Case Name:
Cox (Re)

IN THE MATTER OF The Securities Act, R.S.B.C. 1996, c. 418
AND IN THE MATTER OF Thomas William Cox
AND IN THE MATTER OF The Canadian Venture Exchange Inc.

2001 LNBCSC 128

[2001] B.C.S.C.D. No. 210

2001 BCSECCOM 204

COR No. 01/031

British Columbia Securities Commission

B.W. Aitken, J.L. Brockman and R. Wares,

Heard: January 30, 2001.
Decision: February 16, 2001.

Appearing:

For **Thomas William Cox,** Carey D. Veinotte K. Zimmer.

For The Canadian Venture Exchange Inc.

Larry R. Jackie.

For Commission Staff, Lorne Herlin.

DECISION OF THE COMMISSION

1 This is a hearing and review of a decision of the Canadian Venture Exchange Inc. under section 28 of the Securities Act, R.S.B.C. 1996, c. 418. **Thomas William Cox** applied to the Exchange for an order compelling Exchange staff to disclose to Cox an investigation report related to a citation that the Exchange has issued against Cox. An Exchange hearing panel refused the application. Cox argues that the Exchange proceeded on an incorrect principle and erred in law in making that decision and asks that we set aside the Exchange's decision and order disclosure of the report.

BACKGROUND

2 At all material times, Cox was an approved person employed by Yorkton Securities Inc., a member of the Exchange and its predecessor, the Vancouver Stock Exchange.

3 Exchange staff alleges in a citation dated February 11, 1999 that Cox:

1. sold shares from an account on instructions of a third party without appropriate authority, and
2. misled or attempted to mislead Exchange staff, contrary to the Rules and By-laws of the Exchange.

4 The alleged trading irregularities occurred on December 4, 1996. The allegation that Cox misled or attempted to mislead Exchange staff arose on August 21, 1997. In an interview with the Exchange's investigator, Chris Perkins, Cox offered an explanation of the events relating to the first allegation. Exchange staff believes its interpretation of those events is the correct one, so it concluded that Cox must be lying. This is the basis of the second allegation.

5 A date for a hearing on the merits has not been set and it appears it will be some months yet before the hearing is held.

6 After completing his investigation Perkins submitted an investigation report to the Executive Committee of the Exchange. The report recommended that proceedings be brought against Cox. Perkins' recommendation was apparently accepted, since the Executive Committee authorized the issue of the citation.

7 On April 22, 1998, the Exchange wrote Cox advising him of the particulars of the allegations. The Exchange said it was relying on the existence of the sell order from a person who had no authority to trade in the account in question and the subsequent execution of the order. Cox had told the Exchange that the sale was intended to have been made from an account of another client. The Exchange advised that it was rejecting that explanation because there was no sell order from the other client and that client's account did not contain any shares of the company that were sold.

8 In addition, Exchange staff has disclosed to Cox all material required to be disclosed under the disclosure standard established in the Cartaway and O'Neill cases (discussed below).

9 Cox also sought production of the Perkins report. Exchange staff refused.

10 Cox applied to an Exchange hearing panel for an order compelling Exchange staff to produce the drafts (if any) and the final version of the Perkins report. In refusing Cox's application on July 5, 2000, the Exchange hearing panel said:

> "For the reason that follow, we have concluded that the Exchange is not obligated to produce the drafts, if any, or the final version of the report of Mr. Chris Perkins in this case.
>
> "In reaching this conclusion, we are cognizant of the very clear direction given by the Commission in the Cartaway and [O'Neill] cases as to what constitutes procedural fairness in administrative proceedings in the securities regulatory context.
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> "It seems clear that all materials gathered in the course of the investigation, i.e., 'the fruits of the investigation', as they were characterized in Cartaway, have been provided to Mr. Cox or his counsel, together with the particulars of the allegations made.

