, et annule la décision de la commission.

Arrêt : Le pourvoi est accueilli et l'affaire est renvoyée à la Cour d'appel de la Colombie-Britannique pour qu'elle statue sur les questions qu'elle n'a pas examinées.

Il est de jurisprudence constante que, en l'absence de contraintes constitutionnelles, le degré d'indépendance requis d'un décideur ou d'un tribunal administratif est déterminé par sa loi habilitante. Il faut interpréter la loi dans son ensemble pour déterminer le degré d'indépendance qu'a voulu assurer le législateur. Confrontés à des lois muettes ou ambiguës, les tribunaux infèrent généralement que le Parlement ou la législature voulait que les procédures du tribunal administratif soient conformes aux principes de justice naturelle. Toutefois, comme pour tous les principes de justice naturelle, le degré d'indépendance requis des membres du tribunal administratif peut être écarté par les termes exprès de la loi ou par déduction nécessaire.

Il existe une distinction fondamentale entre tribunaux administratifs et tribunaux judiciaires. Du fait de leur compétence inhérente, les cours supérieures sont constitutionnellement tenues d'offrir des garanties objectives d'indépendance institutionnelle et individuelle. Le même impératif constitutionnel s'applique aux tribunaux provinciaux. Par contre, les tribunaux administratifs ne sont pas constitutionnellement séparés de l'exécutif. Ils sont en fait créés précisément en vue de la mise en œuvre de la politique gouvernementale. Pour remplir cette fonction, ils peuvent être appelés à rendre des décisions quasi judiciaires. Toutefois, vu que leur fonction première est d'appliquer des politiques, il appartient à bon droit au Parlement et aux législatures de déterminer

ture required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not.

The legislature's intention that Board members should serve at pleasure is unequivocal. As such, it does not permit the argument that the statute is ambiguous and hence should be read as imposing a higher degree of independence to meet the requirements of natural justice, if indeed a higher standard is required. Where the intention of the legislature, as here, is unequivocal, there is no room to import common law doctrines of independence. Nor is a constitutional guarantee of independence implicated here. There is no basis upon which to extend the constitutional guarantee of judicial independence that animated the *Provincial Court Judges Reference* to the Liquor Appeal Board. The Board is not a court, nor does it approach the constitutional role of the courts. It is first and foremost a licensing body. The suspension complained of was an incident of the Board's licensing function. Licences are granted on condition of compliance with the Act, and can be suspended for non-compliance. The exercise of power here at issue falls squarely within the executive power of the provincial government.

This Court's conclusion affirming the independence of the Board makes it necessary to remit the case to the Court of Appeal for consideration of the issues it expressly refrained from addressing. Many of these issues directly relate to the validity of the decision at first instance. Since the Court of Appeal will have the benefit of full argument on the nature of the initial hearing and the relevant provisions of the Act, the Court also remits for its consideration the issue of whether this hearing gave rise to a reasonable apprehension of bias and, if so, whether this apprehension was cured by the *de novo* proceedings before the Board.

Cases Cited

Distinguished: *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; **referred to:** *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495; *Law Society of Upper Canada v. French*, [1975] 2 S.C.R.

la composition et l'organisation qui permettront aux tribunaux administratifs de s'acquitter des attributions qui leur sont dévolues. Même si certains tribunaux administratifs peuvent parfois être assujettis aux exigences de la *Charte* relatives à l'indépendance, ce n'est généralement pas le cas.

Le législateur a exprimé sans équivoque l'intention que les commissaires soient nommés à titre amovible. On ne peut donc pas soutenir que la loi est ambiguë et qu'il faut par conséquent l'interpréter comme imposant un degré d'indépendance plus élevé afin de satisfaire aux exigences de la justice naturelle, si tant est qu'une norme plus élevée s'impose. Lorsque, comme en l'espèce, l'intention du législateur est sans équivoque, il n'y a pas lieu d'importer les théories de common law en matière d'indépendance. La présente espèce ne fait pas jouer non plus quelque garantie constitutionnelle d'indépendance. Il n'y a rien dans ce qui sous-tend le *Renvoi relatif aux juges de la Cour provinciale* qui permet d'étendre la garantie constitutionnelle de l'indépendance de la magistrature à la commission. La commission n'est pas un tribunal judiciaire, et elle est loin de posséder les attributs constitutionnels des tribunaux judiciaires. Sa fonction première est l'octroi de permis. La suspension qui a fait l'objet de la plainte se rattachait à l'exercice de cette fonction. Les permis sont accordés sous réserve du respect de la Loi et peuvent être suspendus en cas d'inobservation. L'exercice du pouvoir en cause procède carrément du pouvoir exécutif du gouvernement provincial.

Vu la conclusion relative à l'indépendance de la commission, il est nécessaire de renvoyer l'affaire à la Cour d'appel pour qu'elle examine les questions qu'elle s'est expressément abstenue d'analyser. Plusieurs de ces questions touchent directement la validité de la décision initiale. Comme la Cour d'appel pourra bénéficier des plaidoiries sur la nature de l'audition initiale et des dispositions applicables de la Loi, la Cour renvoie également à son examen la question de savoir si cette audition créait une crainte raisonnable de partialité et, dans l'affirmative, si les procédures *de novo* devant la commission y ont remédié.

Jurisprudence

Distinction d'avec l'arrêt : *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 R.C.S. 919; **arrêts mentionnés :** *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3; *Ministre du Revenu national c. Coopers et Lybrand*, [1979] 1 R.C.S. 495; *Law Society of Upper Canada c. French*,

767; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405; *Innisfil (Corporation of the Township of) v. Corporation of the Township of Vespra*, [1981] 2 S.C.R. 145; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Ringrose v. College of Physicians and Surgeons (Alberta)*, [1977] 1 S.C.R. 814; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Preston v. British Columbia* (1994), 92 B.C.L.R. (2d) 298; *Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129; *Attorney-General for Ontario v. Attorney-General for Canada*, [1947] A.C. 127; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *R. v. Silveira*, [1995] 2 S.C.R. 297; *M. v. H.*, [1999] 2 S.C.R. 3.

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Canadian Charter of Rights and Freedoms, ss. 7, 11(*d*).
Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 23.
Constitution Act, 1867, preamble.
Evidence Act, R.S.B.C. 1996, c. 124, s. 10(3).
Liquor Control and Licensing Act, R.S.B.C. 1979, c. 237 [now R.S.B.C. 1996, c. 267], ss. 2, 3, 20, 30, 37, 38(1)(a) [am. 1986, c. 5, s. 11], 45(2) [am. 1988, c. 43, s. 21], 48.
Liquor Control and Licensing Regulations, B.C. Reg. 608/76, s. 11(3).

APPEAL from a judgment of the British Columbia Court of Appeal (1999), 68 B.C.L.R. (3d) 82, 174 D.L.R. (4th) 498, 15 Admin. L.R. (3d) 13, 125 B.C.A.C. 82, 204 W.A.C. 82, [1999] B.C.J. No. 1112 (QL), 1999 BCCA 317, allowing the respondent's appeal from a decision of the Liquor Appeal Board upholding a two-day suspension of the respondent's liquor licence. Appeal allowed.

George H. Copley, *Q.C.*, and *Neena Sharma*, for the appellant.

Howard Rubin and *Peter L. Rubin*, for the respondent.

Donald J. Rennie and *Anne M. Turley*, for the intervener the Attorney General of Canada.

[1975] 2 R.C.S. 767; *Katz c. Vancouver Stock Exchange*, [1996] 3 R.C.S. 405; *Innisfil (Municipalité du canton d') c. Municipalité du canton de Vespra*, [1981] 2 R.C.S. 145; *Brosseau c. Alberta Securities Commission*, [1989] 1 R.C.S. 301; *Ringrose c. College of Physicians and Surgeons (Alberta)*, [1977] 1 R.C.S. 814; *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3; *Beauregard c. Canada*, [1986] 2 R.C.S. 56; *Preston c. British Columbia* (1994), 92 B.C.L.R. (2d) 298; *Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129; *Attorney-General for Ontario c. Attorney-General for Canada*, [1947] A.C. 127; *Newfoundland Telephone Co. c. Terre-Neuve (Board of Commissioners of Public Utilities)*, [1992] 1 R.C.S. 623; *R. c. Silveira*, [1995] 2 R.C.S. 297; *M. c. H.*, [1999] 2 R.C.S. 3.

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Charte des droits et libertés de la personne, L.R.Q., ch. C-12, art. 23.
Evidence Act, R.S.B.C. 1996, ch. 124, art. 10(3).
Liquor Control and Licensing Act, R.S.B.C. 1979, ch. 237 [maintenant R.S.B.C. 1996, ch. 267], art. 2, 3, 20, 30, 37, 38(1)a) [mod. 1986, ch. 5, art. 11], 45(2) [mod. 1988, ch. 43, art. 21], 48.
Liquor Control and Licensing Regulations, B.C. Reg. 608/76, art. 11(3).
Loi constitutionnelle de 1867, préambule.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1999), 68 B.C.L.R. (3d) 82, 174 D.L.R. (4th) 498, 15 Admin. L.R. (3d) 13, 125 B.C.A.C. 82, 204 W.A.C. 82, [1999] B.C.J. No. 1112 (QL), 1999 BCCA 317, qui a accueilli l'appel de l'intimée contre une décision de la Liquor Appeal Board qui avait confirmé la suspension de deux jours du permis d'alcool de l'intimée. Pourvoi accueilli.

George H. Copley, *c.r.*, et *Neena Sharma*, pour l'appelant.

Howard Rubin et *Peter L. Rubin*, pour l'intimée.

Donald J. Rennie et *Anne M. Turley*, pour l'intervenant le procureur général du Canada.

Dennis W. Brown, Q.C., and *Lucy McSweeney*, for the intervener the Attorney General for Ontario.

Shawn Greenberg and *Rodney G. Garson*, for the intervener the Attorney General of Manitoba.

Timothy Hurlburt and *Sean McDonough*, for the interveners Her Majesty the Queen in right of Alberta and the Minister of Justice and Attorney General for Alberta.

The judgment of the Court was delivered by

THE CHIEF JUSTICE — This appeal raises a critical but largely unexplored issue of administrative law: the degree of independence required of members sitting on administrative tribunals empowered to impose penalties. As the intervening Attorneys General emphasize, this is an issue that implicates the structures of administrative bodies across the nation.

The Court allowed the appeal at the conclusion of the hearing, with reasons to follow. These are the reasons for judgment.

I. The Background

Ocean Port Hotel Ltd. operates a hotel and pub in Squamish, British Columbia. The RCMP investigated a number of incidents in and around the Ocean Port Hotel and reported that the establishment had not been operating in compliance with the *Liquor Control and Licensing Act*, R.S.B.C. 1979, c. 237 (now R.S.B.C. 1996, c. 267) (the "Act"), the Regulations, and the terms of its liquor licence. Mel Tait, a Senior Inspector with the Liquor Control and Licensing Branch, conducted an investigation into these incidents. This investigation culminated in a hearing, pursuant to s. 20 of the Act, before Peter Jones, another Senior Inspector with the Branch.

Dennis W. Brown, c.r., et *Lucy McSweeney*, pour l'intervenant le procureur général de l'Ontario.

Shawn Greenberg et *Rodney G. Garson*, pour l'intervenant le procureur général du Manitoba.

Timothy Hurlburt et *Sean McDonough*, pour les intervenants Sa Majesté la Reine du chef de l'Alberta et le ministre de la Justice et procureur général de l'Alberta.

Version française du jugement de la Cour rendu par

LE JUGE EN CHEF — Le présent pourvoi soulève une question de droit administratif cruciale mais largement inexplorée : le degré d'indépendance requis des membres siégeant à des tribunaux administratifs habilités à prononcer des peines. Comme l'ont souligné les procureurs généraux intervenants, cette question met en cause la structure d'organismes administratifs dans l'ensemble du pays. 1

La Cour a accueilli le pourvoi à la fin de l'audience, avec motifs à suivre. Voici les motifs de ce jugement. 2

I. Le contexte

Ocean Port Hotel Ltd. exploite un hôtel et un pub à Squamish, en Colombie-Britannique. Dans un rapport d'enquête sur plusieurs incidents survenus à l'hôtel Ocean Port ou à proximité, la GRC a conclu que l'établissement n'avait pas été exploité en conformité avec la *Liquor Control and Licensing Act*, R.S.B.C. 1979, ch. 237 (maintenant R.S.B.C. 1996, ch. 267) (la « Loi »), les règlements et les conditions attachées à son permis d'alcool. Mel Tait, inspecteur principal à la Liquor Control and Licensing Branch (la « direction générale »), a mené une enquête sur ces incidents, laquelle a abouti à la tenue, en vertu de l'art. 20 de la Loi, d'une audience présidée par Peter Jones, autre inspecteur principal à la direction générale. 3

4 At this hearing, Senior Inspector Tait presented information to support the following five allegations of non-compliance:

1. May 12, 1996: An intoxicated person was found within Ocean Port contrary to s. 45(2)(a) and (b) of the Act.
2. May 12, 1996: The intoxicated patron attempted to start a fight contrary to s. 38(1)(a) of the Act.
3. October 4, 1996: Ocean Port failed to comply with s. 37 of the Act by permitting minors to enter and remain within the establishment.
4. October 26, 1996: Ocean Port permitted a patron to become intoxicated contrary to s. 45(2)(a) of the Act.
5. October 26, 1996: Two patrons were observed carrying liquor from Ocean Port contrary to s. 11(3) of the *Liquor Control and Licensing Regulations*, B.C. Reg. 608/76.

5 Senior Inspector Jones concluded that the allegations had been substantiated on a balance of probabilities and imposed a two-day suspension of Ocean Port's liquor licence to be served on a prescribed Friday and Saturday. He also ordered that a sign notifying the public of the suspension be posted in a prominent location. He advised Ocean Port of his decision by letter.

6 Ocean Port appealed this decision to the Liquor Appeal Board by way of a hearing *de novo*. At this hearing, the Board heard evidence on the charges from three RCMP officers and two witnesses for Ocean Port. The Board accepted the evidence of the police officers over that of Ocean Port's witnesses where the evidence differed, finding the officers' evidence more credible and consistent. The Board issued written reasons affirming Senior Inspector Jones' decision with regard to the first, second, third and fifth allegations. It held that the actions of the doorman relied on by Ocean Port did not constitute due diligence. It confirmed the two-day, Friday and Saturday suspension as an appropriate penalty. The panel acknowledged that control of the premises had improved since the appointment of a new general manager, but noted

À l'audience, l'inspecteur principal Tait a produit des informations pour étayer les cinq allégations suivantes de non-conformité :

1. 12 mai 1996 : Une personne en état d'ivresse a été trouvée à l'intérieur de l'hôtel Ocean Port, en contravention des al. 45(2)a) et b) de la Loi.
2. 12 mai 1996 : Le client en état d'ivresse a cherché la bagarre, en contravention de l'al. 38(1)a) de la Loi.
3. 4 octobre 1996 : Ocean Port a omis de se conformer à l'art. 37 de la Loi en permettant que des mineurs entrent dans l'établissement et y demeurent.
4. 26 octobre 1996 : Ocean Port a permis qu'un client s'enivre, en contravention de l'al. 45(2)a) de la Loi.
5. 26 octobre 1996 : Deux clients ont été vus emportant de l'alcool de l'hôtel Ocean Port, en contravention du par. 11(3) des *Liquor Control and Licensing Regulations*, B.C. Reg. 608/76.

L'inspecteur principal Jones a conclu que les allégations avaient été prouvées suivant la prépondérance des probabilités. Il a imposé une suspension de deux jours du permis d'alcool de l'intimé, à appliquer un vendredi et un samedi, et a ordonné l'affichage bien en vue d'un avis public de la suspension. Il a avisé Ocean Port de sa décision par lettre.

Ocean Port a interjeté appel de cette décision devant la Liquor Appeal Board (la « commission ») par voie d'appel *de novo*. À l'audience, la commission a entendu le témoignage de trois agents de la GRC et de deux témoins d'Ocean Port. Elle a retenu le témoignage des agents plutôt que celui des témoins d'Ocean Port sur les points où il y avait divergences, estimant qu'il était plus crédible et cohérent. Dans une décision motivée, la commission a confirmé la décision de l'inspecteur principal Jones sur les première, deuxième, troisième et cinquième allégations. Elle a conclu que les mesures qu'Ocean Port disait avoir été prises par le portier ne constituaient pas une preuve de diligence raisonnable. Elle a confirmé la suspension de deux jours, à appliquer un vendredi et un samedi, qu'elle estimait appropriée. La formation a

that two of the infractions occurred after his appointment.

Ocean Port sought and obtained leave to appeal to the British Columbia Court of Appeal under s. 30(9) of the Act. The Chief Justice of British Columbia stayed the licence suspension pending the resolution of this appeal.

Before the Court of Appeal ((1999), 68 B.C.L.R. (3d) 82, 1999 BCCA 317), Ocean Port argued for the first time that the Board lacked sufficient independence to make the ruling and impose the penalty it had, and that as a result the decision must be set aside. It also objected to the order on the grounds that: (1) the Board relied on hearsay, irrelevant evidence and insufficient evidence to support the allegations against Ocean Port, in contravention of the principles of natural justice and its duty of fairness; (2) the Board erred in law in its application of s. 10(3) of the *Evidence Act*, R.S.B.C. 1996, c. 124, and (3) the jurisdiction of the General Manager under the Act was limited to matters of compliance and could not ground a decision on an "offence", a power reserved to the courts.

The Court of Appeal, *per* Huddart J.A., held that appointees to the Board lacked the security of tenure necessary to ensure their independence. Huddart J.A. started her analysis by noting the agreement of the parties that the court must be guided by the relevant principles articulated by Gonthier J. in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919. Although Gonthier J. articulated these principles in relation to s. 23 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, he looked to the common law rules of natural justice and fairness to guide his interpretation of this provision's guarantees of independence and impartiality. Huddart J.A. identified two principles affirmed in *Régie*: (1) governmental decision makers imposing penalties must comply with the requirements of

reconnu que la surveillance des lieux s'était améliorée depuis qu'un nouveau gérant avait été nommé, mais elle a fait observer que deux des infractions étaient postérieures à sa nomination.

