

# 2005 BCSECCOM 576

**John Frederick Brighten and Investment Dealers Association of Canada**

**Section 28 of the *Securities Act*, RSBC 1996, c. 418**

## **Hearing and Review**

<b>Panel</b>	Robin E. Ford	Commissioner
	Joan L. Brockman	Commissioner
	John K. Graf	Commissioner

**Dates of Hearing**                      May 20 and 26, 2005

**Date of Decision**                     September 9, 2005

## **Appearing**

Shayne P. Strukoff                      For John Frederick Brighten  
Douglas Garrod

Paul Smith                                For the Investment Dealers Association of Canada

Joyce M. Johner                         For the Executive Director

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## Decision

- ¶ 1 John Frederick Brighten and the enforcement staff of the Investment Dealers Association (IDA) agreed to a settlement on June 14, 2004. In an oral decision on August 24, 2004, a panel of the Pacific District Council of the IDA (the Brighten panel) rejected the settlement agreement. The panel issued its reasons for the rejection on September 22, 2004.
- ¶ 2 The Brighten panel rejected the settlement agreement because the agreement “seriously mis-characterizes the nature of Mr. Brighten's contravention” and, as a result, the sanction in the settlement agreement “clearly falls outside a reasonable range of appropriateness”.
- ¶ 3 On September 23, 2004, Brighten applied to the Commission for a hearing and review of the Brighten decision under section 28 of the *Securities Act*, RSBC 1996, c. 418. Brighten says that the participation of one member of the Brighten panel raised a reasonable apprehension of bias because he also sat on another panel (the Thomson panel) that dealt with the same facts and heard evidence and submissions, and made findings, critical of Brighten. He also argues that the Brighten panel exceeded its jurisdiction. He asks us to set aside the Brighten decision and to direct the IDA to send the settlement agreement to a newly constituted panel.
- ¶ 4 The IDA and the Executive Director ask us to uphold the decision of the Brighten panel.

### I. Background

- ¶ 5 The events addressed by the Brighten panel and the Thomson panel took place from March 16 to June 3, 1999 while Brighten was the Executive Vice-President, Branch Manager, Compliance Manager, and Ultimate Designated Person of IPO Capital Corporation. IPO was a member of the IDA with an office in Vancouver. During this time, Alan Bruce Alexander Thomson was a registered representative at the Vancouver office of IPO.

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### *Thomson hearing and decision*

¶ 6 On July 20, 2004, an IDA panel held a hearing to determine whether Thomson contravened the IDA's by-laws when he sold debtor certificates of Value Software Corporation, a Nevada corporation. Thomson was then under Brighten's supervision. Brighten was not a party to, nor was he represented at, the Thomson hearing.

¶ 7 At the hearing, in addition to the facts he admitted, Thomson gave oral evidence and made submissions. He argued that he was not liable because he relied on IPO and IPO's management. Brighten is mentioned several times in the transcript of the hearing, and it is clear, for example, that Thomson thought Brighten was at fault for not telling him that a prospectus was required:

With respect to a prospectus, I brought – as Mr. Smith led, I brought all the documentation in to senior management, the most senior management in the firm, the CEO and vice-president in charge of compliance. They reviewed it all and came back to me and said I could proceed at my own discretion.

Now, if a prospectus should have been prepared, in my opinion, it was their responsibility to guide me with respect to that. That's why I went to them. So I went to the highest powers to get guidance with respect to this and you've heard the guidance I got. (Thomson transcript, pp. 142 to 143).

¶ 8 The IDA did not call any witnesses. On August 3, 2004, the Thomson panel found that Thomson had contravened IDA By-law 29 when he:

- distributed securities to IPO clients without a receipt for a prospectus having been issued contrary to section 61 of the Act,
- distributed securities "off book" to three non-IPO clients, and
- failed to use due diligence to ensure that the securities were a legitimate investment. (See *Re Thomson*, [2004] IDACD No. 49.)

¶ 9 The individuals named in the Thomson hearing as responsible for Thomson's supervision were Brighten and Steven Nizam Khan, IPO's chairman and chief executive officer.

¶ 10 The panel rejected Thomson's submission that he should not be liable because he relied on his employer. The panel stated (at pages 8 to 9):

[Thomson] claims that he is not liable for breaching the Association's rules as he was relying on his employer and on third parties to ensure that

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all was in order. His defense questions the very role of a registered representative in the investment industry.

...

Similarly, we do not accept as reasonable the Respondent's explanation that he met any duty he might have had to the investors to perform due diligence by relying on his employer and the fact that the investor's monies were going into a lawyer's trust account. He was specifically advised by his employer that IPO was not interested in participating in the offering and therefore was not doing any due diligence whatsoever with respect to the Debtor Certificates.

- ¶ 11 Although the panel found Thomson liable for his behaviour, the panel made a number of findings related to IPO:
- It appears that the Respondent [Thomson] was *under pressure from IPO to generate additional commissions ...* (page 3). (our emphasis)
  - On June 2, 1999, the Respondent's employment with IPO was terminated by IPO because he had *failed to meet internal sales targets* and because he was actively soliciting offers of employment from other employers while employed by IPO (page 5). (our emphasis)
  - A registered representative *under great pressure to produce commission income* traded in securities with a pedigree of what most charitably could be described as questionable. Even more disturbing, this is not a case of a novice in the investment industry getting hoodwinked by smart promoters. The Respondent had almost 10 years experience as a registered representative (page 8). (our emphasis)
  - It is clear on the facts before us that there was pressure on the Respondent to earn commission income for himself and IPO. *It was this rather than the best interests of his clients that motivated the Respondent* (page 12). (our emphasis)
  - However, *there are mitigating circumstances*. The Respondent has not before been disciplined by the Association. *He was operating with the full knowledge and encouragement of his employer* (page 14). (our emphasis)
- ¶ 12 The Thomson panel imposed a \$25,000 fine on Thomson and a suspension of seven years from registration as an employee of a member of the IDA in any

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capacity (commencing April 30, 2000). Before he can be reinstated, Thomson must:

- pay the fine, plus costs of \$26,500, and
- re-write and pass the examination based on the Conduct and Practices Handbook for Securities Industry Professionals.