> "What has not been provided is the report, which was created by the investigator in preparation for the hearing. We agree with the Commission's statement in [O'Neill] that '[i]t is the responsibility of the hearing panel to determine whether the allegations in the Citation have been met. The views of the Exchange staff, as expressed in internally generated documents, such as investigation reports, are of no relevance in this regard.' As such, we also find the report in this case not relevant.

> "We have considered carefully the decision of Boyd J. in Milner, decided since both the decisions in Cartaway and [O'Neill] were rendered. . . . nothing in the decision suggests that it has any application in the securities regulatory field. The B.C. Court of Appeal in Rak v. B.C. Supt. of Brokers (1990), 51 B.C.L.R. (2d) 27 (C.A.) at 34, Hollinrake J.A., stated that 'trading in securities is not a profession in the sense that doctors, lawyers, architects, engineers, accountants and other professionally trained persons can be said to be engaged in a profession.'

> " . . . we are not convinced that Milner gives us any reason to doubt the proposition in [O'Neill] stated above."

11 Cox argued that the delay in bringing the matter to a hearing constituted special circumstances that would justify production of the report. Of this, the hearing panel said,

> "It is understandable that witnesses' memories may no longer be as reliable and that the attendance of all relevant witnesses may not be assured, but we do not necessarily see the link between these circumstances and the investigator's report."

ARGUMENTS AND ISSUES

12 Cox says he needs to see the Perkins report, primarily to prepare for his cross examination of Perkins with respect to the second allegation. Cox argues that in refusing to order production of the Perkins report the Exchange proceeded on an incorrect principle or erred in law. He asks that the Exchange's decision be set aside.

13 The Exchange argues that the Exchange hearing panel followed applicable law and the Commission's directions on disclosure. The Exchange asks that the Exchange's decision be confirmed.

14 Commission staff supports the position of the Exchange.

DISCUSSION

15 The Commission has established in previous decisions that it will generally confirm a decision of the Exchange unless:

> (a) the Exchange has proceeded on an incorrect principle,
> (b) the Exchange has erred in law,
> (c) the Exchange has overlooked some material evidence,
> (d) new and compelling evidence is presented to the Commission that was not presented to the Exchange, or
> (e) the Commission's view of the public interest is different from the view of the Exchange.

Disclosure under Cartaway

16 Re Cartaway Resources Corporation, [1999] 22 BCSC Weekly Summary 27 was an application by a respondent,

Johnson, for disclosure by Commission staff of various documents and information. The allegations against Johnson in the notice of hearing were serious. Commission staff were seeking orders that would deny his use of exemptions under the Act, prohibit his employment in the securities industry, prohibit his acting as an officer or director of any issuer and impose administrative penalties.

17 The disclosure sought included "all of the notes, records, memos or other materials created" by the investigator.

18 Johnson argued that the disclosure standard set forth by the Supreme Court of Canada in R. v. Stinchcombe, [1991] 3 S.C.R. 326 ought to apply because it had been applied in Hammami v. College of Physicians and Surgeons of British Columbia, [1997] 9 W.W.R. 301, a professional discipline case.

19 Stinchcombe was a case involving an indictable offence under the Criminal Code (Canada). The court, after noting (at p. 333) that the "fruits of the investigation" in possession of the Crown are "the property of the public to ensure justice is done", described the Crown's disclosure obligations to the defence in such cases as follows (at p. 343):

> "With respect to what should be disclosed, the general principle to which I have referred is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence.
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> . . .
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> "There is virtually no disagreement that statements in the possession of the Crown obtained from witnesses it proposes to call should be produced. In some cases the statement will simply be recorded in notes taken by an investigator, usually a police officer. The notes or copies should be produced. If notes do not exist, then a 'will say' statement, summarizing the anticipated evidence of the witness, should be produced based on the information in the Crown's possession. A more difficult issue is posed with respect to witnesses and other persons whom the Crown does not propose to call.
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> . . .
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> "I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced . . . . If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecutor."

