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Five Year Review of the Ontario Securities Act.

August 18, 2004 Presentation by William Weissglas BA, LL.B., LL.M., C.Med. to
The Ontario Standing Committee on Finance and Economic Affairs

My name is William Weissglas. I am a lawyer, I also possess a Master of Laws degree in Alternative Dispute Resolution, and I am presently CEO of a Mediation/Arbitration firm. Prior to Oct 2003, I was for 2 years Senior Legal Counsel and legal department Head of the Real Estate Council of Ontario(RECO), the Ont Govt Administrative agency which administers the REBBA and licenses and disciplines real estate brokers and sales representatives; One of RECO's reasons d'être is to protect the public through an equitable marketplace. I am not an expert in securities law, but I am an interested consumer.

One of the many things this Standing Committee is reviewing (as part of the motion passed in the Legislature on June 29,) is the structure of the OSC and by implication the IDA. The Crawford report recommended that the government should review whether to split the OSC's (IDA) dual role both as prosecutor of securities violators in Ontario and its judicial role, that of presiding over disciplinary hearings. The Crawford report said that this dual role can give rise to "perceptions of potential for conflict or abuse" i.e. bias.

I appear before this committee on a very narrow issue, and that is to urge you to support the recommendation that these 2 roles (adjudicator and prosecutor) be split and that a separate adjudicative tribunal (independent of the OSC/IDA or any future national regulator) be created, for adjudication of securities violations and for the restitution of investor losses. The rulings of this independent tribunal would of course be appealable to the courts. The OSC/IDA or its national successor would still retain it's investigative and prosecutor roles.

As Senior Legal Council at RECO, I had the unique opportunity of being able to compare consumers' and stake holders' perceptions of two different approaches to fielding complaints and obtaining justice.

One approach, the RECO Complaints Compliance and Discipline process was similar (although not identical) to the existing OSC/IDA system. Pursuant to the CCD process, a complaint was received by the manager of CCD and after the complaint was reviewed/investigated by a number of RECO staff, and after the respondent had an opportunity to rebut in writing the complaint, and if it was still determined that a contravention of RECO's code of ethics may have occurred, then either the respondent was issued a caution or for more serious matters, an allegation statement was issued and the matter was referred to a CCD tribunal for adjudication. The tribunal was composed of 3 realtors who were members of RECO and carried on their practice in a different jurisdiction than the respondent, ie the respondent was to be judged by his peers. The tribunal members were part of a panel of adjudicators chosen annually by RECO staff and directors. My department lawyers acted as prosecutors at these hearings.

A second approach, was for a complaint to be channeled to the Real Estate Registrar for an alledged breach of the REBBA. The Registrar and/or his staff would investigate and if a contravention of the REBBA appeared to have been committed, then the respondent was invited to appear before the Registrar to explain why he/she should not be put on terms and conditions if a minor breach or for a major breach, why the Registrar should not issue a Proposal to rescind the respondent's licence. If the respondent refused to accept terms and conditions or in a major matter, if the Registrar remained unconvinced of the respondents innocence, a proposal to terminate the respondent's license would be issued by the Registrar and the matter would be referred to the Ontario Government License Appeal Tribunal (LAT). My department lawyers would act as prosecutors for the Registrar and request that the respondents' licence be revoked. LAT is an independent tribunal set up by the Ontario government which has the power to validate the Registrars Proposal to revoke a respondent's licence or any other terms and conditions it deems appropriate. LAT hears cases not only referred to it from RECO but also from numerous other provincial agencies ie TICO-Tourist Industry Council, OMVIC-Ont. Motor Vehicle Industry Council ONHWP TSSA Funeral Directors, LAT's judges are independant lawyers who are not necessarily experts in the specific matters being heard before them but they usually do have an expertise in providing natural justice to the parties.

I would like to provide you with some of my observations of the two hearing systems by way of anecdotal evidence. So for clarification, through one system (CCD), a complaint is brought before a tribunal made up of industry members who are required by law to be members of the prosecuting agency, through the other system (LAT) the complaint is brought before a tribunal made up of non-expert independent 3rd parties perceived to be appointed by the Ontario government).

In a CCD hearing, if the tribunal found the respondent not guilty or rendered a less than substantial fine or verdict, the complainant, time and time again, would voice the complaint that the panel had been sympathetic to the respondent ie biased, because they were also real estate brokers or representatives "just like the respondent." On the other hand, if the CCD tribunal rendered a substantial monetary fine or verdict, the respondent would voice the complaint, that his/her peers had been unfair or biased because they were jealous of his/her success (successful realtors don't have time to serve as tribunal members) or they were unfairly making an example of him/her when they knew this type of thing was rampant in the industry and even in their own brokers offices. As well, the complainant would often be annoyed because the tribunal did not order restitution to him/her for the damages he/she had suffered. (In reality the tribunal had no power to order such restitution.)

(The same complaints about alleged bias, would come up when adjournments were requested, costs ordered etc. in CCD and not at LAT)

Surprisingly in LAT hearing, it was very rare indeed that the complainant or respondent complained that the tribunal member was biased, because the tribunal member(s) was/were viewed as being independent impartial 3rd party adjudicators with no axe to grind or special sympathies. As well, CCD tribunal verdicts were appealed much more frequently, than LAT tribunal verdicts, which were rarely appealed.

One asks, was there any more actual tribunal bias in CCD hearings than in a LAT hearing? From a legal point of view the answer is a resounding No! (The recent case of Barret v Layton which was a motion for retrial, heard on or about Jan. 20, 2004 by the Superior Court of Justice in the Ontario states that : " the test for a disqualifying apprehension of bias is 'what would a reasonable and right-minded person, applying himself to the question and in possession of all the relevant circumstances, viewing the matter realistically and practically and having thought the matter through, conclude. The grounds for disqualifying apprehension of bias must be substantial. A real likelihood or probability of bias must be demonstrated. Mere suspicion is not enough.")

So, although there may not be a legal bias, as Robert Kyle so ably states in a paper which he will present to you tomorrow, "Perception is critical. A perception of bias is noted with respect to the OSC's and IDA's role as policymaker, investigator, prosecutor, adjudicator and sanctioner." For this reason I urge you to support the recommendation that the OSC/IDA roles (adjudicator and prosecutor) be split and that a separate adjudicative tribunal (independent of the OSC/IDA or any future national regulator) be created.

In today's world of instant information, communication and disclosure legislation, the average investor consumer has the tools, the knowledge and possibly the right, to demand that not only should there be an absence of actual bias in the OSC/IDA's role but also there should be an absence of any perception of such bias. And it is incumbent upon you, members of this committee, as the elected representatives of Ontario's consumers, to make certain that their wishes are adhered to, and that consumers are afforded the all encompassing protection they deserve.

Thank you for your time and patience.