¶ 13 The IDA informed Thomson of the panel's decision on September 8, 2004, and published the decision on its website on September 21, 2004, in Bulletin No. 3332.

### *Brighten settlement agreement*

¶ 14 On June 14, 2004, prior to the Thomson hearing, Brighten and IDA staff had entered into a settlement agreement relating to Brighten's role in Thomson's distribution of the Value Software Corporation securities.

¶ 15 Paragraphs 8 to 60 of the agreement contain the facts agreed by Brighten and IDA staff which are also set out in paragraph 2 of the Brighten decision. These facts are, broadly, the same as those admitted by Thomson. However, so far as we are aware, the information in two paragraphs was not before the Thomson hearing of June 21, 2004. They are admissions by Brighten for the purpose of settlement:

59. The Respondent [Brighten] allowed Thomson to market the Debtor Certificates to IPO clients with Thomson conducting his own due diligence and drafting his own subscription documents, when he knew, or ought to have known that Thomson had no experience with bankruptcy reorganizations or reverse takeovers.

60. The Respondent failed to prohibit Thomson from marketing the Debtor Certificates to IPO clients.

¶ 16 In paragraph 63 of the settlement agreement, Brighten and IDA staff agreed that Brighten contravened the IDA by-laws in that he:

failed to ensure that the distribution of the Debtor Certificates of Value Software Corporation complied with the prospectus requirements of the Act and failed to prohibit Thomson from marketing the Debtor Certificates to IPO clients without ensuring Thomson had done sufficient due diligence to qualify the investment for IPO clients and thereby failed to observe high standards of conduct in the transaction of his business contrary to Association By-Law 29.1.

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- ¶ 17 Brighten agreed to pay a fine of \$10,000 and to pay \$2,500 toward the IDA's costs.

### *Brighten decision*

- ¶ 18 On August 24, 2004, three weeks after the Thomson decision, but before its publication, the Brighten panel held a hearing to review the settlement agreement under IDA By-law 20.26.
- ¶ 19 Following standard practice, the IDA gave the Brighten panel copies of the settlement agreement in advance of the hearing. At the hearing, IDA staff and Brighten made joint submissions recommending that the panel accept the settlement agreement. IDA staff advised the Brighten panel of its options under By-law 20.26.
- ¶ 20 The panel chair gave the Brighten decision orally:

We have come to the conclusion that we cannot accept the settlement, and under by-law 20.26, we are rejecting it and we'll follow with reasons.  
(Brighten transcript, page 31)

- ¶ 21 In its reasons for decision of September 22, 2004, the Brighten panel said (at para 5) that they were guided by the decision in *Re Milewski*, [1999] IDACD No. 17, Bulletin 2605 at page 11 in which that panel stated:

A District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. *It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.* (emphasis of the Brighten panel)

- ¶ 22 The panel's analysis is found in paragraphs 6 to 13 of its decision:

6 In our view, paragraph 63 of the Settlement Agreement significantly understates the nature of Mr. Brighten's default. We think that Mr. Brighten's conduct involves a contravention far more serious than the language of paragraph 63 suggests and because of this we think that the proposed penalty clearly falls outside a reasonable range of appropriateness.

7 During the Relevant Period Mr. Brighten was IPO's Executive Vice President, its Compliance Manager and its Ultimate Designated Person. In those capacities, he was responsible to the Association for the conduct of

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the firm and the supervision of its employees (Association Bylaw 38.1); for ensuring the implementation of policies and procedures that adequately reflected the regulatory requirements applicable to IPO (Association Bylaw 38.10); and for monitoring adherence by IPO to those policies and procedures to ensure that the management of the compliance function was effective and provided reasonable assurance that the IDA's standards were met (Association Bylaw 38.11). Specifically, Mr. Brighten was responsible for ensuring that the handling of client business was within the bounds of ethical conduct, consistent with just and equitable principles of trade and not detrimental to the interests of the securities industry (Association Guide to Categories of Registration: Ultimated [sic] Designated Person; Association Rule 1300.2(a)).

8 Mr. Brighten took no steps to ensure that the Debtor Certificates could be lawfully marketed in British Columbia. Compliance with law – in particular with the securities law – is elementary and Mr. Brighten's failure in this respect was fundamental. He appears to have relied on the views of Mr. Wolff or those of Mr. Thomson, neither of whom had any relevant credentials. Mr. Brighten acknowledges that he should have satisfied himself on this point and there does not seem to be any explanation for his failure to do so.

9 Mr. Brighten gave Mr. Thomson written authorization to market the Debtor Certificates, but instructed him:

(i) that 'solicitations of expression of interest should be based only on the material provided by the issuers and your subscribers must base their decisions on that material';

(ii) that IPO would not be doing any due diligence or research on the Debtor Certificates; and

(iii) to ensure that the firm's name did not appear in any of the materials used by Value/Auto Finance to present the deal.