7 Ocean Port a demandé et obtenu l'autorisation d'interjeter appel à la Cour d'appel de la Colombie-Britannique en vertu du par. 30(9) de la Loi. Le Juge en chef de la Colombie-Britannique a sursis à la suspension du permis jusqu'à l'issue de l'appel.

8 Devant la Cour d'appel ((1999), 68 B.C.L.R. (3d) 82, 1999 BCCA 317), Ocean Port a, pour la première fois, allégué que la commission n'avait pas l'indépendance suffisante pour rendre la décision et infliger la peine et, qu'en conséquence, la décision devait être annulée. Ocean Port s'est également opposée à l'ordonnance pour les motifs que : (1) pour étayer les allégations faites contre elle, la commission s'est fondée sur du ouï-dire et sur une preuve non pertinente et insuffisante, en contravention des principes de justice naturelle et de son obligation d'équité; (2) la commission a commis une erreur de droit dans son application du par. 10(3) de l'*Evidence Act*, R.S.B.C. 1996, ch. 124, et (3) la compétence du directeur général en vertu de la Loi se limitait aux questions liées à la conformité et ne pouvait pas fonder une décision sur une « infraction », pouvoir qui est réservé aux tribunaux judiciaires.

9 La Cour d'appel, par la voix du juge Huddart, a conclu que les personnes nommées à la commission n'avaient pas l'inamovibilité nécessaire pour assurer leur indépendance. Le juge Huddart a commencé son analyse en soulignant que les parties convenaient que la cour devait se guider sur les principes dégagés par le juge Gonthier dans *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 R.C.S. 919. Bien qu'il ait énoncé ces principes en relation avec l'art. 23 de la *Charte des droits et libertés de la personne* du Québec, L.R.Q., ch. C-12, le juge Gonthier s'est inspiré des règles de justice naturelle et d'équité en common law pour interpréter les garanties d'indépendance et d'impartialité établies dans cette disposition. Le juge Huddart a retenu deux principes exposés dans *Régie* : (1) les décideurs gouverne-

impartiality and independence; and (2) the content of these requirements depends on all of the circumstances, "in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make" (*Régie*, at para. 39).

10 Huddart J.A. concluded that the decision to suspend a licence for violation of the Act closely resembles a judicial decision. It is a penalty with serious, albeit purely economic, consequences. In these circumstances, she concluded, the content of the procedural fairness rules, including the requirement of independence, must approach the standards required of a court at common law.

11 Huddart J.A. summarized Ocean Port's complaint about fairness as involving two key issues: the fusion of the General Manager's prosecutorial and adjudicative roles in the senior inspectors and the reliance at both hearings on hearsay evidence. She noted that, had the alleged infractions been prosecuted as criminal offences under s. 48 of the Act, the procedural safeguards available in the Provincial Court may well have resulted in different findings of fact. Further, the maximum fine of $10 000 for conviction of an offence under s. 48 might be less costly than the two-day suspension imposed by the Board. She also noted that this Court, in *Régie*, held that the overlapping duties of senior inspectors gave rise to a reasonable apprehension of bias. However, she concluded that it was unnecessary to resolve the arguments surrounding the decision of Senior Inspector Jones to suspend the licence, since the General Manager had conceded that this initial decision could stand only if the appeal process was valid.

12 This brought her to the focal point of the appeal: Ocean Port's concerns relating to the independence of the Board. Relying on *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, Huddart J.A. noted that institutional independence consists of three core components: security of tenmentaux prononçant des peines doivent respecter les exigences d'impartialité et d'indépendance; (2) le contenu de ces exigences dépend de l'ensemble des circonstances « et notamment des termes de la loi en vertu de laquelle l'organisme agit, de la nature de la tâche qu'il accomplit et du type de décision qu'il est appelé à rendre » (*Régie*, par. 39).

Le juge Huddart a conclu que la décision de suspendre un permis pour violation de la Loi ressemblait beaucoup à une décision judiciaire. Cette sanction a des conséquences graves, bien que purement financières. Dans les circonstances, a-t-elle conclu, le contenu des règles d'équité procédurale, dont l'exigence d'indépendance, est proche des normes requises des cours de common law.

Pour le juge Huddart, la plainte d'Ocean Port touchant l'équité se ramenait à deux questions centrales : la fusion, dans la personne des inspecteurs principaux, des rôles de juge et de poursuivant du directeur général, et l'admission, aux deux audiences, de la preuve par ouï-dire. Elle a fait remarquer que si les contraventions alléguées avaient été poursuivies à titre d'infractions criminelles en vertu de l'art. 48 de la Loi, les garanties procédurales applicables devant la Cour provinciale auraient bien pu mener à des conclusions de fait différentes. De plus, l'amende maximale de 10 000 $ pour une infraction prévue à l'art. 48 pourrait être moins coûteuse que la suspension de deux jours décrétée par la commission. Elle a également noté que notre Cour, dans *Régie*, a conclu que le cumul des fonctions des inspecteurs principaux créait une crainte raisonnable de partialité. Elle a toutefois conclu qu'il n'était pas nécessaire de traiter de la décision de l'inspecteur principal Jones de suspendre le permis, étant donné que le directeur général avait convenu que cette décision initiale ne pouvait être maintenue que si le processus d'appel était valide.

Ceci menait au cœur de l'appel, soit les préoccupations d'Ocean Port touchant l'indépendance de la commission. Se fondant sur *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3, le juge Huddart a souligné les trois principales composantes de l'indépendance institu-

ure, financial security and administrative control. Only the first component, security of tenure, was at issue in the present case. She found, upon reviewing the Act and the evidence, that the Board functioned through part-time, fixed-term appointments. Members of the Board could be removed at pleasure, but were entitled to payment for the term of their appointment. The essential question was whether such appointments provided sufficient security of tenure.

Reviewing this Court's decision in *Régie*, Huddart J.A. reasoned that "at pleasure" appointments to administrative agencies such as the Quebec Régie des permis d'alcool and the Liquor Appeal Board, which impose sanctions for violations of statutes, cannot satisfy the requirement of security of tenure. She concluded that the part-time, fixed-term appointments to the Board were indistinguishable from full-time appointments "at pleasure", since a member can in effect be removed (or not assigned to hearings) at the will of the government. As a result, the Board lacked the necessary degree of independence, and its decision was set aside. Since the validity of the decision at first instance hinged on a fair hearing before the Board, that decision was set aside as well. In view of this conclusion, Huddart J.A. did not consider Ocean Port's other grounds of appeal.

The Court of Appeal, *per* Ryan J.A., subsequently granted an order staying the execution of the judgment until this Court refused to grant leave to appeal or, alternatively, granted leave and rendered a decision on the appeal: (1999), 128 B.C.A.C. 130. Leave to appeal was granted by this Court ([2000] 1 S.C.R. xii), and the stay remained in force until the appeal was allowed on March 22, 2001.

II. Legislation

The relevant provisions of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267, provide as follows:

tionnelle : l'inamovibilité, la sécurité financière et le contrôle administratif. En l'occurrence, seule la première, l'inamovibilité, était en cause. Après examen de la Loi et de la preuve, elle a constaté que la commission procédait par nominations à temps partiel et à durée déterminée. Les commissaires étaient révocables en tout temps mais avaient droit à leur rémunération pour la durée de leur mandat. La question essentielle était de savoir si ces nominations assuraient une inamovibilité suffisante.

13 Considérant la décision de notre Cour dans *Régie*, le juge Huddart estimait que les nominations à titre amovible à des organismes administratifs tels la Régie des permis d'alcools du Québec et la commission d'appel en l'espèce, qui appliquent des sanctions en cas de violation de la loi, ne peuvent satisfaire à l'exigence d'inamovibilité. Elle a conclu qu'il n'y avait pas de différence entre les nominations à la commission pour des mandats à temps partiel et à durée déterminée, et les nominations à temps plein à titre amovible, étant donné qu'un commissaire peut être démis de ses fonctions (ou ne pas être appelé à siéger) au gré du gouvernement. La commission n'avait donc pas le degré d'indépendance nécessaire, et sa décision a été annulée. Étant donné que la validité de la décision en premier ressort dépendait d'une audition équitable devant la commission, cette décision a également été annulée. Vu cette conclusion, le juge Huddart n'a pas examiné les autres moyens d'appel d'Ocean Port.

14 Dans une ordonnance ultérieure, le juge Ryan de la Cour d'appel a sursis à l'exécution du jugement jusqu'à la décision de notre Cour sur l'autorisation de pourvoi ou, si elle était accordée, sur le pourvoi (1999), 128 B.C.A.C. 130. Notre Cour a accordé l'autorisation ([2000] 1 R.C.S. xii) et le sursis est demeuré en vigueur jusqu'au jugement accueillant le pourvoi, prononcé le 22 mars 2001.

II. La loi

15 Les dispositions applicables de la *Liquor Control and Licensing Act*, R.S.B.C. 1996, ch. 267, sont les suivantes :

2 (1) The Liquor Control and Licensing Branch, as established in the ministry of the minister, is continued.

(2) The branch may grant licences and permits to purchase liquor from the Liquor Distribution Branch for resale and reuse in accordance with this Act and the *Liquor Distribution Act*.

3 (1) The minister, under the *Public Service Act*, must appoint a general manager of the branch and set his or her remuneration.

(2) The general manager must, subject to orders and direction of the minister on matters of general policy,

(a) administer this Act, and

(b) supervise all licensed establishments and manufacturers of liquor.

20 (1) In addition to any other powers the general manager has under this Act, the general manager may, on the general manager's own motion or on receiving a complaint, take action against a licensee for any of the following reasons:

(a) the licensee's failure to comply with a requirement of this Act, the regulations or a term or condition of a licence;

(b) the conviction of the licensee of an offence under the laws of Canada or British Columbia or under the bylaws of a municipality or regional district, if the offence relates to the licensed establishment or the conduct of it;

(c) the persistent failure to keep the licensed establishment in a clean and orderly fashion;

(d) the existence of a circumstance that, under section 16, would prevent the issue of a licence;

(e) the suspension or cancellation of a municipally, regionally, provincially or federally granted licence, permit or certificate that the licensee is required to hold in order to operate the licensed establishment.

(2) If the general manager has the right under subsection (1) to take action against a licensee, the gen-

[TRADUCTION]

2 (1) La Direction générale des permis d'alcool, établie au sein du ministère, est maintenue.

(2) La Direction générale peut délivrer des licences et des permis d'achat d'alcool auprès de la Direction générale de la distribution des boissons alcooliques, pour revente et usage en conformité avec la présente loi et la *Liquor Distribution Act*.

3 (1) Conformément à la *Public Service Act*, le ministre nomme le directeur général et fixe sa rémunération.

(2) Sous réserve des décrets et des directives du ministre touchant des questions d'intérêt général, le directeur général doit

a) appliquer la présente loi;

b) surveiller tous les établissements et les fabricants d'alcool titulaires d'un permis.

20 (1) En plus des autres pouvoirs qui lui sont conférés par la présente loi, le directeur général peut, de sa propre initiative ou à la suite d'une plainte, prendre des mesures contre un titulaire de permis pour l'un ou l'autre des motifs suivants :

a) le titulaire du permis contrevient à une exigence de la présente loi, des règlements et d'une condition attachée à son permis;

b) le titulaire du permis est déclaré coupable d'une infraction aux lois du Canada ou de la Colombie-Britannique ou aux règlements d'une municipalité et d'un district régional, si l'infraction se rapporte à l'établissement ou à sa gestion;

c) le titulaire du permis omet, de façon répétée, de garder son établissement en bon état de propreté et d'y maintenir l'ordre;

d) une circonstance prévue à l'article 16, empêche la délivrance d'un permis;

e) une licence, un permis ou un certificat, délivré par une autorité municipale, régionale, provinciale ou fédérale et requis pour exploiter l'établissement, a été suspendu ou révoqué.

(2) Dans le cas où le directeur général peut, en vertu du paragraphe (1), prendre une mesure contre le

eral manager may do any one or more of the following, with or without a hearing:

(a) issue a warning to the licensee;

(b) impose terms and conditions on the licensee's licence or rescind or amend existing terms and conditions on the licence;

(c) impose a fine on the licensee within the limits prescribed;

(d) suspend or cancel the licensee's licence, in whole or in part.

(3) Despite subsection (2)(d), the general manager must suspend or cancel a licence held by a person who

(a) has been convicted of an offence against prescribed laws of Canada or British Columbia, or

(b) has been convicted of an offence against this Act, if the person committed the offence within 3 years after being convicted of a previous offence against this Act.

30 (1) The Liquor Appeal Board is continued consisting of a chair and other members the Lieutenant Governor in Council may appoint.

(2) The chair and the members of the appeal board

(a) serve at the pleasure of the Lieutenant Governor in Council, and

(b) are entitled to

(i) receive the remuneration set by the Lieutenant Governor in Council, and

(ii) be paid reasonable expenses incurred in carrying out their duties as members of the appeal board.

(3) The chair of the appeal board may designate one member as vice chair.

(4) Subject to section 31(6) and (8), the appeal board must hear and determine any matter appealed under section 31.

(5) The chair of the appeal board may establish one or more panels of the appeal board, each consisting of one or 3 members of the appeal board, as

titulaire de permis, il peut, après avoir tenu ou non une audience, appliquer l'une ou plusieurs des sanctions suivantes à l'encontre du titulaire du permis :

a) émettre un avertissement;

b) assujettir son permis à des conditions ou révoquer ou modifier les conditions existantes du permis;

c) lui infliger une amende, dans les limites permises;

d) suspendre ou révoquer, totalement ou partiellement, son permis.

(3) Nonobstant l'alinéa (2)d), le directeur général doit suspendre ou révoquer le permis du titulaire qui a été déclaré coupable

a) d'une infraction aux lois mentionnées du Canada ou de la Colombie-Britannique,

b) d'une infraction à la présente loi, si la personne a commis cette infraction dans les trois années suivant sa déclaration de culpabilité pour une infraction à la présente loi.

30 (1) Est maintenue la Commission d'appel des permis d'alcool, composée d'un président et des commissaires que peut nommer le lieutenant-gouverneur en conseil.

(2) Le président et les commissaires

a) sont révocables à tout moment au gré du lieutenant-gouverneur en conseil et

b) ont droit

(i) de recevoir la rémunération que fixe le lieutenant-gouverneur en conseil,

(ii) d'être remboursés des dépenses raisonnables qu'ils engagent dans l'exécution de leurs fonctions de commissaires.

(3) Le président peut désigner un vice-président.

(4) Sous réserve des paragraphes 31(6) et (8), la commission d'appel connaît de toute question faisant l'objet d'un appel en vertu de l'article 31.

(5) Le président peut établir une ou plusieurs formations, chacune étant composée de un ou de trois commissaires, selon ce qu'il considère indiqué,

the chair considers advisable, to hear any matter that is before the appeal board, and when a panel is established,

(a) the chair must appoint one of the members of the panel to preside at meetings of the panel, and

(b) the panel has the jurisdiction of the appeal board with respect to matters under this Act that come before the appeal board. . . .

pour connaître de toute affaire soumise à la commission d'appel, et lorsqu'une formation est établie,

a) le président doit désigner un des membres de la formation pour en présider les réunions,

b) la formation a la compétence de la commission d'appel à l'égard de toutes les questions soumises à la commission sous le régime de la présente loi. . .

16 The preamble to the *Constitution Act, 1867* provides, in part:

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom . . . .

Le préambule de la *Loi constitutionnelle de 1867* dispose notamment :

Considérant que les provinces du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick ont exprimé le désir de s'unir en fédération pour former un seul et même dominion sous la Couronne du Royaume-Uni de Grande-Bretagne et d'Irlande, avec une constitution semblable dans son principe à celle du Royaume-Uni. . .

III. Issue

17 The issue is whether members of the Liquor Appeal Board are sufficiently independent to render decisions on violations of the Act and impose the penalties it provides. The other grounds raised by the respondent against the validity of the Senior Inspector's initial decision to impose a penalty are not before the Court.

III. Question en litige

La question est de savoir si les commissaires jouissent d'une indépendance suffisante pour rendre des décisions sur des contraventions à la Loi et prononcer les peines qu'elle prévoit. Notre Cour n'est pas saisie des autres moyens que fait valoir l'intimée contre la décision initiale de l'inspecteur principal d'infliger une peine.

IV. Discussion

18 This appeal concerns the independence of the Liquor Appeal Board. The Court of Appeal concluded that members of the Board lacked the necessary guarantees of independence required of administrative decision makers imposing penalties. More specifically, it held that the tenure enjoyed by Board members — appointed "at the pleasure" of the executive to serve on a part-time basis — was insufficiently secure to preserve the appearance of their independence. As a consequence, it set aside the Board's decision in the present case.

19 The appellant, with the support of the intervening Attorneys General, argues that this reasoning disregards a fundamental principle of law: absent

IV. Analyse

Le présent pourvoi concerne l'indépendance de la commission. La Cour d'appel a conclu que les commissaires n'avaient pas les garanties d'indépendance requises pour des décideurs habilités à prononcer des peines. Plus précisément, la Cour estimait que les commissaires — nommés « au gré » de l'exécutif pour exercer un mandat à temps partiel — n'avaient pas l'inamovibilité requise pour préserver une apparence d'indépendance. Elle a donc annulé la décision de la commission.

L'appelant, avec l'appui des procureurs généraux intervenants, fait valoir que ce raisonnement ne tient pas compte d'un principe de droit fonda-

a constitutional challenge, a statutory regime prevails over common law principles of natural justice. The Act expressly provides for the appointment of Board members at the pleasure of the Lieutenant Governor in Council. The decision of the Court of Appeal, the appellant contends, effectively struck down this validly enacted provision without reference to constitutional principle or authority. In essence, the Court of Appeal elevated a principle of natural justice to constitutional status. In so doing, it committed a clear error of law.

mental : en l'absence de contestation constitutionnelle, le régime prévu par la loi prime sur les principes de justice naturelle de la common law. La Loi prévoit expressément que les commissaires sont nommés à titre amovible par le lieutenant-gouverneur en conseil. Selon l'appelant, la Cour d'appel a invalidé cette disposition validement édictée sans se reporter à un principe ou à une autorité constitutionnels. Essentiellement, la Cour d'appel a érigé un principe de justice naturelle au rang de principe constitutionnel. Ce faisant, elle a commis une erreur de droit manifeste.

