IN THE MATTER OF the *Public Inquiries Act*, S.O., 2009

AND IN THE MATTER OF the *Municipal Act*, 2001, S.O. 2001

AND IN THE MATTER OF the *Town of Collingwood Judicial Inquiry*

BOOK OF AUTHORITIES

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Commission scolaire de Laval c. Syndicat de l'enseignement de la région de Laval

2016 CarswellQue 1791, 2016 CarswellQue 1792, 2016 SCC 8, 2016 CSC 8, [2016] 1 S.C.R. 29, [2016] S.C.J. No. 8, 263 L.A.C. (4th) 275, 263 A.C.W.S. (3d) 396, 396 D.L.R. (4th) 1, 481 N.R. 25, 97 Admin. L.R. (5th) 177, J.E. 2016-507, D.T.E. 2016T-213

Commission scolaire de Laval and Fédération des commissions scolaires du Québec, Appellants and Syndicat de l'enseignement de la région de Laval and Fédération autonome de l'enseignement, Respondents and Centrale des syndicats du Québec, Intervener

McLachlin C.J.C., Abella, Karakatsanis, Wagner, Gascon, Côté, Brown JJ.

Heard: October 14, 2015
Judgment: March 18, 2016
Docket: 35898

Proceedings: reversing *Laval (Commission scolaire) c. Doré* (2014), D.T.E. 2014T-240, EYB 2014-234945, 2014 QCCA 591, 2014 CarswellQue 2355, 69 Admin. L.R. (5th) 95, Bich J.C.A., Gagnon J.C.A., Savard J.C.A. (C.A. Que.) [Quebec]

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Gascon J. **(McLachlin C.J.C., Abella, Karakatsanis JJ. concurring):**

I. Introduction

1 Any employee, whether in the public or the private sector, has a right to contest disciplinary action taken against him or her and can, in doing so, raise any relevant evidence. For this, the employee may examine the employer's representatives on the reasons for the action and on the decision-making process that led to it.

2 However, public law immunities protect decisions of an adjudicative, legislative, regulatory, policy or purely discretionary nature made by public bodies. As a result, there are sometimes limits on the right to examine members of the decision-making authorities of such bodies on the considerations on which their decisions are based.

3 The interplay of these rights and immunities can lead to conflict. This appeal involves one such conflict. At issue is the right of a public body's employee to examine members of a decision-making authority of his or her employer on the motives for their decision to dismiss the employee after deliberations held in camera.

4 The respondent Syndicat de l'enseignement de la région de Laval ("Union") filed a grievance with respect to the dismissal of a teacher. In the course of the inquiry into the grievance, the appellant Commission scolaire de Laval ("Board") objected to the examination of three commissioners who were members of its executive committee, which had decided in camera to dismiss the teacher. In the Board's view, the motives of individual members of a collective body that underlie a decision thus made by the body by way of a resolution are "unknowable", and therefore irrelevant. In addition, the executive committee's members were shielded by deliberative secrecy from being compelled to testify regarding their in camera deliberations.

5 The arbitrator dismissed the Board's objections and allowed the examination of the executive committee's members regarding their deliberations and their decision to dismiss the teacher. On a motion for judicial review, the Superior Court quashed the arbitrator's decision and barred any testimony by members of the executive committee except as regards the formal process that led to their decision that was announced at a public meeting. The majority of the Court of Appeal restored the arbitrator's decision and allowed the examination of the executive committee's members, subject to the usual limits of what is relevant.

6 I would dismiss the appeal. The principle that the motives of a legislative body are "unknowable" and deliberative secrecy do not apply to a public employer, the Board in this case, that decides to take disciplinary action against an employee, even if an in camera meeting is ordered. The three members of the Board's executive committee can be examined, subject to the limits of what is relevant and to the other rules applicable to the inquiry into the grievance. The arbitrator has exclusive jurisdiction to determine whether any questions that may be asked are relevant.

II. Facts

7 The Board is a legal person established in the public interest under the *Education Act*, CQLR, c. I-13.3 ("*EA*"). The Union, which is certified under the *Labour Code*, CQLR, c. C-27 ("*L.C.*"), represents a number of the Board's employees, including B, a vocational training instructor employed by the Board since March 2000.

8 In the winter of 2009, B's principal asked him to send a declaration concerning his judicial record to the Board's human resources unit. As a result of amendments made to the *EA* in 2006 (S.Q. 2006, c. 16), a school board must "ensure" that "persons who work with minor students and persons who are regularly in contact with minor students ... have no judicial record relevant to their functions within that ... board" (s. 261.0.2). The *EA* provides for a mechanism enabling the board to require a job applicant or an employee to send it a declaration concerning his or her judicial record (ss. 261.0.1 to 261.0.6). Where a school board notes that a person holding a teaching licence has a record it considers relevant to that person's functions, it must notably inform the Minister of that fact (s. 261.0.7), and the Minister may refuse to renew the licence or may suspend or revoke it or attach conditions to it (s. 34.3).

9 The *EA*'s scheme for verifying records provides an exception for an offence for which a "pardon" has been obtained (s. 34.3 para. 1(1) and s. 258.1 para. 1(1)). The *EA* thus reflects the protection provided for in s. 18.2 of the Quebec *Charter of human rights and freedoms*, CQLR, c. C-12 ("*Quebec Charter*"):

> **18.2.** No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence.

10 The word "pardon" as used in s. 18.2 of the *Quebec Charter* includes the "pardon" provided for at the time in the *Criminal Records Act*, R.S.C. 1985, c. C-47 ("*CRA*"): *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Service de police de la Communauté urbaine)*, 2008 SCC 48, [2008] 2 S.C.R. 698 (S.C.C.), at para. 14. Moreover, as is authorized by s. 258.4 *EA*, the Minister prepared a guide entitled *Verification of Judicial Records: Information Guide for School Boards and Private Schools in Québec* (2011), to which the appellants refer in their factum. This guide deals, among other subjects, with pardons (p. 13). Thus, under the *EA*, a teacher who obtained a pardon under the *CRA* is exempted from application of the provisions on the verification of judicial records and on notifying the Minister of the existence of such a record.

11 In March 2009, in response to his principal's request, B indicated that he had been convicted of possession of a prohibited weapon in March 1980, possession of narcotics for the purpose of trafficking in December 1980 and July 1995, and possession of proceeds of crime in June 1996. It is also alleged that B informed the Board's human resources unit that he had applied for a pardon under the *CRA* and that he expected to obtain one in about June 2009. Moreover, the Union submitted that the principal of the training centre at which B taught had been aware of B's record on hiring him nine years earlier.

12 After examining the declaration with respect to B's judicial record, the director of the human resources unit expressed the opinion that B's record was relevant to his functions as a teacher. A review committee reached the same conclusion. Under the *EA* (s. 261.0.3), however, the final decision on whether an employee's record is relevant to his or her functions must be made by the Board's authorities, that is, by its council of commissioners or its executive committee (ss. 143 and 179).

13 On June 29, 2009, B was summoned to attend a special meeting of the Board's executive committee. The committee had to determine whether B's judicial record was relevant to his functions and, if it was, decide whether to resiliate his employment contract. B attended the meeting with a union representative. After hearing B in a [TRANSLATION] "partially in camera meeting" (from which the public was excluded), the executive committee ordered a "totally in camera meeting" (from which the teacher and his representative were excluded) in order to deliberate. Upon completion of these two in camera meetings that lasted a total of 27 minutes, the committee, sitting in public once again, proceeded to adopt resolution No. 238, which terminated B's employment contract.

14 This resolution listed the offences of which B had been convicted, noted [TRANSLATION] "the provisions of the [*EA*] concerning judicial records of persons who work with minors" and mentioned the recommendations of the human resources unit and the director general that B's record was relevant to his functions. The executive committee unanimously decided that "the employment relationship between the teacher [B] and the Board [is] resiliated as of this day on the ground of incapacity". In the Board's view, the fact that a teacher has a judicial record that is relevant to his or her functions makes the teacher legally incapable of performing those functions.

15 On July 2, the Union filed a grievance on B's behalf to contest his dismissal. It alleged that [TRANSLATION] "[t]he procedure for dismissal provided for in the collective agreement was not followed" and that "[t]he board has contravened ... the [*EA*] and the Quebec Charter". The Board and the Union are bound by both provincial and local collective agreements. The local agreement provides that the Board may dismiss a teacher for one of the following reasons only: [TRANSLATION] "... incapacity, failure to discharge his or her duties, insubordination, misconduct or immorality" (clause 5-7.02). It adds that the employment relationship may be terminated "only after thorough deliberations at a meeting of the board's council of commissioners or executive committee called for that purpose" (clause 5-7.06).

16 On July 3, the day after the grievance was filed and four days after the employment relationship was terminated, the National Parole Board granted B a pardon under the *CRA*.

17 The inquiry into the grievance began before arbitrator Jacques Doré on May 12, 2010 and on November 3 and 24 of that same year. After the Board had completed its evidence, the Union began its own by summoning as its first witnesses three members of the executive committee who had been present for the in camera deliberations of June 29, 2009. The Board objected to having them testify, arguing that the motives of individual members of the committee were irrelevant and that deliberative secrecy shielded the members from being examined on what had been said in camera. It asked the arbitrator to limit the scope of the three members' testimony such that they would not be questioned about the in camera deliberations. The Union countered that this testimony would be relevant, admissible and necessary, given that it intended to [TRANSLATION] "contes[t] both the procedure followed and the ground relied on by the employer". The respondent Fédération autonome de l'enseignement ("FAE") intervened in support of the Union's position. The appellant Fédération des commissions scolaires du Québec ("FCSQ") also intervened, asking that the summonses be quashed.

III. Judicial History

A. Arbitrator's Interlocutory Decision

18 The arbitrator rejected the arguments of the Board and the FCSQ and allowed the examination of the members of the executive committee on what had been said in camera. In order to determine in particular whether the committee's deliberations had been [TRANSLATION] "thorough" as required by the collective agreement, he considered it necessary

to know their substance, including what had [TRANSLATION] "happened in camera in terms of the information transmitted orally and in writing in the discussions between the members, as well as any objections that were raised, etc." (para. 17). This was especially true given his observation that according to the parties' submissions, the "thorough deliberations" had taken place in camera (para. 14). He noted that "[t]he adjective 'thorough' was not added by the parties to the agreement solely to 'make things look nice'", that it "means something" and that it "adds a dimension to the deliberations" (para. 16).

19 In the arbitrator's opinion, the fact that a body deliberates in camera does not necessarily mean that it benefits from deliberative secrecy. As well, the fact that the executive committee can decide unilaterally to sit in camera should not enable its members to shield themselves from scrutiny by a grievance arbitrator (paras. 18-21). However, he said that he would be prepared to hear the testimony of the executive committee's members in camera, if he received a request to that effect, to ensure that they would be able to speak as freely as in their deliberations (para. 22).

B. Quebec Superior Court (2012 QCCS 248 (C.S. Que.))

20 Delorme J., hearing a motion for judicial review of the arbitrator's interlocutory decision, found that the application of deliberative secrecy is a [TRANSLATION] "question of law that is outside the arbitrator's particular area of expertise and is of interest to all school boards" (para. 19 (CanLII)). He accordingly applied the standard of review of correctness (paras. 17-21).

21 Delorme J. cited *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952 (S.C.C.), to the effect that deliberative secrecy is the rule for administrative tribunals, but that it can be lifted if a litigant presents valid reasons for believing that the tribunal's process was tainted by procedural errors (paras. 27-28 and 31). He added that this Court had held in *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3 (S.C.C.), that the intentions of members of a municipal council are irrelevant to the determination of whether a resolution adopted by the council is valid. In Delorme J.'s opinion, these principles apply to a school board's decision to resiliate an employment contract (paras. 30-31). He found that the executive committee's decision to deliberate in camera had rendered its deliberations confidential, adding that, although the committee is not required to hold its meetings in public, it has provided in its rules of procedure that they are to be open to the public [TRANSLATION] "unless it decides otherwise" (para. 24). Because the committee chose to deliberate in camera pursuant to its rules of procedure, that choice must be respected (para. 26).

22 Delorme J. concluded that the examination could not concern [TRANSLATION] "the underlying reasons or the development of those reasons in the minds of the executive committee's members" (para. 44). The latter could be compelled to testify only about the "formal process that led to the decision made in the public meeting" (*ibid.*).

C. Quebec Court of Appeal (2014 QCCA 591, 69 Admin. L.R. (5th) 95 (C.A. Que.))

23 The majority of the Court of Appeal, per Bich J.A., allowed the appeals of the Union and the FAE and restored the arbitrator's interlocutory decision. They, like Delorme J., applied the standard of correctness. In their view, the principle that motives are "unknowable" and deliberative secrecy, on which the Board and the FCSQ relied, are questions of central importance to the legal system as a whole that are outside the arbitrator's specialized area of expertise and require a uniform and consistent answer to ensure legal order (paras. 39-53).

24 This being said, Bich J.A. held in light of *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (S.C.C.), and *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), that a decision with respect to employment, and more specifically with respect to dismissal, made by a public body falls under employment law, whether individual or collective, and not under public law (para. 76). In her opinion, the rule from *Clearwater* does not apply in the case at bar. According to that rule, which is merely a restatement of the principle of relevance, the motives of the members of a public body's decision-making authority in performing functions of a legislative, regulatory, policy or purely discretionary nature are irrelevant to the determination of whether a decision made in such a context is valid (para. 89). However, the Board is not performing such functions in deciding, as in B's case, to dismiss an employee (para. 92).

25 Furthermore, Bich J.A. held that deliberative secrecy does not apply in the instant case, since the executive committee is not an authority that performs adjudicative functions (para. 124). Also, the fact that the executive committee decided unilaterally to meet in camera is not in itself sufficient to shield its members from being compellable (paras. 102-19).

26 Bich J.A. noted that the rule of relevance is of general application, including in a proceeding before a grievance arbitrator (para. 59). It is settled law that [TRANSLATION] "the circumstances of and grounds for" a dismissal are relevant to a challenge to the dismissal (paras. 64 and 67). Moreover, clause 5-7.13 of the local collective agreement gives the arbitrator a very broad power to examine the dismissal "from every angle, having regard both to procedure and to substance" (para. 129). This does not, in Bich J.A.'s view, mean "that there are no limits to the questions that can be put to the commissioners who have been summoned" (para. 142). What each decision maker thought at each minute of the deliberations will undoubtedly not be relevant. But it is the arbitrator who must decide whether particular questions are relevant and will further the inquiry into the grievance (para. 143). Bich J.A. noted that if an appellate court were to determine the exact meaning of the expression "thorough deliberations", it would usurp the grievance arbitrator's exclusive jurisdiction to interpret the collective agreement (para. 133).

27 Gagnon J.A., dissenting, would have dismissed the appeals and affirmed Delorme J.'s judgment. Unlike Delorme J., however, he would have quashed the summonses of the executive committee's members rather than limiting their testimony to the formal process (para. 214). Applying the standard of correctness, Gagnon J.A. concluded that *Clearwater* applies to the decisions of any public collective decision maker, whether acting in a private or public capacity, provided that the communicated decision officially expresses the public body's will (paras. 172-73). Resolution No. 238 of the Board's executive committee is one such decision. It speaks for itself and sets out the grounds for dismissal (paras. 177-79). Thus, although the executive committee's members are in principle compellable (para. 152), given the absence of any allegation of bad faith, examining them would be irrelevant to the determination of whether the dismissal was valid (paras. 174 and 180).

28 Gagnon J.A. stressed that the employer is not required to show that the deliberations leading up to the adoption of a resolution for dismissal were adequate (para. 162). In his view, the expression "thorough deliberations" is not [TRANSLATION] "a formal qualitative standard" that will, if it is not met, cause a dismissal to be invalid (para. 188). At any rate, he observed, it can be seen from the evidence that the decision to dismiss "was not made lightly" (para. 206).

IV. Issues

29 The central issue of the appeal is whether the Union may examine the three commissioners, members of the Board's executive committee, and what the scope of such examinations would be. It will require the Court to determine whether the principle that the motives of a legislative body are "unknowable" and deliberative secrecy are applicable to the facts of this case. It will also be necessary to establish, if the examinations are allowed, what limits will apply to them as a result of the rule of relevance. Before doing this, I must begin by identifying the standard of review that applies to the arbitrator's decision.

V. Analysis

A. Standard of Review

30 Unlike the judges of the Court of Appeal and the Superior Court, I find that the standard applicable to the arbitrator's interlocutory decision is reasonableness. Whether the examination of the members of the Board's executive committee should be allowed is ultimately an evidentiary issue. The arbitrator has exclusive jurisdiction over such matters. In my opinion, a desire, like that of the appellants, to attribute an excessive scope to this Court's decisions in *Clearwater* and *Tremblay* does not transform this determination into a question of law that is of central importance to the legal system and is outside the arbitrator's area of expertise, such that the standard of correctness should apply.

31 By virtue of the powers conferred on him or her by s. 100.2 *L.C.*, a grievance arbitrator has full authority and exclusive jurisdiction over evidence and procedure in the arbitration process: *Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières*, [1993] 1 S.C.R. 471 (S.C.C.), at pp. 487 and 491. In disciplinary matters, the arbitrator has jurisdiction to rule both on the procedure followed and on the substance of the impugned measure: s. 100.12(*f*) *L.C.*; F. Morin and R. Blouin, with J.-Y. Brière and J.-P. Villaggi, *Droit de l'arbitrage de grief* (6th ed. 2012), at pp. 587-88; D. J. M. Brown and D. M. Beatty, with C. E. Deacon, *Canadian Labour Arbitration* (4th ed. (loose-leaf)), at pp. 7-162 to 7-163. He or she also has exclusive jurisdiction to interpret the collective agreement between the parties: ss. 100 and 1(*f*) *L.C.*; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.), at paras. 50 and 58; *General Motors of Canada Ltd. v. Brunet* (1976), [1977] 2 S.C.R. 537 (S.C.C.), at p. 552. The arbitrator in the instant case was asked to interpret, in particular, the expression [TRANSLATION] "thorough deliberations" used in clause 5-7.06 of the agreement between the Board and the Union. In his decision, he concluded that he would have to hear the testimony of the executive committee's members in order to determine whether clauses 5-7.02 and 5-7.06 of that agreement had been complied with when B was dismissed. Clause 5.7.13 provides that he "may annul the ... decision if the prescribed procedure was not followed or if the grounds for dismissal were unfounded or did not constitute a sufficient basis for dismissal".

32 In *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), the Court stated that when an administrative tribunal interprets or applies its home statute, there is a presumption that the standard of review applicable to its decision is reasonableness (paras. 39 and 41; see also *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161 (S.C.C.), at para. 35; *Alliance Pipeline Ltd. v. Smith*, 2011 SCC 7, [2011] 1 S.C.R. 160 (S.C.C.), at paras. 26 et 28; *Dunsmuir*, at para. 54). That presumption applies in the case at bar. The arbitrator's decision to allow the Union to examine the executive committee's members was based on his conclusion that their testimony would be helpful to him in determining whether the collective agreement and the legislation had been complied with. This conclusion flowed from his interpretation of the local agreement between the parties and of the *EA*. His home statute, the *Labour Code*, provides that an arbitrator may "interpret and apply any Act or regulation to the extent necessary to settle a grievance" (s. 100.12(*a*)). The Court has held that a reviewing court owes the greatest possible deference to an interpretation of provisions of the *EA* by a grievance arbitrator in an educational setting: *Syndicat de l'enseignement du Grand-Portage c. Morency*, 2000 SCC 62, [2000] 2 S.C.R. 913 (S.C.C.), at para. 1.

33 The presumption is reinforced by the fact that the Court has held that the usual standard for judicial review of decisions of grievance arbitrators is reasonableness: *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34, [2013] 2 S.C.R. 458 (S.C.C.), at para. 7; *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), at para. 8; *Dunsmuir*, at para. 68. The Court added in *M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, 2011 SCC 59, [2011] 3 S.C.R. 616 (S.C.C.), that this standard is equally appropriate where the arbitrator applies or adapts, for example, common law and equitable doctrines that emanate from the courts: paras. 5-6, 31 and 44-45. This is because the grievance arbitrator is part of a discrete and special administrative scheme under which the decision maker has specialized expertise. In Quebec, moreover, the grievance arbitrator is protected by general full privative clauses (ss. 139, 139.1 and 140 *L.C.*; *T.U.A.C., local 503 c. Cie Wal-mart du Canada*, 2014 SCC 45, [2014] 2 S.C.R. 323 (S.C.C.), at para. 89).

34 The presumption from *A.T.A.* has not been rebutted in the instant case. The issues in this case are not included in the narrow class of issues identified in *Dunsmuir* for which the applicable standard is correctness. As the Court explained in *Dunsmuir*, that standard can apply to questions of law that are of central importance to the legal system as a whole and are outside the decision maker's area of expertise (paras. 55 and 60). Such questions must sometimes be dealt with uniformly by courts and administrative tribunals "[b]ecause of their impact on the administration of justice as a whole" (para. 60). However, questions of this nature are rare and tend to be limited to situations that are detrimental to "consistency in the fundamental legal order of our country" (*Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.) ("*Mowat*"), at para. 22; *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.), at paras. 26-27; see also *Dunsmuir*, at para. 55).

35 Bich J.A. maintained that the questions related to the principle that motives are "unknowable" and deliberative secrecy are of central importance to the legal system because they concern [TRANSLATION] "all decisions made by public (or even private) bodies that act through collective decision-making authorities" (para. 49). In her opinion, they are questions that could be raised not only before arbitrators or administrative tribunals, but also in any court of law. She stressed that these questions do not form part of "the arbitrator's specialized area of adjudicative expertise" (para. 51). With respect, this characterization seems to disregard what the appellants are actually asking for and what the arbitrator ultimately decided.

36 The arbitrator was asked, in the context of his interpretation of the *Labour Code*, the *EA* and the collective agreement between the parties, to decide on the application of well-known and uncontroversial rules and principles. On the one hand, while it is true that this Court has never applied *Clearwater* to facts like the ones in the case at bar, the scope of that case was clearly defined by Binnie J., who stated that the "rule" in question related to whether the testimony of members of a legislative body would be relevant (para. 45). In their respective reasons, both Delorme J. (at para. 29) and Bich J.A. (at para. 46) referred to "relevance" to characterize what must be considered as a result of *Clearwater*. Because the arbitrator has full authority over evidence and procedure in an inquiry into a grievance, it is up to the arbitrator to apply the rule of relevance to the facts of the case in such a way as he or she deems helpful for the purpose of ruling on the grievance. This is exactly what the arbitrator did in the instant case in concluding that what took place in the executive committee's in camera deliberations was relevant. A reviewing court owes deference to the arbitrator's decision. Moreover, the appellants themselves recognize in this Court that their arguments against allowing the commissioners to be called to testify about those deliberations are based on the question whether that testimony would be relevant. With this in mind, applying the standard of correctness cannot be justified.

37 On the other hand, as regards deliberative secrecy, its scope is well known. The appellants are not asking that this scope be expanded. Bich J.A. agreed on this point when she wrote that the appellants [TRANSLATION] "... are employing a concept here that does not apply in the circumstances" (para. 123). As a result, all the arbitrator had to do in this regard was to apply a known rule in order to decide whether deliberative secrecy shielded the executive committee's deliberations in the context of B's dismissal. In light of the arbitrator's broad jurisdiction over evidence and procedure, this does not amount to a question of law of central importance that is outside his area of expertise.

38 Although my colleague Côté J. does not call the reasonableness of the arbitrator's decision into question, she finds that the standard of correctness should apply to it instead. On this point, her concurring reasons stray, in my humble opinion, from the Court's decisions in *Nor-Man*, *A.T.A.* and *Dunsmuir*, among others. The questions of evidence and procedure that arise here with respect to the principle that motives are "unknowable" and to deliberative secrecy in the context of an employer's collective decision-making authority are not outside the arbitrator's area of expertise. Nor does the application of that principle and of deliberative secrecy to a fact situation characteristic of a dismissal amount to a question that is detrimental to consistency in the country's fundamental legal order. Once this is established, maintaining that the concepts at issue do not fall solely within the arbitrator's expertise in the area or jurisdiction over the matter (paras. 82 and 84 of my colleague's reasons), or that one of them is a general principle of law that applies to other legal fields (para. 82 of her reasons), is not in my opinion enough to justify dispensing with the deferential standard that is required in such a case: *Nor-Man*, at para. 55, citing the majority in *Smith*, at para. 26, and *Dunsmuir*, at para. 60; *Mowat*, at para. 23.

39 In the instant case, in light of the information available to him at the time of the summonses, and of the content of the collective agreement and the applicable legislation, the arbitrator allowed the examination of the members of the Board's executive committee in the grievance proceeding before him. It is this decision that is at issue in the judicial review proceedings, and it was reasonable. The reasons for the arbitrator's decision are transparent and intelligible, and the justification given for it is sufficient; it falls within a range of possible acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at para. 47). Neither the argument that the motives were "unknowable" nor that of deliberative secrecy, on which the appellants rely, counters this conclusion. At this point, all the arbitrator

has done is to allow the examination of the members of the executive committee to begin. He has not yet ruled on the relevance of specific questions, as none had been asked yet when the Board objected to the witnesses being called.

B. Motives are "Unknowable"

40 The appellants submit that the arbitrator erred in not applying the principle that motives are "unknowable" when he allowed the examination of the executive committee's members. In the appellants' opinion, the Court held in *Clearwater* that a rule to this effect applies to any collective decision-making body that makes a decision in writing. The motives of such a body are never relevant to a review by a court, arbitrator or administrative tribunal of the validity of an impugned decision. Thus, the appellants argue, because the Board's executive committee recorded the result of its decision-making process in a resolution, that resolution sets out everything that is needed to explain the decision to dismiss teacher B. The motives of the individual committee members are not relevant, as the resolution is proof of its content.

41 To the appellants, the principle that motives are "unknowable" must apply to every public body, regardless of whether its acts are public or private in nature, as well as to every private body. The sole criterion for finding that the motives of such a body are "unknowable" is the requirement that it act collectively and speak by way of a resolution or other official document, such that the decision is made by no individual member.

42 In my opinion, the appellants are wrong. Their argument attributes an excessive scope to *Clearwater*. It was reasonable for the arbitrator to choose not to apply that case to the decision of the Board's executive committee to dismiss its teacher.

43 In *Clearwater*, a land developer was contesting the validity (in the sense of legality or *vires*) of a resolution adopted by a municipal council. The developer wanted to show that the council had acted unlawfully in authorizing, by way of resolution, a judicial inquiry into transactions involving the developer. To prove this, it sought to summon as witnesses certain members of the municipal council who had voted for the resolution.

44 This Court rejected this attempt to summon the municipal council members. In the key passage quoted by the appellants, Binnie J. wrote the following:

> The motives of a legislative body composed of numerous persons are "unknowable" except by what it enacts. Here the municipal Council possessed the [power under s. 100 of its enabling legislation] and exercised it in the form of a resolution which speaks for itself. While some members of the present or previous Sarnia Council may have made statements which suggest a desire to unmask alleged misconduct, the inquiry will not be run by city councillors but by ... a Superior Court judge, who will take his direction from the s. 100 Resolution, not from press reports of comments of some of the city politicians. Accordingly the courts below were correct to quash the summonses and strike from the record certain other evidence. While courts should be slow to interfere with a party's effort to build its case, they should set aside summonses where, as here, the evidence sought to be elicited has no relevance to a live issue in the judicial review applications ....
>
> [Emphasis added; para. 45.]

45 It is true that *Clearwater* concerned the relevance of a legislative body's motives and that, in that case, the summonses were quashed on the basis that they were not relevant. But it is wrong to say that *Clearwater* established a rule of relevance that applies to every collective decision made by a decision-making body by means of an official document regardless of the nature of the decision or of the body making it. Rather, the "unknowable" motives in question are those that led a legislative body to adopt provisions of a legislative nature, that is, to carry out acts of a public nature. There is nothing in Binnie J.'s analysis to support extending his conclusion respecting irrelevance in the manner suggested by the appellants.

46 In *Clearwater*, Binnie J. relied, *inter alia*, on *Thorne's Hardware Ltd. v. R.*, [1983] 1 S.C.R. 106 (S.C.C.), noting that "[t]his case provides a good illustration of why the rule in *Thorne's Hardware* ... is salutary" (para. 44). However, the claim in *Thorne's Hardware* had been that an order in council made by the Governor in Council that extended the

limits of a port was unlawful and discriminatory. The parties contesting the decision wished to adduce the Governor in Council's motives in evidence. Dickson J. (as he then was) wrote that "[d]ecisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings" (p. 111). Because of this, "[i]t is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the [impugned] Order in Council" (*Thorne's Hardware*, at p. 112). Given that the Governor in Council's decision was purely one of policy and was discretionary in nature, the motives behind it were not relevant to the determination of whether it was lawful. In that case, too, whether the motives of the body that had made the decision were relevant depended on the nature of the decision itself.

47 In my opinion, Bich J.A. was right that the rule from *Clearwater*, to the extent that it can in fact be regarded as distinct from the simple rule of relevance, applies only to decisions of a legislative, regulatory, policy or purely discretionary nature made by public bodies (para. 95). In other words, it applies to decisions made by a public body when it carries out acts of a public nature. In the case at bar, the executive committee's decision was made in a completely different context. Resolution No. 238 concerned a decision to dismiss one of the Board's teachers under the procedure provided for in the collective agreement.

48 In *Dunsmuir*, this Court held that in the context of an employment contract, the dismissal of a public sector employee is as a general rule governed by the law of contracts and employment law, and not by public law principles. Bastarache and LeBel JJ., writing for the majority, stated that "the existence of a contract of employment, not the public employee's status as an office holder, is the crucial consideration" (para. 102). Thus, where a contractual relationship exists between an employee and a public employer, "disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations" (para. 113).

49 In that case, the Court relied on its earlier decision in *Wells*, in which it had rejected the argument that the principles of public law (namely those of administrative law) are applicable to a dispute concerning the employment of a public servant:

> While the terms and conditions of the contract may be dictated, in whole or in part, by statute, the employment relationship remains a contract in substance and the general law of contract will apply unless specifically superseded by explicit terms in the statute or the agreement. [para. 30]

Since *Wells*, it is established that the principles of contract law are presumed to apply to the majority of public sector jobs, the exception being where there is an express statutory provision to the contrary: P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 336. The Court held that this rule applied in a context in which "[t]he majority of civil servants ... are unionized and employed under collective agreements which define the terms of their work as well as the Crown's obligations towards them" (*Wells*, at para. 23; Hogg, Monahan and Wright, at p. 336). The fact that relationships between employees and public employers are often governed by collective agreements has no impact on the application of the conclusions reached by the Court in *Dunsmuir*.

50 In the instant case, even though the Board is a legal person established in the public interest under the *EA*, it was acting as an employer when it decided to dismiss teacher B by way of a resolution of its executive committee. That decision had an effect on the employment contract between B and the Board and was made in the context of a process provided for in the collective agreement between the parties. It was not a decision of a legislative, regulatory, policy or discretionary nature. Rather, it was made in the context of the very type of contractual relationship that was at issue in *Dunsmuir* and *Wells*. In reviewing such a decision, a grievance arbitrator applies the principles of employment law that are applicable to any dismissal. As a result, this case is clearly distinguishable from *Clearwater*. A rule of relevance based on the public nature of an impugned decision does not apply here.

51 This conclusion is further strengthened by the appellants' acknowledgment that the executive committee's members can at the very least be compelled to testify on certain aspects of the in camera deliberations and on the grounds for the dismissal. They conceded at the hearing before us that the Union can, among other things, ask the members if,

in their deliberations, they considered the possibility of B's being pardoned or if they thought that the *EA* requires an automatic dismissal as soon as the executive committee concludes that an employee's judicial record is relevant to his or her functions. This concession is poles apart from Binnie J.'s conclusion in *Clearwater* that the members of the municipal council could in no way be called to testify on the motives behind their decision to adopt a resolution.

52 Furthermore, it is quite hard to distinguish questions concerning the process that led to a decision from questions concerning the motives behind the decision. A single question could be useful for determining both whether the process was lawful and whether the disciplinary sanction satisfies the substantive requirements provided for in the collective agreement and in labour legislation. For example, the question whether the members of the executive committee considered the existence of B's application for a pardon might be relevant to the assessment of the process followed by the committee. The same question might also be relevant to the assessment of the validity of the committee's substantive decision.

53 This leads me to conclude that it was reasonable for the arbitrator to rule that he needed to know what had taken place in camera in order to determine whether the executive committee's deliberations had been thorough. His decision on this point was consistent with those of several grievance arbitrators who had in the past allowed the examination of school board officials regarding in camera deliberations in disciplinary matters: *Syndicat des professionnelles et professionnels de l'éducation du Bas-St-Laurent v. Commission scolaire des Monts-et-Marées* (2006), S.A.E. 7953, 54 R.S.E. 481, at paras. 59-60 and 66-69; *Syndicat des enseignantes et enseignants de Le Royer v. Commission scolaire de la Pointe-de-l'Île* (2000), S.A.E. 7006, 47 R.S.E. 1049, at pp. 1051-52;*Syndicat des travailleuses et travailleurs de l'enseignement de Portneuf C.E.Q. v. Commission scolaire de Portneuf* (1988), S.A.E. 4674, 35 R.S.E. 1722; *Association des enseignants de Le Royer v. Commission scolaire régionale Le Royer* (1975), S.A.E. 513, 6 R.S.E. 43, at p. 45. Given the recognized jurisdiction of arbitrators over evidence and procedure, deference must be shown.

54 The other decisions cited by the appellants in support of their argument that the executive committee's motives are "unknowable" are of no assistance to them. In *Duke of Buccleuch v. Metropolitan Board of Works* (1872), L.R. 5 H.L. 418 (U.K. H.L.), the House of Lords ruled on an action for enforcement of an arbitral award in which one of the parties was trying to summon the arbitrator himself to testify. Similar situations were considered in *O'Rourke v. Railways Commissioner*, (1890) L.R. 15 App. Cas. 371 (New South Wales P.C.), *Ward v. Shell-Mex* (1951), [1952] 1 K.B. 280 (Eng. K.B.); and *Knight Lumber Co., Re* (1959), 22 D.L.R. (2d) 92 (B.C. S.C.). All these cases involved adjudicative decisions in which the decision makers' motives were not allowed to be adduced in evidence, not because they were irrelevant, but on the basis of deliberative secrecy.

55 Finally, extending the conclusions reached by this Court in *Clearwater* to every decision made by a public or private collective decision-making body, as the appellants propose, would have unfortunate consequences in spheres that are unrelated to the context of the instant case. In the appellants' submission, *Clearwater* would apply not only to public bodies like school boards, but also to Crown corporations, all of which make their decisions known through resolutions adopted collectively by their decision-making authorities. And the same rule would apply to private corporations that operate in the same way. If that were the case, the makers of a wide range of decisions made collectively would be shielded from ever testifying about their motives or their deliberations, even in cases in which such testimony would be of particular relevance to the dispute. It would not be desirable to attribute such a scope and such effects to the reasons of narrow scope given by Binnie J. in *Clearwater*.

C. Deliberative Secrecy

56 The appellants' other argument regarding deliberative secrecy is no more persuasive. Once again, I find that it was reasonable for the arbitrator to reject this argument. It is wrong to say that the members of the executive committee are shielded by deliberative secrecy here and that they cannot be called to testify about their deliberations during the "total" in camera portion of the meeting of June 29, 2009.

57 The scope of deliberative secrecy is clearly defined in the case law. In *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 (S.C.C.), the Court, per McLachlin J. (as she then was), stressed that the protection of the process by which judges reach their decisions is a core component of the constitutional principle of judicial independence:

> The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence .... As stated by Dickson C.J. in *Beauregard v. Canada*, [[1986] 2 S.C.R. 56,] the judiciary, if it is to play the proper constitutional role, must be completely separate in authority and function from the other arms of government. It is implicit in that separation that a judge cannot be required by the executive or legislative branches of government to explain and account for his or her judgment. To entertain the demand that a judge testify before a civil body, an emanation of the legislature or executive, on how and why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence.
>
> [Emphasis added; pp. 830-31.]

The need to shield the judicial decision-making process from review by the other branches of government flows from the principle of separation of powers that is reflected in the constitutional requirement of judicial independence.

58 It is true that, as the appellants point out, the Court has held, since its decision in *MacKeigan*, that deliberative secrecy also protects the deliberations of administrative tribunals (*Tremblay*, at p. 966). For such decision makers, however, the protection is not watertight. Although secrecy remains the rule, it can be lifted, for example, "when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice" (*Tremblay*, at p. 966). Nonetheless, in the absence of procedural defects, deliberative secrecy continues to shield such decision makers from having to testify if their decisions are contested.

59 The appellants argue on the basis of *Tremblay* that this principle resolves the question whether the members of the executive committee must testify. Because its members were officers of the Board, a public body that holds its powers and makes its decisions under the *EA*, the committee must, the appellants submit, be considered to be one of the administrative decision-making authorities to which *Tremblay* applies. In the appellants' submission, given that the Union has made no allegation of bad faith or of a procedural defect, deliberative secrecy should not be lifted to allow the members to be examined about their in camera deliberations.

60 I disagree. *Tremblay* does not apply to every administrative organization required to perform [TRANSLATION] "decision-making functions", to borrow the expression the appellants use to characterize a type of administrative act that is not limited to adjudicative functions (A.F., at para. 108). Once again, *Tremblay* is clear and does not have the scope the appellants seek to attribute to it. That case concerns the deliberative secrecy that applies to administrative tribunals, that is, to bodies that perform adjudicative functions. Moreover, the cases the appellants cite to illustrate the application of deliberative secrecy support this view. In *Duke of Buccleuch*, *O'Rourke*, *Ward* and *Knight Lumber*, the arbitrators and administrative tribunal members the parties wished to call to testify had exercised powers of an adjudicative nature. The same is true of *Noble China Inc. v. Lei* (1998), 42 O.R. (3d) 69 (Ont. Gen. Div. [Commercial List]), in which the Ontario Court (General Division) held that the deliberations of an arbitrator in a commercial arbitration process were protected by deliberative secrecy as a result of *Tremblay*. Deliberative secrecy was also found to apply to deliberations of administrative tribunals performing adjudicative functions in *Comité de révision de l'aide juridique c. Denis*, 2007 QCCA 126 (C.A. Que.), and *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 37, 253 N.S.R. (2d) 134 (N.S. C.A.).

61 But when the executive committee decided to dismiss B after deliberating in camera, it was not performing an adjudicative function and was not acting as a quasi-judicial decision maker. Rather, it was acting as an employer dismissing an employee. Its decision was therefore one of a private nature that falls under employment law, not one of a public nature to which the constitutional principles of judicial independence and separation of powers would apply. No

valid analogy can be drawn between the administrative tribunal in *Tremblay*, whose quasi-judicial decision was final and could not be appealed, and the decision-making authority of a public employer — even where the authority in question is the employer's executive committee — that decides to resiliate an employee's employment contract.

62 I am also unable to accept the appellants' argument that, because the executive committee was applying a statutory rule (namely the Board's obligation to ensure that the teacher had no judicial record relevant to his functions), its decision was adjudicative in nature. An employer's decision to dismiss an employee cannot be characterized as adjudicative merely because the employer is required to apply statutory rules. The dismissal of teacher B resulted from the exercise of the Board's right of management. This right is defined by the *Labour Code*, the *EA* and the collective agreement. The dismissal did not result simply from the application of substantive rules provided for in the *EA* to the facts found by the executive committee, as is the case with adjudicative decisions (*Collavino Brothers Construction Co., Re* (1978), [1979] 1 S.C.R. 495 (S.C.C.), at p. 504).

63 Furthermore, to hold that the application of deliberative secrecy depends on whether the executive committee applied statutory provisions in deciding whether to dismiss a teacher would lead to absurd results. According to this reasoning, if the executive committee dismissed a teacher for theft, a dismissal that would not involve the provisions of the *EA*, its in camera deliberations would not be protected by deliberative secrecy. Yet its decision would be of the same nature as the one made in this case. Moreover, if every decision to dismiss an employee were considered to be an adjudicative decision, the only remedy available to the employee would be to go straight to a motion for judicial review. But in the context of a collective agreement, the way to contest a dismissal is obviously to instead file a grievance under the *Labour Code* (ss. 100 et seq.).

64 Finally, I note that the appellants have acknowledged that holding a meeting in camera is optional and may be imposed at the sole discretion of the executive committee. The rules of procedure for the meetings of the Board's executive committee provide that deliberations held in public are the rule and those held in camera the exception (art. 8). According to the appellants' submissions, deliberative secrecy shields only in camera deliberations from examination. This argument, too, leads to a strange result. The members of the executive committee could thus choose whether or not they can be compelled to testify about their deliberations. To give a party the possibility of shielding its deliberations from judicial review as it sees fit would not be desirable. The consequence of accepting this argument is that the application of deliberative secrecy would become optional despite the fact that it is an imperative rule that flows from the constitutional principle of the separation of powers: H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at p. 871, citing *Promutuel Dorchester société mutuelle d'assurance générale c. Ferland*, [2001] R.J.Q. 2882 (C.S. Que.). Judges cannot of course choose to lift deliberative secrecy to explain the reasoning behind their conclusions whenever it suits them to do so.

65 In sum, regardless of the perspective from which the appellants' argument on deliberative secrecy is considered, the only possible conclusion is that the executive committee was not performing an adjudicative function when it decided to dismiss teacher B. Rather, it was acting as an employer in the context of a contractual relationship to which the principles of employment law applied. As a result, the discussions held by its members in camera are not shielded by deliberative secrecy. It was reasonable for the arbitrator to reject this argument.

D. Relevance

66 The majority of the Court of Appeal were thus right to reject the appellants' arguments regarding the principle that motives are "unknowable" and deliberative secrecy, to restore the impugned decision, and to allow the examination of the executive committee's members, subject to the usual limits of what is relevant. However, an additional question was raised at the hearing in this Court: If the Court reaches this decision, should limits be placed in advance on the questions that may be asked of the executive committee's members? In my opinion, the answer is no.

67 Assessing the relevance of evidence falls within the exclusive jurisdiction of the arbitrator. In this case, given that the employer applied for judicial review of the interlocutory decision allowing the examination of the executive

committee's members, they have yet to be asked any questions. It is not open to a reviewing court to speculate about the types of questions that could be relevant before the examination has even begun. This conclusion is justified both by the arbitrator's powers under the legislation and the collective agreement and by the nature of a grievance arbitration proceeding.

68 First, s. 100.2 *L.C.* provides that the grievance arbitrator has full authority over evidence and procedure in the arbitration process. The Court has on many occasions reiterated that in a grievance arbitration proceeding, the arbitrator has exclusive jurisdiction over evidence and procedure, which includes the assessment of relevance: *Larocque*, at pp. 485 and 491; *M.U.A., local 6869 c. Cie minière Québec Cartier*, [1995] 2 S.C.R. 1095 (S.C.C.), at para. 11; *C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at pp. 343-44. It has also stressed the importance of the deference that must be shown to arbitrators in order to preserve the "expeditious, effective and specialized dispute settlement method" represented by grievance arbitration: *Wal-Mart*, at para. 85; see also *Newfoundland and Labrador Nurses' Union*, at paras. 24-25; *A.U.P.E. v. Lethbridge Community College*, 2004 SCC 28, [2004] 1 S.C.R. 727 (S.C.C.), at paras. 40-41; *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157 (S.C.C.), at paras. 16 et seq. This deference and maintaining grievance arbitration as an expeditious, effective and specialized process constitute "a basic requirement for peace in industrial relations": *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.), at para. 36.

69 Next, the context in which relevance is assessed includes the fact that in disciplinary matters, the arbitrator has a broad power to replace the sanction imposed by the employer with one he or she deems fair and reasonable having regard to "the circumstances concerning the matter" (s. 100.12(*f*) *L.C.*). These circumstances might include substantive and procedural issues. Clause 5-7.13 of the collective agreement authorizes the arbitrator to annul the dismissal [TRANSLATION] "if the prescribed procedure was not followed or if the grounds for dismissal were unfounded or did not constitute a sufficient basis for dismissal". This means that he can consider both the validity and the appropriateness of the dismissal and can also examine the resolution that was adopted and the process that was followed to arrive at its adoption.

70 Moreover, the grievance filed by the Union concerns the expression [TRANSLATION] "thorough deliberations" found in clause 5-7.06. The arbitrator thus had to consider this provision of the collective agreement, which he was responsible for enforcing, in determining whether the evidence was relevant. The requirement of thorough deliberations where an employee is dismissed can be found in many agreements in Quebec's education sector. As long ago as 1985, Arbitrator Frumkin noted that this concept had [TRANSLATION] "been considered in a large number of decisions" by arbitrators: *North Island Laurentian Teachers' Union v. Commission scolaire Laurenval* (1985), S.A.E. 3964, 33 R.S.E. 1262, at p. 1274. The case law in this regard was summarized in a recent award, in which the arbitrator noted that before dismissing an employee, a school board must [TRANSLATION] "act after careful consideration" and must also "respect the rights of the complainant and his or her Union and ... act reasonably and responsibly": *Commission scolaire des Grandes-Seigneuries et Association des professeurs de Lignery (Vishwanee Joyejob)*, 2015 QCTA 663, [2015] AZ-51203453, at para. 493; see also paras. 494-95. In short, grievance arbitrators have been interpreting and applying the concept of thorough deliberations in the education sector for many years, and continue to do so today. It would be inappropriate for a reviewing court to specify as of now what meaning should be given to that expression for the purpose of ruling on the relevance of evidence that has yet to be heard.

71 Finally, it seems to me self-evident that the nature of arbitration proceedings would be unsuited to an advance assessment of testimony that has not yet been heard. Relevance is established on the basis of the legal framework, the factual context and the circumstances of the particular case: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at p. 854; S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at pp. 54-55. Owing to certain features specific to grievance arbitration, the legal framework and factual context often become known only as the proceedings and the examination of witnesses unfold. This is because most decisions that might be grieved, including decisions to take disciplinary action, are made by the employer, for reasons that it often knows better than the union and the employee: F. Morin *et al.*, *Le droit de l'emploi au Québec* (4th ed. 2010), at pp. 1293 and 1315. To the

above must be added the informal nature of the pleadings that lead to arbitration and the absence of applications with detailed allegations that would be available to a court of law to help it determine what is relevant on the basis of the facts alleged in support of a proceeding. In this context, it would be risky to rule in advance on the relevance of evidence that could depend on what will be revealed in the course of the examination of the employer's representatives.

72 For example, the arbitrator in the case at bar has already mentioned that it would be relevant for the Union to examine the executive committee's members about what [TRANSLATION] "happened in camera in terms of the information transmitted orally and in writing in the discussions between the members, as well as any objections that were raised, etc." (para. 17). Given the broad powers conferred on the arbitrator to consider both the procedure followed and the appropriateness of the substantive disciplinary action, this does not seem, as Bich J.A. rightly observed, to be open to question (paras. 68-69). An employee is clearly entitled to examine and confront those who decided to dismiss him about the circumstances of their decision and the details of the process that led up to it. Likewise, it would be inappropriate to preclude in advance all questions about the motives behind the dismissal. As I have mentioned in para. 51 of these reasons, the appellants have themselves conceded that certain questions about the in camera deliberations and the grounds for dismissal would be relevant.

73 Of course, as Bich J.A. rightly points out (at paras. 142-43), this does not amount to an authorization to survey the states of mind of the decision makers to find out how each one's individual thoughts evolved over the course of their deliberations. Nor does it authorize a fishing expedition or redundant examinations of all of them. Indeed, the grievance's legal framework and factual context are clearly identified. It will be up to the arbitrator to take them into account in order to decide what is relevant in this context on the basis of the questions that are eventually asked and to determine which of them really further the resolution of the case. If a court must intervene, it will do so after the arbitrator has ruled on a given point.

74 In concluding, I must make one final comment. In my humble opinion, it is most unfortunate that, more than six years after filing a grievance with respect to a dismissal, the Union has not yet been able to begin presenting its evidence. The mission of the grievance arbitration system, that is, to provide employers and employees with justice that is accessible, expeditious and effective, has been forgotten. I would note the importance of the sensible rule that, with only a few exceptions, a grievance arbitrator's interlocutory decision, in particular one concerning evidence and procedure, is not subject to judicial review: *Syndicat des salariés de Béton St-Hubert-CSN c. Béton St-Hubert inc.*, 2010 QCCA 2270 (C.A. Que.), at para. 23; *Sûreté du Québec c. Lussier*, [1994] R.D.J. 470 (C.A. Que.); *Cégep de Valleyfield c. Gauthier-Cashman*, [1984] R.D.J. 385 (C.A. Que.). The courts of several provinces have taken a similar deferential approach to interlocutory decisions of arbitrators: *Lethbridge Regional Police Service v. LPA*, 2013 ABCA 47, 542 A.R. 252 (Alta. C.A.), at para. 21; *Canadian Nuclear Laboratories v. IUOE, Local 772*, 2015 ONSC 3436 (Ont. Div. Ct.), at paras. 5-7 and 11; *Blass v. U.R.F.A.*, 2007 SKQB 470, 76 Admin. L.R. (4th) 262 (Sask. Q.B.), at para. 82. In the instant case, the arbitrator had offered to hear the testimony of the executive committee's members in camera (para. 22).That would in all probability have obviated any risk of consequences that would be impossible to correct at the time of the final award. The lengthy judicial review proceedings at the stage of an interlocutory decision that are now drawing to a close could then have been avoided.

VI. Disposition

75 I would therefore dismiss the appeal with costs throughout and remand the case to the arbitrator in order that the inquiry into the grievance may at long last proceed.

***Côté J.* (Wagner, Brown JJ. concurring):**

76 I agree that the appeal should be dismissed. However, I find that the Superior Court and both the majority and the dissenting judges of the Court of Appeal were right to hold that the applicable standard of review in this case is correctness.

77 My colleague Gascon J. writes that "[w]hether the examination of the members of the Board's executive committee should be allowed is ultimately an evidentiary issue" and that "a desire, like that of the appellants, to attribute an excessive scope to this Court's decisions in [*Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3 (S.C.C.),] and [*Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952 (S.C.C.),] does not transform this determination into a question of law that is of central importance to the legal system and is outside the arbitrator's area of expertise, such that the standard of correctness should apply" (para. 30). It is true that the arbitrator has jurisdiction over evidentiary issues and that deference is usually owed in this regard. There are times, however, when a question concerning an area over which the arbitrator generally has full authority is of such a nature as to affect the administration of justice as a whole and relates to principles in respect of which the arbitrator has no particular expertise in that they are not specific to the arbitrator's specialized role. According to the principles stated by the Court in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at paras. 55 and 60, and as the Court of Appeal noted at para. 33 of its reasons in the case at bar, [TRANSLATION] "the standard of correctness will apply to decisions of arbitrators (as to those of any administrative tribunal) in which they rule on general questions of law that are, first, of central importance to the legal system *and*, second, outside their specialized area of expertise in the sense of not being specific to their specialized role" (2014 QCCA 591, 69 Admin. L.R. (5th) 95 (C.A. Que.) (emphasis added)).

78 Although such questions are rare — as the majority of the Court of Appeal acknowledged — I consider it necessary to refrain from giving too narrow an interpretation to the category of general questions of law that was established in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), and reiterated in *Dunsmuir*. Where the question relates not simply to the rules of evidence in general, but to the scope of such basic rules as those relating to the immunities from disclosure and deliberative secrecy, a court reviewing an arbitrator's decision in this regard must be able to go further than merely inquiring into the reasonableness of the decision. Where necessary, it must also be able, absent clear instructions to the contrary, to substitute its own view for that of the arbitrator if the arbitrator's decision is incorrect. But my colleague's reasoning leads to the conclusion that judicial review on a question related to the scope of professional secrecy, for example, would also be subject to the reasonableness standard. Given the importance of such questions and the fact that an arbitrator has no particular expertise or expertise unique to his or her specialized role with respect to such matters, I am of the opinion that, despite the privative clause in the instant case, the legislature could not have intended such an outcome.

79 Even more importantly, I find that the applicable standard of review cannot depend on how a court will ultimately answer the question, as that could make it even more difficult to predict what the result of the analysis will be. Instead, what is important is the nature of the question being raised. In the case at bar, the appellants submit that the effect of *Clearwater* is that any collective decision-making body that makes a decision in writing is shielded by a form of immunity from disclosure. They also argue that deliberative secrecy, as recognized in *Tremblay*, applies to every administrative body with adjudicative functions. Although the cases on which the appellants rely do not have the scope the appellants would give them — I agree with my colleague in this regard — the questions of law raised in their submissions are nonetheless general in nature and must be applied uniformly and consistently. Gascon J. seems in fact to acknowledge this, at least in part, in writing that "extending the conclusions reached by this Court in *Clearwater* to every decision made by a public or private collective decision-making body, as the appellants propose, would have unfortunate consequences in spheres *that are unrelated to the context of the instant case*" (para. 55 (emphasis added)). What the appellants want the Court to accept in the case at bar is, first and foremost, a principle that motives are "unknowable" that applies to every collective decision-making body that makes a decision in writing.

80 This being said, it must be acknowledged that the application of the principles stated by this Court, at least those from *Clearwater*, does not lead to a clear result in the instant case, as can be seen from the conclusions reached by the Superior Court judge and the dissenting judge of the Court of Appeal on the merits of the case. In short, although I agree that the appellants are trying to attribute an excessive scope to *Clearwater* and *Tremblay*, their arguments are not entirely unfounded. As I mentioned above, when all is said and done, what is important is the nature of the question being raised, not how a court will answer it.

81 The foregoing is what led all the judges of the Court of Appeal and the Superior Court judge to find that the applicable standard of review is correctness. In this regard, Bich J.A. wrote that [TRANSLATION] "the questions submitted to the arbitrator, *as drafted*, are limited neither to the context of the grievance before him nor to that of the collective agreement on which the grievance is based, and they *engage principles that apply generally to the administration of justice as a whole and are not entirely dependent on the particular facts of the case*" (para. 44 (emphasis added)). It would be hard to put it better.

82 Furthermore, if the Court were to decide in the instant case to accept the appellants' argument regarding the principle that motives are unknowable and to hold that the commissioners cannot be examined, that decision would be based not on circumstances specific to this case, but on a general principle of law that applies in every legal field and to proceedings in every court and administrative tribunal. Thus, even if the examination of the commissioners were not authorized on the basis that it would be irrelevant, the conclusion that it would be irrelevant would not flow from the assessment intrinsically linked to the facts of the case that is traditionally made by an arbitrator, but would instead be based on a principle that is not specific to the arbitration context and that has not yet been clearly defined by the courts.

83 This case can therefore be distinguished from *M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, 2011 SCC 59, [2011] 3 S.C.R. 616 (S.C.C.), to which my colleague refers (at paras. 33 and 38). First of all, what was at issue in that case was the *application to the facts* of a principle — estoppel — whose scope was well known and clearly defined. Moreover, Fish J. stated that arbitrators are well equipped to adapt and fashion that principle as they see fit (para. 45). The same cannot be said with respect to the immunities from disclosure and deliberative secrecy. These principles, which relate to the administration of justice as a whole, must be applied uniformly and consistently. In addition, the principle at issue in *Nor-Man* was closely linked to the arbitrator's discretion to order the remedy he or she considers just and appropriate in the circumstances of the case before him or her. Finally, and most importantly, the application of the principle of estoppel was not of central importance to the legal system in such circumstances.

84 It is true that the existence of a privative clause indicates that the legislature intended to limit the review of an arbitrator's decision to a minimum. Deference to the legislature's intention is important in employment law matters. Nevertheless, the existence of a privative clause is not in itself determinative (*Dunsmuir*, at para. 52), nor can it preclude intervention by a court on every question over which an arbitrator has jurisdiction or that relates to the arbitrator's general jurisdiction as a decision maker (as opposed to his or her particular expertise). Section 139 of the *Labour Code*, CQLR, c. C-27, cannot preclude a court from intervening in respect of [TRANSLATION] "issues of a general nature that might be raised in the same terms before any arbitrator and any administrative tribunal, but also in any court of law, *and that cannot be resolved differently from one forum to the next*" (per Bich J.A., at para. 39 (emphasis added)).

85 In short, despite the existence of a privative clause and even though the appeal arises in the context of the hearing of the evidence, over which the arbitrator has full authority, the specific questions that are raised in this case are general questions of law that, by their nature, are of central importance to the administration of justice as a whole and in respect of which the arbitrator has no particular expertise or expertise that is unique to his or her specialized role. As Bastarache and LeBel JJ. wrote, for the majority, in *Dunsmuir*, "[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers" (para. 60).

86 Finally, I note that, in the instant case, the result is the same regardless of whether the applicable standard is correctness or reasonableness.

Appeal dismissed.

Pourvoi rejeté.

1998 CarswellOnt 3948
Supreme Court of Canada

Consortium Developments (Clearwater) Ltd. v. Sarnia (City)

1998 CarswellOnt 3948, 1998 CarswellOnt 3949, [1998] 3 S.C.R. 3, [1998] S.C.J. No. 26, 114 O.A.C. 92, 165 D.L.R. (4th) 25, 230 N.R. 343, 39 W.C.B. (2d) 533, 40 O.R. (3d) 158 (headnote only), 40 O.R. (3d) 158 (note), 40 O.R. (3d) 158, 48 M.P.L.R. (2d) 1, 83 A.C.W.S. (3d) 118, 8 Admin. L.R. (3d) 165

Consortium Developments (Clearwater) Ltd., Appellant v. The Corporation of the City of Sarnia and the Lambton County Roman Catholic Separate School Board, Respondents

Kenneth MacAlpine, James Pumple and MacPump Developments Ltd., Appellants v. The Corporation of the City of Sarnia and the Lambton County Roman Catholic Separate School Board, Respondents and The Attorney General for Saskatchewan, Intervener

Lamer C.J.C., L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Bastarache and Binnie JJ.

Heard: March 16, 1998
Judgment: October 22, 1998
Docket: 25604

Proceedings: affirming (1996), 34 M.P.L.R. (2d) 291, 30 O.R. (3d) 1, 138 D.L.R. (4th) 512, 92 O.A.C. 321 (Ont. C.A.); affirming (1995), 27 M.P.L.R. (2d) 157, 83 O.A.C. 241, 23 O.R. (2d) 498 (Ont. Div. Ct.)

Counsel: *Harvey T. Strosberg, Q.C.*, and *Susan J. Stamm*, for the appellants.
George H. Rust-D'Eye, *Barnet H. Kussner* and *Valerie M'Garry*, for the respondent the City of Sarnia.
Thomson Irvine, for the intervener.

The judgment of the court was delivered by *Binnie J.*:

1 This appeal involves an attack on the validity and conduct of a municipally authorized judicial inquiry into alleged conflicts of interest and alleged irregularities in certain land transactions in the City of Sarnia, Ontario. The appellants, who include private developers, allege that the judicial inquiry trenches on the federal criminal law power, was otherwise improperly constituted and *ultra vires* the municipality, and that they were wrongly prevented by the courts below from assembling a proper record to demonstrate the facts in support of their various allegations of invalidity. At the conclusion of the hearing in this Court, the appeal was dismissed from the bench with reasons to follow. These are the reasons.

