IN THE MATTER OF

THE SECURITIES ACT
S.N.B. 2004, c. S-5.5

- and -

IN THE MATTER OF

PIERRE EMOND, ARMEL DRAPEAU and JULES BOSSÉ
(RESPONDENTS)

Date of Hearing of Motion:	9-10 May 2011
Date of Reasons for Decision on Preliminary Motion:	18 August 2011

Panel:

Guy Couturier, Q.C., Panel Chair

Anne La Forest, Panel Member

Céline Trifts, Panel Member

Appearances:

Jake van der Laan & Marc Wagg	Counsel for Staff of the New Brunswick Securities Commission
Jack Blackier & Michel Arseneault Barry Spalding	Counsel for Armel Drapeau
Pierre Emond, per se	
Gaétan Migneault	Solicitor for the Attorney General of New Brunswick

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REASONS FOR DECISION ON CONSTITUTIONAL MOTION

1. BACKGROUND

[1] On 24 June 2010, Staff ("Staff") of the New Brunswick Securities Commission ("Commission") filed a Statement of Allegations against the Respondents and an Amended Statement of Allegations was filed on 26 April 2011. Among other claims, Staff make the allegation that the Respondents were involved in illegal distributions of securities in the province. They request a cease-trade order, a disgorgement order and orders for administrative penalties and costs pursuant to the *Securities Act* ("*Act*"). A hearing of the merits of this matter has not yet occurred.

[2] Pursuant to Local Rule 15-501 of the Commission, the respondent Armel Drapeau ("Drapeau") filed a Notice of Preliminary Motion ("Motion") on 29 March 2011, with the Office of the Secretary of the Commission. In the Motion, Drapeau was seeking several grounds of relief. All of the grounds laid out in the Motion but one were heard on 21 April 2011, with Reasons for Decision (Part 1) issued on 2 May 2011, and Reasons for Decision (Part 2) issued on 20 July 2011. The remaining ground is as follows:

> An order dismissing the allegations against the Respondent, Armel Drapeau, on the grounds that the Panel lacks jurisdiction to hear the complaint resulting from its lack of impartiality and/or independence as required by the rules of natural justice and/or sections 7 and 11(d) of the *Charter of Rights and Freedoms, Constitution Act, 1982;*

[3] This ground involves a constitutional question and puts in issue the Commission's jurisdiction. Counsel for Drapeau notified the Attorney General of New Brunswick ("A.G.") of the challenge. The A.G. advised that they wished to appear and be heard on the constitutional aspect of the Motion, but had no interest in the remaining issues. The Commission thus severed this issue from the remaining grounds raised in the Motion, and this issue was heard on 9 May 2011. The Commission reserved its decision.

[4] Counsel for Staff, counsel for Drapeau and counsel for the A.G. all appeared and made submissions before the Panel. The Respondent Mr. Pierre Emond did appear on his own behalf, but filed no submissions.

[5] Despite being properly served with the Notice of Motion scheduling the jurisdictional issue to be heard on 9 May 2011 – as evidenced by the Affidavit of Service of B.K. sworn 9 May 2011 – the respondent Jules Bossé did not appear and did not file any submissions.

2. ANALYSIS AND DISPOSITION

a. Positions of the Parties and the A.G.

[6] The respondent Drapeau is seeking a dismissal of Staff's allegations, based on the following grounds:

- The Panel lacks jurisdiction to hear the complaint resulting from its lack of impartiality and/or independence as required by the rules of natural justice; and/or
- The Panel lacks jurisdiction to hear the complaint resulting from a breach of sections 7 and 11(d) of the *Charter of Rights and Freedoms, Constitution Act, 1982.*

[7] Staff seek a dismissal of Drapeau's motion for the reasons that:

- The required threshold to establish an institutional bias justifying relief has not been met in this case;

- Section 11(d) of the *Charter* has no application in this proceeding, and the requirements for relief thereunder have not been met in any event; and
- The requirements for relief under section 7 of the *Charter* have not been met.

