The Québec Experience with an Independent Administrative Tribunal Specialized in Securities: A Study of the *Bureau de décision et de révision en valeurs mobilières*

A Research Study Prepared for the
Expert Panel on Securities Regulation in Canada

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Biography

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Executive Summary

Canadian securities commissions have traditionally been structured as multi-functional administrative agencies. Under this model, they act as regulator, investigator, prosecutor and adjudicator. There is a growing consensus amongst policymakers and legal experts that this structure is problematic and needs to be reviewed so that the regulatory and adjudicative functions are performed by separate entities under a "bifurcated model". Despite this growing consensus, some critics doubt that the bifurcated model would improve the overall regulatory environment, stressing the risk of a lack of responsiveness to policy considerations by an independent administrative tribunal.

Québec offers an interesting laboratory to analyse the attractions and the challenges of an independent administrative tribunal specialized in securities. Indeed, in 2002, Québec introduced a sweeping reform of the regulation of its financial services sector. The reform led to the creation of the *Autorité des marchés financiers* ("AMF") and introduced a bifurcated model with the creation of the *Bureau de décision et de révision en valeurs mobilières* ("Bureau"), which acts as an administrative tribunal charged with exercising certain powers provided for in the *Securities Act*.

The general objective of this research report is to gain a better understanding of the experience of the Bureau, so as to inform the current debate on the value of the bifurcated model. The report provides some context on the debate on an independent securities tribunal in Canada, and examines the choices made in Québec in this respect. It presents the structure and operations of the Bureau, focusing namely on its governance, funding, powers, and procedures. It also analyses the decisions issued by the Bureau since 2004 to assess its contribution to enforcement. In the analysis, specific attention is given to the subject matter, the powers exercised, the orders issued, and the interpretation given to the concept of "public interest" by the Bureau. The experience of the Bureau indicates that it is possible for market participants to benefit from a fair, independent hearing while also ensuring that decisions are not disassociated from the policy workings of the securities regulatory agency.

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Introduction

Canadian securities commissions have traditionally been structured as multi-functional administrative agencies. Under this model, they act as regulator, investigator, prosecutor, and adjudicator. There is a growing consensus amongst policymakers and legal experts that this structure is problematic and needs to be reviewed. Specifically, commentators emphasize that the multifunctional model gives rise to perceptions of potential for conflict or abuse. Those concerns translate into the recommendation that the regulatory and adjudicative functions be performed by separate entities under a "bifurcated model". Despite this growing consensus, some critics doubt that the bifurcated model will improve the overall regulatory environment, stressing the risk of a lack of responsiveness to policy considerations by an independent administrative tribunal.

Québec offers an interesting laboratory to analyse the attractions and the challenges of an independent administrative tribunal specialized in securities. Indeed, in 2002, Québec introduced a sweeping reform of the regulation of its financial services sector. The reform led to the creation of the *Autorité des marchés financiers* ("AMF") with the mandate to administer all the laws governing the supervision of Québec's financial sector, including insurance, securities, deposit-taking institutions, and the distribution of financial products and services in Québec. The reform also introduced a bifurcated model with the creation of the *Bureau de décision et de révision en valeurs mobilières* ("Bureau"), which acts as an administrative tribunal charged with exercising certain powers provided for in the *Securities Act*.

The general objective of this study is to gain a better understanding of the experience of the Bureau so as to inform the current debate on the value of the bifurcated model. The report contains three parts. The first part provides some context on the debate on an independent securities tribunal in Canada, and examines the choices made in Québec in this respect. The second part presents the structure and operations of the

Bureau, focusing namely on its governance, funding, powers, and procedures. It also analyses the decisions issued by the Bureau since 2004 to assess its contribution to enforcement. In the analysis, specific attention will be given to the subject matter, the powers exercised, the orders issued, and the interpretation given to the concept of "public interest" by the Bureau. The third part discusses the issue of a pan-Canadian securities tribunal, from both federal and provincial perspectives, and addresses both the legal and operational issues underlying such a tribunal.

I. THE DEBATE ON AN INDEPENDENT TRIBUNAL SPECIALIZED IN SECURITIES AND THE CREATION OF THE *BUREAU DE DÉCISION ET DE RÉVISION EN VALEURS MOBILIÈRES*

A. Framing the Issue: An Overview of the Critisms of Multifunctional Securities Commissions

1. A Thumbnail Sketch of the Multifunctional Model

In Canada, securities commissions have traditionally been the primary capital markets regulators[1]. Commissions are typically self-funding provincial administrative agencies in charge of the administration of the securities act and related legislation[2]. They are characterized as "integrated" or "multifunctional" agencies in that they perform both regulatory and adjudicative functions[3]. Commissions are headed by a bureau of directors composed of Commissioners appointed by the Government.

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[1] D. JOHNSTON & K.D. ROCKWELL, *Canadian Securities Regulation*, 4th Toronto, LexisNexis, 2006, p. 63-130 ; J.G. MACINTOSH & C.C. NICHOLLS, *Securities Law*, Toronto, Irwin, 2002, p. 69-72.

[2] Note that there is a somewhat different regime in the provinces of Prince Edward Island and Newfoundland, as well as in the Territories. In these jurisdictions, there is no securities commission. Rather, the administration of the securities act is assigned to government officials. See M.R. GILLEN, *Securities Regulation in Canada*, 3rd Ed., Toronto, Carswell, 2007, p. 108.

[3] P. ANISMAN, "The Ontario Securities Commission as Regulator: Adjudication, Fairness and Accountability", in A.A. ANAND & W.F. FLANNIGAN, *Conflicts of Interest in Capital Markets Structures*, Toronto, Carswell, 2003, p. 104; C.A. OSBORNE, D.J. MULLAN & B. FINLAY, *Report of the Fairness Committee to the Ontario Securities Commission*, 2004, p. 5 [hereinafter "*Osborne Committee*"]. For an

More specifically, commissions discharge legislative functions through rule-making and policy development. They are also involved in investigation and enforcement. The commissions' staffs informally investigate potential contravention to securities legislation and regulation. Where appropriate, staff will launch proceedings to enforce compliance. In addition, commissions have the power to initiate formal investigations for the due administration of the securities act or the regulation of capital markets. Most notably, commissions perform adjudicative functions through hearings held before panels of commissioners. Commissions have jurisdiction over a wide range of issues, including appeals from staff decisions, exemptions, takeover bids, and disciplinary matters. They also approve settlement agreements entered into by their staff and respondents.

2. Concerns about Bias in Multifunctional Commission Adjudication

Adjudication by a multifunctional commission raises concerns in light of two principles of natural justice: independence and impartiality[4]. Independence refers to the impact of the tribunal's administrative structure on the independence of adjudicators from those who appoint them: "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."[5] Impartiality relates to the adjudicator's state of mind or independence of thought: "Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular

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overview of securities commissions' powers, see D. JOHNSTON & K.D. ROCKWELL, *Canadian Securities Regulation*, Toronto, LexisNexis, 2006, p. 69-70.

[4] For a summary, see D. JOHNSTON & K.D. ROCKWELL, *Canadian Securities Regulation*, 4th Ed., Toronto, LexisNexis, 2006, p. 120-121.

[5] *Beauregard v. Canada*, [1986] 2 S.C.R. 56, 69.

case."[6] Impartiality also has an institutional aspect as the Supreme Court of Canada recognized in *Lippé*: "whether or not any particular judge harboured pre-conceived ideas or biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met."[7] Voiced recently by market participants and commentators, concerns about bias and lack of independence in a multifunctional commission have been examined thoroughly by the Osborne Committee. They can be summarized around three points.

At a general level, critics point out that the overlapping of the rulemaking, enforcement, and adjudicative functions in securities commissions creates the perception that a "fair hearing" cannot be obtained[8]. Secondly, institutional and personal factors make it difficult for commissioners to be neutral or "dispassionate" when acting in the role of adjudicator[9]. Thirdly, adjudicative powers are used by commissioners as a tool to develop policy at the expense of the rulemaking function[10].

Hitherto, the concerns about bias and lack of independence have not led courts to conclude that the multifunctional model contravenes principles of natural justice. Indeed, in *Brosseau v. Alberta (Securities Commission)*, the Supreme Court of Canada held that, to the extent it is authorized by the *Securities Act*, the combination of the enforcement and adjudicative functions prevents the making of a common law challenge for reasonable

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6 *Valente v. R.*, [1985] 2 S.C.R. 673, 685.

7 *R. v. Lippé*, [1991] 2 S.C.R. 114, 140.

8 D. JOHNSTON & K.D. ROCKWELL, *Canadian Securities Regulation*, 4th Ed., Toronto, LexisNexis, 2006, p. 123.

9 P. ANISMAN, "The Ontario Securities Commission as Regulator: Adjudication, Fairness and Accountability", in A.A. ANAND & W.F. FLANNIGAN, *Conflicts of Interest in Capital Markets Structures*, Toronto, Carswell, 2003, p. 116.

10 *Ibid*., p. 108-111.

apprehension of bias or independence[11]. Commissions must nonetheless be wary of ensuring that their organization allows for adequate separation of the investigative and prosecutorial functions from the adjudicative function to avoid the inappropriate overlapping of functions[12].

In light of the case law, it appears that the issue is not "whether the current structure is permissible, but whether it is one which gives rise to perceptions of potential for conflict or abuse"[13]. In this respect, the findings of the Osborne Committee are quite telling:

> We are satisfied that the nature of the apprehension of bias has become sufficiently acute as to not only undermine the Commission's adjudicative process, but also the integrity of the Commission as a whole among the many constituencies that we interviewed. Matters of institutional loyalty, the involvement of the Chair in the major cases, the increased penalties, the sense that "the cards are stacked against them", the home-court advantage, the lengthy criminal law-like trials, and the Commission's aggressive enforcement stance, which likely will only increase over time, all combine to make a compelling case for a separate adjudicative body.[14]

Thus, it comes as no surprise that the reports tabled over the last five years consider those perceptions sufficiently strong to warrant structural reform.