10 Mr. Brighten seems to have made no effort:

(a) to ensure that Thomson conducted the appropriate, or indeed any, inquiries about the Debtor Certificates, the transaction or the people involved;

(b) to ensure that the marketing materials proposed to be used by Thomson to market the Debtor Certificates were appropriate,

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despite his knowledge (see paragraph 27 of the Statement of Facts) that Thomson was working with Mr. Wolff to produce such materials;

(c) to ensure that the Subscription Agreement that Thomson prepared was appropriate and complied with the requirements of the Authorizing Order of the Bankruptcy Court; or

(d) to satisfy himself that the instructions given by Thomson to Mr. Brighten's assistant were consistent with the requirements of the Authorizing Order of the Bankruptcy Court.

11 In our opinion the facts indicate a pattern of complete abdication by Mr. Brighten of his responsibility to supervise Mr. Thomson's conduct. The contravention described in paragraph 63 of the Settlement Agreement focuses on only two isolated aspects of that pattern, rather than the pattern itself. In our opinion:

(a) the general character of the transaction;

(b) the manifestly high risk nature of the securities offered;

(c) the purported credentials of those associated with the offering and in particular of Mr. Wolff;

(d) the apparent lack of relevant corporate finance experience of Mr. Thomson,

were all obvious, or should have been obvious, to Mr. Brighten. Cumulatively, they demanded a high degree of supervision and attention on Mr. Brighten's part that, it seems to us, he conspicuously failed to display. The Settlement Agreement indicates that this was not a case of inadvertence. Mr. Brighten was aware of the facts that gave rise to the need for close supervision. He elected to ignore them and abdicate his responsibilities.

12 Having regard to all of these considerations, we think that:

(e) the Settlement Agreement seriously mis-characterizes the nature of Mr. Brighten's contravention; and

(f) as a result; and in particular having regard to Mr. Brighten's experience in the industry, the positions he occupied as an officer



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of IPO and the duties and responsibilities that he assumed by virtue of those positions, the sanction provided for in the Settlement Agreement clearly falls outside a reasonable range of appropriateness.

13 It is for the foregoing reasons that we declined to approve the settlement.

- ¶ 23 The decision in the Thomson matter was not in evidence before the Brighten panel. It appears that Brighten learned after his hearing that one member of the panel, Don Teatro, had also been a member of the Thomson panel.

### **II. Grounds for Review**

#### *Brighten submissions*

- ¶ 24 Brighten says that a reasonable apprehension of bias was raised because one member of the Brighten panel, while a member of the Thomson panel, had heard negative evidence and submissions about Brighten, and made findings adverse to Brighten.
- ¶ 25 He also argues that the Brighten panel made findings outside its mandated scope of review, and so exceeded its jurisdiction, in determining whether to accept or reject the settlement agreement. He says that the Brighten panel:

did not confine itself to the facts and allegations set out in the Settlement Agreement and it *disapproved* that agreement. In so doing it made adverse findings of fact, concluded that the contravention was ‘mischaracterized’, and in substance reached its decision based on what it regarded as a more properly characterized contravention, which the parties to the Settlement Agreement had not agreed upon. In the result, the Brighten Panel disapproved the Settlement Agreement, rather than make a finding required by IDA By law 20.26. (Brighten’s emphasis)

- ¶ 26 Brighten asks us to set aside the IDA decision for error of law and breach of the public interest and to order that a new, properly constituted panel re-consider the settlement agreement.

#### *IDA response*

- ¶ 27 The IDA says that Teatro’s prior participation as a member of the Thomson panel did not create a reasonable apprehension of bias because the grounds (if any) are not substantial.

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¶ 28 The IDA says that the Brighten panel did not exceed its jurisdiction. In reviewing the settlement agreement, the panel considered and applied the proper test and was at all times properly performing its role under IDA By-law 20.26.

¶ 29 The IDA asks us to confirm the Brighten panel's rejection of the settlement agreement.

### *Position of the Executive Director*

¶ 30 Commission staff say that Brighten has not provided us with good grounds for interfering with the Brighten decision. They point out that the threshold for a finding of reasonable apprehension of bias is high and the burden of proof is on the applicant.

### **III. Law, Analysis and Findings**

#### *IDA settlements*

¶ 31 The Brighten settlement agreement was made under IDA By-law 20.25. Under By-law 20.26, settlements were required to be referred to the applicable District Council which could:

(i) accept the settlement agreement, (ii) reject it, (iii) amend it by imposing a lesser penalty or terms less onerous to the individual or Member than those contained in the settlement agreement as negotiated or (iv) amend it with the consent of the individual involved by imposing a penalty or terms more onerous than those contained in the settlement agreement as negotiated. A settlement agreement shall only become binding in accordance with its terms upon such acceptance or imposition of such lesser penalty or less onerous terms and, in such event, the individual or Member shall be deemed to have been penalized by the applicable District Council for the purpose of giving notice thereof. (as it was before the amendments effective on October 1, 2004)

#### *Standard of Review by the Commission*

¶ 32 The Commission's standard for reviewing decisions of a self-regulatory organization like the IDA is set out in section 4.6(b) of *BC Policy 15-601* as follows:

In a hearing and review of a decision of an SRO when the Commission does not proceed by way of a new hearing, the Commission will generally confirm the decision of the SRO unless:

- (1) the SRO has erred in law,
- (2) the SRO has overlooked material evidence,

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- (3) compelling evidence is presented to the Commission that was not tendered at the original hearing, or
- (4) the Commission's view of the public interest is different from the SRO's.

- ¶ 33 The hearing and review process is not intended to provide parties with a second opinion from the Commission on a matter decided by an SRO. The Commission is generally reluctant to interfere simply because it would have made a different decision in the circumstances. (*BC Policy 15-601*, s. 4.6(a))
- ¶ 34 On a hearing and review, the Commission may confirm or vary the decision under review or make another decision it considers proper. In the case of an SRO decision, the Commission may also refer the matter back to the SRO (*BC Policy 15-601*, s. 4.8 and the Act, s. 165(4)).

