WORKERS' COMPENSATION
REPORTER

Decision of the Appeal Division

Number: 2001-0934/0935
Date: May 11, 2001
Panel: John Steeves, Laura Bradbury, Heather McDonald
Subject: Procedural Fairness and Bias

BIAS (PROCEDURAL FAIRNESS) (OCCUPATIONAL SAFETY AND HEALTH) — Corporation appealed administrative penalty and re-classification — Procedural unfairness flowing from failure of hearing officer to disclose information obtained during verbal communications with assessment officer — Information related to the Corporation's defences before hearing officer — Reasonable apprehension of bias arising from conduct of occupational safety officer, hearing officer and assessment officer — Applied *Baker* five-part test — Overall circumstances suggested a lack of impartiality on part of the Board — Board decisions tainted by bias — Decision on re-classification to be redetermined by new decision-maker — Administrative penalty cancelled.

Law:	*WCA* (1996): s. 96(6), s. 107, s. 196(6), s. 212
Policy:	*Prevention Manual* D12-196-5; *APM*: #20:30:31, #30:20:20
Decisions:	Baker v. Minister of Citizenship and Immigration, [1999] 2 S.C.R. 817; Kane v. University of British Columbia, [1980] S.C.R. 1105; Sivarguru v. Canada, [1992] 2 F.C. 374 (F.C.A.); Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369 (deGrandpré, J. dissent); Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623

Appeal of Administrative Penalty and Re-classification [employer appeal, assmt. dept./prev. div.]
Appeal Division Decision No. 2001-0934/0935

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Introduction

(1) The appellant is a corporation (the "Corporation") which operates in the grocery sector in B.C. and other provinces.

(2) In 1999 the Workers' Compensation Board (the Board) decided to re-classify some of the Corporation's B.C. divisions from the "wholesale" industry class to the "retail" industry class. The Board also decided to impose an administrative penalty on one of the Corporation's "StoreClubs" for violations of the Occupational Health and Safety Regulation (the Regulation).

(3) The Corporation has appealed the two decisions of the Board as follows:

1. The first appeal relates to a decision dated October 1, 1999 by an assessment officer in the Assessment Department of the Board. The assessment officer re-classified two divisions of the Corporation from wholesale to retail supermarket, effective January 1, 1998, resulting in an $800,000 cost to the Corporation. The employer brings this appeal pursuant to

section 96(6) of the *Workers Compensation Act* (the Act) which, before the appeal can proceed, requires that there be an error of law, error of fact, or a breach of a published policy of the governors in the assessment officer's decision. (Under section 83.1 of the Act, a panel of administrators is discharging the powers, duties and functions of the governors under the Act).

2. The second appeal relates to a decision dated December 10, 1999 by a variance and sanction review officer (the "hearing officer") in the Prevention Division of the Board. The decision imposed an administrative penalty on the Corporation in the amount of $112,000 for breaches of the Regulation. The employer brings this appeal pursuant to section 208 of the Act which does not require grounds for the appeal to proceed. Section 212 of the Act provides that if the appeal is successful the Appeal Division may confirm, vary or cancel the penalty, or refer the matter back to the Board for reconsideration.

(4) The Corporation alleges that the Board officers involved in these two decisions engaged in conduct which amounts to a reasonable apprehension of bias. Specifically, the Corporation alleges that the occupational safety officer (O.S.O.), the assessment officer and the hearing officer committed abuses of process and breaches of natural justice which, considered together, would cause a reasonable person to believe that the decisions were not made by objective and impartial decision makers. The Corporation submits that, as a result, the decision of the hearing officer (which upheld a recommendation for sanction by the O.S.O.) is void. It also submits that the decision of the assessment officer must be returned to the Board for redetermination by a different decision maker, or alternatively, decided by this panel.

Issue(s)

(5) Do the circumstances of this case give rise to a breach of natural justice or procedural unfairness? Do the circumstances of this case give rise to actual bias or a reasonable apprehension of bias? Was there an error of fact, law or contravention of published policy in the assessment decision? If the answer to any of the previous three questions is yes, then what is the appropriate remedy or remedies?

The Hearing Process

(6) We agreed, in a preliminary decision, that we would hear the Corporation's two appeals together. We also agreed that we would hear evidence on the bias issue before hearing, if necessary, evidence on the substantive matters.

(7) We held a hearing on November 7 and 8 and December 4, 2000.

(8) Legal counsel represented the Corporation. The Corporation called two witnesses: the corporate manager of safety and workers' compensation, and the vice-president of industrial relations.

(9) We requested that the O.S.O., the assessment officer and the hearing officer attend the hearing to give evidence on the bias issue, not on the merits of their decisions. The three officers attended. We questioned them and so did counsel for the Corporation. Board counsel attended on behalf of the Board witnesses on December 4, 2000. The manager of the Board's Assessment Department attended throughout the hearing and he gave evidence on the relevant Board policies.

(10) Pursuant to section 208 of the Act, the union representing the workers of the Corporation at the location where the occupational health and safety regulation violations allegedly occurred attended with respect to the health and safety issues only. The union was represented by its trade union advocate.

(11) We note that the Act does not give standing to the Board, or any of its divisions, to participate in an appeal before the Appeal Division as a party. Board counsel attended for the limited purpose of assisting the Board witnesses but he did not make arguments or submissions to us on the bias issue.

Background: The Corporation's Corporate Structure and History in B.C., and the Decisions in Question

(12) The Corporation is a complex corporate organization operating in the grocery sector with its head office located in a province outside British Columbia.

(13) The Corporation employs approximately 22,000 people throughout Canada. It has five operating divisions, each of which is headed by a vice-president. The vice-presidents sit on an executive committee chaired by the president of the Corporation. The divisions operate independently of each other in the sense that employees work only for one division; however, all employees receive paycheques in the name of the Corporation.

(14) The Corporation began operating in B.C. in 1989. The Board considered the Corporation to be a "firm." However, the Board classified the Corporation's different operating divisions as either "retail" or "wholesale" for assessment purposes. The Board assessment rates for retail operations are higher than those for wholesale operations. Retail stores engage in cutting meat, baking, and other activities. The industry is considered a higher risk than the wholesale industry. Wholesale operations engage primarily in moving stock and repackaging goods, and they may also sell to the public.

(15) In 1989 the Corporation operated a number of large supermarkets which were classified by the Board as a retail supermarket division (the "Supermarket") of the firm. The Corporation also operated one large wholesale supplier (the "Supplier") that provided goods to all the company's retail supermarkets in B.C., accounting for approximately 75% of the Supplier's business. We heard evidence that approximately 25% of the Supplier's business was providing goods to independent retailers, not associated with the Corporation. The Supplier was classified by the Board as a wholesale division of the firm. In addition to these two divisions,

the Corporation operated "cash and carry" outlets, which sold both to small businesses and to the public at large. The Board classified these outlets as a wholesale division. The cash and carry outlets closed in 1993 and were replaced in 1995 by the "StoreClub," also classified as a wholesale division of the firm by the Board prior to October 1, 1999. The StoreClub operates nine StoreClub stores in B.C. We heard evidence that seven of the nine StoreClub stores are open to the general public but approximately 75% of StoreClub's business consists of bulk sales to small businesses.

(16) Prior to the decision under appeal with respect to health and safety violations (the hearing officer's decision), the StoreClub store where the violations allegedly occurred had no orders against it for violations of the Regulation. However, some of the retail Supermarket outlets had received prior warning letters and sanctions from the Board for various breaches of the Regulation.

(17) The assessment officer's October 1, 1999 decision re-classified the two wholesale divisions, the Supplier and the StoreClub, to retail supermarket operations on the basis that the StoreClub was part of the Supplier Division, that "you cannot wholesale to yourself," and that the Supplier Division was not a distinct and separate operation under the Board's multiple classification policy. The decision was back-dated to January 1, 1998 and resulted in a cost to the Corporation of approximately $800,000.

(18) The hearing officer's December 10, 1999 decision rejected the Corporation's argument (made at a hearing on June 18, 1999) that since the wholesale and retail divisions were in different industry classifications, it should be recognized that the two divisions were engaged in different businesses. The Corporation argued that, therefore, the sanction (health and safety) experience of one division should not be used against, or affected by, the experience of another division of the Corporation. The hearing officer's decision found that the sanction or penalty history of the retail Supermarket division could be used in determining the appropriate penalty for the StoreClub store and noted that the StoreClub store had been re-classified as retail by the assessment officer. As a result, the hearing officer, taking into account prior sanctions against the retail Supermarkets, imposed a penalty for the StoreClub violations in the amount of $112,000.

(19) Set out below is the evidence we heard about how these Board decisions came about. We have set out the evidence in considerable detail since it is the basis for the Corporation's allegations of bias and a reasonable apprehension of bias.

The Evidence

(a) The Events Between December, 1998 and June 17, 1999

(20) On December 16, 1998 a Board O.S.O. inspected a StoreClub worksite in a Vancouver suburb. After his inspection, the O.S.O. issued an inspection report (#1998A), listing twenty-five orders against the Corporation regarding violations of the Regulation. The violations and orders specified in the report are summarized as follows:

Regulation 4.39 (1) — holes in floors causing tripping hazards to workers;

Regulation 33.2(3) — inadequate first aid supplies and equipment;

Regulation 33.4(1) — no notice outlining the authority of the first aid attendant and the responsibility of the employer to report injuries;

Regulation 33.6(1) — no record of all injuries and manifestations of disease reported or treated at the workplace;

Regulation 4.14(1) — emergency means of escape was blocked and emergency temporary light was broken;

Regulation 19.13 — some electrical distribution switches and controls were not clearly marked to indicate the equipment they served;

Regulation 4.40 — slipping hazards on the floor due to standing water on the floor in the produce and the meat departments;

Regulation 4.8(2)(d) — material was stored on top of freezers and coolers, without there being a rated load capacity of the freezers and coolers certified by a professional engineer;

Regulation 19.12 (1) — no guards for uninsulated, energized parts of low voltage electrical equipment;

Regulation 19.7(1) — obstructions around electrical equipment impeded worker access to machinery requiring attention;

Regulation 5.93(3) — several eyewash bottles were depleted and there was no date change or inspection confirmation;

Regulation 8.22(3)(a) — Appropriate safety protective footwear required in the workplace for workers exposed to hazards to the feet. (This was a preventative order);

Regulation 4.13(3)(c) — no written rescue and evacuation procedures regarding work with hazardous substances;

Regulation 10.4(1) — inadequate lockout procedures with respect to the garbage compactor;

Regulation 3.15 — no regular, documented inspections of all locations at intervals that would prevent the development of unsafe working conditions;

Regulation 5.14(1) — no material safety data sheet (M.S.D.S.) for a controlled product used in the workplace;

Regulation 5.5(a) — no effective W.H.M.I.S. program in place to address applicable W.H.M.I.S. requirements including education and training;

Regulation 4.28(1) — no risk assessment had been performed regarding risk of injury to workers arising from violence arising out of employment in the workplace;

Regulation 4.29(a) — no procedures, policies or work environment arrangements in place to eliminate the risk to workers from violence;

Regulation 3.8(b) — no accident investigation reports available regarding injuries that required medical treatment;

Regulation 3.6(2)(d) — the Occupational Health & Safety Committee did not hold regular monthly meetings to review accidents, their causes and means of prevention; there was only one documented meeting since the store opened in 1997;

Regulation 3.1(1)(b) — A written occupational health & safety program was available at the store, but was not being followed; the employer had not initiated and maintained an occupational health & safety program;

Regulation 3.22 — based on the preceding violations, the employer had failed to ensure the adequate direction and instruction of workers in the safe performance of their duties;

Regulation 3.23 — based on the preceding violations, the employer had failed to ensure that supervisors including store level, district management and head office personnel, provide proper instruction of workers or failed to ensure that their work was being performed without undue risk;

Section 71(2) of the *Act* — The O.S.O. directed the employer to submit a written notice of compliance to the Board within thirty days;

(21) On December 22, 1998, the O.S.O. returned to the StoreClub store and issued a second inspection report (#1998B). The purpose of the second report was to re-issue the orders regarding the violations of Regulation 3.22 and 3.23 that the O.S.O. had "incorrectly entered" on inspection report #1998A. The O.S.O. rescinded those orders on inspection report #1998A and re-issued them on inspection report #1998B.

(22) By memorandum dated January 12, 1999, the O.S.O. wrote to the Prevention Division's acting regional manager and recommended an "increase in the penalty amount" pursuant to "Policy 1.4.3(3)(III)" of the Prevention Division's *Policy and Procedures Manual* (the "Manual"). The

O.S.O. noted the violations of the Regulation referred to in the two December 1998 inspection reports of the StoreClub and stated in part that:

> [The StoreClub store], which is associated with [the Corporation] and has the same principals has failed to ensure that an occupational safety and health program has been maintained at this site. There are numerous repeat violations, which are similar in content to recent sanction activity at a neighbouring [Supermarket]. . . .
>
> This company has its head office out of province. There is a system of management including district managers who oversee the system in B.C., and it appears that there is an expectation for site management to ensure compliance of O.H.S. regulations at their respective locations. This has not taken place at this location, opened in November of 1997, and management above the store level all the way back to head office have failed to ensure compliance by location manager(s).
>
> Several weeks after the initial inspection, [the occupational hygiene officer] and I attended an O.S.H. Committee meeting and only the manager was aware that a written O.S.H. program even existed. This confirmed that there is a failure on the employer's part to maintain the program and this in itself eclipses the myriad of "fix-it" items.
>
> Repeat orders and the sanction process have failed to communicate to this employer their responsibilities towards health and safety. Based on the review of their history and consideration of O.S.&H. Policy 1.4.3(3)(III) an increase of the penalty amount is necessary to motivate this unwilling employer toward compliance.
>
> A review of this employer's record was conducted to determine prior knowledge. A penalty recommendation for similar violations was processed under [a previous sanction recommendation]
>
> [reproduced as written]

(23) The O.S.O.'s memorandum did not refer to any specific amount for the additional assessment he recommended. However, in a letter dated April 16, 1999 to the Corporation, the Board's Variance and Sanction Review Section found that additional assessments for violations of the type in question "generally range in the amount of $112,000.00."

(24) At the oral hearing on November 7, 2000, we heard testimony from Ms. X ("X"), the Corporation's corporate manager of safety and workers' compensation. She has held that position since December of 1998. X's responsibilities include workers' compensation matters, including occupational health and safety, claims management and assessment issues. She supervises operations in those areas for the StoreClub, the Supplier and Supermarket divisions of the Corporation. X's background includes her profession as a nurse as well as seven years experience as a case manager, clinical advisor and training analyst for a workers' compensation board outside British Columbia.