3. Models for Separating Regulatory and Adjudicative Functions

The concerns about bias and lack of independence have led a number of reform committees and commentators to examine alternatives to the current model. Two broad options have been put forth. The first is to strengthen the internal independence of the

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[11] [1989] 1 S.C.R. 301. See also *W.D. Latimer Co. Ltd. v. Ontario (Attorney General)*, (1974) 6 O.R. (2s) 129 (Ont. C.A.); *E.A. Manning Ltd. v. Ontario Securities Commission*, (1995) 23 O.R. (3d) 257 (Ont. C.A.).

[12] *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool),* [1996] 3 S.C.R. 919.

[13] ONTARIO, FIVE-YEAR REVIEW COMMITTEE, *Final Report – Reviewing the Securities Act (Ontario)*, 2003, p. 65.

[14] *Osborne Committee*, p. 32.

adjudicative function[15]. The second is the "bifurcated" or external separation model which consists in the establishment of a separate tribunal to perform the adjudicative function. This latter recommendation has gained the broadest support from committees, such as the Wise Persons' Committee, the Québec Task Force on Financial Sector Regulation, the Osborne Committee, the Crawford Panel, and the Task Force to Modernize Securities Legislation in Canada. In Québec, the external separation model has formed the basis for the creation of the *Bureau de décision et de révision en valeurs mobilières* discussed further below.

Despite the broad consensus in favour of the bifurcated model, some critics stress that a separate tribunal for securities would be unworkable. For instance, Anisman argues that bifurcation would "impede significantly the Commission's ability to fulfil its regulatory mandate"[16]. Since policymaking and adjudication are closely intertwined, external separation may impoverish these functions as they are discharged by the commission and the tribunal. On the one hand, external separation would deprive the commission of valuable experience. On the other hand, a separate tribunal "would not acquire experience through the administrative and rulemaking activities or […] through its own adjudication, in view of the relatively small number of formal hearings held"[17]. Hence, Anisman fears that an external tribunal "would also create a potential to undercut the policies" developed by the commission[18]. Another critique by Professor Condon emphasizes the risk that the establishment of an independent tribunal would lead to

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15 P. ANISMAN, "The Ontario Securities Commission as Regulator: Adjudication, Fairness and Accountability", in A.A. ANAND & W.F. FLANNIGAN, *Conflicts of Interest in Capital Markets Structures*, Toronto, Carswell, 2003, p. 131-139; D. JOHNSTON & K.D. ROCKWELL, *Canadian Securities Regulation*, 4th Ed., Toronto, LexisNexis, 2006, p. 124-127.

16 P. ANISMAN, "The Ontario Securities Commission as Regulator: Adjudication, Fairness and Accountability", in A.A. ANAND & W.F. FLANNIGAN, *Conflicts of Interest in Capital Markets Structures*, Toronto, Carswell, 2003, p. 124.

17 *Ibid*., 126.

18 *Ibid*., 126. See also D. JOHNSTON & K.D. ROCKWELL, *Canadian Securities Regulation*, Toronto, LexisNexis, 2006, p. 125.

"hyper-proceduralization […] turning administrative hearings [into] even more criminal-type trials"[19].

Although the Osborne Committee offered a reasoned rebuttal of these critics[20], we must recognize that the arguments in favour and against the bifurcated model have remained largely theoretical in the Canadian context up until now[21]. The Québec experience with the Bureau since 2004 offers a unique opportunity to examine empirically the operations of a separate tribunal to gain insight into the validity of these critics.

B. The Reform of Financial Services Regulation in Québec and the Implementation of an Independent Tribunal

1. The Autorité des marchés financiers

In 2001, the Government of Québec established the Task Force on Financial Sector Regulation to "review the regulatory structure of the Québec financial sector and to formulate recommendations in order to enhance the structure's efficiency both from the standpoint of consumer protection and streamlining for the industry of the administrative and regulatory burden within Québec's fields of jurisdiction"[22]. The Task Force tabled a report entitled *A Streamlined Regulatory Structure for Québec's Financial Sector*, which recommended major changes to the regulatory framework.

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19 M. CONDON, "Rethinking Enforcement and Litigation in Ontario Securities Regulation", (2006) 32 Queen's L.J. 1, 16.

20 *Osborne Committee*, p. 33-35.

21 D. JOHNSTON & K.D. ROCKWELL, *Canadian Securities Regulation*, 4th Ed., Toronto, LexisNexis, 2006, p. 126.

22 QUÉBEC, TASK FORCE ON FINANCIAL SECTOR REGULATION, *A Streamlined Regulatory Structure for Québec's Financial Sector*, Final Report, 2001, p. 1.

The central recommendation of the report was the establishment of a single body to regulate the financial sector in Québec, including, in particular, the fields of insurance, securities, deposit-taking institutions, the distribution of financial products and services, brokerage of loans secured by immovable hypothec, and pension plans. The Legislature followed the recommendation of the Task Force by adopting the *Loi sur l'Autorité des marchés financiers*[23], which consolidated the responsibility to administer all the laws governing the supervision of Québec's financial sector into a single regulatory body, the Autorité des marchés financiers ("the AMF"),.

The AMF acts as the single financial services regulator in Québec. Its mission is to[24]:

1) provide assistance to consumers of financial products and services, in particular by setting up consumer-oriented educational programs on financial products and services, processing complaints filed by consumers and giving consumers access to dispute-resolution services;

2) ensure that the financial institutions and other regulated entities of the financial sector comply with the solvency standards applicable to them, as well as with the obligations imposed on them by law, with a view to protecting the interests of consumers of financial products and services, and take any measure provided by law for those purposes;

3) supervise the activities connected with the distribution of financial products and services, administer the rules governing eligibility for and the carrying on of those activities, and take any measure provided by law for those purposes;

4) supervise stock market and clearing house activities and monitor the securities market, in particular, by administering the controls provided by law as regards access to the public capital market, ensuring that the issuers and other practitioners involved in the financial

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23 *Act respecting the Agence nationale d'encadrement du secteur financier,* R.S.Q., c. A-33.2.

24 *Act respecting the Agence nationale d'encadrement du secteur financier*, R.S.Q., c. A-33.2., s. 4.

sector comply with the obligations imposed on them by law and taking any measure provided by law for those purposes;

5) see to the implementation of protection and compensation programs for consumers of financial products and services and administer the compensation funds set up by law.

With respect to securities, the mission of the AMF is stated more precisely in the Québec *Securities Act* as being[25]:

1) to promote efficiency in the securities market;

2) to protect investors against unfair, improper or fraudulent practices;

3) to regulate the information that must be disclosed to security holders and to the public in respect of persons engaging in the distribution of securities and in respect of the securities issued by these persons;

4) to define a framework for the activities of the professionals of the securities market and organizations responsible for the operation of a stock market.

In sum, the role of the AMF is to supervise financial markets, to protect investors and the public, and to regulate securities trading[26].

The legislation grants the AMF broad regulatory powers to enable it to discharge its responsibilities. With respect to securities, the AMF is in charge of the administration of the *Securities Act*, which involves reviewing prospectus and disclosure documents, issuing receipts for the prospectus, and granting exemptions. It also has the power to adopt regulations and to draw up policy statements[27]. In addition to these administrative and policy-making powers, the *Securities Act* confers enforcement powers to the AMF,

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25 *Securities Act*, R.S.Q., c. V-1.1, s. 276.

26 *Autorité des marchés financiers* c. *Lacroix*, 2007 QCCS, par. 44.

27 *Securities Act*, R.S.Q., c. V-1.1, s. 274, 331 ss. [hereinafter *QSA*].

such as the power to conduct investigations, take any steps to ensure compliance with the Act and the regulations, and impose fines. However, the AMF does not wield quasi-judicial powers. As discussed further below, the exercise of the quasi-judicial function rests with the Bureau, which may grant orders upon application by the AMF or a third party. In other words, the Act vests the AMF with administrative, investigative, and prosecutorial functions, but not with the adjudicative function.

The AMF is organized around four divisions ("directorates") pursuant to a functional approach[28]. The *Direction de l'encadrement de l'assistance aux consommateur* is responsible for assisting consumers with complaints and claims, managing compensation and protection programs, disseminating educational programs, and providing consumers with an information centre. The *Direction de l'encadrement de la solvabilité* monitors and supervises insurance companies and deposit-taking institutions operating in Québec. The *Direction de l'encadrement de la distribution* supervises the distribution of financial products, and services and manages the certification of representatives, and the registration of firms, in insurance, financial planning, and related areas. The *Direction de l'encadrement des marchés de valeurs* oversees the proper operation of the securities markets and promotes the protection of investors. Specifically, it analyses disclosure documents, makes sure that reporting issuers comply with their obligations, and oversees the establishment and implementation of rules and regulations pertaining to capital markets.

The AMF is headed by a President and Chief Executive Officer (CEO) appointed by the Government of Québec for a five-year term[29]. Each Directorate is headed by an

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28 *An Act Respecting the Autorité des marchés financiers*, R.S.Q., c. A-33.2, s. 5 [hereinafter *AMFA*]; QUÉBEC, TASK FORCE ON FINANCIAL SECTOR REGULATION, *A Streamlined Regulatory Structure for Québec's Financial Sector*, Final Report, 2001, p. 103.

29 *AMFA*, s. 20.

Executive Director (or Superintendent) appointed by the President and CEO[30]. The President and CEO may delegate, generally or specifically, to any of the Executive Directors, the functions and powers conferred by the legislation to the AMF[31]. However, the powers provided in the applicable Acts to make regulations, to define a policy statement, or to establish a guideline, may not be delegated.