This conclusion, in my view, is inescapable. It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended.

20 Cette conclusion est, à mon avis, inéluctable. Il est de jurisprudence constante que, en l'absence de contraintes constitutionnelles, le degré d'indépendance requis d'un décideur ou d'un tribunal administratif est déterminé par sa loi habilitante. C'est la législature ou le Parlement qui détermine le degré d'indépendance requis des membres d'un tribunal administratif. Il faut interpréter la loi dans son ensemble pour déterminer le degré d'indépendance qu'a voulu assurer le législateur.

Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice: *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495, at p. 503; *Law Society of Upper Canada v. French*, [1975] 2 S.C.R. 767, at pp. 783-84. In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision maker, one of the fundamental principles of natural justice: *Matsqui*, *supra* (*per* Lamer C.J. and Sopinka J.); *Régie*, *supra*, at para. 39; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405. Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make": *Régie*, at para. 39.

21 Confrontés à des lois muettes ou ambiguës, les tribunaux judiciaires infèrent généralement que le Parlement ou la législature voulait que les procédures du tribunal administratif soient conformes aux principes de justice naturelle : *Ministre du Revenu national c. Coopers and Lybrand*, [1979] 1 R.C.S. 495, p. 503; *Law Society of Upper Canada c. French*, [1975] 2 R.C.S. 767, p. 783-784. En pareilles circonstances, les tribunaux administratifs peuvent être liés par l'exigence d'un décideur indépendant et impartial, un des principes fondamentaux de la justice naturelle : *Matsqui*, précité (le juge en chef Lamer et le juge Sopinka); *Régie*, précité, par. 39; *Katz c. Vancouver Stock Exchange*, [1996] 3 R.C.S. 405. De fait, les tribunaux hésiteront à présumer que les législateurs avaient l'intention d'édicter des procédures contraires à ce principe, bien que le degré précis d'indépendance requis dépendra « de l'ensemble des circonstances, et notamment des termes de la loi en vertu de laquelle l'organisme agit, de la nature de la tâche qu'il accomplit et du type de décision qu'il est appelé à rendre » : *Régie*, par. 39.

22 However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. See generally: *Innisfil (Corporation of the Township of) v. Corporation of the Township of Vespra*, [1981] 2 S.C.R. 145; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Ringrose v. College of Physicians and Surgeons (Alberta*), [1977] 1 S.C.R. 814; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105. Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.

Toutefois, comme pour tous les principes de justice naturelle, le degré d'indépendance requis des membres du tribunal administratif peut être écarté par les termes exprès de la loi ou par déduction nécessaire. Voir de façon générale : *Innisfil (Municipalité du canton d') c. Municipalité du canton de Vespra*, [1981] 2 R.C.S. 145; *Brosseau c. Alberta Securities Commission*, [1989] 1 R.C.S. 301; *Ringrose c. College of Physicians and Surgeons (Alberta*), [1977] 1 R.C.S. 814; *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105. En dernier ressort, c'est le Parlement ou la législature qui détermine la nature des relations entre le tribunal administratif et l'exécutif. Il n'est pas loisible à un tribunal judiciaire d'appliquer une règle de common law alors qu'il est en présence d'une directive législative claire. Les tribunaux judiciaires siégeant en révision de décisions administratives doivent se reporter à l'intention du législateur pour apprécier le degré d'indépendance requis du tribunal administratif en cause.

23 This principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (the "*Provincial Court Judges Reference*"). Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges — both in fact and perception — by insulating them from external influence, most notably the influence of the executive: *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 69; *Régie*, at para. 61.

Ce principe traduit la distinction fondamentale entre tribunaux administratifs et tribunaux judiciaires. Du fait de leur compétence inhérente, les cours supérieures sont constitutionnellement tenues d'offrir des garanties objectives d'indépendance institutionnelle et individuelle. Le même impératif constitutionnel s'applique aux tribunaux provinciaux : *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3 (« *Renvoi relatif aux juges de la Cour provinciale* »). À l'origine, l'exigence de l'indépendance de la magistrature reposait sur la nécessité de marquer la séparation fondamentale entre les pouvoirs judiciaire et exécutif. Elle protégeait et protège toujours l'impartialité et l'image d'impartialité des juges en les gardant contre toute influence de l'extérieur, plus particulièrement celle de l'exécutif : *Beauregard c. Canada*, [1986] 2 R.C.S. 56, p. 69; *Régie*, par. 61.

24 Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-

Par contre, les tribunaux administratifs ne sont pas constitutionnellement séparés de l'exécutif. Ils sont en fait créés précisément en vue de la mise en œuvre de la politique gouvernementale. Pour remplir cette fonction, ils peuvent être appelés à rendre

judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

des décisions quasi judiciaires. On peut considérer en ce sens qu'ils chevauchent la ligne de partage constitutionnelle entre l'exécutif et le judiciaire. Toutefois, vu que leur fonction première est d'appliquer des politiques, il appartient à bon droit au Parlement et aux législatures de déterminer la composition et l'organisation qui permettront aux tribunaux administratifs de s'acquitter des attributions qui leur sont dévolues. Même si certains tribunaux administratifs peuvent parfois être assujettis aux exigences de la *Charte* relatives à l'indépendance, ce n'est généralement pas le cas. Ainsi le degré d'indépendance exigé d'un tribunal administratif donné est fonction de l'intention du législateur et, en l'absence de contraintes constitutionnelles, il convient de respecter ce choix.

In the present case, the legislature of British Columbia spoke directly to the nature of appointments to the Liquor Appeal Board. Pursuant to s. 30(2)(a) of the Act, the chair and members of the Board "serve at the pleasure of the Lieutenant Governor in Council". In practice, members are appointed for a one-year term (pursuant to an Order-in-Council), and serve on a part-time basis. All members but the chair are paid on a *per diem* basis. The chair establishes panels of one or three members to hear matters before the Board "as the chair considers advisable": s. 30(5).

25 En l'espèce, la législature de la Colombie-Britannique a traité explicitement de la nature des nominations à la commission. En vertu de l'al. 30(2)a) de la Loi, le président et les commissaires « sont révocables à tout moment au gré du lieutenant-gouverneur en conseil ». En pratique, les commissaires sont nommés pour un an (par décret), et ils exercent leur charge à temps partiel. Tous les commissaires sauf le président touchent une rétribution quotidienne. Le président établit des formations d'un ou trois commissaires qui entendent les affaires soumises à la commission, « selon ce qu'il considère indiqué » : par. 30(5).

The Court of Appeal, *per* Huddart J.A. concluded that this appointment scheme effectively deprived Board members of security of tenure, an essential safeguard of their independence. Relying on *Preston v. British Columbia* (1994), 92 B.C.L.R. (2d) 298, she held that Board members could be removed at pleasure, although they would be entitled to payment for the fixed term of their appointment. In her view, however, the additional protection offered by the fixed term of employment was illusory. Since the chair has an absolute discretion over the composition of hearing panels, it is possible that members might not be assigned to any cases, thus depriving them of work and remuneration. Thus part-time, fixed term appointments to the Board are indistinguishable from appointments "at pleasure". Both raise a reasona-

26 Au nom de la Cour d'appel, le juge Huddart a conclu que ce mode de nomination privait en fait les commissaires de l'inamovibilité, élément essentiel de la garantie d'indépendance. S'appuyant sur *Preston c. British Columbia* (1994), 92 B.C.L.R. (2d) 298, elle a jugé que, même s'ils avaient le droit d'être rétribués pour toute la durée de leur mandat les commissaires étaient révocables à tout moment. À son avis, la protection supplémentaire offerte par la durée fixe de leur mandat était illusoire. Comme le président a le pouvoir discrétionnaire de choisir les formations d'appel, il est possible que des commissaires ne soient choisis pour aucune et soient donc privés de travail et de rémunération. En conséquence, la nomination pour une durée déterminée, à temps partiel, ne se distingue pas d'une nomination à titre amovible. L'une

ble apprehension that Board members may be unduly influenced by the threat of removal should they render unsatisfactory decisions in the eyes of the executive.

27 In my view, the legislature's intention that Board members should serve at pleasure, as expressed through s. 30(2)(a) of the Act, is unequivocal. As such, it does not permit the argument that the statute is ambiguous and hence should be read as imposing a higher degree of independence to meet the requirements of natural justice, if indeed a higher standard is required. It is easy to imagine more exacting safeguards of independence — longer, fixed-term appointments; full-time appointments; a panel selection process for appointing members to panels instead of the Chair's discretion. However, in each case one must face the question: "Is this what the legislature intended?" Given the legislature's willingness to countenance "at pleasure" appointments with full knowledge of the processes and penalties involved, it is impossible to answer this question in the affirmative. Huddart J.A. concluded that the tenure enjoyed by Board members was "no better than an appointment at pleasure" (para. 27). However, this is precisely the standard of independence required by the Act. Where the intention of the legislature, as here, is unequivocal, there is no room to import common law doctrines of independence, "however inviting it may be for a Court to do so": *Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129 (C.A.), at p. 137.

28 Part of the problem in this case may be attributable to the Board's apparent concession before the Court of Appeal (at para. 9) that "the court must be guided in its consideration of this appeal by the discussion of the applicable principles" in *Régie*. The Court of Appeal, on this basis, appears to have treated the standards of independence articulated in *Régie* as binding. This overlooks the fact that the requirements of independence in *Régie* emanated from the Quebec *Charter of Human Rights and Freedoms*, a quasi-constitutional statute. Section 23 of the Quebec *Charter* entrenches the right

et l'autre font naître une crainte raisonnable que les commissaires puissent être indûment influencés par la menace de révocation au cas où ils rendraient des décisions que le pouvoir exécutif juge insatisfaisantes.

À mon avis, le législateur a exprimé sans équivoque à l'al. 30(2)a) de la Loi l'intention que les commissaires soient nommés à titre amovible. On ne peut donc pas soutenir que la loi est ambiguë et qu'il faut par conséquent l'interpréter comme imposant un degré d'indépendance plus élevé afin de satisfaire aux exigences de la justice naturelle, si tant est qu'une norme plus élevée s'impose. On peut facilement imaginer des garanties d'indépendance plus rigoureuses : nominations à durée déterminée de plus longue durée; nominations à temps plein; processus de sélection des commissaires pour les auditions autre que selon le gré du président. Toutefois, la même question se pose toujours : « Est-ce là l'intention du législateur? ». Étant donné que le législateur a permis les nominations à titre amovible en pleine connaissance des processus et des pénalités en cause, il est impossible de répondre par l'affirmative. Le juge Huddart conclut que la nomination des commissaires [TRADUCTION] « ne vaut pas plus qu'une nomination à titre amovible » (par. 27). C'est pourtant précisément la norme d'indépendance que fixe la Loi. Lorsque, comme en l'espèce, l'intention du législateur est sans équivoque, il n'y a pas lieu d'importer les théories de common law en matière d'indépendance [TRADUCTION] « si tentant cela soit-il pour la cour » : *Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129 (C.A.), p. 137.

Le problème en l'espèce est en partie attribuable au fait que la commission a apparemment admis devant la Cour d'appel (au par. 9) que [TRADUCTION] « la cour doit, dans le présent appel, se guider sur l'examen des principes applicables » que fait l'arrêt *Régie*. Sur ce point, la Cour d'appel semble s'être estimée liée par les normes d'indépendance exposées dans *Régie*, sans tenir compte du fait que les exigences d'indépendance dans *Régie* résultaient de la *Charte des droits et libertés de la personne* du Québec, une loi à caractère quasi constitutionnel. L'article 23 de la *Charte*

to a "full and equal, public and fair hearing by an independent and impartial tribunal" (emphasis added). No equivalent guarantee of independence constrains the legislature of British Columbia. The Court of Appeal consequently erred in treating the standard articulated in *Régie* — rather than the will of the legislature — as determinative of the degree of independence required of Board members.

Nor is a constitutional guarantee of independence implicated in the present case. The respondent does not argue that the proceedings before the Board engage a right to an independent tribunal under ss. 7 or 11(*d*) of the *Canadian Charter of Rights and Freedoms*. Instead, it contends that the preamble to the *Constitution Act, 1867* mandates a minimum degree of independence for at least some administrative tribunals. In support, the respondent invokes Lamer C.J.'s discussion of judicial independence in the *Provincial Court Judges Reference*. In that case, Lamer C.J., writing for the majority, concluded that "judicial independence is at root an unwritten constitutional principle . . . recognized and affirmed by the preamble to the *Constitution Act, 1867*" (para. 83 (emphasis in original)). The respondent argues that the same principle binds administrative tribunals exercising adjudicative functions.

With respect, I find no support for this proposition in the *Provincial Court Judges Reference*. The language and reasoning of the decision are confined to the superior and provincial courts. Lamer C.J. addressed the issue of judicial independence; that is, the independence of the courts of law comprising the judicial branch of government. Nowhere in his reasons does he extend his comments to tribunals other than courts of law.

Nor does the rationale for locating a constitutional guarantee of independence in the preamble to the *Constitution Act, 1867* extend, as a matter of principle, to administrative tribunals. Lamer C.J.'s reasoning rests on the preamble's reference to a constitutional system "similar in Principle to that

québécoise consacre le droit de toute personne, « en pleine égalité, à une audition publique et impartiale de sa cause par un tribunal indépendant et qui ne soit pas préjugé » (je souligne). Aucune garantie d'indépendance équivalente ne limite l'action de la législature de la Colombie-Britannique. La Cour d'appel a donc jugé à tort que la norme énoncée dans *Régie* — plutôt que la volonté du législateur — déterminait le degré d'indépendance exigé dans le cas des commissaires.

29 Le présent pourvoi ne fait pas jouer non plus quelque garantie constitutionnelle d'indépendance. L'intimée ne soutient pas que l'instance devant la commission fait intervenir le droit à un tribunal indépendant garanti par l'art. 7 ou l'al. 11*d*) de la *Charte canadienne des droits et libertés*. Elle prétend plutôt que le préambule de la *Loi constitutionnelle de 1867* exige un degré minimum d'indépendance pour au moins certains tribunaux administratifs. Elle invoque au soutien de sa thèse l'examen que faisait le juge en chef Lamer, au nom de la majorité, de l'indépendance de la magistrature dans le *Renvoi relatif aux juges de la Cour provinciale* : « l'indépendance de la magistrature est à l'origine un principe constitutionnel non écrit, [. . .] [dont l'existence] est reconnue et confirmée par le préambule de la *Loi constitutionnelle de 1867* » (par. 83 (souligné dans l'original)). L'intimée affirme que le même principe lie les tribunaux administratifs exerçant des fonctions décisionnelles.

30 Je ne vois malheureusement pas en quoi le *Renvoi relatif aux juges de la Cour provinciale* permet d'affirmer cela. Les termes et le raisonnement de cette décision ne concernent que les cours supérieures et provinciales. Le juge en chef Lamer y étudie la question de l'indépendance de la magistrature, c'est-à-dire des cours de justice formant le pouvoir judiciaire. Ses motifs ne traitent aucunement des tribunaux autres que judiciaires.

31 La raison de fonder la garantie constitutionnelle d'indépendance sur le préambule de la *Loi constitutionnelle de 1867* ne s'applique pas, en principe, aux tribunaux administratifs. Le raisonnement du juge en chef Lamer repose sur la référence dans le préambule à une constitution « semblable dans son

of the United Kingdom". Applied to the modern Canadian context, this guarantee extends to provincial courts (at para. 106):

> The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the *Act of Settlement* of 1701. As we said in *Valente*, *supra*, at p. 693, that Act was the "historical inspiration" for the judicature provisions of the *Constitution Act, 1867*. Admittedly, the Act only extends protection to judges of the English superior courts. However . . . judicial independence [has] grown into a principle that now extends to all courts, not just the superior courts of this country.

These comments circumscribe the requirement of independence, as a constitutional imperative emanating from the preamble, to the provincial and superior courts.

32 Lamer C.J. also supported his conclusion with reference to the traditional division between the executive, the legislature and the judiciary. The preservation of this tripartite constitutional structure, he argued, requires a constitutional guarantee of an independent judiciary. The classical division between court and state does not, however, compel the same conclusion in relation to the independence of administrative tribunals. As discussed, such tribunals span the constitutional divide between the judiciary and the executive. While they may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts.

33 The Constitution is an organic instrument, and must be interpreted flexibly to reflect changing circumstances: *Attorney-General for Ontario v. Attorney-General for Canada*, [1947] A.C. 127 (P.C.). Indeed, in the *Provincial Court Judges Reference*, Lamer C.J. relied on this principle to extend the tradition of independent superior courts (derived from the constitution of the United Kingdom) to all courts, stating that "our Constitu-

principe à celle du Royaume-Uni ». Dans le contexte de la société canadienne d'aujourd'hui, cette garantie s'étend aux cours provinciales (au par. 106) :

> Les origines historiques de la protection de l'indépendance de la magistrature au Royaume-Uni et, partant, dans la Constitution du Canada, remontent à l'*Act of Settlement* de 1701. Comme nous l'avons dit dans *Valente*, précité, à la p. 693, c'est de cette loi que «s'inspirent historiquement» les dispositions relatives à la magistrature de la *Loi constitutionnelle de 1867*. Il faut reconnaître que la loi britannique ne protège que les juges des cours supérieures anglaises. Toutefois, [. . .] l'indépendance de la magistrature est devenue un principe qui vise maintenant tous les tribunaux, et non seulement les cours supérieures du pays.

Ces remarques limitent l'exigence d'indépendance, en tant qu'impératif constitutionnel résultant du préambule, aux cours provinciales et supérieures.

Le juge en chef Lamer appuie aussi sa conclusion sur la séparation classique des pouvoirs exécutif, législatif et judiciaire. La préservation de cette structure constitutionnelle tripartite, affirme-t-il, commande une garantie constitutionnelle de l'indépendance de la magistrature. La séparation classique entre le judiciaire et l'exécutif ne mène cependant pas à la même conclusion pour les tribunaux administratifs. Nous avons vu que ces tribunaux chevauchent la ligne de démarcation entre le judiciaire et l'exécutif. Quoiqu'ils exercent une fonction décisionnelle, ils fonctionnent en fin de compte dans le cadre du pouvoir exécutif de l'État, conformément au mandat confié par la législature. Ce ne sont pas des tribunaux judiciaires et ils ne remplissent pas la même fonction constitutionnelle que ceux-ci.