Factual Background

2 In the fall of 1989 and spring of 1990, a number of transactions took place involving vacant land near the intersection of Highways 402 and 40, in the Town of Clearwater, just east of the old City of Sarnia. As a result of these land transactions, which included reciprocal sales of land between the municipality and a developer, the appellant Consortium Developments (Clearwater) Ltd. ("Consortium"), lands were transferred between the public and private sectors. The Lambton County Roman Catholic Separate School Board emerged with a school site, the Town of Clearwater emerged with a park and some rights to adjoining land, and Consortium emerged with 107 acres of unserviced land intended for residential development. It was later alleged that the Town of Clearwater had paid inflated prices for the 40 acres it acquired as a park, while the appellant, Consortium (which had acquired a right of first refusal on the municipal lands as part of the purchase price of its lands by Clearwater) paid too little. The sale to Consortium was by public tender.

Consortium, as purchaser, gave back a mortgage to the Town of Clearwater as vendor for $3,390,812 (the" Consortium mortgage").

3 On January 1, 1991, Clearwater and the former City of Sarnia were amalgamated. By the terms of the *Sarnia Lambton-Act, 1989*, S.O. 1989, c. 41, the newly amalgamated municipality inherited the assets and liabilities of Clearwater, including the Consortium mortgage. The respondent Sarnia says that the effect of the amalgamating Act is that the City and its local boards stands in the place of the former municipalities and their local boards. If the Town of Clearwater could have authorized the inquiry, it is argued, so too could the newly amalgamated City of Sarnia.

4 Questions arose soon after amalgamation regarding the propriety of the land transactions. The Mayor of Sarnia wrote to the solicitor for Consortium requesting information and, in particular, disclosure of the identities of the shareholders and principals of Consortium. The request was refused. The political pot boiled over.

The Consortium Mortgage

5 The Consortium mortgage has a number of controversial features. It provides that neither interest nor principal will be payable until the municipality has completed a secondary plan for the subject property and assumed the services on the lands. These steps would open the way to Consortium to develop the lands for residential homes under a plan of subdivision in accordance with the *Planning Act*, R.S.O. 1990, c. P.13. Payment of the principal monies is not tied to any calendar date, but is scheduled to begin three years after interest begins to accrue. Consortium explained this arrangement on the basis that, until Clearwater (now Sarnia) satisfies this condition, which it was anticipated would be done "almost immediately" after the sale, Consortium would be the owner of undeveloped land worth only a fraction of the purchase price. From Sarnia's perspective, these financial terms mean that the $3,390,812 Consortium mortgage generates no immediate benefit for the City and, further, could be criticized as an inducement to facilitate the development of the Consortium lands ahead of other raw lands in the municipality, perhaps contrary to the priority that ordinary planning considerations might otherwise dictate.

6 Another controversial feature of the Consortium transaction is the continuing insistence of the shareholders and principals on anonymity. The Town of Clearwater had not insisted on disclosure, and its dealings had all been with the developer's lawyer. Accordingly, Consortium now argues that anonymity has somehow become a contractual term of the sale of the park binding on the new City of Sarnia. The identity of the shareholder(s) remained undisclosed at the date of the hearing of this appeal. The other appellants, Kenneth MacAlpine, James Pumple and MacPump Developments Ltd., were (or were involved with) the predecessors in title of the lands involved in some of the transactions, and have joined in the challenge to the judicial inquiry on the basis that they consider themselves to be potential targets. In earlier judicial review proceedings, the Sarnia City Solicitor filed an affidavit stating:

> One councillor and the Mayor of Clearwater Council and two of the principals of MacPump were all employed by the same Real Estate Company during the relevant time. As a result, questions are raised concerning Conflict of Interest legislation.

The Investigations

7 Local taxpayers petitioned the Minister of Municipal Affairs to convene an inquiry under s. 178 of the *Municipal Act*, R.S.O. 1990, c. M.45. The Ministry investigated and decided not to order a provincial inquiry, but referred the matter to the Ontario Provincial Police Anti-Rackets Branch. On August 18, 1993, the Ontario Provincial Police issued a press release advising that the police investigation had been concluded and revealed "no evidence of the commission of any criminal offence". On two occasions, the role of the solicitors for Consortium in the land transactions was investigated by the Law Society of Upper Canada. On both occasions, the Law Society found no evidence of professional misconduct or conduct unbecoming a solicitor and took no action.

The First Sarnia City Council Resolution

8 On November 23, 1992, Sarnia City Council passed a Resolution pursuant to s. 100(1) of the *Municipal Act* to establish a judicial inquiry concerning the land transactions. Section 100(1) grants a broad power to Ontario municipalities to authorize judicial inquiries into matters of municipal concern. The appellants say that this power is divided into two distinct branches. The first branch contemplates an investigation into specific misconduct and the second branch contemplates an inquiry more generally into the good government of the municipality, "or the conduct of any part of its public business", as follows:

> **100**. --(1) Where the council of a municipality passes a resolution requesting a judge of the Ontario Court (General Division) to investigate [*the first branch*] any matter relating to a supposed malfeasance, breach of trust or other misconduct on the part of a member of the council, or an officer or employee of the corporation, or of any person having a contract with it, in regard to the duties or obligations of the member, officer, employee or other person to the corporation, or [*the second branch*] to inquire into or concerning any matter connected with the good government of the municipality or the conduct of any part of its public business, including any business conducted by a commission appointed by the municipal council or elected by the electors....

9 The operative portion of the text of the first Sarnia City Council Resolution provided as follows:

> THAT Sarnia City Council ask for the appointment of a Judge under the appropriate legislation to carry out an inquiry for the City concerning the sale of City lands to Consortium and the sale from Consortium to the Lambton County Separate School Board of land in OPA #7, and Lottie Neely Park.

10 Consortium has consistently taken the position that the proposed judicial inquiry is not directed at concerns with respect to "good government" or "the public business" but constitutes a substitute police investigation. Consortium supports its case not only by reference to the inconclusive OPP investigation and Law Society inquiries already mentioned, but also by reference to local press reports of the various statements by Sarnia municipal politicians, including the following:

(i) On July 17, 1993, Alderman John Vollmar is quoted as saying, "People who talked to me want answers, who's involved ... the legality and the morality of it".

(ii) On August 19, 1993, Alderman Elizabeth Wood is quoted as saying that "council is interested in finding out about mistakes in judgment and possible conflicts of interest".

(iii) On August 31, 1993, Mayor Mike Bradley is quoted with respect to his views on why the city wanted to proceed with the judicial inquiry:

> He said council wants to find out who the unnamed principals are behind Consortium, since the city inherited from Clearwater its purchase arrangement with the group, which includes a $3.4 million mortgage.
>
> [Council] also wants to know why Clearwater acted as it did and whether any public official had a conflict of interest.

(iv) On September 3, 1993, Alderman Terry Burrell is quoted as saying that the OPP investigations "did not examine whether members of public bodies, like Clearwater council, were in conflict of interest ... that is the outstanding question here". Alderman Wood is quoted as saying that a judicial inquiry is a powerful instrument to get at the truth of whether public officials or staff" misused" their positions.

(v) On February 14, 1994, Alderman Dave Boushy is quoted as saying that "the issue is whether there were any laws broken when the transactions took place".

(vi) On February 16, 1994, while commenting on the OPP finding that there was no evidence of commission of a criminal offence, Mayor Mike Bradley is quoted as stating that such a finding does not mean everything was above board.

11 Consortium sought to develop the factual foundation for the allegation that the inquiry was a colourable attempt to create a substitute criminal inquiry by causing summonses to be issued to members of the Sarnia City Council and some of its senior officials. These summonses were ultimately quashed by the courts below, and this quashing gives rise to one of the grounds of appeal to this Court.

Quashing the First Sarnia City Council Resolution

12 The first Resolution was quashed for vagueness; see *MacPump Developments Ltd. v. Sarnia (City)* (1994), 20 O.R. (3d) 755 (Ont. C.A.). However, the Court of Appeal did hold on that occasion that as Sarnia now included within its boundaries the whole of the former municipality of Clearwater, and stood in its place under s. 9 of the amalgamating statute, the new City of Sarnia had the power under s. 100 to pass a properly framed resolution to inquire into the affairs of the former municipality of Clearwater. Doherty J.A. observed at p. 771:

> ...matters connected with the good government or public business of Clearwater are after amalgamation matters connected with the good government and public business of Sarnia.

The Second Sarnia City Council Resolution

13 On January 9, 1995, only a month after the quashing of its previous Resolution authorizing a judicial inquiry, and more than 16 months after termination of the OPP investigation, the City of Sarnia passed a longer and more detailed authorizing Resolution that referred specifically to the "good government" and "conduct of public business" branch of s. 100 of the *Municipal Act*. As its terms formed a significant part of the argument on the appeal, I reproduce it in full:

> Being a Resolution to request a Judicial Inquiry pursuant to Section 100 of the *Municipal Act*, and to provide the Terms of Reference therefor
>
> WHEREAS, under section 100 of the *Municipal Act*, R.S.O. 1990, c. M.45, a council of a municipality may, by resolution, request a Judge of the Ontario Court (General Division), to inquire into or concerning any matter connected with the good government of the municipality, or the conduct of any part of its public business;
>
> AND WHEREAS any Judge so requested shall make the Inquiry and shall report with all convenient speed, to Council, the result of the Inquiry and the evidence taken, and for that purpose shall have all the powers of a commission under Par II of the *Public Inquiries Act*, R.S.O. 1990, c. P.41;
>
> AND WHEREAS the Corporation of the City of Sarnia has become the owner of certain lands, shown on the attached map, and known as the "Lottie Neely lands" or "Lottie Neely Park", as a result of the amalgamation of the former Town of Clearwater ("Clearwater") with the former City of Sarnia, and as a result of the purchase of these lands from MacPump Developments Ltd. ("MacPump") by Clearwater;
>
> AND WHEREAS the consideration for the purchase by Clearwater of the Lottie Neely lands included, in addition to the purchase price of $1,200,000.00, the granting to MacPump of a right of first refusal on a 142 acre parcel of land owned by Clearwater, also shown on the attached map, and known as the" Parklands";
>
> AND WHEREAS Clearwater sold the Parklands to Consortium Developments (Clearwater) Ltd. ("Consortium") following a public tender process, which was subject to the right of first refusal;

AND WHEREAS, prior to the sale of the Parklands to Consortium, Clearwater declined to negotiate with the Lambton County Roman Catholic Separate School Board (the" Board"), the Board's offer to purchase a portion of the Parklands;

AND WHEREAS the right of first refusal granted by Clearwater to MacPump, was assigned by MacPump, to a trustee (the "Trustee");

AND WHEREAS the Trustee agreed to sell a 35 acre parcel of the Parklands to the Board;

AND WHEREAS the Parklands which Clearwater sold to Consortium were conveyed in two parcels, as follows:

1. a 35 acre parcel conveyed to the Trustee, and

2. a 107 acre parcel conveyed to Consortium.

AND WHEREAS, on the same day that the Parklands were conveyed by Clearwater to the Trustee and Consortium, the Trustee conveyed the 35 acre parcel of land, to a trustee, in trust for the Board;

AND WHEREAS, as a result of the sale to Consortium, the Corporation of the City of Sarnia is now the holder of a mortgage in the amount of $3,390,812.20 on the 107 acre portion of the Parklands, which mortgage was registered April 5th, 1990 and provides, in part, that:

The said principal sum shall be repayable as follows:

a) interest shall be calculated at the rate of 10% per annum, half yearly not in advance, and shall be payable yearly. Interest shall commence on the completion by the Chargee of the secondary plan for the subject property and upon completion and assumption by the Chargee of the infrastructure in relation thereto in order that the lands being charged can proceed to be developed by plan of subdivision in accordance with the Planning Act.

b) all outstanding principal and interest to be due and payable three (3) years from the date upon which interest commences as set out in clause (a) above.

AND WHEREAS the conditions precedent for the commencement of interest on the principal sum secured by the mortgage have not been satisfied;

AND WHEREAS, by virtue of section 9 of the *Sarnia-Lambton Act*, S.O. 1989, c. 41, the assets and liabilities of Clearwater have become assets and liabilities of the City of Sarnia, and the City stands in the place of Clearwater;

AND WHEREAS a public inquiry would permit the public to understand and evaluate fully the above noted transactions, and would permit the Commissioner to make recommendations that would be of benefit for the future conduct of the public business of the municipality;

AND WHEREAS the City of Sarnia has received delegations and petitions calling for the City to inquire into these transactions;

AND WHEREAS the Ontario Court of Appeal has affirmed the City's right to pass such a Resolution;

NOW THEREFORE THE MUNICIPAL COUNCIL OF THE CORPORATION OF THE CITY OF SARNIA DOES HEREBY RESOLVE THAT:

1. An Inquiry is hereby requested to be conducted pursuant to that portion of Section 100 of the *Municipal Act* which authorizes the Commissioner to, "inquire into, or concerning, any matter connected with the good government of the municipality, or the conduct of any part of its public business", and

2. The Honourable Mr. Justice Gordon P. Killeen be requested to act as Commissioner for the Inquiry.

AND IT IS FURTHER RESOLVED THAT the Terms of Reference of the inquiry shall be:

To inquire into all aspects of the above transactions, their history and their impact on the ratepayers of the City of Sarnia as they relate to the good government of the municipality, or the conduct of its public business, and to make any recommendations which the Commissioner may deem appropriate and in the public interest as a result of his Inquiry.

AND IT IS FURTHER RESOLVED THAT the Commissioner, in conducting the Inquiry into the transactions in question to which the Town of Clearwater was a party, and without expressly inquiring into the internal affairs and conduct of the Board, except as is incidental to his primary inquiry, is empowered to ask any questions which he may consider as necessarily incidental or ancillary to a complete understanding of these transactions.

AND, for the purpose of providing fair notice to those individuals who may be required to attend and give evidence, and without infringing on the Commissioner's discretion in conducting the Inquiry in accordance with the Terms of Reference stated herein, it is anticipated that the Inquiry may include the following:

1. an inquiry into all relevant circumstances pertaining to the various transactions referred to herein, including: their relationship to one another; the consideration provided by the parties in each instance; the granting by Clearwater of a right of first refusal to MacPump upon the purchase of the Lottie Neely lands by Clearwater; the acceptance by Clearwater of a mortgage given by Consortium upon its purchase of the Parklands; and the timing of the various transactions in relation to one another and in relation to the amalgamation of Clearwater and the former City of Sarnia;

2. an inquiry into the nature and extent of the information which was available to the parties to the various transactions at all relevant times;

3. an inquiry into the relationships, if any, between the elected and administrative representatives of Clearwater, and the principals and representatives of the Board, MacPump, the Trustee and Consortium at all relevant times; and

4. an inquiry into the legal or other professional advice obtained by Clearwater in connection with its negotiations.

Second Judicial Review Application

14 On February 28, 1995, several weeks after passage of the Second Sarnia City Council Resolution, the present applications for judicial review were commenced. Included in the grounds was the allegation that the Second Sarnia City Council Resolution had a colourable purpose in that it:

...creates an inquiry into the supposed misconduct of named and unnamed individuals while purporting to create an inquiry into the good government of the municipality.

Opening of the Commission of Inquiry

15 On March 6, 1995, Commissioner Gordon P. Killeen, a justice of the Ontario Court (General Division), opened his inquiry. His opening statement indicated an intention to proceed without awaiting the final resolution of the judicial

review applications together with an outline of the general inquiry procedure he would follow. The appellants took the position that Commissioner Killeen had made up his mind not only to proceed without hearing their submissions, but also *how* he would proceed. They brought a motion to seek his removal from the inquiry. This removal motion was dismissed by a unanimous Divisional Court by order dated March 10, 1995.

Subpoena to Members of City Council

16 As stated, in an effort to advance its allegation of colourable purpose Consortium caused summonses to be issued to various members of City Council and senior city officials to testify as witnesses in the pending motions for judicial review. The Divisional Court, on a preliminary motion with written reasons released on April 12, 1995, (1995), 81 O.A.C. 102 (Ont. Div. Ct.) , quashed the summonses on the basis that evidence about the intent of individual members would be irrelevant to the validity of the Council resolution, citing *Thorne's Hardware Ltd. v. R.*, [1983] 1 S.C.R. 106 (S.C.C.).

Relevant Statutory Provisions

17 Section 100(1) of the *Municipal Act*, R.S.O. 1990, c. M.45, provides:

> **100**. --(1)Where the council of a municipality passes a resolution requesting a judge of the Ontario Court (General Division) to investigate any matter relating to a supposed malfeasance, breach of trust or other misconduct on the part of a member of the council, or an officer or employee of the corporation, or of any person having a contract with it, in regard to the duties or obligations of the member, officer, employee or other person to the corporation, or to inquire into or concerning any matter connected with the good government of the municipality or the conduct of any part of its public business, including any business conducted by a commission appointed by the municipal council or elected by the electors, the judge shall make the inquiry and for that purpose has all the powers of a commission under Part II of the *Public Inquiries Act*, which Part applies to such investigation as if it were an inquiry under that Act, and the judge shall, with all convenient speed, report to the council the result of the inquiry and the evidence taken.

Judgments

18 The appellant's application for judicial review to quash the new Resolution of January 9, 1995 was dismissed by a majority of the Divisional Court (Steele J. and Rosenberg J. concurring, with Borins J. dissenting) on June 8, 1995. The Court of Appeal, on September 6, 1996, dismissed the appeals of the decisions of the Divisional Court rendered on March 10 (the application to remove Commissioner Killeen), April 12 (the quashing of the subpoenas) and June 8, 1995 (dismissal of the judicial review applications on their merits).

Ontario Court (General Division), Divisional Court (1995), 23 O.R. (3d) 498 (Ont. Div. Ct.)

Per Steele J., for the majority

19 A by-law or resolution is presumed to be valid and the onus was on the applicants to show that it should be quashed. Doubtful expressions should be resolved in favour of an *intra vires* interpretation. City council had the authority to pass a resolution appointing the inquiry unless on the face of the resolution it is vague or infringes upon federal criminal law powers. Even if the alleged oral contract of non-disclosure regarding the names of Consortium's principals was binding on Sarnia, this would not preclude Sarnia from passing the Resolution. The Resolution was not vague. It made the necessary connection required by s. 100 of the Act between the particular subject-matter and the good government or business affairs of the municipality. "The ... resolution raises the issue to be investigated in a sufficient manner to show valid connection to the public business and good government of the municipality and the purpose of the inquiry" (p. 515). The pith and substance of the Resolution is to inquire into good government of the municipality and, in particular, the conduct of its public business. All inquiries may result in evidence showing bad conduct, and this possibility alone is not sufficient to hold that the Resolution is invalid. It should be presumed that the Commissioner knows the law and would

respond appropriately if a question about evidence or the invasion of individual rights should arise. The application for judicial review should be dismissed.

Per Rosenberg, J., concurring

20 The inquiry should be permitted to proceed for the reasons of Steele, J. and for the following reasons. The inquiry was being conducted by a superior court judge well aware of the limits imposed on an inquiry. It would be wrong to take too technical a view of the requirement that terms of reference define the questions to be answered. Only when the full details of the various land transactions have been explored can the true questions be knowledgeably formulated and recommendations made.

Per Borins J., dissenting

21 Borins J. concluded that this was, in reality, a first branch inquiry, the focus of which was to determine whether there was anything corrupt respecting the land transactions, and not a second branch inquiry concerning good government or public business of the municipality. He concluded (at p. 521) that its true purpose

> was to determine whether there was unspecified malfeasance, breach of trust, conflict of interest, or some other type of impropriety on the part of MacPump and Consortium, or their principals, or the representatives of the school board, or the representatives of the former Town of Clearwater.

Borins, J. held that particulars are required for either branch of s. 100, but especially the first branch, and that this Resolution was improper because it" identifies nothing about the land transactions which may be suspect, such as a conflict of interest or improper use of funds" (p. 527). He said (at pp. 531-32):

> In short, there is nothing on the face of the resolution, or in the evidence, that demonstrates that the subject matter of the proposed inquiry affects the good government or public business of Clearwater. Similarly, if characterized as a first branch inquiry, the resolution also lacks particularity as it fails to state any act of alleged malfeasance.

The Resolution offends the principle that a by-law, or resolution, must express its meaning with sufficient certainty to enable those persons affected by it to understand it in order to be able to comply with it. Furthermore, the Resolution was void on constitutional grounds. A review of all the circumstances led to the conclusion that the true purpose of the inquiry was a criminal investigation. The Resolution was an unconstitutional exercise by a municipal council of federal criminal law powers under s. 91(27) of the *Constitution Act, 1867*. Borins J. would have quashed the second City of Sarnia Resolution and halted the inquiry.

Court of Appeal (1996), 30 O.R. (3d) 1 (Ont. C.A.)

22 The appeal was dismissed. Section 100(1) of the *Municipal Act* has two branches. Under the first branch, the council can pass a resolution to investigate supposed misconduct on the part of officials or any person dealing with the municipality. Under the second branch, the council can pass a resolution to inquire into "any matter connected with the good government of the municipality or the conduct of any part of its public business". The court rejected the argument that the City's Resolution was unlawful because it was drafted as a second branch inquiry, when in reality it created a first branch inquiry without the appropriate procedural safeguards. The court concluded that it was not necessary for the municipality to specify the branch under which it purports to act as it had jurisdiction to act under either branch.

23 The argument that the Resolution was too vague and lacked particularity was rejected. The preamble to the Resolution described the land transactions in considerable detail. "It is clear that the land transactions are' the matter' to be investigated within the meaning of s. 100(1) of the *Municipal Act*" (p. 20). The Resolution was sufficiently particular to comply with the requirements of s. 100(1) of the Act. McMurtry C.J.O. for the court observed (at p. 22) that:

> The City of Sarnia has specified the "matter" to be investigated, and that matter is a limited, defined series of transactions. The resolution does not need to spell out specific allegations for the commissioner to understand

the potential problem areas that might be related to the public interest. Public funds were used to purchase two properties at what appears to be substantially inflated prices, the City is holding a mortgage which may be unenforceable and Consortium has steadfastly refused to disclose its principals. Again, the transactions are described in sufficient detail to direct the commissioner as to the subject-matter of the inquiry.

The court was of the opinion that the appellants appeared to be asking for particulars that might be available only after the inquiry had concluded its investigation.

24 As to the argument that the Resolution infringed upon federal criminal law powers under s. 91(27) of the *Constitution Act, 1867*, McMurtry C.J.O. stated that the land transactions had generated considerable public concern, and the Resolution on its face addressed policy issues by asking the commissioner to inquire into all aspects of these transactions including their impact on the ratepayers of the City. This was a matter of municipal good governance and the conduct of public business. The *Municipal Act* authorizes such an inquiry, and the constitutional division of powers did not invalidate the inquiry. Even if the inquiry incidentally touches on what may be criminal conduct, the inquiry itself was established for a valid provincial purpose. The pith and substance of the Resolution fell within provincial jurisdiction. All of the other grounds of appeal were dismissed.

Issues

25 In this Court the appellants advanced the following issues:

1. Is the Resolution unlawful in that it fails to comply with the requirements of s. 100(1) of the Act?

2. Should the appellants' attempt to create a record of surrounding circumstances have been restricted by the quashing of the summonses issued to the mayor and the Sarnia City councilors, and city officials?

3. Is the Resolution *ultra vires* because the inquiry it creates is in reality a substitute police investigation and preliminary inquiry infringing the federal criminal law powers under s. 91(27) of the *Constitution Act, 1867*?

4. Is the Resolution unlawful in that it requires an investigation by Sarnia into the affairs of Clearwater?

5. Did the Commissioner breach the requirements of natural justice and irrevocably lose jurisdiction by the procedure he adopted at the inquiry pre-hearing?

1. Is the Resolution Unlawful in That It Fails to Comply With the Requirements of s. 100(1) of the Act?

26 The power of an Ontario municipality to authorize a judicial inquiry into matters touching the good government of the municipality, or "any part of its public business", and any alleged misconduct in connection therewith, reaches back prior to Confederation. Apart from a few amendments to harmonize this power with other legislative changes in the province, s. 100 of the *Municipal Act* is substantially unchanged from its predecessor section in 1866. This reflects a recognition through the decades that good government depends in part on the availability of good information. A municipality, like senior levels of government, needs from time to time to get to the bottom of matters and events within its bailiwick. The power to authorize a judicial inquiry is an important safeguard of the public interest, and should not be diminished by a restrictive or overly technical interpretation of the legislative requirements for its exercise. At the same time, of course, individuals who played a role in the events being investigated are also entitled to have their rights respected. The basic issue in this appeal is how a balance is to be struck between those two requirements.

27 Counsel for Consortium expressed his client's opposition to the apparent sweep of s. 100 with the comment that it gives every municipality in the province the power to "compel a private citizen to come to the town square to be interrogated". It should be remembered, however, that Consortium elected to do business with a public body, whose successor is now accountable to its taxpayers for a $3.39 million unperforming mortgage and 40 acres of parkland allegedly purchased at an excessive price. The interrogation of Consortium's shareholders or principals (if and when they are identified) will be under the direction of a Commissioner who is (as he must be) a judge of the Ontario Court (General

Division). The fact a s. 100 inquiry is a *judicial* inquiry clearly seeks to balance the municipality's desire to have accurate information and useful recommendations from an independent Commissioner against the right of private citizens and others to have their legitimate interests recognized and protected. A good deal of confidence is inevitably and properly placed in the ability of the Commissioner to ensure the fairness of the inquiry.

Procedural Fairness

28 Some of the arguments advanced on behalf of the appellants did, in fact, seem to overlook the distinction between the requirements for a valid exercise of the s. 100 power to establish an inquiry, on the one hand, and the procedural protections to which the appellants are entitled in the course of an inquiry once validly established on the other hand. The municipal council resolution contemplated by s. 100 must, to be sure, be intelligible. It must convey to the Commissioner and every other interested person the subject matter of the inquiry, and it must connect the subject matter to one or more of the matters referred to in s. 100 of the *Municipal Act*. It must provide those who appear before the Commissioner with a reasonable understanding of the scope, as well as the limits, of the inquiry, so as to avoid the possibility, however remote, that an overly enthusiastic Commissioner or commission counsel could, in effect, draw their own terms of reference. The s. 100 resolution must provide sufficient particularity to satisfy these legislative requirements.

29 That having been said, the s. 100 Resolution is not a pleading, much less is it a bill of indictment. It creates a jurisdiction, but in the exercise of that jurisdiction the Commissioner is limited by the principles of procedural fairness, irrespective of whether or not these limits are spelled out in the s. 100 Resolution. The application of these principles will, of course, depend upon the subject matter of the inquiry and the varying interests of those who appear to give evidence or who are otherwise caught up in the proceedings. The need for flexibility in the application of procedural fairness is evident in the spectrum of matters which are referred to in s. 100 itself. Witnesses who appear at a general policy inquiry to give expert evidence about, for example, municipal finances will likely have little need of procedural protection. An inquiry into a particular item of "public business", such as a tendering mishap, is more likely to impact on individual rights, and the procedure will be more strictly controlled in consequence. At the most sensitive end of the spectrum, where misconduct is alleged that may have the potential of civil or criminal liability (irrespective of whether the inquiry is a first branch inquiry or a second branch inquiry), the full strictures of natural justice will protect those who are reasonably seen as potential targets.

30 The conceptual distinctions between legislative validity and the fair inquiry interests of the participants is important. If the municipality had a sufficient grip on the relevant facts to give detailed particulars there might be no need for an inquiry. At the same time, the municipality's lack of knowledge does not license it to trample on the rights of its employees, former employees, persons with whom it has done business, or others. Aspects of procedural fairness, such as the need for particulars, should not defeat an inquiry at the outset unless it is concluded that in the particular circumstances of the case a fair inquiry simply cannot be had based upon the wording of the particular resolution under consideration. Otherwise the inquiry should be allowed to proceed, and procedural objections dealt with at a later stage when the Commissioner has had an opportunity to consider the fairness issues and deal with them.

31 It is true, as pointed out by Borins J. dissenting in the Divisional Court, at p. 525, that s. 100, unlike s. 13 of the federal *Inquiries Act*, R.S.C. 1985, c. I-11, and s. 5(2) of the Ontario *Public Inquiries Act*, R.S.O. 1990, c. P.41, does not explicitly state that no finding of misconduct shall be made against a person unless that person is given reasonable notice of the substance of the alleged misconduct, and given an opportunity to be heard during the inquiry in person or by counsel. Borins J. considered that this omission meant:

> ...that the commissioner, in reporting the result of his or her inquiry to the municipal council, may make findings of misconduct without the necessity of [such notice].

I do not agree. Section 13 of the federal *Inquiries Act* and s. 5(2) of the Ontario *Public Inquiries Act* reflect the applicable principles of natural justice dealing with notice and the opportunity to be heard where misconduct is alleged, and a Commissioner under s. 100 is bound to govern himself accordingly even though s. 100 is silent on the requirement.

Legislative Validity of the Second Sarnia City Resolution

32 With these principles in mind, I turn to the argument that the second Sarnia Council Resolution fails to meet the minimum *legislative* requirements for a valid exercise of the s. 100 power. The Resolution first identifies s. 100 as the source of the municipality's jurisdiction, and then recites in considerable detail each step of the transactions involving the subject lands, including the controversial terms of the Consortium mortgage mentioned above, and then describes the successor relationship between Sarnia and the former Town of Clearwater. Having identified the subject matter of the inquiry, and appointed Mr. Justice Killeen as the Commissioner, the Resolution then relates the terms of inquiry to s. 100 as follows:

> To inquire into all aspects of the above transactions, their history and their impact on the ratepayers of the City of Sarnia as they relate to the good government of the municipality, or the conduct of its public business, and to make any recommendations which the Commissioner may deem appropriate and in the public interest as a result of his Inquiry. [Emphasis added.]

33 The Commissioner is thus directed to, *and limited by*, the municipality's interest in good government and the conduct of public business. The limitation is important and counsel for the various participants are entitled to see that it is respected. The Resolution then provides:

> for the purpose of providing fair notice to those individuals who may be required to attend and give evidence, ... it is anticipated that the Inquiry may include ... [in respect of the various transactions] their relationship to one another; the consideration provided by the parties in each instance; the granting by Clearwater of a right of first refusal to MacPump upon the purchase of the Lottie Neely lands by Clearwater; the acceptance by Clearwater of a mortgage given by Consortium upon its purchase of the Parklands; and the timing of the various transactions in relation to one another and in relation to the amalgamation of Clearwater and the former City of Sarnia; [Emphasis added.]

34 In terms of "good government" and the conduct of "public business" the Resolution specifically recites its "anticipation" of

> 2. an inquiry into the nature and extent of the information which was available to the parties to the various transactions at all relevant times;
>
> 3. an inquiry into the relationships, if any, between the elected and administrative representatives of Clearwater, and the principals and representatives of the Board, MacPump, the Trustee and Consortium at all relevant times; and
>
> 4. an inquiry into the legal or other professional advice obtained by Clearwater in connection with its negotiations.

35 The appellants complain that there is no mention here of specific acts of" supposed malfeasance, breach of trust or other misconduct". Their objective, apparently, is to limit the inquiry to particulars the municipality already knows about, if indeed there are any such particulars. Section 100, however, does not compel a municipality to advance more extravagant allegations than it is ready, willing and able to make. Item 3 in the Resolution talks about an inquiry into the "relationships" between representatives of the developer and City officials. This item clearly raises the topic of potential conflicts of interest. There is no obligation on the City to allege as a fact that such conflicts of interest existed. Item 4 raises the issue whether Clearwater ignored its professional advisors. Such matters as potential conflicts of interest and possible disregard of professional advice have a good government aspect as well, potentially, as a misconduct aspect. Section 100 creates a broad power, and it was open to Sarnia City Council to authorize the more general inquiry into the conduct of public business expressed in its Resolution as opposed to the narrower inquiry into specific acts of misconduct that the appellants think would have been preferable.

36 The appellants argue that the connection between "good government" and the subject land transactions should be spelled out in the s. 100 Resolution, but the Resolution, taken as a whole, makes it clear to a mind willing to understand that the City believes that as a result of "public business" that may have involved "relationships" between public officials and private developers, the City is now stuck with an unperforming mortgage and an overpriced park, which have generated "delegations and petitions", and the City believes it would benefit from the Commissioner's recommendations for the "future conduct of the public business of the municipality". It is evident that an inquiry under the second branch of s. 100 into an item of public business may disclose misconduct. Equally, an inquiry under the first branch may look into "supposed malfeasance", and discover the conduct was entirely innocent, but ought nevertheless to result in recommendations for the good government of the municipality. While it may therefore be useful for some purposes to think of s. 100 as having two branches, it is but a single power, and the preconditions for its valid exercise to establish a judicial inquiry do not vary with the subject matter. A more compartmentalized interpretation would undermine the utility of the power and contradict the broad legislative intent evident on the face of s. 100. The concern, which I believe is a legitimate concern, about the need for greater particularity in cases where misconduct may be found can best be handled, in my view, within the framework of procedural fairness at the inquiry stage.

37 It must be remembered that the report of the Commissioner to the City Council will represent only his views, and will not determine civil or criminal liability, if any. As this Court recently emphasized in *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 (S.C.C.) (the "*Blood Inquiry* case"), *per* Cory J. at para. 34:

> A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter.

While the public benefits sought to be achieved by the judicial inquiry cannot be purchased at the expense of violating the rights of the appellants and others involved in the land transactions, those rights will be protected in the course of the proceeding by the principles of natural justice and the fairness of the Commissioner, and thereafter by the inadmissibility of compelled testimony in subsequent proceedings federally under s. 5(2) of the *Canada Evidence Act*, R.S.C., 1985, c. C-5, and s. 13 of the *Canadian Charter of Rights and Freedoms* (*Di Iorio v. Montreal Jail* (1976), [1978] 1 S.C.R. 152 (S.C.C.); *R. v. Dubois*, [1985] 2 S.C.R. 350 (S.C.C.)), and provincially under s. 9(1) of the Ontario *Public Inquiries Act*, which is incorporated by reference into s. 100(1) of the *Municipal Act*.

38 The appellants rely, as did Borins J., dissenting, in the Divisional Court, on the dissenting reasons of Gwynne J. in this Court in *Godson v. Toronto (City)* (1890), 18 S.C.R. 36 (S.C.C.). In that case, the majority upheld a very sweeping municipal resolution to establish a judicial inquiry into the conduct of a municipal inspector suspected of malfeasance. The resolution lacked particulars. A majority of this court, *per* Sir W.J. Ritchie C.J., held at p. 40 that "[t]he city was empowered by law to issue the commission to the county judge to make the inquiries directed in this case." The sole dissenting judgment of Gwynne J. was based on his view that the municipal power to authorize a judicial inquiry was so "open to abuse" that the legislation should be "so construed as to confine the powers ... within the strictest construction of its letter" (p. 41). Clearly a restrictive interpretation was rejected by the majority of the Court. Gwynne J. went on to hold that jurisdiction under the first branch required the municipal resolution to "specify some act, matter or thing, either in the nature of malfeasance, breach of trust, or other named misconduct" (p. 42). It seems to me that Gwynne J. was merely pointing out that the subject matter of an inquiry has to be specified, a proposition with which I agree. It hardly bears repetition that an inquiry into misconduct must identify the misconduct to be inquired into. However, to the extent that Gwynne J. is taken by the appellants as advancing the broader proposition that, in the absence of such specification of misconduct, a municipality cannot initiate a more general inquiry under the second branch of s. 100 to

get to the bottom of some controversial item of public business, I do not agree that Gwynne J. was advancing such a proposition. If he was, I think the majority of this Court in *Godson* can be taken as having rejected it, and rightly so.

39 A more recent and instructive case is the *Blood Inquiry* case, *supra*. That case involved a challenge to the authority of Commissioner Horace Krever to find not only the "facts" about Canada's blood supply in the early 1980s, but to draw inferences that might indicate that there had been conduct on the part of the corporations or individuals which *could* attract criminal culpability or civil liability. The terms of reference in that case, as here, did not make any allegations of misconduct. In that aspect, it provides a striking parallel to the present case. This Court unanimously rejected the challenge to Commissioner Krever's notices of potential misconduct, and his authority eventually to make findings that disclosed misconduct if he were to think it fit to do so. The ruling in that case ought to be applied to the present case to hold that not only may the Commissioner acting under the second branch of s. 100 inquire into, as part of his larger mandate, conduct which may have potential criminal or civil consequences, but may in his report (*per* Cory J. at para. 57):

> ...make findings of misconduct based on the factual findings, provided that they are necessary to fulfill the purpose of the inquiry as it is described in the terms of reference.

40 The s. 100 Resolution in this case is perfectly intelligible. It identifies not only what is to be inquired into but the limits of the municipality's interest. The subject matter of the inquiry as set out in the second Sarnia City Council Resolution is a matter of legitimate municipal concern within the ambit of the matters referred to in s. 100. The attack on the legislative validity of the s. 100 Resolution must therefore be rejected.

Procedural Fairness at the Inquiry

41 Before leaving the appellants' first ground of appeal, I want to emphasize that the concerns of individuals caught up in judicial inquiries are real and understandable. Unlike an ordinary lawsuit or prosecution where there has been preliminary disclosure and the trial proceeds at a measured pace in accordance with well-established procedures, a judicial inquiry often resembles a giant multi-party examination for discovery where there are no pleadings, minimal pre-hearing disclosure (because commission counsel, at least at the outset, may have little to disclose) and relaxed rules of evidence. The hearings will frequently unfold in the glare of publicity. Often, of course, at least some of the participants will know far in advance of commission counsel what the documents will show, what the key witnesses will say, and where "misunderstandings" may occur. The inquiry necessarily moves in a convoy carrying participants of widely different interests, motives, information, involvement, and exposure. It is a tall order to ask any Commissioner to orchestrate this process to further the public interest in getting at the truth without risking unnecessary, avoidable or wrongful collateral damage on the participants. While the appellants go too far in arguing that the particulars they seek must be built into the s. 100 resolution, inquiry participants are entitled to particulars of what, if any, misconduct is alleged against them sufficiently in advance of the conclusion of the hearings (and ordinarily to each of them in advance of giving testimony) to reasonably enable each of them to respond (if they have not already responded) as each of them may consider appropriate. Witnesses are routinely required to make disclosure of relevant documents to Commission counsel, and in the spirit of even-handedness it should be customary for Commission counsel, to the extent practicable, to disclose to witnesses, in advance of their testimony, any other documents obtained by the Commission which have relevance to the matters proposed to be covered in testimony, particularly documents relevant to the witness's own involvement in the events being inquired into. Judicial inquiries are not ordeals by ambush. Indeed, judicial inquiries often defend the validity of their existence and methods on the ground that such inquiries are inquisitional rather than adversarial, and that there is no *lis* between the participants. Judicial inquires are not, in that sense, adversarial. On this basis the appellants and others whose conduct is under scrutiny can legitimately say that as they are deemed by the law not to be adversaries, they should not be treated by Commission counsel as if they were.

2. Should the Appellants' Attempt to Create a Record of Surrounding Circumstances Have Been Restricted by Quashing the Summonses to the Mayor, the Sarnia City Councillors, and City Officials?

42 This point is governed by the principles already discussed. The appellants submit that evidence of the surrounding circumstances, including the intent of the individual members of the Sarnia City Council, is admissible and relevant to show whether or not the true purpose of the Resolution was to uncover and disclose unspecified misconduct. The evidence would be directed to whether the Councillors really intended to constitute a "first branch" inquiry masquerading as a "second branch" inquiry within the general framework of s. 100 so as to avoid the necessity of providing appropriate particulars of misconduct. Beyond this, the appellants want to demonstrate that, even as a "first branch" inquiry, the supporters of the Resolution were, in fact, seeking a substitute police investigation into the commission of specific criminal offences, by specific individuals, thus attracting the prohibition of *Starr v. Ontario (Commissioner of Inquiry)*, [1990] 1 S.C.R. 1366 (S.C.C.).

43 I will address the *Starr* issue below. Subject to that, it is clear that the evidence directed to a" first branch" versus "second branch" argument is irrelevant. The doctrine of colourability applies where a legislature purports to exercise its power in relation to a matter within its jurisdiction but, in fact, is directing its legislative effort to a matter outside its jurisdiction. To put the matter another way, the appellants argue that while the s. 100 Resolution "in form" authorizes a second branch inquiry, it is" in substance" a first branch inquiry, and should attract what the appellants contend should be the more rigorous procedural requirements of a" first branch" inquiry. Leaving aside the division of powers issue that prevailed in *Starr* the appellants cannot succeed simply by showing that some members of Council may have had in mind one aspect of the s. 100 jurisdiction while others had in mind a different aspect of the s. 100 jurisdiction. The Resolution was in writing. Members of Council voted for the written text. The Commissioner is bound by the written text. The question is whether the municipality, as opposed to the individual members of its Council, had jurisdiction to do what it did. See *British Columbia (Milk Board) v. Grisnich*, [1995] 2 S.C.R. 895 (S.C.C.), at para. 5.

44 This case provides a good illustration of why the rule in *Thorne's Hardware, supra*, is salutary. In that case the Court was invited to conclude that the federal Cabinet was motivated by crass and improper financial considerations to extend the boundaries of St. John Harbour to include new deep water liquid bulk terminal facilities which Irving Oil and its wholly owned subsidiaries had carefully located outside the previous harbour limits. The result was that harbour dues not previously payable at the new facility became payable. Dickson J. for the Court said, at p. 112:

> Counsel for the appellants was critical of the failure of the Federal Court of Appeal to examine and weigh the evidence for the purpose of determining whether the Governor in Council had been motivated by improper motives in passing the impugned Order in Council. We were invited to undertake such an examination but I think that with all due respect, we must decline. It is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council.....

45 The motives of a legislative body composed of numerous persons are "unknowable" except by what it enacts. Here the municipal Council possessed the s. 100 power and exercised it in the form of a resolution which speaks for itself. While some members of the present or previous Sarnia Council may have made statements which suggest a desire to unmask alleged misconduct, the inquiry will not be run by city councillors but by Commissioner Killeen, a Superior Court judge, who will take his direction from the s. 100 Resolution, not from press reports of comments of some of the city politicians. Accordingly the courts below were correct to quash the summonses and strike from the record certain other evidence. While courts should be slow to interfere with a party's effort to build its case, they should set aside summonses where, as here, the evidence sought to be elicited has no relevance to a live issue in the judicial review applications: *Canada Metal Co. v. Heap* (1975), 7 O.R. (2d) 185 (Ont. C.A.), *per* Arnup J.A., at p. 192.

3. Is the Resolution Ultra Vires Because the Inquiry It Creates Is in Reality a Substitute Police Investigation and Preliminary Inquiry Infringing the Federal Criminal Law Power Under s. 92(27) of the Constitution Act, 1867?

46 An issue of colourability would properly be raised if it were established that this judicial inquiry, purportedly authorized under provincial law, was in fact a substitute police investigation invading the exclusive jurisdiction of Parliament in relation to criminal law and procedure. Extrinsic evidence would be admissible to demonstrate

colourability: *Starr*, *supra*, at p. 1403. If the appellants are correct the Resolution would be *ultra vires* s. 100, which authorizes only inquiries within provincial jurisdiction, and the s. 100 Resolution would be invalid on division of powers grounds.

47 The constitutional validity of s. 100 itself is undoubted. It can be supported under various provisions of s. 92 of the *Constitution Act, 1867*: (a) s. 92(8), Municipal Institutions in the Province; (b) s. 92(13), Property and Civil Rights in the Province; and (c) s. 92(16), Generally all Matters of a merely local or private Nature in the Province. The question is whether this particular resolution, passed pursuant to that authority, is itself *ultra vires*.

48 The appellants' allegation is that members of Sarnia City Council were frustrated by the failure of investigations of the police and the provincial Ministry of Municipal Affairs to produce evidence of "wrongdoing". The appellants' solicitor points to a meeting he had with some city officials on March 3, 1995 in which three municipal Councillors mentioned an *in camera* meeting within a month prior to passing the January 9, 1995 Resolution in which there was talk of getting to the bottom of "wrongdoing" and the city's solicitor allegedly reported she had been told by an OPP officer "off the record" that the Council should go ahead with the inquiry. Implicit in this statement, it is argued, was the OPP officer's belief that criminality might well be uncovered if there was an inquiry. The appellants seek to attribute this motive to City Council.

49 The first problem with this line of argument is that wishful thinking on the part of municipal councillors, even if established, could not turn a s. 100 inquiry into a substitute police investigation. The reason why the jurisdictional challenge succeeded in *Starr* was not that the framers of the provincial Order in Council *hoped* that the Commissioner would be able to conduct a substitute police investigation, but because this Court concluded that in fact that is what the Order in Council directed the Commissioner to undertake. Extrinsic evidence was admitted to support the finding of *ultra vires* but such evidence corroborated what was already evident in the text of the Order in Council. The simple answer to the appellant's argument in this case is that if the Commissioner did attempt to undertake a substitute police investigation as in *Starr* he would be acting *ultra vires* the authority conferred by the s. 100 Resolution. Even if some members of the City Council were motivated to vote for the Resolution by an erroneous view of what it accomplishes, this motive cannot turn an *intra vires* resolution into an *ultra vires* resolution.

50 The decision in *Starr* cannot be taken as a licence to attack the jurisdiction of every judicial inquiry that may incidentally, in the course of discharging its mandate, uncover misconduct potentially subject to criminal sanction. In the present case, while the OPP investigation was ongoing at the time of the first City Council Resolution, it had terminated 16 months prior to passage of the second Sarnia Council Resolution of January 9, 1995. Even if passage of the second Resolution is thought to be tainted with the circumstances alleged to have surrounded the first Resolution (notwithstanding the intermediate election of a new City Council), the fact remains that the second Resolution is not directed to specific allegations of criminal misconduct by named individuals.

51 It must be remembered that in *Starr* the police criminal investigation was ongoing during the Houlden inquiry itself. A senior official in the office of the Ontario Premier had resigned after admitting improper receipt of personal benefits at no cost, including the famous refrigerator. The Houlden inquiry had regular police officers assigned to its investigation staff. Efforts had to be made to prevent the work of the "inquiry police" from tainting the work of the" police police" who were investigating concurrently the possibility of charges under the *Criminal Code*. Both investigations were working under substantially identical terms of reference, namely s. 121 of the *Criminal Code*, R.S.C. 1985, c. C-46, as may be seen by comparing s. 121 with the Houlden Commission terms of reference.

Criminal Code, s. 121

> Every one ... who ... pays a commission or reward to or confers an advantage or benefit of any kind on an employee or official of the government with which he deals, or to any member of his family...

Houlden Commission terms of reference, para. 2

> ...a benefit, advantage or reward of any kind was conferred upon an elected or unelected public official or upon any member of the family....

In the result, the "police police" and the "inquiry police" were covering the same ground under substantially the same terms of reference at the same time. The difference was that the "police police" had to work within the constraints of the criminal law, whereas the "inquiry police" did not. The Houlden Commission Order in Council was thus quashed on the basis that it was directed to exclusive federal jurisdiction over criminal law and procedure and was therefore *ultra vires* the legislative authority of the province. The narrowness of its finding is evident from the judgment of Lamer J., as he then was, at p. 1402:

> The terms of reference name private individuals and do so in reference to language that is virtually indistinguishable from the parallel *Criminal Code* provision. Those same terms of reference require the Commissioner to investigate and make findings of fact that would in effect establish a *prima facie* case against the named individuals sufficient to commit those individuals to trial for the offence in s. 121 of the *Code*. The net effect of the inquiry, although perhaps not intended by the province, is that it acts as a substitute for a proper police investigation, and for a preliminary inquiry governed by Part XVIII of the *Code*, into allegations of specific criminal acts by Starr and Tridel Corporation Inc.

Further, the general constitutional rule that permits provincial inquiries that are in "pith and substance" directed to provincial matters (in this case local government) to proceed despite possible "incidental" effects on the federal criminal law power was affirmed by Lamer J. at p. 1409:

> There is no doubt that a number of cases have held that inquiries whose predominant role it is to elucidate facts and not conduct a criminal trial are validly constituted even though there may be some overlap between the subject-matter of the inquiry and criminal activity. Indeed, it is clear that the fact that a witness before a commission may subsequently be a defendant in a criminal trial does not render the commission *ultra vires* the province. But in no case before this Court has there ever been a provincial inquiry that combines the virtual replication of an existing *Criminal Code* offence with the naming of private individuals while ongoing police investigations exist in respect of those same individuals.

52 The exceptional nature of *Starr*, and the exceptional set of facts that compelled this Court's decision, was emphasized in the *Blood Inquiry* case, *supra*. In that case as stated, the Krever Inquiry, established under the federal *Inquiries Act*, was held to be within its jurisdiction to make findings of misconduct, even misconduct carrying potential civil or criminal liability, provided such findings were properly relevant to the broader purpose of the inquiry, as set out in its terms of reference. In delivering the reasons of this Court, Cory J. distinguished *Starr* and *Nelles v. Grange* (1984), 46 O.R. (2d) 210 (Ont. C.A.) at para. 47:

> Clearly, these two inquiries were unique. They dealt with specific incidents and specific individuals, during the course of criminal investigations.

The *Blood Inquiry* case picked up and endorsed the earlier line of cases in this Court giving broad scope to provincial inquiries, including *Quebec (Attorney General) v. Canada (Attorney General)* (1978), [1979] 1 S.C.R. 218 (S.C.C.); *Robinson v. British Columbia*, [1987] 2 S.C.R. 591 (S.C.C.); and *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 S.C.R. 97 (S.C.C.). The *Westray* case is particularly interesting in comparison to the facts of this case because at the time the mine managers were called to testify before the Commission they were in fact simultaneously facing charges under the provincial *Occupational Health and Safety Act*. The affirmation of the correctness of those decisions by a unanimous Court in the *Blood Inquiry* case renders the division of powers ground of appeal untenable in the present case as well.

4. Is the Resolution Unlawful in That It Requires an Investigation by Sarnia Into the Affairs of Clearwater?

53 The appellants submit that the new municipal body of Sarnia created by operation of the *Sarnia-Lambton Act, 1989* could not lawfully undertake an inquiry into the affairs of the predecessor municipality. In this regard the appellants rely on *Mississauga Hydro-Electric Commission v. Mississauga (City)* (1975), 13 O.R. (2d) 511 (Ont. Div. Ct.). The appellants submit that the *Sarnia-Lambton Act, 1989*, read as a whole, provides for the creation of a new body from two separate municipalities, both of which were dissolved upon the amalgamation. It is argued that the language of the Act creates a discontinuity between the former municipalities, now dissolved, and a new and separate entity, and that s. 100 does not allow the new City of Sarnia to investigate the officers, servants and contractors of a defunct municipality or to inquire into the conduct of that other municipality's public business.

54 This issue turns upon the intent of the Ontario legislation, and in particular s. 9 of the *Sarnia-Lambton Act, 1989*, which provides as follows:

> **9.** Except as other provided in this Act, the assets and liabilities of the former municipalities and their local boards become assets and liabilities of the City or a local board thereof without compensation, and the City and its local boards stand in the place of the former municipalities and their local boards. [Emphasis added.]

The appellants argue that if the concluding words had included "for all purposes" the underlined phrase "might well have broadened the ambit of the section beyond the subject of 'assets and liabilities'" (Appellants' Factum, at para. 36). I think the interpretation of s. 9 advanced by the appellants is too narrow, but in any event the fact is that the springboard for the s. 100 resolution in this case is precisely Sarnia's inheritance of the assets and liabilities from Clearwater. The conditions attached to these assets, as we have seen, require the new City of Sarnia to take planning action and to assume municipal services before interest or principal becomes payable. These conditions, and their provenance, constitute" live issues" for the consideration of the new City of Sarnia. Thus, even on the appellants' interpretation, s. 9 of the *Sarnia-Lambton Act, 1989*, which puts the new City of Sarnia "in the place of the former" municipality for purposes relevant to assets and liabilities, brings Sarnia within s. 100. It is unnecessary to consider the broader view of s. 9 contended for by the respondent.

5. Did the Commissioner Breach the Requirements of Natural Justice and Irrevocably Lose Jurisdiction by the Procedure He Adopted at the Inquiry Pre-Hearing?

55 The appellants submit that the Commissioner erred in failing to share the advice from Commission counsel with interested parties and in failing to hear submissions from the appellants' counsel before deciding the procedure he would follow. The appellants submit that when the Commissioner denied them a hearing, he was not acting impartially and thus undermined public confidence in the integrity of the Commission process.

56 In my view this submission, as well, fails on the facts. The appellants were not denied a hearing and the Commissioner's conduct disclosed no bias. It is true that at the opening of the "pre-hearing" on March 6, 1995 the Commissioner stated that he would proceed notwithstanding the filing of the judicial review application. However, at the time he made this statement, neither the Commissioner nor Commission counsel had received any application from the appellants for an adjournment. When counsel for the appellants came to address the Commissioner, it seems that they felt their tactical position would be stronger if they treated the Commissioner's opening announcement as irrevocable. This strategy was carried to the point that counsel who at that time acted for Consortium, after making submissions that cover two and a half pages of transcript, concluded by saying:

> So I thought out of courtesy, sir, I should let you know what we would have said to you. [Emphasis added.]

After saying what they *would* have said, but making it clear that they were not actually saying it, appellants' counsel sat down and did not participate further. The Commissioner's statement of the procedure he proposed to follow consisted largely of generalities seemingly addressed to the non-lawyers in the hearing room. In the absence of any notification that an adjournment would be sought, the Commissioner cannot be faulted for outlining his proposal to proceed with the inquiry in an expeditious way, nor can he be faulted for declining to consider a possible adjournment in circumstances

where the appellants themselves refused, in apparent umbrage, or for tactical reasons, to make submissions in support of that relief. There is no basis to attribute lack of impartiality to the Commissioner. In the particular circumstances of the pre-hearing, he was entitled to outline how he proposed to proceed without disclosing the advice he received from Commission counsel. His rulings will stand or fall on their own merits, irrespective of what advice he received. His decision to proceed and the proposed arrangements for the hearing were decisions properly made within the ambit of his procedural discretion, and thus this ground too must be rejected.

Disposition

57 The appeal is therefore dismissed with costs.

Appeal dismissed.

Pourvoi rejeté.

1983 CarswellNat 530
Supreme Court of Canada

Thorne's Hardware Ltd. v. R.

1983 CarswellNat 530F, 1983 CarswellNat 530, [1983] 1 S.C.R. 106, [1983]
S.C.J. No. 10, 143 D.L.R. (3d) 577, 18 A.C.W.S. (2d) 136, 46 N.R. 91, J.E. 83-187

Thorne's Hardware Limited, Kent Lines Limited, Canaport Limited and Irving Oil Limited, Appellants and Her Majesty The Queen and National Harbours Board, Respondents

Ritchie, Dickson, Beetz, Lamer and Wilson JJ.

Judgment: May 19, 1982
Judgment: February 8, 1983
Docket: 16381

Proceedings: On appeal from the Federal Court of Appeal

Counsel: *Raynold Langlois* and *Michel St-Pierre*, for the appellants.
Jean-Claude Ruelland and *Paul Plourde*, for the respondents.

Related Abridgment Classifications
Maritime and admiralty law
VII Harbours and docks
VII.4 Tolls
Headnote
Maritime Law --- Harbours and docks — Tolls

The judgment of the Court was delivered by *Dickson J.*:

1 The issue is whether the appellants are obliged to pay harbour dues imposed by the National Harbours Board on ships entering or using the port of Saint John, New Brunswick. Two questions arise: (i) is federal Order in Council P.C. 1977-2115 extending the limits of the port of Saint John so as to include the appellant's riparian property "void, unlawful, unjust, discriminatory and *ultra vires*" the Governor in Council?; (ii) is National Harbours Board By-law B-1, *Tariff of Harbour Dues*, imposing harbour dues on all vessels entering or using the port of Saint John, applicable to the appellants in the circumstances of this case?

I Facts and Procedural History

2 The appellants are Irving Oil Limited and its wholly owned subsidiaries, Thorne's Hardware Limited, Kent Lines Limited and Canaport Limited. For many years Irving Oil received crude oil shipments at the port of Saint John. In 1969 Irving decided to build new deep water liquid bulk terminal facilities beyond the territorial limits of the port. To that end Thorne's Hardware acquired a water lot of 1,380 acres at Mispec Point outside the harbour.

3 In 1971 Canaport Limited acquired part of the water lot. Facilities were constructed, at a cost of $43,000,000 for crude oil tankers operated by Kent Lines Limited which came to discharge cargoes of oil into storage tanks adjacent to the water lot. The petroleum products were taken by pipeline from the storage tanks to the Irving Oil refinery at Courtenay Bay, some five miles from Mispec Point.

4 On July 27, 1977 the Governor in Council passed Order in Council P.C. 1977-2115 extending the limits of the port of Saint John. As a result, the water lot of the appellants was brought within the limits of the port. The National Harbours Board claimed jurisdiction over the tankers which anchored at Mispec Point and, more important for the purposes of the present proceedings, claimed harbour dues in respect of the vessels, pursuant to By-law B-1 to which I have referred. The dues are not insubstantial. The appellants paid the Board in respect of the period July 1977 to November 1979 harbour dues of $128,033.

5 The appellants sought relief in the Federal Court. They claimed the Order in Council extending the harbour limits was beyond the powers of the Governor in Council on two main grounds: (i) the Order in Council was passed for improper motives, namely, to permit the National Harbours Board to collect harbour dues from Kent Lines Limited without offering any service in return, and (ii) the Order in Council constituted, for the appellants, a form of expropriation without compensation.

6 It was also contended that By-law B-1 — the *Tariff of Harbour Dues* — was inapplicable to the appellants because: (i) it was an improper exercise by the Board of jurisdiction over private property rights within a harbour, contrary to s. 8 of the *National Harbours Board Act*, R.S.C. 1970, c. N-8 and (ii) it was a form of taxation beyond the powers of the National Harbours Board. The appellants claimed reimbursement of $128,033.

7 In the Trial Division of the Federal Court, [1980] 2 F.C. 3, Dubé J. held the Order in Council *intra vires* and that, in the circumstances, the Order in Council could not be attacked on the ground of bad faith on the part of the Governor in Council. On the second point, however, namely, the applicability of By-law B-1 to the appellants, the judge held that the National Harbours Board could not exact tolls from vessels making use of their own facilities and receiving no services from the port. It appeared inequitable that the Board could claim dues from ships entering the port and proceeding toward their own installations, which were in place before the extension of the limits of the port, thus treating them in the same manner as other vessels using harbour facilities constructed at taxpayers' expense. The judge directed the Board to refund the appellants $128,033.

8 The National Harbours Board appealed and the appellants cross-appealed. A unanimous Federal Court of Appeal (Pratte, Le Dain, Hyde JJ.) [1981] 2 F.C. 393 allowed the Board's appeal and dismissed the cross-appeal. The Court agreed with Mr. Justice Dubé that the Order in Council could not be successfully challenged on the ground of improper motive or discrimination. On the By-law B-1 point the Court, differing from Justice Dubé, held the Board was not exercising any jurisdiction or control over the private property or rights of the appellants in requiring the appellants' vessels to pay the same dues as other vessels entering the port of Saint John; such dues were payable by vessels entering the harbour whether or not port services were rendered to the vessels. I agree with the Federal Court of Appeal.