2. Bureau de décision et de révision en valeurs mobilières

As part of its review of financial services regulation in Québec, the Task Force on Financial Sector Regulation expressed concerns in its report with respect to the combination of the regulatory and adjudicative functions in a single agency:

> We observe that the main problem of any administrative authority exercising both regulatory functions and quasi-judicial functions involves the guarantee of independence and impartiality of the individuals charged with exercising quasi-judicial functions compared to other regulatory tasks.[32]

These concerns, which echo those underscored above, led the Task Force to recommend that a barrier be raised between the regulatory and adjudicative functions. The Legislature paid heed to this recommendation when it went forward with the reform of financial sector regulation. Thus, it provided for the creation of the Bureau in the *Act respecting the Agence d'encadrement du secteur financier*. As discussed further below, the Bureau is an independent administrative tribunal specialized in securities that exercises the adjudicative functions.

II. THE EXPERIENCE OF THE *BUREAU DE DÉCISION ET DE RÉVISION EN VALEURS MOBILIÈRES*

30 *AMFA*, s. 23.

31 *AMFA*, s. 24.

32 QUÉBEC, TASK FORCE ON FINANCIAL SECTOR REGULATION, *A Streamlined Regulatory Structure for Québec's Financial Sector*, Final Report, 2001, p. 50.

A. Structure and Governance

1. Organization

a. Members

The Bureau is composed of members appointed by the Government of Québec, the number of which it determines[33]. The term of office of a member is five years[34]. The Government may nonetheless determine a shorter term of office in special circumstances. As the corollary to the appointment power, the Government has the power to remove a member from office[35]. Given that the security of tenure is an "essential condition of independence", the power to remove should only be exercised in exceptional cases for cause related to the member's capacity to perform her functions[36].

There are no specific statutory qualification requirements that must be met by the candidates, leaving it to the discretion of the Government. Currently, the Bureau has six members; the position of president is vacant. The members of the Bureau are together identified as the Bureau of the Bureau. Until recently, there were three full-time members, including a chair, deputy chair, and three part-time members. All the current members have been called to the Québec Bar and have expertise and extensive experience in securities and litigation[37]. In this respect, it is interesting to note that four of the six original members of the Bureau had previously worked with the Commission des valeurs mobilières du Québec, the Québec securities regulator that preceded the establishment of the AMF[38].

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33 *AMFA*, s. 97.

34 *AMFA*, s. 97.

35 *Interpretation Act*, R.S.Q., c. , s. 55.

36 *Valente v. The Queen*, [1985] 2 S.C.R. 673.

37 BUREAU DE DÉCISION ET DE RÉVISION EN VALEURS MOBILIÈRES, *Rapport annuel 2006-2007*, p. 3.

38 *Ibid*., p. 3.

The Government determines the remuneration, employee benefits, and other conditions of employment of the members of the Bureau. Once established, a member's remuneration may not be reduced[39]. The pension plan of the full-time members of the Bureau is set pursuant to the *Act respecting the Pension Plan of Management Personnel*[40].

b. Administrative Organization

The Government designates, from among the members of the Bureau, the Chair and the appropriate number of Deputy Chairs. They exercise their functions on a full-time basis. The Chair assigns and coordinates the work of the members. The Deputy Chair takes over the functions of the Chair, as required.

The managerial functions of the Bureau are divided into two divisions: tribunal and registry management, and resource management. The Secrétariat Général and Legal Affairs Directorate are in charge of the registry services. It receives and processes applications for hearings, manages the schedule of hearings, and provides access to the registry's documents. The Administration Directorate is responsible for planning, organizing, controlling, and evaluating all activities pertaining to the management of human, financial, material, and information resources. The staff is appointed pursuant to the *Public Administration Act*[41].

Finally, the Bureau is distinct from the persons or entities using any of its services. Its offices are located in a different building from those of the AMF, to ensure a physical differentiation between them.

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39 *AMFA*, s. 101. Nonetheless, the additional remuneration that comes with the duties of chair and deputy chair shall cease when those functions are relinquished.

40 R.S.Q., c. R-12.1. *AMFA*, s. 102.

41 R.S.Q., c. F-3.1.1. *AMFA*, s.104.

c. Funding

With respect to funding, the Chair of the Bureau submits each year to the Minister of Finance the budget estimates for the following fiscal year[42]. The estimates are submitted to the Government for approval. However, the funds required for the operations of the Bureau are not taken from the consolidated revenue fund, as it is a governmental body other than a budget-funded body pursuant to the *Financial Administration Act*[43]. Rather, the Bureau is funded through a fund made up of:

1. the sums paid by the AMF in the amount and according to the terms and conditions determined by the Government;

2. the sums collected pursuant to the tariff of duties, fees and other charges related to applications heard by the Bureau.[44]

In other words, the operations of the Bureau are funded by market participants, either directly or indirectly.

It is important to emphasize that the AMF does not have discretion over the funding of the Bureau. Indeed, the sums paid by the AMF to the fund used to finance the operations of the Bureau are determined by the Government. Thus, the Bureau does not deal with the AMF to secure its funding. This financing structure contributes to the independence of the Bureau from the AMF.

2. Jurisdiction and Procedural Issues

a. Jurisdiction

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42 *AMFA*, s. 110.

43 *Financial Administration Act*, R.S.Q., c. A-6, s. 2. However, the Government may, according to the conditions it determines, authorize the Minister of Finance to advance to the fund of the Bureau sums taken out of the consolidated revenue fund. In such a case, the advance shall be repayable out of the fund of the Bureau. *AMFA*, s. 115.

44 *AMFA*, s. 114. See also *Tarif des droits, honoraires and autres frais afférents aux demandes entendues par le Bureau de Décision and de révision en valeurs mobilières*, (2004), 136, G.O. II, 3191.

The jurisdiction of the Bureau is broad. At the request of the AMF, or any interested person, the Bureau shall exercise the powers provided for it in the *Securities Act* as concerns:

1) the revocation, suspension, or imposition of restrictions on the rights granted by registration to a dealer or adviser under section 152 of that Act;

2) an order prescribing a course of action concerning a legal person, partnership or entity carrying on securities exchange or clearing activities under section 172 of that Act;

2.1) an order under section 233.2 of that Act regarding a take-over bid or issuer bid;

3) a freeze order under Title IX of that Act;

4) an order under section 262.1 of that Act;

5) the refusal of an exemption under section 264 of that Act;

6) an order prescribing the cessation of an activity in respect of a transaction in securities under section 265 of that Act, except in the case of failure by a reporting issuer to provide periodic disclosure about its business and internal affairs in accordance with the conditions determined by regulation or failure by an issuer or by another person to provide any other disclosure prescribed by regulation in accordance with the conditions determined by regulation;

7) an order directing a person to cease carrying on business as an adviser under section 266 of that Act;

8) a prohibition or restrictions of representations in respect of a security determined under section 270 of that Act;

9) a reprimand under section 273 of that Act;

10) the imposition of an administrative penalty, the repayment of the cost of an investigation or an order prohibiting a person from acting as director or senior executive under sections 273.1 to 273.3 of that Act.[45]

At the request of the AMF, the Bureau may also take any measure conducive to ensuring compliance with the provisions of the *Securities Act*[46].

Additionally, the Bureau has the power to review a decision rendered by the AMF or a recognized self-regulatory organization, such as the TMX, the Chambre de la sécurité financière,[47] the Investment Industry Regulatory Organization of Canada, and the Clearing and Depository Services[48]. In exercising this power, the Bureau has adopted a deferential attitude towards the decisions rendered by these entities. Indeed, the Vice-President of the Bureau, Mr. Alain Gélinas, stated in the *Métivier* case that a systematic and unprincipled revision of the decisions rendered by a self-regulatory organization would undermine self-regulation[49].

Finally, note that, until recently, the Bureau also had the power to recommend to the Minister of Finance the appointment of a "provisional administrator" (or receiver) to manage the business and affairs of the issuer. However, following recent legislative amendments, receivership in securities is now under the jurisdiction of the Superior Court

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45 *AMFA*, s. 93(1).

46 *AMFA*, s. 94.

47 The Chambre de la sécurité financière is established by the *Loi sur la distribution des produits et services financiers* [*An Act respecting the distribution of financial products and services*], R.S.Q., c. D-9.2. Its mission is to protect consumers by maintaining discipline and overseeing the training and ethics of its members who work in six sectors: group savings brokerage, financial planning, scholarship plan brokerage, investment contract brokerage, insurance of persons and group insurance of persons.

48 *AMFA*, s. 93(2).

49 *Métivier v. Association canadienne des courtiers en valeurs mobilières*, File no. 2004-006, February 17, 2005, p. 13 (*translation*).

of Québec[50]. Thus, it is the Superior Court that may appoint a receiver upon application by the AMF. Vesting the power to appoint a receiver to the Superior Court is meant to facilitate receivership in complex cases, where bankruptcy and liquidation issues intertwine with securities law[51]. Given its inherent jurisdiction, the Superior Court is viewed as having a greater ability to craft solutions to novel questions.

To summarize, the Bureau has adjudicative powers that can be used to enforce compliance with the *Securities Act* in the context of disputes between the AMF and market participants. The powers also extend to disputes which do not concern the AMF, and that involve only market participants, such as in the case of take-overs, or market participants and self-regulatory organizations. In any case, given that the disputes are brought before it by the AMF or another person, the Bureau is disinterested in the outcome of the cases. It can thereby act as an impartial third party to adjudicate the disputes.

b. Procedure

The Bureau is designated by the *Conseil de la justice administrative* (Administrative Justice Council) as a body of the administrative branch charged with settling the disputes between a citizen and an administrative authority or a decentralized authority implementing a government program[52]. Accordingly, it is subject to the provisions of the

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50 *AMFA*, s. 19.1 ss.