(25) The Corporation had just hired X at the time the O.S.O. issued his two inspection reports regarding the StoreClub, on December 16 and December 22, 1998. X testified that on January 6, 1999, she telephoned the O.S.O. to introduce herself and to tell him that she wanted to begin an effective working relationship with him and the Board. She testified that she found the O.S.O. to be "very insulting and threatening" during the telephone conversation. X believed that the O.S.O. had clearly made up his mind regarding her abilities, her education and background and the way in which they applied to her position with the Corporation. As an example, X testified that the O.S.O. asked her "What does an education in nursing have to do with health and safety?" With respect to her workers' compensation board experience he commented "I bet your experience was all in claims," and that he also said "all employers care about is money." X testified that when she suggested that she wanted to "work through" the situation and develop some basic project management approaches for the Corporation such as a needs assessment, the O.S.O. responded that he had "heard all this before," and that he "didn't believe it — nothing changes."

(26) X also testified that the O.S.O. told her that the Corporation would be receiving a fine because he had recommended a sanction — he had "sent it upstairs" regarding a possible prosecution against the Corporation. X wasn't clear on the process and had some questions about the O.S.O.'s reference to a prosecution. She testified that he responded "I'm not after you — it is [first name of the Corporation's corporate president] that we want. . . ." X testified that she was surprised to hear the O.S.O. refer to the Corporation's president by his first name. She stated that the O.S.O. then said "We've been through this with your competitors in the past — you're the last. We're tired of it and that's why you're getting the biggest fines." X testified that she indicated to the O.S.O. that she didn't want to focus on the Corporation's competitors — it was none of her business what they did. She testified that she told the O.S.O. that her intention was to improve the situation with the Corporation, and that she asked him to give her some time to make a difference. She testified that he responded, "You're out of time."

(27) The O.S.O. testified before us on the second day of the oral hearing on December 4, 2000. He testified that he has been an O.S.O. with the Board since 1991 or 1992, and that since 1994 he has worked with a Board occupational hygienist in the retail food store environment. He has had previous Board experience inspecting three large competitors of the Corporation and dealing with their health and safety issues. The O.S.O. testified that the Board had assigned him and the occupational hygienist to inspect and review the Corporation's occupational health and safety programs. They worked together on the inspection of the StoreClub in December of 1998. The O.S.O. wrote and signed the inspection reports, although the occupational hygienist worked with him on the inspection.

(28) The O.S.O.'s recollection of his first telephone conversation with X was that he telephoned her on January 6, 1999 to introduce himself and to advise that he and his partner had been in the StoreClub and had written orders that would be considered "repeat orders." He testified that his demeanor during the telephone call was "normal." He said that it was his first connection with X, and that there was nothing special or different about the telephone call. He remembered that X told him she was new on the job and that the store manager at the StoreClub location was also new on the job. The O.S.O. testified that although he remembered X telling

him that she had been a nurse and had experience in workers' compensation claims, he denied implying to her that her background had no value. He denied saying that he'd "heard it all before" or that he didn't believe her when she suggested changes for improvement. At one point in cross-examination, the O.S.O. denied "absolutely" that he had referred to the Corporation's president by his first name or that he had stated it was the president he wanted to "get." Responding to a question from the panel, he also denied saying that he was tired of dealing with the Corporation's competitors and that as the Corporation was "the last," that was why it was getting the biggest fines. He denied telling X that the matter was "going upstairs" for prosecution. The O.S.O. indicated that he might have mentioned to X that he had previous experience dealing with food stores, although he didn't specifically recall saying it.

(29) Under cross-examination, the O.S.O. testified that he did not recommend a fine of $112,000.00 against the Corporation. He said that he "didn't choose that number," although he recommended that the fine should be higher than previous fines. He testified that Board staff in the Variance and Sanction Review Section "made that calculation." The O.S.O. admitted that he "probably knew" the amounts of the previous penalties against the Corporation, and that he "guessed" that yes, he "knew the general magnitude of the penalties he was recommending" against the Corporation. The O.S.O. testified that he had asked the Prevention Division's legal counsel whether the sanction history of the Corporation's Supermarket division could be considered part of StoreClub's history; that is, he asked if StoreClub could be considered the same as the Supermarket division of the Corporation for the purpose of considering relevant sanction history. He received an affirmative response. Therefore the O.S.O. recommended an additional assessment against the Corporation with respect to the December 1998 StoreClub violations of the Regulation, as he took into account the sanction history of other divisions of the Corporation, in particular the history of the Supermarket division.

(30) The O.S.O. produced two contact records which referred to two telephone conversations he had with X, one on January 7, 1999 and one on January 8, 1999. The contact record dated January 7, 1999 reads in part as follows:

> The call was initiated to invite [X] and other head office personnel to discuss the state of the O.S.H. program and the issues at the [StoreClub] location. I also informed [X] that a penalty action would be initiated for repeat noncompliance of O.S.H. regulations. She said that the problems were being addressed at the store and that the store manager . . . and herself were new at their jobs and that no penalty action should take place. I told her that I was invited to the warehouse store for a meeting of the O.S.H. committee slated for Friday, January 8, 1999.
>
> [X] said that she was not planning to come to the Lower Mainland in the near future. I left her my phone number and local in the event that she saw the need to meet with the Board prior to the penalty hearing.

(31) The O.S.O. testified that X phoned him back a day or two later to tell him that she was interested in having a meeting with the Board. The second contact record, dated January 8, 1999, states in part as follows:

> [X] phoned to express interest in meeting with B.C. Board members and [the Corporation's manager of human resources and a Supermarket representative] to discuss the state of the [Corporation's] O.S.H. program. I spoke to her about a review of past I.H.S. and O.S.H. violations and will look at getting a summary of them to forward to her. Also spoke about the Board mandate to reduce the injury rate and that we would be actively looking at accident investigations and injury trends. [X] expressed concern that present Board data is not adequate and that she would like claims costs by location and employee number.

(32) X testified that the Corporation sent its notice of compliance to the Board on January 8, 1999. She testified that she spoke to the O.S.O. again on January 26, 1999, when he responded to a phone call that she had made to him on January 11, 1999. During the telephone conversation of January 26, 1999, X was not alone. With her in her office was a colleague who was the national director of occupational health and safety for an eastern Canadian firm related to the Corporation. X testified that she took handwritten notes of the telephone conversation while she was speaking with the O.S.O.; her colleague "witnessed" the handwritten notes to verify that her responses were as he had heard them in the office during the telephone call. The colleague did not hear the O.S.O.'s side of the conversation.

(33) X testified that the telephone conversation began with a discussion about the Board's requirements for the notice of compliance. X asked the O.S.O. if the Corporation's response, sent to the Board on January 8, 1999, was sufficient for the Board. X testified that the O.S.O. responded "If it is good enough for you." She testified that the O.S.O. kept repeating that the penalty imposed on the Corporation by the Board was "going to be a big one." X testified that the O.S.O. told her that the Board had put the Corporation's competitors under the same scrutiny the Corporation had experienced, and as the Corporation was last on the list, the Board was "tired of it" and the Corporation was "going to get the biggest fines." X testified that the O.S.O. told her that he didn't think it was his responsibility to go into each of the Corporation's stores and set up a health and safety program for each store. X indicated that with respect to the prospective fines, the O.S.O. had said "It is [first name of the Corporation's president] that we want."

(34) X's handwritten notes record the telephone conversation as follows:

> I asked him about the receipt of the compliance letter [from the StoreClub]
> - confirmed he had received it
>
> I asked about the 99 Jan 08 letters I received
> - he stated he had [the StoreClub manager's] response
> - I asked if the orders were being directed at me
> - He said "No"

X: “So do I need to respond to them”

O.S.O.: “I got [StoreClub manager’s] letter

X: “Is that good enough?”

O.S.O.: “That’s up to you — if it’s good enough for you . . .

X: “Have you read his letter?”

O.S.O.: “Only briefly reviewed it.”

X: “Okay — could you please read it & determine if the response complies & meets expectations so there will be no further problems & get back to me one way or another.”

O.S.O.: “Okay”

O.S.O.: brought up the fine

- says it’s a “big one”
- indicated we “know about the possibility of charges” & that we “are lucky” this was only a fine & not “more charges.”
- indicated he has been appointed Coordinator for O.S.H. [employer]
- indicated the info I requested was en route
- had been requested

X: I voiced my agenda for our meeting

- discuss current situation
- expectations
- how to meet

Plan of action -------- Common ground/plan of action discuss situation

Requested/suggested giving us “a little time to work out any hiccoughs”

O.S.O.: He repeatedly wished to discuss our competitors and past inspections.

X: I indicated our focus would be on present and future so as to eliminate further problems.

(35) In his testimony, the O.S.O. could not remember whether he had spoken to X at the end of January, 1999, although he stated that he might have done so. He could not recall numerous aspects of the conversation as related by X. For example, his evidence was that he was not denying the statements but he could not remember if X asked him about the sufficiency of the

Corporation's compliance letter, whether he told her the fine would be a "big one," or whether he had indicated that the Corporation was lucky that the Board was not going to initiate a prosecution against it.

(36) The O.S.O. denied in his testimony that X told him she didn't want to focus on the Corporation's competitors, but he stated that he might have told her he had previous experience dealing with food stores. He also testified that he didn't remember telling her that as the Corporation was the last food store to undergo Board scrutiny, it would get the biggest fines — he did not deny this, but stated that he did not recall saying that. The O.S.O. also testified that he didn't think he had ever referred to the Corporation's president by his first name, but that he might have mentioned his first name in some conversation with X, he just couldn't recall doing so. He stated that he did not recall whether he had told her words to the effect "It is [president's first name] we want." This testimony contradicts in some important respects the O.S.O.'s earlier evidence in cross-examination, in which he vehemently denied referring to the Corporation's president by his first name or indicating that the Corporation's president was the ultimate object of the Board's investigations.

(37) On February 10, 1999, Board representatives met with Corporation representatives to discuss the Corporation's occupational health and safety program. X testified that the O.S.O. and his work partner, the occupational hygiene officer, were there. The director of the Prevention Division was also present as well as another Board officer from the Prevention Division. For the Corporation, the B.C. district manager for the Supermarket was there, as well as X and B, the Corporation's vice-president of industrial relations. X testified that the Board officers revisited the matter of the violations in the two December 1998 inspection orders, but the Corporation wanted to "move on" and work in the context of avoiding the "penalizing strategy" the Board was taking. X testified that the Board officers indicated that they were going to continue as they were and that they needed a "commitment letter from [first name of the Corporation's president]."

(38) The O.S.O.'s contact record of the February 10, 1999 meeting states in part that the parties met to discuss:

> . . . recent penalty action at [the Supermarket store]. Also discussed repeat orders and sanction resulting from December inspection at the [StoreClub]. The potential of prosecution for repeated noncompliance relating to the failing health and safety program was raised and we suggested that head office submit a compliance plan for British Columbia.
>
> The firm responded that we have their attention and are concerned that they are in a terrible position for repeat orders being issued. We re-stated that they need to produce a written corporate commitment for compliance in B.C. . . .

(39) X testified that the O.S.O. telephoned her on February 24, 1999 asking for the letter of commitment. She told him that the Corporation hadn't yet written the letter of commitment, because key people from the organization would be meeting on March 10, 1999 in order to deal with it.

X testified that the O.S.O. responded by saying: “Typical.” She said that his tone was rude and insulting. She interpreted his comments as suggesting that the Corporation was not going to do anything about the commitment letter.

(40) On March 9, 1999, the Corporation sent a commitment letter to the Board’s director of the Prevention Division. The letter was signed by the senior vice-presidents for the StoreClub and Supermarket divisions, the senior district manager for the Supermarket division, the district manager for the StoreClub division, the Corporation’s vice-president of industrial relations and X, the Corporation’s corporate manager for safety and workers’ compensation matters. The letter states as follows:

> Thank you for taking the time to meet with representatives from our organization to discuss the current status of our Health and Safety program.
>
> [The Corporation] is committed to working with the Prevention Division of the Workers’ Compensation Board of British Columbia in the Worksafe Program to ensure a safe working environment for all our employees.
>
> The goal for our 1999 Safety Plan is to improve our safety record. The first phase of this plan will focus on the evaluation of the existing Safety and Health Program. Specifically this includes:
>
> 1. Injury recording, reporting and accident investigation,
> 2. An effective Health and Safety Committee,
> 3. Safe work procedures,
> 4. Work site inspections.
>
> [The Corporation] requests the balance of 1999 as a period of recovery time to allow us to implement this program. Given the number of locations and the size of the group, we need time to deal with the various issues.

(41) X testified that at the end of March 1999, she received a letter from the Board’s Assessment Department. The letter was dated March 29, 1999. The letter indicated that it was dealing with the Corporation’s Supplier Division. It advised that the Board would soon be introducing a new employer classification system, designed to place employers into groups that would be used to establish fair and equitable assessment rates. The Board advised that, effective January 1, 2000, the Supplier’s new industry classification would be 742006 “Food, Beverage or Tobacco Product Wholesale.” The letter requested the Corporation to review the enclosed classification unit description to ensure that it described the Supplier’s core business activity. The description indicated that:

> Included in this classification unit are employers that maintain stock of goods and are primarily engaged in the wholesale of dairy products, processed fish and prepared seafood, fruit and vegetables, meat and meat products, poultry products, sugar, spice and chocolate confectionaries, and other food products. These foods have already been canned, cooked, cured, dried, frozen, packaged, or processed.

(42) X testified that she telephoned the Board's Assessment Department to ensure that the Supplier was correctly classified as of that date, for the 1999 assessment year. She could not recall with whom she spoke. X asked for classification unit descriptions for retail and wholesale stores, but the Board sent her only unit descriptions for retail supermarkets and butcher shops, retail department stores, and general retail and services.

(43) On March 31, 1999, X and the O.S.O. had another telephone conversation. On March 13 and March 22, X had left telephone messages for the director of the Prevention Division to contact her. On March 31, 1999, the O.S.O. made the telephone call to X. X testified that the O.S.O. told her that the Prevention Department's director had asked him to make the call, as the director was too busy to do it. The purpose of the call was to respond to the Corporation's March 9, 1999 commitment letter. X testified that in discussing the Corporation's request for recovery time, the O.S.O. indicated that the Board would not give the Corporation any time and that it was "business as usual." She testified that the O.S.O. told her:

> "Basically it's F--- off [pronounced "Eff off"] and get on with it."

