Private Commercial Interests on Trial: Regulatory Hearings

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Both economic regulators and their regulated companies are facing a different world today than that of ten or fifteen years ago. This paper examines one aspect of how regulators have to adjust their behaviour to function in this changing world. The procedures and analytical tools related to the traditional regulatory process may not easily fit with the current environment any more than the classic tools of rate-base regulation meet current needs. When regulated firms operate in a wholly or partly competitive environment, the confidentiality of information demanded by the regulators becomes a sensitive issue. Indeed, it is the partly competitive nature of the market that so often creates the particular difficulties that regulators are facing. Treating such a regulated firm fairly may now mean more than applying the usual rules of natural justice. It requires a consciousness of the realities of the competitive market.

The regulatory hearing process, of course, must continue to be consistent with the rules of natural justice. The changing economic regulatory environment does not affect obligations to be fair to the regulated firm and the other participants in the process. The issue of confidentiality, however, can become an avenue for attack on a regulator's decisions. The very competitive pressures that make disclosure a sensitive matter may incline the participants to use the regulatory process as a weapon against competitors.[1] Regulators must be willing to clearly articulate their criteria for determining confidentiality or disclosure. Explicit and well-known procedures must be developed to deal with confidential information in a hearing. Otherwise, inconsistency and seemingly arbitrary rulings on confidentiality will undermine the tribunal's ability to earn the respect of both the public and the judiciary.

Furthermore, regulators must take a more critical look at the requests for confidentiality. The dangers of comfortable relationships with partly competitive regulated industries can take on a new dimension when the regulator defers too quickly to requests for confidential treatment. A regulator dealing with the players in a competitive or partly competitive market runs the risk of favouring, perhaps unintentionally, a particular player or interest by not scrupulously adhering to the procedures. It requires time, expertise and the expenditure of increasingly rare resources to analyze information, identify portions that meet the criteria for confidential treatment, require severance and summaries, and develop procedures that both protect the confidential information and enhance the values of openness in the justice system. It can be much easier to simply accept the designations offered (or negotiated) by the parties, hear large proportions of the evidence in camera , and place the mutual comfort of the tribunal and the parties ahead of the public interest in an open and transparent system of justice.

The competing interests of the parties in the regulatory proceeding are easily recognized. What is less often acknowledged is the competing public interests in dealing with confidential information. There is a public interest in openness, in protecting the integrity and accountability of the regulatory process. There is also a public interest in maintaining the appropriate commercial information as confidential. It can ensure that the regulated industries are willing to provide the regulators with the information they need to fulfil their mandate. Although regulators can demand and subpoena information, a constant adversarial relationship with the regulated firms drains public resources and

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1. B. Owen § R. Braeutigam, *The Regulation Game: Strategic Uses of the Administrative Process* (Cambridge: Ballinger Publishing, 1978) outlines some of the traditional regulatory games, such as use of delay; information gathering is a new weapon in these games. For example, the most common use of Freedom of Information legislation is the United States is allegedly by competitors seeking information in government files.

usually leaves the regulator with less information. The ability to keep some information, the so-called "trade secrets", as confidential can also encourage investment, innovation and efficiency.[2] While regulators must maintain open and accountable proceedings, they may also be neglecting their duty to protect the public interest if the appropriate commercial information is not kept confidential.

I. GENERAL APPROACH OF THE COURTS TO CONFIDENTIALITY

The court system has long experience in balancing an individual's or a corporation's right to privacy with the competing values of openness. The broad rule is that judicial proceedings are open to the public, that the documents and evidence presented in judicial proceedings are available to the public, that decisions and reasons of the courts are public documents, and that a member of the public can review the proceedings and their results and form an opinion on the fairness of the entire process.

Underlying this general rule is a very strong public policy argument that openness is essential to the integrity of the modern justice system. Jeremy Bentham, whose words were adopted by Mr. Justice Dickson in the *Attorney General of Nova Scotia et al.* v. *MacIntyre*,[3] stated — with great strength and emphasis:

> *In the darkness of secrecy, sinister interest, and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and surest of all guards against improbity. It keeps the judge himself while trying under trial.*

Aside from being enshrined in custom and general practice, the requirement of open court hearings is also found in statute.[4]

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2. W.L. Casey, Jr. et al., *Entrepreneurship, Productivity, and the Freedom of Information Act* (Toronto: Lexington Books, 1983), especially c. 5, "Entrepreneurship and the Case for Protecting Circumstantially Relevant Business Information".

3. *Attorney General of Nova Scotia et al.* v. *MacIntyre* (1982), 132 D.L.R. (3d) 385 at 400 (S.C.C.). This quotation was also used by Lord Shaw of Dunferline in *Scott* v. *Scott*, [1913] A.C. 417 at 477 (H.L.), which is a seminal English case in this area. I would like to thank Ian Binnie, Q.C., for drawing this to the attention of the members of the Council of Canadian Administrative Tribunals at their annual conference in Ottawa, June, 1994.

   There is also an argument that a public legal system serves an additional social function of defining deviance and educating the populace about the limits of acceptable social behaviour. Commentators have noted that public executions ended in the west approximately at the point that newspapers became widely available to a literate citizenry. The demand for televising executions in the United States may say more about literacy rates than crime rates.

4. For example, the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43.

Like all broad or general rules, however, there are exceptions to the openness of judicial proceedings. These too have been codified in statute. The Ontario *Courts of Justice Act*,[5] for example, states in subsections 135(2) and 137(2):

> 135(2) *The court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public.*
>
> [...]
>
> 137(2) *A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.*

Certain well-developed exceptions to the general rule of openness have been acknowledged. Historically, these included hearings regarding infants and persons with mental disabilities, as well as cases involving trade secrets. The rationale for privacy in dealing with the first two categories derived partly from the sensitivities of the subject matter and partly from the fact that the courts were exercising a traditional *parens patriae* jurisdiction, which was not a strict determination of the rights of parties in a dispute.[6] The third category, trade secrets, is exceptional because of the inherent nature of the subject matter of the dispute: open proceedings would destroy the trade secret. In fact, the trade secret exception is probably a subcategory of the exception that proceedings may be *in camera* when an open hearing would render "the administration of justice impracticable [...]".[7]

In addition to trade secret litigation, which has been the source of much of the caselaw on dealing with confidential evidence, some other exceptions to the general rule have been recognized. Thus, *ex parte* applications for search warrants are private,[8] and evidence can be given privately by an individual whose life might be endangered by publicity.[9] A number of statutory provisions allow for *in camera* proceedings; for example, proceedings before the Federal Court on applications pursuant to the *Access to Information Act* or the *Privacy Act*[10] may be *in camera*.