51 See M. POPLAW et al., « Les balises de l'administration provisoire and les développements législatifs à venir », in A. LEDUC, *Les récents scandales financiers au Québec en matière de fonds communs de placement*, Actes de la formation juridique permanente 2008, vol. 1, Cowansville, Éditions Yvon Blais, 2008, at p. 25-26.

52 *Act respecting administrative justice,* R.S.Q., c. J-3, s. 178.

Loi sur la justice administrative[53], which enact general rules of conduct that shape the procedure followed by such body[54].

Specifically, the *Loi sur la justice administrative* requires that the procedures leading to a decision of the Bureau be conducted in keeping with the duty to act impartially so as to ensure a fair process[55]. The parties must also be given the opportunity to be heard. The hearings of the Bureau must be held in public. However, it may order hearings to be held in camera where necessary to maintain public order. The Act recognizes that the Bureau has, within the scope of the law, full authority over the conduct of the hearing. It shall, in conducting the proceedings, be flexible and ensure that the substantive law is rendered effective and is carried out. The Act provides that the Bureau can rule on the admissibility of evidence and means of proof and may, for that purpose, follow the ordinary rules of evidence applicable in civil matters. Nonetheless, it can, reject any evidence that was obtained in a manner that breached fundamental individual rights and freedoms, which would bring the administration of justice into disrepute[56]. Every decision rendered must be communicated in clear and concise terms to the parties and to every other person that the law indicates. Moreover, every decision terminating a matter, even a decision communicated orally to the parties, must be in writing together with the reasons on which it is based.

The Act emphasizes that the Bureau must play an active role in conducting the hearings. Thus, it must take measures to circumscribe the issue and, where expedient, to promote reconciliation between the parties. In addition, it is required to give the parties

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53 *Act respecting administrative justice,* R.S.Q., c. J-3, s. 178.

54 *Ibid*., s. 9.

55 *Ibid*., s. 9-13.

56 The use of evidence obtained in violation of the right to professional secrecy is deemed to bring the administration of justice into disrepute.

the opportunity to prove the facts in support of their allegations and to present arguments. If necessary, the Bureau shall also provide fair and impartial assistance to each party during the hearing, and must allow each party to be assisted or represented by persons empowered by law to do so.

Besides the requirements imposed by the *Act respecting administrative justice*, the hearings and decisions of the Bureau are subject to rules enacted by the *Securities Act* and the *Act respecting the Autorité des marchés financiers*. Most noteworthy among these rules is, firstly, the provision granting the Bureau the power to hold joint hearings with, and consult with any other authority responsible for, the supervision of securities trading[57]. This provision may be seen as seeking to prevent respondents from arguing that the Bureau cannot hold hearings jointly with multifunctional commissions because of apprehension of bias or lack of independence[58]. Secondly, while the Bureau is required to give parties to the proceedings the opportunity to be heard, the *Securities Act* recognizes that a decision adversely affecting the rights of a person may, where it is imperative to do so, be rendered without a prior hearing[59]. In such a case, the Bureau must give the person concerned the opportunity to be heard within 15 days. Thirdly, the Bureau may file its decision with the Superior Court[60]. Once filed, the decision must be enforced in the same way as a decision of the Superior Court, and has all the effects thereof. This mechanism may be used, for instance, with respect to decisions imposing administrative penalties. Fourthly, the decision of the Bureau may be rendered by a single member[61]. However, the Bureau can elect to have hearings conducted by two or more members to foster

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57 *QSA*, s. 323.

58 P. ANISMAN, "The Ontario Securities Commission as Regulator: Adjudication, Fairness and Accountability", in A.A. ANAND & W.F. FLANNIGAN, *Conflicts of Interest in Capital Markets Structures*, Toronto, Carswell, 2003, p. 128.

59 *QSA*, s. 323.6, 323.7.

60 *QSA*, s. 323.10.

61 *AMFA*, s. 103.

collegiality, sharing of expertise, and coherence in the decisions[62]. Lastly, as required by the *Securities Act*[63], the Bureau has enacted formal rules of procedure that establish the procedure applicable to matters brought before it, in keeping with the principles of natural justice and equality of the parties.

c. Immunity

No proceedings may be instituted against any member of the Bureau by reason of an act performed in good faith in the exercise of their functions[64]. In addition, where a member of the Bureau is prosecuted by a third party for an act done in the exercise of the functions of office, the Bureau shall assume the person's defence and shall pay any damages awarded as compensation for the injury resulting from that act, unless the person committed a gross fault or a personal fault separable from those functions[65]. In penal or criminal proceedings, however, the Bureau shall pay the defence costs of the chair, a deputy chair, or another member of the Bureau, only if the person had reasonable grounds to believe that the conduct was in conformity with the law, or was discharged or acquitted.

Where the Bureau prosecutes the chair, a deputy chair or another member of the bureau for an act done in the exercise of the functions of office and loses its case, it shall pay the person's defence costs if the court so decides[66]. If the Bureau wins its case only in part, the court may determine the amount of the defence costs it must pay.

3. Accountability

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62 Rapport annuel 2006-2007, p. 5.

63 *QSA*, s. 323.1.

64 *AMFA*, s. 104.

65 *AMFA*, s. 104.2.

66 *AMFA*, s. 104.3.

a. Appeal

An appeal lies from the decision of the Bureau to the Court of Québec. From there, there is an appeal to the Court of Appeal, with leave. The decisions rendered by the Bureau, aside from an appeal, benefit from the protection of the "privative clause", which shields the Bureau's decision from judicial review. Thus, except on a question of jurisdiction, no extraordinary recourse within the meaning of the Code of Civil Procedure may be exercised and no injunction may be granted against the Bureau, its members, or staff. As the Supreme Court of Canada noted in *Pushpanathan*, "the presence of a "full" privative clause is compelling evidence that the court ought to show deference to the tribunal's decision, unless other factors strongly indicate the contrary as regards the particular determination in question"[67].

b. Governmental Oversight

The Bureau is accountable to the Government through various mechanisms. The Government exercises oversight of the financial operations of the Bureau. As discussed above, the Chair of the Bureau submits each year to the Minister of Finance the budget estimates of the Bureau for the following fiscal year. The estimates are submitted to the Government for approval. In addition, each year, the Bureau must submit to the Minister its financial statements as well as a report on its activities for the previous fiscal year[68]. The books and accounts of the Bureau are audited by the Auditor General each year and whenever the Government so orders[69]. The Minister tables the activity report and the financial statements of the Bureau before the National Assembly[70]. The Auditor General's report must accompany the activity report and the financial statements of the bureau.

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67 *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, par. 30.

68 *AMFA*, s. 112.

69 *AMFA*, s. 111.

70 *AMFA*, s. 113.

B. Enforcement Decisions by the Bureau de décision et de révision en valeurs mobilières

1. Overview of Enforcement Decisions

The Bureau rendered 90 decisions between the time it began exercising its jurisdiction on February 1, 2004 and June 30, 2008. Chart 1 presents the subject matter of the hearings which led to a decision of the Bureau. Chart 2 provides details on the enforcement orders involved, specifying whether the order was granted.

The data refer to the occurrence of each of the subject matter in the decisions. This implies that several subject matters may be involved in a single decision. Further, where a hearing involves two cases, the orders issued by the Bureau therefore apply to each of the cases. In those instances, the cases have been considered independently for the purpose of our analysis. Stated differently, we have treated them as if two independent decisions had been rendered. Thus, the number of subject matters and orders exceeds the number of decisions.

As Chart 1 shows, a variety of issues have led to enforcement decisions by the Bureau. Overall, leaving aside the miscellaneous category, the most common subject matter for a hearing was the distribution of a security without a prospectus or registration. While it appears notable, misrepresentation remains a marginal subject matter since it is usually dealt with in cases involving distribution without a prospectus. Thus, the other significant category concerns inappropriate behaviour by market intermediaries. Otherwise, subjects such as market manipulation or insider trading have rarely been considered by the Bureau. Finally, the Bureau rules on many miscellaneous subject matters that essentially relate to procedural issues, such as the extension or lifting of orders or the appointment of a "provisional administrator" (receiver)[71].

[71] Note that, as a result of the following recent legislative amendments, the Bureau no longer has the power to appointment a provisional administrator.

Chart 1 : Subject Matter of the Decisions

Distribution without prospectus/registration	42
Failure to file insider trading reports	2
Failure to comply with continuous disclosure obligations	4
Misrepresentation	16
Conduct unbecoming of a registrant	13
Violating the know-your-client rule	1
Failure to maintain adequate working capital	1
Failure to provide documents requested (investigation)	3
Market manipulation	5
Insider trading	1
Takeover bid	1
Miscellaneous	163

In its decisions, the Bureau had exercised six of the eleven enforcement powers granted by section 93 of the *Act respecting the Autorité des marchés financiers*. It is also worth mentioning that a significant number of decisions are rendered without a prior hearing in accordance with section 323.7 of the *Securities Act*.

The enforcement orders issued by the Bureau are presented in Chart 2, reproduced in the Appendix. The most frequent orders are freeze orders and cease trade orders. In a number of cases, the Bureau has issued orders to revoke the licenses of securities advisors. The chart also shows that the plaintiff, usually the AMF, has a high rate of success before the Bureau, as very few requests have been refused. This suggests that the Bureau is a forum that is responsive to enforcement issues raised by the regulator. Although it is independent, the Bureau thus appears to be receptive to the AMF's investor protection mission.

This perception merits qualifications in light of the administrative penalties imposed by the Bureau. There are nine cases where the AMF requested that the Bureau exercise its power to order an administrative penalty. While orders were issued in seven of those cases, the penalties imposed were rather symbolic, being generally less than $5,000. The modest penalties may be explained, at least in part, by the gravity of the contravention involved.