(44) X testified that she was shocked by the O.S.O.'s reply and that she said:

> "Pardon me?"

(45) X testified that the O.S.O. made the same response, and again she responded "Pardon me?." X testified that this interchange happened four times until finally she said to the O.S.O.:

> "You're telling me to F--- off and get on with it?"

(46) at which the O.S.O. responded:

> "Oh — I mean — Step off and get on with it."

(47) X testified that the O.S.O. told her that if he walked into another one of the Corporation's stores and found twenty-five violations, there would be another fine and it would be bigger.

(48) Shortly after the telephone call X made handwritten notes of the conversation which she recorded in part as follows:

> [Director of Prevention Division] asked [O.S.O.] to return my call — as he's busy.
>
> 1. No prosecution on the [StoreClub] orders
> 2. No Recovery time
> 3. What about the commitment portion
>
> "[The employer] has been given enough time and it's business as usual."
>
> - If he walks into another store & there's 25 orders there will likely be a fine.

- "Basically it's "f off & get on with it." I asked him to clarify x 4 – Finally 5th he said "step off & get on with it."

Outreach (Education) department of WCB

- used to provide training in accident investigation and worksite inspection.

[reproduced as written]

(49) At the oral hearing before this panel, the O.S.O. testified that he remembered calling X on March 31, 1999, but he couldn't remember whether it was at the request of the director of the Prevention Department. He remembered summarizing the director's advice by saying "business as usual." He recalled X asking him about the Board's Outreach training program. The O.S.O. specifically denied telling X to "F--- off and get on with it." He testified that he told her to "Step off and get on with it." He testified that he "definitely" did not tell X to "F--- off," but used the term "step off." In response to a question from the panel, the O.S.O. testified that he did not necessarily view the phrase "step off" as a "common expression." The O.S.O. did remember telling X that there would be no recovery time for the Corporation.

(50) Under cross-examination, the O.S.O. denied that he was "out to get" the biggest fines he could against the Corporation. He stated that he didn't care whether the Corporation had one or more industry classifications for assessment purposes. In response to a question from the panel, the O.S.O. testified that from his point of view, it is a matter of how many times the Board has to get the message out to employers. He offered the example of one of the Corporation's competitors, where he and the occupational hygienist would go to each store location, write the same orders regarding violations of the Regulation, talk to the same managers about the problems and he testified "We got tired of it." The O.S.O. said that with respect to the Corporation's StoreClub, he didn't see why he should have to "do it store by store — I think head office should get the message out; I don't see the different divisions of [the Corporation] as being any different than different locations of [the Corporation's competitor]."

(51) On April 16, 1999, the Variance and Sanction Review Section of the Board's Prevention Division sent a letter to the president of the Corporation indicating that under section 73(1) of the Act, the Board was proceeding with a review into the imposition of an additional assessment, in the range of $112,000, against the Corporation. The letter referred to the O.S.O.'s December 16 and December 22, 1998 inspection reports regarding the StoreClub worksite. The letter stated that the Board was proceeding with the review "based on repeated non-compliance with the Regulation and for willful and deliberate attitude of non-compliance." The letter went on to note:

> While the officer's memorandum includes reference to only one previous sanction [in 1998], please take note that [the Corporation's] sanction history for the previous 5 years may also be considered in this review.

(52) The letter concluded by inviting written submissions from the Corporation, and providing the Corporation with an opportunity for an oral hearing.

(53) On April 20, 1999, the Corporation sent a letter to the director of the Board's Prevention Division. It stated as follows:

> At the meeting we attended on February 10, 1999, we understood that by re-committing ourselves to developing and implementing an effective Health & Safety program, we could expect to develop a more cooperative approach with WCB. Specifically, that we should request some 'recovery time' to allow us to implement a program that would be acceptable to the Prevention Division.
>
> To confirm our intention, we sent a commitment letter dated March 9,1999 signed by several senior managers and officers of [the Corporation]. This letter was the result of several meetings to discuss and endorse that commitment.
>
> On March 25, 1999 we were contacted by [the O.S.O.] and advised that our request for recovery time had been denied and it was 'business as usual.' We are disappointed and confused as to why your department has refused our efforts to develop an effective program and implement it in a cooperative manner.
>
> We respectfully request you re-consider this issue and advise us of your decision.

(54) By letter dated May 17, 1999, the director of the Prevention Division responded to the Corporation as follows:

> As we have discussed several times, we fully expect you to be in compliance with the Regulation at all times.
>
> You have had four years that I personally know of to get in compliance with the Regulation; therefore, I must tell you that it is business as usual with no grace period to develop an effective Health and Safety program.

(b) The Events on June 18, 1999

(55) The Prevention Division scheduled an oral hearing for June 18, 1999 to deal with the O.S.O.'s recommendation for an additional assessment against the Corporation under section 73(1) of the Act. X testified that in preparation for that hearing, she contacted the Board's Assessment Department to confirm that the Corporation's separate divisions (Supermarket, StoreClub and the Supplier) were classified in the appropriate industry classifications. She testified that she saw an opportunity to use the differences in the divisions' industry classifications as a defense to the additional assessment penalty. X telephoned the Assessment Department on May 12, 1999 and advised the person who took the call that she was new with the Corporation and wanted to confirm the classifications of the Corporation's divisions. The contact person in the Assessment Department confirmed with X that the Supermarket was correctly classified in the retail classification and that the Supplier and StoreClub were correctly classified in the wholesale classification.

(56) The Corporation attended the June 18, 1999 hearing, represented by X as well as the district manager of the StoreClub and the Corporation's vice-president of industrial relations. The O.S.O. and occupational hygiene officer who inspected the StoreClub on December 16 and 22, 1998 also attended the hearing. The Prevention Division's regional manager attended as an observer. Although invited to participate by the Variance and Sanction department, the trade union certified to the Corporation did not attend the hearing nor participate by way of written submission.

(57) The Corporation provided a written submission to the hearing officer. At the hearing, the Corporation conceded many, albeit not all, of the violations of the Regulation. The Corporation disputed four of the orders in the December 1998 inspection reports. Specifically it disputed orders dealing with a lack of a violence prevention program, and orders involving allegations that it lacked an occupational health and safety program and that it did not ensure the adequate direction and instruction of its workers in the safe performance of their duties. The Corporation also denied that it displayed a willful and deliberate attitude of non-compliance.

(58) The thrust of the Corporation's arguments at the Variance and Sanction Review hearing, however, dealt not so much with the merits of defending the violations themselves, but rather with the appropriateness of the Board levying an additional assessment in the proposed range of $112,000.00. The Corporation's written submission emphasized this main point: in considering sanction history for purposes of levying an additional assessment against the Corporation regarding the StoreClub violations of the Regulation, the Board could not consider the sanction history of other divisions of the Corporation (that is, divisions other than StoreClub). This was particularly so when the different divisions represented different businesses in different industry classifications. An excerpt from the Corporation's written submission states:

> It is our opinion the Board has no authority to consider the sanction history of other [Corporation] operations in determining whether a sanction should be levied against the [StoreClub]. There is nothing in either the legislation, regulations or published policies of the Board which enable them to treat two separate businesses as one for the purpose of determining whether additional assessments should be levied. The Board's decision to treat all [the Corporation's] operations as one is an internal practice which has no legal foundation . . .
>
> The Board has a written policy for dealing with employers with more than one worksite. This policy does not consider the owner *where the operations are classified in different industries* with separate firm numbers. Therefore, the Board cannot apply this policy to justify the levying of an additional assessment against the [StoreClub]. In other words, violations which occur at one worksite do not affect the violation or sanction history of a separate business, *in a different industry* and under a different firm number. The only way that the Board could justify levying an additional assessment against the [StoreClub] for the infractions noted in the December 16, 1996 Inspection Report would be by considering the sanction history of the [Supermarket]. Without the sanction

history of the [Supermarket], there is simply no justification for levying an additional assessment against the [StoreClub] *as there is no policy or legislation that considers history or comparisons across industries.*

[italic emphasis added]

(59) We listened to the audiotape of the Variance and Sanction Review hearing. The Corporation's oral submissions at the hearing made the same point:

> We get, on the first visit to a specific location, a penalty assessment and a penalty recommendation of $112,000.00. Now this penalty is based on a cumulation of other orders in other divisions in other stores *in separate businesses that are in a separate subclass*, that have a separate firm number — you know, all of that is swept away with the motivation to maximize the penalty at the earliest possible opportunity . . .
>
> We think that on a first visit to a specific location where particularly there has been no previous fines for any [StoreClub] in B.C. or anywhere else for that matter, there ought to have been a warning letter. Or, if the panel or this tribunal thinks appropriate, that a monetary penalty be applied consistent with the policy we were sent.
>
> The [StoreClub] is a separate division, a separate business from the retail stores. As I said, it has a separate firm number, *a separate subclass*, and has a separate management structure right up to and including the V.P. who heads up the division. What we get is people coming into the store wanting information that somehow ties it all in to the president of the organization. Now I ask you, when officers go to Zellers, do they say: "Well, we inspected a Hudson's Bay store in another place and they had a similar problem so you're getting a larger fine?" Maybe, but I doubt it — but *even then they're probably in the same subclass* . . .
>
> Now, I accept that in the report it talks about the targeting of certain types of businesses *but it does not include the subclass of which the [StoreClub] is in! It talks about supermarkets. The [StoreClubs] are not a supermarket and they're not in the supermarket subclass. And we would ask that you consider whether or not this kind of penalty can be justified in all the circumstances. We don't believe it can*.
>
> [italic emphasis added]

(60) At the Variance and Sanction Review hearing the O.S.O. did not make any comments about the Corporation's arguments. The occupational hygiene officer, however, did provide lengthy remarks. He stated that he and the O.S.O. had certainly recommended an additional assessment due to the lack of Corporation motivation to comply with the Regulation. But he stated that the exact amount of the proposed penalty was derived by a system "foreign" to how he and the O.S.O. "do business." He went on to state:

> As for treating you as a corporate entity, as [the Corporation], again, that is something that I understood was reviewed by our Legal Department. Now, [the hearing officer] may be able to comment on, I don't know. Certainly, where we are in the system, we see you as [the Corporation], but when we go out to the [StoreClub] we see [the Corporation] with the same people's names on it as when we're in [the Supermarket]. In many cases, we see things that have a [Supermarket] connection on them so to us, you're no different than a [Supermarket], where we are in the food chain . . .
>
> Well, the health and safety program in your [StoreClub] store is the same program that we saw at the [the Supermarket]. The same contact people exist: [X], the president of [the Corporation]; the risk assessment forms are the same, in some cases the lockout procedures are the same . . .

(61) The occupational hygiene officer and X then engaged in a discussion before the hearing officer in which they disputed the issue about the differences between the employer's Supermarket and StoreClub divisions. The hearing officer eventually broke in to say:

> Rather than go back and forth, I think the bigger issue is the employer relationship and whether we're dealing with one employer and the fact that we've used the history of one division to levy or to propose a penalty on another division. . . . O.K. . . . and I've made a note of that issue and it is something I will address. Other than that, do you have any other comments?

(62) The Corporation representatives then indicated that they were committed to the safety of employees and to complying with the Regulation. The Corporation's vice-president of industrial relations concluded by indicating that in his view, the Board had been unfair to the StoreClub by treating it as under the same umbrella as all other stores in other divisions in the Corporation's organization.

(63) X testified before us that at the conclusion of the Variance and Sanction Review hearing, the hearing officer indicated that he would have his decision issued within thirty days. The O.S.O. also testified that he recalled the hearing officer stating that his decision "would be out in thirty days." The hearing officer testified in these appeal proceedings. He agreed that at the conclusion of the Variance and Sanction Review hearing, he may have told the Corporation to expect a decision within thirty days.

(c) The Events After June 18, 1999

(64) According to his evidence before us, the hearing officer made a telephone call to an assessment officer in the Board's Assessment Department shortly after the conclusion of the Variance and Sanction Review hearing, either that same afternoon or the next day.

(65) The assessment officer who was contacted by the hearing officer also testified before us. He testified that he has been an assessment officer with the Board for approximately five years. His primary role is to ensure adherence to the assessment system by reviewing employer classifications and performing audits. The assessment officer testified that he received a telephone call from the hearing officer on or about the week of June 14–18, 1999. The hearing officer is a former Board colleague of the assessment officer, as some ten years earlier they had trained together as claims adjudicators in the Compensation Services Division. They have socialized infrequently, playing golf occasionally and socializing in the evening perhaps two or three times in five years. The assessment officer characterized their relationship as primarily a business or professional relationship, and that they converse once every month or two primarily on policy issues. The assessment officer testified that he understood, in general terms, the role of the hearing officer in reviewing decisions made by Prevention officers.

(66) The assessment officer testified that the hearing officer telephoned him during the week of June 14–18, 1999 to ask about the Assessment Department's policy regarding divisional registration of companies. The assessment officer remembered referring the hearing officer to section 20:30:31 of the *Assessment Operating Manual*. That policy outlines that even though the Board may register divisions of an employer separately, the Board will view them as one for the purpose of classification and experience rating, unless an operation is considered a separate and distinct industry under the Board's multiple-classification policy in section 30:20:20 of the *Assessment Operating Manual*. The assessment officer testified that he reviewed the policies with the hearing officer.

(67) The assessment officer stated that he then asked the hearing officer to provide more details about the identity of the company in question, and how they operated their business. The hearing officer identified the Corporation and described its StoreClub, Supermarket and Supplier operating divisions. The assessment officer remembered the hearing officer advising that there was a wholesale arm of the Corporation's organization which dealt with the Corporation's retail operations. The assessment officer became concerned that there had been a misclassification of the Corporation's divisions. He was "fairly sure" that he told the hearing officer that there was a classification issue involving the Corporation that he would be following up by referring the issue to the audit manager in the Board's Revenue Services Department to authorize a classification review of the Corporation.

(68) Shortly after the telephone conversation with the hearing officer, the assessment officer went to speak to the audit manager to discuss initiating a classification review of the Corporation. He discussed the Corporation's divisions and indicated that the Board might have misclassified them. The audit manager approved the classification review. The assessment officer requested the Corporation's firm file, and received it on or about June 22, 1999. On cross-examination, the assessment officer denied that he had acted unusually promptly in initiating the classification review. He stated that it was his obligation, in his role as an assessment officer, to act on information suggesting an employer was improperly classified. He said that he acted no more quickly in this case than he would act in any other case.