[8] The A.G. submits that sections 7 and 11(d) do not apply to the type of proceedings before the Commission in this matter and the challenge reflects a fundamental misconception as to the nature of the proceedings initiated under section 184 of the *Act*. The A.G. further submits that the common law notion of natural justice does not have constitutional status and cannot serve to invalidate legislation.

[9] The Commission will first address the argument of lack of natural justice, and will then discuss the application of section 7 and 11(d) of the *Charter*.

b. Natural Justice

[10] The respondent Drapeau claims that the current structure of the Commission is such that he cannot receive a fair hearing. Drapeau alleges that the structure of the Commission gives rise to a reasonable apprehension of institutional bias. In his affidavit sworn 1 May 2011, Drapeau states as follows at paragraph 3:

> It is my position is [sic] based on the current structure of the New Brunswick Securities Commission (hereinafter referred to as the "NBSC" or the "Commission") and the multiple roles exercised by the Commission in order to exercise its mandate under the ***Securities Act***, that the Commission Panel does not have the necessary impartiality and independence.

[11] Drapeau relies on the common law rules of natural justice – or procedural fairness – in support of his request to have the proceedings dismissed.[1] He takes the position that the Commission lacks the structural guarantees of independence; thereby effectively undermining the perception that justice can be done in this case, with the result that there exists a reasonable apprehension of bias on the part of the Commission.

[1] As noted by the Alberta Securities Commission in *Re Proprietary Industries*, 2005 CarswellAlta 2702 at para 22, the terms "natural justice" and "procedural fairness" are often used interchangeably in the administrative law context. For ease of reference, in these reasons the Commission will use the term "natural justice", as this is the term used by the Parties in their submissions.

[12] There are two elements to the common law entitlement to natural justice: the right to be heard, and the right to an independent and impartial decision-maker.[2] Drapeau's claim of institutional bias relates to the second element of natural justice: the right to an independent and impartial decision-maker.

[13] The test for institutional bias is as follows:

> would a well-informed person, viewing the matter realistically and practically – and having thought the matter through – have a reasonable apprehension of bias *in a substantial number of cases*?[3]

And, to support a claim of institutional bias, the claimant "must do more than make bald assertions of bias or apprehension of bias".[4]

[14] In the specific context of securities tribunals, there have been several institutional bias challenges. As a result, there is a substantial body of case law supporting the very structure being challenged by Drapeau. In summary, the cases in this area clearly hold that where the overlap of functions and the structure of the Commission have been authorized by statute, and without evidence of actions outside of the legislated authority, the structure alone is insufficient to support a claim for institutional bias. As stated by the Supreme Court of Canada in *Brosseau v. Alberta Securities Commission*[5]:

> 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*.

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[2] *Proprietary Industries Inc., Re*, 2005 CarswellAlta 2702 at para 23
[3] *Proprietary Industries Inc., Re*, 2005 CarswellAlta 2702 at para 61
[4] *Alberta (Securities Commission) v. Workhum*, 2010 CarswellAlta 2478 at para 66
[5] *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301 at pg. 13

The *Brosseau* decision has been followed numerous times, and has been re-affirmed by the Supreme Court of Canada[6].

[15] As set out by Staff in their written submissions, numerous decisions of securities commissions across Canada have also followed *Brosseau.* These decisions are consistent in their position. The following statement from the Alberta Securities Commission in *Re Proprietary Industries* is typical:

> As the Respondents acknowledged, the multifaceted tasks of an administrative body such as the Commission have been the subject of repeated and serious consideration by legislators and the courts. The law is clear that the mere fact that an administrative body has investigative, prosecutorial and adjudicative powers and functions does not give rise to a fatal inherent conflict.[7]

[16] The respondent Drapeau, in his motion, makes no specific allegations of bias against the Commission. There has been no evidence presented of any unfair or partial treatment by the Commission, or of the Commission acting outside of its statutory authority. Drapeau's only grounds for seeking a dismissal on the basis of a denial of natural justice is the current structure of the Commission, which has been created and authorized by the *Act*. And, as indicated above, the legislation – not the common law – regulates the process of administrative tribunals. As the Supreme Court of Canada states in *Ocean Port:*

> 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 of 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.[8]

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[6] See *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* , [1992] 1 S.C.R. 623 (S.C.C); *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2001] 2 S.C.R. 781 (S.C.C.); *Bell Canada v. C.T.E.A.*, [2003] 1 S.C.R. 884 (S.C.C.)