La Constitution est un instrument organique et elle doit être interprétée avec souplesse afin de tenir compte des changements de circonstances : *Attorney-General for Ontario c. Attorney-General for Canada*, [1947] A.C. 127 (C.P.). En fait, dans le *Renvoi relatif aux juges de la Cour provinciale*, le juge en chef Lamer se fonde sur ce principe pour étendre la tradition des cours supérieures indépendantes (dérivée de la constitution du Royaume-

tion has evolved over time" (para. 106). However, I can find no basis upon which to extend the constitutional guarantee of judicial independence that animated the *Provincial Court Judges Reference* to the Liquor Appeal Board. The Board is not a court, nor does it approach the constitutional role of the courts. It is first and foremost a licensing body. The suspension complained of was an incident of the Board's licensing function. Licences are granted on condition of compliance with the Act, and can be suspended for non-compliance. The exercise of power here at issue falls squarely within the executive power of the provincial government.

Uni) à tous les tribunaux judiciaires, disant que « notre Constitution a évolué avec le temps » (par. 106). Toutefois, je ne vois rien dans ce qui sous-tend le *Renvoi relatif aux juges de la Cour provinciale* qui nous autorise à étendre à la commission la garantie constitutionnelle de l'indépendance de la magistrature. La commission n'est pas un tribunal judiciaire, et elle est loin de posséder les attributs constitutionnels des tribunaux judiciaires. Sa fonction première est l'octroi de permis. La suspension qui a fait l'objet de la plainte se rattachait à l'exercice de cette fonction. Les permis sont accordés sous réserve du respect de la Loi et peuvent être suspendus en cas d'inobservation. L'exercice du pouvoir en cause procède carrément du pouvoir exécutif du gouvernement provincial.

The respondent argues in the alternative that the Court of Appeal correctly found a reasonable apprehension of bias arising from the initial hearing before Senior Inspector Jones. The real issue before the Court of Appeal, in its view, was whether the appeal proceedings were sufficiently fair to "cure" this defect in the initial hearing. In order to "cure" the apprehension of bias arising from the initial stage, it contends, the Board must be sufficiently independent to provide a fair hearing. In the respondent's submission, a fair hearing can only occur if it comports with the principles of natural justice, even if the tribunal's enabling statute contemplates less stringent guarantees of independence.

34 L'intimée soutient subsidiairement que la Cour d'appel a conclu à bon droit à l'existence d'une crainte raisonnable de partialité quant à l'audience initiale tenue par l'inspecteur principal Jones. Selon elle, la véritable question soumise à la Cour d'appel était de savoir si la procédure d'appel était suffisamment équitable pour « remédier » à ce vice de la procédure initiale. Pour « remédier » à la crainte de partialité suscitée par cette première procédure, à ce qu'elle affirme, la commission doit être suffisamment indépendante pour assurer une audition équitable. Selon l'intimée, une audition équitable n'est possible que si les principes de justice naturelle sont respectés, même si la loi constitutive du tribunal administratif prévoit des garanties d'indépendance moins strictes.

The complaint against the initial hearing before Senior Inspector Jones was framed as follows by the Court of Appeal (at para. 15):

> The appellant [Ocean Port Hotel Ltd.] sees in the delegation of some of the functions of the general manager to senior inspectors a breach of the principle of natural justice requiring impartiality of the decision maker. The overlap in their functions as investigator, prosecutor, and decision maker, offends the rule that no one should be the judge in his own cause.

35 La plainte déposée à l'égard de la procédure initiale devant l'inspecteur principal Jones a été formulée en ces termes par la Cour d'appel (au para. 15) :

> [TRADUCTION] L'appelante [Ocean Port Hotel Ltd.] estime que la délégation de certaines fonctions du directeur général aux inspecteurs principaux constitue un manquement au principe de justice naturelle qui exige l'impartialité du décideur. Le cumul de leurs fonctions d'enquêteur, de poursuivant et de décideur viole la règle qui interdit d'être à la fois juge et partie.

The respondent contends that the last sentence of this paragraph amounts to a finding of bias by the Court of Appeal. Read in context, however,

36 L'intimée prétend que, par la dernière phrase de ce paragraphe, la Cour d'appel a conclu à la partialité. Or, il ressort du contexte que celle-ci ne con-

this statement was not a finding of bias, but merely a summary of the respondent's argument. In fact, the Court of Appeal declined to decide this issue. Huddart J.A. stated (at para. 18):

> Because the respondent [the General Manager, Liquor Control and Licensing Branch] conceded the decision at first instance could only be upheld if the appeal process was valid, I do not find it necessary to analyse the arguments surrounding the initial decision to suspend. This brings me to the focal point of this appeal, namely the institutional independence of the Liquor Appeal Board. [Emphasis added.]

37 Upon determining that the Board lacked the necessary guarantees of independence, Huddart J.A. concluded as follows (at para. 38):

> The consequence of the absence of independence in the Board is that its decision must be set aside. Because the validity of the decision of Senior Inspector Jones was dependent on a fair hearing review before the Board, that decision too must be set aside. Having reached this conclusion, I need not consider whether the hearings before the Senior Inspector and the Board were unfair because of the lack of evidence to support their findings of fact or their inappropriate reliance on hearsay evidence. Nor need I consider the two discrete issues on which leave was also granted.

38 The Court of Appeal clearly declined to address any of the issues before it except the issue of the Board's independence. Although it set aside the decision of the Senior Inspector, it did so on the strength of a concession attributed to the appellant, rather than a determination that the initial hearing in fact contravened the rule against bias. This concession, as framed by Huddart J.A., was to the effect that "the decision at first instance could only be upheld if the appeal process was valid" (para. 18). It was on this basis, rather than an analysis of the applicable facts and law, that the initial decision was set aside.

39 The appellant does not make the same concession before this Court. Instead, he contends that no reasonable apprehension of bias arose from the initial hearing. Even assuming the initial hearing

cluait pas à la partialité, mais résumait simplement l'argument de l'intimée. En fait, la Cour d'appel s'est abstenue de trancher la question. Le juge Huddart dit ceci (au para. 18) :

> [TRADUCTION] Comme l'intimé [directeur général de la commission] a reconnu que la décision initiale ne pouvait être confirmée que si le processus d'appel était valide, je n'estime pas nécessaire d'analyser les arguments touchant la décision initiale de suspendre. Ce qui m'amène au cœur de l'appel, savoir l'indépendance institutionnelle de la commission d'appel. [Je souligne.]

Ayant déterminé que la commission ne jouissait pas de garanties suffisantes d'indépendance, le juge Huddart conclut en ces termes (au para. 38) :

> [TRADUCTION] La conséquence de l'absence d'indépendance de la commission est que sa décision doit être annulée. Étant donné que la validité de la décision de l'inspecteur principal Jones dépendait d'une révision équitable devant la commission, cette décision doit également être annulée. Ayant ainsi conclu, je n'ai pas à considérer si les auditions qu'ont tenues l'inspecteur principal et la commission étaient inéquitables en raison de l'insuffisance de la preuve étayant leurs conclusions de fait ou de l'inadmissibilité de la preuve par ouï-dire. Je n'ai pas davantage à considérer les deux questions distinctes pour lesquelles l'autorisation d'appel a aussi été accordée.

La Cour d'appel a clairement refusé d'examiner les questions autres que celle de l'indépendance de la commission. Bien qu'elle ait annulé la décision de l'inspecteur principal, elle l'a fait sur la foi d'une admission attribuée à l'appelant, et non parce qu'elle a conclu que l'audition initiale avait dans les faits contrevenu à la règle de l'impartialité. Cette admission, selon la description du juge Huddart, consistait à reconnaître que [TRADUCTION] « la décision initiale ne pouvait être confirmée que si le processus d'appel était valide » (para. 18). C'est sur ce fondement, plutôt que sur une analyse des faits et du droit applicables, que la décision initiale a été annulée.

L'appelant ne fait pas la même admission devant notre Cour. Il soutient au contraire que l'audition initiale n'a donné naissance à aucune crainte raisonnable de partialité. Selon lui, à sup-

might otherwise have offended the rule against bias, he argues, the overlapping of duties performed by senior inspectors was authorized by statute, and consequently cannot be attacked on this basis. Finally, he contends that a finding of bias in the initial hearing would not be fatal in any event, since it was cured by the subsequent *de novo* hearing before the Board.

poser même que l'audition initiale ait pu par ailleurs contrevenir à la règle de l'impartialité, le cumul des fonctions des inspecteurs principaux est autorisé par la loi, et ne peut donc pas être contesté sur cette base. Enfin, soutient-il, conclure qu'il y a eu partialité lors de l'audition initiale ne serait en aucun cas fatal, étant donné que l'audience ultérieure *de novo* devant la commission a remédié à ce vice.

In my view, there is considerable merit to the appellant's submissions. The mere fact that senior inspectors functioned both as investigators and as decision makers does not automatically establish a reasonable apprehension of bias. The respondent relies on *Régie*, where the Court held that an apprehension of bias arose from the plurality of functions performed by the Régie's lawyers and directors. *Régie*, however, is clearly distinguishable from the case at bar. The apprehension of bias in *Régie* resulted from the possibility of a single officer participating at each stage of the process, from the investigation of a complaint through to the decision ultimately rendered. The central concern in *Régie*, succinctly stated by Gonthier J., was that "prosecuting counsel must in no circumstances be in a position to participate in the adjudication process" (para. 56; see also paras. 54 and 60).

40 À mon avis, les arguments de l'appelant ont beaucoup de force. Le simple fait que les inspecteurs principaux aient exercé des fonctions d'enquêteurs et de décideurs n'établit pas automatiquement une crainte raisonnable de partialité. L'intimée invoque l'arrêt *Régie*, dans lequel la Cour a décidé que le cumul de fonctions des avocats et des régisseurs soulevait une crainte raisonnable de partialité. Toutefois, une distinction peut de toute évidence être faite entre l'arrêt *Régie* et la présente espèce. La crainte de partialité dans l'affaire *Régie* résultait de la possibilité qu'un seul et même fonctionnaire participe à chaque étape du processus, de l'enquête sur une plainte à la prise de la décision. La préoccupation centrale dans cette affaire, énoncée succinctement par le juge Gonthier, était que « l'avocat poursuivant ne doit sous aucune condition être en mesure de participer au processus d'adjudication » (par. 56; voir aussi les par. 54 et 60).

The respondent makes no similar allegations in the present case. Its concern hinges solely on the fact that the Branch's hearing officers were employed by the same authority as its prosecuting officers. However, as Gonthier J. cautioned in *Régie*, "a plurality of functions in a single administrative agency is not necessarily problematic" (para. 47). The overlapping of investigative, prosecutorial and adjudicative functions in a single agency is frequently necessary for a tribunal to effectively perform its intended role: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623. Without deciding the issue, I would note that such flexibility may be appropriate

41 Les allégations de l'intimée en l'espèce sont tout autres. Elle s'inquiète seulement de ce que, à la direction générale, les fonctionnaires chargés des auditions étaient employés par le même organisme comme poursuivants. Toutefois, le juge Gonthier précise bien dans *Régie* que « le cumul de plusieurs fonctions au sein d'un même organisme administratif ne pose pas nécessairement problème » (par. 47). Le cumul de fonctions d'enquête, de poursuite et de décision au sein d'un organisme est souvent nécessaire pour permettre à un tribunal administratif de remplir efficacement son rôle : *Newfoundland Telephone Co. c. Terre-Neuve (Board of Commissioners of Public Utilities)*, [1992] 1 R.C.S. 623. Sans trancher la question, je ferais observer qu'une telle flexibilité peut être appropriée dans le cas d'un système d'octroi

in a licensing scheme involving purely economic interests.

42 Further, absent constitutional constraints, it is always open to the legislature to authorize an overlapping of functions that would otherwise contravene the rule against bias. Gonthier J. alluded to this possibility in *Régie*, at para. 47, quoting from the opinion of L'Heureux-Dubé J. in *Brosseau*, *supra*, at pp. 309-10:

> As with most principles, there are exceptions. One exception to the "*nemo judex*" principle is where the overlap of functions which occurs has been authorized by statute, assuming the constitutionality of the statute is not in issue.
>
> . . .
>
> In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. . . . If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" *per se*.

43 Thus, even assuming the plurality of functions performed by senior inspectors would otherwise offend the rule against bias, it may well be that this structure was authorized by the Act at the relevant time.

44 Given the apparent merit of the appellant's submissions, I am reluctant to find the initial decision invalid solely on the basis of a concession that is now denied by the appellant, or at least recanted. This Court, of course, is not bound by concessions on questions of law: *R. v. Silveira*, [1995] 2 S.C.R. 297; *M. v. H.*, [1999] 2 S.C.R. 3. However, in the circumstances, I have concluded that it is best to refrain from embarking on an extensive inquiry into the validity of the initial decision, especially in the absence of a considered decision on this issue in the court below. This Court's conclusion affirming the independence of the Board makes it necessary to remit the case to the Court of Appeal for consideration of the issues it expressly refrained from addressing. Many of these issues

de permis mettant en cause des intérêts purement économiques.

En outre, en l'absence de contrainte constitutionnelle, il est toujours loisible au législateur d'autoriser un cumul de fonctions qui contrevient par ailleurs à la règle de l'impartialité. Le juge Gonthier fait allusion à cette possibilité dans l'arrêt *Régie*, au par. 47, en citant les motifs du juge L'Heureux-Dubé dans *Brosseau*, précité, p. 309-310 :

> Comme la plupart des principes, celui-ci a ses exceptions. Il y a exception au principe «*nemo judex*» lorsque le chevauchement de fonctions est autorisé par la loi, dans l'hypothèse où la constitutionnalité de la loi n'est pas attaquée.
>
> . . .
>
> Dans certains cas, [le législateur] estimera souhaitable, pour atteindre les objectifs de la loi, de permettre un chevauchement de fonctions qui, dans des procédures judiciaires normales, seraient séparées [. . .] Si la loi autorise un certain degré de chevauchement de fonctions, ce chevauchement, dans la mesure où il est autorisé, n'est généralement pas assujetti *per se* à la doctrine de la «crainte raisonnable de partialité».

Ainsi, à supposer même que le cumul des fonctions des inspecteurs principaux contrevienne par ailleurs à la règle de l'impartialité, il est fort possible que cette structure ait été autorisée par la Loi, à l'époque pertinente.

Vu la valeur apparente des arguments de l'appelant, j'hésite à conclure à l'invalidité de la décision initiale uniquement sur la base d'une admission qu'il nie maintenant, ou du moins qu'il désavoue. À l'évidence, notre Cour n'est pas liée par les admissions de droit : *R. c. Silveira*, [1995] 2 R.C.S. 297; *M. c. H.*, [1999] 2 R.C.S. 3. Dans les circonstances toutefois, j'estime préférable de ne pas entrer dans une analyse approfondie de la validité de la décision initiale, surtout en l'absence de décision étayée sur cette question en Cour d'appel. Vu la conclusion relative à l'indépendance de la commission, il est nécessaire de renvoyer l'affaire à la Cour d'appel pour qu'elle examine les questions qu'elle s'est expressément abstenue d'analyser. Plusieurs de ces questions touchent directement la

directly relate to the validity of the decision at first instance. Since the Court of Appeal will have the benefit of full argument on the nature of the initial hearing and the relevant provisions of the Act, I would also remit for its consideration the issue of whether this hearing gave rise to a reasonable apprehension of bias and, if so, whether this apprehension was cured by the *de novo* proceedings before the Board.

V. Conclusion

The appeal is allowed with costs, the order of the British Columbia Court of Appeal is set aside, and the matter is remitted to the British Columbia Court of Appeal to decide the issues which it did not address.

Appeal allowed with costs.

Solicitor for the appellant: The Ministry of the Attorney General, Vancouver.

Solicitor for the respondent: Howard Rubin, Vancouver.

Solicitor for the intervener the Attorney General of Canada: The Department of Justice, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.

Solicitor for the interveners Her Majesty the Queen in right of Alberta and the Minister of Justice and Attorney General for Alberta: Alberta Justice, Edmonton.

validité de la décision initiale. Comme la Cour d'appel bénéficiera des plaidoiries sur la nature de l'audition initiale et des dispositions applicables de la Loi, je renverrais également à son examen la question de savoir si cette audition créait une crainte raisonnable de partialité et, dans l'affirmative, si les procédures *de novo* devant la commission y ont remédié.

V. Conclusion

Le pourvoi est accueilli avec dépens, l'ordonnance de la Cour d'appel de la Colombie-Britannique est annulée et l'affaire est renvoyée à la Cour d'appel pour qu'elle statue sur les questions qu'elle n'a pas examinées.

Pourvoi accueilli avec dépens.

Procureur de l'appelant : Le ministère du Procureur général, Vancouver.

Procureur de l'intimée : Howard Rubin, Vancouver.

Procureur de l'intervenant le procureur général du Canada : Le ministère de la Justice, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario : Le ministère du Procureur général, Toronto.

Procureur de l'intervenant le procureur général du Manitoba : Le ministère de la Justice, Winnipeg.

Procureur des intervenants Sa Majesté la Reine du chef de l'Alberta et le ministre de la Justice et procureur général de l'Alberta : Alberta Justice, Edmonton.

Georges R. Brosseau *Appellant*

v.

The Alberta Securities Commission *Respondent*

INDEXED AS: BROSSEAU *v.* ALBERTA SECURITIES COMMISSION

File No.: 19832.

1988: March 28; 1989: March 9.

Present: Dickson C.J. and Estey*, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Administrative law — Reasonable apprehension of bias — Commission conducting hearing with respect to trading in securities and/or the possible deprivation of certain statutory exemptions — Chairperson of Commission receiving report in his investigative capacity prior to hearing — Whether or not reasonable apprehension of bias.