20 A full understanding of the Hammami case requires information on its background. Hammami had been found by the British Columbia College of Physicians and Surgeons not to have the requisite skills and knowledge to practice and his right to practice was withdrawn. Prior to the hearing the College gave particulars of the complaints to Hammami but did not disclose the names of the patients and complaining doctors. The patients' names were eventually disclosed. Much later, after the College made its decision and as a result of requests from Hammami, the names of the doctors were also disclosed.

21 It turned out that some of the doctors on the investigating committee had treated some of the patients whose treatment by Hammami was in issue, and one of those doctors had filed a complaint against Hammami. As a result the

College's decision was overturned by the British Columbia Supreme Court on the basis that the committee investigating Hammami's conduct was tainted by a reasonable apprehension of bias.

22 In later related proceedings, Hammami asked the College to disclose his complete file. The College refused. This gave rise to the Hammami case on which Johnson relied in Cartaway.

23 In Hammami, Williams C.J.S.C. of the Supreme Court of British Columbia reviewed several administrative law cases in which the application of the Stinchcombe standard was considered. The court concluded (at p. 322) that:

> " . . . in cases arising from the administrative law context where the decision of an administrative tribunal might terminate or restrict the 'accused's' right to practice that career or seriously impact on a professional reputation then the principles in Stinchcombe, in respect of disclosure may well apply.
>
> . . . in appropriate cases the court's approach should be as outlined by the Court of Appeal in G. (J.P.) v. British Columbia (Superintendent of Family & Child Services)i and that is where disclosure 'might have been useful' then disclosure should be made by the Crown (or tribunal) unless there is 'any special reason why such material should not be disclosed' and in those circumstances the special reason should be brought to the attention of the judge or tribunal."

[emphasis added]

The court observed, "When I consider the background facts in the case at bar I must say that I have an uneasy feeling about what might have been revealed had the appellant been given his file" and concluded that the Stinchcombe standard should apply to the case "particularly bearing in mind its unsettling history".

24 In Cartaway, the Commission did not apply Hammami. The Commission characterized the disclosure obligation as an element of procedural fairness, observing that the Supreme Court of Canada has stated that "the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case": Knight v. Indian Head School Division No. 19 of Saskatchewan, [1990] 1 S.C.R. 653 at 682.

25 Considering the context, the Commission noted that the primary objective of securities regulation is the regulation of the market and the protection of the public interest and referred to the Supreme Court of Canada decision in Gregory & Co. v. Quebec Securities Commission, [1961] S.C.R. 584 in which the court said (at p. 588):

> "The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business."

26 The Commission noted (at p. 36):

> "In several subsequent cases where certain provisions of the Act and powers of the Commission were challenged, the Supreme Court of Canada again confirmed the regulatory nature of the Act and the powers given to the Commission to administer it. See Pezim v. British Columbia Securities Commission, [1994] 2 S.C.R. 557 and British Columbia Securities Commission v. Branch, [1995] 2 S.C.R. 3 in which Sopinka J. and Iacobucci J. noted at page 39 that:
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> "'[T]he Securities Act is essentially a scheme of economic regulation which is designed to

> discourage detrimental forms of commercial behaviour. The provisions provided by the legislature are pragmatic sanctions designed to induce compliance with the Act.'"

27 The Commission distinguished Stinchcombe on the basis that proceedings before the Commission were administrative, not penal, citing the Supreme Court of Canada's decision in Brousseau v. Alberta Securities Commission.ii In considering Hammami, the Commission noted that the court applied the Stinchcombe standard in light of that case's "unsettling history".

28 Considering the application before it, the Commission said (at p. 39):

> "In our view, disclosure and the demands for disclosure of materials must have some relevance to the proof or defence of allegations in the section 161(1) notice of hearing. By necessity this means that Commission staff counsel will have to exercise discretion and judgment in determining what materials fit within those parameters. In our view, if Commission staff counsel view materials as "potentially relevant to the respondents" the materials would fit within the above parameters and should simply be disclosed as relevant materials but materials upon which Commission staff may not rely. In our view, it is not appropriate to permit fishing expeditions into Commission staff files for purposes unrelated to the allegations in the notice of hearing or to simply see what is there. There may be materials in the Commission staff's file that were not gathered in the course of the investigation but rather created by Commission staff in preparation for the hearing. In our view, these kinds of materials are not 'fruits of the investigation' as suggested by Johnson and need not be disclosed.
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> . . .
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> "In our view, it is appropriate to restate the standard of disclosure that we expect Commission staff counsel to make to all respondents in section 161(1) enforcement hearings. The duty on Commission staff counsel requires disclosure of:

"1. the particulars of the case against the respondents; and

"2. all relevant material gathered in the investigation relating to the allegations in the notice of hearing, whether Commission staff intend to rely on the material or not, unless there is any special reason why such material should not be disclosed and in those circumstances the special reason should be brought to the attention of the respondents. Of the relevant materials disclosed, Commission staff counsel should continue to distinguish between the materials upon which Commission staff intend to rely and that which they do not."

29 Three things are noteworthy about Cartaway. First, it significantly expanded the disclosure obligation that was set out in Re Simon Fraser Resources et al., [1996] 47 BCSC Weekly Summary 25.

30 Second, the Cartaway standard is not far removed from the Stinchcombe standard. Certainly any relevant material gathered in the investigation must be disclosed under both standards. To the extent the two standards differ, the primary distinction is that in addition to "fruits of the investigation", Stinchcombe, at least as interpreted in Hammami, may require disclosure of materials created by staff in connection with the investigation or for the purposes of the hearing, where Cartaway would not.

31 Third, the Cartaway standard is consistent with the disclosure mandated for proceedings under the rules applicable

to proceedings before the Ontario Securities Commission under the Securities Act (Ontario). The Cartaway standard exceeds that mandated for proceedings before The Toronto Stock Exchange under its Rules. In those rules, only materials that the parties intend to rely on or refer to in the hearing need be disclosed.

Application of Cartaway to Exchange Proceedings: O'Neill

32 In Re Kevin Patrick O'Neill, [1999] 31 BCSC Weekly Summary 20 the Commission held that the Cartaway disclosure standard applies to proceedings before the Exchange. The Commission said, "It has been recognized by the courts that the Exchange, in exercising its regulatory responsibilities, plays a key role in the protection of the public interest in our capital markets" and cited Supreme Court of Canada decision in Pezim.

33 In Pezim, the court said (at p. 589):

> "It is important to note from the outset that the [Securities] Act is regulatory in nature. In fact, it is part of a much larger regulatory framework which regulates the securities industry throughout Canada. . . .
>
> "Within this large framework of securities regulation, there are various government administrative agencies which are responsible for the securities legislation within their respective jurisdictions. . . . Also within this large framework are self-regulatory organizations which possess the power to admit and discipline members and issuers. The VSE [the Exchange's predecessor] falls under this head."

The Milner Case

34 Subsequent to the Cartaway and O'Neill decisions, the Supreme Court of British Columbia considered disclosure issues in Milner v. Registered Nurses Association of British Columbia (1999), 71 B.C.L.R. (3d) 372. Milner was a judicial review of a decision by the Registered Nurses Association to terminate Milner's membership in the Association. One of the grounds on which the court was invited to overturn the decision was the failure of the Association to disclose the investigator's report and notes made by the investigator of witness interviews, as well as other documents and materials.

35 After a review of the case law, the court said (at p. 380), " . . . the Courts have clearly moved toward requiring administrative disciplinary tribunals to approach, if not meet, the Stinchcombe standard" and referred to Markandey v. Board of Ophthalmic Dispensers (Ontario) (March 19, 1994), O.J. No. 284 (QL) (Ont. Gen. Div.) in which the court said (at p. 21):

> " . . . tribunals should disclose all information relevant to the conduct of the case, whether it be damaging to or supportive of a respondent's position, in a timely manner unless it is privileged as a matter of law. Minimally, this should include copies of all witness statements and notes of the investigators."