(69) The hearing officer testified as to his dealings with the assessment officer. He stated that the $112,000.00 penalty involving the Corporation was a large penalty, one of the largest penalties he had ever adjudicated as a Variance and Sanction Review hearing officer. He testified that he telephoned the assessment officer shortly after the Variance and Sanction Review hearing in order to obtain more information about the differences in classification between supermarkets and wholesale stores. The hearing officer testified that the Corporation had argued before him at the hearing that the Board couldn't use the sanction history of one division against another division to increase a penalty assessment. The Board officers who conducted the December 1998 inspections, however, were of the opinion that the penalty should be substantial because the Board should consider the prior sanction history of the Corporation's Supermarket division against the StoreClub division. The hearing officer testified that he was "not clear" on the classification differences between the Corporation's divisions, so he contacted the assessment officer on the point.

(70) The hearing officer testified that he didn't remember whether or not the assessment officer referred him to section 20:30:31 of the *Assessment Operating Manual*. He also stated that he had no explanation as to why he identified the Corporation to the assessment officer, as he agreed on cross-examination that the identity of the Corporation had no particular relevance to the question he asked of the assessment officer. The hearing officer testified that he did not believe that by making his inquiry to the assessment officer, he might prompt an investigation of the Corporation by the Assessment Department. The hearing officer stated that it is routine for hearing officers to contact Board officers in other departments such as Claims or Assessments if they are dealing with an issue relevant to those areas and need assistance.

(71) The hearing officer testified that he was not initially aware that as a result of his phone call, the assessment officer was making further inquiries about the classification of the Corporation's divisions. He agreed on cross-examination, however, that soon after the phone call he became aware of the Assessment Department's classification review of the Corporation. This is because the assessment officer sent the Corporation a letter dated June 25, 1999, and sent the hearing officer a copy of the letter.

(d) The Assessment Officer's Actions and Decision

(72) X testified that she received a telephone call from the assessment officer on June 25, 1999. He told her that the Board was conducting a review of the Corporation's classifications and that he would need information from her regarding the Corporation's business operations. He told X that he would be faxing her a letter with questions for her to answer in that regard. X testified that she was polite as she didn't understand the process and wasn't aware at the time of any connection between the assessment officer and the hearing officer.

(73) The assessment officer's letter of June 25, 1999 is lengthy and it is unnecessary to describe its contents in detail. It is sufficient to say that the letter noted the classification distinctions between wholesale and supermarket operations and referred to section 20:30:31 of the *Assessment Operating Manual*. The overall tenor of the letter suggested that the Board was investigating whether the Corporation's StoreClub and Supplier divisions might not be

correctly classified in the wholesale division, but perhaps should be reclassified in the retail division, the same as the Supermarket division. In the letter, the assessment officer posed eight comprehensive questions for X to answer. At the end of the letter, the assessment officer indicated that copies of the letter were being sent to the Corporation's premium equity administrator as well as to the Variance and Sanction Review hearing officer.

(74) The assessment officer faxed the June 25, 1999 letter to X. When she received the letter and noticed that the assessment officer had sent a copy to the hearing officer, she believed that the hearing officer had contacted the assessment officer and requested him to undertake a classification review of the Corporation. She phoned the hearing officer but was only able to leave a voice-mail message for him to call her. The hearing officer eventually returned her call, also leaving a voice mail message stating that he had been away on vacation but that he would have his decision issued within the next thirty days. As it turned out, X never did speak directly with the hearing officer after the Variance and Sanction Review hearing.

(75) X went ahead and prepared a written response to the assessment officer's questions, and sent it to him in a letter dated July 16, 1999. She also spoke to him on or about July 25, 1999 when he telephoned her to clarify points in her letter response. X testified that at that point, she confronted the assessment officer with her suspicions. On the basis of her memory, she testified that the conversation went something like this:

X:	"[The hearing officer] asked you to review our classification, didn't he?
Assessment officer:	"No — that's not true."
X:	"So why is he copied on your letter?"
Assessment officer:	"It wasn't just him."
X:	"Well then, who was it?"
Assessment officer:	"I can't name names."
X:	"Was it your boss?"
Assessment officer:	"And people higher than that . . ."
X:	"I believe that you're doing this to ruin my defense at the sanction hearing"

(76) X testified that she couldn't remember exactly what the assessment officer replied to her last comment, but that he did go on to say that he would not "go retroactive" in a reclassification "if there was going to be a change."

(77) The assessment officer testified that he didn't remember X suggesting to him that the hearing officer had asked him to do a classification review of the Corporation, but it sounded "reasonable" to him that she may have suggested it to him. He categorically denied saying anything to X about refusing to "name names" or "It's not just him" or "people higher than that." The assessment officer stated that he does not use those types of phrases as they are not "my language." He indicated that there was a discussion regarding the effective date of a reclassification, if the Board were to make a decision to reclassify the Corporation. He believed that he told X he did not intend to be punitive. The assessment officer agreed on cross-examination that the only way he could be punitive would be to deal with the effective date to implement a reclassification decision, as retroactivity would affect quantum.

(78) X testified that she did make handwritten notes of that July 25, 1999 telephone conversation, but that the notes went missing due to an internal administrative mix-up.

(79) The assessment officer testified that he sent a copy of his June 25, 1999 letter to the hearing officer as a matter of courtesy, and to share information with him. He testified that he didn't know at the time whether or not the information was meaningful to the hearing officer. The assessment officer also testified that the hearing officer telephoned him sometime later (between June and October of 1999) to ask about the progress of the classification review; he responded that it was "going fine — it was proceeding."

(80) The hearing officer testified that the assessment officer telephoned him after his initial call in June 1999, to report on his opinion that the StoreClub was improperly classified in the wholesale store industry classification. On cross-examination, the hearing officer testified that he may have contacted the assessment officer to ask how the Corporation's classification review was going, but he didn't remember doing so. When asked on cross-examination: "Why would you care about the assessment officer's progress on the [Corporation's] classification review?," the hearing officer responded: "I don't recall why I cared to ask the question."

(81) The hearing officer testified that he did not advise the Corporation that he was speaking with the assessment officer about the classification issue, and that he did not invite the Corporation to make further submissions in the face of the classification review by the Assessment Department. The hearing officer testified that the classification review was not a significant factor in his decision with respect to the issues raised in the Variance and Sanction review hearing. He denied the suggestion put to him on cross-examination that he had had no intention of issuing his decision before the assessment officer reached his decision on the classification review of the Corporation.

(82) The assessment officer proceeded with the classification review of the Corporation. He did not visit the Supplier location as he believed he already understood the nature of its operations. He did visit one StoreClub operation in order to gain a better understanding of the nature of their business. As earlier stated, the assessment officer testified that sometime between the end of June, 1999 and October 1, 1999, he received a telephone call from the hearing officer inquiring how his classification investigation was going. He responded that it was "going fine." In his testimony, the assessment officer indicated that it took him approximately 2½ months to

render a decision on the classification review because he took holidays during that time, and he also needed to follow up with X on some issues. He stated that there was no reason of significance to explain the time he needed to reach his decision, he simply "got to it when he got to it."

(83) The assessment officer's decision is dated October 1, 1999. On October 1, 1999, at approximately 4 p.m. Vancouver time, the assessment officer telephoned X. X testified that it was "after-hours" in the time zone in her province. She stated that the assessment officer expressed surprise that she answered the telephone, indicating he had been expecting an answering machine. The assessment officer told her that he had reached a decision in the classification review, but that he wasn't prepared to discuss the issues with her at that time. He would fax her a copy of the decision. He advised her that his decision was to reclassify the Supplier and the StoreClub divisions from the wholesale classification to the retail supermarket classification, effective January 1, 1998. X's recollection of the conversation went as follows in her testimony:

X: "I thought you weren't going to go retroactive"

Assessment officer: "No — I said I wouldn't go back to 1989 as I was asked to."

(84) X testified that she didn't know who asked the assessment officer to make the reclassification retroactive to 1989. She testified that the assessment officer indicated a couple of times that he was reluctant to discuss the decision, but she "pushed him":

Assessment officer: "Basically, you can't wholesale to yourself"

X: "I know what's going on here."

Assessment officer: "What?"

X: "This reclassification has been done to destroy my defence I presented at the sanction and review hearing in June."

(85) The assessment officer denied that was the case, and told X that the hearing officer had contacted him only to obtain basic information on employer classifications. The assessment officer told X that it was the Corporation's responsibility to ensure it was properly classified. X protested that indeed she had confirmed that the Corporation was correctly classified, referring to her May 1999 telephone call to the Assessment Department. X testified that the assessment officer had given her "bad news." She then stated to him:

X: "Do you think I'd be that stupid to rely on something that was wrong? The hearing officer asked you to do this — that's why he received your correspondence."

(86) X made handwritten notes of this conversation with the assessment officer immediately after the telephone call. They record the following, which is a mix of the conversation and X's impressions:

> Oct 01
> [Assessment officer], WCB called.
>
> - He has reached a decision
> - was expecting a machine
> - was unprepared to talk b/c of this (expecting machine) (I guess he didn't want to face me with the decision)
> - expected to leave msg. Re this and f/u in writing
> - he has decided to reclassify [the Supplier] into supermarkets (including [StoreClub]).
> - Effective date of decision Jan 1 '98
> - I thought he wasn't going retroactive as per our last discussions
> - Not what he "said" he believes he said he "wasn't going back to 1989 as he had been asked to!!"
>
> ------ [hearing officer]
>
> - Discussed rationale for his decision
> - "You can't wholesale to yourself"
> - It would be in the decision letter
> - Asked other questions — he did not want to get into a debate, the letter would explain it.
> - He indicated it was our responsibility as an employer to ensure we were classified correctly.
> - I stated I called months ago and confirmed this with WCB (as per wholesale & supermarket definitions. Even stated to them it was to ensure we were classified right (call documented).
> - I indicated it was obvious what was going on.
> - What?
> - Effective date Jan 1 '98 considering this was required to *ruin* our defence with the Prevention Division.
> - Stated he was not aware of any of that
> - I said "Come on, you had to know — it was the Sanction Review Officer who asked you to do this
> - His decision is outstanding — you had to know what was going on & the impact on us
> - He denied & stated our responsibility to ensure proper classification
> - We did! "Do you think I would be stupid enough to use the differences in firms as a defense if I hadn't confirmed it? — NO!"

- [Hearing officer] asked to have it reviewed
- [Assessment officer] stated it was his decision to reclassify, [hearing officer] only inquired re one employer with separate firms
- I stated this was unbelievable!! Why then would [the hearing officer] take 3 months longer than he said it would take re: sanction review?
- In fact — no decision yet
- He stated he wasn't aware
- I indicated this to be impossible
- Unbelievable bureaucracy!

[reproduced as written]

(87) In his testimony, the assessment officer remembered that X was angry and upset when he spoke to her on October 1, 1999. He did not recall many specifics of the conversation, but believed she did raise a point about the hearing officer being linked in some way to his decision in the classification review. The assessment officer testified that her comments had no significance to him, so he couldn't remember the details.

(88) The assessment officer's decision of October 1, 1999 changed the Supplier classification from wholesale (065400) to retail supermarket (067100), effective January 1, 1998. The decision indicates that the Supplier should probably have been classified as retail supermarket from the outset, as it appeared that the Supplier primarily engaged in providing warehousing and distribution operations for the Corporation's retail division, the Supermarket. In the decision, the assessment officer assumes the StoreClubs to be part of the Supplier division. In fact, the StoreClubs represent a division of the Corporation separate and distinct from the Supplier division.

(89) In the October 1, 1999 decision, the assessment officer reviewed the criteria for the wholesale and retail supermarket classifications. He decided that the Supplier division met the criteria for the retail supermarket classification, based on its "total sales of grocery items to the [Supermarket] and its own [StoreClubs]." He found that section 30:20:20 (Multiple Classification Policy) in the *Assessment Operating Manual*, which allowed separate classifications in certain circumstances, would not apply to the Supplier division. The assessment officer found that the Supplier predominantly provided warehousing and distribution for the Supermarket, and thus should be considered an inescapable part of the Corporation's Supermarket operations: they could not "wholesale to themselves." He found as a fact that the Supplier operated nine StoreClubs which were supermarket outlets, not wholesale outlets, because (a) most of those stores allowed access to the general public (b) their layout and staffing was indicative of a retail supermarket (c) their pricing policy was similar to the Supermarket, which were retail stores and (d) their direct competitors were stores in the retail supermarket class.

(90) The assessment officer concluded that the Corporation had not adequately advised the Board about the nature of the StoreClub operations when they opened in 1995. He did not find this to be a deliberate misrepresentation by the Corporation, but rather an instance of inadvertent

misrepresentation. Accordingly, he applied the relevant Board policy in section 30:20:40 of the *Assessment Operating Manual* which states:

> Change effective January 1st of the year prior to the year the WCB became aware unless the misrepresentation was blatant in which case the effective date can be prior to that with the authorization of the director.

(91) As the Board became aware of the classification issue in June of 1999, the assessment officer made the effective date of the classification change from wholesale to retail as of January 1, 1998.

(92) The assessment officer sent a copy of his October 1, 1999 reclassification decision to the Corporation's premium equity administrator, the Board's audit manager in the Revenue Services department, and to the Variance and Sanction Review hearing officer.

(93) Under cross-examination, the assessment officer agreed that the reclassification decision was a significant one, with a magnitude of approximately $800,000.00 in assessment premiums. He refuted the suggestion that the timing of his decision had anything to do with the hearing officer's decision. At one point in cross-examination, the assessment officer stated:

> I was aware that [the hearing officer] was waiting for my decision . . . My decision was going to have some implications for his decision.

(94) Immediately after making that statement, the assessment officer then testified:

> I retract what I said just now.
>
> I'm not aware that [the hearing officer] told me he was awaiting my decision. I didn't have a clue of what [the hearing officer] was doing.
>
> I understood, I believe that [the hearing officer] was making a decision. I wasn't aware that the timing of my decision was going to affect him.
>
> He phoned me once and asked how it was going — obviously, whatever I was doing may have had an impact on his decision. The topic came up, so I didn't have a thought one way or another . . .
>
> I didn't know if [the hearing officer] had already decided the case — it was what I felt — that's the feeling I had.
>
> I don't even know today how my decision affected his decision — I'm not in his department . . .
>
> There is nothing in my job that I have to do to satisfy another department. The classification decision is purely on the merits . . . I categorically refute that I had any direct involvement with [the hearing officer] and what was happening . . .