Statutes — Interpretation — Retrospective effect — Statute imposing penalty related to a past event — Goal of penalty not to punish person in question but to protect the public — Whether or not statute attracting presumption against retrospective effect — Securities Act, S.A. 1981, c. S-6.1, ss. 28, 165, 166.

Appellant Brosseau, in his capacity as solicitor, prepared the prospectus of a company that later went into bankruptcy. The R.C.M.P. and the Alberta Securities Commission conducted separate investigations into the affairs of the company. The investigation initiated by the Securities Commission found no evidence of any violations of the *Securities Act*. The R.C.M.P. investigation, however, resulted in the laying of criminal charges against Brosseau and a colleague, Barry. The charges related to the making of false or misleading statements in the prospectus under the 'old' *Securities Act*, R.S.A. 1970, c. 333.

The Commission's investigation was reopened when the Assistant Deputy Minister of the Department of Consumer and Corporate Affairs informed the Chairman that litigation was pending concerning the collapse of the company, and that the Alberta Government was named as a party. There was a suggestion in some documents that the Alberta Government felt that any

* Estey and Le Dain JJ. took no part in the judgment.

Georges R. Brosseau *Appelant*

c.

The Alberta Securities Commission *Intimée*

RÉPERTORIÉ: BROSSEAU *c.* ALBERTA SECURITIES COMMISSION

N° du greffe: 19832.

1988: 28 mars; 1989: 9 mars.

Présents: Le juge en chef Dickson et les juges Estey*, Lamer, Wilson, Le Dain*, La Forest et L'Heureux-Dubé.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit administratif — Crainte raisonnable de partialité — Commission tenant une audition concernant des opérations sur des valeurs mobilières ou l'inapplication possible de certaines exemptions prévues par la loi — Le président de la Commission, dans ses fonctions d'enquête, a reçu un rapport avant l'audition — Y a-t-il crainte raisonnable de partialité?

Législation — Interprétation — Rétroactivité — Loi imposant une peine liée à un événement passé — La peine n'a pas pour but de punir la personne visée mais de protéger le public — La loi fait-elle intervenir la présomption de non-rétroactivité? — Securities Act, S.A. 1981, chap. S-6.1, art. 28, 165, 166.

En sa qualité de procureur, l'appelant Brosseau a préparé le prospectus d'une société qui plus tard a fait faillite. La G.R.C. et l'Alberta Securities Commission (la Commission) ont mené des enquêtes distinctes sur les activités de la société. L'enquête de la Commission n'a abouti à aucune preuve d'infraction à la *Securities Act*. L'enquête de la G.R.C. a cependant mené au dépôt d'accusations criminelles contre Brosseau et un de ses collègues, Barry, relativement à des déclarations fausses ou trompeuses dans le prospectus, aux termes de «l'ancienne» *Securities Act*, R.S.A. 1970, chap. 333.

L'enquête de la Commission a été rouverte lorsque le sous-ministre adjoint du ministère de la Consommation et des Corporations avisa le président que des procédures étaient en cours à la suite de l'effondrement de Dial et que le gouvernement de l'Alberta y était nommé partie. Certains documents suggéraient que le gouvernement de l'Alberta estimait que toute responsabilité qui

* Les juges Estey et Le Dain n'ont pas pris part au jugement.

liability which attached to it would do so because of negligence on the part of the Commission. The Chairman forwarded the materials received from the Assistant Deputy Minister to the Deputy Director, Enforcement, of the Securities Commission. A review was conducted, and a copy of the Commission's staff report was given to the Chairman in March 1984.

The Alberta Securities Commission gave a notice of hearing to determine if Brosseau and Barry should be made subject to a cease trading order and/or possible deprivation of certain statutory exemptions. Brosseau and Barry, after their acquittal on the criminal charges in 1985, brought a preliminary application before the Alberta Securities Commission seeking an order and declaration that the Commission had no jurisdiction to hold a hearing against them. The Commission ruled it had jurisdiction pursuant to s. 26 of the "new" *Securities Act*, S.A. 1981, c. S-6.1, denied the application and directed that the hearing continue. An appeal to the Alberta Court of Appeal was dismissed. Barry discontinued his appeal before this Court and appellant Brosseau restricted his to two issues. The first was whether or not there was a reasonable apprehension of bias given the fact that the Commission Chairperson, in his investigative capacity, had received a report prior to the hearing from the Deputy Director of Enforcement. The second was whether or not the action taken by the Commission under the "new" *Securities Act* attracted the presumption against the retrospectivity of statutes. Before this Court, the appellant abandoned all argument based on s. 11 of the *Canadian Charter of Rights and Freedoms*.

Held: The appeal should be dismissed.

The facts of this case neither raise a reasonable apprehension of bias nor do they undermine public confidence in the impartiality of the Securities Commission.

The principle that no one should be a judge in his own action underlies the doctrine of "reasonable apprehension of bias". An exception occurs, however, where an overlap of functions is authorized by statute.

It was not necessary to decide to what extent the Chairman initiated the investigation because the Act contemplated his involvement at several stages of the proceedings.

The broad and formal investigatory powers granted the Commission by s. 28 of the *Securities Act* suggest that the Commission has the implied authority to conduct a more informal internal review. The Commission logically would first investigate the facts before ordering

lui serait imputée proviendrait d'une négligence de la part de la Commission. Le président a transmis les documents reçus du sous-ministre adjoint au directeur adjoint chargé de l'application de la loi pour la Commission. On procéda à un examen et une copie du rapport du personnel de la Commission fut communiquée au président en mars 1984.

La Commission a donné un avis d'audition en vue de déterminer si Brosseau et Barry pouvaient faire l'objet d'une ordonnance leur intimant de cesser des opérations sur des valeurs mobilières ou s'ils pouvaient être privés de certaines exemptions prévues par la loi. Après leur acquittement des accusations criminelles en 1985, Brosseau et Barry ont présenté à la Commission une demande préliminaire sollicitant une ordonnance et une déclaration portant que la Commission n'avait pas compétence pour tenir une audition contre eux. La Commission a conclu qu'elle avait compétence en vertu de l'art. 26 de la «nouvelle» *Securities Act*, S.A. 1981, chap. S-6.1, a rejeté la demande et a ordonné la poursuite de l'audition. La Cour d'appel de l'Alberta a rejeté l'appel de cette décision. L'appelant Barry s'est désisté de son pourvoi devant cette Cour et l'appelant Brosseau a limité le sien à deux points. Le premier est de savoir s'il y a crainte raisonnable de partialité étant donné que le président de la Commission, dans ses fonctions d'enquête, avait reçu avant l'audition un rapport du directeur adjoint, chargé de l'application de la loi. Le second est de savoir si les mesures prises par la Commission en vertu de la «nouvelle» *Securities Act* font intervenir la présomption de non-rétroactivité des lois. Devant cette Cour, l'appelant a abandonné toute argumentation fondée sur l'art. 11 de la *Charte canadienne des droits et libertés*.

Arrêt: Le pourvoi est rejeté.

Les faits de la présente affaire ne suscitent pas de crainte raisonnable de partialité et ne minent pas la confiance du public dans l'impartialité de la Commission.

Le principe que nul ne doit être juge dans sa propre cause sous-tend la doctrine de «la crainte raisonnable de partialité». Il y a cependant exception lorsque la loi autorise un chevauchement de fonctions.

Il n'est pas nécessaire de décider dans quelle mesure le président a déclenché l'enquête puisque la Loi prévoit sa participation à différentes étapes des procédures.

Les formalités qui accompagnent l'enquête en vertu de l'art. 28 de la *Securities Act*, et les vastes pouvoirs attribués, permettent de penser que la Commission a le pouvoir implicite de procéder à un examen interne plus informel. Logiquement, la Commission devrait enquêter

a s. 28 investigation. Only if irregularities were uncovered would the Commission proceed to either a more thorough s. 28 investigation or a hearing to probe more deeply into the matter.

Securities commissions, by their nature, undertake several different functions. The Commission's empowering legislation clearly indicates that the Commission was not meant to act like a court in conducting its internal reviews and certain activities, which might otherwise be considered "biased", form an integral part of its operations. A section 28 investigation is of a different nature from this type of proceeding.

A security commission's protective role, which gives it a special character, its structure and responsibilities, must be considered in assessing allegations of bias. A "reasonable apprehension of bias" affecting the Commission as a whole cannot be said to exist if the Chairman did not act outside of his statutory authority and if there were no evidence to show involvement beyond the Chairman's fulfilling his statutory duties.

The Chairman, as Chief Executive Officer of the Commission, did not exceed the bounds of authority of his office. The report in question was also made available to the appellant.

There was no element of "improper purpose" in the Commission's conduct of the proceedings against the appellant. Any suspicion that the Commission's actions were motivated with a view to escaping its own potential liability in any pending litigation was not supported by the evidence.

The presumption against retrospectivity, that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act, applies only to "penal" statutes. It does not apply to statutes imposing a penalty related to a past event, so long as the goal of the penalty is not to punish the person in question, but to protect the public. The provisions here are designed to disqualify persons, whom the Commission found to have committed acts calling their business integrity into question, from trading in securities. The presumption against the retrospective effect of statutes is effectively rebutted because these provisions in question are designed to protect the public in keeping with the general regulatory role of the Commission.

sur les faits avant d'ordonner une enquête fondée sur l'art. 28. Ce n'est que si on découvrait des irrégularités que la Commission procéderait soit à une enquête plus complète fondée sur l'art. 28, soit à une audition pour examiner l'affaire plus à fond.

De par leur nature, les commissions des valeurs mobilières exécutent plusieurs fonctions différentes. Il ressort clairement de la loi habilitante de la Commission qu'elle n'est pas tenue d'agir comme une cour dans ses enquêtes internes et que certaines activités, qui pourraient par ailleurs être considérées comme «partiales», font partie intégrante de son fonctionnement. Une enquête fondée sur l'art. 28 est d'une nature différente.

Le rôle de protection d'une commission des valeurs mobilières, qui lui donne un caractère particulier, ainsi que sa structure et ses responsabilités doivent être examinés pour évaluer les allégations de partialité. Si le président n'a pas excédé les pouvoirs que lui confère la loi et si rien dans la preuve n'indique d'autre participation que le simple exercice des fonctions que lui impose la loi, on ne peut dire qu'il existe une «crainte raisonnable de partialité» qui touche la Commission dans son ensemble.

À titre d'administrateur principal de la Commission, le président n'a pas agi en dehors des limites des pouvoirs attachés à ce poste. L'appelant a également eu accès au rapport en question.

Il n'y a aucun élément d'«objet irrégulier» dans les procédures que la Commission a menées contre l'appelant. Tout soupçon que les actes de la Commission ont été accomplis en vue d'échapper à sa propre responsabilité éventuelle dans des poursuites en cours n'a pas de fondement dans la preuve.

La présomption de non-rétroactivité, selon laquelle les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la Loi ne le décrète expressément ou n'exige implicitement une telle interprétation, ne s'applique qu'aux lois qui imposent une peine. Elle ne s'applique pas aux lois qui imposent une peine liée à un événement passé dans la mesure où le but de la peine n'est pas de punir la personne en question mais de protéger le public. Les dispositions en question sont destinées à empêcher les personnes que la Commission trouve coupables d'avoir accompli des actes qui mettent en doute leur intégrité commerciale, d'effectuer des opérations relatives à des valeurs mobilières. La présomption de non-rétroactivité de la loi est en fait repoussée parce que les dispositions en question sont destinées à protéger le public conformément au rôle général de réglementation de la Commission.

Cases Cited

Considered: *Re W. D. Latimer Co. and Attorney-General for Ontario* (1973), 2 O.R. (2d) 391, aff'd *sub nom. Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129; **distinguished**: *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256; **referred to**: *Committee for Justice and Liberty v. National Energy Board* (the *Crowe* case), [1978] 1 S.C.R. 369; *Gregory & Co. v. Quebec Securities Commission*, [1961] S.C.R. 584; *Nova, An Alberta Corporation v. Amoco Canada Petroleum Co.*, [1981] 2 S.C.R. 437; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271; *R. v. Vine* (1875), 10 L.R. Q.B. 195; *Re A Solicitor's Clerk*, [1957] 3 All E.R. 617.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 11(*d*), (*h*).
Securities Act, R.S.A. 1970, c. 333, s. 136.
Securities Act, S.A. 1981, c. S-6.1, ss. 11, 28, 29, 65, 66, 107, 115, 116, 132, 133, 165, 166.

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Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
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Krauss, Michel. "Réflexions sur la rétroactivité des lois" (1983), 14 *R.G.D.* 287.

APPEAL from a judgment of the Alberta Court of Appeal (1986), 67 A.R. 222, 25 D.L.R. (4th) 730, dismissing an appeal from a judgment of the Alberta Securities Commission. Appeal dismissed.

Rostyk Sadownik, for the appellant.

P. J. McIntyre, for the respondent.

The judgment of the Court was delivered by

L'HEUREUX-DUBÉ J.—The facts of this case raise two main issues. The first concerns the existence of a reasonable apprehension of bias with respect to the activities of the Alberta Securities Commission (the Commission). The second deals with the retroactive application of the Alberta *Securities Act*, S.A. 1981, c. S-6.1, as amended.

Jurisprudence

Arrêts examinés: *Re W. D. Latimer Co. and Attorney-General for Ontario* (1973), 2 O.R. (2d) 391, conf. par *sub nom. Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129; **distinction d'avec l'arrêt**: *Angus c. Sun Alliance Compagnie d'assurance*, [1988] 2 R.C.S. 256; **arrêts mentionnés**: *Committee for Justice and Liberty c. Office national de l'énergie* (l'arrêt *Crowe*), [1978] 1 R.C.S. 369; *Gregory & Co. v. Quebec Securities Commission*, [1961] R.C.S. 584; *Nova, An Alberta Corporation c. Amoco Canada Petroleum Co.*, [1981] 2 R.C.S. 437; *Gustavson Drilling (1964) Ltd. c. Le ministre du Revenu national*, [1977] 1 R.C.S. 271; *R. v. Vine* (1875), 10 L.R. Q.B. 195; *Re A Solicitor's Clerk*, [1957] 3 All E.R. 617.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 11*d*), *h*).
Securities Act, R.S.A. 1970, chap. 333, art. 136.
Securities Act, S.A. 1981, chap. S-6.1, art. 11, 28, 29, 65, 66, 107, 115, 116, 132, 133, 165, 166.

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Côté, Pierre-André. *Interprétation des lois*. Cowansville, Québec: Yvon Blais, 1982.
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Krauss, Michel. «Réflexions sur la rétroactivité des lois» (1983), 14 *R.G.D.* 287.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (1986), 67 A.R. 222, 25 D.L.R. (4th) 730, qui a rejeté un appel contre un jugement de l'Alberta Securities Commission. Pourvoi rejeté.

Rostyk Sadownik, pour l'appelant.

P. J. McIntyre, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE L'HEUREUX-DUBÉ—Les faits de cette affaire soulèvent deux questions en particulier. La première concerne l'existence d'une crainte raisonnable de partialité relativement aux activités de l'Alberta Securities Commission (la Commission). La seconde a trait à l'application rétroactive de la *Securities Act* de l'Alberta, S.A. 1981, chap. S-6.1, et modifications.

Facts

The appellant Brosseau was the solicitor for Dial Mortgage Co. Ltd. (Dial). In his capacity as solicitor, he prepared the company's prospectus, and filed it with the Commission in 1980.

In 1981, it became apparent that Dial was experiencing financial troubles. It was placed in receivership on February 2, 1981, and went into bankruptcy on April 16, 1981.

The Commission was concerned about the collapse of Dial. It ordered its staff to conduct a review of its files to determine if there had been any violation of the *Securities Act*, R.S.A. 1970, c. 333. On March 13, 1981 the staff reported that there was no evidence of any violations.

In March of 1982 the R.C.M.P. became involved in an investigation surrounding the affairs of Dial. They asked the Commission about its role in approving the Dial prospectus. The investigation was undertaken with a view to the laying of criminal charges. At the request of the R.C.M.P., the Commission provided them with documents from their files.

In early 1983, the Assistant Deputy Minister of the Department of Consumer and Corporate Affairs informed the Chairman of the Commission that litigation was pending which named the Alberta Government as a party to an action concerning the collapse of Dial. There is a suggestion in the documents in the case on appeal that the Alberta Government felt that any liability which attached to it would be as a result of negligence on the part of the Commission. Subsequently, the Chairman forwarded the materials received from the Assistant Deputy Minister to the Deputy Director, Enforcement, of the Commission. The Deputy Director directed the Commission staff to conduct an investigation into the matter. The investigation included a review of the Commission's files, as well as meetings with former employees of the Commission, in order to clarify matters relating to the prospectus filed by Dial. The investigators also reviewed seized documents at R.C.M.P. headquarters, and attended an R.C.M.P. interview of the appellant Brosseau.

Les faits

L'appelant Brosseau était le procureur de Dial Mortgage Co. Ltd. (Dial). En sa qualité de procureur, il a préparé le prospectus de la société et l'a déposé auprès de la Commission en 1980.

En 1981, il est devenu évident que Dial était en difficultés financières. Elle a été mise sous séquestre le 2 février 1981 et a fait cession de ses biens le 16 avril 1981.

La Commission s'est inquiétée de la déconfiture de Dial. Elle a ordonné à son personnel de procéder à un examen de ses dossiers pour déterminer s'il y avait eu infraction à la *Securities Act*, R.S.A. 1970, chap. 333. Dans son rapport du 13 mars 1981, le personnel a conclu qu'il n'y avait aucune preuve d'infraction.

En mars 1982, la G.R.C. a entrepris une enquête sur les affaires de Dial. La G.R.C. s'est informée du rôle de la Commission dans l'approbation du prospectus de Dial. L'enquête avait été entreprise dans le but de déposer des accusations criminelles. La Commission a fourni à la G.R.C., à sa demande, des documents provenant de ses dossiers.