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5. *Ibid.*

6. See the discussion in *Scott, supra* note 3, and in *Official Solicitor to the Supreme Court and K. and another*, [1965] A.C. 201 (H.L.).

7. *Supra* note 3 at 446.

8. *Supra* note 3.

9. *R.* v. *A.*, [1990] S.C.R. 992. Again, privacy for both search warrant applications and endangered witnesses can be viewed as subcategories of the exception that privacy is permitted where the administration of justice would otherwise be impracticable.

10. *Access to Information Act* R.S.C. 1985, c. A-1; *Privacy Act*, R.S.C. 1985, c. P-21. For further commentary, see T. Onyshko, "The Federal Court and the Access to Information Act" (1993) 22 Man. L. J. 73.

Embarrassment or distress at the public nature of court proceedings is not a sufficient excuse for a closed hearing. As Justice Dickson stated, "As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings".[11] Thus, the transcript in the *Scott* case dealing with an annulment on grounds of impotency could be circulated and an individual who feared disciplinary action from a professional body was denied an *in camera* hearing before the Tax Court.[12] Divorce proceedings, including financial evidence, are customarily public.[13] Public accessibility to judicial proceedings will only be curtailed "where there is present the need to protect social values of *superordinate* importance. [...]".[14]

The enactment of the *Canadian Charter of Rights and Freedoms*[15] has reinforced the value of an open justice system, while at the same time requiring the courts to more consciously balance the values of individual privacy. *In camera* proceedings should only be permitted where they clearly further a value that should take precedence over the value of openness and public accountability of the justice system.

Intertwined with the value of openness to enhance the scrutiny and reputation of the justice system is the principle that no one should be subjected to secret law and undefined processes. Thus, while the general public should be free to observe judicial proceedings, the parties must also be able to participate meaningfully in the hearing. The process must be transparent in the sense that natural justice and fairness require that the parties understand the case they have to meet and have an opportunity to present their evidence and argument. Elaborate procedural rules have been developed to guide the parties and to ensure that the courts have relevant evidence and argument before them.

II. WHAT IS CONFIDENTIAL INFORMATION?

The type of information that is being discussed here is generally known as commercial or proprietary information; it is confidential because keeping it secret gives the firm some competitive advantage. Although it originally had a narrower meaning, the term "trade secret" is often used to describe the type of information that concerns us. The Alberta Institute of Law Research and Reform has adopted a definition that has been widely accepted:[16]

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11. *Supra* note 3 at 402, following *Scott*, *supra* note 3.

12. *C.D.* v. *M.N.R.*, (1991) 45 D.T.C. 5210 (F.C.A.).

13. *Re Sorbara and Sorbara* (1987), 59 O.R. (2d) 153; *Edmonton Journal* v. *Alberta (Attorney General)* (1989), 64 D.L.R. (4th) 577 (S.C.C.). Compare, however, art. 815A of the Quebec Code of Civil Procedure that provides for confidentiality regarding the personal details of marital cases.

14. *Supra* note 3 at 403 [emphasis added].

15. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11.

16. The Institute of Law Research and Reform, *Trade Secrets* (Edmonton: Institute of Law, Research and Reform, 1986) at 256. The definition has been adopted by the Ontario Information and Privacy Commissioner, Order M-29 and Order P-561. See also, D. Vaver, "What is a Trade Secret?" in R.T.

> *"Trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:*
>
> *(i) is, or may be used in trade or business,*
>
> *(ii) is not generally known in that trade or business,*
>
> *(iii) has economic value from not being generally known, and*
>
> *(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.*

The confidential information in question at a regulatory hearing is rarely a trade secret in the sense of a formula or process, such as the formula for Coca Cola or Polaroid's development chemicals, but is more likely to be what has been called "circumstantially relevant business information".[17] One characteristic of this information is that it has a relatively short life-span, unlike the trade secret formula for Coke. It generally involves such things as costs, prices, market projections, customer lists, discounts, profit margins on particular products, internal productivity reports, computer modelling, and supply contracts or negotiations. In practice, the phrases "trade secrets" and "confidential commercial information" have often been used interchangeably and loosely and need not be distinguished for regulatory purposes.[18]

Hughes, Q.C., ed., *Trade Secrets* (Toronto: Law Society of Upper Canada, 1990).

17. J.T. O'Reilly, "Confidential Submissions to Utility Regulators: Reconciling Secrets with Service" (1991) 18 Ohio North. U. L. Rev. 217; *Casey et al., supra* note 2.

18. *Supra* note 16 at 17 — 22.

III. REGULATORY TRIBUNALS IN THE JUSTICE SYSTEM

Tribunals have a critical role to play in the Canadian justice system. It is a truism that the decisions of tribunals often have a more direct impact on the lives of citizens in general than all but the most important and fundamental decisions of the courts. Decisions relating to rent, telephone and other utility rates, social benefits, and workers' compensation are made by adjudicators sitting on tribunals, not courts. Tribunals also make decisions about whether individuals will be freed from incarceration in jails, mental hospitals and other secure facilities. Licensing tribunals decide whether, or on what terms, an individual or firm can carry out a particular business. There are other examples, but the point is that the decisions of tribunals have important effects on our lives and welfare.

Tribunals, like the courts, operate according to rules of procedural fairness; these rules may be written and explicit or part of a general behavioral code based on the rules of natural justice and the custom of the tribunal. While there are similarities between the procedures of courts and tribunals, they are rarely identical. There is a wide range of tribunals performing a variety of functions and many were established precisely in order to permit a more expeditious or informal process to be used. The public interest jurisdiction of some tribunals, particularly the regulatory tribunals, requires them to play a semi-inquisitorial role. They issue interrogatories, demand the production of documents and evidence, and use (one hopes publicly) the expertise of staff.

Also like the courts, tribunals are subject to the general rule that their proceedings are to be conducted in public. In Ontario, this requirement can be found in the *Statutory Powers Procedure Act*,[19] which also outlines the customary exceptions that would permit *in camera* hearings: matters involving public security, intimate financial or personal matters where "having regard to the circumstances [...] the desirability of avoiding disclosure [...] outweighs the desirability of adhering to the principle that hearings are open to the public". In a rare instance, a tribunal such as the Ontario Social Assistance Review Board is specifically required by statute to hold hearings *in camera*.[20]

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19. *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22, s. 9. Unfortunately, amendments enacted in Bill 175 (3rd Session, 35th Legislature, Ontario, 43 Elizabeth 11, 1994, third reading December 1, 1994, royal assent December 8, 1994) permit all electronic hearings to be held *in camera*.