(95) A panel member asked the assessment officer at the hearing if it didn't strike him as "odd" that the hearing officer was "waiting" for his decision. The assessment officer responded:

> It didn't strike me as odd that [the hearing officer] was waiting for my decision. Many things I do have implications for other departments . . .

(e) The Events After October 1, 1999

(96) The O.S.O. testified that he telephoned the hearing officer sometime in October of 1999 to ask him about the status of his decision. The O.S.O. testified that he hadn't seen or heard anything, and that it had been a "fairly long time" since the June hearing — usually the decisions are issued within two to three months of the hearing. He asked the hearing officer when he would be issuing the decision. He testified that the hearing officer told him that the Corporation had been "reassessed." The O.S.O. testified that this meant nothing to him as all he looks at are the issues of common personnel between companies, and common locations: assessments are not an issue with him. The O.S.O. said that therefore he asked the hearing officer for more information about the "reassessment" decision. He stated that he thought the hearing officer told him that he had contacted the Assessment Department about a registration issue and then the Assessment Department had sent out an auditor to look at "how the [Corporation] was assessed." The hearing officer told the O.S.O. the name of the assessment officer who conducted the classification review, and told him that the Board had "back-assessed" the Corporation.

(97) The O.S.O. then contacted the assessment officer to "find out what happened." The O.S.O. testified that he made the call because he was "just curious." He expanded on this by advising that he had dealt with at least one other large food store with a set-up similar to that of the Corporation, so he was interested in the assessment officer's decision. The assessment officer explained to him that he had reassessed the Corporation and that he "went back" two years. The O.S.O. testified that he "didn't put it together" that going back two years would precede his inspections and orders of December 1998.

(98) The hearing officer issued his decision on December 10, 1999. As we indicated earlier, the Corporation conceded many of the violations of the Regulation. The Corporation disputed four of the orders in the inspection reports. In particular, the Corporation did not agree that it had displayed a willful and deliberate attitude of non-compliance. The Corporation's position was that there had been a new manager at the particular StoreClub location which was the subject of the December 1998 inspections. There was poor implementation of the Corporation's health and safety program by that particular manager at that store location. The Corporation submitted that the proposed additional assessment of $112,000.00 was severe and excessive, given that it was the Board's first inspection of that particular store.

(99) In the hearing officer's written reasons, he expressly notes the following points made by the Corporation at the hearing:

> [The Corporation] also submitted that their wholesale operation is not a targeted firm in the "Worksafe Program" and that their [StoreClub] was not *in the supermarket class* . . .

In [the Corporation's submission] they state that an administrative penalty should not be levied because;

- It is our opinion the Board has no authority to consider the sanction history of other [Corporation] operations in determining whether a sanction should be levied against the [StoreClub]. There is nothing in either the legislation, Regulations or published policies of the Board, which enable them to treat two separate businesses as one for the purpose of determining whether an administrative penalty should be levied . . .

[italic emphasis added]

(100) Before the hearing officer, the Corporation had also relied on a Prevention Division document entitled "Procedures for the Administrative Penalty Review Process." In that document, it states:

Violations occurring at one of several locations of an employer will normally be considered as if that location were the only one. If the violations were due solely to the neglect, carelessness, or willful non-compliance of management *on one particular worksite, only that worksite's compliance history will be used when considering an additional assessment* . . .

When considering whether to apply an additional assessment for safety infractions at more than one work location, the employer's overall program of compliance is the most important factor. It will be considered, for example, whether the employer

Effectively communicated with all locations regarding health and safety concerns,

Provided adequate training to managers and others who implement site health and safety programs,

Made local management accountable for health and safety performance, and

Provided local management with sufficient resources for health and safety issues.

The employer will normally be given a reasonable time frame, after being notified of a prior violation, to establish an effective health and safety program for their multiple work locations.

[italic emphasis added]

(101) The hearing officer reviewed the evidence with respect to the four orders disputed by the Corporation. He concluded that the Corporation had violated the Regulation and therefore that the four orders were valid. Turning to remedy, the hearing officer queried: "Is an administrative penalty correctly attributed to [the Corporation's name], as the 'employer'?" The hearing officer went on to note:

> [The Corporation] has an extensive history of sanctions at its various retail locations. Under the wholesale operations, there have only been two prior warning letters.
>
> [The Corporation], has several operating divisions, which all come under the umbrella of [the Corporation's full legal name]. The proposed sanction was commenced under section 73(1) of the Workers Compensation Act. This allows for the Board to assess and levy an administrative penalty on an <u>employer</u> to either comply with the Regulations or to ensure the working conditions are safe.
>
> *The basis for this review is the significant sanction history of the [Supermarket] Division of [the Corporation]. Therefore the real issue here is whether the history of one division can be used as a basis for an administrative penalty against another division of [the Corporation]. [The Corporation] argues that their two divisions are two separate businesses and that the Board has no basis in policy or law to treat all of their operations as indivisible.*
>
> [italic emphasis added]

(102) The hearing officer then referred to Appeal Division Decision #99-0830–0833 (unpublished, May 25, 1999) which also dealt with an administrative penalty against the Corporation under section 73(1) of the Act. In that decision, the Appeal Division panel concluded that the "Procedures for the Administrative Penalty Review Process" were internal guidelines, not published policy. The Appeal Division panel found that there were no specific policy provisions in Board published policy dealing with penalty assessments for employers with multiple locations. The panel concluded:

> I am unable to find any provision in the Act, the regulations or published policy that relieves an employer from responsibility for ensuring compliance with the regulations by delegating that responsibility to an operating location of that employer.

(103) The hearing officer stated that the Appeal Division decision was "final and conclusive," and that he had no authority to challenge it. The hearing officer went on to review section 1.4.1 of the *Prevention Policy and Procedure Manual*. He noted that section 1.4.1 deals with an employer's obligations, not the obligations of a specific work location or operating division of an employer. The hearing officer then referred to Assessment Division Policy 20:30:31, which was the policy to which the assessment officer had referred him in the June 1999 telephone conversation after the Variance and Sanction Review hearing. The hearing officer quoted from that policy, and stated:

> This Policy goes on to indicate that divisions of one legal entity can be registered separately by the Board as in the [Corporation's] case however, "It must be emphasized, however, that registration of divisions is done strictly for administrative convenience only and that for classification, experience rating and collection of assessments, *the legal entity will be regarded as one and indivisible*." (Emphasis added)
>
> [reproduced as written]

(104) The hearing officer did not refer to the exception in section 30:20:20 of the Manual "Multiple Classifications," wherein the Board may classify differently separate and distinct operations of an employer entity. The hearing officer concluded that the Act and policies envision the Board considering the sanction history of one division of an employer in determining an administrative penalty in another division, as the Act and policies view the employer as the legal entity ultimately responsible to ensure that the divisions' obligations under the Act and Regulation are met. Accordingly, the hearing officer found that it was correct for the Board to have proposed an administrative penalty against the Corporation as opposed to an administrative penalty against the StoreClub division of the Corporation.

(105) The next issue for the hearing officer was whether the Board should impose an administrative penalty against the Corporation, rather than just a warning letter. The Corporation had argued that the StoreClub's history didn't meet the criteria of frequent or serious claims, that the industry was not a high-risk industry, and there was no history of poor performance. The hearing officer noted:

> There is *also an issue of whether this division should be registered in a separate subclass* and a recent decision of October 1, 1999 by the Assessment Department found that this had been done incorrectly and *that all of [the Corporation's] operations should be in the same subclass, namely retail operations*.
>
> [italic emphasis added]

(106) Thus one of the arguments made by the Corporation, in which the Manual's multiple classification policy might arguably be a defence to the administrative penalty, was now out of consideration. This is because the reclassification decision by the assessment officer had resulted in all three divisions (Supermarket, Supplier and StoreClub) being classified as retail supermarkets. The hearing officer then concluded that it was appropriate for the Board to impose an administrative penalty, given the nature and number of violations, given the Corporation's sanction history (viewing the history of divisions other than the StoreClub), the lack of initiative at the store level, and the lack of follow-up at the corporate level to ensure compliance with the Act and Regulation.

(107) The final issue was quantum. The Corporation, in a 1998 sanction proceeding involving the Supermarket division, had received a $56,000.00 administrative penalty (pre October 1, 1999 amendments to the Act). The hearing officer decided that it was appropriate, in accordance with the *Recommended Schedule of Sanctions* in the Prevention Division's *Policy and Procedure*

Manual, to double the amount of the prior violation. Thus he confirmed an administrative penalty of $112,000.00 against the Corporation for the violations referred to in the December 1998 inspection reports of the StoreClub location in suburban Vancouver.

(108) The hearing officer's decision was issued December 10, 1999, approximately six months after the oral hearing in June of 1999. In testimony in these appeal proceedings, he explained that the summer and autumn of 1999 were hectic times for him as he went on vacation and was also working on policy development related to the new legislation affecting the Prevention Division. He believed he took a reasonable time to issue his decision, and denied on cross-examination that he was waiting for the assessment officer's classification review decision before issuing his decision on the occupational health and safety issues. He had no explanation as to why he might have called the assessment officer to inquire about the progress of the classification review. The hearing officer testified that in his view, the assessment officer's investigation and decision were not significant factors in his decision. He admitted that he did refer to the assessment officer's decision in his written reasons of December 1, 1998, but could give no explanation for including it in his reasons. He testified that he could have excluded the reference. In his view the classification issue was irrelevant because he found that he could use the sanction history of one division or location of an employer to penalize another division or location, whatever their industry classifications.

Submissions

(109) The Corporation submits that the evidence as a whole supports a finding that the Board officers' decisions are tainted by bias, or a reasonable apprehension of bias. It argues that the decisions rest "in a cloud of bias."

(110) The Corporation refers to the interaction between the three officers and submits that a "common apprehension arising from bias" exists for all of their activities involving the Corporation.

(111) The Corporation submits that the decisions of all three Board officers (the O.S.O., the hearing officer and the assessment officer) must conform to the principles of procedural fairness. It argues that the fact that a decision is administrative and affects the rights, privileges or interests of a party is sufficient to trigger the application of the duty of fairness.

(112) The Corporation says that the O.S.O.'s conversations and demeanor illustrate that he was predisposed to make findings and recommendations against the Corporation's interests. Thus, argues the Corporation, his capacity to make an impartial recommendation regarding penalty was tainted by bias.

(113) The Corporation submits that the hearing officer's conduct suggests he was motivated to prompt the assessment officer to conduct the classification review. The classification review undermined the Corporation's principal defence in the Prevention hearing. The hearing officer did not provide the Corporation with notice of the information and Manual references referred to by the assessment officer, nor a proper opportunity for the Corporation to address

those points with the hearing officer before he rendered his decision. The Corporation pointed out that the hearing officer's decision was significantly delayed, and argues that the delay was because the hearing officer intended to rely on the reclassification decision in his Prevention decision to impose a significant penalty on the Corporation. The Corporation refers to the ongoing telephone contact between the O.S.O., hearing officer and the assessment officer, all related to the assessment officer's decision and its implications for the Corporation and other employers in like situations.

(114) The Corporation submits that the evidence supports a finding that the Board's decision to conduct a classification review was made in bad faith and for an improper purpose, namely, to interfere with the Corporation's defence at the Prevention hearing. The Corporation refers to the timing of the classification review (within one week after the conclusion of the Prevention hearing), and the facts that the assessment officer kept in contact with the hearing officer about the progress of the classification review and provided him with a copy of the decision. The Corporation notes that X had confirmed the Corporation's industry classifications with the Board in May of 1999. The Corporation had not changed its operations in any way since that confirmation, and thus there was no reason for a classification review other than the hearing officer taking the step to initiate the review by contacting the assessment officer.

(115) The Corporation also submits that because the assessment officer was motivated to make findings that would assist the hearing officer in the Prevention matter, the reclassification decision fails to correctly characterize or describe the operations of the Supplier or the StoreClub. The Corporation submits that not only did the assessment officer make errors of fact in the reclassification decision, he also failed to correctly apply Manual policy with respect to multiple classifications.

(116) In argument the Corporation relied on a number of authorities including *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Kane v. University of British Columbia*, [1980] S.C.R. 1105; *Newfoundland (Board of Commissioners of Public Utilities*), [1962] 1 S.C.R. 623; and *International Union of Operating Engineers, Local 904 v. Newfoundland (Labour Relations Board)*, [1995] N.J. No. 354 (QL) (Nfld. S.C.).

(117) We asked legal counsel for the Corporation to provide a written submission on a recent decision of the Supreme Court of Canada: *Baker v. Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817. Legal counsel provided us with his submission on December 7, 2000.

(118) The trade union representing the Corporation's employees made a submission with respect to the appeal of the hearing officer's decision. The union submitted that the bias issue raised by the Corporation is a "red herring." It stated that if the Corporation had acted to deal with the previous Regulation orders made by the Board against it with respect to the Supermarket division, "we would not be here before you today." The union indicated that although it is positive about future improvement, such orders go "largely unnoticed" by the Corporation. The union submitted that it was entirely appropriate for the Board to levy the administrative penalty against the Corporation.

(119) Legal counsel representing the Board officers in these appeal proceedings did not make oral argument or provide a written submission on the bias issue or the merits of the Assessment or Prevention decisions.

Has the Corporation Established Grounds for an Appeal of the Assessment Officer's Decision of October 1, 1999?

(120) Section 96(6) of the Act is as follows:

> An employer who has received notice of
>
> (a) an assessment under section 39 or 40,
> (b) a classification, special rate, differential or assessment under section 42, or
> (c) a levy under section 73
>
> may, not more than 30 days after receiving the notice or within a longer period the chief appeal commissioner may allow, appeal the assessment, classification, special rate, differential or additional assessment, levy or contribution to the appeal division on the grounds of error of law or fact or contravention of a published policy of the governors.

(121) As a result of this provision we must determine whether there has been an error of law or fact or contravention of published policy in the assessment officer's decision of October 1, 1999.

(122) We note the assessment officer's October 1, 1999 reclassification decision has the following statement, "In 1995 [the Supplier] opened their [StoreClub] operations." In fact the Supplier and the StoreClub are separate divisions within the Corporation's overall operations. It was the Corporation, not the Supplier, that made the decision to open the StoreClub operations in 1995. In the end, the October 1, 1999 letter concluded that the Supplier was incorrectly classified as wholesale, and the Board reclassified it as retail.