Finally, the data show that the decisions of the Bureau have been rarely appealed. Appeals were filed with respect to only five decisions. Three of those appeals were granted either by the Court of Québec or the Court of Appeal. This suggests that the decisions of the Bureau can be implemented quickly as they do not lead to further contestations through appeals. This contributes to the effectiveness of the enforcement decisions of the Bureau.

2. The Public Interest Dimension

Pursuant to section 323.5 of the *Securities Act*, the Bureau must exercise the discretion conferred to it in accordance with the public interest. Given the influence of this concept on enforcement proceedings, both in Québec and in the other provinces and territories, it seems apposite to examine how the Bureau defines it. To do so, we follow the approach proposed by Professor Condon and look more specifically at the relationship between public interest and the goals of securities regulation[72].

The first dimension of our study deals with the extent to which the Bureau takes into account the goal of investor protection and market efficiency in its construction of public interest. This dimension is important given the comments made by Justice

[72] M. CONDON, "The Use of Public Interest Enforcement Orders by Securities Regulators in Canada", in A.D. HARRIS, *Committee to Review the Structure of Securities Regulation in Canada, Research Studies***,** 2003, p. 420.

Iacobucci of the Supreme Court of Canada in the *Asbestos* decision. In that decision, Justice Iacobucci emphasized that enforcement orders must be rendered in light of the overall goals of securities regulation, which extend beyond investor protection:

> In considering an order in the public interest, it is an error to focus only on the fair treatment of investors. The effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets should also be considered.[73]

The second dimension of our study compares the Bureau's conception of public interest with that of provincial and territorial securities commissions, using the work done by Professor Condon for the Wise Persons' Committee.

With respect to the first dimension, our analysis indicates that the Bureau has invoked public interest in close to 60 percent of the cases to support its decisions. This reflects the position of the Bureau that its enforcement powers are "closely intertwined" with the concept of public interest[74]. Considering that its powers resemble those of the Ontario Securities Commission under section 127 of the *Ontario Securities Act*, the Bureau has referred frequently to the comments of the Supreme Court of Canada in *Asbestos*[75] and *Cartaway Resources*[76].

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[73] *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132.

[74] *Autorité des marchés financiers* c. *Mizrahi*, File 2008-004, Decision 2008-004-006 (12 May 2008), p. 10.

[75] *Autorité des marchés financiers* c. *Mizrahi,* File 2008-004, Decision 2008-004-006 (12 May 2008), p. 10-11. See also *Northern Financial Corporation* c. *Jaguar Nickel,* File 2006-021, Decision 2006-021-02 (4 April 2007), p. 22 à 24.

[76] *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672. *Autorité des marchés financiers* c. *David Mizrahi,* File 2008-004, Decision 2008-004-006 (12 May 2008), p. 11, citing *Cartaway Resources Corp. (Re)*, par. 125. See : *Autorité des marchés financiers* c. *Gauthier,* File 2007-004 (21 June 2007), p. 6 : « Le bureau tient compte de la dissuasion générale lorsqu'il se prononce dans l'intérêt public quant à la sévérité d'une pénalité ». See also : *Autorité des marchés financiers* c. *ABN Amro Asset Management Canada Limited,* File 2007-002 (20 June 2007), p. 6-7; *Autorité des marchés financiers* c. *Desbiens,* File 2006-019 (4 October 2007), p. 15.

At a general level, this has led the Bureau to construct public interest as encompassing the twin goals of securities regulation:

> The Bureau is of the opinion that the public interest in capital markets transcends the interests of an investor. The Tribunal must in effect take into account the well-functioning of the capital market and the public confidence in it. [Translation][77]

More specifically, in the *Mizrahi* and *Demers* cases, the Bureau has sought to make a synthesis of the principles flowing from the Supreme Court's decision:

> A number of principles concerning the powers conferred on securities commissions or specialized tribunals such as the Bureau can be gleaned from these passages by the Supreme Court and from case law, as follows:
>
> - The Bureau's obligation to exercise the discretion conferred on it in accordance with the public interest under subsection 323.5 of the Securities Act gives the Bureau very broad discretion to oversee activities related to Quebec's financial markets, in my opinion;
>
> - A prescription made by the Bureau in the public interest must take into account the rights of the respondents, the fair treatment of investors, the impact of the Bureau's intervention on the efficiency of financial markets and public confidence in these markets;
>
> - The prescriptions made by the Bureau are regulatory in nature and are therefore neither remedial nor punitive; they are first and foremost designed to protect against and prevent risks that may be harmful to Quebec's financial markets. They may nonetheless be dissuasive, in terms of sending a clear message to market stakeholders that certain forms of conduct will no longer be tolerated;
>
> - Bureau prescriptions are forward-looking, and their purpose is to prevent any future conduct that may harm the public interest, which must have precedence in a fair, efficient market;

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[77] *Autorité des marchés financiers* c. *Dominion Investments (Nassau)*, Files 2006-004 and 2006-003, Decision 2006-004-12 and 2006-003-12 (8 February 2008), p.24. See also *Northern Financial Corporation* c. *Jaguar Nickel,* File 2006-021, Decision 2006-021-02 (4 April 2007), p.22.

- The public interest may require removing from financial markets individuals whose past conduct has been so improper that it is reasonable to fear that future conduct could damage the integrity of Quebec's financial markets;

- However, the Bureau's power to intervene in accordance with the public interest is not unlimited and must balance the protection of investors, the effectiveness of financial markets, and public confidence in their integrity. [Translation][78]

This synthesis shows a willingness on the part of the Bureau to maintain a balance between excessive interventionism in financial transactions and unacceptable tolerance toward abusive conducts, as advocated by the Supreme Court of Canada.

With respect to the second dimension, it appears that the Bureau shares a conception of the public interest that is similar to that of provincial and territorial securities commissions. Indeed, in her study of the decisions rendered by those commissions, Professor Condon remarked that "[t]here was considerable agreement that the predominant purpose of making these orders was to protect the integrity of the provincial capital market, and to engage in a future-oriented analysis of the respondent's likely behaviour, with sanctions being applied if necessary to achieve the goal of maintaining public confidence in the market's ongoing integrity"[79]. We share her opinion that the "uniform sense of the purpose of the enterprise no doubt has a lot to do with the convergence effect of Supreme Court decisions like *Asbestos*"[80]. Still, the Bureau seems even more inclined than the other commissions to follow the principles established by the Supreme Court with respect to the need to take into account all of the goals of securities

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78 *Autorité des marchés financiers* c. *David Mizrahi,* File 2008-004, Decision 2008-004-006 (12 Mai 2008), p. 12. *Autorité des marchés financiers* c. *Demers*, File 2004-018, Decision 2004-018-01 (28 February 2006), p. 21-22, listing the same principles.

79 M. CONDON, "The Use of Public Interest Enforcement Orders by Securities Regulators in Canada", in A.D. HARRIS, *Committee to Review the Structure of Securities Regulation in Canada, Research Studies* **,** 2003, p. 441.

80 *Ibid.*

regulation to define public interest. Indeed, in her study, Condon noted that "even since the *Asbestos* decision's stricture to consider market efficiency issues in making enforcement orders, this aspect has been largely ignored to date"[81].

This finding is interesting given that critics argue that an independent administrative tribunal would not have the same understanding of the policy issues than a multi-functional commission. For instance, according to Condon:

> Indeed, the exercise of regulatory discretion (such as the determination of what is in the "public interest") can only be justifiable if it is engaged in by individuals with a deep understanding of the overall regulatory framework to be maximized. What are the purported advantages of giving enforcement powers to a regulatory agency? Ideally, we give them such powers because they can be more nimble, more targeted and more specialized than the courts in their approach to economic or social regulation.[82]

Our review of the experience of the Bureau shows that those concerns, however legitimate, should not be overstated. In this respect, two elements have probably been instrumental in ensuring that the Bureau overcomes those risks. The first is the provision in the *Loi sur l'Autorité des marchés financiers* which enjoins the Bureau from refraining to substitute its appraisal of the public interest for the appraisal made by the AMF where it is called upon to review a decision of the latter. Although it is limited to the review power, this provision nonetheless sends a signal to the Bureau as to the particular status of the AMF as regulator. The second element concerns the expertise of the members of the Bureau, a number of which came from the Commission des valeurs mobilières du Québec. The presence of former members of the former Quebec Securities Commission ensured the responsiveness of the Bureau to the policy issues underlying the regulatory framework.

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[81] *Ibid.*

[82] M. CONDON, "Rethinking Enforcement and Litigation in Ontario Securities Regulation", (2006) 32 Queen's L.J. 1. See also P. ANISMAN, "The Ontario Securities Commission as Regulator: Adjudication, Fairness and Accountability", in A.A. ANAND & W.F. FLANNIGAN, *Conflicts of Interest in Capital Markets Structures*, Toronto, Carswell, 2003, p. 126-127

Critics could question whether it is desirable to have members of an independent tribunal that were previously employed by the regulator. Specifically, the preoccupation relates to the potential that the members' prior policymaking activities influence them in their adjudicative functions, thereby creating a reasonable apprehension of bias. For instance, a member could have an interest in reaching a particular decision in a case dealing with a policy she contributed to develop.

In itself, prior involvement in policymaking should not raise a reasonable apprehension of bias. Anisman's remarks are apposite:

> The fact that an adjudicator may hold a view about policy is not bias. It is inevitable that decisionmakers will bring their understanding of policy to bear on decisions they make [...] In this respect, previously held policy views are to be distinguished from possible prejudgment of factual issues. Generally, the former are permissible, the latter not.[83]

Further, concerns about impartiality are mitigated by the policymaking process that rarely rests on a single individual, especially when the Canadian Securities Administrators (CSA) is involved. This likely reduces the risk, assuming that it exists, that a member of the tribunal feel highly committed to a particular policy she contributed to craft. Requiring that cases be heard by a panel of members and providing an appeal procedure are additional safeguards against abuses. Thus, it seems doubtful that a "well-informed person, viewing the matter realistically and practically -- and having thought the matter through -- would have a reasonable apprehension of bias in a substantial number of cases."[84]

3. Observations on Two Specific Issues: Exemptions and Takeover Bids

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[83] P. ANISMAN, "The Ontario Securities Commission as Regulator: Adjudication, Fairness and Accountability", in A.A. ANAND & W.F. FLANNIGAN, *Conflicts of Interest in Capital Markets Structures*, Toronto, Carswell, 2003, p. 109-110.