20. *Ministry of Community and Social Services Act,* R.S.O. 1990, c. M.20, s. 12(1). Although phrased as "notwithstanding the *Statutory Powers Procedure Act*...", the requirement is in fact consistent with that Act since the exception is based upon the sensitive personal and financial information of the applicants. Query, however, whether a broad provision that does not allow for the tribunal's exercise of discretion on individual facts violates the Charter. A partial list of federal tribunals and legislation empowering special provisions for dealing confidentially with sensitive information can be found in the reasons of Justice Décary in *Hunter* v. *Canada (Consumer and Corporate Affairs)* (1991), 80 D.L.R. (4th) 497 at 511-513. If the tribunal's enabling legislation does not specifically prohibit *in camera* hearings, then it is within the tribunal's discretion; *Re Millward and Public Service Commission* (1975), 49 D.L.R. (3d) 295 (F.C.T.D.).

The same values, as expressed by Jeremy Bentham among others, underlie the importance of openness for regulatory tribunals. In fact, it can be argued that it may be even more important for tribunals to conduct their affairs openly and "in the sunshine". Tribunals have a reputation of being anomalies in a parliamentary system of responsible government. They are not courts, but they are also not departments under the direct control of a minister. Most of the time they are intended to operate with a high degree of independence from the executive arm of government, while complying with procedural rules established by legislation and the courts and following the same general requirements of government departments with respect to budgets, personnel, expenditures, etc. In spite of their proliferation and critical role in the lives of many citizens, however, their legitimacy and accountability continue to be questioned.

Openness in decision-making and process are key elements in maintaining accountability for tribunals.[21] Any routine reduction in the openness of regulatory procedures is detrimental to their legitimacy and acceptance as accountable decision-makers.

IV. THE CHANGING REGULATORY CLIMATE

One of the classic rationales for regulation has been the control of the abuse of monopoly power.[22] The regulator controlled such facets of behaviour as entry into and exit from the market, the prices offered, the profit obtained, the quality of service, the quantity of goods produced or even the nature of the goods or service.

In order to do this job, the regulator was, and still is, required to have a great deal of knowledge and information about the regulated industry. The fact that the regulatee always knew more about what was going on in its own business than the regulator did has been one of the weaknesses of the regulatory process, but it was generally acknowledged that information gathering was a necessary task for the regulator.[23]

Part of the classic regulatory bargain, therefore, has been that the regulated company received benefits of regulation — the quiet life of the monopoly — and in return

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21. M. Priest, "Structure and Accountability of Administrative Agencies" in *Administrative Law: Principles, Practices and Pluralism*, 1992 Special Lectures of the Law Society of Upper Canada (Toronto: Carswell, 1993) at 11.

22. See, for example, S.G. Breyer, *Regulation and its Reform* (Cambridge, MA.: Harvard University Press, 1982) c. 1-8 which provide a useful background to the rationales for economic regulation and the various methods of regulation that can be used.

23. M. Priest, *Provision of Information in the Context of Regulation* (Ottawa: Economic Council of Canada, 7982). The regulated company cannot refuse to divulge information simply because it believes the information is confidential; there is no special privilege for commercially sensitive information; *Re Alberta Government Telephones and Canadian Radio-Television and Telecommunications Commission et al.* (1980), 114 D.L.R. (3d) 64; *Federal Communications Commission* v. *Cohn et al.*, 154 F. Supp. 899 (S.D.N.Y. 1957).

it divulged matters that might be considered private in another context.[24] Where there was a monopoly or a group of companies subject to similar competitive restraints, there was little argument for not making public all or most of the information filed by the regulatee.

Today, both the regulator and the regulatee face a different and occasionally stressful situation. Technology has changed the functions and nature of the regulated company and can mean competition with an unregulated entity. The increasingly interconnected world markets have meant that the policies and regulation of one country have greater effects on the companies situated in another country than ever before. Both technology and politics have increased the opportunities for "substitutability" that add to competitive pressures in areas traditionally considered either monopolies or with such high capital requirements that few players would enter the market. The regulators themselves have been permitting or advocating some degree of competition as the best route to various economic and social objectives.

The recent decisions of the Canadian Radio-television and Telecommunications Commission ("CRTC") on interexchange competition[25] and adjustments to the regulatory framework to further increase communications competition[26] are indicia of the changing climate. Deregulation in transportation has reduced the opportunities for regulatory intervention, but it also means that the occasional need for regulatory approvals are now taking place in an atmosphere of fierce inter and intramodal competition. Regulators will be increasingly dealing with issues that mingle competitive and noncompetitive activities and will deal with competitive information in making regulatory decisions.

It is not sufficient to say that the competitive aspects of a regulated entity's activities are or should be subject to forbearance and the purview of another regulator — the Director of Investigation and Research and the Competition Tribunal.[27] Rarely in practice can the lines be neatly and completely drawn between all those aspects of an enterprise that are competitive and unregulated and those that continue to be regulated. Rarely is one area without effects and influences on the other, particularly where accounting separations are a primary regulatory tool to guard against cross-subsidization. Thus, better tools to analyze information and better procedures to deal with it have to be used.

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24. The choices of a regulated company are constrained as compared to those of its nonregulated counterparts. This is, of course, the purpose of regulation. But it has long been accepted that the regulated company received benefits from being regulated; indeed, some have argued that these benefits are sufficient that a company might seek out the status of being regulated. The regulated company may take on obligations in return, however, such as being a common carrier or the carrier of last resort. The obligation to serve less attractive markets, such as the far North and Arctic in Canada, has been an implicit and explicit part of the bargain for airlines prior to "deregulation" and continues for telephone companies. Note also that the "regulatory bargain" in the information sense is similar to that of the patent regime: a limited-time monopoly is granted in exchange for disclosure.

25. CRTC Telecom Decision 92-12.

26. CRTC Telecom Decision 94-19.

27. The CRTC, for example, is required to forebear from regulating certain competitive activities: *Telecommunications Act*, S.C. 1993, c. 38, s. 34. The Competition Tribunal, of course, has its own procedures to deal with competitive information.

V. TREATMENT OF CONFIDENTIAL INFORMATION BY REGULATORS

A. Traditional Approach

The regulatory bargain has historically not required the extensive development of statutory rules that can guide tribunals in determining when confidential information should be divulged. With very few exceptions, the subject was not addressed in the enabling statutes that set up tribunals and gave them their powers. The provisions of the *Railway Act* are noted as an early statutory example dealing with confidentiality. The *Railway Act* generally says that costs and other information of a confidential nature shall not be divulged by a regulator unless it is necessary in the public interest that the information be made public.[28] This was not helpful and essentially placed the burden on the regulator to define the test of when the public interest requires the disclosure of information that might otherwise be considered confidential. The bias in favour of confidentiality runs contrary to current views on disclosure.[29]

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28. *Railway Act*, R.S.C. 1985, c. R-3, s. 358.