(123) In considering multiple classification policy, there must be an accurate understanding of the Corporation's divisions. The Supplier division does not include Storeclubs, as the Storeclub division is separate from that of the Supplier. The assessment officer assumed, incorrectly, that Storeclubs were part of the Supplier division. On this basis we find that there has been an error of fact so as to satisfy the threshold test in section 96(6) of the Act. Having established this we are now required to consider the merits of the Corporation's assessment appeal. This also means that the Corporation's appeal of the Assessment decision is now on an equal footing with its appeal of the Prevention decision.

Procedural Fairness

(a) The Legal Context

(124) A recent decision of the Supreme Court of Canada is significant for its findings in the areas of procedural fairness and reasonable apprehension of bias in the context of administrative tribunals. This appeal is an opportunity to discuss that decision in the context of the new Occupational Health and Safety provisions in Part 3 of the Act which became effective October 1, 1999.

(125) *Baker v. Minister of Citizenship and Immigration,* [1999] 2 S.C.R. 817 has been described as "one of the most significant administrative law judgements ever delivered by the Supreme Court of Canada" (see; David Mullan, "*Baker v. Canada (Minister of Citizenship & Immigration)* — A Defining Moment in Canadian Administrative Law," *Reid's Administrative Law*, Volume 7, Numbers 7 & 8, October 1999, page 145 at 146)[1] .

(126) The facts of *Baker* are that a woman had been in Canada for over 11 years, without the status of permanent resident, and then she became the subject of a deportation Order. She had given birth to four children while in Canada, the children were all Canadian citizens and she applied for an exemption from deportation on the grounds of humanitarian and compassionate grounds as provided for under the *Immigration Act*. An immigration officer refused exemption and this was ultimately set aside by the Supreme Court of Canada and returned to the Minister for redetermination.

(127) The *Baker* decision is significant for a number of reasons including: the application of the principles of procedural fairness to levels of decision making that had previously been thought to be outside those principles; the duty of a tribunal to give reasons; ratification of international treaties; and a number of administrative law issues such as legitimate expectation. Many of the issues discussed in *Baker* are not issues in the appeals before us. It is the court's approach to the scope of procedural fairness and the issue of administrative and quasi-judicial bias which is noteworthy for the purposes of this appeal.

(128) The issue of the scope of procedural fairness that is discussed in *Baker* is one that is discussed in the context of the court's jurisdiction arising from the judicial review of tribunal decisions. Our authority is primarily statutory [pursuant to sections 96(6) and 208 of the Act] and it is, therefore, of a different character. Nevertheless, the *Baker* decision provides an important framework for considering the decisions that are before us, because the court was considering issues of procedural fairness arising from the decision-making process of an administrative tribunal. This is one of the tasks before us in these appeal proceedings.

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[1] The authors Brown and Evans (*http://www.brownandevans.com/comment_01.html)* are of a similar view: ". . . the single most important administrative law decision from the Supreme Court of Canada this decade." On the other hand, James Sprague describes the decision as "unsettling" and a "retreat" by the court to the "pre-*C.U.P.E.* days of judicial activism and interference" ("Another View of Baker," *Reid's Administrative Law*, supra, page 163 and 165).

(129) The court in *Baker* set out a five-part test to determine what the common law duty of procedural fairness requires in a given set of circumstances: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure by the agency or tribunal itself. We have considered each part of the test with respect to the circumstances of this case:

1) We first consider the nature of the decision being made and the process followed in making it. According to the court, the closer the "administrative process" is to a judicial process such as a trial court, the more stringent should be the principles of procedural fairness (paragraph 23).

(130) Applying this to the process of the proceedings before the hearing officer, it is noteworthy that the Corporation appeared before the hearing officer in what the Board sometimes refers to as a "meeting" rather than a "hearing." Evidence is usually not given under oath and the procedural steps are informal compared to a trial court. However, parties can call witnesses and bring documentary evidence in the proceedings before a hearing officer. They can also make written and oral arguments to the hearing officer.

(131) The administrative process used by the assessment officer when he re-classified the Corporation was even more informal inasmuch as there was no meeting or hearing and his inquiries were done over the telephone and in written communications. The O.S.O. acts as an investigator in going out "in the field" to gather evidence and write his orders. Overall, we conclude that there are not many similarities between the administrative processes of the O.S.O., hearing officer and the assessment officer, and the judicial processes of a trial court.

2) The second factor in the *Baker* five-part test is the nature of the statutory scheme. The court stated that the role of the particular decision within the statutory scheme and consideration of other indications in the statute will help determine the content of the duty of fairness. For example, greater procedural protections will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted. In the case of the decisions of the O.S.O., the hearing officer and the assessment officer, the Act provides that their findings are ultimately appealable to the Appeal Division. However, the Act makes it clear that there is a more limited appeal of the assessment officer's decision since section 96(6) of the Act requires a threshold determination of an error of law or fact or contravention of policy. In contrast, the standard of review to be applied by the Appeal Division for an appeal of a Prevention matter has no threshold test.

(132) In overall terms, the workers' compensation and occupational health and safety responsibilities of the Act codify an important public trust. The public expects the Board to prevent injuries and diseases, compensate workers when there are injuries and diseases and to do so in a responsible manner. The Act requires the Board to collect assessments from employers to maintain an accident fund in order to carry out its statutory mandate. And the principles of administrative law and natural justice provide enforceable standards for employers and

workers who participate in the administrative processes of the Board. More specifically, it goes without saying that the public, including parties to proceedings such as those conducted by the Board and related appeal tribunals, are entitled to impartial decisions that comply with the rules of natural justice including being free from actual bias or a reasonable apprehension of bias. There are numerous other authorities supporting that principle in broad terms; "Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgement on him and his affairs," (*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; adopting *Szilard v. Szasz*, [1955] S.C.R. 3 at 7).

(133) In Prevention issues a significant duty of procedural fairness seems implicit in the purposes set out in section 107 of the Act;

> 107(1) The purpose of [occupational health and safety legislation] is to benefit all citizens of British Columbia by promoting occupational health and safety and protecting workers and other persons at workplaces from work related risks to their health and safety.
>
> (2) Without limiting subsection (1), the specific purposes of this Part are
>
> (a) to promote a culture of commitment on the part of employers and workers to a high standard of occupational health and safety,
>
> . . .
>
> (f) to foster cooperative and consultative relationships between employers, workers and others regarding occupational health and safety, and to promote worker participation in occupational health and safety programs and occupational health and safety processes, and
>
> (g) to minimize the social and economic costs of work related accidents, injuries and illnesses, in order to enhance the quality of life for British Columbians and the competitiveness of British Columbia in the Canadian and world economies.

(134) We find it difficult to conceive of a cooperative and consultative relationship between employers and workers, or a culture of commitment on their part to occupational health and safety, if they cannot expect fair and impartial adjudication from the Board when they require a decision to be made on something they have not done voluntarily or by agreement. In most cases, the prospect of fair decisions from the Board should have a salutary effect on early and voluntary compliance or an agreement to effect compliance with the Act and the Regulation. This is because fairness in decision making creates predictability, so that parties may anticipate how the Board will make its decisions. Unfairness and bias introduce elements which reduce predictability in the system. This in turn reduces confidence in the system and results in less incentive for consultation and cooperative relationships between the parties and the

Board. These considerations may have been implicit prior to the effective date of Part 3 of the Act. Now, however, they are express and we must take them into account when reviewing health and safety decisions of the Board.

3) The *Baker* decision says that the third requirement to consider is the importance of the decision to the affected individual or individuals affected. This raises important questions in the context of an administrative process that affects a business or corporation. The court's concern in *Baker* relates to individuals in the sense of individual persons rather than corporate organizations or trade unions. The court uses the example of the right to continue in one's profession or employment and makes reference to the need to consider the "lives of those affected" and the "impact on people's lives" (paragraph 25). This is understandable in light of the facts before the court which related to compassionate and humanitarian considerations about the deportation of a mother of children born in Canada.

(135) The appeals before us relate to the right of the Corporation to procedural fairness. A corporation is not an individual and the court in *Baker* did not give direction as to how an administrative tribunal or agency should treat a corporate entity. In terms of the industry classification of an employer within a workers' compensation system such as exists in this province, we accept that the classification of an employer is a fundamental issue for the system. For a workers' compensation system to be actuarially sound it is essential that employers be classified correctly. It is also an important issue for an employer, as the classification of an employer affects its liability in the amount of assessments it owes to the Board. To that extent we accept that a classification decision of an assessment officer is often an important one requiring a high level of procedural fairness. In terms of Prevention issues, the Board's decisions are made in the context of a quasi-criminal system of justice. Part 3 of the Act is dedicated to protecting workers by promoting occupational health and safety, and employers are potentially subject to substantial penalties or criminal prosecution for violations of the Regulation. The findings of Board officers in the Prevention Division are obviously significant ones requiring a high level of procedural fairness, as they affect the public interest in safe workplaces, the workers in the workplaces, and all parties affected by the Regulation.

(136) Whether the importance of an administrative decision is elevated in a particular case because of the amount of money involved is more problematic. We heard evidence that the additional assessment of $112,000 in the Corporation's case was significant to the point that the hearing officer said he had not heard of a higher one previously. On one level this is obviously important both to the Corporation and to the Prevention system. On another level, however, it is not entirely satisfactory to link the importance of the decision solely with the dollar amount, since significant procedural unfairness could occur in the context of a small amount of money. Further, small is a "relative" concept: small amounts of money can be significant to small employers. The Corporation's reclassification was very significant in absolute financial terms, but we expect a smaller employer would consider a smaller financial amount equally significant. We also observe that the court in *Baker* did not mention financial considerations as part of its discussion of the importance of the decision to the individual or individuals. While we note the significant amount of the recommended additional assessment and the significant financial consequences of the Corporation's reclassification, we have not found those considerations to be determinative in dealing with the scope of the duty of fairness in this case.

4) The fourth factor *Baker* refers to in determining the extent of the duty of fairness in a particular case is the "legitimate expectations" of the party challenging the decision. The court in *Baker* observed that the doctrine of "legitimate expectations," as applied in Canada, is based on the principle that the circumstances affecting procedural fairness take into account the promises or regular practices of administrative decision-makers. Thus, it will generally be unfair for administrative decision-makers to act in contravention of representations as to procedure, or to backtrack on promises without according parties significant procedural rights. While the doctrine of legitimate expectations cannot lead to substantive rights, if a party has a legitimate expectation that an administrative decision-maker will follow a certain procedure, the duty of fairness will require that procedural expectation.

(137) The *Prevention Manual* contains policies and practices relevant to the new Part 3 of the Act which deals with occupational health and safety, including administrative penalties against employers. Section 196(6) of the Act authorizes the Board to impose administrative penalties, with specific statutory limitations on that authority. The policy in the *Prevention Manual* (item D12-196-5) referring to the Board's authority under section 196(6) states as follows:

> Any written submissions made by the employer or other person participating in the process may be distributed to a Board officer for comment. *Where required by the rules of natural justice, the Board will disclose written submissions or comments provided by the employer, an officer or other person to the other parties, and they will be given an opportunity to respond.*
>
> [emphasis added]

(138) This policy reflects a long-standing Board practice found in the former *Prevention Policy and Procedure Manual* at No. 1.4.1.-1. While parties to a Prevention hearing may not have legitimate expectations of formal rules of hearing procedure akin to that of a court, we find that Board policy does give rise to reasonable expectations that a hearing officer will follow the rules of natural justice in reaching a decision dealing with the appropriateness of levying an administrative penalty under the Act against an employer.

5) A final factor described by the court in *Baker* (bearing in mind the list is not exhaustive) is the choice of procedures of the administrative tribunal itself. The duty of fairness should also take into account and respect the choices made by the administrative tribunal. This is particularly so when the statute leaves to the tribunal the ability to choose its own procedures, or when the tribunal has expertise in determining what procedures are appropriate in the circumstances (paragraph 27). A tribunal has considerable scope under its authority to determine its own practices and procedures and it is open to the tribunal to develop procedures that are specific to its policy mandate. In the case before us, the two sources of decisions, the Prevention Division and the Assessment Department, have informal procedures and our decision must respect those procedures. We also are obliged to respect the expertise of the Prevention Division and Assessment Department, tempered to some degree by the expertise of the Appeal Division itself.

(139) According to the court in *Baker*, the standard of procedural fairness which applies in particular cases is "eminently variable" and:

> All of the circumstances must be considered in order to determine the content of the duty of procedural fairness. . . . 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. (paragraphs 21, 22).

(140) We agree with that approach. Applying it to the Board's decisions in this case, we have considered the duty of procedural fairness in the context of the nature of the Assessment and Prevention decisions in question, the statutory and institutional context for those decisions and the impact of the decisions on those whose interests they affect including the legitimate expectations of the party challenging the decisions. As with the court's analysis of the decision affecting Ms. Baker (paragraph 31), in the case before us we conclude that some factors suggest a stricter duty of fairness and others suggest a more relaxed requirement. The standard is certainly more than minimal and it is one requiring:

> a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered. (paragraph 32).

(b) Procedural Fairness: Disclosure of Material Information

(141) It follows from the foregoing that parties to an administrative process have a right to expect a fair and open procedure that provides an opportunity to put forward their views and evidence fully, to address any new information or argument that is relevant in the proceedings, and to have their views considered by the decision-maker. In broad terms this is a paraphrasing of the longstanding duty of tribunals to disclose material information and argument to the parties to a proceeding. In another decision the Supreme Court of Canada has discussed the duty on administrative tribunals to disclose evidence as: ". . . each party to a hearing is entitled to be informed of, and to make representations, with respect to evidence which affected the disposition of the case." (*Kane v. University of British Columbia,* [1980] S.C.R. 1105 at 1115-6).

(142) On the evidence before us it is undisputed that the issue of whether the safety record of one division of an employer could be used when considering an additional assessment for violations at another division was an issue before the hearing officer. The tape of the Prevention hearing makes this clear and the hearing officer's decision has a lengthy discussion of the issue. There is also no dispute that this issue was discussed between the hearing officer and the assessment officer, with the hearing officer providing the Corporation's name and a description of its divisions. The hearing officer received information about assessment policy

from the assessment officer and cited that information in his decision. The hearing officer, in his decision of December 10, 1999, referred to the assessment officer's decision. Other communications took place between the three Board officers, such as inquiries about when the assessment officer's decision would be made and discussions about the retroactivity of the assessment officer's decision. Most of this occurred without the Corporation's knowledge. Some of it came to light in conversations between the Board officers and X and the rest arose in the evidence before us in these proceedings. At the end of the hearing in June, 1999 before the hearing officer, all the Corporation knew was that the hearing officer had made a "note" of this issue and would "address" it in his decision.