Au début de 1983, le sous-ministre adjoint du ministère de la Consommation et des Corporations a avisé le président de la Commission que des procédures étaient en cours dans lesquelles le gouvernement de l'Alberta était nommé partie à une poursuite relative à la déconfiture de Dial. Les documents au dossier suggèrent que le gouvernement de l'Alberta était d'avis que toute responsabilité qui lui serait imputée proviendrait d'une négligence de la part de la Commission. Par la suite, le président a transmis les documents reçus du sous-ministre adjoint au directeur adjoint, chargé de l'application de la loi, pour la Commission. Le directeur adjoint a ordonné au personnel de la Commission d'enquêter sur l'affaire. L'enquête comportait un examen des dossiers de la Commission ainsi que des rencontres avec d'anciens employés de la Commission pour clarifier certains points concernant le prospectus déposé par Dial. Les enquêteurs ont également examiné aux quartiers généraux de la G.R.C. des documents saisis et ont assisté à une entrevue de la G.R.C. avec l'appelant Brosseau.

The Chairman was given a copy of the Commission staff's report on March 13, 1984. A notice of hearing was issued by the Commission on June 25, 1984.

Proceedings

I will turn now to a discussion of the proceedings which ensued as a result of the investigations by both the Commission and the R.C.M.P. The investigation involved two individuals, Georges Brosseau and Wayne Barry. The latter, who was originally a party to the appeal, withdrew.

The R.C.M.P. investigation led to the laying of charges against Brosseau and Barry. The charge stated that:

> ... between the 29th day of November, A.D. 1979, and the 2nd day of April, A.D. 1980, at or near the city of Edmonton and elsewhere in the Province of Alberta, did jointly and severally make statements in a prospectus dated the 29th day of August, A.D. 1979, required to be filed or furnished under The Securities Act, 1970 R.S.A. c. 333 or the Regulations enacted thereunder, which said statements at the time and in the light of the circumstances under which they were made, were false or misleading with respect to material facts, the particulars of the said statements appearing in the said prospectus include, but are not limited ....

On February 26, 1985, the Alberta Provincial Court held that it had no jurisdiction to proceed with the charges "because the limitation period had lapsed upon swearing of the Information". The accused were acquitted.

On June 25, 1984, pursuant to ss. 165 and 166 of the Alberta *Securities Act*, the Commission issued a notice of hearing in order to determine whether the Commission should make an order against either or both of them:

> (a) under section 165 that trading cease in respect of any securities or that a person or company cease trading in securities or specified securities for a period of time as specified in the order

and to order, or alternatively may order, as against the Respondents, or each of them,

Le 13 mars 1984, le rapport du personnel de la Commission était communiqué au président. Le 25 juin 1984, la Commission donnait un avis d'audition.

Les procédures

Il y a lieu de discuter ici des procédures qui s'ensuivirent et qui résultèrent des enquêtes et de la Commission et de la G.R.C. L'enquête visait à l'origine deux personnes, Georges Brosseau et Wayne Barry. Ce dernier, qui était initialement partie au présent pourvoi, s'est ensuite désisté.

L'enquête de la G.R.C. a donné lieu au dépôt d'accusations contre Barry et l'appelant Brosseau. L'accusation énonce que:

> [TRADUCTION] ... entre le 29 novembre 1979 et le 2 avril 1980, dans la ville d'Edmonton et ailleurs dans la province d'Alberta, ont conjointement et solidairement fait des déclarations dans un prospectus daté du 29 août 1979, qui devait être déposé ou fourni aux termes de la Securities Act, 1970 R.S.A. chap. 333 ou de ses règlements d'application, lesquelles déclarations, à l'époque et dans les circonstances où elles ont été faites, étaient fausses ou trompeuses en ce qui a trait à des faits importants, les détails desdites déclarations du prospectus comprenant notamment ...

Le 26 février 1985, la Cour provinciale de l'Alberta a conclu qu'elle n'avait pas compétence pour entendre les accusations [TRADUCTION] «parce que le délai de prescription était expiré au moment de la signature de la dénonciation sous serment». Les accusés furent acquittés.

Le 25 juin 1984, en application des art. 165 et 166 de la *Securities Act*, la Commission a donné un avis d'audition pour déterminer si elle devait ordonner contre eux ou l'un d'eux:

> [TRADUCTION]
>
> a) aux termes de l'article 165, que cessent les opérations sur valeurs mobilières ou qu'une personne ou une société cesse d'effectuer des opérations sur des valeurs mobilières ou sur certaines valeurs mobilières données pendant une période précisée dans l'ordonnance.

et ordonner, ou subsidiairement ordonner, contre les intimés ou l'un d'eux,

(b) under section 166 that any or all of the exemptions contained in sections 65, 66, 107, 115, 116, 132 and 133, or in the Regulations do not apply to the person or company named in the order.

(One notes that the criminal charges based on substantially the same allegations were brought under the "old" *Securities Act*, R.S.A. 1970, c. 333, whereas the notice of hearing was based on the provisions of the "new" *Securities Act*, S.A. 1981, c. S-6.1.)

The hearing before the Commission was adjourned from time to time at the request of the parties in order to allow for the completion of the hearing of the charges in Provincial Court. Ultimately, the hearing before the Commission was never proceeded with, due to a preliminary application brought by Brosseau and Barry. After their acquittal from the criminal charges, they sought an order and declaration that the Commission did not have jurisdiction to hold a hearing against them pursuant to ss. 165 and 166 of the Alberta *Securities Act*, S.A. 1981, c. S-6.1.

The bases of the preliminary application before the Commission are set out as follows in the decision of the Commission dated September 11, 1985:

1. Double jeopardy—an infringement of the Respondents' rights as set out in section 11(h) of the Canadian Charter of Rights and Freedoms
2. Bias
3. Improper purpose
4. Expiry of limitation date for commencement of the proceedings
5. Other grounds

The Commission dismissed each of these arguments, ruled it had jurisdiction, denied the application and directed that the hearing continue. Brosseau and Barry appealed the decision to the Alberta Court of Appeal. Stevenson J.A., delivering the unanimous judgment of the Court of Appeal (1986), 67 A.R. 222, rejected their contentions and dismissed the appeal.

b) aux termes de l'article 166, que toutes les exemptions prévues aux articles 65, 66, 107, 115, 116, 132 et 133 ou dans le Règlement, ou certaines d'entre elles, ne s'appliquent pas à la personne ou à la société désignée dans l'ordonnance.

(On notera que les accusations criminelles, fondées essentiellement sur les mêmes allégations, avaient été portées en vertu de «l'ancienne» *Securities Act*, R.S.A. 1970, chap. 333, alors que l'avis d'audition était fondé sur les dispositions de la «nouvelle» *Securities Act*, S.A. 1981, chap. S-6.1.)

L'audition devant la Commission fut ajournée plusieurs fois à la demande des parties pour permettre la tenue du procès sur les accusations devant la Cour provinciale. En fin de compte, l'audition devant la Commission n'a jamais eu lieu en raison d'une requête préliminaire formée par Brosseau et Barry. Ces derniers, après leur acquittement des accusations criminelles, ont en effet requis une ordonnance et une déclaration portant que la Commission n'avait pas compétence pour tenir une audition contre eux en application des art. 165 et 166 de la *Securities Act* de l'Alberta, S.A. 1981, chap. S-6.1.

Les moyens invoqués dans la demande préliminaire devant la Commission sont ainsi rédigés dans la décision de la Commission datée du 11 septembre 1985:

[TRADUCTION]

1. Double péril—atteinte aux droits garantis aux intimés par l'alinéa 11h) de la Charte canadienne des droits et libertés
2. Partialité
3. Objet irrégulier
4. Expiration du délai de prescription pour engager les procédures
5. Autres motifs

La Commission a rejeté chacun de ces arguments, a conclu qu'elle avait compétence, a rejeté la demande et a ordonné la poursuite de l'audition. Brosseau et Barry ont interjeté appel de cette décision à la Cour d'appel de l'Alberta. Le juge Stevenson, qui a rendu l'arrêt unanime de la Cour d'appel (1986), 67 A.R. 222, a rejeté leurs arguments et les a déboutés de leur appel.

In their motion for leave to appeal to this Court, Brosseau and Barry raised constitutional issues which the Chief Justice stated as follows:

1. Does a hearing of the Alberta Securities Commission pursuant to ss. 165 and 166 of the *Securities Act*, S.A. 1981, c. S-6.1, to determine whether certain persons should be subject to a cease-trading order and deprived of certain exemptions provided by the said Act, infringe or deny the rights guaranteed by s. 11(*h*) of the *Canadian Charter of Rights and Freedoms* of persons who previously had been acquitted of an offence under s. 136 of the *Securities Act*, R.S.A. 1970, c. 333, in respect of the same factual allegations?

2. Does a hearing of the Alberta Securities Commission pursuant to ss. 165 and 166 of the *Securities Act*, S.A. 1981, c. S-6.1, infringe or deny the right to a fair and public hearing by an independent and impartial tribunal guaranteed by s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* if the Alberta Securities Commission was involved in the investigation of allegations which are to be considered at the hearing?

3. If and to the extent that such a hearing of the Alberta Securities Commission would infringe or deny rights guaranteed by s. 11(*d*) or s. 11(*h*), is such a hearing justifiable under s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit prescribed by law?

On March 1, 1988, before this case was to be heard, the appellant Brosseau informed the Court that he was abandoning any argument based on s. 11 of the *Canadian Charter of Rights and Freedoms* and would restrict his argument to the following two points:

1. Reasonable apprehension of bias, and

2. Statutory interpretation.

As a consequence, the Attorneys General of Canada, Alberta, Manitoba, Ontario, Quebec and New Brunswick, who had intervened in the case, gave notice of the withdrawal of their intervention.

Issues

After the *Charter* questions were dropped by the appellant, his two remaining arguments were as follows:

Dans leur requête en autorisation de pourvoi devant cette Cour, Brosseau et Barry ont soulevé des questions constitutionnelles que le Juge en chef a énoncées de la manière suivante:

1. Une audition tenue par l'Alberta Securities Commission conformément aux art. 165 et 166 de la *Securities Act*, S.A. 1981, chap. S-6.1, pour déterminer si une ordonnance devrait être rendue pour interdire à certaines personnes d'effectuer des opérations sur valeurs et les priver de certaines dispenses prévues par la Loi, nie-t-elle ou viole-t-elle les droits garantis par l'al. 11*h*) de la *Charte canadienne des droits et libertés* à tout inculpé qui a été antérieurement acquitté à l'égard d'une infraction prévue à l'art. 136 de la *Securities Act*, R.S.A. 1970, chap. 333, concernant les mêmes allégations de fait?

2. Une audition tenue par l'Alberta Securities Commission conformément aux art. 165 et 166 de la *Securities Act*, S.A. 1981, chap. S-6.1, nie-t-elle ou viole-t-elle le droit à un procès public et équitable garanti par l'al. 11*d*) de la *Charte canadienne des droits et libertés* si ladite commission a participé à l'enquête relative aux allégations qui doivent être examinées à l'audition?

3. Si une telle audition de l'Alberta Securities Commission nie ou viole les droits garantis par l'al. 11*d*) ou l'al. 11*h*) et dans la mesure où ils le font, est-elle justifiable en vertu de l'article premier de la *Charte canadienne des droits et libertés* en tant que limite raisonnable fixée par une règle de droit?

Le 1er mars 1988, avant l'audition du pourvoi, l'appelant Brosseau a informé la Cour qu'il abandonnait ses moyens fondés sur l'art. 11 de la *Charte canadienne des droits et libertés* et qu'il limiterait son argumentation aux deux points suivants:

1. Crainte raisonnable de partialité

2. Interprétation législative.

Par conséquent, les procureurs généraux du Canada, de l'Alberta, du Manitoba, de l'Ontario, du Québec et du Nouveau-Brunswick, qui étaient intervenus au dossier, ont donné avis du retrait de leur intervention.

Les questions en litige

Une fois abandonnées les questions relatives à la *Charte* restent les deux seuls arguments que l'appelant formule ainsi:

18. Whether the Court of Appeal erred in holding that, apart from the *Charter*, participation by the same members of the Commission in both investigative and adjudicatory functions did not raise a reasonable apprehension of bias precluding the Commission from holding the Hearing.

19. Whether the Court of Appeal erred in holding that the objects of Sections 165 and 166 of the New Act are protective, rather than punitive, and that therefore the presumption against retrospective application of statutes does not apply to prohibit the Commission from holding the Hearing to consider whether sanctions only provided for in the New Act should be imposed against the Appellants in respect of acts alleged to have been committed at a time when the Old Act governed the trading of securities in Alberta.

I will deal with these issues in the order in which they were argued.

Reasonable Apprehension of Bias

The appellant contends that a reasonable apprehension of bias arose from the fact that the Chairman, who had received the investigative report, was also designated to sit on the panel at the hearing of the matter. He objects to the Chairman's participation at both the investigatory and adjudicatory levels.

The maxim *nemo judex in causa sua debet esse* underlies the doctrine of "reasonable apprehension of bias". It translates into the principle that no one ought to be a judge in his own cause. In this case, it is contended that the Chairman, in acting as both investigator and adjudicator in the same case, created a reasonable apprehension of bias. As a general principle, this is not permitted in law because the taint of bias would destroy the integrity of proceedings conducted in such a manner.

As with most principles, there are exceptions. One exception to the "*nemo judex*" principle is where the overlap of functions which occurs has been authorized by statute, assuming the constitutionality of the statute is not in issue. A case in point relied on by the respondents, *Re W. D. Latimer Co. and Attorney-General for Ontario* (1973), 2 O.R. (2d) 391, affirmed *sub nom. Re W.*

[TRADUCTION] 18. La Cour d'appel a commis une erreur quand elle a conclu que, indépendamment de la *Charte*, la participation des mêmes membres de la Commission à ses fonctions d'enquête et à ses décisions ne suscite pas de crainte raisonnable de partialité empêchant la Commission de tenir l'audition.

19. La Cour d'appel a commis une erreur quand elle a conclu que les articles 165 et 166 de la nouvelle loi visent la protection plutôt que l'imposition d'une peine, et que par conséquent la présomption de non-rétroactivité des lois ne s'applique pas pour interdire à la Commission de tenir l'audition pour déterminer si les sanctions prévues seulement dans la nouvelle loi devraient être imposées aux appelants relativement à des actes qu'on leur reproche d'avoir accomplis à un moment où l'ancienne loi régissait les opérations relatives aux valeurs mobilières en Alberta.

J'examinerai ces moyens dans l'ordre où ils ont été plaidés.

La crainte raisonnable de partialité

L'appelant prétend qu'il y avait crainte raisonnable de partialité parce que le président, qui avait reçu le rapport d'enquête, a également été désigné pour siéger comme membre du tribunal chargé d'entendre l'affaire. Il s'objecte à ce que le président participe à la fois à l'enquête et à la décision.

La maxime *nemo judex in causa sua debet esse* sous-tend la doctrine de «la crainte raisonnable de partialité». Elle traduit le principe que nul ne doit être juge dans sa propre cause. On prétend en l'espèce que le président, en agissant à la fois comme enquêteur et comme arbitre dans la même affaire, a suscité une crainte raisonnable de partialité. Comme principe général, un tel procédé n'est pas autorisé en droit parce qu'il y aurait atteinte à l'intégrité des procédures conduites de cette façon par la crainte de partialité qu'elles susciteraient.

Comme la plupart des principes, celui-ci a ses exceptions. Il y a exception au principe «*nemo judex*» lorsque le chevauchement de fonctions est autorisé par la loi, dans l'hypothèse où la constitutionnalité de la loi n'est pas attaquée. Un arrêt pertinent invoqué par les intimés, *Re W. D. Latimer Co. and Attorney-General for Ontario* (1973), 2 O.R. (2d) 391, confirmé par *sub nom.*

D. Latimer Co. and Bray (1974), 6 O.R. (2d) 129, addresses this particular issue with respect to the activities of a securities commission. In that case, as in this one, members of the panel assigned to hear proceedings had also been involved in the investigatory process. Dubin J.A. for the Court of Appeal found that the structure of the Act itself, whereby commissioners could be involved in both the investigatory and adjudicatory functions did not, by itself, give rise to a reasonable apprehension of bias. He wrote at pp. 140-41:

> Where by statute the tribunal is authorized to perform tripartite functions, disqualification must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task.

In order to disqualify the Commission from hearing the matter in the present case, some act of the Commission going beyond its statutory duties must be found.

Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. In establishing such tribunals, the legislator is free to choose the structure of the administrative body. The legislator will determine, among other things, its composition and the particular degrees of formality required in its operation. In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" *per se*. In this case, the appellant complains that the Chairman was both the investigator and adjudicator and that therefore, the hearing should be prevented from continuing on the grounds of reasonable apprehension of bias.

Re W. D. Latimer Co. and Bray (1974), 6 O.R. (2d) 129, porte précisément sur ce point, en relation avec les activités d'une commission des valeurs mobilières. Dans cette affaire, comme en l'espèce, certains membres d'un tribunal désigné pour l'audition d'une affaire avaient également joué un rôle dans le processus d'enquête. Le juge Dubin a conclu au nom de la Cour d'appel, que l'économie de la loi elle-même, qui prévoyait que les commissaires pouvaient participer à l'enquête et à la prise de décision, ne donnait pas en soi naissance à une crainte raisonnable de partialité. Il écrit, aux pp. 140 et 141:

> [TRADUCTION] Lorsque la loi autorise le tribunal à exercer des fonctions tripartites, la récusation doit être fondée sur un certain acte du tribunal qui excède l'exécution des fonctions que lui attribue le texte législatif en vertu duquel les procédures sont engagées. De simples renseignements préalables quant à la nature de la plainte et quant aux motifs sur lesquels elle est fondée ne sont pas suffisants pour empêcher le tribunal d'accomplir sa tâche.

Pour disqualifier la Commission dans la présente affaire, il faut qu'il y ait quelque acte de la Commission qui aille au-delà des fonctions conférées par la loi.

Les tribunaux administratifs sont créés pour diverses raisons et pour répondre à divers besoins. Lorsqu'il établit ces tribunaux, le législateur est libre de choisir la structure de l'organisme administratif. Il déterminera, entre autres, sa composition et les degrés de formalité requis pour son fonctionnement. Dans certains cas, il estimera souhaitable, pour atteindre les objectifs de la loi, de permettre un chevauchement de fonctions qui, dans des procédures judiciaires normales, seraient séparées. Dans l'appréciation des activités de tribunaux administratifs, les cours doivent tenir compte de la nature de l'organisme créé par le législateur. Si la loi autorise un certain degré de chevauchement de fonctions, ce chevauchement, dans la mesure où il est autorisé, n'est généralement pas assujetti *per se* à la doctrine de la «crainte raisonnable de partialité». En l'espèce, l'appelant se plaint de ce que le président a pris part à la fois à l'enquête et à la décision et qu'en conséquence il y a lieu d'empêcher la poursuite de l'audition au motif de crainte raisonnable de partialité.