II The Bad Faith Argument

9 The mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond judicial review: *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 at p. 748. I have no doubt as to the right of the courts to act in the event that statutorily prescribed conditions have not been met and where there is therefore fatal jurisdictional defect. Law and jurisdiction are within the ambit of judicial control and the courts are entitled to see that statutory procedures have been properly complied with: *R. v. National Fish Co.*, [1931] Ex. C.R. 75; *Minister of Health v. The King* (*on the Prosecution of Yaffe*), [1931] A.C. 494 at p. 533. Decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings. Although, as I have indicated, the possibility of striking down an order in council on jurisdictional or other compelling grounds remains open, it would take an egregious case to warrant such action. This is not such a case.

10 In passing Order in Council P.C. 1977-2115 on July 27, 1977, the federal Cabinet acted under statutory authority deriving from s. 7(2) of the *National Harbours Board Act* which provides that the Saint John harbour boundaries are those described in the schedule to the Act, "or as may be determined from time to time by order of the Governor in Council".

11 The appellants attack the Order in Council expanding the harbour limits on the basis that it was passed for the sole purpose of increasing the National Harbour Board's revenues. They say this amounts to "bad faith" on the part of the Governor in Council. They also argue that harbour expansion for this reason is not within the scope of the jurisdiction conferred on the federal Cabinet by s. 7(2) of the Act and is therefore *ultra vires*.

12 The Federal Court of Appeal answered this submission in these words (at p. 395):

> The reasons the Governor in Council may have had for exercising this authority, in addition to being unknown to us, are of little importance, since I do not see how they could affect the validity of the Order. I would add that a desire to increase the revenues of a harbour appears to me to be a justifiable reason for extending the harbour's boundaries.

13 Counsel for the appellants was critical of the failure of the Federal Court of Appeal to examine and weigh the evidence for the purpose of determining whether the Governor in Council had been motivated by improper motives in passing the impugned Order in Council. We were invited to undertake such an examination but I think that with all due respect, we must decline. It is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council, *Attorney-General for Canada v. Hallet & Carey Ld.*, [1952] A.C. 427, at p. 445; *Reference re Chemical Regulations*, [1943] S.C.R. 1, at p. 12. The position is as stated by Audette J. in *R. v. National Fish Co.* (*supra*, at pp. 80-81):

> ...the Parliament of Canada has undoubtedly full and plenary power to legislate both in respect of the provisions contained in the Act and in the Regulations, even if in the result the tax or fee imposed were excessive, prohibitive, oppressive or discriminative. The suggestion made in this case that the regulations are oppressive and prohibitive is not one that would induce a Court of law to inquire into the power of Parliament to authorize the making of such regulations, or to place any limitation upon the ability of Parliament to tax either oppressively or benignantly. The supreme legislative power of Parliament in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it were, the only remedy is an appeal to those by whom the legislature is elected.

14 I agree with the Federal Court of Appeal that the government's reasons for expanding the harbour are in the end unknown. Governments do not publish reasons for their decisions; governments may be moved by any number of political, eco nomic, social or partisan considerations. There is, however, in the record, a "Memorandum to the Minister" dated June 27, 1977, which casts some light upon the reasons which prompted the National Harbours Board to recommend the extention of the harbour limits:

> **MEMORANDUM TO THE MINISTER**
>
> ***Submission to Governor in Council Port of Saint John***
>
> The attached submission recommends to Governor in Council the extension of harbour limits of the Port of Saint John to include both the Lorneville and Canaport areas in the Bay of Fundy.
>
> Following several years of policy planning at the local level, a port development master plan was prepared in 1971 for the Saint John Port and Industrial Development Commission by Swan Wooster Engineering Co. Ltd. with the co-operation of the Province of New Brunswick. One of the recommendations was to extend the port limits to include the area designated for development of the Canaport and Lorneville projects. Similar zones were suggested in the Urban Region Impact Study which were concurred in by the City of Saint John. The Honourable Roméo Leblanc and Premier Hatfield have been made aware of the intention to extend the port limits and both are in agreement. The extension has also been approved by the Port Authority. Representatives of Irving Oil Limited have recently recorded objection with copies to the Prime Minister and Cabinet Ministers although their agent brought the matter to the attention of Mr. A.L. Irving when the National Harbours Board granted major changes and concessions urgently required a few years ago.

> Irving Oil Limited developed the Canaport deep water liquid bulk terminal facilities at Mispec Point. In order to accommodate larger vessels in the area, the Canadian Coast Guard upgraded the navigational aids and established a Vessel Traffic Management System. While these facilities serve vessels other than those using Canaport, a large portion of the $1.8 million initial expenditure and annual Operating and Maintenance expenditures of approximately the base figure could be allocated to the large crude carrier traffic.
>
> Considerable interest has been shown in developing liquified natural gas facilities at Lorneville. This should result in a substantial increase in vessel traffic in the area and should improve social and economic conditions in the area.
>
> It is estimated that the extension of limits will generate additional port revenues of $130,000 through charges levied against owners of vessels supplying the refinery. Further additional revenues will also result from vessels servicing the liquified natural gas and any other facilities developed at Lorneville.

In the Trial Division Judge Dubé said this (at p. 5)

> It appears from reading the documents entered in evidence that one of the very important factors prompting extension of the Saint John Harbour was undoubtedly the increase in revenue from this harbour. On the other hand, it also appears that other very valid reasons existed in favour of extension of the harbour, in particular the rationalization of shipping activities in the entire area of the harbour.

There was evidence before Mr. Justice Dubé from which one could conclude that the collection of harbour dues was not an unimportant consideration in the decision to extend the harbour boundaries. In a letter dated April 13, 1972 the Port Manager wrote to the Chairman of the National Harbours Board.

> Incidently, and as I mentioned during the interview with the Board, I recommended an extension of the harbour limits in 1968 just prior to the Irving Canaport development, as per letter of June 24, 1968, your file 474-S1-0; a copy of my letter is attached.
>
> Since the Irving Canaport facility has been in use we have been losing harbour dues from tankers that used to unload within the present harbour limits. In 1971 over 2 million tons of crude oil were unloaded at Canaport. The harbour dues which the Board could have collected in 1971 had the harbour limits been extended amounted to $18,187.11 (1,212,474 gross tons). With the Lorneville deepwater site now developing, the harbour dues' revenue would represent a substantial amount of revenue to the port in the future.

15 There was also ample evidence before Mr. Justice Dubé from which one might conclude that the expectation of increased revenues was not the only reason for expanding the harbour. In a letter dated June 24, 1968, to the National Harbours Board, the Port Manager said:

> The new City limits established on January 1, 1967, as a result of amalgamation, take in the area from Musquash Head to Mispec Bay and it is a natural step to extend the harbour limits in order to tie in with these new limits.
>
> The most important reason for extending the harbour limits from the standpoint of Federal control is to place under one central authority (N.H.B.) all ocean-going vessels and other related major harbour activities.

16 I have no doubt that Justice Dubé had factors like these in mind when he said that one of the reasons for expanding the harbour was "rationalization" of maritime activity in the region.

17 Furthermore, the harbour was expanded not only to include Mispec Point in the east, but also to include a new facility at Lorneville to the west of the original harbour.

18 I have referred to these several pieces of evidence, not for the purpose of canvassing the considerations which may have motivated the Governor in Council in passing the Order in Council but to show that the issue of harbour

extension was one of economic policy and politics; and not one of jurisdiction or jurisprudence. The Governor in Council quite obviously believed that he had reasonable grounds for passing Order in Council P.C. 1977-2115 extending the boundaries of Saint John Harbour and we cannot enquire into the validity of those beliefs in order to determine the validity of the Order in Council.

19 I wish to make one further observation on this point. Irving Oil Limited and its associated companies were not denied an opportunity to be heard. On November 29, 1976 Mr. A.L. Irving, President, Irving Oil Limited, sent a telex to the Honourable Otto Lang, then Minister of Transport, voicing strong objection to the inclusion of Canaport in any extension of Saint John Harbour limits. This was followed by a further telex on December 28, 1976 to which Mr. Lang replied on January 18, 1977 in these terms:

> Dear Mr. Irving:
>
> I would like to acknowledge receipt of your recent telegram regarding the proposed extension of harbour limits at Saint John, N.B.
>
> Substantial federal funds were involved in providing navigational aids and vessel traffic management to permit operations at the Canaport project to proceed.
>
> When major changes and concessions were urgently required by Irving Oil Limited and its associated companies in various leases of property in Courtenay Bay, the National Harbours Board adjusted its policies to meet the urgent request. Mr. K. McKenzie who was your agent in the matter was asked to bring to your attention the proposed extension of harbour limits to include the total city waterfront as suggested by Swan Wooster in their port planning study for the City of Saint John in 1972.
>
> The result of the extension would be the levying of harbour dues by the National Harbours Board against the vessels which are understood to be foreign vessels using Canadian waters.
>
> In view of the foregoing, I would suggest that the extension of the limits is fair and reasonable.

This was followed by a lengthy letter to Mr. Lang dated March 29, 1977 from Mr. Hector C. Boulay, Corporate Executive, Irving Oil Limited. Mr. Lang replied on May 4, 1977. Mr. Boulay wrote again on May 31, 1977. In this correspondence the position of Irving Oil Limited was explained forcefully and in detail.

20 The appellants also argue that the Order in Council expanding the harbour is *ultra vires* because it is not in conformity with the objects of s. 7(2) of the Act, pursuant to which the Order in Council was passed. Section 7 provides:

> *7.* (1) The Board, for the purpose of and as provided for in this Act, has jurisdiction over the following harbours: Halifax, Saint John, Chicoutimi, Quebec, TroisRivières, Montreal and Vancouver, and likewise has administration, management and control of
>
> > (a) all works and property that on the 1st day of October 1936 were administered, managed and controlled by any of the Corporations;
> >
> > (b) all other harbours and works and property of Canada that the Governor in Council may transfer to the Board for administration, management and control.
>
> (2) The boundaries of the harbours of Halifax, Saint John, Chicoutimi, Quebec, Trois-Rivières, Montreal and Vancouver are as described in the schedule, or as may be determined from time to time by order of the Governor in Council and any such order shall be published in the *Canada Gazette*.

21 The appellants acknowledge that s. 7 does give the federal Cabinet jurisdiction to expand the harbour limits. They say, however, that this can only be done with an eye to the "administration, management and control" of the harbour and that the section does not authorize expansion for the purpose of increasing the Board's revenues.

22 I have already pointed out that the port was not expanded only for the purpose of increasing revenues, and that "rationalization" of maritime activity in the area was also an important factor. It seems to me that "rationalization" in the sense indicated above easily falls within the scope of the powers conferred by s. 7(2).

23 For the above reasons then the appellants' first submission must fail.

III Is By-law B-1 applicable to the appellants?

24 Since the Order in Council was, in my view, validly passed and since its effect was to bring the Mispec Point facility within the harbour boundaries it would seem reasonable to conclude that vessels using that facility would become subject to the Board's jurisdiction and tolls.

25 The statutory authority to levy such tolls is found in s. 14(1)(*e*) of the Act:

> *14.* (1) The Governor in Council may make by-laws, not inconsistent with the provisions of this Act, for the direction, conduct and government of the Board and its employees, and the administration, management and control of the several harbours, works and property under its jurisdiction including
>
> . . . . .
>
> (e) *the imposition and collection of tolls on vessels or aircraft entering, using or leaving any of the harbours*; on passengers; on cargoes; on goods or cargoes of any kind brought into or taken from any of the harbours or any property under the administration of the Board, or landed, shipped, transhipped or stored at any of the harbours or on any property under the administration of the Board or moved across property under the administration of the Board; for the use of any property under the administration of the Board or for any service performed by the Board; and the stipulation of the terms and conditions (including any affecting the civil liability of the Board in the event of negligence on the part of any officer or employee of the Board) upon which such use may be made or service performed. [Emphasis added.]

26 The appellants present several ingenious arguments in support of the claim that By-law B-1 is inapplicable to the appellants. The main argument centres on s. 8 of the *National Harbours Board Act* which reads:

> *8.* Unless otherwise specifically provided for in this Act, nothing in section 7 shall be deemed to give the Board jurisdiction over or control of private property or rights within any of the harbours under the jurisdiction of the Board.

27 The appellants cite high and vintage authority to the effect that the owner of riparian property has a right of access from his land to the water, and from the water to his land. For example, *North Shore Railway Co. v. Pion* (1889), 14 App. Cas. 612; *Lyon v. Fishmongers' Company* (1876), 1 App. Cas. 662; *Chaplin & Co. v. Westminster Corporation*, [1901] 2 Ch. 329; *Attorney-General v. Conservators of the Thames* (1862), 1 H & M Ch. 1. The cases also show that this is a private property right, to be distinguished from the public right of navigation on the water. The right of access can be vindicated by an action for damages or by injunction.

28 The appellants argue that when someone docks his own vessel at his own riparian lot, the imposition of harbour dues on the vessel amounts to an interference with the riparian owner's private right of access, and since s. 8 of the Act precludes the Board from exercising jurisdiction or control over "private property or rights", the By-law imposing tolls on harbour users must be inapplicable to Kent Lines Limited's vessels docking at the Mispec Point facilities. I think the appellants' submission fails for several reasons.

29 Although the cases relied on do show that access to and from the water is an incident of riparian ownership, each of them involved a physical obstruction to access. No authority is cited for the proposition that economic impediment can constitute an interference with this right. Indeed, in *Attorney-General v. Conservators of the Thames supra*, it was held that a wharf that did not totally block access to a riparian neighbour's water lot, but did force the neighbour to take a longer and more expensive route to his water lot, did not amount to an obstruction to the private right. The case involved very different facts, but it may lend support to the view that economic barriers will not constitute interference.

30 It is obvious that nothing in the Tariff at issue here interferes with or affects in any physical sense the right of access from the waters of the Bay of Fundy to the riparian frontage. Oil tankers may anchor and discharge their cargoes without impediment.

31 The appellants' submission is unsupported by authority. In effect, they ask the Court to expand the law of riparian ownership to recognize a new property right. If there is nothing fatal in the fact that the appellants' case is novel, is it supported by sound principle?

32 It must be remembered that when the vessels enter the harbour they are exercising a public right and not a private right and it is upon entry that harbour dues become payable. If there is in this case an interference with a right, the right interfered with is not, as Vice-Chancellor Sir W. Page Wood noted in *Attorney-General v. Conservators of the Thames, supra*, at p. 33, the private right of access, which still remains, but the right of approaching from a distance, which forms part of the public right of navigation.

33 The practical implications of the appellants' argument must not be overlooked. The facts of the case are somewhat unusual. There is one parent company and three subsidiary companies. One of the companies, Kent Lines Limited, is claiming exemption from harbour dues because others of the companies, namely Canaport Limited and Irving Oil Limited, constructed harbour facilities at no cost to the taxpayer. Are the vessels of Kent Lines to be free of harbour dues in perpetuity? If the ownership of Kent Lines or of Canaport, for example, were to change tomorrow would the immunity of Kent Lines from harbour dues continue unabated? Under what circumstances does the immunity continue? I do not wish to be aridly technical but it seems to me the appellants' proposition might well lead to difficulty in its application.

34 Even if the riparian owner's right of access did include the right to avoid harbour dues, it is far from clear that the language of s. 8 would be apt to prohibit the Board from infringing that right. Section 8 says that nothing in s. 7 gives the Board "jurisdiction over or control of private property or rights" within the harbour. Section 7 gives the Board jurisdiction over seven Canadian harbours, over "all works and property" that was "administered, managed and controlled" by the Board's predecessors, and over "all other harbours and works and property of Canada" that the government transfers to the Board. In the Federal Court of Appeal Mr. Justice Pratte said (at pp. 396-97):

> According to section 8, the Board may not exercise jurisdiction over or control of "private property or rights within" a harbour. In the present case the "private property" in question consists of the respondents' harbour installations. It does not seem to me that the Board has exercised any jurisdiction or control over these installations by requiring that vessels travelling thereto pay the same dues as all other vessels entering the Saint John Harbour. The situation would be different, of course, if the Board had claimed to regulate the manner in which the respondents used their harbour installations or if the Board had regulated access to these installations directly, by requiring those using them to pay dues, for example. This was not the situation here, however. The National Harbours Board did not exercise any jurisdiction or control over the respondents' property, it simply regulated the right of movement in the Saint John Harbour: this right is neither a private right nor private property of the respondents.

I agree that the imposition of harbour dues on vessels who use the Saint John Harbour does not amount to an exercise of "jurisdiction over or control of" private property within the meaning of s. 8.

35 The appellants' submission fails even if we assume both that the riparian owner has a right to use his property free of harbour dues, and also that the imposition of tolls amounts to an exercise of "jurisdiction or control" within the meaning

of s. 8. The appellants' problem would then be that s. 8 begins with the words "unless otherwise specifically provided for in this Act". In other words the s. 8 limitation on the Board's jurisdiction is expressly made subject to other sections of the Act that give the Board particular powers. Section 14(1)(*e*) expressly gives the Board jurisdiction to make by-laws respecting "the imposition and collection of tolls on vessels or aircraft entering, using or leaving any of the harbours".

IV Tolls and Taxes

36 The appellants' third argument relies on the wording of s. 14(1)(*e*), which permits the Board to impose "tolls" on ships entering the harbour. The appellants cite authority such as *Manchester Ship Canada Co. v. Upper Mersey Navigation Commissioners*, [1958] 2 Lloyd's Rep. 81 at p. 90, to the effect that "tolls" is a term to be distinguished from "taxes", the difference being that "tolls" are charged to defray the cost of providing particular government services, while "taxes" are imposed for the purpose of raising revenue. The appellants say the Board provides no services to users of its Mispec Point facility; the payments exacted by the Board are "taxes" rather than "tolls" and the Board has no jurisdiction to impose such charges under s. 14(1)(*e*).

37 The trial judge apparently concluded that the Board provides no services to vessels using the dock at Mispec Point. He also agreed with the appellants' submission that the "tolls" were really taxes, and were therefore *ultra vires* the Board. The Federal Court of Appeal disagreed, holding that s. 14 explicitly authorizes the imposition of "tolls" on any vessel entering the harbour, whether or not the Board rendered any service to the vessel charged. Mr. Justice Pratte said (at p. 397):

> It is clear from reading the By-law in question that the dues it imposes are "payable in respect of each vessel that enters or operates within a harbour", regardless of whether or not services have been provided to the vessel. It seems to me, moreover, that the imposition of such dues is authorized by the early part of paragraph 14(1)(*e*) of the Act.

38 I shall assume, *arguendo*, that the appellants are right in their contention that the word "tolls" in s. 14(1)(*e*) restricts the Board to charges reasonably related to the costs of operating the harbour. It does not follow, however, that a toll imposed on a particular vessel pursuant to s. 14 must be related to the cost of services provided to that vessel. Nor do the appellants cite any authority to this effect. Indeed one of the cases the appellants rely on appears to be authority to the contrary. In *Foreman v. Free Fishers of Whitstable*, (1869) L.R. 4 H.L. 266, the plaintiffs brought an action to recover "anchorage dues" allegedly owed by the defendants. In that case Lord Chelmsford said (at p. 285):

> I find nothing in the authorities to warrant the argument of the learned counsel that the benefit conferred by the owner of the port must be precisely that in respect of which the toll is demanded. On the contrary, it appears from Lord *Hale, De Portibus Maris*, chap. 6, that, "though A. may have the property of a creek, or harbour, or navigable river, yet the King may grant there the liberty of a port to B., and so the interest of the property and the interest of franchise be several and divided". And he afterwards mentions anchorage as a toll arising from the *jus dominii* or franchise of a port. In this case it is clear that the anchorage toll would not be payable in respect of any benefit which the anchoring vessel derived from the owner of the franchise.

39 Even if the word "tolls" in s. 14 limits the Board to charges reasonably related to the cost of providing harbour services, a toll levied against a particu lar vessel need not be based on the actual cost of services rendered to that vessel. To show that the Board's fees were *ultra vires* as "taxes" it would at least be necessary to show that the Board's revenues were significantly greater than the cost of providing harbour facilities and services to the public and no such showing was attempted here. Indeed, a memorandum dated July 22, 1969 written to the National Harbours Board by Vice-Chairman of the Board indicates that the port of Saint John suffered net operating losses amounting to $644,049 and $781,222 in the years 1968 and 1967 respectively.

V Expropriation without Compensation

40 The appellants' final submission is that the imposition of tolls on vessels entering the harbour in order to use the Mispec Point facilities amounts to expropriation of private property without compensation.

41 I have concluded, however, that the riparian owner has no private right to operate his wharf free of harbour dues. It follows that the Board has not "expropriated" any property right belonging to the appellants. The fourth submission therefore falls with the second.

VI

42 To sum up, if one accepts the proposition that harbour limits may be increased and the further proposition that tolls may be imposed in order to defray the costs of operating the harbour, I cannot possibly see how persons having riparian rights within the extended area can be exempted in perpetuity from payment of the harbour tolls.

43 I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors of record:
Solicitors for the appellants: *Langlois*, Drouin & Associés, Quebec.
Solicitor for the respondents: *R. Tassé*, Ottawa.

2016 BCSC 2375
British Columbia Supreme Court

Cambie Surgeries Corp. v. British Columbia (Attorney General)

2016 CarswellBC 3597, 2016 BCSC 2375, [2017] B.C.W.L.D. 648, [2017] B.C.W.L.D. 713, 17 Admin. L.R. (6th) 154, 274 A.C.W.S. (3d) 677, 93 B.C.L.R. (5th) 407

Cambie Surgeries Corporation, Chris Chiavatti, Mandy Martens, Krystiana Corrado, Walid Khalfallah by his litigation guardian Debbie Waitkus, and Specialist Referral Clinic (Vancouver) Inc. (Plaintiffs) and Attorney General of British Columbia (Defendant) and Dr. Duncan Etches, Dr. Robert Woollard, Glyn Townson, Thomas McGregor, British Columbia Friends of Medicare Society, Canadian Doctors for Medicare, Mariël Schooff, Daphne Lang, Joyce Hamer, Myrna Allison, and the British Columbia Anesthesiologists' Society (Intervenors) and The Attorney General of Canada (Pursuant to the Constitutional Question Act)

Steeves J.

Heard: November 17, 2016; December 7, 2016
Judgment: December 19, 2016
Docket: Vancouver S090663

Counsel: Peter W. Gall, Q.C., Robert W. Grant, Q.C., for Plaintiffs
Jacqueline D. Hughes, Jonathan G. Penner, for Defendant
Kenneth A. Manning, for Attorney General of Canada
Craig D. Bavis, for Intervenors, Schooff, Lang, Hamer and Allison
Joseph J.M. Arvay, Q.C., for Intervenors, Drs. Etches, Woollard, Townson and McGregor, British Columbia Friends of Medicare Society, and Canadian Doctors for Medicare
Dr. Roland Orfaly (Agent), for Intervenor, British Columbia Anesthesiologists' Society

***Steeves J.*:**

A. INTRODUCTION

1 This litigation is about wait times for health care in British Columbia: whether, given those wait times, three provisions of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286, are contrary to ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* and if so can they be saved under s. 1 of the *Charter*.

2 The trial of this litigation has commenced and more than 40 days of hearings have been completed.

3 There is now a dispute between the parties about the evidence of Gordon Denford. He was a lay member of the Medical Services Commission ("MSC") from 2000 to 2008 and he currently is a businessman who owns and operates retirement homes. He commenced his evidence and then was excused so that counsel could prepare legal argument on the issues in dispute about his evidence and considered here.

4 The plaintiffs seek to have Mr. Denford testify about his work on the MSC, in particular, the Commission's work on private diagnostic services such as laboratories. There is no challenge to any decision of the MSC. The decisions themselves as well as minutes from the relevant MSC meetings are in evidence by agreement.

5 The defendant British Columbia ("British Columbia") objects to the evidence of Mr. Denford on the basis of a confidentiality covenant he signed, on the basis of "deliberative secrecy" and because the work of the MSC is "unknowable" except through its decisions. Canada takes no position. There is also an issue about the confidentiality provision in s. 49 of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286 ("MPA"). Furthermore, British Columbia objects to testimony from Mr. Denford that includes hearsay and opinion, as described in a will-say statement provided by the plaintiffs to British Columbia in anticipation of his evidence.

B. ANALYSIS

6 According to the will-say statement of Mr. Denford he will testify on a number of issues. Two that are of immediate relevance here are:

> Most of the members of the [MSC] shared the view that private surgical clinics were a net benefit to the public system, and that no benefit would arise out of interfering with the operations of private clinics.
>
> . . .
>
> [The MSC was aware of] . . . the activities of private surgical clinics and of their role as an alternative to long waiting lists in the public system.

7 As set out in different parts of the plaintiffs' written argument, the plaintiffs do not seek to use Mr. Denford's evidence to challenge adjudicative decisions of the MSC. Nor would his evidence be directed to establishing the "legislative intent" of those decisions. Instead, the plaintiffs seek to tender evidence from Mr. Denford about his participation on the MSC as a means of responding to issues raised in the pleadings of British Columbia. The particulars of that evidence would be the knowledge and conduct of the MSC when dealing with medical services and health care costs, including the use of private health service providers.

8 British Columbia opposes the admissibility of that evidence on the basis of a confidential covenant signed by Mr. Denford and on the basis of deliberative secrecy. There is also s. 49 of the MPA which creates a duty on Commission members to keep information confidential. British Columbia also says that the motives of the MSC are not knowable except through its formal decisions. This latter point is discussed in a leading decision from the Supreme Court of Canada, *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3 (S.C.C.). British Columbia also raises issues about a will-say statement provided by the plaintiffs about Mr. Denford's evidence including hearsay and opinion evidence.

9 I will proceed by, first, discussing the *Clearwater* decision and its application to the present matter. I then move on to discuss the issues of the confidential covenant signed by Mr. Denford, any deliberative secrecy that attaches to the proceeding of the MSC and s. 49 of the MPA as well as the alleged hearsay and opinion evidence in the will-say statement.

(a) The Clearwater decision

10 The *Clearwater* decision arose from a dispute in Ontario about land development. A land developer sought to summons in court certain members of a municipal council who voted for a judicial inquiry into transactions involving the developer.

11 The developer alleged that the council had acted unlawfully because the true purpose of the resolution was to uncover and disclose unspecified misconduct. However, the approach chosen by the council under the *Municipal Act*, R.S.O. 1990, c. M. 45 would avoid the necessity of providing particulars of any misconduct. An alternate approach in the legislation would have required disclosure and there was a dispute about which provision the council should have proceeded under and whether one approach was really a disguise for the other approach. The inquiry was to be conducted by an independent commissioner.

12 A decision of the lower courts to quash the summonses sought by the developer was upheld in the Supreme Court of Canada. The Court concluded that the question was whether the municipality, rather than individual members of its council, had jurisdiction to do what they did (at para. 43). The Court adopted a previous decision which held that it is " . . . neither the duty nor our right to investigate the motives . . . " behind a decision of the Governor in Council (*Thorne's Hardware Ltd. v. R.*, [1983] 1 S.C.R. 106 (S.C.C.), at p. 112).

13 In *Clearwater* the Court also said the following:

> [45] The motives of a legislative body composed of numerous persons are "unknowable" except by what it enacts. Here the municipal Council possessed the s. 100 power and exercised it in the form of a resolution which speaks for itself. While some members of the present or previous Sarnia Council may have made statements which suggest a desire to unmask alleged misconduct, the inquiry will not be run by city councillors but by Commissioner Killeen, a Superior Court judge, who will take his direction from the s. 100 Resolution, not from press reports of comments of some of the city politicians. Accordingly the courts below were correct to quash the summonses and strike from the record certain other evidence. While courts should be slow to interfere with a party's effort to build its case, they should set aside summonses where, as here, the evidence sought to be elicited has no relevance to a live issue in the judicial review applications: *Re Canada Metal Co. and Heap* (1975), 7 O.R. (2d) 185 (C.A.), per Arnup J.A., at p. 192.

14 *Clearwater* was applied in a British Columbia judgment in which a party sought to have a senior official ("Mr. Brown") in the office of the Premier answer interrogatories (*B.C.T.F. v. British Columbia (Attorney General)*, 2008 BCSC 1699 (B.C. S.C.)). This was unsuccessful as follows:

> [50] The Supreme Court of Canada has carefully separated analysis of legislative purpose (which may be relevant) from the motives of individual members of government (which cannot be). In *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3, 165 D.L.R. (4th) 25, the court held that the testimonies of individual members of a municipal council were not admissible in determining the constitutional validity of a municipal bylaw. The court again distinguished between legislative purpose and the motives of individual members, and held, at para. 45, that only the former was relevant [cited above] . . .
>
> . . .
>
> [65] In order for the teachers to succeed on their application, they must show that the documents they seek, the evidence sought from Mr. Brown and the questions asked in the interrogatory are relevant to an issue in the litigation. These types of evidence will not be admissible unless they have the proper "institutional quality"; statements and documents reflecting the opinions of individual members of the Legislature rather than the intention of the Legislature as a whole will not be admitted.
>
> . . .
>
> [69] The teachers' position has not been embraced by the courts, even in *Charter* cases where the one question might be whether and to what extent less intrusive measures were available to address the mischief to which the legislation was directed. They have not been able to point to any decision which suggests that, in a challenge to the constitutionality of the legislation, extrinsic evidence should be expanded to include evidence from "behind the curtain": i.e. information other than that relating to the deliberations of the Legislature. . . .

15 In another decision involving an application to obtain evidence from individual members of the council of the City of Vancouver the result was the same (*Delta Sunshine Taxi (1972) Ltd. v. Vancouver (City)*, 2015 BCSC 357 (B.C. S.C.)):

> [59] Courts are reluctant to admit the statements of individual members of governing bodies for the purpose of impugning the law as written. It is generally the purpose of the law itself that is of concern, not the specific intention

of a specific member of the legislature or of council: see *British Columbia Teacher's Federation v. Attorney General of British Columbia*, 2008 BCSC 1699.

16 Then the Supreme Court of Canada had a second opportunity to address the issues in *Clearwater* in *Commission scolaire de Laval c. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 (S.C.C.) [hereinafter *Clearwater*]. The facts in *Laval* involved an arbitrator who sought evidence from commissioners who were members of the Commission scolaire de Laval about the dismissal of a teacher. The Commission relied on *Clearwater* (among other defences) and declined to provide evidence to the arbitrator.

17 The Supreme Court of Canada upheld a decision of the Quebec Court of Appeal that the commissioners could be summoned as witnesses on the issues before the arbitrator. The Court noted that in *Thorne's Hardware* the impugned decision was "purely one of policy and was discretionary in nature." On this basis the motives behind the decision at issue in *Thorne's Hardware* were not relevant to whether it was lawful or not (*Commission scolaire de Laval*, at para. 46).

18 On the facts in *Laval* the Court also noted that the dismissal of a public sector employee is generally governed by the private laws of contract and employment and not by public law principles (at para. 48). On this basis the Court clarified the scope of *Clearwater* as follows:

> [47] In my opinion, Bich J.A. was right [2014 QCCA 591] that the rule from *Clearwater*, to the extent that it can in fact be regarded as distinct from the simple rule of relevance, applies only to decisions of a legislative, regulatory, policy or purely discretionary nature made by public bodies (para. 95). In other words, it applies to decisions made by a public body when it carries out acts of a public nature. In the case at bar, the executive committee's decision was made in a completely different context. Resolution No. 238 concerned a decision to dismiss one of the Board's teachers under the procedure provided for in the collective agreement.

19 It follows from the above cases that the issue to be considered here is whether the evidence of Mr. Denford would relate to the legislative, regulatory and policy functions of the MSC or purely discretionary matters of the MSC as a public body.

20 It is therefore necessary to consider the nature of the MSC in legal terms in order to determine if the *Clearwater* judgment applies or not. I will consider the statutory structure of the MSC, some of the decisions made by it and then I will set out a summary of the applicable pleadings.

(i) The statutory structure of the MSC

21 The MSC is continued (from a former Act) under Part 1 of the MPA.

22 It has nine members, three appointed by the British Columbia Medical Association ("BCMA"), three members appointed by the Government of British Columbia and three members jointly appointed by the Minister of Health and the BCMA (s. 3(1)). It may sue or be sued in its own name (s. 3(11)).

23 Under s. 5 of the MPA the MSC has a number of powers and authorities as follows:

> **Responsibilities and powers of the commission**
>
> 5(1) The commission may do one or more of the following:
>
> (a) administer this Act on a non-profit basis;
>
> (b) receive premiums that are payable by beneficiaries;
>
> (c) determine the services rendered by an enrolled medical practitioner, or performed in an approved diagnostic facility, that are not benefits under this Act;

(d) determine the manner by which claims for payment of benefits rendered in or outside British Columbia to beneficiaries are made;

(e) determine the information required to be provided by beneficiaries and practitioners for the purpose of assessing or reassessing claims for payment of benefits rendered to beneficiaries;

(f) investigate and determine whether a person is a resident and, for this purpose, require the person to provide the commission with evidence, satisfactory to the commission, that residency has been established;

(g) determine whether a person is a spouse or a child;

(q.2) require that a party to a hearing under section 15 or 37 submit a matter at issue in the hearing to non-binding mediation;

(g.1) determine whether a person is a member of a prescribed class;

(h) determine whether a person is a medical practitioner or a health care practitioner;

(i) determine for the purposes of this Act whether a person meets the requirements established in the regulations for premium assistance;

(j) determine whether a service is a benefit or whether any matter is related to the rendering of a benefit;

(k) determine before or after a service is rendered outside British Columbia whether the service would be a benefit if it were rendered in British Columbia;

(l) determine whether a diagnostic facility, or a benefit performed in an approved diagnostic facility, meets the requirements of the regulations;

(m) monitor and assess the effectiveness and efficiency of benefits;

(n) enter, with the prior approval of the Lieutenant Governor in Council, into agreements on behalf of the government with Canada, a province, another jurisdiction in or outside Canada or a person in or outside British Columbia for the purposes of this Act;

(o) establish advisory committees, including pattern of practice committees, to advise and assist the commission in exercising its powers, functions and duties under this Act, and may remunerate members of a committee at a rate fixed by the commission and pay reasonable and necessary travelling and living expenses incurred by members of a committee in the performance of their duties;

(p) authorize surveys and research programs to obtain information for purposes related to the provision of benefits;

(q) enter into arrangements and make payment for the costs of rendering benefits that will be provided on a fee for service or other basis;

(q.1) establish, subject to this Act and the regulations, rules to govern its own practices and procedures for the conduct of hearings under section 15 or 37, including the following:

(i) the conduct of negotiations or a pre-hearing conference for possible settlement of the issues before a hearing is commenced;

(ii) the means by which particular facts may be proved or the mode in which evidence may be given at a pre-hearing conference or a hearing;

(iii) the time limits for the exchange of documents, reports and affidavits in preparation for a pre-hearing conference or a hearing;

(iv) the requirements for the attendance of witnesses, the conduct of witnesses or the compelling of witnesses to give evidence under oath or in some other manner;

(r) provide to a person or body prescribed by the Lieutenant Governor in Council, for the purpose of an audit or investigation of a practitioner's pattern of practice or billing, information concerning claims submitted by that practitioner to the commission;

(s) apply section 26 for supply management and optimum distribution of medical care, health care and diagnostic services throughout British Columbia;

(t) establish guidelines setting the number of practitioners that a beneficiary may consult respecting the same medical condition within the period specified in the guidelines;

(u) exercise other powers or functions that are authorized by the regulations or the minister.

24 Section 1 of the MPA defines "diagnostic facility" as "a facility, place or office principally equipped for prescribed diagnostic services, studies or procedures and includes any branches of a diagnostic facility".

25 Section 5(3) of the MPA states that certain provisions of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 ("ATA") apply to the MSC:

(3) For the purposes of a hearing under this Act, sections 34 (3) and (4), 48 and 49 of the *Administrative Tribunals Act* apply to the commission.

26 Section 34(3) of the ATA authorizes the MSC to include intervenors in its proceedings. Section 34(4) is as follows:

Power to compel witnesses and order disclosure

34 (1) A party to an application may prepare and serve a summons in the form established by the tribunal, requiring a person

(a) to attend an oral or electronic hearing to give evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in the application, or

(b) to produce for the tribunal, that party or another party a document or other thing in the person's possession or control that is admissible and relevant to an issue in the application.

(2) A party to an application may apply to the court for an order

(a) directing a person to comply with a summons served by a party under subsection (1), or

(b) directing any directors and officers of a person to cause the person to comply with a summons served by a party under subsection (1).

(3) Subject to section 29, at any time before or during a hearing, but before its decision, the tribunal may make an order requiring a person

(a) to attend an oral or electronic hearing to give evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in an application, or

(b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application.

(4) The tribunal may apply to the court for an order

(a) directing a person to comply with an order made by the tribunal under subsection (3), or

(b) directing any directors and officers of a person to cause the person to comply with an order made by the tribunal under subsection (3).

27 Section 48 of the ATA authorizes the MSC to make orders or give directions that it considers necessary for the maintenance of order at a hearing. If any person disobeys or fails to comply with any order or direction, the MSC may call on the assistance of any peace officer to enforce the order or direction. Section 49 of the ATA permits the MSC to make a finding of contempt against an uncooperative witness or other person. Under s. 1 of the ATA a "tribunal" is defined as a tribunal to which some or all of the provisions of this Act are made applicable.

28 Returning to the MPA, s. 5.01 authorizes the MSC to investigate under the Act, including for the purpose of determining "cause" under s. 11. For example, it can investigate whether a beneficiary knowingly requested services that are not medically required from a practitioner to be a benefit (s. 11(1)(a)).

29 In preforming its responsibilities and exercising its powers under ss. 5(1) and 5(2) of the MPA the MSC must, among other things, have regard to the principles of the *Canada Health Act* and the principle of sustainability (s. 5.1). The principles of comprehensiveness (s. 5.3), universality (s. 5.4), portability (s. 5.5), accessibility (s. 5.6) and sustainability (s. 5.7) are set out. And the MSC may delegate any of its powers or duties to a "panel".

30 Finally, the plaintiffs agree that the MSC is a "statutory decision maker" under s. 1 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 214; it has the power or right conferred by the MPA to make decisions regarding the rights or privileges of a person or the eligibility of a person to receive, or continue to receive, a benefit. The MSC also appears to be a "tribunal" under that legislation.

(ii) Decisions of the MSC

31 It is also useful to note some of the decisions of the MSC as an aid to understanding the MSC in light of the *Clearwater* decision. These are included in documents in evidence by agreement which also include a record of discussions on various topics.

32 There are ten documents titled "Record of Decisions" in evidence by agreement. They are dated April 10, 2002; February 16, April 13, 2005; January 18, March 14, May 17, October 13, October 25, September 13, 2006; and January 17, 2007. Mr. Denford is recorded as being present at all meetings except for April 13, 2005. A number of areas in the records are redacted because they contain privileged legal advice.

33 They record information and decisions on a number of issues. The items which appear to be most relevant to the issues in this litigation relate to laboratory diagnostic services and references to private health clinics.

34 I summarize those items as follows:

(a) *April 10, 2000:* A decision was made on a retroactive fee increase for diagnostic services and on the same date a report was given with respect to laboratory services modernization. A planning phase was scheduled for the latter, at which public and private participants would be invited to take part.

(b) *February 16, 2005:* Mr. Denford was recorded as absent. There was a presentation from the Laboratory Fee Review Panel about the evaluation of laboratory fees and subsequent recommendations to the MSC. The Provincial Lab Coordinating Office provided an update on their planning activities and work plan. Also, there was an item with respect to the Advisory Committee on Diagnostic Facilities. Approvals were provided to the MSC. A decision regarding the Whistler Health Care Centre's application for Doppler Studies was deferred. Approval was denied for a specimen collection station for what appears to be a private facility. Approval for a private polysomnography facility was deferred. There is a short redaction.

(c) *April 13, 2005:* Mr. Denford was recorded as absent. Following an update with respect to polysomnography in Kelowna, an application for a private polysomnographic facility was approved. Another application within the Vancouver and Fraser Health Authorities was waiting for an update on polysomnography wait times. A new member of the Laboratory Fee Review Panel was noted and there was difficulty hiring an independent consultant. An in-camera discussion took place. There is a redaction of about one-half page.

(d) *January 18, 2006:* A representative of the Provincial Lab Coordinating Office inquired whether the current regulatory structure with respect to specimen collection stations is effective in terms of access and utilization control. Time was set aside to discuss this in the future. A final report from the Laboratory Fee Review Panel was received. One of the key findings related to adjustments to 158 fee items. The Ministry of Health and the BCMA were to review the report and "should either party disagree on the adjustments recommended by the Panel, the Commission will be asked to adjudicate." There is a long redaction under the topic of the Laboratory Fee Review Panel.

(e) *March 14, 2006:* This was a special meeting to discuss private clinics. Commission members received a summary of legal advice regarding extra billing and the MPA and copies of two legal opinions. Members were "reminded of [the] obligation to not share or discuss these confidential documents outside of the meeting." There was a presentation on private clinics and charging extra fees for accessing health care. There was a specific update with respect to the Copeman Healthcare Centre and discussion of "potential risks and strategic concerns." There is a short redaction.

A motion was approved to authorize the chair to make inquiries of physicians practicing at the Copeman Healthcare Centre. This would be initiated by sending a letter to the physicians advising them of the Commission's concerns. The nature of those concerns is not recorded. The letter was to ask the physicians to explain the fees paid and services provided along with supporting documents regarding those fees and it was to advise them of the concerns of the MSC. Another letter was to be sent to Mr. Copeman requesting the names of all physicians working at the Centre. Based on the responses to the letters the matter was to be brought back to the MSC. Subsequent to the meeting it was decided that the motion would not be released to the public.

(f) *May 17, 2006:* A report about the Laboratory Fee Review Panel indicated that discussions were ongoing between the Ministry and the BCMA. "If the two parties disagree on the Panel's recommendations, the MSC will be required to adjudicate at a future meeting." There are two redactions amounting to about one page.

(g) *May 17, 2006:* There was a discussion about extra billing and the record states that the *Canada Health Act*, R.S.C., 1985, c. C-6 ("CHA") explicitly prohibits user fees and extra billing of patients for insured, medically necessary services. Further, the MPA contains provisions aimed at ensuring compliance with the CHA.

(h) *October 13, 2006:* This was a special meeting to receive a presentation from the Copeman Healthcare Centre and to discuss legal options and next steps. Mr. Copeman presented the components of the Centre's business model. It was agreed to continue discussion of this issue at the next meeting on October 25, 2006. There is a short redaction.

(i) *October 25, 2006:* There was a presentation from the president of the BCMA with regards to its 2006 report *Waiting Too Long: Reducing and Better Managing Wait Times in BC.* Previous work on wait times was summarized and progress was acknowledged. However, according to the president of the BCMA, British Columbians still

consider waiting the most serious problem in the health care system. There is a redaction of about 1.5 pages because it contains legal advice.

(j) *September 13, 2006:* There was a presentation given on the June 28 - July 19, 2006 approvals granted by the Advisory Committee on Diagnostic Facilities.

(k) *January 17, 2007:* There was a presentation regarding a dispute over a subsidiary agreement for physicians in rural practice. It was noted that the Ministry of Health and the BCMA had ratified a new agreement with respect to the work of the Laboratory Fee Review Panel. There is a redaction of something less than a page.

(iii) Conclusion: Clearwater decision

35 The plaintiffs seek to have Mr. Denford testify about the functioning of the MSC. They do not challenge any decisions of the MSC or seek evidence about how it makes decisions. The specific concern of the plaintiffs is the approval of private diagnostic facilities such as laboratories. As above, under the *Clearwater* decision, the question is whether his evidence relates to the legislative, regulatory and policy functions or the purely discretionary nature of the MSC.

36 Section 3(3) of the MPA sets out that the Commission's function is to "facilitate, in the manner provided for in this Act, reasonable access, throughout British Columbia, to quality medical care, health care and prescribed diagnostic services for residents of British Columbia under the Medical Services Plan".

37 From this broad power the MSC has been given a number of specific responsibilities under the *MPA* of a policy and regulatory nature, as set out above. For example, it determines the services rendered by a medical practitioner and can investigate whether a person is a resident or not. It is also clear that the MSC is an administrative tribunal in the sense of a body that makes decisions with legal consequences, determining rights and obligations of individual patients, practitioners and health care facilities. The MSC also decides whether a diagnostic facility meets the requirement of the regulations.

38 The MSC is a tribunal under the *Judicial Review Procedures Act.* The plaintiffs submit it is not a *quasi-judicial* tribunal. Whether that is true or not is of no real significance. The MSC has some of the powers of a tribunal (from s. 5(q.1) of the MPA and the ATA) available to it in order to carry out its responsibilities.

39 The records of decisions of the MSC reflect its range of statutory responsibilities. It receives information on various issues including diagnostic services and information about private clinics. It makes decisions about these issues with respect to billing and extra fees, including making inquiries into the operation of specific clinics. The MSC records reflect decisions in these areas including making adjudications between, for example, the BCMA and the Ministry of Health.

40 The plaintiffs submit that the basis for hearing the evidence of Mr. Denford is found in the pleadings.

41 The initiating pleadings and style of cause, as drafted by the plaintiffs, included the MSC as a defendant along with the Minister of Health of British Columbia and the Attorney General of British Columbia. By consent, during the trial, the defendant has been amended to be only the Attorney General of British Columbia. As a result of this history there are descriptive references to the MSC in the plaintiff's last Amended Notice of Civil Claim, filed March 14, 2016. There are no references to the MSC with respect to the individual circumstances of the plaintiffs or in the context of waiting times. There are no references to diagnostic or laboratory services.

42 For the most part the pleadings of British Columbia (Response to Civil Claim, filed March 14, 2016) track and/or paraphrase the provisions of the MPA. For example, s. 6 of British Columbia's response describes the nine members of the Commission, three appointed by government, three by the BCMA and three jointly appointed. Section 7 summarizes the functions of the MSC under s. 3 of the MPA, including facilitating reasonable access throughout British Columbia to diagnostic facility services, among other services. Section 8 of the Response is a short summary of the responsibilities

of the MSC and s. 9 emphasizes that, under s. 5 of the MPA, the MSC has the responsibility to determine whether a service is a benefit, and whether any matter is related to a benefit.

43 The next part of the Response of British Columbia is titled "The Medical Services Plan" and includes ss. 10-22. It similarly paraphrases or summarizes the provisions of the MPA. It also describes transfer payments from the federal government to the Province of British Columbia. It states that a physician must enroll with the MSC in order to submit claims. Once they are enrolled they are reimbursed by the MSC. A physician may choose to not be enrolled and no physician is required to enroll.

44 Taken overall, I conclude that the MSC is an agency of the Province of British Columbia with the responsibilities set out above. Its decisions are not challenged by the plaintiffs. Mr. Denford would testify about the issues set out in his will-say statement (discussed further below). Broadly speaking, based on his will-say statement, his evidence is expected to touch upon the ways in which the MSC dealt with private health clinics and its role in negotiating contracts with private diagnostic laboratories. In some cases, the Commission adjudicates disputes between the Ministry and other parties. The pleadings of British Columbia are consistent with these roles.

45 In my view, the plaintiffs seek to tender evidence about the legislative, regulatory and policy work of the MSC. This is framed in terms of seeking information about the functioning of the Commission but it is not clear how any meaningful evidence about the operations of the Commission can be separated from its policy, regulatory and adjudicative responsibilities. The plaintiffs say they are not seeking evidence about the motives of the MSC but Mr. Denford's will-say statement does just that by, for example, stating that he will give evidence about what "most of the members" believed when certain decisions were made. Furthermore, in light of the application of provisions of the ATA (as I have discussed above), I consider the proceedings of the Commission to be analogous to proceedings of other administrative tribunals and going behind the decisions of the Commission is not an appropriate inquiry.

46 For example, whether the Commission approves a diagnostic facility or not is clearly an example of a regulatory decision that lies at the heart of its function as an administrative tribunal. And the decision-making process related to private clinics is about billing, another regulatory issue. There is no indication or evidence that the Commission approves private clinics or otherwise interprets the MPA to approve private clinics. Nor is that claimed by the plaintiffs. There is evidence that it is the health authorities rather than the MSC who have a major role with respect to contracts with diagnostic facilities and private clinics.

47 With respect to the *Clearwater* and *Laval* decisions, a member of the MSC might be able to testify about an employment decision (or other private law matter) made by it, especially if there is an issue of bad faith. In any case, it is not immediately obvious that the Commission as part of the Government of British Columbia makes any decisions about the employment of their staff, nor is that at issue in the current matter.

48 I consider the information that Mr. Denford might testify about to be quite different. It would be about issues of policy and regulation, clearly matters of public policy within the MSC's statutory role under the MPA. For this reason, I conclude that *Clearwater* is directly applicable and the work of the MSC is to be understood by the decisions it makes. The individual testimonies of members of the MSC or the intentions of individual members are not relevant and not admissible (*British Columbia Teachers' Federation*, at para. 50; *Delta Taxi*, at para. 9). What occurred behind the decisions of the MSC, how they were made, who had what position and so on are unknowable to this Court.

(b) Other issues

49 In light of my conclusion above that the *Clearwater* rule applies in this case, it is not necessary to decide the issues of deliberative secrecy, the confidentiality covenant signed by Mr. Denford when he became a member of the MSC or s. 49 of the MPA ("Duty to keep information confidential").

50 Returning to the will-say statement of Mr. Denford, British Columbia objects to a number of other hearsay and opinion elements in that statement. The plaintiffs say, in reply, that they are not bound by all of the statement

when they actually present the evidence of Mr. Denford and they can, for example, call less evidence than is described in the statement. I accept that point with two qualifications. First, it would be a courtesy between counsel to explain any changes in the statement prior to a witness testifying. Also, any significant additions to a will-say statement can be problematic and result in adjournments in order to allow the other parties to properly prepare their cross examination. For completeness, I add that the issue of the application of the *Clearwater* decision, discussed above, is a legitimate legal issue to raise.

51 The problems with the will-say statement of Mr. Denford go beyond these considerations. It indicates that he will be testifying about issues such as what "most of the members" of the MSC believed about the benefit of private clinics and that "no benefit would arise out of interfering with the operations of private clinics." His evidence will also be about the clients in his retirement home including their "experiences" obtaining timely medical care and unnamed references to wait times for "3 residents" and "many" clients. These comments in the will-say statements raise issues of hearsay and opinion evidence that are problematic.

52 It is not responsive to these concerns to say that counsel can ask Mr. Denford to testify about fewer things than is found in his statement. In fact, other than that general comment, the plaintiffs have not said his evidence will not include hearsay and opinions. The purpose of a will-say statement is to provide another party (in this case British Columbia) with information that it can use to prepare for cross-examination of the witness. Likewise, the purpose is to make the most efficient use of court time. Unfortunately, the problems in the will-say statement of Mr. Denford have added to the court time in this litigation.

53 The result is that the will-say statement of Mr. Denford will have to be re-written before he testifies again. It will not include inadmissible references to hearsay and opinions and it will be delivered to British Columbia no later than ten working days before he testifies.

C. SUMMARY

54 The plaintiffs seek to call evidence from Mr. Gordon Denford about the proceedings of the MSC, at which he was a member from 2000 to 2008. The plaintiffs do not challenge any decision of the MSC. As indicated in a will-say statement he would also give evidence about the situations of residents of a retirement home he owns and operates.

55 The Supreme Court of Canada's decision in *Clearwater* applies to the MSC. It is a regulatory body that makes decisions about the application of policy and it is an administrative tribunal that makes adjudicative decisions. These decisions involve public policy questions and do not involve private law issues such as employment contracts. On this basis what occurred during the meetings of the MSC is "unknowable" except as reflected in its decisions.

56 Due to my conclusion on the application of *Clearwater* in this matter it is not necessary to consider the issues of deliberative secrecy, the confidentiality covenant signed by Mr. Denford when he was a member of the MSC or s. 49 of the MPA ("Duty to keep information confidential").

57 There are other problems with Mr. Denford's will-say statement such as hearsay and opinion. If the plaintiffs wish to call Mr. Denford back as a lay witness then his will-say statement must be re-written and re-delivered to British Columbia no later than ten working days before he testifies again. It will not contain inadmissible hearsay and Mr. Denford is not qualified to give opinion or testify as an expert.

Order accordingly.

2012 ONSC 2753
Ontario Superior Court of Justice (Divisional Court)

Summitt Energy Management Inc. v. Ontario (Energy Board)

2012 CarswellOnt 5633, 2012 ONSC 2753, 217 A.C.W.S. (3d) 52, 292 O.A.C. 268

Summitt Energy Management Inc., Appellant and Ontario Energy Board, Respondent

Perell J.

Heard: April 24, 2012
Judgment: May 8, 2012
Docket: 624/10

Counsel: William J. Burden, Linda I. Knol, for Appellant, Summitt Energy Management Inc.
Mahmud Jamal, Raphael T. Eghan, for Respondent, Ontario Energy Board
M. Philip Tunley, for Respondent, Ontario Energy Board
Arif Virani, for Intervenor, Attorney General of Ontario

***Perell J.*:**

A. Introduction

1 After a six-day hearing, the Ontario Energy Board found that Summitt Energy Management Inc. ("Summitt") had breached the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B. Summitt appealed, and as part of its appeal, it has brought a motion to submit new evidence. In aid of its motion, it has issued summonses to examine Marika Hare, who was a member of the Energy Board panel that decided against Summitt, and Patrick Duffy of Stikeman Elliott LLP, which was the Energy Board's external legal counsel. The Energy Board brings this motion to quash the two summonses.

2 For the reasons that follow, I quash the summonses.

B. Factual Background

3 Summitt Energy Management Inc. ("Summitt") is a retail energy marketer that provides fixed-price natural gas and electricity programs to homes and businesses in Ontario, Quebec, and British Columbia. It has a sales force that markets door-to-door.

4 In Ontario, Summitt is licensed and regulated by the Ontario Energy Board ("the Energy Board"), an administrative tribunal that oversees electricity and natural gas sectors through regulation and enforcement in accordance with the *Ontario Energy Board Act, 1998*.

5 Summitt is a member of the Ontario Energy Association ("OEA"), which is a trade association of energy marketers and retailers, consultants from many industry sectors, and law firms.

6 Summitt's lawyer, Cassels Brock & Blackwell LLP ("Cassels Brock"), is a member of the OEA. The Energy Board's external counsel, Stikeman Elliott LLP, ("Stikeman Elliott") is a member of the OEA.

7 Summitt is a member in the OEA's Energy Marketers and Retailers category. Summitt's competitors are also members in the category.

8 On June 17, 2010, the Energy Board issued a Notice of Intention to Make an Order for Compliance, Suspension, and Administrative Penalty against Summitt. The Energy Board's separate prosecutorial arm alleged that in contravention of the *Ontario Energy Board Act*, *1998*, Ont. Reg. 200/02, the *Code of Conduct for Gas Marketers*, and the *Electricity Retailers Code of Conduct*, five of Summitt's sales agents had engaged in unfair practices while marketing energy contracts.

9 Marika Hare and Paul Somerville comprised the Energy Board panel for the enforcement proceedings. Patrick Duffy, a lawyer with Stikeman Elliott was employed by the Board as independent legal counsel for the panel. From August 30, 2010 through September 8, 2010, Mr. Duffy attended the hearing, and he advised the panel on substantive and procedural issues.

10 At the hearing, Summitt was represented by Cassells Brock. The prosecutorial role was assumed by Compliance Counsel for the Energy Board.

11 The Energy Board heard evidence from 19 consumer complainants and from Summitt's sales agents among other witnesses.

12 During the hearing, Compliance Counsel argued that a due diligence defence was not available under the *Ontario Energy Board Act, 1998.* and that the issue of due diligence should be relevant only to penalty. The Energy Board, however, did not accept Compliance Counsel's submissions, and the panel considered but ultimately rejected a due diligence defence by Summitt.

13 The Energy Board issued its decision and order on November 18, 2010, with clarifications on December 13, 2010.

14 The Energy Board found that Summitt's energy contracts were "at best ambiguous, and at worst misleading;" had been sold door-to-door by sales agents with "scarcely a few hours of training;" that Summitt's compliance program "fell far short of any reasonable standard in its operation" and was "inadequate and poorly enforced;" and that "customer after customer was misled into signing contracts that provided an economic benefit to Summitt at the expense of the customer." As already noted above, the Energy Board found against Summitt's due diligence defence. The Energy Board ordered Summitt to pay an administrative penalty of $234,000 and to procure an independent review and audit of its revised sales practices and to file that review and audit with the Energy Board.

15 On December 17, 2010, Summitt appealed the Energy Board's decision and Order to the Divisional Court pursuant to the statutory right of appeal in s. 33 of the *Ontario Energy Board Act, 1998*. Summitt advances numerous grounds of appeal, including the submission that the Energy Board erred by considering Summitt's due diligence program without providing Summitt with the information in its possession that was relevant to assessing whether Summitt was diligent. Summitt also submitted the Energy Board committed fundamental errors in law in its consideration of Summitt's due diligence defence.

16 The appeal to the Divisional Court was perfected, and it was scheduled to be heard on November 30, 2011.

17 On October 25, 2011, Summitt received a letter from Stikeman Elliott on behalf of Just Energy Corp. and Just Energy Ontario L.P., which are competitors of Summitt. Summitt forwarded the letter to Cassels Brock and instructed it to investigate whether Stikeman Elliott had represented competitors of Summitt before or during the Energy Board hearing involving Summitt.

18 Cassels Brock undertook that investigation and learned that: (a) in 2008, Stikeman Elliott acted for Universal Energy Corporation, a competitor of Summitt, in proceedings before the British Columbia Utilities Commission with respect to energy marketer and retailer sales agent conduct; (b) in 2002, Stikeman Elliott acted for Direct Energy Marketing Limited, a competitor of Summitt, in gas rate hearings before the Energy Board; (c) in 2005, Stikeman Elliott acted

for AltaGas Utility Holdings Inc. and AltaGas Utilities Inc, which are affiliated with ECNG Energy L.P., which is a competitor of Summitt, in hearings before the Alberta Utilities Commission.

19 As part of the investigations, Summitt also learned for the first time that Stikeman Elliott is a member of the OEA.

20 Meanwhile, Summitt's own investigations indicated that Stikeman Elliott likely had obtained documents from OEA's Energy Markets Joint Sector Committee and from OEA's Energy Marketers and Retailers Committee, which is a committee made up of Summitt and 14 other energy marketers and retailers. Summitt submits that the information from these OEA committees would be relevant to Summitt's due diligence defence.

21 On November 20, 2011, Cassels Brock wrote to Stikeman Elliott and asserted that Stikeman Elliott's involvement had resulted in Summitt having been denied a fair hearing.

22 By letter dated November 22, 2011, Mr. Duffy responded to Cassels Brock's letter. He replied that "as counsel for the panel, it would not be appropriate for me to respond to the allegations made in your letter. I will not be responding further."

23 On November 25, 2011, Summitt brought a motion to adjourn the appeal in order to provide fresh evidence in support of a new ground of appeal; namely that there was a reasonable apprehension of bias because: (a) Stikeman Elliott had represented some of Summitt's competitors in other matters and would have had an interest in ensuring Summitt's conviction; and (b) Stikeman Elliott is a member of the OEA, an industry trade group, and would have been privy to OEA information relevant to Summitt's due diligence defence.

