3. SUGGESTED NEW PROVISIONS FOR THE SECURITIES ACT, 2005

3.1 New Part XII: The Securities Market Tribunal

3.1.1 **Multiple Functions of the TTSEC**. In the Inception Report, the Consultants noted that the TTSEC has multiple functions. It administers securities law, investigates and adjudicates on breaches of the law, and it makes policy. This structure is similar to that of securities commissions in some other jurisdictions, including Canada. The Consultants recommended that the adjudicative powers of the TTSEC in respect of appeals from decisions of TTSEC staff and disciplinary matters brought by TTSEC's staff involving breaches of securities laws should be vested in a separate body, thereby leaving the TTSEC to administer the legislation and to act as a policy-making and oversight body. Under the proposed structure, the proposed "Securities Market Tribunal" would assume many of the adjudicative functions while the TTSEC would focus on policy making and oversight of its staff who administer the proposed *SA, 2005* (including investigation and enforcement) to ensure that the TTSEC's functions are exercised in accordance with its regulatory objectives and functions, and the purposes of the legislation. The TTSEC would continue to have an adjudicative function in respect of matters related to oversight of the market (such as cease trade orders and takeover bids). This is discussed in more detail below. [13]

3.1.2 **Resources**. The lack of resources to support a Tribunal was a concern expressed by a number of commentators on the proposal in the Inception Report. In the Interim Report, the Consultants expressed the view that it is unlikely that the Tribunal will meet often, particularly in the early years of its existence, and that it could be implemented with a minimal increase in resources (both legal and financial). The Consultants agreed that the establishment of a full time Tribunal is not justified at this time and recommended that the Tribunal be ad hoc, staffed as and when required.

3.1.3 **Interim Report**. In the Interim Report, the Consultants expressed the view that the modest resources required to establish the Tribunal will be money well spent. By clearly separating adjudicative and enforcement functions, regulatory oversight and enforcement would improve as would the perception of the TTSEC. The existence of the Tribunal should enhance confidence that the regulatory structure has built-in "checks and balances" and can provide a timely and impartial review of decisions of TTSEC staff. It should also give greater confidence to the public that market misconduct cases will be dealt with impartially and relatively quickly using efficient civil procedures, and that the Tribunal may order remedial measures as opposed to

[13] A similar recommendation was also made by Terry Chuppe in the Inter-American Development Bank's 2001 "Diagnostic Study of the Securities and Exchange Commission and Securities Industry of Trinidad and Tobago."

the criminal system which punishes offenders but does not assist victims.

3.1.4 **Ad Hoc Tribunal**. In Hong Kong, the securities legislation provides for a similar tribunal which may be chaired by a judge (including a judge or deputy judge of the Court of First Instance, a former justice of appeal, or a former judge of the Court of First Instance who sits on panels with two lay members). At present, the Hong Kong Securities and Futures Appeals Tribunal ("**SFAT**") is chaired by a sitting judge experienced in corporate and commercial cases and who chairs tribunal panels as and when required. (The other two members of the tribunal are appointed by the Chief Executive of the Hong Kong SAR.) The Consultants supported the use of this model for Trinidad and Tobago. However, concerns were expressed as to whether such a structure was feasible in Trinidad and Tobago. As a result, the Interim Report recommended that the President would have the power to appoint a Chairman, Vice-Chairman and other members of the Tribunal. In the early days, one could appoint a Chairman and compensate the Chairman based on a modest annual stipend plus a per diem rate (which would apply when the Tribunal is called upon to consider a case). Potential ordinary members could be appointed or might be identified but not appointed until the Tribunal was called upon to hear a case. Ordinary members would be paid a per diem rate. The role of the Registrar of the Tribunal could be performed by a staff member of the TTSEC. The premises for hearings could either be those of the TTSEC or the premises of the government or of the courts – no dedicated hearing premises would be required.

3.1.5 **Comments on Interim Report**. While some comments supported the Tribunal concept, some commentators continued to question the proposed establishment of the Tribunal. Concerns were expressed about resources, "political" appointments to the Tribunal of the chairman and members, and whether a two-thirds majority of Parliament was required to establish the Tribunal. If a Tribunal were to be implemented, commentators endorsed the suggestion that the Tax Appeal Board or the independent tribunal proposed by the Central Bank be used instead of a Tribunal dedicated only to *SA, 2005* matters.