### *Reasonable Apprehension of Bias*

- ¶ 35 Brighten says that the Brighten panel acted contrary to the principles of procedural fairness and so erred in law and acted contrary to the public interest. Brighten says that to err in law is also to act contrary to the public interest, but he does not argue that the Brighten decision was contrary to the public interest for other reasons.
- ¶ 36 Brighten argues that the mere presence of Teatro on the Brighten panel is sufficient to raise a reasonable apprehension of bias because the Thomson panel heard negative evidence and argument about IPO's management in the absence of Brighten, without Brighten having the ability to cross-examine Thomson or provide evidence himself. In addition, the Thomson panel made negative findings about Brighten when it found that Thomson was "under great pressure" by IPO to generate commissions and that this pressure motivated him to earn commission rather than act in the best interests of his clients. The panel also found that Thomson "was operating with the full knowledge and encouragement of his employer". Brighten says these factors raise a reasonable apprehension of bias with respect to the impartiality of Teatro and the Brighten panel even if they were in fact scrupulous about not taking into account the evidence and findings in the Thomson matter in the Brighten decision.
- ¶ 37 The IDA argues that prior knowledge of a case does not support a finding of reasonable apprehension of bias, and the grounds raised by Brighten are in any event not substantial. Furthermore, says the IDA, the same facts were admitted in both the Thomson and the Brighten case. Therefore, says the IDA, the Brighten panel was not making new findings of fact and there could be no reasonable apprehension of bias.

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- ¶ 38 All the parties agree that the rules of fairness, which include a right to be heard by an impartial tribunal free from a reasonable apprehension of bias, apply to IDA proceedings. (See *Ripley v. Investment Dealers Association*, [1991] NSJ No. 452 (Nova Scotia Court of Appeal)).

### The test

- ¶ 39 The test for reasonable apprehension of bias was set out by de Grandpré J of the Supreme Court of Canada in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369 at page 394. The test was more recently confirmed by the Court in *R v. S (RD)*, [1997] 3 SCR 484 by Cory J, writing for himself and Iacobucci J, at para 111:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. ... [The] test is ‘what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude’ ...

- ¶ 40 In separate reasons in *R v. S (RD)* (at para 31), L’Heureux-Dubé and McLachlin JJ added to this the next sentence of the de Grandpré test:

Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

- ¶ 41 Cory J, in *R v. S (RD)*, elaborated on the test for a reasonable apprehension of bias in the *National Energy Board* case:

111 . . . This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case ... Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including ‘the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold’ ...

112 The appellant submitted that the test requires a demonstration of ‘real likelihood’ of bias, in the sense that bias is probable, rather than a ‘mere suspicion’. This submission appears to be unnecessary in light of the sound observations of de Grandpré J in *Committee for Justice and Liberty*, supra, at pp. 394 to 95:

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I can see no real difference between the expressions found in the decided cases, be they ‘reasonable apprehension of bias’, ‘reasonable suspicion of bias’, or ‘real likelihood of bias’. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the ‘very sensitive or scrupulous conscience’.

Nonetheless the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough. (emphasis of Cory J)

¶ 42 The Court emphasized the importance of considering the broad factual context in evaluating a bias allegation:

136 Allegations of reasonable apprehension of bias are entirely fact-specific. It follows that other cases in which courts have dealt with similar allegations are of very limited precedential value. It is simply not possible to look at an individual case and conclude that the determination of the presence or absence of bias in that case must apply to the case at bar. Nonetheless, it is helpful to review some selected cases in which similar allegations have been made if only to observe the benchmarks against which the allegations were measured.

¶ 43 In *Newfoundland Telephone Co v. Newfoundland (Public Utilities Board)*, [1992] 1 SCR 623 (at para 22), Cory J concluded that: “the test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator”.

¶ 44 Cory J said (at para 27):

... there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision.

¶ 45 The parties agree that this higher standard applies to IDA panels in settlement hearings.

¶ 46 Cory J went on to say (at para 40):

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If there has been a denial of a right to a fair hearing it cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. Procedural fairness is an essential aspect of any hearing before a tribunal. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void.

- ¶ 47 The issue before us turns on whether Teatro's involvement in the Thomson hearing, in the circumstances described above, raised a reasonable apprehension of bias in the Brighten hearing and decision.

### Other authorities

- ¶ 48 The parties provided us with a number of case authorities. We do not consider this to be a case of institutional bias, involving, for example, overlapping functions, such as the investigation and adjudication functions. (See, for example, *Brosseau v. Alberta Securities Commission*, [1989] 1 SCR 301; *Re Katz*, [1995] 19 BCSC Weekly Summary 5 (Sec. Comm.) upheld by the Court of Appeal [1995] 39 BCSC Weekly Summary 14.) So those cases offer little direct assistance.
- ¶ 49 Although the parties have not given us any cases directly on point, there are a number of cases which deal with an adjudicator who had a prior involvement in a matter. We found these cases to be the most helpful.
- ¶ 50 Brighten argues that Teatro's presence on the Thomson panel is similar to the prior involvement of Mr Crowe addressed in the *National Energy Board* case. Crowe had been part of a study group that examined the feasibility of a northern natural gas pipeline. He took part in discussions and decisions leading to an application before a panel of the National Energy Board which he was to chair. The Supreme Court of Canada held that Crowe's participation in the study group raised a reasonable apprehension of bias. He "had a hand in developing and approving important underpinnings of the very application which eventually was brought before the panel".
- ¶ 51 We do not think the *National Energy Board* case is similar to this case, as Brighten suggests. Mr Crowe had been a participant in the very matter that was to be addressed by the National Energy Board. That is not the situation here. Teatro was not directly involved in the matter he was to adjudicate.
- ¶ 52 However, the case does illustrate a "concern" ... "that there be no prejudgment of issues (and certainly no predetermination)" arising from a prior involvement of the adjudicator. The Court in *National Energy Board* looked back to *Szilard v.*

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*Szasz*, [1955] SCR 3 at pp 6-7 where Rand J spoke of the “probability or reasoned suspicion of biased appraisal and judgment, unintended though it be”. Laskin CJ, speaking for the majority, said:

This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and I think that emphasis is lent to this concern in the present case by the fact that the National Energy Board is ... to have regard for the public interest.