[7] 2005 CarswellAlta 2702 at para 45; referred to in *Re Ironside* 2009 CarswellAlta 499

[8] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2001] 2 S.C.R. 781 (S.C.C.) at para 20.

Further,

> 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. [9]

[17] Drapeau's counsel, in his submissions, relies on the recent Supreme Court of Canada case of *R. v. Conway*[10] to counter the *Brosseau* and *Ocean Port* line of authorities. Essentially, Drapeau's counsel argues that *Conway* accords the Commission the status of a court of competent jurisdiction, therefore making the Commission subject to the common law natural justice guarantees of independence and impartiality. His position is that *Conway* has essentially changed the law in this area, overruling *Brousseau* and the line of cases following *Brosseau*.

[18] The difference between the application of natural justice to statutory tribunals and to courts of competent jurisdiction is discussed in *Ocean Port*[11]:

> 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.
>
> 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. 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

[9] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2001] 2 S.C.R. 781 (S.C.C.) at para 22
[10] [2010] 1. S.C.R. 765
[11] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2001] 2 S.C.R. 781 (S.C.C.) at paras 23-24

> 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.

[19] There is no question that *Conway* is an important decision in the realm of administrative law. The Supreme Court of Canada in *Conway* has made clear that administrative tribunals with the power to decide questions of law have the jurisdiction to consider and rule on constitutional challenges that are linked to matters properly before them.[12] However, the Commission does not accept that *Conway* goes so far as to overrule the Supreme Court of Canada's decisions in such cases as *Brosseau* and *Ocean Port* which specifically address the question at issue in this matter[13]. Such a significant departure from the jurisprudence of the Supreme Court of Canada should not be made without clearer direction from the Court.

[20] Furthermore, *Conway* states that tribunals with the authority to decide questions of law can also determine whether a particular *Charter* challenge or violation is present, and grant remedies accordingly. Therefore, following *Conway,* the Commission can properly consider and apply the *Charter* and its remedies; and the Commission fits within the definition of court of competent jurisdiction only for the purposes of granting remedies under subsection 24(1) of the *Charter*:

> Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s.24(1) [of the *Charter*], the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* – and *Charter* remedies – when resolving the matters properly before it.
>
> Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is

[12] *R. v. Conway*, [2010] 1. S.C.R. 765 at para 78
[13] See also Footnote 6.

> necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function (*Dunedin*).[14]

[21] Finally, even if the Commission had accepted that *Conway* had the effect of changing the previous jurisprudence of the Supreme Court of Canada relating to institutional bias, the Commission concludes that the respondent Drapeau has not met the test to establish such bias. The evidence, namely paragraphs 5 through 29 of the affidavit of Rick Hancox, the Executive Director of the New Brunswick Securities Commission, dated 2 May 2011 ("Hancox Affidavit"), establishes that the Commission has sufficient protections and systems in place to ensure impartiality and independence on the part of the Commission.

[22] As confirmed by *Brosseau, Ocean Port, Re Proprietary Industries, Workum* and others, the Commission's provision of both investigative and adjudicative functions does not in itself create a lack of independence or impartiality. The Commission's separation of its adjudicative and investigative branches, the evidence regarding the Commission's operations and the structural safeguards in place at the Commission - which are set out in the Hancox Affidavit – would lead any well-informed person, viewing the matter realistically and practically, to conclude that Commission Panels are independent and impartial. Of particular importance are the safeguards set out in the Commission's comprehensive Governance Policy, and in Local Rule 11-504 *Conflict of Interest and Code of Conduct*.