24 Mr. Justice Dambrot granted the adjournment, and he ordered the hearing of the appeal to be brought back on a date to be fixed by the Registrar of the Divisional Court on at least seven days' notice to counsel.

25 On December 14, 2011, Cassels Brock wrote Stikeman Elliott and asked for information about the firm's involvement with the Energy Board in four areas; namely: (a) nature of the advice given by Stikeman Elliott to the Board's panel; (b) whether and when the firm had acted for Summitt's competitors; (c) the nature of the firm's involvement with the OEA; and (4) whether the firm had acted for Summitt's competitors in other proceedings before the Energy Board or before other provincial or federal energy regulatory agencies or had acted as compliance counsel or provided advice to other regulators.

26 Cassels Brock requested a response to its December 14, 2011 letter from Stikeman Elliott by no later than January 6, 2012. Stikeman Elliott did not respond to the letter.

27 The December 14, 2012 letter included a schedule that detailed four areas of inquiry for Mr. Duffy and one area of inquiry for Ms. Hare. The four areas of inquiry are as follows:

- A. *Retainer Questions* {For Mr. Duffy and Ms. Hare} — When did the Energy Board retain Stikeman Elliott? What was the retainer letter and related correspondence? Without disclosing the advice itself, did Stikeman Elliott provide advice on issues relevant to the appeal?

- B. *Competitor Representation Questions* {For Mr. Duffy} — Without disclosing the reason for the retainer, did Stikeman Elliott represent any of Summitt's competitors during the years of 2008 to 2011?

- C. *OEA Involvement Questions* {For Mr. Duffy} — What information did Stikeman Elliott have by reason of its involvement with the OEA and its committees?

- D. *Other Proceedings Questions* {For Mr. Duffy}- Did Stikeman Elliot act for Summitt's competitors in other proceedings before the Energy Board or before other provincial or federal energy regulatory agencies and did it act as compliance counsel or provide advice to other regulators?

28 On January 16, 2012, Summitt delivered its motion to adduce fresh evidence on the appeal. In its motion, among other things, Summitt sought leave to: (1) adduce fresh evidence; and (2) revise its Amended Notice of Appeal to include as an additional ground of appeal the reasonable apprehension of bias by reason of Stikeman Elliott having acted as counsel to the Panel in circumstances where Stikeman Elliott was in conflict of interest due to: (a) its representation of Summitt's competitors; and (b) its having access to confidential information arising from its OEA membership.

29 More particularly, Summitt submits that Stikeman Elliott was in a position of conflict of interest because: (a) it had acted for direct competitors of Summitt who stood to benefit from any difficulties encountered by Summitt in the highly competitive industry sector; and (b) through its involvement with the OEA, it had confidential strategic information, as well as, training and other due diligence materials and procedures, that were relevant to Summitt's due diligence defence.

30 On January 17, 2012, Summitt served summonses on Ms. Hare and on Mr. Duffy in aid of the motion to admit fresh evidence. The summonses directed them to appear for examination on February 6, 2012 and to bring with them the following documents and things:

> All correspondence, notes, memoranda, contracts, records, documents and copies of same in your custody, possession or power in any way relating to the matters which are within the scope of this proceeding or have any reference thereto.

31 In response to the summonses, the Energy Board with the support of the Energy Board (Compliance Counsel) seeks to have the summonses quashed.

32 The Attorney General intervenes in the motion to quash because in Summitt's response to the motion to quash, Summitt challenged s. 10 of the *Ontario Energy Board Act, 1998*, as *ultra vires*.

33 The Energy Board and its Compliance Counsel submit that the summonses should be quashed because: (1) the evidence to be adduced is irrelevant to Summitt's allegation of a reasonable apprehension of bias; (2) the summonses infringe the absolute testimonial immunity granted by s. 10 of the *Ontario Energy Board Act, 1998*, to Board members and employees of the Board; (3) the summonses infringe the principle of deliberative secrecy; and (4) the summonses infringe solicitor-client privilege.

34 In response, Summitt's position is that: (a) the evidence sought by means of the summonses is relevant to the issues of whether there is a reasonable apprehension of bias; (b) s. 10 of the *Ontario Energy Act, 1998*, does not apply to provide testimonial immunity to Ms. Hare or Mr. Duffy; (c) in the alternative, in so far as s. 10 applies to the Duffy summons, the section should be "read down" so that the court has the necessary information to determine whether a breach of natural justice has occurred; (d) the principle of deliberative secrecy does not bar either summonses; (e) in the alternative, this is an appropriate case to remove deliberative secrecy to the limited extent necessary for Mr. Duffy and Ms. Hare to answer the proposed questions; and (f) there is no infringement of solicitor-client privilege because Summitt is not seeking the content of any legal advice and the identity of Stikeman Elliott's clients is not privileged.

35 Summitt initially took the position that if s. 10 applies so as to prohibit the examinations from proceeding, then s. 10 of the *Ontario Energy Board Act, 1998*, violates s. 96 of the *Constitution Act, 1867* and must be read down. It was because of this constitutional challenge that the Attorney General of Ontario intervened as of right pursuant to s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

36 The Attorney General did not take a position about the application or interpretation of s. 10 but defended s. 10 as *intra vires* Ontario's legislative authority and as compliant with s. 96 of the *Constitution Act, 1867*. During argument, Summitt made it clear that it was making only an interpretative challenge and did not contest the constitutional validity of s. 10 of the *Ontario Energy Board Act, 1998*. Therefore, I will have no more to say about this point.

C. Analysis

1. Introduction

37 There are a matrix of issues to be resolved in this motion to quash the two summonses. Visualize, Summitt has severed a summons on Mr. Duffy to examine him on four topic areas, and it has served a summons on Ms. Hare to examine her on one of those topic areas. The Energy Board seeks to quash the summonses on four discrete grounds, of which three grounds concern testimonial immunity and privilege, and one ground concerns the relevance of the line of questioning to be pursued at the examinations of Mr. Duffy and Ms. Hare respectively.

38 To determine whether to quash the two summonses, as a matter of methodology, I will analyze the four topic areas in the context of the four grounds advanced to attack the summonses.

39 I will begin by asking whether the four topic areas are relevant to the particular issue that will eventually be before the Divisional Court, which is whether there could be a reasonable apprehension of bias because of: (a) Stikeman Elliott having acted for Summitt's competitors; and (b) Stikeman Elliott having access to information that would be relevant to Summitt's due diligence defence.

40 I foreshadow to say that once the issue to be decided by the Divisional Court is accurately articulated, it will be seen that the evidence being sought pursuant to the summonses is irrelevant and, therefore, both summonses should be quashed.

41 However, on the assumption that the analysis of relevancy is incorrect, I shall consider whether Ms. Hare and Mr. Duffy have testimonial immunity under s. 10 of the *Ontario Energy Board Act, 1998*. I foreshadow to say that my answer is yes for Ms. Hare and no for Mr. Duffy. Thus, Ms. Hare's summons but not Mr. Duffy's summons should be quashed on this ground.

42 However, on the assumption that the above analyses are incorrect, I next consider whether Ms. Hare and Mr. Duffy have testimonial immunity under the doctrine of deliberative secrecy. I foreshadow to say that the answer is yes with respect to Ms. Hare. The answer is no with respect to Mr. Duffy being asked Competitor Representation Questions, OEA Involvement Questions, and Other Proceedings Questions. Deliberative secrecy would immunize Mr. Duffy only from questioning about Retainer Questions. Thus, on the grounds of adjudicative secrecy, Ms. Hare's summons should be quashed but not Mr. Duffy's.

43 However on the assumptions that (a) the questions are relevant, (b) s. 10 of the *Ontario Energy Board Act, 1998*, is not applicable, and (c) the principle of deliberative secrecy is not available, the final issue is whether the four topic areas are subject to solicitor-client privilege.

44 For the analysis of solicitor-client privilege, I foreshadow to say the answer is: (1) yes with respect to the Retainer Questions; (2) subject to some instances of waiver, yes with respect to the Competitor Representation Questions and the Other Proceedings Questions; and (3) no with respect to the OEA Involvement Questions. Thus, Ms. Hare's summons should be quashed but not Mr. Duffy's because assuming relevancy and no testimonial immunity, there are some questions not covered by solicitor-client privilege.

45 The outcome of this methodology is that there are four reasons to quash Ms. Hare's summons and one reason to quash Mr. Duffy's summons.

2. Relevance

46 In this part, I discuss whether the summonses should be quashed on the grounds of absence of relevance. This discussion will involve describing the law about quashing a summons, and evidence law about relevancy, and a few legal principles about the nature of a reasonable apprehension of bias. Then, I will analyse the four proposed lines of inquiry to determine their relevancy.

47 Where a party serves a summons to examine a witness for a pending motion, an opposing party may move to quash the summons for the examination of the witness on the grounds that the evidence sought is not relevant to the motion or that the examination or the underlying motion would amount to an abuse of process: *Canada Metal Co. v. Heap* (1975), 7 O.R. (2d) 185 (Ont. C.A.); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 27 O.R. (3d) 291 (Ont. Gen. Div.); *Fehringer v. Sun Media Corp.* (2001), 54 O.R. (3d) 31 (Ont. S.C.J.); *Ontario (Attorney General) v. Dieleman* (1993), 16 O.R. (3d) 39 (Ont. Gen. Div.).

48 If the summons is challenged, the party seeking the examination should be prepared to show that the evidence is relevant to the pending motion and that the party to be examined is in a position to provide the evidence: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, *supra*. If the party seeking the examination cannot satisfy the relevancy and evidentiary screening, then the summons is regarded as a "fishing expedition" and an abuse of process: *Canada Metal Co. v. Heap*, *supra*; *René v. Carling Export Brewing & Malting Co.* (1928), 61 O.L.R. 495 (Ont. S.C.); *Agnew v. Assn. of Architects (Ontario)* (1987), 64 O.R. (2d) 8 (Ont. Div. Ct.).

49 In considering whether to strike a summons to a witness, the court will consider the nature and grounds for the motion to determine what are the issues for which the examination is in aid: *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*, [2002] O.J. No. 1445 (Ont. C.A.), leave to appeal refused (2003), [2002] S.C.C.A. No. 252 (S.C.C.).

50 Once the party seeking to conduct the examination shows that the proposed examination is about an issue relevant to the pending motion and that the party to be examined is in a position to offer relevant evidence, it is not necessary for the party to go further and show that the proposed examination will produce evidence helpful to that party's cause: *Manulife Securities International Ltd. v. Société Générale* (2008), 90 O.R. (3d) 376 (Ont. S.C.J. [Commercial List]), leave to appeal refused [2008] O.J. No. 1698 (Ont. Div. Ct.); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, *supra*.

51 In the case at bar, the general issue with respect to which the summonses have been issued is the issue of whether the Energy Board's determination was tarnished by a reasonable apprehension of bias.

52 The legal test for a reasonable apprehension of bias was set out by de Grandpré J., in his dissenting judgment in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.), and the test was approved and adopted by the Supreme Court of Canada in *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 (S.C.C.) and in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.). The test is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would think that it is more likely than not that the decision-maker consciously or unconsciously would not decide the matter fairly.

53 The test for a reasonable apprehension of bias has two elements of objectivity: (1) the measure is that of the reasonable and informed person; and (2) his or her apprehension of bias must be reasonable: *R. v. S. (R.D.)*, *supra*; *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.). The determination of whether there is a reasonable apprehension of bias is an objective, fact-specific inquiry in relation to the facts and circumstances of a particular trial: *Chippewas of Mnjikaning First Nation v. Ontario*, 2010 ONCA 47 (Ont. C.A.) at para. 230.

54 Is then the evidence being sought by Summitt pursuant to its summonses relevant to the test for a reasonable apprehension of bias? The law of evidence is largely built on the principle that evidence that is not logically probative of a fact requiring proof (a fact in issue) is inadmissible; to be probative, the evidence must increase or decrease the probability of the truth of the fact: *R. v. Morris*, [1983] 2 S.C.R. 190 (S.C.C.); *R. v. Cloutier*, [1979] 2 S.C.R. 709 (S.C.C.).

55 In the case at bar and in every case, relevancy is a contextual matter dependent upon the facts in question. In the case at bar, the material fact to be proven is that an objective viewer would have a reasonable apprehension of bias because of two particular alleged material facts associated with Mr. Duffy's law firm; namely: (1) Stikeman Elliot had

acted for one or more of Summitt's competitors; and (2) the firm was a member of certain OEA committees that had developed information relevant to Summitt's due diligence defences.

56 With this articulation of the issue to be proven, then, in my opinion, the four lines of inquiry for which the summonses have been issued are irrelevant.

57 In its factum, in an argument with which I agree, the Energy Board argued that Summitt had not established the threshold of relevancy for the summonses. Paragraph 38 of the factum stated:

> 38. Summitt cannot meet this onus because the evidence Summitt seeks to obtain is irrelevant: the relationships giving rise to Summitt's allegation of reasonable apprehension of bias have already been established. It is important to note that Summitt has alleged that the Panel was tainted by a ***reasonable apprehension of bias*** by virtue of Stikeman Elliott's role as independent legal counsel — there is no allegation of bias in fact. The test in law for a reasonable apprehension of bias is objective: what would an informed person, viewing the matters realistically and practically and having thought the matter through, conclude? The apprehension of bias must rest on serious grounds, in light of the strong presumption of judicial impartiality. Here, because the factual basis for Summitt's claim of a reasonable apprehension of bias is already established through facts that Summitt has [already learned], no useful purpose would be served by allowing Summitt to engage in a fishing expedition by examining a Board member or the Board's outside counsel

58 It is not disputed that Stikeman Elliott acted for Summitt's competitors, and it is not disputed that Stikeman Elliot was a member of the OEA committees. It is known that Summitt acts for Just Energy Corp., Just Energy Ontario L.P, Universal Energy Corporation, Direct Energy Marketing Limited, and for an affiliate of ECNG Energy L.P., all competitors of Summitt.

59 Further details being sought by the summonses are collateral information. The names of other competitors that may have retained Stikeman Elliott, the nature of the retainers, the dates of the retainers, retainers involving other provinces regulators, the precise items of information available to Stikeman Elliott, and the nature of Mr. Duffy's retainer with the Energy Board are all irrelevant. Somewhat crudely, it may be said that these details do not pass the "so what" test of relevancy.

60 I wish to be clear that given that it is admitted or not disputed that Stikeman Elliot acted for Summitt's competitors and that it was a member of OEA committees that had information relevant to Summitt's due diligence defence, I am not determining that the lines of inquiries are irrelevant because of redundancy. The proven facts do not establish the relevancy of the proposed lines of inquiry. Rather, these lines of inquiry will tend to prove collateral facts that are immaterial to the ultimate determination of whether there was a reasonable apprehension of bias which is the issue that a full panel of the Divisional Court must determine. Putting names and dates and descriptions of the retainers with the competitors is simply beside the point.

61 The relevance of the proposed lines of inquiry would be different if the issue was whether Ms. Hare or Mr. Duffy were biased because Stikeman Elliott acted for a particular Summitt competitor, in which case the details might be probative and relevant, but there is no allegation of actual bias. To borrow a quote from *Agnew v. Assn. of Architects (Ontario)* (1987), 64 O.R. (2d) 8 (Ont. Div. Ct.), where a summons was quashed, it cannot be said that the proposed lines of questioning are relevant and necessary having regard to the grounds of review and the state of the record. I, therefore, conclude that both summonses should be quashed.

3. Immunity under s. 10 of the Ontario Energy Board Act, 1998

62 Assuming the above conclusion, is incorrect, I turn to the questions of: (a) whether as an Energy Board member, Ms. Hare has testimonial immunity; and (b) whether as retained external counsel for the Energy Board, Mr. Duffy has testimonial immunity under s.10 of the *Ontario Energy Board Act, 1998*.

63 Section 10 of the *Ontario Energy Board Act, 1998*, grants testimonial immunity to members of the Board and employees of the Board with regard to information obtained in the discharge of their official duties.

64 Section 10 provides as follows:

> 10. Members of the Board and employees of the Board are not required to give testimony in any civil proceeding with regard to information obtained in the discharge of their official duties.

65 Provisions like s. 10 are designed to protect or augment deliberative secrecy, discussed below, and provisions like s. 10 guard against the chilling effect on the decision-making process that the potential of compellability wound engender: *Ellis-Don Ltd. v. Ontario (Labour Relations Board)* (1994), 16 O.R. (3d) 698 (Ont. Div. Ct.) at p. 714.

66 The summons directed at Ms. Hare seeks testimony from a "member of the Board" in a "civil proceeding" (an appeal pursuant to s. 33 of the *Ontario Energy Board Act, 1998*), with regard to "information obtained in the discharge of [her] official duties". It is not disputed that Ms. Hare is a member of the Board and the information about which she is to be questioned could only have come to her in the discharge of her official duties. Thus, this summons should be quashed because of Ms. Hare's testimonial immunity.

67 The situation of Mr. Duffy is different. He not a member of the Board, and Summitt argues that he is not an "employee" of the Board. Further, Summitt submits that the information sought from Mr. Duffy is not information that he obtained in the discharge of his official duties.

68 Employee is not a defined term in the *Ontario Energy Board Act, 1998*, and the Energy Board's argument essentially is that giving s. 10 a purposive interpretation, independent legal counsel is and should be within the definition of an employee. The Energy Board's argument is set out in paragraphs 26 and 27 of its factum as follows:

> 26. As independent legal counsel to the Board, Mr. Duffy is an "employee of the Board" within the meaning of s. 10, *i.e.* is a "person who works in the service of another person (the employer) under an express or implied contract for hire, under which the employer has the right to control the details of work performance:" *Black's Law Dictionary* (9th ed., 2009), "employee."
>
> 27. This interpretation is consistent with a purposive, large and liberal interpretation of s. 10. It is trite that the words of a statute must be interpreted in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the Act and the intention of the legislature: *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26. It is also clear that the *Legislation Act, 2006*, S.O. 2006, c. 21, Schedule F, s. 64(1) directs that legislation "shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects." The purpose of the statutory testimonial immunity in s. 10 is to protect Board members and Board employees "from the distraction, the expenditure of time, and the potential intimidation associated with testifying about their board-related activities in other legal proceedings:" *Ellis-Don Ltd. v. Ontario Labour Relations Board* (1994), 16 O.R. (3d) 698 at p. 709 (Div. Ct.). The Ontario Legislature intended the testimonial immunity to apply equally to both the Board's full-time in-house counsel and to part-time independent counsel employed by the Board for a specific mandate (like Mr. Duffy in this case).

69 Summitt's counterargument is much more elaborate. It has a multifaceted argument that as external counsel Mr. Duffy is not an "employee" of the Board and it also argues that if he is an employee, then the information he obtained was not obtained in the discharge of his official duties.

70 There are five branches to Summitt's interpretation argument:

- First, Summitt submits that s. 111(1)(b) (Confidentiality) and 112.0.6(1) (Confidentiality) of the Act creates a distinction between "counsel for the Board" and "an employee of the Board" from which Summitt submits it cannot

be the case that external counsel for the Board is "an employee of the Board" for purposes of section 10 because such a distinction would not be necessary and there would be no need to include the words "counsel for the Board" in these sections of the Act.

• Second, Summitt submits that there are other provisions in the Act that differentiate between "employees" and other persons such as: consultants, counsel, agents, third parties, officers, affiliates, other assistance, (See sections 28.7(4), 59(3)(d), 88.1(2), 88.3 (1), 88.3(5), 98(1), 101(1), 107(1), and 107(2).) and, therefore, it is apparent that the Legislature was very specific when it used the term "employees" versus other terms to describe the group of persons that come within the scope of each particular section, and if the Legislature had intended for external counsel to come within the ambit of section 10 of the Act, then it would have stated so expressly.

• Third, Summitt submits that s. 10 of the Act can be contrasted with the provision that was at issue in *Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal)* (1993), 99 D.L.R. (4th) 682 (Ont. Div. Ct.), at 692; varied (1993), 99 D.L.R. (4th) 706 (Ont. Div. Ct.); namely, section 31 of the *Pay Equity Act*, which expressly included within its ambit "persons whose services have been contracted for by the [tribunal]". This contrast demonstrates that if the Legislature had intended to include external counsel in s. 10 of the Act, or more generally "persons whose services have been contracted for by the Board", it would have stated so expressly.

• Fourth, Summitt submits that s. 14 of the Act also demonstrates that external counsel are not "employees" of the Board. Section 14 authorizes the "Board to appoint persons having technical or special knowledge to assist the Board." However, if such persons are "employees" of the Board, then appointing such persons would be no different than hiring any other employee, and section 14 of the Act would be unnecessary.

• Fifth, relying on *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] S.C.J. No. 61 (S.C.C.) at para. 47, Summitt submits that the common law distinguishes between "employees" and "independent contractors", and Stikeman Elliott and Mr. Duffy are independent contractors and Mr. Duffy is an associate and employee of Stikeman Elliott, not an employee of the Board.

71 I am not convinced by the Energy Board's interpretation argument. As a matter of giving s. 10 a purposively interpretation, it is not necessary to include external legal counsel as "employees" because solicitor-client privilege, which I will discuss below, would immunize external counsel from giving testimony with regard to information obtained in providing legal service to the Energy Board.

72 I rather favour the arguments and the ultimate conclusion of Summitt's argument that had the Legislature intended to include external counsel within s. 10 of the *Ontario Energy Board Act, 1998*, it would have done so expressly. Giving "employee" its everyday ordinary meaning, external counsel are not employees whose work performance is controlled by the employer. I would not describe external counsel as "independent contractors" but rather as professionals hired to provide independent legal advice.

73 With the exception of the information about Mr. Duffy's retainer, which would be subject to solicitor-client privilege, I also agree with Summitt's argument that the information being sought from Mr. Duffy was not information obtained in the discharge of his official duties. The information about Stikeman Elliott acting for Summitt's competitors or about its participating in the activities of several OEA committees is external to his service for the Energy Board.

74 Thus, I conclude that Mr. Duffy is not covered by s. 10 of the *Ontario Energy Board Act, 1998*, and he does not have testimonial immunity. Therefore, I would not quash his summons on account of s. 10 of the Act.

4. Deliberative Secrecy

75 In this section, I discuss whether the summonses should be quashed on the grounds of deliberative secrecy.

76 Under the doctrine or principle of deliberative secrecy, which promotes adjudicative independence, collegial debate, and the finality of decisions, a judge or an administrative tribunal adjudicator cannot be compelled to testify about the deliberations or the substance of the decision-making process or how or why a particular decision was reached by the court or administrative tribunal: *Clendenning v. Belleville (Town) Commissioners of Police* (1976), 15 O.R. (2d) 97 (Ont. Div. Ct.); *Agnew v. Assn. of Architects (Ontario)* (1987), 64 O.R. (2d) 8 (Ont. Div. Ct.); *156621 Canada Ltd. v. Ottawa (City)* (2004), 70 O.R. (3d) 201 (Ont. S.C.J.).

77 The substance of the decision-making process includes what material was considered or not considered by the adjudicator, whether the adjudicator pre-judged the matter, and the extent to which the adjudicator was influenced by the views of others: *Agnew v. Assn. of Architects (Ontario)*, *supra*, at p. 17.

78 Deliberative secrecy would cover the involvement of independent counsel unless there was good reason and a factual foundation to believe that counsel transgressed the limits of fairness and natural justice: *Rudinskas v. College of Physicians & Surgeons (Ontario)*, 2011 ONSC 4819 (Ont. Div. Ct.); *Aronov v. Royal College of Dental Surgeons (Ontario)*, [2001] O.J. No. 1927 (Ont. Div. Ct.); *Stevens v. Canada (Commission of Inquiry)*, 2003 FC 1259 (F.C.).

79 Deliberative secrecy extends to the administrative aspects of the decision-making process, including the assignment of the adjudicator(s) to particular cases: *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)* (2007), 282 D.L.R. (4th) 538 (N.S. C.A.) at paras. 15-18; *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952 (S.C.C.).

80 Under the rule of deliberative secrecy, members of administrative tribunals generally cannot be required to testify about how or why they reach their decisions: *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, *supra*. In *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)* *supra* at para. 16, Cromwell, J.A., as he then was, noted that, although the principle of deliberative secrecy does not apply as strongly to administrative tribunals as to courts, the Supreme Court of Canada has confirmed that deliberative secrecy is the general rule for administrative tribunals.

81 The testimonial immunity of deliberative secrecy for the administrative aspects of the decision-making process is not absolute and will yield where it is alleged that the right of natural justice has been infringed: *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952 (S.C.C.); *Payne v. Ontario (Human Rights Commission)* (2000), 192 D.L.R. (4th) 315 (Ont. C.A.).

82 The testimonial immunity of deliberative secrecy can be lifted if a litigant can show clearly articulated and objectively sound reasons for believing that the process did not comply with the rules of natural justice or procedural fairness: *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)* *supra*; *Payne v. Ontario (Human Rights Commission)*, *supra*; *Agnew v. Assn. of Architects (Ontario)*, *supra*, at p. 15.

83 In the case at bar, Summitt submits that deliberative secrecy is not engaged because the lines of inquiry do not involve the decision-making process of the Energy Board or that deliberative secrecy should be lifted in the circumstances of this case.

84 In my opinion, deliberative secrecy undoubtedly applies to Ms. Hare. As for Mr. Duffy, in my opinion, under the principle of deliberative secrecy, he cannot be compelled to answer Retainer Questions; however, deliberative secrecy would not apply to Competitor Representation Questions, OEA Involvement Questions, and Other Proceedings Questions. These lines of inquiry are extraneous to the Energy Board's decision-making process.

85 For clarity, I point out that the decision with respect to Mr. Duffy and three lines of inquiry is not a matter of lifting deliberative secrecy; rather, it is a matter of concluding that there is no adjudicative secrecy associated with the circumstances that Stikeman Elliott had other clients and was a member of the OEA.

86 Thus, Ms. Hare's summons should be quashed on the grounds of deliberative secrecy but not Mr. Duffy's summons.

5. Solicitor-Client Privilege

87 In this section, I discuss the extent to which solicitor-client privilege would provide grounds for quashing the summonses.

88 Solicitor-client privilege protects from disclosure, communications between lawyer and client. There is a rebuttable presumption of fact that "all communications between client and lawyer and the information they shared would be considered *prima facie* confidential in nature: *Société d'énergie Foster Wheeler ltée c. Société intermunicipale de gestion & d'élimination des déchets inc.*, [2004] 1 S.C.R. 456 (S.C.C.) at para. 42. It is enough for the party invoking the privilege to show that a general mandate had been given to the lawyer for the purpose of obtaining a range of services generally expected of a lawyer in his or her professional capacity: *Foster Wheeler Power Co.*, *supra*.

89 Privilege applies to counsel advising an administrative tribunal: *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 (S.C.C.) at paras. 17-19, 31.

90 The names of client are not categorically protected by solicitor-client privilege, but may be. For instance, the nature of a lawyer's practice may reveal the topic and nature of the legal advice and the disclosure of the client's name would be privileged: *R. v. Lavallee, Rackel & Heintz*, [2002] 3 S.C.R. 209 (S.C.C.); *Minister of National Revenue v. Welton Parent Inc.*, [2006] 2 C.T.C. 177 (F.C.) at paras. 82-94.

91 In the case at bar, however, Summitt submits that none of the lines of inquiry are subject to solicitor-client privilege.

92 In this regard, Summitt attempts to draw a distinction between disclosure of communications between client and solicitor, which would be privileged, and disclosure that there were communications between client and solicitor but without disclosing the advice given, which information it submits is not privileged. With respect, this distinction is untenable. Ms. Hare has a privilege not to disclose whether she had communications with Mr. Duffy and not to disclose the topics of those communications. Similarly, Stikeman Elliott's clients have a privilege not to disclose that they retained the firm. Mr. Duffy is bound by these solicitor-client privileges.

93 In the case at bar, in my opinion, despite Summitt's arguments to the contrary, the Retainer Questions, the Competitor Representation Questions, and the Other Proceedings Questions are subject to solicitor-client privilege, although it would appear that with respect to some of Summitt's competitors, the privilege has been waived by the public disclosure of Stikeman Elliott's retainers.

94 The OEA Involvement Questions do not involve the communication of legal advice to a client and would not be covered by solicitor-client privilege.

95 This line of reasoning leads to the conclusion that Ms. Hare's summonses should be quashed but not Mr. Duffy's, although he could only be questioned with respect to the OEA Involvement Questions.

D. Conclusion

96 For the above reasons, the motion to quash the summonses should be granted.

97 If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Energy Board parties and the Attorney General's submissions within 20 days of the release of these reasons for decision followed by Summitt's submissions within a further 20 days.

98 It may be of assistance to the parties to know that my present inclination is to order costs in the cause with an exception for the Attorney General's costs, which would be payable forthwith on a partial indemnity scale.

Motion granted.

2009 CarswellOnt 2905
Ontario Superior Court of Justice

Airport Taxicab (Pearson Airport) Assn. v. Toronto (City)

2009 CarswellOnt 2905, [2009] O.J. No. 2144, 177 A.C.W.S. (3d) 813, 61 M.P.L.R. (4th) 8

AIRPORT TAXICAB (PEARSON AIRPORT) ASSOCIATION (Applicant) and CITY OF TORONTO (Respondent)

AIRPORT LIMOUSINE OPERATORS ASSOCIATION (Applicant) and CITY OF TORONTO (Respondent)

Perell J.

Heard: May 22, 2009
Judgment: May 25, 2009 *
Docket: 08-CV-347221 PD3, 08-CV-347233 PD3

Counsel: David E. Leonard for Airport Taxicab (Pearson Airport) Association
Mark Veneziano, Naomi Loewith for Airport Limousine Operators Association
Michele A. Wright for City of Toronto

***Perell J.*:**

1 The Airport Taxicab (Pearson Airport) Association and the Airport Limousine Operators Association have each brought applications to quash City of Toronto By-law 1425-2007 (the "Exemption Removal By-law") enacted by the City in December 2007. The Associations rely on a variety of grounds, including the ground that the by-law was enacted in bad faith.

2 In January 2008, the Associations each brought interlocutory injunctions to enjoin the City from enforcing the by-law, and Justice Low, in the context of that interlocutory motion, which she granted, found that there was a *prima facie* case of bad faith and a serious issue for trial that required a full factual record for a determination to be made. See *Airport Taxicab (Pearson Airport) Assn. v. Toronto (City)*, [2008] O.J. No. 490 (Ont. S.C.J.).

3 After securing the interlocutory injunction, pursuant to Rule 39.03, both Associations served a summons to examine Councillor Howard Moscoe, who is the Chair of the City's six-member Licencing and Standards Committee.

4 In the motion now before the Court, the City seeks to quash the summons. For the reasons that follow, I dismiss the City's motion.

Factual Background

5 The factual background is that The Airport Limousine Operators Association is an association of corporations that operate limousines that transport passengers to and from Pearson Airport, which is located in the City of Mississauga. The Airport Taxicab (Pearson Airport) Association is a not-for-profit corporation, whose purpose is to promote the interests of drivers and owners of taxicabs authorized to operate at Pearson Airport. The membership is made up of owners who have permits to operate at the airport that are issued by the Greater Toronto Airport Authority ("GTAA") and who have business licences issued by a municipality, primarily the City of Mississauga.

6 Under the *City of Toronto Municipal Code* the operators of taxis and limousines picking up passengers in the City of Toronto are required to have a business licence issued by the City. Historically, however, there was an exception in the

Code, and it was not necessary to have a licence if: (a) the vehicle was only taking passengers to an airport operated by the Crown in right of Canada; and (b) the vehicle held a valid permit issued by the federal Minister of Transport under the Government Airport Concession Operations Regulations.

7 Up until the events that precipitated their applications to quash By-law 1425-2007, the members of the two Associations arguably fell within the exception in the *City of Toronto Municipal Code* and they did not have to have Toronto business licences in order to pick up passengers going to the airport. It would appear that this state of affairs rankled taxi owners who compete for passenger business to and from Pearson Airport and who are required to have a business licence from the City.

8 I say that the Associations members arguably fell within the exception because in December 1996, GTAA became the operator of Pearson Airport and since that date it, and not the Minister of Transport, has issued permits to taxis and limousines. From this circumstance, the City argues that after December 1996, the members of the Associations have not been entitled to any exemption under the *City of Toronto Municipal Code*.

9 The Associations dispute the City's interpretation of the exemption, but up until January 1 2007, the debate was a sterile one because there was another exemption that was available for members of the Associations. Under s.156 (3) of the *Municipal Act*, the City was prohibited from requiring taxis or limousines to obtain a licence if the vehicle was only picking up passengers for a trip to a "designated airport," of which Pearson Airport was one.

10 The debate about the interpretation of the exception in the *Municipal Code*, however, became a meaningful one when the *City of Toronto Act, 2006* S.O. 2006, c. 11 replaced the *Municipal Act* and the new legislation contained no equivalent provision inhibiting the City from requiring a business licence from the Associations' members. The debate now being a meaningful one, soon after the *City of Toronto Act, 2006* came into force, Councillor Moscoe introduced a resolution to the Licencing and Standards Committee to recommend the removal of the airport exemption.

11 Based on some newspaper reports quoting Councillor Moscoe, the Associations submit that the City's motivation for removing the exemption was to secure bargaining leverage with GTAA and the City of Mississauga over the regulation of taxis and limousines at Pearson Airport. This leverage would apparently be gained at the expense of members of the Association, who would no longer be entitled to pick up fares in Toronto because the City would not grant them the necessary business licences to do so.

12 The City Staff recommended that the matter required further study, but the Licencing and Standards Committee approved Councillor Moscoe's motion for the removal of the exemption, and in April 2007, City Council voted to enact By-law 435-2007, which is a forerunner to the by-law that is the subject of the two pending applications now before the Court.

13 A video of the April 24, 2007 City Council Meeting reveals that Councillor Moscoe asked his fellow council members, of which there are 45 in number including the mayor, "not to send the City into consultations or negotiations with their hands tied behind their back" and "to set right a grievance that has been simmering below the surface for 30 years."

14 After the vote, Councillor Moscoe spoke to the press and it is reported that he stated:

> We have the hammer and we can begin to negotiate. I anticipate the City of Mississauga and the GTAA will want to sit down and negotiate with us. They haven't been interested very much in the past. Now we've got their attention.

15 After the Council's vote, the Associations promptly brought court proceedings to challenge By-law 435-2007 on the grounds that: (1) it frustrated a federal legislative purpose; (2) it was enacted without due diligence; and (3) it was passed in bad faith.

16 In the face of this attack, Councillor Moscoe returned to the Licencing and Standards Committee and moved it and later the City Council to repeal By-law 435-2007 to allow the business licence issue to be studied. Thus, on September 26, 2007, the City repealed the by-law.

17 No study, however, went forward; rather, Councillor Moscoe moved the Licencing and Standards Committee a second time to recommend the enactment of the exemption removal by-law. It appears that there was now an opinion that the exemption should be removed simply because it had no practical effect given that GTAA had taken over the airport's operation and, therefore, arguably the exemption was moribund and the revocation of it merely a housekeeping amendment.

18 On December 12, 2007, on Councillor Moscoe's motion, City Council voted in favour of By-law 1425-2007. It was enacted, and it is the by-law now under attack by the two Associations. A transcript of the meeting indicates that Councillor Moscoe introduced the by-law, spoke in its favour, and answered questions from fellow councilors about the by-law.

19 In attacking the by-law, the Associations rely on, among other things, the following grounds:

(a) although By-law 435-2007 was repealed to allow for studies, no studies were undertaken before the enactment of By-law 1452-2007;

(b) By-law 1452-2007 is illegal because the City failed to consider the issues fairly and judiciously, exercising the degree of due diligence required under law;

(c) By-law 1452-2007 is illegal because it was passed in bad faith in order to confer a competitive and bargaining advantage upon taxicabs and livery vehicles with City permits in the battle with GTAA;

(d) By-law 1452-2007 is inoperative as it illegally frustrates a federal legislative purpose; namely the regulation of Pearson Airport;

(e) By-law 1452-2007 is illegal as it impermissibly discriminates against taxicab and limousine operators who posses valid federal permits;

(f) By-law 1452-2007 and the City's current interpretation of the *City of Toronto Municipal Code* cannot extinguish the rights of the Associations members under the airport exemption.

20 As already noted above, when the City refused to delay implementation of By-law 1452-2007, the two Associations moved for an interlocutory injunction, which was granted by Justice Low, who stated at para. 6 of her Reasons for Decision:

> There is credible evidence before the court that there was bad faith in the enactment of the impugned by-law. First, there is evidence in the comments of councilors of a collateral purpose motivating the enactment. Second, despite the recognition by the City of the need for consultation with the different levels of government that would be impacted, with the various stakeholders, and particularly with those entities whose interests would be most directly and adversely affected, the City proceeded to enact the by-law with no consultation. That refusal to engage in consultation and analysis could amount to bad faith depending on all of the other surrounding circumstances. (see *Langille (c.o.b. Rickshaw Runners of Toronto) v. Toronto (City)*, (2007) 33 M.P.L.R. (4th) 136 (S.C.J.). I am not in a position at this juncture to say that the allegation of bad faith is a frivolous one as there is an evidentiary basis for making the claim. It is an issue of fact and I am satisfied that it is a serious issue for trial or a hearing on the merits on a full evidentiary record.

21 The Applicants now wish to move forward with their case to quash the by-law, and pursuant to rule 39.03, they have each served a notice of examination on Councillor Moscoe.

22 Rule 39.03 (1) states:

> Subject to subrule 39.02 (2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence for use at the hearing.

23 The City now seeks to quash the summons.

Discussion

24 In their factums, the Associations submit that the issue now before the Court is whether having made out a *prima facie* case that the City acted in bad faith, the Associations are entitled to marshal the evidence necessary to prove their allegation. In my opinion, however, this submission misstates the issue the before the Court. There is no doubt that the Associations are entitled to marshal the evidence necessary to prove their allegation of bad faith. Indeed, they would be entitled to marshal evidence about bad faith even if they had not made out a *prima facie* case of bad faith for the purpose of their interlocutory injunction motion.

25 The question before the court is simply whether in marshalling evidence, the Associations may use rule 39.03 to examine Councillor Moscoe. The not-so-simple answer to that question turns on whether he can provide relevant evidence about the alleged bad faith of the collective of which he is just a part; namely, the Council of the City of Toronto.

26 There is a *prima facie* right to examine a witness for a pending application, but the party seeking to conduct the examination must show on a reasonable evidentiary basis that the examination would be conducted on an issue relevant to the application and that the proposed witness is in a position to offer relevant evidence: *Canada Metal Co. v. Heap* (1975), 7 O.R. (2d) 185 (Ont. C.A.); *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont. C.A.), leave to appeal to the S.C.C. refused (2003) (S.C.C.); *Bearden v. Lee*, [2005] O.J. No. 1583 (Ont. S.C.J.).

27 An opposing party may move to quash a summons to examine a witness on the grounds that the evidence sought is not relevant to the application or that the examination or the underlying proceeding would amount to an abuse of process: *Canada Metal Co. v. Heap* (1975), 7 O.R. (2d) 185 (Ont. C.A.); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 27 O.R. (3d) 291 (Ont. Gen. Div.); *Bearden v. Lee*, [2005] O.J. No. 1583 (Ont. S.C.J.); *Ontario (Attorney General) v. Dieleman* (1993), 16 O.R. (3d) 39 (Ont. Gen. Div.).

28 If the party seeking the examination cannot satisfy the relevancy and evidentiary screening, then the summons is regarded as a fishing expedition and an abuse of process: *Canada Metal Co. v. Heap* (1975), 7 O.R. (2d) 185 (Ont. C.A.); *Schreiber v. Mulroney* (2007), 87 O.R. (3d) 643 (Ont. S.C.J.); *René v. Carling Export Brewing & Malting Co.* (1928), 61 O.L.R. 495 (Ont. S.C.); *Agnew v. Assn. of Architects (Ontario)* (1987), 64 O.R. (2d) 8 (Ont. Div. Ct.); *Bettes v. Boeing Canada DeHavilland Division* (1992), 10 O.R. (3d) 768 (Ont. Gen. Div.); *Beck v. Bradstock* (1976), 14 O.R. (2d) 333 (Ont. H.C.).

29 In considering whether to strike a summons to a witness, the court will consider the nature and grounds for the motion, application, or action to determine what are the issues for which the examination is in aid: *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont. C.A.), leave to appeal to the S.C.C. refused (2003) (S.C.C.).

30 Once the party seeking to conduct the examination shows that the proposed examination is about an issue relevant to the pending motion or proceeding and that the party to be examined is in a position to offer possibly relevant evidence, it not necessary for the party to go further and show that the proposed examination will yield evidence helpful to that party's cause: *Manulife Securities International Ltd. v. Société Générale* (2008), 90 O.R. (3d) 376 (Ont. S.C.J. [Commercial List]); *Heslin v. Verbeeten* (2001), 10 C.P.C. (5th) 378 (Ont. S.C.J.); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 27 O.R. (3d) 291 (Ont. Gen. Div.).

31 In the immediate case, the Associations seek to examine Councillor Moscoe on the issue of whether the City acted in bad faith when it enacted By-laws 1452-2007 and 435-2007, and thus, as I have noted above, the precise issue to be decided is whether Councillor Moscoe could have relevant evidence to offer about the City's alleged bad faith in the enactment of these by-laws.

32 At first blush, it would seem he would have such evidence. He was the chair of the City's Licencing and Standards Committee, and he was the driving force who introduced the by-laws and who urged his fellow Council members to enact the by-laws. His comments to the media suggest that he, at least, was motivated by a desire to secure negotiating leverage in dealings with the GTAA and the City of Mississauga and that he was prepared to act without obtaining the recommended study of the matter.

33 The City's response is that Councillor Moscoe can provide no relevant evidence because his individual motivation is not determinative of whether the Council as a whole acted in bad faith; it is the intention of Council as a whole that is relevant to the legal issues to be decided and the intention of individual members. The City submits that the intention of a legislative body can be determined by assessing only its collective action, because legislative bodies act only through resolutions or by-laws. Further, it submits that the intention of one councillor, even the one leading an initiative and being its major proponent, is not evidence of the intention of the collective and that to allow an examination of Councillor Moscoe would be to move a political debate from a legislative forum to a judicial one.

34 I agree with the City that that the intention of a legislative body can be determined by assessing only its collective action. However, I disagree with the City's categorical argument that evidence of the intention of one councillor cannot ever be evidence of the intention of the collective. In my opinion, depending upon the particular circumstances of the case, evidence of the conduct of an individual may be probative of the intention of the collective of which he or she is a part. In the case at bar, it is my view that the Associations have gotten over the threshold of showing that Councillor Moscoe is in a position to offer relevant evidence about the intention of the City in enacting By-law 1452-2007, and, therefore, the summons should not be quashed.

35 I come to my opinion by a close reading of the judgment of Justice Blair in *O.T.F. v. Ontario (Attorney General)* (1998), 39 O.R. (3d) 140 (Ont. Gen. Div.), a judgment on an interlocutory motion that was not appealed, and the judgment of Justice Goudge for the Court of Appeal made on the merits of the same case and reported as *O.T.F. v. Ontario (Attorney General)* (2000), 49 O.R. (3d) 257 (Ont. C.A.).

36 I have noted a subtlety in these two judgments about the relationship between an individual's purposes and the purposes of the collective of which he or she is a part, and this subtlety has guided my decision in the case at bar.

37 In the *O.T.F.* cases, within days after job action that was characterized by the government as an illegal strike and was characterized by the participants as a political protest, the Provincial Government enacted legislation that excluded school principals and vice-principals from access to collective bargaining under the *Labour Relations Act.* The principals responded with an application to have the legislation struck down as a violation of their rights under the *Charter of Rights and Freedoms*.

38 In an allegation that is similar to an allegation of bad faith, the principals and vice-principals submitted that the new legislation was "reprisal legislation" designed not for legitimate legislative purposes but simply to punish them for having exercised their democratic rights. To develop evidence in support of their application, the principals relied on rule 39.03, and they sought to examine both the Minister of Education and also the Director of Policy in the Office of the Premier. Justice Blair quashed both summons.

39 The principals in *O.T.F.*, like the Associations in the case at bar, asked the question why should they not be permitted to have access to the best evidence of the motivation of those most responsible for initiating the impugned legislation. Justice Blair's negative answer found in para. 22 of his Reasons for Decision is that evidence from the instigators and proponents of the legislation would only be evidence of their individual purposes and motivations. The evidence of the

individuals as to their purpose in advancing the legislation would not be probative of the purpose of the collective that is the legislature.

40 Justice Blair's judgment was not appealed, but the attack against the legislation went forward, and it eventually reached the Court of Appeal, where Justice Goudge took up the theme of when is extrinsic evidence probative of the intention of the legislature.

41 At para. 32 of his Reasons for Decision, delivered for the Court, Justice Goudge (Doherty and Rosenberg, JJ.A. concurring) stated with emphasis added: "While the court can consider admissible extrinsic evidence of purpose, **it must be careful to ensure that the evidence has an institutional quality that reflects the intention of the legislature** and not just the individual motivation of a particular member of the government." At para. 34, he stated, with emphasis added:

> I acknowledge that the right to protest government action lies at the very core of the guarantee of freedom of expression. Thus, the court must be searching in its evaluation of the assertion that a legislative provision has as its purpose to punish those who speak out. I also acknowledge that the court can consider extrinsic evidence of purpose as part of that evaluation. However, this must be done within the context described by Bastarache J. The provision itself and its statutory context remain vital sign posts in the search for legislative purpose, because they are the actual manifestations of that purpose. **Expressions of motivation by individual government actors must be scrutinized to see that they truly reflect legislative intent, rather than simply individual concerns. The former are appropriately part of the Charter analysis.** The latter are left to be sanctioned at the ballot box.

42 I have added emphasis to make the point that Justice Goudge was not speaking categorically to preclude expressions of individual motivation being reflections of the legislature's intent. Rather, he was directing that individual expressions of purpose be carefully scrutinized to ensure that they have "an institutional quality that reflects the intention of the legislature." Indeed, he concluded that the evidence of the Minister of Education and Training had this quality, although on the merits, the evidence failed to establish that the legislature was improperly motivated. Thus, Justice Goudge stated at paras. 42 and 47 of his judgment:

> 42. What then of the extrinsic evidence on which the appellants principally rely? I accept, as did Southey J., that the statements made in the legislative process by the Minister of Education have the necessary institutional quality referred to by Bastarache J. in *Delisle*, *supra*. They constitute an expression of legislative purpose.
>
> 47. In summary, the appellants have simply not been able to make out their case. Neither the intrinsic evidence nor the extrinsic evidence advanced by the appellants demonstrates on a balance of probabilities that the legislative purpose of the impugned amendments was to punish principals and vice-principals for participating in the protest against Bill 160. It cannot therefore be said that these amendments infringe their Charter freedoms of expression or association because of an invalid purpose.

43 The subtle point to note is that in the context of an effort to gather evidence using rule 39.03, whether an individual member of a public authority has probative evidence to offer about the intention of the public body will depend on the facts of the particular case and whether in all the circumstances of the particular case, the individual's conduct has demonstrated an institutional quality that might reflect the intention of the public authority. Thus, to use the case at bar as an illustration, apart from Councillor Moscoe, there is no demonstrated basis to summons any member of the Licencing and Standards Committee or of the municipal council to testify.

44 There is another subtle point to note. In the application before me, I am not deciding that Councillor Moscoe's intention - which itself remains to be determined - is necessarily the intention of the municipal council or that it amounts to acting in bad faith. All I am deciding is that having scrutinized the record, there is an institutional quality to Councillor Moscoe's conduct such that it *might* be found to reflect the intention of the City Council. I sense that Justice Low was of a similar opinion, and she went no further in deciding that there was a serious issue about bad faith to be tried.

45 In addition to the *O.T.F.* case, the City relied on several other cases where a summons to a politician or government official was quashed, but in my opinion, these cases are distinguishable from the case at bar.

46 In *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 211 D.L.R. (4th) 741 (Ont. C.A.), after the Minister had announced that there was no basis for cancelling the spring bear hunt, a regulation was passed cancelling the hunt. A federation of hunters brought an application on the grounds that the regulation was *ultra vires*, and in aid of that application, the federation served a notice of examination pursuant to rule 39.03 on the Minister and on the Premier. It was alleged that their evidence would be relevant because it was alleged that the Minister had cancelled the spring hunt at the direction and under the influence of the Premier and thus the Minister had not exercised an independent discretion.

47 Reversing the Divisional Court and restoring the decision of the motion's judge, the Court of Appeal quashed the notice of examination. Justice Abella wrote the judgment for the Court (MacPherson and Simmons, JJ.A. concurring). She held that the Minister and the Premier were not in a position to offer evidence relevant to the application. She reasoned that even if the regulation was influenced by the Premier, it was a decision of cabinet and not of the Premier or the Minister and that any political motives for the regulation were irrelevant and not justiciable. As she noted at para. 53 of her judgment: "Governments are motivated to make regulations by political, economic, social or partisan considerations. These motives, even if known, are irrelevant to whether the regulation is valid."

48 Justice Abella conceded at para. 56 of her judgment that Ministers of the Crown are not immune from testifying under rule 39.03, but she was of the view that there was no justiciable issue raised by the evidence for which their evidence would be relevant.

49 The *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* case is distinguishable from the case at bar because, unlike the case at bar, it was not a bad faith case. Unlike the case at bar, where an unlawful purpose is at the heart of the case, the legislative act of cancelling the bear hunt was not suggested to be an act of bad faith. Unlike the case at bar, the issue of an unlawful intent was irrelevant to the application, and the Minister and the Premier's evidence would have been irrelevant to the merits of the case actually before the court.

50 *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3 (S.C.C.) is distinguishable for similar reasons. In this case, a municipality passed a resolution to establish a judicial inquiry about alleged irregularities in certain land transactions. Several private developers brought proceedings to have the inquiry stopped on the ground that it was *ultra vires* the municipality as intruding on the federal criminal law power. To make their case, the developers sought to summon several council members and several senior officials of the municipality as witnesses because these individuals had made comments to the press that suggested that what was sought was an investigation of possible criminal activity. The Supreme Court of Canada agreed that the Divisional Court was correct in quashing the summons because evidence about the intent of individual members would be irrelevant to the validity of the Council's resolution.

51 Justice Binnie stated at para. 45 of his judgment for the Court:

> The motives of a legislative body composed of numerous persons are "unknowable" except by what it enacts. Here the municipal Council possessed the s. 100 power and exercised it in the form of a resolution which speaks for itself. While some members of the present or previous Sarnia Council may have made statements which suggest a desire to unmask alleged misconduct, the inquiry will not be run by city councillors but by Commissioner Killeen, a Superior Court judge, who will take his direction from the s. 100 Resolution, not from press reports of comments of some of the city politicians. Accordingly the courts below were correct to quash the summonses and strike from the record certain other evidence. While courts should be slow to interfere with a party's effort to build its case, they should set aside summonses where, as here, the evidence sought to be elicited has no relevance to a live issue in the judicial review applications: *Re Canada Metal Co. and Heap* (1975), 7 O.R. (2d) 185 (C.A.), per Arnup J.A., at p. 192.

52 Once again it is to be noted that the *Consortium Developments* case is not about proving bad faith. The *Consortium Developments* case does not discuss whether the conduct of the individual council members had any institutional quality so that it could provide evidence about the issue before the court. The statements of individual members of council were just a reflection of their individual aspirations about the purposes of a judicial inquiry. That evidence would be irrelevant to the issue before the court, and thus the notice to examine the individuals did not pass scrutiny for the purposes of justifying resort to rule 39.03.

53 In the *O.T.F.* case, in quashing the rule 39.03 summons, Justice Blair also noted - although he expressly did not base his decision on this basis -the policy factors that the courts should respect the differing functions of courts and legislators in a democratic society and courts should be very careful not to permit rule 39.03 to usurp the legislative process by making the courtroom the place for what is a properly a political debate. At para. 17 of his Reasons for Decision, he stated:

> Legislation implementing fundamental changes in society inevitably invokes passionate and robust debate. Arguments of one sort or another based upon infringement of the Charter are not infrequently put forward. While I do not suggest for a moment that such is the case on the instant Application, it seems to me that if those opposing legislative initiatives are to have access to the outside testimony and documentation of members of the Legislature, Ministers of the Crown, civil servants and policy advisors connected with the implementation of the targeted legislation through the simple means of launching a Charter challenge in the Courts based on allegations of "colourability", the implications are significant for the Courts, and for the differing functions which the Courts and the broader political arena have in society. There may be no end to such skirmishes. The Courts - and the discovery process inherent in the court process - will become simply another extension of the Legislative floor. That is not the intention of the legislative process, or of the provisions of Rule 39.03, in my view.

54 I share Justice Blair's concern about the improper use of rule 39.03, but I note that at para. 18 of his reasons in the *O.T.F.* case, he noted that his concern might not be sufficient to preclude examinations if the evidence sought were otherwise relevant and admissible to the issues that were the subject of the proceeding.

55 As noted by Justice Blair in *Grosvenor v. East Luther Grand Valley (Township)*, 2007 ONCA 55 (Ont. C.A.) at paras. 41-42, good faith remains a central foundation for the validity of a municipal by-law. The case at bar is not a case where an allegation of bad faith based on an individual councillor's statements is being used as a fishing expedition to find evidence of bad faith by a municipal council. Rather, the evidence of the influential role and persuasive force of Councillor Moscoe, like the role of the Minister of Education in the *O.T.F.* case, provides a foundation for the Associations to show the necessary institutional quality from which to argue that Councillor Moscoe's evidence might be probative of whether the City's council acted in bad faith when it enacted the by-law removing the airport exemption.

Conclusion

56 For the above reasons, I dismiss the City's motion. If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the two Associations within 20 days of the release of these Reasons for Decision followed by submissions of the City within 40 days of the release of these Reasons.

Motion dismissed.

Footnotes

* Leave to appeal refused *Airport Taxicab (Pearson Airport) Assn. v. Toronto (City)* (2009), 61 M.P.L.R. (4th) 1, 2009 CarswellOnt 3703 (Ont. Div. Ct.).

2018 ONSC 3162
Ontario Superior Court of Justice

2386240 Ontario Inc. v. The City of Mississauga

2018 CarswellOnt 9119, 2018 ONSC 3162, 293 A.C.W.S. (3d) 637, 76 M.P.L.R. (5th) 307

2386240 ONTARIO INC., O/A AL-OMDA LOUNGE, HABIBI LOUNGE, FUSION LOUNGE, SAIMA ROGINA INC., O/A EL FISHAWY, 84921231 CANADA INC., O/A MAZAJ LOUNGE and SHISALICIOUS CAFÉ (Applicants) v. THE CITY OF MISSISSAUGA and THE REGIONAL MUNICIPALITY OF PEEL (Respondents)

Peter A. Daley R.S.J.

Heard: January 17, 23, 2018
Judgment: June 5, 2018
Docket: CV-16-4669-00

Counsel: R.P. Zigler, for Applicants
B.H. Kussner, S.R. Rouleau, for Respondents

***Peter A. Daley R.S.J.*:**

Introduction:

1 The applicants sought a declaration that sections 2 (a), (b), (c) and 5 of By-Law 1331-2016 ("the By-Law") enacted by the respondent The Regional Municipality of Peel (the "Region") are illegal or invalid and as such the applicants seek to quash those provisions of the By-Law. The remaining provisions of the By-Law are not challenged.

2 The applicants are the owners of several waterpipe lounges which are located in the Region.

3 As will be discussed below, the By-Law prohibits waterpipe smoking in enclosed public places such as the applicants' business establishments. The By-Law was enacted by Council for the Region and was subsequently confirmed through the consent of the Councils of all three lower-tier municipalities which comprise the Region — namely, the City of Brampton, the City of Mississauga and the Town of Caledon.

4 The application initially sought relief from both the Region and the City of Mississauga, however the application was withdrawn against the latter party as enforcement of the By-Law was to be solely carried out by the Region.

5 For the reasons that follow the application is dismissed.

Evidence as to the Events Leading to the Enactment of the By-Law:

6 A substantial evidentiary record was submitted by both parties. Generally, there is little dispute as to the evidence submitted. Determination of the application turns largely on whether the Region was lawfully entitled to enact the By-Law and whether it lawfully carried out that process.

7 In 2012 the Public Health Division of the Region's Health Services Department ("Peel Public Health") released a report entitled "Burden of Tobacco: the Use and Consequences of Tobacco in Peel" (the "*Burden of Tobacco Report*"). The report included an examination of concerns related to the use of waterpipes.

8 In the affidavit of Eileen de Villa, Medical Officer of Health ("MOH"), submitted on behalf of the Region in response to the application, there is uncontradicted evidence as to the negative health outcomes associated with waterpipe smoking as contained in the *Burden of Tobacco Report*, including higher rates of respiratory illness, lung cancer, lower birth weights and periodontal disease.

9 The *Burden of Tobacco Report* also identified multiple concerns with respect to smoking generally throughout the Region, including adverse results from smoking on an annual basis involving 3300 hospitalizations for diseases attributed to smoking, almost 700 deaths related to smoking, almost 5000 years of life lost as a result of premature death. Further, as a result of exposure to environmental i.e. second-hand tobacco smoke, it was estimated that:

(I) approximately 156 people were hospitalized annually for lung cancer or ischemic heart disease as a result of exposure to second-hand smoke;

(II) approximately 40 people died annually from lung cancer or ischemic heart disease as a result of inhaling someone else's smoke; and

(III) one out of ten non-smokers across the Region continue to be exposed to second-hand smoke.

10 The *Burden of Tobacco Report* also identified the economic costs of hospital treatment of smoking-attributable diseases across the Region as in excess of $49 million annually.

11 As deposed by witness de Villa in her affidavit, since 2009 there has been an increase in the number of waterpipe establishments carrying on business in the Region and this increase was running counter to the Region's policies focused on protecting public health from harmful effects of smoking and second-hand smoke.

12 As a result of concerns with the ever-increasing number of waterpipe establishments in the Region and the recognized harmful effects of both tobacco and non-tobacco smoking generally and with the use of a waterpipe, the MOH concluded that as a matter of public health and safety and occupational health and safety, legislative intervention by the Region was warranted.

13 In her affidavit, the MOH deposed that in view of the health concerns recognized on February 5, 2015, Peel Public Health issued a report entitled "Health Effects from the Uses of, and Exposure to, Tobacco and Non-tobacco Waterpipes" (the "*Waterpipes Report*").

14 This Report was in part prepared to respond to complaints made to Peel Public Health in respect of poor indoor air quality and with respect to the consumption of tobacco within waterpipe establishments in the Region. The *Waterpipes Report* was based on a review of studies and reports in regard to waterpipe use and certain recommendations were made by the authors of the report to Peel Public Health some of which included:

(I) the development of policy options regarding the use of waterpipes and the potential option of the development of a by-law prohibiting waterpipe smoking in enclosed public places and workplaces, including restaurant and bar patios;

(II) partner with key stakeholders to conduct high-quality research on the health effects of the use of, and exposure to, tobacco and non-tobacco waterpipes;

(III) advocate to the Minister of Health and Long-Term Care in favour of providing an accurate, timely, cost-effective and efficient process for health units to submit waterpipe products for laboratory analysis of tobacco content;

(IV) advocate to the Minister of Health and Long-Term Care in favour of amending the *Smoke-Free Ontario Act*, S.O. 1994, c. 10 to also prohibit the smoking of tobacco-like products such as non-tobacco waterpipes, in all areas where the smoking of tobacco products is prohibited; and

(I) advocate to the federal Minister of Health in favour of including tobacco waterpipe products under the federal *Tobacco Act* in order to set minimum requirements for packaging and labelling.