- ¶ 53 Brighten also relies on *Hammami v. College of Physicians and Surgeons of British Columbia*, [1989] BCJ No. 1976 (SC). There, two of the physicians who sat on the committee that heard the allegations against Dr Hammami had, in one case, lodged a complaint about him with the college and, in the other, treated two of his patients who had each become the subject of a complaint. Mr Justice Oppal of the British Columbia Supreme Court had “no difficulty” concluding that the rules of natural justice had been breached.
- ¶ 54 The IDA argues that this is not a case like *Hammami*. We agree. *Hammami* is, like *National Energy Board*, a case where the adjudicator had been involved in the very matter on which he was to adjudicate. Like the *National Energy Board* case, however, *Hammami* does involve a situation that could be viewed as giving rise to a reasonable perception that an adjudicator may not be impartial.
- ¶ 55 Brighten says this case is similar to *Spence v. Prince Albert (City) Police Commissioners* (1987), 53 Sask R 35 (Sask CA). In that case, the Mayor and chair of the Board of Police Commissioners met privately with a witness who had approached him with her concerns about allegations against Sergeant Spence. In their conversation, the Mayor asked her whether Spence had “really done those things” and she responded “yes”. Although the chambers judge found no bias, the Saskatchewan Court of Appeal, applying the *National Energy Board* case, concluded (at para 20):

In that meeting she discussed the allegation contained in the charge in a general way, but what is significant is that when asked by the chairman whether the allegations were true, she answered in the affirmative. In my opinion, the facts in this case constitute in law a reasonable apprehension of bias.

- ¶ 56 The Court said (at para 17):

A person accused is entitled to have his cause determined by an impartial tribunal which is untainted with the knowledge of facts or with a predisposition to a particular point of view which might affect the result.

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- ¶ 57 At para 20, the Court quoted Dickson, J in *Kane v. University of British Columbia Board of Governors*, [1980] 1 SCR 1105; 110 DLR (3d) 311 at p. 322:

It is a cardinal principle of our law that, unless expressly or by necessary implication empowered to act *ex parte*, an appellate authority must not hold private interviews with witnesses (de Smith, *Judicial Review of Administrative Action*, 3rd ed. (1973), p. 179) or, a fortiori, hear evidence in the absence of a party whose conduct is impugned and under scrutiny.

- ¶ 58 At para 23, the Court quoted again from *Kane* (at page 324):

The Court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so ... We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.

- ¶ 59 The IDA argues that *Brighten* is not a case like *Spence*, where the adjudicator had a private meeting with one of the witnesses prior to the hearing and discussed the evidence. We agree the situation is not the same. The *Spence* case involves the prior involvement of an adjudicator with a witness who was to testify (and did testify) against the respondent. Again, however, the Court decided that this involvement could affect the impartiality of the adjudicator.

- ¶ 60 The IDA relies on *Thompson v. Chiropractors' Association of Saskatchewan*, [1996] SJ No. 11. In that case, the Saskatchewan Court of Queen's Bench rejected an applicant's motion to prohibit the discipline committee of the Chiropractors' Association of Saskatchewan from proceeding with a hearing against him for professional misconduct for having used an activator device in his practice. The applicant argued that, since the Chiropractors' Association had deemed the use of an activator device illegal, there was a reasonable suspicion that the Discipline Committee of the Association was biased and could not effectively adjudicate on whether or not the applicant had used an activator device in an inappropriate manner. The Court stated (at para. 9):

It would be a fallacy to take the view of the governing body and simply attribute it to the discipline committee. There must be something more if an apprehension of bias is to be reasonable.

- ¶ 61 We find the *Thompson* case to be of limited assistance. The same is true of *Brett v. Ontario (Board of Directors of Physiotherapy)* (1992), 92 DLR (4<sup>th</sup>) 693 (Ont. Div. Ct.), another case relied on by the IDA. There, the three board members who sent the matter on for hearing after an initial screening process were the same



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board members proposed for the hearing on the merits. The Court found no reasonable apprehension of prejudgment in their participation in the screening process since:

... mere advance information about the nature of the complaint and the grounds for it are not sufficient, in the absence of evidence of reasonable apprehension of prejudgment, to disqualify a tribunal ... (at pages 701 to 702)

¶ 62 Commission staff brought to our attention the case of *Re Marchment & MacKay Ltd* (1996), 19 OSCB 6163 (Ontario Securities Commission). The *Marchment* case is not on point, in the sense that the Commission (upheld by the Superior Court) held that the panel had not made any findings of fact about the applicant in the earlier hearing. Findings of improper behaviour related to the practices of another firm, and not to those of the applicant, so there could be no reasonable apprehension of bias.

¶ 63 There is, however, a statement in the *Marchment* decision which Commission staff say, and we agree, also applies to an IDA panel:

... Commissioners, like judges and member of many tribunals, are quite capable of excluding from their consideration irrelevant or improper evidence, and evidence heard by them in other proceedings or information obtained by them in other contexts. (at page 6172)

### Teatro's participation in the Thomson panel

¶ 64 Keeping this in mind, would an informed person viewing the matter realistically and practically - and having thought the matter through - think that it is more likely than not that Teatro, whether consciously or not, would not decide fairly?