3.1.6 **Conclusions**. While continuing to endorse the concept of a separate adjudicative function, the Consultants acknowledge the validity of the reservations of several commentators. In the view of the Consultants, the separation of the adjudicative function is more important than how that separation is achieved. A number of options for separating the adjudicative function are available, all of which minimize the resources required:

(i) the proposed Tribunal could be structured along the lines of the Hong Kong model or as described in the Interim Report;

(ii) the Tax Appeal Board's jurisdiction could be expanded to include securities matters, and membership could include persons with expertise in securities markets; or

(iii) the proposed independent Financial Services Tribunal to be established to hear appeals from decisions of the Central Bank and Inspector of Banks could also serve as the Tribunal for securities matters.

It is beyond the remit of the Consultants to engage in discussions with the Government, the Judicial and Legal Services Commission, the Central Bank and others on whether it would be appropriate to combine the proposed Tribunal with the Tax Appeal Board or the Financial Services Tribunal or to use a sitting judge. Accordingly, we recommend that the TTSEC explore these issues with the Government, the Central Bank and other interested parties and come to its own view. In the paragraphs that follow we describe the structure, jurisdiction, powers and operation of the Tribunal on the assumption that it will be a freestanding body. If a decision is made to combine the proposed Tribunal with the Tax Appeal Board, the Financial Services Tribunal or some other adjudicative body, appropriate amendments would need to be made. The proposed SA has been drafted so that the Part XII on the Securities Market Tribunal can easily be amended and replaced by references to the appropriate body (or removed in its entirety).

3.2 Structure, Jurisdiction and Powers of Tribunal

3.2.1 **Separation of Adjudicative Function**. The primary reasons for the recommendation to establish the Tribunal are as follows. First, the performance of multiple functions can strain the resources of the TTSEC and detract from the performance of its other functions. Conversely these adjudicative functions may result in appeals and disciplinary matters not being heard on a timely basis. Second, the adjudicative function also calls for different skills than the policy making, market oversight and investigation functions. Third, and perhaps most importantly, a structure where the staff report to the TTSEC and the TTSEC adjudicates on decisions of staff or disciplinary proceedings brought by the staff against market participants may give rise to concerns about "structural" bias or reasonable apprehension of bias.

3.2.2 **Structure is an Emerging Issue**. The multi-functional role of the TTSEC is similar to that found in Canada. In recent years, there has been greater impetus towards separating the adjudicative function. Since publication of the Inception Report, the multi-functional role of the Ontario Securities Commission has became an important policy issue in Canadian securities regulation. The Final Report of the Five Year Review Committee published in March 2003 recommended that the multi-functional structure be reconsidered on a priority basis. The following is an excerpt from the Final Report:

> *"We have considered whether the structure of the Commission, which permits it to develop policy, conduct investigations and adjudicate issues which come before it, should be modified. We reviewed the structure of other administrative tribunals in Canada, and of securities regulatory authorities in Canada, the U.S., the U.K. and Australia.*

We have also considered the case law in Canada concerning the functions of administrative tribunals.

The structure of the Commission, combining both regulatory and adjudicative functions in one administrative agency, is neither unique to the Commission nor contrary to the common law doctrine of reasonable apprehension of bias. The Supreme Court of Canada has considered multi-functional administrative agencies similar to the Commission on several occasions, and has consistently held that if the multiple functions are authorized by statute (as they are in the case of the Commission), the administrative tribunal cannot be attacked on grounds of reasonable apprehension of bias, solely because the structure, albeit statutorily authorized, expressly authorizes and directs it to perform overlapping functions.

The question, then, is not whether the current structure is permissible, but whether it is one which gives rise to perceptions of potential for conflict or abuse. This is a complex issue. There are advantages and disadvantages to both an integrated tribunal with "overlapping functions" as well as a bifurcated model where the investigative and adjudicative functions are performed by separate entities. We make no recommendation on this issue at this time other than to note that because the structure of a multi-functional agency can give rise to perceptions of potential for conflicts or abuse, the current structure of the Commission merits further thought and study on a priority basis."