29. The history of the regulation of railways may have some relevance to the approach to confidentiality found in section 358. The original regulator was the Governor in Council, pursuant to either the original charters or the *Railway Clauses Consolidation Act*, 14-15 Vic. 1851, c. 51. After 1888, the regulator was the Railway Committee of the Privy Council (a group of Ministers appointed by the Governor in Council pursuant to the *Railway Act*, 51 Vic. 1888, c. 29). The powers of the Railway Committee were transferred to the Board of Railway Commissioners in 1904 pursuant to the *Railway Act*, 3 Edward VII 1903, c. 58; this statute was the forerunner of the current *Act*. The history indicates the possibility of a "gentlemen's agreement" where publicity wouldn't necessarily have the value ascribed to it today. Even using the current language of the *Railway Act*, however, an evolving concept of "public interest" might require more disclosure than the view that was taken nearly a century ago. This view would be consistent with the approach taken in the *CRTC Telecommunications Rules of Procedure*, SOR 79-554, as amended by SOR 86-832; SOR/93-49, s. 19. For a fuller discussion of the CRTC procedures, see J.H. Francis, Q.C., *Confidential Information in the Regulatory Context: The Legal and Policy Issues* (CAMPUT May, 1992); M. Ryan, *Canadian Telecommunications Law and Regulation* (Scarborough: Carswell, 1993) at §815.

B. Current Approaches

Two tribunals that regularly deal with confidential information are the Canadian International Trade Tribunal and the Competition Tribunal. The paper by Neil Campbell, "The Confidentiality of Commercial Information in a System of Open Justice",[30] describes the approaches used by those tribunals to deal with confidential information.

One of the newest legislative regimes for dealing with confidential information is found in sections 38 and 39 of the new *Telecommunications Act*.[31] Section 38 provides that the Commission shall make available for public inspection any information submitted to it in the course of proceedings. This is qualified by section 39, which states that any person who submits certain types of information may designate it as confidential and that this information must not be disclosed except where the Commission "determines, after considering representations from interested persons, that the disclosure is in the public interest".[32]

Legislatures have enacted statutes that provide for access to information[33] that can affect the maintenance of commercial information provided by a party in confidence by a regulator. The regulator should be aware of the interaction of these statutes with the considerations in the context of a hearing. Generally the regulatory disclosure regime and the access regime are intended to work in tandem:

> *It is important to note that the two different schemes for providing access to government information are not co-extensive. In certain circumstances, it might be more advantageous for an individual to seek to exercise access rights under one of these schemes rather than the other. For example, an individual who is subject to a decision-making process involving a formal hearing will be entitled to obtain access to information prior to a hearing which may, in some instances, be exempt from access under the freedom of information scheme.*[34]

The criteria involved in maintaining confidentiality in a quasi-judicial hearing and determining whether an exemption from disclosure under an access provision applies

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30. N. Campbell, "The Confidentiality of Commercial Information in a System of Open Justice", published in this volume.

31. *Supra* note 27 s. 38.

32. *Ibid.* s. 39(4).

33. For example, *Freedom of Information and Protection of Individual Privacy Act*, S.O. 1987, c. 25; the federal *Access to Information Act, supra* note 10; (U.S.) *Freedom of Information Act*, 5 U.S.C. § 552 (1966) [Note: the U.S. FOIA is a section of the U.S. *Administrative Procedures Act*; actual decision making by administrative agencies is required to be public by the U.S. *Sunshine Act*, 5 U.S.C. § 552b (1974).

34. L. Murdoch, *Commission on Freedom of Information and Individual Privacy*, vol. 2 (Toronto: Queen's Printer of Ontario, 1980) at 396. See also, Information and Privacy Commissioner of Ontario, Order 53 (20 April 1989) at 7-8.

are not identical.[35] The access statutes do not specifically address economic regulation and the particular problems faced by regulators. The result of the interaction of the two schemes, however, will always be in favour of disclosure. An item that might be confidential under a freedom of information and protection of privacy scheme may properly, and necessarily, be fully or partly disclosed because of the requirements of natural justice.[36] Conversely, freedom of information legislation may override provisions for confidentiality in other legislation.[37]

It would not appear to serve any useful purpose for a regulator to apply stricter criteria for confidentiality in a hearing than would apply under the relevant access legislation. Refusing disclosure of information to interested parties when anyone can apply and succeed in obtaining it does not enhance a tribunal's credibility.[38] There may be situations, however, when other factors — the public interest (as defined in regulatory legislation and regulatory case law, not in the access statute) or natural justice — require disclosure or the partial disclosure of information that would indeed be exempt from disclosure under an access regime. At best, access and privacy legislation are potential sources of policy guidance. As the next paragraphs indicate, the intellectual analysis in determining confidentiality under an access regime where commercially sensitive information is involved is very similar to the analysis that should be used by a regulator in a hearing. Access legislation, however, is not designed to address evidentiary matters or determine what procedures a tribunal should follow when considering confidential information.[39] Therefore, it appears that in devising rules that can be consistently applied and in creating procedures that are fair to all parties and that take account of the objective of oversight, more work needs to be done.

The first issue to be addressed by the tribunal is the question of the onus — who has the burden to prove that information should be kept confidential or should be published? The *Railway Act* would imply that the burden is on the regulator to show that

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35. For example, a requester under an access regime does not generally have to prove need or even, in some cases, identify himself. A regulator would consider relevancy and possibly the correlation of need and the cost of obtaining the information before requiring the filing and disclosure of information or approving interrogatories requested by parties.

36. *H.* v. *The Queen et al.* (1986), 17 Admin. L. Rev. 39 (F.C.T.D.). The U.S. Federal Energy Regulatory Commission (FERC) follows a similar approach: information that is exempt from disclosure to the general public under the U.S. FOIA may be subject to discovery if it is relevant and not privileged; *Columbia Gas Transmission Company*, 44 FERC ¶ 61,090. For a general survey of the approach used by American public utility regulators, see S.M. Fetter & G. Kitts, *Regulatory Commission Treatment of Proprietary Information under Freedom of Information Statutes*, Seventh NARUC Biennial Regulatory Information Conference (Sept. 12-14, 1990) Columbus, Ohio.

37. *Canada (Commissioner)* v. *Canada (Immigration Appeal Board)* (1988), 51 D.L.R. (4th) 79 (F.C.T.D.).

38. This is to be distinguished from the situation where information is not made available by a regulator because of lack of relevancy or other regulatory considerations.