36 Applying these standards, the court considered the non-disclosures. In a section entitled "Category 1 Documents: Investigator's Report and Notes", the court considered the non-disclosure of the notes of witness interviews, but made no mention of the investigator's report. The court carefully considered every element of non-disclosure it thought may have impaired Milner's ability to make full answer and defence, so this omission suggests that the investigator's report was not considered relevant.

Analysis

37 Cox argues that the Exchange errors are twofold. First, he says that Milner mandates the Stinchcombe standard

and the Exchange erred in distinguishing Milner on the basis that brokers are not "professionals" as stated in Rak. Cox argues that what matters is the seriousness of the consequences to the respondent, not his or her "professional" status.

38 Second, Cox says that Cartaway is in error in relying on the distinction between penal and non-penal consequences. He argues that the obligation to disclose is a component of procedural fairness, which he says must be considered in the context of the tribunal, its powers and the effect on the respondent, according to Baker v. Minister of Citizenship and Immigration et al. (1999) 174 D.L.R. (4th) 193 (Supreme Court of Canada).

39 In our opinion the Exchange was correct in not following Milner, although not for the reasons it expressed. We agree with Cox that whether or not he is properly characterized as a professional is not determinative of the issue. Disclosure is a matter of procedural fairness. It is clear from the authorities, in particular Baker, that to the extent the position of the respondent is relevant to the degree of procedural fairness that applies, what matters is the potential impact of the decision on the respondent, not his or her professional status.

40 In our opinion, there is nothing in the Milner decision that casts doubt on Cartaway as the appropriate standard for disclosure by Exchange staff. Cox cited several cases, mostly professional discipline cases, expressing approval of Stinchcombe or near-Stinchcombe disclosureiii. However, it is important to consider just what was in issue in these cases. With one exception (Hammami), all of the cases dealt with witness statements, notes of witness interviews, videotapes or other materials that were clearly relevant material that would be disclosed under the Cartaway standard. Therefore, no expansion of the Cartaway standard would be necessary to ensure disclosure of such materials in proceedings before the Commission or the Exchange. So while some may be tempted to interpret these cases as importing a broader standard, in their result they required no broader a standard than Cartaway.

41 In Hammami, the court ordered the production of the entire investigation file. However, the court did not go so far as to mandate a blanket application of Stinchcombe. Furthermore, it said that disclosure of everything "useful" in the absence of "special reasons" not to disclose should be required only in "appropriate" cases. It seems clear that the "background facts" and the "unsettling history" of the case were major factors in the court's decision.

42 Milner itself mentions an investigation report, but in fact the decision deals only with material that would be disclosed under a Cartaway standard.

43 Cox argues the distinction between penal and non-penal consequences, as discussed in Cartaway, is not relevant, and to the extent that Cartaway depends on that distinction, it is wrongly decided. No authority was provided to suggest that the distinction between penal and non-penal consequences (as observed by the Supreme Court of Canada in Wigglesworth v. The Queen (1987), 45 D.L.R. (4th) 235) is now irrelevant. However, it follows that the closer the courts move to the Stinchcombe standard, the distinction assumes less importance, at least in the context of disclosure by the Exchange or the Commission.

44 It is therefore more useful, as Cox argues, that disclosure be viewed in the context of procedural fairness.

45 Baker articulated the factors to consider in determining the degree of procedural fairness that will apply. L'Heureux-DubÚ J. began by observing that:

> "I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision maker."

46 L'Heureux-Dube J. then identified five factors to consider:

1. The nature of the decision being made and the process followed in making it. In

describing this factor, L'Heureux-DubÚ J. said:

"The more the process provided for, the function of the tribunal, the nature of the decision-making body and the determinations that must be made to reach a decision resemble judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness."

Applying this test, we find that disciplinary proceedings before the Exchange tend to the judicial end of the spectrum.

2. The nature of the statutory scheme and the terms of the statute under which the tribunal operates. This has been described in the discussion of Cartaway and O'Neill above.
3. The importance of the decision to the individual affected. Generally, Exchange disciplinary proceedings are of significant importance to an approved person. An individual in these proceedings faces fines, suspension and expulsion.
4. The legitimate expectation of the individual with respect to the procedure to be followed. As an approved person, Cox would expect the Exchange to follow the procedures in its Rules and By-laws..
5. The authority of the tribunal to set its own procedures. The Exchange, like the Commission, has the authority to establish its own procedures for hearings.