¶ 65 Generally we would expect a panel to be capable of putting out of its mind mere negative information in assessing the evidence and argument before it in a later hearing. The Thomson hearing was, however, clearly more than a reading of an agreed statement of facts and went beyond mere negative information. In his evidence, Thomson attempted to diminish his responsibility and discredit IPO management by stating he relied upon Brighten and others at IPO to ensure that he was following the rules. He was critical of Brighten's supervision. Thomson's submissions on liability were rejected by the Thomson panel. However, says Brighten, Teatro not only heard evidence and submissions that were critical of Brighten, he also formed a negative view about Brighten which is reflected in the findings of the Thomson decision.

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- ¶ 66 The IDA argues that we should not view the Thomson findings as critical of Brighten. It says that the findings relate to IPO management and should not be taken to apply to Brighten. In any event, says the IDA, no finding impugned Brighten to the point that that it created a reasonable apprehension of bias regarding Teatro's impartiality toward Brighten. The findings, says the IDA, "are either irrelevant to Brighten or do not impugn him to any degree". Any grounds are not substantial.
- ¶ 67 In our view, substantial grounds may exist if the evidence shows that the Thomson panel impugned Brighten when it made negative findings (or formed a negative opinion) about Brighten.
- ¶ 68 The Thomson panel found that Thomson was "under great pressure to produce commission income". Later on page 12, when deciding on penalty and considering relevant factors, the Thomson panel stated: "... there was pressure on [Thomson] to earn commission income for himself and IPO. It was this rather than the best interests of his clients that motivated the Respondent".
- ¶ 69 The IDA says that at no point did the Thomson panel indicate the pressure came from IPO management in general or Brighten in particular. The finding does not expressly apply to Brighten. Brighten is only one of two members of the IPO management team referred to in the facts admitted by both Thomson and Brighten, but even if the Thomson panel felt some of the pressure was coming from IPO management, says the IDA, it is not clear that it had decided that Brighten should bear responsibility for that pressure.
- ¶ 70 The IDA says there are numerous other factors to consider when determining whether this finding impugns IPO at all and, if so, to what extent. All brokers are under a certain amount of pressure to produce commissions. The fact that management at a firm is pressuring a broker to produce commission income, says the IDA, does not mean management expects or is pressuring the broker to breach securities laws and SRO rules and regulations.
- ¶ 71 Brighten says that the IDA is being disingenuous when it says that this finding does not impugn him. The Thomson panel found that pressure was applied. It can, says Brighten, only have been applied by IPO management. The very fact of the finding and the use of the word "great" implies that the panel thought it was relevant and of concern. The only two individuals mentioned in the evidence are Brighten and Khan. Brighten was an Executive-President. It follows that as part of management he would be at least partly responsible for applying any pressure.
- ¶ 72 We note that on page 3 of the Thomson decision the panel states that Thomson was under pressure from IPO to generate additional commissions. In our view,

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the finding in the Thomson decision that Thomson was under great pressure to produce commission income does refer to pressure applied by IPO management. However, we do not think that the finding impugns either IPO or Brighten. The panel does not say that it thought the pressure was undue or improper. In its decision the panel states only that it relied on this finding to explain Thomson's motive. Brighten characterizes this finding as a mitigating circumstance in the Thomson decision. The decision itself does not, however, describe this finding as a mitigating circumstance and we see no reason to conclude that is how the Thomson panel viewed it. It follows that we do not find that this ground supports an allegation of reasonable apprehension of bias.

- ¶ 73 The Thomson panel also found that Thomson was operating with the full knowledge and encouragement of his employer and this was a mitigating circumstance. Whether the finding is taken to mean deliberate or reckless encouragement or inadvertent encouragement, we infer that the panel concluded that IPO management had in some way been complicit in or responsible for Thomson's behaviour. On either interpretation, the finding impugns Brighten.
- ¶ 74 The IDA says that this finding (critical or not) cannot contribute to any apprehension of bias because Brighten admitted the same facts, in the settlement agreement, that led the Thomson panel to come to this conclusion.
- ¶ 75 Paragraphs 23 to 31 of the settlement agreement, under the heading 'What the Respondent Knew', are the same as paragraphs 18 to 26 of the Thomson notice of hearing and particulars. These paragraphs, says the IDA, led to the finding of the Thomson panel. The fact that the Thomson panel considered this to be a mitigating factor in favour of Thomson is not what impugned Brighten. What impugned Brighten, says the IDA, was the fact that he admitted the same facts in the settlement agreement.
- ¶ 76 The IDA asks us to find that paragraphs 18 to 26 of the Thomson notice of hearing led to the finding of full knowledge and encouragement. We do not have the full record of the Thomson hearing before us. We cannot therefore conclude that paragraphs 18 to 26 (and only those paragraphs) led to the finding of full knowledge and encouragement.
- ¶ 77 In any event, the fact that the finding of full knowledge and encouragement might also be made on the facts agreed by Brighten is, in our view, generally irrelevant. As in *Spence* (cited above), the damage had been done. The IDA's argument might succeed only if the finding followed automatically or inevitably from the agreed facts. In our view, it does not. Another panel might reasonably have come to a different conclusion on the same facts.