[84] 2747-*3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, par. 44.

The Bureau does not have jurisdiction to provide discretionary exemptions to issuers or market participants. Following the Securities Act, it is the AMF which has the power to grant such an exemption, when it considers it not to be detrimental to the protection of investors.[85] However, the Bureau may deny the benefit of an exemption contained in this Act or the regulations where it considers it necessary to do so to protect investors.[86]

The choice made by the Securities Act in the allocation of the exemption powers reflects a willingness to balance the competing preoccupations of independence and expertise. Granting exemptions to a market participant involves a very specific and contextual analysis which needs to be conducted on a timely basis. It calls upon the expertise of the regulator to adapt the regulatory framework to unforeseen situations or problems. In this context, there is no dispute to adjudicate. The issue is regulatory, i.e. whether it is desirable to adapt the requirements to the particular case. Undoubtedly, members of the regulator are better equipped to deal with this issue than a tribunal. In contrast, denying an exemption provided by the Act or the regulations raises a dispute between the regulator and a market participant that may lead to the denial of the latter's right. In such a case, it is preferable to have independent adjudicators rule on the refusal rather than have the regulator both initiate and decide it. Hitherto, the Bureau has not exercised this power. Therefore, we can only speculate as to the soundness of these theoretical arguments.

A more difficult question relates to takeover bids. Specifically, should the tribunal have jurisdiction over matters such as rights plan ("poison pills") and the application takeover bid rules as the Bureau currently does? On the one hand, some observers argue that the institutional features of a securities commission make it a better forum to conduct

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85 *QSA*, s. 263.

86 *QSA*, s. 264.

hearings on those matters.[87] They point to the expertise of the commission's staff as well as to procedural flexibility that enables it to render decisions on a timely basis. On the other hand, others caution against overstating these features.[88] Some, such as the authors of the *Practitioners Report* published 25 years ago,[89] even advocate an enlarged role for courts in takeover bids.

The experience of the Bureau is inconclusive in this respect. Indeed, the Bureau has been involved in only one takeover bid case where it was called upon by a potential suitor to rule on the application of a rights plan.[90] Nonetheless, it is argued here that this debate needs to be framed more broadly to encompass the securities law and corporate law issues pertaining to takeover bids. As notes Professor Nicholls, "the most critical, and most frequently litigated, source of dispute [...] arises from attempts by directors and officers of companies that are targets of hostile takeover bids to implement defensive tactics to defeat or delay hostile bids, or to adopt "deal protection measures" in agreements with favoured friendly bidders, that are claimed, by hostile bidder".[91] If they involve the application and interpretation of securities instruments, such as National Policy 62-202, the questions underlined by Nicholls also implicate fundamental corporate law principles, such as the scope of directors' duties. Hence, having these questions tried by both courts and securities commissions may be counterproductive. In fact, some,

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87 See, for instance, *Osborne Committee*, p. 37.

88 See in general P. MOYER, "The Regulation of Corporate Law by Securities Regulators: A Comparison of Ontario and the United States", (1997) 55 *U.T. Fac. L. Rev.* 43.

89 G. COLEMAN, G. EMERSON & D. JACKSON, *Report of the Committee to Review the Provisions of the Securities Act (Ontario) Relating to Takeover Bids and Issuer Bids,* Toronto, 1983.

90 *Northern Financial Corporation* c. *Jaguar Nickel,* File 2006-021, Decision 2006-021-02 (April 4, 2007).

91 C.C. NICHOLLS, *Mergers, Acquisitions and other Changes of Corporate Control*, Toronto, Irwin Law, 2007, p. 170.

including this author, have remarked that the development of case law in two separate forums may have impoverished our takeover bid system.[92]

Thus reframed, the issue becomes whether takeover bids hearings should be conducted by two concurrent forums, courts and securities commission, or rather by a single forum that would have the ability to address both the corporate law and securities regulation dimensions of those operations. Admittedly, this issue is beyond the scope of this study. Still, it appears important to emphasize the importance of resolving it as part of the debate on the proper structure for securities regulation in Canada.

III. LOOKING FORWARD: THE FEASIBILITY OF A PAN-CANADIAN INDEPENDENT SECURITIES TRIBUNAL

Although there is a broad support for a separate tribunal for securities, some commentators nonetheless question the wisdom of this model. As noted above, those commentators identify a series of problems with the bifurcated model which would make it unworkable. At the same time, they point out that the case for a separate tribunal is largely based on anecdotal evidence and theories.

The study of the Bureau is particularly relevant as it sheds empirical light on the debate. In this respect, the experience of the Bureau since 2004 is a testament to the feasibility of the separation of the adjudicative function from the policy making and regulatory functions from an institutional perspective. The review of the decisions of the Bureau indicates that an independent tribunal has the ability to be responsive to the goals underlying securities regulation in exercising its enforcement powers. Further, this experience suggests that it is possible to avoid the "hyper-proceduralization of regulatory

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[92] S. ROUSSEAU et P. DESALLIERS, *Les devoirs des administrateurs lors d'une prise de contrôle – Étude comparative du droit du Delaware et du droit canadien*, Montréal, Éditions Thémis, 2007, p. 218-225.

proceedings" in an independent tribunal that would constrain the effectiveness of enforcement.

To summarize, the experience of the Bureau underscores the potential of an independent securities tribunal. It lends support to those who advocate the bifurcated model for securities commissions. It also raises an interesting question: should a pan-Canadian securities tribunal be established, as recently proposed by some[93]? For instance, Québec Minister of Finance Monique Jérôme-Forget proposed the creation of an interprovincial tribunal stressing its positive benefit for consistent enforcement across the country:

> At the Canadian level, I proposed to my ministerial colleagues that we examine the possibility of establishing an independent securities tribunal system. That tribunal system would be interprovincial. It's a matter of separating the supervisory function from the quasi-judiciary function of the securities commissions.
>
> The goal of such an undertaking is to strengthen the quasi-judiciary function by establishing a uniform interpretation of common rules in Canada.[94]

Emphasizing similar benefits, the Task Force to Modernize Securities Legislation in Canada also favoured the creation of an independent pan-Canadian tribunal[95]. The report tabled in the context of proposals to create a national securities commission all recommended that securities regulation be structured so as to allow for the bifurcated model.

In this context, this part discusses the options to create a pan-Canadian securities tribunal. It highlights the key principles that should govern its design and organization. It

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93 The question is part of the issues underlined by the Expert Panel on Securities Regulation in its Consultation Document.

94 MONIQUE JÉRÔME-FORGET, *The Passport Securities System*, Speech to the Investment Funds Institute of Canada, Toronto, October 3, 2007, p. 10.

95 TASK FORCE TO MODERNIZE SECURITIES LEGISLATION IN CANADA, *Final Report*, Toronto, 2006, p. 122-123.

also discusses the implications of reform initiatives on the institutional features of the tribunal.

A. The Creation of a Pan-Canadian Securities Tribunal

The creation of a pan-Canadian securities tribunal through a common provincial and territorial initiative involves political and constitutional law dimensions.

The political issues are beyond the scope of this report. They involve the willingness of the provinces and territories to extend the passport regime so as to accommodate a common securities tribunal. Still, it is worth mentioning that the Provincial/Territorial Council of Ministers of Securities Regulation have noted in its 2007 *Annual Progress Report* that it had asked a "Taskforce to examine the potential benefits of establishing an independent securities tribunal (IST) system to provide consistent decision-making in administrative enforcement of securities regulation across Canada"[96].

With respect to the constitutional law dimension, the creation of a Pan-Canadian securities tribunal at this level raises two sets of issues. Firstly, the provinces and territories would have to decide how the tribunal would be created. An option would be to have the tribunal set up through a special statute, although it would raise questions of jurisdiction. Alternatively, the tribunal could be created as a not-for-profit corporation, such as the Canadian Public Accountability Board, with the provinces and territories delegating it adjudicative powers through legislative intervention.

In any case, the second issue concerns the legality of the delegation of the quasi-judicial function by the provinces and territories to the tribunal. In Canadian

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[96] PROVINCIAL/TERRITORIAL COUNCIL OF MINISTERS OF SECURITIES REGULATION, *Annual Progress Report*, 2008, p. 5.

constitutional law, case law and commentators recognize that provincial and federal legislatures have jurisdiction to delegate their legislative, administrative, and judicial powers to bodies created by another legislature[97]. The delegation must contemplate powers which are within the material and territorial competence of the delegating legislature pursuant to the *Constitutional Act of 1867*. In this respect, it is well established that provinces have constitutional authority over securities regulation[98]. Moreover, the Supreme Court of Canada has stated that the territorial scope of provincial securities regulation is broad[99]. Thus, there does not seem to be significant constitutional law roadblocks preventing the provinces and territories from delegating enforcement powers of the same nature and jurisdictional scope as those actually held by securities commissions and, in Québec, the Bureau.