3.2.3 **Report of the Fairness Committee**. In August 2004 the OSC released publicly the "Report of the Fairness Committee to the Ontario Securities Commission (Dated March 5, 2004)" (referred to as the "Osborne Report" after its chair the Honourable Coulter A. Osborne Q.C.). The Committee had been established by the OSC (which did not favour separation of the adjudicative function) to study the issue raised in the Final Report of the Five Year Review Committee and its mandate was to not recommend structural change unless there was clear and convincing evidence of the need for change. Despite the bias in its terms of reference against structural change, the Osborne Report came out with a strong recommendation for separation of the adjudicative function:

We would strongly advise the Commission to take steps to separate its adjudicative function from the Commission. The arguments supported by the evidence in favour of this separation are persuasive, indeed overwhelming. The evidence to which we refer goes beyond the now familiar complaints of some members of the securities litigation bar. Apart entirely from what might be characterized as anecdotal evidence, we received considerable expert opinion evidence on the governance issues we were asked to consider. A substantial preponderance of that evidence supports our central recommendation—that the Commission should do what is required to be done to establish an adjudicative tribunal that is separate from the Commission.*

We are satisfied that the nature of the apprehension of bias has become sufficiently acute as to not only undermine the Commission's adjudicative process, but also the integrity of the Commission as a whole among the many constituencies that we interviews. Matters of institutional loyalty, the involvement of the Chair in the major cases, the increased penalties, the sense that "the cards are stacked against them," the home-court advantage, the lengthy criminal law-like trials, and the Commissions aggressive enforcement stance, which likely will only increase over time, all combine to make a compelling case for a separate adjudicative body. (Page 32, Osborne Report)

** While the Wise Persons' Committee recommends that adjudication should be the responsibility of a separate body independent of a proposed National Securities Commission, it provides no analysis, nor did it respond to our letter asking for its analysis.*

The Osborne Report set out detailed recommendations for how an adjudicative tribunal should be established and operate. The Standing Committee on Finance and Economic Affairs of the Ontario Legislature endorsed the recommendations in the Osborne Report and the Ontario Government announced in November 2004 that it will implement the recommendations of the Osborne Report.[14]

3.2.4 **Hong Kong Model**. We noted above that Hong Kong created a structure where the adjudicative function is separate from the regulatory function when the Securities and Futures Commission ("**SFC**") was first established in 1989. At that time, the Securities and Futures Appeals Panel ("**SFAP**") was established to hear appeals from decisions of the SFC. In addition, an Insider Dealing Tribunal ("**IDT**") was established to hear insider trading cases which were brought following investigation by, and on recommendations from, the SFC. The separation of the adjudicative functions and the introduction of civil proceedings for hearing insider trading cases has been in operation for more than a decade in Hong Kong. The separation of the adjudicative function has been considered to be successful and had widespread support. In April 2003, Hong Kong implemented comprehensive new securities legislation, the Securities and Futures Ordinance ("**SFO**"). Under the new SFO, the SFAP was upgraded to the status of a statutory tribunal and its jurisdiction was expanded to enable it to review an expanded list of SFC decisions. At the same time, the IDT was reconstituted as the Market Misconduct Tribunal ("**MMT**") and its jurisdiction was expanded to include all forms of "market misconduct". The MMT has jurisdiction to inquire into and impose sanctions in cases of insider trading, market manipulation, false or misleading documents and other types of "market misconduct."

3.2.5 **TTSEC**. Under our proposals, the TTSEC would retain many of its existing functions as an administrative tribunal. It would continue to hold hearings in respect of matters generally related to market oversight including takeover bids, cease trading orders and oversight of the Stock Exchange. In addition to being part of the TTSEC's market oversight function, these matters are generally matters where the potential for perception of conflict of interest or reasonable apprehension of bias does not arise or is more limited. Generally speaking, market participants and TTSEC staff are not principal adversaries in such matters. The adjudicative functions proposed to be retained by the TTSEC include:

(i) Subsection 46(2) appeals from decisions of self regulatory organizations;

[14] Ontario Legislative Assembly. Standing Committee on Finance and Economic Affairs, "Report on the Five Year Review of the Securities Act" (October, 2004).