(143) We find that procedural unfairness occurred in this case. When a decision-maker obtains potentially relevant evidence or information from a source other than through the hearing process, and does not disclose it to the parties in the proceeding, an appellate court or tribunal will set aside the decision-maker's decision. Similarly, where proceedings will determine important rights or interests, it is a denial of natural justice for the decision-maker not to disclose the standards on which it makes its decisions. (see, Brown & Evans, *Judicial Review of Administrative Action in Canada,* July 2000, 9:7100).

(144) If we characterize the nature of the hearing officer's calls to the assessment officer as nothing more than inquiries to obtain information about Board policy on how the Assessment Department treats divisions of the same employer, those inquiries may well have been necessary and appropriate for the hearing officer to adjudicate completely the issues arising in the proceeding before him. However, in our view, even with this characterization of the hearing officer's intent, it would still be necessary for the hearing officer to disclose to the Corporation the nature of his call, the information he obtained and then provide an opportunity for the Corporation to respond to the information. This is because the inquiry to the assessment officer related to one of the Corporation's defenses before the hearing officer in the Prevention proceeding. We do not make any comments on the merits of that defense. It is clear, however, that the Corporation believed it was their most important and primary defense.

(145) Thus the hearing officer went beyond making generic inquiries about the Board's assessment policy and focused on policy relevant to one of the Corporation's defences in the Prevention proceeding. We note that Policy D12-196-5 of the *Prevention Manual* refers to the requirement that *written* submissions or comments by a party or other person to a hearing officer will be disclosed by the Board to the other parties where the rules of natural justice require such disclosure. In our view, the rules of natural justice require the same standard for verbal communications. If a Board hearing officer in a proceeding under section 196(6) of the Act makes verbal or written inquiries before or after a hearing or meeting, and these relate or may relate to the disposition of the case, then the requirements of natural justice require disclosure of the fact of the inquiry and the information obtained, as well as the opportunity for the parties in the proceeding to make representations about the new information.

(146) This applies even when a tribunal is authorized by statute to obtain information other than under oath or affirmation: ". . . this does not authorize it to depart from the rules of natural justice" (*Kane*, supra, 1115, adopting *Pfizer Company Limited v. Deputy Minister of National*

Revenue for Customs and Excise, [1977] 1 S.C.R. 456 at 463). It is a logical extension of that principle that this duty would apply to proceedings subject to the inquiry model that the Board often uses when making decisions under the Act.

(147) Some inquiry-based proceedings do make inquiries that are not disclosed to the parties to the proceedings and, in some narrow circumstances, that may be defensible from the point of view of procedural fairness. However, the intent to have private inquiries should be communicated to affected parties in advance as part of the decision-maker's practice and procedures in the proceedings. This gives the parties notice of the nature of the proceedings. And, assuming there is consultation for the practices and procedures, the parties have an opportunity to challenge the practice of private proceedings. In the absence of any such practices and procedures, as in the case before us, the parties are entitled to expect that the decision-maker will follow the common-law requirement to disclose material information and argument.

(148) We have considered the fact that the assessment officer copied the hearing officer with his letter of June 25, 1999 and his decision of October 1, 1999. But we do not consider those communications fulfill the Board's duty in the Prevention proceedings to disclose relevant information. The assessment officer's letter and decision did not include any reference to the circumstances of the hearing officer's involvement in the Corporation's reclassification and the type of policy information that the assessment officer provided to the hearing officer. Without such complete notice, there was no practical opportunity for the Corporation to make further submissions to the hearing officer on the applicability of the Assessment policy to which the assessment officer referred the hearing officer.

(149) The hearing officer also specifically mentioned the assessment officer's decision of October 1, 1999 in his decision of December 10, 1999. But this was not timely notice, since by that time all decisions were made and the Corporation found itself subject to an additional penalty of $112,000 and a very costly (approximately $800,000) reclassification. In the context of procedural fairness, there was no timely disclosure to the Corporation. Further (as with the assessment officer's June letter and October decision) disclosure was incomplete, as the hearing officer did not disclose the nature of his conversation with the assessment officer.

(150) On this basis we find a lack of procedural fairness to the parties in the Prevention proceedings. The Corporation, as a party to the Prevention proceedings under section 196(6) of the Act, was entitled to be informed of, and to make representations about, the new information provided by the assessment officer to the hearing officer. That new information about assessment policy related to the Corporation's defences before the hearing officer, and potentially at least, might have affected the disposition of the Corporation's case.

Bias

(151) The *Baker* decision is helpful in determining the bias issue raised by the Corporation in this case. One of the arguments made to the court by legal counsel for the Minister of Citizenship and Immigration was that the court should disregard the conduct of an immigration officer who was not the final decision-maker on the administrative tribunal, but whose notes and

recommendations formed part of the case file before the decision-maker. The court rejected that approach. In its reasons, the court suggests that in considering an allegation of bias or reasonable apprehension of bias, appellate judges should be looking at all the circumstances in a case, beyond facts involving the actual decision-makers of an inferior tribunal. The court endorses a judicial approach which also reviews the circumstances involving administrative officers who were involved in the administrative process prior to the matter going before the decision-makers.

(152) Thus the court in *Baker* suggests a review of the entire administrative process is now necessary. The duty to act fairly applies to all administrative officers who play an important part in the ultimate decision-making process, whether they are subordinate officers with authority only to make recommendations, or reviewing officers who make the final decision. As the court in *Baker* observed:

> . . . if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner.

(153) In *Baker* a significant aspect of the facts was the notes taken by an immigration officer when he interviewed the person requesting exemption from deportation. In his decision to deny exemption the reviewing officer had not given reasons. But the notes and recommendations of the immigration officer indicated some of the factors the reviewing officer may have considered in reaching his decision. The following excerpt from *Baker* provides an indication of the immigration officer's considerations as well as the court's views of those considerations,

> In my opinion, the well informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes. Most unfortunate is the fact they seem to make a link between Ms. Baker's mental illness, her training as a domestic worker, the fact that she has several children, and the conclusion that she would therefore be a strain on our social welfare system for the rest of her life. In addition, the conclusion drawn was contrary to the psychiatrist's letter, which stated that, with treatment, Ms. Baker could remain well and return to being a productive member of society. *Whether they were intended in this manner or not, these statements give the impression that Officer Lorenz may have been drawing conclusions based not on the evidence before him*, but on the fact that Ms. Baker was a single mother with several children, and had been diagnosed with a psychiatric illness. His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status. Reading his comments, I do not believe that a reasonable and well-informed member of the community would conclude that he had approached this case with the impartiality appropriate to a decision made by an immigration officer. It would appear to a reasonable observer that his own frustration with the "system" interfered with his duty to consider impartially whether the appellant's admission should be facilitated

owing to humanitarian or compassionate considerations. I conclude that the notes of Officer Lorenz demonstrate a reasonable apprehension of bias. (Paragraph 48).

[emphasis added]

(154) The concepts of partiality and bias are related. We adopt the following statement on partiality which discusses the nature of a fair and proper hearing:

> An essential requirement for such a hearing, in my view, is that the Board act with impartiality. The impartiality required by judges, as it was explained by LeDain J. in *Valente v. The Queen et al.,* [1985] 2 S.C.R. 673, extends, it seems to me, to a [Refugee Division] Board member. At page 685, his Lordship stated:
>
>> "Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case." The word "impartial" as Howland C.J.O noted, connotes absence of bias, actual or perceived.

Sivarguru v. Canada, [1992] 2 F.C. 374 at 389 (F.C.A.)

(155) We note that appellate tribunals rarely make findings that decision-makers acted with actual bias in reaching their decisions. Actual bias may be difficult to prove. More often, a party may obtain relief from an appellate tribunal by proving that the circumstances of the case reveal "a reasonable apprehension of bias," as opposed to actual bias. A test, albeit a broad one, widely accepted by the judiciary (including the court in *Baker*) for "reasonable apprehension of bias," is as follows:

> . . . the apprehension of a bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information . . . that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369 at 394. (dissenting opinion of deGrandpré, J.)

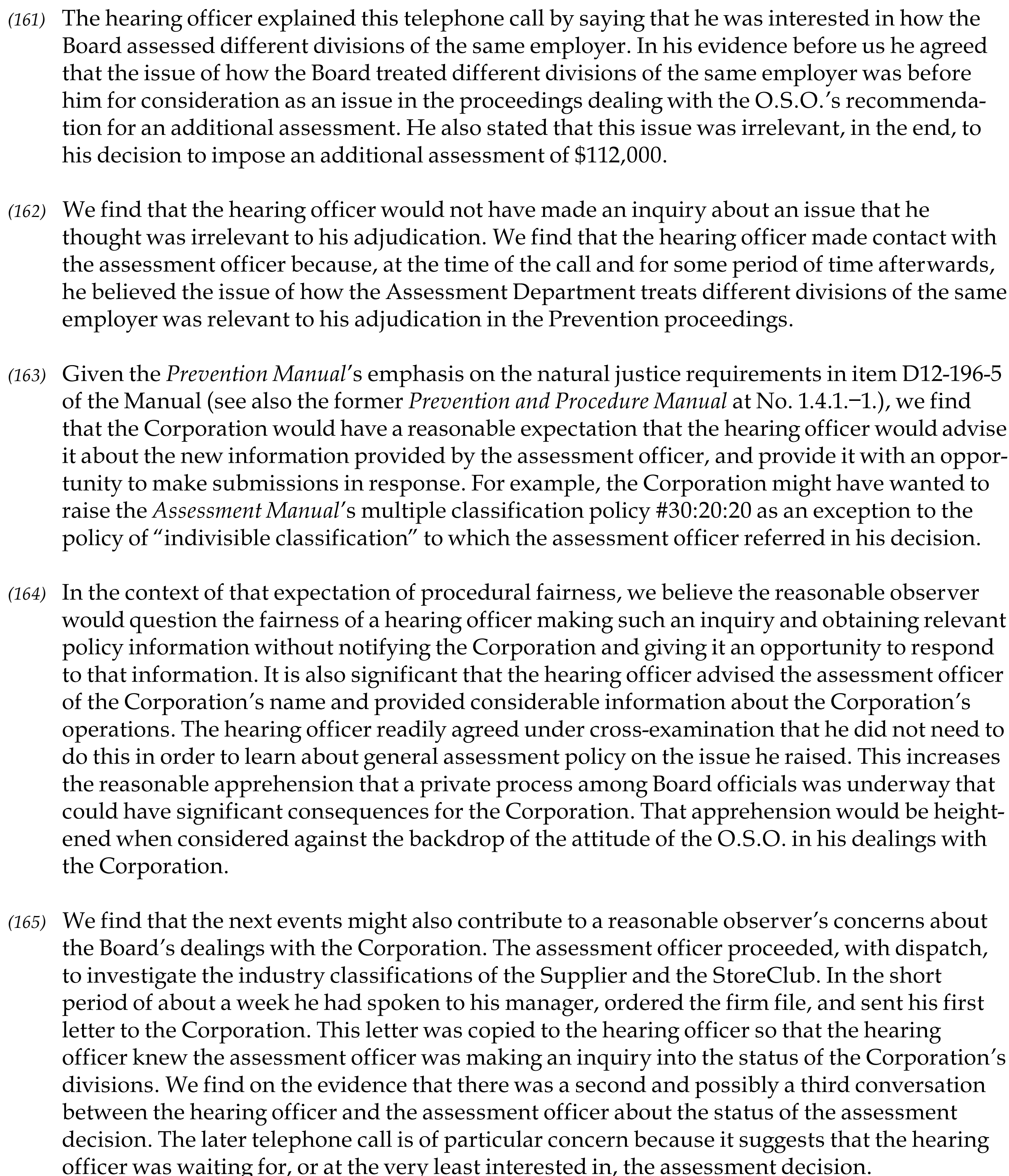
(156) In this case we have decided that it is unnecessary to make findings about the actual intentions of any of the three Board officers involved in this case in an effort to deal with the employer's allegation of "actual bias." We find that it is appropriate to approach this case by asking whether the evidence gives rise to a "reasonable apprehension of bias." In that context, how would an observer who is reasonable and informed, who has reviewed the matter realistically and practically and thought it through, view the facts of the case before us?

(157) We also advise that in considering the "reasonable apprehension of bias" issue, we have looked at the entire circumstances of the Corporation's involvement with the Board, including the Assessment Department's reclassification review, the Prevention Division's investigation and hearing, as well as the communications between the Board officers involved in those proceedings and their contact with the Corporation. We have not attempted to view specific incidents or proceedings in isolation and thereby pass judgement on the bias apprehension issue. In our view, to fairly consider the bias issue raised by the Corporation, it is necessary for us to take a broad and unbroken view of the evidence. In other words, as the court suggested in *Baker*, we have looked at the totality of events affecting the Corporation in its relationship with the Board in the one-year period between December of 1998 and December of 1999. It is only after considering the whole story that we can assess the validity of the bias apprehension issue raised by the Corporation.

(158) The story began with the O.S.O.'s inspection of the Corporation in December of 1998. Although there are significant disagreements between the O.S.O. and X about their conversations in January and February 1999, we have drawn some conclusions about what happened. The O.S.O. testified before us that he and the occupational hygienist were "tired" of making the same orders for the same violations in the industry. From his point of view, it was a matter of: "how many times does the Board have to get the message out to employers?" This is essentially consistent with X's evidence that the O.S.O. would not give the Corporation any more time to develop a comprehensive health and safety program and it was time to "get on with it." We also note that the O.S.O. under cross-examination at first adamantly denied referring by name to the Corporation's president, but subsequently testified that he might have mentioned the president by first name, he just didn't recall doing so. On this point we find X's recall more reliable and credible than that of the O.S.O., and we find that the O.S.O.'s comments did suggest to X that the Board was "out to get" the Corporation's president.