39. Although, as noted below in the text, the experience of the courts in reviewing access privacy requests or dealing with trade secret litigation provides models for the regulator in dealing with confidential commercial information in a regulatory hearing.

the public interest requires disclosure.[40] The structure of the *Telecommunications Act* has similar implications. As noted above, the *Railway Act* provisions would appear to be outdated in light of increasing emphasis on natural justice, fairness, the accountability of regulators, public participation and consultation, and access to information regimes. The *Telecommunications Act*, however, is a brand-new statute that shows the latest parliamentary thinking on the subject. It provides some guidance in defining confidential information, but leaves process and other considerations to be developed by the Commission.

CRTC Rule 19 deals with confidentiality claims.[41] The party seeking to claim confidentiality must provide details as to the nature and extent of the specific direct harm that might result.[42] However, a party seeking disclosure of a document that has been designated confidential may file a request for disclosure setting out reasons, including the public interest in disclosure, and any documents supporting the request.[43] The Commission may also, on its own motion, seek to place a document on the public record. What factors constitute an overriding public interest are left to the Commission's discretion. The rules of the U.S. Federal Communications Commission require that a party seeking confidential treatment must demonstrate on the preponderance of the evidence that nondisclosure is consistent with the provisions of the U.S. *Freedom of Information Act.*[44] The public nature of regulation should clearly place the onus on the party advancing the claim of confidentiality to support it.[45]

This may seem self-evident, but it has to be articulated clearly if the parties are to know from the beginning where they stand. Who has to make the case is the first step. If, as has been posited, it is consistent with the regulatory bargain and the open nature of a quasi-judicial proceeding that the burden be placed on the regulated firm, the question next becomes: what must the regulated firm do to establish that the material should be maintained in confidence?

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40. In fact, both the Canadian Transport Commission and the CRTC did require that the party claiming confidentiality demonstrate that harm would result from disclosure.

41. *CRTC Telecommunications Rules of Procedure*, *supra* note 29.

42. *Supra* note 29 rule 19(2).

43. *Ibid.* rule 19(6).

44. FCC Memorandum Opinion and Order, FCC 90--58, Adopted Feb. 6, 1990, applying § 0.459 of the Commission's Rules, 47 C.F.R. (1988). The U.S. FOIA requires a showing of "substantial competitive harm".

45. This view is consistent with the onus relating to disclosure in access to information regimes. For example, section 53 of the Ontario *Freedom of Information and Protection of Individual Privacy Act*, *supra* note 33 states: "Where a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head". With respect to the Federal Act, see *Re Maislin Industries Ltd.* v. *Minister for Industry, Trade and Commerce et al.*, [1984] 1 F.C. 939 (T.D.); 10 D.L.R. (4th) 417.

The firm must first have submitted the information in confidence to the tribunal.[46] Whatever the history or characterization of the material, it is possible that this particular filing or hearing may be the occasion for divulging previously secret information. If not, the confidentiality of the filing should be clear and explicit. While certain access regimes recognize "implicit confidentiality", the public and open nature of regulation would make it appropriate that the burden of identifying the information desired to be kept confidential also be squarely placed on the party seeking confidentiality.

The firm must next show that the information has a confidential character. Merely filing information "in confidence" does not make it confidential. It must be shown to be treated as such by the regulated firm.[47] One expert has reviewed the intellectual property caselaw in this area:

> *The following factors are amongst the more important ones used by judges to determine whether information is sufficiently withdrawn from the public domain to be treated as confidential: (i) the extent to which the information is known outside the business; (ii) the extent to which it is known by employees and others involved in the business; (iii) the extent of measures taken to guard the secrecy of the information; (iv) the value of the information to the holder of the secret, and to its competitors; (v) the amount of effort or money expended in developing the information; (vi) the ease or difficulty with which the information can be properly acquired or duplicated by others; (vii) whether the holder and taker of the information would reasonably recognize that the information was being imparted in confidence; (viii) any reasonable industry practice treating the information as secret, especially if known or acted upon by the parties.*[48]

The next critical step is that the regulated firm must show that it is likely that it will sustain specific direct harm if the information is divulged. The likely harm must be identifiable; it cannot be vague and hypothetical.[49] The Ontario *Freedom of Information and Protection of Privacy Act* would require that disclosure would "prejudice significantly" the competitive position of the provider of the information (the so-called

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46. Subsection 39(1) of the *Telecommunications Act*, *supra* note 27, permits a person submitting certain confidential commercial information to designate it as confidential. The ultimate characterization as "confidential" appears to be up to the submitter; the Commission does not release the information because it has found that it is not confidential, but because it believes "disclosure is in the public interest" or that there is no "specific direct harm".

47. The federal *Access to Information Act*, *supra* note 10 s. 20(1)(b), requires that the third party supplying the commercial information to the government consistently treat it as confidential if exemption from disclosure is to be obtained. This is not a specific requirement under the Ontario Act, for example, but it must surely be an evidentiary point in seeking protection from disclosure. A similar analysis would seem appropriate for a tribunal's determinations on this issue.

48. *Supra* note 16 at 24, footnotes omitted.

49. See, for example, *Canada Packers Inc. and Canada (Minister of Agriculture)* (1989), 53 D.L.R. (4th) 246: requirement of a "reasonable expectation of probable harm"; *Re Daigle* (1980), 30 N.B.R. (2d) 209: cannot rely on a "speculative loss or gain...".

"third party") before disclosure would be denied,[50] so it would be counterproductive for a provincial regulator to require less in Ontario. The existence of such a criterion in a neighbouring jurisdiction would also surely be an evidentiary point in determining the likelihood or significance of harm when the matter is being considered by other regulators.[51] It is unlikely, for example, that provincial undertakings are hardier competitors than their federal counterparts, whose regulators would consider the federal *Access to Information Act*, which leaves the words "prejudice" and "interfere" unadorned.[52] One might also look to examples in the United States, particularly in these days of free trade. Companies in the United States may be required to file extensive information with various regulators, such as the 10K forms filed with the Securities and Exchange Commission or the detailed route and financial information filed with the Interstate Commerce Commission. These firms would not appear to suffer significant harm from this disclosure. In any event, the public interest is considered to override any embarrassment that might be caused. Similar disclosure is unlikely to harm Canadian firms. This is particularly true if they already file the information in the United States. In any event, the availability of information in another context is a relevant factor in determining whether the information has been treated by the regulatee as "confidential" and what the likelihood and severity of detriment or prejudice might be.[53]

It should be noted that if information is considered to be available publicly in one context (such as a corporate or securities filing or a filing in a certain type of regulatory case), it is unlikely to meet all the tests required for confidentiality in another context. Data that is appropriately public in a general rate case, for example, is likely to be appropriately public when dealing with a customer complaint. The fact that its context in the one case might make it easier for a competitor to draw some hypothetical conclusions that might require greater analysis in the other case does not change either the confidential nature (or lack of it) of the information or the likelihood of real direct harm or prejudice.[54] In this sense, the information is context neutral. A given level of potential harm, however, may carry different weight in different regulatory proceedings because the competing interests of the other parties may be of varying importance in different types of hearings.