(ii) Section 143 hearings in connection with the power to order cessation of trading;

(iii) Section 144 powers to make orders in the public interest, including to grant exemptions or to require compliance with the *SA, 2005* or the by-laws;

(iv) Section 145 orders for penalty; and

(v) Pursuant to the proposed Take-Over By-Law.

TTSEC decisions in cases referred to in paragraphs (ii) to (iv) above would be appealable to the Tribunal. No further appeal would be provided from a TTSEC decision in respect of an appeal from a self-regulatory organization (paragraph (i) above) since the aggrieved person has already been granted an appeal to the TTSEC. Judicial review would be available for all of the decisions referred to above.

3.2.6 **The Courts**. Under the proposed new structure, the courts would retain their jurisdiction as a forum for judicial review, for enforcing administrative orders and issuing criminal sanctions, and for the appeal of certain decisions.

3.2.7 **Appeals and Disciplinary Matters**. The proposed Tribunal would have two functions:

(i) It would hear appeals of TTSEC and TTSEC staff decisions (made under delegated authority from the TTSEC) on administrative matters such as prospectus receipts and the registration of market actors and self-regulatory organizations.

(ii) It would hear cases at first instance involving alleged breaches of securities laws brought by the TTSEC (sometimes referred to as "market misconduct" or "disciplinary" cases). The Tribunal would have the power to impose civil sanctions on persons involved in market misconduct.

The jurisdictional scope of the Tribunal would be set out in section 162 (for appeals) and section 165 (for first instance cases of market misconduct) of the proposed *SA, 2005*.

3.2.8 **Structure**. Market participant comments on the Inception Report endorsed the separation of the adjudicative function from the regulatory, enforcement and policy making functions of the TTSEC. The TTSEC and market participants (including the Bankers Association of Trinidad and Tobago) observed that given the size of the local market and the more limited resources in Trinidad and Tobago, it was considered that the two functions of the Tribunal could be conducted by one body. This recommendation was adopted by the Consultants so that it was proposed in the Interim Report that there be only one Tribunal performing both functions. The

Tribunal would be a superior court of record and the Consultants understand it would have the powers inherent in such a court, in addition to the jurisdiction and powers granted to it under the *SA, 2005*. The Consultants note the submission of the Central Bank which states that a Tribunal that would act as a superior court of record would require sanction of a two-thirds majority of Parliament. The Central Bank also noted that recommendations have been made for the establishment of a similar tribunal under proposed amendments to the *Financial Institutions Act.*[15]

3.2.9 **Composition**. The Tribunal would consist of a Chairman who is required to be a judge of the High Court or an experienced attorney-at-law. The Tribunal would also consist of other members who would be chosen based on their knowledge or experience in law, securities and futures markets, commerce, finance, industry or accountancy. These ordinary members could be securities practitioners, former judges, lawyers, accountants, businessmen or former regulators. They could be appointed in connection with a specific case or for a specified term. The legislation would not restrict the types of persons to be appointed except that current members of the TTSEC would not be permitted to be appointed to the Tribunal (proposed subsection 159(9). The Chairman and any Vice-Chairman of the Tribunal would be appointed by the President, while appointments of lay members would be made by the Chairman (proposed subsections 159(1) and (2). Subject to the *SA, 2005*, the Tribunal would be free to make its own rules of procedure governing the commencement, hearing and determination of cases, including any rules of evidence (proposed section 168).

3.2.10 **Hearing Panels**. Each hearing panel would normally consist of the Chairman and two ordinary members (proposed section 161). However, the Chairman would also have the ability to consider the appeal or the market misconduct case as a sole member of the Tribunal with the consent of all parties. Hearings of the Tribunal would generally be open to the public (proposed subsection 164(1)). For purposes of a hearing, the Tribunal could receive and consider any material by way of oral evidence or written statements or documents or could order that written submissions be filed in addition to, or in place of, an oral hearing (proposed subsection 161(9)).

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[15] Letter of December 27, 2002 from the Central Bank of Trinidad and Tobago to the Securities Exchange Commission:

As stated above, therefore, it appears that the Appeal Tribunal would act as superior court of record, with the powers inherent in such a Court. If this is preferred intent of the TTSEC, it is to be noted that appointment of at least the legally qualified members would be required to be in line with members of a superior court of record in Trinidad and Tobago, as provided for in s. 104 of the Constitution.