Nonetheless, there would be some limitations to the enforcement powers that could be attributed to such a tribunal. The provinces and territories would not have jurisdiction to grant enforcement powers pertaining to matters which fall under the jurisdiction of the federal legislature, unless the Parliament agrees to do so. Another limitation would be that the provinces and territories would have to comply with section 96 of the *Constitutional Act of 1867* when vesting the tribunal with adjudicative powers. Recall that courts have interpreted section 96 as limiting the ability of provincial legislatures to invest provincially-established administrative tribunals with adjudicative functions that were the exclusive jurisdiction of a superior, district or county court in

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[97] See *P.E.I. Potatoe Marketing Bureau* c. *Willis,* [1952] 2 S.C.R. 292; P.W. HOGG, *Constitutional Law of Canada*, Thomson Carswell, Scarborough (Ontario), Student Ed. 2006, section 14.3 (a); D. JOHNSTON & K.D. ROCKWELL, *Canadian Securities Regulation*, 4th Ed., Toronto, LexisNexis, 2006, p. 506-509; J.C. MAYKUT, "An Alternative Regulatory Model for Canada", in A.A. ANAND & W.F. FLANNIGAN, *Responding to Globalization*, 2001, p. 29.

[98] *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, par. 40.

[99] *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, par. 41.

1867.[100] Hence, they could not delegate to the securities tribunal functions which are similar to those performed by a superior, district, or county court. In other words, the securities tribunal would not be the sole forum hearing securities cases as courts would continue to have a concurrent jurisdiction. This would create constraints to harmonization at the enforcement level.

A second option would be to have the independent tribunal created at the federal level. This option has been proposed by a number of expert panels over the last five years. Following this model, a federal statute would establish the securities tribunal. With respect to its jurisdiction, two general scenarios can be contemplated.

Under the first, provinces and territories would continue to regulate securities markets pursuant to the passport system. The provincial and territorial legislatures would however cede the adjudicative powers of their securities commissions – and in the case of Québec, the Bureau – to the federal tribunal. As mentioned above, from a constitutional law perspective, this delegation of adjudicative functions would be feasible, assuming a willingness to do so[101].

The second scenario was put forth recently by the Crawford Panel. It involves the adoption of a *Canadian Securities Act* and the creation of a national securities commission. The Act would also provide for the establishment of a Canadian securities tribunal as a separate agency from the commission. The tribunal would have the adjudicative powers currently held by securities commissions and the Bureau.

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[100] P.W. HOGG, *Constitutional Law of Canada*, Thomson Carswell, Scarborough (Ontario), Student Ed. 2006, p. 354-355.

[101] J.C. MAYKUT, "An Alternative Regulatory Model for Canada", in A.A. ANAND & W.F. FLANNIGAN, *Responding to Globalization*, 2001, p. 37.

The creation of the securities tribunal under a federal statute following either scenario would alleviate the concerns pertaining to the scope of adjudicative powers under section 96 of the *Constitutional Act of 1867* for provincial administrative tribunals[102]. Indeed, as notes Professor Hogg, the limits imposed by section 96 with respect to the delegation of adjudicative functions to administrative tribunals do not apply to federally-established tribunals whose members are appointed by the federal Government. Thus, the Act establishing the securities tribunal could grant the latter jurisdiction over regulatory offences, for instance.

B. The Governance of a Pan-Canadian Securities Tribunal

The governance of a pan-Canadian securities tribunal raises important issues that affect its effectiveness and legitimacy. Although it is beyond the scope of this report to lay out in details the governance arrangements of such a tribunal, it is appropriate to identify some key principles that should govern institutional design[103].

The first principle is evident, and it is that the tribunal should be organized in a way that guarantees its independence from the securities regulators. The organization of the Bureau is a model which could inspire the designers of the pan-Canadian tribunal in this respect. As seen above, the appointment process of the members of the Bureau, its governance, its financial resources, and its location, provide independence from the AMF.

The second principle is expertise. The tribunal should be composed of members who have expertise in securities regulation, capital markets, and adjudication. Again, the experience of the Bureau is relevant as it emphasizes the importance of having

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[102] P.W. HOGG, *Constitutional Law of Canada*, Thomson Carswell, Scarborough (Ontario), Student Ed. 2006, p. 221.

[103] *Osborne Committee*, p. 21-22, 36-42.

adjudicators with the appropriate background and expertise. This was also recognized by the Crawford Panel Report which listed as potential members of the tribunal "experienced adjudicators, such as retired judges, ideally with experience relating to the securities or financial services industry, as well as current commissioners of the provincial securities regulators who have adjudicative experience"[104]. The need for expertise should also translate into cases being generally heard by a panel of adjudicators, rather than by a single adjudicator.

The members' expertise dovetails with the importance of their responsiveness to capital markets policy issues. In this respect, to ensure that the tribunal is composed of adjudicators who have such responsiveness, its members should be appointed for a specific renewable term, such as a five-year term, rather than appointed for life. Fixed-term appointments would allow for renewal by permitting new members coming in and bringing fresh insights and experience with respect to capital markets and adjudication. At the same time, providing that the terms are renewable would ensure some level of stability for the tribunal.

We do recognize that recruiting candidates may be a challenge, as note Johnston and Rockwell, "as the pool of retired judges with such experience who are willing and able to take on this role would naturally be limited"[105]. Overcoming this challenge would certainly involve crafting compensation packages which would be sufficient to attract individuals of the highest quality, as stated in the report of the Osborne Committee[106].

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104 CRAWFORD PANEL ON A SINGLE SECURITIES REGULATOR, *Blueprint for a Canadian Securities Commission*, Final Report, 2006, p. 28.

105 D. JOHNSTON & K.D. ROCKWELL, *Canadian Securities Regulation*, 4th Ed, Toronto, LexisNexis, 2006, p. 517.

106 *Osborne Committee*, p. 21.

Thirdly, the tribunal should be designed to ensure regional presence and representation. It appears important that the tribunal have regional presence given the views frequently expressed by provinces and territories in this respect[107]. Further, regional presence would contribute to effective enforcement. Enforcement ultimately involves issuers, investors, and other market participants whose head offices, places of business, or personal residences are located in a specific province. Having the hearings held in a place that is relatively close to the parties' own location seems preferable in terms of costs and timeliness. Whether having the tribunal travel to the various jurisdictions as proposed by the Crawford Panel would be sufficient is debatable, given the volume of the cases to be heard, the availability of the adjudicators, and the need to have orders rendered effectively. It would seem preferable to establish regional offices from which the adjudicators would work. This approach would be more compatible with another issue which is that of regional representation. Indeed, for regional presence to have its full meaning it must translate into the composition of the tribunal, i.e., the selection of its members should ensure a fair and reasonable representation of the provinces and territories, in light of the characteristics of their capital markets. Having such a regional representation would ensure that the adjudicators have an understanding of the institutional context. It would contribute to making the tribunal responsive to local registrants, issuers, and investors.

Finally, the goal of uniform application of securities regulation across the country, which underlies the proposition for a pan-Canadian tribunal, should be taken into account. In terms of the tribunal's operations, this could mean fostering collegiality by periodically changing the composition of the panel and having members hear cases from outside the region where they usually adjudicate. Further, decisions rendered by the tribunal should be published in both French and English to ensure that they can be read, understood, and relied upon across the country.

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[107] See, e.g., CRAWFORD PANEL ON A SINGLE SECURITIES REGULATOR, *Blueprint for a Canadian Securities Commission*, Final Report, 2006, p. 25.

C. The Pan-Canadian Securities Tribunal in Light of Recent Reform Proposals

Over the last decade, there has been a flurry of reform proposals which purport to improve securities regulation in Canada. The Consultation Paper issued by the Expert Panel contemplates a number of proposals in this respect. It is appropriate to consider the incidence of these proposals on the bifurcation model given the role of a pan-Canadian securities tribunal in the regulatory regime. Although there is a broad range of proposals set forth in the Consultation Paper, three items stand out as having a particular interest for our purpose: principles-based regulation, proportionate regulation, and a common securities regulator.

1. Principles-based Securities Regulation

There is an ongoing debate as to the proper approach to regulate securities markets[108]. This debate, which takes place in a number of jurisdictions, contrasts the principles-based approach with the rules-based approach. In Canada, reports tabled over the last few years have favoured the former approach[109]. In addition, British Columbia enacted a new principles-based *Securities Act* in 2004 that has not been put into force[110]. In light of this debate, the Expert Panel identified whether moving to a more principles-based approach to regulation as an issue on which it is seeking comments.

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[108] L.A. CUNNINGHAM, "A Prescription to Retire the Rhetoric of "Principles-Based Systems" in Corporate Law, Securities Regulation, and Accounting", (2007) 60 *Vand. L. Rev.* 1411; C.L. FORD, "New Governance, Compliance, and Principles-Based Securities Regulation", (2008) 45 *Am. Bus. L.J.* 1.

[109] See, e.g., CRAWFORD PANEL ON A SINGLE CANADIAN SECURITIES REGULATOR, *One Year On: Seeing the Way Forward*, Update Report, 2007; TASK FORCE TO MODERNIZE SECURITIES LEGISLATION IN CANADA, *Canada Steps Up*, Final Report, Toronto, 2006.

[110] Bill 38, 5e Sess., 37e Parl., No. 72 and 73.

In this context, a question arises as to how would a principles-based approach influence the implementation of the bifurcated model? A first observation in this respect is that a principles-based approach requires that the tribunal use its enforcement powers to refine the high level principles and standards of conduct. Indeed, the hallmark of the principles-based approach is avoiding detailed prescriptive rules in favour of goals and principles that must be interpreted by market participants, regulators, and tribunals. Secondly, under a principles-based approach, it is likely that enforcement would be tilted toward compliance rather than deterrence[111]. Thus, enforcement would seek to "educate and shape organizational behaviour"[112] so that market participants internalize the principles and norms underlying securities regulation. Placing greater emphasis on compliance means that the regulator, i.e., the securities commissions, would devolve more resources to the monitoring and oversight of compliance programs. Further, the experience of the integrated financial sector regulator in the United Kingdom, the Financial Services Authority, suggests that it is likely that enforcement proceedings would be initiated selectively by the regulator, targeting cases involving a fundamental principle or threatening the integrity or the stability of the market[113].