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50. Ontario *Freedom of Information and Protection of Privacy Act, supra* note 33 section l7.

51. "Substantial competitive harm" is the test accepted in *National Parks and Conservation Association* v. *Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) in relation to the U.S. *Freedom of Information Act*.

52. *Access to Information Act, supra* note 10 s. 20(1). The *Telecommunications Act, supra* note 27, is similarly unadorned; indeed, disclosure need only "affect" contractual or other negotiations, although a "material" loss or gain is required. Telecom Rule 19, *supra* note 29, deals with "specific direct harm" and involves a test of weighing the harm against the public interest. While in theory the nature of the public interest in regulatory proceedings should require that harm be substantial before it would outweigh the interest in an open, accountable process, the likely effect is to place too much weight on the side of confidentiality.

53. *Franchi and others* v. *Franchi and others*, [1967] R.P.C. 149; publication in a foreign country removes status of confidentiality.

54. This question of context is reminiscent of the situation of an experienced securities analyst compared to that of the average investor. Information will always mean more to the expert and information that may not be material to the general player in the market may give significant messages to the expert. The expert, however, will not be trading on undisclosed material information if she simply applies her expertise and honed instincts about the market.

This can be distinguished, however, from the situation where the confidential nature of the information has changed over time. Usually information that is confidential at one point in time will become less so as time passes and the information becomes "stale". Indeed, this is an important characteristic of "commercially relevant business information". A confidentiality determination cannot be static and, within reason, may have to be made more than once. In many of the cases we are concerned about, however, a particular *type* of information that may once have been public may now be best kept confidential because of some change in industry, regulatory, or market conditions.[55] It would be farcical, however, to make confidential a particular piece of information that was public in an earlier proceeding simply because changed market conditions would now make it more sensitive. The context may have changed, but one cannot pretend that it cannot be found by reviewing the earlier record. A changing characterization of data as currently confidential may simply be one of the prices of a changing regulatory environment.[56]

Beyond this, however, there is a need to become much more critical about questioning the reality and likelihood of harm and the reality of the "confidential" label. Does the company really treat the information as a secret, or do a number of people have access to it? Is the company willing to describe the processes used to keep the information confidential or has there been an automatic knee-jerk use of a red "Confidential" stamp that would indicate that little or no thought has gone into the request?[57] The CRTC noted, for example, that "too often parties making claims for confidentiality have been providing only brief, vague, standardized reasons for request".[58]

Where significant and likely direct harm is likely to occur, the regulator should have assurances that the information is controlled and treated by the company as the valuable and sensitive commodity they ask the tribunal to believe it is. The requirement that the projected harm not be vague would also require that company to give some realistic assessments of what the harm might be. Phrases such as "Our competitors will use this information against us" are not helpful and do not permit the regulator to make a

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55. The *type* of information that was once public may now require confidentiality, but specific information continues to retain its public character even if it is more meaningful to a competitor than it once was. In most cases, however, commercial information has a short confidential life span, in contrast to the trade secret formula or process.

56. A new "confidential" characterization of data that was specifically in an earlier public record would also only give an advantage to the larger and more sophisticated players who have the capacity to search records and correlate data.

57. In hearings I have received "confidential" copies of city maps that could be purchased at the corner store, blank copies of surveys that had been distributed to 500 people, and information clearly listed in filings before the Interstate Commerce Commission or the Securities and Exchange Commission. In each case I was assured by counsel that any publication of these "sensitive" documents would cause untold harm to the client. I was not convinced.

58. Letter from the Secretary General, Allan J. Darling, Re: Treatment of Confidential Documents, March 10, 1994. Mr. Darling states, at 2, that "many such claims are supported only by language such as: This information is submitted in confidence, since its release to competitors would result in specific direct harm to the company".

meaningful decision on the matter.[59] Because of the potential importance of the issues at stake, there is no reason why a regulator should be any more satisfied with vague and unsubstantiated evidence on this point than it would be with vague and unsubstantiated evidence on the larger regulatory issue to be decided, such as rates, entry or discrimination.

59. The regulator is not alone in finding these arguments unhelpful. In *Sorbara, supra* note 13, Master Cork found that an affidavit by counsel, not by the concerned party, that "gave no specifics as to even probable damage" was insufficient. In Order No. 36, the Ontario Information and Privacy Commission found a denial by the Ministry of Industry, Trade and Technology to be unjustified: "I find the third party's statements to be generalized assertions of fact in support of what amounts, at most, to speculations of possible harm". Of course, in that case the Ministry's and the third party's arguments were undercut by the fact that most of the information had been disclosed in an official News Release by the Ministry.

VI. TECHNIQUES TO HANDLE CONFIDENTIAL INFORMATION

There are a number of methods that can be used by tribunals to deal with confidential information; most of them have been used by courts in dealing with trade secrets or under special applications, such as reviews of freedom of information requests. The spectrum of techniques ranges at one end from simply refusing to accept any information that is not public, to allowing only the tribunal to view the information and refusing access to the parties in the hearing at the other end.

The first technique can be useful in some situations and should not be forgotten. Elaborate confidentiality procedures and careful considerations of the degree of potential harm, etc., are not always necessary. If the evidence is not highly probative or not required by the tribunal in order to make a decision in the public interest and the party has a high degree of discretion in deciding what evidence it wants to put forward to make its case, then the tribunal can simply set out the ground rules of a public procedure and let the party decide what it wants to do.

At the other extreme, the tribunal receives confidential evidence that is not revealed to the parties. The decision is therefore being made on the basis of information that cannot be tested or disputed by an affected party. While on its face it is unfair and violates the rules of natural justice, this approach can be justified in exceptional circumstances. I would suggest that the evidence should be highly relevant and probative before such exceptions should be made. I would also suggest that this is only appropriate where the competing values are both of a high order — "superordinate" to use Chief Justice Dickson's words.[60]

Thus, in hearings before the Parole Board, where the issues at stake are liberty for the applicant and the safety of the community on one hand, and the life or safety of an informant on the other hand, evidence has been accepted that was not revealed to the applicant prisoner.[61] The issues at stake are sufficiently important that the tribunal must have all the evidence available to make the best possible decision, that is, the consequences of error are high. Furthermore, the value of the life and safety of the informant is sufficiently high that it has "superordinate importance". These factors justify the exception to the general rules of both openness and procedural rules of fairness. Although this technique has been used by regulators, it is the rare case in which the values at stake have the "superordinate importance" to justify its use.[62]

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60. *Supra* note 3.