In the course of deciding this case, it became clear to this Court that the arguments presented by the parties in their factums and in oral argument before this Court were insufficient to properly address these questions. As a result, the parties were requested to provide written submissions in answer to the following questions:

(1) pursuant to what statutory authority was the investigation directed?

(2) was the investigation directed solely at the initiative of the Chairman?

(3) was the investigation confined to documents on file with the Commission, i.e. was it a purely internal investigation or was it broader in scope?

In his written submissions, the appellant claimed that there was no authority for the investigation. He maintained that it was directed solely at the initiative of the Chairman, and was not confined to documents on file. Not surprisingly, the respondents disagreed. They argued that while not specifically authorized by statute, implicit authority for the investigation could be found in the general scheme of the *Securities Act*.

If the investigation was without statutory authority, and if it was also directed at the initiative of the Chairman, then it is clear that the Chairman was attempting to act in the role of both investigator and adjudicator in circumstances which would not permit an abrogation of the general rules against bias. The appellant claims that the investigation was initiated by the Chairman. The respondent contends that it was, in fact, the Director who ordered the investigation. In my view, the available evidence does not favour one position over the other. While it appears that the Chairman may have had some role in "initiating" the investigation, it is far from clear that he initiated it in the sense of directing what should be done, how, and by whom. However, I do not feel it necessary to decide this point since I believe that the Act contemplates the involvement of the Chairman at several stages of proceedings.

Section 28 of the *Securities Act* provides authority for the Commission to carry out a full scale investigation which includes a wide range of

Au cours du délibéré, il est devenu évident que les arguments présentés par les parties dans leurs mémoires et lors de l'audition étaient insuffisants pour traiter adéquatement de ces questions. La Cour a donc demandé aux parties de présenter des mémoires additionnels pour répondre aux questions suivantes:

1) En application de quelles dispositions législatives l'enquête a-t-elle été ordonnée?

2) L'enquête a-t-elle été ordonnée à la seule initiative du président?

3) L'enquête était-elle limitée à des documents faisant partie du dossier de la Commission, c.-à-d. s'agissait-il d'une enquête purement interne ou avait-elle une portée plus large?

Dans son mémoire, l'appelant a prétendu qu'aucun texte de loi n'autorisait l'enquête. Il a maintenu qu'elle avait été ordonnée à la seule initiative du président et qu'elle n'était pas limitée aux documents figurant au dossier. Comme il fallait s'y attendre, l'intimée ne fut pas d'accord. Elle a allégué que, bien qu'elle ne soit pas autorisée spécifiquement par un texte de loi, l'enquête était autorisée implicitement en vertu de l'économie générale de la *Securities Act*.

Si l'enquête n'est pas autorisée par un texte de loi et si elle a été ordonnée à l'initiative du président, il est clair que le président a tenté d'agir à la fois comme enquêteur et comme arbitre dans des circonstances qui ne permettent pas d'écarter les règles générales établies en matière de partialité. L'appelant soutient que l'enquête a été déclenchée par le président. L'intimée prétend qu'en fait elle a été lancée par le directeur. À mon avis, la preuve au dossier ne favorise pas plus l'un que l'autre. Bien qu'apparemment le président ait joué un certain rôle dans le «déclenchement» de l'enquête, il est loin d'être clair qu'il l'a déclenchée en ce sens qu'il aurait ordonné ce qu'il fallait faire, la manière de le faire et qui le ferait. Je n'estime cependant pas nécessaire de trancher ce point puisque, à mon avis, la Loi prévoit la participation du président à différentes étapes des procédures.

L'article 28 de la *Securities Act* autorise la Commission à mener une enquête complète ce qui comporte un large éventail de pouvoirs. La per-

powers. The person appointed to make the investigation under s. 28 has, by virtue of s. 29, "the same power as is vested in the Court of Queen's Bench for the trial of civil actions." Because of the extensive nature of the powers granted to an investigator under s. 28, such an investigation must be ordered by the Commission, and not by the Chairman alone.

There is no evidence in the present case that a s. 28 investigation was ordered by the Commission. In fact, the record and submissions suggest that this was not the route chosen by the Commission. The appellant contends that the only permissible route for an investigation is s. 28, and that therefore there was no statutory authorization for the action taken by the Chairman.

The respondent argues that the Act implies powers on a different level from the s. 28 formal investigative procedures. It contends that an informal "enforcement review" is the mechanism used by the Commission to bring to its attention those matters which warrant a more in depth investigation. Because of the formalities surrounding the s. 28 investigation, and because of the broad powers conferred, I am inclined to agree that the Commission must have the implied authority to conduct a more informal internal review. It would be unreasonable to say that a securities commission requires express statutory authority to review the documents it has on file, or to keep itself informed of the course of an R.C.M.P. investigation. To do so would be to make mandatory a resort to a s. 28 investigation for what are often simple administrative purposes. Such an approach might have the effect of paralysing the operations of the Commission. It would seem logical that before ordering a s. 28 investigation, the Commission would have first investigated the facts. If no wrongdoing is found, that would end the matter. If irregularities are uncovered, then the Commission could proceed either to a more thorough s. 28 investigation or to order a hearing, as in this case, to probe more deeply into the matter.

Section 11 of the *Securities Act* provides that the Chairman of the Commission is its Chief Executive Officer. As such, it appears to me that

sonne chargée de l'enquête en vertu de l'art. 28 a, en vertu de l'art. 29, [TRADUCTION] «les mêmes pouvoirs que ceux qui sont attribués à la Cour du Banc de la Reine pour l'audition de poursuites civiles.» À cause de l'étendue des pouvoirs accordés à l'enquêteur en vertu de l'art. 28, l'enquête doit être ordonnée par la Commission et non par le président seul.

Rien ne prouve en l'espèce que la Commission ait ordonné une enquête fondée sur l'art. 28. En fait, le dossier et les allégations permettent de croire que la Commission a choisi une voie différente. L'appelant prétend que le seul moyen permis pour initier une enquête est le recours à l'art. 28 et que la mesure prise par le président n'était donc pas autorisée par un texte de loi.

L'intimée allègue que la Loi présume l'existence de pouvoirs qui se situent à un niveau différent des procédures d'enquête formelles visées par l'art. 28. Elle prétend que la révision informelle est le mécanisme que la Commission utilise pour identifier les questions qui méritent une enquête plus approfondie. À cause des formalités qui accompagnent l'enquête fondée sur l'art. 28 et à cause des vastes pouvoirs y attribués, je suis d'avis que la Commission doit avoir le pouvoir implicite de procéder à un examen interne plus informel. Il serait déraisonnable de prétendre qu'une commission des valeurs mobilières requiert un pouvoir expressément prévu par la Loi pour examiner les documents qui se trouvent dans ses dossiers ou pour suivre l'évolution d'une enquête de la G.R.C. Ce serait là rendre obligatoire l'enquête fondée sur l'art. 28 pour de simples questions administratives. Une telle approche pourrait avoir l'effet de paralyser le fonctionnement de la Commission. Il semblerait logique que, avant d'ordonner une enquête fondée sur l'art. 28, la Commission enquête d'abord sur les faits. Si on ne trouve rien de répréhensible, l'affaire s'arrête là. Si on découvre des irrégularités, la Commission peut alors soit procéder à une enquête plus complète, fondée sur l'art. 28, soit ordonner une audition, comme en l'espèce, pour examiner l'affaire plus à fond.

L'article 11 de la *Securities Act* prévoit que le président de la Commission en est l'administrateur en chef. À ce titre, j'estime qu'il a nécessairement

he would necessarily have the authority to receive information from the Assistant Deputy Minister or from the R.C.M.P., pass this material along to the Director of the Commission, require that the Director verify the allegations and complaints, and receive a report of any review made by the Director. There is no evidence that his participation went beyond these bounds. It is also to be noted that the report in question was made available to the appellant.

Certain other factors should be taken into consideration along with the question of statutory authorization. For example, in a specialized body such as the Commission, it is more than likely that the same decision-makers will have repeated dealings with a given party on a number of occasions and for a variety of reasons. It is hardly surprising, given the fact that there is only one Alberta Securities Commission, that the Commission in this case was required to deal with many aspects of the failure of Dial over a period of years.

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 ss. 165 or 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 con-

le pouvoir de recevoir des renseignements du sous-ministre adjoint ou de la G.R.C., de les transmettre au directeur de la Commission, de demander à celui-ci de vérifier les allégations et les plaintes, et de recevoir un rapport de tout examen fait par le directeur. Rien dans la preuve n'indique qu'il ait agi en dehors de ces limites. Il faut également noter que l'appelant a eu accès au rapport en question.

Outre la question de l'autorisation accordée par la loi, il y a aussi lieu de tenir compte d'autres facteurs. Par exemple, dans un organisme spécialisé comme la Commission, il est plus que probable que les mêmes instances décisionnelles auront des contacts répétés avec une partie donnée, à de nombreuses occasions et pour diverses raisons. Étant donné qu'il n'y a qu'une seule commission des valeurs mobilières en Alberta, il n'est guère surprenant qu'on ait demandé à la Commission en l'espèce d'examiner de nombreux aspects de la déconfiture de Dial, sur plusieurs années.

De par leur nature, les commissions de valeurs mobilières remplissent plusieurs fonctions différentes. Elles surveillent le dépôt de prospectus, réglementent les opérations relatives aux valeurs mobilières, inscrivent les personnes et les sociétés qui font des opérations relatives aux valeurs mobilières, mènent des enquêtes et appliquent les dispositions de la Loi. De par leur nature, elles sont amenées à avoir des contacts répétés avec les mêmes parties tant dans leur rôle administratif que dans leur rôle décisionnel. Dans le cas des procédures d'application de la loi envisagées aux art. 165 ou 166 de la Loi, la partie visée a la possibilité de faire des représentations à une audition tenue devant la Commission, comme cela a été fait en l'espèce. La Commission ordonne la tenue de l'audition et rend sa décision. Dans les circonstances, l'appelant ne peut, pour fonder son allégation de partialité, se contenter de dire que la Commission, lorsqu'elle a fait sa révision préliminaire interne, n'a pas agi comme une cour de justice. Il ressort clairement de sa loi habilitante que, dans de telles circonstances, la Commission n'est pas tenue d'agir comme une cour et que certaines activités, qui pourraient par ailleurs être

sidered "biased" form an integral part of its operations. A section 28 investigation is of a different nature from this type of proceeding.

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

considérées comme «partiales», font partie intégrante de son fonctionnement. Une enquête fondée sur l'art. 28 est d'une nature différente de celle dont il est ici question.

D'une manière générale, on peut dire que les lois sur les valeurs mobilières visent à réglementer le marché et à protéger le public. Cette Cour a reconnu ce rôle dans l'arrêt *Gregory & Co. v. Quebec Securities Commission*, [1961] R.C.S. 584, dans lequel le juge Fauteux a fait remarquer à la p. 588:

> [TRADUCTION] L'objet prépondérant de la loi est d'assurer que les personnes qui, dans la province, exercent le commerce des valeurs mobilières ou qui agissent comme conseillers en placement, sont honnêtes et de bonne réputation et, ainsi, de protéger le public, dans la province ou ailleurs, contre toute fraude consécutive à certaines activités amorcées dans la province par des personnes qui y exercent ce commerce.

Ce rôle protecteur, qui est commun à toutes les commissions des valeurs mobilières, donne à ces organismes un caractère particulier qui doit être reconnu lorsqu'on examine la manière dont leurs fonctions sont exercées aux termes des lois qui leur sont applicables.

La situation particulière du tribunal en l'espèce est essentiellement la même que celle dans l'affaire *Re W. D. Latimer Co. and Attorney-General for Ontario*, précitée. Le juge Wright de la Cour suprême de l'Ontario y faisait les remarques suivantes à la p. 404:

> [TRADUCTION] La Cour doit décider ce qui est franc-jeu dans des circonstances particulières, et dans quelle mesure et de quelle manière le pouvoir des tribunaux de l'appliquer devrait être exercé. D'une part, elle doit veiller à ce que le citoyen ne soit pas traité injustement ou placé dans une situation où il pourrait subir un péril injustifié aux mains d'une personne ou d'un organisme qui exerce la compétence. D'autre part, elle doit veiller à ce que ces personnes ou ces organismes qui cherchent à exécuter leurs obligations publiques ne soient pas gênés indûment dans leur travail et à ce que le but visé par l'assemblée législative, si c'est la source de leur compétence, soit respecté et réalisé tel qu'il a été exprimé.

La structure particulière et les responsabilités de la Commission doivent être examinées pour évaluer les allégations de partialité. Dans l'affaire *Latimer*, le juge Dubin, au nom de la Cour d'appel

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.

Improper Purpose

Although not argued before this Court, I have also considered the question of whether there may have been some element of "improper purpose" in the conduct of the proceedings against the appellant. For example, if the Commission conducted a review of Dial and ordered a hearing with a view to escaping its own potential liability in any pending litigation against the Commission, then otherwise legitimate proceedings could be tainted with bias. However, after a careful review of the file I am satisfied that any such "suspicion" of the motives of the Chairman, or of the Commission, is completely unfounded. While there seems, at one point, to have been pending litigation, there is no evidence as to the actual existence of claims against the Commission. More importantly, there is no evidence of the nature of such claims, or of

de l'Ontario, a rejeté la plainte de partialité. Il a reconnu, à la p. 135, que la Commission avait une responsabilité envers le public et les personnes inscrites:

> [TRADUCTION] Je suis d'avis que l'obligation de la Commission envers les personnes inscrites est semblable à celle d'un organisme professionnel traitant de questions relatives à la discipline de ses membres. L'obligation qui incombe à la Commission de protéger les membres du public contre la mauvaise conduite des personnes inscrites est, évidemment, un des buts principaux de la loi, mais la loi lui impose également l'obligation de traiter équitablement ceux dont le gagne-pain est placé entre ses mains et, à mon avis, il n'y a aucun avantage à faire prévaloir l'une de ses fonctions sur l'autre.

Le juge Dubin a conclu que l'économie de la Loi, qui permettait aux commissaires d'avoir à la fois des fonctions d'enquête et des fonctions décisionnelles ne pouvait, en elle-même, susciter de crainte raisonnable de partialité.

Je suis d'accord avec cette opinion. Dans la mesure où le président n'a pas excédé les pouvoirs que lui confère la Loi et dans la mesure où rien dans la preuve n'indique d'autre participation que le simple fait d'avoir exercé les fonctions que lui impose la loi, on ne peut dire qu'il existe une «crainte raisonnable de partialité» qui affecterait la Commission dans son ensemble.

L'objet irrégulier

Bien qu'elle n'ait pas été plaidée devant cette Cour, j'ai également examiné la possibilité de l'«objet irrégulier» des procédures engagées contre l'appelant. Par exemple, si la Commission avait examiné la situation de Dial et ordonné une audition en vue d'échapper à sa propre responsabilité éventuelle dans des poursuites dirigées contre elle, alors, des procédures par ailleurs légitimes pourraient être entachées de partialité. Après un examen attentif du dossier, je suis cependant convaincue que tout «soupçon» de ce genre, en ce qui a trait au but visé par le président ou la Commission, est sans aucun fondement. Bien qu'il semble y avoir eu à un certain moment un litige, il n'y a aucune preuve de l'existence de réclamations contre la Commission. Plus important encore, aucune preuve n'a été produite quant à la nature

the possible defences available to the Commission. In short, any argument of bias founded on such scanty information would hardly be a reasonable suspicion. It would be more easily categorized as sheer conjecture.

Of course, had there been any evidence of a possible conflict between the interest of the Commission in the outcome of the hearing, and their duty to give a fair hearing to the appellant, it would be a different matter, and might raise a reasonable apprehension of bias. However, in my view, this is not the case here.

Conclusion

In *Committee for Justice and Liberty v. National Energy Board* (the *Crowe* case), [1978] 1 S.C.R. 369, Chief Justice Laskin stated the principle behind the test of reasonable apprehension of bias. He wrote, at p. 391:

> This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies . . . .

In my view, the facts of this case do not raise a reasonable apprehension of bias, nor can they undermine public confidence in the impartiality of the Commission. I would therefore dismiss this first ground of appeal.

Retroactivity

The appellant claims that ss. 165 and 166 of the new Act (1981) cannot be applied retrospectively to him. The appellant maintains that these provisions of the new Act broaden the powers of the Commission. He submits that the Court of Appeal erred "in relying upon the case of *Re A Solicitor's Clerk*, [1957] 3 All E.R. 617, as authority for the proposition that where the objectives of a statute are 'protective', rather than 'penal', then the presumption against retrospective operation of statutes does not apply." The appellant contends that under ss. 165 and 166 of the new Act (1981), sanctions are penal and consequently the Act should not be applied retrospectively.

de ces réclamations ou aux moyens de défense que la Commission pouvait invoquer. Bref, une allégation de partialité fondée sur d'aussi maigres renseignements serait loin d'équivaloir à un soupçon raisonnable. Ce serait plus aisément taxé de pure conjecture.

Il en irait autrement s'il y avait eu preuve d'un conflit possible entre l'intérêt de la Commission dans l'issue de l'audition et son obligation d'accorder une audition équitable à l'appelant. Ceci serait de nature à susciter une crainte raisonnable de partialité. À mon avis cependant, tel n'est pas le cas ici.

Conclusion

Dans l'arrêt *Committee for Justice and Liberty c. Office national de l'énergie* (l'arrêt *Crowe*), [1978] 1 R.C.S. 369, le juge en chef Laskin a formulé le principe qui sous-tend le critère de la crainte raisonnable de partialité. Il écrit à la p. 391:

> Ce critère se fonde sur la préoccupation constante qu'il ne faut pas que le public puisse douter de l'impartialité des organismes ayant un pouvoir décisionnel . . .