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### Our conclusion

¶ 78 Did the evidence, submissions and finding that impugned Brighten give rise to a reasonable apprehension of bias? Would an informed person viewing the matter realistically and practically - and having thought the matter through - reasonably perceive prejudice on the part of Teatro, whether conscious or not? Are the grounds for such perception substantial? We think that they are. Teatro heard evidence and submissions that impugned Brighten. We have found that he, together with the other panel members, made a finding in the Thomson decision that impugned Brighten. The Thomson panel's finding of Brighten's complicity in, or responsibility for, Thomson's improper conduct is a serious one. Considering the broad factual context, in our view, an informed and reasonable person would reasonably perceive bias in Teatro's later participation in the Brighten hearing and decision, whether or not any prejudice actually prejudiced Brighten.

¶ 79 Although he was only one of three members, there is still a reasonable apprehension that other members might also become tainted. In *Huerto v. College of Physicians and Surgeons* (1996), 133 DLR(4<sup>th</sup>) 100 at page 105, the Saskatchewan Court of Appeal quoted and upheld the Court of Queen's Bench (1994), 117 DLR(4<sup>th</sup>) 129:

Although he is only one of four members, still there is a reasonable perception other members might become tainted.

¶ 80 We find that Teatro's presence on the Brighten panel raised a reasonable apprehension of bias. This was an error of law, the effect of which is that the decision of the Brighten panel is void.

### *Jurisdiction*

#### First argument

¶ 81 Brighten argues that the role of a settlement panel under By-law 20.26 is to determine whether the agreed facts constitute a contravention, and if so whether the proposed penalty falls within a reasonable range of appropriateness based on the agreed contravention. He says that the panel may not make findings of fact, supplement the facts, or amend the alleged contravention. Brighten further argues that the panel must accept that the contravention correctly fits the facts, and is not entitled to reject a settlement on the basis that it believes the agreed contravention does not adequately reflect the agreed facts.

¶ 82 Brighten says that the Brighten panel exceeded its jurisdiction by determining that the agreed contravention was the wrong one. In his view, the panel decided that it would not "approve" the agreed upon penalty because of its view that the agreed

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upon facts and contravention “mischaracterized” the issues. This, says Brighten, is not the proper role of a panel hearing a matter under IDA By-law 20.26.

- ¶ 83 The IDA argues that under By-law 20.26, the panel is mandated to accept or reject the settlement if the facts are insufficient to prove the contravention or if the agreed facts support a contravention that is more serious than the agreed contravention. It is not limited to accepting or rejecting the proposed penalty. Given that the panel is to act in the public interest, it would be wrong to “handcuff” the panel so that it could not consider whether the agreed contravention was appropriate in light of the agreed facts.

### The law

- ¶ 84 IDA By-law 20.26 (quoted above) governs the District Council review of settlement agreements. The purpose of By-law 20.26 is to ensure that the public interest is considered before any agreement concerning disciplinary action becomes binding:

It is therefore incumbent upon the District Council to test the provisions of any settlement agreement for which its approval is being sought against what it considers to be in the best interests of the investing public and of the investment industry. (*Re Jeske*, [2004] Bulletin 3317, June 28, 2004, at page 12)

- ¶ 85 Under By-law 20.26, a panel hearing a settlement agreement is required to accept or reject the “settlement agreement”.
- ¶ 86 A District Council panel in a contested hearing under IDA By-law 20.10 has a broader discretion to hear a matter and determine an appropriate penalty than under By-law 20.26. The differences between the two types of hearing are discussed in *Re Mikewski*, [1999] IDACD No. 17 where the Ontario District Council of the IDA stated (at page 10):

Although a settlement agreement must be accepted by a District Council before it can become effective, the standards for acceptance are not identical to those applied by a District Council when making a penalty determination after a contested hearing. In a contested hearing, the District Council attempts to determine the correct penalty. A District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. Put another way, the District Council

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will reflect the public interest benefits of the settlement process in its consideration of specific settlements.

This understanding is reflected in paragraph 20.26 of the By-laws which authorizes the District Council to ‘accept’, rather than approve, a settlement agreement. In each case a District Council must determine appropriateness, but the standards applicable to its doing so on a settlement hearing differ from those in a contested hearing. Thus, the penalties imposed under settlement agreements, while relevant to a District Council exercising its discretion to penalize, provide only limited assistance in a hearing like this one.

### Our conclusion

- ¶ 87 First we think it wrong to conclude that the Brighten panel “determined that the agreed upon contravention was the wrong one”. The panel found that the “Settlement Agreement seriously mis-characterizes the nature of Mr. Brighten’s contravention”. “[As] as result ... the sanction provided for in the Settlement Agreement clearly falls outside a reasonable range of appropriateness.” (para 12)
- ¶ 88 By-law 29.1 states:
- Members and each partner, director, officer, sales manager [etc] (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) ...
- ¶ 89 The panel did not say that Brighten breached another by-law instead of, or in addition to, By-law 29.1 (the one specified in the agreement). The panel did not add further particulars or “counts” to the contravention. Instead it found that the breaches set out in the agreement were more serious than the wording of paragraph 63 would suggest. That is not the same as finding that that the agreed contravention was wrong.
- ¶ 90 In paragraph 10 of the Brighten decision, the Brighten panel lists four areas where Brighten seemed to have made no effort. Brighten says that in identifying four aspects of the failure to supervise, rather than the two which the IDA and Brighten had specifically agreed, it imposed its own views as to the contravention. We do not see this list as adding to or changing the contravention (set out in paragraph 63 of the settlement agreement). It merely elaborates on Brighten’s failure to supervise, drawing on the agreed facts.
- ¶ 91 In their joint submission to the Brighten panel, the IDA described the agreed contravention as “more of a due diligence type of offence than it is a supervision

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type of offence” involving a firm-wide failure to supervise. There is no evidence that the panel nevertheless decided that the contravention related to a firm-wide or “systemic” failure to supervise. One reason for its assessment of the contravention was Brighten’s status in IPO (see paragraph 7 of the decision quoted in paragraph 22 above). Another was its view that Brighten’s failure to ensure that the securities could be marketed was “fundamental” (see paragraph 8 quoted in paragraph 22 above). Finally, the panel referred to Brighten’s failure to make any effort, at various points in the marketing of the securities, to ensure that Thomson did the necessary due diligence (see paragraph 10 quoted in paragraph 22 above).