[23] Therefore, based on the authorities and the evidence submitted, the Commission finds that the structure of the Commission has been created and authorized by statute, and the Commission is acting within the authority granted to it by the *Act.* The Commission further finds that the respondent Drapeau has not presented any evidence of probative value to support a finding of institutional bias. As indicated above, the common law rules of natural justice cannot invalidate otherwise valid legislation.

[14] *R. v. Conway*, [2010] 1. S.C.R. 765 at paras 81 and 82

[24] For the reasons above, the respondent Drapeau's motion for relief based on a denial of natural justice is dismissed.

c. Section 7 of the *Charter*

[25] The respondent Drapeau's second argument is that the Commission lacks jurisdiction to hear the allegations as a result of a breach of section 7 of the *Charter.* Section 7 reads:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[26] The appropriate approach to analyze a claim for of a section 7 violation is described in the Supreme Court of Canada decision of *R. v. Beare* as follows:

> The analysis of s. 7 of the *Charter* involves two steps. To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty, and security of the person" and, secondly, that that deprivation is contrary to the principles of fundamental justice.[15]

[27] With respect to the first question, the Commission must find a deprivation of the right to life, liberty of security of the person in order to move to a discussion of fundamental justice. The respondent Drapeau made few submissions on the question of a section 7 violation. One submission was that, based on the Statement of Allegations, Drapeau could go to jail. The Commission, having reviewed the Amended Statement of Allegations, disagrees. Staff do cite sections 179 and 180 of the *Act* – labelled in the *Act* as "offence" sections – in their Amended Statement of Allegations, filed on 26 April 2011. However, Staff are <u>not</u> prosecuting Drapeau under section 179 or 180 of the *Act*, nor are they seeking any penalty under these sections of the *Act*. Staff are seeking public interest remedies under sections 184 and 186 of the *Act*, and have alleged *violations* of 179 and 180 of the *Act*. Sections 179 and 180 are not prosecuted

[15] *R. v. Beare*, [1998] 2 S.C.R. 387 at 401

by Staff, but rather by a Crown Prosecutor in Provincial Court.[16] No such prosecution is at issue here.

[28] The other potential harms cited by Drapeau in his Affidavit dated 2 May 2011 are economic and social harm[17]. As submitted by the A.G. and by Staff, and accepted by the Commission, it is well established that the protection of section 7 of the *Charter* is not engaged when purely economic interests are at issue. It has been recognized that the sanctions imposed by a securities tribunal are most properly characterized as economic in nature. In *Proprietary Industries Inc,* the Alberta Securities Commission stated this point as follows:

> The sanctions that the Commission can impose in the public interest, despite these constraints, can clearly have important consequences for a market participant. Their effect, though, is essentially on economic and property interests – money, livelihood in some cases, and continued enjoyment of the privilege of access to the capital market. (See *Malartic Gold Mines (Canada) Ltd., Re* (1985), 8 O.S.C.B. 157 (Ont. Securities Comm.), at 5). "Life" and "liberty" are not in jeopardy here.[18]

[29] Regarding social harm, the court in *Blencoe v. British Columbia (Human Rights Commission)*[19] held that serious interference by the state with an individual's "psychological integrity" can be a violation of security of the person, under section 7.[20] However, this will only be the case in very limited and compelling circumstances:

> It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. While these fundamental personal choices would include the right to make decisions concerning one's body free from state interference or the prospect of losing guardianship of one's children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings. [21]

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[16] Affidavit of Rick Hancox dated 2 May 2011, at para. 23
[17] Affidavit of Armel Drapeau dated 2 May 2011 at para 24
[18] *Proprietary Industries Inc., Re*, 2005 CarswellAlta 2702 at para 179.
[19] *Blencoe v. British Columbia (Human Rights Commission)* (2000), 2000 SCC 44
[20] *Proprietary Industries, Re*, 2005 CarswellAlta 2702 at para 181, citing *Blencoe*
[21] *Blencoe v. British Columbia (Human Rights Commission))* (2000), 2000 SCC 44 at para 83; cited in *Re Proprietary Industries* at para 184

The Commission finds that the social harm and stigma cited by the respondent Drapeau does not amount to harm violating his section 7 right to security of the person.