Further, any creation of an Appeal Tribunal in the manner, and with the powers so envisaged, would require the sanction of a two-thirds majority in Parliament, and it would alter certain provisions of the Constitution. The creation of such a Tribunal would also require explicit provisions to be made with regard to its jurisdiction, procedure and the conditions of service of persons appointed to serve on the Commission. The question of incorporating a statutory right to appeal to the Court of Appeal on questions of law, (other than the usual right of judicial review) from decisions of the Commission should also be considered, and precedent for this approach has been set in the creation of the Industrial Court, and the Environmental Commission.

Finally, it should be noted that in the proposed amendments to the FIA, similar recommendations were made for the creation of an independent Appeals Tribunal to hear appeals from banks, financial institutions and insurance companies against the decisions of the Central Bank and the Inspector of Banks.

3.2.11 **Appeals**. The first function of the Tribunal would be to hear appeals of decisions made by the TTSEC, or TTSEC staff decisions made under delegated authority. The decisions appealable to the Tribunal would include:

(i) refusal of registration of a market actor (paragraph 162(1)(a));

(ii) unacceptable conditions to registration of a market actor or self-regulatory organization (paragraph 162(1)(c));

(iii) revocation or suspension of registration of market actor or self-regulatory organization (paragraph 162(1)(d));

(iv) refusal of a receipt for a prospectus (paragraph 162(1)(e));

(v) cease trading orders under proposed paragraph 143 (power to order cessation of trading); and

(vi) final orders under proposed section 144 (power to make orders in the public interest), which would include among other items, orders for reprimand or censure of a market actor, or an order that a person not act as a director or senior officer of a reporting issuer, or section 145 (orders for penalty).

The Tribunal would have the power to confirm, vary or set aside a decision of the TTSEC, its delegatee, or remit the matter back to the decision-maker for reconsideration (paragraph 164(2)(b) of the proposed *SA, 2005*). It would also have the power to issue any order, which the TTSEC or the delegatee could have done, such as issue a prospectus receipt or grant registration to an applicant (paragraph 164(2)(c)).

3.2.12 **Judicial Review**. It is proposed that no subsequent statutory right of appeal would be available from the Tribunal to the courts in cases where the Tribunal is exercising its appellate function (proposed subsection 164(5)). Recourse to the courts would remain available through the mechanism of judicial review.

3.2.13 **Market Misconduct**. The second function of the Tribunal would be to hear "market misconduct" cases at first instance. The TTSEC would generally bring actions against market actors, reporting issuers and other persons before the Tribunal. The jurisdiction of the Tribunal as a first instance body, as set forth in proposed section 165 (i.e. the definition of "market misconduct"), would extend to cover the following matters:

(i) allegations of market manipulation offences under sections 89 to 95 of the proposed *SA, 2005*;

(ii) allegations of illegal use or disclosure of undisclosed price sensitive information contrary to sections 97 or 98 of the proposed *SA, 2005*;

(iii) failure of a person to be registered in an appropriate category of market actor contrary to section 54 of the proposed *SA, 2005*;

(iv) allegations that a person is trading in securities without a prospectus contrary to section 76 of the proposed *SA, 2005*;

(v) allegations that a reporting issuer has failed to comply with Part V (Disclosure Obligations of Reporting Issuers) of the proposed *SA, 2005* or has otherwise breached section 73 (Part V offences) of the proposed *SA, 2005*; and

(vi) allegations of a breach of the Act under section 155 (general offence provision) of the proposed *SA, 2005*.

3.2.14 **Standard of Proof**. The standard of proof in hearings before the Tribunal would be the civil standard of "balance of probabilities" (proposed sections 164(4) and 165(9)).