¶ 92 Second, even if we had found that the panel decided that the contravention was wrong, we are of the view that it could do so. We accept the submission of the IDA that By-law 20.26 is not restricted in the way suggested by Brighten. An IDA panel may reject a settlement agreement because the penalty is not within a reasonable range. This may be so either because the facts do not support the contravention at all, or because they support a different contravention or one that is markedly less or more serious than that suggested by the penalty. The penalty is after all imposed to address the contravention.

¶ 93 The IDA points out that the reference to settlement agreements in *Milewski* was for the purpose of establishing how much precedent value could be derived from penalties agreed in settlement agreements, as opposed to penalties imposed by panels after a contested disciplinary hearing. We agree with the IDA that *Milewski* does not stand for the proposition, proposed by Brighten, that a panel reviewing a settlement agreement, which considers anything but the reasonableness of the agreed penalty, is acting outside its jurisdiction.

### Second argument

¶ 94 Brighten also says that the Brighten panel acted outside its jurisdiction when it made adverse findings of fact, or speculated as to facts, that were not agreed as follows (quoting from the Brighten decision):

8 Mr. Brighten took no steps to ensure that the Debtor Certificates could be lawfully marketed in British Columbia. Compliance with the law – in particular with the securities law – is elementary and Mr. Brighten’s failure in this respect was fundamental. He appears to have relied on the views of Mr. Wolff or those of Mr Thomson, neither of whom had any relevant credentials.

...

10 Mr. Brighten seems to have made no effort:

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(a) to ensure that Thomson conducted the appropriate, or indeed any, inquiries about Debtor Certificates . . .

. . .

11 . . . In our opinion:

- (a) the general character of the transaction;
- (b) the manifestly high risk nature of the securities offered;
- (c) the purported credentials of those associated with the offering and in particular of Mr. Wolff;
- (d) the apparent lack of relevant corporate finance experience of Mr. Thomson,

were all obvious, or should have been obvious, to Mr. Brighten. . . . The Settlement Agreement indicated that this was not a case of inadvertence. Mr. Brighten was aware of the facts that gave rise to the need for close supervision. He elected to ignore them and abdicate his responsibilities. (Brighten's emphasis)

### Our conclusion

- ¶ 95 We think that, on the agreed facts, it is clear that Brighten “took no steps” to ensure that the securities could be lawfully marketed in BC, and that “he appears to have relied on the views of Mr. Wolff or those of Mr Thomson”. Since we do not have the full record of the Thomson hearing before us, we cannot be sure what the panel relied on when it stated that neither Mr Wolff nor Mr Thomson had “any relevant credentials”. However, since Brighten agreed that he should have ensured that the distribution complied with the prospectus requirements, we do not think that speculation (if any) about credentials is sufficiently material to justify overturning the Brighten decision. The agreed facts also support the finding that Brighten seems to have made no effort to ensure that Thomson did the necessary due diligence as set out in paragraph 10 of the Brighten decision (quoted in paragraph 94 above).
- ¶ 96 Nowhere in the settlement agreement does it say that Brighten “elected to ignore” the facts which gave rise to the need for close supervision and “abdicate his responsibilities”. The question then is whether these findings might reasonably be made on the basis of the agreed facts and within the jurisdiction of the panel.
- ¶ 97 It is true that by not acting on the four factors identified by the IDA panel in paragraph 11 of the Brighten decision (quoted in paragraph 94 above), Brighten in a sense “elected” or chose to ignore them. But the use of the word “elected” and earlier words in that paragraph - “were all obvious, or should have been obvious”,



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“a pattern of complete abdication”, and “this was not a case of inadvertence” - suggest a finding that Brighten made a deliberate choice to ignore the warning signs. It appears that the panel found Brighten to have been at least reckless as to his responsibilities. On the basis of all the findings described above, the IDA panel went on to find that the contravention was “far more serious than the language of paragraph 63 suggests”.

- ¶ 98 We have concluded that these findings are not clearly wrong. In our view, it was not outside the jurisdiction of the panel to make them.
- ¶ 99 Finally, while By-law 20.26 states that the panel may accept or reject the settlement, the Brighten panel used the words ‘approve’ and ‘disapprove’ as well as ‘accept’ and ‘reject’. Brighten says that the terminology used by the Brighten panel supports his submission that the panel applied the wrong test. He acknowledges, however, that what matters is what the panel in fact did, not what words it used to describe it. We are of the view that although the use of incorrect terminology is unfortunate, it does not show that the panel applied the wrong test. Reading the decision as a whole, and taking into account the fact that IDA staff properly advised the panel as to its options, we find that the panel applied the correct test.

### **IV. Decision**

- ¶ 100 We have found that the decision of the Brighten panel is void.
- ¶ 101 Brighten asks us to direct the IDA to send the settlement agreement to a new, properly constituted panel. The IDA asks us to make no direction.
- ¶ 102 We see no reason why the IDA’s decision should not be carried out as originally intended. We direct that the IDA refer the settlement agreement to a panel with new members.
- ¶ 103 September 9, 2005
- ¶ 104 **For the Commission**

Robin E. Ford  
Commissioner

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Joan L. Brockman  
Commissioner

John K. Graf  
Commissioner