[30] With no deprivation of "life, liberty or security of the person", section 7 of the *Charter* is not triggered in this case. There is therefore no need to assess the second part of the section 7 test.

[31] For the above reasons, the respondent Drapeau's motion based on a violation of section 7 of the *Charter* is dismissed.

d. Section 11(d) of the *Charter*

[32] The respondent Drapeau argues that the Commission lacks jurisdiction to hear the allegations as a result of a breach of section 11(d) of the *Charter.* Section 11(d) provides that any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[33] The starting point for consideration of the application of section 11(d) of the Charter is the existence of an "offence". Section 11(d) is largely confined to the criminal context. The proceedings against Drapeau are administrative and regulatory, not criminal. However counsel for Drapeau, in his submissions, cites *R. v. Wigglesworth*[22] to support his claim that the magnitude of the administrative penalty and the costs sought by Staff bring the allegations into the realm of "true penal consequences", therefore engaging section 11(d). Counsel for Drapeau also cites Staff's references to sections 179 and 180 of the *Act* in their amended Statement of Allegations.

[34] The Commission has addressed Staff's citation of sections 179 and 180 of the *Act,* and their application to these proceedings, above at paragraph [27]. Staff are not seeking any penalty under section 179 or 180 of the *Act*, and are not prosecuting Drapeau under section 179 or 180. The Commission finds that the inclusion of a reference to sections 179 and 180 in Staff's Amended Statement of Allegations – where

[22] *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 at para 21

no penalty is being sought under these sections – does not engage 11(d) of the *Charter*.

[35] As to "true penal consequences" as defined by *Wigglesworth,* this precise issue was dealt with by the Alberta Court of Appeal in *Lavallee v. Alberta (Securities Commission)*[23], in which the court held the following:[24]

> [22] As the chambers judge noted, Wilson J. in *Wigglesworth* went on to state that the protections provided by s. 11 may apply to private or regulatory matters if there is the imposition of "true penal consequences". She opined at para. 24 that true penal consequences might include a "fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity".
>
> [23] The appellants rely on this last statement to argue that the potential penalties they face, for fines of up to $1 million per contravention of securities law, amount to true penal consequences and that the protections guaranteed by s. 11 are therefore engaged. The chambers judge rejected that argument, emphasizing the need to consider the purpose of the sanction, and not just its magnitude, in assessing whether it amounts to a true penal consequence. Moreover, when considering the purpose of the sanction it is necessary to consider the overarching purposes of the *Securities Act*, which include the protection of investors and the public, the efficiency of the capital markets, and ensuring public confidence in the system. In the end, the chambers judge agreed with this Court's conclusion, at para. 54 of *Brost*, that the increase in the magnitude of administrative penalties reflects a legislative intent to ensure that the penalties are not simply considered another cost of doing business. He therefore concluded that no true penal consequences arise under ss. 198 and 199 of the *Securities Act* and that s. 11 of the *Charter* is, accordingly, not engaged here. I agree.

[36] The Commission agrees with the Court in *Lavallee*. Administrative penalties available under the *Act* have increased so that they continue to assist the Commission in protecting investors and the public. The amount of the administrative penalties does not amount to true penal consequences. Therefore, section 11(d) of the *Charter* is not engaged.

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[23] *Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48 (Alta C.A.)
[24] *Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48 (Alta C.A.) at paras 22 and 23

[37] For the above reasons, the respondent Drapeau's motion based on a violation of section 11(d) of the *Charter* is dismissed.

2. CONCLUSION

[38] These reasons constitute the Commission's Decision and Reasons for Decision on the jurisdictional Motion heard on 9 and 10 May 2011.

Dated this 18 day of August, 2011.

"original signed by"

Guy G. Couturier, Q.C., Panel Chair

"original signed by"

Anne La Forest, Panel Member

"original signed by"

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