À mon avis, les faits de la présente affaire ne suscitent pas de crainte raisonnable de partialité et ils ne peuvent miner la confiance du public dans l'impartialité de la Commission. Je suis donc d'avis de rejeter le premier moyen d'appel.

La rétroactivité

L'appelant allègue que les art. 165 et 166 de la nouvelle loi (1981) ne peuvent lui être appliqués rétroactivement. L'appelant soutient que ces dispositions de la nouvelle loi élargissent les pouvoirs de la Commission. Il prétend que la Cour d'appel a commis une erreur [TRADUCTION] «en se fondant sur l'arrêt *Re A Solicitor's Clerk*, [1957] 3 All E.R. 617, pour affirmer que, lorsque les objectifs d'une loi sont la «protection» plutôt que «l'imposition d'une peine», la présomption contre l'application rétroactive des lois ne s'applique pas.» L'appelant est d'avis qu'aux termes des art. 165 et 166 de la nouvelle loi (1981), les sanctions sont pénales et que, par conséquent, la loi ne devrait pas être appliquée rétroactivement.

The relevant legislation consists of s. 136 of the *Securities Act*, R.S.A. 1970, c. 333, and ss. 165 and 166 of the current *Securities Act*, S.A. 1981, c. S-6.1:

136. (1) Every person or company who

. . .

(*b*) makes a statement in any application, report, prospectus ... required to be filed or furnished ... that ... is false or misleading is ... guilty of an offence.

165(1) The Commission may order that

(a) trading cease in respect of any security for a period of time as is specified in the order, or

(b) that a person or company cease trading in securities or specified securities for a period of time as is specified in the order.

(2) The Commission shall not make an order under subsection (1) without conducting a hearing.

166(1) The Commission may order that any or all of the exemptions contained in sections 65, 66, 107, 115, 116, 132 and 133 or in the regulations do not apply to the person or company named in the order.

(2) The Commission shall not make an order under subsection (1) without conducting a hearing.

The basic rule of statutory interpretation, that laws should not be construed so as to have retrospective effect, was reiterated in the recent decision of this Court in *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256. That case, however, dealt with the question of the retrospective effect of procedural versus substantive provisions. The present case presents a different facet of the problem of retrospectivity.

While the presumption against retrospective effect is clear, there seems to be a great deal of confusion among the authorities and case law as to what constitutes such an effect. Michel Krauss in "Réflexions sur la rétroactivité des lois" (1983), 14 *R.G.D.* 287, observes at p. 291:

[TRANSLATION] ... there is unanimity when it comes to recognizing that the "non-retrospectivity rule" is now applicable. However, the content of this presumption has still to be determined in order to apply it consistent-

Les dispositions pertinentes sont l'art. 136 de la *Securities Act*, R.S.A. 1970, chap. 333 et les art. 165 et 166 de l'actuelle *Securities Act*, S.A. 1981, chap. S-61:

[TRADUCTION] **136.** (1) Est coupable d'une infraction, quiconque

. . .

b) fait une déclaration [...] fausse ou trompeuse [...] dans une demande, dans un rapport, dans un prospectus [...] qui doit être produit ou fourni ...

165(1) La Commission peut ordonner

a) que cessent toutes opérations relatives à des valeurs mobilières pendant la période précisée dans l'ordonnance, ou

b) qu'une personne ou une société cesse d'effectuer des opérations relatives à des valeurs mobilières ou à des valeurs mobilières désignées pendant la période précisée dans l'ordonnance.

(2) La Commission ne doit pas prendre d'ordonnance aux termes du paragraphe (1) sans audition.

166(1) La Commission peut ordonner que l'une ou l'autre des exemptions prévues aux articles 65, 66, 107, 115, 116, 132 et 133 ou dans le Règlement ne s'applique pas à la personne ou à la société désignée dans l'ordonnance.

(2) La Commission ne doit pas rendre d'ordonnance aux termes du paragraphe (1) sans tenir d'audition.

La règle fondamentale d'interprétation des lois selon laquelle les lois ne devraient pas être interprétées de manière à avoir un effet rétroactif, a été réitérée dans l'arrêt récent de cette Cour *Angus c. Sun Alliance Compagnie d'assurance*, [1988] 2 R.C.S. 256. Cet arrêt portait toutefois sur l'effet rétroactif de dispositions de nature procédurale par opposition à des dispositions de fond. La présente affaire soulève un aspect différent du problème de la rétroactivité.

Bien que la présomption de non-rétroactivité soit claire, il semble y avoir beaucoup de confusion dans la doctrine et la jurisprudence sur ce que constitue un effet rétroactif. Michel Krauss dans «Réflexions sur la rétroactivité des lois» (1983), 14 *R.G.D.* 287 fait remarquer à la p. 291:

... il y a unanimité lorsqu'il s'agit de reconnaître la vigueur actuelle de la «règle de non-rétroactivité». Toutefois, pour pouvoir appliquer précisément et avec constance cette présomption, encore faut-il en cerner le

ly and precisely. In our opinion, this concept is not precisely defined in our law.

Pierre-André Côté (*The Interpretation of Legislation in Canada* (1984)) wrote on the subject of the application of the rule against retroactive application of laws at p. 91:

> Examination of the case law reveals a great number of judgments based on general principles. It is difficult to discern a logical thread in this panoply of decisions that are difficult to reconcile.

This Court has had the opportunity to consider the matter of the retrospective application of laws. In *Nova, An Alberta Corporation v. Amoco Canada Petroleum Co.*, [1981] 2 S.C.R. 437, Estey J. dealt with the issue of retrospectivity by scrutinizing the intent behind the particular piece of legislation. He stated at p. 448 that "each statute must, for the purpose of its interpretation, stand on its own and be examined according to its terminology and the general legislative pattern it establishes". In *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, Dickson J. (as he then was) stated the general principle with respect to retrospectivity of enactments at p. 279:

> The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively.

The so-called presumption against retrospectivity applies only to prejudicial statutes. It does not apply to those which confer a benefit. As Elmer Driedger, *Construction of Statutes* (2nd ed. 1983), explains at p. 198:

> ... there are three kinds of statutes that can properly be said to be retrospective, but there is only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Second, there are those that attach prejudicial consequences to a prior

contenu. Nous croyons justement que ce concept n'est pas précis en notre droit.

Pierre-André Côté (*Interprétation des lois* (1982)) a écrit ceci au sujet de l'application de la règle de non-rétroactivité des lois à la p. 100:

> L'examen de la jurisprudence en matière d'effet de la loi dans le temps fait voir une multitude de décisions rendues sur le fondement de quelques principes très généraux et dont chacune paraît un cas d'espèce. Les décisions particulières sont souvent difficiles à réconcilier sur un plan logique . . .

Cette Cour a eu l'occasion d'examiner la question de l'application rétroactive des lois. Dans l'arrêt *Nova, An Alberta Corporation c. Amoco Canada Petroleum Co.*, [1981] 2 R.C.S. 437, le juge Estey a analysé la question de la rétroactivité en examinant l'intention qui sous-tend la disposition législative visée. Il a dit à la p. 448 que «chaque loi doit être complète en elle-même et se lire en fonction de sa terminologie propre et du plan législatif général qu'elle met en place». Dans l'arrêt *Gustavson Drilling (1964) Ltd. c. Le ministre du Revenu national*, [1977] 1 R.C.S. 271, le juge Dickson (maintenant Juge en chef) a énoncé le principe général relatif à la rétroactivité des textes législatifs à la p. 279:

> Selon la règle générale, les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la Loi ne le décrète expressément ou n'exige implicitement une telle interprétation. Une disposition modificatrice peut prévoir qu'elle est censée être entrée en vigueur à une date antérieure à son adoption, ou qu'elle porte uniquement sur les transactions conclues avant son adoption. Dans ces deux cas, elle a un effet rétroactif.

Ce qu'on appelle la présomption de non-rétroactivité ne s'applique qu'aux lois qui ont un effet préjudiciable. Elle ne s'applique pas à celles qui confèrent un avantage. Elmer Driedger, explique dans *Construction of Statutes* (2nd ed. 1983), à la p. 198:

> [TRADUCTION] Il y a trois sortes de lois que l'on peut, à proprement parler, qualifier de rétroactives, mais il n'y en a qu'une qui donne lieu à la présomption. Premièrement, il y a les lois qui rattachent des conséquences bienfaisantes à un événement antérieur; elles ne donnent pas lieu à la présomption. Deuxièmement, il y a celles

event; they attract the presumption. Third, there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event; these do not attract the presumption.

A sub-category of the third type of statute described by Driedger is enactments which may impose a penalty on a person related to a past event, so long as the goal of the penalty is not to punish the person in question, but to protect the public. This distinction was elaborated in the early case of *R. v. Vine* (1875), 10 L.R. Q.B. 195, where Cockburn C.J. wrote at p. 199:

> If one could see some reason for thinking that the intention of this enactment was merely to aggravate the punishment for felony by imposing this disqualification in addition, I should feel the force of Mr. Poland's argument, founded on the rule which has obtained in putting a construction upon statutes—that when they are penal in their nature they are not to be construed retrospectively, if the language is capable of having a prospective effect given to it and is not necessarily retrospective. But here the object of the enactment is not to punish offenders, but to protect the public against public-houses in which spirits are retailed being kept by persons of doubtful character ... the legislature has categorically drawn a hard and fast line, obviously with a view to protect the public, in order that places of public resort may be kept by persons of good character; and it matters not for this purpose whether a person was convicted before or after the Act passed, one is equally bad as the other and ought not to be intrusted with a licence.

In *Re A Solicitor's Clerk*, *supra*, a statute concerning the practice of law by solicitors was amended so as to enable an order disqualifying a person from acting as a solicitor's clerk if such person had been convicted of larceny, embezzlement or fraudulent conversion of property. A clerk who had been convicted of one of those offenses before the coming into effect of the new law, contested his disqualification on the basis that the law was being given a retrospective effect. The Court of Queen's Bench dismissed these arguments. Lord Goddard C.J. found that there was no

qui rattachent des conséquences préjudiciables à un événement antérieur; elles donnent lieu à la présomption. Troisièmement, il y a celles qui imposent une peine à une personne qui est décrite par rapport à un événement antérieur, mais la peine n'est pas destinée à constituer une autre punition pour l'événement; elles ne donnent pas lieu à la présomption.

Une sous-catégorie du troisième type de lois décrit par Driedger est composée des textes législatifs qui peuvent imposer à une personne une peine liée à un événement passé en autant que le but de la peine n'est pas de punir la personne en question mais de protéger le public. Cette distinction a été élaborée dans un arrêt ancien, *R. v. Vine* (1875), 10 L.R. Q.B. 195, dans lequel le juge en chef Cockburn a écrit à la p. 199:

> [TRADUCTION] Si on pouvait trouver une raison pour penser que l'intention de ce texte législatif était simplement d'augmenter la peine à l'égard d'une infraction majeure en y ajoutant cette interdiction, je serais sensible à la force de l'argument de M. Poland, qui est fondé sur la règle d'interprétation des lois selon laquelle, lorsqu'elles sont de nature pénale, elles ne peuvent être interprétées rétroactivement, si le texte peut avoir un effet pour l'avenir et n'est pas nécessairement rétroactif. Toutefois, en l'espèce, le but du texte législatif n'est pas de punir les contrevenants, mais de protéger le public contre la possibilité que des débits d'alcool soient tenus par des personnes de mœurs douteuses [...] le Parlement a de façon catégorique adopté une position ferme, de toute évidence pour protéger le public, afin que les endroits publics puissent être tenus par des personnes de bonnes mœurs, et il n'est pas important à cette fin de savoir si une personne a été déclarée coupable avant ou après l'adoption de la loi, car elle est tout aussi mauvaise dans un cas comme dans l'autre et ne devrait pas recevoir de permis.

Dans l'arrêt *Re A Solicitor's Clerk*, précité, une loi concernant l'exercice de la profession d'avocat avait été modifiée de manière à autoriser une ordonnance empêchant une personne d'agir à titre de clerc d'avocat si cette personne avait été déclarée coupable de vol, d'abus de confiance ou de détournement de biens. Un clerc, qui avait été déclaré coupable de l'une de ces infractions avant l'entrée en vigueur de la nouvelle loi, avait contesté son exclusion parce que l'on donnait à la loi un effet rétroactif. La Court of Queen's Bench a rejeté ces arguments. Le juge en chef, Lord

retrospective effect since the real aim of the law was prospective and aimed at protecting the public. He wrote at p. 619:

> In my opinion, however, this Act is not in truth retrospective. It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order; but the order has no retrospective effect. It would be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void or voidable or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force or the order was made. This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past.

Elmer Driedger summarizes the point in "Statutes: Retroactive, Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at p. 275:

> In the end, resort must be had to the object of the statute. If the intent is to punish or penalize a person for having done what he did, the presumption applies, because a new consequence is attached to a prior event. But if the new punishment or penalty is intended to protect the public, the presumption does not apply.

Stevenson J.A. of the Court of Appeal likened the situation in the present appeal to that in the *Re A Solicitor's Clerk* case at p. 229:

> In my view the principle in the **Solicitor's Clerk** case is indistinguishable. An additional power is given to the Commission—based on previous conduct. A new punishment cannot be added but that is not the nature of the office of ss. 166 and 167. It is the same office that the **Solicitor's Clerk** case deals with, namely to provide a disqualification based on past conduct which may show unfitness for the exemption.

The present case involves the imposition of a remedy, the application of which is based upon conduct of the appellant before the enactment of ss. 165 and 166. Nonetheless, the remedy is not designed as a punishment for that conduct. Rather, it serves to protect members of the public.

The fact that the relief is not really punitive in nature is supported by the conclusion of Stevenson J.A. that the imposition of the new remedy did not

Goddard, a conclu qu'il n'y avait pas d'effet rétroactif, étant donné que le but réel de la loi était prospectif et visait la protection du public. Il écrit à la p. 619:

> [TRADUCTION] À mon avis, cette loi n'est pas véritablement rétroactive. Elle permet de rendre une ordonnance empêchant une personne d'agir à titre de clerc d'avocat dans l'avenir et ce qui s'est produit dans le passé constitue la cause ou la raison de l'ordonnance; mais l'ordonnance n'a pas d'effet rétroactif. Elle serait rétroactive si la loi déclarait nulle ou annulable une chose faite avant l'entrée en vigueur de la loi ou avant l'ordonnance ou imposait une peine pour avoir agi à tel titre avant que l'entrée en vigueur de la loi ou avant l'ordonnance. La loi permet simplement l'exclusion pour l'avenir, ce qui n'a aucun d'effet sur ce que l'appelant a fait dans le passé.

Elmer Driedger résume la question dans «Statutes: Retroactive, Retrospective Reflections» (1978), 56 *R. du B. can.* 264, à la p. 275:

> [TRADUCTION] Finalement, il faut se tourner vers l'objet de la loi. Si l'intention est de punir ou de pénaliser une personne pour ce qu'elle a fait, la présomption joue, parce qu'une nouvelle conséquence se rattache à un événement antérieur. Toutefois, si la nouvelle punition ou peine est destinée à protéger le public, la présomption ne joue pas.

Le juge Stevenson de la Cour d'appel a comparé la situation de la présente affaire à celle de l'affaire *Re A Solicitor's Clerk* à la p. 229:

> [TRADUCTION] À mon avis, on ne peut établir de distinction avec le principe énoncé dans l'arrêt **Solicitor's Clerk**. Un pouvoir additionnel est accordé à la Commission, fondé sur la conduite antérieure. Une nouvelle peine ne peut être ajoutée mais ce n'est pas le rôle des art. 166 et 167. L'arrêt **Solicitor's Clerk** portait sur le même rôle, c'est-à-dire prévoir une exclusion fondée sur la conduite passée qui peut démontrer l'incapacité en ce qui a trait à l'exemption.

La présente affaire concerne un redressement dont l'application est fondée sur la conduite de l'appelant avant l'adoption des art. 165 et 166. Néanmoins, le redressement n'est pas conçu comme une peine liée à cette conduite. Il vise plutôt à protéger le public.

Le fait que ce redressement ne soit pas véritablement de nature punitive est appuyé par la conclusion du juge Stevenson selon laquelle l'imposi-

lie at the root of the appellant's concern in this matter at p. 229:

> In essence, the appellants fear the stigma arising from a finding that they did, or failed to do, what is alleged in the hearing notice. That root concern was well illustrated by the suggestion made in argument that neither would be particularly aggrieved by the remedy being imposed against them, indeed they could accept the remedies, but were concerned about the finding of wrong doing.

The provisions in question are designed to disqualify from trading in securities those persons whom the Commission finds to have committed acts which call into question their business integrity. This is a measure designed to protect the public, and it is in keeping with the general regulatory role of the Commission. Since the amendment at issue here is designed to protect the public, the presumption against the retrospective effect of statutes is effectively rebutted.

In the result, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Wheatley, Sadownik, Edmonton.

Solicitors for the respondent: Burnet, Duckworth & Palmer, Calgary.

tion du nouveau redressement n'était pas la préoccupation fondamentale de l'appelant en l'espèce à la p. 229:

> [TRADUCTION] Essentiellement, les appelants craignent d'être marqués par une décision indiquant qu'ils ont fait ou omis de faire ce qui est allégué dans l'avis d'audition. Cette préoccupation fondamentale est bien illustrée par la déclaration faite dans l'argumentation, selon laquelle ils se souciaient moins du redressement imposé contre eux, car ils pouvaient accepter le redressement, que de la possibilité d'une conclusion sur l'illégalité.

Les dispositions en question sont destinées à empêcher les personnes que la Commission trouve coupables d'avoir accompli des actes qui mettent en doute leur intégrité commerciale, d'effectuer des opérations relatives à des valeurs mobilières. Il s'agit d'une mesure destinée à protéger le public et elle est conforme au rôle général de réglementation de la Commission. Étant donné que la modification contestée en l'espèce est destinée à protéger le public, la présomption de non-rétroactivité de la loi est en fait repoussée.

Je suis en conséquence d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs de l'appelant: Wheatley, Sadownik, Edmonton.

Procureurs de l'intimée: Burnet, Duckworth & Palmer, Calgary.