These attributes of the principles-based approach entail some consequences for an independent tribunal. Amongst the most notable, the tribunal's governing statute or charter should state its mission and objectives, emphasizing the principles-based approach, to ensure that it operates on similar premises as the regulator. Also, the tribunal

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111 M. CONDON, "Rethinking Enforcement and Litigation in Ontario Securities Regulation", (2006) 32 Queen's L.J. 1; C.L. FORD, "New Governance, Compliance, and Principles-Based Securities Regulation", (2008) 45 *Am. Bus. L.J.* 1.

112 M. CONDON, "Rethinking Enforcement and Litigation in Ontario Securities Regulation", (2006) 32 Queen's L.J. 1.

113 FINANCIAL SERVICES AUTHORITY, *Essential facts about the Financial Services Authority*, February 2006 [http://www.fsa.gov.uk/pubs/other/essential_facts.pdf]; M. CONDON & P. PURI, "The Role of Compliance in Securities Regulatory Enforcement", in TASK FORCE TO MODERNIZE SECURITIES LEGISLATION, *Canada Steps Up*, Toronto, vol. 6, p. 16.

should be composed of adjudicators who have the expertise to understand and fully grasp both the objectives of securities regulation and the realities of financial markets when fleshing out the content of the principles enacted. Another corollary of the principles-based approach is that it seems preferable that a single tribunal be put in place so that the volume of cases be sufficient to ensure that the tribunal's members get the opportunity to maintain and develop their expertise. Finally, a more delicate issue to contemplate is the development of a forum in which regulators, self-regulatory organizations, market participants, and members of the tribunal could periodically interact to discuss policy issues and regulatory challenges. We acknowledge that this forum would need to be designed in a way that preserves the impartiality and independence of the tribunal and its members, and avoid their capture by interests groups.

2. Proportionate Regulation

Consideration is currently given to the implementation of proportionate securities regulation, which is the adaptation of regulatory requirements to certain economic characteristics of issuers, such as their size or business risk. Proportionate regulation, as principles-based regulation, involves primarily a revision of the laws and rules so that they take into account this objective. Still, a shift towards proportionate regulation is not without consequences for a securities tribunal. Indeed, adjudicating cases requires the interpretation and application of laws and rules elaborated in accordance with that approach.

An independent securities tribunal is not *per se* incompatible with proportionate regulation. At a general level, the ability of the tribunal to address preoccupations pertaining to proportionate regulation relates to the permeability of its members to policy issues, a question discussed previously. More specifically, it seems that to have the tribunal integrate effectively this dimension into the adjudicative process would require legislative intervention. For instance, this could be done through the formulation of guiding principles or of specific rules allowing the tribunal to carve out solutions adapted

to smaller issuers. Although such interventions would support a shift towards proportionate regulation, it remains debatable whether a securities tribunal is the proper forum to implement this approach in an extensive and effective way.

3. The Structure of Securities Regulation

A major and recurrent issue in Canada is the structure of the regulatory framework which raises the debate as to the opportunity of a common securities regulator. While this report does not intend to take side in this debate, considerations need to be given to the impact of the regulatory structure on the operations of a pan-Canadian tribunal. As discussed above, a pan-Canadian securities tribunal can be created by the provinces, within the passport system, or by the Federal Parliament under a common regulator model. Beyond the scope of the tribunal's powers in these two settings, the question arises as to what challenges its implementation would face under each model.

Under a passport system, a first challenge would be to have all provinces and territories agree to the independent tribunal model. Indeed, even if the preservation of the multifunctional model in some jurisdictions would not prevent the implementation of a multijurisdictional tribunal, it would nonetheless hamper its effectiveness. Assuming a pan-Canadian tribunal can be established, a second challenge would be for the tribunal to remain responsive to the policy issues that have priority according to each commission. A risk could arise that the tribunal be seen as being more attune to some regional interests than others, in particular under a principles-based approach. Variations could arise in the application of securities laws and regulations which could reinforce this perception. To a certain extent, this concern could be addressed through the governance arrangements discussed above. In addition, on the prosecution side, the commissions could coordinate their efforts namely by agreeing on a set of goals and priorities guiding their enforcement actions.

Under a common regulator model, the pan-Canadian tribunal would be called upon to rule on cases involving local or regional interests. It would have to balance the goal of being responsive to those interests with the goal of ensuring the uniform application of the law and regulations across Canada. In other words, the tribunal would face the same challenge as the one operating under the passport model in this respect with the exception that it would only have to deal with a single regulatory. Policy and enforcement priorities identified by the regulator could therefore be easier to ascertain by the tribunal. Still, a challenge would remain to ensure that the adjudicators hearing cases across the country are able to share their experiences and understanding of policy issues in order to avoid the development of "regional" jurisprudence.

CONCLUSION

Canadian securities commissions have traditionally been structured as multi-functional administrative agencies. Under this model, commissions act as regulator, investigator, prosecutor and adjudicator. There is a growing consensus amongst policymakers and legal experts that this structure is problematic and needs to be reviewed, so that the regulatory and adjudicative functions are performed by separate entities under a "bifurcated model". Despite this growing consensus, some critics doubt that the bifurcated model will improve the overall regulatory environment, stressing the risk of a lack of responsiveness to policy considerations by an independent administrative tribunal.

Québec offers an interesting laboratory to analyse the attractions and the challenges of an independent administrative tribunal specialized in securities. Indeed, in 2002, Québec introduced a sweeping reform of the regulation of its financial services sector. The reform led to the creation of the AMF and introduced a bifurcated model with the creation of the Bureau, which acts as an administrative tribunal charged with exercising certain powers provided for in the *Securities Act*. The study of the Bureau is particularly relevant as it sheds empirical light on the debate.

The experience of the Bureau since 2004 is a testament to the feasibility of the separation of the adjudicative function from the policy-making and regulatory functions from an institutional perspective. The review of the decisions of the Bureau indicates that an independent tribunal has the ability to be responsive to the goals underlying securities regulation where exercising its enforcement powers. To summarize, the experience of the Bureau underscores the potential of an independent securities tribunal. It lends support to those who advocate the bifurcated model for securities commissions.

Appendix:

Chart 2: Orders Issued

Powers relating to orders	**Related Provisions**	**Orders granted**	**Orders refused**
93(1°) AAMF : Powers relating to the revocation, suspension or imposition of restrictions on the rights granted by registration to a dealer or adviser under section 152 of that Act:			
Order aiming to designate the inscription as conditions advisor	152 and 323.7 Securities Act and 93(1°) AAMF	2	0
Revocation of the rights conferred by the inscription	152 Securities Act and 93(1°) AAMF	1	0
Suspension of the rights conferred by the inscription	152 Securities Act and 93(1°) AAMF	3	0
93(3°) AAMF : Powers relating to a freeze order under Title IX of that Act:			

Freeze order	249 and 250 Securities Act and 93(3°) AAMF	21	0
Extension of a freeze order	250(2) Securities Act and 93(3°) AAMF	86	2
Partial Lifting or end of a freeze order	93(3°) AAMF	33	2
Rectification of an extension of a freeze order	90 *BDRVM* Regulation, 250(2) Securities Act and 93(3°) AAMF	2	0
Rectification of a freeze order	249, 250 and 323.7 Securities Act and 93(3°) AAMF	1	0
Partial modification of a freeze order	250 Securities Act and 93(3°) AAMF	1	0
93(4°) AAMF : Powers relating to the recommendation to the minister for the nomination of a provisional administrator, for the liquidation of assets of a person or for the liquidation of a under sections 257 and following of that act:			
Recommendation to the minister of finance for	93(4°) AAMF and 257, 258 Securities	9	0

the nomination of a provisional administrator	Act		
Recommendation to the minister for the liquidation of the assets and the designation of a liquidator	93(4°) AAMF and 261(3) Securities Act	3	1
93(6°) AAMF : Powers relating to an order prescribing the cessation of an activity in respect of a transaction in securities under section 265 of that Act, except in the case of failure by a reporting issuer to provide periodic disclosure about its business and internal affairs in accordance with the conditions determined by regulation or failure by an issuer or by another person to provide any other disclosure prescribed by regulation in accordance with the conditions determined by regulation:			
Order of cessation of activity in securities	265 Securities Act and 93(6°) AAMF	46	1

Lifting of an order of cessation of activity in securities (including partial lifting)	265 and 93(6°) AAMF	5	3
Modification of an order of cessation of activity in securities	265 LVM and 93(6°) AAMF	1	0
93 (7°) AAMF. Powers relating to an order directing a person to cease carrying on business as an adviser under section 266 of that Act:			
Order of cessation of business as adviser.	93(7°) AAMF and 266 Securities Act	13	0
93(10°) AAMF. Powers relating to the imposition of an administrative penalty, the repayment of the cost of an investigation or an order prohibiting a person from acting as director or senior executive under sections 273.1 to 273.3 of that Act:			

Administrative penalty	273.1 Securities Act and 93(10°) AAMF	8	1 (1 revised)
Order prohibiting from acting as an administrator	273.3 Securities Act and 93(10°) AAMF	2	0
93(2) AAMF. Power of revision:			
Application for review of a decision by the AMF	322 Securities Act and 93(2) AAMF	1	3
Decision on a preliminary objection (Motion for the inadmissibility of an application for review)	57 *Bureau* Regulation and 322 Securities Act	1	0
Application for review of a decision by a self-regulatory organization	322 Securities Act and 93(2) AAMF	1	1 (1 withdrawal)
94 AAMF. Powers to take any measure conducive to ensuring compliance with the provisions of the Securities Act:			

Order to depose certain documents	94 AAMF	2	0
Interdiction for an administrator to exercise his right to vote	94 AAMF	2	0
Application to ratify a deal between the parties	94 AAMF	1	0
Application for intervention	42 *Bureau* Regulation	2	0
Application for suspension of execution	329 Securities Act	0	1