61. *Supra* note 36; P. Petraglia, "Confidential and Sufficient Information: Procedural Fairness" (1986) 2 Admin. L.Rev. 46.

62. A variation of this technique is to disclose the evidence to a staff member, who prepares a report or summary for the hearing panel; the report is not available to the parties. It's hard to see why the interposition of a staff member is preferable: the tribunal members cannot personally assess the evidence and the parties are still denied access.

There are other techniques between these two extremes that are more commonly used by tribunals and are more likely to balance the competing interests in a regulatory hearing. Occasionally, simply excluding the general public from the hearing is sufficient; the evidence is taken *in camera* and separated from the public record. In a "paper" hearing, the evidence is separated from the public record. More often, however, the concern relates to the other parties. The most common technique is disclosure to legal counsel pursuant to their undertakings not to disclose the information, even to their own clients.[63] While this may leave counsel in the uncomfortable position of being unable to receive fully informed instructions from the client, it is generally a very workable procedure. Some tribunals and courts have required that counsel be specially qualified in some way, for example, have security clearance.[64] In some circumstances, only a summary or other limited form of the information is provided, but in the regulatory context this is rarely justified.[65] In trade secret litigation, full access is routinely provided to counsel; if this has been a satisfactory technique for over a century in an area where disclosure effectively destroys the secret and its value, it should work in the regulatory area where the commercially sensitive information generally has a more limited life span.

When the information is technical or financial, independent experts or accountants may be permitted to review it to advise counsel or, in some cases, to advise the tribunal, with the expert's report being made available to counsel (who usually undertake not to reveal the report to the clients).[66] While experts may feel personally bound by undertakings and may occasionally be subject to the discipline of a professional body, they are usually not in the same position as counsel to provide confidentiality undertakings to the tribunal. This raises the issue of the use of protective orders.

Protective orders (or confidentiality orders) have been used for many years by the courts in trade secret litigation.[67] It is also frequently used by American public utility regulators.[68] Most of the experience has been in the telecom area, but increased deregulation has meant that larger numbers of protective orders are likely to be issued in natural gas and electricity proceedings.

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63. *Re Magnasonic Canada Ltd. and the Anti-Dumping Tribunal* (1973), 30 D.L.R. (3d) 118 (F.C.A.). A formal undertaking by counsel may not be required.

64. *Supra* note 20. There may also be concern about counsel from other jurisdictions; apparently, the Canadian International Trade Tribunal is reluctant to divulge information to foreign counsel, although Canadian counsel are permitted to have access. Presumably this concern is based on fears related to the rapid and easy enforcement of undertakings, see text below, and not xenophobia.

65. Where personal information was involved and only the type of information rather than its specific content was necessary in the circumstances, a summary or listing of information was provided; *Hunter, ibid.*

66. A "surrogate viewer" can also be used, such as an Office of Public Counsel, if the appropriate body exists.

67. For example, *Procter & Gamble Co.* v. *Kimberly-Clark of Canada Ltd.* (1987), 16 C.P.R. (3d) 523; *Warner-Lambert Co.* v. *Glaxo Laboratories Ltd.*, [1975] R.P.C. 354 (C.A.). See, J.D. Kokonis, Q.C., "Litigation as to Trade Secrets — Confidentiality Orders" in R.T. Hughes, Q.C. ed., *Trade Secrets, supra* note 16.

68. S. Fetter & G. Kitts, *supra* note 36 at 18; of the 43 states responding to their survey, 35 used protective orders. In some states, the order must be issued by a court.

A typical protective order states (i) that all confidential information or trade secrets will be dealt with by the terms of the order; (ii) that the information will be given only to counsel for the purposes of the proceeding; (iii) that counsel may divulge the information to their experts for the purposes of the proceeding; (iv) that the experts must be independent of the client; (v) that prior to divulging information to the experts, counsel must deliver a copy of the protective order and obtain the written agreement of the expert that he or she will be bound by it; (vi) that copies of the information will be delivered to counsel if feasible or, alternatively, made available for inspection; (vii) that any disagreement about the confidentiality status of information will be resolved by the regulatory commission; (viii) that the regulatory commission's counsel and staff will be bound by the order; (ix) that the regulatory commission will seal and segregate any responses to interrogatories or other confidential evidence it receives; (x) that all persons who are given access by virtue of the order agree to use the information only for the conduct of the proceeding and shall take reasonable precautions to keep the information secure; (xi) that the parties retain the right to challenge admissibility, relevance, etc.; (xii) that upon completion of the proceeding, all the confidential information will be returned to the party that supplied it with the exception of information that is made part of the record by the regulatory commission.[69]

Protective orders have some advantages over simple undertakings. In regulatory hearings, unlike trade secret litigation, only a portion of the evidence is likely to be determined to be confidential and there is likely to be a time limit to its sensitivity. Protective orders allow the regulator to more carefully delineate the scope of the protected information, to require severances and summaries, to set time limits on the order, to tailor the order to the individuals (for example, counsel, experts, noncompetitor parties such as public interest intervenors, and staff), and to structure the process so that the maximum evidence and argument are presented publicly. The process of negotiating and creating an order should force the tribunal and the parties to more carefully consider the competing interests of privacy and the public process of the justice system, as well as limit the areas of secrecy to those where the individual interests — and hence the public interest — would be harmed by disclosure. It is important that the tribunal be involved in the structuring of the protective order. An arrangement between parties (particularly between parties who are likely to find their positions reversed in the future) where the confidentiality designation is negotiated, can mean that the comfort of the parties rather than the public's right to openness and accountability governs. The tribunal cannot assume that the parties are adverse in interest when it comes to negotiation of confidentiality and should not abdicate its responsibility to ensure that evidence treated as confidential remains at the appropriate minimum.