(159) We also find on the evidence that although the O.S.O. testified his demeanor toward X was "normal" for him, his conversations with her revealed an attitude that the Board was going to make an example of the Corporation. In this regard, we accept as credible X's testimony about the March 31, 1999 conversation with the O.S.O. Whether the O.S.O. said "Step off and get on with it" (as he testified) or "F--- off and get on with it" (as she testified), we find that the O.S.O.'s attitude provides a backdrop against which a reasonable person would interpret subsequent events involving the Board and the Corporation.

(160) The O.S.O. recommended an additional assessment. In his memo to the Prevention Division recommending the additional assessment, he referred to the Corporation's previous sanction history. Before the hearing officer, the Corporation relied on the fact of its Supplier and StoreClub divisions having different industry classifications than its Supermarket division. The Corporation essentially relied on that fact as evidence to argue that for Prevention purposes, the Board should treat each division as a separate "employer" because each division had independent industry classifications. Shortly after the Corporation made that argument and the hearing ended, the hearing officer telephoned the assessment officer to ask about Board policy on separate industry classifications in the context of one large corporation. Prior to this telephone conversation the Board had taken no action nor shown any interest in the classification of the Corporation or any of its divisions. We accept X's evidence that in fact, a Board contact had just told her few months earlier that the Corporation was correctly classified.



(161) The hearing officer explained this telephone call by saying that he was interested in how the Board assessed different divisions of the same employer. In his evidence before us he agreed that the issue of how the Board treated different divisions of the same employer was before him for consideration as an issue in the proceedings dealing with the O.S.O.'s recommendation for an additional assessment. He also stated that this issue was irrelevant, in the end, to his decision to impose an additional assessment of $112,000.

(162) We find that the hearing officer would not have made an inquiry about an issue that he thought was irrelevant to his adjudication. We find that the hearing officer made contact with the assessment officer because, at the time of the call and for some period of time afterwards, he believed the issue of how the Assessment Department treats different divisions of the same employer was relevant to his adjudication in the Prevention proceedings.

(163) Given the *Prevention Manual*'s emphasis on the natural justice requirements in item D12-196-5 of the Manual (see also the former *Prevention and Procedure Manual* at No. 1.4.1.–1.), we find that the Corporation would have a reasonable expectation that the hearing officer would advise it about the new information provided by the assessment officer, and provide it with an opportunity to make submissions in response. For example, the Corporation might have wanted to raise the *Assessment Manual*'s multiple classification policy #30:20:20 as an exception to the policy of "indivisible classification" to which the assessment officer referred in his decision.

(164) In the context of that expectation of procedural fairness, we believe the reasonable observer would question the fairness of a hearing officer making such an inquiry and obtaining relevant policy information without notifying the Corporation and giving it an opportunity to respond to that information. It is also significant that the hearing officer advised the assessment officer of the Corporation's name and provided considerable information about the Corporation's operations. The hearing officer readily agreed under cross-examination that he did not need to do this in order to learn about general assessment policy on the issue he raised. This increases the reasonable apprehension that a private process among Board officials was underway that could have significant consequences for the Corporation. That apprehension would be heightened when considered against the backdrop of the attitude of the O.S.O. in his dealings with the Corporation.

(165) We find that the next events might also contribute to a reasonable observer's concerns about the Board's dealings with the Corporation. The assessment officer proceeded, with dispatch, to investigate the industry classifications of the Supplier and the StoreClub. In the short period of about a week he had spoken to his manager, ordered the firm file, and sent his first letter to the Corporation. This letter was copied to the hearing officer so that the hearing officer knew the assessment officer was making an inquiry into the status of the Corporation's divisions. We find on the evidence that there was a second and possibly a third conversation between the hearing officer and the assessment officer about the status of the assessment decision. The later telephone call is of particular concern because it suggests that the hearing officer was waiting for, or at the very least interested in, the assessment decision.

(166) At one point in his evidence the assessment officer testified that he was aware his decision was going to have an effect on the hearing officer's decision, although the assessment officer then attempted to retract his evidence on that point. We find that the assessment officer did believe (rightly or wrongly) that his decision on the classification review of the Corporation was going to have an impact on the hearing officer's decision. This conclusion is supported by the O.S.O.'s evidence that he, too, contacted the assessment officer to discuss some of the details about the assessment officer's decision. The O.S.O. testified that he was "curious" about the reclassification decision, given his dealings as an O.S.O. with at least one other employer with a similar set-up to that of the Corporation, so he telephoned the assessment officer. Thus, the O.S.O. believed that the classification decision was at least potentially relevant to his work with respect to the Corporation and other employers in the retail and wholesale food industries. The O.S.O. believed the assessment officer's decision might have relevance in Prevention matters involving employers with organizational structures similar to that of the Corporation.

(167) After initiating the classification review, the assessment officer sent the Corporation a letter on June 25, 1999 to advise them about it, and he sent the hearing officer a copy of the letter. The Corporation received the letter and noticed the hearing officer's name as a recipient of a copy. Sometime later, X telephoned the assessment officer and confronted him with her belief that the hearing officer had specifically requested that the assessment officer reclassify the Corporation. The testimony of X and the assessment officer conflicted about his responses to her. X testified that the assessment officer referred to people "higher" than his boss asking him to review the Corporation's classification, but that he couldn't "name names." The assessment officer denied making such statements. We prefer the evidence of the assessment officer on this point. We observed that the assessment officer several times in his testimony, in unusual contexts not dealing with higher levels of bureaucracy, used a turn of phrase referring to "a higher level." For example, at one point he used the phrase a "higher level" in the context of an approach to, or way of thinking about, a problem. We find it probable that the assessment officer was using that same turn of phrase in his conversation with X and that she misinterpreted it to refer to persons higher in the bureaucracy influencing the assessment officer's decision. We make no findings of fact that any Board officer directed the assessment officer to initiate the classification review, to reach any particular conclusion on the Corporation's classification review, or otherwise directed him to prejudge the issues in that review.

(168) The delay in the hearing officer's decision is also significant. Although the hearing officer had advised the people at the hearing before him in June 1999 that his decision would be out in 30 days, in fact he did not issue his decision until December of 1999, approximately six months later. We accept the hearing officer's reasons for not making a decision after 30 days and that it was no more than a courtesy for the hearing officer to explain to the parties that his decision would be out within 30 days.

(169) We also note, however, the O.S.O.'s evidence that he telephoned the hearing officer some time in October to find out the status of his decision, because "it had been a fairly long time" and decisions usually come out in two to three months. The O.S.O. testified that in explaining the delay, the hearing officer told him that the assessment officer had audited the Corporation, he

named the assessment officer, and referred to the retroactivity of the assessment officer's decision. The hearing officer's evidence was that he did not recall the O.S.O. making inquiries to him about the delay in issuing his decision. We find that the O.S.O. did make such an inquiry, and that the hearing officer referred to the classification review as one of the reasons for the delay. On these facts, we find that the reasonable observer would believe that the hearing officer delayed issuing his Prevention decision until after the assessment officer made his reclassification decision, because the hearing officer thought the assessment decision might be relevant to the issue of imposing an additional assessment on the Corporation.

(170) Further support for this is contained in the hearing officer's decision of December 1999. In that decision, the hearing officer referred to the "real issue" in the proceedings as whether the sanction history of one of the Corporation's divisions could be used as a basis for an administrative penalty against another of the Corporation's divisions. The hearing officer noted the employer's argument that the Supermarket division was a separate business with a separate industry classification from that of the StoreClub. By the time the hearing officer's decision was issued, however, the Board had reclassified the StoreClub so that it had the same industry classification as the Supermarket. The hearing officer referred to that in his decision, and also relied on the policy referred to him by the assessment officer that for "classification [purposes]. . . . the legal entity will be regarded as one and indivisible."

(171) The test for reviewing an allegation of a reasonable apprehension of bias is not a subjective one. This means that we need not find that any of the three Board officers prejudged the issues they dealt with involving the Corporation, or were otherwise impartial with a mindset against the Corporation. For example, the court in *Baker* made its finding of a reasonable apprehension of bias and said it was irrelevant whether the objectionable conclusions of the immigration officer were "intended in this manner or not." Similarly the *Committee for Justice and Liberty* description of reasonable apprehension of bias is clearly framed in terms of an objective test. In the context of this case, the test of whether there was a reasonable apprehension of bias is not about the intentions of the O.S.O., the hearing officer or the assessment officer or even how X or the Corporation perceived their conduct. The test is how the reasonable observer, who is well informed and who has thought through the matter, would perceive the situation.

(172) In considering the test of reasonable apprehension of bias, we are not required to decide the merits of the employer's arguments before the assessment officer or the hearing officer. We have not made a decision with respect to the merits of the employer's arguments on the Assessment and Prevention issues. The issue before us concerns all the evidence about the Corporation's involvement with the Board in the events surrounding the Assessment and Prevention decisions and, whether or not that evidence gives rise to a reasonable apprehension of bias in this case. We bear in mind the court's suggestion in *Baker* to consider all the evidence and the decision-making process as a whole rather than isolating separate incidents.

(173) Considering the evidence as a whole we conclude that a reasonable apprehension of bias arises from the facts in this case. We have earlier referred to the lack of procedural fairness in the Board's failure to give notice to the Corporation about the new information provided by the assessment officer to the hearing officer, and the Corporation's lack of opportunity to respond to the new evidence. That procedural unfairness took place in the following context:

- the Corporation dealing with an O.S.O. whose conduct suggested the Board intended to make an example of the Corporation;
- the Board deciding to conduct a classification review of the Corporation after the hearing officer raised a classification issue with an assessment officer, even though a Board contact in the Assessment Department had only recently confirmed to the Corporation that the industry classifications for its divisions were correct;
- a very expeditious, though factually incorrect, classification review by the assessment officer;
- a decision in the classification review of the Corporation which effectively undermined the Corporation's main argument before the hearing officer;
- telephone calls between the O.S.O., the hearing officer and the assessment officer dealing with the timing of the Assessment and Prevention decisions;
- the hearing officer's decision delayed until after the assessment officer's classification decision;
- the hearing officer's reference in his decision to the very policy referred to him by the assessment officer and his reference to the reclassification decision when he rejected the Corporation's argument;
- one of the largest Prevention penalties on record ($112,000);
- a significant sum of approximately $800,000 as the financial impact to the Corporation of the reclassification decision.

(174) Procedural unfairness is an issue of its own, indicating a lack of transparency in the administrative processes of the Board. Considered with the other evidence in this case, the overall circumstances suggest a lack of impartiality on the Board's part, that is, a desire for particular outcomes. We find that viewing the Board's procedural unfairness toward the Corporation in the context of all the evidence before us, the "well-informed member of the community" (to borrow from the *Baker* decision) would "perceive bias" on the part of the Board with respect to the decisions made by the Board officers in this case. We agree with the Corporation's submission that there is "a cloud of bias" over the evidence in this case in which rest the Board's decisions with respect to the Corporation.

(175) We emphasize that we are not making findings of the actual intentions or mindset of the Board officers in their dealings with the Corporation. "Apprehension," as defined in the *Concise Oxford Dictionary* (8th edition, 1990) means that there is an "uneasiness" in one's perception of an idea or events. For there to be a reasonable apprehension of bias means that the reasonable and informed person, viewing the matter realistically and practically and after thinking the matter through, would be uneasy and concerned that the decision-makers did not approach their tasks with appropriate impartiality. In our view, the evidence in this case would lead the

reasonable and informed person to just that apprehension. Applying the objective test in the *Committee of Justice and Liberty* decision as well as the approach in *Baker*, our conclusion is that the evidence in this case gives rise to a reasonable apprehension of bias which taints the Board's decisions with respect to the Corporation.

Conclusion

(176) For the foregoing reasons, we allow the Corporation's appeal of the assessment officer's decision dated October 1, 1999. We have found an error of fact in the assessment officer's decision. Further, we have found an error of law in that the assessment officer's decision is tainted by a reasonable apprehension of bias.

(177) We also allow the Corporation's appeal of the hearing officer's decision dated December 10, 1999. The hearing officer's decision is tainted by procedural unfairness and a reasonable apprehension of bias.

Remedy

(1) We refer the issue of the Corporation's reclassification back to the Assessment Department of the Board for reconsideration. Since this is a question of the status of the Corporation, it can and should be redetermined by a new decision-maker with no connection to the decision of October 1, 1999.

(2) The issue of the hearing officer's decision is more problematic. The range of remedies available includes remitting the decision to the Prevention Division to be redetermined by a decision-maker with no connection to the decision of December 10, 1999; rehearing the matter ourselves; or canceling the hearing officer's decision with no redetermination by the Prevention Division. Specifically, section 212 of the Act states that the remedies available to us are to "confirm, vary or cancel the decision under appeal" or "refer the matter back to the Board for reconsideration."

(178) The authorities are not consistent on what remedy is appropriate where there is a finding of reasonable apprehension of bias. In *Newfoundland Telephone Ltd*, supra, the decision under review was declared void because the appearance of unfairness could not be cured by a subsequent decision of the tribunal. On the other hand, in *Baker* the court set aside the decision before them and directed that the matter be redetermined by the tribunal below since the appellant's immigration status could be redetermined by a different reviewing officer.

(179) The facts in this case guide our decision on the appropriate remedy for the Prevention issues before us. On the basis of *Baker* we have looked at the evidence as a whole, considering events from the time the O.S.O. dealt with the Corporation up to December of 1999 when the hearing officer issued his decision. The investigations and Orders of the O.S.O. and his report formed the basis of the recommendation for the additional assessment. The events involving the O.S.O. form part of the evidence in this case that gives rise to a reasonable apprehension of

bias. In our view it would be illogical and inappropriate to make the findings we have made about the evidence as a whole, which included events involving the O.S.O., and then direct that the Prevention Division redetermine the issue of an additional assessment based on the O.S.O.'s investigation and report.

(180) Our concern, akin to that expressed in *Newfoundland Telephone Ltd.*, is that the appearance of bias and unfairness in this case would not be cured by a subsequent decision of another hearing officer based on the O.S.O.'s investigation and report. Unlike the assessment decision in this case which involved the status of the Corporation, the Prevention decision is based not on a "status" issue but on findings of regulatory violations. The alleged regulatory violations involve findings about events in time that cannot be re-investigated by the Board. For the same reasons we cannot take upon ourselves the redetermination of an additional penalty assessment. Therefore our decision is to set aside the December 10, 1999 decision of the hearing officer. Applying the wording of section 212 of the Act, we cancel the hearing officer's decision.

Editors' Note: The names of the parties have been removed for privacy considerations. This decision has been edited for publication.