15 The MOH and its Commissioner of Health Services tendered a report in November 2015 to the Regional Council where it recommended undertaking stakeholder consultations with waterpipe establishment owners, patrons of waterpipe establishments, and staff from the Region's three lower-tier municipalities with a view to determining how the Region could best address the public health risks related to waterpipe smoking in public places. The recommendations made to the Regional Council were passed in November 2015. Consultations were then carried out with the stakeholders.

16 The stakeholder consultations included the following:

(I) Representatives from 20 of approximately 32 businesses known to offer waterpipe smoking were interviewed;

(II) 105 patrons of different waterpipe establishments were interviewed;

(III) Peel Public Health representatives met with representatives of the local three lower-tier municipalities during the summer of 2015; and

(IV) Peel Public Health representatives contacted several public health agencies in Middle Eastern countries in which waterpipe smoking is common, including Lebanon, Turkey, Egypt and Kuwait.

17 Following the completion of the stakeholder consultation process, a jointly prepared report from the MOH and Commissioner of Health Services was issued in April 2016 and presented to Regional Council. The report identified several findings collected during the stakeholder consultation process including:

(I) 70% of the patrons attending waterpipe establishments cited "socialization" as their main reason for doing so;

(II) waterpipe smoking, particularly among young adults, was increasing in the Region;

(III) existing and emerging research confirmed that waterpipe smoking posed health risks to users and those exposed to second-hand smoke;

(IV) most individuals were unaware of the risks posed by waterpipe smoking or believed that the risks were minimal; and

(V) in addition to several Canadian jurisdictions, a number of countries in the Middle East had already prohibited waterpipe smoking in public spaces.

18 In its conclusion, the authors of the April 2016 report recommended the enactment of a by-law prohibiting waterpipe smoking in respect of both tobacco and non-tobacco in enclosed public places, enclosed workplaces and specific outdoor public places within the Region.

19 On April 28, 2016 Regional Council received the April 2016 report and during this public Council meeting submissions and delegations were received from members with respect to the recommendations contained in the report. Following consideration of the submissions and delegations, Regional Council enacted the By-Law in accordance with the recommendations in the April 2016 report.

20 The vote at Regional Council was twenty-one members in favour of enacting the By-Law while two opposed it.

21 In May 2016, each of the three lower-tier municipalities within the Region consented to the enactment of the By-Law and resolutions were passed for that purpose by each municipality.

22 As to investigations carried out with respect to waterpipe lounges operated by the applicants, the respondent filed affidavit evidence from Jakub Graczyk, a Public Health Inspector and Tobacco Enforcement Officer ("TEO") employed by the Public Health Division of Peel Public Health for the Region.

23 As outlined by witness Graczyk, three rounds of sampling were carried out whereby samples were collected from waterpipe establishments and tested for tobacco content. During the first round of testing, samples were collected from 11 waterpipe establishments. Of those 11 premises, 7 were found to have at least one sample containing tobacco.

24 During the second round of testing, samples were collected from one premises and of the samples collected at least one contained tobacco.

25 During the third round of testing, samples were collected from 11 premises. Eight of those premises were found to have at least one sample containing tobacco.

26 Five of the applicants in this proceeding were found to have samples containing tobacco on the premises during at least one of the three rounds of testing and the particulars with respect to that are set out in Graczyk's affidavit.

Nature of the Applicants' Businesses:

27 Affidavit evidence from the principles of each applicant was submitted outlining the nature of their respective waterpipe lounges.

28 The applicants supply waterpipes and smoking products to their customers to be consumed on site, while the customers socialize in their premises.

29 The applicants depose in their affidavits that their waterpipe lounges offer herbal shisha to customers, which is heated in the waterpipe by burning charcoal. Smoke is generated by this and the smoke is cooled by water and inhaled by the customer through a hose or mouthpiece. Herbal shisha is not a substance prohibited under the *Smoke-Free Ontario Act*.

30 The applicants' evidence is that the bulk of their business revenues are derived from the supply of waterpipes and the shisha sold to their customers. The percentage revenue of their total revenue from the rental of waterpipes and sale of herbal product ranges from approximately 60% to as high as 90%.

31 A survey of waterpipe lounge clientele, as commissioned by the respondent, indicated that 75% of those interviewed would be unlikely to visit a waterpipe lounge if waterpipe smoking was prohibited.

32 The applicants explain that their business operations are small and that they have invested substantial sums of money ranging from $60,000-$500,000 to refurbish their business premises for the operation of a waterpipe lounge.

33 The applicants disputed the evidence with respect to the sampling and testing that resulted in the detection of tobacco at certain waterpipe lounges in the Region, which was relied upon by the Region in considering the proposed By-Law.

34 It is further the applicants' evidence that they will face significant personal liability with respect to their business premises leases as a result of the adverse effects from the enforcement of the subject By-Law.

35 In submissions on behalf of the applicants, counsel urged that enforcing the subject By-Law would ultimately result in the closure of the applicants' waterpipe lounges and substantial economic losses flowing from that.

Analysis:

36 Most of the issues at stake on this application have already been thoroughly considered by this court in *2326169 Ontario Inc. v. Toronto (City)*, 2016 ONSC 6221, 59 M.P.L.R. (5th) 279 (Ont. S.C.J.) (Goldstein J.), and by the Ontario Court of Appeal in *232169 Ontario Inc. (Farouz Sheesha Café) v. Toronto (City)*, 2017 ONCA 484, 67 M.P.L.R. (5th) 183 (Ont. C.A.). These two cases, collectively, are hereinafter referred to as the "*City of Toronto Case*".

37 The application before the court in that case was virtually identical to the application before this court.

38 The applicants take the position that the determinations made by both the application judge and the Court of Appeal in the *City of Toronto Case* are distinguishable from the issues in this application and as such, the findings and conclusions reached by both courts have limited application to this matter. For the reasons outlined below I disagree with this submission.

39 Counsel for the applicants did not address the applicable standard of review on an application to quash a municipal by-law pursuant to section 273 of the *Municipal Act*, *2001*, S.O. 2001, c.25. This section provides that one may bring an application to this court to quash a by-law in whole or in part for "illegality" within one year after the passing of the by-law.

40 As established in *Friends of Lansdowne Inc. v. Ottawa (City)*, 2012 ONCA 273, 110 O.R. (3d) 1 (Ont. C.A.), at paras. 13 — 14 on an application to quash a municipal by-law, the court must determine if the municipality acted within the scope of its express or implied statutory powers and for the purposes consistent with those statutory powers. In the absence of a clear demonstration of illegality, municipal by-laws are "well insulated from judicial review."

41 The question as to what constitutes "illegality" within the meaning of section 273 of the *Municipal Act, 2001* encompasses a variety of municipal law grounds, such as *ultra vires*, procedural irregularities or vagueness. When construing a municipal by-law on the assertion that it is *ultra vires*, the applicable standard is one of correctness. However, as stated by the Court of Appeal in *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502, 86 O.R. (3d) 401 (Ont. C.A.), at paras. 20 — 24, "in determining the question, courts are to take a broad and purposive approach to the construction and interpretation of municipal powers."

42 Both the legislative and jurisprudential framework, which guides the determination of a municipal by-law's validity, must be examined by taking a broad and purposive approach to the construction and interpretation of municipal powers.

43 Municipalities are creatures of statute and the *Municipal Act, 2001* provides broad powers to municipal councils to make policy choices and legislative decisions. Sections 8 and 11 of the *Municipal Act, 2001* set out the range of authority and powers conferred upon municipal governments in the following subsections:

> 8 (1) The powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues.
>
> . . .
>
> (3) Without limiting the generality of subsections (1) and (2), a by-law under sections 10 and 11 respecting a matter may,
>
> (a) regulate or prohibit respecting the matter;
>
> (b) require persons to do things respecting the matter;
>
> (c) provide for a system of licences respecting the matter.

(4) Without limiting the generality of subsections (1), (2) and (3) and except as otherwise provided, a by-law under this Act may be general or specific in its application and may differentiate in any way and on any basis a municipality considers appropriate.

11(1) A lower-tier municipality and an upper-tier municipality may provide any service or thing that the municipality considers necessary or desirable for the public; subject to the rules set out in subsection (4). 2006, c. 32, Sched. A, s. 8.

(2) A lower-tier municipality and an upper-tier municipality may pass by-laws, subject to the rules set out in subsection (4), respecting the following matters:

. . .

6. Health safety and well-being of persons.

. . .

(5) The power to pass a by-law respecting a matter set out in a paragraph of subsection (2) or (3) is not limited or restrited by the power to pass a by-law respecting a matter set out in another paragraph of subsection (2) or (3).

44 As to the jurisprudence applicable to the review of municipal by-laws, the Supreme Court of Canada and the Ontario Court of Appeal have emphasized the need for a generous, deferential standard of review of the decisions of elected municipal councils made pursuant to valid enabling legislation: *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342 (S.C.C.), at paras. 35-36; *Grosvenor v. East Luther Grand Valley (Township)*, 2007 ONCA 55, 84 O.R. (3d) 346 (Ont. C.A.), at para. 31.

45 Several principles that emerge from these cases are engaged here. Counsel for the respondent provided a thorough review of the applicable jurisprudence in both his factum and oral submissions.

46 The deferential approach to the construction of municipal by-laws calls for a reviewing court to "respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens of those municipal councils." See: *Toronto Livery Assn. v. Toronto (City)*, 2009 ONCA 535, 83 M.V.R. (5th) 1 (Ont. C.A.), at para. 44; *Nanaimo (City)* (supra).

47 A party challenging the validity of municipal action on the basis that it is invalid or unenforceable bears a heavy onus. All *intra virus* municipal actions are presumptively valid. Courts should be reluctant to find bad faith on the part of democratically elected municipal councils unless the evidence leads to "no other rational conclusion": *Canada Mortgage & Housing Corp. v. North Vancouver (District)*, 2000 BCCA 142, 77 B.C.L.R. (3d) 14 (B.C. C.A.), at paras. 41-43.

48 By-laws must be presumed to have been enacted in good faith unless the contrary can be proven. If there are lawful grounds upon which the municipal council can be found to have acted, the court should not presume that the council acted beyond its authority or that it intended to do so: *McKay v. R.*, [1965] S.C.R. 798 (S.C.C.), at 803-804.

49 Statutory provisions dealing with municipal powers should be given a "benevolent construction" using a "broad and purposive" approach consistent with underlying objectives and "showing deference to and respect for the decisions of local elected officials".

50 It has been held that the "overhaul of the *Municipal Act*, R.S.O. 1990, c. M.45 in 2001 was intended to "give municipalities the tools they need to tackle the challenges of governing in the 21st century . . . including more authority, accountability and flexibility so that municipal government would be able to deliver services as they saw fit.": *Croplife Canada v. Toronto (City)* (2005), 75 O.R. (3d) 357 (Ont. C.A.), at para. 37; *Fourth Generation Realty Corp. v. Ottawa (City)* (2005), 197 O.A.C. 389 (Ont. C.A.) at paras. 29 — 37.

51 In terms of the evidentiary record to be considered on an application such as this, the Court of Appeal has confirmed the principle that statements made by individual members of a municipal council are not to be taken as determinative of the intent of council as a whole when enacting a particular resolution or by-law. Council's decision on its face represents the exercise of its authority within its jurisdiction and the decision underlying the enactment of a by-law is not open to attack on the basis of an allegation that one or more individual members of council were motivated by improper purposes. The motives of a legislative body such as the Regional Council in this case, is made up of a number of members. As such, the motives are "unknowable" except by what the council enacts: *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)* (1996), 30 O.R. (3d) 1 (Ont. C.A.), at paras. 29 — 31; [1998] 3 S.C.R. 3 (S.C.C.) at paras. 43-45.

52 I will address the positions as argued under five separate issues.

(i) Issue 1 — Does the By-Law Conflict with Provincial Legislation:

53 It was urged on behalf of the applicants that the impugned provisions of the By-Law are not authorized by the *Municipal Act, 2001* or alternatively, the provisions conflict or are inconsistent with superior legislation.

54 Section 14 of the *Municipal Act, 2001* establishes the test for determining whether a municipal by-law conflicts with provincial or federal legislation:

> 14 (1) A by-law is without effect to the extent of any conflict with,
>
> (a) a provincial or federal Act or a regulation made under such an Act; or
>
> (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation.
>
> (2) Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument.

55 The applicants submit that the By-Law conflicts with the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (the "*OHSA*").

56 It has been held that the two-pronged test established by the Supreme Court of Canada in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188 (S.C.C.), at para. 15 calls for the reviewing court to consider two questions namely:

> (1) is it impossible to comply with both the by-law and the provincial legislation?
>
> (2) does the by-law frustrate the purpose of the legislation enacting that law?

If the answer to both questions is "no" then the by-law is not in conflict with the provincial or federal legislation: *Croplife Canada*, at paras. 60, 63.

57 The Court of Appeal at para. 23 of the *City of Toronto Case*, when considering essentially the same by-law, concluded that there was "no merit to the appellant's' submission that the by-law conflicts with and frustrates the purpose of the *OHSA*." The court further noted at para. 24 that "[t]he by-law protects the health and safety of patrons as well as employees of businesses. It does not render compliance with the *OHSA* impossible, or even more difficult. On the contrary, the by-law is complementary to both the purpose and the provisions of the *OHSA*. Contrary to the appellant's' submission, the *OHSA* does not require the City to adopt measures short of a prohibition on waterpipe smoking in order to protect employment in waterpipe lounges."

58 The application judge in the *City of Toronto Case*, whose decision was subsequently upheld by the Court of Appeal, noted that it is the current public policy in Ontario to discourage smoking and to protect people, including employees, from the effects of tobacco smoke. He further concluded that a by-law that protects workers, in a facility such as a waterpipe lounge, does not frustrate the objectives of the *OHSA*.

59 Further, I have concluded that it would not be impossible for an owner of a waterpipe establishment to comply with both the By-Law as well as any provisions of the *OHSA*.

60 There is symmetry in the operation of the By-Law and the *OHSA*.

61 For these reasons, and given the determination made by the Court of Appeal on this issue, I have concluded that there is no merit in the applicants' submission on this issue.

(ii) Issue 2 — Did the Respondent Region Act in Bad Faith?

62 The central submission made by counsel for the applicants in respect of this issue was that where an economic interest is at stake, affected parties are entitled to be consulted and provided notice of a council meeting prior to the passing of a by-law, and failure to do so constitutes bad faith. In this regard, counsel's submissions primarily related to employees of the waterpipe lounges.

63 It is notable that no evidence whatsoever was offered by any employees associated with the applicants' businesses. As such, there is no evidence at all as to what adverse economic outcomes would arise from the enforcement of the subject By-Law so far as employees are concerned.

64 There is a very heavy burden on the party seeking to establish bad faith on the part of a municipal council in the enactment of a by-law. There is no evidence in this record to support the assertion of bad faith on the part of the respondent Region's Council, let alone evidence that would even come close to discharging the heavy burden imposed.

65 The record more than amply discloses very diligent and thorough levels of inquiry, research and consultation by the Region prior to the enactment of the subject By-Law.

66 A public meeting was held which provided members of the public and stakeholders to make their concerns and submissions known to the Regional Council. There is no evidence of any mistakes or errors in that process that could possibly demonstrate any bad faith on the part of the respondent. In order to establish bad faith, there would have to be evidence of some malicious or purposeful intention of council to exclude the employees in the consultation/decision making process. Here, there is no such evience. Mere inadvertence of council to invite employees does not make out bad faith, especially if it was open to such employees to come to the public meeting.

67 As such, the applicants have failed to meet the heavy burden to establish the presence of bad faith in the enactment of the By-Law.

(iii) Issue 3 — Did the Region Contravene the Health Protection and Promotion Act?

68 It is asserted on behalf of the applicants that the Region breached section 11 of the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7, which provides as follows:

> **Complaint re health hazard related to occupational or environmental health**
>
> **11** (1) Where a complaint is made to a board of health or a medical officer of health that a health hazard related to occupational or environmental health exists in the health unit served by the board of health or the medical officer of health, the medical officer of health shall notify the ministry of the Government of Ontario that has primary

responsibility in the matter and, in consultation with the ministry, the medical officer of health shall investigate the complaint to determine whether the health hazard exists or does not exist.

Report

(2) The medical officer of health shall report the results of the investigation to the complainant, but shall not include in the report personal health information within the meaning of the *Personal Health Information Protection Act, 2004* in respect of a person other than the complainant, unless consent to the disclosure is obtained in accordance with that Act.

Conflict

(3) The obligation imposed on the medical officer of health under subsection (2) prevails despite anything to the contrary in the *Personal Health Information Protection Act, 2004*.

69 Although counsel for the applicants indicated in his reply submissions that the applicants were no longer pursing this issue, for the completeness of these reasons, I have decided to briefly address the matters raised.

70 It was acknowledged by the MOH on cross-examination on her affidavit that neither she nor anyone on her behalf gave consideration to contacting the Ministry of Labour with respect to complaints received from members of the public in regard to poor air quality in the waterpipe establishments that were investigated prior to the enactment of the subject By-Law.

71 I disagree with counsel for the applicants so far as this submission is concerned. Section 11 of the *Health Protection and Promotion Act* does not obligate the MOH to report to a particular ministry on matters that are being considered by Regional Council, such as the case was here. Rather, the legislation requires the MOH to make such a report following a complaint in respect of a specific health hazard related to occupational or environmental health connected with specific events on specific premises.

72 Thus, I have concluded that there is no evidence that the respondent contravened the *Health Protection and Promotion Act*.

(iv) Issues 4 & 5 — Does The Region Have The Legal Authority To Pass The By-Law — And Does The By-Law Prohibit Business, And Even If It Does, Does The Region Have Statutory Authority To Do So?

73 I disagree with counsel for the applicants' assertion that the *City of Toronto Case* has little application here or can be easily distinguished given new arguments that are being presented by him in this case.

74 The findings and legal conclusions reached by the judge at first instance and as upheld by the Court of Appeal in the *City of Toronto Case*, are all apt and instructive in the circumstances of the present application.

75 Not only is the subject matter and the type of by-law in question strikingly similar in the *City of Toronto Case*, that case dealt with the legislative authority of municipalities to enact by-laws of the type in question. The public policy considerations underlying the enactment of the by-laws is similar, as well as the procedural steps involved prior to each by-law's enactment.

76 In the *City of Toronto Case*, the court concluded that the *City of Toronto Act*, 2006, S.O. 2006, c. 11, Sched. A, conferred the necessary powers upon the City of Toronto to enact its by-law. Subsection 11(2) of the *Municipal Act, 2001* confers similar powers on the Region, and as noted by the Court of Appeal, there was "ample support in the record for the application judge's conclusion that the purpose of the by-law was the protection of public health and safety a purpose specifically authorized by section 8(2) of the *City of Toronto Act*".

77 I have concluded that similarly there is ample evidence in this record to support the conclusion that the purpose of the By-Law was protection of public health and safety, which is a purpose specifically authorized by section 11(2) subparagraph 6 of the *Municipal Act, 2001.*

78 The MOHs in Toronto and in the Region both recommended a prohibition against waterpipe smoking in public places in their respective jurisdictions. In the case of the City of Toronto, the recommendation was in the form of a prohibition against waterpipe smoking in establishments which were required to be licenced by the city, whereas in the case of the respondent Region it took the form of a prohibition against waterpipe smoking of both tobacco and non-tobacco in enclosed public places, enclosed workplaces and specific outdoor public places within the Region. The resulting effects of the by-law in the *City of Toronto Case* and the By-Law in this case are virtually the same, namely the prohibition of waterpipe smoking in certain establishments.

79 The courts in the *City of Toronto Case* also considered whether or not the net result of the enforcement of the subject By-law would result in the prohibition of a certain type of business, which was an issue raised in this case.

80 It was urged by counsel on behalf of the applicants that the true purpose of the subject By-Law is to prohibit the particular type of business — namely, waterpipe lounges and as such, in the absence of expressly stated authority in the *Municipal Act, 2001*, the by-law would be *ultra vires*.

81 In support of this submission, counsel relied upon the decision in *Canada Post Corp. v. Hamilton (City)*, 2016 ONCA 767, 134 O.R. (3d) 502 (Ont. C.A.). In my view this case, which involved questions of constitutional law and specifically a determination as to whether or not there was conflict between a provincial by-law and federal legislation and the application of the doctrine of paramountcy, has no application here. The case involved an appeal by the City of Hamilton from Canada Post's challenge of a municipal by-law giving the City control over the installation of equipment, including community mailboxes on municipal roads. At first instance, the court concluded that the by-law was inoperative for several reasons including as a result of the application of the doctrine of paramountcy.

82 In considering the issues on the appeal, the court stated at para. 30 that "[t]he focus of these reasons is on the question of the *vires* and paramountcy, which are decisive of the appeal. The other issues raised by the City — vagueness, Crown immunity, and interjurisdictional immunity — will be disposed of summarily."

83 Counsel for the applicants referred to this decision as an authority that not only was it necessary to examine the "purpose" of the by-law to determine whether or not it was *intra vires* the municipality, but additionally that the "effect" of the by-law must be examined as well. That was the type of examination undertaken by the court in the *Canada Post Corp.* decision.

84 I have concluded that the ultimate effect of the By-Law on the economic interest of the applicants, need not be considered when determining whether the By-Law was lawfully enacted having regard to its purpose.

85 The Court of Appeal in the *City of Toronto Case* addressed the applicants' argument on this point and rejected it at paras. 12 — 15, which for completeness I will fully quote here:

> 12. The appellants submit that the purpose of the by-law must be determined having regard not only to its apparent purpose, but also its effect. They characterize health and safety concerns as the *motive* for the by-law, but submit that the effect of the by-law is the closure of many, if not most of the appellants' businesses, and that this is determinative of the by-law's purpose.
>
> 13. The appellants do not submit that the City's stated purpose — the protection of health and safety — is somehow colourable, but say that the primary effect of the law will be the closing of hookah lounges, and that this overwhelms the City's health and safety motive when characterizing the purpose of the by-law.
>
> 14. This argument must be rejected.

> 15. As the application judge noted, the appellants are licensed by the City to sell food and may continue to do so. Indeed, they may continue to sell shisha. What they cannot do is to permit the smoking of hookah pipes on their business premises. There is no doubt that many hookah lounges will suffer economic harm as a result of the by-law and may no longer be economically viable, but it does not follow that this is the by-law's purpose. The protection of public health and safety necessarily has economic impact on the operation of the appellants' businesses, but that impact is incidental to, rather than determinative of, the purpose of the by-law.

86 In my view, there is no evidence to support the submission that the purpose of the subject By-Law was to prohibit business. Its true purpose was to prohibit a specific activity, namely smoking with waterpipes on the grounds that it posed a risk to public health and safety.

87 Section 8(3) of the *Municipal Act, 2001* expressly confers statutory authority upon municipalities to "regulate or prohibit" specific activities with respect to any matter falling within their general by-law enacting authority.

88 Subsection 11(2) subparagraph 6 of the *Municipal Act*, *2001*, which is complementary with the scope of by-law making power set out in section 8(3), allows by-laws to be enacted with respect to "[h]ealth, safety and well-being of persons."

89 The Court of Appeal's decision in *Galganov v. Russell (Township)*, 2012 ONCA 409, 293 O.A.C. 340 (Ont. C.A.), is most instructive in terms of explaining the authority to enact by-laws established in both subsection 8(3) and section 11 of the *Municipal Act, 2001*.

90 At para. 24 of that decision, the court held that subsection 8(3) "makes clear that specific by-laws may be enacted pursuant to the general municipal powers and spheres of jurisdiction" in section 11. Further, the court restated the principle established in the Supreme Court of Canada decision of *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241 (S.C.C.). at paras. 18 — 19 that "where no specific power is granted, a general provision in the Act may be the source of power for the enactment of a specific by-law."

91 Thus, I have concluded that the Region does have statutory authority to enact the subject By-Law. Further, I have concluded that the purpose of the By-Law is not to close waterpipe lounges, but rather to protect public health and safety. As noted by the Court of Appeal in the *City of Toronto Case*, the enactment and enforcement of the subject By-Law may have an economic impact on the operation of the applicants' businesses, but that is only an unfortunate incidental result of the By-Law and not determinative of its purpose.

Conclusion:

92 For these reasons, I have concluded that the application must be dismissed.

93 In the event counsel cannot agree on the disposition of costs, counsel on behalf of the respondent shall file costs submissions of no longer than 3 pages, along with a Bill of Costs within 20 days from the release of these reasons. Counsel for the applicants shall file similar submissions within 20 days thereafter. No reply submissions shall be filed without leave.

Application dismissed.

2007 NSCA 37
Nova Scotia Court of Appeal

Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)

2007 CarswellNS 144, 2007 NSCA 37, 156 A.C.W.S. (3d) 315, 253 N.S.R. (2d) 134, 282 D.L.R. (4th) 538, 45 C.P.C. (6th) 392, 807 A.P.R. 134

Cherubini Metal Works Limited, a body corporate (Appellant) v. The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia (Respondent)

Roscoe, Cromwell, Oland JJ.A.

Heard: January 19, 2007
Judgment: April 5, 2007
Docket: C.A. 270800

Proceedings: affirming *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)* (2006), 789 A.P.R. 46, 248 N.S.R. (2d) 46, 2006 CarswellNS 424, 2006 NSSC 181 (N.S. S.C.)

Counsel: Michelle Awad for Appellant
Michael Pugsley for Respondent

***Cromwell J.A.*:**

I. Introduction

1 Members of administrative tribunals generally cannot be required to testify about how or why they reach their decisions. This rule of deliberative secrecy protects their time and independence and promotes candid collegial debate.

2 At issue in this appeal is whether members of the former Board of Examiners under the *Stationary Engineers Act*, R.S.N.S. 1989, c. 440, should be compelled to testify on discovery about how and why they decided cases, including one involving the appellant. Justice C. Richard Coughlan in Supreme Court chambers ruled that they should not, finding that this information is protected by deliberative secrecy and that the appellant had failed to provide evidence that would justify lifting it. I agree and would, therefore, dismiss the appeal. (Decision reported at 248 N.S.R. (2d) 46 (N.S. S.C.)).

II. Facts and Decision under Appeal

3 This appeal arises out of the appellant's attempt to examine two former members of the Board of Examiners (Board) under the *Stationary Engineers Act* ("*Act*"). To put the issues in context, I must briefly outline the background events, the claims the appellant makes in its law suit and how the proposed discovery examination of the board members relates to them.

4 The appellant operated a metal fabrication plant in Amherst, Nova Scotia. It experienced rancourous labour relations with the union representing its workers and encountered many difficulties with the Province respecting occupational health and safety issues. The plant closed in 2002. In a law suit brought against the Province and the local and international unions, the appellant alleges that the unions and the Province harassed it out of business.

5 The appellant claims against the Province in negligence, abuse of public authority, conspiracy and intentional interference with economic interests. These allegations focus on numerous compliance orders issued under the

Occupational Health and Safety Act, S.N.S. 1996, c. 7. The appellant alleges, among other things, that the Province exercised its regulatory powers in an unusually harsh and harassing manner.

6 The *Act*, which is the source of authority for the two Board members whom the appellant wants to examine, is not mentioned in the statement of claim or in any of the appellant's replies to several demands for particulars. However, it is common ground on appeal that certain actions taken by inspectors and by the Board under the *Act* are potentially relevant to the appellant's claims. I will, therefore, assume that the information sought meets the relevance threshold for discovery under *Rules* 18.01 and 18.09. The background in relation to the *Act* is this.

7 An inspector for the Department of Environment and Labour, Mr Simms, ordered the appellant to have certified operators for some cranes at its plant. The appellant, so far as the record shows, did not challenge this order. It did, however, apply (under s. 48 of the *Stationary Engineers Regulations*, N.S. Reg. 134/1988, s. 4) to the Board of Examiners (established under s. 3 of the *Act*) to have certificates of qualification issued for its long-term employees. Had this application succeeded, I understand it would have permitted these employees to operate the cranes in compliance with Mr. Simms' order. The application, however, was dismissed by the Board (in April of 2000). The Minister dismissed the appellant's subsequent appeal to him. (The *Act* was repealed and the Board ceased to exist in 2001.)

8 In connection with its law suit against the Province and the unions, the appellant issued notices of examination to two members of the Board, Messrs Fralic and Estabrooks. The Province moved successfully in Supreme Court chambers to quash the notices. The judge held, as noted, that the evidence sought was covered by deliberative secrecy and that the appellant had not shown sufficient reason to lift it.

9 The appellant applies for leave to appeal and, if granted, asks that the decision of the chambers judge be set aside and that the notices of examination be restored. The appellant makes two basic points: first, deliberative secrecy does not protect the information it seeks; and second, even if it does, there were valid reasons to lift the secrecy. The Province, on the other hand, says that the evidence which the appellant seeks is covered by deliberative secrecy and that the appellant did not show any valid reason to lift it.

III. Issues and Standard of Review

10 The issues are:

1. Is the information the appellant seeks covered by deliberative secrecy?

This issue turns on the answers to three questions:

a. Does deliberative secrecy apply to discovery sought in a tort action?

b. If so, is the information which the appellant seeks covered by deliberative secrecy? and

c. If so, what does the appellant have to show in order to justify lifting the secrecy?

2. If the information is covered by deliberative secrecy, did the appellant establish a valid reason to lift deliberative secrecy?

11 The first issue is a question of law which is reviewed on appeal for correctness: *Garth v. Halifax (Regional Municipality)*, 245 N.S.R. (2d) 108, [2006] N.S.J. No. 300 (N.S. C.A.) at para. 13. The second issue involves both a question of law — that is, what did the appellant have to show in order to justify lifting deliberative secrecy — and a question of fact — that is, did the evidence meet this standard. The legal question is reviewed on appeal for correctness. The factual question is reviewed for palpable and overriding error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.).

IV. Analysis

A. The Applicability of Deliberative Secrecy

1. Does deliberative secrecy apply to discovery sought in a tort action?

12 The appellant says that it does not have to meet any threshold other than relevance in order to discover the former Board members. While acknowledging that there are restrictions on discovery in judicial review proceedings or where the decision of a tribunal is being directly attacked, the appellant says that these do not apply in a civil action for damages such as this one.

13 I agree with the appellant that the special rules limiting discovery in judicial review proceedings generally do not apply in tort actions such as this. However, I conclude that the principle of deliberative secrecy applies whenever evidence is sought about how or why an administrative tribunal reached a decision. The judge therefore, did not err in applying the principles of deliberative secrecy to the appellant's attempt to discover the former Board members.

14 The principle of deliberative secrecy prevents disclosure of how and why adjudicative decision-makers make their decisions. This protection is necessary to help preserve the independence of decision-makers, to promote consistency and finality of decisions and to prevent decision-makers from having to spend more time testifying about their decisions than making them: see, for example, *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, [2001] 1 S.C.R. 221 (S.C.C.) at paras. 52-54; *Agnew v. Assn. of Architects (Ontario)* (1987), 64 O.R. (2d) 8 (Ont. Div. Ct.), R. E. Hawkins, "*Behind Closed Doors II: The Operational Problem — Deliberative Secrecy, Statutory Immunity and Testimonial Privilege*" (1996), 10 Can. J. Admin. L. & Prac. 39 at 42-49.

15 At the core of the principle is protection of the substance of the matters decided and the decision-maker's thinking with respect to such matters: *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952 (S.C.C.), at 964-65. Deliberative secrecy also extends to the administrative aspects of the decision-making process — at least those matters which directly affect adjudication — such as the assignment of adjudicators to particular cases: *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 (S.C.C.) per McLachlin J (as she then was) at 831-33.

16 The Supreme Court has confirmed that deliberative secrecy is the general rule for administrative tribunals. However, the Court has also made it clear that administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals: *Tremblay* at 968.

17 The evidence in issue in *Tremblay* related to the tribunal's process for dealing with draft decisions. That process included approval by legal counsel and discussion at plenary meetings. Gonthier, J. found that deliberative secrecy should be lifted with respect to that material. He said that these matters did not touch "on matters of substance or the decision-makers' thinking" (964) and that while "... secrecy remains the rule, ... it may nonetheless be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice." (966)

18 It is clear, therefore, that the Court in *Tremblay* conceived of deliberative secrecy as relating not only to "matters of substance or the decision-makers' thinking on such matters", but also to matters relating to the "formal process established by the Commission to ensure consistency in its decisions.": 964. If secrecy did not extend to the process of decision-making, the Court would not have had to consider whether secrecy should be "lifted" in the circumstances of the case. It is also clear from *Tremblay* that the party seeking to have the court lift deliberative secrecy with respect to the tribunal's process of decision-making has a threshold to meet. As expressed by Gonthier, J. in *Tremblay*, the party must show that there are "valid reasons" for doing so.

19 *Tremblay*, of course, was an administrative law case in which the tribunal's decision was being challenged on the basis of an alleged denial of natural justice. Does deliberative secrecy apply when discovery of tribunal members is sought in a tort case?

20 In my view, it does. Deliberative secrecy is concerned with the subject matter of the evidence which is sought, not the forum in which that evidence is to be used. The how and the why of decision-making are kept secret to protect the decision maker and the decision-making process. It seems to me, therefore, that the principles of deliberative secrecy must apply whether the evidence is sought for the purposes of judicial review proceedings or in the context of traditional civil litigation such as the appellant's tort action in this case. It is the secrecy which is important, not the forum in which it may be lifted.

21 The authorities support this view. For example, deliberative secrecy has been found to apply in actions for damages arising from the conduct of commissions of inquiry and of an advisory committee: *Stevens v. Canada (Commission of Inquiry)*, [2000] F.C.J. No. 1255 (Fed. T.D.) (Prothonotary); aff'd (Fed. T.D.); *Stevens v. Canada (Commission of Inquiry)*, [2003] F.C.J. No. 1589 (F.C.); *Néron c. Comeau*, [2004] J.Q. No. 13590 (C.S. Que.); *Apotex Inc. v. Alberta*, [2006] A.J. No. 435 (Alta. C.A.) It is true, as the appellant points out, that these damage actions were founded on administrative law proceedings. However, I do not think that changes the principle. As noted earlier, the purpose of deliberative secrecy is to protect the confidentiality of the information regardless of the forum in which the information is sought.

22 I conclude, therefore, that deliberative secrecy applies to both the actual decision-making of administrative tribunals and to the processes by which those decisions are reached — to both the how and the why of decision-making. At least with respect to the how of decision-making — that is, the process used, deliberative secrecy may be lifted if the party seeking the evidence establishes valid reasons for doing so. The principle of deliberative secrecy applies regardless of the nature of the forum in which the information is sought.

2. Is the evidence the appellant seeks protected by deliberative secrecy?

23 As noted, Messrs. Fralic and Estabrooks were members of the Board of Examiners appointed under the *Act*. Their duties included assessing applications and determining if persons were suitably qualified: Stationary Engineer Regulations, s. 15. There is no suggestion that the Board was not the type of tribunal entitled to the protection of deliberative secrecy. The question is whether the information sought by the appellant falls within that protection.

24 Counsel set out a provisional list of what the appellant seeks from Messrs. Estabrooks and Fralic:

1. their background

2. their experience on the Board

3. the information typically received in relation to Board decisions

4. previous Board dealings regarding applications similar to that brought by the appellant

5. the information received in relation to the appellant

6. any other information or matters considered in relation to the appellant

7. how the appellant was dealt with in comparison to other employers in similar situations.

25 These items fall into three categories. Items 1 and 2 are not subject to deliberative secrecy at all, item 3 falls within the broader aspect of deliberative secrecy which relates to the process of the Board's decision-making and the remainder fall within the core of deliberative secrecy. I will explain.

26 In my opinion, items 1 and 2 are not subject to deliberative secrecy as they do not relate to either the Board's actual decision-making or its decision-making process. These items simply relate to biographical details about the two former Board members.

27 Item 3 relates to the process followed by the Board and, therefore, falls within the broader principle of deliberative secrecy as discussed earlier. This inquiry relates to the process followed by the Board in the same way in which the process of review and discussion of draft decisions was found to do so in *Tremblay*.

28 Items 4, 5, 6, and 7 relate to the actual decision-making of the Board.

29 Items 4 and 7 are similar. The inquiries concerning "previous Board dealings regarding applications similar to that brought by the appellant" and "how the appellant was dealt with in comparison to other employers" both seek information about the actual decision-making of the Board members. The "Board dealings" as referred to in item 4 must relate to the Board's decisions in other cases and the inquiry in item 7 about how the appellant was "dealt with" must refer, at least in part, to the Board's decision in the appellant's case. Replying to these inquiries would necessarily involve providing an explanation of the reasoning supporting the result, not only in the appellant's matter, but in other cases. It inevitably would involve an explanation of why the Board considered cases to be, or not to be "similar". That, of course, relates directly to the reasoning processes which the Board members followed.

30 Items 5 and 6 concern the "information received in relation to the appellant" and "any other information or matters considered in relation to the appellant." These inquiries seek information about what the Board relied on in reaching its decision. The question of the contents of the record a decision-maker relies on in arriving at a given conclusion is an integral part of the adjudicative process: *MacKeigan*, *supra* per Lamer J. (as he then was) at 806; per McLachlin, J. at 831; see also, *R. v. Celmaster*, [1994] B.C.J. No. 287 (B.C. S.C.) at para. 8. For example, in *Agnew*, some of the information sought related to whether the tribunal had considered the material put before it and whether it had made its decision on the basis of that material. The Court found that these inquiries related to matters at the heart of the decision-making process. I reach the same conclusion with respect to the material sought in this case.

31 I conclude, therefore, that all of the information sought from the Board members, except items 1 and 2, is covered by deliberative secrecy.

3. What does the appellant have to show in order to justify lifting the secrecy?

32 The judge found that the appellant had an onus to establish a proper evidentiary foundation for lifting deliberative secrecy. He described this onus as a requirement to show valid reasons for doing so by providing evidence that would "*prima facie* rebut the presumption of regularity": reasons para. 8, citing Freeman J.A. in *Waverley (Village) v. Nova Scotia (Acting Minister of Municipal Affairs)* (1994), 129 N.S.R. (2d) 298 (N.S. C.A.). The judge looked for evidence that there had been any constraint on the Board members' ability to decide according to their opinions. He found none and, therefore, concluded that the appellant had "... not established a proper evidentiary foundation for the discoveries"(decision para. 20).

33 The appellant does not attack the way the judge defined the threshold; rather, it challenges his conclusion that the appellant failed to meet it. I, therefore, do not have to make any firm decision about what the threshold should be when deliberative secrecy is invoked in civil litigation such as the appellant's tort action rather than in judicial review proceedings as in *Waverley*. A few comments, however, may be helpful.

34 The Supreme Court in *Tremblay* lifted deliberative secrecy in relation to the process of decision-making, not with respect to the substance of the decision or the decision-makers' thinking. The case, therefore, is not authority for the view that deliberative secrecy may be lifted in any circumstances in relation to the substance of the decision or the decision-makers' thinking. I do not need to decide in this case whether this may be done and nothing I say should be taken otherwise. The threshold for lifting deliberative secrecy with which I am concerned is that which applies to the process of decision-making.

35 In the context of administrative law challenges to a tribunal's decision, the party seeking to lift deliberative secrecy must show valid reasons for believing that the process followed did not comply with the rules of natural justice or

procedural fairness or that the discretionary authority has been otherwise exceeded: *Tremblay* at 966 and *Waverley* at para. 17. In other words, the party must establish valid reasons for believing that lifting deliberative secrecy will show that the tribunal made a reviewable error.

36 What is the threshold for lifting deliberative secrecy in the context of a tort action? By analogy to the judicial review cases, it would seem that there must be evidence of a clearly articulated and objectively reasonable concern that a relevant legal right may have been infringed and that the proposed discovery will afford evidence of it. This is a slightly modified version of the approach taken by the Ontario Court of Appeal in a judicial review case in *Payne v. Ontario (Human Rights Commission)*, 192 D.L.R. (4th) 315 (Ont. C.A.) at para. 172 and which is adopted in Brown and Evans, *Judicial Review of Administrative Action in Canada*, vol. 2 (looseleaf, updated to July, 2006) (Toronto: Canvasback Publishing, 1998), section 6:5620. It serves at least as a useful starting point for defining the threshold in civil litigation as opposed to judicial review and related proceedings.

37 I would also add this. The decision about whether to lift deliberative secrecy in a particular case involves a weighing of the competing interests of protecting tribunals from undue disclosure with the need of litigants to have access to information in order to assert their rights. Deliberative secrecy should not be lifted any more than necessary to provide access to the required information. It follows, therefore, that among the factors that may be taken into account in balancing these interests is what other sources of information are available to the party that would not intrude upon deliberative secrecy.

4. Did the appellant show that lifting the secrecy is justified in this case?

38 As noted, the appellant has not taken issue with the way the judge defined the evidentiary threshold in this case but with his finding that it had not been met. This is a question of the weight of the evidence and absent legal error, the judge's weighing of the evidence should only be disturbed on appeal if palpable and overriding error has been shown.

39 In my respectful view, the appellant has not provided any clearly articulated basis to displace deliberative secrecy, let alone provide evidence to support it. The judge's conclusion to that effect should not be disturbed.

40 The appellant points to two matters which, in its submission, provide sufficient evidence of possible irregularity and constraint on the decision-makers to justify lifting deliberative secrecy. First, it points to the involvement of the inspectors at each stage of the restricted certificate application and the fact that they appear to have been the main source of information for the Board. Second, the appellant refers to the fact that the Board in its decision relied on a draft policy and suggests that there is evidence that this draft policy was not applied consistently. It will be helpful to briefly review the record in relation to each of these points.

41 Mr. Simms was the inspector who made the order requiring the appellant to have certified operators for cranes used in its operations. He deposes in his affidavit that he provided no recommendation or opinion to the Board or to the Minister in relation to the appellant's application and subsequent appeal and that he had "no input" into the content of the letter which set out the Board's decision.

42 Mr. Siggers, Mr. Simms' superior at the time, deposed in his affidavit that he had no recall at all of providing the Board with any opinion or recommendation to deny the appellant's application and that he gave no recommendation or opinion to the Minister in relation to the appeal from the Board's decision. However, under cross-examination, he indicated that he had provided information to his Director and knew that the Minister had used some of it in deciding the appeal.

43 Mr. Siggers, on discovery, testified generally about the way in which the Board worked, indicating that he and Mr. Simms gave them information and responded to their requests for information. He said that both he and Mr Simms probably made recommendations to the Board. He indicated in his evidence that he and Mr. Simms were two conduits of information from the field to the Board. He reiterated in his evidence before the judge, however, that he did not recall

making a recommendation in this particular case. As I understand the record, Mr Siggers did not start his employment until May 1, 2000 which, of course, was after the Board's April 25th, 2000 decision.

44 The appellant says that the problem with this is the sources of information placed before the Board. It submits that to have the decision-maker who is being challenged (and here I take it the appellant is referring to Mr. Simms who made the order which led to the application to the Board) be the sole source of information for the next level of review is "rife" with perceived and potential problems of constraint on the Board's decision-making. The appellant says that its "concerns" are heightened by the fact that Messrs. Simms and Siggers participated in and provided opinions to the Board. The submission, in essence, is that there was something improper about Mr. Simms providing information to the Board when it was sitting in review of his order.

45 I cannot accept the appellant's position. The Board was not reviewing Mr Simms' order. He had made an order requiring the appellant to have certified operators for certain cranes which had been in operation at its plant for many years. The appellant applied to the Board to have certificates of qualification issued without examination for employees with long-term service under s. 48(1) of the Stationary Engineers Regulations. This was not a review of or, in any real sense, an appeal from the order Mr. Simms made. Rather, the appellant was seeking from the Board a means to comply with that order without requiring the employees to attempt the qualification examinations. I see no evidence that the Board was in any sense sitting in review of Mr. Simms' order or, for that matter, that the appellant was even attempting to challenge the correctness of that order before the Board. The appellant's suggestion that Mr. Simms' involvement may have been problematic because his order was under review is, on the material in the record, groundless. The evidence in the record does not support in any way an allegation of "constraint" on the Board's decision-making or for that matter, that there was anything even arguably wrong with Mr. Simms' initial order.

46 With respect to the draft policy, Mr. Simms' affidavit stated that the Board had followed its usual policy in rejecting the appellant's application based on the policy. He conceded on cross-examination, however, that he was not sure if there had been any other similar applications before the appellant's. There was also evidence from Mr. Siggers that when policies were marked "draft" as this one was, it meant that it was up to the Board whether to follow it or not and its application was considered on a case by case basis.

47 The appellant submits that there is evidence that this policy was not applied consistently by the Board. Implied in this submission is that there is evidence that the policy was applied in an arbitrary or discriminatory way. With respect, the record does not support this submission. The record does not go beyond suggesting that the policy was not applied in each and every case, but that does not afford any evidence of arbitrariness or discrimination. Respectfully, the fact the policy may have been applied on a case-by-case basis is not evidence which supports the appellant's suggestion that may have been "irregularity and possible constraint" in the Board's decision-making.

48 In my view, the judge did not make any palpable and overriding error on this record in deciding that the appellant had failed to provide any evidentiary basis that would justify lifting deliberative secrecy.

C. Conclusion

49 I conclude that deliberative secrecy applies to all of the information which the appellant seeks except the biographical information about the two Board members. The judge did not err in finding that the appellant had not established any basis to lift the secrecy. It was not suggested that oral discovery was required to obtain the sort of biographical information sought in items 1 and 2. I would, therefore, uphold the judge's decision to quash the notices of examination.

IV. Disposition

50 While I would grant leave, I would dismiss the appeal with costs fixed at $2000 plus disbursements and payable forthwith.

Appeal dismissed.

2017 ONSC 1223
Ontario Superior Court of Justice

Taylor v. Ontario (Workplace Safety & Insurance Board)

2017 CarswellOnt 2410, 2017 ONSC 1223, 277 A.C.W.S. (3d) 534

PAUL TAYLOR (Plaintiff / Responding Party) and WORKPLACE SAFETY & INSURANCE BOARD - WSIB, and WORKPLACE SAFETY & INSURANCE APPEALS TRIBUNAL - WSIAT (Defendant / Moving Party)

Price J.

Heard: August 15, 2016
Judgment: February 22, 2017
Docket: Brampton CV-14-0794-00

Counsel: Plaintiff / Responding Party, for himself
Jean-Denis Belec, for Defendant / Moving Party, WSIB
Andrew Lokan, for Defendant / Moving Party, WSIAT

***Price J.*:**

OVERVIEW

1 The plaintiff Paul Taylor applied for workplace insurance benefits following a workplace injury he suffered in 1997. His application was determined in a series of decisions between 1997 and 2006 by the Provincial Administrative Board that administered employer-funded benefits to injured workers. Mr. Taylor appealed the Board's decisions to the Appeal Tribunal, which reviewed the Board's decisions on appeal in 2008 and, on reconsideration, in 2013.

2 Mr. Taylor, who is self-represented, now sues the Board and the Appeal Tribunal for approximately $17 million, alleging that, by numerous breaches of the *Human Rights Code* and the *Charter of Rights*, they acted in bad faith in requiring him to undergo training for positions that were unsuitable for him by reason of his colour-blindness and work-related injuries, and by intentionally trying to harm him.

3 The Appeal Tribunal brings this motion to dismiss Mr. Taylor's action as frivolous, vexatious, and an abuse of process or, in the alternative, to strike his pleadings on the ground that they disclose no reasonable cause of action. The Tribunal additionally asserts that Mr. Taylor's remedy, if any, was by way of application to the Divisional Court for judicial review, that this Court lacks jurisdiction to determine them, and that his claims, in any event, are statute-barred.

BACKGROUND FACTS

4 On February 6, 1997, Paul Taylor was injured in a work-related accident. He later applied to the Workers Compensation Board (WCB) for benefits pursuant to the *Workman's Compensation Act*. The WCB was a Provincial Administrative Board which administered employer-funded benefits to injured workers.

5 The WCB was replaced on January 1, 1998, by the Workplace Safety and Insurance Board (WSIB), an independent trust agency created under the *Workman's Safety and Insurance Act* (WSIA) to administer workplace accident benefits under the WSIA. Paul Taylor became a WSIA benefits claimant.

6 The Workplace Safety & Insurance Appeals Tribunal (WSIAT or Tribunal) is an administrative tribunal created under the WSIA. The WSIAT hears and decides appeals from final decisions of the WSIB.

a. The Tribunal's Appeal and Reconsideration Decisions

7 In 2007, after a series of decisions by the WSIB, Mr. Taylor appealed five of the Board's decisions to the WSIAT. A panel of the WSIAT heard Mr. Taylor's appeal during four days of hearings on January 10, and on July 3, 4, and 5, 2007.

8 On February 11, 2008, the WSIAT rendered its decision in the appeal, allowing Mr. Taylor's appeal in part (the "Appeal Decision"). The Appeal Decision affirmed the following aspects of the WSIB's determinations:

a) the WSIB's decision to deny certain short-term and long-term benefits relating to Mr. Taylor's alleged back and neck injuries for lack of medical support;

b) the WSIB's labour market re-entry plan for Mr. Taylor, including its assessment of suitable alternative employment; and

c) the WSIB's calculation of future economic loss benefits.

9 Mr. Taylor applied to the WSIAT for reconsideration of its decision in his appeal, arguing that the WSIAT had treated him unfairly at the appeal hearing. On June 13, 2013, the Tribunal denied Mr. Taylor's application for reconsideration (the "Reconsideration Decision"). It found that there was no evidence of unfair treatment at the appeal hearing, and that the appeals panel had come to a reasonable conclusion.

b. Mr. Taylor's Application for Judicial Review

10 On June 20, 2013, Mr. Taylor sent a letter to the Tribunal in which he stated: "Please also consider this my intent to file for judicial review of the [appeal] decision and reconsideration decision."

11 On June 24, 2013, the Tribunal sent a reply to Mr. Taylor advising him that his letter did not constitute an application for judicial review, and advised him to consult a lawyer regarding the requirements and implications of commencing a judicial review application.

12 On July 4, 2013, Mr. Taylor commenced an application to the Superior Court of Justice for judicial review. His application sought to set aside the WSIAT's Appeal and Reconsideration Decisions, and sought an order from the Court granting him determinations about his medical restrictions and a wide range of WSIA benefits.

13 On July 11, 2013, the Tribunal wrote to Mr. Taylor, advising him that, given the relief sought by his application, he likely intended to bring an application for judicial review before the Divisional Court. Mr. Taylor abandoned his Superior Court application on August 1, 2013.

c. The current proceeding

14 On February 20, 2014, Mr. Taylor commenced the present action, in which he sought $6,460,455 plus interest, consisting of loss of interest on benefits not paid prior to 2013, earnings benefits from 2003 to June 2016, loss of future increases in earnings from 2003 to June 2016, the cost of retraining programs, including tuition, books, and travel, amounting to $73,831, loss of non-economic loss awards, and damages in the amount of $5,000,000.

15 On July 23, 2014, Mr. Taylor caused an Amended Claim to be issued. In his Amended Claim, he increased the amount he claims to $16,710,455, seeking, in addition to earlier amounts claimed, compensatory damages in the amount of $1,710,455, and punitive damages in the amount of $15,000,000. The Amended Claim states that it seeks increased damages for "decisions by defence counsel that caused intentional delays which were of a clear strategic nature and were not in good faith."

16 Mr. Taylor, in his Amended Claim, follows his prayer for relief with 77 paragraphs in which he sets out a wide range of complaints about the handling of his claims by the WSIB and the WSIAT. These include the following allegations about the WSIB:

a) It acknowledged the full extent of his injuries in February 1997 and later, without consulting his family doctor on medical reporting, downgraded his injuries based on discrepancies in such reporting, with the intention of reducing the cost of the injuries to the WSIB.

b) It failed to provide treatment prescribed by Mr. Taylor's family doctor, or to pay for any treatment after March 1997.

c) It did not recognize that he had suffered a permanent impairment until approximately 3 years after his initial injuries, in spite of the fact that Mr. Taylor's family doctor characterized his injuries in this manner after 7 months, choosing, instead, to follow a less reliable medical report.

d) It only recognized permanent impairment to Mr. Taylor's lower back, whereas he had, in fact, suffered a permanent impairment to his entire back, neck and head.

e) It always sided with Mr. Taylor's employer, falsely stating that Mr. Taylor was not cooperating, which was later found to be incorrect, and reducing his income benefits by half.

f) Knowing that Mr. Taylor's employer had provided Mr. Taylor with work in March/April 1997 that was unsuitable and which aggravated his condition, including forcing him to operate a heavy vehicle while under the influence of strong opioid pain medication, it took no action to prevent harm to Mr. Taylor or the public.

g) It took no action when it found that Mr. Taylor's employer had deceived them by intentionally withholding important evidence that Mr. Taylor and the WSIB had requested.

h) It failed to recognize a prior colour-blindness and possible learning disabilities or test for such disabilities, and failed to accommodate his disabilities in the WSIB appeal. Instead, it misled Mr. Taylor into believing that his colour-blindness was not recognized by law as a disability, in breach of the Ontario Human Rights Code and the equality provision in section 15 of the Charter of Rights and Freedoms.

i) It sponsored career retraining programs that were unsuitable, in that they were designed for employment of a person with the qualifications of a Professional Engineer, which Mr. Taylor did not possess, and without colour-blindness.

j) It sponsored a retraining program which required Mr. Taylor to endure a 1.5 hour bus ride, which subjected him to physical hardship, owing to his back injuries, and to emotional distress.

k) It intentionally made false claims that Mr. Taylor's disabilities were not real and that he suffered from self-perceived limitations, which maligned Mr. Taylor's character.

17 The Amended Claim makes the following allegations about the WSIAT:

a) It refused to allow most of Mr. Taylor's crucial witnesses to testify, including WSIB doctors and Mr. Taylor's own doctor, who would have been able to explain the inconsistencies in the medical reporting concerning his injuries and condition, thereby violating due process.

b) It refused to receive, or ignored, Mr. Taylor's up-to-date medical evidence, stating that it was too recent, when the WSIB had failed to request such evidence earlier.

c) It disregarded WSIB policy stating that only the functional abilities form was to be used for determining a claimant's capabilities for job retraining.

d) It refused to accept his colour-blindness as a disability under the Ontario *Human Rights Code*. Instead, it set its own criteria for determining the suitability of job retraining for a person with a disability

e) It refused to allow Mr. Taylor to testify about his prior non-work-related and work-related disabilities which rendered proposed retraining program unsuitable. Further, after a 5-month recess, WSIAT refused to permit him to testify about the retraining program selection process and the problems he had encountered during his employment.

f) It intentionally misled Mr. Taylor into believing that he was required to provide medical evidence of his prior non-work related disability that might render a proposed employment or re-training unsuitable.

g) It made intentionally made findings of fact before reviewing the facts [evidence] in his case, in order to save costs.

h) It refused to permit Mr. Taylor to further question his witnesses to correct apparent falsehoods in their testimony, and misquoted the testimony of Mr. Taylor and his witnesses.

i) It intentionally misquoted Mr. Taylor to say that he did not want legal representation when, in fact, he had tried to secure such representation and had been advised that he must proceed with his appeal before such representation could be provided.

j) A panel member, during the panel's deliberations, said that Mr. Taylor was "a joke" and that he should be kicked in the ass for not getting a job and providing for his children.

k) It declined to deal with issues that Mr. Taylor had raised in his 15-page reconsideration request, including issues of entitlement, permanent impairment, and chronic pain disability, among others.

l) It failed to consider his complaint that he should not have been required to provide proof of his colour-blindness. Further, when he provided such evidence, WSIAT disallowed the evidence, refusing to deal with his complaint as a human rights complaint rather than as an appeal.

m) It failed to give Mr. Taylor the benefit of the doubt and instead, intentionally ruled against him where there was a doubt.

n) It took ten years to deal with his appeal, deferring in some instances to WSIB counsel, when they stated they were unavailable on dates that the WIAT offered them. Mr. Taylor submits the WSIB counsel's unavailability was strategic and intentional.

18 Mr. Taylor concludes:

This is where insurance companies and workers compensation systems intentionally delay paying benefits to individuals to starve them out. This is in hopes claimants will go away and have no resources to fight them. In the end result, the insurance companies save a considerable amount of money. This is why the Canadian courts have slowly started to respond by starting to award larger amounts of punitive damages.

Either the courts start to award even larger damages to plaintiffs in insurance company and workers compensation cases or order them to pay the claimants benefits while they wait the long periods of time. This prevents the typical starve-out technic [sic] that is all too often employed in the insurance industry and workers compensation systems throughout North America. It is also a major concern, especially in cases of suitability concerns to force a worker to do unsuitable work for months or years because the WSIB is unwilling to do their part. As in this particular case,

it poses a serious safety concern where the truck driver is knowingly being forced to operate a heavy vehicle while under the influence of drugs . . . .

19 The essence of Mr. Taylor's action is that the Tribunal decisions are wrong and should be reversed.

20 Mr. Taylor additionally alleges errors of fact and law in the Tribunal's Appeal and Reconsideration Decisions, including:

a) failing to acknowledge colour blindness as a disability under the Ontario *Human Rights Code*;

b) questioning the amount of pain Mr. Taylor was in because he did not have continual pain medication prescribed;

c) failing to find that the WSIB had an onus to consult with Mr. Taylor's doctor in the course of developing its labour market re-entry plan;

d) failing to incorporate Mr. Taylor's limitations into the WSIB's retraining program; and

e) failing to deal with medical restrictions as a separate matter.

21 Moreover, Mr. Taylor alleges a variety of purported torts against the Tribunal and its panel members — all of which are denied — including:

a) intentionally misleading Mr. Taylor into believing that he had to provide medical evidence of his prior non-work related disability;

b) intentionally misquoting Mr. Taylor in its decision; and

c) threatening to harm Mr. Taylor (based on the member's statement that he would like to kick Mr. Taylor in the ass for not getting a job and supporting his family).

ISSUES

22 This motion requires the court to determine the following issues:

a) Does this court have jurisdiction over the subject-matter of the action?

b) Does the WSIAT have the capacity to be sued?

c) Is the action frivolous and vexatious or an abuse of process?

d) Does the Claim disclose a reasonable cause of action?

POSITIONS OF THE PARTIES

23 The WSIAT argues that:

a) this Court lacks jurisdiction over the subject-matter of the action, in that Mr. Taylor seeks judicial review of the decisions of the Board or the Tribunal, which remedy is within the exclusive jurisdiction of the Divisional Court;

b) WSIAT lacks legal capacity to be sued; and

c) the action is frivolous, vexatious and an abuse of process, based on the following:

(i) it is, in essence, an attempt to re-litigate issues that were, or could and should, have been raised before the Board or the Tribunal, and is therefore an abuse of process;

(ii) Mr. Taylor claims relief that is beyond the jurisdiction of this Court to order, including loss of earnings benefits, future economic loss benefits, non-economic loss benefits, retraining expenses, costs of medical care, and interest on benefits that were not paid — all of which are within the exclusive jurisdiction of the WSIB and the Tribunal.