3.2.15 **Powers and Sanctions**. The Tribunal would have the powers of a court and would be able to impose a range of civil sanctions consistent with the Constitution of Trinidad and Tobago. At the conclusion of any proceedings in which market misconduct is proven to the satisfaction of the Tribunal, it may do one or more of the following (subsection 165(5)):

(i) impose a fine on the person;

(ii) censure the person, including by means of publishing a written notice of censure;

(iii) make an order requiring the person to effect restitution or compensate any person for such period and on such terms as the Tribunal may direct;

(iv) make an order requiring the person to account for, in such form and on such terms as the Tribunal may direct, such amounts as the Tribunal determines to be profits arising from wrongdoing or any other form of unjust enrichment as determined by the Tribunal;

(v) make an order requiring the person to cease and desist from such activity as the Tribunal may stipulate;

(vi) make an order requiring the person to do any act or thing;

(vii) make an order prohibiting the person from becoming a senior officer or director of a reporting issuer or market actor; or

(viii) make an order requiring a party to the proceedings to pay a specified amount, being all or part of the costs of the proceedings, including those of any party to the proceedings.

3.2.16 **Alternative Routes**. The Tribunal would not be a criminal tribunal and would not have the power to impose criminal sanctions such as imprisonment. However, the prosecution of market misconduct offences would have two potential routes – one civil and one criminal. Accordingly, where an offence was serious enough to warrant sanctions that are more severe than the civil sanctions that would be available to the Tribunal, such matters could be referred to the Director of Public Prosecutions ("**DPP**") under proposed subsection 165(10) or simply taken up by the Director of Public Prosecutions itself.

3.2.17 **Dual Proceedings**. The Commission would not be prohibited from instituting proceedings before the Tribunal where the DPP has brought criminal charges since the objective of proceedings before the Tribunal would be primarily intended to protect the market and investors (e.g. seeking orders banning someone from acting as a director of a reporting issuer or ordering restitution or compensation for a person harmed by the market misconduct).

3.2.18 **Appeals**. Where the Tribunal acts as a first instance tribunal hearing market misconduct cases, a right of appeal would be available from the Tribunal to the Court of Appeal (proposed subsection 166(1)). The Commission or respondent who is dissatisfied with the decision of the Tribunal would be able to appeal on a point of law or, with the leave of the Court of Appeal, on a question of fact. An aggrieved person could also seek judicial review of a Tribunal decision.

3.2.19 **Standard on Appeal**. We note that common law courts generally give deference to decisions of a specialized body such as a securities commission. A recent decision of the Ontario Superior Court of Justice (*Donini v. Ontario Securities Commission*) expressed the approach of the courts to appeals as follows:

> *Much of this appeal was based upon an attempt to have the Court reassess the findings made by the panel in the course of its Reasons. This of course is not the function of this court, unless it can be determined that there is no reasonable way in which the facts as presented could establish the conclusion drawn by the tribunal. This is particularly so in cases where the tribunal has a special expertise which it is called upon to apply during the course of its deliberations. The OSC must exercise its public interest jurisdiction under s. 127 of the Act. As stated by Iacobucci J. in Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), [2001] 2 S.C.R. 132 at pp. 152 and 153,*
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> > *In this case, as in Pezim, it cannot be contested that the OSC is a specialized tribunal with a wide discretion to intervene in the public interest and that the protection of the public interest is a matter falling within the course of the OSC's expertise. Therefore, although there is no privative clause shielding the decision of the OSC from review by the courts that body's relative expertise in the*

> *regulation of the capital markets, the purpose of the Act as a whole and section 127(1) in particular, and the nature of the problem before the OSC all militate in favour of a higher degree of curial defence. However, as there is a statutory right of appeal from the decision of the OSC to the courts, when this factor is considered with all of the other factors, an intermediate standard of review is indicated. Accordingly, the standard of review in this case is one of reasonableness. See also Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557.*

Hopefully the courts in Trinidad and Tobago will adapt a similar approach to that taken by the courts in Canada when the local courts consider appeals from the TTSEC or the Tribunal.

3.2.20 **Conclusion**. The Consultants are of the view that the modest resources required to establish the Tribunal will be money well spent. By clearly separating adjudicative and enforcement functions, regulatory oversight and enforcement would improve. The existence of the Tribunal should enhance confidence that the regulatory structure has built-in checks and balances and can provide a timely review of decisions of TTSEC staff. It should also give greater confidence to the public that market misconduct cases will be dealt with impartially and relatively quickly using efficient civil procedures, and that the Tribunal may order remedial measures as opposed to the criminal system which punishes offenders but does not assist victims.