47 Considering these factors, it is clear that disciplinary proceedings before the Exchange would attract a reasonably high level of procedural fairness. Is the Cartaway disclosure standard consistent with that level of procedural fairness?

48 We find that it is. As noted above, the Cartaway standard is not far short of Stinchcombe. To the extent it does fall short of Stinchcombe, it is consistent with the function and role of the Commission and the Exchange as part of the system of securities regulation in Canada. In Stinchcombe itself, the court cautioned against applying the standard too broadly, even within the criminal law sphere (at p. 342):

"The general principles referred to herein arise in the context of indictable offences. While it may be argued that the duty of disclosure extends to all offences, many of the factors which I have canvassed may not apply at all or may apply with less impact in summary conviction offences. Moreover, the content of the right to make full answer and defence entrenched in s. 7 of the Charter may be of a more limited nature."

49 Proceedings before the Exchange and the Commission are administrative. The Legislature has chosen an administrative agency to regulate securities markets because the flexibility and responsiveness of the administrative structure is well suited to the demands of the fast moving commercial sector. (The case before us is perhaps not the best example of that.) It is consistent with this intent that securities regulatory agencies afford a high level of procedural protection yet not be burdened with the highest standards possible. As the Supreme Court of Canada said in Knight (at p. 685):

"It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (de Smith's Judicial Review of Administrative Action (4th ed. 1980), at p. 240), the aim is not to create 'procedural protection' but to achieve a

certain balance between the need for fairness, efficiency and predictability of outcome."

50 It is clear from these decisions, and the other decisions of the Supreme Court of Canada cited earlier that refer specifically to securities regulation, that the court considers factors such as flexibility, expediency, pragmatism and the economic regulation function of the securities regulatory system to be significant is assessing the procedures to be followed by securities regulatory agencies.

51 In our opinion, the standard of disclosure set by Cartaway is consistent with the high level of procedural fairness to which respondents are entitled in proceedings before the Commission and the Exchange. It also reflects the role of the Commission and the Exchange in protecting the public interest in connection with the regulation of our securities markets.

52 In this case, anything contained in the Perkins report that is among the "fruits of the investigation" of Exchange staff has been disclosed to Cox under the Cartaway standard.

53 Cox argues that the delay in this case amounts to special circumstances that justify disclosure of the Perkins report. In our opinion, Cox has not established how disclosure of the report will ameliorate the effects of the delay. The connection between the delay and disclosure of the report is no more apparent to us than it was to the Exchange hearing panel.

54 Finally, Cox argues that to defend himself against the second allegation in the citation, he needs to see the report in order to divine why Perkins chose not to believe Cox's version of the events. He says, for example, that if Perkins' view of Cox's truthfulness changed between drafts of the report, that would open a line of cross examination that he ought to be able pursue.

55 We do not agree. The hearing panel will determine whether or not Cox lied, based on the evidence. Perkins' opinion on that issue is irrelevant.

DECISION

56 We find that in refusing to order Exchange staff to produce the Perkins report, the Exchange did not proceed on an incorrect principle or err in law. The Exchange's decision is therefore confirmed.

i (1993), 77 B.C.L.R. (2d) 204 (B.C.C.A.).
ii [1989] 1 S.C.R. 301 at 323.
iii Markandey, supra; Thompson v. Chiropractors Association of Saskatchewan (1996), 36 Admin. L.R. (3d) 273; Lawrence E. Pierce v. The Law Society of British Columbia (2000), B.C.S.C. 887; Nrecaj v. Canada (Minister of Employment and Immigration) (1993), 3 F.C. 630 ; Howe v. Institute of Chartered Accountants (Ont.) (1994), 27 Admin. L.R. (2d) 118; Hammami, supra; and Milner, supra.

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