(iii) In short, it amounts to an indirect and collateral attack on the Tribunal's Appeal and Reconsideration Decisions.

d) It is statute-barred, because the action was commenced more than two years after the alleged misfeasance.

e) It is based on a surreptitious tape-recording of deliberations of the Board, which evidence is inadmissible;

24 Alternatively, the WSIAT submits that the Statement of Claim should be struck out because it fails to disclose a reasonable cause of action.

25 Mr. Taylor submits that:

a) He is suing for bad faith, not seeking judicial review of a decision made in good faith;

b) He is not seeking to re-litigate his entitlement to benefits, or his obligation to undergo re-training, but suing for damages for the tort of misfeasance of office, which could not reasonably have been raised before the Board or Tribunal that was determining his entitlement to benefits and that he was suing for misfeasance;

c) His surreptitious tape recording of confidential deliberations and private communications falls within an exception to the rule rendering such evidence inadmissible because of the wrongful nature of the deliberations and communications;

d) His cause of action is not statute barred because it did not crystalize until he had exhausted the remedies available to him within the decision-making process of the Board and the Tribunal, and he commenced his action within two years of the final decision of the Tribunal.

ANALYSIS AND LAW

a) Does this court have jurisdiction over the subject matter of the action?

Legislative Framework

26 Rule 21.01(3)(a) allows the court to dismiss an action where it does not have jurisdiction over the subject matter of the action. [1]

27 The Tribunal has exclusive jurisdiction to hear and decide appeals relating to *WSIA* claims. Its decisions are not open to review by the courts on its merits. The Tribunal's exclusive jurisdiction is set out at s. 123 of the *WSIA*:

Jurisdiction

123. (1) ***The Appeals Tribunal has exclusive jurisdiction to hear and decide,***

(a) all appeals from final decisions of the Board with respect to entitlement to health care, return to work, labour market re-entry and entitlement to other benefits under the insurance plan;

(b) all appeals from final decisions of the Board with respect to transfer of costs, an employer's classification under the insurance plan and the amount of the premiums and penalties payable by a Schedule 1 employer and the amounts and penalties payable by a Schedule 2 employer; and

(c) such other matters as are assigned to the Appeals Tribunal under this Act.

[. . .]

Decisions on an appeal

(3) On an appeal, the Appeals Tribunal may confirm, vary or reverse the decision of the Board.

Finality of decision

(4) ***An action or decision of the Appeals Tribunal under this Act is final and is not open to question or review in a court***.

Same

(5) No proceeding by or before the Appeals Tribunal shall be restrained by injunction, prohibition or other process or procedure in a court or be removed by application for judicial review or otherwise into a court.[2] [Emphasis added]

Applying the legislation to the facts of this case

28 Mr. Taylor's action challenges the Tribunal's Appeal and Reconsideration Decision by alleging procedural and substantive errors. The proper process for asserting such errors is by an application for judicial review before the Divisional Court.[3] This Court does not have jurisdiction to engage in a judicial review of the Tribunal's decisions in the context of an action.[4]

29 This Court has no jurisdiction to order some categories of relief which Mr. Taylor seeks in his action, including loss of earnings, future economic loss, and non-economic loss benefits, retraining expenses, costs of medical care, and interest on benefits that were not paid — all of which are within the exclusive jurisdiction of the Tribunal and the WSIB.[5]

b) Does the tribunal have the legal capacity to be sued?

Legislative framework

30 Rule 21.01(3)(b) allows the court to dismiss an action where the defendant does not have the legal capacity to be sued.[6]

31 The Tribunal, which exercises quasi-judicial functions, lacks the legal status and capacity to be sued for its actions in carrying out those functions.

32 The *WSIA* provides that Tribunal members and employees are immune from liability for action in carrying out the Tribunal's statutory functions, including hearing appeals and rendering decisions:

Immunity

179. (1) ***No action or other proceeding for damages may be commenced against any of the following persons for an act or omission done or omitted by the person in good faith in the execution or intended execution of any power or duty under this Act:***

1. ***Members of the board of directors, officers and employees of the Board***.

2. ***The chair, vice-chairs, members and employees of the Appeals Tribunal*** . . .[7]

Jurisprudence

33 This Court confirmed the Tribunal's status as an entity with no legal capacity to be sued in *Aird v. Ontario (Workplace Safety & Insurance Appeals Tribunal)* ("*Aird*"):

> The WSIAT is an administrative tribunal separate and apart from the WSIB. It is the final appellate forum in matters of workplace safety and insurance in Ontario. It is a specialized tribunal which makes findings of fact and decides legal questions and applies the law. As a result, I am satisfied that the WSIAT exercises quasi-judicial functions and lacks the legal status and capacity to be sued for actions taken in carrying out those functions. [8]

c) Is the action frivolous, vexatious and an abuse of process?

Legislative framework

34 Rule 21.01(3)(d) allows the court to dismiss an action where it is frivolous, vexatious and an abuse of process. [9]

35 Abuse of process includes circumstances where the litigation before the court is found to be in essence an attempt to re-litigate a claim has already been determined in another forum. [10]

36 In *Aird* the Court faced similar facts to those of the present case. Mr. Aird made a claim under the *WSIA* alleging that a heart condition was work-related. His claim was denied by the WSIB and the Tribunal, on appeal and on reconsideration. Mr. Aird commenced an action, claiming that the Tribunal's decisions were flawed and wrong, advancing a number of purported tort claims against the Tribunal and its members. [11] This Court held that Mr. Aird's action was frivolous, vexatious and an abuse of process:

> 16 In any event, the issues raised by Mr. Aird in the Statement of Claim regarding his medical condition, medical records, WSIB's refusal to accept his claim, breach by Mr. Aird's employer to report are indirect or collateral attacks on the fundamental issue — was Mr. Aird entitled to benefits for an employment related medical condition in accordance with the WSIB's Policies and Guidelines. ***Given the essence of the claim is beyond this court's jurisdiction and has already been litigated, the claim is frivolous and vexatious***.
>
> [. . .]
>
> 18 ***Any further litigation of this issue would be an abuse of process***. [Emphasis added] [12]

37 In *Pagourov v. Science Applications International Corp.* (2007), Mr. Pagourov, the benefits claimant, alleged that the WSIB had engaged in bad faith adjudication of his claim. The Court dismissed the action, finding that it would be an abuse of process to allow the plaintiff to proceed:

> 14 Canadian courts have applied the doctrine of abuse of process to prevent a party from re-litigating a claim already decided in another forum: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 (S.C.C.) at paras. 35-55; *Detchev v. Canadian Feed Screws MFG Ltd.*, [2006] O.J. No. 2565 (Ont. S.C.J.)
>
> 15 The plaintiff already has a decision from the Board on the fundamental issue in his case, being whether the workplace caused his illness. As the plaintiff is aware, the *WSIA* sets out appeal procedures that he can follow if he disagrees with the Board's decision. To allow the plaintiff to circumvent the statutory appeals mechanism set out in the *WSIA* is tantamount to permitting him to relitigate the very issue already decided by the Board. This violates what Justice Arbour called the principles of judicial economy, consistency, finality and the integrity of the administration of justice: *Toronto (City) v. C.U.P.E., Local 79*, *supra*, para 37.
>
> 16 I conclude it would be an abuse of process to permit the plaintiff to proceed with his action. [13]

38 The issues raised by Mr. Taylor in his Statement of Claim regarding his entitlement to *WSIA* benefits arising from his 1997 workplace injury have been decided by the WSIB's final decisions, the Tribunal's Appeal Decision, and the Tribunal's Reconsideration Decision. Further litigation of Mr. Taylor's entitlement to *WSIA* benefits for his 1997 workplace injury would constitute a collateral attack on the WSIB and Tribunal's decisions, and would constitute an abuse of process.

39 Mr. Taylor's allegations dealing with "delays" of this motion are an abuse of process. Mr. Taylor should have raised any concerns he had with the pace of this Rule 21 motion in a motion for procedural remedies. They are not the proper basis for claims in his amended Statement of Claim. [14]

d) Does Mr. Taylor's Claim disclose a reasonable cause of action?

40 This Court is entitled to strike out the Statement of Claim on the basis that it does not disclose a reasonable cause of action.

Legislative framework

The Test to be applied in a motion made pursuant to Rule 21.01(b)

41 The law relating to motions to strike out a pleading under rule 21.01(1)(b) is well-settled. A pleading should only be struck under rule 21.01(1)(b) where it is plain and obvious that the pleading discloses no reasonable cause of action. Put differently, a pleading should be struck where the claim has no reasonable prospect of success. [15]

42 No evidence is admissible on a motion to strike out a pleading on the ground that it discloses no reasonable cause of action. The motion proceeds on the basis that the facts pleaded in the statement of claim are true. [16]

43 A plaintiff must clearly plead the facts upon which he relies in making his claim:

> A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted. [17]

44 Striking out claims that have no reasonable prospect of success is essential to effective and fair litigation. In a proceeding that contains a valid claim, it unclutters the proceedings by weeding out hopeless claims. This promotes efficiency and correct decision making, and reduces time and cost to litigants and the courts. [18]

Applying the legal principles to the present action

45 Mr. Taylor's Statement of Claim must be struck out in its entirety, as it discloses no reasonable cause of action.

46 Many of the allegations made in the Statement of Claim, particularly in relation to faults Mr. Taylor finds with the rulings made by the Tribunal, do not amount to torts recognized in law. For instance, there is no recognized tort for "misquoting" a litigant in a decision. Mr. Taylor's grievances relate primarily to perceived procedural and substantive errors in the Tribunal's decisions — which are properly the subject of an application for judicial review.

(i) Mr. Taylor's allegation of assault

47 Mr. Taylor, at paras. 44 and 58 of his Amended Claim, alleges an assault by an unidentified Tribunal panel member:

> 44. [. . .] In a more damaging situation the WSIAT panel member threatens to harm the plaintiff by making the statement he like to kick the plaintiff's ass. [. . .]

58. During the WSIAT hearing a WSIAT panel member had said to another person that he threatened the plaintiff with physical harm by stating in a meeting that the panel member wanted to "kick his [the plaintiff] ass". [. . .] The panel member's decision to make such a statement of threat of bodily harm to the plaintiff lacked any good faith what so ever. [19]

48 Mr. Taylor, who is self-represented, filed an affidavit in response to the motion. Mr. Taylor referred to the alleged threats by a WSIAT panel member, but did not fully describe or disclose when or in what circumstances they were made. The Plaintiff filed with his affidavit a sound recording. [20]

49 On cross-examination, Mr. Taylor confirmed the following:

(a) That he surreptitiously taped a private in-caucus session of the Tribunal, without the Panel's knowledge or consent;

(b) That the alleged threats were captured on his surreptitious recording, which he appended to his affidavit as Exhibit U5;

(c) That this occurred on or about July 5, 2007;

(d) That he does not rely upon any other incident in his claims of assault against the Tribunal;

(e) That he knew about the statements at the time he says they were made, and raised them shortly after with the Tribunal; and

(f) That he waited to commence his action until 2014, some seven years after the events in question. [21]

50 WSIAT submits that Exhibit U5, which was surreptitiously recorded by Mr. Taylor, violates the WSIAT panel's deliberative secrecy privilege. As such, its prejudicial effect outweighs its probative value and Mr. Taylor should not be permitted to rely on it in this motion or in this action.

51 The WSIAT seeks leave to rely on the Affidavit of Mary Ferrari ("Ferrari Affidavit") sworn September 24, 2015. WSIAT seeks leave under Rule 39.02(2) to rely on the Ferrari Affidavit.

52 Member Ferrari's affidavit is proper reply evidence. It arises out of the description Mr. Taylor gave in his cross-examination concerning the circumstances leading to Exhibit U5. Prior to Mr. Taylor's cross-examination, it was not evident where or how he had obtained his evidence, or what he relied on in support of his allegation of assault. Member Ferrari's affidavit properly responds to Mr. Taylor's assertion that he cannot recall whether the statements he objects to were made during the hearing panel's in-caucus session. [22]

53 The WSIAT has satisfied the test under rule 39.02 for leave to respond to a matter raised on cross-examination:

a) The evidence is relevant;

b) The evidence responds to a matter raised on cross-examination;

c) Granting leave to file the affidavit does not result any non-compensable prejudice; and

d) There is a reasonable explanation for why the evidence was not included at the outset. [23]

54 The court additionally exercises its residual discretion under rule 1.04 to permit the evidence where it is in the interests of justice to do so. [24]

55 Member Ferrari's affidavit discloses the following:

> a) The statements that are the basis of Mr. Taylor's allegation of assault were made during the Tribunal panel's deliberations, after hearing Mr. Taylor's submissions.
>
> b) Pursuant to WSIAT policy, the "on record" part of hearings at WSIAT are usually audio recorded. It is WSIAT policy that parties are not permitted to record Tribunal hearings. Applicants and others who attend the hearing are not permitted to record or be present during in-caucus sessions.
>
> c) Mr. Taylor's appeal before WSIAT proceeded on January 10 and July 3, 4 and 5, 2007. The appeal was before a three-member panel of which Member Ferrari served as the Member Representative of Workers. As was the practice, Mr. Taylor's hearing was recorded by WSIAT.
>
> d) Unbeknownst to the panel members, Mr. Taylor also recorded the proceedings. Among other exhibits, Mr. Taylor has appended Exhibit U5 to his affidavit sworn May 6, 2015, which he says is a digital audio recording of the hearing on July 5, 2007.
>
> e) Member Ferrari reviewed WSIAT's official recording for Mr. Taylor's hearing on July 5, 2007, which was the last day of Mr. Taylor's appeal. Based on her review and comparison of WSIAT's official recording and Exhibit U5, it is Member Ferrari's evidence that Exhibit U5 contains a recording of the panel's private, in-caucus discussion.

56 During cross-examination, Mr. Taylor acknowledged he did not have permission from the panel to make his unofficial recording, and the panel was not aware that Mr. Taylor was recording the proceedings. Mr. Taylor further acknowledged that he recorded the panel's in-caucus discussion, albeit he contends the recording of the in-caucus discussion was inadvertent.

57 It is clear from Member Ferrari's evidence and the WSIAT recording of the public portion of the hearing that Mr. Taylor was excused from the hearing room to allow the panel members to caucus in private. Mr. Taylor agreed during cross-examination that Exhibit U5 was recorded while the panel members understood they were "off-the-record". Although Mr. Taylor did not concede during cross-examination that his recording of the in-caucus discussion was unauthorized, his evidence on this point is contradicted directly by Member Ferrari, who states that Mr. Taylor was not authorized to record the panel's private, in-caucus discussion.

58 Justice Cromwell, as he then was, in the Nova Scotia Court of Appeal's decision in *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, noted that deliberative secrecy is essential in order for administrative tribunals to perform their adjudicative functions:

> The principle of deliberative secrecy prevents disclosure of how and why adjudicative decision-makers make their decisions. This protection is necessary to help preserve the independence of decision-makers, to promote consistency and finality of decisions and to prevent decision-makers from having to spend more time testifying about their decisions than making them. [25]

59 Deliberative secrecy applies broadly to both matters of substance (that is, how decision-makers think about the case) and to the process by which adjudicators make their decisions. [26]

60 Given the importance of deliberative secrecy to adjudicative decision-making, the party arguing to lift deliberative secrecy bears the onus to demonstrate the process did not comply with the rules of natural justice or procedural fairness, and the party must establish "valid reasons" for believing that lifting deliberative secrecy will show that the tribunal made a reviewable error. [27]

61 Mr. Taylor has failed to articulate any compelling reasons to justify admitting his surreptitious recording of the panel's private, in-caucus discussion. On the contrary, while Mr. Taylor casts the comments on Exhibit U5 as evidence that "the panel members had already made up their mind, prior to hearing the evidence" and that he felt "extremely threatened" by the comments, it is noteworthy that Mr. Taylor took no steps to address the comments for several years. [28]

62 Deliberative secrecy privilege has long been recognized as an important privilege that warrants protection by the courts. [29] As the Supreme Court warned in *Ellis-Don*, the absence of deliberative secrecy could have a chilling effect on the process for administrative decision-making. [30]

63 The exclusion of Exhibit U5 from the record is consistent with the principled approach taken by the courts to the admissibility of evidence. The Supreme Court of Canada noted in *Cloutier* that even where evidence is relevant, material, and admissible, the court has discretion to exclude evidence where the probative value of the evidence is exceeded by its prejudicial effects. [31] That is the case in either a criminal or civil matter.

64 Given that Mr. Taylor's recording of the in-caucus discussion was a violation of deliberative secrecy and, possibly, illegally obtained in contravention of section 184.5(1) of the *Criminal Code*, [32] its probative value, if any, is outweighed by the prejudicial effect of admitting such evidence.

65 WSIAT requests that Exhibit U5, appended to Mr. Taylor's affidavit sworn May 6, 2015, be excluded from the evidence on the motion, struck from the record, and removed from the court file. In the alternative, WSIAT further requests an order that Exhibit U5 be sealed. It argues that although court proceedings are subject to the open courts principle, protective orders are regularly granted to ensure that privileged documents and information are not disclosed. [33] In such cases, courts recognize that protecting privilege is a value of "superordinate importance" that justifies overriding the presumption in favour of openness. I do not find that this is a case in which protecting privilege is of such importance as to override the presumption in favour of openness.

66 Even if I had concluded that the tape-recording was admissible, it would not affect the outcome. I am required to treat the allegations in the Amended Claim as true. Doing so, I find, for the reasons that follow, that the allegations of assault do not disclose a reasonable cause of action.

67 The Statement of Claim does not plead the necessary material facts to assert a claim in assault. Rule 25.06(8) requires full particulars to be pleaded for intentional or malicious conduct.

68 Assault is the "intentional creation of the apprehension of imminent harmful or offensive contact." [34] The necessary elements of assault include:

a) intention: the defendant must have intended to create the apprehension of imminent harmful or offensive contact;

b) apprehension of harmful or offensive conduct: the plaintiff must reasonably apprehend harmful or offensive contact; and

c) apprehension of imminent contact: the apprehended contact must be imminent. [35]

69 The Statement of Claim fails to plead basic facts. It fails to identify the purported tortfeasor and fails to provide any particulars as to how and in what context the purported "threat" was communicated to Mr. Taylor.

70 Further, the Statement of Claim fails to plead any of the necessary facts indicating: (a) that the purported tortfeasor intended to create an apprehension of imminent harmful or offensive conduct, (b) that there was a reasonable apprehension of harm or offensive contact, or (c) that the threatened event was imminent.

(ii) Mr. Taylor's allegations of misfeasance of public office

71 Mr. Taylor raises for the first time in his factum a new cause of action that WSIAT has committed the tort of misfeasance of public office. [36]

72 Rule 26 of the *Rules* sets out the process and legal requirements for a party to assert a new cause of action by way of an amendment to the party's pleading. It is not proper, in either substance or form, for Mr. Taylor to raise a new cause of action in his factum on the motion. Indeed, Mr. Taylor is aware of the requirements of Rule 26 having already amended his claim once.

73 Additionally, Mr. Taylor fails to allege in his factum (or his Statement of Claim) the necessary elements to support a cause of action for the tort of misfeasance of public office.

74 The essential elements were set out by Justice Iacobucci in *Odhavji Estate*. [37] First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. [38]

75 Mr. Taylor's "claim" for misfeasance of public office is not tenable at law, and such a claim is, in any event, barred by operation of the limitation period for reasons set out below.

e) Is the Claim Statute-Barred?

76 I find that the claims that Mr. Taylor makes concerning the Tribunal's appeal hearing in 2007 and its decision in 2008, including his allegations of assault, are statute-barred pursuant to the *Limitations Act, 2002*. [39]

77 Mr. Taylor argues that the limitation period for his Claim did not begin to run until after he had exhausted his remedies in the WSIB/WSIAT process, including his appeal and request for reconsideration. He argues that it would be unreasonable to expect him to have commenced his action against the very Tribunal which was charged with making a decision in relation to his application for benefits.

78 Had Mr. Taylor pursued the WSIAT reconsideration or judicial review process in a timely fashion, this argument would have traction. However, Mr. Taylor did not seek reconsideration of the panel's decision until 2012, four years after the WSIAT decision was released. Mr. Taylor has not provided a reasonable explanation for this delay, and should not be permitted to rely on this unreasonable delay to extend the limitation period. Mr. Taylor had knowledge of the WSIAT panel members' alleged improper comments and possessed the surreptitious tape-recording that forms the basis for this lawsuit for many years. Mr. Taylor is presumed to be capable of commencing a proceeding in respect of a claim at all times [40] and failed to do so in a timely manner.

f) Should leave to amend be granted?

79 Leave to amend pleadings should not be granted where a corrected pleading would nevertheless disclose no reasonable cause of action.

CONCLUSION AND ORDER

80 For the reasons stated above, it is ordered that:

1. Leave to amend the statement of claim is denied.

2. The statement of claim is struck.

3. Mr. Taylor shall pay the defendants' costs of the motion. If the parties are unable agree on the amount of costs, they shall make written argument, not to exceed four pages, and a Costs Outline, by March 10, 2017.

Motion granted.

Footnotes

1 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), r. 21.01(3)(a).

2 *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A., s. 123.

3 *Aird v. Ontario (Workplace Safety & Insurance Appeals Tribunal)*, 2010 ONSC 3600 (Ont. S.C.J.) [*Aird*] at para. 15.

4 *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, ss. 2, 6(1).

5 *WSIA*, *supra*, s. 123(1)(a) and (4).

6 *Rules*, *supra*, r. 21.01(3)(b).

7 *WSIA*, *supra*, s. 179(1).

8 *Aird supra*, at para. 24.

9 *Rules*, *supra*, r. 21.01(3)(d). See also r. 25.11, whereby the Court may strike out all or part of a pleading, without leave to amend, on the grounds that the pleading is frivolous, vexatious or an abuse of process.

10 *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.) ("*CUPE*") at para. 37; *Aird*, *supra*, at para. 17.

11 *Aird*, *supra*, at paras. 9, 30.

12 *Aird*, *supra*, at paras. 16, 18.

13 *Pagourov v. Science Applications International Corp.*, [2007] O.J. No. 891 (Ont. S.C.J.) at paras. 14-16.

14 Amended Statement of Claim, paras. 2, 62-65, 70-78, WSIAT Motion Record, Tab 4, pp. 35, 45-46.

15 *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.) [*Imperial Tobacco*] at para. 17.

16 *Rules*, *supra*, r. 21.01(2).

17 *Imperial Tobacco*, *supra*, at para. 22.

18 *Imperial Tobacco*, *supra*, at paras. 21-22.

19 Amended Statement of Claim, paras. 44, 58

20 Affidavit of Paul Taylor, sworn May 6, 2015 ("Taylor Affidavit") Exhibit U5.

21 Taylor Affidavit at para.96; Cross-Examination of Paul Taylor on May 6, 2015 ("Taylor Transcript") at pp. 44-45.

22 *First Capital Realty Inc. v. Centrecorp Management Services Ltd.* [2009 CarswellOnt 6914 (Ont. Div. Ct.)], 2009 CanLII 75631

23 *Ibid*, at para. 9; see also: *Arfanis v. University of Ottawa* [2004 CarswellOnt 3698 (Ont. S.C.J.)], 2004 CanLII 22944

24 *Ibid*, at para. 10; *Rules* , r. 1.04: "These rules shall be liberally construed to secured the just, most expeditious and least expensive determination of every civil proceedings on its merits."

25 *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 37 (N.S. C.A.) (CanLII) [*Cherubini*] at paras.14 and 35; see also: *Summitt Energy Management Inc. v. Ontario (Energy Board)*, 2012 ONSC 2753 (Ont. Div. Ct.) (CanLII) [*Summitt*] at para. 76.

26 *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952 (S.C.C.) at pp. 964-65 [*Tremblay*].

27 *Ibid*, at pp. 964; *Summitt*, *supra*, at para. 82

28 Taylor Affidavit at paras. 81-82; Taylor Transcript at p. 39.

29 *Cherubini*, *supra*, at para 14. *Summitt*, *supra*, at paras. 83-84.

30 *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, 2001 SCC 4, [2001] 1 S.C.R. 221 (S.C.C.) at para. 53

31 *R. v. Cloutier*, [1979] 2 S.C.R. 709 (S.C.C.)

32 *Criminal Code*, R.S.C. 1985, c C-46, s. 184.5(1): Every one who, by means of any electro-magnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

33 *Hollinger Inc., Re*, 2011 ONCA 579 (Ont. C.A.) (CanLII), at paras. 18-20 (settlement privilege); *Fotwe v. Citadel General Assurance Co.* [2005 CarswellOnt 840 (Ont. Div. Ct.)], 2005 CanLII 5469, at paras. 3-4 (solicitor-client privilege)

34 *Wuttunee v. Merck Frosst Canada Ltd.*, 2007 SKQB 29 (Sask. Q.B.) (CanLII), at para. 46 [*Wuttunee*].

35 *Ibid*, at paras. 46-48.

36 Factum of Paul Taylor dated June 8, 2015 ("Taylor Factum"), at paras. 1(a) and 25(g).

37 *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 (S.C.C.)

38 *Ibid* at para. 23.

39 *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B., ss. 4 and 5.

40 *Ibid*, s. 7(2).

2017 ONSC 4865
Ontario Superior Court of Justice (Divisional Court)

City of Hamilton v. Ombudsman of Ontario

2017 CarswellOnt 13203, 2017 ONSC 4865, 283 A.C.W.S. (3d) 189, 68 M.P.L.R. (5th) 97

CITY OF HAMILTON (Applicant) and OMBUDSMAN OF ONTARIO (Respondent)

W. Matheson, J.K. Trimble, L.C. Sheard JJ.

Heard: June 9, 2017
Judgment: August 28, 2017
Docket: Hamilton DC-16-772

Counsel: Brydena M. MacNeil, for Applicant
Robert A. Centa, for Respondent

***W. Matheson J.*:**

1 This is an application seeking a determination of the jurisdiction of the Ombudsman of Ontario under s. 14(5) of the *Ombudsman Act*, R.S.O. 1990, c. O.6, as well as an application for judicial review arising from a Report of the Ombudsman dated July 2016.

2 The City of Hamilton primarily seeks a declaration that the Ombudsman's jurisdiction to investigate compliance with the open meeting requirements of the *Municipal Act, 2001*, S.O. 2011, c. 25 (the "*Municipal Act*") does not extend to an Election Compliance Audit Committee or a Property Standards Committee, each of which holds public hearings but deliberates and prepares reasons for decision in private. In brief, the City's main submission is that these and other adjudicative tribunals that make quasi-judicial decisions are not "local boards," a prerequisite to the Ombudsman's jurisdiction.

3 For the reasons set out below, I conclude that the Election Compliance Audit Committee and the Property Standards Committee are not "local boards" and there therefore should be a declaration that the Ombudsman does not have jurisdiction to investigate them under the above regime. However, I also conclude that there should not be declaratory relief extending beyond those two Committees and there should be no relief under that part of this application that is an application for judicial review.

Section 14(5) application

4 The *Ombudsman Act* provides for the determination of the Ombudsman's jurisdiction on this application under s. 14(5), as follows:

> If any question arises whether the Ombudsman has jurisdiction to investigate any case or class of cases under this Act, the Ombudsman or any person who is directly affected may apply to the Divisional Court for a declaratory order determining the question.

5 The City of Hamilton proceeds under this section. The portion of this application that is an application for judicial review is dealt with separately below.

Basis for claimed jurisdiction

6 The Ombudsman relies upon s. 14.1 of the *Ombudsman Act* and s. 239.1 of the *Municipal Act* for its jurisdiction in this case.

7 Section 14.1 relates to the Ombudsman's role as an investigator into alleged non-compliance with the open meeting requirements in s. 239 of the *Municipal Act*. Section 239 of the *Municipal Act* requires that all meetings of a municipal council, local board, or committee of either of them, be open to the public, with limited exceptions. In turn, s. 239.1 of the *Municipal Act* provides for the right to request an investigation into a closed meeting. Section 239.1 provides as follows, in relevant part:

> A person may request that an investigation of whether a municipality or local board has complied with section 239 or a procedure by-law under subsection 238 (2) in respect of a meeting or part of a meeting that was closed to the public be undertaken,
>
> . . .
>
> (b) by the Ombudsman appointed under the *Ombudsman Act*, if the municipality has not appointed an investigator referred to in subsection 239.2 (1). . . . [Emphasis added.]

8 Section 239.1 provides that these investigations are conducted by the Ombudsman unless the City of Hamilton has appointed its own investigator. The City has not done so.

9 In parallel to the above provision in the *Municipal Act*, s. 14.1(3) of the *Ombudsman Act* also provides that the Ombudsman may investigate where a person has requested an investigation under s. 239.1 of the *Municipal Act*. Section 14.1(3) provides as follows, in relevant part:

> If a person makes a request under clause 239.1 (b) of the *Municipal Act* . . . , the Ombudsman may . . . investigate,
>
> (a) whether a municipality or local board of a municipality has complied with section 239 of the *Municipal Act* or a procedure by-law under subsection 238 (2) of that Act in respect of a meeting or part of a meeting that was closed to the public; . . . [Emphasis added.]

10 As set out in the above provisions, one of the threshold requirements for the Ombudsman's jurisdiction to investigate is that the entity at issue must be a "municipality or local board of a municipality." Here, the main issue is whether an Election Compliance Audit Committee or a Property Standards Committee is a "local board of a municipality." The other prerequisite at issue in this case is the requirement that the step not taken in public must be "a meeting or part of a meeting." These two requirements appear in both the *Ombudsman Act* and the *Municipal Act*.

Committees at issue

11 In this application, the City seeks broad relief regarding what it describes as all "statutory adjudicative tribunals performing quasi-judicial functions." However, the factual record before us relates only to the City's Election Compliance Audit Committee and Property Standards Committee.

12 These two Committees conduct meetings or hearings in public, but they deliberate and prepare their reasons for decision in private. The City submits that neither Committee is a "local board of a municipality," nor are their deliberations "meetings" under the above sections. In turn, the City submits that the Ombudsman has no jurisdiction to investigate. The Ombudsman submits that these Committees are "local boards," their deliberations are "meetings" and, therefore, the Ombudsman has jurisdiction to investigate.

13 There has been one completed investigation by the Ombudsman regarding the Election Compliance Audit Committee for the City of Hamilton, and another is underway. An investigation is also underway regarding the Property Standards Committee for the City of Hamilton.

14 The issues before us begin with the *Ombudsman Act* and the *Municipal Act* and also include the legislative regime under which the Election Compliance Audit Committee and the Property Standards Committee are mandated. For the Election Compliance Audit Committee, the relevant legislation is the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sched. (the "*Municipal Elections Act*"). [1] For the Property Standards Committee, the relevant legislation is the *Building Code Act, 1992*, S.O. 1992, c. 23 (the "*Building Code Act*").

Election Compliance Audit Committee: Municipal Elections Act

15 The *Municipal Elections Act* legislates numerous aspects of municipal elections, including limitations on election expenses and contributions received by candidates. Section 88.37(1) of the *Act* provides that a municipal council or local board shall establish a compliance audit committee (the "Election Compliance Audit Committee") for the purposes of the *Municipal Elections Act*. The City of Hamilton has done so.

16 The mandate of the Election Compliance Audit Committee is to consider and decide requests for compliance audits of candidates' campaign finances, and to address compliance audit reports where applicable. The Committee performs a quasi-judicial function: *Chapman v. Hamilton (City)*, 2005 ONCJ 157, 9 M.P.L.R. (4th) 146 (Ont. C.J.), at para. 7.

17 Prior to 2009, requests for compliance audits could be and were decided by municipal councils: *Lancaster v. St. Catharines (City)*, 2012 ONSC 5629, 3 M.P.L.R. (5th) 117 (Ont. S.C.J.), at para. 31. In 2009, the Legislature removed the function from municipal council, and moved it to this impartial tribunal. Municipal council members are not permitted to be on the Committee. Under s. 88.37(2) of the *Municipal Elections Act*, the Committee must have between three and seven members and must not include any members of council, employees of the City, officers of the municipality, candidates or registered third parties. The City has implemented an application process for positions on the Committee, and seeks people with relevant experience. The Committee currently has four members, all of whom have accounting backgrounds. These are volunteer positions.

18 Section 88.33 of the *Municipal Elections Act* provides that an elector who believes on reasonable grounds that a candidate has contravened a campaign finance provision of the *Act* may apply for a compliance audit of a candidate's election campaign finances. In brief, s. 88.33 includes the following steps regarding a request for a compliance audit:

(i) an elector may apply for a compliance audit, within a certain time frame (s. 88.33(3));

(ii) the application is forwarded to the applicable Election Compliance Audit Committee (s. 88.33(4));

(iii) within 30 days of receiving the application, the Committee "shall consider the application and decide whether it should be granted or rejected" (s. 88.33(7));

(iv) the decision of the Committee and brief written reasons must be given to the applicant and the candidate, among others (s. 88.33(8));

(v) the Committee's decision may be appealed to the Superior Court of Justice (s. 88.33(9));

(vi) if the Committee decides to grant an application, it must appoint an auditor to conduct a compliance audit of the candidate's election campaign finances (s. 88.33(10));

(vii) when an auditor is appointed, a further process is provided for completing and reporting on the audit (s. 88.33(12)-(15));

(viii) if the auditor's report concludes that the candidate appeared to have contravened the election campaign finance provisions of the *Act*, the Committee must consider whether to commence a legal proceeding against the candidate for the apparent contravention (s. 88.33(17)); and,

(ix) notice of the Committee's decision about commencing litigation, together with brief written reasons, must be given (s. 88.33(18)).

19 The City provides administrative support to the Committee including the use of facilities for the hearing, the use of its website and assistance from the office of the City Clerk, and bears the costs of the Committee.

20 Section 88.33(5) requires that the meetings of the Election Compliance Audit Committee under s. 88.33 be open to the public and that reasonable notice be given to the candidate, the applicant and the public. The administrative practices and procedures established for the Committee pursuant to s. 88.37(6) also provide for notice of a public meeting at which both the applicant and the candidate may make presentations and answer questions posed by the Committee about an application. The Committee's procedure further provides that, after the presentations, the Committee "may retire to deliberate before rendering its decision."

21 In accordance with the above provisions, the Election Compliance Audit Committee holds public hearings after giving appropriate notice. After hearing the presentations of the parties at the public hearing, the Committee usually reserves its decision and deliberates in private in order to come to a decision. It then provides its written reasons for decision, which are also posted on the City's website.

22 In October 2015, the Ombudsman received a complaint about the City of Hamilton's Election Compliance Audit Committee holding its deliberations in private. On July 13, 2015, the Committee had held a public hearing at which it received submissions and evidence regarding a number of applications seeking compliance audits. The hearing was open to the public. Notice was provided on the City's website. Minutes were taken. As shown in the minutes, the Committee reserved its decisions. The Committee then met privately to deliberate on July 15, 2015. During the deliberations, the Committee reviewed financial documentation and the parties' submissions, discussed points raised in the submissions and came to decisions. The decisions were then formatted by staff into written decisions. While legal staff was present during the deliberations, no legal advice was given. The deliberations lasted about three hours. Written decisions were then released, including reasons for each decision.

23 A complaint about these private deliberations gave rise to an investigation by the Ombudsman, culminating in a report dated July 2016 (the "Report"). The City cooperated in the investigation and attempted, unsuccessfully, to persuade the Ombudsman that the Ombudsman had no jurisdiction to investigate the complaint.

24 In his Report, the Ombudsman gave his opinion that the Election Compliance Audit Committee was a "local board" under the *Municipal Act* and had contravened the open meeting requirements by conducting its deliberations in private. In turn, the Ombudsman made non-binding recommendations to implement changes giving effect to his opinion.

25 As part of his investigation, the Ombudsman conducted research into the meeting practices of other Election Compliance Audit Committees in Ontario. Of those surveyed, practices varied. Many of the Committees surveyed conducted their deliberations in public except when legal advice was being given. The open meeting requirement in s. 239 of the *Municipal Act* provides an exception for legal advice. However, some Committees reserved their decisions and deliberated in private. Not surprisingly, the Ombudsman did not do a comprehensive survey of the Committees for the over 400 municipalities in Ontario.

Property Standards Committee: Building Code Act

26 Property Standards Committees hear appeals from orders made by municipal officers against property owners or occupants arising from non-compliance with property standards by-laws. The appeals are essentially hearings *de novo*, with parties presenting opening and closing statements, calling evidence from witnesses that is taken under oath, introducing documentary evidence and making argument.

27 These appeals arise from the property standards regime in the *Building Code Act.* Section 15.1(3) of that *Act* provides that a municipal council may pass a property standards by-law including both standards for the maintenance and occupancy of property and requirements to conform to those standards. The City of Hamilton has done so. In turn, s. 15.6 (1) of that *Act* requires that the by-law provide for the establishment of a committee composed of no fewer than three members, as counsel considers advisable and on such conditions as the by-law may establish (the "Property Standards Committee"). Under the City's by-law, the Property Standards Committee must have five members, who are residents of or property owners in the City of Hamilton. These are volunteer positions.

28 The *Building Code Act* provides for the issuance of compliance orders and for appeals of compliance orders. Under s. 15.2(2) of that *Act*, property standards orders may be made by municipal officers against property owners or occupants, requiring repairs or demolition. Orders include the time for complying with the terms and conditions of the order and give notice that, if the particularized repair or clearance is not carried out within that time, the municipality may carry out the repair or clearance at the owner's expense. Under s. 15.3(1) of the *Building Code Act*, an owner or occupant who has been served with a property standards order made by a municipal officer and is not satisfied with its terms and conditions may appeal the order to the applicable Property Standards Committee.

29 Section 15.3 (3) provides that the Property Standards Committee "shall hear" all appeals, and under s. 15.3 (3.1) the Committee has broad powers to confirm, modify or rescind the order in question and extend the time for compliance.

30 There is a right of appeal from the Committee's decision to the Superior Court of Justice (s. 15.3(4)). If an order of a municipal officer is not appealed, or the appeal confirms the order, the order is "final and binding" on the owner or occupant.

31 The Property Standards Committee for the City of Hamilton proceeds generally as follows:

(i) the Committee meets when required and, at that time, hears and decides any appeals that have been filed;

(ii) notice of the Committee meetings is posted on the City's website and the meetings are open to the public;

(iii) at the hearing of an appeal, the parties present their cases by giving opening and closing statements, calling evidence from witnesses (taken under oath), filing documentary evidence and presenting arguments;

(iv) members of the Committee may ask questions, including of witnesses, during the hearing;

(v) when the hearing has concluded, the Committee members usually retire to an ante room to deliberate in private in order to reach a decision; and,

(vi) the Committee provides reasons for each decision in writing, though it may also choose to deliver an oral decision at a meeting.

32 The City provides administrative support to the Property Standards Committee including an appeal form, the use of facilities for the hearing, the use of its website and assistance from the office of the City Clerk regarding minutes, and the City charges an appellant an appeal fee.

33 Under ss. 15.6(8)(9) of the *Building Code Act*, the Property Standards Committee may adopt its own rules of procedure, subject to the requirement that it must give notice of the hearing of an appeal. The Property Standards Committee for the City of Hamilton has published an outline of its "Appeal Process" and made a reconsideration rule. With respect to its deliberations, the Appeal Process provides that the Property Standards Committee may retire to deliberate in the absence of the public. In keeping with this statement, the Committee does retire and deliberate in private.

Analysis

34 The issues on this application are as follows:

(1) whether the Ombudsman has jurisdiction to investigate these Committees, and more specifically:

(a) whether either the Election Compliance Audit Committee or the Property Standards Committee is a "local board of a municipality" under the *Ombudsman Act* and the *Municipal Act*; and,

(b) if so, whether their deliberations are "a meeting or part of a meeting";

(2) whether a declaration regarding jurisdiction should be made more generally, regarding all "statutory adjudicative tribunals performing quasi-judicial functions," as requested by the City; and,

(3) whether any relief should be granted under the *Judicial Review Procedure Act*.

35 This application requires the interpretation of a number of statutes. The jurisdictional question begins with the *Ombudsman Act* and the *Municipal Act*, and then brings in other relevant legislation. The proper approach to statutory interpretation is well-accepted. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature: *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21. Further, interpretations favouring harmony between various statutes enacted by the same government should prevail, especially when they relate to the same subject matter: R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 179.

Whether a "local board"

36 The main focus of this application is the definition of "local board" in the *Municipal Act*, which has been adopted by the *Ombudsman Act*. For the Ombudsman to have jurisdiction to investigate, each of the Election Compliance Audit Committee and the Property Standards Committee must be a "local board."

37 There is a statutory definition of "local board" in the *Municipal Act*, which is awkwardly incorporated into the *Ombudsman Act* in relation to the s. 239 investigative role. Section 14.1(2)(a) of the *Ombudsman Act* adopts the definition in s. 238(1) of the *Municipal Act.* However, section 238(1) provides only as follows:

In this section and in sections 239 to 239.2 . . . "local board" does not include police services boards or public library boards. . . .

38 The parties agree, and logic demands, that this section be read along with the definition of "local board" found in s. 1(1) of the *Municipal Act*, which provides as follows:

"local board" means a municipal service board, transportation commission, public library board, board of health, police services board, planning board, or <u>any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities</u>, excluding a school board and a conservation authority; [Emphasis added.]

39 Neither an Election Compliance Audit Committee nor a Property Standards Committee is specifically listed as a local board under this definition. The issue is whether either or both Committees fall within the more general language in the definition.

40 The regime that applies to "local boards" under the *Municipal Act* is not limited to the open meeting requirements in s. 239. For example, under s. 270, local boards are required to adopt and maintain policies with respect to the sale and other disposition of land, hiring of employees and procurement of goods. Section 270 excludes a number of entities from the definition of "local board", as set out in s. 269(1). Other examples are found in ss. 10(6), 223.1, 390 of the *Municipal Act*, where specific entities are excluded from the s. 1(1) definition of "local board" for other purposes. None

of these provisions exclude either an Election Compliance Audit Committee or a Property Standards Committee from the definition, although other entities that are not specifically listed in the s. 1(1) definition are excluded.

41 The *Municipal Act* also permits the Minister to make regulations prescribing local boards for certain purposes. Neither an Election Compliance Audit Committee nor a Property Standards Committee has been so prescribed.

42 The *Municipal Act* gives the municipality the power to dissolve local boards and assume their powers. Section 216 of the *Municipal Act* confirms that a municipality has the authority to dissolve (or change) a "local board" with listed exceptions. Neither an Election Compliance Audit Committee nor a Property Standards Committee is listed as an exception to this power. Further, under O.Reg. 582/06 ("Dissolution of and Assumption of Powers of Local Boards"), where a local board is dissolved by a municipality, the powers of the local board vest in the municipality and the municipality stands in the place of the local board for all purposes. The general language in the s. 1(1) definition must be interpreted within this statutory context. This power is a significant factor for the Committees at issue here, as discussed below.

43 There is little case law on the interpretation of "local board." There are a few cases in which a similar definition is interpreted in the context of deciding whether an entity is entitled to a tax exemption or rebate: *Hamilton (City) v. Hamilton Harbour Commissioners* (1984), 48 O.R. (2d) 757 (Ont. H.C.); *St. Lawrence Power Co. v. Ontario (Minister of Revenue)* (1978), 23 O.R. (2d) 61 (Ont. H.C.); *Toronto & Region Conservation Authority v. Ontario (Minister of Finance)* (1999), 9 M.P.L.R. (3d) 312 (Ont. S.C.J.). As well, a similar definition has been considered in the conflict of interest context: *Mangano v. Moscoe* (1991), 4 O.R. (3d) 469 (Ont. Gen. Div.); *Westfall v. Eedy* (1991), 6 O.R. (3d) 422 (Ont. Gen. Div.). No other authorities have been provided to us.

44 These cases do not address the specific statutory regime at issue here. However, the definitions of "local board" in the legislation at issue in the above cases do begin with a list of specific entities, followed by general language that is similar to the s. 1(1) definition of "local board" in the *Municipal Act*. One of the principles relied upon in some of the cases is *ejusdem generis*, under which the general language in the definition ought to be interpreted to include only entities "of the same kind or nature" as those that are specifically listed: *Hamilton Harbour Commissioners*, at p. 770, para. 40; *St. Lawrence Power Co.*, at p. 63, para. 10; *Toronto & Region Conservation Authority*, at para. 24; *Westfall*, at p. 428, para. 18.

45 The City of Hamilton submits that the Election Compliance Audit Committee and Property Standards Committee, and all other entities that are statutory adjudicative tribunals performing quasi-judicial functions, are not "local boards" within the applicable definition in the *Municipal Act*. In summary, it submits as follows:

> (i) that these two Committees are not expressly listed in the definition and the general language in the definition should be interpreted in the entire context, including the power of the municipality to dissolve a local board and stand in its place, which is inconsistent with the legislative regime that applies to these Committees;
>
> (ii) that under the *ejusdem generis* principle, these Committees are not of the same kind or nature as the entities that are specifically listed in the definition because they do not act for a local or municipal purpose or on behalf of the City's interests and are not providing municipal services; and,
>
> (iii) similarly, that the quasi-judicial decision-making function of these Committees distinguishes them from the entities that are expressly named and is inconsistent with an interpretation that includes them within the definition of a "local board."

46 With respect to the adjudicative nature of these Committees, the City relies on the law of deliberative secrecy, which protects adjudicative decision makers from intrusion into their decision-making process: *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 (S.C.C.), at p. 806, para. 4 (Lamer J. as he then was), pp. 807, 809, paras. 10, 13 (Wilson J.), pp. 840-841, paras. 33-35 (Cory J.); *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 37, 253 N.S.R. (2d) 134 (N.S. C.A.), at paras. 14, 18, 20, 22 and 34-37. Deliberative secrecy applies to administrative tribunals,

although not with the same force as it applies to courts: *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952 (S.C.C.), at p. 966, para. 33. It may be lifted due to natural justice concerns and can be abrogated by statute, though to do so would require clear and express language: *Ontario (Liquor Control Board) v. Magnotta Winery Corp.*, 2010 ONCA 681, 102 O.R. (3d) 545 (Ont. C.A.), at para. 38. The City submits that it has not been abrogated here. The City further relies on the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ("*SPPA*"), submitting that it ousts the application of the open meeting requirements in s. 239 of the *Municipal Act* in any event.

47 The Ombudsman relies on the above case law, based upon which he advances four characteristics of local boards that he submits support the conclusion that these Committees are "local boards":

(i) that the entity is carrying on the affairs of the municipality;

(ii) that there is a direct link with the municipality either by way of legislation or through authority from the municipality;

(iii) that there is a connection to or control by the municipality; and,

(iv) that there is an element of autonomy.

48 There is an acknowledged overlap between the above factors. Further, although these factors are derived from the cases, the cases address different statutory regimes and for the most part, do not provide extensive analysis. The exception is *Toronto & Region Conservation Authority v. Ontario (Minister of Finance)*, which underscores the need to look at the purpose of the specific legislation and all other relevant factors in determining whether an entity falls within the general language in the definition of "local board."

49 The Ombudsman further submits that the open meeting requirements under s. 239 of the *Municipal Act*, which include a number of exceptions, do not provide an exception for deliberations and therefore do override deliberative secrecy. If the Election Compliance Audit Committee and the Property Standards Committee are "local boards" and their deliberations are "meetings or parts of meetings," there is no exception in s. 239 that permits deliberations in private. It is agreed that none of the exceptions under s. 239 apply.

50 I first consider these arguments as they apply to the two Committees at issue, specifically the Election Compliance Audit Committee and the Property Standards Committee. I deal separately with the City's request for a declaration that extends beyond these two Committees.

Election Compliance Audit Committee

51 In that the Election Compliance Audit Committee is not one of the entities listed under the definition of "local board", the issue is whether it falls within the general language in the definition. Thus, the issue is whether it is another "board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities" within the meaning of the definition. These words must be read in their entire context, having regard for the purpose of the relevant legislation.

52 I accept the Ombudsman's submission that a local board must have some autonomy from the municipality. A "local board" is not the municipality itself — it is a separate entity. But all separate entities are not necessarily local boards. Further, the degree of independence from a municipality may also be an indication that the entity is not a local board: e.g., *Toronto & Region Conservation Authority*.

53 The City accepts that the Election Compliance Audit Committee's affairs or purposes are "loosely linked" to the City insofar as the Committee is concerned with the campaign finances of candidates in the City's municipal election (whether the candidate wins or loses). Further, the City appoints the members of the Committee and provides the Committee with administrative support. This support includes posting notices and decisions on the City's website and the use of facilities and secretarial and legal staff, and the City bears the costs of the Committee.

54 However, the Election Compliance Audit Committee was not established to run City affairs, nor does it exercise power over any actual City affairs or purposes. Further, the connections with the City do not include the delegation of the Committee's decision-making role to the City and do not compromise the Committee's impartiality. In addition, the Committee does not derive its authority from the City.

55 The City submits that this Committee is unlike the entities specifically listed in the definition, relying on the interpretative principle of *ejusdem generis*. The City submits that the entities that are specifically listed all act for a local or municipal purpose or on behalf of the City and actually provide municipal services. This Committee does not do so. The provision of municipal services has been found to be an indication that an entity is a local board: *Toronto & Region Conservation Authority*, at para. 15, citing *St. Lawrence Power Co. v. Ontario (Minister of Revenue)*.

56 This submission is supported by the legislative regime that applies to a number of the entities specifically listed in the s. 1(1) definition. Beginning with municipal service boards, the *Municipal Act* permits a municipality to establish municipal service boards and delegate powers and duties of the municipality to those boards (s. 198). The focus is on the provision of municipal services that would otherwise be provided by the municipality. Similarly, boards of health are local boards specifically listed in the s. 1(1) definition, also referenced in s. 10(6) of the *Municipal Act*, and are charged with providing local health programs and services: ss. 1(1), 4, 5, 61 and 67 of the *Health Protection and Promotion Act*, RSO 1990, c H.7. A planning board, also specifically listed in s. 1(1), provides advice and assistance in the preparation of an official plan for the municipality among other things: *Planning Act*, R.S.O. 1990, c. P.13.

57 Police services boards and public library boards are also specifically listed in the s. 1(1) definition, and relate to the provision of municipal services (*Police Services Act*, R.S.O. 1990, c. P.15, *Public Libraries Act*, R.S.O. 1990, c. P.44). However, under s. 238 of the *Municipal Act* they have been expressly exempted from the definition of "local board" for the purpose of the open meeting requirements. We have been provided with no submissions or material regarding why those two types of boards were excluded under s. 238, nor any suggestion that it is significant to this case. There remains, in the list of specific entities in the s. 1(1) definition, a "transportation commission," which is not defined or connected to specific legislation describing its purposes.

58 There is, therefore, some support for the City's submission that local boards provide services for municipalities.

59 The City further submits that the Election Compliance Audit Committee is unlike the entities specifically listed in the definition of "local board" because it is an adjudicative body that makes quasi-judicial decisions. However, this general proposition conflicts with the *Municipal Act* itself because of its regime regarding the delegation of powers.

60 Section 23.1 and related provisions in the *Municipal Act* confirm that ss. 9, 10 and 11 of the *Act* authorize a municipality to delegate its powers. Section 23.4 expressly contemplates that power may be delegated to a municipal service board, which is one of the entities specifically listed in the definition of "local board." And s. 23.2 of that *Act* confirms that, in certain circumstances, quasi-judicial powers may be delegated by a municipality. In addition, s. 23.5 provides that delegation is permitted where a municipality is required by law to hold a hearing. There are various exceptions and requirements regarding delegation, none of which foreclose the potential for quasi-judicial powers to be delegated to a municipal service board. Thus, the *Act* contemplates that quasi-judicial powers may be delegated to a municipal service board, which is specifically named in the s. 1(1) definition of "local board." I am therefore not persuaded by the City's distinction based upon quasi-judicial functions.

61 Construing the definition of "local board" in its entire context requires that a municipality's power to dissolve a local board and stand in its place be taken into account, as well as the regime implemented in the related *Municipal Elections Act*. An interpretation that a municipality has the power to dissolve and take over the functions of the Election Compliance Audit Committee is completely inconsistent with the *Municipal Elections Act* and its legislative history.

62 Before legislative reform in 2009, the functions of the Election Compliance Audit Committee were performed by municipal council. In 2009, the provincial legislature removed the functions from that politically-minded setting to

the Election Compliance Audit Committee: *Lancaster v. St. Catharines (City)*, at para. 31; *Good Government Act*, S.O. 2009, Sch. 21.

63 Through that legislative reform, the functions now performed by the Election Compliance Audit Committee were distanced from the municipality. That independence was underscored by the statutory requirements introduced into the *Municipal Elections Act* that the Committee must not include members of council, among others with connections with the municipality. The City does not control the Committee.

64 Proper statutory construction favours harmony between these two related provincial statutes. The clear legislative intent under the *Municipal Elections Act* is that members of a municipal council or certain related parties should not be making the decisions about whether a compliance audit, or litigation, should be initiated regarding a candidate in a municipal election. If this Committee is a local board, the municipality could do just that by dissolving the Committee and taking over its functions.

65 The purposes of the term "local board" in the *Municipal Act* are varied, general and not defeated by an interpretation that excludes this Committee. They are not specifically focused on the open meeting provisions and thus not limited to the purpose of that requirement. I note, however, that the *Municipal Elections Act* itself has an open meeting provision. That requirement persists. The interpretation of that provision and whether it permits deliberations in private are issues that were not the focus of the application.

66 I conclude that, interpreting the definition of "local board" in its full statutory context and in harmony with the *Municipal Elections Act*, the Election Compliance Audit Committee is not a local board. It is an independent and impartial decision-making body with a mandate that is part of the Legislature's oversight of municipal elections. Its purpose, as set out in the *Municipal Elections Act*, is to make certain decisions that form part of the enforcement of election finance provisions in that *Act*, for which it is distanced from the municipality in a manner that is inconsistent with a municipality's power to dissolve a local board.

Property Standards Committee

67 Much of the above analysis applies to the Property Standards Committee as well. However, it brings in a different legislation regime under the *Building Code Act* and has a different adjudicative function and purpose.

68 The Property Standards Committee is also not specifically listed in the s. 1(1) definition of "local board" in the *Municipal Act*, nor is it named in other provisions of that *Act* that exclude entities from that definition for various purposes. It also has similar connections with the City, which appoints its members, and receives similar administrative support.

69 An independent and impartial adjudication is central to the mandate of this Committee. The purpose of the Property Standards Committee is to provide an appeal to property owners and occupants against whom orders have been made by municipal officers. The Committee conducts a full hearing, including opening statements, witness testimony taken under oath, the introductions of documents as exhibits, and closing arguments. It determines whether an order made by a municipal officer should be confirmed, modified or rescinded.

70 The Ombudsman submits that this Committee carries on the affairs of the municipality in that it is created by the City's property standards by-law, and the City is not obliged to have a property standards by-law. It chose to do so. However, it is the *Building Code Act*, not the City, which requires that if there are property standards being enforced by the municipality, there must be a Property Standards Committee to hear appeals. I nonetheless agree that this Committee is more closely involved in municipal affairs than the Election Compliance Audit Committee.

71 Like the Election Compliance Audit Committee, the purpose of the Property Standards Board is inconsistent with the power to dissolve a local board and assume the power itself. The *Building Code Act* does not have the same legislative history as the *Municipal Elections Act* or the related provision that expressly excludes municipal councilors

from becoming members. However, the *Building Code Act* expressly requires that the City, which enforces property standards, constitute a Property Standards Committee to conduct these appeals. It is not optional. If the City could dissolve the Committee and assume its powers, it would defeat the statutory regime under the *Building Code Act*.

72 As well, the statutory interpretation argument based upon the *ejusdem generis* principle has more force when considering the Property Standards Committee. This Committee does not just make quasi-judicial decisions; it is charged with deciding appeals from orders already made against individuals. Where the Election Compliance Audit Committee decides whether to initiate a process, this Committee fully decides the merits of the appeal. None of the specifically listed entities in the s. 1(1) definition of "local board" are charged with conducting an appeal from an order already made against an individual in regard to their property, subject to the lack of legislation or information before us regarding a "transportation commission." With that proviso, the entities specifically listed in the definition are not of the same kind or nature as the Property Standards Committee.

73 The *Building Code Act* uses the term "hearing" not "meeting" when addressing the Property Standards Committee. The term "hearing" is also used to refer to the further appeal to the Court from the decision of the Committee. On its plain language, there must be a public hearing, as there is, but there is no broader open meeting provision that could be said to abrogate deliberative secrecy. It is difficult to see how this Committee, charged with deciding an appeal of the merits from an order, could effectively deliberate in public after its hearing. This would mean that discussions about witness credibility, inferences from the facts and the myriad of other issues that could arise would have to be discussed in front of all concerned. The deliberative secrecy principle recognizes the importance of private deliberations to a fair and just adjudication. It preserves adjudicative independence so that the adjudication occurs with circumspection, reflection and full discussion: *Noble China Inc. v. Lei* (1998), 42 O.R. (3d) 69 (Ont. Gen. Div. [Commercial List]), at p. 80, para. 34-35. On its face, the *Building Code Act* does not abrogate deliberative secrecy. This is consistent with the purpose of this Committee under the *Building Code Act*. An interpretation that the Committee is a local board is in conflict with this regime.

74 The *SPPA* provides a procedural framework for all statutory tribunals that are required to hold hearings, including this Committee. Section 9 of that *Act* provides that all "hearings" must be open to the public, yet no authority has been placed before us holding that s. 9 abrogates deliberative secrecy.

75 I conclude that, interpreting the definition of "local board" in its full statutory context and in harmony with the *Building Code Act*, the Property Standards Committee is not a local board. It is an independent and impartial decision-making body. Its purpose, as set out in the *Building Code Act*, is to adjudicate on appeals from orders of municipal officers made against individuals regarding their property after, essentially, a full trial. The Property Standards Committee is a mandatory part of the property standards regime. The Committee is different in nature from most if not all of the listed entities, and a finding that it is a local board would be inconsistent with deliberative secrecy and inconsistent with a municipality's power to dissolve a local board.

No jurisdiction

76 Given my conclusion that the Election Compliance Audit Committee and the Property Standards Committee are not local boards, the Ombudsman does not have jurisdiction to investigate either of them under s. 14.1 of the *Ombudsman Act* or s. 239.1 of the *Municipal Act*. As a result, there is no need to address the further argument advanced by the City that the deliberations of these Committees are not "meetings or part of meetings" or the argument that s. 239 of the *Municipal Act* does not apply in any event because of the *SPPA*.

Statutory adjudicative tribunals more generally

77 The City has requested a broad declaration regarding the Ombudsman's jurisdiction that extends beyond the Election Compliance Audit Committee and the Property Standards Committee. Specifically, it requests a declaration that the Ombudsman does not have jurisdiction to investigate "the City's statutory adjudicative tribunals performing quasi-

judicial functions." I am not prepared to grant that broader declaration. The conclusions regarding the two Committees that are the focus of this application are very dependent on their specific statutory regimes and related purposes. As well, quasi-judicial functions do not, by themselves, mean that an entity is not a local board. These determinations are context-dependent and a broader declaration is therefore not appropriate.