There are problems with tribunal protective orders, however. Regulatory tribunals have limited methods of enforcing these orders. While they have powers to control their own procedures and establish rules of procedure, they rarely have contempt

69. Summary of order in *The Mountain States Telephone and Telegraph Company et al.* v. *The Department of Public Service Regulation*, 634 P.2d 181 (Mont. S.C. 1981).

powers.[70] In general, any order of the tribunal must be enforced by a court[71] or the tribunal must request a court to punish contempt.[72] The nature of confidential information is such that delays in enforcement can render the question of protection moot. The delays and uncertainties of court applications can make protective orders less attractive when highly sensitive information is at stake.[73] Furthermore, not all tribunals are confident that courts fully appreciate the seriousness of these issues and will respond with the alacrity and severity the breach of a protective order warrants. The answer to this problem is probably not to legislate a broad contempt power for regulatory tribunals, but to ensure that courts consider protective orders to be as immediately deserving of enforcement as their own orders. While tribunals generally do not seek greater court oversight of their activities, the routine filing of protective orders with the courts and even the explicit adoption of these orders pursuant to specific legislation would give them a higher juridical profile and enhance their enforceability.

It should be noted, however, that in some circumstances regulatory tribunals have an enforcement advantage over other types of tribunals, including the courts. The same parties — and counsel and experts — tend to appear over and over again before the tribunal. There may be an on-going supervisory jurisdiction over the regulated firm. While informal, this reality can enforce a code of conduct for the parties and their counsel that goes beyond the precise terms of an undertaking or a protective order. Depending on the regulatory regime and the tribunal's powers, profits obtained from activities that violated the protective order can be discounted and adjustments made to reduce the benefit of the violation to the regulated firm. In any event, actual violations of protective orders may be rare. Although they also usually lack contempt powers, the American public utility commissions that have had longer experience with protective orders have seldom had difficulties with violations.

There is an additional sensitivity about protective orders, however, that has not to date been adequately recognized in Canada. This concerns the role of the professional staff of regulatory tribunals, and possibly even the tribunal members themselves. Staff play important roles in regulatory tribunals; this fact is recognized by their frequent movement

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70. A rare exception is the court-like Competition Tribunal; *Chrysler Canada Ltd.* v. *Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394. See, J. Sprague, "Exploring Ex Facie: Determining the Authority of Administrative Agencies to Punish for a Contempt Not Committed in the Presence of the Agency" (1993) 6 Can.J.Admin. L.P. 331.

71. In some cases, a simple filing of a tribunal order with the court gives the order the status of a court order: *National Energy Board Act*, R.S.C. 1985, c. N-7, s. 17; *Ontario Highway Transport Board Act*, R.S.O. 1990, c. O.19, s. 17. Recent amendments to the Ontario *Statutory Powers Procedure Act*, *supra* note 19, provide that a certified copy of an order of a tribunal may be filed in the Ontario Court (General Division) and will be deemed to be an order of the court: Bill 175, third reading, December 1, 1994.

72. *Supra* note 19, section 13 provides authority for the tribunal or another party to state a case to the Divisional Court to inquire into the matter and, after a hearing, to punish or take appropriate steps in the same manner as if the person had been guilty of contempt of court.

73. The Indiana Public Utilities Commission, for example, has refused to issue protective orders because of its lack of contempt jurisdiction; *Fetter & Kitts*, *supra* note 36 at 28-29. The Indiana Chief Administrative Judge was also concerned that an impecunious party might release information and then later be judgment-proof against an order for compensation; *ibid*. at 21.

from tribunals to senior positions in industry. Most tribunals have not developed specific conflict guidelines for tribunal members, let alone staff.[74] In the United States, protective orders frequently include the commission staff. The role of American staff and administrative law judges is not identical to that of staff in Canadian tribunals, but these orders nonetheless recognize a reality that has not been articulated in Canada. It is no comfort to a regulated firm if its market plans are disclosed by a former staff member of the regulator rather than by a competitor.[75]

74. The Ontario Securities Commission has conflict of interest guidelines for staff, reflecting their exposure to market information and potential capacity to influence the market. Several tribunals, such as the Ontario Workers' Compensation Board, have developed guidelines for tribunal members. Staff may be subject to general government guidelines, but these do not usually reflect the specific values and opportunities that are present in a tribunal. The Ontario Society of Adjudicators and Regulators and the Council of Canadian Administrative Tribunals are exploring the development of member and staff guidelines. The *Telecommunications Act*, *supra* note 27 s. 39(2)(3), specifically states that no person employed by or a member of the Commission shall disclose information designated as confidential.

75. There are gaps in the range of remedies available to a firm whose confidential information has been disclosed; it is not clear whether the firm would have an action against the staff member, who has probably left the government at that point and has been removed from the purview of employer discipline; *supra* note 17; Fetter & Kitts, *supra* note 36. Seeking a remedy also assumes that the regulated firm can identify the source of the information leak.

CONCLUSION

Canadian regulators are going to be dealing more frequently with the need to make arrangements to receive commercially sensitive information in hearings. Only in the rarest cases in which "superordinate" values are at stake should a regulator consider taking confidential evidence for use in decision making that is not available to the parties in the proceeding. In general, the protective order, combined with *in camera* hearings, is the best mechanism for the regulator to use. The formal requirement of negotiating and structuring an order should remind both the regulator and the parties of the nature of the order, which is an exception to the requirement and practice of open hearings.

Although most tribunals are likely to have the power to create protective orders, the scope of the power and the ability to enforce the order can be debatable. I would suggest amendments to either the enabling legislation of regulatory tribunals or to general procedural statutes in order to provide certain explicit powers in this area.

The power to create a protective order and to hold *in camera* hearings in conjunction with the order should be explicit to avoid uncertainty. At the same time, the legislation can reaffirm the value of openness and public scrutiny by reminding us of the exceptional nature of protective orders and outlining the considerations that must be balanced before a decision is made to consider evidence privately. Techniques, such as severance and summaries, should be incorporated into protective orders. Tribunals should be required to establish procedural rules to deal with both applications for confidential treatment and with the information that is subject to a protective order.[76]

Although proposals have been made that all tribunal orders should be capable of being filed with the courts for enforcement purposes,[77] tribunals at a minimum should be able to file protective orders with the courts for enforcement. The orders should include staff, and the legislation relating to the orders should reaffirm the confidentiality obligations of both tribunal members and staff.

The legislation, while providing that the courts can make whatever order they think fit, should also provide a range of possible curative or compensatory orders, including accounting of profits. While the emphasis should be on the narrow use of protective orders, any violation should be treated with great seriousness. The values of openness and accessibility are in fact enhanced when the rare exceptions are shown to be for the protection of information related to an important interest. Consequently, just as protective orders should not be entered into casually, neither should they be violated casually.

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76. *Supra* note 17 outlines some possible procedures, including designated confidential areas in offices and sign-outs by those who review the information.

77. R. Macaulay, *Directions*, Review of Ontario's Regulatory Agencies (Toronto: Queen's Printer, 1989) at 9-36 — 9-39. This recommendation was implemented in the new amendments to the Ontario *Statutory Powers Procedure Act*, *supra* note 19.