Judicial review of Report of the Ombudsman

78 In addition to its application under s. 14(5) of the *Ombudsman Act*, the City has sought *certiorari* and prohibition under the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1)1. More specifically, the City asks that if this Court finds that the Ombudsman had no jurisdiction to investigate the Election Compliance Audit Committee, the Ombudsman's July 2016 Report be quashed, declared of no force and effect and that there be an order of prohibition precluding any further investigations regarding these Committees including the investigations that are already underway.

79 The Ombudsman objects to any relief under the *Judicial Review Procedure Act* regarding his Report because his Report merely stated an opinion and made recommendations. The Ombudsman submits that recommendations made in the Report are not an order against the City, are not legally enforceable as an order, and are not the proper subject-matter for an order for the requested relief under the *Judicial Review Procedure Act*: see, e.g., *C.U.P.E., Local 873 v. British Columbia (Attorney General)*, 2010 BCSC 593 (B.C. S.C.), at para. 50, citing *U.T.U., Locals 1778 & 1923 v. B.C. Rail Ltd.* (1992), 67 B.C.L.R. (2d) 112 (B.C. C.A.). Other objections are also made regarding this request for extraordinary relief under that *Act.*

80 The City recognizes that the Report is not legally binding on it but submits that the Report nonetheless carries weight and could confuse the complainant and the public.

81 With respect to the claim for prohibition, the Ombudsman further confirms that an order of prohibition is not required in that he recognizes that he is subject to a declaratory order made under s. 14(5) regarding his jurisdiction. Neither an order for prohibition nor a further declaration is required.

82 In the above circumstances, I am not prepared to grant the relief requested under the *Judicial Review Procedure Act.*

Orders made

83 I therefore grant an order declaring that the Ombudsman has no jurisdiction to investigate the Election Compliance Audit Committee or the Property Standards Committee under either s. 14.1 of the *Ombudsman Act* or s. 239.1 of the *Municipal Act*, and dismiss the balance of the application insofar as additional relief was sought.

84 Given the divided success on the application, there shall be no order as to costs.

***J.K. Trimble J.*:**

I agree

***L.C. Sheard J.*:**

I agree

Application granted in part.

Footnotes

1 There have been various amendments to the *Municipal Election Act* over the relevant period, resulting in changes to its section numbers. The current section numbers are used in these reasons for decision.

1989 CarswellAlta 450
Alberta Court of Queen's Bench

Broda v. Edmonton (City)

1989 CarswellAlta 450, [1989] A.W.L.D. 1010, [1989] A.J. No. 952, 102 A.R. 255, 17 A.C.W.S. (3d) 972

In The Matter of City of Edmonton Bylaw No. 9101; and in The Matter of The Municipal Government Act, R.S.A. 1980, Chapter M-26 and Amendments thereto

Ihor Broda, Applicant v. The City of Edmonton and The Council of the City of Edmonton, Respondents.

Alex Broda, Applicant v. The City of Edmonton and The Council of The City of Edmonton Respondents

Honourable Madam Justice Marguerite J. Trussler

Judgment: October 27, 1989
Docket: Doc. Action 8903 05651, 8903 09627

Counsel: Ihor Broda, appeared on his own behalf.
D.G. Lopushinsky, Esq., for the City of Edmonton.
R.J. Liteplo, Esq., for the City of Edmonton.

Honourable *Madam Justice Marguerite J. Trussler*:

REASONS FOR JUDGMENT

1 This application is brought pursuant to the applicant's request for judicial review of Edmonton City Council's decisions regarding several land use by-laws. The applicant now asks for an order directing the respondent to produce the following:

> (A) All documents regarding by-laws 8179, 8637, 9069 and 9101, that were or may have been before City Council and which are on the files of the City's Planning and Development Department, as part of the record:
>
> (B) All city councillors, who were members of Edmonton City Council on January 31 and March 14, 1989, the Director of the Land Use Development Branch of the Planning and Development Department along with any other officer or employee of said department, that the applicant may choose, for examinations for discovery.

2 The applicant alleges that without this order information relevant to the proceedings before the court will be withheld.

I BACKGROUND

3 In his application for judicial review, the applicant seeks three forms of relief. He requests an order in the nature of *certiorari* to quash by-law 9101. In addition, he asks the court to declare: that the rights he is guaranteed by the *Canadian Charter of Rights and Freedoms* (*Charter*) have been denied; that land use by-law 5996 contravenes the *Charter*; and, that sections 69 and 70 of the Planning Act, R.S.A. 1980, c. P-9 also contravene the *Charter*. Finally, the applicant seeks an injunction that would prevent the City from issuing permits for development or building until such time as the entire matter has been dealt with by the court. The request for an injunction has already been the subject of a separate chamber's application and was denied on June 23, 1989. An appeal was filed on June 30, 1989 but has not yet been heard.

4 The grounds relied on by the applicant include allegations of bias and bad faith on the part of some or all city councillors. It is further alleged that the applicant has been denied equality before and under the law as well as the

right to equal protection and benefit of the law. In addition, the applicant contends that by-law 9101 is illegal in that it contravenes by-law 5996 and fails to satisfy the criteria established for a DC-5 district.

II ISSUES

5 There are two issues to be decided. The first concerns the question as to what constitutes the record in judicial review proceedings. Second, it must be determined, in the context of these proceedings, whether or not city councillors and officers and employees of the City's Planning and Development Department are compellable to attend examinations for discovery.

III WHAT CONSTITUTES THE RECORD?

6 In his notice of motion, the applicant asks that the respondents be directed to include in the Return "all documents that were or may have been before City Council" pertaining to the by-laws he has enumerated. No brief was submitted by the applicant on this issue, however, it was apparent from his oral submissions that he seeks a very broad interpretation of what constitutes the record. In the applicant's view, the record should include information on file in the Planning and Development Department which may possibly have been referenced by individual councillors. Therefore, he submits the record should not be limited to those materials before Council as a whole.

7 The respondent takes a contrary view. In its submission, the record only includes documents that were before the councillors when in session. Accordingly, the respondent claims to have included all such documents in its Return. Its opposition to including further information is based on two arguments. The respondent points out that it is the decision of City Council that is impugned and not that of the Planning and Development Department. Furthermore, the latter functions solely in an advisory capacity and does not have the standing of a statutory delegate. Consequently, the respondent argues that the Department's work should not be the subject of judicial review.

8 The traditional view of the record has generally been more limited than expansive. At common law the record comprised the document or application initiating the proceedings, the pleadings, if any, and the adjudication or order of the tribunal, but not the evidence or the reasons for the decision, unless the tribunal chose to incorporate them: *R. v. Northumberland Comp. Appeal Tribunal*, [1951] 1 K.B. 711, affd. [1952] 1 K.B. 338. Any extensions to or restrictions of this concept of the record must be legislated and, presumably, as they then deviate from the common law, they should be strictly interpreted.

9 Generally, any enlarged definition of the record remains limited to those documents before the statutory delegate when considering the matter in issue. For example, it has been argued that,

> In principle, correspondence between members of a statutory body, written after the hearing for the purpose of discussing the issues, should not form part of the record, because it does not affect the proceedings at the hearing: Jones & de Villars, *Principles of Administrative Law* (1985) p. 279.

In this case, no authority was given for extending the record to include any piece of information a councillor may have referenced in independent research outside the council session.

10 In Alberta, the constitution of the record is set out in Rules 753.12 and 753.13(1) of the Rules of Court:

> 753.12(1) Where the relief claimed on an application for judicial review is an order to set aside a decision or act, the application shall cause to be endorsed on the application for judicial review a notice to the following effect, adapted as may be necessary, addressed to the person from whose decision or act relief is claimed:
>
> > You are required forthwith after service of this notice to return to the clerk of the Court of Queen's Bench at ... (as the case may be) the judgment, order or decision (as the case may be) to which this notice refers and reasons, if any, together with the process commencing the proceedings, the evidence and all exhibits filed, if any, and all things touching the matter as fully and entirely as they remain in your custody, together with this notice.

Date ...

To A.B., provincial judge at ...

(or as the case may be)

signed C.D. ...

(Solicitor for the Applicant).

(2) All things required by this section to be returned to the clerk of the Court of Queen's Bench shall for the purposes of the application constitute part of the record.

753.13(1) On receiving the application for judicial review endorsed in accordance with Rule 752.12, the person from whose decision or act relief is claimed shall return forthwith to the office mentioned therein the judgment, order or decision, as the case may be, together with the process commencing the proceedings, the evidence and all exhibits filed, if any, and all things touching the matter and the notice served on him with a certificate endorsed thereon in the following form:

Pursuant to the accompanying notice, I hereby return to the Honourable Court the following papers and documents, that is to say

(a) the judgment, order or decision, as the case may be, and the reasons therefor;

(b) the process commencing the proceedings;

(c) the evidence taken at the hearing and all exhibits filed;

(d) all other papers or documents touching the matter.

And I hereby certify to this Honourable Court that I have above truly set forth all the papers and documents in my custody and power relating to the matter set forth in the originating notice.

What is included in the record is not definitive due to the phrases "all things touching the matter" in Rules 753.12(1), 753.13(1) and "all other papers or documents touching the matter" in Rule 753.13(1)(d). In these two rules the words, 'all things' or "all papers or documents" are qualified by the words "touching the matter."

11 The items listed in Rule 753.13(1)(a) to (c) all refer to those documents presented to or considered by the statutory delegate during the proceedings or documents emanating from the proceedings. Therefore, the words 'touching the matter', given the list of documents in the preceeding sub-sections, must refer to the proceedings before council.

12 There does not appear to be any basis for including in the record any thing which did not form part of the proceedings before the City Council meeting as a whole.

IV WHO CAN BE EXAMINED FOR DISCOVERY?

13 The applicant seeks three types of remedies in his application for judicial review. He asks that by-law 9101 be quashed, which is a request for relief in the nature of *certiorari*. In addition, he requests declaratory and injunctive relief. To support his application, the applicant wants to examine for discovery those councillors who were members of City Council at the time the impugned by-laws were considered, as well as any officer or employee of the City's Planning and Development Department that he feels has relevant information.

14 It is the respondent's position that the applicant can only examine a party adverse in interest. The City of Edmonton sits as a quasi-judicial body when deciding matters pertaining to land use. As such, the respondent argues it is an inferior tribunal, not an adversarial party and, consequently, is not subject to examinations.

15 The governing principle on judicial review applications is that "there is no interrogatory or discovery process associated with an application for one of the prerogative remedies": *Principles of Administrative Law, supra*, p. 431. This is particularly true when dealing with an intra-jurisdictional error of law where only the record can be the subject of the review. The discovery process does not apply even if bias or a jurisdictional defect is alleged, in which case all other types of evidence become admissible.

16 There are at least three questions that arise concerning this issue. First, does the "no discovery" principle change as a result of the recent unification of the prerogative remedies with certain non-prerogative remedies within the new rules on judicial review?

17 The availability of remedies "in the nature of" the prerogative writs continues under the new judicial review procedure. In addition, relief in the form of a declaration or an injunction can be obtained. This is set out in Rule 753.04(1), which reads as follows:

753.04(1) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in proceedings for any one or more of the following remedies:

(a)an order in the nature of mandamus, prohibition, quo warranto or habeas corpus;

(b)a declaration or injunction.

Traditionally proceedings for declarations or injunctions have been commenced by way of statement of claim and have included examinations for discovery and all other interlocutory process.

18 Given that there is no provision for examination for discovery in the new rules, it appears that the principle limiting the availability of interlocutory process, such as examination for discovery, extends to applications for declaratory or injunctive relief that are commenced under the judicial review procedure. However, where relief by way of a declaration or an injunction is requested in a proceeding commenced by a statement of claim it is still possible to have examinations for discovery. This interpretation is reinforced by the fact that Rule 753.16 allows for a judicial review application to be continued as a proceeding begun by statement of claim or vice versa. This provision would not be necessary if there was not a procedural distinction between the rules for judicial review and an action commenced by a statement of claim.

19 It was suggested that Rule 266 provides a means of circumventing the "no discovery" principle. The position generally taken is that Rule 266 is not a form of examination for discovery. This is supported by two factors. The rule is not included in Part 13 of the Rules of Court which provides the procedure for discovery. Rather, Rule 266 is included in Part 26 which sets out the general procedures concerning evidence. In *Ferguson v. Cairns* (1959) 21 D.L.R. (2d) 659, 30 W.W.R. 276 the Appellate Division of the Supreme Court of Alberta held that "an examination under this Rule [being the Rule 266 equivalent] is not examination for discovery - any doubt as to this is removed by the closing words of the rules, 'his examination conducted in the same manner as those of a witness at trial'." Rule 266 reads as follows,

> 266. A party to an action or proceeding may by service of an appointment issued by an officer having jurisdiction in the judicial district where the witness resides to issue appointments for the examination of parties for discovery, require the attendance of a witness to be examined before that officer for the purpose of using his evidence upon any motion, petition or other proceeding before the court or any judge or judicial officer in chambers; and his attendance may be procured and his examination conducted in the same manner as chose of a witness at the trial.

20 Furthermore, an examination under Rule 266 is an examination-in-chief. Cross-examination is not permitted. This was the finding in *Ferguson*, where the court held at p. 662,

> If the opposite party is called, he becomes a witness of the party calling him. He is bound by his testimony to the same extent as he would be bound by the evidence of any witness he might call. He cannot cross-examine him - if a party can ever be declared a hostile witness, he can only be so declared by a judge.

21 Therefore, it may be possible to examine an opposite party, or anyone else, in the context of a judicial review application by relying on this rule. However, it must be pointed out that the applicant did not request this relief in his notice of motion and it was only raised by the respondent, City of Edmonton.

22 If the application were continued as a proceeding begun by statement of claim, the second question that arises is whether or not the availability of examinations for discovery would still be limited given the character of City Council.

23 One important characteristic of city councillors is that they are not generally compellable to attend examinations for discovery. Councillors are not considered officers or servants within the scope of the rule providing for the examination of officers and servants of a corporation: Rogers, *The Law of Canadian Municipal Corporations* (2d) at p. 148 and p. 1329; *Davies v. The Sovereign Bank* (1906) 12 O.L.R. 557; *Porky Packers Ltd. v. Town of the Pas and Tewse et al*, [1973] 4 W.W.R. 692 (Q.B.).

24 In the Municipal Government Act, R.S.A. 1980, c.M-26, s. 1 (o) "municipal officer" is defined as follows,

> (o) "municipal official" means
>
> > (i) a municipal commissioner, manager, secretary, treasurer, assessor, solicitor, comptroller, engineer and any other official appointed by resolution or by by-law of the council, and
> >
> > (ii) the holder of any other position or office designated as such by the council:

In addition, s. 87 strictly limits a councillor's ability to hold municipal office. Section 87 states that,

> 87. No member of the council is eligible for appointment to any municipal office other than that of
>
> > (a) Mayor, deputy mayor or acting mayor, or
> >
> > (b) volunteer chief or other volunteer officer of a volunteer fire department, volunteer ambulance service, volunteer emergency measures organization or other volunteer organization or service.

As stated in Davies at page 558:

> While aldermen, as members of the municipal council, are in one sense officers of the corporation, I do not think the framers of the rule intended to include them in the expression 'officer or servant of such corporation.' They are merely legislative officers of the corporation, and with the exception of the mayor or other head (who is by sec. 279 of the Municipal Act declared to be the 'chief executive officer of the corporation') no individual executive or ministerial duties are imposed upon them. They are not employed by, nor are they in any way under the control of the corporation while in office. *They have no authority to act for the corporation, except in conjunction with other persons constituting a quorum.*
>
> (emphasis added)

Based on the above, city councillors are generally not amenable to discovery.

25 The third question concerns the function of City Council as a quasi-judicial body. Is the availability of examinations qualified with respect to quasi-judicial bodies and their staff?

26 The courts have held that by-laws dealing with land use issues are quasi-judicial in nature. As a result, councillors are sitting as a quasi-judicial body when considering such issues: *Wiswell et al v. Metro Corp. of Greater Winnipeg*, [1965] S.C.R. 512. Consequently, Council members are generally exempt from examinations about decisions made when they are sitting as a quasi-judicial body. This principle was explained by Mr. Justice Pennel in *Re Schabas et al And Caput of The University of Toronto et al* (1974) 52 D.L.R. (3d) 495 at 508, as follows:

> In discussing the question of bias, it is worthwhile to notice that at the request of the applicants, each member of the Caput was polled and each flatly denied having previously discussed the "Banfield incident". Complaint is made as to the Caput's failure to allow further cross-examination of the members of the tribunal. In my respectful opinion the complaint is unwarranted. I think the members of the Caput should not be subjected to cross-examination. They are sitting as a *quasi*-judicial body. In this respect, the Caput does not substantially differ from a Court. In such circumstances, the integrity of the judicial process should be respected: *Duke of Buccleuch v. Metropolitan Board of Works* (1872), L.R. 5 H.L. 418 at p. 437.

27 In this case, City Council was considering the zoning of particular property and thus was sitting in a quasi-judicial capacity. When sitting in this capacity, the members of City Council can no more be questioned about or examined on their decision than can members of a tribunal such as a Development Appeal Board, the Land Compensation Board or the Alberta Planning Board when their decisions are under review. Furthermore, the principle that members of a quasi-judicial body are not compellable to attend examinations logically extends to members of their staff. Otherwise, the principle would have no meaning.

28 In conclusion I find that,

> (1) All documents that were before City Council when it was considering the by-laws in question should form part of the record. Correspondingly, the record would exclude any materials that were not presented at the actual hearing or hearings held by the Council;
>
> (2) Regarding the availability of examinations for discovery:
>
> (a)
>
> Examinations for discovery are not available on a judicial review application.
>
> (b)
>
> Even if the application were continued by statement of claim, city councillors are not officers and servants and, therefore, do not fit within the rule providing for examination of officers and servants of a corporation where an action has been brought against a municipal corporation.
>
> (c)
>
> Furthermore, a city council functions as a quasi-judicial body when considering land use by-laws. In this role, it is analogous to a court or a statutory tribunal. Just as the rules pertaining to examinations for discovery or examinations pursuant to Rule 266 would not apply to a member of the judiciary or a statutory tribunal or to judicial staff or a tribunal's staff, they do not apply to a member of a municipal council sitting in a quasi-judicial capacity or to municipal staff.

29 The application is, therefore, dismissed and the respondents are entitled to their costs of the application.

TORONTO COMPUTER LEASING INQUIRY

The Honourable Denise Bellamy, Commissioner

Ruling on Standing and Funding

BACKGROUND

On February 14, 2002, Toronto City Council voted unanimously to hold a public inquiry, under s.100 of the *Municipal Act,* to inquire into all aspects of leasing contracts for computers and related software between the City of Toronto and MFP Financial Services and between the City of Toronto and Oracle Database. On March 7, 2002, the Chief Justice of the Superior Court of Justice in Ontario, the Honourable Patrick LeSage, appointed me to be the Commissioner for the Inquiry.

The full Terms of Reference can be found on the Inquiry's website at www.torontoinquiry.ca. For ease of reference, the operative sections are as follows:

> AND IT IS FURTHER RESOLVED THAT the terms of reference of the inquiry shall be:
>
> To inquire into all aspects of the above transactions, their history and their impact on the ratepayers of the City of Toronto as they relate to the good government of the municipality, or the conduct of its public business, and to make any recommendations which the Commissioner may deem appropriate and in the public interest as a result of his inquiry.
>
> And it is further resolved that the Commissioner, in conducting the inquiry into the transactions in question to which the city of Toronto is a party, is empowered to ask any questions which he may consider as necessarily incidental or ancillary to a complete understanding of these transactions;
>
> And, for the purpose of providing fair notice to those individuals who may be required to attend and give evidence, without infringing on the Commissioner's discretion in conducting the inquiry in accordance with the terms of reference stated herein, it is anticipated that inquiry may include the following:
>
> 1. an inquiry into all relevant circumstances pertaining to the various transactions referred to in this resolution, including the relevant facts pertaining to the various transactions at the relevant time as contained in the reports dated November 29, 2001, February 6,

2002 and January 28, 2002, the basis of and reasons for making the recommendations for entering into the subject transactions and the basis of the decisions taken in respect of the subject transactions;

2. an inquiry into the relationships, if any, between the existing and former elected and administrative representatives of the City of Toronto and the existing and former principals and representatives of MFP and Oracle at all relevant times; and

3. an inquiry into any professional advice obtained by the City of Toronto in connection with the subject transactions at the relevant times.

STANDING HEARINGS

The Commission published a "Call for Applications for Standing" in relevant newspapers on May 27, 2002 advising that applications for standing were to be made in writing and received in the Inquiry offices by June 7, 2002. The notice stated that applications for standing were being invited from any person or group who had a substantial and direct interest in the subject matter of the Inquiry or whose participation may be helpful to fulfill the Commission's mandate.

I received five applications for standing. Hearings on the applications took place on Monday, June 24, 2002, in the Council Chambers at the East York Civic Centre, 850 Coxwell Avenue, Toronto.

Before the Hearings, the Commission had published Rules of Procedure applicable to the Inquiry, including a section on standing. Paragraph 8 contains the test for standing. The Rules stated as follows:

STANDING

7. Persons, groups of persons, organizations or corporations ("people") who wish to participate may seek standing before the Inquiry.

8. The Commissioner may grant standing to people who satisfy her that they have a substantial and direct interest in the subject matter of the Inquiry or whose participation may be helpful to the Commission in fulfilling its mandate. The Commissioner will determine on what terms standing may be granted.

9. People who are granted standing are deemed to undertake to follow the Rules of Procedure.

10. People who apply for standing will first be required to provide written submissions explaining why they wish standing. Written submissions are to be received at the Commission's office no later than 4:00 p.m. on Friday, June 7, 2002.

11. People who apply for standing will also be given an opportunity to appear in person before the Commissioner to explain their reasons for requesting standing. Applications for standing will be heard starting on Monday, June 24, 2002.

12. The Commissioner has appointed Commission counsel to represent her and the public interest. Commission counsel will ensure that all matters which bear on the public interest are brought to the attention of the Commissioner. Commission counsel will have standing throughout the Inquiry.

DECISION ON THE APPLICATIONS FOR STANDING

General

I will deal with the applications in the order in which I heard them. The first four applicants applied for full standing; the fifth, for special standing.

I have decided to grant full standing to the City of Toronto, MFP Financial Services Ltd., Lana Viinamae and Wanda Liczyk.

I have decided to grant special standing to the Canadian Union of Public Employees, Local 79.

Full Standing includes:

1. Access to documents collected by the Commission subject to the Rules of Procedure;

2. Advance notice of documents that are proposed to be introduced into evidence;

3. Advance provision of statements of anticipated evidence;

4. A seat at counsel table;

5. The opportunity to suggest witnesses to be called by Commission counsel, failing which an opportunity to apply to me to lead the evidence of a particular witness;

6. The opportunity to cross-examine witnesses on relevant matters; and

7. The opportunity to make closing submissions.

Special Standing includes:

1. Access to documents collected by the Commission subject to the Rules of Procedure;

2. Advance notice of documents that are proposed to be introduced into evidence;

3. Advance provision of statements of anticipated evidence;

4. The opportunity to suggest areas that should be canvassed and areas for examination of certain witnesses by Commission counsel; and

5. The opportunity to make closing submissions.

REASONS FOR GRANTING STANDING

City of Toronto (represented by Ms. Diana Dimmer)

The City of Toronto will be directly and substantially affected by all aspects of the Inquiry and may be helpful to me in fulfilling my mandate. The City called for the Inquiry, and the Terms of Reference for the Inquiry concern issues involving the City. Further, the City is likely to be directly affected by my recommendations.

MFP Financial Services Ltd. (represented by Mr. David C. Moore and Mr. Fraser Berrill)

MFP Financial Services Ltd. will be directly and substantially affected by almost all aspects of the Inquiry. MFP has indicated that it wishes to cooperate fully with the Commission to ensure that all relevant information and evidence is provided to the Inquiry. To that end, it may be helpful to me in fulfilling my mandate. The Terms of Reference focus specifically on the transactions between the City and MFP. MFP's interests may be affected by the evidence lead at the Inquiry and, indeed, by my recommendations at the end of the Inquiry. Both MFP and the City have well-publicized lawsuits pending against each other relating to some of the matters that I have been asked to address in the Terms of Reference.

Lana Viinamae (represented by Mr. Raj Anand)

At the material time, Ms. Viinamae was the Director of the Y2K Project. She has a direct and substantial interest in many aspects of the Inquiry. She has acknowledged that her

actions and knowledge will be in issue, as she was one of the key senior staff at the material times. She was named (by title) in the Terms of Reference. Her participation may be helpful to me in fulfilling my mandate. Ms. Viinamae's interests may be affected by the Inquiry and, possibly, by my recommendations.

Wanda Liczyk (represented by Mr. William D. Anderson)

At the material time, Ms. Liczyk was the Chief Financial Officer and Treasurer of the City of Toronto. She has advised the Commission that she is prepared to make herself available and to cooperate with all our reasonable requests. She has a direct and substantial interest in many aspects of the Inquiry and her participation may be helpful to me in fulfilling my mandate. She is named (by title) in the Terms of Reference. Ms. Liczyk's interests may be affected by the Inquiry, and possibly, by my recommendations.

Canadian Union of Public Employees, Local 79 (represented by Ms. Melissa J. Kronick)

CUPE Local 79 is the bargaining agent for the 20,000 inside employees of the former Corporation of the City of Toronto and the Municipality of Metropolitan Toronto. It represents employees of the City of Toronto who have first-hand knowledge of computers and computer software. It is possible that some of its members will be called as witnesses at the Inquiry. Counsel for CUPE indicated that it did not appear that anyone from Local 79 was being accused of any misconduct.

Local 79 does not ask for full standing, but for special standing. Specifically, Local 79 asks for the type of special standing that was granted to certain applicants in the Walkerton Inquiry. It wishes to be granted a role of monitoring the Inquiry and having the opportunity to suggest areas to Commission counsel that it thinks should be canvassed.

Counsel for the City of Toronto did not take strong objection to special standing for CUPE. Her main concern was that the Inquiry not stray from its Terms of Reference and that the proceedings not be unnecessarily delayed or lengthened as a result of CUPE's participation.

At this early stage, it does not appear that Local 79 has a direct and substantial interest in the Inquiry. I do believe, however, that Local 79 may be in a position to be helpful to the Commission in fulfilling its mandate. Counsel for CUPE asserts that prior to amalgamation, the duties of Local 79 members included analysis, monitoring and acquisition of hardware and software, including ensuring that such acquisitions were financially and technically sound. Further, the experience of Local 79's members may be useful in identifying systemic issues with respect to the City's policies, procedures and practices. Accordingly, Local 79 may have experience to offer that may assist me in making recommendations dealing with good governance and with the public interest. It

has a collective interest that is different from the institutional interests of MFP or the City, and different from the interests of the two individual applicants.

APPLICATIONS FOR FUNDING

Both Lana Viinamae and Wanda Liczyk have asked that, if granted standing, they be able to obtain funding.

Terms of Reference

The Terms of Reference creating this Inquiry are completely silent with respect to the issue of funding.

Rule 34 of our Rules of Procedure indicates as follows: "Counsel will be retained at the expense of the witness and people with standing. The Terms of Reference do not grant the Commissioner jurisdiction to order the City of Toronto to provide funding for legal counsel".

The City takes the position that there is no statutory jurisdiction that allows me to order the City of Toronto to provide funding. Neither section 100 of the *Municipal Act*, R.S.O. 1998, c.M.45 nor the provisions of the *Public Inquiries Act*, R.S.O. 1990, c.P.41 provide jurisdiction to award funding.

While the City takes the position that I have no jurisdiction to order the City to provide funding, it does acknowledge that I can make recommendations to the City.

Position of the City of Toronto at the Standing Hearings

Although the Terms of Reference do not address the issue of funding, I have been informed that City Council has invited me to direct the City to provide limited funding to individual applicants in certain circumstances. In a letter delivered to the Commission offices on Friday, June 21, 2002, Ms. Anna Kinastowski, the City Solicitor, wrote as follows:

> We advise that we have obtained further instructions from City Council on these issues. We are instructed to invite you to direct that funding, limited to $50,000.00 per person on receipt of invoices, be provided by the City of Toronto to individuals who have applied for and are granted standing at the Inquiry...The amount chosen represents partial funding for individuals recognizing they will only be directly involved in testifying for a portion of the hearing part of the Inquiry. It is intended that the funding identified by City Council is only available to individuals who are granted standing and who show that it is fair and reasonable that they be provided with some funding in order to allow them to participate at the Inquiry.

At the Standing Hearings, counsel for the City clarified that it is the City's intention that it be the Commissioner and not the City who should make the decision about whether it is fair and reasonable for an individual to receive funding. Counsel for the City took the further position that I do not have jurisdiction to order the City of Toronto to pay anything in excess of $50,000.00 per person. If I believe that a larger amount should be made available, counsel said I should instead make a recommendation to the City. The recommendation would then be taken back to City Council for its determination. As well, counsel said the City would have no objection if I were to revisit the number at a later stage with counsel appearing before me to address that issue.

The amount of $50,000 has apparently been chosen as a result of the following assumptions:

1. It is not in the public interest to have open-ended funding. Some parameters must be set;
2. It is not in the public interest to provide full indemnification;
3. It should not be necessary for counsel for the individuals who have applied for funding to attend the entire hearing;
4. Counsel for individuals with standing should attend the hearing only on days where the individual will be giving evidence or where evidence is being adduced which would affect their interests;
5. Only one counsel per individual should be required;
6. An assumption was made that there would be forty days of hearing. A further assumption was made that individuals with standing would be required for only half of those hearing days. Additionally, an assumption was made that a counsel fee of $2,300 per day was reasonable. This fee was based on the new Costs Grid from the *Rules of Civil Procedure.*

Lana Viinamae

Ms. Viinamae, through her counsel, Mr. Raj Anand, contended that I do have the jurisdiction to order the City to provide funding of reasonable fees and disbursements. In the alternative, Mr. Anand asserted that I have the jurisdiction to recommend that the City provide such funding, a point conceded by the City.

In seeking funding, Mr. Anand points out that Ms. Viinamae has a clearly ascertainable interest that should be represented at this Inquiry. Her interests cannot be represented by another participant in this Inquiry; indeed, her interests are adverse to that of the City. She does not have sufficient financial resources to enable her to adequately represent her interest at the Inquiry. Currently, she is unemployed, having been removed from her position by the City in February 2002. Without funding, she will be unable to bear the financial burden of being represented at the Inquiry.

Mr. Anand has put forward a proposal for the use of funds. These funds would be used for fees and disbursements of counsel to prepare for and appear at the Inquiry. He proposes to deliver a detailed monthly bill for services rendered, together with a separate bill for disbursements. He is prepared to provide an undertaking, on appropriate terms, to ensure that any funding he receives from the City for Ms. Viinamae would be used only for the Inquiry and not in the pursuit of her lawsuit against the City.

While he is prepared to abide by any reasonable terms with respect to monitoring and checks as to reasonableness, Mr. Anand takes the position that the cap of $50,000 is entirely unrealistic, especially in light of the amount budgeted for the City's counsel ($500,000 - $750,000) and for Commission counsel. It establishes, he suggests, an uneven playing field for one side to get partial indemnity and for the City's counsel to get full indemnity. He concedes that preparation time will be greater for Commission counsel, but like all counsel, he too will be required to review all the material in his preparation for the Inquiry. Further, the theoretical amount of $2300 per day, taken from the new Costs Grid, does not include any time for preparation, something the Costs Grid does in fact take into account.

Wanda Liczyk

Mr. Bill Anderson, on behalf of Wanda Liczyk, adopted many of the arguments made by Mr. Anand, especially with respect to the adequacy of the amount of funding being offered by the City. In his view, the $50,000 amount appears to be a somewhat arbitrary number, which should be revisited once all those with standing have a better appreciation of how much time will actually be required. On behalf of the City, Ms. Dimmer agreed that the amount might be revisited once there is more information.

Mr. Anderson asked that I strongly recommend to the City that Ms. Liczyk be provided reasonable funding, and further that I recommend to the City that I be given the jurisdiction to make funding recommendations. Mr. Anderson has asked that he be funded to properly prepare for the Hearings.

Wanda Liczyk too is an individual, as opposed to an institutional or corporate party. She will not be able to fully participate if she does not receive some funding from the City. At present, without funding, she could not engage in anything other than a limited role.

Mr. Anderson is quite prepared to provide a billable rate and a litigation proposal once the issues have been more clearly delineated and he has had the opportunity to discuss the matter with Commission counsel. He does not intend to squander public money. Indeed, he recognizes that there would necessarily be accountability for the expenditure of public money. He would be prepared to provide a detailed bill.

MFP Financial Services Ltd.

MFP is not asking for funding at this point. It does not take the position that it cannot pay the costs of legal counsel at the Inquiry. However, MFP has put the Commission on

notice that at some future date, it may be asking me to determine that fairness requires funding to be provided to it on the basis that there is no reason why MFP should have to bear any additional costs beyond those costs that it would already have to incur in the civil litigation.

DECISION ON THE APPLICATIONS FOR FUNDING

Is there jurisdiction to order funding?

The Terms of Reference setting up the Inquiry are silent on the issue of funding. I read this silence as meaning that the City does not wish to confer power on the Commissioner to order funding. Accordingly, I have no power deriving from the Terms of Reference to order funding.

Is there power under statute to do so? I think not. The two operative statutes are the *Public Inquiries Act* and section 100 of the *Municipal Act*. Neither of them contains express language dealing with funding of applicants in situations like this. Authority to so order is not expressly conferred. In my view, only through an extraordinarily generous reading of those statutes would one be able to infer that there is power to order a municipality to fund an applicant out of the public purse. I am not prepared to interpret the statutes in that way.

Is there jurisdiction to recommend funding?

The City has acknowledged that a Commissioner may recommend funding. Indeed, they have encouraged me to make recommendations for funding up to $50,000, and have indicated they have no objection to my revisiting that amount at a later stage in the Hearings, especially once we have a firmer estimate on the possible length of the Inquiry.

I think the City's position on a Commissioner's ability to make recommendations with respect to funding is the correct one. A number of other Commissions of Inquiry have ruled on whether or not they can provide recommendations in this regard. For example, in the funding ruling of May 14, 1987, the Commissioners of the *Royal Commission on the Donald Marshall, Jr., Prosecution*, had this to say:

> [W]e do believe that, absent any prohibition, it is implicit in the Terms of Reference of any Royal Commission that it has the capacity, and indeed the obligation, to respond to any party who has been granted standing and who raises an issue of participant funding. To refuse to respond to such a request would be inconsistent with a tradition of Royal Commissions, a tradition which encourages full participation in a pubic and independent forum.
>
> ...

> The Commission, if its findings are to be considered credible, must be perceived to be conducting fair Hearings, and to be doing everything possible to ensure that proper representation is provided for all parties whose participation in all, or some particular part, of the Hearings is required. It would be extremely unfortunate, and inconsistent with the proper administration of justice, if a necessary party were prevented from presenting its full story to the Commission due to lack of financial resources. The public interest is unlikely to be served adequately if only some interested groups and parties are represented, since necessarily that would risk having our findings influenced in favour of those parties who are either better organized or better funded.

Recommendations with respect to funding

Having decided that both Wanda Liczyk and Lana Viinamae have a direct and substantial interest in the Inquiry and having provided them with full standing, I want to ensure that they are afforded a full and ample opportunity to actively participate in the Hearings. Their role, as is that of the others with standing, is important to the success of this Inquiry. In my view, that can best be achieved by their having counsel. To that end, I adopt the comments of Madam Justice Reed in *Jones v Canada (Royal Canadian Mounted Police Public Complaints Commission)*, [1998] F.C.J. No. 1051:

> The consideration that I would think would be crucial for the Commission is whether legal representation of the complainants would improve the quality of the proceedings before it. My observation is that when decision-makers have before them one party who is represented by conscientious, experienced and highly competent counsel...they prefer that the opposite party be on a similar footing. They prefer that one party not be unrepresented. An equality in representation usually makes for easier and better decision-making.

Using the City's early estimates, this Inquiry could last about forty days. This number may indeed be conservative because, in fairness to the City, at the time of making the estimates, it did not know how many people would be seeking standing or how much evidence might be called. The issues are complex. So far, there are over twenty thousand pages of documents. There are parallel civil proceedings between at least one of the individuals and the City.

Both individuals who have applied for funding are former employees of the City. Had they still been employed at the City, they would likely have been entitled to be represented by counsel hired by the City or to have been indemnified if they had hired separate counsel.

The City has put forward a good first position. I am pleased that they appear to be open to a recognition that this is indeed a first position. As the grantor of public funds, it is for the City to make the final decision on what conditions it will attach to the funds. I think it would be best for the City to approach this decision on a principled basis. To assist in that regard, I intend to make recommendations as to the sorts of conditions the City may

wish to consider. While I am aware that the City is not required to accept my recommendations, given the position they have put forward through their counsel, I fully expect that serious consideration will be given to them.

Order to the City of Toronto:

In keeping with City Council's invitation, as contained in Ms. Kinastowski's letter to me of June 21, 2002, I direct that it is fair and reasonable that Ms. Wanda Liczyk and Ms. Lana Viinamae be provided with funding to allow them to participate at the Inquiry. I direct that funding, up to $50,000.00, on receipt of invoices, be payable by the City to each of them.

Recommendations with respect to further funding:

1. Wanda Liczyk and Lana Viinamae should be provided with the funding necessary to fully and actively participate in this Inquiry. Having said that, I make the following recommendations for the City's attention.

2. It is not in the public interest to have open-ended funding. The taxpayers of Toronto have a right to expect a principled approach to the spending of their money.

3. It is not in the public interest for public funds to be provided to individuals for their lawyer of choice at that lawyer's regular hourly rate. This principle has been implicitly recognized in every public inquiry with which I am familiar.

4. The City should establish reasonable hourly rates for senior and junior counsel for purposes of this Inquiry. The City does not have an approved policy for the retention of outside counsel similar to that of the federal or provincial government; therefore, in determining what is "reasonable", the City may wish to consider what it pays for the retention of outside counsel at a Coroner's Inquest, for example. In the alternative, and although the *Rules of Civil Procedure* do not apply to this Inquiry, the City may choose to be guided by the Partial Indemnity Scale of the Costs Grid from the *Rules* which came into effect in Ontario on January 1, 2002.

5. Whatever hourly rate or scale of compensation the City selects, it should include reasonable time for preparation by counsel as well as for attendance at the Hearings.

6. The City should either limit the number of counsel or specify the use that will be made of junior counsel. In that regard, the City should consider efficiency as well as effective representation. Counsel should undertake to make the most efficient use of their resources, using law clerks, students, and junior counsel where it is

more efficient and cost effective to do so. Where preparation time is concerned, counsel should be encouraged to use less expensive resources. Where the Hearings are concerned, it may not be effective or appropriate to have more than one counsel present at a time.

7. In principle, counsel should be entitled to their reasonable and necessary disbursements. However, the City should specify which disbursements or expenses will or will not be paid. For example, it is the obligation of Commission counsel to do a thorough and complete investigation. If one of the individuals wishes to have an issue or person investigated, the Rules of Procedure permit that individual to bring this to the attention of Commission counsel. Accordingly, it may be appropriate for the City to specify that it will not pay for investigators or experts for the parties.

8. Where appropriate, disbursement rates should be set (e.g., for photocopying or laser copies). For specific disbursements, the City may want to consider the amounts put forward in the *Rules of Civil Procedure* or to establish its own reasonable rates.

9. Limits should be set on preparation time. Since Commission counsel will be doing most of the preparation and the calling of witnesses, preparation time for individuals with standing will probably be less than that required for Commission counsel - for example, one hour of preparation for every hour in attendance at the hearing. One exception might be preparation for cross-examination of a major witness.

10. Time spent at the Hearings should be limited to a reasonable number of hours.

11. Attendance of counsel at the Hearings should be limited to attending when the party's interests are engaged. Commission counsel will be providing people with standing access to documents and to witness statements, and will be informing people with standing when certain witnesses are expected to be called. Based on this advance disclosure, people with standing should be able to anticipate when evidence that may affect their interests will be called. Further, given that transcripts of each day's proceedings are available that evening on the Commission's website, the necessity to appear at the Hearings should be limited to a direct engagement of a party's interests. This should not be interpreted as limiting counsel's attendance solely to when the client is testifying.

12. No fees incurred before February 14, 2002 (the date of Council's decision to hold a public inquiry) should be paid.

13. No fees related to any other matters (e.g. civil litigation) should be paid. There will inevitably be some overlap; however, the taxpayers of Toronto should not be expected to pay the legal fees of a party who, in another forum, is adverse in

interest to the City. While the knowledge they obtain will inevitably be of some benefit, this cannot be helped.

14. Accounts should be subject to assessment. If there are disputes about fees, they can be resolved by the appointment of an independent third party.

CONCLUSION

I have granted full standing to the City of Toronto, MFP Financial Services Ltd., Lana Viinamae and Wanda Liczyk. I have granted special standing to the Canadian Union of Public Employees, Local 79.

I have decided that I do not have the jurisdiction to order the City to provide funding to people with standing; however, I have directed that the City of Toronto provide up to $50,000.00 funding to Wanda Liczyk and Lana Viinamae, on receipt of invoices. I have also decided that I do have the jurisdiction to make recommendations with respect to funding, and I have done so.

To the extent possible, I expect counsel for people with standing to cooperate with each other and with Commission counsel.

I look forward to working with those who have been granted standing.

Applications for Standing & Funding heard on: June 24, 2002
Decision Released on: July 3, 2002

Ruling on Standing and Funding

Appendix E (ii)

THE WALKERTON INQUIRY

LA COMMISSION
D'ENQUÊTE WALKERTON

Ruling on Standing and Funding

I. The Inquiry Process

I have been appointed by Order in Council 1170/2000 to conduct an inquiry into the following matters:

(a) the circumstances which caused hundreds of people in the Walkerton area to become ill, and several of them to die in May and June 2000, at or around the same time as *Escherichia coli* bacteria were found to be present in the town's water supply;

(b) the cause of these events including the effect, if any, of government policies, procedures and practices; and

(c) any other relevant matters that the commission considers necessary to ensure the safety of Ontario's drinking water.

I will be conducting the Inquiry in two parts. Part I will focus on the matters set out in paragraphs (a) and (b) of the Order in Council. Part I will be further divided into two sub-parts: Part IA and Part IB. Part IA will focus on the circumstances and causes of the *E. coli* contamination in the Walkerton water supply, other than those causes set out in paragraph (b) of the Order in Council. Part IB will address the effect, if any, of government policies, procedures and practices on the cause of these events.

I recognize that there will be some overlap in the issues to be considered in Parts IA and IB. Nevertheless, I consider the division of the Inquiry into these parts important for making my decisions on standing and funding. I will be

flexible in allowing participation where the lines drawn would deny me the assistance which I consider important to a grant of standing.

In Part II of the Inquiry, I will be addressing the matters set out in paragraph (c) of the Order in Council.

A. Part I Process

Part I will be conducted by way of public hearings to be held in Walkerton, at which witnesses will give evidence under oath or affirmation, and at which the witnesses will be examined and cross-examined. Parties with standing will make closing submissions at the end of Part I.

The Rules of Procedure and Practice which have been developed for Part I have been published on the Commission website at www.walkertoninquiry.com. These have been modelled on the rules used in other public inquiries. I thought that it would be useful to publish these Rules before the hearings on standing. However, if any party granted standing wishes to make submissions on the Rules, it should do so in writing by September 22, 2000. Any changes will be published on the Commission website. Parties granted standing should visit our website regularly for information on practical details and scheduling.

B. Part II Process

Because of the policy nature of the issues, Part II will not proceed by formal evidentiary hearings. Instead, in order to make its work accessible and provide an opportunity for public participation, Part II will proceed in three phases. These three phases encompass Commission Papers, Public Submissions, and Public Meetings as discussed below. They will proceed concurrently with Part I.

(i) *Commission Papers*

In the first phase, the Commission will arrange for the preparation of papers (the "Commission Papers") from recognized experts on a broad range of relevant topics. These Commission Papers will, among other things, describe current practices in Ontario, describe current practices in other jurisdictions, identify difficulties and review alternative solutions. A draft list of study topics has been published on the Commission website.

I have established a Research Advisory Panel (the "Panel"). The Panel will assist me in identifying the subject matter of the Commission Papers and who should be retained to prepare them. The Panel, under my direction, will also monitor the progress of Commission Papers and provide advice and direction to the various authors as needed. The Commission will set and publish a deadline by which all Commission Papers must be completed and the Papers will thereafter be published, in draft, on the Commission website.

(ii) *Public Submissions*

In the second phase, the Commission will invite any person or group with an interest in the subject matter of Part II of the Inquiry to make submissions in writing (the "Public Submissions") to the Commission about any matter relevant to Part II, including the matters reviewed in the Commission Papers. The Commission will set and publish a deadline by which all Public Submissions must be received. The Public Submissions will be made available for public review.

(iii) *Public Meetings*

In the final phase of Part II, I will convene a number of public meetings relating to the major topics comprising Part II of the Inquiry. The format of the public meetings will be tailored to the topics discussed and may vary among meetings.

I will preside over the public meetings. They may also include participation by the relevant authors of Commission Papers, representatives of those who have been granted standing in Part II and who in my view will make a contribution to the meeting, and selected members of the Research Advisory Panel. Based upon the Public Submissions received, I may invite other persons or groups whom I conclude would make a useful contribution to the discussions.

II. Standing and Funding

The Commission published a Notice of Hearing which invited interested parties to apply for standing. I received 47 applications for standing, some of them involving multiple individuals or organizations. The applications were heard in Walkerton from September 5 to 7, 2000.

A. Part I Standing

There are two types of standing, full and special, in Part I. Both types may be specifically limited to those portions of the Inquiry that are relevant to the interests of the party which formed the basis for my decision to grant standing.

(i) *Full Standing*

I have granted full standing in Part I to persons or groups who have demonstrated that they have a substantial and direct interest in the subject matter of the Inquiry pursuant to section 5(1) of the *Public Inquiries Act*, R.S.O. 1990, c.P.41 (the "Act"). In some cases I have also granted full standing, on a discretionary basis, even though the party does not have an interest under section 5(1). I have exercised this discretion on the basis of my assessment of the contribution that such a party will make to the Inquiry. In either case, I have limited full standing to those portions of the Inquiry that are relevant to the party's interests. Parties will be advised by Commission counsel when issues relevant to their interests will arise. Full standing will include:

1. access to documents collected by the Commission subject to the Rules of Procedure and Practice;

2. advance notice of documents which are proposed to be introduced into evidence;

3. advance provision of statements of anticipated evidence;

4. a seat at counsel table;

5. the opportunity to suggest witnesses to be called by Commission counsel, failing which an opportunity to apply to me to lead the evidence of a particular witness;

6. the opportunity to cross-examine witnesses on matters relevant to the basis upon which standing was granted;

7. the opportunity to review transcripts at Commission offices (a copy of the transcript may be purchased from the court reporter);

8. the opportunity to make closing submissions; and

9. the opportunity to apply for funding to participate in Part I.

(ii) *Special Standing*

I have granted special standing in Part IA to some parties who have been granted full standing in Part IB. Even though these applicants do not have an interest in Part IA under s.5(1) of the Act, I consider that their involvement through special standing will be of assistance to me. Special standing will include:

1. the matters listed under numbers 1, 2, 3, 5, 7, 8 and 9 above; and

2. the opportunity to suggest areas for examination of a certain witness by Commission counsel, failing which an opportunity to request leave to examine the witness on such areas.

B. Part II Standing

I have granted standing to persons or groups who in my view are sufficiently affected by Part II of the Inquiry or who represent clearly ascertainable interests and perspectives that I consider ought to be separately represented before the Inquiry. Standing for Part II of the Inquiry will involve:

1. access to documents collected by the Commission which relate to Part II subject to the Rules of Procedure and Practice;

2. the opportunity to make Public Submissions on any matter relevant to the Commission's mandate in Part II, including papers which respond to Commission Papers;

3. the opportunity to participate directly in one or more public meetings where the Commissioner is of the view that such participation would make a contribution to the subject matter of the meeting; and

4. the opportunity to apply for funding to participate in Part II.

C. Principles

(i) *Standing*

Before separately addressing each of the applications, I think it is useful to summarize the general principles that have guided my decisions on standing and funding.

- It is essential that the Inquiry be full and complete and that I consider all relevant information and a variety of perspectives on the issues raised in the Order in Council.

- Commission counsel will assist me throughout the Inquiry. They are to ensure the orderly conduct of the Inquiry and have standing throughout. Commission counsel have the primary responsibility for representing the public interest, including the responsibility to ensure that all interests that bear on the public interest are brought to my attention. Commission counsel do not represent any particular interest or point of view. Their role is not adversarial or partisan.

- Applicants are granted standing only for those portions of the Inquiry that are relevant to their particular interest or perspective.

- Parties may be granted special standing in Part IA, rather than full standing, in order to make the work of the Commission accessible to parties who do not have a substantial and direct interest in the subject matter of Part IA, but who nevertheless represent interests and perspectives that I consider to be helpful to my mandate. Those parties will be able to participate in the Inquiry in a meaningful way through the provision of documents, the opportunity to suggest evidence and the opportunity to make closing submissions.

- In order to avoid repetition and unnecessary delay, I have grouped certain applicants into coalitions, as discussed below. I have done this in situations where the applicants have a similar interest or perspective, where there is no apparent conflict of interest and where I am satisfied that the relevant interest or perspective will be fully and fairly represented by a single grant of standing to the parties as a group.

- In the event of a change in circumstances affecting a grant of standing, a party whose participation has been limited to a particular portion of the

Inquiry, who was granted special standing or who has been grouped into a single grant of standing, may apply for a change in its standing.

- Witnesses in Part I who are not represented by counsel for parties with standing are entitled to have their own counsel present while they testify. The witness may be represented by counsel for the purposes of his or her testimony and to make any objections thought appropriate.

I mentioned the formation of coalitions as one of the principles that has guided my decisions on standing. There are a large number of applicants with an interest or perspective that I consider important in Part I. Many of these share common interests and perspectives. In order to make Part I manageable, I have formed coalitions comprised of applicants whose interests and perspective coincide and who do not have a conflict of interest that would render a coalition unworkable.

In directing that applicants participate through a coalition I recognize that circumstances may develop that result in a coalition becoming unsuitable for a member of a coalition on one or more issues. With this in mind, I have provided for flexibility, allowing members to request separate standing should such a situation arise.

In my view the formation of flexible coalitions achieves a fair balance between the desire to have important interests and perspectives represented and the need to have an inquiry that is manageable. I am asking that the counsel and principals of applicants who have been joined in a coalition make all efforts to work within the coalition. Cooperation and reasonableness are essential. Even with coalitions, the hearings in some stages of Part I will be complex and may be protracted. In my view, the alternative of separate standing for everyone is simply not acceptable.

(ii) *Funding*

The Order in Council provides that I may make recommendations to the Attorney General for funding for parties granted standing. To qualify for a funding recommendation, a party must be able to demonstrate that it would not be able to participate in the Inquiry without such funding. In addition, the party must have a satisfactory proposal as to the use it intends to make of the funds and how it will account for the funds.

In addition, I have considered the following:

- the nature of the party's interest and proposed involvement in the Inquiry;
- whether the party has an established record of concern for and a demonstrated commitment to the interest it seeks to represent;
- whether the party has special experience or expertise with respect to the Commission's mandate; and
- whether the party can reasonably be included in a group with others of similar interests.

At this time, I am not recommending payment for experts to be called by those with standing in Part I. The primary responsibility for calling experts lies with Commission counsel who will be open to suggestions from parties as to the types and names of experts to be called. Experts called by Commission counsel will be paid by the Commission.

The guidelines issued by the Attorney General for funding include the payment of counsel fees and disbursements. Disbursements for experts to assist counsel in preparing for cross-examination are not included in the guidelines.

I have decided not to make any recommendations for Part II funding at the present time although I anticipate that I will be doing so in the months to come. The Commission has published a list of proposed Commission Papers and welcomes suggestions for additions or changes. Parties with standing may suggest the names of experts to prepare papers, may offer to prepare some of the Commission Papers or may independently have papers prepared on subjects relevant to the Commission's mandate in Part II.

I anticipate that when the Commission Papers are published, parties with standing will respond with comments or criticism. At that time, I will consider applications for funding for the preparation of papers in response to Commission Papers and for attendance at public meetings. I will also consider applications for funding for counsel fees for Part II at that time. I would observe now, however, that given the nature of the Part II process, I do not foresee significant funding for legal fees.

III. Applications for Standing

I turn now to the individual applications and I address them generally in the order they were heard, although in some areas I have generally grouped the applicants according to their interests and perspectives.

A. Walkerton Groups and Residents

There are four applicants who seek to represent the interests and perspectives of the residents of the Town of Walkerton. Each also asks that I make a recommendation for funding.

The residents of Walkerton were seriously affected by the water contamination and have a significant interest in the subject matter of Part I of the Inquiry. Given the tragedy that the residents have suffered, their interests must be represented. I have been told that many residents consider that they have different interests and perspectives than the Town and the Walkerton Public Utilities Commission (the "PUC").

All four applicants have one important interest in common. In one form or another they seek to bring before the Inquiry the nature, scope and type of impact – physical, personal and economic – experienced by the residents of the Town. The impact of the contamination is an important part of the work of the Inquiry. In recognition of this, I held informal hearings in July during which I heard directly from over 50 individuals and groups about the impact of this tragedy on their lives. I anticipate that, in Part I, Commission counsel will be calling some evidence, including expert evidence, dealing with the physical and medical problems experienced by those who were affected by the contaminated water. In Part II, one of the proposed papers will examine the economic and other long term effects of the contamination.

The residents of Walkerton also have a significant interest in the circumstances that led to the contamination and the various causes that may have contributed to it. I expect that the evidence that relates to the issues of what happened and why will form a major part of the evidence that will be called in Part I.

I have asked applicants with similar interests or perspectives to attempt to form coalitions for purposes of standing and funding. I am satisfied from the

written material and the oral submissions that there is a sufficient difference in the perspective of two of the groups who have applied to represent the residents that requiring them to be represented by a single coalition would be unrealistic. The Walkerton residents have the greatest interest in Part I. Their voices must be heard even if those voices deliver somewhat different messages. As a result, I am prepared to make more than one grant of standing to represent the interests and perspectives of the residents.

The Concerned Walkerton Citizens (the "CWC") is a group comprised of over 500 residents of Walkerton and the immediate area. It was formed specifically in response to the events of May 2000. It is represented by the Canadian Environmental Law Association ("CELA") and seeks standing in Parts I and II and funding for counsel and experts in both. The CWC represents a large number of residents and importantly has demonstrated a serious, genuine and continuing concern about the issues raised by the Inquiry. I am satisfied that the CWC should be granted full standing for Parts I and II.

The Walkerton Community Foundation also seeks standing and funding for Parts I and II. This is a broadly based group comprised of the Walkerton Rotary Club, the Saugeen Masonic Lodge, the Knights of Columbus, the Knights of Columbus Auxiliary, the St. John Ambulance Society, the Walkerton Lions Club, the Walkerton Optimists Club, the Royal Canadian Legion Branch 102 and a "Community Members" group. The Foundation was also formed in response to the contamination. It is incorporated and registered as a charitable foundation. It appears that the Foundation has a different perspective than the CWC on the events that occurred in May of this year and in particular on the possible causes of the contamination of the water supply. The member organizations of the Foundation have contributed an enormous amount of time and service to the Walkerton community both before and after the tragedy. I am satisfied that the Foundation should also be granted full standing for Parts I and II.

The Walkerton District Chamber of Commerce has applied for standing in Parts I and II, specifically to examine "the existing communication mechanism for notifying of a boil water advisory and the economic implications of the absence of potable water." I am satisfied that insofar as Part I is concerned the interests of the Chamber are congruent with those of the Foundation and, in my view, the interests of the Chamber can be fully and fairly represented within the standing granted to the Foundation. In this regard, I appreciate the efforts that the Foundation and the Chamber have made to join with one

another and encourage them to continue those efforts. I am not going to grant standing to the Chamber in Part I. However, if there is difficulty in arriving at a satisfactory arrangement between the two groups I may be spoken to. As to Part II, I see no need to join the two. I grant the Chamber separate standing in Part II for issues relating to the economic impact of the contamination upon the Walkerton community and issues relating to the communication of similar events by public authorities generally.

Finally, the law firm of Siskind Cromarty seeks standing in Part I for injured victims comprised of three separate groups:

- The putative plaintiffs in a proposed class action;
- parents of seriously injured children; and
- 200 individual residents of Walkerton who suffered losses as a result of the tragedy.

In its application the "Injured Victims" group says "… it is distinguishable from groups such as the Concerned Walkerton Citizen's group which represents itself as a non-partisan group seeking intervenor status at the Inquiry." The group states further that "[t]he Injured Victims of the contamination, while clearly partisan and motivated by personal interests, are, nonetheless, a critical voice to be represented at Part I of the Inquiry."

The objective of the group is to ensure that the perspective of the injured victim is brought before the Inquiry. What defines this group is their membership in a proposed class action or the fact that they have retained the same lawyers to represent them. Neither of these characteristics gives them an interest in the Inquiry. The interest that entitles them to standing arises from the fact that they are residents of Walkerton and, like many others, have suffered injury and loss from the contamination.

As I have said above, the perspective of the residents and those who have suffered must be heard. However, it is not feasible for every resident, or indeed every group of residents, who has suffered to be represented separately. Lines must be drawn. I am satisfied that the interests of the members of this group in the issues of how and why the contamination occurred can and should be represented by either of the two parties to which I have granted standing. The CWC and the Foundation have shown a genuine and ongoing interest in the issues

raised by the Inquiry and between them, I believe, will fully and fairly represent the interests of all the residents.

While the impact of the contamination will undoubtedly be examined, it will not be a major focus of Part I. The relief sought by the Injured Victims in the lawsuit is something that will be addressed in a separate proceeding and involves issues that go beyond the mandate of this Inquiry. That said, I am nonetheless of the view that the Injured Victim group should be granted standing in Part IA, limited to issues relating to the impact of the contamination upon them.

In reaching this conclusion I expect that Commission counsel and counsel representing the CWC and the Foundation will be open to receiving suggestions and ideas from members of this group to ensure that their views are fully and adequately represented in those parts of the Inquiry in which they have been granted standing. If there is difficulty in this regard I may be spoken to.

I turn next to the question of funding for the residents of Walkerton. Paragraph 5 of the Order in Council provides that I may make recommendations for funding where in my view, "the party would not otherwise be able to participate in the Inquiry without such funding." CELA has agreed to represent the CWC. Counsel provided by CELA will be paid through the Ontario Legal Aid Plan. CELA will be able to act for the CWC without funding from the Attorney General. As a result, the CWC has not met the requirements of the Order in Council and I am not authorized to make a recommendation for funding of a counsel fee. However, the funding CELA receives from Legal Aid does not include disbursements. I will therefore recommend the payment of disbursements by the Attorney General. CELA has requested payment of fees for a case worker and a community worker. I understand that the Attorney General's guidelines do not include such expenses. In the circumstances, I will recommend the payment of disbursements for two counsel for CWC.

As to the request of the CWC for the payment of fees for experts to be called in Part I, I have suggested that CWC propose the names of the experts that it wishes to be called in Part I to Commission counsel.

I have granted standing to the CWC in Part II. It remains open to the CWC to make application for Part II funding.

I am satisfied that the Foundation has met all criteria for funding. I propose to recommend funding for one counsel for Part I for the Foundation.

I do not anticipate that the involvement of the "Injured Victims" will be extensive. Given the nature of the ties that bind this group I do not think it appropriate to recommend funding.

B. Government of Ontario

In light of its clear interest in the issues raised in the Order in Council, I am satisfied that the Government of Ontario meets the criteria for standing for both Parts I and II.

C. Farming and Agricultural Groups

The Commission received eight applications for standing from groups whose focus is on issues related to farming and agriculture. These groups have in common the fact that they are all interested in the potential impact of the Inquiry on issues relating to farming and agriculture. This interest encompasses an environmental perspective. Each also brings with it a different and potentially unique perspective. The groups are:

1. the Christian Farmers Federation, an organization with more than 4,400 family farm members that approaches agricultural issues from the perspective of "the Christian value system that motivates [its] members";

2. the Dairy Farmers Federation of Ontario, which represents approximately 6,500 dairy farmers in the Province;

3. the Ontario Cattle Feeders Association, which represents feedlot operators who feed approximately 55 percent of the fed cattle in Ontario;

4. the Ontario Cattlemen's Association, which represents 25,000 beef producers across Ontario;

5. the Ontario Farm Animal Council, a coalition of groups within the livestock and processing industry, whose mandate is to provide communication and education links between livestock producers, processors and the consumer;

6. the Ontario Federation of Agriculture, which is made up of 51 county and district federations representing 43,000 farm family members across Ontario;

7. the Ontario Pork Producers Marketing Board, which represents 5,100 pork producers in the Province; and

8. the Ontario Farm Environmental Coalition ("OFEC"), which is a coalition of agricultural groups (including many of the organizations mentioned above) formed principally to advance an agricultural and farming position on environmental issues.

All eight groups have agreed to be represented by OFEC should standing be granted to them in Part I of the Inquiry. However, each has applied for separate standing in relation to Part II.

I have no difficulty in concluding that these groups represent a clearly ascertainable interest and perspective in relation to farming and agricultural issues, which I consider important to my mandate in Part I. I am mindful of the fact that no individual or group which represents farming and agriculture and has a direct interest in Part I has applied for standing. As a result, if I do not grant standing to OFEC, the agricultural and farming perspective would not be directly represented. In these circumstances, I exercise my discretion and grant standing to OFEC for Part I in relation to farming and agricultural issues.

I do not have sufficient information on the financial position of OFEC and its members to determine whether they qualify for funding. If OFEC wishes to pursue funding, it should submit the necessary information to me by September 22.

In relation to Part II it is clear to me that the eight groups, taken together, have the type of interest in this part of the Inquiry which merits standing. I am told that the different perspectives which they represent may cause them to take different positions on the broader policy issues which will arise in Part II and that there may be issues in which some but not all groups wish to participate. I accept that there is a greater possibility for such divergence in Part II and I am prepared to grant standing separate to the extent necessary to accommodate their different perspectives.

As noted at the outset, I am not making any decisions with respect to funding in Part II of the Inquiry at this time.

D. Members of CUPE Local 255

CUPE Local 255 seeks standing on behalf of its members Allan Buckle, Robert McKay, Tim Hawkins, Steve Lorley, Vivian Slater and Ellen Dentinger. These are seven of the eight fulltime unionized employees of the Walkerton PUC. Mr. Frank Koebel, who is a member of CUPE Local 255, has been granted separate standing.

The Walkerton PUC bargaining unit includes employees whose duties involve both water and hydro-electric power services. Allan Buckle is the primary employee involved on the water side of the PUC and has been actively involved in maintenance and monitoring of the PUC's wells as well as water sample testing. Robert McKay, Tim Hawkins and Steve Lorley are primarily employed as hydro linespersons but from time to time have assisted employees working on the "water side" of the PUC. The other two applicants, Vivian Slater and Ellen Dentinger, are employed as clerical staff by the PUC. Their duties include sending water samples to the private sector laboratories for testing and forwarding telephone messages and faxes from the laboratories.

In my view, only Allan Buckle, who by virtue of the performance of his duties was intimately involved in the water side at the relevant time, should be granted standing personally. I grant standing to Mr. Buckle for Part I insofar as his personal interests are affected. I also recommend funding for one counsel, for Mr. Buckle, together with reasonable disbursements, but only for the purposes of representing Mr. Buckle's personal interests. If the other individual applicants are called as witnesses, they will be entitled to counsel and limited standing in accordance with Rule 17 of the Rules of Procedure and Practice. If they choose, the bargaining unit members may be represented by counsel for CUPE Local 255 at that time.

E. The Bargaining Agents

The Commission received applications for Part I standing from CUPE Local 255, and from two provincial bargaining agents, OPSEU and PEGO. I discuss these applications together, as I am directing a coalition be formed.

CUPE Local 255 seeks standing in Part I on its own behalf, as a separate institutional entity representing the collective interests of unionized employees of the Walkerton PUC. CUPE Local 255's written submissions state that "the Local represents the collective interests of the employees in pursuing the proper, efficient and safe operation of the workplace and in ensuring that the employees are properly trained and equipped for their jobs."

The Ontario Public Service Employees' Union ("OPSEU") has applied for full standing for Parts I and II of the Inquiry. OPSEU submits that it would bring three major interests or perspectives to the Inquiry, as it is:

(a) the trade union representative for approximately 2000 employees particularly concerned with water quality and delivery issues, including Ministry of the Environment ("MOE") staff, Ontario Clean Water Agency ("OCWA") staff, employees dealing with agricultural issues, and technical and professional non-medical staff at local Health Units;

(b) the trade union for most provincial government and public sector employees, who have concerns such as funding, downsizing, alternative service delivery and privatization; and

(c) the representative of individual employees involved directly or indirectly in the events at Walkerton, including workers who work or reside in Walkerton.

Four employees of the MOE Owen Sound office for whom OPSEU acts as bargaining agent have retained other counsel. OPSEU has offered to provide legal representation to other OPSEU members at the Part I hearings, should this be necessary.

The Professional Engineers and Architects of the Ontario Public Service (PEGO) has applied for standing for Parts I and II of this Inquiry. PEGO represents those employed in the public service as engineers, including those employed by OCWA, the Ministry of the Environment and other directly involved government departments. PEGO's counsel, Mr. Fellows, noted that engineers in the public service are involved in all aspects of water regulation. They may be responsible for approval of water treatment and distribution facilities, the setting of standards, the imposition of conditions on the operation of water

facilities, and policy recommendations and advice to government with respect to the operation of water facilities. Mr. Fellows stated that the issue of how the Province regulates water treatment and distribution facilities will affect the role of engineers in the public service.

There is a significant congruence of interests among CUPE Local 255, OPSEU and PEGO in Part I of the Inquiry. I believe that all three bargaining agents will assist the Commission by providing valuable perspectives with respect to the operational aspects of government policies, procedures and practices. Further, I consider the experience and expertise of the union members to be valuable in the identification of systemic issues and solutions in this area. Given the congruence of interests, the valuable perspectives which the bargaining agents will bring, and the lack of conflict except as discussed below, I make a single grant of standing in Part I to CUPE Local 255, OPSEU and PEGO. In light of OPSEU's broad representation of provincial government employees, it may be appropriate for OPSEU to take the lead in this coalition. Other than potentially providing legal representation for their members who may be called as witnesses in Part IA, I do not find an interest which warrants full standing and therefore grant special standing to OPSEU in Part IA. I grant the Bargaining Agents Coalition full standing in Part IB. The grants of standing to this coalition in both Part IA and IB are limited to those issues affecting municipal, public sector and provincial government employees.

Counsel for PEGO identified a potential conflict with both CUPE and OPSEU, bargaining agents whose members are primarily involved in front-line field work, including testing and inspections. PEGO notes the potential difference that would arise with respect to issues of decredentialization. PEGO will be addressing issues regarding functions relating to water treatment and distribution requiring the professional judgment of engineers. In this regard alone, I grant separate standing to PEGO in Part IB; otherwise their participation is to be through the Bargaining Agent Coalition. I also recognize that certain issues may result in a different perspective for the Walkerton PUC employees as opposed to provincial employees. Should this situation arise, I am prepared to grant separate standing to Local 255 in Part IB on those issues only. If other conflicts arise, then any of the three coalition partners may apply for separate standing on an issue-specific basis in Part IB.

I grant separate standing to both PEGO and OPSEU in Part II.

PEGO has also requested funding. It is not a national body, but a small organization with 410 working members. The contingency fund referred to in the annual statements filed by PEGO is in fact PEGO's strike fund. In light of the relatively small number of members employed and the lack of a national organization, I recommend funding for PEGO for one counsel limited to Part IB issues involving decredentialization only. I defer my decision on Part II funding.

OPSEU made no request for funding and I make no recommendation in this regard.

I defer CUPE Local 255's request for funding for Part IB in the hope that its national union will see fit to support the Local. I note that if CUPE Local 255 represents its member Allan Buckle, Local 255 will receive funding for its representation of the interests of Mr. Buckle. In the event that Local 255 is granted separate standing for Part IB, it may apply to me for a recommendation for separate funding with respect to those limited interests at that time.

F. CUPE National

CUPE National has applied for standing in Part II of the Inquiry. In Ontario, CUPE represents over 40,000 municipal employees. Within many of these municipal locals, CUPE members operate and maintain water and wastewater facilities. In 1997 CUPE National identified the issue of safe, clean public water as a primary focus for its activities. It has established a "Water Watch" campaign, the objective of which is to halt the privatization of municipal water services, to identify threats to water quality, to promote access to safe water for all local residents, and to promote water conservation. I am of the view that CUPE National is in a position to assist the Commission in Part II, in light of its expertise in water and wastewater services, privatization and employment relations, as well as the front-line expertise of its members in water delivery in Ontario. I grant CUPE National standing for Part II of the Inquiry.

G. Dr. McQuigge, Mr. Patterson and Ms. Sellars

Dr. Murray McQuigge, David Patterson and Mary Sellars have applied for standing collectively in Parts I and II. Dr. McQuigge is the Medical Officer of Health for the Bruce Grey Owen Sound Health Unit (the "Health Unit"). David Patterson is the Assistant Director of Health Protection for the Health

Unit, and a public health inspector under the *Health Protection and Promotion Act*, R.S.O. 1990, c.H.7 ("HPPA"). Mary Sellars is Dr. McQuigge's Executive Assistant. All three were involved in responding to the water contamination in Walkerton, the boil water advisory issued by the Medical Officer of Health, and the subsequent remediation efforts. Mr. Cherniak, co-counsel for the three applicants, submits that their interest is in determining the cause of the outbreak, the contributing factors and the solution to the problem. Mr. Cherniak also submits that the three applicants are substantially and directly affected, since they were in the "eye of the storm" as the contamination and its effects spread through the area served by the Health Unit.

Mr. Cherniak commented on the concurrent application of the Health Unit, which is a Local Board of Health under the HPPA and the employer of these three applicants. He noted that, pursuant to the statutory provisions of the HPPA, the role of the Medical Officer of Health is clearly separate and different from that of the Health Unit. Further, he said that Dr. McQuigge had duties placed upon him by the Ontario Drinking Water Objectives of the MOE that were not shared by the Health Unit.

Given the extensive personal involvement of Dr. McQuigge and the importance of his role as Medical Officer of Health in relation to the Walkerton contamination, I grant full standing to Dr. McQuigge on public health issues in Part I. I do not find it necessary to grant standing to Mr. Patterson or Ms. Sellars. I am also prepared to grant Dr. McQuigge standing in Part II although I would expect that his participation might usefully be joined with the Health Unit and ALPHA whose applications I discuss below. Dr. McQuigge, Mr. Patterson and Ms. Sellars have not sought funding and accordingly I make no recommendation in this regard.

H. Bruce Grey Owen Sound Health Unit

The Health Unit has separately applied for standing in Parts I and II of the Inquiry. Mr. Middlebro', counsel for the Health Unit, noted that it is named as a defendant in a $1.3 billion civil suit relating to the Walkerton contamination. Mr. Middlebro' stated that, under the HPPA, the Health Unit is not able to direct the nature of the Medical Officer of Health's opinion, but remains responsible for his actions. Mr. Middlebro' quite properly conceded that at this point in time there is no conflict between the interests of the Health Unit and those of Dr. McQuigge, Mr. Patterson and Ms. Sellars.

I do not find that the Health Unit has a substantial and direct interest in Part I within the meaning of s.5(1) of the *Public Inquiries Act*. Dr. McQuigge has been granted standing in Part IA. I expect that the Health Unit will have the same interest and perspective in Part IA issues as Dr. McQuigge. I am not prepared to grant the Health Unit standing in Part IA. If a conflict does arise, the Health Unit may reapply.

I grant the Health Unit standing in Part IB with respect to public health issues. I find that the Health Unit shares the same interest in Part IB as the Association of Local Public Health Agencies ("ALPHA"), whose application I address below. I grant these two applicants a single standing in Part IB limited to public health issues. These two applicants will probably share the same interest on many issues with Dr. McQuigge. Where there are such common interests, only one cross-examination may be conducted. I also grant standing to the Health Unit in Part II but would encourage it to participate jointly with Dr. McQuigge and ALPHA. No application was made for funding by the Health Unit and I make no recommendation in that regard.

I. Association of Local Public Health Agencies

The Association of Local Public Health Agencies has applied for standing and funding in respect of both Parts I and II. ALPHA is a not-for-profit organization of professional public health care providers, whose primary membership consists of Medical Officers of Health and the 37 Boards of Health of Ontario. I note that the Health Unit is a member of ALPHA, and Dr. McQuigge has served as Treasurer of ALPHA. There are also seven affiliate member associations consisting of the Association of Supervisors of Public Health Inspectors of Ontario, Association of Ontario Public Health Business Administrators, Association of Public Health Epidemiologists of Ontario, Health Promotion Ontario, Ontario Association of Public Health Dentistry, Ontario Society of Nutrition Professionals in Public Health, and Public Health Nursing Management. ALPHA's counsel noted that a primary contribution of ALPHA would be to assist the Commission in knowing expected procedures and practice in safe water delivery and protection.

I grant standing to ALPHA in Part IB jointly with the Health Unit, as described above. Given that the Health Unit has not applied for funding, I do not propose to provide funding for this group in Part I. I grant ALPHA's application for

standing for Part II of the Inquiry, and will defer my decision as to funding for that part.

J. Ontario New Democratic Party

A group comprised of the Ontario New Democratic Party (the "ONDP"), the New Democratic Party Caucus of the Ontario Legislature, Howard Hampton, Leader of the Ontario New Democratic Party and Leader of the New Democratic Party Caucus, and Bud Wildman, former Minister of the Environment and Energy (the "ONDP Group") has applied for standing and funding in Parts I and II.

I recognize that the ONDP Group has demonstrated a serious and long-standing concern for environmental issues. However, I am not satisfied that it meets the criteria for standing set out in the *Public Inquiries Act* nor, for the reasons set out below, do I consider that this is a case in which I should exercise my discretion to grant standing.

In my view, the ONDP Group does not have a substantial and direct interest in the subject matter of the Inquiry as that term is used in s.5(1) of the Act. I do not anticipate that the interests of the members of this group will be substantially affected by findings or recommendations that may be made in my report.

Section 5(2) of the Act provides that no findings of misconduct can be made against any person in a report following a public inquiry unless that person has been provided reasonable notice of the alleged misconduct and is given an opportunity to participate in the inquiry. On the basis of information now available, Commission counsel do not intend to provide a s.5(2) notice to the ONDP Group.

This applicant makes two submissions in arguing that it has an interest that may be affected by findings to be made in Part I. First, it says that the Premier of Ontario has called the policies, practices and procedures of the pre-1995 ONDP government into question. In response to a question from the press, the Premier apparently said that certain changes in water testing and reporting standards had been made by the previous ONDP government. The ONDP Group suggests that this comment carried with it the innuendo that these

changes contributed to what happened in Walkerton. The ONDP Group submits that it should be afforded an opportunity to participate in the Inquiry in order to deal with this allegation. I do not think that the Premier's comment gives rise to the type of interest that warrants standing under s.5 of the Act. The comment seems to have been made as part of the political process in which one politician speaks on an issue and on which an opposing politician may respond in the same forum. It is clearly open to the members of this group to respond to this comment in a forum other than this Inquiry.

I am aware that a political party was granted standing in the Houlden Inquiry. In that inquiry, however, the mandate of the Commissioner included an allegation of wrongdoing involving the political party which was granted standing. The present Inquiry is different. There is no allegation of wrongdoing against the ONDP Group in my mandate. If there are allegations of misconduct, improper behaviour, or the like directed at this group during the Inquiry, I will entertain an application for standing to answer such allegations.

The second ground upon which the ONDP Group claims an interest for which it ought to be granted standing is that the ONDP was vocal in calling for the government to establish this Inquiry. In my view, the fact that a political party or its members call for the government to establish a public inquiry, without more, does not create an interest within the meaning of s.5(1) of the Act.

Finally, I do not think that this is a case in which I should exercise my discretion to grant standing. I say this for two reasons. First, parties who have been granted standing will bring a sufficiently broad range of perspectives to enable me to fulfil my mandate. In granting standing, I have attempted to ensure that all perspectives, and in particular those such as the ones held by this applicant, which question the effect of government policies, practices and procedures, are fully represented. It is essential that there be a thorough examination of these factors in relation to the events in Walkerton. I am satisfied that this will occur.

The second reason why I am not inclined to grant this group standing is that it is, in my view, generally undesirable to use public inquiries to have political parties advance their positions or policies. There are other more appropriate arenas for them to do so. Mr. Jacobs, counsel for the ONDP Group, recognized this concern and assured me that this was not the motivation underlying the application. I accept Mr. Jacobs' assurance without reservation. Nevertheless, I think there is a danger that this applicant's participation could be viewed

by the public as politicizing the Inquiry in a partisan way. To the extent possible, that result should be avoided.

Finally, I note that the considerations in granting standing to a political party differ from those which apply to a government. Governments play a different role and have different responsibilities than do political parties. Moreover, the ONDP, unlike any other applicant, will have an opportunity to participate in the subject matter of the Inquiry by responding to my report in the Legislature.

K. The Municipality of Brockton and Related Applicants and the Public Utilities Commission

The Corporation of the Municipality of Brockton, the successor municipality to the Town of Walkerton, (referred to collectively as the "Town") has applied for standing and funding in Part I of the Inquiry, together with a number of individuals who by employment, contract or office are associated with the Town. The co-applicants are: Mayor David Thomson of Brockton ("Mayor Thomson"); Audrey Webb, Deputy Mayor; Roland Anstett, David Jacobi, Wilfred Lane, Jack Riley and Glen Tanner, the present Councillors of Brockton; the Chief Administrative Officer of Brockton, Richard Radford; former Mayor James Bolden; Don Carroll, Clayton Gutscher, David Mullen and Mary Ramsay (with the exception of one individual, the 1988 Councillors of Walkerton); and Steven Burns, a Professional Engineer with B.M. Ross and Associates Limited, in his capacity as a consultant performing the role of the Town's engineer. Mr. McLeod, counsel for the group, also proposed standing be granted to any other staff member or agent who falls within s.5(1) of the *Public Inquiries Act*, who wishes to be represented by him, and who executes a waiver and consent document and a retainer agreement. The Town and its co-applicants have applied for standing and funding in Part I of the Inquiry.

The PUC has also applied for standing and funding in Part I of the Inquiry.

Mr. McLeod has assured me that there is no conflict in his firm's representation of the Town and the individuals. He further states that he has sought and received consents and waivers with respect to the joint retainer, and has established, with the consent of his clients, a mechanism pursuant to which future conflicts may be resolved in order of priority of representation.

I turn then to the interests of the Town. The Town owns the water treatment and distribution system, which is operated by the PUC pursuant to the terms of the *Public Utilities Act*, R.S.O. 1990, c.P.52. Section 2(1) of the *Public Utilities Act* provides that:

> The corporation of a local municipality may, under and subject to the provisions of this Part, acquire, establish, maintain and operate waterworks, and may acquire by purchase or otherwise and may enter on and expropriate land, waters and water privileges and the right to divert any lake, river, pond, spring or stream of water, within or without the municipality, as may be considered necessary for waterworks purposes, or for protecting the waterworks or preserving the purity of the water supply.

Section 38 of the *Public Utilities Act* provides that:

> … the council of a municipal corporation that owns or operates works for the production, manufacture or supply of any public utility or is about to establish such works, may, by by-law passed with the assent of the municipal electors, provide for entrusting the construction of the works and the control and management of the works to a commission to be called The Public Utilities Commission….

Pursuant to section 38(6), the control and management of the works are vested in the council and the PUC ceases to exist upon the repeal of a by-law establishing a PUC.

The powers of a PUC are set out in s. 41(1) of the *Public Utilities Act*:

> Subject to subsection (4), where a commission has been established under this Part and the members thereof have been elected or where the control and management of any other public utility works are entrusted to a commission established under this Part, all the powers, rights, authorities and privileges that are by this Act conferred on a corporation shall, while the by-laws… remain in force, be exercised by the commission and not by the council of the corporation.

The *Public Utilities Act* establishes that there are to be three to five elected commissioners, including the head of council as a commissioner *ex officio*. The

PUC is required to report to council annually, providing a statement of revenue and expenditure.

Effective January 1, 1999, both the PUC and the Town of Walkerton were subject to a restructuring order by the Minister of Municipal Affairs under the *Municipal Act*, R.S.O. 1990, c.M.45 (the "Order"). Section 2(4) of the Order amalgamated the three former townships under the name "The Corporation of the Township of Brant-Greenock-Walkerton", subsequently renamed "Brockton".

Pursuant to sections 45-46 of the Order, the PUC of the Town of Walkerton was dissolved, and "The Walkerton Public Utilities Commission" was established. Section 46(2) of the Order provides that:

> The commission established under subsection 1 shall distribute and supply electrical power and produce, treat, distribute and supply water to the geographic area of the former Town of Walkerton.

Section 46(3) provides that the commission is subject to the *Public Utilities Act*. Mr. McLeod states that, since May 25, 2000, the PUC has contracted with the Ontario Clean Water Agency to operate the water treatment and distribution system.

The relationship between the Town and the PUC can be fairly summarized by saying that the PUC operates the water treatment and distribution system on behalf of the owner, the Town.

Mr. McLeod identified the interest of the Town in Part I of the Inquiry in relation to the fact that it is the owner of the water treatment and distribution system. He identified specific attributes of ownership which he asserted are relevant to the Town's interest. He noted that, as owner, the Town faces potential civil liability and is a defendant in a civil suit relating to the contamination. He also referred to the Town's exposure to regulatory initiatives of government, and specifically noted that, since at least 1997, the MOE's practice and policy has been to issue orders or enforce regulatory provisions under the *Ontario Water Resources Act*, R.S.O. 1990, c.O.40, against the Town as owner of the waterworks.

Mr. McLeod agreed that there was the possibility of some congruence of interests with the PUC with respect to events prior to May, 2000. He stated that,

since the contamination, the Town and the PUC have been working together on remediation and compliance issues. He also pointed out that, under the *Public Utilities Act*, the Mayor of the Town is an *ex officio* member of the PUC.

Mr. Prehogan, counsel for the PUC submits that, since the PUC was responsible for the provision of potable water in Walkerton, and operated the water treatment and distribution system at the time of the contamination, it is substantially and directly affected by this Inquiry and its recommendations. Mr. Prehogan stated that in his view there was no conflict of interest between the PUC and the Town with respect to determining what caused the contamination. He asserted, however, that the interest of the PUC is not identical to the interest of the Town, since the PUC has its own employees and its own statutory mandate. Mr. Prehogan said that, prior to May 2000, the Town was not involved in the events giving rise to this Inquiry except through the PUC. He also said the Town has been involved in remediation efforts since late May, 2000.

I am of the view that there is a significant congruence of interest between the Town and the PUC. However, Mr. McLeod raised the prospect that a conflict could arise. Recognizing this potential for conflict, I deem it prudent to grant separate standing to the Town and the PUC. Until such a conflict arises, I expect the Town and the PUC to cooperate. There will be only one set of cross-examinations to be shared by the two parties on all issues and evidence with respect to which there is no conflict.

I turn now to the fourteen individuals and the unnamed staff members and agents for whom Mr. McLeod also seeks standing. The Mayor, David Thomson, and former Mayor, James Bolden, were both *ex officio* members of the PUC during their time in office, and were also intimately involved in responding to water-related issues raised by the MOE. Both are, to a certain extent, in the "eye of the storm," and are substantially and directly involved in the events preceding and subsequent to May, 2000. As a result, I grant both Mr. Thomson and Mr. Bolden standing in Part I of the Inquiry, limited to matters relating to their personal or official involvement.

Mr. Burns, in his capacity as a consultant performing the role of Brockton's engineer, has a long history of direct involvement in engineering aspects of the Town's wells. I consider that he has a substantial and direct interest in matters relating to his performance of water-related engineering functions for the Town. In the result, I grant him standing, limited according to his interest so described.

My comments in respect of a single set of cross-examinations for the PUC and the Town also apply to the three individuals granted standing.

I decline to grant standing to the other individual co-applicants. If they are called as witnesses, their counsel may have standing in accordance with s.17 of the Rules. I do not find that they have a substantial and direct interest.

In terms of funding, Mr. McLeod requested that I defer my decision regarding funding for the Town and the individuals represented by him. I will make my decision after Mr. McLeod has advised me of the outcome of the outstanding litigation between the Town and its insurers.

I propose to recommend funding for one counsel for the PUC.

L. The Association of Municipalities of Ontario

The Association of Municipalities of Ontario ("AMO") is a non-profit organization, made up of several hundred Ontario municipalities serving over 98 percent of Ontario's population. Mr. Hamilton, counsel for AMO, stated that the primary interest of his client is in Part II of the Inquiry, but he also submitted that the members of AMO would be substantially and directly affected by the findings of this Inquiry in Part IB as government policies will affect other municipalities. With respect to Part IA, he stated that AMO has much less interest but suggested that AMO might help in determining systemic issues deserving a further examination. The materials filed by AMO set out AMO's extensive involvement in drinking water issues from the municipal perspective, including AMO's interest in the provincial downloading of drinking water responsibility and funding pressures posed in the area of drinking water as a result of downloading. AMO proposes to work closely with the Municipal Engineers Association and the Ontario Good Roads Association.

Mr. Hamilton has also requested funding on behalf of AMO, stating that there are no funds presently available for the Walkerton Inquiry, and that AMO has already done a cash call among its members to raise funds for the Town.

I grant standing to AMO in Part II. I also grant standing in Part IB, limited to the interests of municipalities in issues raised in Part IB. I grant special standing to AMO for Part IA, as its interests are attenuated with respect to the Walkerton-

specific issues given the standing of the Town. I suggest that any issues of concern in Part IA be raised with Commission counsel.

At this time I am not recommending funding for Part I of the Inquiry. AMO is a large and well-funded organization which has the ability to raise funds from its members. If indeed they are as committed to the issues as they have stated in their materials, I would expect the organization to devote the appropriate funds to represent its interests. I also note that reference is made to the fact that in this year's budget no priority had been set for the Inquiry. As Part IB will commence after Christmas, and thus after the year-end, there should be an opportunity to re-direct priorities. If funding is not possible for reasons not presently apparent to me, AMO may reapply. I defer my decision on funding with respect to Part II.

M. Stan Koebel

Stan Koebel was at all relevant times Manager of the PUC and his performance in this role gives him a substantial and direct interest, and therefore standing, for matters relating to his performance in this role in Part IA. Mr. Koebel also has standing in Part IB to the extent that the issues raised affect his substantial and direct personal interest. I recommend funding for one counsel for the limited interest described above.

N. Frank Koebel

Frank Koebel was at the relevant times the Foreman of the PUC and his performance in this role gives him a substantial and direct interest, and therefore standing, for matters relating to his performance in this role in Part IA. He also has standing in Part IB to the extent that the issues raised affect his substantial and direct personal interest. I recommend funding for one counsel for the limited interests described above.

O. Office of the Chief Coroner

The Chief Coroner of the Province of Ontario has applied for full standing in both Parts I and II. Ms. Cronk, on behalf of the Chief Coroner, indicated that given the broad mandate in the Order in Council creating the Inquiry, the

Chief Coroner considers that an inquest would involve an unnecessary duplication of effort and expense. Accordingly, the Chief Coroner does not, at present, intend to hold an inquest.

The Chief Coroner has made the results of his investigation available to Commission counsel.

I am pleased that the Chief Coroner wishes to be represented by counsel throughout the Inquiry. I appreciate the assistance the Chief Coroner has given the Inquiry to date and welcome the continued assistance of the Chief Coroner's counsel. The Chief Coroner has an interest in the work of the Inquiry and is able to contribute in a way I consider important. The Chief Coroner is therefore granted full standing in Parts I and II.

P. The Environmental Coalitions

The Commission received applications for standing from four environmental groups including three coalitions representing a broad range of interests in environmental matters. Each of the groups has asked for full standing and for funding in Parts I and II of the Inquiry. I will deal first with the three coalitions.

(i) *ALERT – Sierra Club Coalition*

This coalition is led by the Agricultural Livestock Expansion Response Team (ALERT) and the Sierra Club of Canada. The focus of the coalition is on the technical and regulatory issues surrounding intensive farming and manure management. Both ALERT and the Sierra Club have extensive experience with environmental concerns in the agricultural sector.

(ii) *The Sierra Legal Defence Fund Coalition*

The Sierra Legal Defence Fund submitted an application for standing and funding on behalf of three organizations: the Canadian Association of Physicians for the Environment, whose overarching concern is children's environmental health; the Council of Canadians, a citizens' watchdog association which is focused on such issues as the safeguarding social programs, alternatives to free trade, and the commodification of fresh water; and Great Lakes United, a

coalition of environmental, conservation, labour and community groups whose mission is to develop and maintain a healthy ecosystem in the Great Lakes. In both its written and oral submissions the Sierra Legal Coalition stressed the fact that it could offer the Inquiry broad national and international perspectives on the issues it would address.

(iii) *The CEDF and Pollution Probe Coalition*

This coalition is made up of two national organizations: the Canadian Environmental Defence Fund ("CEDF"), an organization whose mandate is to intervene directly or to provide technical, legal, organizational and financial support to other organizations in relation to legal initiatives on environmental issues; and Pollution Probe, an organization focusing on a broad range of environmental issues including the enhancement of water quality. Both the CEDF and Pollution Probe have long and distinguished histories of involvement in environmental matters. They are joined in the coalition by nine other local organizations: CARD of Balsam Lake, Coalition of Concerned Citizens of Caledon, Four Corners Environmental Group, Mariposa Aquifer Protection Association, Save the Rouge Valley System, Stuart Hall Against Mismanaged Environment, Waring's Creek Improvement Association, Fort Erie Water Advocacy Group and the Attawapiskat First Nation.

(iv) *Discussion*

On the issue of whether standing should be granted to any or all of these organizations, the three environmental coalitions in my view represent a clearly ascertainable interest and perspective which I consider important to my mandate in Part I. I do not believe that the interests of the environmental groups in Part I are accurately characterized as substantial and direct. In order to ensure that all important points of view are represented, however, I grant standing to an environmental group in Part IA to deal with environmental issues relating to farming and agriculture. I am also prepared to grant special standing with respect to the remaining issues in Part IA and full standing for Part IB. I note as well that the CWC will be represented by CELA, which brings a similar perspective to the Inquiry as this coalition. That perspective will indeed be well represented throughout Part I.

While I consider the involvement of the environmental groups in Part I to be both useful and important, I believe that the interests represented by these groups can be adequately accommodated by one grant of standing to be shared among them. In reviewing the material filed by the coalitions, it appears to me that the positions advanced by them, where they do not overlap, are at least complementary. When asked by me, none of the counsel for the groups could identify any areas of conflict among the three coalitions. Because of the special expertise in the area of agricultural and farming, I assume that the ALERT – Sierra Club Coalition will deal with environmental issues relating to farming and agriculture. When I asked them in oral argument, both Ms. Christie on behalf of the Sierra Legal Defence Fund Coalition and Mr. Sokolov on behalf of the CEDF-Pollution Probe Coalition stated that they would be able to work out a division of the remaining environmental issues among themselves. I would also recommend funding for one counsel in Part I of the Inquiry to be allocated among the three coalitions in accordance with my reasons above.

Further, the three coalitions will in my view make an important contribution to Part II. As with the agricultural groups, I am prepared to grant separate standing in Part II to the extent that, in their written submissions, they express a different interest or perspective.

On the issue of funding, it is my intention, by granting standing in Part II to each of the three coalitions, that each be entitled to provide me with a detailed application for funding setting out the nature of any papers such group intends to prepare as well as the details of the costs it expects to incur with regard to Part II.

Q. Energy Probe Research Foundation (EPRF)

EPRF is an environmental and public policy research institute which traces its roots to Pollution Probe. I have not grouped EPRF with the other environmental groups because its focus is markedly different from the three coalitions discussed above. Specifically, EPRF advocates a drinking water system that is regulated by government, operated and managed by the private sector and in which consumers pay the full cost of the system. EPRF has applied for full standing and funding in Parts I and II of the Inquiry.

Dealing first with Part I, EPRF has a clearly ascertainable perspective which I believe will be helpful to me in fulfilling my mandate in Part IB of the Inquiry.

In my view, the unique perspective on which EPRF provides assistance is narrow. It centres on the issue of whether private ownership of the water system would have made a difference to what happened in Walkerton.

EPRF has also asked for standing in Part IA in order to ask questions of those officials in Walkerton with decision-making power over the water system. EPRF has informed me that these questions are necessary to assist in building its hypothesis about how a water utility should be structured. While I understand the reason for EPRF's request, I am of the view that its interest can be accommodated without granting it standing in Part IA. First, I understand that it is the intention of Commission counsel to call the evidence of local officials, not only in Part IA but also in Part IB. The evidence given by these officials in Part IB will focus on matters relating to government policies and procedures – the primary focus of EPRF. I therefore grant standing to EPRF in Part IB of the Inquiry for the limited perspective outlined above. I am not satisfied from the material presented that EPRF meets the funding criteria for Part IB. It is not clear to me what efforts, if any, it has made to raise funds for this Inquiry. EPRF may reapply in the future.

I am also prepared to grant standing to EPRF in Part II. As noted elsewhere in these reasons, I will defer consideration of the funding proposals for Part II.

R. Groups Applying for Part II Standing Only

I heard from a number of groups and individuals who applied for standing only in Part II of the Inquiry. For the reasons set out below, I have granted standing to each of these applicants. As I have noted previously, I have deferred the issue of funding for the preparation and/or presentation of Public Submissions until after the Commission Papers have been published in draft. Those groups which have an interest in preparing or assisting in the preparation of Commission Papers should contact Mr. Harry Swain, the Chair of our Research Advisory Panel. I have granted standing in Part II of the Inquiry to the following applicants.

1. *Azurix North America (Canada) Corp.*

   Azurix provides water and waste water services to more than 700 facilities in Canada and the United States, including 16 facilities in Ontario. It has offered to bring to Part II its perspective as a private operator of

water systems and I am of the view that this will assist me in the fulfillment of my mandate.

2. *Indian Associations Coordinating Committee of Ontario Inc. (Chiefs of Ontario)*

The Chiefs of Ontario is an umbrella organization for all status Indian communities in Ontario. It represents the interests of all of Ontario's 134 First Nations, comprising approximately 130,000 individuals, on a broad range of issues. I am most appreciative of the Chiefs of Ontario's offer to prepare a paper addressing First Nations water quality issues across the general topics proposed for the Inquiry. I also accept the Chiefs' offer to provide assistance on other drinking water-related issues affecting First Nations.

3. *Conservation Ontario and Saugeen Valley Conservation Authority*

Conservation Ontario represents Ontario's 38 conservation authorities and has applied for standing together with the Saugeen Valley Conservation Authority. The focus of these two organizations will be on the need for a comprehensive provincial framework for sustainable water management including submissions on current provincial policies and perceived program gaps. I note that Conservation Ontario and the Saugeen Valley Conservation Authority have offered to share standing with the Grand River Conservation Authority and Ducks Unlimited. While I am appreciative of the fact that this offer was made in an attempt to help shorten the length of the Inquiry, I do not have the same concerns about an unduly protracted process in Part II as I do in Part I. For this reason I have granted separate standing to all three applicants. I note, however, that when requests for funding are made, I will again be looking to avoid any unnecessary duplication and would strongly urge these groups (and, indeed, any groups with the same or similar interest) to find ways to combine their efforts on any research papers which they may wish to produce.

4. *Ducks Unlimited – Ontario*

Ducks Unlimited has a long-standing interest in the preservation and management of Ontario's wetlands. Through its Waterfowl and Wetlands Research Institute, Ducks Unlimited is currently preparing a report

outlining the science associated with wetlands, water quality and water management which they have kindly offered to provide to the Commisson when it is complete. I am most appreciate of this offer and look forward to further assistance from this organization.

5. *The Grand River Conservation Authority*

The Grand River Conservation Authority works with watershed municipalities, the Province and a variety of other groups to help protect the quality of the water supply in the Grand River watershed. For the reasons noted in relation to Conservation Ontario, I have also granted standing in Part II to the Grand River Conservation Authority.

6. *The Ontario Municipal Water Association (OMWA)*

OMWA represents more than 160 public drinking water authorities in Ontario. Its role is to lobby on behalf of its members on policy, legislative and regulatory issues related to the provision of water. OMWA offers to bring its knowledge and experience in the governance and operation of municipal public water systems to the Inquiry.

7. *The Ontario Water Works Association (OWWA)*

The OWWA's membership includes approximately 70 large and small utilities responsible for the provision of drinking water in Ontario. While the focus of the OMWA is on the management and operation of water systems, the focus of the OWWA is on the science and technology of water treatment. The interests of the OMWA and the OWWA obviously overlap. While I have granted each of these organizations standing, I encourage them to work together on the many issues which I expect they share.

8. *The Ontario Society of Professional Engineers (OSPE)*

The OSPE is a new organization recently spawned by the Professional Engineers – Ontario to deal with many non-regulatory concerns shared by professional engineers in Ontario. The OSPE has established a task group which will examine issues related to water quality management in Ontario from an engineering perspective. The OSPE has offered to provide input to the Commission on the following four issues: (i) the extent of

engineering involvement in the production, treatment and delivery of drinking water; (ii) the gradual reduction in the extent of engineers' involvement in the drinking water process in Ontario; (iii) the value of having engineers involved in this process; and (iv) the fact that the quality of water systems is directly proportionate to the investment in such systems.

9. *The Professional Engineers – Ontario*

The Professional Engineers – Ontario is the organization which regulates and sets standards for engineers in Ontario. It has offered to bring its vast expertise in standard setting and the regulation of engineers to the Inquiry.

10. *The Ontario Medical Association*

The Ontario Medical Association intends to focus on the public health aspect of the Commission's mandate in Part II. Its particular interests are the roles of the Medical Officer of Health and the administrative structure and reporting requirements in the assurance of safe drinking water.

11. *Maureen Reilly/ Sludgewatch*

Ms. Reilly is involved in public interest research and public education on the agricultural application of wastewater sewage sludge, septage and other wastes. Ms. Reilly has offered her experience in these matters to Part II of the Inquiry and I am pleased to grant her standing.

S. Individuals

Five individuals with different experiences and backgrounds and with different points of view also sought standing. They are:

Ernest Farmer

Mary Richter

Mary-Clare Saunders

Jacqueline Schneider-Stewart (People Opposed to Ontario Pollution)

Greta Thomson

These individuals have not satisfied either of the criteria for standing. Each, however, has a point of view or experience that will be considered by Commission counsel in making decisions on what evidence should be called. I thank each of them for their interest in the Inquiry.

Summary

I have granted standing to six parties for all issues in Part I. I have also granted standing to 14 other parties, some of them coalitions, but have limited their participation because of the nature of their interest or perspective. I have granted standing to, at most, 35 applicants in Part II, some of whom I expect will form coalitions.

I have dealt with standing so as to ensure that all the relevant interests and perspectives are fully represented. My first criterion has been to ensure the Inquiry is thorough. When in doubt, I have opted in favour of inclusion. In doing so, I recognize there will be overlapping positions and a potential for duplication. I want to make two points clear about the process in Part I. I expect parties with the same interest to cooperate with one another and with Commission counsel to avoid repetition and delay. I also expect parties who have been granted standing in a limited area to stay within the permitted bounds. In light of these expectations, I will not hesitate to intervene where there is any departure from the approach I have set out above.

Finally, I want to thank the many individuals and groups who applied for standing. I appreciate your interest in the Inquiry and your willingness to help. I take great comfort from the enormous expertise that has been made available to the Inquiry through the grants of standing. I look forward to working with those granted standing on this endeavour that is so important to the people of Walkerton and the rest of Ontario.

Appendix - Appearances on behalf of applicants

- Paul Muldoon and Theresa McClenaghan, Canadian Environmental Law Association, for Concerned Citizens of Walkerton

- John Gilbert and Clayton Gutscher for the Walkerton Community Foundation
- Rick Lekx and Tom Schulz for the Walkerton & District Chamber of Commerce
- Frank Marrocco, Glenn Hainey and Lynn Mahoney for the Government of Ontario
- Paul Vrkley for the Ontario Farm Environmental Coalition
- Robert Bedggood for Christian Farmers Federation of Ontario
- Gordon Coukell for the Dairy Farmers of Ontario
- Jim Clark for the Ontario Cattle Feeders Association
- Mike McMorris for the Ontario Cattlemen's Association
- G. Michael Cooper for the Ontario Farm Animal Council
- Cecil Bradley for the Ontario Federation of Agriculture
- Larry Skinner for the Ontario Pork Producers Marketing Board
- Donald K. Eady and Timothy G.R. Hadwen for the Ontario Public Service Employees Union
- Peter T. Fallis for Mary Clare Saunders
- Greta Thompson, in person
- John H.E. Middlebro' for the Bruce Grey Owen Sound Health Unit
- Paul Wearing and James LeNoury for the Association of Local Public Health Agencies
- Earl A. Cherniak, Q.C. and Douglas Grace for Dr. Murray McQuigge, David Patterson and Mary Sellars

- David Jacobs for the Ontario New Democratic Party *et al.*
- James Caskey, Q.C. and Mark Poland for the Injured Victims
- Mr. Ernest Farmer, via telephone
- Michael Epstein for Frank Koebel
- William Trudell for Stan Koebel
- Rod McLeod, Q.C. and Bruce McMeekin for the Municipality of Brockton *et al.*
- Kenneth Prehogan for the Walkerton Public Utilities Commission
- Frank J.E. Zechner for Azurix North America (Canada) Ltd.
- Paul G. Vogel and Dawn J. Kershaw for the ALERT – Sierra Club Coalition
- E.A. Cronk for the Office of the Chief Coroner of Ontario
- Mark Mattson for Energy Probe Research Foundation
- Louis Sokolov and Benson Cowan for the Canadian Environmental Defence Fund *et al.*
- Elizabeth Christie for the Canadian Association of Physicians for the Environment *et al.*
- Jacqueline Schneider-Stewart representing People Opposed to Ontario Pollution
- Howard Goldblatt for the Canadian Union of Public Employees, Local 255, individual named members, and CUPE National
- Ian Fellows for the Professional Engineers and Architects of the Ontario Public Service
- Jonathan W. Kahn and Allison A. Thornton for the Chiefs of Ontario

- Richard Hunter for Conservation Ontario
- Jim Coffey for the Saugeen Valley Conservation Authority
- J. Anderson for Ducks Unlimited - Ontario
- Douglas B. James and Barker Willson for the Ontario Municipal Water Association
- Paul Emerson for the Grand River Conservation Authority
- Joseph Castrilli for the Ontario Water Works Association
- Robert Goodings and Joyce Rowlands for the Ontario Society of Professional Engineers
- Doug Hamilton and Craig Rix for the Association of Municipalities of Ontario
- John D. Gamble and Johnny Zuccon for the Professional Engineers of Ontario
- B.T.B. (Ted) Boadway, M.D. for the Ontario Medical Association
- Maureen Reilly for Sludgewatch (Uxbridge Conservation Authority)
- Mrs. Mary Richter, in person

The Honourable Dennis R. O'Connor,
Commissioner

Supplementary Ruling on Standing and Funding

Appendix E (iii)

THE WALKERTON INQUIRY

LA COMMISSION D'ENQUÊTE WALKERTON

Supplementary Ruling on Standing and Funding

I have received three written requests to reconsider my Ruling of September 11.

1. The Walkerton Public Utilities Commission (the "PUC") requests that I amend my Ruling to allow the PUC to cross-examine all witnesses rather than sharing the right of cross-examination with the Town. At the standing hearing, Mr. Prehogan, for the PUC, took the position that there was no conflict of interest between the PUC and the Town with respect to the issue of what caused the contamination.

   In making the present request Mr. Prehogan now points out five circumstances which he says will make co-operation between the Town and the PUC difficult. These circumstances primarily relate to the adversity in interest between the two with regard to issues of liability for damages resulting from the contamination. The Order in Council under which I was appointed precludes me from making findings of civil liability. Nonetheless, it would be naïve to think that the positions of the two parties in civil proceedings will not affect the manner in which they approach the Inquiry. I understand why co-operation may be difficult. Accordingly, I am prepared to accede to the request and permit the PUC and the Town separate cross-examinations. In doing so, however, I note that there will likely be a congruence of interest on many issues. In those instances, I encourage counsel to agree on a single cross-examination. In any event I will insist that there be no repetition.

   The PUC also requests that I amend my recommendation for funding to include payment of a junior counsel fee. In addition to acting for the PUC, Mr. Prehogan will be acting for two of the PUC Commissioners in their personal capacities, both of whom will be called as witnesses.

In these circumstances, I am satisfied that there will be some portions of the evidence in Part IA for which a junior counsel is necessary. I therefore recommend the payment of a junior counsel fee for a maximum of 20 days during Part IA only.

2. Stanley Koebel requests that I alter my recommendation for funding to include payment of a junior counsel fee. In my view, this request should be granted. I am limiting the recommendation for funding for a junior counsel to a maximum of 20 days.

   After my Ruling, Mr. Trudell, Mr. Koebel's counsel, described certain personal circumstances of Mr. Koebel which underlie this request. These circumstances were not included as part of the original application for funding. I accept Mr. Trudell's statement that these circumstances are such that it would be difficult, if not impossible, for him to continue to act for Mr. Koebel without the assistance of junior counsel. These circumstances are tied to the central role attributed to Mr. Koebel in the events of May, 2000, the likelihood that Mr. Koebel will be compelled to testify at the Inquiry, and the anticipated positions of other parties concerning the cause of the contamination. Mr. Trudell has requested that the details of these circumstances be kept confidential because of their personal nature. I am prepared to accede to that request.

   I note that no similar application has been made by Frank Koebel, and that Mr. Epstein, his counsel, has specifically indicated that he will not be seeking alteration of the funding recommendation to include payment of a junior counsel fee. Mr. Epstein has, however, supported the request made by Stanley Koebel and, in doing so, has echoed the reasons advanced by Mr. Trudell.

   I therefore recommend the payment of a junior counsel fee for Stanley Koebel for 20 days during Part IA only. I would point out that under the Attorney General's guideline, when junior counsel attends hearings with senior counsel, he or she will be paid 75% of the junior counsel's hourly rate under the Attorney General's Hourly Fee Schedule.

3. In my Ruling, I asked the Ontario Farm Environmental Coalition (OFEC) to submit additional information with respect to funding. OFEC has written to indicate that it requires funding for one counsel to represent OFEC for portions of the Inquiry hearings. OFEC indicates that it has

raised $25,000 from organizations representing commercial livestock producers and from the two general farm organizations which are members of OFEC. OFEC is reluctant to ask farm family members to contribute additional funds, beyond what they have already paid in general contributions to OFEC member organizations, in light of the particularly low crop prices and poor crops that farm families face this year.

I am satisfied that OFEC has met the criteria for funding and will recommend funding for one counsel for OFEC for those portions of the hearings that relate to farming and agricultural issues. These issues are the basis upon which I granted standing to OFEC in Part I. However, I will qualify this recommendation to fund OFEC by indicating that funding should be provided only after OFEC has exhausted the $25,000 that it has raised independently.

I note further that OFEC has indicated that it is seeking support through the Agricultural Adaption Council's Small Projects Initiative. To the extent that financial support is provided by this route, I will amend my recommendation to fund OFEC to reflect additional funding from the Agricultural Adaption Council. In particular, such additional funding should be exhausted before any funding is provided pursuant to my recommendation.

DATE RELEASED: October 3, 2000

The Honourable Dennis R. O'Connor,
Commissioner

Funding Guidelines – Rates

Appendix F (ii)

Guidelines for Reimbursement of Legal Fees and Expenses

The Ministry of the Attorney General has advised the Commission that it has determined that the appropriate rate for the reimbursement of legal fees and expenses to those who have been granted funding should be the amount paid by the Ministry for retention of private sector counsel. Those rates are:

Hourly Rates for Retention of Private Sector Lawyers

Hourly Fee Schedule (Max. 10 Hours Per Day)	*Criteria*
A. $56 – 104	Junior Lawyer
B. $88 – 132	Intermediate lawyer with good experience
C. $124 – 176	Senior lawyer with extensive experience, well-recognized in area of expertise
D. – 192	Only the most senior lawyers performing work on a significant project requiring a high degree of specialized skill

The legal fees and expenses eligible for reimbursement are those which relate to reasonable preparation for and representation at those portions of the inquiry for which standing has been accorded to the client, subject to the Commissioner's recommendations. It will not include funding related to the investigative activities of other agencies or to the investigative activities of the Commission except for attendance at interviews by Commission counsel or staff. Legal fees and related expenses accumulated prior to the signing of the Order-in-Council are also not eligible.

A lawyer accepting compensation shall not bill the client, or apply to any third party, for any additional funding for the services in question. Unless the Commission recommends otherwise, only one counsel per client is eligible for reimbursement. If the Commissioner approves a junior counsel then, if such junior counsel attends hearings with senior counsel, he or she will be paid 75% of the junior counsel's hourly rate.

Reasonable claims for travel expenses and disbursements, supported by receipts or invoices, may be claimed. Photocopying may be claimed at 10.0 cents per page.

The reimbursement of eligible legal expenses will be made on an ex gratia basis only, with no right of challenge or appeal.

In addition, the Commission proposes that all accounts for legal fees and disbursements will be referred to an independent officer who will assess the accounts on the basis of this guideline. Once approved, accounts will be forwarded to the Ministry of the Attorney General for payment.

City of Mississauga Judicial Inquiry

The Honourable J. Douglas Cunningham, Commissioner

Motion by Peter McCallion: Decision of Commissioner Cunningham
December 3, 2010

Counsel for Mr. McCallion raises an important issue. I won't repeat what I said on May 17, other than to recap that on I recommended that Mississauga City Council grant Mr. McCallion full funding for legal representation. I noted then that it was imperative that I have experienced counsel appear for Mr. McCallion who were able to properly prepare and put forward all the issues in their proper context. Mississauga City Council awarded limited funding, and Mr. McCallion has been ably represented to date.

The funding provided by City Council has now been exhausted, and Mr. McCallion's counsel advises it was in fact exhausted by the end of July. This is not surprising, given the length of the Inquiry and the complexity of the issues raised. Ahead of us remains one further day of evidence, two days of expert testimony, the preparation of written submissions and approximately one week of oral submissions.

I implore City Council to consider Mr. McCallion's request for further funding. It would be unfortunate to come this far and not allow the hearing to finish with all the procedural protections we can afford a party. While I have of course made no findings, it is obvious that Mr McCallion's interests are squarely in play based upon the evidence which I have heard to date. City Council set the terms of this Inquiry, specifically naming Peter McCallion in the Terms of Reference. His request for further funding is valid and should be given serious consideration. Clearly there is some mystery and indeed some real concern about the alleged interest of Peter McCallion in WCD. This will be for me to untangle in my report.

Nevertheless, if City Council elects not to follow my recommendation, the appropriate remedy is not to halt these proceedings. There are seven parties in this Inquiry, and the citizens of Mississauga have expended significant resources and are entitled to my findings of fact and my recommendations. The only jurisdiction I have is to make recommendations to the municipality, and it would not be appropriate to hold the hearing hostage until City Council takes specific action.

If further funding is not awarded, Mr. McCallion's remedy is to argue that no finding should be made against him because he lacked the procedural protection of representation by legal counsel. I would then be required to determine whether the lack of full funding undermined the Inquiry's process and hampered its ability to lead to fair and accurate findings of fact with respect to Mr. McCallion.

The Inquiry will therefore resume as planned on Tuesday, December 14 at 10:00 a.m. I hope that Mississauga City Council will assess Mr. McCallion's request for full funding with an eye to its duty to act responsibly and fairly, having set into motion the steps leading to the Inquiry and leading us here today. Regardless of City Council's decision, however, the Inquiry will proceed on December 14.

Cunningham, A.C.J.O. (Commissioner)
December 3, 2010

GUIDELINES
FOR REIMBURSEMENT OF LEGAL FEES AND DISBURSEMENTS
PUBLIC INQUIRY INTO THE SAFETY AND SECURITY OF RESIDENTS IN THE LONG-TERM CARE HOMES SYSTEM

AS AT NOVEMBER 21, 2017

The Ministry of the Attorney General has advised the Commission that, pursuant to paragraph 13 of Order-in-Council 1549/2017 dated July 26, 2017, the rate for the reimbursement of legal fees and disbursements to those participants who have been granted funding will be consistent with the amount paid by the Ministry for retention of private sector counsel. Those rates are set out below:

Hourly Rates for Retention of Private Sector Lawyers

Hourly Fee Schedule

Lawyer Category	Hourly Rate	Corresponding Years of Experience
Junior counsel	**$132**	**up to 7 years experience**
Intermediate counsel	**$160**	**8-9 years experience**
Senior counsel	**$192 (Maximum)**	**10+ years' experience**
Articling Students	**$45 to $55**	
Law Students	**$30 to $45**	
Law Clerks/Paralegals	**$30 to $55**	

HST is payable on legal fees claimed by external counsel (aka vendors). Vendors are also entitled to reimbursement of HST included in disbursements paid to third parties. Note that it is the responsibility of vendors to confirm with Canada Revenue Agency if they should be charging HST for their service or not.

The legal fees and disbursements eligible for reimbursement are those which relate to reasonable preparation for, and representation at, those portions of the inquiry for which participation rights have been accorded to the client, subject to the Commissioner's recommendations. Legal fees and disbursements eligible for reimbursement also include attendance at meetings requested by the Commission, the production of documents in the possession or control of legal counsels' client and the provision of other information requested by the Commission. It will not include funding related to the investigative activities of other agencies or to the investigative activities of the Commission except for preparation and attendance at interviews by Commission counsel or staff. Only legal fees and related disbursements accumulated after the signing of Order-in-Council 1549/2017 dated July 26, 2017 will be eligible for reimbursement.

A lawyer accepting compensation in accordance with these Guidelines shall not bill the client, or apply to any third party, for any additional funding for the services in question.

Funding will be in accordance with the Commissioner's specific recommendation in respect of the number and seniority of the funded counsel permitted to each participant as well as the number of counsel attendance fees.

Billings for services rendered are limited to a maximum of 10 hours per day for each funded client. Where the Commission has authorized and it is necessary for two counsel to attend on hearing days, the total hours per day is extended to 20.

There is authority for the Independent Assessment Officer, in rare circumstances, to exercise discretion to exceed the otherwise applicable maximum hours per day. In the event that a billing lawyer seeks the exercise of discretion in respect of daily hours billed, or to address additional work required from time to time to deal with extraordinary circumstances, it is necessary for the billing lawyer to describe in detail in the docketed description of the item claimed the reason for the request for the exercise of discretion and/or additional work performed. Such detail can be augmented in the billing lawyer's cover letter accompanying the account. Where the Commission has approved participant funding for two or more counsel, should more than one counsel participate in the preparation, there shall be no duplication of services provided. It is understood that some work overlap may result from reasonable substitution among counsel as contemplated in the Commissioner's funding recommendations.

Reasonable claims for travel time and disbursements, (not including meals and office overhead expenses) supported by receipts or invoices, may be claimed. Photocopying may be claimed at 10¢ per page. The allowable rate per kilometre for personal use of your own vehicle must be consistent with the Ontario government's Management Board directive on Travel, Meal and Hospitality Directive, an excerpt of which is attached.

Under Section 8 of the Travel Directive – January 1, 2017 consultants and other contractors will not be reimbursed for any hospitality, incidental or food expenses, including:

- Meals, snacks and beverages
- Gratuities
- Laundry or dry cleaning
- Valet services
- Dependant care
- Home management
- Personal telephone calls

The reimbursement of eligible legal fees and disbursements will be made on an *ex gratia* basis only, with no right of challenge or appeal.

Each account submitted for assessment must bear the billing lawyer's certification that all services performed and disbursements claimed were incurred for the purposes of the Inquiry and that there has been no duplication of services for which payment is claimed.

All accounts for legal fees and disbursements will be referred to an Independent Assessment Officer who will assess the accounts on the basis of these Guidelines. Once approved, accounts will be forwarded to the Ministry of the Attorney General for payment.

Accounts may be rendered as often as counsel wishes in such format as may be required by the Independent Assessment Officer. Accounts must be rendered on no less than a quarterly basis and 60 days before the conclusion of each fiscal year ending March 31.

Acceptance of provincial government funding carries with it important responsibilities for transparency and accountability in the use of public funds. No privilege or confidentiality applies to information on any funding provided to a participant by the Government of Ontario, including the existence of any funding and its nature, rate and amount.

KILOMETRE REIMBURSEMENT RATES FOR PERSONAL VEHICLE USE

Effective January 1, 2017 the reimbursement rates for a personal vehicle used on government business travel are as follows:

Kilometres Driven	**Southern Ontario (cents per km)**	**Northern Ontario (cents per km)**
0 – 4,000 km	$0.4000	$0.4100
4,001 – 10,700 km	$0.3500	$0.3600
10,701 – 24,000 km	$0.2900	$0.3000
More than 24,000 km	$0.2400	$0.2500

NOTE:

The highways and roads named below are to be included in southern Ontario. The boundary between northern and southern Ontario for the purposes of kilometre reimbursement is as follows:

- Healey Lake (Municipal) Road from Healey Lake easterly to its junction with Highway 612;
- Highway 612 southerly to its junction with Highway 69;
- Highway 69 easterly to its junction with Highway 169;
- Highway 169 easterly to its junction with Highway 118;
- Highway 118 through Bracebridge to its junction with Highway 11;
- Highway 11 northerly to its junction with Highway 60 at Huntsville; and
- Highway 60 easterly to its junction with County Road 58 at Killaloe Station; and County Road 58 to Pembroke

Kilometres are accumulated from April 1 of each fiscal year. *Travellers are strongly encouraged to rent cars for business travel instead of using their own vehicle when the total distance to be driven in one day will exceed 200 kilometres. Payment of gasoline expense is only recoverable when a car is rented. Reimbursement is provided for necessary and reasonable expenditures on parking, as well as tolls for bridges, ferries and highways, when driving on government business.*

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